The European Arrest Warrant and its Implementation in the Member States of the European Union

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of the European Union

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Introduction
(Prof. Dr Piotr Hofmański)

The conference, whose achievements are presented in this collection of contributions, was held in Kraków from 9th to 11th November 2006. The conference has been a part of a research project carried out by the Chair for Criminal Procedure, the Jagiellonian University, Kraków. The project aims at investigating the manner of operation in 27 Member States of the European Union of the European Arrest Warrant (EAW), a new instrument of cooperation in criminal matters. The principal goal of the research is to learn of the ways by which the legislatures of the EU states introduced this instrument into their domestic legal orders, in implementation of the Framework Decision of 13th June 2002, and to identify the discrepancies occurring in the course of implementation. The study is also to diagnose the interpretation difficulties occurring in this field, as well as problems occurring in the practice of mutual surrendering persons when using the EAW.

It should be mentioned that as early as in the Amsterdam Treaty of 1997, the beginning of creating the common area of freedom, security and justice was envisaged, which has later been expressed more precisely in the Conclusions of the Tampere European Council, where the Council stated that the principle of mutual recognition of judicial decisions “should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union”. It was only the Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the surrender procedures between Member States that introduced the principle of recognition *ipso facto* the judicial decisions in criminal matters in European law, therefore changing profoundly the third pillar area, which ceased to be an exclusive domain of intergovernmental cooperation. The European Arrest Warrant, being a kind of testing device in the new European system of legal cooperation has been a rewarding field of research. This topic focuses on some constitutional problems not occurring earlier in the Member States and reveals the need to overcome a number of mental barriers erected on the grounds of the mechanisms functioning to date.

As shown by the short history of the functioning of this instrument, the EAW implementation has caused some problems not only in Poland, but also in the remaining 24 Member States of the European Union. Arriving at a correct diagnosis of these problems required mustering cooperation with experts from other Member States. Within the scope of the research project, a questionnaire was prepared containing detailed questions concerning the implementation of the Framework Decision and the practical problems involved in implementation and functioning of the EAW in relevant countries. The cooperation could not be secured, alas, from experts in all Member States. For various reasons the experts from France, Estonia, Ireland, the United Kingdom and Italy have not participated. The participation of the experts from 20 remaining EU states should nevertheless be considered as a success and the results of the study should be regarded as representative. The filled-in questionnaires will be next subjected to detailed comparatistic legal studies, as they represent a priceless source of information about problems which surfaced in connection with the implementation of the Framework Decision on the EAW in various countries. These questionnaires are published in their original form in this volume.

We have invited all cooperating experts from the remaining Member States to take part in the conference and all of them appeared, except for the representative of Portugal. The sheer quantity of the materials gathered has prevented the presentation of national reports in their entirety at the conference. Such
exercise would make little sense after all. Apart from the first working session, devoted to the Framework Decision as an instrument serving as means of building a new order in the mechanisms of legal cooperation in criminal matters, all subsequent sessions were conducted as panels on various issues of implementing and functioning of the EAW in mutual relations between the Member States of the European Union. In this collection of the conference materials we present to our readers both panel presentations and the discussion following each of the panels.

The research project carried out by the Chair for Criminal Procedure, the Jagiellonian University, is financed by the State Committee for Scientific Research. Organising the Conference was made possible by additional financial support from the Konrad Adenauer Stiftung and the Jagiellonian University.
I. The Conference

1. Welcoming addresses

(Pro-Rector of the Jagiellonian University, Prof. Dr Maria Szewczyk)

It is not only a great honour, but also satisfaction to welcome you all on behalf of His Magnificence Rector and myself to the international conference on the European Arrest Warrant, organized by the Chair of Criminal Procedure. The conference’s theme is an exceptionally valid topic. There are, obviously, a lot of benefits and new opportunities, but also – which is only understandable – new risks that are involved in the existence of the European Union. A problem that has currently arisen is the issue of how to properly address the conflict between the need to combat crime and the need to protect the individual, civil and political rights as well as the rights of the Member States.

I am very glad that you have agreed to attend this conference and share your thoughts on the European Arrest Warrant here, in Kraków. Just like – echoing the words of Henry IV – Paris was well worth a Mass, so Kraków is certainly well worth visiting. Indeed, Kraków is not only a centre of scientific ideas, courtesy of the Jagiellonian University or just a city permeated with Polish history, but also a city of artists, a city of beauty and magic – in short, one of the “jewels of Europe”. Therefore, wishing you fruitful deliberations on this difficult but important issue, I urge you not to forget to absorb the atmosphere of this wonderful city.

(Dean of the Faculty of Law and Administration, Jagiellonian University, Prof. Dr Tadeusz Włudyka)

I wish to welcome you to the conference. We have the honour to have amongst us the preceding speaker, Pro-Rector Professor Maria Szewczyk, who welcomed all the persons present on behalf of the College of Rectors. I, in turn, have the pleasure of welcoming you on behalf of the College of Deans and the Council of the Faculty of Law and Administration of the Jagiellonian University, which is the oldest in Poland and one of the oldest universities in Europe. We are very glad to be able to host such distinguished guests as representatives of penal science from all over Europe. Welcoming you, it is worthwhile to re-emphasise in a few words the ‘glories’ of Kraków, which Pro-Rector Maria Szewczyk talked about so beautifully, and those of our faculty. Not only is the Faculty of Law and Administration the Jagiellonian University’s oldest, it is also the largest faculty – there are almost 6000 students in its two specialty areas (law and administration) of study. We maintain widespread international contacts and your presence at our conference demonstrates that these contacts are likely to be even more intensive in future. Within the framework of its international relations, the faculty runs, amongst other things, several schools of foreign law: German, US, French and Austrian. We also run schools of Polish law in Vilnius and Ternopil. In our faculty we have the European Doctoral College which in cooperation with other academic centres in Germany has already promoted
more than forty doctoral graduates representing young researchers from both Germany and Poland. These and other forms of activities pursued by our faculty enable it to continually improve the level of education of its graduates. This objective is also served by the international conferences that are organized here, with the participation of distinguished guests, just like the one which has gathered us here. Let me then wholeheartedly welcome you again and wish you fruitful proceedings.

(Research Project Manager, Prof. Dr Piotr Hofmański)

Distinguished Madam Rector, distinguished dean, our prominent Guests! It is with great satisfaction that I wish to welcome all of you to this conference. The conference that we are opening today is a part of the research programme which I manage and under which we intend to study problem, involved in the implementation of the Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the practical difficulties encountered in its implementation in the different Member States. I believe that Kraków is a good place to discuss this issue. Next to France, Poland is the country where the largest number of European arrest warrants is issued, and a high percentage of them is actually enforced. We have thus gathered quite a lot of experience which we now wish to compare with the experience accumulated in other EU Member States.

For many months now we have been working together on national reports, reflecting the implementation of the European Arrest Warrant in the individual Member States of the European Union and the problems involved in the application of this legal instrument in practice. Today we have the honour to host here in Kraków our colleagues from 19 European countries. I am looking forward to the discussions that we are going to hold here over the coming two days. Before we commence them, however, I would like to thank our collaborators most sincerely for their contribution to our joint project.

It is mainly based on their reports that we have prepared the conference proceedings that were sent to you electronically. However, the CD included in the conference folder contains not only the national reports, but also the texts of 25 statutes implementing the Framework Decision in the national legal orders and – as far as we were able to gather it – the jurisprudence of the supreme courts and constitutional courts of the different states. You will also find there the text of the Council Framework Decision of 13th June 2002 on the European Arrest Warrant and other documents related to its implementation and application.

In designing the conference’s agenda we have abandoned the idea of presenting the national reports, in order to leave room for panel discussions with the participation of our guests, during which we will review in more detail various issues involved in the implementation and application of the European Arrest Warrant. We intend to discuss special constitutional points which have emerged in particular in German, Czech, Cypriot and Polish laws, matters related to various methods of implementation of the Council Framework Decision of 13th June 2002 on the European Arrest Warrant as well as problems related to the warrant’s issuance and enforcement.

Before, however, we commence the panel discussions I would invite Professor Stanislaw Biernat, Head of the Chair of European Law, the Jagiellonian University in Kraków to take the floor. Professor Biernat has agreed to prepare the keynote speech on the Framework Decision as the most important instrument of the third pillar of the European Union. Next, we will listen to the paper presenting an alternative point to be delivered by Professor Gert Vermeulen of the University of Gent.
2. The opening session

(Chair: Piotr Hofmański, Jagiellonian University)

2.1. The Framework Decision as a legal instrument in the third pillar of the European Union*

(Stanisław Biernat)

1. The 1992 Treaty of Maastricht (TEU) provided the legal grounds in European Union primary law for the cooperation between Member States in the field of justice and home affairs. It meant that something commonly known as the third pillar of the EU has been finally ushered into life. The logic behind the cooperation among Member States in this pillar has been formulated in a manner different from that adopted in the first pillar of the Union i.e. in the European Community (formerly the European Economic Community). This time the method selected was not the ‘Community’ one, but the method of intergovernmental cooperation, which is characteristic of public international law.

Initially, the only legally binding forms of cooperation in the third pillar were conventions, e.g. international agreements among Member States. These were established within the Council (of the European Union) and then adopted by Member States. In practice the necessity for ratification of the conventions in all Member States, as well as frequent delays in the ratification processes proved to be an impediment on usefulness of the conventions. For this reason not all conventions came into effect1.

2. The provisions of the TEU have been substantially changed by the Treaty of Amsterdam signed in 1997. It introduced two new legal instruments in the third pillar: framework decisions issued and decisions, which superseded conventions to a great extent. The framework decisions turned out to be the most important and effective instrument. By the end of 2006, the Council adopted about twenty framework decisions. The best known is the 2002 Framework Decision on the European Arrest Warrant and the surrender procedures between Member States2.

The issue of framework decisions was raised in three fairly recent and important judgments of the ECJ in Luxembourg. Additionally, a number of constitutional courts in several Member States voiced their opinions, also including the Polish Constitutional Court (Constitutional Tribunal).

3. The power to issue framework decisions is contained in Article 34 (2) (b) TEU. One of the Polish authors, Dr Agnieszka Grzelak, completed a detailed analysis of the framework decisions issued to-date and suggested dividing them into several groups depending on their subject matter and content:3

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* The text retains the features of the lecture delivered during the Conference on the EAW held on 10th November 2006. For this reason, the references to the body of publications and case law were kept at minimum.

1 The most important conventions to be mentioned are: on the establishment of a European Police Office (EUROPOL), on the protection of the European Communities' financial interests and on mutual assistance in criminal matters.

2 Cf. the framework decision 2002/584/JHA O.J. 2002 L 190/1.

3 A. Grzelak, Instrumenty prawne w obszarze współpracy policyjnej i sądowej w sprawach karnych w Unii Europejskiej [Legal instruments in the area of police and judicial cooperation in criminal matters], Kraków 2006, manuscript of a Ph.D. dissertation. It was from this manuscript that I have gathered many other pieces of information on the practice applied by EC/EU institutions in the third pillar.
I. framework decisions concerning the introduction of certain types of crimes, e.g. combating terrorism, counterfeiting euros;
II. framework decisions concerning mutual recognition of court decisions, e.g. introducing the EAW;
III. framework decisions concerning the establishment of certain forms of cooperation, e.g. joint investigation teams;
IV. framework decisions concerning selected aspects of criminal procedure, e.g. on the standing of victims in criminal proceedings, on the EAW;
V. framework decisions concerning issues regulated by international law, e.g. on money laundering. The transposition of some framework decisions in this group requires the withdrawal of earlier reservations submitted to international agreements.

4. The legal characteristics of a framework decision consists of various construction elements contained in Article 34 (2) (b) TEU. The function of the framework decision is just primary. It is the harmonisation of legal provisions in Member States in the areas now covered by the subject-matter and scope of the third pillar. Sometimes certain doubts may arise as to whether the content of a decision falls within the authorisation of the Treaty, i.e. whether its content is actually the harmonisation of the legal provisions in Member States. This kind of doubt was raised by the Belgian Arbitragehof (Cour d’arbitrage), which referred the question concerning the framework decision on the EAW to the ECJ for a preliminary ruling. The view taken by the Belgian court was that the provisions which constituted the subject matter of the framework decision should be contained in a convention. In the rationale for the referral to the ECJ, the Belgian court expressed a view that the framework decision on the EAW did not aim to approximate earlier national laws because it introduced a new, yet undefined legal construction. Also, in the opinion of the referring court, the earlier international agreements concerning extradition should be changed or annulled in the same form e.g. the actus contrarius is required in so doing.

The ECJ stated⁴, however, that the EAW could equally have been the subject of a convention, it is within the Council’s discretion to give preference to the legal instrument of the framework decision in the case where, as here, the conditions governing the adoption of such a measure are satisfied. Any other interpretation would risk depriving of its essential effectiveness the Council’s recognized power to adopt framework decisions in fields previously governed by international conventions.

5. The definition of the features of framework decisions in Article 34 TEU is inevitably associated with an instrument of Community law (from the first pillar of the EU) e.g. with the directive⁵. The definition of the directive given in Article 249 (3) EC is almost identical with that of the framework decision.

The issue of how far the framework decisions are similar to the directives and wherein their differences lie is often discussed in legal literature. Personally, I am inclined to support the view that highlights the remarkable similarities of these two legal instruments. The single most important similarity is the obligation of Member States to implement, before a specified deadline, both the

⁴ Case C-303/05 Advocaten voor de Wereld VZW v. Leden van de Ministerraad (The judgement of 3rd May 2007, n.y.r.).
⁵ This issue is considered at length by M. Szwarc, Decyzje ramowe jako instrument harmonizacji prawa karnego w UE [Framework decisions as instruments for harmonising criminal law in the EU], PIP 2005, No. 7, p. 22–38.
directives and the framework decisions, i.e. to introduce their norms into respective national legal orders. Both in the case of directives and framework decisions, the forms and methods of implementation may differ, depending on concrete situations. Most often there will be a need to change national law and therefore the intervention of the legislative power will be required. It may happen, however, that the implementation does not require changes to the law, but would require instead rather organisational changes, changes of interpretation of law or practices currently applied, as well as changes in the sphere of international law. The obligation of the timely implementation of framework decisions into Polish law and their similarities with directives were underscored by the Constitutional Court, in its decision of 2005 concerning the EAW6.

Again, as in the case of directives, Member States are under an obligation to inform the Council and the Commission of the means undertaken to implement framework decisions, after which the Commission then prepares reports on the current state of implementation.

The fundamental difference concerns the sanctions that are available in the event of a failure to implement or an incorrect implementation of a directive on the one hand, and a framework decision on the other. In the case of directives the Commission may bring a matter against a Member State to the ECJ pursuant to Article 226 EC. Such action is not, however, available in the third pillar. Therefore, there is still no formal means to compel Member States to comply with the requirement for correct implementation and application of framework decisions.

Yet another difference between directives and framework decisions is often emphasised in legal publications. Pursuant to a clear reservation in Article 34 (2) (b) second sentence TEU: [Framework decisions]... shall not entail direct effect. It means that the provisions of framework decisions are not capable of being a source of rights or obligations on the part of individuals nor can they be used as legal basis for the judgments of national courts or the decisions of other authorities.

In my opinion, this difference is not as important as it is often portrayed. The ability of directives to have a direct effect is not their immanent, nor even characteristic feature. It is an exception rather than a rule. The rule is that the directives require implementation into national law and that only national law can be the source of rights or obligations of individuals. The direct effect of the directives concerns relatively rare and undesired situations, when a directive has not been implemented, implemented incorrectly or not in time. Moreover, the direct effect depends on meeting further requirements, e.g. that the provision in the directive must be precise and unconditional. In addition, the direct effect may occur only in a vertical arrangement, i.e. in the relationships between the State and an individual, as opposed to between individuals and may pertain only to the granting of rights to individuals, and not to imposing obligations on them.

The above considerations imply that the direct effect is not a feature which would represent an essential difference between directives and framework decisions. It must also be added, that despite the fact that the framework decisions lack direct effect, they may influence the legal situation of individuals. This has followed from the latest case law of the ECJ7.

In further comparisons between the legal acts in question it should be also observed that the framework decisions are issued only by the Council, whereas the directives may be issued not only by

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7 Case C-105/03 Pupino [2005] ECR I–5285.
the Council, but also jointly by the Parliament and the Council, or by the Commission. The framework decisions are always issued unanimously, while the directives of the Council are presently mostly being adopted by a qualified majority vote. The role of the European Parliament in formulating a framework decision is only consultative and not that of co-deciding, as may be the case for directives.

6. The above mentioned differences may be of significance when deciding which of the two instruments should be used by the EC (EU) institutions. The choice looks seemingly easy given the difference in the subject matter of legal provisions and the different legal basis of the two categories of legal acts under consideration. However, as it turns out, doubts have appeared in some cases concerning situations in which the Council requires that Member States apply criminal sanctions, in order to protect certain interests essential to the Community (the Union). In practice, in these cases, the Council resorted to the form of a framework decision rather than a directive. The underlying reason for the choice of this legal instrument could be the fact that, as mentioned earlier, in the third pillar of the Union no formal action is envisaged against a Member State failing to meet its Treaty obligations. Thus, the consequences of the infringement of the obligations resulting from framework decisions are not specified. This feature works to the ‘advantage’ of the framework decisions, although their adoption is formally more difficult than directives, because of the requirement for unanimity in the Council. It sometimes happened that in the course of legislative work on a directive, the Council changed its (collective) mind and decided to adopt a framework decision instead. Another solution involved the simultaneous adoption of two acts regulating a given field: a directive and a framework decision. The contents of these acts complemented each other.

The European Commission decided to oppose such practices and brought an action against the Council to the ECJ, pursuant to the provisions of Article 35(6) TEU, alleging invalidity of the 2003 framework decision on the protection of the environment through criminal law. In the view of the Commission, the matter should be included by a directive and its legal basis should be Article 175 EC, which empowers the Council to take actions to ensure the protection of the environment. The ECJ shared this view and decided to annul the framework decision in its entirety. The Court expressed the view, which was already presented in its case law, that the choice of legal basis for an act and the procedure required for its adoption following from the choice should rest on objective factors. In the case under consideration, the legal basis could be the norms of Community law concerning the environment protection policy rather than the norms of the third pillar of the EU. The Court emphasised the connection between the norm of Community law regulating particular common policies with the norms requiring the Member States to introduce criminal sanctions in order to ensure the execution of these policies.

This judgment is controversial and its effects are still difficult to predict. It may transpire that, as a result of the ruling, legislative activities in the area concerned will be weakened. The Council (actually – the Member States) may not be inclined to issue directives with the provisions which could have been issued in framework decisions under the earlier practice. Even the possibility of including the provisions in the act of Community law, ordering the introduction of criminal sanc-

8 Cf. e.g. drafts concerning strengthening the protection of the rights to intellectual property.
tions in Member States to ensure the effectiveness of directives, is itself debatable. Nevertheless, such a solution has longed since been adopted. What is beyond any doubt, however, is that the norms of neither Community nor Union law may be used as the sole basis for determining or aggravating the criminal liability of individuals.

7. The legal nature of the framework decision has been discussed. The view has been expressed in Polish legal publications that framework decisions are simplified international agreements. In 2005 the Constitutional Court shared that opinion in its judgment concerning the Accession Treaty. The arguments included the fact that the cooperation of states in the third pillar is of an inter-governmental and not of a Community type, and also that the EU (in contrast to the EC) lacks a legal personality and thus, that the legal acts in this pillar are actually issued by the Member States which only operate through the EC (EU) institutions.

It seems that this view is incorrect. It should be assumed that the framework decisions are a distinct category of the Council’s acts and thus it is the Union and not Member States which should be ‘credited’ for it. Additionally, the framework decisions are binding upon the Member States.

The argument referring to the inter-governmental nature of the cooperation in the third pillar does not explain the nature of the framework decision and even leads to a vicious circle of doubt. Then, the issue of legal personality of the EU (or its absence) is without any significance in terms of the evaluation of the legal nature of framework decisions. The legal personality pertains to the legal standing of the EU in external relations and not to the relations between the Union and its Member States, in connection with the adoption of framework decisions and the effects thereof. Parenthetically, the assessment of the legal personality of the EU is now different from that prevailing in the early 1990s, immediately after the TEU was concluded. It is sufficient to note that now it is the European Union (not only the European Community or Member States) which is the party to some international agreements.

Treating framework decisions as international agreements binding Member States would not be justified also in the light of the provisions of the TUE. The Treaty makes a distinction between conventions which need ratification by Member States on the one hand, and framework decisions, which are acts passed by the Council. In this situation, assigning a framework decision to the category of international agreements, along with conventions, would be incomprehensible.

The concept criticised in this place would also be unacceptable in the light of Polish law. The framework decisions are binding in Poland and require implementation into national law. Under the provisions of Article 91 of the Constitution of the Republic of Poland, non-ratified international agreements are not binding in Poland.

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13 Cf. the agreements with the United States on extradition or on mutual legal assistance in criminal matters.
14 The Polish Constitutional Court confirmed this in its 2005 decision P 1/05 concerning the EAW, cited above in the footnote 6.
agreements concluded in a simplified manner could not be of such significance. The framework decisions should be considered as ‘law established by an international organisation’ within the meaning of Article 91 (3) of the Constitution.

8. Interesting changes have taken place recently in assessing the third-pillar law and in particular in an evaluation of the role of framework decisions. In the traditional approach, the law of the third pillar of the EU does not enjoy primacy over the law of Member States. The obligation of Member States to observe the law in this pillar could result from the *pacta sunt servanda* principle, derived from public international law. Also, as already mentioned, the norms of framework decisions are devoid of direct effect pursuant to the expressly worded provision of Article 34 TEU.

These matters are still being resolved. Major publicity has resulted from the ECJ’s preliminary ruling in the Pupino case, already mentioned, in which the Court emphasised the binding nature of the framework decisions and their similarity to directives. According to this judgment, the obligation placed on courts to interpret national law in conformity with the wording and purpose of third-pillar law is of principal significance. Through this, the obligation formulated in Community law has now been extended to the third-pillar law. The Court has applied the well-known formula expressed in the obligation to interpret national law in conformity ‘as far as possible’. Moreover, in order to ensure the effective exercise of the ECJ’s competence to issue preliminary rulings pursuant to Article 35 TEU, individuals should be granted the right to invoke the framework decisions before courts, in order to bring the interpretation of national law into line with the framework decisions. The Court has derived the obligation that the interpretation of national law should conform to the framework decisions from the principle of loyal cooperation. This principle applies, in its opinion, also in the third pillar, although the TEU lacks the norm equivalent of Article 10 EC. The Court stated that, without the loyal cooperation of Member States and institutions, it would not be possible to fulfil the mission of the Union, in field of police and judicial cooperation in criminal matters. Even though the Court has not said so explicitly, it has essentially recognised the obligation of the Member States to effectively apply the law of the third pillar of the Union.

These statements from the ECJ’s jurisprudence support the thesis of the legal order of the third pillar being close to Community law. Obviously, differences still exist. Particularly, the legal norms in the field of police and judicial cooperation in criminal matters may not be a direct source for the rights or obligations of individuals. However, proclaiming the obligation to interpret national law in conformity with the law of the third pillar, as well as of the right of individuals to demand such interpretation in the proceedings before a national court, compensates to a significant extent for the lack of a direct effect. This phenomenon is also known in Community law.

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15 Article 91 (1) A ratified international agreement, upon its publication in Dziennik Ustaw Rzeczypospolitej Polskiej [Journal of Laws of the Republic of Poland], shall constitute part of the national legal order, and shall be applied directly, unless its application depends on the enactment of a statute.

16 An international agreement that has been ratified upon prior consent granted in a statute shall have primacy over a statute, if the statute in question cannot be reconciled with the agreement.

17 If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the law established by such organization shall be applied directly, and have primacy in the event of a collision with statutes.

The Court did not voice its opinion on the primacy of the law of the third pillar over the laws of Member States. Yet, beyond any doubt, the Member States are bound by the norms of the TEU and by the secondary law in the field of police and judicial cooperation in criminal matters. Invoking the principle of loyalty, which would then assume general significance, not just limited to Community law, indicates that the source of subordination of the Member States to the norms of the third pillar has already moved beyond the *pacta sunt servanda* principle.

9. In conclusion, it would be worthwhile providing a brief treatment of the proposals for reforms included in the Treaty establishing a Constitution for Europe (Constitutional Treaty). As we all know, the future of the Treaty is uncertain.

In general terms the Constitutional Treaty intends to abolish the present pillar structure of the Union. The specificity of the present third pillar would nevertheless be recognised in special solutions applied to the area of freedom, security and justice. Principally, the same legal instruments would be used in the present first and third pillars. The equivalent of directives, as well as of framework decisions, would appear in ‘European framework laws’. In addition, Article I-6 of the Constitutional Treaty provides expressly for the principle of the primacy of the law of the new European Union over the laws of individual Member States. This primacy will also extend to the area of freedom, security and justice. Therefore, the reforms envisaged in the Constitutional Treaty are of primary significance to the field discussed in this paper as they finalise certain tendencies which can be observed even today.

### 2.2. Interference of Gert Vermeulen

*(Summary prepared by Adam Górski)*

In his speech, Prof. Vermeulen examined the difference between the framework decision and other third pillar legal instruments and the first pillar directive. He challenged the content of Prof. Biernat’s speech and examined the legal instruments under the Maastricht Treaty. He stressed that Maastricht Treaty did not offer formally the possibility to approximate domestic criminal law. Joint actions were only politically binding. The speaker stated that joint actions were also used to set up European Judicial Network.

He then went on to describe the legal nature of framework decision and its practical application. He pondered over the term ‘approximation’ and the real scope of competence given by Amsterdam Treaty to regulate by means of a framework decision. In Prof. Vermeulen’s opinion the Council of the European Union actually abuses/overuses the mandate provided in the Treaty by using framework decision in such legal areas as international (European) cooperation in criminal matters, especially in the case of the European Arrest Warrant. Also, his main argument was that there is no right stemming from Amsterdam Treaty to shape legal relations between the Member States by means of a framework decision. In the speaker’s opinion the actual task of framework decision was shaping domestic substantive criminal law. Matters of international cooperation should rather be left to ‘traditional’ international law instruments, that is, conventions. In Prof. Vermeulen’s view framework decision and convention have different legitimization (international treaty should be ratified by national parliaments) and therefore its use should be limited very literally to matters provided in the Amsterdam Treaty. Moreover, the principle of mutual recognition that lies behind
many framework decision regulations is not explicitly written in the Amsterdam Treaty. In the speaker’s opinion, the Council should not regulate everything by means of framework decisions simply because traditional instruments were not ratified by satisfying number of Member States. Equaling international treaty and framework decision would in that sense mean that the EU solves the problem of ratification with “back door” means.

Prof. Vermeulen said also that the point is that the conventions have been approved by us – citizens, parliaments, because the things regulated in conventions impact on my position, your position, my rights, your rights. How arrogant is it for ministers of justice in home affairs to state in the framework decision on the European Arrest Warrant that its provisions will replace the text of all the existing conventions on extradition. This is continuously happening at European level and I don’t think it can be done. The speaker stressed that the existing shape of the third pillar does not give reasons to state that domestic parliaments transferred powers to the Council of the EU because that is what would have happened only with the entrance to force of the Constitution for Europe. The Treaty of Amsterdam does not allow for such an interpretation.

In the speaker’s view, a presumption of a competence to enact a framework decision could be compared to replacing parliamentary bills with ministerial decisions.

2.3. Discussion

(reported by Adam Górski)

The first participant in the discussion, Prof. Lagodny related himself to the line of argumentation presented by Prof. Vermeulen, which implied that it was unthinkable to see that a framework decision could cause certain international agreement to be deprived of legal force, and that in the future the international convention would disappear from international legal transactions. Prof. Lagodny discussed a possible solution, under which the TEU could include a provision concluding that conventions would remain in force but alongside the framework decisions which would enjoy position superior to the conventions. In reply, Prof. Vermeulen stated that in the solution proposed by Prof. Lagodny the difference would be in understanding what kind of powers had been given to the Council of the European Union with respect to issuing binding decisions. This issue was not regulated in the present reading of the Treaty. Prof. Vermeulen was of the opinion that such power to modify international obligations does not exist. The practices which did occur deviated from what is written in the Treaty. The fundamental principle of enacting criminal law by national parliaments is rejected in the European Union. Decisions are taken by a group of officials.

Prof. Spinellis referred to the hierarchy of principles (normative acts) pertaining to the extradition of a citizen. In Greece there is no such constitutional prohibition but it has been introduced by almost all international conventions binding that country. These treaties (conventions) were replaced by the framework decision but the relevant Greek laws assume the form of parliamentary statutes being obviously of a lower rank in the hierarchy than that of a ratified international agreement. Viewing the issue from this perspective, one could say that the provisions on extradition regulating the extradition of a citizen were neither replaced nor derogated.

Prof. Biernat referred to a relevant pieces of presentation by Prof. Vermeulen. Prof. Biernat was of the opinion that the hierarchy of legal instruments within the third pillar is lacking. The differ-
ence between conventions and framework decisions arises principally out of the participation of national parliaments in creating this law. It is rather a problem concerning the Member States than the EU alone. The issue is rather to what extent the positions of national parliaments are binding, and the practice differs much between Member States. In Poland, the decision of the Parliament on drafted Framework decisions does not have a binding effect. The opinion of national parliaments is of an additional importance because an FD is later implemented by the parliaments.

Another speaker in the discussion, Prof. Wong, noted the lack of the FDs’ direct effect. He also criticised the ECJ judgment in the Pupino case just because of the specific nature of the third pillar.

The floor was taken again by Prof. Vermeulen. He noted that the obligation to construe the provisions of criminal law in a strict manner forces the rejection of the concept that harmonisation of legal orders can be extended to cover also cooperation in criminal matters. The speaker agreed with the representative of Greece, the hierarchy of norm-setting legal acts in Belgium brings about a situation similar to the one presented by Prof. Spinellis, concerning Greece. The speaker noted also that the text of the convention should never be annulled by an FD. The framework decision binds states but it cannot create obligations between states.

Entering the discussion again, Prof. Biernat highlighted the controversial nature of the material with which the participants to the conference have wrestled. He did not share, however, Prof. Wong’s critical opinion concerning the outlook of the interpretation process occurring at present in the third pillar, which consists of slowly reaching a similar result as prevailing in the first pillar. The speaker noted that the direct effect is applicable to the rights of an individual rather than to his/her obligations. The cooperation in the third pillar depends yet, very much, on the willingness of Member States manifested by the implementation of the relevant instruments. Prof. Biernat observed that possible putting into effect of the provision of the Constitution for Europe would strengthen the process of European integration in criminal matters.
3. Session 1
Constitutional Problems – can they be overcome?

(Chair: Andrzej Zoll, the Jagiellonian University)

3.1. The European Arrest Warrant (EAW) in Cyprus and Constitutional Concerns

(Andreas Kapardis)

3.1.1. Introduction

Traditionally, the criminal law has been one of the manifestations of State authority. In the European context, however, the criminal law has acquired additional significance as the European Community, in essence an economic organization, evolved and a need arose to ensure the free movement of goods and persons within its boundaries. At the same time, the need to deal with organized crime and terrorism has resulted in the criminal law being used to ensure freedom, security and justice for EU citizens. This was clearly stated in the Amsterdam Treaty, 1997, that extended the ‘third pillar’ without democratic accountability and judicial control. Interestingly, the Treaty of Nice 2000 merely ‘proclaimed’ the Charter of Fundamental Rights.

In the absence of a European constitution, the EU cannot function as a State, except on the basis of cooperation and trust between its members. Consequently, we have, inter alia, seen the establishment of Europol in the 199517, 1997 and 2000 Action Plans that broadened the role of Europol to include operational functions and, following the September 2001 attack on the United States, the Council Decision of 22nd January 2003 that provided for the Member States to supply Europol with intelligence on terrorism that specialist services established for that purpose would now collect. In addition, in order to fight organized crime, the 1997 Action Plan provided for a Judicial Cooperation Network, culminating in the establishment of Eurojust in the early part of 2003.

It could be argued that the Framework Decision of the Council on the 18th of July 2002 regarding the European Arrest Warrant (EAW), came about largely as a result of the September 2001 attack on the US, in response to which on the 19th of the same month the Heads of State and the President of the EU issued a Common Statement in Brussels, stressing the need to deal with international terrorism and organized crime. To that end, there was a need for an EU Member State to be able to extradite even one’s own nationals.

The cornerstone of the EAW is a high degree of trust between the Member States. Consequently, it became inevitable that in order to facilitate its enforcement, the provisions of the EAW (a) contradicted the constitutional provision in a number of countries, including Cyprus, that a government shall not extradite to another country any of its own citizens, and (b) largely eroded the requirement in most countries that in order for the relevant authorities to arrest and extradite a person to another country the offence involved must be in violation of the criminal law both of the country applying for such an extradition, as well as the country considering the application.

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It could be objected of course that the extraditing State is not enforcing its own criminal law and procedure, but is merely contributing to the satisfaction of the demand by another State to have its criminal process enforced (Fytraki in footnote 5). It has been argued by Vasilakakis\(^\text{18}\) that the abolition of the requirement that for a person to be extradited the offence in question must be considered as such in both countries involved in the issuance of an EAW leads to the over-criminalization of everyday life within the EU because with so much movement of people there is an increased risk of people finding themselves the subject of a EAW for conduct that does not constitute an offence in their own country but does in the country they happen to visit, travel through or work in.

The prohibition against extraditing one’s own nationals centres around an obligation on a State to protect its citizens from having their fundamental rights violated by the criminal justice system of other countries, betraying a mistrust for the justice systems of other countries\(^\text{19}\). Not surprisingly, perhaps, in its decision of 27\(^\text{th}\) April 2005 the Constitutional Court of Poland\(^\text{20}\) determined that the act of handing over a citizen of Poland in the context of the EAW in order for that person to be prosecuted in another country for an act that does not constitute a criminal offence in Poland, worsens the position of that person and, more importantly, it breaches Art. 55(1) of the Polish Constitution. The same decision by the Constitutional Court of Poland also addressed the issue of the terms ‘extradition’ and ‘handing over’ and concluded that the two are not substantially different. To make things worse for the supporters of the EAW, the Constitutional Court of Germany on 18\(^\text{th}\) July 2005 (see Chapter 5 of this volume) found that the law that made the EAW part of German legislation contradicted the German Constitution that prohibits the extradition of a German citizen\(^\text{21}\) and it declared that law invalid. The same Court also decided that EU citizenship does not replace German citizenship. Citing the German Constitutional Court’s decision, the Thessaloniki Supreme Court (Συμβούλιο Εφετών Θεσσαλονίκης)\(^\text{22}\) and the Greek High Court (Άριος Πάγος)\(^\text{23}\) decided against the enforcement of an EAW issued in Germany because the relevant German law had been declared unconstitutional.

Before discussing some of the arguments put forward for the EAW, it should be noted in this context that Articles 18-24 of the proposed Draft for the European Constitutional Treaty\(^\text{24}\) provided for the establishment of a central European prosecution service. The fact that the proposal was rejected by the European Council in Tampere in October 1999 and later in Nice, showed the unwillingness of the Member States to confer criminal law powers onto a central EU entity and their preparedness to halt the advance of a “Corpus juris penalis”.


\(^{20}\) Decision P 1/05, accessible at the Court’s own website www.trybunal.gov.pl.

\(^{21}\) To Spain to face charges for being a member of Al Qaida.

\(^{22}\) Συμβούλιο Εφετών Θεσσαλονίκης 1677/2005 ΠοινΔικ. 2005, 1414.

\(^{23}\) Άριος Πάγος 2483/2005.

\(^{24}\) Of 18\(^\text{th}\) July 2003.
3.1.2. The structure and content of Law 133 (1) of 2004 that implemented the FD

Prior to the introduction of the EAW into Cyprus law with Law 133 (1) 2004 on 30th April 2004, the following legal provisions governed the extradition of persons to EU Member States:

A. The European Extradition Treaty of 13th December 1957 and additional Protocols to it.

(a) Law 133(1)/2004 that introduced the EAW into Cyprus law

The first part of the Law safeguards the rights of the person to be arrested and surrendered, details the legal status and the essential information to be contained in an EAW application, the language in which it is to be submitted and in which it is to be accepted and, also, provides for the Central Authority, which in Cyprus is the Ministry of Justice and Public Order. The competent authority is obliged to administratively convey and receive the EAW and to oversee the relevant authorities regarding its issuance and enforcement, which are the courts and police respectively. When Cyprus issues an EAW, it has to be sent translated into one of the formal languages of the receiving country25, while the Republic of Cyprus accepts to enforce a warrant sent in either of its formal languages which, as article 2 of the Constitution of 1960 provides, are Greek and Turkish but, also, in English.

Article 2(2) of the Law provides in the body of the law the safeguarding of fundamental rights and principles that are stated in article 6 of the EU Convention. The Law adopts para 12 of the Preamble of the Framework Decision that no requested person shall be extradited to a country where there are indications that there is a serious danger of violation of his/her fundamental rights or where there is a serious danger the person will be tortured or be subjected to some other inhuman or humiliating sanction or treatment or will be sentenced to death26.

Article 3(1) of the Law details the legal nature of the EAW. It has to be a decision or an order by a judicial authority of an EU Member State that is issued in order for the requested person to be arrested and surrendered for the purposes of continuing a criminal prosecution or executing a sentence or detention order. Article 4 of the Law lists the content, the type and essential information the warrant must contain and that is nothing more and nothing less than what is stated in Article 8(1) of the Framework Decision. Furthermore, an Appendix to the same Law reproduces in Greek the Annex of the Framework Decision.

The issuing judicial authority of the EAW is the District Court having territorial jurisdiction for trying the offence for which the arrest and surrender of the requested person are required, or the Court which has imposed the sentence or detention order (Art. 6). Under Article 7 of the Law, the EAW shall be issued for acts which are punishable according to Cypriot criminal law with a custo-

25 The law does not provide in accordance with Art. 8(2) of the Framework Decision that the EAW can be sent in a language which is acceptable to an EU Member State on the basis of a Statement to the Council Secretarial.

26 See below the Cyprus Supreme Court decision in Scatterwood, Civil Appeal 12/2005 on 21st January 2005.
dial sentence or a detention order for a maximum period of at least twelve months or, in the event
where a penalty or order has already been passed, for a sentence for a period of at least four-month
imprisonment.

As for the transmission of the European Arrest Warrant, where the domicile or residence of the
requested person are known, the District Judge may transmit the European Arrest Warrant directly
to the executing judicial authority. According to the law, where the domicile or residence of the
requested person are not known, the competent District Judge, via the central authority, proceeds
to the requisite and makes enquiries, notably through the Schengen Information System (SIS), and
through the contact points of the European Judicial Network (EJN), in order to obtain that informa-
tion from the executing State. However, it should be noted that in 2005 no EAW was transmitted
via the SIS or the EJN. In practice, the competent authorities send a “red notice” notification for
the existence of an EAW. When the requested person is located, the competent authorities send
the original EAW.

The competent District Judge has the right, along with the transmission of the European Arrest
Warrant, to request from the executing judicial authority the seizure and handing over of property
which may be used as evidence or which has been acquired by the requested person as a result
of the offence (Art. 9(1)). However, any rights which the executing Member State or third parties
may have acquired in the seized property are preserved (Art. 9(2)).

Part III of Law No. 133(1) 2004 deals with the method of executing the EAW and covers the
provisions of Articles 2-6 of the Framework Decision. The competent authority for the arrest and
custody of the requested person, as well as for the executing decision of surrender or refusal is the
competent District Judge in the district in which the requested person is arrested or is believed to
be, or the District Judge of Nicosia (the capital of Cyprus), in the event when the whereabouts
of the requested person are not known (Art. 11(1)(b)).

The Law embodies the list of 31 offences that are listed in Art. 2(2) of the Framework Decision,
which does not require the double criminality principle provided the offences are punishable in
the issuing Member State by a custodial sentence or a detention order for a maximum period of
at least three years, as defined by the law of the issuing State of the warrant. If the offence is not
one of those listed in Art. 12(2) of the Law, an EAW can be issued if the act constitutes an offence
punishable by a custodial sentence or detention order, according to the law of the issuing State
and the Cypriot criminal laws notwithstanding its description.

Art. 13 provides the grounds for mandatory non-execution of the EAW provided in the Law. The
law does not only include the grounds listed in Art. 3 of the Framework Decision, but also addresses
the concerns of the Republic of Cyprus that this oppressive procedure should be compatible with
the Constitution and the best possible adherence to human rights. Thus, in addition to the known
grounds for non-execution of an EAW (which are: amnesty27, the ne bis in idem28 principle and the
non-criminal responsibility due to the age of the sought person29, the Cypriot legislator provides
for three more cases:

27 Art.13(a).
28 Art.13(b).
29 Art.13(c).
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a. if the EAW has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions, sexual orientation or activity for freedom (Art.13(d)),

b. if the person who is the subject of the European Arrest Warrant, for the execution of a custodial sentence or detention order, is a Cypriot and the Republic of Cyprus undertakes the obligation to execute the sentence or detention order according to its criminal laws (Art.13(e)),

c. if the person who is the subject of the European Arrest Warrant for his prosecution is a Cypriot, unless it is ensured that after being heard, he or she shall be transferred to the Republic of Cyprus, in order to serve a custodial sentence or a detention order, which shall be passed against him/her in the issuing State of the warrant (Art.13(f)).

The last two grounds for mandatory non-execution of an European Arrest Warrant is an attempt to introduce into Cyprus law the provisions of the Framework Decision without those being incompatible with Article 11(2)(f) of the Constitution, which prohibits depriving a Cypriot national of his liberty, in order to deport or extradite him. To be precise, the above Article of the Constitution allows an exception to one's right to be free, namely the arrest or detention of an alien, in order that he be deported or extradited. Consequently, the differentiation made in the same article of the Constitution between the terms person and alien has been interpreted by the Supreme Court since the early days of the Constitution that it prohibits the deportation or extradition of a Cypriot citizen. Article 11 of the Constitution in many respects corresponds to Article 5(1) of the European Convention on Human Rights. However, if one compares Article 5(1) of the Convention with Article 11(2)(f) of the Constitution, the difference which the drafters of the Constitution (which was imposed on the Cypriot people) wanted to ensure becomes apparent. They replaced the word person which is used in the Convention with the word alien. Thus, since the birth of the Republic of Cyprus this provision has been interpreted as confining the deportation procedures to aliens only. Consequently, the attempt to extradite a Cypriot citizen under the provisions of the Framework Decision, without breaching the provision of the Constitution, has failed because in the Konstantinou case the full bench of the Supreme Court decided that deporting or surrendering a Cypriot citizen to the authorities of another EU Member State is in breach of the Constitutional provision referred to above (see below).

As far as the grounds for optional non-execution of the EAW are concerned, the following should be noted. Firstly, the Cypriot legislator does not require the enforcement of the principle of double criminality as it relates to the crimes listed in Article 2(2) of the FD. Consequently, the first reason for the optional non-execution provided in Article 4 of the FD is not incorporated in the Cyprus law. Secondly, all the other reasons listed in Article 4 of the FD, which give the discretion to the judiciary to refuse to execute the EAW, are fully implemented in the relevant law.

The guarantees to be given by the issuing Member State to the executing judicial authorities in particular cases provided for in Article 5 of the Framework Decision are implemented in the Cyprus law verbatim. The guarantees concern the case of enforcing a decision which was decided in the absence of the accused, the need for a provision in the law of the requesting Member State that the imposed sentence of life imprisonment may be reviewed at the latest after 20 years. In case

a person who is the subject of an EAW for the purpose of prosecution is a resident of the Republic of Cyprus, the execution of the European arrest warrant by the competent judicial authority may be subject to the condition that the requested person, after being heard, is returned to the Republic of Cyprus in order to serve there the custodial sentence order.

(b) Issuing EAWs: Practice and Problems

In 2005 in Cyprus 44 EAWs were issued, all of which were transmitted via Interpol. Three of those resulted in the effective surrender of the person sought. On the other hand, during the same year 24 EAWs were received by the Cypriot judicial authorities. Nine persons were arrested, eight of whom had effectively surrendered. Of those surrendered, five contested their surrender. It is estimated that where the person agrees to the surrender, the average time between the arrest and the decision on the surrender of the person was between 10-15 days. If the person did not consent to the surrender, the average time increased up to 40 days. A Counsel in the Legal Office of the Republic has the responsibility of ensuring the correctness of an EAW that will be submitted for execution by the proper judicial authorities of the Republic and for the issuing of an arrest warrant by a Court in Cyprus when a person who is the subject of an EAW is located in Cyprus or there is information that he/she is located or is expected to arrive in Cyprus.

The need for the Attorney General of the Republic to approve the draft of an EAW that will be submitted in order to be issued by the competent authorities in Cyprus can be explained, on the one hand, by Article 113.2 of the Constitution of 1960. The Attorney General alone is responsible for all criminal prosecutions that take place in the Republic of Cyprus and, consequently, must know of all cases in which the Republic has requested the extradition of persons from another country to Cyprus in order that they be tried in Cyprus. On the other hand, the whole procedure of handing over a wanted person is solely a matter for the judicial authority and the executive cannot be involved in any way. However, Article 5 of the Law provides that it is the Ministry of Justice and Public Order that is the Central Authority for the EAW, which monitors the appropriate administrative authorities for both the issuing and enforcement, as well as the receiving of an EAW.

In order for an EAW issued by Cyprus to be enforced by the appropriate authorities of EU Member States, the procedure to be followed includes the following: if it is not known where the person in question is residing, a request is sent through Interpol to the appropriate authorities of all Member States, requesting the location of the person wanted. When he is located, then, within the time limit provided, a formal EAW is sent in a language acceptable to the receiving country. In serious cases it is preferred that from the outset a warrant be sent in the language acceptable to the receiving country. This requires coordination of the appropriate authorities in order to comply with the time-limits provided in each country. In practice, however, problems may arise because EU Member States have not agreed on a common language acceptable to all. When it is known in which country the wanted person is residing, then the appropriate authority in Cyprus (Ministry of Justice and Public Order) sends the EAW to the appropriate authority of the EU member concerned requesting its enforcement.

From a practical point of view, the following questions can be posed:

a. Is it necessary that the translation of the EAW in the receiving country be formally certified?

b. When Interpol sends a message for the location of a wanted person, should it also at the same time send the EAW even though the translation of the EAW must be certified?
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(c) Enforcing European Arrest Warrants: Practice and Problems

The enforcement of an EAW is provided in Part III of the Law. Article 16 provides that where the Central Authority receives an EAW and satisfies itself that the warrant has been issued in due form, it shall issue a certificate and shall see to the arrest of the requested person. Upon presentation of the certificate to the competent judge along with the EAW, the District Judge shall proceed to the issuance of an EAW, provided that he is satisfied that the conditions of issuance of the arrest warrant are fulfilled. In the event of urgency, the District Judge may issue a provisional arrest warrant for a requested person for whom an EAW is in force, and prior to its transmission, at the request of the State issuing the warrant, by post or by wire. The provisional arrest shall not exceed the date of arrest of the requested person over three days. If the EAW is not received within this time-limit, the arrested person shall be released.

When a requested person is arrested on the basis of an EAW, he or she shall be conducted within twenty-four hours before a competent judge (Art. 17(1)). After the judge is satisfied with regard to the identity of the requested person, the District Judge shall inform the latter about the existence and the contents of the warrant, the right to have legal counsel and an interpreter as well as the possibility of surrendering to the issuing state of the warrant. If the arrested person challenges his identity, the judge shall make a final decision on the matter within five days, after having heard the arrested person and his/her legal counsel (Art.19(4)). Following the arrest of the requested person and the attestation of his/her identity, the competent District Judge shall decide whether such person shall remain in detention, in order to prevent him/her from absconding or to release him/her, with or without restrictive conditions (Art.18(1)).

Article 19 provides that if the arrested person declares that he/she consents to surrender to the issuing State of the warrant, that consent, and if appropriate, the express renunciation of entitlement to the speciality rule referred to in Article 36 of the Law, is given before the competent District Judge. In this context, minutes are kept in respect of the information given and of the answers of the requested person. In such cases, the Judge decides on the execution of the EAW within ten days after consent has been given.

Where the arrested person does not consent to his/her surrender, the competent judge sets a date for hearing. In such cases, the final decision on the execution of the warrant shall be taken within sixty days from the arrest of the requested person. The time limits may be extended by further thirty days in specific circumstances, where for any reason the EAW cannot be executed. Against the final decision of the District Judge, the requested person or the Attorney General of the Republic have the right to file an appeal before the Supreme Court within three days of the publication of the decision. The Supreme Court shall take a decision within eight days after the appeal has been filed (Art. 24(2)). Interestingly enough, however, in the Konstantinou case the Supreme Court did not comply with the aforementioned time limit, on the grounds that the length of time taken to reach a decision on an appeal is entirely up to the Supreme Court, which cannot be constrained by strict time limits set by the legislator.

The time limit for the surrender of the requested person shall not exceed ten days from the time of the delivery of the final decision on the execution of the EAW. If the surrender of the requested person within the above time limit has proved to be impossible due to circumstances beyond the control of any of the competent authorities, the Judge and issuing judicial authority immediately agree on a new surrender date. In that event, the surrender shall take place within ten days of the
new date thus agreed. If upon expiry of the above time limits, the requested person is still being held in custody, he/she shall be released.

3.1.3. First obstacles through decisions of the Supreme Court

(a) Attorney General vs. Konstantinou, Civil Appeal 294/2005, Full Bench of the Supreme Court, 7th November 2005

The case concerned an application by the UK to the Cypriot authorities to hand over a person with dual UK and Cypriot nationality charged with conspiring to defraud the British government. A question that had to be answered was whether the way in which the Framework Decision had been introduced into the Cyprus legal system was in compliance with the Cyprus Constitution of 1960. It was argued that the law that introduced the Framework Decision was incompatible with Article 11.2 (f) of the Constitution that states:

“Nobody is deprived of their liberty except in those cases where the law so provides, namely: […] (f) “for the arrest or detention of a person in order to prevent his entry into the Republic without a permit or in the case of an alien against whom procedures have been instituted to have him expelled or extradited.”

It was argued on behalf of the Attorney General that EU law is superior to the laws of all Member States and, consequently, the same applies in the case of Cyprus. It was alternatively argued that the provisions of Law 133(1)/2004 can be so interpreted as to be compatible with the constitutional provisions of Article 11.2 (f).

The Court dealt with relevant decisions in other EU Member States, like the decision of the Greek High Court (Άρειος Πάγος) No. 591/2005, the Supreme Court of Poland No. P1/05, on 27th April 2005, the Federal Constitutional Court of Germany in B. V. R. No. 2236/04, on 18th July 2005 and a decision by the Conseil d’Etat of France. It was distinguished that in the Polish decision it was decided that the law that had implemented the EU legislation into Polish law was in breach of a specific provision of the Polish Constitution.

The Court further noted that the Polish Court had also found that the extradition of a person on the run from the police/courts that applied prior to the introduction of the harmonization law, had the same legal status as the arrest and handing over of a person subject of an EAW. Regarding the last finding, the Court cited a relevant decision of the Conseil d’Etat of France. In contrast to the aforementioned arguments, the Attorney General maintained that a basic element of the EAW is the surrender of the sought person and not his extradition to the requesting Member State.

The full bench of the Supreme Court accepted that Law 133(1)/2004 introduced the Framework Decision into the law of Cyprus, in effect reproducing all the provisions of the Framework Decision. The unanimous decision also found that article 11 of the Constitution of Cyprus provides an exhaustive list of reasons for which a person may be arrested. Arresting a person in the context of an EAW is not one of the reasons stated. The Court reiterated a previous relevant decision in Cyprus31, where it was decided that the extradition of a Cypriot citizen on the basis of Article 11(f) of the Constitution is prohibited. In arriving at this finding, the Supreme Court made a clear reference to the recent decision of the Court of the European Communities in the Maria Pupino case,

C-105/03, of 16th June 2005, arguing that in that case, too, it is left to the Court of every Member State to decide whether an interpretation of its national law is in accordance with the Framework Decision32.

Regarding the question of whether the Law that introduced the EAW is superior to the Constitution, it was decided that the Framework Decision leaves the method and the means of how to realise its goal up to the Member States, and even if achieving that goal is compulsory, it does not have an immediate effect. Consequently, the correct legal procedure should be used to ensure the introduction and integration of the EAW into the Cyprus order. This had not been done since the law concerned was incompatible with a specific provision of the Constitution.

(b) The Scatterwood case, Civil Appeal 12/2005, on 21/1/2005

The person sought had pleaded guilty in a court in the UK to two charges of conspiring to import illicit drugs and was released on a recognisance. His lawyer argued that his client had been arrested following the issuing of an arrest warrant in violation of Article 11 of the Constitution, since it was based on provisions of the Criminal Procedure Law and not on provisions of the Law for the European Arrest Warrant – Law No. 133(1)/2004. The Supreme Court rejected that argument, noting that the issuing of an arrest warrant by a court in Cyprus is not a *sine qua non* condition for jurisdiction by courts in Cyprus. The jurisdiction of a court in Cyprus emanates from the EAW itself because, by virtue of Art. 3 of Law No. 133(1)/2004, it is an order of a judicial authority of an EU Member State that is issued in the context of a criminal procedure for the purpose of having the sought person arrested and handed over to the applicant country. The Court went on to state that further evidence for this view is to be found in Article 18 of the Law, according to which the Court decides whether to detain in custody the sought person or to impose on him other restrictions. It was emphasised that article 16 of the Law provides a preliminary step, the aim of which is to arrest the wanted person in order to be decided whether or not execution of the EAW will be allowed.

The appellant’s lawyer also argued before the Court that Article 4(3) of the Law breaches provisions of the Constitution by providing that the EAW can be transmitted in English, and not only in the two formal languages of the Republic of Cyprus, namely Greek and English, The Court rejected that claim, noting that the legislation in Cyprus provides that a document in a foreign language can be submitted as evidence, so far as the court hearing has been conducted in Greek.

The appellant’s lawyer further argued that there had been abuse of process because an earlier application to the court to have the sought person extradited on the basis of the Extradition of Fugitives from Justice Law was rejected after eleven months. That claim was also rejected by the Court, noting that (a) it had been provided with no evidence documenting the reasons for the eleven-month delay and (b) the procedure for surrendering a wanted person who is the subject of an EAW does not cease being a different procedure based on a separate law, despite its affinity with the Extradition of Fugitives from Justice Law.

There was also an argument put before the Court that if the person sought were to be surrendered to the United Kingdom authorities, the life of himself and his family would be in immediate danger. The appellant’s lawyer based that argument on Article 2(2) of the Law, which incorporates into Cyprus law the preamble of the Framework Decision where it is stated that enforcing the Law

32 Pp. 48 in Pupino.
should not result in the violation of fundamental rights and principles. The sought person was an ex-police informer and before absconding had intended to testify against drug traffickers. After analysing the existing sworn statements of the persons concerned, the Court reached the view that there was no greater danger for the life of the wanted person in England than he faced in Cyprus. The Court emphasised that the protection offered had to encompass serious dangers emanating from organs of the State but also from danger posed by private citizens. It concluded that substantial reasons had to be documented that if the sought person were extradited, he would be facing a serious threat to his life and, also, that the British authorities would be in no position to avert such a danger by providing him with sufficient protection.

3.1.4. Amendments to the Cyprus Constitution

Following months of debate in Parliament, on 13th July 2006, the House of Representatives voted in with more than the required two-thirds majority the Fifth Amendment of the Constitution Law of 2006. It made possible the arrest and detention of a Cypriot national in order to extradite him/her to another country, following a written application by another EU Member State in the form of an EAW, but to apply only for offences committed after Cyprus became a member of the EU on 1st May 2004. The model for the amendment was a similar amendment of the Irish Constitution, following objections in parliament by AKEL (The communist party) to the phrasing of the draft proposed by the government. Some of the justifications listed in the 2006 Constitutional Amendment Law for the three amendments to the country’s Constitution, inter alia, include: the Republic is obligated in the context of the international judicial co-operation that has evolved for criminal matters to extradite or hand over citizens of the Republic who have committed offenses overseas; and, because the amendments are essential in order to enable the Republic to function smoothly as a member of the European Union, exercising all its rights and carrying out all its obligations as a Member State.

The Constitutional amendments included the addition of a new Article (1A) and the amendment of Articles 11, 140, 169 and 179. Article 1A provides that,

“No provision of the Constitution is considered to cancel laws enacted, actions undertaken or steps taken by the Republic which become necessary under its obligations as a Member State of the European Union or to prevent regulations, directives or other acts or binding measures of a legislative nature that are adopted by the European Union or by the European Communities or by their statutory organs or the appropriate authorities on the basis of the treaties that founded the European communities or the European Union from having legal effect in the Republic.”

Article 11 of the Constitution was amended to allow the handing over of a Cypriot national against whom an EAW has been issued, but only for acts committed after the date when Cyprus became a full member of the EU and extraditions after the said Law was published in the official gazette of the Republic. Interestingly enough, paragraph (iii) of the amended Article 11 provides that no person shall be arrested or held in custody in order to be extradited or handed over if the appropriate authority has a substantial reason for believing that the request for extradition or the handing over aims to prosecute him or punish him by virtue of his race, religion, ethnic origin or political beliefs, for example. In addition, Law 112 (I) of 2006, that came into force on 28th July 2006,

provides that a written request for the issuing of an EAW must be accompanied by the written consent of the Attorney General that the application is for criminal prosecution.

3.1.5. A critique and conclusions

Fytraki (ibid footnote 5, at 216) has argued that the Konstantinou decision is significant for two reasons:
(a) in a common law country like Cyprus applies the principle that ‘all crime is local’,
(b) because the EAW had been issued by the United Kingdom, a country with a long history of relations with Cyprus (an ex-British colony). However, one could argue that the cornerstone of the EAW is mutual recognition and trust between EU Member States and the legislator of the Constitution of 1960 wanted to safeguard the rights of the Cypriot citizen in being tried by a not-known legal system. On the other hand, the trust needed for the enforcement of the EAW could lead one to argue that surrendering a citizen of one Member State to another Member State is not incompatible with the trust that is endemic in mutual recognition.

Following months of debate in Parliament, Law 112 (I) of 2006 introduced a new Article into the Constitution and amended four existing ones to make possible the arrest and detention of a Cypriot national in order to extradite him/her to another country following a written application by another EU Member State in the form of an EAW. The limitation set with the constitutional amendment is in blatant violation of the Framework Decision which precludes any of the new Member States from setting any statutory limitations for the execution of an EAW. However, when the Framework-Decision was enacted on 13th June 2002 the Republic of Cyprus was not a member of the EU and, thus, in no position to set any time limits regarding the execution of the EAW, but had until 1st January 2004 to receive an EAW. In other words, as a result of the amendment, Article 11 (2) (f) (i) of the Cyprus Constitution is in contradiction with Article 32 of the Framework Decision. Furthermore, one could argue that the constitutional limitation served political (!) rather than legal purposes.

There is, also, another contradiction between the amended Article 11 of the Constitution which, as seen already, provides a limitation, and the new Article 1A introduced into the Constitution. The latter states that “No provision of the Constitution is considered to cancel laws enacted, actions undertaken or steps taken by the Republic which become necessary under its obligations as a Member State of the European Union…”; one of these obligations is the enforcement of the EAW introduced by the relevant law before the constitutional amendment.

The concern of many parliamentarians about possible abuse of the EAW made possible by the constitutional amendments led (a) to the condition that a written request for the issuing of an EAW be accompanied by the written consent of the Attorney General that the application is for criminal prosecution, and (b) the amendment of Article 11 that provides that no person shall be arrested or held in custody in order to extradite or hand him/her over if the appropriate authority has a substantial reason for believing that the request for extradition or the handing over aims to prosecute him or punish him by virtue, inter alia, of his race, religion, ethnic origin, and political beliefs. Also, as the present authors have pointed out above, the constitutional amendments may contain two contradictions.

Furthermore, the evident violation of Article 32 of the Framework Decision by the Republic of Cyprus could not result in an application for violation by the Commission to the European Court. It could, however, have an adverse effect on the reciprocity principle which, though not provided in
the European Law, in practice manifests itself in the relations between EU Member States. Consequently, it may very well turn out that other Member States will not enforce as provided, the EAW’s that were issued for crimes committed by their own nationals before the first of May 2004.

An examination of articles on the EAW in Greek-language criminal law and criminal justice journals reveals a number of interesting arguments. Kalfeli, for example, has argued that the EAW suffers from an endemic contradiction because, even though the ‘euroconstitution’ has been rejected and thus so has the political unification of Europe, “hygemonic elements in Brussels believe that uniformity in criminal procedures can proceed on its own” (p.199). For her part, Φυτράκη (2006: 213) notes that, overall, the EAW adds significantly to the role of the police in dealing with crime at the expense of the prosecutorial jurisdiction of the courts, in fact to such a degree that one can talk about the de-judicialization of criminal law and criminal procedure. The de-judicialization of criminal law and procedure can be seen in the decision by the Supreme Court of Cyprus on 19th September 2005 in the case of Attorney General vs. Ovakimyan, in which it was decided that the Framework Decision allows a State to nominate which authority will be the proper authority to issue an EAW and this, inter alia, includes a Public Prosecutor, as in the case of the request by the Public Prosecutor in the Netherlands.

In conclusion, a number of security measures have been implemented after September 11th, 2001, but without democratic accountability and judicial control for third pillar legislation. It is an undisputed fact that the European Union has significantly increased its role in criminal justice and the role of Europol and Eurojust and, finally, the EAW, are good illustrations of the trend. A number of countries, including Cyprus, have been feeling the impact of European criminal law on their domestic law and all is not well. So the situation became complicated.

Tension is inevitable between, on the one hand, the fact that a high degree of trust between EU Member States is the essential lynchpin of the EAW while, on the other hand, the provision in the constitution of countries like Greece, Poland, and Germany, including the 1960 Constitution of Cyprus betrays a deep-seated mistrust of the legal systems of other countries as far as one’s own citizens are concerned. In other words, arresting and surrendering a Cypriot national to the UK competent authority is prohibited by the Constitution but, in contrast, there were no such problems concerning the extradition of a British national, as evidenced in the Scatterwood decision. A list of proposed amendments to the Cyprus constitution will make Law 133(1) of 2004 compatible with the Constitution, but only for offences committed after Cyprus joined he EU on 1st May 2004, in blatant violation of the FD provision that precludes new EU Member States from setting any statutory limitations for the execution of the EAW. Finally, the present authors share the view expressed by Douglas-Scott (2004), who wrote that,

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36 See: Fytraki, at 213, ibid footnote 5.
37 The case can be accessed in the free legal database www.cylaw.org
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“There is no single market in justice…The internal market in security is not being matched by one in freedom and justice – resulting in an unbalanced agenda which favours the free movement of investigation and prosecutions over the rights of suspects and defendants” (at p. 226).

Law 133(1)/2004, which introduced the EAW into Cyprus law, in effect incorporates the Framework Decision. The Supreme Court decision in the Konstantinou case dealt a blow to the EAW and, finally, serious criticism can be levelled against the amendments to the Constitution.

3.2. Constitutional Problems of the EAW under the Polish Constitution

(Marian Grzybowski)

I would like to thank the organisers for inviting me to take part in this panel, and at the same time to make the reservation, that I am not a criminal lawyer and that in my life I have not dealt with criminal law except through textbooks and exams. For this reason I shall be rather reticent when talking about criminal law and proceedings and concentrate instead on the issues connected with the decision of the Polish Constitutional Court of 27th April 2005. The decision in question is, of course, the one issued as a result of a legal question submitted by the District Court in Gdańsk, concerning the possibility of surrendering a Polish citizen under the provisions of the EAW, in the light of the provisions of Article 55 of the Polish Constitution, which (as it read at that time) contains the categorical prohibition of the extradition of a Polish citizen. The court had entertained certain doubts – as to whether surrendering a Polish citizen under the EAW falls within this constitutional ban.

It has to be noted that during the drafting of Article 55, the possibility to provide for certain exceptions resulting from international agreements was debated at some length. Ultimately, the idea was dropped and the prohibition of extradition of Polish citizens was upheld in a categorical form.

The positions taken by participants to the proceedings before the Constitutional Court in this case were quite diverse. The Prosecutor-General and the Polish Parliament both opted for the admissibility to surrender a Polish citizen under the EAW provisions. The opinions of legal authors were divided – most of the experts in criminal law advocated the admissibility of the EAW with respect to Polish citizens, whereas the experts in constitutional law were either against such a possibility or regarded it as debatable. The latter opinion was based on the premise that the constitutional concept of extradition is broad and includes also the surrender under the EAW – which was implied by considering the right of a Polish citizen to be tried before a Polish court, and to serve a sentence under the Polish judicial and penal authorities. Opposing opinions were also presented, emphasizing that the Code of Criminal Proceedings (hereinafter abbreviated as ‘CCP’), when defining the European Arrest Warrant, made a distinction between it and the extradition, and therefore, the prohibition in Article 55 of the Constitution did not apply to the former instrument (i.e. the EAW).

One should remember that the Constitutional Court was to decide on the constitutionality of the provisions of the Code of Criminal Procedure regulations implementing the European Arrest Warrant on the eve of deciding about the constitutionality of the Treaty of Accession and the related acts. The Court thus faced the issue of how to position the Constitution and its primacy in relation to European law. In these circumstances, the interpretation of the constitutional concept
of extradition, viewed from the angle of its code-based meaning, would expose the Court to the charge of negating the position of the Constitution as the supreme law of the Republic of Poland (Article 8 of the Constitution) – such would be the overtones of interpreting the Constitution in the light of the provisions of legislation implementing Community law.

Taking into account these circumstances and the fact that the provisions on the EAW were implemented after the Constitution had come into force (i.e. with the doctrine of the position of the Constitution in the system of the acts of law already formulated), the Constitutional Court adopted the following solution: there is no doubt that the constitutional concept of extradition may not be construed in the way envisaged by the parliamentary legislators. Yet – particularly in the reasons given in the decision – the Court expressed the opinion that the European Arrest Warrant is a much needed institution which must be respected, especially in the light of Polish membership in the EU. Therefore, the Constitutional Court resolved that, on the one hand, the provision of Article 607t of the CCP (the provision implementing the EAW into the Polish legal order) contradicts Article 55 of the Constitution of the Republic of Poland. On the other hand, however, it postponed the date the decision came into effect by a maximum period of 18 months, thereby providing the constitutional and parliamentary legislators with the opportunity to amend the Constitution to reflect the changed legal situation. In the reasons for the decision, the Court expressly suggested that the courts would be able to apply the regulations of the European arrest warrant during the period of postponement (or till a suitable amendment of the Constitution is adopted), using the presumption of constitutionality.

Thank you very much for your attention – should any further questions arise concerning the motives of the decision by the Constitutional Court, I am at your disposal within my knowledge of criminal law.

3.3. The EAW and the Hungarian Constitution

(Karoly Bard)

The Hungarian Constitutional Court has not had the opportunity to decide questions the Polish or the German Court had to entertain. The reason is not that the Hungarian Court is difficult to approach. On the contrary, any citizen can invoke the Court alleging the discrepancy between any piece of legislation and the Constitution without having any personal interest in the case. Although the review of alleged conflicts between international treaties and domestic law can be initiated by bodies and officials specified in the law on the Constitutional Court only (such as the Parliament, the President of the Republic, the Government and its members, etc.) the actio popularis, that is how the Constitutional Court ruled, is open to any individual alleging the unconstitutionality of legislation that transforms an international treaty into domestic law. The Framework Decision on the European Arrest Warrant has been implemented in the Hungarian domestic legal system by the Act of Parliament no. CXXX of 2003 (law on cooperation with other Member States of the European Union in criminal matters), therefore any citizen could request the Constitutional Court to review whether the Act and through this the EAW is in line with the Constitution.

The reason why the Hungarian Court has not been invoked to rule on the constitutionality of the provision in the EAW or rather of the implementing law permitting the surrender of Hungarian citizens is simply that, on the delicate matter of turning over, extraditing and surrendering own
nationals the Hungarian laws seem to attach less weight to sovereignty considerations. There is no such ban in the Constitution, however, the law on international judicial cooperation in criminal matters (Act no. XXXVIII of 1996) proclaims the prohibition of extraditing nationals. There are two exceptions to the general rule: individuals with dual citizenship and whose permanent residence is abroad can be extradited; the same is the case with Hungarian nationals extradited to Hungary upon the condition that after the completion of the proceedings or the punishment imposed on them they will be further extradited to a third country.

There is a clear conflict between the provisions of the 1996 law and the Act on the implementation of the EAW adopted in 2003, provided that the terms surrender and extradition are interpreted as being identical. However, the conflict is resolved in favor of the 2003 law for a number of reasons. Since both laws were adopted in the form of an act by the Parliament, in case of a possible conflict the posterior law has to be given preference. In addition, the 1996 law is basically subsidiary: it should be applied in the absence of a contrary treaty provision only (Article 3). But even if both the 1996 law and the law implementing the FD take the form of acts, the latter is ranked higher. Although there is no explicit provision in the Constitution on the hierarchy of international treaties and ordinary acts, the Constitutional Court defined the place of acts transforming international treaties above the ordinary acts and below the Constitution. The Court came to this conclusion with reference to the wording of the Act on the Constitutional Court. Articles 44-47 of this Act establish the competence of the Court to decide on alleged conflicts between domestic law and international treaty. The Hungarian title of these provisions suggests that it is the domestic law which collides with the international treaty not the international treaty with the provisions of national law. In the view of the Court, this wording implies that an act transforming an international treaty is superior to an ordinary act of the Parliament. One could, of course argue that the cited ruling does not apply to our case since instruments of European law are not international treaties. This is also the view of the Constitutional Court, which nevertheless stressed that the former in some aspects “behave” like international treaties. That is why domestic laws transforming EU legislation, framework decisions included, are above “ordinary” acts (provided of course that the transposing law was adopted in the form of an act of Parliament).

Coming back to the question of the surrender of nationals, according to Article 69 of the Constitution no Hungarian citizen may be expelled from the territory of Hungary and every citizen has the right to always return to the country. Recently the Czech Constitutional Court was confronted with the question whether surrender of own nationals as envisaged by the EAW is in compliance with the provision of similar content of the Czech Charter of Fundamental Rights and Freedoms (“no one can be forced to leave his/her homeland against her/his will”). The Czech Court took a Europe friendly approach and upheld the penal provisions implementing the EAW. The Court stated that in a situation where Czech citizens enjoy advantages from EU membership it is necessary to accept a certain portion of responsibility. It ruled that if a provision of constitutional rank can be interpreted both in line with what “European law” mandates and contrary to that, then the pro-European interpretation has to be given priority. The Court found that the temporary transfer of a national to another EU Member State is a legitimate limitation of nationals’ right not to be forced to leave Czech territory.

Now, for me, the question is whether the Constitutional Court of my country would adopt a similar pro-European approach if confronted with the question the Czech Court was invoked to rule on? With a view to the wording of the Constitution and in the light of earlier decisions of the
Hungarian Court I have serious doubts. First, the accession clause in the Constitution does not reveal a particularly Europe friendly attitude. May I recall that with a view to the country’s accession to the EU the Constitution’s provisions on sovereignty were supplemented by a novel rule in 2002 (Act No. LXI of 2002). The rule proclaims that the Republic of Hungary in the interest of the country’s participation in the EU as a Member State may, to the extent required for exercising rights and complying with obligations as set forth in the founding treaties of the European Communities and the European Union, exercise some of its powers deriving from the Constitution jointly with other Member States. The provision in the 2002 amendment also added that this power may be exercised autonomously through the institutions of the European Union. The treaty on the shared exercise of competence may be ratified and promulgated upon a two thirds majority decision of the members of Parliament (Art. 2/A of the Constitution). The wording of the provision has been rightly criticized by both politicians and experts in constitutional law, who argue that its language is obscure and leaves a number of fundamental questions unanswered.

The original draft of the amendment to the sovereignty provision of the Constitution submitted by the Government (Draft No. 1270 submitted in November 2002) was in fact more comprehensive and more open. First, it contained a general provision on the transfer of powers to any international organization, stating that the Republic of Hungary for the sake of its participation in an international organization may, on the basis of an international treaty and to the extent determined in the treaty, transfer some of its powers, with the exception of its legislative competence, deriving from the Constitution, to the international organization, or may exercise its competence jointly with other Member States. Thus, the provision in the government draft envisaged explicitly the transfer of competence and not exclusively to institutions of the EU but to any international organization if the relevant treaty so provides. The explanation to the relevant provision of the draft emphasized that the progress in international law in the last fifty years has indicated the trend towards the restriction of state sovereignty. Whereas in earlier times states by concluding international treaties took upon themselves only concrete obligations, which could clearly be foreseen at the time of the conclusion of the treaty, by adopting the UN Charter states agreed to comply with future obligations not determined and not anticipated in advance. This trend is further evidenced, as stated in the explanation, by the acceptance of human rights treaties that envisage the right to individual application to international human rights bodies or by the establishment of the International Criminal Court.

A separate provision contained the so-called accession clause. Unlike the final text adopted as a result of political bargains, the draft made explicit mention of the transfer of certain powers to the EU, including the legislative competence. In contrast to the text adopted by Parliament, the draft also proclaimed the supremacy of community law by providing that in the Republic of Hungary community law and the acquis of the European Union shall apply according to the founding treaties of the European Union and the legal principles deriving therefrom. But, once more, finally a soft rule strongly emphasizing state sovereignty was adopted.

My second argument in support of my forecast, i.e. that the Hungarian Court would not necessarily come to the conclusion reached by the Czech Court, is that the decisions rendered by our Court in cases with European law relevance show that the Court is not willing to deviate from the standard level of the protection of human rights set in its earlier decisions, which is in some respect higher than the protection granted in EU legislation. One of the cases concerned the law on agricultural surplus stocks implementing a relevant regulation of the EU Commission (Decision
No. 17/2004). The law was struck down, since the Court found that it violated the principle of legal certainty in that it failed to give sufficient time for preparation for the addressees. In the Court’s view the time between the promulgation of the law and its entering into force was too short. The Court based its decision on its earlier case-law, whereas according to the critics, it could have interpreted the notion of legal certainty in a case with a European dimension differently. In a more recent decision (1053/E/2005), the Court rejected to treat the founding treaties of the European Union as international treaties and declined to examine the violation of assumed international obligations in this regard. Thus, the mere fact that there is an omission contrary to EU law does not necessarily give rise to unconstitutionality.

In sum, the wording of the Constitution’s accession clause and the case-law of the Court do not reveal a particularly pro-Europe attitude. Therefore, I have certain doubts if the Hungarian Court came to the conclusion drawn by its Czech counterpart if confronted with the question of the compatibility of the EAW with the constitutional prohibition of forcing nationals to leave their country.

3.4. The German perspective

(Arndt Sinn, Liane Wörner)

Dear Prof. Hofmanski, Dear Colleagues, Dear Ladies and Gentlemen! First of all, thank you so much for organizing this very interesting conference. It is planned very thoughtfully and gives all of us the possibility to learn from each other’s experiences, problems, and ideas in a “Europeanizing World”.

With our statement today we want to call your attention to Germany’s constitutional problems implementing the European Arrest Warrant Framework Decision. After a short introduction to the topic, we will quickly explain the constitutional problems which occurred with Germany’s first approach to implement the European Arrest Warrant. Then, we will shortly summarize how German legislators solved those problems and conclude with a closing remark.

Introduction

Implementing the Framework Decision on the European Arrest Warrant and Surrender Proceedings between the Member States of the European Union developed to be a quite difficult undertaking for German legislators. This is especially true insofar as constitutional rights were concerned. With its First European Arrest Warrant Act of July 2004, German legislators complied with the obligations to implement the European Arrest Warrant Framework Decision. The German European Arrest Warrant Act came into effect on 23rd August 2004 and was used on a regular basis until the day of the Federal High Constitutional Court’s (Bundesverfassungsgericht, BVerfG)


40 BGBl. I, 1748.
ruling\textsuperscript{41}. According to the German System of Laws, it amended the Law on International Judicial Assistance in Criminal Matters (\textit{Gesetz über die internationale Rechtshilfe in Strafsachen, IRG})\textsuperscript{42} in the eighth part (§§ 78 IRG et seq.).

In its judgment of 18\textsuperscript{th} July 2005, the Second Senate of the Federal High Constitutional Court declared this \textit{First European Arrest Warrant Act} unconstitutional and void\textsuperscript{43}. The Court declared the implementing Act nullified in contradicting the German Constitution. Simultaneously, it clearly stated that the European Arrest Warrant Framework Decision itself does not contradict the German Constitution (also referred to as Basic Law, \textit{Grundgesetz, GG}).

However, national laws, which implement European Framework Decisions, are being interpreted in sight of German national and especially German constitutional law and not just solely referring to the specific Framework Decision, its wording or content. Yet, the aims of those framework decisions are to be taken into account.

The First European Arrest Warrant Act did not meet the standards set by the German Basic Law\textsuperscript{44}. As a consequence, one might have thought – many scholars indeed did\textsuperscript{45} - that German national’s extradition had to follow the rules of the European Convention on Extradition from 1957 till a new law was implemented\textsuperscript{46}.

However, the European Court of Justice Decision Pupino\textsuperscript{47} and the German Federal High Constitutional Court’s decision on the extradition of a Danish citizen to Spain\textsuperscript{48} makes clear that German national authorities had and will have to base their decisions on applicable European Framework Decisions. According to the Pupino decision, this is true if applying the Framework Decision concedes in a European conform solution while national law lacks implementation. The German Federal High Constitutional Court confirmed this, as far as and as long as the European Framework Decision does not contradict German constitutional law\textsuperscript{49}. However, these decisions and developments do not allow simply and solely referring to provisions of framework decisions. A sole reference does not meet the German constitutional principle requiring a ‘law’ when interfering with civil rights of the people\textsuperscript{50}.

\textsuperscript{41} See the following court judgments on regular basis ruling. Oberlandsgericht Celle, StV FORUM, 36 (2005), 163; Oberlandsgericht Düsseldorf, StV FORUM, 36 (2005), 207; Oberlandsgericht Hamm, NStZ, 25 (2005), 350; Oberlandsgericht Karlsruhe, NStZ, 25 (2005), 352; OLG Stuttgart, NJW 58 (2005), 1522.

\textsuperscript{42} Hereafter called \textit{IRG}, esp. According to certain sections.

\textsuperscript{43} BVerGE v. 18.7.2005 – 2 BvR 2236/04.

\textsuperscript{44} BVerGE v. 18.7.2005 – 2 BvR 2236/04.

\textsuperscript{45} Mölders, German Law Journal Vol. 07 No. 1, p. 46; Vogel, JZ 2005, p. 802.

\textsuperscript{46} Cf. European Convention on Extradition, Dec. 13, 1957, ETS 24 (entered into force on 18\textsuperscript{th} April 1960).

\textsuperscript{47} Cf. EuGH v. 16.6.05 – Rs. C-105/03 (Pupino) in JZ 2005, p. 838–839.

\textsuperscript{48} Cf. BVerfG v. 24.11.2005 – BvR 1667/05.

\textsuperscript{49} Cf. decision of the German Federal High Court of the Constitution (BVerfG v. 24.11.2005 – BvR 1667/05). The court stated explicitly on the matter of the nullified implemented European Arrest Warrant law, that the court in nullifying the law had not questioned the constitutionality of the European Arrest Warrant Framework Decision. Thus, German authorities had to interpret European-conform and had to base their extraditing decision directly on standard forms as provided in Art. 8 of the European Arrest Warrant FrameWork Decision and to use those ways of transmissions as there are provided in Arts. 9 and 10 of the Framework Decision. This is in order to simplify the work of the Member States.

\textsuperscript{50} A BVerfG decision questioning the extradition of a Danish citizen to Spain underlines that (BVerfG v. 24.11.2005 – BvR 1667/05).
As a result, the German national statutes implementing European law have to be interpreted European-conform and according to the standards provided by the German constitution. Third pillar European framework decisions, however, will have to be questioned directly if national law lacks implementation and if this lack is only due to national reasons and not to the fact that the framework decision itself contradicts national constitutional law. One will have to be apprehensive that European framework decisions will be used as domestic laws.

The new lawmaking proceedings were accelerated by these decisions and a Second European Arrest Warrant Act went into force on 2nd August 2006\(^{51}\). Again, it did not enter into force as a separate law, but rather provisions amended the German Act on International Assistance in Criminal Matters (IRG) in its eighth part (§§ 78 IRG et seq.)\(^ {52}\). Thus, the extradition on the basis of European Arrest Warrants is seen as a specific form of extradition between the Member States of the EU.

**Germany’s First Implementation of the European Framework Decision on the EAW, the European Arrest Warrant Act of July, 2004\(^ {53}\).**

In concrete, the Federal High Constitutional Court nullified the First European Arrest Warrant Act of July 2004 for two main reasons:

- **First**, it interferes with the first sentence of Article 16 (2) GG: the right not to be extradited. German legislators have not complied with the prerequisites of the qualified proviso of legality (qualifizierter Gesetzesvorbehalt) when implementing the Framework Decision.

- **Second**, the statute interfered with Article 19 (4) GG by excluding recourse to a court against the grant of extradition to a European Member State.

**A. Article 16 (2) GG**

Concerning the interference with the right not to be extradited, one has to know that the German Constitution was already subject to change in 1998. At that time, the acknowledgement of the International Criminal Court already required the possibility to extradite German citizens in an exemption to their German civil right to not be extradited\(^ {54}\). With its decision concerning the First European Arrest Warrant Act, the Federal High Constitutional Court underlined that the extradition of German citizens overall does not contradict the guarantee of perpetuity (Ewigkeitsgarantie, Article 79 (3) GG or Article 23 (1) GG, Integrationsschranke)\(^ {55}\). While the court’s statement can only be summarized herein, it needs to be emphasized that the extradition of Germans is only allowed to the extent that the principles of constitutionality are not infringed upon (“soweit rechtsstaatliche Grundsätze gewahrt sind”)\(^ {56}\). Beyond this, the German Federal High Constitutional Court stressed the principle of proportionality (Grundsatz der Verhältnismäßigkeit), which must be respected especially when fundamental rights are interfered with\(^ {57}\).

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\(^{51}\) European Arrest Warrant Act (EuHbG, Europäisches Haftbefehlsgesetz) v. 20.7.2006, BGBl. I 1721.


\(^{53}\) BGBl. I, 1748.


\(^{55}\) BVerfG, NJW 2005, 2290; BVerfGE 29, 183 (193) representing the opinion of the Senate’s majority.

\(^{56}\) BVerfG id. The Court interprets this as a requirement of ‘structural correspondence’ (Strukturontersprechung).

\(^{57}\) BVerfG id. at 2291.
Preparing a constitutional implementation of the Framework Decision, the Court distinguished three categories:

(a) cases which mainly concern domestic aspects (“maßgeblicher Inlandsbezug”, genuine domestic link) and where the extradition is in principle disproportionate and illegitimate,
(b) cases of a significant connection to a foreign country (maßgeblicher Auslandsbezug), where Germany has no concerns about the extradition of German citizens to a Member State58, and
(c) cases where the criminal action takes place in Germany, whereas the site of the crime (Tatort) is abroad. These cases require a thorough assessment in each individual case. Here, it is obligatory to weigh the effectiveness of the prosecution on the one hand, against the fundamental rights of the defendant on the other. In the Senate’s opinion, the First European Arrest Warrant Act did not meet this standard59.

B. Article 19 (4) GG

Secondly, the First European Arrest Warrant Act was found unconstitutional concerning the interference with the Guarantee of Access to a Court. The reason is, that according to this First Act, the prosecutor’s decision of Granting an EAW was not open to recourse60. In Germany, the extradition procedure is split into a procedure for admissibility of extradition by the High Regional Courts61 (Zulässigkeitsverfahren) and a procedure for granting extradition by the Offices for Prosecution at the High Regional Court (Bewilligungsverfahren). The proceedings for granting extradition are complemented by specified grounds for optional non-execution of European Arrest Warrants. As a result, the authority – the prosecutor – responsible for granting the extradition has to enter into a process of balancing personal interests and subjective rights of the person affected. In particular, the authority has to decide if the subject is in particular criminal prosecution in the ‘home state’ of the person affected and thus the European Arrest Warrant could be granted62. The prosecuted person’s rights were not protected, according to the Basic Law, if such a decision was not open to a courts review63. However, the Federal High Constitutional Court did not query the German two-stage proceeding for extraditions from admissibility (stage 1) to grant (stage 2) itself.

Germany’s Second Implementation of the European Framework Decision on the EAW, the European Arrest Warrant Act of 20th July, 200664.

Meanwhile, the Second European Arrest Warrant Act entered into force on 2nd August, 2006. The new Act implemented that which the Federal High Constitutional Court had criticized. Amendments concern the recourse to court for decisions of grant, the extradition of Germans and aliens as well as the extradition in lifelong-sentencing cases. Additionally, the Second Act filled a gap left

58 Whoever acts within another legal system must suppose him or her being held responsible within that system. BVerfG id. Also cf. Mölders (supranote 45) p. 49.
59 BVerfG id.
60 § 74b IRG old version; BVerfG id. at 2294.
61 Oberlandesgerichte.
62 BVerfG id. at 2295; with this clear sentence Mölders (supranote 45), p. 51.
63 BVerfG id. at 2296.
64 BGBl. I 1721.
open by the First European Arrest Warrant Act, concerning the goal of the Framework Decision to allow the extradition of nationals under simplified conditions.

A. §§ 79 and 74 b IRG: Recourse to Law.

In specific, the new European Arrest Warrant Act opens recourse to the court within the first-stage-proceeding for admissibility of European Arrest Warrants. To back-draw this, the German proceedings for international extradition consist of two stages, as a so called Two-Stage Proceeding. Within Stage 1, the admissibility of European Arrest Warrants is proven by the High Regional Court (Oberlandesgericht). At Stage 2, the responsible prosecutor, a State Attorney General (Generalstaatsanwalt), questions whether an European Arrest Warrant is to be granted (Bewilligung). These decisions of granting European Arrest Warrants are now subject to appeal. The Second Act (§ 79 IRG new version) demands that the offices for prosecution need to name probable reasons for not-granting the European Arrest Warrant when asking for its admissibility in court. As a result, the probable reasons for not-granting European Arrest Warrants are considered by the High Regional Court when deciding about the admissibility.

At the same time, the very provision which stated that the Prosecutor’s Granting Decision was not reversible, was erased from the law (former § 74 b IRG). Thus, the decision granting an European Arrest Warrant is now per se open to legal recourse as demanded by the German Constitution. Legislators reasoned that according to the Federal High Constitutional Court’s decision. Also, Granting Decisions can interfere with the (subjective) rights of the people65.

Conclusively, the High Regional Court (Oberlandesgericht) now decides about the admissibility of European Arrest Warrants and about probable reasons not to grant them, as told by the prosecution. And in addition, the High Regional Court decides about new reasons, which hinder admissibility and grant, as they are caused by a change of circumstances after the first decision (§ 33 IRG)66.

B. §§ 80 I and 80 II IRG: Extradition for prosecution.

Secondly, the new European Arrest Warrant Act installed a check routine for extraditions of German nationals (§§ 80 I and 80 II IRG). It complies with the requirements as stated by the Federal High Constitutional Court (complying with qualified proviso of legality) and with those of the European Union as stated in Article 5 No. 3 and Article 4 No. 6 FD. At the same time, the new law takes the right to family and marriage of Article 6 GG into account. As a result, German nationals can be extradited for prosecution, if the issuing Member State guarantees to offer the “Back-Transfer” for execution of sentences to Germany, and if the crime committed shows a decisive relation to the issuing Member State (§ 80 I No. 1 and 2 IRG new). Exceptionally, if such decisive relation cannot be proved, extradition is only admissible if the issuing Member State guarantees to offer the backtransfer, if the crime shows no decisive relation to Germany, and if the crime is being punishable (as it or in translation) according to German law (§ 80 II IRG).

C. §§ 80 III and IV IRG: Extradition for execution of sentences.

Amendments to the Extradition for Execution of Sentences (§ 80 III, IV IRG) were due to compulsory requirements of the European Arrest Warrant Framework Decision. They are the examples for today to show that German provisions can be both constitutional and European conform.

According to Germany’s First and Second EAW Act, German nationals can be extradited for execution of sentences in principle if they affirmed to the extradition (§ 80 III IRG). Due to a provision of the proceedings for extradition in International Assistance cases in general (§ 49 I No. 3 IRG), they could not be back-transferred to Germany for execution if the sentenced crime was not punishable according to German criminal law. As a result, a German national was able to hinder the execution of sentences, if the crime was not punishable according to German law, simply by not consenting to his extradition. This directly controverts Art. 4 No 6 FD.

According to the Second European Arrest Warrant Act (§ 80 IV IRG new version), whether or not the actual crime is punishable in Germany (according to § 49 I No. 3 IRG) is no longer considered. Indeed, the general renunciation (Aufgabe) of ambilateral punishability (beidseitiger Strafbarkeit), as a crime, is proportional and constitutional. Compared with the alternative – the national’s extradition – the interference with the national’s constitutional rights is of minor importance.

D. § 83 b II IRG (former § 80 IV IRG): Optional reason for not-granting EAW, if the person affected is an alien.

The emphasis today shall be on another important change. The former compulsory reason for inadmissibility of European Arrest Warrants when the affected person is an alien, is no longer a reason not to grant an European Arrest Warrant. The European Arrest Warrant Framework Decision only requires that certain non-nationals, especially in cases where they have their social hub (gesellschaftlicher Mittelpunkt) in the extraditing Member State, must have rights comparable to national citizens (Art. 5 No. 3 and Art. 4 No. 6 FD). This statement does not require a compulsory inadmissibility of extradition. Rather, it may invoke an option to not grant a European Arrest Warrant. Thus, aliens who can show that their social hub is in Germany by their place of residence, can only be extradited for prosecution if the requirements protecting German nationals (§ 80 I and II IRG) are fulfilled (§ 83 b II (a) IRG). Extradition for execution of sentences cannot be granted, if the alien does not consent or if his subjective right to be executed in Germany prevails (§ 83 II (b) IRG).

E. §§ 83 No. 4 IRG: Extradition in lifelong sentencing cases.

As part of another significant change, the Second European Arrest Warrant Act amended the former optional reason to dismiss granting a European Arrest Warrant in cases of lifelong sentences. The discussions in the law-making proceedings in Germany made clear that the extradition in cases of lifelong sentences almost only interferes with the subjective rights of the affected person.

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68 With the same reasoning BT-Drs. No. 16/2015 (of 28th July 2006), p. 31. According to the First EAW Act, German nationals, who were extradited to another member state to execute sentencing, could only be back-transferred (rücküberstellt) to Germany for execution or stay in Germany for those executions if the crime the person committed was punishable in both the issuing member state and Germany. The new provision allows extraditing German nationals, if they affirm, or rejecting the extradition, if Germany confirms to execute the sentence back in Germany.

Art. 4 No. 6 FD requires the possibility to either extradite nationals or at least to extradite them for prosecution and sentencing, but to execute back in the extraditing Member State (here: Germany).
Chapter I. The Conference

There is almost no scope of discretion (Ermessensspielraum). In order to thoroughly protect the affected person’s subjective rights, the extradition in cases of lifelong sentences is now configured as a compulsory requirement of proceedings of admissibility (Stage 1)\(^\text{69}\).

F. 41 IRG: simplified proceedings.

Finally, attention shall be directed to amendments of the simplified proceedings (§ 41 IRG). Changes of this provision were not due to the German Constitution, but to requirements of the European Arrest Warrant Framework Decision. The main goal of the Framework Decision was to simplify International proceedings for extradition within the European Union. Simplified proceedings allow extradition without the participation of the High Regional Court (Oberlandesgericht) if the affected person – now according to the wording, the ‘suspect’ (Verfolgter) – consents to it, after officially being cautioned by a judge at the local court. Amendment was only seen as clarification\(^\text{70}\).

While Tuffner (BKA-Wiesbaden) already officially stated that this aim has already been achieved, the European Arrest Warrant Framework Decision also aims to simplify extraditions of Member State nationals. It is not meant to be a substitute for the European Conventions on Extradition or the European Union Convention on Extradition. As a result, the simplified proceeding for extradition (§ 41 IRG) can be applied for German nationals and for aliens. Under the First EAW Act, it was only applicable for aliens. The decision, nevertheless, appears to be proportional and constitutional, since extradition depends on the suspect’s decision, and since a judge advises the suspect\(^\text{71}\).

Clincher

So far, Germany’s Second European Arrest Warrant Act appears to be constitutional and to conform to requirements of the Framework Decision. Of course, criticism is very welcome to that point. In Germany, however, the national law to implement the Framework Decision was amended to the national constitution and its requirements. The First European Arrest Warrant Act had not met the constitutional requirements. The German Parliament was sent back home to do its homework and install a Second European Arrest Warrant Act. Thus, it was not the German Constitution that was amended by the European Union Framework Decision.

Times of terror, mass surveillance, and quick technical developments within all parts of our lives include new questions, new problems, and introduce new risks. One risk among others is that of criminals crossing borders. As we plan to live within a ‘harmonized zone of law’ – called the European Union – we want to make sure that the opportunity to go after these criminals is the same within all states of our ‘zone’. That is what the European Arrest Warrant Framework Decision wants. No matter how far we are willing to go for this, if we change our constitutions just to harmonize European investigation and to amend to European requirements, we resign another part of each single system affected by this constitutional change. Not that this must be wrong in any case, but we have to be aware of changing it and us.

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\(^{69}\) Cf. for a detailed reasoning BT-Drs. No. 16/2015 (of 28\(^\text{th}\) July 2006), p. 32.

\(^{70}\) Cf. BT-Drs. No. 16/2015 (of 28\(^\text{th}\) July 2006), p. 27.

\(^{71}\) The change was also due to requirements judges of the BVerfG arrogated to protect German nationals due to Art. 16 II, but at the same time to protect those, aliens, who have the same status.
3.5. Discussion

(reporting by Adam Górski)

Dr Kloučková briefly described the decision of the Constitutional Court of the Czech Republic (hereinafter in Discussion ‘CC CzR’) on the constitutionality of certain provisions of the EAW implementing the law, with particular attention devoted to the European-friendly approach of the Court. She holds as unjustified the views that the CC CzR recognised the supremacy of European law in the third pillar that, according to some, should be recognised by each and every Member State. Dr Kloučková expressed her astonishment at such an interpretation, because the decision of the CC CzR is not interpreted in this way in the CzR. The CC CzR identified three problem areas concerning the constitutionality of the EAW in the CzR.

A. The relationship between the Framework Decision (FD) and national law. On this issue, the CC CzR stated that the Czech national law should be interpreted in conformity with the FD. It referred to the relevant constitutional provision, which stipulates that the CzR must observe its international obligations. The decision referred also to Article 10 TEU, invoking the principle of loyalty of Member States, as well as to the Pupino case. Dr Kloučková observed that the Pupino case is not interpreted in the CzR as indicating the evident primacy of Community law. The decision refers only to a European-friendly interpretation of national law wherever possible, which is not paramount to the direct application of the FD. As regards the extradition of citizens, the constitutional law of the CzR has a provision stating that no Czech citizen may be forced to leave the country. The CC CzR noted that there was no need to amend the Constitution. At the same time the Court has delineated a certain limit of this constitutionality. First of all, the CC CzR emphasised the fact that the Czech citizens had the right to return to the territory of the CzR and therefore, the CzR might surrender its citizens only when another Member State ensured the possibility of their return to serve the sentence within the Republic. In the legislative provisions implementing the EAW there is an express provision which envisages reciprocity. The European Commission, however, criticised the CzR for making such a reservation. In the opinion of Dr Kloučková the CC CzR underscored the constitutional aspect of such legislative reservation.

B. Constitutionality of the partial abolition of dual criminality concerning the ‘list crimes’. The CC CzR noted that the EAW concerns procedural law (rules of procedure) rather than substantive criminal law. It means that the CC CzR has found the constitutionality only because the issue concerned the procedural law. However, in the speaker’s opinion we face another problem having to do with the necessity to implement the FD concerning the recognition of financial penalty. The issue which appears then is the issue of a penalty for punishable action which is not an offence in the Czech Republic. A similar question may be raised in connection with the execution of penalties as to their type of criminal liability which is not recognised in the criminal aspect of the CzR’s legal order (criminal liability of collective entities). The Czech Minister of Justice declared that the CzR would not introduce this solution into its system of criminal law, also in respect of legal persons’ liability, until such liability is brought into the legal order in the Republic. The CC CzR stated also that Article 2.2 FD on the EAW concerning ‘offences from the list’) may not mean the necessity to apply alien (foreign) criminal law in the CzR. This obviously contradicts the idea of mutual recognition if we understand it as the acceptance of alien law
(alien decisions) in the national legal order. Therefore, under this interpretation of the CC CzR, exporting law of the country issuing the EAW to law of the executing state is excluded.

C. The issue of the ‘remotely committed’ crimes was the last one with which the CC CzR has dealt. The Court noted that if an act (which is not an offence in the CzR) is committed within the territory of the CzR and its results (consequences) occur in other Member State, the CzR may refuse to execute the EAW. The CC CzR invoked here a certain provision of the Czech Code of Criminal Procedure, under which any legal assistance may be refused should it infringe upon the Constitution of the CzR.

Therefore, a part of the content of the discussed decision of the CC CzR can be treated as ‘Europe-friendly’, whereas other parts may not be so treated, at least under the interpretation which certain Community officials apply to it.

The next speaker, Prof. Spinellis, asked for elucidation of the concept of ‘de-judiciarisation’ of the cooperation in criminal matters, as earlier referred by Professor Kapardis in his panel presentation. According to Prof. Spinellis, the process occurring in the UE goes in exactly the opposite direction (‘judiciarisation’ of the cooperation). The second question raised by Prof. Spinellis concerned the new German law on the European Arrest Warrant. The speaker pondered over the question whether emphasising the proportionality as a specific premise for cooperation did not exceed outside the scope outlined by the framework decision. The TEU stipulates that the FD is binding as to the result, but each state has the discretion to choose the means of implementation. Therefore, if a court deems that surrendering a citizen would be disproportionate when related to the citizen rights and freedoms and refuses to surrender, such a court goes outside the scope of verifying the EAW allowed by the framework decision, as the FD is indeed binding as to the effect. This would mean that other states would have the right to invoke the principle of reciprocity. They would be able to decide, upon their own discretion, what is disproportionate in the cooperation in criminal matters.

Next to speak was Prof. Jimeno Bulnes. She noted that Spain was also criticised by learned experts for securing the reciprocity principle in its legislation (similarly as it was done in the CzR). Professor Bulnes asked Professor Kapardis whether the Cypriot Constitution indeed limits the binding force of the EAW only to the acts committed after the year 2004. Prof. Bulnes was critical of such an intertemporal solution. Her next question concerned specific details of amendments to Article 55 of the Polish Constitution. Finally, her third question concerned the distinction between the surrendering of an individual to face proceedings and the surrendering to serve a sentence elsewhere. She asked if in the new German law the requirement of double criminality for the cases of surrender to face proceedings concerns the ‘offences on the list’ (Article 2.2). She pondered over the conformity of such a solution with the Community-related obligations.

Next, Prof. van der Wilt contributed. He noted that the Dutch Constitution contains a provision which requires the form of international treaty for any extradition. Obviously it reopens the earlier discussion whether the FD could be regarded as an international agreement. The FD binds states (parliaments), therefore in the speaker’s opinion it can be equated with an international treaty. Prof. van der Wilt asked whether other states have similar constitutional provisions requiring the form of an international treaty for extradition to be effected.

Prof. Hofmański explored the relationship between the Framework Decision and national law. In the speaker’s opinion, the judgment in the Pupino case was interpreted in too broad a way. In
the judgment in question, the European Court of Justice has not expressed the view supporting
the primacy of the European third-pillar law over national law. According to the speaker, there is no
significant clarity as to this issue, as it has been indicated by Prof. Biernat, whose paper could imply
that European law is only one step away also from setting the primacy of the FD over internal legal
order. According to Prof. Hofmański, discussing the primacy of the FD over the domestic legal order
has no sense insofar that the FD is only an obligating act, whereas, as a result of the FD, national
law is created, whose internal relationships are problematic. The issue is therefore as follows: are
the national provisions (e.g. of parliamentary acts) which are the results of the implementation of
a FD any special provisions of the acts? Is the force derived from the FDs in any way ‘stronger’ than
the Constitution? The speaker found that this question has not been managed well by the Polish
Constitutional Court in the decision on the constitutionality of the EAW. In the speaker’s opinion,
the Constitutional Court has defended the primacy of national law over European law, in all its
pillars, at the same time finding that the statute resulting from FD’s implementation is not com-
pliant with the Constitution, therefore it is the latter which has to be necessarily amended... Very
serious debate is needed on the relation between national law enacted routinely and this part of
the national law which is a consequence of the FD implementation.

Then, Prof. Vermeulen re-entered the discussion. He wondered whether, as a result of the ad-
missibility of extradition of a citizen, the jurisdiction principles have been modified (limited) in any
Member State by reducing the liability for offences committed abroad.

Next, Dr. Górski briefly presented the constitutional amendments introduced in Poland pert-
taining to the extradition of a citizen.

The responding panelist was Prof. Kapardis. He answered the question raised by Prof. Spinellis,
stating that the issue of ‘de-judicialisation’ of the cooperation in criminal matters means something
else in the common law countries than in the statute law countries. The ‘de-judicialisation’ of the
cooperation means that through assignment of many procedural entitlements to the police, the
prima facie case has been practically removed. This would be the sense of the ‘de-judicialisation’ of
cooperation in criminal matters in Cyprus. Prof. Kapardis reacted also to the opinions of Prof. Bul-
nes on intertemporal issues. He stated that the intertemporal provision was introduced in Cyprus
principally to protect some politicians from criminal liability in other countries. This amendment
has undoubtedly a typical underlying political motive.

Next, Prof. Grzybowski referred to the contribution presented by Prof. Hofmański and stated
that the Constitutional Court of the Republic of Poland should not be that judicial authority which
is primarily to question the primacy of the Constitution, as it would undermine its own raison
d’entre. There are other judicial authorities whose mission is to defend European law. In speaker’s
opinion, the case of the EAW’s implementation, was not the best context to prove that third-pillar
law implemented by an ordinary piece of legislation could be positioned to compete with the in-
terpretation of the Constitution. Firstly, because the FD lacks an unequivocal status. Secondly, the
essential role there is for historical interpretation of the relevant constitutional regulations. Ulti-
mately, the option of unconditional prohibition of the extradition of citizens was chosen, rejecting
the possibility of surrendering a citizen when so stipulated by an international agreement. The
legislator consciously rejected the version similar to that which now appears in the constitution
after the recent amendment. The ‘difficult’ position has shown also in the fact that the Constitu-
tional Court of the Republic of Poland was somewhat ‘speaking for the legislator’, particularly in
the circumstances of the ‘deficit of democracy’ of the framework decisions, while the Constitution was passed by a referendum and not only by the elected bodies. The Constitutional Court of the Republic of Poland would be forced to present a thesis stating that, despite the manner of adopting the Constitution and in view of certain manner of creating FDs, we place the latter somewhat higher than the Constitution, or at least in the position in certain competition with the manner of adopting the Constitution by referendum. Such a view would make it more difficult to defend the theses expressed in the decisions concerning the Treaty of Accession. This view is supported also by the method of constitutional law studies, taking into consideration the social science aspect, which is adhered to by Prof. Grzybowski.

Professor Bard thanked the representative of the CzR for elucidation of the position of this country. He also referred to the rationalisation of the requirement of a convention form for the provisions regulating extradition. For the speaker, the conventions appear to be the ‘institutionalisation of reciprocity’. In the ‘state-centered’ perspective, the FD would be perceived as an ‘equivalent’ of the convention. The rationalisation of the requirements of convention may also be considered from the viewpoint of protecting fundamental rights. Relating himself to the input by Prof. Vermeulen concerning the jurisdiction over crimes committed abroad, Prof. Bard noted that in the new version of the Penal Code, a requirement of dual criminality is introduced as a requirement limiting the jurisdiction for crimes committed abroad.

Dr Wörner responded to the issue of proportionality requirement raised by Prof. Spinellis. The regulations were not proportional, therefore not compliant with the Constitution. Germany has a very complex procedure admitting the surrender, specific only to this country. In the second parliamentary act, Germany restored this complex structure, restoring its ‘two-tier’ nature. In respect to the principle of dual criminality raised earlier by Prof. Bulnes, under German law, crimes from the list in Article 2.2. FD are not subject to the condition of dual criminality.
4. Session 2

The Implementation of the EAW in the Domestic Orders of the Member States

(Chair: Dionysios Spinellis, University of Athens, Greece)

4.1. The European Arrest Warrant and its implementation in Germany and in Austria: some remarks from the view of the individual

(Otto Lagodny)

4.1.1. Introduction: Focus on Individual-Orientated Problems

The Framework Decision on the European Arrest Warrant (hereinafter: FWD) and its implementation have shown that there was a strong need for a change in Europe. At least with regard to the figures, the European Arrest Warrant (hereinafter: EAW) has been a success in this respect: the numbers of extraditions from one country to another have been two, three or even more times as much as before. If we look for the reasons by analysing the contents of the regulations, we see that the Framework Decision has done away with a lot of regulations which may be classified as “state-orientated” requirements, such as cumbersome channels of communication or formal requirements. The time was more than right to do away also with such exceptions like the political or the fiscal-offence-clause. This has lead to a reduction of the length of proceedings from 9 months to 43 days, i.e. one and a half month.

The main problem, however, is: has the Framework-Decision and its implementation also done away with “individual-orientated” protections?

In the following considerations I will elaborate on this issue: what are the questions at stake (infra A)? Then I will have a look at the situations both in Austria and in Germany (infra B). This is the basis for continuing on two topics: the extradition of nationals and the problem of human rights-clauses (infra C). One of the most striking problems insofar, however, is the access to the relevant (national) laws as the basis of all individual protections (infra D).

A. Focus on the legal interests of the individual

With regard to human rights, the Framework Decision stresses already in pp. 12 of the preamble: (12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (OJ C 364, 18. 12. 2000, p. 1), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European Arrest Warrant has been issued when there

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72 As to exact figures see Information notes of the Council of the European Union of 18th January 2007 – 9005/5/06 REV 5 COPEN 52 EJN 12 EUROJUST 21 (year 2005) and of 9th March 2005 – 7155/05 COPEN 49 EJN 15 EUROJUST 15.

are reasons to believe, on the basis of objective elements, that the said arrest warrant has
been issued for the purpose of prosecuting or punishing a person on the grounds of his
or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual
orientation, or that that person’s position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules
related to due process, freedom of association, freedom of the press and freedom of expression
in other media.

- Pp. 13 of the preamble notes:
  (13) No person should be removed, expelled or extradited to a State where there is a serious
  risk that he or she would be subjected to the death penalty, torture or other inhuman or
degrading treatment or punishment.

- Art. 4 pp. 2, 3 and 5 contain rulings on the problem of a transnational *ne bis in idem*.

- Questions of trials *in absentia* are dealt with in Art. 5 pp. 1;

- Life-long sentences are covered by Art. 5 pp. 2;

- Reransfer after extradition of nationals is provided for by Art. 5 pp. 3.

Although this looks more like a patchwork-approach to human rights, these provisions in gene-
ral cover a lot of problems. Except from pp. 12 and 13, a general human rights clause is missing.
This could be criticized; however, this question is left up to interpretation.

Another feature is the abolition of the granting procedure. The relation between a court’s deci-
sion on extradition and the additional granting decision of an administrative organ (e.g. Minister
of Justice) has caused a lot of problems in the past. From an individual-rights-approach the aboli-
tion has to be welcomed74.

In sum, the overall approach of the Framework Decision shows a clear tendency to protect hu-
man rights and to point out the express protection of individual interest. One cannot say that the
Framework Decision is made ‘for the benefit of the states’ only, as has been said for traditional ex-
tradition treaties. The Framework Decision continues a development which started in treaties and
conventions: the individual is no longer the ‘object’ of the proceedings, it rather has become the
‘subject’. On the European level this development has started with the Soering decision in 198975.

With respect to the impact of the legal interests of the individual, a very important clarifica-
tion has to be made: it is only a question of terminology – and not of contents that the FWD does
not speak of ‘extradition’, it rather uses the term ‘surrender’ of a person. The idea behind this is to
illustrate a conceptual change. ‘Surrender’ shall be the rule with only very few exceptions. ‘Extradi-
tion’ is connotated with the general discretion of the requested state which is bound by treaties or
conventions. The term ‘surrender’ shall indicate something different which eliminates in principle
all kinds of discretion76.

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74 For details see: O. Lagodny, Extradition without a granting procedure: the concept of ‘surrender’, in: Blektoon/van


76 See: Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 12th September 2006, Case C-303/05 (Advocaten
voor de Wereld VZW), pp. 38–47, especially pp. 43 assumes a supranational character, which does not yet exist in the field
of the third pillar: provided in the context of a supranational, harmonised legal system where, by partially renouncing
their sovereignty, States devolve power to independent authorities with law-making powers (pp. 43).
This is, however, not more than a game with words if we analyse it from the view of the individual: the act of surrendering a person by the use of force from one state to another state for the purpose of prosecution in criminal matters remains the same in both situations. The legal impact on the individual – in other words - does not change by the fact that the preconditions for declining such an act alter from broad to narrow has no impact on that.

Therefore, I will use both terms in the same sense. Analytically, one could distinguish between extradition and the act of surrendering, i. e. the act itself, by which extradition, as well as, e.g. the transfer of sentenced persons or else, are effectuated.

B. General Approach in Both Countries

Austrian Law in General

Austria has shown a very self-confident approach already at the time of the negotiations of the Framework Decision: Art. 33 pp. 1 FWD provides:

“1. As long as Austria has not modified Article 12(1) of the ‘Auslieferungs und Rechtshilfegesetz’ and, at the latest, until 31st December 2008, it may allow its executing judicial authorities to refuse the enforcement of a European Arrest Warrant if the requested person is an Austrian citizen and if the act for which the European Arrest Warrant has been issued is not punishable under Austrian law.”

The Austrian Implementing Law of 2004 does not show any problems with a view to the protection of human rights issues.

German Law in General

The German laws in contrast tell a story which is not finished yet: the first implementing law of 2004 was declared null and void in July 2005 by the German Federal Constitutional Court. In August 2006 the second implementing law entered into force. The first law was contrary to the German constitutional guarantee concerning non-extradition of nationals. The law did not make enough use of the possibilities which the Framework Decision had left for the national legislator. The law has stuck too narrow to the European Framework Decision. The second German law rather stuck too much to the reasons given by the Federal Constitutional Court. It is not too much a pessimistic view to expect another decision of the Federal Constitutional Court.


78 Judgment of 18th July 2005, see: Bundesverfassungsgericht.de

Chapter I. The Conference

The problem of double criminality was and is vividly debated in Germany. However, it seems to me that it is only a real problem in connection with the extradition of nationals.80

C. Surrender of Nationals

Austria

As mentioned already, Austria has some time left for the adjustment of its national constitutional law which – at present – prohibits the extradition of nationals. Until the beginning of 2009 it is not obliged to surrender its nationals. The existing law and practice, however, show that there is – already at the time being – nearly no case which would create a duty to extradite Austrian nationals. The approach is based on the exceptions in art. 4 pp. 2, 3 and 7.

The wording of these provisions is:

Art. 4 Grounds for optional non-execution of the European Arrest Warrant

The executing judicial authority may refuse to execute the European Arrest Warrant:

2. when the person who is the subject of the European Arrest Warrant is being prosecuted in the executing Member State for the same act as that on which the European Arrest Warrant is based;

3. when the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European Arrest Warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

4. when the European Arrest Warrant relates to offences which:

   (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

   (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

The interplay of these provisions together with the rules on extraterritorial jurisdiction allows in nearly all relevant cases to open and – when necessary: just one second later - close proceedings at least at the time when the request has arrived in Austria.81

We now could argue that there must not be any interpretation against the spirit of the Framework Decision. This would mean that: the wording ‘is being prosecuted’ in Art. 4 pp. 2 involves that prosecution in the requested state had to exist before the request arrived that Art. 4 pp. 3 which


reads: ‘have decided either not to prosecute […] or to halt proceedings’ presupposes that also the decision must have been taken before the request arrived.

If we look at Art. 4 pp. 7 subpara. a and b FWD we realize that this opens another possibility to refuse the extradition of nationals: if the case is an extraterritorial one for the requesting state, a member state like Austria may stipulate to refuse extradition.

In sum, already on the level of the FWD, there are a lot of possibilities to refuse extradition of nationals. And if we look at the regulations of the Austrian law, we see that this mechanism of opening national proceedings in order to close them right afterwards is a way to avoid extradition of nationals.

This consideration, however, shows the real problem of reducing the principle of double criminality: if the case is a ‘classical’ one of extraterritorial jurisdiction for the requesting state, we realize sharp problems. Let us suppose the following:

A is an Austrian national and has done something in Austria which is not a crime here but a crime in the state X. State X has extraterritorial jurisdiction over that act due to its national rules of jurisdiction. State X requests Austria to extradite A on the basis of a European Arrest Warrant. In this situation we would face a problem which the Federal Constitutional Court of Germany has spotted as a problem of ‘trust in the own legal order’. This problem emerges because of the combination of:

– reduction of the double criminality requirement;
– abolishing the non-extradition of nationals;
– maintaining the enormous extension of national laws on extraterritorial acts.

It is the combination of all three factors which makes the problem so enormous.

The ‘normal’ case of extradition concerns (1) crimes committed in the requesting state; (2) the situation when the extraditee is a national of the requesting state. This means: that the extraditee has done something unlawful in the legal order where he uses to live.

The possible case described supra is a case where the extraditee has acted within his legal order which allows him to act as he did and he should be extradited to a country and be judged there albeit the act in question is an extraterritorial one for this state.

**Germany**

As of now, German law draws a distinction between two kinds of cases. First, when the case took place within Germany; here, extradition is possible only in a very small set of possible cases. Second, the case took place abroad. And third, the large number of cases ‘in between’ (see Art. 80 IRG/LIACM).

**Summary**

The Austrian as well as the German approaches put the thumb on the real problem: the vast extension of extraterritorial jurisdiction. A solution should be to reduce extraterritoriality to an absolute minimum. In Austria, these rules are very moderate in pp. 64 and 65 of the Criminal Code. In Germany, the relevant rules are so broad that they would cover nearly every extraterritorial case.
Then we would have no problems with the abolition of double criminality and the extradition of nationals.\(^82\)

**D. Human Rights in General**

Except from the clause in the preamble there is no explicit human rights clause. The new law of Germany provides for a general human rights clause: extradition under the conditions of the FWD is not allowed if it is contrary to the principles laid down in Art. 6 of the Treaty on the European Union. This more or less only repeats what is said in pp. 12 of the preamble.

Therefore, what has been said by the Commission with regard to human rights clauses is very surprising:

‘Lastly, the introduction of grounds not provided for in the Framework Decision is disturbing. The additional ground of refusal based on *ne bis in idem* in relation to the International Criminal Court, which enables certain Member States to fill a gap in the Framework Decision, is not an issue here. The same applies to the explicit grounds of refusal for violation of fundamental rights (Article 1(3)) or discrimination (recitals 12 and 13), which two thirds of the Member States have chosen to introduce expressly in various forms. However, legitimate they may be, even if they do exceed the Framework Decision (EL, IE, IT, CY), these grounds should only be invoked in exceptional circumstances within the Union.

It is even more important to emphasise the introduction of other reasons for refusal, which are contrary to the Framework Decision (Article 3: DK, IT, MT, NL, PT, UK), such as […] ones involving examination of the merits of a case, e.g. of its special circumstances or the personal or family situation of the individual in question.\(^83\)

‘Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights an explicit ground for refusal in the event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States; in a system based on mutual trust, such a situation should remain exceptional.\(^84\)"

It is then striking that the report continues by saying:

‘All Member States have in the main transposed the provisions of the Framework Decision relating to the rights of a requested person (Art. 11), it being possible for the degree of detail to vary from one Member State to another, in particular with regard to the expression of consent. There are still some shortcomings, however, in particular concerning procedural vagueness (Art. 13: DK, LV, PL, PT; Art. 14: DK). It should be emphasised, lastly, that the facilitation due to the arrest warrant also benefits the persons concerned, who in practice now consent to their surrender in more than half the cases reported.

These deliberations are based on ‘contradictions’ like the following: the Commission criticizes that the Netherlands ‘shall refuse surrender if the Dutch executing judicial authority finds that there

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\(^82\) See also: Opinion of Advocate General Ruiz-Jarabo Colomer (supra note 3, at pp. 106) as to the problem of legality and double criminality.


can be no suspicion that the requested person is guilty [...] The Netherlands have stated that this will occur if 'it has become crystal clear to the executing judicial authority that the person could not have committed the offence'. One has to ask: does the Commission expect a Member State to flagrantly violate its obligations under the ECHR by ignoring such circumstances of a case?

In sum, one has to be aware that such human-rights-clauses cases are rare in the area of the EU. 95 per cent of the cases will not pose any such problems. But for the remaining 5 per cent, the European Union and its Member States are not sacrosanct – as in former times.

However, GA Colomer argues:

'In short, the situation is no longer one where sovereign States cooperate in individual cases; instead, it is one where the Member States of the European Union are required to assist one another when offences which it is in the common interest to prosecute have been perpetrated.'

This is simply unrealistic: as it is based on a federal structure of the European Union which – as of today – does not yet exist.

E. Practical Problems: Discover the Relevant National Law

The Problem

The precedent questions have been vividly discussed in the past. However, one basic problem of individual rights has not been addressed until now: the access to the existing law has not been questioned. The implementation of the Framework Decision is effected by national law. This is – by its very nature – not published in the Official Journal (OJ), but published in the national law gazettes. These are – by their very nature – written in the national language(s).

However, the EU officials have provided for a really astonishing service. On a much hidden place of the website of the European Council one may – by chance – get a translated version of the different implementing laws:


Or you 'fumble' yourself through from the Homepage of the Council:

'Policies' ➔ 'Council configurations' ➔ 'Justice and Home Affairs' ➔ 'Police and Judicial Cooperation' ➔ 'European Arrest Warrant'

On these 'official' pages there are the national implementing laws. With a view to the language problem it is – to say it in a decent mannerastonishing:

- The French and the Luxemburg laws are available only in French,
- The German law is available only in German and it is the law of 2004 which has been declared unconstitutional on 18th July 2005, i.e. one and a half year ago; the new version is in force since August 2006, i.e. since more than half a year,
- The Italian law: only in Italian,

86 Opinion of Advocate General Ruiz-Jarabo Colomer, Case: Advocaten voor de Wereld VZW v. Leden van de Minister- raad, C-303/05, pp. 45.
87 As of 9th March 2007 (date of a visit of the homepage).
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- The Latvian law: only in Latvian,
- Polish law: only in Polish,
- The Spanish law: not in Spanish as the original language but only in English.

It is a question of chance whether one is able to read a national implementing law or not. At least an English version should be available in addition to the original language which is always necessary.

The European Judicial Network does not provide for the implementing legislation on the page: http://www.ejn-crimjust.europa.eu/european-arrest-warrant.aspx

There is at least an impressing project going on which is managed by the Asser-Institute in the Netherlands: www.eurowarrant.net.

It understands itself:

‘It aims to promote the uniform and transparent application of the European Arrest Warrant in all Member States by stimulating exchange of information and promoting practice-oriented research in the field of judicial cooperation in criminal matters. The site is the product of a pan-European consortium of organisations with expertise in this field, led by The TMC Asser Institute with financial support from the AGIS Programme, European Commission – Directorate General Justice, Liberty and Security.’

The problem is that this project will be finished soon because there will be no follow-up budget. The maximum period is two years. If we realize that the background of this project was to outsource something which is the very task of the European Union, namely to provide for access to the existing law, then this becomes more than questionable.

By creating the Framework Decision the European Union has undertaken – as a whole – the responsibility that every person has access to the law implementing that decision.

**Time-limits as an Example**

One cannot oppose this by arguing: the implementing law is always national law if we have to implement any Framework Decision; this is parallel to the implementation of EC-Directives. Firstly, one cannot argue that something is not a problem because there are bigger problems. Secondly, the problem of access to the present law becomes absolutely crucial with regards to time limits. The annex to the report of the EU-Commission mentions a maximum duration of preliminary extradition detention, which ranges from 48 hours in Lithuania up to 40 days in Germany or the Czech Republic. For the arrested individual and his lawyer it may be of vital interest to know these limits.

Another important thing is to know, which state has made use of the possibilities to introduce which reasons to refuse the execution according to Art. 4 and 5 FWD. One can wait for the day on which the first case comes up in which the defense lawyer relied on the information of the Council’s website, but will there be any damage paid?

**Conclusion**

The human rights situation under the Framework Decision is not too bad, however, the access to the relevant law is definitely unsatisfying.
4.2. Denmark and the implementation of the European Arrest Warrant Framework Decision.

(Jørn Vestergaard)

4.2.1. Introduction

Legislation on extradition was introduced relatively late in Denmark. In 1960, an Act regarding the extradition of offenders to other Nordic countries was enacted. In 1967, Denmark implemented the European 1957 Convention on Extradition by passing a common Extradition Act, while upholding the Nordic Extradition Act. Compared to the provisions in the common 1967 Act, the legislation regulating extradition relations between the Nordic countries is characterised by less restrictive conditions for extradition and more simplified procedures. This is a reflection of the mutual confidence and trust between these neighbouring countries, as a result of a relatively high degree of similarity in terms of cultural and legal traditions. From a Danish perspective, relations between the Nordic countries, as well as the broader activities of the Council of Europe, have been important preludes to the recent efforts in judicial cooperation under the third pillar on the extradition of suspects, defendants and convicts.

Denmark joined the EEC in 1973. In the wake of the rejection by public referendum of accession to the Maastricht Treaty in 1992, a so-called ‘national compromise’ was struck between a majority of political parties. As a consequence, the Maastricht Treaty was supplemented by the Edinburgh Agreement between Denmark and the then 11 other Member States, providing Denmark with a number of opt-outs from participation in EU policies in the areas of union citizenship, monetary policy, the defence dimension, and Justice and Home Affairs. Subsequently, an additional referendum was conducted in 1993, this time concluding in an approval. Thus, Denmark participates fully in the intergovernmental cooperation on Justice and Home Affairs under the third pillar, for instance in the fight against terrorism, but is in general not a party to supranational cooperation under the first pillar. Denmark also participates in the Common Foreign and Security Policy, except for decisions and actions with defence implications.

The Council Framework Decision on the European Arrest Warrant (the EAW FD) was implemented in Denmark medio 2003 by Act 433 amending the common 1967 Act on Extradition of Offenders and the 1960 Act on the Extradition of Offenders to Finland, Iceland, Norway and Sweden (transposition of the EU-Framework Decision on the European Arrest Warrant). Denmark was the second Member State to implement the Framework Decision. The new rules Concerning extradition from Denmark to another EU Member State on an EAW are contained in Chapter 2a (conditions for extradition) and chapter 3a (procedures for dealing with such cases) of the com-

88 For a more elaborate account of the state of legislation in Denmark with regard to extradition, see the report submitted by the author to the Kraków conference on the implementation of the EAW, November 2006. Available in Danish is the author’s article: Den europæiske arrestordre – udlevering til straffeforligning mv. Tidsskrift for Kriminalret 9/2004, pp. 555–567.

89 The current consolidation of the 1967 Extradition Act is lovbekendtgørelse (lbk.) 833 of 25th August 2005.
mon 1967 Extradition Act. The amended provisions rules entered into force on 1st January 2004, and they apply to requests for extradition submitted after that date.90

The passing of the Government’s bill signified Parliament’s consent to the Government’s participation, on Denmark’s behalf, in the adoption of the Framework Decision by the Council of the European Union. Before political agreement is concluded in the Council, the Danish Government will in general ensure that a sufficient negotiation mandate has been obtained from the legislature, i.e. the Parliament of Denmark, Folketinget.91 If domestic legislation needs amendment, a bill will often be introduced at an early stage. In principle, Denmark follows a dualist doctrine of international law. Thus, under Danish law, international legal obligations are not binding in domestic law unless they have been specifically incorporated by way of legislation.

Extradition from Denmark to Finland or Sweden is, basically, still covered by the provisions under the amended 1960 Act on Extradition of Offenders to Finland, Iceland, Norway and Sweden. The provisions regarding extradition on the basis of an EAW are, however, applicable in relation to Finland and Sweden insofar as those rules go further, cf. 1960 Extradition Act Section 1 (2)(2). The latter rule may have a particular impact in cases involving extradition of Danish nationals or extradition for political offences, as the provisions in the 1960 Nordic Extradition Act might in such instances have a narrower scope in certain respects.

In November 2006, the Minister of Justice has proposed a bill on a Nordic Arrest Warrant aimed at obtaining Parliament’s consent to ratification of a convention signed by the Nordic countries on 15th December 2005. The purpose is to cover all extradition issues in a comprehensive Act and to annihilate the Nordic 1960 Extradition Act as an independent piece of legislation. The 2005 convention widens extradition conditions and further simplifies procedures, being in that respect even more far-reaching than the EAW.

A set of Guidelines on the handling of requests for the extradition of offenders on the basis of an EAW was issued on 19th December 2003 by the Ministry of Justice and circulated as binding instructions to the Danish police service and the Public Prosecutor’s Office.92 Supplementary Guidelines on the handling of requests for the extradition of offenders on the basis of an EAW were issued on 14th December 2004 by the Ministry of Justice and circulated as binding instructions to the Danish police service and the Public Prosecutor’s Office.93

The amended provisions regarding extradition based on an EAW do not require reciprocity. Thus, they are applied even if at the time of issue of an EAW the issuing Member State has not

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90 The Ministry of Justice has stipulated that the new concepts used in the Framework Decision do not differ substantively from the content of traditional terminology, so the previously used terms were retained in implementing the Framework Decision in Denmark. The Framework Decision uses the term ‘surrender’ instead of ‘extradition.’ As both terms involve the actual handing over of a wanted person to the requesting country, the term extradition is applied in the amended provisions of the Extradition Act, too.

91 Under the Danish Constitution, ‘The King shall act on behalf of the Realm in international affairs,’ cf. Section 19 (1). ‘The King’ means the executive, i.e. the Government. However, except with the approval of parliament, Folketinget, the Government may not enter into any obligation of major importance, e.g. a treaty requiring domestic implementation by law.

92 Justitsministeriets vejledning 9498 of 19th December 2003 om behandlingen af anmodninger om udlevering af lovovertrædere pl grundlag af en europæisk arrestordre.

transposed the Framework Decision into its national law, so that the issuing State would not itself be able to deal with an extradition request under the EAW rules.

Denmark has not made a statement under Art. 32 of the Framework Decision relating to the date of the acts to which an extradition requests relates. The 2003 Amendment Act will apply to acts committed before as well as after it came into force, provided the request is made after 1st January 2004. The only exceptions are in relation to France, Italy and Austria which have made declarations under Art. 32 FD.

The amended provisions regarding extradition for prosecution or enforcement of a sentence in another EU Member State imply a number of significant alterations of the previously applicable modality of extradition under Danish law. Attention has mainly been caught by the following points:

• Extradition may no longer be refused on the grounds that there is insufficient evidence to support the charge or conviction for an act for which extradition is sought.
• Issue of an EAW will in itself provide the basis on which to secure a person's extradition for prosecution or service of sentence, and it is no longer possible to demand an underlying arrest or custody warrant to be supplied.
• Danish nationals will basically be extraditable in the same way as foreign nationals, although a condition regarding re-transferral for serving the sentence in Denmark may be stipulated, cf. Art. 5 (3) FD.
• Extradition may no longer be refused on the grounds that the offences involved are of a political nature.
• Double criminality is no longer required for a number of offences, specified on the ‘positive list’, cf. Art. 2 (2) FD.
• A number of new grounds for refusal have been introduced, some of which are mandatory (i.e. extradition has to be refused), while others are optional (i.e. it may be refused, following concrete assessment in the individual case).
• A European Arrest Warrant has to be dealt with within shorter time limits than in the past and the Act includes deadlines for processing time, for a decision on extradition and for a possible judicial review.

On 23rd February 2005, the Commission report on the Member States' implementation of the Council Framework Decision on the EAW was issued. In the report – and in the Commission staff working document annexed to it – the Commission concluded that Denmark had not implemented some of the provisions of the Framework Decision and had not fully implemented others. In Denmark's comments to the Commission report and the staff working document it is stated that in Denmark's view the Council Framework Decision has been fully transposed into Danish law, and that Denmark therefore cannot understand the Commission's criticism.

Judicial Authority and available judicial remedies

Under the common 1967 Extradition Act, the role of issuing, as well as executing judicial authority, have been assigned to the Ministry of Justice. This arrangement might appear rather odd to someone from a country where such tasks have traditionally been a matter for the courts, or to someone who take the wording of the Framework Decision very literally.

Clearly, this model does not completely remove the authority from the administration and the potential influence of the Government. Still, it is presumably a scheme that will work to the
benefit of the individual, as it not only ensures a certain degree of uniformity and accountability, but ultimately furthers legality and independency, too. The individual in question has full access to court review and even to appellate review of an initial court decision.

A possible flaw of this system, if any, would eventually be an inherent tendency towards reluctance towards extraditing rather than the opposite. All other things equal, this means that the individual’s rights are relatively well protected by checks and balances.

In the Commission report on the EAW it is stated that it is difficult to view the designation of the Ministry of Justice as being in the spirit of the Framework Decision. Furthermore, the Commission states that the designation of an organ of the state as a judicial body in this context impacts on fundamental principles upon which mutual recognition and mutual trust are based.

Denmark has commented that it disagrees altogether with the Commission’s views concerning Denmark’s designation of the Ministry of Justice as the competent judicial authority. The reasons for this are as follows: Art. 6 (1) FD and Art. 6 (2) FD state that the issuing judicial authority and the executing judicial authority shall be the judicial authority of the Member State which is competent respectively to issue or execute an EAW by virtue of the law of that State. Thus, under the Framework Decision, it is for the individual Member State to decide who will issue and execute European Arrest Warrants, and it in no way conflicts with the wording of the Framework Decision to designate the Ministry of Justice of a Member State as the competent judicial authority, assuming of course that the relevant ministry is a judicial authority under national law.

Under Danish law, the concept of ‘judicial authorities’ traditionally includes the courts and the Prosecution Service. According to the Danish law on the administration of justice, the Prosecution Service comprises the Ministry of Justice, the Director of Public Prosecutions, the regional public prosecutors, the Commissioner of the Copenhagen Police and the chief constables. Furthermore, it follows directly from the Danish Penal Code that charges for offences against certain provisions of the Penal Code may be brought only at the order of the Ministry of Justice.

Denmark maintains the position that there is no question of Denmark wishing to create some special arrangement for European Arrest Warrants by designating the Ministry of Justice as the judicial authority for the issue and execution of such warrants. Furthermore, under Danish law the Ministry of Justice has the central competence as regards extradition, and even before the adoption of the Framework Decision on the EAW, the Ministry dealt with cases involving the extradition of offenders to other EU Member States. Also, a decision taken by the Ministry of Justice to extradite a person could always unconditionally be brought before the Danish courts and tested by two instances. Among the reasons for this was the fact that this would result in the same allocation of authority and procedure for handling extradition requests on the basis of an EAW as applied for extradition requests on the basis of e.g. the European 1957 Convention on the Extradition of Offenders. Denmark also wanted to ensure uniform practice in the handling of European Arrest Warrant which it was found would best be achieved by giving authority to the Ministry of Justice.

**Extradition of nationals**

Extradition of Danish nationals has not generally been possible under Danish law. However, this restriction is not prescribed by the Constitution. The 1960 Nordic Extradition Act permits extradition of Danish citizens in more serious cases as well as when the person has previously lived in the requesting country for at least two years. In 2002, the common 1967 Extradition Act was amended
so that it became possible for the first time to extradite a Danish national to a state outside the Nordic countries. The amendment was part of a so-called anti-terror bill presented soon after 11th September 2001. The double criminality requirement was still generally maintained. At the time when the anti-terror package was presented and enacted, the negotiations on the draft Framework Decision on the European Arrest Warrant had by and large been completed and, consequently, more far-reaching amendments were anticipated. The in-between initiative, however, might have facilitated the more far-reaching changes soon to come.

In accordance with the Framework Decision, extradition from Denmark to another Member State can no longer be refused for the reason that the person is a Danish national. However, Denmark has chosen to take advantage of the optional Art. 5(3) EAW that makes the surrender of nationals subject to the condition that the person will be returned to the executing state to serve any custodial sentence or detention order passed in the issuing state. Furthermore, the execution of an arrest warrant in conviction cases may be refused if the judicial authority decides that the sentence should be executed in Denmark.

**Political offence exception**

Traditionally, extradition for political offences has not been permitted by Danish law. However, the 1960 Nordic Extradition Act limited this restriction solely to Danish nationals. The EU Convention 1996 requires that offences covered by the 1977 European Convention on Terrorism be removed from the remit of the political offence exception. Consequently, the common 1960 Extradition Act was amended in 1997. As a result of the anti-terror package mentioned above, two further modifications were added in the form of references to the UN conventions on terror-bombing and terror-financing respectively. In 2006, additional reference was made to the UN convention on the combat of nuclear terrorism.

According to the EAW Framework Decision, the political offence exception is no longer relevant. Thus, it is left out of the new provisions of the common Extradition Act. However, execution of an arrest warrant shall continue to be refused if there is a serious risk that the person will be persecuted for political reasons.

**Double criminality**

In Denmark, extradition without a double criminality requirement was partially authorised by the provisions of the Nordic 1960 Extradition Act. The general requirement under the common

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94 This revision of the Extradition Act implemented the EU Extradition Convention of 1996 and allowed Denmark to withdraw a previous reservation regarding the extradition of its own nationals.

95 Denmark had made a reservation to the 1977 Convention and thus maintained the right to refuse extradition for any kind of political offence. Furthermore, Denmark made reservations to Ch. 1 of the Additional Protocol 1975 to the European Convention on Extradition and so maintained the right to refuse extradition for offences covered by the Convention on Genocide and the Geneva Conventions.

96 Similarly, military offences are no longer considered a valid bar to extradition.

97 Common 1967 Extradition Act Sec. 10 h, sec. 1.

98 Under the Nordic Extradition Act, there is a requirement of double criminality and of a maximum punishment of at least 4 years imprisonment in the case of Danish citizens who have not for the previous two years been resident in the requesting state. In cases regarding political offences, there is also a requirement of double criminality. See Sec. 2 and Sec. 4.
1967 Extradition Act was that the conduct for which extradition was requested must be punishable under Danish law by a maximum sentence of at least 4 years imprisonment. In accordance with the EAW Framework Decision, the double criminality requirement has now been abolished for the listed 32 offences⁹⁹. The terminology of the common Extradition Act nonetheless indicates that there may be grounds for refusal in a specific case – for instance on human rights, even where double criminality is not required. A maximum period of at least 3 years imprisonment under the law of the issuing state is now required.

For any offence not listed in the Framework Decision, double criminality remains a requirement under the common 1967 Extradition Act¹⁰⁰. However, in accordance with the European Convention on Extradition of 1957, the maximum punishment may now be as low as 1 year’s imprisonment under the law of the issuing state, a threshold Danish negotiators were reluctant to accept. There is no longer a punishment threshold in domestic law.

In several responses to the Danish Government’s consultation on the Framework Decision and the Extradition Bill, concern was expressed about the abolition of double criminality, not only from the Bar Association but also from police and prosecutors. In practice, the Framework Decision list does seem to present a real problem. So far, at least, no case has occurred to substantiate such worries. It is difficult to imagine that a European Arrest Warrant will be issued in ordinary criminal cases concerning minor offences. And naturally, the executing authority will be obliged to ensure that an act is not mis-labelled in an attempt to run a smoother extradition business. Political propaganda within the usual boundaries accepted in democratic societies cannot be crudely termed as terrorism, sabotage or racism and xenophobia in order to secure extradition. Minor acts of shoplifting cannot arbitrarily be listed as organised theft.

The EAW Framework Decision contains a territoriality clause allowing extradition to be refused, even for offences that fall within the Art. 2(2) list, where the arrest warrant relates to offences that have been committed in whole or in part on the territory of the executing state. Under the amended 1967 Extradition Act, this optional clause has been adopted as mandatory where the act is not a criminal offence under Danish law¹⁰¹. In cases of this sort it will not make any difference whether or not the act is covered by the Framework Decision list, since the person cannot be extradited in either case.

Bars to extradition

The history of the Framework Decision as well as that of the amended 1967 Extradition Act demonstrates that the Department of Justice fought vigorously to protect the traditional principles of Danish extradition law, while simultaneously acknowledging the need to develop good practice regarding mutual recognition. During the political negotiations, Denmark therefore argued against the initial proposal to abolish double criminality generally, preferring a positive list of specific offences. Similarly, Denmark supported the widest possible use of the reservation regard-

⁹⁹ In English the text is ‘shall ... give rise to surrender’ ... ‘without verification of the double criminality of the act’. In French is reads ‘donnent lieu à rémise’ ‘sans contrôle de la double incrimination du fait’. In the Danish Extradition Act the wording is that extradition ‘may be completed on the basis of an European Arrest Warrant, even though a similar act is not punishable under Danish law’ (author’s translation, italics added), see Sec. 10 a, sec. 1.

¹⁰⁰ The requirement of double criminality implies that the act was considered a criminal offence under Danish law at the time of committing the act as well as at the time of trial.

¹⁰¹ See: Common 1967 Extradition Act Sec. 10 f.
ing constitutional and human rights. In the amended Extradition Act, all optional clauses in the Framework Decision have been incorporated as mandatory bars to extradition. The same is true of the optional provisions on guarantees to be given by the issuing state.102

**Human Rights**

In accordance with the Framework Decision, extradition must be refused if the conduct for which the arrest warrant is issued is regarded by the Danish judicial authority as a lawful exercise of rights and freedoms of association, assembly or speech protected by the Danish constitution or the ECHR.103 By means of this 'cat flap' clause, the executing authority is vested with sufficient discretionary power to avoid unreasonable classifications by the issuing authority within the Framework Decision list, for instance under the heads of organised crime, terrorism, racist and xenophobic offences. Naturally, the vague character of some of the terms included on the list may give rise to concern, and an executing authority cannot always be relied upon to activate the brake in politically sensitive cases. However, on balance, the existence of the human rights clause will minimise the risk of an arrest warrant being abused by an issuing authority or accepted by an executing authority for reasons of convenience or to maintain good international or inter-agency relations.

Under the Danish Extradition Act, therefore, the executing authority may refuse to execute an arrest warrant by reference to fundamental rights and freedoms if a case merely regards passive participation in a criminal organisation, since an offence with such a general scope does not exist in Denmark. Similarly, it is well known that the concept of terrorism is vague. Under Danish law, the definition in the Framework Decision on terrorism was adopted when enacting the earlier mentioned anti-terror package in 2002, which gave rise to fierce discussions regarding the lack of precision in the amended provisions. It might be of some consolation for those of us who are still concerned, that the Council declaration regarding respect for fundamental rights has explicitly been mentioned in the Danish travaux préparatoires.

**Torture and other inhuman or degrading punishment or treatment**

As a supplement to the draft amendment to the Extradition Act, a provision was added that explicitly states that extradition shall be refused if there is a risk that the individual will be subjected to torture or to other inhuman or degrading treatment or punishment in the issuing state.104 This initiative sent an encouraging, if redundant, message since the provision does not add anything to Art. 3 ECHR.105

**Humanitarian considerations**

Humanitarian reasons as a bar to extradition have been reduced to a less prominent position in the Extradition Act. Previously, the Extradition Act included non-compliance with humanitarian considerations as general bar to extradition. Henceforth, even serious humanitarian reasons may

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102 See: Common 1967 Extradition Act Sec. 10 b ff.
103 See: Art. 1(3) and preamble pp. 12.
104 See: Common 1967 Extradition Act Sec. 10 h, sec. 2.
105 The ECHR was specifically incorporated into Danish law in 1992.
only temporarily postpone extradition. However, since there is no fixed time limit for the postponement, it should not be difficult to strike a reasonable balance in individual cases, for instance by deferring extradition for an indeterminate period of time if necessary. It will therefore be possible to conduct mental examinations where appropriate. If a requested individual is seriously mentally ill, extradition would be barred by virtue of humanitarian considerations.

**Conclusion**

All Member States are obligated by the same basic principles. The crucial question is whether the individual is guaranteed fair access to remedies to have the legal instruments respected and enforced. The introduction of the European Arrest Warrant might very well contribute not only to more efficiency within the field of criminal justice cooperation, but also to the development of higher legal standards and better conditions for suspects and convicts. The right to be assisted by legal counsel and an interpreter will definitely contribute to such an effect. Several current projects conducted by the Commission point in that direction, e.g. the Green Paper on Procedural Safeguards for Suspects and Defendants, as well as the discussions regarding minimum standards in pre-trial procedures and the proposed European Supervision Order.

Quite understandably, the introduction of a European Arrest Warrant has caused profound concerns regarding the abolition of traditional principles and requirements under the law of extradition. The hectic political activities in the wake of 11th September gave good reason for worries in relation to civil rights. However, the result of the legislative efforts is fairly balanced. As far as the Danish Extradition Act is concerned, all available handles have been pulled to ensure that an arrest order will not be executed unless it is reasonably fair and just. There are sufficient basis for defending the individual’s relevant interests, and competent agencies and actors have been assigned the relevant tasks in safeguarding fundamental freedoms and rights properly.

4.3. Implementation of the EAW in the Polish law. Principal issues

*(Adam Górski)*

**4.3.1. General remarks. Obligation to implement a framework decision**

In Polish legal science, two views seem to exist on the nature of an obligation stemming from the implementation of a framework decision. For example, E. Piontek subscribes to the literal implementation, whereas the implementation leading to the achievement of the purpose (thus, not necessarily a literal one) is probably supported by the majority of the representatives of this doctrine. During discussions on the role of a framework decision, it is often stated that possible objections and modifications may only appear at the stage of creating the framework decision (therefore *ex ante*), which was not possible in the case of Poland and other ‘new’ Member States. It follows, however, from the panel discussions, that the process of drafting framework decisions is often deficient of formal mechanisms for consultations, particularly the consultations with national parliaments. In my opinion, the existence of such a route for consultations would considerably

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106 See: Common 1967 Extradition Act Sec. 10 i.

107 E. Piontek, Europejski Nakaz Aresztowania [the European Arrest Warrant], PiP 2004, No. 4, p. 34–43.
undermine the arguments suggesting a ‘democratic deficit’ involved in the formation of European criminal law and could on the contrary, facilitate the whole process.

At present, the national legislations allow themselves freedom to introduce fairly far-reaching modifications in the implementation of framework decisions.

The adoption of a certain view concerning the manner in which obligations are met, following from the content of a framework decision, does obviously affect the perception which we have about our obligations under Union law to pass legislation, and also definitely affects the adoption and scope of application of a ‘pro-European’ (uniform) interpretation (referred to in the Pupino case). Understandably, there is a temptation (although not necessarily appropriate) to apply a creative interpretation of domestic law, based on the language or purposes of framework decisions. Such an interpretation would provide an alternative route to achieve the aim envisaged by the Council of the European Union, and could even be creatively extended within certain limits by domestic courts, including constitutional courts. This has perhaps been partly confirmed by a decision of the Constitutional Court of the Czech Republic, concerning the constitutionality of the Act implementing the EAW. The literal character of this implementation of framework decisions can be perceived as running contrary to the democratic principles of criminal law making (*nullum crimen sine lege parlamentaria*) (polemics with this thesis has been provided e.g. by D. Spinellis in his report). This kind of reasoning is based firmly on the decision reached by the German Federal Constitutional Court, and has had an impact on the line of argument underpinning the decision arrived at by the Polish Constitutional Court; although the reasoning behind the decision did not specifically refer to it (however, cf. the contribution to the panel by M. Grzybowski who has evidently raised this legitimising argument).

The issue of ‘democratic deficit’ definitely poses the greatest challenge for European criminal law.

4.3.2. Implementation of the EAW into Polish law

All these factors affect the manner in which the Polish legislator implemented the Framework Decision on the EAW. Some time ago, the lack of knowledge about other implementations resulted in an evaluation of the differences between the language of the Framework Decision and that of the Polish legislation as being profound and far-reaching. Today, after familiarisation with the implementation process in other countries, it would be right to admit that these discrepancies were rather moderate. For example, the implementation legislation in some countries classified all the premises of refusal to surrender (even those which were optional) within the category of obligatory premises. In the case of Poland, additional obstacles to surrender were created by the drafters of the Constitution, in amending Art. 55. After the constitutional amendment came into force together with the corresponding Act, the differences between domestic legislation and Poland’s international obligations have become more significant than before.

Where did these differences (even when disregarding the differences dictated by the latest constitutional amendments) come from? When replying to a question so formulated, a certain distinction has to be made. The latest amendment to the Code of Criminal Procedure represented an almost entirely intentional alteration, aimed somewhat at confirming the changes introduced earlier in the Constitution, which were the topic of fervent discussion in the panel yesterday. It is nevertheless difficult to guess to what extent the differences (again leaving out the constitutional changes) between the wording of the Framework Decision were intentional. It is hard not to be
under impression that at least some of these differences were only pure chance, whereas other have something in common with the implementation in new Member States. Even having in mind the rational character of the Polish legislator.

Let us begin from Art. 607 a. Going against the intent of the Framework Decision, it restricts the possibility for a Polish circuit court to issue an EAW, upon a request from the prosecutor, only to cases of suspicion where a person prosecuted for the offence committed on the territory of the Republic of Poland is abroad (in the EU). Reducing the scope of the EAW’s application solely to the principle of territoriality seems to be unjustified and calls for an urgent legislative correction.

Next, it is not totally clear why the issuance of the EAW may only be initiated by a request from the prosecutor, even though at the jurisdiction stage the EAW could also have been issued by a court. The competent court to issue the EAW is the circuit court, in whose area preliminary proceedings are conducted or where the sentence subject to execution has been pronounced.

(a) Implementation of the EAW: How the legislation and the relevant judicial decisions were received in the legal literature – general comments

The decision on the issue of the EAW is not subject to appeal. This issue was virtually the first part of the implementing legislation that the Supreme Court had to deal with issuing its resolution, under the procedure for a reply to the question concerning the fundamental interpretation of the Act. The Supreme Court decided that there were no grounds to assume that there was no appeal available against the decision on issuing (or refusal to issue) the EAW.

The body of legal literature on the European Arrest Warrant in Poland has focused primarily on the analysis of judgments concerning the functioning of this institution. This analysis has mostly been presented in the form of glosses and comments. Their sheer number reflects the importance of the issues of the practical operation of the European integration instruments in criminal matters. It was finally resolved by the resolution of the Supreme Court in reply to the juridical question referred to it under Art. 441 of the CCP108.

The resolution had been commented upon several times, and in each case the authors approved of the decision handed down by the Supreme Court. J. Izydorczyk, subscribing to the argument of the Supreme Court, noted however, that the Court erred in its direct reference to the Framework Decision on the EAW. At present, in the light of the judgment handed down in the Pupino case, this statement would have certainly had to be tempered, within the scope allowed by the cited judgment. The author shows also the doubts harboured by the Supreme Court as to the legal nature of the European Arrest Warrant as a decision on ‘European provisional detention’ versus extradition request. He presents the reasoning of the Court, which aptly argues that the EAW does not constitute a sui generis European decision on provisional detention and, in accordance with the axiom of the rational legislator that such a decision is not subject to an interlocutory appeal, in the absence of any special arrangements. Similar arguments, in keeping with the position adopted by the Supreme Court, have been earlier presented by S. Steinborn. A. Murzynowski also follows the Supreme Court’s argument, subscribing completely to the opinion voiced in the resolution. More

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doubts were raised in connection with Art. 607 b, with the Polish implementation not alone in having difficulty with the interpretation. In the wording of the Polish legislation, ‘another measure involving deprivation of liberty’ is also a decision on provisional detention.

The issue of the place of stay of the requested person under the EAW is definitely one of the most sensitive points. The principle of transmitting the request directly between courts operates, when the whereabouts of the prosecuted person are known. This type of solution has been adopted in the Polish implementation. If the place is not known, the court issuing the Warrant initiates the requisite inquiries through the contact points of the European Judicial Network Interpol. It is obviously envisaged in the Framework Directive and is in conformance with it.

Definitely, it is not, however, possible to issue an alert for the requested person in the Schengen Information System (SIS), which is normally equivalent to issuing the Warrant. Today, it is not possible either to carry on searching for the requested person other than was listed earlier. This is to prevent the practice of issuing the EAWs for preventative, or more precisely, search purposes.

(b) Premises for executing the EAW

At present, the configuration of premises for executing the EAW has changed fundamentally. It results from the constitutional amendment so often referred to and discussed. The nature of the amendments has been of a type transposing constitutional norms to a common statute. Hence, in the case of a Polish citizen, the additional obligatory obstacles included: ‘dual criminality’, the committing of the offence in the territory of the Republic of Poland, as well as a general clause of human rights. In my opinion, there are several reasons for challenging such a legislative solution. When retaining dual criminality in the case of a Polish citizen, an examination of that requirement is recommended from the perspective of the possibility of delaying execution of the penalty, when adjudicated by a criminal court of another EU Member State.

However, treating dual criminality premise as a constitutional right seems to carry implications not envisaged by the constitutional legislator. Accepted practice treats the principle of dual criminality in terms of functionality rather than of guarantee, so justifying totally different ways of penalising certain actions. It is the facts, not their legal qualification, which decide about the positive verification of the dual criminality condition. At present, in legal transactions, it is difficult to answer in the positive to the question once put by one at the scholars should we take the condition of double criminality seriously? However, it is known that this obstacle, as a constitutional right of a citizen, will no longer be subject to ‘functional interpretation’. We will have to wait and see for some practice in this area. As the additional obstacle of territoriality is concerned, it would border on the banal to remind ourselves of the ‘polyterritoriality’ of the major proportion of organised crime offences. Such an additional obstacle will markedly hamper adoption of the future EU rules for choosing a proper jurisdiction, in so far as a result of adopting a suitable framework decision salving the conflicts of criminal jurisdictions it would appear to be necessary.

Even more interesting is the issue of the possible grounds for refusal to execute the EAW, for reasons outside the legal system. Thus, it was indeed very interesting to track the reaction of commentators to the judgment of the Circuit Court in Szczecin, of 22nd July 2005 (file III Kop 24/05). The Court expressed an opinion that the lack of assurance of reciprocity, in the execution of the EAW by an EU Member State with respect to its own citizens, is a negative premise for the execution by
such a state of the European Arrest Warrant with respect to a Polish citizen. The authors of the relevant glosses\textsuperscript{109} were nevertheless highly critical of the view under which the reciprocity principle could be applied, taking the view that it was a \textit{contra legem} interpretation of domestic law, which does not provide for reciprocity as a condition for surrender. It is typical that the authors refer to the ECJ judgment in the Pupino case in order to support some of their theses. It is probably the first contribution to the analysis of the significance that the Pupino case might have for the evaluation of the provisions of Polish law and criminal process. Additionally, a definite approval would be required of the statement included in the publication: ‘... the opinion of the District Court essentially leads to denial of the idea which provides the foundations of the creation and functioning of the European Union’. As declared by the authors, this ‘new reality’ causes many principles operating in the field of international law to be re-evaluated, as well as in the area of cooperation in criminal matters. The authors are of the opinion that the District Court applied a kind of international law sanction, thereby undermining in general the basis for undertaking such actions by the judicial authority. In addition, there is also a remark, or rather a question, whether applying a ‘retaliatory measure’ in a court judgment does not mean that the twilight of the Union has come?

On the issue of additional grounds for the refusal to execute the EAW, the Supreme Court has also provided the statement concerning the case of Adam G\textsuperscript{110}. The Supreme Court considered whether the goal of issuing the EAW may affect the execution of the EAW. The Court has answered this question in the affirmative, stating that the EAW should not be executed when issued to meet a goal other than that of conducting criminal proceedings. Somewhat in passing, the Supreme Court explained the fundamental interpretation of a statute, and thus granted itself the powers to interpret framework decisions. It justified the latter by a lack (to date) of such a possibility by the European Court of Justice (Poland is in the process of drafting an act concerning the binding by the preliminary rulings of the ECJ). In conclusion, the Supreme Court confirmed that there might be other motives for rejecting the decision by the court other than the obligatory and facultative premises for refusing the execution of the EAW, but may be checked by Polish courts only exceptionally. However, the possibility of committing the act in question may not be subject to court’s proceedings.

The next essential implementation issue regards a joint consideration of multiple arrest warrants, or of a warrant and extradition. In the first case, before the decision is issued in the first instance on surrender of the same person, the court considers all these orders jointly. The court takes into account the circumstances in every case, the gravity of the offence and the place where committed, the order in which the European warrants have been issued, and the goals thereof. In the event that an invalid and non-final judgment has been issued, the court adjourns the consideration on the next European warrant till the aforementioned ruling becomes final and valid.

The issue of coincidence of the warrant and extradition seems somewhat different: in this case, the Polish legislators retained the final decision within the powers of the Minister of Justice. Under the Polish regulation, the court decides first on the admissibility of the execution of the EAW, then suspends the proceedings and notifies the Minister of Justice of the contents of the decision. In the event of the rejection to surrender, the court reopens the suspended proceedings and issues

\textsuperscript{109} L. K. Paprzycki, M. Hudzik, Glosa do postanowienia Sądu Okręgowego w Szczecinie z 22 lipca 2005 [A gloss to the verdict of the Circuit Court in Szczecin, of 22\textsuperscript{nd} July 2005 (tile II Kop 24/05) EPS nr 1, 2005].

\textsuperscript{110} Resolution by the Supreme Court of Poland, 20.07.2006, I KZP 21/06.
a ruling on the surrender. Nevertheless, the final decision on ‘extradition’ is left for the Minister of Justice to take. It seems obvious, that it is also in these circumstances where the constitutional norm under which ‘the courts shall adjudicate on the admissibility of extradition’ (Art. 55 (3) of the Constitution) is applicable.

It is also the permission to transit which is provided by the Minister of Justice. But in this case, the implementation did not provide any regulations on the transit arrest which are present in the regulations on extradition. This issue must be dealt with and changed at once. The legislators have treated the European Arrest Warrant as a trans-boundary coercion measure that alone provides a single basis for the deprivation of liberty throughout the European Union, which currently lacks a legal basis, and may be a source of a number of negative legal consequences.

(c) Conclusion

The presentation began by offering the theoretical deliberations on the implementation of a framework decision as such, with mention made of the importance of the Pupino case. A cautious hypothesis could be postulated, stating that the ‘Europe-friendly interpretation’ may, to a certain extent, be helpful in clarifying any legislative defects, but it should not and might not supersede the legislators altogether. It is not only because of fundamental reasons, but also because of the obligation of compliant interpretation, being evidently limited by the ECJ in the Pupino case. We would supersede the legislators when trying to remove possible legislative defects with a compliant interpretation, thereby adversely affecting the position of an individual.

One example which could be presented is the obstacle in the form of the ‘ne bis in idem’ principle in the Polish implementation, which covers the judgments of all foreign courts and not only, as already provided for in the language of the framework decision, of the criminal courts of Member States. Here the correction by legislator is required. A similar situation prevails with regard to an essential problem, e.g. the constitutional one. Yet a profound analysis of the constitutional issues goes beyond the scope of this presentation.

4.4. European Arrest Warrant – Implementation in Malta

(Stefano Filletti)

The implementation of the European Arrest Warrant in Malta was by and large a smooth transition. The Framework Decision on the EAW (FDEAW) was implemented in Malta in virtue of subsidiary legislation, namely Legal Notice 320 of 2004. The order was made on the 4th June 2004 and entered in force on the 7th June 2004.

The implementation legislation entitled the Extradition (Designated Foreign Countries) Order (the Order) applies to requests made or received by Malta on or after the 7th June 2004 for the surrender of a fugitive criminal.

The EAW procedure is not applied by Malta in respect of requests from EU countries that fail to implement the FDEAW in their legal system.
Chapter I. The Conference

It is interesting to comment upon the instrument used to implement the EAW in Malta. The Maltese Ratification of Treaties Act\textsuperscript{111} regulates the implementation of international legal instruments into Maltese Law. Indeed it would seem that the FDEAW is not an international legal instrument which concerns or affects:

(a) the status of Malta under international law or the maintenance or support of such status, or
(b) the security of Malta, its sovereignty, independence, unity or territorial integrity, or
(c) the relationship of Malta with any multinational organization, agency, association or similar body\textsuperscript{112}.

Consequently, the FDEAW could in essence be implemented by subsidiary legislation. In implementing the EAW the UK Extradition Act 2003 was used as a model. In fact, the EAW procedure is drafted as a simplified extradition procedure and the procedure is similar.

The EAW under the Maltese legal order is to take the form of an arrest warrant. The Order, however, does not prescribe the form or the content of the arrest warrant. It neither excludes the use of standard form arrest warrants such as that provided by the FDEAW. What is interesting to note is the fact that under the Maltese Criminal Code\textsuperscript{113} an ordinary warrant of arrest is more detailed than an EAW. This anomaly has been the source of some criticism.

4.4.1. The Warrant

The EAW is referred to in the implementation legislation as a Part II warrant. Maltese legislation provides for 2 types of Part II warrants:

1. A request for the surrender of a person for the purpose of his prosecution; or
2. A request for the surrender of a person after conviction.

4.4.2. The Competent Authorities

The competent issuing judicial authority under Maltese law is any judge sitting in the Court of Magistrates. On the other hand, the executing judicial authority is the Court of Magistrates (Malta), sitting as a Court of Criminal Enquiry (Court of Committal).

The Maltese Authorities designated the Attorney General Office as the sole designated central authority. The AG’s office also has the function of certifying warrants.

4.4.3. Practical Problems with regard to EAW

Time Limits

Upon the arrest of an individual pursuant to an EAW, the arrested person must be presented before the Court of Magistrates as a Court of Criminal Inquiry for the initial hearing. Provided that the arrested person does not consent to his/her surrender, the Court will set a date for the Extradition Hearing. The date of the Extradition Hearing should in no case be longer than 20 days from the date of the initial hearing.

\textsuperscript{111} Chapter 304, Laws of Malta.
\textsuperscript{112} Art. 3, ibid.
\textsuperscript{113} Chapter 9 of the Laws of Malta.
At this stage it is apt to mention the fact that notwithstanding the existing tight time-limits, no time limit has been imposed for the conclusion of the extradition hearing. The Court of Criminal Inquiry under the ordinary proceedings is to conclude the proceedings within one (1) month. However, there is the possibility to extend these time-limits under certain conditions. Therefore, it would be logical to conclude that the Extradition Hearing is to be concluded within one (1) month, possibly without the extended periods.

**Extradition for Convictions**

An EAW can be issued in respect of a person requested to serve a punishment after conviction. In implementing Art. 5 of the FDEAW, Malta included additional guarantees based on procedural fairness. Indeed after the Court of Committal has determined whether the conviction is warranting the surrender of the individual under the Order, the Court must also examine the sentence of conviction.

If conviction was given in the presence of the arrested person, then the Court of Committal will order the surrender of the arrested person. If, on the other hand, the conviction was given in the absence of the person convicted, then the Court of Committal will examine the reasons for the absence of the person arrested.

If the person arrested was aware of the proceedings in the respective state and deliberately absented himself from these proceedings, then the Court of Committal will order the surrender of the individual. If, on the other hand, the Court of Committal determines that the person arrested failed to appear at his trial and this through no fault of his, the Court is to order the surrender of the arrested individual only if the Court is satisfied that the person arrested will have the right of a retrial. By retrial it is understood that the person arrested will undergo trial again and in that trial that individual will be given effectively the right to defend himself or through legal assistance and, furthermore, will be given the means and time to examine and produce evidence and also to examine and cross examine witnesses.

This additional guarantee introduced by Malta is accepted by the Council of Europe and is also in line Art. 6 of the TEU. This notwithstanding the Commission criticized Malta for this additional guarantee.

**Bars to Surrender – Ne bis in idem**

The bars to surrender include, *inter alia*:

1. Prescription;
2. Age of the requested person;
3. The rule of speciality;
4. Certain extraneous considerations (such as prosecution due to race, place of origin, nationality, political opinions, colour or creed);
5. Amnesty;
6. Death penalty;
7. The person’s earlier extradition to Malta; and
8. *Ne bis in idem.*
Of particular interest is the notion of *ne bis in idem*. Indeed under Maltese Law the principle of *ne bis in idem* is defined as a prohibition from being tried twice for the same fact, as opposed to being tried twice for the same offence. It is to be noted that our Criminal Code\(^{114}\) speaks of a previous conviction on the same facts as being a bar for a person to be tried once again. Judicial interpretation, however, has extended the term ‘conviction’ to include also an ‘acquittal’. What is essential is that there is a *res judicata* judgment upholding a conviction or an acquittal. Mere discharges are not sufficient.

With regards to the EAW, a person’s return is barred by application of the rule of *ne bis in idem* only if it appears that such requested person would be entitled to be discharged under a rule of law relating to a previous acquittal or conviction, or the assumption that the conduct constituting the extradition office constituted an offence in Malta and such person were charged with such an offence in Malta.

Another interesting aspect to the rule of *ne bis in idem* is the fact that the principle, in a simple form, prescribes that a person cannot be charged twice for the same fact. This definition can have a direct effect on the application of the EAW, especially where an extraditable offence is not also an offence in Malta and the person has already been tried in Malta or in another jurisdiction for the same fact but for different offences.

Malta has had a similar experience in the 1980s, relating to an airplane hijacking. In the 1980s Malta was still debating the conclusion of an offence relating to hijacking. In the meantime an Egyptian plane was hijacked and re-routed to Malta. During the negotiations to release hostages, nearly all passengers on board the plane were killed and others grievously injured. The perpetrator of the said hijacking, a certain Ali Rezaq, survived the incident and was arrested. The charge of hijacking could not be presented against Ali Rezaq since, at the time, there was no such offence. Ali Rezaq was charged with other offences including willful homicide. Having served his punishment, and prior to the expiration of the prison sentence imposed, the United States presented an extradition request for Ali Rezaq. The extradition request was for the prosecution for the offence of hijacking, an offence for which Ali Rezaq was clearly not prosecuted in Malta. The extradition request refused by Maltese Authorities on the ground that he had already been tried for the fact and thus Mr. Rezaq could not be tried again for other offences resulting from the said fact.

This limitation to surrender persons affects directly the application of the EAW. Consequently, this limitation to surrender is a notable one, especially if the offence for which an EAW relates is not an offence in Maltese Law and the person has already been tried for that fact.

**Other grounds of Refusal**

It is interesting to note that Art. 4(3) of the FDEAW was not implemented by the Maltese Order. This was completely omitted and was placed neither as a mandatory ground of refusal nor at least as a facultative one.

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\(^{114}\) Ibid.
Art. 4(3) relates to circumstances where the executing judicial authority decides not to prosecute for the specified offence, where the executing judicial authority has decided to halt proceedings; and where final judgment has been passed in a Member State which prevents further proceedings.

This omission has in fact been the source of criticism by the Commission. Indeed the Commission believes that in circumstances where the executing judicial authority has decided to halt proceedings, there should constitute a mandatory ground of refusal for surrender.

**Life Imprisonment**

It is interesting to note that the Maltese Order remained silent on the issue of surrender of individuals subject to imprisonment for life. This has been criticized. Indeed, it is generally agreed that such a surrender should be made subject to a period review, say every 10-20 years and this also to keep in line with recent judgments delivered by the European Court of Human Rights on Art. 5 of the European Convention of Human Rights.

**Rights to Legal Counsel and Interpreter**

The Order does not mention the right to legal counsel and interpreter. There would be no problem of a person arrested being assisted by a legal counsel of his choice. What if a person does not have legal counsel, or what if such a person cannot afford legal counsel? Does such a person have a right to legal aid?

The Order deals with legal counsel in the case of consent to surrender. In fact, where a person is willing to consent to his surrender, such a consent should be given expressly in the presence of that person's legal counsel. Indeed, the Court can appoint legal aid where this is necessary. This is done to ensure that the person so consenting is understanding what he or she is consenting to and also to ensure that the consent is voluntary consent.

The Order, however, is silent as to the right of legal aid in any other part of EAW procedure. Furthermore, it is apt to note that, notwithstanding that legal aid as a right is freely available in ordinary committal proceedings and notwithstanding also the fact that the Court in extradition proceedings is to sit as a Court of Criminal Inquiry (Court of Committal), this does not mean that all the provisions applicable to ordinary proceedings apply in toto to extradition proceedings.

The Maltese Order also makes absolutely no reference to the right to have an interpreter present throughout the EAW proceedings.

Art. 6 of the European Convention of Human Rights establishes the right of any person in trial to have the right to legal counsel (even free of charge where such person cannot afford legal counsel) and also the right to have an interpreter. Art. 6, however, applies only to proceedings having as their scope ‘...the determination of a criminal charge...’. Consequently, extradition proceedings fall out of the scope of Art. 6, meaning that in principle a prior subject to EAW proceedings does not automatically determine a right to legal counsel and to an interpreter.

In practice, in Malta the Maltese Courts always appoint legal counsel and interpreter where they are necessary or requested. However, it is advisable to have the basic rights expressly provided for in the law on EAW.
Conclusion

The implementation of the EAW in Malta has had a modest success. Its application, too, was successful. The reason for the success was largely due to the fact that the EAW was introduced in the pre-existing extradition legal framework. This meant that few amendments in substance or procedural law were necessary. The EAW, this having been said, suffers from some limitations, including problems and limitations connected with extradition in general, as has been pointed out briefly in this presentation.

4.5. Discussion

(reported by Michał Rusinek)

The discussion, which crowned the panel chaired by Prof. Spinellis, was open by Prof. Van der Wilt. Turning to Prof. Lagodny, representing Austria, he voiced his doubts whether actions by some countries, which reserved to themselves the right not to surrender their nationals, did not lead to the violation of the principle of *aut dedere aut iudicare*. Prof. Lagodny expressed his conviction that the legal orders of both Austria and Germany ensure the implementation of the aforementioned principle; these countries evidently try to avoid surrendering their nationals just through instituting proceedings against them in their respective countries.

With respect to Polish legal order, Dr Górski observed also that, despite the fact that it was not stated *expressis verbis* in the statute, in each case where the execution of the EAW was refused, the provisions of law guarantee instituting proceedings in Poland. Next, Igor Dzialuk observed that the implementation of the principle ‘extradite or prosecute’ although it was ensured in theory, had faced serious practical problems. These include, firstly, the problems with evidence – the evidentiary material is most often obtainable only through the legal assistance from the country issuing the EAW, and this particular state (which just faced the refusal of executing the EAW), is not always willing to assist. Secondly, after the decision on refusing to execute the EAW, the basis for applying extradition arrest applies no longer, and there is no grounds for applying arrest under the Code of Criminal Procedure (till evidence has been gathered by means of legal assistance) – thus, it results in the release of the person concerned by the EAW, which carries the risk of such person absconding or going into hiding.

In response to a question raised by Prof. Jimeno Bulnes concerning the issue of instituting domestic proceedings as an alternative to surrender of a national in Austria and Germany, Prof. Lagodny observed that there was a widespread practice of instituting proceedings after receiving the EAW from the state which issued the same. He pointed to the scope of foreign jurisdiction resulting from national laws of particular States which is not without significance for the implementation of the principle *aut dedere aut iudicare*, referring giving, as an example, to Germany as a country with wide expansive foreign jurisdiction.

The next theme brought up in the discussion was the status of the prosecutor as the authority issuing the EAW in some Member States (e.g. Sweden and Denmark). Prof. Kulesza asked the representatives of these countries to elucidate the issue of independence of the prosecutors’ office in the Scandinavian countries, indicating, at the same time, his adverse experience with the independence as regards the Polish prosecutors’ office. He also noted that, according to the Polish
implementing regulation, the EAW proceedings do not offer sufficient guarantee of the protection of the individual’s rights, in particular the right to defence, which is because evidence is not examined and the participation of the defence lawyer is only optional.

In reply, Dr Vestergaard stated that Danish law guarantees the prosecutor full independence of the executive power; what is more, the constitutional tradition and the political practice exclude the possibility of any pressure to be exerted on the prosecutorial bodies. He stated at the same time that pursuant to the Framework Decision, the national legislator could, following the rules of its own legal system, choose the body competent in the EAW matters and the vesting of these powers with the prosecutor does not contradict its provisions. He noted that such a view is shared also by the case law of other Member States and the compliance of the Danish implementing regulation with the Framework Decision has not been effectively challenged to date. He also emphasized that in the case of an appeal, prosecutorial decisions on the issuance of the EAW are in Denmark subject to judicial control.

The next participant in the discussion, Dr Steinborn noted that, for the proper functioning of the EAW, particularly in the context of the principle of mutual confidence, it is necessary for the powers to issue the EAW to be held by fully independent bodies to ensure that the issuance of the warrant was dictated solely by substantive reasons. This seems to be particularly valid considering that not each Member State provides for the possibility of appealing against the decision on the issuance of the EAW.

In another contribution, Dr Sakowicz stated that the efforts of lawyers should be directed at removing barriers for European co-operation in criminal cases rather than creating new ones. In the speaker’s opinion, even though they do not differ from national legislation as to their form, the implementing laws are part of Community legislation and, consequently, a view can be voiced that they supersede national law, even in the aspect of the constitution. On the issue of the powers of the prosecutor to issue the EAW, Dr A. Sakowicz noted that it should not raise concerns if the body executing the EAW is usually the court of law. He also criticized the Polish legislator for making regional courts responsible for the EAW matters – in his opinion, these responsibilities could successfully be performed by district courts.

The next contribution to the discussion came from Prof. Wong, who criticised Swedish legislators for the regulation of the EAW issuance-related matters in the status of fundamental rank. He also returned to the issue of independence of the prosecutor’s office in Scandinavian countries. In his opinion, the Swedish prosecutor’s office is fully independent and any attempts of the executive power to influence the prosecutor’s decisions are excluded. He emphasized further that pursuant to the implementing regulations, the EAWs issued in Sweden have to be based on the arrest warrant issued by the court.

The discussion was concluded by Dr Górski’s comment concerning the prohibition to surrender citizens. He noted that the point behind that prohibition is the right to be tried before the court of the state of one’s citizenship, originating from the medieval *ius de non evocando*, that is the feudalist right to jurisdiction. He asked rhetorically whether the European Union is to be a group of 25 feudalists or is it the right to fair trial that is at stake which, after all, can be guaranteed not only in the state of one’s citizenship.
5. Session 3
Issuing of the EAW
– problems of legislation and practice

(Chair: Stanisław Waltoś, Jagiellonian University, Kraków)

5.1. The issuing of the EAW
– problems in legislation and practice of Lithuania

(Darius Mickevicius)

Dear participants of the conference! At first, I would like to thank the organisers for such a great opportunity to come here and have an interesting debate on the European Arrest Warrant. It is an honour for me to participate and to have a chance to speak in a panel together with such distinguished professors.

Thus, I would like to just shortly indicate some of the legislative and practical problems that Lithuanian authorities face when issuing the European Arrest Warrant. I suppose some of these problems might be known to you, and some might be only characteristic of Lithuania.

One of the problems is the issuing authorities. Lithuania is a small country. We have about 3,5 millions inhabitants. Small size means that, on the one hand, we have little number of institutions and experienced public officials that could deal with criminality issues, but on the other hand we have a possibility to concentrate certain matters in one place. As a result, it is not so strange that Lithuania has decided to have only two issuing authorities:

1. The General Prosecutor Office – that issues European Arrest Warrants for purposes of prosecution as it coordinates all the ongoing criminal prosecutions;
2. The Ministry of Justice – that issues European Arrest Warrants for purposes of executing the sentence as it is a heading institution that has control over criminal sanctions enforcement process.

This was chosen for purely practical reasons: General Prosecutors Office and Ministry of Justice for a long time had been central authorities in extradition cases and they have specialised units with experienced persons working in international cooperation matters. The territorial prosecutors’ offices and courts had a limited number of personnel that could handle serious international cooperation matters. Lithuania has been joining EU and all this mutual legal assistance matters threatened to overload regional offices. So it seemed quite reasonable, at least temporarily, to centralise issuance of the warrants, thus ensuring their quality and not loosing much of the speediness.

It must be noticed that both the Prosecutor General Office and Ministry of Justice cannot issue European Arrest Warrant without court decision. In the first case, it must be a court decision to detain a suspect and in the second case – a court final judgement supplemented with courts decision to send a person back to prison if he fled during probation period. It is also important that these institutions do not issue European Arrest Warrant on their own initiative – it is always the regional police, prosecutor offices, courts or prison administrations that ask for issuance of the warrant. General Prosecutor Office and Ministry of Justice may not refuse issuance, except for cases where there is no basis for European Arrest Warrant.
This system has proved to be effective. These two authorities could ensure the quality of the issued warrants while the purposes of Framework Decision are not undermined.

However, Commission in its report has noted that Ministry of Justice could not be judicial authority according to Framework Decision, as this may impact on fundamental principles upon which mutual recognition and mutual trust are based. It may result in a political involvement in the surrender proceedings.

Theoretically, I agree with this approach. Of course, Ministry of Justice heavily fits into concept of judicial authority. But, on the other hand, in practice there are no major problems. Moreover, experienced personnel makes procedure swifter and admirable. As Ministry of Justice issues warrant only for purpose of execution of penalty and only on the basis of the court decision, it is difficult to suspect in it the possibility of political involvement. Finally, it is assumed that such a system is a temporary one. It is expected that after some time a lot of functions of international legal assistance will be transferred to regional authorities.

Second problem is the quantity of European Arrest Warrants issued. In 2005 Lithuania has issued 500 warrants. Comparing to Lithuania’s size – it is a huge number and Lithuania is among the leaders. Although it is true that many Lithuanian criminals have absconded to Western Europe, especially Ireland, UK, Spain and Germany, and Lithuania tries to find them, there are some other reasons for this. First one is that national prosecution system is based on legality principle, thus prosecutors cannot decide that it is not reasonable to issue European Arrest Warrant. Second reason is, that we issue European Arrest Warrant not only in cases where the person is somewhere in EU, but also in cases where there is only a possibility that he might be in EU. We have such practice – if the person has absconded from justice and it is known that he has left the country – we start international search and issue European Arrest Warrant.

The quantity of warrants results in the third problem – the costs problem. Although surrender under European Arrest Warrant is a bit cheaper than traditional extradition procedure, it is still an expensive instrument. We had cases where a person that was suspected for quite a petty crime (although punishable with imprisonment) has been brought to Lithuania under issued European Arrest Warrant and soon afterwards released with an imposed fine or under probation, or at all released from criminal liability. So the question of expedience arises. Nevertheless, at the moment, due to principle of legality, it is obligatory to search that person and to issue European Arrest Warrant even if it does not seem reasonable. It would be interesting to know whether other countries face such problem.

The fourth problem is cooperation between Member States. It is true that with European Arrest Warrant we have simpler and faster procedure, fewer translations of documents, smaller costs, and fewer formal problems than in traditional extradition procedure. For example, if earlier extradition proceedings with UK were usually problematic, now it is not the case. However, there are still some problems in cooperation with some particular countries, which in fact demonstrate certain mistrust to other countries legal systems. For example, they require additional information which is not foreseen in European Arrest Warrant form, or they require issuing new warrant if some initial information changes, etc. But, in fact, it is quite natural that some countries are very cautious in the surrender proceedings and, to my opinion, this should not be treated as a serious threat to mutual recognition principle.
So these are all major problems that at least practitioners face when issuing the European Arrest Warrants in Lithuania. This leads to a quite optimistic conclusion – generally speaking Lithuania is satisfied with the introduction of European Arrest Warrant and, consequently, it could be counted to the list of countries that are supporting it.

On this positive note I would like to stop my intervention.

5.2. Problems with European Arrest Warrant implementation and practice in the Czech Republic

(Světlana Kloučková)

The implementation of European Arrest Warrant (EAW) in the Czech Republic (CZ) has met with many obstacles. The draft of the amendments of the Constitution of the CZ, the Chart of Fundamental Rights and Freedoms (the constitutional Law in the CZ), the Criminal Code and the Criminal Procedural Code implementing an EAW were submitted to the Czech Parliament on 11th November 2003.

On 11th March, 2004 the Committee for Constitutional Law of the Chamber of Deputies (the lower chamber in the Parliament) decided not to support the amendments of the Constitution of the CZ and the Chart of Fundamental Rights and Freedoms concerning a surrender of Czech nationals under an EAW and the Parliament later on did not accept the amendments of these constitutional laws.

The amendments of the Criminal Code and the Criminal Procedural Code implementing the Framework Decision on the EAW (FD on the EAW) were adopted after the approval by the Chamber of Deputies, the lower chamber of the Parliament of the CZ on 30th June 2004, by the Senate, the higher chamber of the Parliament of the CZ, on 29th July 2004.

According to the Czech Constitution, the President of the CZ has to sign the law to complete the legislative process. However, the President of the CZ executed his constitutional privilege not to sign the laws on 23rd August 2004.

In compliance with the Czech Constitution, the vetoed laws were returned to the Chamber of Deputies. The Chamber of Deputies approved the laws by the absolute majority of its representatives on 24th September 2004. The laws entered into force on the first day of the following month after their promulgation on 1st November 2004.

The Relation between IT (international treaty) and FD

The CZ applies the monistic doctrine on the relationship between international treaties and domestic law (Art. 10 of the Constitution) in the sense:

– international treaties are the integral part of the Czech legal order,
– self executing provisions of international treaty that stipulate something different than a domestic law have the precedence.

EAW is considered as a new system incompatible with the system of extradition in the Czech Republic. FD is an act of the Council of the EU – the unilateral act adopted under the responsibility of the EU (not the agreement of the MS) and it cannot be considered as the international treaty under Art. 30 or Art. 41 of the Vienna Convention on the Law of Treaties, 23rd May 1969. Unlike the
international treaties, the Member State can be bound by a framework decision also in the case when it sustains from voting.

Therefore the implementation of this FD on the EAW had two steps in the CZ:

– the amendment of Criminal Code (Law No. 537/2004) and Criminal Procedural Code (Law No. 539/2004) – in force since 1st November 2004,
– the notification to the Council of Europe under Art. 28(3) of the European Convention on Extradition (submitted to the Secretary General of the Council of Europe on 14th January 2005).

So, the Czech judicial authorities have been applying EAW in practice since 14th January 2005.

**Limited Usage of the EAW in the CZ**

Till 1st July 2006 the Czech courts could not apply the EAW legislation (including the issuing EAWs) concerning crimes committed before 1st November 2004. On 19th April 2006 the Parliament of the Czech Republic enacted an act amending the Criminal Procedural Code that changed the implementation of the FD of the Council of the European Union of 13th July 2002 on the EAW and the surrender procedures between the Member States (2002/584/JHA) in the CZ. This act entered into force on 1st July 2006. On 12th June 2006 the CZ made the notification to the Council of Europe under Art. 28 (3) of the European Convention on Extradition to inform about this change.

After this amendment – since 1st July 2006 – the Czech courts can issue the EAW regarding all crime covered by the FD and they can execute all EAWs with one exception: the CZ does not surrender its nationals for crimes committed before 1st November 2004. However, the CZ applies the principle of active personality – it can prosecute its own nationals for crime committed abroad. So, despite this limit in the usage of the EAW, our citizens cannot avoid their responsibility for crimes committed abroad before 1st November 2004.

**Surrender of the Czech Nationals**

Art. 14(4) of the Czech Constitutional Law No. 2/1993 Coll. – the Charter of Fundamental Rights and Freedoms – says: ‘Every citizen is free to enter the territory of the Czech and Slovak Federal Republic. No citizen may be forced to leave his or her country’. Amendment of this constitutional law was rejected in the Czech Parliament.

On 26th November 2004, the group of members of Parliament (deputies from lower chamber and senators from upper chamber) made a proposal to the Constitutional Court to cancel:

- Sections of the Criminal Code – Sec. 21(2) and the Criminal Procedural Code – 403(2), 411 (6)(e), 411 (7) concerning surrender of the Czech nationals under an EAW because of their contradiction with Art. 115, Art. 4 (2)116 and Art. 14(4)117 of the Constitutional Act No. 2/1993 Coll. – the Charter of Fundamental Rights and Freedoms, and

115 All people are free and equal in their dignity and in their rights. Their fundamental rights and freedoms are inherent, inalienable, illimitable, and irrepealable.

116 Any limits placed on fundamental rights and freedoms may be governed only by law under conditions set by this Charter of Fundamental Rights and Freedoms.

117 Every citizen is free to enter the territory of the Czech Republic. No citizen may be forced to leave his or her country.
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- Section 412 (2) of the Criminal Procedural Code (cancellation of dual criminality rule for listed criminal behaviours) because of its contradiction with the Art. 39\textsuperscript{118} of the Constitutional Act No. 2/1993 Coll. – the Charter of Fundamental Rights and Freedoms.

The Czech Constitutional Court solved these questions in its decision No. Pl. ÚS 66/04:
I) the relationship between the third pillar instruments and Czech national law, including the Czech constitutional law,
II) if the surrender of the Czech nationals is in the contradiction with the Czech Constitutional law,
III) if the cancellation of the dual criminality rule for listed criminal conducts is in the contradiction with the \textit{nullum crimen sine lege} principle.

Ad I)

Regarding the relationship between the third pillar instruments and Czech national law, the Constitutional Court referred first of all to the Art. 1(2) of the Constitution of the Czech Republic\textsuperscript{119} and Article 10 of the Treaty on European Community\textsuperscript{120}. It stated that the constitutional principle ensues from these Articles that the national law including the Constitution should be interpreted in time with principles of the European integration and co-operation between EU authorities and authorities of the Member State.

The Constitutional Court also referred to the Pupino case\textsuperscript{121}, under which Art. 10 of the Treaty on European Community is applicable also to legal instruments of the third pillar, and said that if there are several possibilities how to interpret the Constitution (including the Charter of Fundamental Rights and Freedoms), the Czech authorities have to choose such an interpretation that supports the obligations that the CZ assumed in connection with its accession to the EU – so, it is necessary to choose the interpretation that supports the realization of this obligation and not the interpretation that prevents the realisation of these obligations.

On the other hand, the Constitutional Court did not deal in this decision with the legal nature of framework decisions as such and with their relationship with international treaties.

Ad II)

Regarding the possibility to surrender our national under the EAW, the Constitutional Court made the interpretation of the Art. 14 (4) of the Charter of Fundamental Rights and Freedoms. The Constitutional Court rejected the allegation of the group of Members of the Parliament that the permanent relationship between a citizen and the state has been infringed by passing the national legislation on the EAW.

\textsuperscript{118} Only the law shall determine which acts constitute a crime and what penalties or other detriments to rights or property may be imposed for them.
\textsuperscript{119} The Czech Republic observes the obligation arising for it from international law.
\textsuperscript{120} Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.
\textsuperscript{121} Decision of the ECJ in the case of Maria Pupino from 16\textsuperscript{th} May 2005, No. C-105/03
The Art. 14(4) of the Charter that bans to force a citizen to leave his or her country does not concern extradition (or surrender) – it means that this provision does not prevent the surrender of the Czech national to another Member State. This Article prevents from excluding a citizen from the community of citizens of the CZ which is not the case of the EAW because of the following reasons.

The Czech national legislation on the EAW:
- includes the condition of the consent of the Czech national with his/her surrender to another Member State for purposes of the execution of imprisonment, it means without his/her consent he/she cannot be surrendered for this purpose – if the Czech national does not agree to serve the imprisonment in another Member State, the CZ cannot execute an EAW and has the obligation to recognise the judgement and execute it on its territory,
- bars to surrender the Czech national under the EAW for purposes of prosecution if such a person does not agree to serve a possible imprisonment in another Member State and this Members State does not give the guarantee in written that this Czech national will be returned on the territory of the CZ to serve an imprisonment,
- gives a right to the person that should be surrendered to appeal the decision of the Regional Court on surrender with a suspensory effect (Section 411 (5) of the Criminal Procedural Code122) and a right to bring the case before the Constitutional Court without breachng the EAW time limits (Section 415 (3) of the Criminal Procedural Code123) – these provisions respect the protection of the person to be surrendered and observe the condition that the Czech constitutional order will not be breached in the individual case by surrendering,
- respects the ne bis in idem principle (Section 411 (6)(c)124 and Section 411 (6)(d)125 of the Criminal Procedural Code),
- includes the provision stipulating that a request for any cooperation (including the EAW) cannot be complied with if it breaches the Constitution or a regulation of Czech law, which has to be applied unconditionally (Section 377 of the Criminal Procedural Code126) – it corresponds to the point 12 of the Preamble of the FD on the EAW that refers to the observation of the principles recognised by Art. 6 of the Treaty on European Union,
- respects also the interests of the victims
- the prosecution can be more effective in the state of commission of a crime

122 Appeals may be lodged against the decisions referred to in paragraphs 1, 3 and 4; such appeals have suspensory effect. An appeal by the public prosecutor against a decision to release the requested person from custody shall have suspensory effect only if lodged immediately after the decision is given.

123 Where the person concerned has filed a complaint with the Constitutional Court against the conduct of the competent bodies of the Czech Republic in the course of the transfer proceedings, the time limits referred to in Sections 411(11), 413(4) and 416(2) shall start to run from the day on which the competent body is sent the Constitutional Court’s decision on the complaint.

124 The court shall refuse to surrender the requested person only if the requested person has been finally sentenced in the Czech Republic or the foreign State for the same act and the penalty has already been enforced or is being enforced or is no longer enforceable, or the criminal proceedings have been discontinued in the Czech Republic or other Member State by means of a final judgment, unless such decisions have been overturned in the prescribed proceedings.

125 The court shall refuse to surrender the requested person only if the requested person has been criminally prosecuted in the Czech Republic for the same act in respect of which the European Arrest Warrant was issued.

126 A request from a body in a foreign State may not be complied with if handling it would violate the Constitution of the Czech Republic or any provision of Czech Law that applies unconditionally, or if handling the request would damage some other significant protected interest of the Czech Republic.
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- the surrender of the Czech nationals is conditioned by reciprocity (Section 403 (2) of the Criminal Procedural Code\(^\text{127}\)).

The Constitutional Court also explained that if the Czech citizens can enjoy advantages connected with the status of the EU citizenship, it is natural in such a context that it is necessary to accept also a certain level of responsibility. Current standard of protection of fundamental rights in the EU does not give the occasion to presume that a protection of fundamental rights of our nationals in another Member State will be lower that in the CZ.

Ad III)

Regarding the cancellation of the dual criminality rule for listed criminal behaviours, the Constitutional Court rejected the allegation of the group of Members of the Parliament that Section 412(2) of the Criminal Procedural Code that implements the list of criminal conducts in Art. 2(2) of the FD on the EAW breaches Art. 39 of the Charter of Fundamental Rights and Freedoms (\textit{nullum crimen cine lege} principle).

The Constitutional Court refers to the fact that Section 412(2) of the Criminal Procedural Code is the provision of a procedural law and not a substantive law and the execution of the EAW does not mean the decision on guilt and on the penalty for criminal offences in the meaning of Art. 39 and 40 of the Charter. The list in Section 412(2) of the Criminal Procedural Code concerns the procedure on surrender only and the surrendered person will not be prosecuted in another Member State for a criminal conduct listed in Section 412(2), but for a crime as it is defined in the substantive criminal law of this Member State.

The list of criminal behaviours in Section 412(2) of the Criminal Procedural Code also does not mean the application of criminal substantive law of another Member State in the CZ.

The Constitutional Court also referred to the specific category falling under the principle of territoriality that is represented by remote crimes, committed mainly through computer technology, which theoretically makes it possible that conducts perpetrated in the Czech Republic may result in the crime taking place in another EU Member State. The Constitutional Court concedes that in wholly exceptional circumstances the application of an European Arrest Warrant may conflict with the Czech Constitution, especially in cases where a remote tort might be considered a crime under the law of the requesting Member State, but would not be a crime under Czech criminal law, and might even permit the use of a constitutional defence in the Czech Republic (e.g. within the framework of the constitutional protection of freedom of expression). Such a case, which would anyway be unusual, would involve the application of Section 377 of the Criminal Procedural Code, which includes a mechanism for preventing the unconstitutional consequences of European Arrest Warrants, in the sense mentioned above.

The full text the Czech Constitutional Court No. Pl. ÚS 66/04 from 3\(^{rd}\) May 2006 in English can be found on:

http://www.eurowarrant.net/documents/cms_eaw_id862_1_Decision%20Czech%20Constitutional%20Court-001_EZR-66-04-ENG.doc

\(^{127}\) The Czech Republic may surrender a national of its own to another Member State of the European Union only on the condition of reciprocity.
To sum up, this decision of the Czech Constitutional Court stipulated that it is not necessary to amendment the Czech Constitution regarding surrender of the Czech nationals under an EAW, however, it sets the limits for this constitutionality.

If an issuing state wants the CZ to surrender its own national for the purpose of prosecution, the CZ needs to have an assurance of the issuing state about a return of its national to the CZ for serving the sentence in the case when its national will be sentenced for an imprisonment and he/she will not want to serve this sentence in the issuing state. The lack of the assurance is the reason for the refusal of the EAW. In such a case the CZ applies the active criminality principle.

If an issuing state wants the CZ to surrender its own national for the purpose of execution of sentence and the Czech national does not agree to serve a sentence in another MS, the CZ has to refuse to execute the EAW under its national legislation and has the obligation to execute the sentence on its territory.

This system means that courts in the CZ de facto has to always examine the dual criminality if they decide about the surrender of own citizen, because one of the leading principles of criminal law set in the Czech Constitution is the nulla poena sine lege principle – it is not possible to execute a sentence for an act that does not constitute a crime on the Czech territory.

Practical problems with issuing of EAWs

1) The using of the form

A usage of binding forms is not common in our practice. Therefore, some of presentations for judges were focused on the questions what should be written at what point in the form.

2) The specific demands of several states concerning the form for EAW (UK, IE, IT)

Some Member States have additional demands regarding what should be written in the EAW form. There are several examples:

The UK wants to add to the introducing paragraph the sentence that ‘the person mentioned below is alleged to be unlawfully at large following conviction by a court’ in the issuing state or is prosecuted for a crime mentioned in the EAW form.

Department of Justice, Equality and Law Reform in Ireland review all EAWs before they are submitted to the High Court in Dublin for an endorsement. This central authority can return the EAW to the issuing state for a complement under their demands. Only after the endorsement a wanted person is put into the search system of Ireland.

Courts in Italy want to add the list of evidence that support a guilty, of a wanted person. They apply their own definitions of 32 behaviours listed in Art. 2(2) of the FD on the EAW set in Italian national law on the EAW.

3) The description of facts

Sometimes courts use very complicated language that does not provide an easy survey. Sometimes the description of facts is very vague or, on the other hand, it is so complicated that it is very difficult to understand.
4) The definition of ‘idem’

Definition of the ‘idem’ can be different in different Member States. This question is very important in connection with the rule of speciality. The CZ uses the doctrine of continuing offence and persisting offence when several incidents are considered as one act (the precise rules for the identity of act are stipulated by law and by decisions of the Czech Supreme Court). However, some Member States can have different rules for continuing and persisting offences and they can take it as several separated acts – offences. It is another reason why it is necessary to pay attention to description of facts and describe carefully all incidents that are a contention of the given criminal prosecution.

5) The abolition of the dual criminality principle for the listed criminal behaviour

There are no definitions in Art. 2 (2) of the FD on the EAW. So, it is entirely up to national legislation of Member States to decide on what crimes can be included under the list of criminal behaviours listed in this Art. of the FD. More then 80 crimes defined in the Czech Criminal Code could be possibly included under 32 behaviours listed in Art. 2 (2) of the FD. Furthermore, there are other 32 crimes in the Czech Criminal Code where a serious bodily harm is mentioned in descriptions of crimes as an aggravating circumstance. Can our judge tick a box in a point e (I) in the EAW form in such cases? Sometimes there is an uncertainty of some judges what crimes can be included into this list.

6) The definition of ‘in absentia’

There is a duty of a judge to fulfil the point d) in the EAW form if there was a trial in absentia. However, what is the definition of this procedure? Under the Czech Criminal Procedural Code there can occur three situations when a trial is carried out without the presence of a prosecuted person:
– a trial without the presence of defender – it is possible in the cases of not so serious crimes if the defender was informed about the date of his/her trial (delivery in his own hands),
– a procedure against a fugitive (the person has been absent since the very beginning of a criminal procedure) – a very exceptional procedure,
– a criminal order – the decision of court about a guilt and punishment in the case of a petty crime (there is no trial).

These two first possibilities are considered under the Czech Criminal Law a procedure in absentia. The third one is the way in which our court can decide about petty crimes. In such cases, there is no trial (so no presence of a defendant) and a judge can issue a criminal order. The defendant can raise an objection against such an order and so reach the possibility of a trial with his presence. This third possibility is not considered under the Czech Criminal Law a procedure in absentia.

The EAW has definitely brought the new progress into extradition (now surrender) area. However, they are some differences in the implementation of the FD on the EAW that cause practical problems. The EAW has also brought new problems that we did not meet in extradition procedure (e.g. definitions of behaviours listed in Art. 2(2) of the FD). These unclear points should definitely be discussed in more detail among Member States.
5.3. Request to a Member State to surrender a person under the EAW: theoretical and practical problems

(Andrzej Sakowicz)

A. The European Arrest Warrant is a kind of a flagship of European integration in criminal matters under the third pillar. This thesis is supported in a number of scientific disputes during conferences and in legal periodicals. Yet one should not forget about the controversial rulings of constitutional courts, even sometimes taking a position against the philosophy of cooperation in criminal matters within the territory of the European Union (e.g. of Poland or of Germany), as well as the unanswered questions concerning the nature of the EAW, such as the principle of ‘mutual trust’ and of ‘mutual recognition’ of the decisions issued by judicial authorities and their role in the process of applying the EAW, or the relationship between the act of domestic laws holding the contents of the Framework Decision on the EAW and the constitutions.

Again, many practical problems, which are not all that visible at first, arise in connection with a request to an EU Member State, for the surrender of a prosecuted person under the EAW. This procedure is regulated within Chapter 65a of the Code of Criminal Procedure, and its main issues concentrate around the conditions for issuing the EAW, the ‘specialty’ principle and the way of proceeding when the place of residence of the prosecuted person is not known. Thus, they encourage the formulation of several reflections.

B. Pursuant to the provisions of Art. 607a CCP, and in the event of the suspicion that the prosecuted person resides in the territory of an EU Member State, the district court having territorial jurisdiction may – upon a request from the prosecutor – issue the European Arrest Warrant. The issuance of the EAW may occur when two conditions are met jointly:

a) the suspicion is raised that the person wanted for an offence committed in the territory of the Republic of Poland resides in an EU Member State, and

b) the prosecutors’ office submits a suitable request.

Concerning the first condition, one should note that the term ‘a person prosecuted for the offence’ should be broadly construed, including:

- the suspect;
- the accused;
- the person sentenced in order to enable him/her to serve the adjudicated sentence;
- the person to whom the detention order involving deprivation of liberty has been applied validly, and
- a minor who, after reaching the age of 15 years, having committed an act prohibited by criminal law in Art. 134, Art. 148 § 1, 2 or 3, Art. 156 § 1 or 3, Art. 163 § 1 or 3, Art. 166, Art. 173 § 1 or 3, Art. 197 § 3, Art. 252 § 1 or 2, and in Art. 280 of the Penal Code, may answer to the law as an adult, if the circumstances of the case and the level of development, features and personal conditions of the perpetrator so indicate, and in particular when the previously adopted educational or corrective measures have proven ineffective.
Another doubt is raised by the legislators’ use of the term ‘offence’. Since the European Arrest Warrant applies, *inter alia*, to an adjudicated detention order, an act whose perpetrator is a minor, who may be answerable to justice as an adult (under certain conditions), or to a fiscal offence (Art. 113 § 1 of the Fiscal Offences Code), the use of the concept of ‘an act prohibited by criminal law’ seems justified. Such a thesis is also supported by the expressions used in Art. 2 (1) FD in the English version (‘acts punishable by...’) and the German version (‘Handlungen (...) werden’). These two expressions evidently indicate that the European legislators wanted to refer to ‘an act prohibited by criminal law’ and not to use the term ‘offence’. It should be added that introducing a suitable amendment in the article commented upon, shall enable a broader application of the EAW without unnecessary doubts concerning its subjective and objective scope.

It should be noted that in accordance with the provision of Art. 607a CCP, the European Arrest Warrant may be used for a person who only committed an offence in the territory of the Republic of Poland and who is currently in the territory of a European Union Member State. This narrowing of the grounds for issuing the EAW prevents it from being issued for a person prosecuted for any offence committed in the territory of an EU Member State other than Poland. As a result, a perpetrator of an offence, e.g. directed against the internal or external security of the Republic of Poland, Polish offices or public officials, or essential economic interest of Poland, has been left outside the reach of the EAW.

It seems that such a restriction in applying the EAW is not necessary. Art. 4 (7) FD states, that the fact that an offence has been committed in the territory of the executing country is only a facultative ground for refusing to execute the EAW. Yet the circumstances indicating that the offence has been committed outside the territory of the EAW issuing or executing country will not constitute grounds for refusing to execute the EAW in pursuance of the Framework Decision, insofar as under the laws of the executing country the prosecution of the offence is possible (Art. 4 subpara 7b).

Moving on to the second condition, one should note that the necessity of the request from the prosecutor is neither clear nor comprehensible, even if the proceedings are already at the court stage. It seems utterly justified to conclude that a district court, having territorial jurisdiction, should be empowered to issue the European Arrest Warrant upon a request from the prosecutor, when preparatory proceedings are under way, while during the court or executory proceedings, the powers to issue the EAW should remain with the court.

Still on the theme of the procedure for issuing the EAW, one should relate to the provisions of Article 607b § 1 CCP, from which stem the formal negative premises for issuing the EAW. Pursuant to these provisions, the EAW may not be issued:

– in connection with criminal proceedings against the person prosecuted for the offence punishable by the deprivation of liberty for up to one year;

– in order to execute the penalty of deprivation of liberty for up to 4 months or another measure involving deprivation of liberty for up to 4 months.

The Polish statute on trial proceedings does not provide any clear explanation of the term ‘another measure involving deprivation of liberty’. The explanation cannot be derived either from the reasons of the statute introducing the regulation of the European Arrest Warrant. When consulting the English text of the Framework Decision on the EAW, for example, one can find the term
‘detention order’ – covering the detention orders, as well as the preventive measures involving deprivation of liberty applied in legal proceedings.

The substitutive penalty is another issue which has not yet been fully solved. Pursuant to Art. 2 (1) of the FD, it is known that the EAW can be issued or ‘may be issued for acts punishable by the law of the issuing Member State, by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months,’ such as contained in Art. 607b subpara 2 CCP. The linguistic interpretation of this provision indicates that this point concerns the so-called ‘original’ judgment of deprivation of liberty, rather than the situation in which the perpetrator has been ‘originally’ sentenced to a fine or restriction of liberty, and that only later would this penalty have been commuted to a so-called substitutive penalty of deprivation of liberty. Under the Polish law, in the event that the person sentenced to a fine fails to pay it within the prescribed deadline, the court adjudicates so-called substitutive penalty of deprivation of liberty up to a maximum of 12 months (Art. 46 CCP). On the other hand, when the convicted person evades the penalty of deprivation of liberty, the court can decide on a substitutive penalty of deprivation of liberty up to a maximum term of 9 months (Art. 65 CCP). It should be noted at this point, that the regulation in Art. 2 (1) of the Framework Decision is not an incidental one. It was right to exclude the possibility of issuing the EAW for perpetrators of offences carrying the penalties of deprivation of liberty exceeding four months, whereas Art. 2 (1) of the Framework Decision refers to the penalty of deprivation of liberty amounting to at least four months (German text reads: mindestens vier Monate beträgt). This minor discrepancy resulted in a slight reduction in the possibility of issuing the EAW in subjective terms. A question is thus raised, as to whether an EU Member State may give up its powers to issue EAWs with respect to offences threatened with specific penalties or to persons sentenced to specific penalties. May such a performance of a Member State prejudice its obligations towards other Member States, European legislators, or undermine the working model of legal cooperation? These questions remain unanswered.

Parenthetically, it may be added that pursuant to Art. 607b subpara 2 CCP, it is possible to issue the EAW concerning a person convicted to a term of deprivation of liberty exceeding four months, whereas Art. 2 (1) of the Framework Decision refers to the penalty of deprivation of liberty amounting to at least four months (German text reads: mindestens vier Monate beträgt). This minor discrepancy resulted in a slight reduction in the possibility of issuing the EAW in subjective terms. A question is thus raised, as to whether an EU Member State may give up its powers to issue EAWs with respect to offences threatened with specific penalties or to persons sentenced to specific penalties. May such a performance of a Member State prejudice its obligations towards other Member States, European legislators, or undermine the working model of legal cooperation? These questions remain unanswered.

C. Another issue that Polish judges and prosecutors have to tackle is the sending of the EAW to a relevant judicial authority. When the place of stay of the prosecuted person is known, the judicial authority (under the Polish law it is the circuit court which issued the warrant) shall send it directly to the competent judicial authority of the executing State (Art. 607d § 1 CCP). The direct transmission of the warrant is coupled with the abolition of an ordinary extradition procedure between Member States, with respect to persons suspected of offences, thus facilitating the rapid surrender of those who are validly and finally sentenced.

Under the present state of the law, the Polish Code of Criminal Procedure is silent on the issue of sending the EAW when the place of stay of the prosecuted person is not known. Due to the delay in implementing the Schengen Information System (SIS) by Poland, it is not possible...
to issue an alert for the requested person in the Schengen Information System (in accordance to the provision of Art. 9 (3) of the Framework Decision). An alert in the Schengen Information System shall be equivalent to a European Arrest Warrant. The fact that the Polish legislators abandoned the implementation of Art. 10 of the Framework Decision resulted in major problems in the method of proceeding, when the place of stay was not known. In such an event, the judicial authorities should make the requisite enquiries through the contact points of the European Judicial Network or seek assistance from Interpol. The lack of unambiguous indications in issuing the EAW, when the place of stay of the requested person was not known, has brought about an unwelcome situation. By 30th June 2006, the Polish courts have issued 2756 EAWs, mostly for persons whose place of residence is unknown. This situation results primarily from treating the EAW as an instrument of search (de facto substituting it for a wanted notice), instead of using it as an instrument of international cooperation in criminal matters within the EU, which should be sent directly to the empowered judicial authority of an EU Member State. Certainly, in specific circumstances, issuing the EAW for a person whose place of stay is not known may or should even be effected. But this may not be so each time, or almost each time when the EAW is issued, because such actions are not compatible with the essence of the EAW, as expressed in Art. 1 of the Framework Decision.

In concluding this part of the discussion, one should indicate that the proposed amendments of the CCP with regard to the EAW-related provisions, aim to remedy the present state of the law. In the situation when it is suspected that the prosecuted person may stay within the territory of an EU Member State, and his/her place of stay is not known, the prosecutor or, during the preparatory proceeding (after the earlier issuance of the EAW by a district court), the district court which issued the EAW during court or executory proceedings, shall send a copy of the EAW to the central police unit cooperating with Interpol along with a request to commence the search. Only after the place of stay of the prosecuted person has been established, will the prosecutor in the preparatory proceedings, or the district court which issued the EAW during court or executory proceedings, be obliged to surrender such a person directly to a judicial authority of the state of EAW’s execution.

Although the intention of the amendment is well-aimed, the proposed solutions are only of a temporary nature. The full power of requesting an EU Member State to surrender a person under the EAW will only be in place after the SIS II system is implemented, e.g. in 2009.

D. The next issue that I would like to discuss is the set of issues associated with the principle of ‘specialty’ (Art. 27 of the Framework Decision and Art. 607e § 1 of the CCP). As the ‘dual criminality’ principle, the principle of ‘specialty’ is one of those rules of international criminal law, which ‘block’ the cooperation in criminal matters within the European Union. For his reason, all the exceptions from the principle of ‘specialty’ which appeared in the Framework Decision should be welcome. In my opinion, all the arguments which refer to the ‘interest of the issuing state’ or to the ‘sovereignty’ in order to defend the principle of ‘specialty’ are no longer sufficient. They contradict the fundamental principle of cooperation in criminal matters, e.g. the principle of ‘mutual recognition’. For this reason, the gradual deviation from the principle of ‘specialty’ in the third pillar is greatly recommended.

Art. 607e (1) CCP stipulates that a person surrendered as a result of an execution of a warrant shall neither be prosecuted for offences other than those that give rise to the surrender, nor
subject to the enforcement of penalties of deprivation of liberty or other measures involving deprivation of liberty, imposed on him/her for such offences. It means that there are no barriers to the execution of penalties and penal measures not involving isolation, e.g. a fine or restriction of liberty. Another provision to be accepted is that of Art. 27 (1) of the Framework Decision (FD), which refers to the possibility for a Member State to notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention, with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that referred to in the EAW, for which he or she was surrendered. Such notification is of an abstract rather than specific nature. In dispelling doubts in this way, although not being a *novum*, it refers to Art. 11 of the Convention of 27th September 1996 relating to extradition between the Member States of the European Union, and represents a significant theoretical restriction of the ‘specialty’ principle, because practically only two states (Austria and Estonia) submitted suitable notifications.

Also noteworthy, are other exceptions from the ‘specialty’ principle, covered in Art. 27 (3) FD, even though some of them were only implemented partly, while others raised significant doubts as to their *ratio legis*. For example, pursuant to Art. 27 (3) (d) FD, the ‘specialty’ principle will not apply when “the criminal proceedings do not give rise to the application of a measure restricting personal liberty”, whereas in the Polish Code of Criminal Procedure a provision emerged referring only to the measures involving deprivation of liberty (Art. 607e § 3 (4) CCP). This leads to the conclusion that the exception to the principle of ‘specialty’ pertains perhaps only to the preliminary custody, whereas it should also include any placement under police supervision and a ban on leaving the country.

It should be noted that this exception opens up the possibility of conducting the proceedings on the case of an offence, which is not subject to surrender under the EAW, although only on the condition that the accused will participate in the proceedings, while not detained.

All this is harmonious and theoretically consistent when the accused abstains from any behaviour which might lead to the application of preliminary custody. The problems may arise when the situation develops otherwise and the court applies this preventive measure. The only available way out of such a situation, is to discontinue proceedings concerning the act not named in the EAW’s surrender request. Taking such a decision in the court proceedings, would not mean that possible proceedings concerning this act, e.g. in the state executing the EAW, would not violate the *ne bis in idem* principle.

E. The general premise of the EU legislation on criminal matters is the mutual recognition *ipso facto* of judicial decisions. One of the elements of this principle would be ‘a transboundary arrest’, characterised by a full automatism of its execution. We know, however, that the Framework Decision alone has not met these ideal premises. It allows the courts of the executing country to base its decisions not only on obligatory premises, but also on facultative ones. Therefore, the Framework Decision of the EAW leaves a certain space for discretionary actions, which is sometimes criticised. Nonetheless, it must be emphasised that the EAW represents an evident step towards implementing the principle of ‘mutual recognition’, without which legal cooperation in criminal matters within the territories of UE Member States will not be effectively executed.
5.4. Discussion

(reporting by Michał Rusinek)

Opening the discussion panel, Prof. Waltoś, who chaired the panel, stated that the linking element in the panellists’ contributions related to the difficulties in adapting the EAW Framework Decision to the circumstances prevailing in the different States: in the case of Mickevicius, to the circumstances of a small state, for Prof. Lahti, to the Scandinavian tradition of international cooperation in criminal cases, for Dr Kloučková, to the national rules for criminal prosecution, and in the case of Dr Sakowicz, to the challenges involved in contemporary crimes.

The discussion then returned to the subject of ‘dual criminality’. Dr Grzelak, who started the discussion, noted that a serious error of the Polish legislator was the introduction of this requirement in the Constitution as a condition for the surrender of a Polish national. This concept – in the opinion of the speaker – instead of solving, multiplies the difficulties in European criminal cooperation. Dr Grzelak noted also that some Member States apply in practice the requirement of ‘double criminality’ as a condition for surrendering their nationals, even though the legal basis for such practice is not always clear; she referred to the Netherlands as an example. In response, Prof. van der Wilt confirmed that in fact the Netherlands require double criminality when surrendering its nationals, but only in more serious cases – which are subject to the penalty of deprivation of freedom for longer than three years.

Another speaker taking part in the discussion, Prof. W. Wróbel, compared the attempts to establish European cooperation in criminal cases to building a house from the roof. In his view, all difficulties encountered by this cooperation are due to the lack of trust between Member States. This lack of trust is a consequence of the procedures within which Community law is drafted – national parliaments do not trust Community law created by officials following the administrative procedures. The speaker expressed his belief that as long as the European Constitution and democratic rules for the creation of Community law are not adopted, national parliaments and constitutional tribunals will not have confidence in EU regulations.

In response, Dr Sakowicz noted that even though the adoption of the European Constitution is certainly an urgent need, it is necessary, first of all, to remodel the concept of sovereignty, which is still perceived in line with 19th century criteria. It is these particular difficulties and not the lack of the European Constitution which, in the speaker’s opinion block efficient cooperation under the third pillar. In his view, it is necessary in particular to separate from the concept of sovereignty the so-called right to punish, which to date has been seen as the main attribute of the former.

Another participant in the discussion, Dr Górski, noted that the condition of ‘double criminality’ is a standard applicable in international criminal law and even after exclusion by Community legislation, this standard would still function, in the opinion of some experts, in international transactions. He then asked Dr Kloučkova whether in the Czech Republic the principle of ‘double criminality’ functions as a guarantee or whether its nature is only functional and procedural.

The presenter from the Czech Republic stated that the principle of ‘dual criminality’ results from the principle nulla poena sine lege – because it is not possible to enforce a penalty in the state where the EAW is enforced, if the act for which the EAW has been issued does not constitute an offence in that country. In the assessment presented by Dr Kloučkova, applying this
kind of requirement does not stem from the distrust in other Member States in the area of observing human rights, for instance. The point is rather the observance of the rule of law in the state where the punishment is to be enforced – this may not be the case when the deed is not a crime under national law.

The last of the discussion participants, Prof. Lahti, noted that the mutual trust between Member States can be enhanced, above all, by forming as strong guarantees as possible for the observance of human rights. If sufficiently strong guarantees are created in that regard, it will be easier for Member States to abandon the requirement of ‘double criminality’ and other traditional barriers serving the purpose of protecting the interests of the different states.

In the conclusion to the discussion, the chairman of the panel, Prof. Waltoś agreed with the idea expressed by Prof. Lahti and noted that the principal barrier to international cooperation in criminal cases is the support for the principle of unlimited sovereignty of the state, serving the purpose of protecting its own egoistic interests. It is necessary to overcome the barriers of such thinking since it no longer matches our situation in the integrating Europe.
The Execution of the EAW. Problems of practice and legislation

(Chair: Otto Lagodny)

6.1. The Execution of the EAW. The Netherlands Perspective

(Harmen van der Wilt)

6.1.1. Introduction

Before elaborating on a number of interesting topics in Dutch legislation and case law, I will shortly address the procedural aspects of the execution of EAWs in the Netherlands.

The execution of European Arrest Warrants is assigned to the District Court of Amsterdam, which serves as ‘unus judex’. With a view to speeding up proceedings, both the two-pronged decision making process, involving the Ministry of Justice, and appellate proceedings have been abolished. This development has made the District Court extremely conscious of its solemn responsibility.

I will highlight three aspects in current case law:

1) Position of nationals and those aliens who are to be considered on the same par for the purpose of surrender.

Holland allows the extradition/surrender of its nationals, on the condition that they are allowed to return, in order to serve a foreign sentence in their home country (Art. 6, s. 1 Act of Surrender). In that case, the rule of ‘double criminality’ still applies (because of the nullum crimen principle) and is re-introduced by the back door. Art. 6, s. 5 equalizes aliens who possess a residence permit with Dutch nationals, provided that two additional conditions are met:
- He/she can be prosecuted for the facts underlying the EAW in the Netherlands. In practice, this condition entails a considerable restriction,
- He/she will prospectively not forfeit his/her permit of residence, because of the prior conviction.

Now, the interesting question arises whether this regulation would not open the abyss of EU-citizens’ invoking the non-discrimination rule ex Art. 12 of the Treaty on the European Community. The District Court has plugged the loop hole by further substantiating the extent of integration in Dutch society. Only those EU-citizens who are well integrated in Dutch society – a factual assessment to be judged on the basis of a number of indicia – may harbour reasonable expectations that they will not lose their permit of residence because of and after having served a prior sentence.

2) Territoriality exception (Art. 4(7) FD & Art. 13 Dutch Act of Surrender).

The territoriality exception has been introduced mainly to fence off external interference in the domestic legal order and serves as a compensation for the (partial) abolition of the rule of
'double criminality'. The exception gives rise to awkward problems, whenever a crime has several loci delicti.

Under Dutch law, the optional ground for refusal has been converted into a mandatory exception, even when the crime has only partially been committed on the Dutch territory. However, the Prosecutor is authorized to demand that the Court shall refrain from refusing the execution of the EAW, unless the Prosecutor – in the opinion of the Court – has no reasonable ground to make such a demand. The concept of ‘proper administration of justice’ serves as a guideline to solve these issues. As we all know, however, this concept is rather elusive and harbours potentially diverging interests.

The District Court has used the territoriality exception in order to advance and protect the interests of the requested person. If, for instance, he or she has a family to attend to in the Netherlands, his/her surrender would be particularly pernicious.

This approach has been criticized by some of my colleagues as being contrary to the principle of mutual recognition. I do not agree with their point of view. After all, the concept of ‘proper administration’ encompasses the interests of the requested person as well and its application may tip the balance in his/her favour.

3) Human Rights.

The relationship between surrender and human rights is a well known issue in extradition law. Should obligations stemming from a treaty on human rights prevail over obligations which ensue from an extradition treaty? On an abstract level, the quandary has been solved in the FD itself, but this obviously does not terminate all problems. In Art. 11 of the Dutch Act of Surrender, the priority of human rights is confirmed (one may add: redundantly).

How should the Court decide in a concrete case? The issue has come to the fore, especially in case of undue delay. The District Court distinguishes between irreversible (or irreparable) and non-irreversible violations. Furthermore, it is relevant whether the requested person has an effective remedy in the sense of Art. 13 of the European Convention on Human Rights.

Scrutinizing both conditions in conjunction, the District Court has on a number of occasions refused the execution of an EAW in case of ‘undue delay’. After all, in these cases the violation cannot be repaired. Any protraction of pre-trial detention in the issuing state would aggravate the situation and would render the remedy ineffective.

6.2. The enforcement of the European Arrest Warrant in Spain: problems of practice and legislation

(Mar Jimeno-Bulnes)

6.2.1. Abstract

The Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (EAW) are to be implemented throughout the European Union. The first country to enact legislation – Law 3/2003, 14th of March, on the European
Chapter I. The Conference

Arrest Warrant and Surrender Procedure (LOEDE) – was Spain. This paper constitutes study of the essential aspects in the implementation processes in Spain, such as the decisions taken by the competent judicial authorities, the specific procedures required to issue and execute an EAW and their development in domestic law. Finally, some provisional considerations are advanced on the EAW and its present and future role in the evolving system of European justice.

6.2.2 Introduction

If ever there were a ‘star’ rule on judicial cooperation in criminal matters, it would be is the Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (EAW). Its popularity has increased following the deplorable attacks in the United States of America on 11th September 2001, because it is seen as an effective mechanism in the fight against international terrorism. The Council Framework Decision was presented exactly 8 days after the 9/11 attacks and agreement was reached by Member States in their political negotiations after a mere three months.

129 OJ 18th June 2002 L 190 pp. 1–20 (EAW).


131 Although the EAW has been ‘thrown into the mixture of the EU road-map on terrorism’, its relevance is much wider as pointed out by S. Alegre in, The myth and the reality of a modern European judicial space, 152 New Law Journal 2002 28th June pp. 986–989, p. 986.


The EAW is now seen as a juridical and procedural instrument of ‘surrender between judicial authorities’\(^{134}\) in a similar way to the measure contained in the Rome Statute that applies to the International Criminal Court\(^{135}\). It also constitutes ‘the first concrete measure’\(^{136}\) adopted on the basis of mutual recognition of judicial decisions, a principle established in October 1999 by the Tampere Council as ‘the cornerstone of judicial co-operation in the Union’\(^{137}\). The same principle

\(^{134}\) The ‘judicialisation’ of the surrender process is, in fact, warmly welcomed; see: B. Gilmore, loc.cit., p. 145.

\(^{135}\) Arts. 58 and 89. See: W.A. Schabas, An Introduction to the International Criminal Court, Cambridge 2004, pp. 132–136, explaining at p. 134 that this terminology ‘is to respond to objections from States that have legislation, and sometimes even constitutional provisions, prohibiting the extradition of their own nationals; in Spain, I. Lirola Delgado and M.M. Martín Martínez, La Corte Penal internacional Barcelona 2001, pp. 270–274 and, specifically, La cooperación penal internacional en la detención y entrega de personas: el Estatuto de Roma y la orden europea, 20 Anuario de Derecho Internacional 2004, pp. 173–204. Also the relation between EAW in EU and ICC is described by L. Vierucci in The European Arrest Warrant: an additional tool for prosecuting ICC crimes, 2 Journal of International Criminal Justice 2004, pp. 275–285, in the context of the EAW as an instrument used to prosecute crimes under ICC jurisdiction as set out in Art. 2.2,–30 EAW.


\(^{137}\) According to this principle, ‘judicial decisions in one Member State must be recognised and enforced by judicial authorities in other Member States on the understanding that, while legal systems may differ, the results reached by all EU judicial authorities should be accepted as equivalent’ (S. Alegre and M. Leaf, European Law Journal, op.cit., pp. 200–201); brief comment on this made by the author (M. Jimeno-Bulnes) in European Judicial Cooperation in Criminal Matters, 9 European Law Journal No. 3, pp. 614–630, p. 620. On the Tampere Summit see H. Labayle, Le bilan du mandat de Tampere et l’espace de liberté, sécurité et justice de l’Union européenne, Cahiers de droit européen 2004 No. 5, pp. 591–661. Essential to the concepto of ‘mutual recognition’ itself is to be accompanied by the concept of ‘mutual trust’; see: A. Górski, Common values in criminal law versus constitutional obstacles to their accomplishment. De-liberations on methods and aims of europeanisation of criminal law, European Centrum Natolin, Warsaw 2006, English version in pp. 34–63, p. 54.

is also recognized by the European Constitution138 and was recently reinforced by the European Council in the Hague Programme (2005)139.

It is foreseen in the explanatory memorandum that the EAW will replace the current system of extradition between Member States – the Convention140 – which has neither been widely ratified nor particularly successful. The same explanatory memorandum of the ‘pan-European Arrest Warrant’141 or ‘Euro-warrant’142 qualifies the extradition mechanism as ‘obsolete’143, a view confirmed by several

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139 Strengthening freedom, security and justice in the European Union, OJ 3rd March 2005, C 53 pp. 1–14 at pp. 11–12, where it is stated that ‘further efforts should be made to facilitate access to justice and judicial cooperation as well as the full employment of mutual recognition’; we are also reminded that ‘the comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters … should be completed and further attention should be given to additional proposals in this context.’ See: ‘Programme of measures to implement the principle of mutual recognition of decisions in criminal matters,’ OJ 15th January 2001, C 12, pp. 10–22, including measures such as ne bis in idem, recognition of final sentences, obtaining evidence.


142 Expression used on specialized websites in this area; see for example www.eurowarrant.net. (This and all other websites quoted in this paper last accessed August 2006).


Although the reference to extradition remains, e.g. EA in the UK and Malta under L.N. 320 of 2004; also the Law on Extradition on the basis of an offence between Finland and other Member States of the European Union, issued in Helsinki on 30th December 2003 No. 424. EAW implementation in Denmark, Law No. 433 of 10th June 2003 amending the Law on the extradition of offenders and the Law on the extradition of offenders to Finland, Iceland, Norway and Sweden; in relation to these and other national implementations, see: J. Vestergaard, ‘The Danish Extradition Act’ in S. Alegre and M. Leaf, op.cit., pp. 91–96.
Member States – Italy and Spain, and Spain and the UK, amongst others – which prior to its introduction had already embarked on bilateral discussions to prepare treaties on simple surrender procedures of arrested persons between their respective judicial authorities.

The Council Framework Decision is intended as a juridical instrument in the field of judicial cooperation on criminal matters, and similar to the Directives, must be implemented in the national law of each Member State, in this case prior to 31st December 2003. Spain promptly


In literature from the UK on judicial cooperation in criminal matters during recent years see, as general works, S. Peers EU, Justice and Home Affairs, Harlow 2000, and more recently, N. Walker, ed Europe’s Area of Freedom, Security and Justice, Oxford 2004. Also of interest, the consultation document provided by the Home Office in March 2001, The law on extradition: a review, (www.homeoffice.gov.uk/crimpol/oic/extradition/bill/faq2.htm) announcing a ‘fast-track extradition’ scheme for EU as well as the research updated on 13th March 2002 by the Scotland Parliament Information Centre: see A.J. McLeod and S. Dewar, EU justice and home affairs policy, paper 02/30, Edinburgh 2002.

Although, unlike Directives, Framework Decisions are not imposed according to Art. 34(2)(b). Nevertheless, the relevant judgement in Pupino by the European Court of Justice (ECJ) on 16th June 2005, C-105/03 should not be forgotten, by which ‘the binding character of framework decisions, formulated in terms identical to those of the third paragraph of Art. 249 EC, places on national authorities, and particularly national courts, an obligation to interpret national law in conformity’ (FJ 34). See comments by A. Górski, op.cit., pp. 44–48 and, specifically, M. Fletcher on, Extending ‘indirect effect’ to the third pillar: the significance of Pupino?, 30 European Law Review, 2005 No. 6, pp. 862–877.

Also notable, the unusually short time limit in which the EAW Framework Decision was implemented; within six months instead of a one or two year time span. For delays on implementation and, in general, a comparative view between Member States see both Commission Reports presented in Brussels on 23rd February 2005, COM 2005 63 final, and 24th January 2006, COM 2006 8 final, after the Italian EAW implementation (Law No. 69 on 22nd April 2005 published in Gazzetta Ufficiale No. 98 on 29th April 2005, pp. 6–28). See also a general comparative view and comments on such Commission Reports in S. Combeaud, ‘Premier bilan du mandat d’arrêt européen’, Revue du Marché commun et de l’Union européenne, 2006 No. 495, pp. 114–124.

Note that German (EUHbG- Europäisches Haftbefehlgesetz of 2nd July 2004) and Polish national legislation on EAW (Art. 607w Law on Criminal Procedure of 18th of March 2004) have recently been declared unconstitutional by decisions of 18th July 2005 and 27th April 2005 respectively. Common ground in both cases is the surrender of citizens that is con-
adapted the new rule in the form of Law 3/2003 14th of March, on the European Arrest Warrant and Surrender (LOEDE); the EAW Framework Decision was expected to be implemented by further six Member States over the first quarter of 2003.

institutionally forbidden but the rulings differ in effects: whereas EAW cannot be used in the future and the general judicial cooperation proceeding (IRG – Gesetz über die Internationale Rechtshelfe in Strafsachen of 23rd December 1982) must be used until such time as a new implementation law comes into effect in Germany, a constitutional amendment (Art. 55) is possible in Poland before the constitutional ruling comes in force and EAW implementation will remain in force there for 18 months. The Cypriot Supreme Court decision on 7th November 2005 also brings with it similar consequences to the Polish decision, insofar as it requires a further constitutional amendment; last constitutional decisión at the moment comes from the Czech Constitutional Court on 3rd May 2006 (No. P.LUS 66/04).


At last a new German text is enacted on 20th July 2006, in force since 2nd August, available on http://www.juris.de; according to it, the surrender of German citizens only will take place under special conditions. But, which is even more arguable, the principle of double criminality will be generally applied.


This study sets out the special regulation of the ‘Euro-warrant’, making particular reference to procedural aspects contained in the Spanish legislation. It makes specific reference to the competent judicial authorities that are authorised to issue and execute EAWs, to the development of judicial proceedings concerning the issue and execution of this instrument and, in addition, to the growing number of bibliographical sources and judicial experience on the practical application of these new rules.

6.2.3. Determination of the Competent Judicial Authorities

Quite logically, the European rule leaves the question of the competent judicial authorities responsible for issuing and executing EAWs at the discretion of each Member State; the only prescription contained in EAW Art. 6 is that they be ‘judicial authorities’ under national legislation. The Framework Decision does not, however, seek to define a judicial authority, leaving that matter to Member States whose laws do not always respect the spirit of the European rule (e.g. Denmark). In addition, Art. 7 refers to the ‘interposition’ of a central judicial authority as an option for Member States – ‘when its legal system so provides’ – to assist the competent judicial authorities.

Turning now to Spain, the execution of a ‘Euro-warrant’ issued by another Member State is solely attributed to one judge and one tribunal, despite there being various competent judges and tribunals that are able to issue one. Art. 2 (2) LOEDE states that the Spanish judicial authorities that are authorised to execute EAWs are either the Central Investigative Judges sitting at the Central Criminal Court – Juzgado Central de Instrucción – (JCI), or the Criminal Division of the National Court.
– Sala de lo Penal de la Audiencia Nacional – (AN) when the arrested person does not consent to the surrender\textsuperscript{154}. Some sort of ‘centralization’ of the competent authorities authorised to execute the European Arrest Warrants does therefore exist – which is criticised, at least in Spain\textsuperscript{155} – with some justification, because the latter tribunals are the only competent ones for extradition procedures in Spain\textsuperscript{156}. This country is not, however, the only one among the Member States to have worked out an equation between the EAW and extradition proceeding\textsuperscript{157}.

Firstly, with regard to the judicial authorities empowered to issue an EAW, the Spanish law does not state which judge or court may issue an EAW, except rather vaguely in a general clause under Art. 2.1\textsuperscript{158}. However, the Organic Law of the Judiciary (LOPJ), and the Spanish law on criminal procedure (LECrim)\textsuperscript{159} both clearly state that the Investigative Judge is authorised to adopt precau-

\textsuperscript{154} In the first instance, the competent authority in the execution of an EAW is the Central Investigative Judge. At present, there are 6 Central Investigative Judges (JCI) and the Audiencia Nacional (AN) or National Court, all with their respective seats in Madrid. The JCI are competent to conduct the preliminary criminal proceedings and, the AN, the trial and judgment of particular offences and felonies committed in national territory e.g. counterfeiting currency, drug trafficking, terrorist acts… most of which are included in the scope of the ‘Euro-warrant’. Also with the same seat and jurisdiction are The Central Criminal Judges, the Central Administrative Judges, the Central Minor Judge and, recently, the Central Prison Vigilance Judge.

Address, telephone and fax numbers of respective judicial offices are indicated in document number 16232/03, 17\textsuperscript{th} December 2003, COPEN 129, EJN 16, EUROJUST 19 as well as in the Note from the Spanish delegation to the Working Party on Judicial Cooperation in Criminal Matters (experts on the EAW) on the implementation of the EAW Framework decision, document number 16303/03, COPEN 133, EJN 18, EUROJUST 21, p. 11; the same information is also available in Spain in the practical guide or ‘protocol’ provided by the Ministry of Justic and accessible in electronic format at http://www.mju.es/euroorden.

\textsuperscript{155} E.g. J. de Miguel Zaragoza, Algunas consideraciones sobre la Decisión Marco relativa a la orden de detención europea y a los procedimientos de entrega en la perspectiva de extradición, Actualidad Penal, 2003 No. 4, pp. 139–158, p. 144, which considers this decision to attribute competence for the execution of the ‘Euro-warrant’ to both tribunals as ‘incoherent’ with the general system provided by the Council Framework Decision. A more favourable opinion is expressed by C. Arangüena Fanego, La orden europea de detención y entrega. Análisis de las Leyes 2 y 3 de 14 de marzo de 2003, de transposición al ordenamiento jurídico español de la Decisión Marco sobre la ‘euroorden’, Revista de Derecho Penal, 2003, No. 10, pp. 11–95, p. 59, basing its arguments on juridical grounds – competence in extradition matters, brief time limits in force – as well as on political grounds of immediate relevance because of the recent enforcement in Spain of the law ‘fast-track’ trials (Law 38/2002, 24\textsuperscript{th} October 2002), a partial amendment of the LECr that introduces new abbreviated proceeding; see: M. Jimeno-Bulnes, 10 European Law Journal, loc.cit., p. 244).

Other authors have suggested that competence be attributed to the judge with geographical jurisdiction over the place of residence of the arrested person or that a specialized Investigative Judge be assigned to every autonomous region (Comunidad Autónoma) in Spain. See: respectively, V. Moreno Catena and C. Conde-Pumpido Tourón, Mesa Redonda: la Orden de Detención Europea, International Conference: ‘El Espacio Judicial Europeo, Toledo 29\textsuperscript{nd}–31\textsuperscript{st} October 2003, available on www.espaciojudicialeuropeo.com/eaw; again V. Moreno Catena, L’accueil du mandat d’arrêt européen en Espagne, in E. Cartier, loc.cit., at p. 154 in defence of such ‘arrest forum’.

\textsuperscript{156} See: ‘appropriate judge’ for extradition procedure to category 2 territories in p.139 EA; also Arts. 8.2 and 12(2) LPE.

\textsuperscript{157} For instance, Court of Appeal (Corte di appello) in Italy according to Art. 701 Codice di Procedura Penale, also competent for extradition proceedings and Art. 6(5) Legge No. 69; see: E.B. Liberati and I.J. Patrone, Il mandato di arresto europeo, Questione Giustizia, 2002 No. 1, pp. 70–89, p. 85 as well as F. Impalır, Le mandat d’arrêt européen et la li italienne d’implémentation: un cas exemplaire de conflit de systèmes, www.eurowarrant.net, pp. 41–42.

\textsuperscript{158} Art 2.1 LOEDE: In Spain, the issuing judicial authorities’ competent for the purpose of issuing the European warrant are the judge or court hearing the case in which this type of warrant is in order’ (official translation).

\textsuperscript{159} Art. 87(1)(a) Ley Orgánica del Poder Judicial (LOPJ) or the Organic Law on the Judiciary designates the Investigative Judges as having competence to conduct the preliminary criminal proceedings in causes in which trial and judgment are a matter for the Criminal Judges (Juzgados de lo Penal) and Provincial Courts (Audiencias Provinciales), and the maximum available punishments for the offence in question is up to five years of prison, or more than five years, respectively, Arts. 486–544 bis Ley de Enjuiciamiento Criminal, (LECrim) or Spanish law on criminal procedure contemplate the personal precautionary measures that can be adopted within such preliminary criminal proceedings by the latter courts.
tionary measures of a personal and patrimonial nature in order to proceed with the investigation of a criminal cause or matter. One of these personal measures is precisely preventive custody, referred to as ‘detención’\textsuperscript{160} in Spanish legal procedures, which may now be ordered from outside the national territory by a judicial authority from another European Member State.

Secondly, only the aforementioned judges and courts are entitled to execute EAWs by virtue of Art. 2(2) LOEDE. This may be logical in passive extradition procedures as set out in an earlier regulation, Law 4/1985, 21\textsuperscript{st} March, relating to Passive Extradition (Ley de Extradicción Pasiva) (LEP). It is not so logical, however, in the case of the EAW, as already pointed out. The fact is that in Spain an EAW is not considered in quite the same light as extradition. As extradition was specifically mentioned in Art. 65 (4) and 88 of the LOPJ, those two latter articles have since been amended by Organic Law 2/2003, 14\textsuperscript{th} March, which was introduced to complement the LOEDE, and which authorises the tribunals in question to execute EAWs issued by other Member States\textsuperscript{161}.

It should be said that, in Spain, the Central Judge for Minors could also be included among the executing judicial authorities and, furthermore, that these Judges for Minors should also be considered among the issuing judicial authorities\textsuperscript{162}. One argument in support of this proposition is that, for example, in the UK, the Extradition Act refers to such judges in general terms in a reference to the amendment of the Children and Young Persons Act 1969\textsuperscript{163}. This is also the case in other Member States – in particular, the Youth Law Courts\textsuperscript{164} in Germany – where legislation refers not only to educational and corrective measures, but also to general punishments imposed on minors. It is not, however, the case in Spain, where Art. 7 of Organic Law 5/2000 12\textsuperscript{th} of January, regulating the criminal liability of minors\textsuperscript{165}, provides only for special types of measures, none of which could be qualified under the Spanish law on the ‘Euro-warrant’ as punishments or security measures, although some (e.g. detention in a Centre for Minors) would come within the meaning of ‘custodial sentences’ or ‘detention orders’ used in the English version of Art. 1(1) EAW\textsuperscript{166}.

One could also include judges and courts belonging to the special military jurisdiction as issuing judicial authorities in Spain, and the Central Military Court as an executing judicial authority,
although there is no explicit reference to this either in the Spanish law or in the EAW Framework Decision. But, although military courts have authority to judge offences listed in the Military Code of Justice, no attempt has been made to amend the Organic Law relating to the military judiciary, so as to empower it in the same way as has been done for the civil courts. However, as has been argued\(^{167}\), in view of the very different and varied offences in the military codes of Member States, the possibility of an EAW ever being issued by a military court is a remote one that would have to respect the principle of double jeopardy.

Thirdly and finally, Art. 2(3) Law 3/2003 designates the Justice Ministry in Spain as the central authority in the same way as is contemplated in many other national legislations implementing the EAW\(^{168}\). It was suggested in Spain that the General Council of the Judicial Branch (Consejo General Poder Judicial, abbreviated as CGPJ) might assume these responsibilities with a similar level of authority, which would be upheld by Art. 7(1) EAW that contemplates the possibility of designating more than one central authority. A recent agreement adopted by the latter institution has created the Spanish Judicial Network of International Judicial Co-operation (Red Judicial Española de Cooperación Jurídica Internacional, known as REJUE) composed of judges or magistrates drawn from different jurisdictional areas in order, among its other activities, to issue the ‘Euro-warrants’\(^{169}\). In the same Preliminary Declaration to Statutory Agreement 5/2003 it is acknowledged that the purpose of this new organisation is ‘the suppression of the participation of the central authority’ – e.g. the Ministry of Justice – as the number of judicial interventions, as opposed to governmental procedures, increase in the field of European judicial cooperation. The LOEDE is a clear example of the latter, if one is to compare it to classical extradition proceedings. Any provision that favours political authority at the expense of judicial authority goes against the spirit of the EAW Framework Decision and, all things considered, does not take into account the possible delays caused by its intervention\(^{170}\).

**6.2.4. Issuing an European Arrest Warrant**

Chapter 2 of the LOEDE is dedicated to the issuing of a European Arrest Warrant by the Spanish judicial authorities\(^{171}\). In this regard, it is important to establish the interface between the ‘Euro-war-
rant’ and the conditions for imprisonment laid down by Criminal law\textsuperscript{172} with regard to the different offences and specifically, those established by Art. 2 EAW. Obviously, Art. 5 LOEDE reproduces the same tripartite division used by the European rule, making an important difference between ‘accusation’ and ‘conviction’ cases, according to the scope of each specific EAW. The rule for the clarification of the European statement is odd\textsuperscript{173}, and the purpose of the Spanish law, which is to improve the efficiency of the Framework Decision, is not always fulfilled\textsuperscript{174}. The following list describes the circumstances in which the Spanish judicial authorities may issue an EAW:

a) To proceed with the investigation and judgement of offences punishable by imprisonment for at least 12 months, e.g., accusation cases; in Spain, according to the Criminal Code amended two years ago\textsuperscript{175}, the imprisonment sentence for this offence is referred to as ‘a minor imprisonment sentence’ (from 3 months to 5 years) or ‘a major imprisonment sentence’ (longer than 5 years).

b) To serve a sentence of no less than 4 months imprisonment\textsuperscript{176}, e.g. conviction cases; as already stated, the new Spanish criminal rule provides an even shorter term (3 months imprisonment) as opposed to the current minimum of 6 months, and abolishes ‘weekend imprisonment’, for which the minimum term is 36 hours (equivalent to 2 days of imprisonment) involving a maximum of 24 weekends \textsuperscript{177}.

c) To take action against the offences included in the initial \textit{numerus clausus} list presented in Art. 2(2) EAW\textsuperscript{178}, provided that the maximum sentence is a prison term of at least 3 years, with

\textsuperscript{172} No reference is made to the determination of the offence, neither to the degree of participation (author, accomplice or accessory), nor to its execution (attempted, frustrated or consummated); in Spain, the same policy is followed for classical extradition proceedings according to Preliminary Recitals LEP, point 9.

\textsuperscript{173} Whereas Art. 2(1) states, for example, that the EAW ‘may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a \textit{maximum period of at least} 12 months,’ a sentence which is literally translated in the Spanish rule, the English implementation indicates that the conduct must be punishable under the relevant UK law by imprisonment or another form of detention for a term of 12 months or a greater punishment in subs (1)(b). With regard to the UK, it seems ‘odd’ to maintain different thresholds for accusation and conviction cases; see comments to Commission Report, loc.cit., p. 102.

\textsuperscript{174} It was also pointed in the CGPJ Report that led to certain improvements in the Preliminary Draft.

\textsuperscript{175} Arts. 33(2)(a) and 3(a) Organic Law 10/1995, 23\textsuperscript{rd} November, amended by Organic Law 15/2003, 25\textsuperscript{th} November, in force since 1\textsuperscript{st} October 2004.

\textsuperscript{176} Some national implementations require not only that the sentence be a minimum term of 4 months, but that the related offence is also punishable by at least 12 months; that is the case of Austria and the Netherlands, whose implementation is considered to be contrary to the Framework Decision according the Commission. See both Commission Staff Working Documents, loc.cit., p. 6.

\textsuperscript{177} Art. 37(1) Criminal Code. This kind of punishment will be substituted by ‘home confinement’.

\textsuperscript{178} E.g. participation in criminal organisations, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in drugs and weapons, … counterfeiting currency, computer-related crime, environmental crime and so on. According to Art. 2(3), the addition of other offences to the list is provided for at any time by the Council ‘acting unanimously after consultation with the European Parliament under the conditions laid down in Art. 39(1) TEU’ for which reason the insertion of ‘initial’ in reference to this \textit{numerus clausus} list. A similar provision to extend the list of offences by order of the Secretary of State is contained in s. 215(2) in relation s. 223(6)(a) EA. Also, the Draft report prepared by the Committee on Civil Liberties, Justice and Home Affairs with a proposal for a European Parliament recommendation to the Council on evaluation of the European Arrest Warrant (2005/2175(INI)) suggests the extension of the 32 offences list; see: document PE 365.111v01-00, 30\textsuperscript{th} November 2005, No. 1. It should be pointed out that some EAW implementations by Member States have exempted certain specific legal descriptions of offences from the more general ‘positive list’; as is the case of Belgium legislation, which does not categorize abortion and euthanasia as ‘murder or grievous bodily harm’ as defined in Art. 2(2), hyphen 8 EAW; see: Art. 5(4) Loi 19 décembre 2003 relative au mandat d’arrêt européen. According to the Commission, such legislation is also presumed to contradict the provisions of the EAW.
the obligation on the issuing judicial authority to detail such circumstance in the EAW. The same offences that allow surrender from Spain to another Member State without testing for double jeopardy are listed in Art. 9 (1) LOEDE, in general terms for active and passive surrender; although double jeopardy is an initial requirement for the other two groups of offences listed above under a) and b).

Dispensation of the double jeopardy principle has also been strongly criticized by some authors as being a violation of the principle nullum crime sine lege also guaranteed under Article 7 ECHR. It is nevertheless one of the most important developments introduced by the EAW regulation when compared with classical extradition procedures and is the result of mutual reliance on criminal legislation between Member States. In short, it implies a new ‘inter-state’

Furthermore, Spain has declared that attempt and complicity must be also considered in the same way when applying the list of categories of offences enumerated in Art. 2(2) EAW, thereby doing away with double incrimination; see comments by Member States to Commission Report, loc.cit., p. 37.

See: Art. 5(2) LOEDE. In fact, the EAW Framework Decision provides an annex to be completed by the issuing judicial authority that lists the information required for the ‘exchange’ of an EAW between Member States, and in this case it is only necessary to ‘tick’ the punishable offence; the LOEDE includes the same annex.

In fact, Spanish law contemplates this testing of double jeopardy as optional; see: Art. 9(2) LOEDE, textually, ‘in all other events not included in the paragraph above… surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under Spanish legislation, whatever the constituent elements or however they are described’. Critical voices in Spain have pointed to an excess of judicial discretion because there are no guidelines for taking such judicial decisions; see: A. Cuerda Riezu, De la extradición a la ‘euro orden’ de detención y entrega, Madrid 2003, p. 124 and J. Delgado Martín, La orden europea de detención y entrega, Diario La Ley, 2005, 8th March pp. 1–10 at p. 9.

On the content and significance of the double jeopardy principle in Spain, see C. Cezón González, op.cit., p. 109 and in Spain, J.J. López Ortega, La orden de detención europea: legalidad y jurisdiccionalidad de entrega, Jueces para la democracia (2002) pp. 28–33, p. 30, and, more extensively, El futuro de la extradición en Europa (una reflexión desde los principios del Derecho europeo de extradición)’ in C. Cezón González, op.cit., pp. 303–365, p. 327; also C. Gómez-Jora Díez, Orden de detención europea y Constitución Europea: reflexiones sobre su fundamento en el principio de reconocimiento mutuo, 2004, Diario La Ley 26th July No. 6069, pp. 1–7 (a short English versión in eucrim, loc.cit., pp. 23–25), pp. 4, including the bibliographical sources of such discussion. On the contrary, other authors and, especially, legal practitioners, have welcomed the absence of the double jeopardy test, which reviews the nature of the offence in both countries; e.g. Senior Judge Baltasar Garzón, JCI No.5, in his presentation on the EAW in the above-mentioned JUSTICE Conference ‘Eurowarrant’.


On the notion of mutual reliance see: G. de Kerchove and A. Weyembergh, eds., La confiance mutuelle dans l’espace européen/Mutual Trust in the European Criminal Area, Brussels 2005, in particular D. Flore, La notion de confiance
principle of criminal legality\textsuperscript{183}. Furthermore, in Spain at least, objections on the grounds of the excessive difficulty of drawing up a list of legally typified offences recognised in the legislation of all Member States that in turn refers to the offences enumerated in the EAW, have been – albeit partially – resolved by the jurisprudence of the Constitutional Court in relation to extradition proceedings\textsuperscript{184}. However, it may still be said that the double jeopardy principle continues to be a general rule in EAW proceedings, as reflected by the Framework Decision and its implementation within each Member State\textsuperscript{185}.

With regard to the effective transmission of a European Arrest Warrant from one Member State to another and its transmission procedures, nothing new is detailed in the national rules. Consequently, as explained in the European rule\textsuperscript{186}, the transmission of the EAW within a particular time limit and its respective translation into any of the official languages\textsuperscript{187} of the executing Member State is guaranteed between the judicial authorities of different Member States\textsuperscript{188}, regardless of the format in which the arrest warrant is presented. The decisions which lead to it being issued are


\textsuperscript{184} See: e.g., ATC 23/1997, 27\textsuperscript{th} January, and STC 102/1997, 20\textsuperscript{th} May, in application of Art 2.1 European Convention on Extradition 1959. A database of Spanish constitutional jurisprudence is available at http://www.tribunalconstitucional.es/JC.htm


\textsuperscript{186} Arts. 8 and 9 EAW as well as Art. 6(1) and 8 LOEDE and p.142 EA.

\textsuperscript{187} Prescribed in Art. 8(2) EAW. See list of languages and time limits for EAW reception in each Member State in document No. 123736/1/04, 12\textsuperscript{th} October 2004, COPEN 111, EJN 61, EUROJUST 82, according to which only Spanish is accepted by Spain and only English by the UK; in contrast, English is accepted by other Member States and several other languages for the execution of EAWs, specially in Nordic countries.

Mutual legal assistance tools for legal practitioners, such as Solon programme for the translation of judicial equivalences and others are available at www.ejn-crimjust.eu.int/ejn_tools.aspx. As pointed out by certain judicial authorities, language is an ever-present problem; in Spain, e.g., \textit{J.A. Espina Ramos}, La lucha contra la delincuencia transnacional y su reflejo en el ordenamiento español, con especial referencia a la euroorden, Revista del Ministerio Fiscal, 2004 No. 12, pp. 9–47, p. 32.

Time limits vary from one Member State to another and oscillate between 48 hours (e.g., Lithuania, Poland, Slovakia and UK) to 40 days (Austria, Belgium, Czech Republic, Germany, and Hungary). On the contrary, the Spanish legislation does not provide for a delay for the receipt of the original of the EAW; however, Art. 10(2) LOEDE stipulates that the executing judicial authorities immediately request a translation of the EAW without delay.

\textsuperscript{188} Despite this, a special transmission is necessary to reach the judicial authorities in Gibraltar through the UK Government (Gibraltar Liaison Unit for EU – affairs of the Foreign and Commonwealth) according to the agreement between Spain and UK of the 19\textsuperscript{th} April 2000.
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not, strictly speaking, necessary requirements.\textsuperscript{189} Art. 10(4) EAW allows for all formats (fax, e-mail) subject to the condition that the method is safe, that it can be produced in the form of a written document and that the validity of the document can be verified.\textsuperscript{190} There are no specific rules on electronic communications written into the Spanish national implementation.\textsuperscript{191} In contrast, as regards the form used to issue an EAW, only the Spanish rule contains an application form in its annex that is to be completed by the issuing judicial authority and that mentions all of the legally required information.\textsuperscript{192} The issuing judicial authority has the option of issuing an alert for the wanted person in the Schengen Information System (SIS)\textsuperscript{193}, although the SIS system is not yet available in all Member States and for this reinformation is currently sent out in the form of an ‘Interpol diffusion’ to several or all Member States.\textsuperscript{194} In Spain, Interpol may be called even if it is not possible to use SIS, as set out in Art. 10(3) EAW; practical experience relative to this point has shown that most EAW transmissions are done automatically via Sirene.\textsuperscript{195} Nevertheless, neither of the national implementation texts on EAW make any reference to the contact points of the European Judicial Network existing in Member States as a procedure for transmitting a European Arrest Warrant when the competent executing judicial authority is unknown, as is set out in the European

\textsuperscript{189} Some national authorities require that the EAW forms be accompanied by the national decision, however, this is not in line with the Framework Decision according to Commission Reports; see, for example, the first one on ‘practical implementation of the European Arrest Warrant – First overview of the State of play – Preliminary results’ presented in Brussels on 22\textsuperscript{nd} January 2004, JA/D3/IJ D (2004), p. 3.


\textsuperscript{191} Art. 7 LOEDE only reproduces the general text adopted in Art. 10(4) EAW.

\textsuperscript{192} Art. 3 LOEDE in identical terms to Art. 8 EAW.

\textsuperscript{193} Arts. 9(2) and (3) EAW according to Arts. 92-119 Convention of 19\textsuperscript{th} June 1990 implementing the Schengen Agreement of 14\textsuperscript{th} June 1985 on the gradual abolition of checks at common borders; explicitly, Art. 95 as is indicated in s. 212 EA. See: M. Jimeno-Bulnes, Las nuevas tecnologías en el ámbito de la cooperación judicial y policial europea, Revista de Estudios Europeos, 2002 No. 31 pp. 97–124, p. 117.


\textsuperscript{194} The date of April 2007 had first been put forward by the Brussels European Council 15/16 June 2006, Presidency Conclusions document No.10633/1/06 REV1, available at Council website (http://consilium.europa.eu.int, Council, European Council, Presidency Conclusions) and now deferred to June 2008 according to JHA meeting on 5–6\textsuperscript{th} October 2006 (document No. 13068/06, p. 13).

\textsuperscript{195} Art. 6(5) LOEDE; recourse to Interpol is explicitly provided for in other national EAW implementations, e.g., § 16(2) Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (EU-JZG) approved in Austria on 30\textsuperscript{th} April 2004. At first, it was argued that sending an EAW through Interpol using the ‘red form’ could raise difficulties because it is not recognized as a channel for a formal request in all Member States according to Art. 9 EAW; see: first Commission Report on 2004, op.cit., p. 3. In Spain, perhaps for this reason, the EAW Protocol provided by the Minister of Justice recommends that this alert be sent to both offices, which has become current practice.

\textsuperscript{196} See: official statistics; all the previously mentioned 519 EAWs issued by Spain were transmitted via SIS and/or Interpol. Also, specifically on this matter, J.M. de Frutos, ‘Transmission of the European Arrest Warrant. Police aspects form a practical point of view’, International Conference: the European Arrest Warrant (Toledo 8\textsuperscript{th}-11\textsuperscript{th} November 2004), available at http://www.espaciojudicialeuropeo.com/eaw

Just in recent days an amendment of the Sirene Manual has been taken place by Comission Decision of 22\textsuperscript{nd} September 2006, OJ 16\textsuperscript{th} November 2006 L317 pp. 1–2.
Finally, there are some special provisions in EAW Spanish implementation concerning conditional and temporary surrenders. The Spanish law regulates an aspect that is also included in the original European rule, which allows the Spanish issuing judicial authority to request a 'temporary surrender' while a procedure for definitive surrender is underway in the executing Member State. The LOEDE specifies the purpose of such a temporary surrender, exclusively envisaged to conduct criminal proceedings or the trial or hearing according to criminal law provisions in the LECrim.

Lastly, it envisages the possible presence of the issuing judicial authority in the executing Member State in order to hear the wanted person, a suggestion that has also been reasonably criticized because of the delays that such displacements might cause and because of the possibility of using other resources, such as videoconferences. This latter alternative was initially provided for in the first draft of the EAW, as well as in other European and national texts, specifically in Art. 10(9) of the Convention on Mutual Assistance in Criminal Matters, 29th May 2000 and now in the LECrim.

6.2.5. Executing a European Arrest Warrant: Surrender Procedure

The execution of an EAW by a competent national judicial authority is conditioned by the same requirements established for its issue, discussed in the previous section, which relate to the different legally available punishments. Thus, Art. 5 EAW is replicated by Art. 9 LOEDE, which deal with accusation and conviction cases, respectively. By choosing to differentiate between issuing and

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197 Art. 10(1) EAW according to Council Joint Action 98/428 of 29th June 1998 on the creation of a European Judicial Network, OJ 7th July 1998 L 191 pp. 4–7. In Spain, the inclusion of such possibility was suggested in the CGPJ Report. On the contrary, the national implementation on EAW provided by other Member States provides for such possibility, e.g., Art. 33(4) Belgian Law.

198 Art. 7 LOEDE. Copies are specifically sent to the Subdirectorate-general for International Judicial Cooperation (Subdirección General de Cooperación Jurídica Internacional).

199 Art. 18 EAW.

200 Art. 8(1) LOEDE.

201 In Spain, the presence of the accused is legally required during the criminal trial and only exceptionally can the hearing take place in his absence when the requested punishment is less or equal to 2 years of imprisonment or 6 years if it is of different a nature (Art. 786.1 LECrim).

202 For example, R. Castillejo Manzanares, op.cit., p. 4.

203 Art. 34 Proposal EAW. See also a favourable opinion in F. Siracusano, loc.cit., p. 926.


205 Regarding videoconferencing provisions, see especially B. Piattoli, op.cit., p. 168.


207 See above categories a), b) and c).
executing authorities, the national rules employ a different system to the one described in the European Framework Decision.

**Preliminary Measures**

Before the proceedings for the execution of an EAW can properly get underway, preliminary steps must be taken. In the case of Spain, Art. 10 LOEDE reminds us that exclusive competence to execute these 'Euro-warrants' falls on the JCI, or on the Criminal Division of the AN whenever the arrested person refuses to consent to the surrender process\(^{207}\). By the same token, admission of an EAW is subject to its translation into Spanish (the absence of which is enough to adjourn the proceedings without further justification)\(^{208}\) unless its reception is through an SIS alert, in which case, the Central Investigative Judge will do the translation *ex officio* without interrupting the proceedings. However, despite the provision in the same European rule that refers to translations into one or more of the official languages, Spain has indicated that a translation deposed at the General Secretariat of the Council must be into their own national language\(^{209}\).

Furthermore, the grounds for mandatory and optional non-execution of an EAW in Spain are similar to those included in the European rule\(^{210}\). In contrast, and perhaps even more surprising,

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\(^{207}\) Art.18.2 LOEDE. See also above chapter 2.

\(^{208}\) Because Spanish is the only language accepted by the Spanish Courts according to previous document No. 12736/1/04, *loc.cit.*, p. 4. For a criticism addressing this formal requirement see *R. Castillejo Manzanares, loc.cit.*, p. 3. Incidentally, translation is required into the Spanish but not into the other co-official languages (Basque, Catalan and Galician); also it may be presumed that these translations should be carried out by the Spanish executing judicial authority. For a contrary view, *M. Montón García, La ejecución en España de órdenes europeas de detención y entrega, La Ley Penal, 2005, No. 14 pp. 41–52 at p.45 considers that a translation into Basque, Catalan and Galician by the issuing judicial authority is feasible.

\(^{209}\) Art. 8(2) EAW. Some other Member States have specified several official languages for the translation of the document; English, of course, is the most widely used. See previous document No.12736/1/04.

\(^{210}\) Arts. 3 and 4 EAW contemplated jointly in Art. 12 LOEDE. According to the official statistics for 2005, Spain refused to execute 17 EAWs and its grounds for refusal were double jeopardy, statute-barred and *ne bis in idem*; in the UK there were 12 cases of refusal in addition to 14 on the grounds of double jeopardy, expiry of the time limit for prosecution, insufficient information concerning the conduct, voluntary appearance before the issuing judicial authority, and conduct not constituting an extradition offence.

These optional aspects lead to divergent judicial opinions concerning the execution of EAWs in Member States. Some examples are given in relation to the grounds specified in Art. 7 a) EAW, e.g., ‘offences regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State’; the National Court in Spain executed an EAW issued by a Finnish judicial according to a decision rendered on 10th February 2004, but the French Appeal Court in Pau refused the execution of an EAW issued by judge Baltasar Garzón (JCI n.5) in a ruling given on 1st June 2004. See both decisions *Foro Italiano* (2004) No. 5 IV p. 286 and *Foro Italiano* (2004) IV No. 10 p. 506 respectively, commented by *I. Giuzzolino*.

On the contrary, the same argument of ‘extraterritoriality’ was argued under s. 65 EA by the defence counsel in the case Office of the king's prosecutor, Brussels v. Armas and others; but the refusal of extradition by the commitment of part of the criminal act in UK set out by the District Judge on 26th July 2004 was reversed on appeal by the Office of the King's Prosecutor in Brussels before the High Court in August 2004 (2004) EWHC 2019 Admin, in the consideration that ‘principal criminal activities and consequences occurred in a category 1 territory’ (No. 25); a subsequent appeal by Edisson Rodrigo Cando Armas before the House of Lords was afterwards dismissed on 17th November 2005, 2005, UKHL 67. UK jurisprudence is also available at web pages [http://www.hmcourts-service.gov.uk/cms/judgments.htm](http://www.hmcourts-service.gov.uk/cms/judgments.htm) and [http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm](http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm) for the House of Lords judgments.

Also, some of these grounds for optional non-execution of the EAW have been transposed as mandatory ones in the different national implementations; see the comparative study in Commission Staff Working Documents. One of the most restrictive transpositions is the Italian one; Art. 18.1 Law No. 69 provides 20 mandatory grounds for non-execution of EAWs, including some some even not contemplated by the European rule (e.g., pregnancy or care of children under 3 years old).
is the Spanish implementation of Art. 5 EAW. The Spanish law only echoes two of the three guarantees that are to be given by the issuing Member State in particular cases contemplated in the European rule. Put another way, Art. 11 LOEDE fails to refer to the case of surrenders based on in absentia rulings made in the issuing Member State. Not all of the guarantees required by Art. 5(1) ECHR are met, perhaps because of a political desire to proceed with the surrender of persons declared guilty in absentia, in much the same way as EAW legislation in Italy, although Italy does provide such guarantees as does Spanish legislation for classical extradition proceedings. The Commission has recently pointed to the relevance of such in absentia (or default) judgments, which will probably be the subject of a Green Paper in the near future.

In the literature related to the Spanish implementation of EAW, see: M.J. González Cano, La ejecución condicionada del mandamiento de detención y entrega europea, Unión Europea Aranzadi, 2003, June pp. 5–15, as well as M. de Hoyos Sancho, Euro-orden y causas de denegación de la entrega, in C. Arangüena Fanego, op.cit., pp. 207–312 in relation with the LOEDE. See also the special reference made by S. Alegre and M. Leaf, EAW, op.cit., p. 46.

According to the European rule, ‘surrender may be subject (our italics) to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European Arrest Warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment’ (Art. 5.1 EAW). Faced with this optional choice, the Spanish implementation chose to implement the European rule, as did the Latvian legislation; see: Commission Staff Working Documents, op.cit., pp. 119–135; also, F. Siracusano, loc.cit., p. 915 for a critical view in relation to the right to have a trial in a ‘reasonable time’ according to Art. 6 ECHR.

211 According to the European rule, ‘surrender may be subject (our italics) to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European Arrest Warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment’ (Art. 5.1 EAW). Faced with this optional choice, the Spanish implementation chose to implement the European rule, as did the Latvian legislation; see: Commission Staff Working Documents, op.cit., pp. 119–135; also, F. Siracusano, loc.cit., p. 915 for a critical view in relation to the right to have a trial in a ‘reasonable time’ according to Art. 6 ECHR.

212 Art. 420-querter Codice di Procedura Penale. See also criticisms by R. Castillejo Manzanares, La orden de detención y entrega europea. El sistema de garantías de los ciudadanos de la Unión, Diario La Ley, 2004, 27th December No. 6155 pp. 1–5 at p. 4.

For this reason, such causes argued by the defence have been dismissed by the Spanish executing judicial authority; for example, the argument used by the AN in Order No. 35/2004, 13th May (JUR 2004/241563). In such cases, the AN considered that French legislation provides a sort of ‘nullification’ appeal against judgments pronounced in absentia. By opposite a recent constitutional decision has estimated a defence appeal on this ground in consideration of FWD dispositions according with Pupino judgment (although this one is not mentioned); see: STC 177/2006, 5th June. Same constitutional decision dismissed such defence appeal on the ground of res iudicata argued by the defence because a previous extradition request for same Spanish citizen was refused; this question has caused several pronouncements in Spain by AN and Constitutional Court. In relation with such constitutional and AN jurisprudence about this and other questions see: M. Marcos González-Lecuona, Jurisdicción ordinaria y jurisdicción constitucional en las primeras euroórdenes de ejecución, La Ley Penal, 2006, No. 25, pp. 32–47 at pp. 43–46 in relation with this point.

213 Art. 19(1)(a) Italian Law.


Arrest warrant practice

The procedure to exercise the arrest warrant of the requested person is also of interest because of its special provisions. The EAW implementation in Spain tread carefully when it comes to the enforcement of custody or ‘detention’, e.g., the execution of the arrest warrant by the police and the application of legal custody until the person is brought before the ‘appropriate judge’. As for the procedural guarantees, the most important is, without a doubt, the right of the arrested person to be assisted by a legal counsel and interpreter if necessary, as well as the right to be informed about the EAW and its contents. In national implementation, however, such information is not provided by counsel, but by the judicial authority. All these rights are contemplated in Art. 11 EAW and assistance by counsel and an interpreter are specifically mentioned as rights in Arts. 2-6 of the Council Framework Decision in the context of criminal proceedings throughout the European Union.


Known in Spain as ‘detención’ (preventive custody). Logically, there is a reference in the LECrim as to the form and guarantees when practicing this sort of preventive custody, specifically Arts. 489–501 and 520–527 LECrim respectively, which are referred to in Art. 13(1) LOEDE. As to the form of this arrest, it may be carried out by the judicial authorities, the police or even by private citizens; which is in our view a ‘judicial detention’ of a sort, resulting from the request of the issuing judicial authority of a Member State. See: M. Jimeno-Buines La adopción de medidas cautelares de carácter personal con motivo de la ejecución de una orden europea de detención y entrega, Revista Penal, 2005, pp. 106–122 at p. 108 (a previous French text is also available at http://www.espaciojudicialeuropeo.com/eaw, menu seminars, seminar 2004).

See: ss. 58 and 59 Police and Criminal Evidence Act (PACE) 1984 (c. 60) and Arts. 520 c) and d) LECrim. Firstly, the right to be assisted by a legal counsel in Spain includes the presence of a lawyer, who provides legal counsel, and a ‘procurador’ or barrister-at-law, who speaks before the court; secondly, the right to be freely assisted by an interpreter has been often recognized by the jurisprudence of the Constitutional Court as part of the right to a defence; ie, STC 71/1988, 19 April, following the Oztürk jurisprudence according to Art. 6(3)(d) ECHR, judgment of 21st February 1984, §§ 57 and 58. All these rights can be also provided ex officio without charge under Spanish legal assistance rules for citizens and foreigners (Art. 6.2 and 6.3 Law 1/1996, 10 Jan, Ley de Asistencia Jurídica Gratuita).

From the Spanish point of view, see: F. Jiménez Villarejo, El derecho a un abogado y a un intérprete International Conference: La orden de detención europea, op.cit., www.espaciojudicialeuropeo.com/eaw (printed publication forthcoming), and J. Delgado Martín, La orden de detención europea y los procedimientos de entrega entre los Estados miembros de la Unión Europea, in A. Galgo Peco, ed., Derecho Penal supranacional y cooperación jurídica internacional, Madrid, 2004 pp. 281–380 at p. 340, on the general procedural guarantees for the EAW. Also M. Martín Martínez, loc.cit., pp. 196–199 and V. Moreno Catena, loc.cit., pp. 157–161, in defence of the right of freedom by the requested person too and in criticism of the Spanish regulation on this subject; such right of freedom has been already guaranteed by STC 99/2006, 27th March. Also, for a general view about procedural guarantees under police detention in Spain, S. Barona Vilar, Garantías y derechos de los detenidos en F. Gutierrez-Alviz Conradi and E. López López, eds., Derechos Procesales Fundamentales, Madrid 2005, pp. 51–96.

However, some national EAW implementations have not transmitted any provision in respect of the right to an interpreter and only refer to the right to legal counsel; that is the case of ss. 20 Finnish Law and 11 Maltese Law.

At the time of writing, a Proposal presented by the Commission on 28th April 2004, COM (2004) 328 Art. 3 explicitly refers to the obligation to provide legal assistance whilst remanded in custody and during the EAW procedure, which are considered as proceedings where legal counsel shall be assured. See brief comment by S. Alege, EU fair trial rights – added value or no value?, New Law Journal, 21st May 2004, pp. 758–759; also C. Morgan, Proposal for a framework
As pointed out earlier, a constant problem is the time limit for detention, from the time of the arrest up until the appearance before the judicial authority. A discussion took place in Spain during the adoption of Art. 13(2) LOEDE, because the Preliminary Draft contemplated a maximum term of 24 hours as laid down by procedural rules in Art. 496 LECrim, and the same term may be found in many other Member States’ draft implementations. Unfortunately, this maximum period was increased to 72 hours in the definitive text, as stipulated in the Spanish Constitution (Art. 17.2), following the suggestion contained in the CGPJ Report.

The problem arises now because Art. 13(1) LOEDE sets out EAW procedures for detention in reference to the LECrim. The question in domestic law had been raised once before in order to determine the maximum length of time a suspect may be held in police detention, because of the contradictory terms set out in LECrim (24 hours) and the Constitution (72 hours), which lies behind the amendment of the Spanish law. There is nothing to prevent lawmakers from amending procedural rules within the limits of the constitutional provision and it can only be assumed that the 24 hour time limit still be in force. On the other hand, any legal provision of a longer detention period – e.g., 73 hours – would of course be unconstitutional. Lastly, there is also a special rule on the arrest warrant relating to particular cases, such as forming part of, or aiding and abetting armed gangs or individual acts of terrorism. In these cases, preventive police detention is a straight 72-hour period, which can be extended by a further 48 hours, to make a total of 5 days in custody (Art. 520 bis.1 LECrim).

As a final consideration, it should be remembered that the LOEDE sets the time limit for police detention at 24 hours when executing extradition proceedings, which is the same as is set out in the provisions of the LECrim. Specifically, Art. 8 (2) LEP requires that the arrested person be taken to the Central decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union, in M. Leaf, op. cit., pp. 93–102 – the author is involved in drawing up the proposal in the European Commission – and recently R. Lööf, Shooting from the Hip: Proposed minimum rights in criminal proceedings throughout the EU, 12 European Law Journal, 2006, No. 3 pp. 421–430. In Spain, Y. Gallego-Casilda Grau, El Libro Verde de la Comisión Europea sobre las garantías procesales para sospechosos e inculpados en procesos penales en la Unión Europea, in Dirección del Servicio Jurídico del Estado, op. cit., pp. 235–255.

Recently, following difficulties in the negotiations on the subject between Member States, a new text has been agreed under the Austrian Presidency of the Council, although as yet it is not in the public domain; summary information is provided in Press Release of the Justice and Home Affairs 273rd Council meeting (Luxembourg on 1st–2nd June 2006) No. 9409/06 (Presse 144) p. 14. All press releases are available at http://www.consilium.europa.eu

As stated, 24 hours according to Art. 496 LECrim.

Also, V. Gimeno Sendra Derecho Procesal Penal, Madrid 2004, p. 274 with many constitutional jurisprudential references and, especially, M. de Hoyos Sancho, op. cit., p. 199.

As has been the case of some (former) Herri Batasuna deputies.
Investigative Judge on duty within a period of no more than 24 hours, who will then take a decision regarding preventive custody. Other intermediate solutions are also possible, e.g., judicial presentation before the nearest Investigative Judge under exceptional circumstances, as used in conventional extradition proceedings, which have also been suggested for EAW proceedings. In conclusion, we regret the change to Spanish law, which as suggested by the CGPJ Report, extends the maximum detention time limit for the execution of an EAW to 72 hours instead of the initial provision of 24 hours.

**EAW execution procedure**

The key stage in the EAW execution procedure is the hearing of the arrested person before the executing judicial authority, the nature of which will differ according to whether or not the arrested person consents to the surrender, as laid down in Art. 14 EAW. National implementation in Spain details the conditions under which this initial hearing shall take place and make special provision for the assistance of legal counsel.

The first question to be put to the arrested person must be whether he or she consents to the surrender. This is a crucial step, because according to the European rule such irrevocable consent determines future procedure on the surrender, relating more than anything else to its time frame and to the judicial authority that will pronounce the definitive decision on surrender in Spain. The second question concerns renunciation of the entitlement to the ‘speciality rule’, which

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226 For example, due to geographical distances (police detention takes place in insular territory) structural reasons (bad communications in some peripheral areas) or even harsh weather (snowbound areas in the north of Spain). Suggestions on this point are made in the Spanish EAW Protocol prepared by the Ministry of Justice.

227 Initial and extradition hearing, respectively, in the UK implementation; see: ss. 7–21 as well as 68 EA. Regulation in EAW provides explicitly just one hearing under Art. 14 EAW when there is no consent to the surrender by the requested person; but such consent (or not) must also be explicitly expressed before the executing judicial authority according to national law under Art. 13(19) EAW.

228 Art. 14(1) LOEDE, which refers back to Art. 386 LECr, and s. 45 EA. In Spain, the right to legal counsel must be interpreted as the right to exercise free will in the appointment of counsel, as stressed by the Spanish Constitutional Court in a recent ruling made on 20th December 2005 (STC 339/2005). The constitutional decision makes important distinctions between the legal assistance available to those held in police custody according to ordinary procedural rules as opposed to international rules (e.g., Arts. 5 and 6 ECHR), thereby establishing a superior category and additional requirements for legal counsel relating to the judicial proceedings that are underway, as part of the ‘due process of law’. The same protection must be guaranteed for judicial hearings under EAW rules, as there are no restrictions on the appointment of legal counsel written into Spanish law. A similar statement reinforcing the latter is made in STC 81/2006, 13th March. See comments by F. Calvo Pastrana, Sobre la asistencia letrada por abogado de oficio en los procedimientos judiciales derivados de la Ley 3/2003, de 14 de marzo (Orden Europea de Detención y Entrega). Comentario a las recientes sentencias del Tribunal Constitucional nş 339/05, de 20/12/05 y nş 81/06, de 13/03/06; Otrosí (2006) No. 78, pp. 14–17.

229 Although Art. 13(4) EAW envisages a possible renunciation of this consent, nothing in this sense is provided in the EA or in Spanish law; on the contrary, s. 45 (4)(c) EA and Art. 14(2) LOEDE insist on its irrevocable nature. Most national EAW implementations have stipulated that consent to surrender is not revocable; with the exceptions, for example, of Art. 13(4) Belgian Law as well as ss. 30 Danish Law, 15 Irish Law, 30 Finnish Law, 9 ch. 4 Swedish Law.

230 See: Arts. 17 EAW and 19 LOEDE as well as s. 46 EA.

231 According to Art. 18 LOEDE, JCI if consent is forthcoming, otherwise the AN. In the latter case, a real ‘trial’ takes place, as part of the hearing still before the JCI, because the parties will be heard as well as the prosecutor and all of them can propose evidence according to Arts. 14(2)(IV), 14(3) and 14(4) LOEDE; such trials have been referred to as ‘detention trials’ and have been criticized by some practitioners due to the long delays they have on surrender proceedings and because competence is attributed to another court when a simple provision for an appeals process against the JCI decision on surrender would perhaps suffice; see comments by judge Garzón, loc.cit., p. 5.

According to official statistics for 2005, 193 persons in Spain consented to surrender; in contrast, 237 persons in Spain did not consent to the surrender.
determines whether or not ‘the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered’232, may be considered. However, the ‘speciality rule’ is not applied where there is a specific declaration by the executing Member State or if various circumstances are present, as laid down in Art. 27 and 28 EAW233.

There are legal provisions in the EAW execution procedure regarding other circumstances, for instance, concurrent EAWs issued by two or more Member States and the concurrence of an EAW and an extradition request by a third country, the respective decisions which are taken by the judicial authority a quo and the executive in Spain and England. In this case, Art. 16 EAW refers to a decision taken by the ‘competent authority of the executing state’ following due consideration of the circumstances234, and indicates that the advice of Eurojust235 may be sought in the first instance. There is a further provision, which is more explicitly detailed in the Spanish regulation, concerning ‘temporary surrenders’ while a procedure for definitive surrender is being carried out, which should have the same objectives and form as the latter EAW236. This provision deals with the conditions for receiving the statement on persons arrested in Spain sent out by the issuing judicial authority in Spain sent out by the issuing judicial authority in Spain whenever this is a viable option instead of ‘temporary surrender’ to the issuing Member State237. It guarantees assistance from a legal counsel and an interpreter, as well as the right to the common law privilege against self-incrimination.

Also of interest is Art. 12 EAW on the adoption of personal precautionary measures238, which is not quite the same as preventive incarceration, for instance, (referred to in Spain as ‘provisional prison’) or release on bail (‘provisional release’) in domestic law239. The Article in question grants

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232  Arts. 27(1) EAW and 14(2) LOEDE. For more extensive commentary on the ‘speciality rule’, see: S. Alegre and M. Leaf EAW, op.cit., p. 47; in Spain, for example, R. Bellido Penadés La extradición en Derecho español (normativa interna y convencional: Consejo de Europa y Unión Europea), Madrid 2001, p. 91.

233  As there is a large list of circumstances, the exceptions to the speciality rule are more often than not applied, meaning that such specialty rule is not enforced; see again S. Alegre and M. Leaf, EAW, op.cit., p. 49 and in relation with Art. 24 LOEDE, R. Castillejo Manzanares, AJA, loc.cit., p. 5. According to last Commission Report, only Austria and Estonia have used the possibility of notification under Art. 28(1) EAW.

234  Identical content in Art. 23 LOEDE.


236  Art. 16 LOEDE; remember also former Art. 8(1).

237  According to Art. 16(2) Spanish law, the declaration of the arrested person will observe the Spanish law procedure; the legal basis is the Art. 19(2) EAW, which provides exactly that ‘the requested person shall be heard in accordance with the law of the executing Member State’. As has been argued, this provision is contradictory to the general provisions established by the Convention on mutual assistance in criminal matters, 29th May 2000, whose Art. 4.1 provides that the requested Member State will observe the ‘the formalities and procedures expressly indicated by the requesting Member State’ (e.g., its national legislation) with the sole exception that they ‘are not contrary to the fundamental principles of law in the requested Member State’; see: F. Fonseca Morillo, loc.cit., p. 89.

238  On the procedural requirements for their adoption – fumus boni iuris or, more exactly, fumus commissi delicti, and periculum in mora or, moreover, periculum libertatis – in relation to EAW proceedings, see specifically C. Aránguienza Fanego, Las medidas cautelares en el procedimiento de la euro-orden, in C. Aránguienza Fanego, op.cit., pp. 127–205, p. 164 and M. Jimeno-Bulnes, Revista Penal, op.cit., p. 164.

239  In relation to ordinary Spanish regulations, the personal precautionary measures provided under Arts. 486–544 bis LECrim are the summons (‘citation’), preventive custody (‘detention’), preventive prison (‘provisional prison’) and release from prison on bail (‘provisional release’); this latter may be adopted even without bail according to Art. 529
a discretional faculty to the executing judicial authority to release the arrested person ‘at any time’ in accordance with domestic laws, provided that measures are in place to prevent ‘the person absconding’. Art. 17 LOEDE more or less replicates this same rule and contains special provisions to take certain measures.240

**Surrender procedure and appeal**

As set out in the European rule, the procedure and time frame for decisions on surrender depend on the consent of the arrested person.241 Firstly, if consent is forthcoming, the surrender’s decision will be adopted within a time limit of 10 days after the hearing; otherwise, the time limit for the decision will be extended a further 60 days, as from the date on which the EAW was issued.242 In Spain, it is also important to clarify that, in the first instance, decisions on surrender are taken by the JCI but, if consent is not forthcoming from the arrested person, competence to pronounce the judgment will be transferred to the Criminal Division of the AN.243 In both cases, as set out in Art. 17 EAW, time limits may be extended by a further 30 days if the grounds are considered reasonable.244 However, a controversial question of the Spanish implementation on EAW itself is the absence of appeal’s provisions. As nothing on this matter is required under EAW regulations, Spain opted not to allow appeals against the final decision by the JCI or AN when Art. 18 LOEDE was drafted, which has already received its fair share of criticism.245 Moreover, most national implementations of the EAW by Member States contemplate the possibility of ap-

LCCrim Art. 529 bis LCCrim regulates a new precautionary measure which is the withdrawal of a driving licence for driving offences; also Art. 544 bis LCCrim introduces a further precautionary measure banning a person from approaching or contacting the victim of domestic violence.

For a comparative view between precautionary measures contemplated in national EAW implementations see also M. Jimeno-Bulnes, Revista Penal, op.cit.

240 Art. 17(1) LOEDE. In this sense, the JCI, having heard the prosecutor in each case, has the faculty to decree one or another measure in order to assure the effectiveness of the EAW execution; all such decisions are subject to appeal before the Criminal Division of the National Court. There is a special provision for preventive incarceration because of the seriousness of an offence, which could be stopped ex officio during the execution proceedings, having heard the prosecutor, subject to the application of any of the other precautionary measures available (Art. 17.3).

241 Arts. 17 EAW and 18–19 Spanish law.

242 Certain authors fail to understand why the time limits are calculated from different steps in the surrender proceeding, from the first hearing of the case (initial hearing) and from the arrest itself when there is no consent. The same differences are adopted by the Spanish regulation: see Arts. 19 (2) and (3) LOEDE.

According to official statistics for 2005, surrender decisions take an average of 11 days in Spain when the requested person agrees to the surrender, and 36 days in Spain when there is no consent. In both cases, the time is calculated between the arrest and the decision on the surrender.

243 Also criticized because of the absence of a hearing before the AN in those cases on which it must rule and because of non-fulfilment of ‘the immediacy principle (principio de inmediación); see: C. Arangüena Fanego, Revista de Derecho Penal, loc.cit., p. 79.

244 Also in Art. 19(4) LOEDE. In fact, there is not much proportionality between the ordinary time limit and its possible extension, which is indeed much longer; this extension should be half or, at least, equal to the ordinary time limit (5 or 10 days, respectively) but never longer; again C. Arangüena Fanego, loc. cit., p. 80.

245 For this reason, national EAW implementations differ on this point, e.g., the Irish rule allows an appeal against decisions of the High Court to the Supreme Court on points of law only; the French rule also only provides for such an appeal on points of law (pourvoi de cassation) against the decision of the Chambre de l’instruction when there is no consent to the surrender by the arrested person.

246 For example, M. Jimeno-Bulnes, Diario la Ley, p. 4.
The absence of an appeal’s procedure against an EAW surrender decision in this restrictive Spanish implementation is all the more questionable when compared to a typical extradition process, in which, at least formally, a second appeal (‘petition appeal’) is granted by the same National Court – in Spain, the Plenary of the Criminal Division – as laid down by Art. 15(2) LEP. Also, in these cases, the jurisprudence of the Constitutional Court has, on some occasions, allowed an exceptional ‘defence appeal’, because of the infraction of a fundamental right set out in the Spanish Constitution during the extradition proceedings. This is the case, for example, of the aforementioned detention time limit (Art. 17.2) or the ‘effective judicial protection right’ (Art. 24)²⁴⁸ as has already been argued, because of the execution of an EAW by Spanish judicial authorities²⁴⁹. However, Art. 13.3 Spanish Constitution could never be the object of protection, as it contemplates the extradition proceeding itself and the fundamental rights provided therein²⁵⁰.

A particular problem with the right to ‘effective judicial protection’ or, more precisely, the right to due process of law, has stirred up some constitutional jurisprudence issues in judicial decisions on such ‘defence appeals’, because of the question over the right to a defence in the execution of conventional extradition requests. In some juridical regimes, such as Italy²⁵¹, it is possible to pronounce a sentence in absentia and, in fact, appeals on the grounds of a right to defence are raised against the specific decision, which prompts extradition proceedings from Spain to Italy in order to carry out the punishment. In this respect, the Spanish High Court has supported²⁵² the right to constitutional protection when the requested person has not had the possibility to appeal against

²⁴⁷ E.g., § 20(3) Austrian EU-JZG (n 69), Art. 17(1) Belgian law, s. 24 Cypriot law, ss. 37–43 Finnish law (n 13), Art. 695–43 French CPP, Art. 22 Greek law (n 91), ss. 13(4) and (5) Hungarian law, s. 16(4)(b) Irish law, Art. 22 Italian law, Art. 13 law of Luxembourg, s. 32 Maltese law, ss. 21 (6) and (7) Slovakian law, Art. 23(6) ZENPP in Slovenia, Art. 24 Portuguese law, s. 9 ch. 5 Swedish law.

²⁴⁸ STC 11/1985, 30th January; although admitted, the appeal was rejected because the Constitutional Court considered that no infraction had been committed either of Art. 17(2) SC, because the detention time limit did not exceed (this time) by a further 72 hours, or of Art. 24 SC because the foreign person (an Italian) had had the opportunity to use other legal avenues for appeals against the decisions pronounced by the Spanish Tribunals. Art. 24 SC is the national prescription of Art. 6 ECHR; on this matter, see, e.g., P. Craig, The Human Rights Act, Article 6 and procedural rights, Public Law, 2003, pp. 753–773 and especially B. Poynor, The relevance of Art. 6 to Extradition Proceedings, 10 European Human Rights Law Review, 2005, pp. 408–418.

²⁴⁹ Remember previous SSTC 339/2005 and 81/2006 in relation to the right to legal counsel as the right to exercise free will in appointing counsel. Other examples of defence appeals promoted against decisions on surrender by the National Court are SSTCE 292/2005, 10th November, in relation with the surrender of nationals and 83/2006, 13th March, in relation with the ne bis in idem principle.

²⁵⁰ Same opinion, J. de Miguel Zaragoza, loc.cit., p. 146, and, more specifically, La doctrina del Tribunal Constitucional sobre las sentencias penales en rebeldía: el caso de Italia, Actualidad Penal (2002) No. 1, p. 1 Fundamental rights are regulated by Arts. 14–29 inclusively and 30(2) SC.

²⁵¹ The above-mentioned Art. 420-quater Codice di Procedura Penale, provides for a declaration of contumacy to the accused who does not appear in court; but the right to be represented by a lawyer is always provided for as an obligatory right. Also, the same precept contemplates the possibility of nullifying such a declaration of contumacy if the accused can prove that he or she had no knowledge of the legal notification or that absence from court was grounded in any cause of ‘force majeure’ or ‘legal impediment’ (Art. 420-quater 4).

²⁵² This was the case in SSTC 91 and 162/2000, 12th June, among other previously pronounced constitutional jurisprudence, ie, SSTC 141/1998, 29th June, and 147/1999, 4th August. For a critical perspective, see: F. Rey Martinez, El problema constitucional de la extradición de condenados en contumacia. Comentario de la STC 91/2000 y concordantes, Revista Jurídica de Perú, 2001 No.19, pp. 15–57, also with an interesting argument on the different regulation of the accused’s right of defence and the institution of contumacy.
judgment \textit{in absentia} as set out in the LECrim\textsuperscript{253} and when he or she has not appeared in court at any time. On the other hand, another piece of constitutional jurisprudence from recent times has rejected such ‘defence appeals’ against extradition decisions, on the particular grounds that the requested person still had the right to apply for an appeal before the Italian Tribunals. In this case, the reason that led to extradition was not the execution in itself of a punishment imposed by a sentencing \textit{in absentia}, but the continuation of judicial proceedings in Italy, as it was still possible for the wanted person to speak in court\textsuperscript{254}.

Finally\textsuperscript{255}, the definitive surrender to the specific authority designated by the issuing judicial authority is carried out by the police authority, having previously confirmed the place and date for such a surrender that, in any case, should be no later than 10 days after the final decision on the EAW execution\textsuperscript{256}. The possibility of arranging a new surrender date between both judicial authorities also exists as do exceptional and provisional postponements due to serious humanitarian reasons (e.g., illness)\textsuperscript{257}. Such delays, however, carry with them the risk that the arrested person will have to be released upon expiry of the time limits stipulated in European and national rules\textsuperscript{258}. Although short-time limits to proceed with the surrender are specifically indicated, surprisingly, in the case of non-fulfilment, no kind of juridical sanction or penalty is contemplated\textsuperscript{259}; the European rule simply requires that the relevant information be sent to Eurojust and the Council\textsuperscript{260}.

\textbf{6.2.6. Final Considerations}

Statistics on European Arrest Warrant proceedings point to the success of this new legislation in Europe and its Members States\textsuperscript{261}. It should also be recalled that in some countries similar mechanisms had been set up prior to the application of the EAW procedure\textsuperscript{262}, due, principally, in the Spanish context to police co-operation between France and Spain in the fight against ETA terrorism. In those

\textsuperscript{253} Art. 793 LECrim provides a special appeal called the ‘annulment appeal’ destined for those persons condemned by a judgment in contumacy. As explained above, this is legally provided for today in cases when the requested punishment is less or equal to 2 years imprisonment or six years if the crime is of another nature (Art. 786.1 LECrim).

\textsuperscript{254} Constitutional pronouncement along these lines in SSTC 110 and 160/2002.

\textsuperscript{255} Others legal provisions of the European rule go on to contemplate postponed or conditional surrender (Art. 24), transit (Art. 25), surrender accompanied by the deduction of the detention period served in the executing Member State (Art. 26), possible prosecution for other offences (Art. 27), surrender or subsequent extradition (Art. 28) as well as handing over of property (Art. 29) and costs (Art. 30)… under the respective articles of national implementation. See also Commission Staff Working Documents, \textit{loc.cit.}, pp. 27 and 28 respectively.

\textsuperscript{256} Arts. 23(1) EAW and 20(1) LOEDE.

\textsuperscript{257} Arts. 23(4) EAW and 20(3) LOEDE.

\textsuperscript{258} Arts. 23(5) EAW and 20(4) LOEDE. In relation to the UK implementation, the executing judicial authority is continually reminded that bail may be granted instead of custody provision as already pointed out; see previous legislation.

\textsuperscript{259} See: \textit{M. de Hoyos Sancho}, Cassazione Penale, \textit{loc.cit.}, p. 314.

\textsuperscript{260} Arts. 17(7) EAW and 19(5) LOEDE. But this is only a political sanction as pointed out by \textit{D. Flore}, Journal des Tribunaux, \textit{loc.cit.}, p. 275.

\textsuperscript{261} In 2005 alone, total amounts of between 2,500–3,000 EAWs have been issued. The lower figure is reported in the Eurojust Annual Report 2005; the higher one by \textit{S. Combeaud}, Implementation of the European Arrest Warrant and the constitutional impact in the Member States, in \textit{E. Guild, op.cit.}, pp. 187–194, p. 190.

\textsuperscript{262} For example in the UK through the well known Common Law system of ‘the backing of warrants’ as an informal way to execute warrants issued by different jurisdictions in the UK as well as in Ireland; this arrangement was confirmed on the UK side by the Backing of Warrants (Republic of Ireland) Act 1965 now repealed by ss. 218(a) and 220 as well as Schedule 4 of the EA 2003. See comments on \textit{J.R. Spencer, loc.cit.}, at p. 200.
cases, the Spanish Constitutional Court\textsuperscript{263} ruled that extradition proceedings could be bypassed while declaring the discretionary faculty of states to surrender foreign persons ‘directly’ to the Spanish police force on the border, where they would be arrested in order to continue the judicial investigation or trial in Spain. However, Law 3/2003 now represents the legal basis on which to allow such surrenders of arrested persons between the Member States, and it should be welcomed for that reason alone.

In this context, the ‘new simplified system of surrender’\textsuperscript{264}, does not only imply formal amendment of terminology, but also of material and conceptual terms. The new procedure introduces important and significant changes compared to conventional extradition proceedings: for instance, direct communication between judicial authorities without the intervention of the government as well as the termination of traditional principles, i.e., double jeopardy and the speciality rule mentioned earlier, or refusal to surrender because of objective or subjective causes, respectively, ‘political’ offences\textsuperscript{265} and the surrender of nationals\textsuperscript{266}. Technical improvements may also be mentioned, such as the considerable reduction in the average time for a surrender decision, and effective surrender of the requested person in comparison with conventional extradition proceedings, which move closer to fulfilling the right to a trial within a ‘reasonable time’ set out in Art. 6 ECHR\textsuperscript{267}.

Another important advantage of the new instrument on the working practice surrounding the issuing of EAWs – as has been demonstrated in Spain – is that it may be used to take precautionary measures\textsuperscript{268}. The arguments of the Spanish Provincial Courts\textsuperscript{269}, when dealing with appeals against orders for preventive detention issued by the Investigative Judges invariably refer to the option

\textsuperscript{263} In previously pronounced jurisprudence, e.g., SSTS 2084/2001, 13\textsuperscript{th} December and 304/2002, 15\textsuperscript{th} February.

\textsuperscript{264} See: Preliminary Recitals EAW, point 5.

\textsuperscript{265} See, for example, Arts. 3 European Convention on Extradition and 4(1) LPE. Although some national EAW implementations such as s.10h Danish Law provide for the refusal of its execution ‘if there is a danger that, after extradition, the person will suffer persecution… for political reasons’; see also J. Vestergaard, op.cit., p. 92.

\textsuperscript{266} Austrian nationals now being the sole exception according to Art. 33(1) EAW which imposes the obligation on Austria to amend Art. 12 Auslieferungs- und Rechtshilfegesetz before 31\textsuperscript{st} December 2008; also Austrian EAW national implementation, e.g., § 33 EU-JGZ. But Austria has also made exceptions to this absolute prohibition of the extradition of its own nationals in some other cases, e.g., the legislation regulating the cooperation with the International Ad Hoc Tribunals for Yugoslavia and for Rwanda or the International Criminal Court; see paper presented by H. Epp, Overcoming constitutional barriers: the public law challenges for the EAW in national constitutional courts. The Austrian example, JUSTICE Conference ‘Eurowarrant’, op.cit.

Bear in mind previous constitutional jurisprudence, e.g., in Germany, Poland and Cyprus. Especially, the decision of the German Constitutional Court (BverfG) on 18\textsuperscript{th} July 2005 should also be mentioned in the context of the two agreements adopted in the Plenary Session of the Criminal Division of the Spanish National Court (AN) on 21\textsuperscript{st} July and 20\textsuperscript{th} September 2005 in relation to all future EAWs issued by Germany, as well as the resolution of those pending and already issued to be thereupon treated as extradition requests. The unfortunate mention of the ‘reciprocity principle’ employed by the Spanish Court in the judicial pronouncement itself – and not the jurisdictional decision – in order to unify criteria adopted by the JCI in relation to future EAWs issued by Germany has been strongly criticized by scholars; see S. Combeaud, loc.cit., pp. 120 and 188 respectively and in Spain F. Irurzun Montoro, loc.cit. p. 8. By opposite, it has been defended by Spanish scholars, e.g., T. Quadra-Salcedo Janini, loc.cit., pp. 295–321.

\textsuperscript{267} On this point especially, see: F. Siracusano, loc.cit., e.g., p. 904.

\textsuperscript{268} Such advantages of EAW procedures are also underlined in the previous Commission Reports, loc.cit., at p. 7, commenting on Art. 12 EAW ‘through its effectiveness, in particular in obtaining the surrender of nationals of other Member States, it is easier to decide to release individuals provisionally irrespective of where they reside in the European Union.’

\textsuperscript{269} E.g., Orders (autos) by Audiencia Provincial of Tarragona 444/2004, 22\textsuperscript{nd} October 2004, and Audiencia Provincial of Girona 737/2004, 17\textsuperscript{th} December 2004. By opposite, Order by Audiencia Provincial of Barcelona 164/2006, 17\textsuperscript{th} March, dismissed an appeal against the preventive detention issued by the respective Investigative Judge because of the German nationality of the person and the absence of the application of the EAW proceedings in this country at that moment.
of an EAW being used in the country where the accused is established or settled and to which it is presumed he or she could flee. In brief, the existence of a fast-track detention and surrender procedure between the Member States preserve the exceptional character of precautionary measures, such as preventive custody (prisión provisional), which must be adopted only in exceptional circumstances, in observance of the principle of proportionality proposed for the new European Constitution270. The establishment of the EAW across the European Union has without doubt led to other legislative initiatives by the European Commission, such as the widespread establishment of a European model for provisional release with or without bail (eurobail)271.

On the contrary, it has been argued that there is an excessive amount of judicial discretion in Spain, especially in relation to the decision to execute an EAW and to proceed with the surrender of the arrested person, perhaps because the Spanish implementation gives wider powers to judicial authorities than other national legislations. Besides, there are no guidelines to assist with certain judicial decisions, to wit: whether circumstances that lie outside the positive list of 32 European offences should be subject to the double jeopardy rule272; whether surrender should be made subject to the return of the arrested person in order to serve a custodial sentence; or on postponement of the surrender until the trial in Spain takes place if the arrested person has a criminal cause pending before Spanish courts273. All of these questions need to be resolved by the executing judicial authority, as well as the possible existence of mandatory or optional causes of refusal. This judicial discretion practiced a quo by the judicial authority is, if anything, reinforced in Spanish legislation on the EAW because, as has already been explained, no appeals processes are contemplated274. An appeal, for instance, to the Plenary Session of the AN, would not be amiss in order to unify criteria on execution to be followed by the JCI.

Spanish implementation of the EAW satisfactorily reproduces all the new characteristics, but in relation to Spanish law at least, there is a regrettable silence in other aspects. As has been pointed out by several national and foreign commentators and institutions275, Spanish legislation does not contemplate the mutual recognition of judicial decisions that is so often highlighted: the defence of fundamental rights as a safeguard and prerequisite in judicial cooperation in criminal matters, despite it being clearly mentioned in the Preliminary Recitals of the EAW Framework Decision276.

270 Art. II.109(3) TeCE relating to the imposition of criminal penalties. Also, principle of proportionality as mentioned in Preliminary Recital 7 in fine of EAW Framework Decision.


272 Remember that Spanish law contemplates this verification of the double jeopardy as optional, according to Art. 9(2) LOEDE above mentioned.

273 E.g., previous Arts. 11(2) and 21(2) LOEDE.

274 In criticism of the lack of judicial control over the judge a quo, S. Calaza López, El procedimiento europeo de detención y entrega, Madrid 2005, p. 266.

275 Specifically, the briefing prepared by S. Alegre, at the time Senior Legal Officer-EU Criminal Justice, for JUSTICE in criticism of the Spanish implementation on the above-mentioned point. On other hand, the Committee on Civil Liberties, Justice and Home Affairs (European Parliament) has presented initial guidelines with a view to making a recommendation to Council on the impact on fundamental rights; see: Working Document of 22nd September 2005 already quoted.

Perhaps the urgency to implement the EAW has caused this rather unforgivable omission of a reference to mutual recognition, no mention of which can be found in either the Preliminary Recitals or the text of Law 3/2003. One possible way forward in this area might perhaps be the establishment of common minimum standards between the EU Member States277.

In conclusion, the EAW will presumably continue to have a role in the future of Europe and will foreseeably have a place in any future European Constitution. In fact, Art. III-274 contemplates the possibility of Eurojust evolving into a European Public Prosecutor’s Office (EPP), which will be ‘responsible for investigating, prosecuting and bringing to judgment …the perpetrators of and accomplices in serious crimes affecting more than one Member State and of offences against the Union’s financial interests’ and will ‘exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences’278. If the proposals of Corpus Iuris are ever followed, whenever an EPP considers it to be justifiable, a European Arrest Warrant will be issued; in which case the arrested person should be ‘brought without delay to the Judge of Freedoms of the state where he is being held’279. And why, indeed, should that not be the case one day?

6.3. Implementing the Framework Decision on the EAW in Greece
(Legislation and problems of the practical application)

(Dionysios Spinellis)

A. Greece belongs to the majority of the EU Member States which did not comply with the deadline of 31st December 2003, set in Art. 34, para 1 of the Framework Decision of 13th June 2002 (FDEAW), for transposing into its national law the obligations imposed on them under the FD. The relevant Greek enactment, Law (Act of Parliament) No. 3251/2004, was published and entered into force on the 9th July 2004. Anyway, according to the transitional provision of Art. 39 pp. 1 of that Law, requests to execute an EAW received before its entering into force should be governed by the existing provisions concerning the extradition. The same should apply to requests for extra-

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277 To that end, the definitive approval of the expected Framework Decision on certain ‘procedural rights in criminal proceedings throughout the European Union’ in order to complement the EAW. See: AI (EU Office) Report, ‘Human Rights dissolving at the borders? Counter-terrorism and EU Criminal Law’, loc.cit., p. 19; also in defence of the requirement of common and equivalent protection of human rights in the European judicial area J. Vervaele, Utrecht Law Review, loc. cit., p. 118, in consideration of standards developed by the EctHR as minimum minimorum on this point.


There is also a draft of an alternative Corpus Iuris (Alternativ-Entwurf) prepared by another academic group established in Germany; see comments by German scholars in special issue 116 Zeitschrift für die gesamte Strafrechtswissenschaft (2004).
dition from an EU Member State which had not yet transposed the FDEAW into its law. Therefore, no gaps occurred in the implementation of EAWs or extradition requests in the transitional period between the two procedures.

B. The case law of the Greek courts on EAW questions can be characterized as EAW-friendly. This means that the Greek courts (courts of appeal as first instance courts, Areios Paghos as appellate court) decided in most cases in such a way as to facilitate the implementation of the EAW procedure. This can be demonstrated by the following examples from the case law of Areios Paghos (AP) or courts of appeal (CoA):

1. AP 1735/2005, P Chr. 46, 504: As “issuing judicial authority” is considered the one which is competent to issue an EAW, by virtue of the law of the issuing state (Art. 6 pp. 1 FD). Therefore, since according to Chapter 10 of the Code of Procedure of Denmark the prosecuting authorities include also the Ministry of Justice, and since Denmark has informed about this the General Secretariat of the Council (Art. 6 pp. 3 FD), the Danish Ministry of Justice was the judicial authority which was competent to issue the EAW.

2. AP 109/2006, P Dik. 2006, 809: One of the grounds of optional non-execution of the EAW is the case where the person who is the subject of the EAW is being prosecuted in the executing Member State (Art. 4, Nr. 2 FDEAW). In view of this provision, AP has ruled that as ‘prosecuted in the executing State’ is not considered a person against whom simply a criminal information by a citizen has been filed, but no formal act of prosecution has yet been issued.

3. AP 857/2005, P Chr. 46, 39: According to Art. 12 FDEAW and Art. 15 Law 3251/2005 a person arrested on the basis of an EAW may be released at any time from custody, in conformity with the domestic law of the executing Member State. Therefore, the AP confirmed the decision to release the person sought by an EAW and, instead of custody awaiting surrender, to impose on him only restricting conditions, according to the Greek law. These conditions were the prohibition to leave the country and the obligation to report at intervals to the nearest police station.

C. A question disputed among the Greek scholars has been the possibility to surrender also Greek nationals. The Code of Penal Procedure, Art. 438 (a) prohibits the extradition of Greek nationals, but since this is an ordinary law it could be and has been amended by another more recent one, as is Law 3251/2004. However, some scholars held the opinion that the extradition and also any kind of surrender of Greek nationals is prohibited by the Constitution itself, supporting their opinion by the following arguments:

(a) That Art. 5 pp. 2 Const., in which the prohibition of the extradition of alien freedom fighters is provided, implies that Greek nationals are anyway not extraditable. However, this is not a valid argument, because no mention of Greek nationals is made in that provision. Therefore, judgment of AP 2149/05, P Chr. 46, 602, rejected an appeal based on it. It should be noted that the history of the above constitutional provision is based on the assumption that an alien fighter against an oppressive regime in his homeland may find refuge in Greece. Art. 5 pp. 2 of the Const. corresponds in a way to the provision concerning Greek nationals which is the last article (Art. 120) of the Constitution, by which ‘…Greeks have the right and the duty to resist by all possible means whoever attempts the violent abolition of the Constitution’. But a prohibition to extradite Greek nationals is not mentioned in any provision of the Greek Constitution.
That the surrender violates the right of the Greek nationals to enter, stay in and leave the country (Art. 4 pp. 2 Const.), which should not be restricted by any administrative measures. Such measures may be imposed in cases of emergency and only to prevent the commitment of punishable acts, following a criminal court ruling, as specified by law (Art. 5 pp. 4 of the Constitution). Therefore, the argument goes, since the surrender of a suspect or a convicted person does not fall within the above exception, any forced surrender to an authority outside of Greece is prohibited.

Refuting the above view, it is maintained that the above constitutional provision concerned the rights of Greek citizens with respect to the Greek territory before Greece became a member of the European Community and the European Union. Within the EC and the EU the free movement of persons is guaranteed (Art. 8 pp. 1 TEC), which means that any restriction or expulsion by administrative or judicial measures is prohibited only to the extent it refers to the whole of the territory of the EU Member States.

That the prohibition to extradite Greek nationals is provided in all international treaties and conventions executed by Greece. These, after being ratified by domestic laws, form an integral part of the Greek law and prevail over any contrary provisions of ordinary laws (Art. 28 pp. 1 Const.). The FDEAW has no direct effect, while Law 3251 which transposed its contents into the Greek law is an ordinary Act of Parliament, which cannot supersede and amend the international treaties and conventions. Therefore, the prohibition to extradite Greek nationals provided in international treaties and conventions, which prevail over any contrary provision of the law, could not be abolished by Law 3251/04, which is an ordinary domestic law (Act of Parliament).

The contrary view maintains that the amendment of the provisions of the international treaties has been effected by Art. 31 pp. 1 of the FDEAW of 13th June 2003, which authorized the Member States to introduce domestic laws having the same effect and which article has also a high level of validity as the international treaties.

So far, the case law of Areios Paghos, the Greek Supreme Court, has not been impressed by these more or less legalistic arguments, mentioning in its reasoning mainly policy considerations (AP 2149/05, PChr. 46, 602), such as: that the sharing of common values among the EU Member States, on which reciprocal confidence is built up, instead of the previously reigning diffidence, and, especially, that the protection of human rights in all of them is guaranteed.

In conclusion, I would like to mention that in the period from the 9th July 2004 until March 2006 approximately 40 EAWs have been executed by the Greek authorities (out of a total of over 1500 executed in the EU). The execution was refused in 7 cases. In 3 cases, because it was considered that the criminal offences had been committed partly on Greek territory (FDEAW Art. 4 pp. 7 (a)); therefore they should be prosecuted in Greece. In 3 further cases, because the persons sought were Greek nationals convicted by a foreign court and Greece, applying Art. 4 (b) FDEAW, undertook to execute the sentence in Greece. In one last case, an EAW from Germany has not been executed, because the German law transposing the FDEAW into the German Law had been in the meantime declared unconstitutional and null by judgment of the German Constitutional Court (BverfG); consequently, also the EAW issued by virtue of that Law has been considered as null by the Greek courts competent to execute it (AP 2483/05, PDik. 2006, 173; Thessaloniki CoA 1677/05, PChr. 46, 71).
Chapter I. The Conference

Abbreviations:
AP = Areios Paghos (Greek Supreme Court)
Const. = Constitution
CoA = Court of Appeals
EAW = European Arrest Warrant
FDEAW = Framework Decision on the European Arrest Warrant
P.Chr. = Poinika Chronika (Review on Penal Law)
P.Dik. = Poiniki Dikaiosyni (Review on Penal Justice)
TEC = Treaty establishing the European Community

6.4. The Execution of the European Arrest Warrant in Slovenia: Problems of Practice and Legislation

(Katja Šugman)

6.4.1. Introduction

As we know, the European Arrest Warrant (EAW) is the first and the strongest EU statement regarding the principle of mutual trust and mutual recognition through judicial cooperation.280 As the preamble to the Framework Decision on EAW (FWD) puts it (point 6): ‘The European Arrest Warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial cooperation.’ Further, on the point 10 it states: “Mechanism of the European Arrest Warrant is based on a high level of confidence between Member States”. The basic two principles governing the EAW are therefore the principles of mutual recognition (of judicial judgements) and mutual trust (high level of confidence).

The purpose of this paper is to point out some problems in the execution of the EAW in Slovenia and, most of all, to draw attention to certain legal – and some less than legal – mechanisms that underlie legal decisions while exercising the above mentioned principle. That way, we can also learn some lessons regarding the future measures that will be based on principles of mutual recognition and mutual trust – e.g. “the mutual admissibility of evidence.”

6.4.2. Few basic facts about the Slovenian national legislation on EAW

After an extensive debate on the question of whether Slovenia should implement the FD EAW in the form of a special statute or as an amendment of the CCP – since Slovenian national law already contains provisions on that topic – the decision was passed that the best solution is to pass a special act on that question. Therefore, the ‘Act on the European Arrest Warrant and Surrender Procedures Between Member States’ (hereinafter referred to as EAWSP) was adopted by the National Assembly on 26th March 2004 (O. J. RS No. 37/2004). The Act came into force on the day of accession (1st May 2004).

280 Point 37 of Tampere European Concil Conclusions.
The judicial authority competent for the execution of the EAW is an investigating judge from the district court covering the area in which the requested person resides or is located (Art. 15(1) EAWSP). In cases where the requested person consents to the surrender it is the investigating judge who issues the decision (Art. 20(1) EAWSP). In cases where the requested person does not consent to the surrender it is the panel of 3 district court judges which issues the decision on permitting or refusing surrender after they receive a reasoned proposal from the investigating judge (Art. 21(4) EAWSP).

Prior to entering the EU, Slovenia chose to amend its constitutional provision prohibiting the extradition of Slovenian nationals to other states (Art. 47 CRS). The amended text introduces the term surrender as a separate notion at a constitutional level and surrender of the nationals is allowed. Currently there is a constitutional ban on extradition or surrender of a Slovenian nationals (to other states or judicial bodies), unless otherwise provided by an international treaty – such as, e.g. the treaty on accession to the EU.

The newly adopted Art. 47 CRS provides that ‘No citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty by which, in accordance with the provisions of the first paragraph of Art. 3a, Slovenia has transferred the exercise of part of its sovereign rights to an international organization’ Art. 3a was also added to the Slovenian Constitution, making it possible for Slovenia to join the EU, ‘transferring the exercise of part of its sovereign rights to international organizations...’

Slovenia adopted the so called discrimination clause, since Article 12(1g) of the Slovenian implementation act provides for the mandatory non-execution if there are reasonable grounds for concluding that the EAW was issued for the purpose of instigating criminal prosecution against and sentencing the requested person because of their sex, race, faith, ethnic origin, nationality, language, political convictions, or sexual orientation, or if their position would be made significantly worse for these reasons.

6.4.3. The scope of the judicial check of the EAW request

Finally and most importantly, I want to focus on the question of the scope of the judicial check of the EAW request. In other words, the question is, how wide can a judicial check of the executing MS be as far as the legal qualification and the evidential basis of the EAW are concerned?

The question first depends on the category of the criminal offence in question. As we know, EAW introduces two different categories of criminal offences.

(1) The first category consists of a list of 32 offences (Art. 2(2) FWD) for which the executing authority cannot and must not check the double criminality if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State. Or, as the FWD puts it, ‘without verification of the double criminality of the act [they] give rise to surrender pursuant to the European Arrest Warrant’;

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(2) The second group consists of all other offences under the condition that they are punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months (Art. 2(1) FWD). In such cases the double criminality principle is taken into consideration by the executing MS.

As far as the scope of the judicial check is concerned, there is a slight difference between both of the categories, but in this paper we are focusing on the first category of offences – the ones for which the double criminality principle was abolished. Therefore, we will leave aside the second category.

There are at least 3 different possible ways of checking the EAW. They differ in wideness and depth of the check.

**A. A formal check**

The formal check would include the verification of the formal elements of the EAW, such as was issued by the proper judicial authority, does it contain all the required elements etc. Such a check is, of course and without any doubt, allowed. The FWD itself provides for the possibility for the executing judicial authority to request that the necessary supplementary information be provided by the issuing MS. (Art. 15(2) FWD). It can act so, especially if certain required element of the EAW is missing.

**B. A check whether the described act can reasonably be qualified as one of the acts provided for by the categories of crime**

The question if the executing authority can check whether the described act can reasonably be qualified as one of the acts provided for by the categories of crime named in the Art. 2(2) FWD is more difficult to answer. In such a case, the executing court is already carrying out the logical process of the subsumation (legal qualification) of certain facts to a certain legal definition. It is actually checking whether the facts described in the EAW can reasonably (as by the *prima facie* test) be qualified as the alleged criminal offence.

As far as the FWD (and national legislations accordingly) are concerned, there seems to be no possibility for the executing judicial authority to check or question the certification as far as the offences listed in Art. 2(2) FWD are concerned. Therefore, in case of the first category of criminal offences, the executing state has to execute the EAW as soon as the issuing state indicates that the person is sought for one of the offences on the list.

Slovenian EAWSP e.g. does not provide for the possibility of the legal context of the request to be examined. Art. 16(3) EAWSP provides only for the duty of the investigating judge to check whether the EAW contains all the required information (Art. 16(1) EAW implementing Art. 8(1) FWD). If all the conditions are met, the investigating judge must schedule the meeting and no other check is provided for. As the UK European Scrutiny Committee nicely put it, “The legal classification of the offence will be a matter for the issuing judicial authority and the grounds for refusing to execute a warrant in Arts. 3 and 4 do not include the case where the executing judicial authority disagrees with the classification which has been made. The executing authority will, in effect, be bound by the classification made by the issuing authority.”

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This is also an approach taken by the UK. Section 64(2) and s. 65(2) of the UK Extradition Act 2003 require that conduct has been classified certified by the issuing MS as falling within the Art. 2(2) FD criminal offence list. “It does not appear from the wording of the Extradition Act that a court will be able to question the certification.” But they had an interesting case (The Office of the King’s Prosecutor, Brussels vs. Armas ([2004] EWHC 2019 (Admin)) in which the Court considered the execution of a Flemish EAW. The original Flemish EAW contained three ticks on the Art. 2(2) list offences, while the English translation contained no ticks at all. The Court held that the absence of ticks in the English translation was irrelevant and concluded that the certificate that had to show the alleged conduct was a framework offence was the Flemish original EAW. The Court observed that: “…whether s. 65(2)(b) applies does not depend solely on the list of ticked boxes: if the certificate shows that the alleged conduct falls within the European framework list, it does not matters that the applicable tick box has not been ticked.”

However, the Court went on to conclude that the description of offences in the EAW made it clear that s. 65(2) did indeed apply. Such a decision, as the UK commentator justly points out, “implies that the Court considers it is entitled to look behind the issuing authorities’ ticks to the description of offences in the EAW and draw its own conclusions as to whether the conduct falls within the European framework list.”

It is therefore unclear how a court would respond to any inconsistencies between the ticking of a box and the description of offences, there being no express provision for refusing to execute an EAW on these grounds. One possible exception could be to allow for some judicial independence in case of obvious mistakes such as: the facts of the case indicate that the criminal offence in question is a rape, but the legal qualification refers to e.g. a murder.

C. A check of whether the evidence produced in the EAW is sufficient to conclude that the alleged criminal offence has been committed

The third possibility would provide for an even more thorough check – a possibility to check whether the evidence produced in the EAW is sufficient to conclude that the alleged criminal offence has been committed.

There can be no doubt that the third level of check cannot be carried out in the process of executing the EAW. Not only that would defy the whole purpose (mutual recognition) of the EAW in the first place, but would prolong and complicate the procedure, introducing a sort of a mini trial in the executing state: require the judicial assessment of the evidence gained in another country, translated.

Let’s leave aside the question whether all those solutions are appropriate (there has been serious criticism addressed to that topic already especially from human rights advocates), the bottom line is that the whole point of introducing the EAW FWD was speeding up the extradition procedures and introducing the mutual recognition principle by abolishing the double criminality principle for the most severe forms of crime and possibility of checking the sufficiency and relevance of submitted evidence in cases of serious offences. The whole point of the principle of mutual recognition was to trust judicial authorities of other Member States.

283 See an UK report pt. 5.3 on http://www.eurowarrant.net/ (10th January 2007).
284 Ibidem.
6.4.4. Slovenian experience

Being a national reporter for Eurowarrant project (Asser Institut, The Hague), part of my job was also interviewing judicial authorities responsible for the issuing and the execution of the EAWs. In Slovenia such a judicial institution is the investigating judge.

The overall, and unsurprising impression was that, generally, the newly introduced mechanism works really well. The investigating judges noticed that the surrender procedure is much quicker than the former extradition procedure, and that the direct cooperation between the judicial authorities is also smooth and much more satisfying.

However, the Slovenian investigating judges complained about the cooperation of a few Member states. In some cases, Slovenia was an issuing state for one of the listed categories of offences. Let me repeat that those are offences where there is (1) no double criminality check, (2) no checking whether the described act can reasonably be qualified as one of the act provided for by the categories of crime and (3) no judicial checking of the submitted evidence.

In a few cases, certain states rejected our EAWs once or even more than one time. The executing states in all of the cases not only doubted the classification of the criminal offence, but required the evidence and doubted even that there is enough evidence for the case. Therefore, they went even further than point No. 2 – they actually went to point No. 3.

Let me emphasize that Slovenian EAW contained all the necessary information on fact and law in the case. Both executing states in question required the evidence in paper, which is not only in breach of FWD, but also caused a great deal of expense and trouble on our side, since we had to translate literally the whole of the cases. In both cases the EAW was rejected on basis that there was no ‘probable cause’ for suspicion that fraud was committed. None of the persons sought were citizens of the executing state (although this should not be crucial) and in one of the cases the person sought was even a Slovenian citizen.

6.4.5. Explanations

If we leave aside the most benign, but anyway quite worrying possible explanation, that the judges executing the EAW did not know the law, there are still a few interesting explanations at hand.

A. Firstly, a very obvious conclusion is – some Member States violate the principles and provisions of the FWD rejecting the EAW for no legal reason.

B. Secondly, at least in some cases, there is no mutual trust between the Member States. Or, maybe put in a better way – some Member States do not trust some other Member States.

Now, we can only try to answer the question why? This question is difficult to answer, since we do not have much information on other countries’ experiences. Maybe some of the Member States generally do not like to execute other countries’ judicial decisions. That is sad and disappointing news for “mutual recognition” and “mutual trust” principles, but a useful and a revealing one. Something should therefore be done not only to promote trust, but actively to enhance it.

It is also easy to believe that it is frustrating not to be able to check the fact whether the offence can reasonably be subsumed under one of the listed offences, even in cases the description is very vague and the category is broad. I am sure a lot of judicial authorities feel exactly the same (our investigating judges among them), but anyway they do not reject an execution of an EAW on that basis.

C. And thirdly, this can be a specific reaction to Slovenia’s EAWs. Or it is maybe a subtler new Member State – old Member State thing? A “some of the States are equal, but some of them are more equal than others” thing? Surprisingly enough both of the Member States in question are Old Member States. The distinction also coincides with that of East and West. Is that the so much promoted trust among the countries? If this is the truth, then we are dealing with much deeper stereotypes than we are probably willing to admit. And these cannot be solved by law only.

6.4.6. Conclusion

The purpose of this paper was, besides presenting a few basic data about how Slovenia executes the EAW, to discuss the different levels of the possible judicial check of the EAW. The final point of the paper is to point out the less visible but still ever-present companions to legal decision making. We do not like to talk about them, we do not even like to be aware of them, but they anyway deeply influence legal decisions and undermine the so much promoted EU goals – processes of mutual cooperation and trust. The lack of judicial control in the area of third pillar makes it even more painful.

Any attempt to design new mechanisms on the same principles (like mutual admissibility of evidence) has to count on those underlying mechanisms and take them into consideration. There is still a lot to learn and a long way to go.

6.5. Execution of the EAW in Poland

(Dobrosława Szumiało-Kulczycka)

6.5.1. General principles

Pursuant to the Polish Code of Criminal Procedure (later CCP), it is the circuit court having territorial jurisdiction that shall resolve the matter of the execution of the EAW. The court shall act only upon a request from the prosecutor. This is in line with the notification submitted by Poland, under Art. 7 of the Framework Decision on the EAW to the General Secretariat of the Council, to the effect that the circuit public prosecutors having jurisdiction are the judicial authorities for reception of European Arrest Warrants on the territory of the Republic of Poland. In the event of any doubt as to the designation of a competent prosecutor, the Minister of Justice – the Prosecutor General may resolve the matter.

The court shall resolve the issues of the EAW after a sitting. Under Art. 607 l CCP, the prosecutor and defence counsel of the prosecuted person may take part in the sitting. The lawmakers did not envisage expresis verbis the participation of the prosecuted person himself. It does not mean, however, that he is deprived of that right. Under general rules of the Polish CCP (contained in Arts. 96 and 117), the prosecuted person has the right to participate in such a sitting when he
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appears. The court is not, however, obligated to notify him of the date and venue of the sitting. This regulation seems to be rather unfortunate. In the Polish legal literature, it is postulated that the court should always notify the prosecuted person who has their liberty, on the date and venue of the sitting, while, when they are deprived of liberty, the court should ensure that they are able to participate in person\(^{286}\).

The circuit court’s decision on the execution of the EAW is not final and as such, is subject to an appeal to the appellate court. It is only the decision of the appellate court, provided that it is not the decision to refer the case to be re-examined in the circuit court, that shall become final and subject to execution.

6.5.2. Practice

Between 1\(^{st}\) May 2004 and 31\(^{st}\) October 2006, 159 EAWs were executed in Poland. Of this number, 80 EAWs were executed, and 16 refusals to execute EAWs were issued in 2005\(^{287}\). Among the reasons for the refusals, the following were indicated: ne bis in idem, pending cases before Polish judicial authorities, lack of consent by a Polish citizen to serve a penalty outside the Republic of Poland, and – finally – the most controversial reason, because it was applied without the legal grounds to support it; namely the lack of the reciprocity principle towards its citizens, when the surrender was requested by Germany.

Admissibility of changing a final and valid decision on the execution of the European Arrest Warrant through extraordinary means of appeal.

The Polish criminal procedure embodies an extraordinary means of appeal to change final and valid decisions. It is a cassation lodged with the Supreme Court. Under Art. 521 CCP, the cassation against final decisions on the execution of the EAW will be available to the Commissioner for Citizens’ Rights Protection or the Prosecutor General. Yet, pursuant to Art. 607n, the prosecuted person subject to a final decision on the execution of the EAW should be surrendered to the competent judicial authority of the issuing state within 10 days of the decision becoming final and valid, at the latest. Although the Polish CCP envisages the possibility to postpone the execution of the EAW, this is only possible in three enumerated cases:

1. when the prompt execution of the EAW would be a threat to life or health of the prosecuted person;
2. if criminal proceedings against the prosecuted person are pending in the Republic of Poland for an act other than that referred to in the European Arrest Warrant; and
3. the EAW’s execution is not feasible due to a force majeure. There is no doubt that lodging the cassation against a final and valid decision on the execution of the EAW is not covered by any of the above premises to stay such execution.

Thus, it cannot be ruled out that the appeal in cassation will be considered only after the EAW has been executed and the person transferred abroad. There is an obvious question: what effect would a decision of the cassation court then have, when finding irregularities in the execution of


\(^{287}\) See: Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2005.
the EAW and reversing the decision issued on the matter? And, in particular, what kind of significance might it have to the country issuing the EAW? These questions should first be levelled at the Polish legislature. It seems that only in the case of the decision on executing EAWs, the admissibility of appeal in cassation should be abolished altogether.

6.5.3. The European Arrest Warrant as the source to apply preliminary detention

The Polish Code of Criminal Procedure does not envisage any particular grounds for preliminary detention applied for the purpose of executing the EAW. This prompts the question as to whether preliminary detention in such proceedings should be applied only on the basis of general premises provided in the CCP (Art. 249 and 258), or whether the measure can be applied based purely on the fact that an EAW has been issued for the person named in it.

Pursuant to Art. 1(1) FD EAW: ‘The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.’

Therefore, if arresting the person named in the EAW is one of the purposes of issuing the latter, it would be reasonable to recognise the EAW request alone as sufficient grounds for preliminary detention. This interpretation is further supported by the fact that, in principle, the state executing the EAW will not have information allowing it to decide whether the premises required by law for applying preliminary detention are met. The Polish CCP provides in Art. 249 that the preliminary detention may be applied only in order to secure the proper conduct of the proceedings, and only when the evidence collected indicates a high probability that the accused person has committed an offence. Yet, the court adjudicating on the execution of the EAW would normally not have any possibility to take cognizance of the evidence proving that the offence was committed by the accused. It is altogether a different matter whether the court is at all entitled to evaluate such evidence in the context of the probability of the offence being committed. The existence of such evidence is the prerequisite for the admissibility to issue the EAW. Therefore, this condition is examined in advance by the court issuing the EAW and, in accordance with the principle of mutual recognition expressed in Art. 1(2) FD EAW, it should be binding upon the court which executes the EAW (for more on this topic – see section V).

The principal guideline for resolving the issue of the grounds for preliminary detention in the course of the proceedings and the execution of the EAW should be sought in Art.12 FD EAW. Pursuant to this provision: ‘When a person is arrested on the basis of a European Arrest Warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.’

On the one hand, the above provision permits the preliminary detention of the person prosecuted under an EAW while, on the other hand, charging the court executing the EAW with an obligation to examine whether such detention complies with the domestic law of that court. Within the Polish criminal procedure, the most correct position would be to agree that the EAW – in line with the principle of mutual recognition – relieves the court executing the warrant of the duty to examine whether the above-mentioned general premise for applying preliminary detention exists (Art. 249 CCP), but does not relieve it from finding if any special premise for it has
been met\textsuperscript{288}. Pursuant to Art. 258 CCP, the provisions of the Polish criminal procedure provide for the following special premises for applying preliminary detention: the fear that the accused may take flight or go into hiding, the fear that the accused would induce other persons to give false testimony or attempt to obstruct the criminal proceedings in some other manner, the fear that the accused could abscond either because of the minimum penalty of up to 8 years of deprivation of liberty for the offence in question, or because of the penalty of 3 years of deprivation of liberty that he has been already sentenced to serve, and – finally – the fear that the accused would commit an offence against life, health or public safety, particularly if he had threatened to commit such an offence

6.5.4. Scope of cognizance of the court executing the EAW

One of the issues posing the greatest problems in practice is the matter of the scope of cognizance of the court deciding on the execution of the EAW. It is reflected in the resolution of the Supreme Court adopted on 20\textsuperscript{th} July 2006 against the background of the following facts of the case\textsuperscript{289}.

The Deputy King’s Prosecutor of the Prosecutor’s Office of the King’s Prosecutor in Brussels, issued a European Arrest Warrant for Adam G., a Polish citizen, wanted in Belgium suspected of committing the crime of murder with intent of theft. Adam G. was already 17 but still a minor under the law. At the date when the EAW was issued, it was not known if he was to be tried by a family court as a minor, or by a criminal court as an adult. Under Art. 38 of the Belgian statute on the protection of minors, the ruling on this issue was to be made by a judge of a family court, after considering the circumstances of the crime committed, the nature thereof, the earlier criminal record of Adam G. and his personality profile. For reasons of procedure, the issuance of the ruling was to take place only after the transfer of Adam G. onto the Belgian territory. The Circuit Court in Warsaw decided to surrender Adam G. under the condition that the surrender is affected exclusively for the purpose of conducting criminal proceedings. This decision has been appealed by the defence counsels of Adam G., on the grounds that the provisions of Art. 607 k § 1 of the Polish CCP may have been violated. This Article stipulates that the surrender under the EAW and transfer of a person from the territory of the Republic of Poland may only take place for the purposes of conducting criminal proceedings within the territory of another state. The defence lawyers argued that unless it was known what kind of proceedings would be instituted against Adam G. in Belgium, he may not be surrendered under the EAW. The Appellate Court of Warsaw, in considering the appeal has regarded the ensuing dispute as a legal problem, necessitating the principal interpretation of a statute and therefore submitted a question about a point of law to the Supreme Court.

The Supreme Court has based its deliberations on the distinction drawn between the premises for issuing the EAW and the premises for executing it. Among the premises for issuing the EAW, the Court listed (in accordance with Art. 1 of the Framework Decision on the EAW, and Art. 607 k of the Polish CCP) the purpose of this legal institution, which means a judicial decision issued by a Member State for the purposes of conducting a criminal prosecution of a requested person, or executing a custodial sentence or other penalty involving deprivation of liberty.


\textsuperscript{289} File number I KZP 21/06, published OSNKW 2006, No. 9, item 77.
Among the premises for the execution of the EAW, the Supreme Court listed obligatory and optional grounds for refusal to execute the EAW (covered, respectively, by Arts. 3 and 4 of the Framework Decision on the EAW, and the provisions of Arts. 607 p and 607 r, of the Polish CCP), as well as the grounds for non-execution of the EAW, covered by Art. 607 s CCP. In other words, it means that the evaluation of the existence of the premises for issuing the EAW is performed by the competent authorities of the Member State issuing the EAW. The premises for the execution of the EAW are obviously subject to examination and determination in the process of taking a decision on the execution of the EAW. Thus, the evaluation of the existence of these premises is performed by the judicial authorities of the Member State of execution.

The principal question which faced the Polish Supreme Court was whether the court adjudicating on the execution of the EAW, would be empowered to re-examine the existence of the premises for issuing the EAW. In its analysis of the issue, the Supreme Court referred to the known elements of judicature, as well as to the opinions presented within legal doctrines, which either assumed the admissibility of a limited scope of such a verification or excluded such verification altogether. Finally, the Polish Supreme Court adopted the following position: the judicial authority executing the EAW is entitled to verify the existence of the premises for issuing the EAW, albeit with a very limited scope and only with respect to some of the premises. On the one hand, in the opinion of the Supreme Court, it would be particularly inadmissible to re-examine the existence of valuation premises such as, for example, the existence of justified suspicion that the person named in the EAW had committed the offence concerned. On the other hand, it would be admissible to examine, for example, the competence of a specific judicial authority to issue the warrant, or even the purpose for which the EAW was issued. The examination of the purpose of issuing the EAW might cover both the normative aspect, as well as the factual circumstances of the case in which the EAW was issued.

As can be seen in the preceding description, the Polish Supreme Court has not adopted the principle of full confidence in respect of the state issuing the EAW, allowing for the possibility, however limited, of verifying again the actual existence of premises for issuing the EAW by the court seeking its execution. The main weakness of this position seems to be the lack of clearly specified circumstances which might be subject to such verification. Resolving this issue by referring to the concept of ‘valuation premises’, as those which may not be verified, seems particularly dubious. The term ‘valuation premises’ is fuzzy itself, and as such provides grounds for raising serious doubts as to its application in specific conditions.

The legal literature suggests that the issue could be resolved on the grounds of Art. 15 (2) FD EAW. This provision entitles the executing judicial authority, to request from the issuing judicial authority, the necessary supplementary information to allow the former to decide on surrender. The request may concern, inter alia, the information which should be included in the content of the EAW request. Thus, the right of substantive check as to whether the premises for issuing the

290 The opinion favouring the possibility of verification has been earlier supported by the Irish Supreme Court in its judgments of 9th September 2005 and 14th October 2005 in the case of Minister of Justice, Equality and Law Reform versus Michale Fallon (2005 36 Ex), whereas the opposite stand was adopted by the Belgian Court of Cassation (Flemish Section, 2nd Chamber, P05.0065.N) in its judgment of 25th January 2005, cited after: M. Hudzik: Europejski Nakaz Aresztowania a nieletni sprawcy czynów zabronionych, Europejski Przegląd Sądowy 2006, No. 8, p. 22.
EAW existed, within the scope obligatorily required by Art. 8 FD EAW, to be included in the content of the EAW, is derived from this provision\textsuperscript{291}.

It should be emphasised at this point, however, that the sole fact of the existence of certain obligatory elements of the request does not provide any argument supporting the admissibility of substantially examining their appropriateness or truthfulness. The prime purpose of including particular elements in the EAW request should be to furnish the court of execution with the information concerning the case. It is obvious that that court not only has the right to know, but it indeed must know the case underlying the request for surrender. Nevertheless, this right should not automatically be identified with the right to verify the information concerned. Such right is removed by the principle of mutual recognition stemming directly from Art. 1(2) of FD EAW, as well as the principle of mutual confidence between the EU Member States, evoked in the tenth recital of the Preamble to the Framework Decision.

In conclusion, I am inclined to subscribe to the thesis that the judicial authorities of the executing Member State are not, empowered to verify the premises for issuing the EAW. The scope of cognizance of these authorities shall cover the powers to check the presence of all elements of the request required by law, and to examine the premises for the execution of the EAW, including, in particular the grounds for obligatory or optional refusal to execute the EAW, or the grounds for its non-execution\textsuperscript{292}.

6.6. Discussion

\textit{(reported by Dobrosława Szumiło-Kulczycka)}

The discussion concluding the last conference panel was dominated by two issues, that is to say the problem of appealing against judgments on the enforcement of the EAW and the problem of admissibility of refusal to enforce the EAW based on the general human rights clause.

As for the first of these two problems, as noted by Sławomir Steinborn, regrettably, the Framework Decision is silent about the issue of possibility to appeal against a decision on the enforcement or refusal to enforce the European Arrest Warrant. It means that the different Member States are completely free to regulate it. As a consequence, there are solutions:

- like the one applied in Spain where there is no possibility for the prosecuted person to appeal against the decision of the national court on the enforcement of an EAW against him/her;
- where it is possible to file an appeal, but upon rules with certain restrictions as compared with general terms;
- where the decision on the enforcement of the EAW is appealed upon general terms, sometimes – as in Poland for instance – also with the possibility to file the extraordinary appeal which is the cassation appeal; and finally
- where the possibility to appeal against the decision on the enforcement of the European Arrest Warrant is conditioned by the lack of consent of the prosecuted person to surrender.

\textsuperscript{291} M. Hudzik, op.cit., pp. 26–27.

\textsuperscript{292} Resolved in a similar manner by the Appellate Court in Kraków in its ruling of 15\textsuperscript{th} July 2004, II AKZ 257/04, Krakowskie Zeszyty Sądowe of 2004 No. 9, item. 41.
All this obviously does not favour transparency of regulations and necessarily raises the question of justifiability of this issue being omitted in the Framework Decision itself.

As additionally mentioned by Prof. Lagodny, this issue gets complicated even further when we consider a similar inconsistency of regulations on the admissibility of appeals against EAW decisions in the state which issued the same.

Professor Bulnes pointed out that in actual fact her state, being guided above all by the concern to ensure efficient proceedings, does not provide for the possibility of filing an appeal against the judgment on the enforcement of the European Arrest Warrant. In practice, however, the institution of so-called “petition” has developed, leading to the case reviewed by the whole composition of the relevant Chamber. This practice has been endorsed by the Spanish Supreme Court concluding that the right to appeal is amongst the principal rights to be respected.

The Polish regulation was referred to by Dr Sakowicz. He was of the opinion that the cassation appeal against the decision on the enforcement of the EAW should be considered inadmissible since it will result in the proceedings being prolonged. And this is manifestly in contradiction to EAW objective. This contradiction between the effects of application of national regulations with the objective of the Framework Decision, in line with the idea expressed in the Pupino case, may be considered to be the basis for denying the application of the national regulation. This proposal was not agreed to by Dr Szumilo-Kulczycka painting out, firstly, that the filing in Poland of a cassation appeal against a final and valid European Arrest Warrant does not violate the aims of this institution inasmuch as it does not stop the enforcement of the judgment. Secondly, the idea expressed in the Pupino case assumes only the necessity to interpret national standards in accordance with the provisions of the Framework Decision. This does not provide the grounds for clear violation of national standards where their wording is beyond doubt, which is the case of admissibility of extraordinary cassation appeal against a judgment concerning the enforcement of the European Arrest Warrant.

The other issue under discussion concerned the grounds for denial to enforce the EAW. This problem was put forward by Dr Kloučkova, referring to the following case: a court of law in the Czech Republic received an EAW against a Czech national. The basis for the warrant was the charge of that national with a crime committed in the issuing state. During the course of the EAW proceedings, the Czech court reached the conclusion that the prosecuted person could not have committed the crime he was charged with because precisely on that date he was in a Czech prison. At the place of crime, there was another person using the identity document previously stolen from the said Czech national. Dr Svetlana Kloučkova pointed out that the case was difficult, because even though the court adjudicating on the matter of enforcement of the European Arrest Warrant knew that the prosecuted person was not guilty, in the light of the Framework Decision it had no grounds for denying the enforcement of the warrant.

Professor Spinellis pointed out that the refusal to enforce the warrant in such a situation may be justified by the fact that the person against which it had been issued was not actually the person sought by the issuing state. This line of arguments was supported by Prof. Bulnes who raised, additionally, the possibility of reaching an agreement under consular procedures and explaining the impossibility to attribute the crime which was the basis for issuing the warrant. The diplomatic path, as a way of resolving the issue was also relied upon by Prof. Lagodny. Prof. Bard, in turn, pointed out that in such a situation the denial should rely on Arts. 5 and 6 of the European Convention
for the Protection of Human Rights and Fundamental Freedoms. Indeed, such surrender would lead to a situation where the criminal proceedings should not take place at all. As mentioned by Dr Dzialuk, the problem here is the shortage of resources in the state enforcing the EAW to deny its enforcement. In the situation under discussion, the issue is not very problematic because the adjudicating about the enforcement is in the possession of clear evidence of the prosecuted person being not guilty. Therefore, the denial of enforcement may be based not only on Arts. 5 and 6, but also Art. 3 of the European Convention. The point is that in practice the circumstances are not always so clear. An opposite view was expressed by Dr Szumilo-Kulczycka, arguing that, in such a situation, the denial to enforce the EAW would be in fact based on a substantive assessment of the perpetrator’s alibi by the court enforcing the warrant. While the court has no right to speak on the criminal liability of the prosecuted person, but only concerning the enforcement of the warrant. The premises for enforcing the warrant are specified precisely in the Framework Decision and this has to be binding upon the states which are the parties thereto. Admitting the possibility of review by the court adjudicating on the enforcement of the EAW of the correctness and justifiability of the charge against the prosecuted person by the issuing state would lead to denying the principle of mutual recognition. The need for effective cooperation requires certain stability and transparency in the activity of the different authorities. Such stability and transparency may be achieved only through the principle of trust and based on the existing regulations and the resulting powers. Clearly, such an approach does not provide protection against paradoxical situations such as the one referred to by Dr Kloučková. It seems, however, that currently the only way out of such situations should be diplomatic efforts.

Prof. Lagodny pointed out that there was a broader context for the problem as it raised the question of admissibility of hiding behind human rights in transactions between the EU Member States. So far, the Commission spoke against such a possibility which does not mean, however, that the matter is closed.

Two positions were formed at this point. An attitude unfavourable towards the use of human rights as a means of denying the enforcement of EAWs was demonstrated by Dr Kluckova, who recalled that the draft Framework Decision had provided for the possibility of denying the enforcement of the European Arrest Warrant precisely due to the fact that it would lead to violating human rights. This provision was abandoned later, though, which should not remain without effect on the manner of interpretation of this issue.

Prof. Spinnelis and Prof. Bulnes submitted, on the other hand, that certain fundamental issues are waived aside more and more easily. In view of terrorism and other dangerous crimes of international scale, what is accentuated above all is the need for effectiveness and efficiency. This tendency has to be counterbalanced somehow and it is human rights that should constitute such counterbalance. This thesis was also supported by Prof. Lagodny.
II. Varia

1. General remarks on the basis of the EAW Framework Decision – framework decision as a legal instrument and constitutional problems

(Agnieszka Grzelak)

With reference to some issues pointed out during the International Conference on ‘The European Arrest Warrant and its Implementation in the Member States of the European Union’, organized in Cracow in November 2006, let me present my point of view and some thoughts regarding the questions and issues mentioned in the presentations and during fruitful discussions.

Let me deal with:
1. framework decision as a legal instrument within the third pillar of the European Union,
2. the possibility of overcoming constitutional problems regarding the framework decision on European Arrest Warrant (EAW).

1.1. Framework decision as a legal instrument in the field of police and judicial cooperation between EU member states

1.1.1. I have listened to the presentations of Prof. Biernat and Prof. Vermeulen with great interest. It is true that the answer to the problem regarding the question whether the European Arrest Warrant should be regulated by framework decision or by convention, will be given soon by the European Court of Justice (ECJ) in its judgement in the case C-303/05293. According to the applicant, international cooperation in criminal matters should have been regulated by a convention instead of a framework decision. Indeed, Art. 34 of the Treaty on European Union says that framework decisions may be adopted for the purpose of approximation of the laws and regulations of the Member States, which is allegedly not the case. Moreover, the use of a framework decision, whose transposition into the national law is mandatory for the Member States, would have the effect of excluding the parliamentary control on the act.

The judgement of ECJ will be very important, I would say that it could even become ‘a milestone’ for the development of the EU area of freedom, security and justice, because the Court should answer the question on the scope of the Council competences to adopt framework decisions regulating approximation of Member States’ laws in various matters of criminal procedure, which do not

necessarily belong to the community law (first pillar). In order to give a judgement, the Court will also need to examine the system of sources of law in the third pillar of the Union, especially by analyzing the legal nature of framework decisions, which can be seen as an equivalent to the directives of the community pillar. If the Court states that the criminal procedure law issues cannot be regulated by framework decisions, it will put in question the legality of already adopted instruments and of national laws implementing those instruments. At the same time, the legitimacy and legality of the proposed instruments will be called into question. The judgement of ECJ compatible with the position of the applicants (in the national Belgian case) would surely slow down the present pace of development of legal cooperation in criminal matters in the EU. It must be mentioned, however, that the Advocate General did not support the applicants’ position.

In my opinion, European Arrest Warrant could definitely be introduced into the system using framework decision as a legal instrument. The EU Council was fully competent to do so. Framework decisions constitute one of the sources of the EU law and the competence to adopt them by the Council arises from the international treaty, by which all Member States transferred their power in this field. Such a conclusion results from the wording of the Treaty on European Union (TEU) that states directly – according to Art. 34 – that the Council has the competence to adopt framework decisions, in all areas referred to in Title VI of the Treaty, which means also in the area of legal cooperation in criminal matters.

The wording of Art. 34.2.b TEU does not give any ground for the interpretation that the scope of substantive regulation can be limited. However, one can argue that it can be found in other provisions of Title VI of TEU. In the framework decision 2002/584/JHA on EAW the Council pointed out in particular Art. 3.1.a and b and Art. 34.2.b TEU as the legal basis, that is the general provision on framework decisions and two examples of common actions on judicial cooperation in criminal matters (“facilitating and accelerating cooperation between competent ministries and judicial authorities (…)” and “facilitating extradition between Member States”).

In my opinion, it was not really necessary to look for other possibilities than the main provision of TEU on framework decisions (Art. 34.2.b) in order to justify the concept of harmonization, because the wording of Art. 34.2.b and 31.1.a and b TEU justifies the choice of the Council itself. Framework decisions – unlike normal decisions – are suitable for all measures which require transposition into the national law, within the Title VI of the Treaty. However, one must remember that

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294 As far as the EU competences in criminal matters are concerned, see also the judgement of the Court of Justice in the case C-176/03 of 13th September 2005, Commission of the European Communities v Council of the European Union, ECR [2005] p. 7879.

295 One should mention for example framework decision 2002/465/JHA on joint investigation teams; framework decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence or framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties.

296 In its opinion, the Advocate General pointed out discussions in the Member States, whether EAW is a new form of extradition or whether it is completely new form of cooperation. The Advocate stated that: ‘The move from extradition to the European Arrest Warrant constitutes a complete change of direction. It is clear that both concepts serve the same purpose of surrendering an individual who has been accused or convicted of an offence to the authorities of another State so that he may be prosecuted or serve his sentence there. However, that is where the similarities end. (…) It is therefore not the case that a mechanism which did not previously exist has been created or that national extradition laws have been harmonised; rather, it is the concepts of arrest and surrender which have been harmonised so that the judicial authorities existing in each Member State may assist one another’. See: points 30–47 of the opinion of the Advocate General.
the Art. 31.1.a and 31.1.b are of specific nature and provide for facilitating and accelerating cooperation and for facilitating extradition between the Member States. If so, then they can constitute the exclusive basis also for resignation from extradition procedure, which means – they can constitute the basis to adopt Framework Decision on EAW.

Analyzing those bases, one must remember that the framework decision on the EAW addresses the desire to abolish the formal extradition procedure in the Union and to replace it with a simplified system of judicial surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences. I agree with the opinion of the Advocate General that the move from extradition to the European Arrest Warrant constituted a complete change of direction. The only similarity between both procedures is the same purpose of surrendering an individual who has been accused or convicted of an offence to the authorities of another state so that he/she may be prosecuted or serve his/her sentence there. That does not, however, mean that the EAW has no precedents in the national legal systems whose harmonization is sought. The Advocate General is of the opinion that this is the concept of arrest and surrender which have been harmonized so that the judicial authorities existing in each Member State may assist one another. I would add that provisions of the framework decision on the EAW which require to be transposed into the national law, in reality approximate the national provisions on criminal procedure incorporating very many areas, as for example catalogue of crimes being subject to new procedure, terms or prerequisites of surrender of own nationals etc. There is no legal possibility, in my view, to question the right of the Council to use framework decisions as the instruments in this field.

The combination of Art. 34.2.b TEU with Art. 31.1.a means that some procedural questions, including the extradition procedure or surrender procedure, can be regulated by framework decisions. One must, however, remember that for some academics and for the Belgian Court, which requested a preliminary ruling, it is doubtful whether approximation in the frames of framework decisions, which could contribute to facilitating the police and judicial cooperation, can be extended outside the scope mentioned in Art. 31.1.e TEU. By choosing Art. 34.2.b in connection with Art. 31.1.e, meaning that framework decisions would be used only to approximate laws in the field described in Art. 31.1.e, the area of using this instrument would be very much limited, against the wording of the treaty. One must also remember that mentioning Art. 31.1.e as the general basis in the case of EAW would surely not be correct, because the provisions of the framework decision do not provide for establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking.

In my opinion, framework decision is the only legal instrument of the third pillar which allows for faster attainment of the goal described in Art. 2 of the TEU, which is to maintain and develop the Union as an area of freedom, security and justice. Conventions do not secure such dynamics. They represented real progress at the time of their signature, but today they constitute an obsolete

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297 See also points 41–47 of the opinion of the Advocate General.

298 See: A. Grzelak, W sprawie pytania prawnego dotyczącego zgodności art. 607t Kodeksu postępowania karnego z Art. 55 ust. 1 Konstytucji (sygn. akt P 1/05), Zeszyty Prawnicze Biura Studiów i Ekspercy Kancelarii Sejmu No. 2/2005, pp. 97–104.

299 See also point 50 of the opinion of the Advocate General.

mechanism in view of the progress in relations between the Member States. I would agree with
Advocate General that the choice between the two types of measures (conventions and frame-
work decisions) entails the widest possible discretion, as the Art. 34.2 TEU neither places them in
any hierarchical order nor categorizes them by assigning each type to a particular field. As it has
already been said, Art. 34.2.b TEU does not limit the substantive scope, so framework decision can
regulate both substantive and procedural criminal law, if only it is within the limits of Title VI. The
EAW framework decision regulates matters which deal with the police and judicial cooperation and
for sure contributes to one of the objectives described in Art. 2 of TEU. By introducing the creation
of the area of freedom, security and justice into the list of objectives of the Union, the Treaty of
Amsterdam opened the door to a radical change of perspective and the concern of effectiveness
underlined the option in favour of a framework decision for the creation of the European Arrest
Warrant.

All that has already been said means that when adopting framework decisions as the legal
instrument of the third pillar, it is important to properly choose and analyze the legal basis of the
act. In the case of a wrong legal basis, the legality of framework decision can be reviewed by the
Court of Justice on the basis of Art. 35.6 TEU. However, one must remember that Art. 31.1.e TEU is
not the only legal basis which clarifies whether an act could approximate the national law. As I have
already said, the activity of the Council as regards the adoption of framework decisions provides
for broad understanding of the substantial scope of cooperation.

When describing the positive attitude towards growing competences regarding framework
decisions, one must not forget the opposite opinions, including those presented by the supporters
of the “Alternative Draft of European Penal Procedure”301. They are of the opinion that hypertrophy
– which means abnormal growth of norms of the European criminal law, which the rule on mutual
recognition relates to – constitutes a very serious argument against such method of regulation.
They also mention the huge deficit of democracy, because – in their opinion – the Council of the
EU does not have enough democratic legitimacy to adopt legal measures. By adopting framework
decisions, the Council de facto usurped the competences to adopt legal norms in the field of crimi-
nal law, showing no respect to national organs of criminal procedure and the national systems of
law. They also proposed changes in the treaties, which could result in adoption of acts in the field
of criminal procedure by the parliament, elected in democratic elections. In my opinion, such an
idea can only be introduced in the new treaty, whereas nowadays only the existing procedures
should be developed.

1.1.2. Referring to the discussion, whether framework decision can be seen as an international
agreement, adopted in a simplified procedure or as an act of supranational law, it seems that
at the moment the characteristics of a framework decision should be seen as an interim form302.
At the same time, the relation between the EU law (three pillars) and the national law should be
understood as one of mutual influence, borrowing from the theory on deliberative supranational-
ity. Law enforcement is divided by competences, into the national and the EU law, but one must
remember that we should not talk about two independent legal systems, but one – a multilevel

302 Some German commentators are of the similar view. See: A. Jour-Schröder, M. Wasmeier, EUV, Vorbemerkungen zu
den Artikeln 29 bis 42 EU in: H. von der Groeben, J. Schwarze, Kommentar zum Vertrag über die Europäische Union und
system. This also explains the problem of ‘intervention’ of community law acts into the questions regulated so far in the intergovernmental procedure.

Most of all, however, it should be clearly stated that at the present level of development of the community law, there are more than only two ways of defining framework decisions, as:

a) an act of cooperation, which is a sort of a simplified international agreement, attributed only to the Member States, or

b) an act of supranational law, adopted within the community method.

For example, it can be described as a sort of hybrid between both systems.

I would agree with opinions that framework decision is an act which should be attributed to the European Union and not to the Member States. Such view is based on the rule of uniform institutional framework and on the analysis of Art. 34.2 TEU, as well the unclear position towards the legal personality of the EU. Cooperation within the third pillar of the EU is obviously not based on the community method (first pillar). Framework decision possesses also features, characteristic for the third pillar acts, other than community acts, for example, the right of initiative belongs not only to the Commission, but also to the Member States. According to the wording of the Treaty (Art. 34.2.b), framework decisions never entail direct effect. Also, the applicability of the primacy rule towards the national law in the third pillar is not clear. Moreover, in the third pillar the monitoring procedure, similar to the set out in Art. 226 of Treaty Establishing European Community (TEC), where the execution of obligations by the Member States could be controlled, does not exist.

At the same time, ECJ acknowledged the obligation of loyal cooperation between the Member States, with the consequences in the field of legal transposition of framework decisions. The Court also described the obligations of consistent interpretation of the national law. The jurisdiction of ECJ in some aspects is independent from the will of the Member States (Art. 35.6 TEU), especially when controlling the legality of framework decisions and decisions. Also, the rule of unanimity applicable in the third pillar should not be seen as an argument against understanding framework decisions as an instrument different from classical international agreements, because in the first pillar of the EU there are also politics where the unanimity rule applies. Moreover, framework decisions, unlike regular conventions, need not to be ratified by the Member States. It definitely solves the problem of ratification, but the question remains whether, and how, the Member States will implement framework decisions into the national law.

All this means, that at the present level of development of the EU law, one can only say that the characteristic element of evolution of cooperation between the Member States is gradually supplanting the intergovernmental cooperation based on diplomatic relations and international treaties, by community method with the community law. For some academics, it is even obvious that ever since the entry into force of the Treaty of Amsterdam the third pillar has been a fully-fledged European Union law and, thus, subject to the particularities of the European Union law insofar as these deviate from international law. Prof. Vervaele also stated that, in that sense, it is quite surprising that in 2004 some Member States still argued before the Court of Justice that the third-pillar law is intergovernmental law that is governed by the international law and is therefore excluded from the application of general principles of the European Union law. The tasks of the

third pillar are realized both by traditional means of intergovernmental cooperation (for example using practical cooperation within such institutions as the European Judicial Network or Eurojust), and by such means as framework decisions.

Such an understanding has its consequences for rules of implementation of framework decisions in the Member States. The rule of primacy in regard to supranational law (community law) is unconditional – it results in denying the application of the national law. In the case of framework decisions, such relation does not exist. Pro-European interpretation with all its restrictions does not result in non-application of the national law. In the end, on the level of the national law, only national provisions which implement the third pillar law are applied. Another question is whether such national acts have any special position in the system of national sources of law, but I think that at the present level of development of the EU law, it is not really possible to distinguish a new category of acts – the Polish law does not know various sorts of acts\(^{304}\). Only the national law and pro-European interpretation (together) can confer rights to individuals. Such rights can never be directly conferred directly by a third pillar act itself.

One can expect that this problem will be the subject of judgement of the Court of Justice\(^{305}\).

1.2. The possibility of overcoming constitutional problems

Prof. Grzybowski in his very interesting presentation already described the judgement of the Constitutional Tribunal of 27\(^{th}\) April 2005, in the case P 1/05. As we have also heard, in other countries the judgements of constitutional courts questioning the constitutionality of the European Arrest Warrant have been passed. Finding incompatibility with constitutional safeguards provided for their nationals, the courts created legal uncertainty surrounding the EAW.

In the Polish judgement, it has been argued that the EAW procedure is a sub-species of extradition. During the process of implementation, academic writers have described the framework decision as an attempt to facilitate extradition between the Member States, as a modern version of extradition which is *sui generis* and has a different name\(^{306}\). The Constitutional Tribunal described the surrender of an individual in compliance with the EAW as a form of extradition, although it did so with a view to making the warrant subject to the same determining factors as the traditional transfer from the point of view of the Polish Constitution. That is why the Tribunal declared the provisions of the 1997 Penal Procedure Code (PPC) unconstitutional. The Tribunal

\(^{304}\) During the conference in Cracow P. Hofmański stated that the primacy of EU law should not be overrated, because framework decisions are not direct applicable anyway. He also mentioned that instead, it should be analyzed whether acts transposing EU law have a special position in the system of national sources of law and whether they do not prevail over the Constitution.

\(^{305}\) Some authors suggest that the Court could invoke primacy instead of searching for the legal basis of loyal cooperation in Art. 1 TEU. See: K. Lenaerts, T. Corthaut, Of Birds and Hedges: The Role of Primacy In Invoking Norms of EU Law, European Law Review 2006, No. 3, p. 293.

therefore suggested that there must be an amendment of the national Constitution in order to avoid the potential breach. As the Tribunal obviously was not able to undertake such changes, it strongly suggested to the Polish legislating power to "do something about it" and – preferably – to amend the Constitution so that the European Arrest Warrant could be applied in respect of Polish citizens. It maintained the unconstitutional provision of PPC for the maximum possible period – eighteen months – thus leaving the longest scope of time available for amending this situation. During this period all Polish courts had to apply the unconstitutional provision and could not – in theory – raise its inconformity with Art. 55 of the Constitution. The Tribunal, therefore, used all the means that it had available to milder its judgment in case P 1/05 and allow Poland to continue fulfilling its EU obligations.

When analyzing the problem of constitutional barriers, one must remember that the problem of implementation is very important, because of the substance regulated in these acts, very sensitive as far as the rights of individuals are concerned. Although the obligation to implement the secondary EU law, including framework decisions issued within the framework of the EU third pillar (Art. 34 TEU), results from Art. 9 of the Constitution of the Republic of Poland, the very fact that the domestic act was issued for the purpose of implementation of the secondary EU law does not guarantee substantive compliance of this act with the norms contained in the Constitution.

The obligation to implement the EAW Framework Decision, adopted for the purpose of speeding up extradition procedures by replacing them with a system of surrender operating between judicial authorities of the Member States, was accepted by Poland in the Accession Treaty of 2003. Nevertheless, overcoming of constitutional barriers in the case of Poland seemed to be not complicated at all – it required only amendment of the Constitution within the term provided by the Constitutional Tribunal, so full implementation of the Framework Decision would be possible. Until the expiry of the 18-month transitional period, Poland fulfilled its obligations arising from the framework decision. The hypothetical failure of the constitutional revision combined with annulment of Art. 607t of the Penal Procedure Code would definitely put Poland in a difficult position. We must also notice that some academics were right saying that, in fact, the Tribunal found unconstitutional “wrong” provision, because Art. 607t of PPC was only guaranteeing Polish nationals to come back to Poland in order to serve the sentence. It was not the ground for refusal of EAW’s execution, because mandatory grounds for refusal were to be found in Art. 607r of PPC. In that case, any failure to amend the Constitution within the given time-limit would only mean that Polish citizens would not have this guarantee and still could be extradited on the basis of the EAW. However, when reading the reasoning for the Tribunal’s judgement, we must come to the conclusion that such understanding was definitely not in the mind of the judges.

One must also remember that the Constitutional Tribunal did not have the possibility to refer to the European Court of Justice with the preliminary question, because Poland has not yet accepted the jurisdiction of the Court as far as Art. 35.2 TEU is concerned. The validity of framework decision could not be then verified, although ECJ will have this possibility in case C-303/05.
In passing, it should be mentioned that the Court could – in my opinion – take advantage of the possibilities given by the pro-European interpretation, although the judgement was passed before the Pupino case\textsuperscript{309}, which came two months later. Moreover, the Polish Constitutional Tribunal's judgement is subsequently interpreted in the light of the ECJ judgement in the \textit{Pupino} case. If the latter had been decided earlier, it might potentially have had a great impact on the Polish Tribunal and would be relevant in the decision of the case. The Constitutional Tribunal, although doubting whether the principle of loyal cooperation is valid in the third pillar, decided that the interpretation of the national law in general should respect the process of pro-European interpretation and cooperation between the Member States. The Tribunal however, in my opinion, forgot that novum brought to the national legislation by the EU law requires more flexibility as far as legal amendments are concerned. In that case, it should be possible to interpret the term “extradition” in Art. 55 of the Constitution in such a way that “surrender” would be then a completely different concept\textsuperscript{310}. In reality, the Tribunal opted for absolute primacy of the Constitution of the Republic of Poland over the statutes implementing framework decisions.

Even more constitutional confusion was added by the Tribunal in its later judgement on the Accession Treaty\textsuperscript{311}, which was issued in response to the motions deposited by three groups of deputies of the lower chamber of Polish Parliament. According to the Art. 188 of the Polish Constitution, the Constitutional Tribunal can control the conformity of ratified international agreements concluded by the Republic of Poland with that Constitution. The Tribunal itself confirmed in its judgement the competence to check conformity of EU treaties with the Polish Constitution, saying that any international agreement entered into by the Republic of Poland, even that accepted in a referendum, does not prevail over the Constitution.

The applicants contested the conformity of the Accession Treaty provisions with the principles of sovereignty and supremacy of the Constitution over all other legal acts existing in the Polish legal order. In its ruling of 11\textsuperscript{th} May 2005, the Tribunal either stated the conformity of the mentioned provisions with the Polish Constitution or did not see any inconformity.

The Constitutional Tribunal also returned to the problem raised in its EAW judgment, underlying the limitations of consistent interpretation of the national law in line with the European law. It stressed that such interpretation cannot take place, if it leads to a result contradictory to the wording of the Constitution or if it is irreconcilable with the minimum guarantee functions provided by the Constitution. The guarantees enshrined in the Constitution constitute an unsurpassable minimum that has to be respected in all circumstances. This idea was new: in the EAW judgement the Tribunal did something exactly opposite, namely agreed to a reduction of rights for individuals for the next eighteen months in order to respect obligations stemming from international law.


\textsuperscript{310} W. Czapliński, Glosa do wyroku Trybunału Konstytucyjnego z 27 kwietnia 2005 r. w sprawie P. 1/05, PiP 2005, No. 9, p. 108.

In this judgement, the Polish Constitutional Tribunal declared in fact that the Polish Constitution has an absolute primacy over the community law. As K. Kowalik-Bańczyk stated, it denied thus the well-established practice of national constitutional courts and the ECJ not naming certain conflicting aspects of relation too openly.

The discussed judgments of the Polish Constitutional Tribunal inspired various reactions and comments. Definitely, it cannot be considered in black and white terms. Although the decision is based on the Polish legal context and the Constitution in particular, it is difficult to resist the impression that the Tribunal’s position is influenced by the jurisprudence of the constitutional courts of some of the old Member States and Germany in particular.

The relevant draft of the constitutional amendment was presented by the President of Poland on 12th May 2006 and it seemed to fulfil all prerequisites necessary to meet the obligations imposed by the Framework Decision. Especially, in the presidential draft it was assumed that extradition of the state’s own nationals must be allowed because of the membership of Poland in the European Union. Especially, this draft correctly introduced two exceptions from the prohibition of extradition described in Article 55.1 of the Constitution: both in the case of surrender based on EAW, as well as surrender to the International Criminal Court (ICC), where extradition – according to international obligations – should be allowed regardless of the nationality of the person. However, terminology used in the draft was doubtful: instead of introducing two terms to describe one procedure (extradition and transfer), according to the judgement of the Constitutional Tribunal and the provisions of the Penal Procedure Code, only one was used – a superior term “extradition”, which would include all three forms: traditional transfer, EAW and surrender to ICC.

During many sittings of the parliamentary committee, the draft was however fully “rebuilt”, especially as far as Article 55.2 of the Constitution is concerned. The committee accepted the proposal, later approved by both chambers of the Parliament, that extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organization which the Republic of Poland is a member of, provided that the act covered by a request for extradition:
1. was committed outside the territory of the Republic of Poland, and
2. constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of making the request.

The reasoning given by the speaker of the committee is illegitimate. He claimed that such amendments to the presidential draft would imply that a Polish citizen cannot be arbitrarily surrendered to another state for an act which is not a crime according to the Polish law. He also said that the foreign justice system cannot be applied on the territory of Poland. These statements I found as illegitimate, because one must remember that due to the principle of mutual recogni-

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313 The doubts concerned mainly terminology. See: opinions to the draft, presented in: Nowelizacja art. 55 Konstytucji RP przez Sejm V kadencji, „Przed pierwszym czytaniem” Biuro Analiz Sejmowych Kancelarii Sejmu 2006, No. 1.
tion, on which the cooperation between the Member States is based, such argumentation can no longer be invoked.

The accepted version of Art. 55.2 of the Constitution is not consistent with the Framework Decision – I think it is not doubtful at all. Not only does it introduce the double criminality rule again in cases where it has already been abolished by Framework Decision (Art. 2.2 of the Framework Decision), but also keeps the prohibition of extradition in the case of political crimes. Both problems were the most important achievements of the Framework Decision.

So far the European Commission has criticized some attempts to reintroduce the double criminality check. For example, in its report of 2005, the Commission stated that “obligations were also breached by those Member States which reduced the substantive scope as regards either the minimum thresholds for sentences (...) or certain categories of offence, for which they have reintroduced (...) or created the risk of reintroducing (...), a check on double criminality”. Of course one may say that Poland is surely not the only state that introduced some provisions not in line with the Framework Decision, but it is the only state who introduced them “on purpose” on the constitutional level.

As far as the “territoriality” prerequisite is concerned, I do not find it problematic that – although the framework decision introduced it as an optional, in the Constitution it was adopted as a mandatory ground for refusal. Transposition of the Framework Decision need not necessarily require enactment in precisely the same words in order to express a legal provision – thus it is sufficient, as long as the full application of the Framework Decision is assured in a sufficiently clear and precise manner. Many Member States have interpreted Art. 4 of the framework decision (grounds for optional refusal) as one implying that the state may choose whether a judge is required to refuse surrender where one of the Art. 4 grounds exists or whether the judge has discretion in the matter. In consequence, many states have made these mandatory grounds for refusal. At the same time, since this Art. is optional, some Member States have not transposed it at all. The Commission in its reports accepted such situation. That means that the Polish legislator was allowed to introduce the principle of territoriality as a mandatory ground for refusal.

Instead of overcoming constitutional barriers, new barriers were introduced, causing additional problems. In fact, though guaranteeing greater effectiveness, the Framework Decision limits the grounds for refusing surrender between the Member States, ruling out any decision based on political expediency. The surrender of nationals – a major innovation in the Framework Decision – has now become fact in the European system, except where exempted by the decision itself (Art. 33, for Austria). Most Member States, however, have chosen to apply the condition that, in the case of their nationals, the sentence should be executed on their territory, with a few exceptions (for example the UK). In the process, most Member States have opted for equal treatment for their nationals and their residents. Poland will be an exception, in making surrender conditional on checking in all cases the double criminality and basing on the territoriality principle.


This has been the first constitutional amendment since 1997. Undoubtedly it was determined by the judgement of the Constitutional Tribunal in connection with the necessity to fulfil international obligations and obligations derived from Poland’s accession to the European Union. By adopting provisions inconsistent with the Framework Decision, the legislator also had to amend the PPC in line with the Constitution. If there is a case that the provision of PPC would be questioned before the Constitutional Tribunal, in the end the Tribunal can pass the judgement again that, for example, in case of double criminality check such provisions are not in line with Art. 9 of the Constitution, indirectly showing the necessity to amend Art. 55 of the Constitution.\footnote{The Constitutional Tribunal has no competences to check the conformity of criminal procedure code with the provisions of Framework Decision, although it has competence to check the conformity of PPC with Art. 9 Constitution (obligation to fulfil international obligations).}
Chapter II. Varia

2. The European Arrest Warrant and effective defence – discussion comment

(Cezary Kulesza)

The EU Council’s decision of 13th June 2002 on the European Arrest Warrant\textsuperscript{318} discussed during this conference, resulted in changes in the Polish code of criminal procedure implemented by the law of 18th March 2004 (Dz.U. Nr 69, p. 6626 as amended). It is undoubtedly an example of a decision increasing the effectiveness of the most serious crimes’ prosecution in the Community (with special emphasis on the organized crime). Not to repeat the topics previously presented here by the representatives of the Polish doctrine and foreign guests from all over Europe dealing with constitutional aspects of the EAW regulations in individual countries, I would like to content myself with a short presentation of the objections to those regulations from a perspective of a right to defence.

It is worth to emphasise that in the Polish law, the principle of a right to defence was lifted to the constitutional level\textsuperscript{319}. According to the Art. 42 p. 2 of the Constitution of the Republic of Poland, anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. That undoubtedly includes the proceedings of the Polish citizen’s surrender to a foreign country based on the EAW. Such a person may in particular choose his defence counsel or use the court-appointed defence lawyer according to the applicable law.

It is rightly stated in the Polish specialist literature that as a consequence of the direct applicability of the Constitution (Art. 8, p. 2 of the Polish Constitution), the criminal procedure law cannot define a narrower scope of the right to defence than it is done in the Constitution. Only in the case of the right to use the court-appointed defence lawyer, the Constitution leaves the legislator freedom to decide upon its scope (Art. 78 and 81 of the Polish Code of Criminal Procedure)\textsuperscript{320}.

When it comes to the request of the EU Member State to surrender the prosecuted person based on the EAW (chapter 65 of the code of criminal procedure), the prosecutor, the prosecuted person and his defence lawyer can participate in the court’s session deciding upon the execution of a penalty for the crimes which were the basis for the prosecuted person’s surrender (Art. 607e of the code of criminal procedure).

Provisions of the Art. 451 of the Code of Criminal Procedure are applicable in these proceedings, which means that the court should instruct the prosecuted person on the right to file the request to bring him in to the session. If such a request has been filed, it should be the rule to bring the person in to the session. If the court decides not to bring the prosecuted person into the session, it is obliged to ensure the participation of the defence lawyer in the session. If the prosecuted person

\textsuperscript{318} Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the Surrender Procedures between the Member States, 2002/584/JHA.

\textsuperscript{319} It should be noted that there are legislations where the right of defence does not hold the position of a principal rule of procedure and is not an expressis verbis constitutional regulation. For example, in the German textbooks on criminal procedure such right is listed among the rights of the accused person but it is not included in the catalogue of procedural rules. See e.g.: K. Volk, Strafprozessrecht (2. Aufl.), München 2001, p. 141–150; F. Ch. Schroeder, Strafprozessrecht (2. Aufl.), München 1997, pp. 28–36

\textsuperscript{320} P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego, Tom I, Komentarz do Art. 1–296 (P. Hofmański, red.) (2 wyd.), Warszawa 2004, s. 50.
does not have a defence lawyer, it is necessary to appoint one by the court. If the court refuses to consider the request of the prosecuted person to be brought into the session, the presence of the defence lawyer or the court-appointed lawyer is obligatory.\footnote{Compare: A. Górski, A. Sakowicz, [w]: K.T. Boratyńska, A. Górski, A. Sakowicz, A. Ważny, Kodeks postępowania karnego. Komentarz, Warszawa 2005, s. 1101.}

After the surrender, the prosecuted person may also renounce the specialty rule in relation to the acts committed before the surrender (Art. 607e § 3 p. 7). According to the Art. 27 p. 3 f of the Framework Decision, the renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel. The Polish legislator did not provide the possibility to \textit{ad hoc} appoint the defence lawyer by the court to assist the prosecuted person in making the decision and in submitting such a statement. The prosecuted person can appoint the defence lawyer of his choice based on general rules or apply for the court-appointed defence lawyer on the basis of Art. 78 § 1 of the Code of Criminal Procedure.\footnote{S. Steinborn, Komentarz do Art. 607(e) KPK, [w:] J. Grajewski, L.K. Paprzycki, S. Steinborn, Kodeks postępowania karnego. Komentarz, Tom II (Art. 425-673). Kraków, 2006.}

In case of a court session dealing with the surrender and temporary detention of the person who is to be surrendered by Poland to other Member State based on EAW, the prosecutor and the defence lawyer may participate in it (Art. 607l § 1). We should concur with S. Steinborn that the above mentioned rule is applicable \textit{a maior ad minus} in case when the court decides only on the matter of surrender, as it is a major subject of the decision regulated in chapter 65b.\footnote{Ibidem, uwaga 5 do art. 607l.} Therefore those persons should be informed about the time and place of the court’s session. The fact that provision of Art. 607l § 1 completely omits the prosecuted person, brings out, however, serious doubts as to its accordance with the right to fair hearing guaranteed by the Art. 45 p. 1 of the Constitution and with the right to defence (Art. 42 p. 2 of the Constitution, Art. 6 of the code of criminal procedure). In addition, Art. 14 of the Framework Decision on EAW guarantees the prosecuted and arrested person the right to be heard by the executing judicial authority. A separate regulation included in Arts. 18 and 19 of the decision concerning the right to be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court, explicitly states that those hearings should not be equated.\footnote{Ibidem.}

However, not the sole lack of distinct regulation (in the Polish code of criminal procedure) of the right of the prosecuted person to participate in such session should be noted. The court deciding the case (whether only upon the surrender or the detention) does not make any factual findings basing on the results of the evidence procedure carried out by the authorities of the issuing state. Bringing the situation to the Polish circumstances, it should be noted that the courts quite casually acquaint with the case files and do not use the opportunity to carry out their own factual findings in the course of Art. 97 of the Code of Criminal Procedure, even when they decide on the motion on arrest filed by the Polish prosecutor leading or supervising the preparatory proceedings. As a result, we are facing a mass occurrence of a situation where, in 90% of the cases, such motions are taken into consideration by the courts and in the same proportion the complaints of the defence on the
decision on the arrest are dismissed\textsuperscript{325}. Lack of possibility to get familiar with the case files by the Polish defence lawyers (refusals of the authorities leading the proceeding are actionable only in the course of the prosecutor supervision – Art. 159 of the Code of Criminal Procedure) is one of the reasons why they are rarely present during such court sessions. It reduces the participation of the defence to a symbolic company.

Such threats to the right of formal defence resulting in the lack of its effectiveness all the more concern the detention procedures when the Polish citizen is surrendered as a consequence of the EAW which is based on the mutual recognition of evidence proceedings carried out in a different Member State of the Community.

The judicature of the Polish courts also indicates the principle of mutual trust and the principle of the recognition of the national courts’ decision as a base of the surrender of Polish citizens in the course of EAW.

In the decision of 20th July, 2006 (I KZP 21/06, OSNKW 2006/9/77), discussed during this conference, the Supreme Court stated \textit{inter alia} that: “decision whether the surrender of a person prosecuted by the European Arrest Warrant is performed to carry out the criminal procedure against him – on the territory of a different Member State – is made not based on the law the executing Member State but on the law of the issuing Member State interpreted in accordance with the content of the Council Framework Decision of 13\textsuperscript{th} June 2002 on the European Arrest Warrant and the Surrender Procedures between the Member States (2002/584/WSiSW)” . In the justification of the decision, the Supreme Court stated that beyond its cognition is the issue that in the presented case the European Arrest Warrant, issued to carry out the criminal procedure against the prosecuted person (and based on the decision on temporary detention or other decision with similar function), should be issued according to the Art. 32 of the Belgium law of 19\textsuperscript{th} December, 2003, by the investigating judge, and not, as it happened, by the Royal Prosecutor. Based on the analysis of the judicatures of other European courts and the subject literature, the Court also noted that the permission of a negative verification of the European Arrest Warrant’s conditions in the executing Member State must be limited to completely exceptional circumstances as a consequence of the mutual confidence principle, which is the foundation of the judicial cooperation among the Member States of the European Union. However, in such a broad justification of the decision, no threats to the right to defence caused by the above principle were noted.

The appellate courts take similar view. For example, the appellate court in Krakow in the decision of 17\textsuperscript{th} November, 2004 (AKz 403/04, KZS 2004/11/19) stated that the mechanism of the European Arrest Warrant is based on the high level of confidence between the Member States, which execute it in the mutual recognition of the judicial organ’s decisions (Art. 10 of the Preamble to the Council Framework Decision of 13\textsuperscript{th} June, 2002 – 2002/584/WSiSW). (Also see the decision of the appellate court in Krakow of 15\textsuperscript{th} July, 2004 (AKz 257/04, KZS 2004/9/41).

The problem of threats to the effective right of defence caused by the procedure of the EAW in the Community’s Member States is noticed in other European countries. In German literature B. Schünemann and F. Salditt conducted a thorough criticism of the mutual recognition principle as a ground for the EAW. In case of B. Schünemann, it raised from a general negative assessment

\textsuperscript{325} Statistics date on the activity of the common organizational units of the prosecution for the first half of 2006, Organizational Department of the Ministry of Justice, table II p. 18, www.ms.gov
of the europeanization of the criminal procedure causing threats to the democratic legal state.\textsuperscript{326}

According to the author, fundamental dangers for the rules of the state of law in the field of criminal law and criminal procedure law resulting from a mutual recognition principle are related to the concept that criminal legislation of each Member State can be applied to any citizen of the European Union. The European Arrest Warrant causes the necessity and obligation to surrender own citizen to other European country which, in the case of Germany, violates the constitutional principle that the state may level charge of the commitment of prohibited act against a citizen only if the parliament of the country legally categorized the specific behaviour as an offence. Author touches a broader problem of the democracy violation through the presently dominating model of the creation of the European criminal law by the Council of Ministers of the European Union, not the European Parliament\textsuperscript{327}.

Other German attorneys also emphasized dangers coming from the combination of fragmentary regulations from totally diversified systems of criminal procedure law, for example in the field concerning the possibility of the suspected person to participate in the preparatory proceedings’ actions and the influence of its results on the main trial\textsuperscript{328}. It leads to the violation of the judicial system rules and causes threats to the correctness of its final effect - that is the verdict\textsuperscript{329}.

Presented by U. Sommer, vivid example of adverse consequences for the legal order arising from a rash assumption of the similarity of the legal systems allows the British citizen to drive in Germany according to the British rules of the left side driving\textsuperscript{330}.

Similar dangers to the effectiveness of the right to defence resulting from the acceptance of the “mutual recognition” principle are indicated by French attorneys based on the differences between the French and British judiciaries (especially in the field of evidence proceedings)\textsuperscript{331}.

The group, initiated by B. Schünemann as a consequence of the discussion with other defence lawyers and theorists of criminal procedure, drew up an Alternative project of the European criminal prosecution (\textit{Alternativ–Entwurf Europäische Strafverfolgung}). The institution of Eurodefender would be an ideological and practical innovation “determining almost revolutionary change in the European protection of civil rights”. It would constitute a counterbalance to the strong position of the investigating authorities in the European criminal procedure and thus restore the balance between the prosecution and defence. The project’s authors considered the possibility to create a central

\begin{footnotesize}
\begin{enumerate}
\item[326] B. Schünemann, Gefahren für den Rechtstaat durch die Europäisierung der Strafrechtspflege? [w:] Aktuelle problemy prawa karnego i kryminologii, op. cit., s. 359–380.
\item[327] B. Schünemann also indicates the deficiency of the Parliament’s legitimization to create criminal legislation limiting the freedoms of the EU citizens, because the principle of equality is not retained in the parliamentary elections. Criminal laws or framework decisions could be passed with the objection of the representatives of the European community majority. Ibidem, pp. 367–369.
\item[328] U. Sommer, Die Europäische Staatsanwaltschaft, StV 2003, No. 2, pp. 126–127.
\item[331] B. Madignier, Verteidigungsrechte im Grünbuch aus französischer Sicht, StV 2003, No. 2, p. 131–133.
\end{enumerate}
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Chapter II. Varia

institution, as in the case of Eurojust, that is the institution of European Prosecutor. The EU would manage its financing and the supervision would be given to the national attorney corporations or criminal defence lawyers organizations.

The Eurodefender institution should be based on two grounds. Firstly, he should act as an individual service institution supporting the national defence lawyer overloaded with work. Such assistance would not be, however, just like the entire work of the national defence lawyer, determined in a prescriptive way (rights and claims), but by the persons working for the Eurodefender based on the assigned tasks and existing needs.

Secondly, the defence perspective would be noticed early in proceedings carried out confidentially where the appointment of an attorney lacks raison d’entre.

According to the opinion of B. Schünemann, such a possibility of strengthening the defence in the carried out European proceedings would be more effective than simple improvement of the contacts between the defence lawyers in particular countries.

Similar conclusions, based on the analysis of the framework decision of the EAW, were drawn up by F. Salditt. He indicates the danger caused by EAW for the fundamental rules of effective (so far) defence. The defence lawyer knows the local procedural practice and possibly even some parts of the case files in the country where the procedure takes place. However, he faces, difficulties with the contact with unknown client. Through fast ‘surrender’ (Übergabe) of the accused, his social integration in the mother country is violated. Attorney in Germany, as long as appointed before the ‘surrender’, admittedly knows the ‘lost’ client and his relatives but does not know the mechanisms of a foreign judiciary or the procedural practice of the system. As the author points out, ‘Fictional unity of the European territory as a space of freedom, security and law, was established exclusively for the aims of effective prosecution. The consequence is of Kafka nature. Change of the frame conditions will eliminate the defence if the caused deficits will not be structurally compensated’. That is why all efforts should be undertaken to create a new idea of effective defence crossing the borders of a country and based on the following principles:

1) due to the fact, that the presence in front of the court and prosecution requires the defence artistry, to persuade those authorities to the one’s view through personal contact. Considerable role is played by the fact that in his own country, attorney obtains the same education as judges and prosecutors. Such essential conditions change, if the defence is to be performed in a foreign country;

2) attorney, as the assistant of a person accused in the country executing the EAW, does not know the language of his client and does not have any access to his relatives. Confidence, as a ground

334 F. Salditt, Doppelte Verteidigung im einheitlichen Raum, StV 2003, No. 2, pp. 136–137.
336 Ibidem, p. 137.
of the defence relation, is even more important than contacts with judges and prosecuting authorities. That is why the accused will, as a rule, need a confidential and free contact with the attorney in his mother country and it can be enabled by a colleague in the same line of work from an executing country. This will require cooperation of both attorneys;

3) in the presented cases, the effectiveness of the defence would require the accused to use the assistance of an attorney since the beginning of the EAW execution procedure, both in the issuing country and the mother country (as it is regulated in § 40 p. 2 of the German law on extradition – IRG), still before the “surrender”. However, in contrary to the extradition procedure, this authorization to defence extends to the EAW executing country. In such way, the necessity of the creation of a new institution of double obligatory defence appears;

4) coordination of such complicated defences would require a creation of a central bureau of public defenders, which would be informed about all the EAWs to be executed and which would supervise the double defence performance;

5) change of the life conditions related to the execution of EAW would prevent the accused from finding a trusted defence lawyer on his own. That is why the bureau of public defenders should act as agent in finding such lawyers. While working on the draft of framework decision on the EAW, in its justification, the Commission did not consider the right of the accused to choose an attorney, because “each of them (appointed by the person or by the court) should provide effective assistance”.

As F. Salditt stated in the conclusion of his concept of a double obligatory defence in the EAW cases “Things would go better in the “freedom sphere”, if the governments decided on the security of EAW only after all the necessary requirements for the civil rights protection were clarified. With all of this excellent pathos practiced with predilection by the administration in Brussels – when it comes to the oath, verbosity is the only thing left”337.

It is also worth to point out how differently the essence of EAW is understood in the Member States of the European Union. It can be observed in the diversity of court practices in executing the EAW. In some legal systems it is treated as a sui generis form of the European cooperation among the Member States (Holland, France, Spain), in others – as a modification of the extradition warrants (Germany, Austria, Great Britain)338.

In this context it is worth noticing, that the Council tried to straighten the rights of the accused (including the right to defence) in the proposal of the framework decision of 18th April, 2004 on the certain procedural rights in the criminal procedure in the European Union339.

As we can read in the explanatory memorandum to the proposal, the increasing number of claims filed to the EHRC (over 500% in years 1993–2000) resulting from the lack of adaptation of

337 ‘Im Raum der Freiheit wäre es besser gewesen, die Regierungen hätten das Sicherheitskonzept des Europäischen Haftbefehls erst beschlossen, nachdem die notwendigen bürgerlichen Voraussetzungen geklärt waren. Bei allem schönen Pathos, mit dem die Brüsseler Administration zu formulieren beliebt — wenn es zum Schwur kommt, bleiben die Worte nur leere Hülsen’, F. Salditt, op.cit., p.137.


the national systems to the standards of ECHR, was one of the reasons to define the rights of the accused in the draft\textsuperscript{340}.

The drafters’ assumption is a general determination of the rights of all accused persons and creation of an equal standard for the minimum guarantees of their protection in the European Union. Establishment of such a unified standard should in turn facilitate the application of the mutual recognition principle\textsuperscript{341}.

Based on the standards of the ECHR, Charter of Fundamental Rights of the European Union of December 2000 and conclusions from the intergovernmental conference in Tampere of October 1999\textsuperscript{342}, it was established that the minimum standards of the rights of the accused should most of all include:

− access to legal advice, both before the trial and at the trial;
− access to free interpretation and translation;
− ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention;
− the right to communicate, \textit{inter alia}, with consular authorities in the case of foreign suspects;
− notifying suspected persons of their rights (by giving them a written “Letter of Rights”).

The right to use the advice of a defence lawyer was regulated in four articles of the proposal: Art. 2 dealing with the right to legal advice, Art. 3 dealing with obligation to provide legal assistance, Art. 4 including the obligation to ensure effectiveness of legal advice and Art. 5 establishing the right to free legal advice. The proposed regulation of Art. 2 p. 1 of the Framework Decision sets out the basic right to legal advice for a suspected person if he wishes to receive it as soon as possible and throughout the criminal proceedings. P. 2 of the Article states that a suspect benefits from legal advice before answering any questions in the course of which he may say something he later regrets without understanding the legal implications. As it is emphasised in the explanatory memorandum, such advice should be served by the qualified lawyer as soon as possible.

It is noted that the so far practice of some Member States imposes a limit on access, has an initial period during which the suspect may not have access to a lawyer (‘\textit{garde à vue}’) or precludes the presence of a lawyer during police questioning. Some Member States do not have a formal scheme offering 24-hour access to a lawyer, so that those arrested at night or at weekends are also denied access, at least on a temporary basis. The proposal states that legal advice be an entitlement throughout all the criminal proceedings which are defined as all proceedings taking place within the European Union aiming to establish the guilt or innocence of a person suspected of having committed a criminal offence or to decide on the outcome following a guilty plea in respect of a criminal charge\textsuperscript{343}.

Art. 3 of the proposal sets out the catalogue of circumstances where the suspect should be offered the legal advice as a guarantee of a fairness of the procedure, unless such person resigns


\textsuperscript{341} Proposal\ldots, pp. 2–3, p. 7–9.

\textsuperscript{342} Ibidem, p. 3–7.

\textsuperscript{343} Proposal, op.cit., p. 9.
from this right as in each procedures he may want to lead his own defence. This relatively obliga-
tory defence relates to the suspected person who:
- is remanded in custody prior to the trial, or
- is formally accused of having committed a criminal offence which involves a complex factual
  or legal situation, or which is subject to severe punishment, in particular where, in a Member
  State, a mandatory sentence of more than six year’s imprisonment can be imposed, or
- is the subject of a European Arrest Warrant or extradition request or other surrender procedure, or
- is a minor, or
- appears not to be able to understand or follow the content or the meaning of the proceedings
  owing to his age, mental, physical or emotional condition.

However, even the last case constitutes a relative obligatory defence because the suspect
may choose personal defence.

The Member State should bear the costs of legal advice if these costs would cause undue fi-
nancial hardship to the suspected person or his dependants. The Member States must ensure that
they have in place a mechanism for ascertaining whether the suspected person has the means to
pay for legal advice.

Citing the applied judicature of the EHRC (Pakelli v. Germany case of 25th April, 1983) the pro-
posal leaves the states with freedom to operate the system that appears to them to be the most
cost effective as long as free legal advice remains available when it is in the interests of justice344.

The proposal also provides that the Member States will be obliged to implement a system to
ensure that some check is made that effective advice is given.

In the comment to Art. 4 constituting the requirement of the effectiveness of the attorney partici-
pating in the procedure, it is stated that only lawyers as defined in Art. 1(2)(a) of Directive 98/5/EC345
are employed in this context so as to help to safeguard effectiveness. At the same time it points
that, according to the standards of the ECHR (Artctico v. Italy, case of 13th May, 1980), in the situation
where legal advice offered is not effective, the Member State is obliged to provide an alternative.
Another concept of the proposal should be considered important and at the same time controversial
that since the suspect is not always in a position to assess the effectiveness of his legal representa-
tion, the onus must be on the Member States to establish a system for checking this346.

Evaluating the regulations of the Framework Decision, we may agree with their drafters that
those are minimum standards and that the Member State will always be able to cross them toward
the benefit of the suspect. However, quite broad extension of the obligatory defence and at the
same time emphasis on the costs coverage by the state, even at the moment causes anxiety among
governmental spheres of the EU Member States in relation to the costs of a potential implementa-
tion of the decision in this respect347.

346 Proposal... , op. cit., p. 13.
347 Compare the opinion of the German Minister of Justice of 18th June, 2004: ‘Observations of the Federal Ministry of
Justice regarding the Commission Proposal for a Council Framework Decision on certain procedural rights in criminal
proceedings throughout the European Union,’ p. 4.
The fact that the above analyzed proposal of the framework decision of 18th April, 2004 on certain procedural rights in criminal proceedings in the European Union has not obtained a status of a decision yet, should be recognized as symptomatic in the context of this conference dedicated to the implementation of the Framework Decision on the EAW in the European countries.

With reference to the diversity of authorities responsible for issuing and executing the EWA in the EU Member States, it should be noted that the prosecutor’s office may be a judicial authority of the issuing state, since independent authorities of the EU Member States decide upon the character of such authorities in the course of an appropriate notification (Art. 6 p. 3 of the Framework Decision on the EAW). It may be controversial for the foreign guests to state that in the Polish reality, such a function (and the more so, the function of executing the EAW) cannot be carried by the prosecutor’s office but only by independent courts. My Polish colleagues will not have any doubts and the more so emotions, when stating (relevant for instance at the moment of implementation of the court monopoly on the application of the arrest) that the Polish prosecutor does not fully posses the qualifications of impartiality and independence of the judicial authority required even by the Art. 5 p. 3 of the ECtHR348.

Among numerous arguments justifying this thesis, at least some are worth mentioning. Above all, the Prosecutor General as the head of the hierarchically built prosecution, at the same time holds a position of the Minister of Justice, so we can talk about political dependence of prosecutors from the executive authority. According to Art. 7 of the law on public prosecution authority349 the prosecutor shall be impartial and according to Art. 8 p. 1 he shall be independent when carrying out the actions determined by the law. However, according to Art. 8 p. 2 of the law, the prosecutor is obligated to carry out the orders, directives and commands of the supervisor. Art. 8 p. 5 of this act introduces some limitations to this connection by stating that the order concerning the content of the procedural actions issued by the supervising prosecutor, other than the directly supervising one (in practice – the head of the prosecution), cannot include the manner of the ending of the preparatory proceedings and proceedings before the court; a contrario, only the directly supervising prosecutor is entitled to issue all kinds of official orders350. In the subject literature it is indicated that the prosecutor, as every authority applying the law, should keep in mind that the established law is not always the right law. Performing his functions with the sanction of the law, he can feel that the criminal sanction is not adequate to the occurrence being the subject of the criminal procedure. Pointing out the limitations of their independence, the prosecutors indicate that the perversion of justice does not have to be performed on the

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348 In relation to Ukraine, compare the decision of the EHRC of 6th September, 2005 in case of Salov v. Ukraine (case nr 65518/01, LEX nr 156619) stating that under the legislation of a sued country, a prosecutor cannot be regarded as an officer exercising “judicial power” within the meaning of Article 5 § 3 of the Convention. Moreover, his status cannot offer guarantees against any arbitrary or unjustified deprivation of liberty as he is not endowed with the attributes of “independence” and “impartiality” required by Article 5 § 3. Furthermore, the prosecution authorities not only belong to the executive branch of the State, but they also concurrently perform investigative and prosecution functions in criminal proceedings and are party to those proceedings. The prosecutor cannot be regarded as “an officer authorised by law to exercise judicial power”. Also see: The discussion in Polish doctrine regarding the application of the temporary detention by the prosecution in the code of criminal procedure of 1969 [in: C. Kulesza, Sędzia śledczy w modelu postępowania przygotowawczego na tle prawnopорównawczym, Białystok 1991, s. 157–161 and provided literature.

349 Law of 10th June, 1985 (Dz.U. 02.21.206 as amended)

350 S. Waltoś, Prokuratura – jej miejsce wśród organów władzy, struktura i funkcje, PiP 2002, Nr 4 s. 5.
level of the law, but also on the level of the directives issued for the prosecutor in the frame of the hierarchical subjection rule\textsuperscript{351}.

However, the judicature of the Polish courts concerning the execution of the EAW explicitly indicated that the motion to apply preventive measures combined with the European warrant may be filed not only by the judicial authority of the issuing state (Art. 607k § 3 of the Code of Criminal Procedure) but also by the prosecutor (decision of the appellate court in Krakow of 15\textsuperscript{th} July, 2004 – AKz 257/04, KZS 2004/9/41 and the decision of the appellate court in Lublin of 8\textsuperscript{th} March, 2006 - II AKz 50/06, LEX nr 179028).

\textsuperscript{351} P. Nowicki, Etyka prokuratora, Prokurator 2005, No. 1, p. 16.
3. The Possibility of lodging complaint against decisions on the EAW

(Sławomir Steinborn)

Notwithstanding the fact that provisions of the Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the surrender procedures between the Member States (2002/584/JHA) are detailed, that decision does not contain any direct references to the possibility of lodging a complaint against decisions on issuing and execution of the EAW. Only in point 8 of the preamble it is indicated that decisions on the execution of the European Arrest Warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender. It seems, however, that the main aim of the abovementioned statement comes down to emphasising the necessity of a judicial review of the EAW and thus, this statement should not be perceived as a standpoint on the question of the possibility of lodging a complaint against the decisions on the EAW. It is also difficult to infer from the content of the Framework Decision any direct references to this question. Although the content and form of the EAW were established in Art. 8 of the Framework Decision, the problem of the possibility of lodging a complaint against the decisions on the EAW was completely ignored. There is either no reference to this problem in Art. 11 of the Framework Decision laying down rights of a requested person. It is similar in the case of execution of the EAW. Art. 15 of the framework decision concerning a surrender decision provides for no requirement for those decisions to be subject to complaint. This question is neither dealt with in Art. 27(4) of the Framework Decision referring to a request for consent to be given by a state, that surrendered a requested person, for the prosecution of that person for other offences that that for which s/he was surrendered. Nevertheless, there are some provisions of the Framework Decision on the EAW that may give rise to some conclusions concerning the possibility of lodging a complaint against the decisions on the EAW. For instance, although Art. 17 of the Framework Decision establishing time-limits for the decision on execution of the EAW does not introduce any specific provisions in case of lodging a complaint against that decision (provisions consisting in prolongation of the time-limit), it, however, provides for giving a final decision. Similarly, Art. 23 of the Framework Decision, which provides for the time-limits for surrender of the requested person, establishes that they shall run after a final decision is given. It can be concluded from the abovementioned regulations that the European legislator does not, by means of his silence, exclude the possibility of lodging a complaint against the decisions on the EAW under national law to be introduced by individual Member States. Lack of express regulation in the Framework Decisions on the EAW means solely that the European legislator left the question of the possibility of lodging a complaint against the decisions on issuing and execution of the EAW to be regulated under national law. Thus, the Member States have been given a free hand regarding regulation of that problem. However, they undoubtedly should remember not to frustrate the aim of the EAW. What also cannot be omitted, is fundamental rules on which proceedings in the EAW are based, including promptness and efficiency of the proceedings.

Searching for a standard relating to the possibility of lodging a complaint against the decision on issuing and execution of the EAW which is common for the Member States, one should not ignore conclusions arising from international law act. Provisions of Art. 2 of the Protocol No. 7 to
the Convention for the Protection of Human Rights and Fundamental Freedoms (further: CPHRFF) and of Art. 15(4) of the International Pact on Civil and Political Rights which lay down the right of appeal, guarantee only the possibility of lodging a complaint against a court judgment of conviction given at first instance. Thus, the right to lodge a complaint against the decision on issuing or execution of the EAW cannot be inferred from them. There are also no grounds for inferring that right from the provision of Art. 6(1) of the CPHRFF, since it does not guarantee any access to all instances. Only when a national legislator introduces the appeal proceedings, must it meet the standards of a fair trial. Worth mentioning are also the provisions of Art. 5(1)(f) and (4) of the CPHRFF, from which results the right of appeal to court by a person detained under an extradition arrest in order to establish immediately the legality of that detention by the court. Next, Art. 13 of the CPHRFF provides for the right to an effective remedy. Although it is the court that applies the extradition arrest and as a consequence, the guarantee established in Art. 5(4) of the CPHRFF is ‘absorbed’, a party must, having regard to the provision of Art. 13 of the CPHRFF, be entrusted with the possibility of bringing an appeal against a court decision to a court of higher instance. It should be beyond dispute that the standard resulting from those regulations must be applicable also in case of proceedings on execution of the EAW. It follows from the foregoing that a prosecuted person detained by the police on the basis of the EAW issued in another Member State of the EU should have a right to lodge a complaint against that detention and to do this independently of the parallel possibility of lodging a complaint against an order of a court concerning application of detention on remand (so called extradition arrest).

Lack of an express solution to the question of lodging a complaint against the decision on the EAW in the Framework Decision should be perceived as the main cause for a substantial divergence among solutions adopted in the Member States. In such situation, the Member States were guided, in the course of laying down national provisions on the EAW, by their own legal tradition, specific character of the institutions of the national system of criminal jurisdiction competent to issue and execute the EAW, and by the necessity to obey rules of guarantee provided for in higher-order legal acts, above all, in their own constitutions.

The possibility for the decision on issuing the EAW to be reviewed was introduced only in some states. In Denmark it results from the fact that issuing of the EAW belongs to the competences of the Minister of Justice, the decision of whom is subject to judicial review. In Spain the EAW is issued by an investigative judge, the judgments of whom are subject to complaint under general rules provided for in the Spanish Code of Criminal Procedure. The possibility of lodging a complaint concerns both issuing and refusal to issue the EAW and it is despite the fact that the Spanish Act

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354 See also P. Hofmarński, Konwencja... p. 197, pp. 335–336.

No. 3/2003 does not expressly provide for the possibility of lodging a complaint against those decisions. In the judgement of 20th January 2005 (file reference I KZP 29/04, OSNKW 2005, No. 1, item 5), the Polish Supreme Court expressly stated that there is no right to lodge a complaint against a decision on issuing the EAW. It should, however, be mentioned that the draft bill on amendments to the Code of Criminal Procedure, which has recently been prepared by the Ministry of Justice, introduces the possibility of lodging a complaint against a court decision on the refusal to issue the EAW by a prosecutor.

Analysis of the regulations adopted by the Member States of the EU concerning the execution of the EAW enables to distinguish four types of solutions regarding the possibility of lodging a complaint against the decisions on the execution of the EAW:

1. The possibility of lodging a complaint against a surrender decision in all instances (full challengeability of surrender decision) – usually only one appeal can be brought (Austria, Czech Republic, Estonia, Finland, Germany, Luxemburg, Poland, Portugal, Slovenia), and it can be based both on grounds of law and on grounds of facts. In some states, such as Belgium or Denmark, it is possible to lodge a complaint against such a decision at two instances. In Poland, the legislator did not exclude the possibility of bringing a cassation against a decision of a court of appeal which, according to the case law of the Supreme Court on extradition, seems to give such a possibility.

2. The surrender decision is subject to complaint except for a situation in which a prosecuted person consents to surrender (Cyprus, France, Greece, Hungary, Ireland, Lithuania, Sweden, the United Kingdom).

3. The surrender decision is subject to complaint but the grounds for lodging a complaint are limited to the grounds of law (Holland, Ireland, Italy) or only to the grounds referring to the grounds for refusal to execute the EAW (Slovakia).

4. Complete exclusion of the possibility of lodging a complaint against the decision on execution of the EAW (Spain) – it is, however, indicated in legal writing that the case-law of the Spanish Constitutional Court exceptionally allows the possibility of bringing a defence appeal in case of a breach of fundamental rights, such as permissible detention period or the right to a fair trial, in the course of extradition procedure. It is therefore also allowed to bring such appeal before the Constitutional Court against a final decision given by the Central Investigative Judges or the ‘Audiencia National’ – National Court under Art. 18 of the Act No. 3/2003. It will be possible to base such an appeal analogical grounds as in the case of extradition.

In most countries bringing an appeal has suspensory effect on the execution of the decision which is subject to complaint. Exceptional are here the solutions adopted in Hungary and Holland.

In models allowing the possibility of lodging a complaint, the time-limit laid down for bringing an appeal is usually short (for example, in Belgium and Greece it is 24 hours from the delivery or service of the decision, in Austria, the Czech Republic and Estonia 3 days from the day of delivery, in

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Portugal – 5 days). In some cases, national legislation have not only provided for a 60-day-time-limit established in the Framework Decision, within which the final surrender decision should be given, but also for maximum time-limits for examining a given case by a court of appeal (for example, in Cyprus and Greece it should follow within 8 days from bringing an appeal, in Estonia – 10 days, in Lithuania – 14 days, in Belgium – 15 days). An interesting and exceptional method for accelerating proceedings, is the solution adopted in Italy, which consists in putting on parties an obligation to declare, after the court has given its surrender decision, whether they will bring an appeal.

In regard to the second model, it is worth indicating an alternative solution adopted in Slovenia and Poland. It is allowed there to bring an appeal against the surrender decision, however, the time-limit for bringing such appeal before a court depends on whether such decision was issued in case of a consent for surrender given by the prosecuted person (then, in Slovenia the time-limit is 24 hours from the moment of service of the decision, and in Poland – 3 days from the moment of delivery), or in case of lack of such consent (then, in Slovenia the time-limit for bringing an appeal is 3 days and in Poland 7 days). Such a solution does not deprive the prosecuted person of the right to bring an appeal and thus protects his/her rights better. Such possibility may be of great importance in a situation when the consent for surrender was given involuntarily or under mistake. On the one hand, substantial shortening of the time-limit for bringing an appeal causes that there is no danger to the promptness of proceedings on the execution of the EAW and in most cases the surrender decision will be binding immediately since the prosecuted person consented for surrender, and consequently, s/he will not bring an appeal. On the other hand, in exceptional cases, which can never be excluded, a prosecuted person is not completely deprived of the possibility of protection of his/her rights and of lodging a complaint against the decision in question.

Undoubtedly, substantial divergence among the solutions concerning the possibility of lodging a complaint against the decisions on the EAW adopted in the Member States does not support ensuring an uniform standard of procedural guarantees. It does not seem to be guaranteed that the possibility of lodging a complaint against the surrender decision by the prosecuted person was dependent only on that in which Member State she was detained. It should also be taken into account that in some Member States the EAW is issued by prosecutors (Belgium, Finland, Germany, Greece, Holland, Sweden) and sometimes also by institutions of the executive, such as the Ministry of Justice (Denmark, Lithuania); in most cases, however, there is no possibility of lodging a complaint against the decision on issuing the EAW. From that perspective, it seems to be particularly important to ensure at least the possibility of reviewing the surrender decision by the court of higher instance. Lack of an express determination of that issue should be regarded as a serious disadvantage of the Framework Decision on the EAW.

What should generally be approved is regulations adopted in some Member States consisting in laying down time-limits for bringing an appeal and in establishing a separate time-limit within which a given appeal should be examined by the court of second instance. Thus, they support the main aim, that is fast surrender of prosecuted persons and in most cases keeping high standard of procedural guarantees.
III. Country reports

1. Belgium

(Gert Vermeulen)

1.1. Constitutional issues

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


The same view was presented by the applicants in the case before the Belgian Constitutional Court, in which the applicants (the non-profit making organization called ‘Advocaten voor de Wereld’) disputed the validity of the Framework Decision on the European Arrest Warrant. A preliminary procedure was started before the ECJ (See Case 303/05 Opinion by Advocate General delivered on 12th September 2006).

b. Please indicate the position of the doctrine and courts in your country concerning relation between 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?

International treaties or conventions need to be approved by law before they may be ratified by the Government in order to take effect. According to Art. 75, pp. 3 in conjunction with Art. 77, under 6°, of the Constitution, the Government must therefore introduce a bill to Parliament, both Senate (first) and the House of Representatives (subsequently) being equally required to give their approval.

Further, according to Art. 34 of the Constitution, both domestic law and international convention law (if binding, and thus requiring preliminary approval by law and subsequent ratification and entry into force) may entrust international organisations (including the EC and the EU) to exercise certain state powers, including legislative powers.
Moreover, the decision of the Cour de Cassation in the case Belgium v S.A. Fromagerie Franco-Suisse Le Ski (Cass., 27th May 1971, Journal des Tribunaux, 1971, p. 460), made away with the dualistic regime regarding the relationship between international convention law and domestic law that had applied in Belgium until then. With the decision concerned, in which the Court ruled that a self executing treaty (in casu the TEC – Treaty establishing the European Community) prevails over acts adopted at the domestic level either before or after the ratification of such treaty and hence, that the courts should give effect to such treaty, monism has taken the place of the formerly applied dualistic approach. Self executing treaties or conventions since are deemed to be an integral part of the domestic legal order, and to supersede over incompatible domestic legislation. In this respect, it makes no difference whether the domestic legislation is the implementation legislation of a framework decision or another piece of domestic legislation. However, implementation legislation for framework decisions implementing EU mutual recognition obligations is particularly precise in delineating its application and that of conventions previously applied between the EU Member States in the given field, so that incompatibility between directly applicable international convention law and implementation legislation for EU framework decisions usually does not arise.

In order for a treaty to be self executing and entail direct effect in the domestic legal order, its provisions must be clear, unconditional and not subject to discretionary implementing measures. Whereas for the European Communities' legal order, the direct effect notion has longstanding tradition (since the European Court of Justice's ruling in the case Van Gend & Loos v Nederlandse Administratie der Belastingen, 1963, 26/62), this is not the case for the field of police and judicial cooperation in criminal matters between the Member States under Title VI of the TEU (Treaty establishing the European Union). Apart from ‘third pillar’ conventions (as meant in Art. 34, pp. 2, under d) TEU), which may surely entail direct effect following adoption, ratification and entry into force and where its provisions have the required characteristics for sorting direct effect (supra), the legal instruments the JHA (Justice and Home Affairs) Council may adopt in the area of police and judicial cooperation in criminal matters do not entail any direct effect (Art. 34, pp. 2 TEU). In sum, as regards EU ‘third pillar’ legal instruments, only conventions may entail direct effect, though often their adoption at domestic level requires passing implementing legislation, because they are not fully self executing.

A single exception so far to the absence of domestic legal effect for non-convention-type ‘third pillar’ legal instruments is reflected in Art. 12bis of the Preliminary Title to the Code of Criminal Procedure (following changes brought by Act of 22nd December 2003, Moniteur belge, 31st December 2003). The revised Art. attributes direct effect to provisions of EU secondary legislation (term encompassing inter alia framework decisions) to the extent that these establish obligations for the Member States to prescribe extraterritorial jurisdiction. The above rule is the only one where equal affect is attributed to international convention-type legal instruments and framework decisions (even without the latter having been expressly implemented). The provision serves as a type of default a priori implementation international obligations regarding ‘jurisdiction to prescribe’, irrespective of the nature of the legal instrument in which the obligation can be found.

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?

The Belgian doctrine and judicature remains European-friendly in its interpretation of domestic law, including constitutional law.
d. What is the influence of ECJ judicial decisions on the implementation of domestic law (e.g. the Pupino case)?

The case Gözütok and Brügge (C-187/01 and C-385/01) before the ECJ lead to the inclusion in the Belgian implementation law on the EAW of the compulsory refusal of the execution of an EAW when for the same facts another final decision has been made which precludes the subsequent commencing of prosecution, for example a settlement or an alternative administrative procedure.

With regard to the Pupino case, the only ‘influence’ that can be detected is a reference to the Pupino case in the aforementioned opinion of the Advocate General of the ECJ in the preliminary ruling from the Belgian Constitutional Court on the validity of the FD on the EAW.

e. Is the 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?

Implementation laws have, so far, never just referred to the Framework Decision but have always been elaborated laws, complemented with circulars concerning the application of the law in practice.

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

All national courts can start a preliminary procedure with the ECJ in the case of the interpretation of EU legislation. In the case of framework decisions, this happened once in the aforementioned preliminary ruling started by the Belgian Constitutional Court regarding the Framework Decision on the European Arrest Warrant.

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?

Framework decisions are implemented into Belgian legislation by means of a separate law, supplemented with a circular concerning the application of the law in practice.

The law implementing the European Arrest Warrant was adopted on 19th December 2003 (published in the ‘Belgisch Staatsblad’, which is the official publication for legislation on 22nd December 2003) and entered into force on 1st January 2004.

h. Was the implementation the Framework Decision and the Framework Decision itself subject of proceedings of the constitutional court in your country?

Yes, the non-profit-making association called ‘Advocaten voor de wereld’ started proceedings against the Council of Ministers before the Belgian Constitutional Court concerning the validity of the Framework Decision on the European Arrest Warrant. Consequently, the Constitutional Court submitted a preliminary question to the ECJ in the aforementioned case.

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

Treated as a separate legal instrument and fully disconnected from extradition law. All Belgian legislation (laws and circulars) concerning extradition procedures between the EU Member States
have been substituted by the implementation law and circular on the EAW due to the significant difference between extradition and surrender based on the EAW.

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

a. Are there any 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 (compulsory and optional) of surrender?
     The optional ground for refusal in Art. 4, 4° of the Framework Decision (criminal prosecution or punishment of the requested person is statute-barred) was changed into a compulsory ground for refusal in the Belgian law.
   - the catalogue of “crimes” listed in Art. 2.2. FD. Are all those “crimes” criminalised in your country? Please specify which are not criminalized
     All crimes are criminalized, however an exception is included in the Belgian law on the EAW regarding the acts of abortion and euthanasia which will not be considered as ‘murder’ in the sense of Art. 2.2 of the Framework Decision.
   - the period of time for the execution of the EAW?
     In the case of a procedure in which the arrested person consents to his surrender, the Belgian legislator has included the possibility for the arrested person to revoke his consent. Therefore, the period between the date of consent and the date of the revocation is not taken into consideration in establishing the time limits.
     In the case of a procedure in which the arrested person does not consent to his surrender, there is no difference in time for executing the EAW with the Belgian law.
   - other issues; please specify
     Regarding taxes and in the case of customs and exchange, the execution of the EAW can not be refused for the reason that the Belgian law does not provide in the same type of taxes or the same legislation concerning taxes or customs and exchange as the issuing state.

b. Can a lack of dual criminality in cases other than mentioned in Art. 2.2. of the FD constitute optional reason to refuse the execution of the EAW (to surrender)?
   No.

c. Did your country make a proper notification to the Secretary of the CUE (Council of the European Union), concerning the waiver of the specialty rule (according to the Art. 27.1 FD)?
   No, the specialty rule is applicable according to Arts. 27-28 of the FD.

d. Did your country appoint a central authority (Art. 7 FD). If so, which one? What are the scope and tasks it is supposed to perform and its practical meaning?
   Federal Public Administration Justice
   Directorate-General Legislation and Fundamental Rights and Freedoms
   Central authority for mutual legal assistance in criminal matters
   Waterloolaan 115
   B – 1000 Brussels
The Federal Public Service Justice will receive information on every procedure concerning the execution or issue of an EAW. This authority will use the received information to produce statistics on the implementation of the Belgian law on the EAW.

1.3. 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?

   The Belgian law uses the criterion of the facts, not the offences.

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

   Yes, the execution of the EAW is refused in the case when a final decision has been delivered against the arrested person regarding the same facts, on the condition that in the case of a conviction, the sentence has been served, is served at the present time or can no longer be served by virtue of the legislation of the Member State in which the judgment was pronounced, or in the case a final decision regarding the same facts against the arrested person has been delivered that precludes the subsequent commencing of prosecution.

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 final disposal of the trial’ in Art. 54 CISA in your country?

   – Is such a disposal the valid decision on discontinuance of the criminal process because of its legal inadmissibility?

     Yes. Prosecution is no longer possible when a final decision has been delivered against the arrested person regarding the same facts, on the condition that in the case of a conviction, the sentence has been served, is served at the present time or can no longer be served by virtue of the legislation of the Member State in which the judgment was pronounced.

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

     Although the opportunity principle governs the initiating of criminal proceedings in Belgium, the consequence of the *ne bis in idem* principle is the inadmissibility of a prosecution for the same facts, when a final decision has been delivered against the person concerned.

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)?

   No.
1.4. The issuing of the EAW

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

In the case of surrender in order to prosecute a person, the examining magistrate (‘onderzoeksrechter’) issues an EAW.

In the case of surrender in order to execute a criminal sentence or a measure, the public prosecutor (‘procureur des Konings’) has the competence to issue an EAW.

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?

No.

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

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

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

No.

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?

In the case of a judgment rendered in absentia against the person concerned and of this person has not been subpoenaed or in another manner informed of the date and location of the hearing during which the judgment was pronounced, the EAW should include a provision that the person concerned can appeal against this judgment in absentia.

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

The Belgian implementation law (19th December 2003) is only applicable to the arrest and surrender of persons from 1st January 2004. The requests for surrender dated prior to 1st January 2004 are regulated by the old legislation regarding extradition.

In the relations between Belgium and the competent French authorities, the Belgian implementation law is applicable for criminal acts committed after 1st November 1993.

In the relations between Belgium and the competent Italian and Austrian authorities, the Belgian implementation law is applicable for criminal acts committed after 7th August 2002.

In the case a person is arrested before 1st January 2004 on the basis of an arrest warrant with a view to extradition and the request for his extradition has not been sent to the Belgian authorities before 31st December 2003, the original arrest warrant remains to be valid and this person’s extradition will be regulated by the old legislation regarding extradition.
h. How many EAWs had been issued in your country until the day mentioned above in point 1g of the questionnaire?

According to the Central Authority (mentioned under 2.d), which should be notified of all incoming and outgoing EAWs (but clearly does not, surrender law having become a matter of the judicial authorities, an important deal whereof is believed not to do the requested notification to the Central Authority systematically), the total of EAWs issued and received between 1st January 2004 and 21st June 2006 was 841. No split figures for issued and received EAWs are available for this entire period. For 2005, however, official figures made available by the Central Authority for the calendar year 2005, show a volume of 212 EAWs having been issued. As indicated before, the dark number (both in issued and received EAWs), is believed to be important.

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?

No data available or the Central Authority refused access.

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

No data available or Central Authority refused access.

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

l. Which information channels are used before/along with the issuing of the EAW in your country (SIS, EJN, Europol, other means)? Is the 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?

Sending through SIS is used as a first channel and Interpol is mentioned as a subsidiary channel (due to the fact that the secured telecommunications system of the European Judicial Network is not operational yet). In last instance, every trustworthy system that allows to obtain a printed trail, on the condition that the executing state can verify the authenticity of the warrant.

In the case the place of residence of the person is known, the EAW is addressed directly to the competent authority. In the case the place of residence of the person is not known, the necessary research can be done through the contact persons of the European Judicial Network in order to obtain this information of the executing state.

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

No data available or the Central Authority refused access.

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?

No data available or the Central Authority refused access.
1.5. Executing of the European Arrest Warrant

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

The Council Chamber (‘raadkamer’) decides on the execution of the EAW.

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?

The Council Chamber makes the decision after hearing the examining magistrate (‘onderzoeksrechter’), the prosecutor and the arrested person.

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?

The motivated decision should be taken within 15 days (starting from the arrest of the person concerned).

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

Before the decision by the Council Chamber, the examining magistrate hears the arrested person and can – if necessary – request additional information in order to report to the Council Chamber.

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

In the case of several EAWs from several Member States, the implementation law states that the competent prosecutor should inform the federal prosecutor, who requests the Council Chamber to decide (within 15 days) which EAW will be executed. The federal prosecutor advises the Council Chamber on this decision and the Chamber can take all circumstances into consideration, especially the seriousness of the committed criminal acts, the place where the criminal acts were committed, the information which is in the several EAWs and the fact whether the EAW is issued with a view to prosecute the person or execute a sentence or measure. The federal prosecutor can request advice from Eurojust.

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

In this case, the federal prosecutor and the government are informed by the competent prosecutor. Within 30 days (starting from the moment of notification by the prosecutor), the government decides upon advice by the federal prosecutor and the remarks made by the competent examining magistrate and taking into consideration all circumstances (especially these mentioned before in e.) and the applicable conventions, whether preference is given to the EAW or the extradition procedure.

In the case the government decides to give preference to the EAW and the competent judicial authority decides not to execute the EAW, the government is informed by the prosecutor in order to decide upon the execution of the extradition procedure.

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 examining magistrate hears the person within 24 hours of his arrest and decides upon his further arrest or (conditional or not) release.

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

At the latest 10 days after the decision on the execution of the EAW the arrested person should be surrendered. In the cases of ‘force majeure’, the prosecutor should set a new date for the surrender with the competent authorities of the issuing state within 10 days.

In the case of serious humanitarian reasons, the surrender can be temporarily suspended. The person is surrendered when these reasons no longer exist. The prosecutor informs the competent authorities of the issuing state when the reasons cease to exist and a new date for the surrender is set within 10 days of the notification.

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

The Council Chamber is a chamber of one judge with 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?**

The Council Chamber decides upon a report by the examining magistrate and the competent prosecutor and after hearing the arrested person.

**k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?**

The arrested person and the prosecutor can appeal to the decision of the Council Chamber within 24 hours (starting from the moment the decision was taken for the prosecutor and from the moment of notification for the arrested person). Appeals to the decision of the Council Chamber are reviewed by the Court of Indictment (‘Kamer van Inbeschuldigingstelling’).

**l. Does the person in question have the right to:**

- **the assistance by the defense lawyer?**
  Yes.

- **the right to interpreter?**
  Yes.

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

No.

**n. How many EAWs issued by other MS have been executed by your country since the date mentioned in 1g of the questionnaire? In how many cases has the person been effectively surrendered?**

According to the Central Authority (mentioned under 2d), which should be notified of all incoming and outgoing EAWs (but clearly does not, surrender law having become a matter of the judicial authorities, an important deal whereof is believed not to systematically do the requested notifica-
tion to the Central Authority), the total of EAWs issued and received between 1\textsuperscript{st} January 2004 and 21\textsuperscript{st} June 2006 was 841. No split figures for issued and received EAWs are available for this entire period. For 2005 however, official figures made available by the Central Authority for the calendar year 2005, show a volume of 185 EAWs having been received (and therefore mostly executed). As indicated, the dark number (both in issued and received EAWs), is believed to be important).

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

No data available or the Central Authority refused access.

**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.**

No data available or the Central Authority refused access.

**q. Has the EAW been executed for crimes other than listed in the above mentioned Art. 2.2. FD? If so, in how many cases?**

No data available or the Central Authority refused access.

**r. Have there been cases in your country, in which courts rejected the executing of the EAW because of a possible violation of guarantees of the requested person in the country of issuing of the EAW (esp. human rights)?**

No.

No data available or the Central Authority refused access.

**s. In how many cases has the decision on the execution of the EAW been 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?**

In the case of Moreno-Garcia, the decision on the execution of the EAW was appealed to and revoked twice. The third and final decision of the Chamber of Indictment decided that the execution of the EAW was impossible due to the criminal prosecution being statute-barred according to the Belgian law, while the acts fall within the jurisdiction of the Belgian authorities.

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

No data available or the Central Authority refused access.

1.6. Others

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

No.
2. Cyprus

*(Andreas Kapardis, Elias Stephanou)*

### 2.1. Constitutional issues

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

According to the decision of the full court of the Supreme Court of Cyprus...\(^\text{357}\)

**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?**

According to the most recent constitutional amendment: “No provision of the Constitution is considered to cancel Acts that are enacted, actions that are held or measures that are taken from the Republic, that are established as necessities from its obligations as a Member State of the European Union, nor can it obstruct Regulations, Instructions or other actions or binding measures of legislative nature that are enacted from the European Union or from the European Communities or from their statutory instruments or from their competent bodies based on the treaties that founded the European Communities or the European Union from having legal effect in the Republic.”

**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?**

Both the policy and the judiciary in Cyprus are European-friendly. Before the constitutional amendment the constitution used to be superior to any other law, European or domestic. After the amendment, any obligation that arises from the induction of Cyprus in the EU should be met, even though this is in contrast to the Constitution. Whether this interpretation includes the third pillar instruments is questionable. I personally am of the opinion that according to the wording of the new amendment it covers the whole scope of obligations, including the third pillar obligations.

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

The Supreme Court in the Constantinou case made a clear reference to the recent decision of the Court of the European Communities in the Maria Pupino case, C-105/03, of 16\(^{th}\) June 2005, arguing that in that case, too, it is left to the Court of every Member State to decide whether an interpretation of its national law is in accordance with the Framework Decision.

**e. Is the 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?**

\(^\text{357}\) For the comment of the Supreme Court decisions see chapter 3.1. at this book.
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The domestic courts when interpreting a law take into account all the relevant statutes or explanatory memorandum which can lead them to the right decision. If an FD is not implemented in the domestic legal order then it cannot be taken into account.

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

There is no specific constitutional provision or statutory provision for an ECJ preliminary question. However, this is an option for every court if the requirements are met.

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?

The Law L. 133(I)/2004 on the European Arrest Warrant and the surrender procedures of requested persons was implemented and entered into force on the 30th of April 2004. It is a new law separate from the extradition provisions.

h. Was the law implementing the Framework Decision and the Framework Decision itself subject of proceedings of the constitutional court in your country?

In the Constantiou Case. The English version of the decision is attached.

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

Although the Attorney General tried in the Constantiou Case to present the EAW as surrender procedure, the Supreme Court had the view that this is an extradition procedure.

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

a. Are there any 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 (compulsory and optional) of surrender?
     No differences.
   – the catalogue of “crimes” listed in Art. 2.2. FD. Are all those “crimes” criminalised in your country? Please specify which are not criminalized.
     No differences.
   – the period of time for the execution of the EAW?
     No differences.
   – other issues; please specify
     No differences.

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

It is not an optional reason to refuse but mandatory. According to Art. 7 of the Law ‘The European Arrest Warrant shall be issued for acts which are punishable according to Cypriot criminal
laws with a custodial sentence or a detention order for a maximum period of at least twelve (12) months or, in the event where a penalty or order has already been passed, for a sentence for a period of at least four (4) months.

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)?

No.

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

Central authority: As a basic principle, the Ministry of Justice and Public Order is the competent authority for the issuing and the executing of foreign international assistance request. This is being carried out by the police force on agreement with the Law Office of the Republic.

The Law Office of the Republic, as the legal representative of the Ministry of Justice and Public Order, has the role of dealing in Court all the matters of extradition and surrender of a requested person. In this respect, the Law Office of the Republic has the role of assembling national case law, especially concerning surrender decisions.

2.3. 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?

The principle of *ne bis in idem* incorporates the meaning that both facts and the legal basis should be the same. Furthermore, in the common law countries covers every count that could have been filled on the basis of the same facts.

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

Yes.

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 final disposal of the trial” in Art. 54 CISA in your country?

- Is such a disposal the valid decision on discontinuance of the criminal process because of its legal inadmissibility?

Yes, could be.

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358 For any further information you may contact Ms Eleni Kanari Morfaki and Ms Maria Mounti in the Ministry of Justice and Public Order, fax: 00357 22 518328, e-mail: emorphaki@mjpo.gov.cy

359 For any further information contact Ms Eleni Loizidou, who is the coordinator of the enforcement of EAWs in Cyprus, e-mail: roc-law@cytanet.com.cy
– Is such a disposal the valid decision on discontinuance of the criminal process because of the lack of advisability of prosecution?

Yes, could be.

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)?

We follow the English jurisprudence.

1.4. The issuing of the EAW

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

According to Art. 6 of the relevant Law, the competent authority for the issuance of the European Arrest Warrant for the purpose of criminal prosecution, as well for the purpose of the execution of a sentence is the District Judge, having territorial jurisdiction for trying of the offence for which the arrest and surrender of the requested person are required, or the Court which has issued the decision with regard to the sentence or the detention order.

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?

The judicial decision is made after a request by the police under the assistance of the Attorney General's Office.

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

A District Judge.

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

Under the law there is no specific provision. However, under the jurisprudence there is a great possibility that when the requested asks to participate in the session, the Judge will allow her or his lawyer to participate.

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

No.

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 specific provision. However, as the EAW is *mutatis mutandis* a domestic arrest warrant is expected that the requested person to appeal the decision through the prerogative order of *certiorari*.

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

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

Not known.

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.

Not known.

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

Yes, but exact numbers are not known.

k. How many such requests have been rejected by the deciding judicial authority? (applies only if EAW are issued on request)?

None.

l. Which information channels are used before/along with the issuing of the EAW in your country (SIS, EJN, Europol, other means)? Is the 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?

Europol and Interpol. SIS still not in use.

m. How many EAWs issued by the judicial authority in your country have been executed in other Member States? In how many cases has the requested person been effectively surrendered?

Not known.

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

Not known.

1.5. Executing of the European Arrest Warrant

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

In practice, the reception of a Red Notice documentation issued by a foreign national jurisdiction has to be conducted by law enforcement agents of the national jurisdiction constitutionally empowered to do so. At the same time, it has to be noted that the formal reception of the EAW issued by a foreign national authority is conducted by the police and the ministerial bodies responsible for justice and public order. Upon receiving Red Notice documentation from a foreign government, national law enforcement agencies need to undertake the necessary investigation proceedings for the timely detection and provisional arrest of the person identified on the Red notice documents. Subsequently, as soon as the national law enforcement agents take the requested person into temporary custody, they need to duly inform the national Ministry of Justice and Public Order, as well as the foreign national authorities submitting the request in question, of the positive outcome of their investigation.
In turn, as the foreign national authorities become aware of the details of the detection and arrest of the person wanted, they have to promptly forward an EAW to the relevant ministerial authorities of the country responsible for receiving and executing the Red Notice request. The Ministry of Justice then proceeds to include the Attorney General's office in the process by informing it of the developments following the newly issued EAW, and by asking it to initiate the appropriate proceedings for the surrender of the person wanted by the foreign authorities. For its own part, the Attorney General then moves to designate a legal counsel member of staff to be responsible for overseeing the effectiveness and the legality of the whole proceedings. In particular, the designated legal counsel is called upon to assist the arresting authorities in taking the case to court as well as to present the very request for extradition before a court with appropriate jurisdiction.

Where the central authority receives the EAW and satisfies itself that the warrant has been issued in due form, it shall issue a certificate and shall see to the arrest of the requested person.360 Upon presentation of the certificate to the competent judge along with the EAW, the judge shall proceed to the issuance of the EAW for the purposes of this Law, provided that he is satisfied that the conditions of issuance of the warrant of the requested person are fulfilled.

In the event of urgency, the competent judge may issue a provisional arrest warrant of a requested person for whom an EAW is in force, and prior to its transmission, at the request of the issuing state of the warrant, by post, by wire or through the International Organization of Criminal Police or by any other means361.

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?

Ex officio.

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 cases where the requested person consents to his/her surrender, the competent District Judge shall decide on the execution of the European Arrest Warrant within ten (10) days after consent has been given. In cases where the requested person does not consent to surrender, the final decision on the execution of the warrant shall be taken within sixty (60) days from the arrest of the requested person. In specific circumstances, where the European Arrest Warrant cannot be executed within the time limits laid down in subsections (1) and (2), the Court before which the case is pending shall immediately inform, through the Central Authority, the issuing judicial authority thereof, giving the reasons for the delay. In such cases, the time limits may be extended by a further thirty (30) days. Where in exceptional circumstances the judicial authority which decides on the execution of the warrant, including the Supreme Court in the event of an appeal, cannot observe the time limits provided for in this section, it shall inform Eurojust, giving the reasons for the delay.

360 Art. 16(1) of Law No. 133(I)&2004.
361 Art. 16(4) (a) of Law No. 133(I)&2004.
d. Can the judicial authority deciding upon the execution of the EAW verify the information provided in the EAW? Can it perform evidence?

Where the judicial authority, which decides about the execution of the warrant, considers that the information which has been forwarded by the issuing Member State of the warrant is not sufficient to allow it to decide on the issue of surrender, it shall request, through the Central Authority, to be furnished, as a matter of urgency, with the necessary supplementary information and it may also fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in section 23 of this Law. The decision concerning the execution or non-execution of the European Arrest Warrant shall be reasoned.

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

If two or more Member States have issued European Arrest Warrants for the same person, the decision on which one of the European Arrest Warrants shall be executed shall be taken by the competent District Judge who decides on the execution of the warrant. In taking such decision, due consideration shall be given to all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European Arrest Warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order. The competent judge who decides on the execution of the warrant may seek the advice of Eurojust when making the choice referred to in subsection (1).

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

In the event of a conflict between a European Arrest Warrant and a request for extradition presented by a third country, the decision on whether the European Arrest Warrant or the extradition request takes precedence shall be taken by the Minister of Justice and Public Order with due consideration to all the circumstances, in particular those referred above and those mentioned in the applicable convention.

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?

Where the requested person is arrested on the basis of the European Arrest Warrant, he or she shall be conducted within twenty-four (24) hours to a competent District Judge. After being satisfied with regard to the identity of the requested person, the District Judge shall inform the latter about the existence and the contents of the warrant, the right to have legal counsel and an interpreter and the possibility of consenting to surrender to the issuing state of the warrant.

Following the arrest of the requested person and the attestation of his or her identity, the competent District Judge shall decide whether such a person should remain in detention, in order to prevent him/her from absconding or to release them, with or without restrictive measures. The District Judge may order the provisional release of the requested person and the imposition of restrictive measures.

The restrictive measures which have been imposed on the requested person may be replaced by detention, in the event of danger of such a person absconding.
h. What is the maximum period for the arrest of the requested person before his or her effective surrender?

See answer to question c.

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

A District Judge sitting alone.

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

Where the arrested person does not consent to his/her surrender, the competent judge shall fix a date for hearing. The person in question shall have the right to appear in Court with legal counsel and an interpreter of his or her choice or, where he or she does not have one, the person in question shall have the right to ask for the appointment of legal counsel by the competent judge.

k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?

In the event of non-consent of the requested person, the requested person or the Attorney General of the Republic of Cyprus shall have the right to file an appeal before the Supreme Court against the final decision of the competent judge, within 3 days of the publication of the decision. The Supreme Court shall take a decision within eight (8) days after the appeal has been filed. The requested person shall be invited by the Chief Registrar of the Supreme Court, in person or through his or her authorized attorney, within twenty-four (24) hours before the hearing.

l. Does the person in question have the right to:

– the assistance by the defense lawyer?
  See answer to question j.

– the right to interpreter?
  See answer to question j.

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

According to the Law, the executing judicial authority of the warrant shall refuse to execute the European Arrest Warrant in the following cases:

a. if the person who is the subject of the European Arrest Warrant, for the execution of custodial sentence or detention order, is a national and the Republic of Cyprus undertakes the obligation to execute the sentence or detention order according to its criminal laws,

b. if the person who is the subject of the European Arrest Warrant for his prosecution is a national, unless it is ensured that after being heard, he or she shall be transferred to the Republic of Cyprus, in order to serve a custodial sentence or a detention order which shall be passed against him/her in the state issuing the warrant.

However, under the above mentioned amendment of the Constitution it seems that there is no problem in the surrender of Cypriots if the crime is committed after the 1st of May 2004.
n. How many EAWs issued by other MSs have been executed by your country since the date mentioned in 1g of the questionnaire? In how many cases has the person been effectively surrendered?
   Not known.

o. In how many cases has judicial authority in your country refused to execute the EAW? What were the grounds for non execution?
   Not known.

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.
   Not known.

q. Has the EAW been executed for crimes other than listed in the above mentioned Art. 2.2. FD? If so, in how many cases?
   Not known.

r. Have there been cases in your country in which courts rejected the executing of the EAW because of a possible violation of guarantees of the requested person in the country of issuing of the EAW (esp. human rights)?
   No.

s. How often does the requested person consent to the “fast track” surrender procedure?
   In half of the cases.

t. In how many cases has the decision on the execution of the EAW been 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?
   There are three decisions of the Supreme Court. In two of them the surrender succeeded, and in one case the surrender of the Cypriot national failed (the Constantinou case).

u. What is the average period of time between the execution of the EAW and the effective surrender of the requested person?
   Not known.

2.6. Others

a. Are there any special difficulties in putting the EAW into practice, resulting from particularities of the legal system in your country (esp. common law countries)?
   The first problem in the way the FD on the EAW was implemented into the legal system of the Republic of Cyprus arose in the decision of the full bench of the Supreme Court of Cyprus in the case Attorney General vs. Konstantinou, Civil Appeal 294/2005, which was delivered on the 7th November 2005.

   The case concerned an application by the UK to the Cypriot authorities to hand over a person with dual UK and Cypriot nationality charged with conspiring to defraud the British government.
A question that had to be answered was whether the way in which the Framework Decision had been introduced into the Cyprus legal system was in compliance with the Cyprus Constitution of 1960. It was argued that the law that introduced the Framework Decision was incompatible with Art. 11.2 (f) of the Constitution that states:

“Nobody is deprived of their liberty except in those cases where the law so provides, namely: [...] (f) “for the arrest or detention of a person in order to prevent his entry into the Republic without a permit or in the case of an alien against whom procedures have been instituted to have him expelled or extradited.”

The Court further noted that the Polish Court had also found that the extradition of a same legal status as the arrest and handing over of a person subject of an EAW. Regarding the last finding, the Court cited a relevant decision of the Conseil d’Etat of France. In contrast to the aforementioned arguments, the Attorney General maintained that a basic element of the EAW is the surrender of the sought person and not his extradition to the requesting Member State.

The full Bench of the Supreme Court accepted that Law 133(1)/2004 introduced the Framework Decision into the law of Cyprus, in effect reproducing all the provisions of the Framework Decision. The unanimous decision also found that Art. 11 of the Constitution of Cyprus provides an exhaustive list of the reasons for which a person may be arrested. Arresting a person in the context of an EAW is not one of the reasons stated. The Court reiterated a previous relevant decision in Cyprus362, where it was decided that the extradition of a Cypriot citizen on the basis of Art. 11(f) of the Constitution is prohibited. In arriving at this finding, the Supreme Court made a clear reference to the recent decision of the Court of the European Communities in the Maria Pupino case, C-105/03, of 16th June 2005, arguing that in that case, too, it is left to the Court of every Member State to decide whether an interpretation of its national law is in accordance with the Framework Decision363.

Regarding the question of whether the Law that introduced the EAW is superior to the Constitution, it was decided that the Framework Decision leaves the method and the means of how to realise its goal up to the Member States, and even if achieving that goal is compulsory, it does not have an immediate effect. Consequently, the correct legal procedure should be used to ensure the introduction and integration of the EAW into the Cyprus order. This had not been done since the law concerned is incompatible with a specific provision of the Constitution.

Under the new provision of Art.11 of the Constitution:

“Arrest or withholding of a person with intent of obstructing the entrance without permit into the territory of the Republic or arrest or withholding of an alien against whom actions were taken with intent to deport or extradite or arrest or withholding a citizen of the Republic in order o extradite or surrender him, having in mind of the reservations of the following provisions: [...] (i) The arrest or withholding of a citizen of the Republic with the intention of surrendering him based on a European Arrest Warrant is possible only with regard to facts that supervened or actions committed after the date of the accession of the Republic into the European Union...”.

363 Pp. 48 in Pupino.
3. The Czech Republic

(Světlana Kloučková)

At the very beginning of my answer to your questionnaire I would like to make a general comment to the implementation of the Framework Decision (FD) on the EAW in the Czech Republic what can a little bit clarify some problems in our practice.

Summary of the passage through Parliament

The implementation of the FD on the EAW in the Czech Republic (CZ) has met with many obstacles. The draft of the amendments of the Constitution of the CZ, the Chart of Fundamental Rights and Freedoms (the constitutional Law in the CZ), the Criminal Code and the Criminal Procedural Code implementing an EAW were submitted to the Czech Parliament on 11th November 2003.

On 11th March, 2004 the Committee for Constitutional Law of the Chamber of Deputies (the lower chamber in the Parliament) decided not to support the amendments of the Constitution of the CZ and the Chart of Fundamental Rights and Freedoms concerning a surrender of Czech nationals under an EAW and the Parliament later on did not accept the amendments of these constitutional laws.

The amendments of the Criminal Code and the Criminal Procedural Code implementing the FD on the EAW were adopted after the approval by the Chamber of Deputies, the lower chamber of the Parliament of the CZ on 30th June 2004, by the Senate, the higher chamber of the Parliament of the CZ, on 29th July 2004.

According to the Czech Constitution, the President of the CZ has to sign the law to complete the legislative process. However, the President of the CZ executed his constitutional privilege not to sign the laws on 23rd August 2004.

In compliance with the Czech Constitution, the vetoed laws were returned to the Chamber of Deputies. The Chamber of Deputies approved the laws by the absolute majority of its representatives on 24th September 2004. The laws entered into force on the first day of the following month after their promulgation – on 1st November 2004.

On 14th January 2005, the CZ submitted its Notification under Art. 28 (3) of the European Convention on Extradition (13/12/1957) to the Secretary General of the Council of Europe. The Czech judicial authorities started to use the national legislation on an EAW on 14th January 2005.

The main problem of the application of the EAW in the CZ is that the CZ has not made a statement under Art. 32 of the Framework Decision relating to the date of the acts to which an extradition requests relates. Despite that, the CZ applies the EAW under its national legislation only regarding acts committed since the 1st November 2004. Regarding the crimes committed before this date, the CZ applies the “traditional” extradition regime (this exception was not a part of the government draft of law but it was put in during the negotiation in our Parliament).

The result is that the current situation is worse than it was during the application of an extradition procedure only. Cyprus, Ireland, Italy, Latvia, Malta, the Netherlands, Poland, Spain, Sweden, the UK confirmed to the Czech Ministry of Justice that they will not cooperate with the CZ under the extradition regime regarding acts committed before the 1st November 2004 if the CZ is the
requesting state. So that, these 10 Member States are now “safe territories” for criminals that are wanted by the CZ for these “old” crimes.

Cyprus, Ireland, Malta, the Netherlands, Spain, the UK have confirmed to the Czech Ministry of Justice that they will not cooperate with the CZ under the extradition regime regarding acts committed before the 1st November 2004 if the CZ is the requested state. So that the CZ is now “a safe territory” for criminals that are wanted by these 6 Member States for these “old” crimes.

Austria, Hungary, Germany (after the decision of German Constitutional Court only extradition procedure is applied for all acts), France, Lithuania and Slovakia have confirmed to the Czech Ministry of Justice that they will cooperate with the CZ under the extradition regime regarding acts committed before the 1st November 2004.

The Czech Ministry of Justice has not received any answer from others countries yet. Slovenia informed that it is entire up to courts how they will deal with the problem.

In February 2006 the Ministry of Justice brought the initiative to our Parliament to reduce the limitation of the usage of the EAW. Under this proposal that was accepted by the Committee for Constitutional Law of the Chamber of Deputies, only the Czech citizens should not be surrendered under the EAW for crimes committed before 1st November 2004. In March 2006 this amendment passed the Chamber of Deputies. Now the Senate, the higher chamber of the Parliament of the CZ, will decide about this amendment. After that the president of the CZ will have to sign this law to complete legislative proces.

**Used abbreviations:**
- CC – the Criminal Code
- CPC – the Criminal Procedural Code
- FD – a Framework Decision
- EAW – a European Arrest Warrant
- MS/MSs – a Member State/ Member States
- CZ – the Czech Republic
- TEU – the Treaty on European Union

### 3.1. Constitutional issues

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

Art. 34 (2)(b) of the TEU states that the Council, acting unanimously on the initiative of any MS or of the Commission, may adopt FDs for the purpose of approximation of the laws and regulations of the MSs. FDs shall be binding upon the MSs as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.

Some important facts can be inferred from that definition. The FD is an act of the Council of the EU – the unilateral act adopted under the responsibility of the EU and not the agreement of the MSs. The fact that the Council acts unanimously does not change the legal nature of the FD. The Council acts as a body of the EU, not as a conference of representatives of the MSs. That is why the FD cannot be considered as an international treaty, namely the later treaty relating to the same
subject-matter between some of the states parties in the sense of Art. 30 of the Vienna Convention on the Law of Treaties, 23rd May 1969 or the agreement to modify the multilateral treaty between certain of the parties only under Art. 41 of the Vienna Convention.

As far as the FD on the EAW is concerned, it must be mentioned that Art. 28 (2) the European Convention on Extradition enables the conclusion of bilateral or multilateral agreements between the contracting parties only in order to supplement the provisions of this convention or to facilitate the application of the principles contained therein. The FD on the EAW neither supplements the Convention nor facilitates the application of its principles, but it brings the entirely new system, which is incompatible with the system of extradition.

Moreover, the provisions of the European Convention on Extradition are directly applicable in certain MSs (states having the monistic regulation of the relationship between international and national laws – e.g. the CZ364). If a FD could modify the provisions of such international treaty directly, it would entail direct effect, which was expressly excluded by Art. 34 (2)(b) of the TEU.

The conclusion can be drawn from these facts about the legal nature of the FD that an FD itself cannot modify the provisions of international treaty directly. The only way to replace the regulation contained in an international treaty by the regulation adopted in the form of a FD is to exclude the application of such treaty in accordance with its provisions or with the rules of the international law on treaties.

The European Convention on Extradition provides the smart way to exclude its application in its Art. 28 (3). This way is based on two conditions:
1) the adoption of uniform laws regulating the mutual relations between two or more contracting parties in respect of extradition or laws providing for the mutual execution in the territory of a contracting party of warrants of arrest issued in the territory of the other party (substantive condition),
2) making the notification under Art. 28 (3) of the European Convention on Extradition (formal condition).

National laws implementing the FD on the EAW can fall under the first condition. The notification has both declaratory and constitutive effects. On the one hand, it declares the existence of uniform laws or laws on mutual execution of arrest warrants and, on the other hand, it causes the exclusion of application of the European Convention on Extradition, including its amendments. Until the exclusion of application of the Convention by the notification is made, there remains the conflict between national implementing legislation on the EAW and the provisions of the European Convention on Extradition. National legal orders can solve the conflict in different ways. For example, Art. 10 of Czech Constitution stipulates the precedence of the provisions of international treaty.

364 Under the Art. 10 of the Czech Constitution the international treaties are the entire part of the Czech legal order if:
– they are ratified by the Czech Parliament (or the Czechoslovak Parliament in the previous time),
– they are in force on the international level (they were ratified by the given number of states),
– they are promulgated in the Czech Collection of Laws or (since 1st January 2000) the Czech Collection of International Treaties.
If the self-executing provisions of such a treaty stipulate something different than a domestic law, the Czech authorities have to apply directly these self-executing provisions.
The necessity of making the notification under Art. 28 (3) of the European Convention on Extradition was confirmed in some documents of the EU:

- Proposal for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States (presented by the Commission), COM(2001) 522 final/2, 2001/0215 (CNS), Brussels, 25th September 2001 states in the explanatory memorandum to Art. 43 (which is the predecessor of the Art. 31 of the FD on the EAW) that the legal instruments governing extradition are replaced by the EAW in relations between the Member States and that the Member States will accordingly have to make a notification pursuant to Art. 28 of the European Convention on Extradition.

- Conclusions of the Council, 2nd – 3rd October 2003, point A/5 urge the Member States to make notification referred to in Art. 28 pp. 3 of the European Convention on Extradition as soon as possible and by 1st January 2004 at the latest for the current Member States and from 1st May 2004 for the new Member States (see Draft Council conclusions on the application of the EAW and its relationship with Council of Europe legal instruments, 12413/03, CATS 55, COPEN 85, Brussels, 11th September 2003).


However, some MSs (Estonia, Greece, Italy, Latvia and Slovakia – data from 24th March 2006 – have not made the notification under Art. 28 (3) of the European Convention on Extradition so far. Some MSs made the notification earlier and generally, without exclusive link with the implementation of the FD on the EAW (e.g. the United Kingdom, partly also the Netherlands, Spain). Other MSs made the notification in connection with the implementation of the FD on the EAW, but the content of their notifications varies considerably.

Putting the Netherlands, Spain and the United Kingdom with their earlier and general notifications aside, we can see that only Denmark, Germany and Sweden managed to put into conformity the date of entry into force of national implementing legislation and the date of entry into force of the notification under Art. 28 (3) of the European Convention on Extradition. Only the CZ (under our knowledge) made the application of its national legislation implementing the FD on the EAW (in force from 1st November 2004) dependent on the notification (in force from 14th January 2005). Other MSs applied their national legislations implementing the FD on the EAW irrespective of the notification – they made the notification sooner or later after the entry into force of national implementing legislation or they have not made the notification.

This different approach of the MSs causes at least uncertainty as regards the legal basis for extradition/surrender.

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?

See point a). The Czech courts respect the opinion that the authorities of the CZ can apply our EAW legislation since 14th January 2005. There was one case in our practice when a wanted person
(the EAW was issued in Germany) was arrested on the Czech territory on 7th January 2005 and the Regional Court in the CZ started the extradition procedure, not the EAW procedure, because of the precedence of the international treaties.

On 14th January 2005 when the CZ made a notification under Art. 28 (3) of the European Convention on Extradition, the Regional Court changed the extradition procedure in this case to the procedure on the EAW (the court heard the wanted person again and informed the person of the fact that it would be the Regional Court that would decide about the surrender in this case (no more the Ministry of Justice) and again informed the wanted person about their rights, the principle of speciality and about a possibility of simplified procedure if the person agrees with surrender).

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?

We have not much practical experience in our criminal cases yet. But it is possible to see certain reluctance in our Parliament to adopt the EU legislation in the third pillar.

Under Sec. 224(5) of the CPC the court decides about a discontinuance of the criminal proceedings and put to the case before the Constitutional Court if it has an opinion that the law whose application is substantial for a decision about the guilt and sentence (no matter if it was adopted under the FD or not) is in a contradiction with the Constitution or an international treaty that has a precedence before the domestic law. This provision could be hardly used in the case when court would have doubts if our national legislation is in line with an FD because FDs are not international treaties and they have no direct effect.

As mentioned in point h), there is a proposal to cancel several provisions in our EAW legislation, however our Constitutional Court has not yet decided about this proposal. So, there is no judicature of this Court concerning the problem if it is a duty for the CZ to interpret also its Constitution in line with the FDs.

We have also no case in our practice when our Constitutional Court would decide the cases concerning the problem if our national law is in line with the FD.

There are only some decisions of the Constitutional Court concerning the first pillar – the Communitarian law. The Constitutional Court decided in one case that since 1st May 2004 every state authority has a duty to apply the Communitarian law in preference before the Czech law if the Czech law is in contradiction with the Communitarian law. Courts have to consider the conformity between the Czech and the Communitarian law themselves (including asking preliminary question to the ECJ) without the participation of the Constitutional Court.

In another first pillar case (the case concerned the production quota in agriculture), the Constitutional Court solved the problem whether the Czech Constitutional Court is the Court that has a right (and in the same time a duty) to ask a preliminary question to the ECJ. The conclusion of the Czech Constitutional Court was ambiguous. The Court decided in this case not to ask the preliminary question because there is a rich ECJ case law in this area. However, the Constitutional Court stated that it did not put away the possibility to ask the preliminary question in the future in individual cases. Furthermore, the Constitutional Court said that it was not competent to review the questions of validity of the Communitarian law. It is the entire competence of the ECJ. Regard-
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ing the perspective of the Communitarian law, the norms of this law have precedence before the national laws of the MSs. However, the Constitutional Court also draws attention to the fact that the supreme courts of many MSs have never succumbed absolutely the doctrine of the absolute precedence of the Communitarian law above all constitutional laws. These courts kept a certain reserve in interpretation of such principles as the principle of democratic state and the area of the protection of basic human rights and freedoms\(^{365}\).

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

The CZ in its notification enclosed to the Accession Treaty accepted the jurisdiction of the ECJ. Under this notification, if a question concerning validity and interpretation of acts listed in Art. 35(1) of the TEU has been arisen, the courts that issue the non-appealable decisions have a duty to bring forward such a question to the ECJ. Under Sec. 9a of the CPC, the decisions of the ECJ are binding for all authorities active in criminal proceeding.

Regarding the Pupino case it is necessary to stress that this case was about the relationship between the FDs and national law, not about the relationship between international treaties and the FDs. We understand the conclusions of the case that if there is a provision of national law that can be interpreted in two ways, it is the obligation of national authorities to choose the interpretation that is in line with the FDs. However, if there is a lack of national law, the court cannot apply directly the FD because it has not direct effect and it is a task for national legislative authorities to implement correctly the FD.

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

The Czech court can refer to the FD in its interpretation of our national law (in the sense of the Pupino case). It does not matter if the national law was enacted before or after the publication of the FD in the Official Journal. We understand that the implementation of an FD does not necessarily mean enacting a new legislation but to assuring that the aim of the FD will be achieved – by using available legislation or by adopting a new one.

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

No Czech court has asked the ECJ for a preliminary question in a criminal mater yet, so we have no practical experience.

\(^{365}\) – the decision of the Italian Constitutional Court from 27\(^{th}\) December 1973, No. 183/73 Frontini v. Ministero delle Finanze,
– the decision of the Italian Constitutional Court from 21\(^{st}\) April 1989, No. 232/1989 Fragd v. Amministrazione delle Finanze dello Stato,
– the decision of the German Constitutional Court from 22\(^{nd}\) October 1986, No. 2 BvR 197/83 Wuensche Handelsgesellschaft, Solange II,
– the decision of the German Constitutional Court from 12\(^{th}\) October1993, No. 2 BvR 2134 and 2159/92 zum Vertrag über die Europäische Union.
The FDs are neither international treaties nor a part of the Czech Constitutional Order, therefore it is not a question for our Constitutional Court to decide the accord between the FD and our domestic law. However, the FDs will be taken into consideration regarding the interpretation of our national law. Concerning the practice of our Constitutional Court see point c).

**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?**

The EAW was implemented as a unit in Chapter 25 of the CPC that deals with the international co-operation in criminal matters. This law came into force on 1st November 2004, however, we apply this legislation since 14th January 2005, when the CZ dealt with its international obligation to apply the European Convention on Extradition – see point a).

**h. Was the implementation the Framework Decision and the Framework Decision itself subject of proceedings of the constitutional court in your country?**

At the end of November 2004 the group of deputies of the Czech Parliament made a proposal to the Constitutional Court to annul provisions of our legislation on the EAW concerning surrender of our nationals under the EAW (Sec. 21(2) of the CC) and cancellation of dual criminality principle for a certain group of crimes (Sec. 412 of the CPC). Our Constitutional Court has not decided yet about the proposal.

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

We strictly distinguished between the terms “extradition” and “surrender”. The term “extradition” is used for the procedure when a government of one state asks for an arrest and handing over of a wanted person and the government of the state on which territory this person has been found decides (after a decision of a court about an admissibility of extradition) to hand over this person abroad for the purpose of criminal prosecution or for the carrying out of a sentence or detention order.

The term “surrender” is used for the procedure under an EAW when it is a court that decides to hand over a wanted person to another MS for the purpose of a criminal prosecution or for the carrying out of a sentence or detention order. The EAW is considered as the new system that is incompatible with the system of ‘traditional’ extradition.

So, we understand the EAW as a separate legal instrument.

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

**a. Are there any 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 (compulsory and optional) of surrender?**

The FDs are binding for MSs and judicial authorities cannot apply them directly but they can apply “just” the national legislation enacted by the Parliament according the FDs. So, we under-
stand that it is up to the MS (not a judicial authority of the MS) to choose what premises will be implemented as compulsory ones and what as optional ones.

The CZ implemented all of the negative premises in Art. 4 of the FD as mandatory grounds for non-execution of the EAW and all judicial authorities have an obligation to apply them together with grounds given in Art. 3 of the FD.

- **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 CZ belongs to the MSs that took over the list of “crimes” into its law (Sec. 412 of the CPC) – it means we took over the list how it is introduced in Art. 2(2) of the FD and we did not try to find out our own features of crimes and create the list from them. Generally, it is possible to say that all “crimes” are criminalised in our country.

  We have very small practical experience with the EAW and that follows we have not currently any practical problems concerning the list. However, we have already discussed in the CZ what crimes can possibly be included into the list. E.g.: there is “grievous bodily injury” on the list. We have the special crime “grievous bodily injury” (Sec. 222 of the CC), however, there are more than 30 other crimes that have “grievous bodily injury” among aggravating circumstances. The opinion of our courts is that a judge who issues the EAW can tick a “grievous bodily injury” regarding all these other crimes. We just advise them to quote the text of these qualified features of crimes – aggravating circumstances.

- **the period of time for execution the EAW?**

  We accepted the time limits specified in the FD. However, if a court is not able to decide about the surrender under the EAW in the given time limit, it has only these consequences:

  i. to inform the authority that has issued the EAW,
  ii. to inform EUROJUST.

  Breaching the time limits does not mean in any case a duty to release a wanted person.

- **other issues; please specify**

  The CZ explicitly expresses in its law that it will surrender its own nationals under the reciprocity principle (Sec. 403/2 of the CPC).

  The CZ also cannot apply its EAW legislation concerning crimes committed before 1st November 2004 – see above.

  The EAW issued in another MS will be rejected by a Czech court not only if the requested person has been finally sentenced in a MS but in any foreign state for the same act and the penalty has already been enforced or is being enforced or is no longer enforceable, unless such decisions have been overturned in the prescribed proceedings.

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

  The CZ will not surrender anybody if there is no dual criminality concerning crimes that are not on the list.

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)?**
No. The CZ made a notification concerning Arts. 6(3), 7(1), 8(2), 25(2), 31 and 32. The CZ put also before the Council of the EU its legislation on the EAW that includes our implementation of the FD on the EAW.

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

In his letter to the Secretary General of the Council of the European Union, dated 17th January 2005, the Permanent Representative to the CZ also made the following notification on behalf of the CZ concerning Art. 7(1) – the central authorities designated to assist the judicial authorities:

"Ministry of Justice of the Czech Republic, Supreme Prosecutor's Office of the Czech Republic and Police Presidium of the Czech Republic are the central authorities designated to assist the judicial authorities. Contact details are contained in the Annex."

The CZ Ministry of Justice, the CZ Supreme Public Prosecutor's Office and the CZ Police Presidium have only a supportive and methodical role. The CZ Ministry of Justice and the CZ Supreme Public Prosecutor's Office monitor the decision of the Supreme Court or the Constitutional Court in the CZ or the important decisions in other MSs. The CZ Supreme Public Prosecutor's Office organises every half a year the meetings of prosecutors specialised in a mutual legal assistance in criminal matters where these decisions are discussed.

The Ministry of Justice issued the Instruction of the Minister of Justice on a procedure of courts in criminal matters regarding the MSs of the EU, from 30th December 2004 (No. 66/2004-MO-J) that includes the form of the EAW and that is binding for courts.

The Supreme Public Prosecutor issued the Instruction of General Nature on the procedure of public prosecutors regarding a mutual legal assistance in criminal matters, from 26th January 2005 (No. 1/2005, amended No. 3/2005) that includes instructions for prosecutors concerning inter alia the EAW and that is binding for prosecutors.

The CZ branch of SIRENE is a part of the CZ Police Presidium. The Police Presidium has also its Instruction for Police concerning this matter.

3.3. 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?

The CZ applies the doctrine of identity of description of facts, not identity of legal qualification.

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

The EAW issued in another MS will be rejected by a court if the requested person has been prosecuted in the CZ (Sec. 411 (6)(d) of the CPC) or he/she has been finally sentenced in the CZ.

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367 Cover note from Mr Jan KOHOUT, Permanent Representative of the Czech Republic to the European Union, Brussels 17th January 2005, COPEN 9, EJN 1, EUROJUST 1.
or the criminal proceedings have been finally terminated in the CZ (Sec. 411 (6)(c) of the CPC) for the same act in respect of which the EAW has been issued. They are mandatory grounds for non-execution of the EAW.

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

The EAW issued in another MS will be rejected by a court if:
- the requested person has been finally sentenced in any foreign State for the same act and the penalty has already been enforced or is being enforced or is no longer enforceable, or
- the criminal proceedings have been terminated in another MS by means of a final decision, unless such decisions have been overturned in the prescribed proceedings (Sec. 411 (6)(c) of the CPC).

d. What is the meaning and/or interpretation of “the finally disposal of the trial” in Art. 54 CISA in your country?

- Is such a disposal the valid decision on discontinuance of the criminal process because of its legal inadmissibility?

Any decision of a public prosecutor in pre-trial proceedings and of a court in a trial about a final termination of a criminal prosecution is a res iudicata decision in the CZ.

Under Sec. 172(1) of the CPC a public prosecutor has to terminate a criminal prosecution if:
- a) it is without any doubts that the offence because of which the criminal prosecution is conducted did not take place;
- b) this offence is not a criminal offence and there is no reason to assign the case to another authority;
- c) it has not been proven that the offence has been committed by the defendant;
- d) the criminal prosecution is not admissible under Sec. 11(1) of the CPC (see below);
- e) the defendant had not been criminally responsible at the time of committing the offence;
  or
- f) the criminality of the offence has been extinguished.

Under Sec. 223(1) of the CPC a court has to terminate a criminal prosecution during a trial if there is any circumstance listed in Sec. 11(1) of the CPC.

Section 11
Inadmissibility of Criminal Prosecution

(1) The criminal prosecution may not be initiated, and if already initiated, may not be continued and has to be terminated:
- a) if ordered by the president of the Republic who has applied his/her right to grant mercy or amnesty;
- b) if the criminal proceedings have become statute-barred;
- c) if it concerns a person exempted from the powers of the agencies involved in criminal proceedings (section 10), or a person the prosecution of which requires an approval under the law, and such approval has not been granted by the authorised body;
- d) if it concerns a person who is not criminally responsible due to the his/her low age;
e) against such a person who has died, or has been declared dead;
f) against a person against whom the criminal proceedings for the same offence have been concluded through the court verdict coming into legal force, or have been brought to a stop by the court decision or by the decision of another authorised body, unless the decision has been cancelled during the prescribed proceedings;
g) against a person against whom the criminal proceedings for the same offence have been concluded through the court verdict on an approved settlement coming into force, unless the decision has been cancelled during the specified proceedings;
h) against a person against whom the criminal proceedings for the same offence have been concluded through the decision coming into force on assignment of the case with a suspicion that the act is a misdemeanour, another administrative culpable act, or a disciplinary misdemeanour, unless the decision has been cancelled during the specified proceedings;
i) if the criminal prosecution is subject to the approval of the injured person, and such an approval has not been granted, or has been withdrawn;
j) if provided so under the published international treaty which the Czech Republic is bound with.

(4) The decisions under subsection 1(f)(g) and (h) are also the decisions of courts and other judicial authorities of the European Union Member States.

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

A public prosecutor (under Sec. 172(1) of the CPC) and a court (under Sec. 223(2) of the CPC) may terminate a criminal prosecution if:

a) the punishment which the criminal prosecution may lead to is quite insignificant in comparison with that already imposed on the defendant because of another offence, or which will be imposed on the defendant as expected;
b) if the defendant’s offence has been already decided on by another body, in the disciplinary or another manner or by a foreign court or a foreign office, and such decision may be considered to be sufficient; or
c) if in view of the importance of the protected interest affected by the offence, manner of the offence committed and consequences thereof, or circumstances under which it has been committed, and in view of the defendant’s behaviour after committing the crime, it is obvious that the purpose of the criminal proceedings has been achieved.

The CZ does not apply Art. 54 till 57 of the Schengen Implementing Treaty (SIT) because of the Art. 58. As you can see above, the Section 11(1)(4) of the CPC establishes much broader application of the ne bis in idem principle than Art. 54 till 57 of the SIT.

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)?

No, there was no case before the Czech Supreme or Constitutional Courts concerning the application of the principle ne bis in idem on the EU level. There are only many decisions of Supreme Court and some decisions of Constitutional Court concerning the principle ne bis in idem (an identity of a description of facts) in our national criminal cases.
Chapter III. Country reports

3.4. The issuing of the EAW

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

Every district judge upon the request of a public prosecutor in pre-trial proceeding and every presiding judge that carries out a trial can issue the EAW.

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?

In pre-trial proceeding, a judge can issue the EAW only upon a motion of a public prosecutor. A presiding judge does not need a motion of a public prosecutor to issue the EAW during a trial.

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

It is a judge (not a panel of judges) who issues the EAW in pre-trial proceeding and a presiding judge during a trial.

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

No. The EAW (the same as in domestic warrants) is issued in a closed (non-public) session. A public prosecutor and a defence lawyer can be present during this session and to present their proposals, but it is not necessary. Written documents are satisfactory for this procedure.

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

There is no evidence procedure concerning a validity of prosecution in the sense that a public prosecutor should present individual evidence and prove the validity of prosecution. However, a public prosecutor submits to a judge not only his/her motion to issue the EAW but also a criminal file. If a judge has doubts about illegality of the prosecution, he/she can reject to issue a warrant or the EAW (there are several decisions of the Supreme Court about this matter).

A judge first of all reviews if there are conditions for issuing the EAW – the conditions are: if there is a suspicion that a charged person is in another MS, it is necessary to summon him/her and this person is prosecuted for a crime for which it is possible to issue the EAW.

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?

No, there is no appeal against issuing the EAW. Any warrant including the EAW has a form of an order, not a form of the decision of a judge.

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

The EAW is considered a part of a criminal procedural law, not of a criminal substantive law, so the general rule is that the criminal procedural law is applied since the moment when it came into force if there are no exemptions explicitly stipulated in a law.

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368 There are four levels of courts and prosecutor’s offices in the CZ: the district, regional, high and supreme ones.
The CZ has a specific problem with the application of the EAW legislation that is mentioned above. There is a specific provision in the CPC that the Czech judge cannot issue the EAW regarding a crime committed before 1st November 2004.

If our parliament accepts the proposal for amendment of this specific provision of the CPC, there will be no obstacle to issue the EAW concerning the crime committed before 1st November 2004 short of crimes committed (or before a sentence – allegedly committed) by our nationals.

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

None, because of the impossibility to apply the EAW legislation for crimes committed before the 1st November 2004.

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.

The CZ has issued 5 EAWs till 20th March 2006 and 2 of them concerned “crimes” listed in Art. 2.2 of the FD.

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

Yes, in 3 of them.

j. How many such requests were rejected by the deciding judicial authority? (applies only if EAWs are issued on request)

We have no experience with that. Till now no MS will execute our EAW (just in one case, a French court agreed with the surrender of our national who escaped from our prison, however, the surrender has not been realised yet).

k. 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?

All issued EAWs are sent to the Czech branch of SIRENE that communicates the EAW via Interpol (the SIS is not opened for the CZ yet). If it is necessary the consultation of the case in the EJN or Eurojust is possible. Our judge can issue the EAW if there is a suspicion that a wanted person is on the territory of other MSs.

m. How many EAWs issued by the judicial authority in your country have been executed in other Member States? In how many cases has the requested person been effectively surrendered?

None.

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

We have no cases like that.
3.5. Executing of the European Arrest Warrant

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

The Regional Courts – there are 8 of them in the CZ.

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?

The Regional Court can decide about a surrender under the EAW only upon a motion of a public prosecutor from the Regional Public Prosecutor’s Office.

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?

The time limits are taken over from the FD. The Regional Court should decide about surrender under the EAW within 60 + 30 days after an arrest of a wanted person in a standard procedure and within 10 + 30 days after an agreement of a wanted person with surrender in a simplified procedure. If the Court cannot decide about surrender in these limits, it does not mean that it has to release a wanted person or to stop the surrender procedure but it has to inform about delays the authority that has issued the EAW and EUROJUST.

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

A public prosecutor in preliminary proceeding and a court can ask for additional information if some information in the EAW is missing or if the description of the facts or other information in the EAW is not clear. These authorities, however, cannot ask for evidence supporting the validity of prosecution in another MS.

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

Under Sec. 419 of the CPC, if till the moment of validity of a surrender decision more than one EAW is delivered for one and the same requested person, the Regional Court shall decide on the basis of a proposal of the public prosecutor which EAW to enforce.

In doing so, it shall take into account the circumstances like the seriousness and location of the offences committed, the dates on which the EAW were issued and whether they were issued for the purpose of criminal prosecution or for the enforcement of a custodial sentence or detention order. It shall send its decision to the authorities in the other requesting MSs for their information.

The time limits for the decision on surrender shall start to run from the date on which the last EAW is served.

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

Yes, it does in Sec. 420 of the CPC. If till the moment of validity of a surrender decision an extradition request is delivered for one and the same requested person, the Regional Court shall, on a proposal of the public prosecutor, decide on the surrender under Sec. 411 of the CPC and on whether extradition is permissible under Sec. 397 of the CPC.
In the event of issuing a decision on surrender under Sec. 411(1) of the CPC and at the same time on the permissibility of extradition under Sec. 397(1) of the CPC, the presiding judge of the Regional Court shall forward the case to the Ministry of Justice to decide whether to enforce the EAW or comply with the extradition request.

The presiding judge of the Regional Court shall inform the competent authority in the requesting State without delay: 1) of the concurrent EAW and extradition request, 2) of his/her decision on the permissibility of extradition and 3) of the referral of the case to the Ministry of Justice.

In deciding whether to enforce the EAW or comply with the extradition request, the Minister of Justice shall take into account such circumstances as the seriousness and location of the offences committed, the dates on which the EAW and the extradition request were issued and whether they were issued for the purpose of a criminal prosecution or for the enforcement of a custodial sentence or detention order.

If the Minister of Justice decides that the enforcement of the EAW shall take precedence, he or she shall immediately notify the competent Regional Court accordingly. The Court shall then realise surrender in cooperation with SIRENE. The time limit for realisations of surrender (10 days) shall start to run from the date on which the notification of the Minister of Justice that the enforcement of the EAW shall take precedence is delivered to the regional Court.

If the Minister of Justice decides that compliance with the extradition request shall take precedence, he or she shall immediately notify it to the Regional Court that decided on the surrender under Sec. 411(4) of the CPC and the competent authority in the requesting MS. It shall then proceed under the provisions of Part Two of the Chapter 25 of the CPC that concerns extradition procedure.

A decision by the Ministry of Justice that the extradition request shall take precedence is a ground for a cancelling of the decision about the surrender under Sec. 411 of the CPC. The decision on this shall be taken without delay by the Regional Court as soon as it receives this notification from the Minister of Justice, in closed session by means of a non-appealable ruling. It shall send the ruling to the public prosecutor and the authority in the requesting MS that issued the EAW.

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?

It is a decision (very informal one) of a public prosecutor to arrest a wanted person – in urgent cases, the police can arrest a wanted person without the permission of a public prosecutor, however, and it has a duty to inform a prosecutor about the arrest without delays. The prosecutor has an obligation after that to ask the court for a decision about a preliminary custody within 48 hours after the arrest. The EAW is the basis for a prosecutor’s or police decision to arrest the person.

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

If the court decides about a preliminary custody there is only one limitation of this custody. The original of the EAW translated into the Czech language (except Slovakia and Austria – the special language regime with these states is constituted in the bilateral treaties) has to be delivered to the Regional Public Prosecutor’s Office till 40 days after the arrest. If not, the arrested person is released.
If the original of the EAW is delivered after this period, the wanted person can be taken to the preliminary custody again. There are no other limitations of the preliminary custody in our law.

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

It is a panel of three professional judges.

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

The Regional Court decides in an open session. A public prosecutor and a defence lawyer have to be present during this session (the EAW procedure is the case of a mandatory defence).

**k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?**

Yes, a wanted person or a public prosecutor can make a complaint against the decision of the Regional Court on a surrender. The High Court decides about the complaint. There are two High Courts in the CZ that decide these complaints – in Prague (for regions in Bohemia) and in Olomouc (for regions in Moravia). Such an appeal has suspensory effect. An appeal of the public prosecutor against a decision to release the requested person from custody has the suspensory effect only if it is lodged immediately after the court’s decision.

**l. Does the person in question have the right to:**

- **the assistance by the defence lawyer?**
  Yes, each wanted person has to have the defence counsel in each case of the EAW (it is the same as in extradition cases).

- **the right to interpreter?**
  Yes, everyone in a criminal proceeding (including the EAW procedure and extradition) has a right for an interpreter if he/she cannot understand Czech – the Sec. 2(14) of the CPC.

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

Besides the limitation of the usage of the EAW mentioned above there are two provisions in the CPC concerning the surrender of our nationals – Sec. 411(6)(e) and Sec. 411(7).

The EAW concerning the Czech nationals issued for purposes of execution of a sentence – Sec. 411(6)(e) of the CPC:

The Regional Court refuses surrender under the EAW if a Czech national, who is wanted for the enforcement of a custodial sentence or preventive treatment or a correctional penalty, has stated on the record in the Court that he/she refuses to submit to the enforcement of this penalty or preventive measure in the requesting MS. This declaration may not be retracted. In such a case the CZ has an obligation to recognise a judgement of another MS concerned and to enforce this judgement on its territory.

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369 There is a Law on obtaining and losing of the citizenship of the CZ (No. 40/1993 Coll.). The citizenship can be obtained by birth, an adoption, a decision on paternity, a finding on the territory of the CZ, a proclamation and a granting of a citizenship. The return guarantee covers also permanent residents.
The EAW concerning the Czech nationals issued for purposes of prosecution – Sec. 411(7) of the CPC:

If a Czech national shall be surrendered to the requesting MS for criminal prosecution, the court shall make the surrender subject to the proviso that the person will be returned to the CZ for enforcement of the custodial sentence or preventive treatment or correctional penalty, if this type of penalty or preventive measure is imposed on him or her and, when the verdict is handed down in the requesting MS, if a wanted person does not consent to the enforcement of the penalty or preventive measure in that MS.

The Court shall decide on surrender only if the requesting MS has given a guarantee that it will hand over the person to the CZ for the enforcement of the penalty or preventive measure. If the requesting MS does not provide such a guarantee, the court shall refuse to surrender the requested person.

There is also a general provision in our CPC concerning the surrender of our nationals – Sec. 403(2). Under this Section, the CZ may surrender a national of its own to another EU MS only on the condition of reciprocity. This provision is used now towards Austria (in the scope of Austria reservation in Art. 33(1) of the FD), Germany and other countries that cannot surrender their nationals under the decisions of their Constitutional Courts.

There is also a general provision in our CC – Sec. 21(2). It stipulates that a Czech citizen can be surrendered to another MS under the EAW.

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

If you mean the point 4g – the EAW issued retroactively, I have to refer again to the fact that the CZ cannot execute the EAW regarding a crime committed before 1st November 2004 because of the specific provision in the CPC.

Since 14th January 2005, the CZ started preliminary proceeding concerning the EAW in nine cases (till 20th March 2006). The CZ has already surrendered 5 persons under the EAW (one of them is a Czech national).

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

We have no cases when the EAW was rejected in the CZ – concerning the cases when the EAW was issued in another MS regarding crimes committed after 1st November 2004.

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.

Since 14th January 2005 the CZ started preliminary proceeding concerning the EAW in nine cases and eight of them concerned the “crimes” listed in Art. 2.2 of the FD.

q. Has the EAW been executed for crimes other than listed in the above-mentioned Art. 2.2. FD? If so, in how many cases?

Since 14th January 2005 the CZ started preliminary proceeding concerning the EAW in nine cases and one of them does not concern the “crimes” listed in Art. 2.2 of the FD.
Chapter III. Country reports

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

No, till 20th March 2006 we had no such case.

s. How often does the requested person consent to the “fast track” surrender procedure?

The simplified procedure was carried out in two cases.

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?

The surrender procedure has been finished in three cases. There were no appeals in these cases.

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

Approx. 20 days.

3.6. Others

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

There were no particular legal problems but political ones.

One of the hottest discussion concerned surrender of our nationals. Under Art. 14(4) of the Constitutional Law No. 2/1993 Coll. – the Charter of Fundamental Rights and Freedoms – “Every citizen is free to enter the territory of the Czech and Slovak Federal Republic. No citizen may be forced to leave his or her country.” The amendment of this constitutional law was rejected in the Czech Parliament.

In the end of November 2004 group of deputies and senators of the Czech Parliament made the proposal to the Constitutional Court to annul:
– provisions of the CC and the CPC concerning the surrender of nationals,
– the provisions of the CPC concerning cancellation of a dual criminality principle.
4. Denmark

(Jørn Vestergaard)

4.1. Introduction

Denmark joined the European Community (then EEC)\textsuperscript{370} in 1973. The 1972 European Communities Act\textsuperscript{371} provided for the incorporation of the EC law into the Danish domestic law following Denmark’s accession to the EC. Sec. 3 states that relevant EC law has direct effect in Denmark as if it were established by the Danish Parliament.

In the wake of a rejection by a public referendum of accession to the Maastricht Treaty in 1992, a so-called “national compromise” was struck between the majority of political parties. As a consequence, the Maastricht Treaty was supplemented by Edinburgh Agreement between Denmark and the then 11 other Member States, providing Denmark with a number of opt-outs from participation in EU policies in the areas of union citizenship, monetary policy, the defence dimension, and Justice and Home Affairs. Subsequently, an additional referendum was conducted in 1993, this time concluding in an approval. Denmark participates fully in the intergovernmental cooperation on Justice and Home Affairs under the third pillar, for instance in the fight against terrorism, but is not a party to supranational cooperation under the first pillar. Denmark participates in the Common Foreign and Security Policy except for decisions and actions with defence implications.

Legislation on extradition was introduced relatively late in Denmark\textsuperscript{372}. In 1960, an Act regarding the extradition of offenders to other Nordic countries was introduced. In 1967, Denmark implemented the European 1957 Convention on Extradition by passing a common Extradition Act. Compared to the provisions in the common Act, the legislation regulating extradition relations between the Nordic countries is characterised by less restrictive conditions for extradition and more simplified procedures. This is a reflection of the mutual confidence and trust between these neighboring countries as a result of a relatively high degree of similarity in terms of cultural and legal traditions. From a Danish perspective, relations between the Nordic countries, as well as the broader activities of the Council of Europe, have been important preludes to the recent efforts in judicial cooperation under the third pillar on the extradition of suspects, defendants and convicts.

The Council Framework Decision on the European Arrest Warrant was implemented in Denmark by Act 433, 2003 amending the 1967 Act on Extradition of Offenders and the 1960 Act on the Extradition of Offenders to Finland, Iceland, Norway and Sweden (transposition of the EU-Framework Decision on the European Arrest Warrant)\textsuperscript{373}.

\textsuperscript{370} For a brief introduction, see M. Rudinger: Denmark in the EU. For a more thorough account, see O. Due: Danish Law in a European Context. In Dahl et al. (ed.), 2002, pp. 11 ff.

\textsuperscript{371} Cf. Act 447 of 11th October 1972 on Denmark’s accession to the European Communities, as latest amended by Act 499 of 7th June 2001 (ratification of the Nice Treaty).


\textsuperscript{373} The current consolidation of the 1967 Extradition Act is lovbekendtgørelse (lbk.) 833 of 25th August 2005.
Chapter III. Country reports

Denmark was the second Member State to implement the Framework Decision on the European Arrest Warrant (EAW), completing the process by the end of May 2003. The initiative necessitated the amendment of two chapters of the common Extradition Act. The amended chapters specifically concerned Danish relations with other EU Member States.

The new rules concerning extradition from Denmark to another EU Member State on an EAW are contained in Chapter 2a (conditions for extradition) and Chapter 3a (procedures for dealing with such cases) of the 1967 Extradition Act.


The Ministry of Justice stipulated that the new concepts used in the Framework Decision do not differ substantively from the content of traditional terminology, so the previously used terms were retained in implementing the Framework Decision in Denmark. The Framework Decision uses the term “surrender” instead of “extradition”. As both terms involve the actual handing over of a wanted person to the requesting country, the term extradition is applied in the amended provisions of the Extradition Act, too.

Extradition from Denmark to Finland or Sweden is, basically, still covered by the provisions under the amended 1960 Act on Extradition of offenders to Finland, Iceland, Norway and Sweden. The provisions regarding extradition on the basis of an EAW are, however, applicable in relation to Finland and Sweden insofar as those rules go further, cf. Extradition Act Section 1 (2)(2). The latter rule may have a particular impact in cases involving extradition of Danish nationals or extradition for political offences, as the provisions in the 1960 Nordic Extradition Act might in such instances have a narrower scope in certain respects.

A set of guidelines on the handling of requests for the extradition of offenders on the basis of an EAW was issued on 19th December 2003 by the Ministry of Justice and circulated as binding instructions to the Danish police service and the Public Prosecutor’s Office. The Permanent Representa-
tative to Denmark informed the Secretary General of the Council of the European Union by letter received on 14th January 2004\textsuperscript{378}. The letter included ad\ ad\ addendum to the previous notification.

Supplementary guidelines on the handling of requests for the extradition of offenders on the basis of an EAW were issued on 14th December 2004 by the Ministry of Justice and circulated as binding instructions to the Danish police service and the Public Prosecutor’s Office\textsuperscript{379}.

The amended provisions regarding extradition based on an EAW do not require reciprocity. Thus, they are applied even if, at the time of issue of an EAW, the issuing Member State has not transposed the Framework Decision into its national law, so that the issuing State would not itself be able to deal with an extradition request under the EAW rules.

Denmark has not made a statement under Art. 32 of the Framework Decision relating to the date of the acts to which an extradition request relates. The 2003 amendment Act will apply to acts committed before, as well as after it came into force, provided the request is made after 1\textsuperscript{st} January 2004. The only exceptions are in relation to France, Italy and Austria who have made declarations under Art. 32 FD. In the administrative guidelines on the operation of the EAW, it is noted that those countries will deal with extradition requests for such offences under the pre-existing rules in their national legislation on extradition of offenders.

The amended provisions regarding extradition for prosecution or enforcement of a sentence in another EU Member State imply a number of significant alterations of the previously applicable modality of extradition under Danish law. Attention has mainly been caught by the following points:

- Extradition will no longer be refusable on the grounds that there is insufficient evidence to support the charge or conviction for an act for which extradition is sought.
- Issue of an EAW will in itself provide the basis on which to secure a person’s extradition for prosecution or service of sentence, and it is no longer possible to demand an underlying arrest or custody warrant to be supplied.
- Danish nationals will basically be extraditable in the same way as foreign nationals, although a condition regarding re-transferral for serving the sentence in Denmark may be stipulated, cf Art. 5 (3) FD.
- Extradition will no longer be refusable on the grounds that the offences involved are of a political nature.
- Double criminality is no longer required for a number of offences, specified on the ‘positive list’, cf Art. 2 (2) FD.
- A number of new grounds for refusal have been introduced, some of which are mandatory (e.g. extradition has to be refused), while others are optional (e.g. it may be refused, following concrete assessment in the individual case).
- A European Arrest Warrant has to be dealt with within shorter time limits than in the past and the Act includes deadlines for processing time, for a decision on extradition and for a possible judicial review.

\textsuperscript{378} Addendum to Cover note to the General Secretariat, Brussels 16\textsuperscript{th} January. 5348/04 ADD 1, COPEN 13, EJN 5, EUROJUST 5.

\textsuperscript{379} Supplement til vejledning om behandling af anmeldinger om udlevering af lovovertrådere p\l grundlag af euneuropåsk arrestordre, cirk.skriv. 9678 af 14\textsuperscript{th} December 2004.
On 23rd February 2005 the Commission report on the Member States' implementation of the Council Framework Decision on the EAW was issued. In the report – and in the Commission staff working document annexed to it – the Commission concluded that Denmark had not implemented some of the provisions of the Framework Decision and had not fully implemented others. In Denmark's comments to the Commission report and the staff working document it is stated that in Denmark's view the Council Framework Decision has been fully transposed into Danish law, and that Denmark therefore cannot understand the Commission's criticism. Further details regarding the Danish position will be provided in the following sections.

4.2. Constitutional issues

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

According to Art. 34 (2) TUE, the Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may adopt certain legal instruments, e.g. framework decisions for the purpose of approximation of the laws and regulations of the Member States, cf. Art. 34 (2)(b) TUE. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.

In general, framework decisions are complied with rather strictly by the Danish Legislature, i.e. the Parliament of Denmark, Folketinget. Before political agreement is concluded in the Council, the Danish Government will ensure that a sufficient negotiation mandate has been obtained from Folketinget. If domestic legislation needs amendment, a bill will often be introduced at an early stage. No specific Danish views of doctrine and judicature concerning the legal character of the third pillar framework decisions can be indicated.

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?

As Denmark follows the dualist doctrine of international law, legislation being a result of implementation of a Framework Decision shall be given priority to international obligations rooted in a convention, e.g. if the latter has not been implemented in other legislation. Thus, under Danish law, international legal obligations are not binding in domestic law unless they have been specifically incorporated by way of legislation. The point of departure, according to Danish constitutional law, is that rules of public international law do not automatically become part of domestic law.

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381 Regarding Member States' comments to the Report from the Commission on the EAW, see further the following note: 11528/05, COPEN 118, EJN 40, EUROJUST 44.  
382 Under the Danish Constitution, “The King shall act on behalf of the Realm in international affairs”; cf. Section 19 (1) “The King” means the executive, e.g. the Government. However, except with the approval of parliament, Folketinget, the Government may not enter into any obligation of major importance, e.g. a treaty requiring domestic implementation by law.
law *per se.* Only treaties specifically incorporated into Danish law by legislative measures are given full effect. In principle, this means that international agreements require special implementing measures in order to create rights for individuals and to be enforceable by Danish courts and other law-applying authorities.

Convention obligations can be fulfilled either by establishing that special measures are not considered necessary since domestic law is already in conformity with the relevant obligations under international law ("norm harmony"), incorporation by legislative reference to the entire body of a specific international agreement, thereby enacting it as a directly applicable part of domestic law or transformation, i.e. implementation by application of one or the other legislative technique, e.g. by rewriting and rephrasing a set of international obligations into the format of domestic law statutes, thereby enacting new or amended provisions in accordance with Danish legislative traditions.

However, not only conventions that have been implemented in Danish law by being transformed or incorporated are relevant sources of law in domestic law. Unincorporated guarantees of human rights may be taken into account by domestic courts, too. Also conventions, etc., that have not been specifically implemented, because harmony of norms has been ascertained, can be invoked before and applied by Danish courts and other law-applying authorities. This means that also the unincorporated conventions are relevant sources of law.

The courts shall assume that the legislature does not intend to legislate in a manner incompatible with Denmark's international legal obligations. If domestic law is open for different interpretations, courts shall to the extent possible interpret legislation in conformity with international obligations ("rule of interpretation").

Furthermore, courts shall presume that the legislature has not intended to legislate in contravention of Denmark's international obligations ("rule of presumption"). Thus, courts shall to the extent possible apply domestic legislation in such a way that infringement of international obligations is avoided. However, this does not apply if the legislature has deliberately legislated in contravention of such obligations.

Administrative authorities are obliged to take into account Denmark's international obligations in exercising discretionary powers ("rule of instruction").

As the mentioned rules are rather vague, application may give rise to doubts as to how judicial authorities are to solve the conflict between such a convention and a statutory provision, and the specific outcome is not always predictable.

In 1992, the ECHR and additional protocols to the Convention were incorporated into Danish domestic law, thus enabling invocation of Convention law directly before national courts and government agencies. As the Convention and the ECHR jurisprudence have gained status as a sort of surrogate constitution regarding civil liberties, the incorporation initiative has had a noticeable effect on procedures and arguments brought up in criminal cases, and a substantial number of case reports refer to the ECHR. No other human rights instruments have been directly

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incorporated in domestic law\textsuperscript{385}, but, obviously, Denmark has ratified most of the major existing human rights instruments, and some obligations under such conventions and treaties have been transformed into domestic law. The Penal Code provision on discriminatory manifestations\textsuperscript{386} reflects a transposition of certain parts of the International Convention on the Elimination of All Forms of Racial Discrimination, CERD; general clauses in various penal provisions cover provisions of the Geneva Conventions on humanitarian law, which therefore may be invoked before domestic courts.

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?

It would seem rather difficult to offer a univocal account of the interpretation of domestic Danish law as either pro-European or the opposite.

From a constitutional perspective, the position of the Judiciary may be characterised as a rather balanced one. In the so-called 1998 Maastricht-Ratification-case, the Supreme Court recognised a group of citizens as formal applicants\textsuperscript{387}, but rejected the claim that the accession to the Maastricht Treaty as supplemented by the Edinburgh Agreement was in breach of the Constitution’s requirement that only a delimited amount of power\textsuperscript{388} may be ceded to “international authorities”\textsuperscript{389}. The judgement shares basic features with a parallel ruling of the Bundesverfassungsgericht regarding the validity of the ratification of the Maastricht Treaty.

However, in terms of requesting the Court of Justice to give preliminary rulings in accordance with Art. 234 TEC concerning the interpretation of the Treaty establishing the European Community, there seems to be some reluctance on the part of the Danish Judiciary and the administration, too.

\textsuperscript{385} The question regarding further incorporation has been examined by a Committee under the Department of Justice in the Report Inkorporering af menneskerettighedskonventioner i dansk ret, Betænkning nr 1407 (Summary in English, Chap. 16). The Committee suggested incorporation of ICCP with additional protocols, CERD and CAT, but legislation to such an effect has not been enacted.

\textsuperscript{386} Cf Section 266 b PC.

\textsuperscript{387} See: the judgment in the case UfR 1996.1300 H. The Supreme Court recognized that individuals may have locus standi in a case regarding transfer of state power if the matter is considered to be of general importance to citizens, or has substantive impact in the population in general. In a later judgment, the Supreme Court ruled to the opposite effect in the specific instance in a case regarding Danish ratification of the Schengen Convention, see: UfR 2001.2065 H.

\textsuperscript{388} Cf Section 20, which only allows for delegation of state powers “to a certain specified extent”. The domestic Accession Act to the Communities provides for the transfer of powers under the Danish Constitution to be exercised by the institutions of the Communities “to the extent specified in the treaties”. The Supreme Court found the Accession Act compatible with the requirements of Section 20, even though it is acknowledged that the exact delimitation of powers transferred may give rise to doubts, which are then subject to the jurisdiction of the ECJ. However, the Supreme Court also found that if an “extraordinary situation” should arise that an act issued by the Communities clearly exceeds the limits of the powers transferred, even though the ECJ might rule otherwise, Danish courts must rule such an act inapplicable in Denmark. The full text of the Supreme Court’s ratio decidendi in the Maastricht judgement is excerpted in Dahl et al (ed.), pp. 33 ff.

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

In general, judicial decisions by the European Court of Justice would be adhered to rather strictly by Danish courts. Any effect of the Pupino decision has not yet been noted.

e. Is the 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, the interpretation of domestic Danish law implementing a framework decision would not be possible solely by referring to the wording or inhalt of the framework decision. It would certainly not be possible either when a framework decision is not yet implemented into the domestic legal order.

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

Under Art. 235 EC, the ECJ has the jurisdiction to give preliminary rulings on the interpretation and validity of certain measures adopted under the third pillar, but only if the Member State has accepted the ECJ's jurisdiction by making a declaration to this effect. Denmark has not to date made such a declaration. Furthermore, Denmark has no particular constitutional court or equivalent.

In principle, it is within the jurisdiction ratione materiae of Danish courts to review the compatibility of a specific legislative provision or body of legislation with the Constitution. Over the years, this has been a manifest presupposition behind a good deal of jurisprudence. However, the judicial authority to set aside a piece of legislation as unconstitutional has been explicitly exercised by the Supreme Court only once, and very recently. The 1999 verdict in the so-called Tvind-case made history, as the Court found that legislation stripping particular private schools of their access to state subsidies was motivated by distrust in the institution's prior and future compliance with relevant legal requirements and, therefore, a final conclusion to a concrete legal dispute and as such in contradiction with the principle regarding separation of powers as stated in the Constitution.

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?

The amended provisions in the Extradition Act entered into force on 1st January 2004, and they apply to requests for extradition submitted after that date, cf. § 3 of the amendment Act. See further details in the introduction above.

h. Was the implementation of the Framework Decision and the Framework Decision itself subject of proceedings of the constitutional court in your country?

No. As previously mentioned, Denmark has no particular constitutional court or equivalent. The constitutionality of the FD has not been challenged at the ordinary courts, either.
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 previously explained, the surrender procedure according to the EAW is understood as a form of extradition.

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

a. Are there any 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 (compulsory and optional) of surrender?

In the following sections, the provisions regarding grounds for non-execution of an EAW as stipulated in the amended Danish Extradition Act will be dealt with in more detail. Comments made in the Commission’s 2005 report will be included as to clarify differences between the way of implementation of the EAW in Denmark and the “pattern” provided by the Framework Decision.

Grounds for non-execution of an EAW, Art. 3 FD and Art. 4 FD:

Sections 10c–10h in the amended 1967 Extradition Act set out the bars that apply to complying with European Arrest Warrants.

The following grounds may be surrender from Denmark:

(i) Age of criminal responsibility, Section 10 c,
(ii) Double jeopardy, Section 10 d,
(iii) Statutory limitations, Section 10 e,
(iv) Lack of double criminality, Section 10 f,
(v) Trial in absentia, Section 10 g,
(vi) Human rights perils, Sec. 10 h and Sec. 10 j (1), cf Sec. 10,
(vii) Specialty limitations, Sec. 10 j (2 and 3), cf Sec. 10.

Temporary postponement of execution of an EAW, Art. 23 (4) FD

Art. 23 (4) FD has been transposed by Sec. 10 i of the amended Extradition Act. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, e.g. if there are substantial grounds for believing that it would manifestly endanger the requested person’s life or health. The execution of the European Arrest Warrant shall take place as soon as these grounds have ceased to exist.

In the Commission report on the EAW it is stated that the provision on postponement of surrender of the requested person for serious humanitarian reasons has not been fully transposed by Denmark. The Commission refers to Denmark having no provision requiring the issuing authority to be informed of the postponement or for arranging a new date for surrender. Denmark has pointed out in a comment to the report that it follows from Sec. 10 i of the amended Extradition Act that extradition shall be postponed if it must be accepted that it would be incompatible with humanitarian concerns. Extradition must be postponed until the special conditions preventing extradition no longer apply. Furthermore, it is evident for example from the travaux préparatoires that the provision is a result of Art. 23 (4) FD, implying that the judicial authorities of the Member
State concerned shall be informed of the postponement at once, and a new date for surrender agreed if possible. Therefore, Denmark does not agree with the Commission’s criticism as regards the transposition of Art. 23 FD.

Conditional execution of an EAW, Art. 5 FD

Art. 5(3) FD (surrender conditional on return of nationals or residents to executing state to serve sentence) has been transposed by Sec. 10 b of the amended Extradition Act.

Art. 5(2) FD (surrender conditional on review where the act on which the EAW is based is punishable by life sentence in the issuing state) has not been transposed by Denmark.

Conditional execution of an EAW, Art. 24 (2) FD

Conditional execution of an EAW is also dealt with in Sec. 21 a of the amended Extradition Act, which allows temporary transfer of a prisoner from another country to Denmark to be made conditional on the re-transfer of the person surrendered to the executing state to serve his sentence. This provision partially transposes Art. 24 (2) FD.

Grounds for mandatory non-execution, Art. 3 FD.

1) Amnesty, Art. 3 (1) FD

The judicial authority of the Member State of execution shall refuse to execute the European Arrest Warrant if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law, cf. Art. 3 (1) FD.

Art. 3 (1) FD has been transposed by Sec. 10 d (1)(2) of the amended Extradition Act. According to said provision, extradition shall be refused if the person has been pardoned in Denmark.

No express provision has been included in the amended Extradition Act regarding the non-execution of an EAW on the grounds that the offence is covered by an amnesty in Denmark.

In its report the Commission states that by using the word “pardon” in the Danish extradition law (second sentence of Sec. 10 d (1)) rather than “amnesty”, Denmark has not fully implemented Art. 3 (1) FD on the mandatory non-execution of an extradition request if the offence on which the European Arrest Warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law. The Commission submits that pardon is a narrower concept than amnesty. Denmark has commented that it follows from the first sentence of Sec. 10 d (1) that extradition cannot take place when the requested person has been tried or acquitted of the same criminal act in Denmark. This also applies if the person whose extradition is sought has been granted a pardon in Denmark for the act (second sentence of Sec. 10 d (1)). This means that extradition cannot take place if the person sought has been tried, acquitted or pardoned in Denmark for the act on which the European Arrest Warrant is based.

It also follows from the first sentence of Sec. 10 d (2) that extradition shall be refused if charges against the person concerned have been dropped in Denmark, and if it is no longer possible to review this decision under the ordinary rules for reviewing such decisions pursuant to the law on the administration of justice. This means that extradition cannot take place if the Danish Prosecution Service has made a final decision not to press charges for the act on which the European Arrest Warrant is based.
In Denmark’s view, these provisions contain clear and full legal rules laying down that extradition from Denmark cannot take place, and that a request on the basis of an EAW must therefore be refused, if the criminal act at the basis of the extradition request is covered by amnesty in Denmark.

It is noted in the Danish comment that Denmark does not make use of general releases exemptions from punishment in the form of proper amnesties. In practice, only individual pardons are used or – rarely – general anticipatory decisions not to press charges from the outset, for example, by granting safe-conduct to hand over illegal weapons to the police. Such general decisions not to press charges from the outset are covered by the first sentence of Sec. 10 d (2). The fact that the Danish extradition law does not use the same form of words – here the expression “amnesty” – as is used in the Council Framework Decision does therefore not mean that Art. 3 (1) FD has not been fully and correctly transposed into Danish law.

2) *Ne bis in idem* (double jeopardy), Art. 3 (2) FD

The judicial authority of the Member State of execution shall refuse to execute the European Arrest Warrant if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State, cf Art. 3 (2) FD.

Art. 3 (2) FD has been transposed by Sec. 10 d (1)(1 and 3) and Sec. d (2)(1) of the amended Extradition Act.

According to Sec. 10 d (1)(1), extradition shall be refused if the person has been convicted or acquitted of the same criminal act in Denmark or in a Member State other than the issuing State390. However, where there has been sentence, extradition can only be refused provided that the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State, cf Sec. 10 d (1)(4).

Regarding refusal of extradition in instances where a waiver of prosecution has been issued in Denmark prior to reception of an EAW, see details in a following section. Under Danish law, non-execution has been made mandatory in such cases, provided that the decision to refrain from indictment has become final.

3) Minors, Art. 3 (3) FD

The judicial authority of the Member State of execution shall refuse to execute the European Arrest Warrant if the person may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State, cf Art. 3 (3) FD.

Art. 3 (3) FD has been transposed by Sec. 10 c of the amended Extradition Act. According to Sec. 10 c, extradition shall be refused if the person was below 15 years of age at the time of committing the alleged crime. Under Danish law, the said age limit is the general minimum age of criminal responsibility, cf Sec. 15 PC.

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390 Under Section 10 d (1)(3) of the amended Extradition Act, extradition may also, at the relevant judicial authority’s discretion, be refused if the person has been convicted or acquitted of the same criminal act in a Third State, cf Art. 4 (5) FD. Thus, in such an instance the EAW may be executed, e.g. if an acquittal is obviously the result of a flawed trial.
Where any of the mentioned grounds listed above for non-execution of an EAW apply, extradition is barred. They are all mandatory grounds for non-execution.

Additional grounds for indispensable non-execution of an EAW

Denmark has supplemented the mandatory grounds for non-execution foreseen by the FD with additional provisions in the amended Extradition Act regarding indispensable non-execution of European Arrest Warrants. These grounds concern certain instances where double criminality is lacking and certain instances where a waiver of prosecution has been issued in Denmark prior to reception of the EAW. Moreover, non-execution is mandatory under the amended Extradition Act in certain instances regarding risk of human rights violations, trial in absentia, and competing international obligations.

Lack of double criminality in certain instances

Regarding instances where double criminality is lacking, there are two relevant instances:
- cases regarding offences not included in the Art. 2 (2) list, cf. Sec. 10 a (2)(prosecution) and Sec. 10 a (3) (sentence), and
- cases regarding offences committed in part or in whole within Danish territory (Art. 4 (7)(a)), cf Sec. 10 f (1).

In other words, Denmark has made use of the option granted in the Framework Decision to set up indispensable requirements regarding double criminality for certain categories of cases. For offences other than those covered by Art. 2 (2) FD, surrender may be subject to the condition that the acts for which the European Arrest Warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described, cf. Art. 2 (4) FD.

Thus, the traditional requirement regarding double criminality has only been removed for conduct listed in Art. 2(2) FD. An EAW must, therefore, be refused for all conduct falling outside that listed in Sec. 10 a (2) of the amended Extradition Act where such conduct does not constitute an offence under Danish law.

In the travaux préparatoires of the amendment Act it was stated that the requirement regarding double criminality shall be administered in a flexible manner in accordance with Art. 2 (4) FD, so that the requirement is found to be fulfilled if an act described in an EAW in whole or in part corresponds to an offence under Danish law. Regardless of legal classification, it shall be sufficient that the accusation, the indictment or the judgement concerns an act which would have been considered an offence if committed in Denmark.

Offences not covered by Art. 2 (2) FD

The executing judicial authority may refuse to execute an EAW if, in one of the cases referred to in Art. 2 (4) FD, the act on which the European Arrest Warrant is based does not constitute an offence under the law of the executing Member State, cf Art. 4 (1) FD.

An EAW regarding prosecution in another EU Member State may be executed for acts not covered by Art. 2 (2) FD as transposed by Sec. 10 a (1) of the amended Extradition Act, if the offence is punishable by imprisonment for at least one year under the law of the issuing State, and the act is considered an offence under Danish law, cf Sec. 10 a (2) of the amended Extradition Act.
condition for the requirement regarding double criminality is that the act is not included in the Art. 2 (2) FD list, or that it is not punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. The bottom line under the particular provision is that if the said conditions are not fulfilled, an EAW can not be executed. In this specific context, no particular requirements have been established concerning the level of punishment under Danish law, but double criminality is unconditionally required.

An EAW regarding enforcement of a sentence in another EU Member State may be executed for acts not covered by Art. 2 (2) FD as transposed by Sec. 10 a (1) of the amended Extradition Act, where a sentence has been passed or a detention order has been made, if the sanction is a sentence of at least four months, and the act is considered an offence under Danish law, cf Sec. 10 a (3) of the amended Extradition Act. A precondition for the requirement regarding double criminality is that the act is not included in the Art. 2 (2) FD list, or that it is not punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. The bottom line under the particular provision is that if the said conditions are not fulfilled, the EAW cannot be executed. In this specific context, no particular requirements have been established concerning the level of punishment under Danish law, but double criminality is required.

Extradition for prosecution or enforcement of a sentence may be executed for multiple offences, even though the above stipulated conditions are only met for one of the relevant offences, cf Section 10 a (4) of the amended Extradition Act.

In particular regarding taxes or duties, customs and exchange offences In relation to taxes or duties, customs and exchange offences, execution of an EAW shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State, cf Art. 4 (1) FD. With regard to the said exception from a strict principle requiring double criminality there has been no need for an explicit transposition into Danish law. Danish extradition law is based on a doctrine implying that a certain conduct fulfills the requirement of double criminality if an equivalent act committed on Danish territory and violating Danish national interests would have constituted an offence under Danish law. As previously mentioned, Denmark did therefore not make any reservations with regard to the Second Additional Protocol to the European Convention on Extradition 1957, as the principles under the Protocol are entirely compatible with Danish law.

In the Commission report regarding the EAW it is stated that the second part of Art. 4 (1) FD cannot be regarded as fully transposed into Danish law, since the Danish law does not contain a specific reference to the condition established by the said article. In the Danish comment to the Commission report, it is pointed out that Denmark does not agree with the Commission's assessment on this point, as the Extradition Act only provides rules regarding those cases in which an EAW may be refused, and thus does not indicate when a refusal may not be given. In Denmark's view such a provision would be unusual as regards legal technique. In addition, Art. 34 (2)(b) TEU was cited with regard to choice of form and methods for transposition. Further, it was noted that under Danish law the requirement of double criminality shall be administered flexibly, so that the condition is regarded as having been met if the acts described in the arrest warrant wholly or partly correspond to an offence in the executing State. Finally, it was stressed that by participating in the
adoption of the Council Framework Decision, Denmark has under international law undertaken an obligation towards other Member States to administer the Danish extradition law in accordance with the provisions of the Framework Decision. Thus, the Danish authorities would not be able to refuse an extradition request on the basis of a tax offence on the grounds that Danish law did not contain the same type of taxes, duties, etc.

Offences committed within Danish territory, Art. 4 (7)(a) FD

Execution of an EAW is barred for cases regarding acts committed in part or in whole on Danish territory if double criminality is lacking, cf Sec. 10 f (1) of the amended Extradition Act.

Prior waiver of prosecution in Denmark

The requested judicial authority may refuse to execute an EAW where the judicial authorities of the requested Member State have decided either not to prosecute for the offence on which the European Arrest Warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings, cf. Art. 4 (3) FD.

The optional ground for non-execution provided by the third (final) part of Art. 4 (3) FD (final judgement) has been transposed into Danish law as a mandatory ground for non-execution of an EAW where a waiver of prosecution (in Danish: tiltalefrafald) has previously been issued by the prosecutor, provided that the decision to refrain from indictment has become final. Thus, an EAW may only be executed if the common conditions under the Administration of Justice Act concerning reversal of the non-prosecution decision and resumption of the case are fulfilled, cf. Sec.10 d (2)(1) of the amended Extradition Act.

However, there seems to be a great deal of disparity regarding the understanding of Article 4 (3) FD and, consequently, the perceptions as to what has been transposed and whether the implementation is in accordance with the Framework Decision. For an account of the positions of the Commission and the Danish Ministry of Justice, see further below in this section.

Danish law provides the prosecutor rather extensive authority to waive prosecution due to a doctrine regarding the principle of expediency (opportunitetsprincippet). The main reasons to apply the expediency principle are:

- the offence is of a minor seriousness;
- measures according to social; welfare legislation preferable to punishment;
- the offender was under 18 years old when committing the act, and conditions for waiving prosecution are stipulated;
- the offender has recently been sentenced for another crime, and none or only minor additional punishment would be imposed;
- continuation of prosecution would be disproportionate;
- the offence is a corporate crime and the corporation is prosecuted;
- the victim requests charges to be dropped; or
- the offender has been re-committed to custody.

The above cited Sec. 10 d (1)(1) and Sec. 10 d of the amended Extradition Act reflects the Art. 54 Schengen Convention which refers to judgement regarding the ‘same acts’ and has been incorporated
into Art. 3 (2) FD. Thus, the formulation of the Extradition Act does not require the second prosecution to be for an offence identical in law to the first. It is a sufficient ground for a refusal of extradition that the second case aims at prosecution for any offence arising out of the same facts. Conduct covered by the Art. 2(2) FD list, for which double criminality is removed, would therefore also be protected by the double jeopardy rule in Denmark. This formulation of the double jeopardy rule is in line with the wording of the FD as well as to the ECJ judgment in Gözutok and Brügge, in which the court stated that the double jeopardy rule in Art. 54 Schengen is part of the Community acquis and that the rule's application is not conditional on harmonisation of criminal procedural rules391.

The amended Extradition Act is in agreement with the above mentioned reservation concerning Art. 9 ECE. Further, Denmark has ratified ECHR and additional protocols (including Protocol 7 Art. 4 ECHR)392, the 1975 Additional Protocol to the 1957 European Convention on Extradition (including Art. 2), the 1970 European Convention on International Validity of Criminal Judgments (including Art. 53–55), and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters (including Art. 35–37), the 1987 EC Convention on Double Jeopardy.

Regarding prosecution in Denmark, the Penal Code contains a statute barring double jeopardy, cf. Sec. 10 a PC. Under certain conditions, a person who has been finally judged in the State where the criminal act has been committed cannot be prosecuted in Denmark for the same act. The same rule applies regarding judgements covered by the 1970 European Convention on International Validity of Criminal Judgments and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters. The conditions for barring prosecution in the second case are that (1) the person was acquitted, (2) that there has been a sentence which has been served or is currently being served or may no longer be executed under the law of the sentencing Member State, or (3) that the person was convicted but no sentence was applied. However, a second prosecution is not barred if the act is covered by the territoriality principle under Sec. 6 PC or the protective principle under Sec. 8 (1) PC, see above, regarding said provisions and principles. If a second prosecution results in a sentence, due considerations shall be taken regarding a prior sentence imposed for the same act to the extent it has already been served, cf. Sec. 10 b PC.

Regarding the Member States’ implementation of the second part of Art. 4(3) FD (halting of proceedings), it is claimed in the Commission report on the EAW and the annexed staff working document that implementation is not in accordance with the case-law of the ECJ in a number of Member States, including Denmark, since it has allegedly been made optional for extradition to be refused in cases where the executing State has decided to halt proceedings for the same offence as that on which the EAW is based. Principally, Denmark has commented that it follows directly and expressly from Art. 4 of the Council Framework Decision that Member States “may” refuse to execute an EAW in the cases listed in Art. 4 FD. Thus, Member States have the option of deciding whether they wish to use the grounds for refusal in Art. 4 FD. Therefore, Denmark finds the Commission’s comment that this is not in accordance with the case-law of the ECJ basically misleading in relation to the question of whether the Framework Decision itself has been correctly implemented in the national law of the Member States.

391 Joined cases C-187/01 Gözutok and C-385/01 Brügge of 11th February 2003.
392 As previously mentioned, the ECHR and additional protocols to the Convention have been incorporated into Danish domestic law, thus enabling invocation of Convention law directly before national courts and government agencies, cf. Act No. 285 of 29th April 1992.
Further, Denmark has called attention to the fact that it actually follows from Sec. 10 d (2)(1) of the amended Extradition Act that extradition shall be refused if charges against the person for the same act “have been dropped” (in Danish: titalefrafald) in Denmark, and if it is no longer possible to review this decision under the ordinary rules for reviewing such decisions pursuant to the Administration of Justice Act. The Ministry of Justice added that this “means that extradition cannot take place if the Prosecution Service has made a final decision not to press charges for the act on which the European Arrest Warrant is based.” However, in the comment made by Denmark, the rule established in the cited Sec. 10 d (2)(1) is taken as a result of the implementation of the second part of Art. 4 (3) into Danish law, which is probably not an adequate reading of the Framework Decision, see further below.

Moreover, the Ministry of Justice in its comment to the Commission report also stated that it follows from the second sentence of Sec. 10 d (2) of the Extradition Act that extradition may (“can”) be refused if “charges have been withdrawn” (in Danish: påtaleopgivelse) and if the conditions for reviewing the decision to withdraw the charges (under the ordinary rules pursuant to the Administration of Justice Act) have not been met. Regarding this issue, see further details below in a section on optional non-execution.

Thus, Denmark believes that it has implemented the second part of Art. 4(3) in accordance with the Council Framework Decision.

The conclusion reached in Denmark’s comment regarding implementation of Art. 3 (4) FD is definitely correct. However, the line of argument reflects the fact that it is not at all sufficiently clear what the three parts of Art. 4 (3) are supposed to cover and regulate. Rightfully, an instance regarding a prior waiver of prosecution should adequately be attributed to the article’s third part (regarding final judgements), in accordance with Gözutok and Brügge. However, the uncertainty regarding the correct reading of the Framework Decision is reflected in the line of argument upon which the conclusion in Denmark’s comment is built, as the views expressed there refer to the first and second part of Art. 4 (3) FD as far as waiver of prosecution is concerned, although the proper reference should be the third and final part of the Article (final judgements). The report of the Commission and the staff working document seem to be based on a misinterpretation of the Framework Decision, too, as the relevant ECJ case-law is allegedly connected with the second part of Art. 4 (3) FD, which should rightly have been the third and final part of the Article.

**Risk of capital punishment, persecution, torture, or other violations of human rights, recitals 12 and 13 FD, Art. 1 (3) FD**

The 1967 Extradition Act includes certain specific provisions barring extraditions in instances where fundamental human rights are at stake. A person may not be extradited if capital punishment might be enforced. This principle is stated in Sec. 10 (3) of the Extradition Act, and the amended Sec. 10 j (1) refers to said section with regard to the conditions for extradition to an EU Member State. Further, a person may not be extradited if there is a risk of serious persecution due to his or her ethnic background, religious or political faith or other political circumstances. This principle is stated in Sec. 6 (1) of the Extradition Act, and, in accordance with recital 12 FD, an equivalent provision has been amended in a new Sec. 10 h (1) with regard to the conditions for extradition to an EU Member State. In accordance with tradition, the Extradition Act does not contain any general provision explicitly barring extradition in instances where there is a risk of human rights violations.
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The 2003 Amendment Act did not alter this tradition in any fundamental way. However, new provisions were introduced to accommodate human rights proponents who had advocated an express provision barring extradition in cases characterised by a manifest risk of torture, etc. Consequently, it has now been specifically stated in the Extradition Act that a person may not be extradited on the basis of an EAW if there is a risk of torture or other inhuman or degrading treatment or punishment, cf. Section 10 h (2) of the amended Extradition Act. An equivalent provision was set up regarding extradition to third countries, cf. Sec. 6 (2) of the amended Extradition Act.

It was emphasized in the travaux préparatoires of the 2003 Amendment Act that Denmark’s international obligations regarding human rights and principles were not in any way affected by the Framework Decision, and that compliance in extradition law was not dependant on the existence of particular statutes regulation the issue. As previously mentioned, Denmark has incorporated the ECHR and additional protocols by 1992 legislation and subsequent amendments. Thus, deliberations regarding extraditions must take into consideration whether extradition would be compatible with the European Convention on Human Rights. If it is found that extradition would be incompatible with convention rights, extradition must be rejected. In other words, extradition is barred e.g. if surrender would jeopardize the right to a fair trial under Art. 6 ECHR. In addition, the general human rights clause stated in recital 12 FD was quoted by the Ministry of Justice:

“This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European Arrest Warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of these reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.”

Also Art. 1 (3) FD was cited in the travaux préparatoires:

“This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined by Article 6 of the Treaty on European Union.”

Thus, the fact that the issuing state is a signatory to the ECHR does not per se mean that extradition will be compatible with Convention rights and that, consequently, an EAW should not automatically trigger a decision to surrender. However, it may be anticipated that Danish extradition authorities will handle an EAW on the basis of a presumption that the issuing Member State has a criminal justice system that is trustworthy and Strasbourg-compliant, so that wanted men can be sent there without fear for their human rights. Still, in unusual instances, there might be a reason particular to the case in hand for thinking otherwise. It remains to see how the Ministry of Justice and the judiciary will exercise justice in such cases.

All in all, the Danish legislature did not find it necessary to deploy a general provision regarding respect of human rights. Further it was argued, that the existence of such a provision might lead to unfortunate conclusions with regard to the interpretation of other legislation where such
provisions had not been implemented. However, risk of torture, etc. is explicitly mentioned in the recitals to the Framework Decision as a bar to extradition, etc., cf. recital 13 FD. Therefore, it was argued, such a specific rule could also be included in the amended Extradition Act.

In the Commission’s report on the EAW it is stated that a number of Member States, including Denmark, have provided for mandatory refusal of an extradition request on the basis of an EAW if extradition conflicted with the fundamental rights of the person whose extradition is being sought. The Commission comments that there is a risk that Danish implementation of the Framework Decision on this point goes too far beyond the provisions of the Framework Decision, since extradition will be refused if there is a danger that the person will suffer persecution for “political reasons”, cf. Sec. 10 h of the amended Extradition Act. In the Danish comment to the report it is pointed out that Denmark does not agree with the Commission that Danish implementation of the Framework Decision goes too far beyond the provisions of that Decision. It is accentuated in the Danish comment as a background to the Danish view that recital 12 FD and Art. 1(3) FD state that the Framework Decision respects fundamental rights and principles recognised in Art. 6 TEU and elsewhere. A consequence of this is that the Framework Decision respects the ECHR. Extradition will therefore have to be denied if there are objective grounds to believe that an EAW has been issued with the aim of persecuting or punishing a person amongst other things because of that person’s political beliefs. Thus, in Denmark’s view there is no question of the Danish extradition law going further than the Framework Decision.

**Trial in absentia**

The execution of the European Arrest Warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

Where an EAW has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European Arrest Warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment, cf. Art. 5 Denmark has implemented a provision resembling Art. 5(1) FD. However, the said article has been interpreted as concerning a particular set of grounds for non-execution. Thus, instead of allowing surrender to be made conditional on the person receiving a retrial in such cases, the amended Extradition Act requires surrender to be refused where the person has not been appropriately summoned regarding the trial and is not entitled to a retrial in the issuing state and to be present at the judgement, cf. Sec. 10 g (1 and 2) of the amended Extradition Act. The rationale behind the new provision in the Extradition Act is convincingly explained in the travaux préparatoires of the Act with reference to ECtHR jurisprudence regarding Art. 6 ECHR.

**Earlier extradition to Denmark and competing international obligations, Article 21 FD**

The Framework Decision shall not prejudice the obligations of the executing Member State where the requested person has been extradited to that Member State from a third State and where that person is protected by provisions of the arrangement, under which he or she was extradited concerning speciality, cf. Art. 21 (1) FD. The executing Member State shall take all necessary measures for requesting forthwith the consent of the State from which the requested person was extradited, so that he or she can be surrendered to the Member State which issued the European Arrest Warrant, cf. Art. 21 (2) FD.
Art. 21 FD is cited bluntly in the travaux préparatoires to the 2003 Amendment Act, but nothing is said regarding the issue in the Act or in the administrative guidelines.

In the Commission report on the EAW it is, in general, claimed that the implementation of framework decisions in the national legislation of the Member States requires the use of binding provisions. In Denmark’s comment to the report it is stated that Denmark does not agree with the Commission’s view. For details, see the section above regarding multiple requests.

Grounds for optional non-execution

**Lack of double criminality, Art. 4 (1) FD and Art. 4 (7)(a) FD**

As previously mentioned, Denmark has implemented the following optional grounds for non-execution in Art. 4 FD as mandatory under the amended Extradition Act.

Grounds for indispensable non-execution of European Arrest Warrants concern lack of double criminality in two instances (for further details, see above):
- Offences not covered by Art. 2 (2) FD, cf. Art. 4 (1) FD
- Offences committed within Danish territory, Art. 4 (7)(a) FD

Concerning other indispensable grounds for non-execution, see above with regard to the following issues that are not included under Art. 4 FD:
- Risk of capital punishment, persecution, torture, or other violations of human rights
- Trial in absentia

**Litis pendens – instances where a person subject of an EAW is being prosecuted in the requested Member State for the act on which the EAW is based, Art. 4(2) FD**

The executing judicial authority may refuse to execute an EAW where the person who is the subject of the EAW is being prosecuted in the executing Member State for the same act as that on which the EAW is based, cf. Art. 4 (2) FD.

Extradition for prosecution can be refused if court proceedings have been instituted in Denmark against the person concerned for the act for which extradition is sought and the legal proceedings, by reason of the nature of the act, the person’s relation to Denmark and the circumstances in general, indicate that the proceedings should be carried out in Denmark, cf. Sec. 10 d (3) of the amended Extradition Act. Traditionally, it has not been found necessary to have an explicit provision to this effect, and no such provision has been instituted with regard to extradition requests from third countries, as no statutory basis for refusal has been considered required. With regard to the Framework Decision, however, it was found that grounds for non-execution should be explicitly stated in the Extradition Act.

**Ne bis in idem – dismissal of prosecution and halting of proceedings, first and second parts of Ar. 4 (3) FD**

The requested judicial authority may refuse to execute an EAW where the judicial authorities of the requested Member State have decided either not to prosecute for the offence on which the European Arrest Warrant is based or to halt proceedings, or where a final judgment has been
passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings, cf. Art. 4 (3) FD.

As previously mentioned, the optional ground for non-execution provided by the third part of Art. 4 (3) FD (final judgements) has been transposed into Danish law as a mandatory ground for non-execution due to a prior waiver of prosecution, provided that the decision to drop charges has become final. Thus, if a waiver of prosecution (in Danish: *tiltalefratald*) has been issued by the prosecutor, an EAW may only be executed if the common conditions under the Administration of Justice Act concerning reversal of the non-prosecution decision and resumption of the case are fulfilled, cf. Sec. 10 d (2)(1) of the amended Extradition Act. For further details, see above in a previous section concerning additional grounds for mandatory non-execution, where the disparity regarding the interpretation of Art. 4 (3) FD are also mentioned.

The first part of Art. 4 (3) FD regarding dismissal of prosecution or halting of proceedings has been transposed into Danish law as an optional ground for non-execution, provided that the decision to withdraw charges or discontinue proceedings has become final. If the prosecutor has decided to dismiss charges (in Danish: *påtaleopgivelse*) and the common conditions under the Administration of Justice Act concerning reversal of the decision are not fulfilled, execution of an EAW may be refused at the relevant judicial authority’s discretion, cf. Sec. 10 d (2)(2) of the amended Extradition Act. An equivalent provision was simultaneously enacted with regard to extradition requests from third countries, cf. Sec. 8 (3) of the amended Extradition Act. As main reasons for *nolle prosequi* under Danish law, lack of sufficient evidence, an exculpation, a lack of jurisdiction, the perpetrator’s minority, might be listed.

The travaux préparatoires on the 2003 Amendment Act state in relation to Sec. 10 d (2)(2) that there might be grounds to refuse extradition on the basis of an EAW, e.g. if the Danish police and Prosecution Service had already assessed the case to which the EAW related on the basis of the evidence, with a view to possible prosecution in Denmark, and had withdrawn charges because they had proven unfounded. On the other hand, for example there would not be the same grounds to refuse to execute an EAW if the reason charges had been withdrawn in Denmark was that a prosecution could not be brought in Denmark because of a lack of jurisdiction, but had to be brought in the Member State now issuing an EAW.

As mentioned in a previous section regarding Art. 4 (3) FD, the comment made by Denmark with regard to the Commission report on the EAW reflects a certain disparity in the interpretations of duties imposed on the Member States.

**Statute of limitation, Art. 4 (4) FD**

The executing judicial authority may refuse to execute the European Arrest Warrant where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law, cf. Art. 4 (4) FD.

Art. 4 (4) FD has been transposed into Danish law as an optional ground for non-execution. Thus, extradition for an alleged offence within Danish jurisdiction may be refused at the relevant judicial authority’s discretion if criminal liability or enforceability of a possible sentence would have been statute-barred according to Danish law, cf. Sec. 10 e of the amended Extradition Act.
In the travaux préparatoires to the 2003 amendment Act it is stated that there will mainly be a presumption regarding non-execution of an EAW due to statute of limitation where the offence has been committed on Danish territory.

**Ne bis in idem – wanted person finally judged by a third State, Article 4 (5) FD**

The requested judicial authority may refuse to execute an EAW if the wanted person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country, cf. Art. 4 (5) FD.

The said optional ground for non-execution due to reasons regarding double jeopardy has been transposed into Danish law as a discretionary rule regarding non-execution. Extradition may be refused if the person has been convicted or acquitted of the same criminal act in a third state, cf. Sec. 10 d (1)(3) of the amended Extradition Act. Thus, in such an instance the EAW may be executed at the relevant juridical authority's discretion, e.g. if an acquittal is obviously the result of a flawed trial.

**Execution of a custodial sentence – nationals and residents of the requested Member State, Article 4(6) FD**

The executing judicial authority may refuse to execute the European Arrest Warrant if the European Arrest Warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law, cf. Art. 4 (6) FD.

The said optional ground for non-execution has been transposed into Danish law as a discretionary rule regarding relevant non-execution. If a Danish citizen or a person permanently residing in Denmark is wanted for execution of an imposed punishment, surrender may, at the relevant judicial authority's discretion, be refused if the sentence will be served in Denmark instead, cf. Sec. 10 b (2) of the amended Extradition Act.

Under Danish extradition law, a “national” is a person in possession of Danish citizenship, whether acquired by birth, licensing, or naturalisation. A “resident” is a person with a “permanent address” (fast bopæl) in Denmark. The term is applied as a relevant criterion in a great deal of legislation, e.g. regarding elections, social welfare, taxation, foreigners, but the law does not offer a uniform definition of a “resident”, and the understanding of the concept may differ from one area of legislation to another. The Extradition Act does not contain a definition, either. Supposedly, the application of Art. 5 (3) FD and the corresponding Sec. 10 b of the Extradition Act will be dependent of an individual assessment of the wanted individual's personal affiliation with Denmark in terms of length and continuity of stay. Possession of a residence permit might naturally be of importance. Special problems might arise concerning the legal status of asylum seekers. If the person has been living on and off in more that one country, e.g. for occupational reasons, the specific circumstances of the individual case might leave a great deal of choice to the Ministry of Justice, as the person does not have a literal right under said provision, which basically confers the authority to make a discretionary decision to the Ministry of Justice.

No distinction has been drawn under Danish law between nationals/residents and non-nationals/non-residents with regard to surrender for prosecution and surrender for serving of a sentence.
As previously mentioned, the 1983 European Convention on the Transfer of Sentenced Persons has been implemented in Denmark by Act 323, 1986 on the execution of international criminal judgments\(^{393}\), which has later been amended several times\(^{394}\).

Regarding Denmark’s implementation of Art. 4 (6) FD in national law, the Commission has stated in the report on the EAW that the Danish legislation does not oblige Denmark to execute the sentence. Denmark has commented that under Sec. 10 b (2) of the amended Extradition Act, a request for the extradition of a Danish national or a person who is permanently resident in Denmark for execution of a judgment may (“can”) be refused if the punishment will (“can”) instead be served in Denmark. Thus, the law contains a condition that, when extradition for execution of a sentence is refused, the Danish national or permanent resident in question will serve their sentence in Denmark. This is covered in more detail in the comments on Sec. 10b (2) where it is stated that extradition may be refused in such cases if Denmark gives a commitment that the sentence will be executed there. Denmark therefore does not accept the Commission’s comment on Danish legislation on this point.

**Offences committed within Danish territory, Art. 4 (7)(a) FD**

The requested judicial authority may refuse to execute an EAW where the EAW relates to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such, cf. Art. 4 (7)(a) FD.

As previously mentioned, Art. 4 (7)(a) FD has been transposed into Danish law as an mandatory ground for non-execution. Thus, execution of an EAW is barred for cases regarding acts committed in part or in whole on Danish territory if double criminality is lacking, cf. Sec. 10 f (1) of the amended Extradition Act.

**Disparity in extraterritorial jurisdiction, Article 4 (7)(b) FD**

The requested judicial authority may refuse to execute an EAW where the EAW relates to offences which have been committed outside the territory of the issuing Member State and the law of the requested Member State does not allow prosecution for the same offences when committed outside its territory, cf. Art. 4 (7)(b) FD.

\[^{393}\text{Cf. Act on the enforcement of international judgements 323 of 4th June 1986 (covering the 1970 European Convention on the International Validity of Judgments, too; see footnote 36 above).}\]

Art. 4 (7)(b) FD has been transposed into Danish law as a discretionary rule regarding non-execution. Thus, execution of an EAW may be refused if the act in question was committed outside the territory of the issuing Member State and an equivalent act committed outside Danish territory would not have been within Danish jurisdiction, cf. Sec. 10 f (2) of the amended Extradition Act. In other words, if the alleged offence cannot be prosecuted in Denmark, execution of an EAW may be refused if it has been issued in a Member State different from the one where the offence has allegedly been committed. The situation might be that the issuing Member State attempts to exercise extraterritorial jurisdiction with regard to an act committed by a Danish citizen in a third country where the said act is not considered a criminal offence, in which case Denmark lacks jurisdiction since the standard requirement under the active personality principle regarding double criminality is not fulfilled.

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

Regarding “participation in a criminal organisation”, it may be noted that, theoretically, an EAW might include a type of act which is not per se criminalized as an offence sui generis under Danish law. Thus, extradition would be barred if the alleged act merely concerned passive membership in a criminal organization and the wanted person was charged with no other specific offence. Depending on the specificities of the case, extradition could be refused on the ground that it would imply a violation of a fundamental freedom of association etc.

Included on the list of offences covered by Art. 2 (2) FD is also “racism and xenophobia”. Prior to the EAW, Denmark has issued a declaration to the effect that such an act will only be regarded as an offence if it is threatening, insulting or degrading and, thus, in violation of the Danish Penal Code § 266 b\footnote{The declaration was issued in relation to the 1992 Common Action regarding racism and xenophobia.}. Art. 2 (2) FD list also includes “computer-related crime”, which is a concept that may give rise to many interpretation problems. Under Danish law, no particular offence labelled as “computer-related crime” exists but, naturally, a number of such acts are considered to be crimes of various types.

– the period of time for executing the EAW?

There are no differences between the way of implementation of the EAW in Denmark and the “pattern” provided by the Framework Decision. In the administrative guidelines, the Ministry of Justice has stated the following:

“According to information available to the Ministry of Justice, in their legislation, EU Member States set differing time limits for forwarding a European Arrest Warrant. Preliminary information suggests that practice varies widely from one Member State to another, with time limits, which seem to depend in part on whether the country in question requires an actual certificate, likely to be set in such a way that in some countries the arrest warrant has to be received within a very short time (in some circumstances, within 48 hours of arrest), while other countries will accept forwarding of the arrest warrant within a longer period (in some circumstances, up to two months after arrest).

In order to ensure that a European Arrest Warrant can be forwarded within any time-limit applicable in the Member State in question, the original of it should be kept in the police district concerned, so that it can be translated into the relevant language as swiftly as possible and
then forwarded to the executing judicial authority, if appropriate via the National Police Commissioner’s Office (Communications Centre).”

– other issues; please specify

b. Can a 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 previously mentioned, lack of double criminality in cases other than those mentioned in Art. 2 (2) FD is an indispensable ground for refusing extradition, cf. The Danish Extradition Act Sec. 10 a (2) (prosecution) and Sec. 10 a (3) (sentence). Thus, the traditional requirement regarding double criminality has only been removed for conduct listed in Art. 2(2) FD. An EAW must, therefore, be refused for all conduct falling outside that listed in Sec. 10 a (2) of the amended Extradition Act where such conduct does not constitute an offence under Danish law.

In the travaux préparatoires of the Amendment Act it was stated that the requirement regarding double criminality shall be administered in a flexible manner in accordance with Art. 2 (4) FD, so that the requirement is found to be fulfilled if an act described in an EAW in whole or in part corresponds to an offence under Danish law. Regardless of legal classification, it shall be sufficient that the accusation, the indictment or the judgement concerns an act which would have been considered an offence if committed in Denmark.

c. Did your country make a proper notification to the Secretary of the CEU, concerning the waiver of the speciality rule (according to the Art. 27.1 FD)?

The General Secretariat has been informed that Denmark does not wish to issue notifications as referred to in Art. 27 (1) FD.

Under Danish law, the Ministry of Justice may grant permission to submit a person who has been extradited to prosecution, enforcement of a sentence or extradition requested by a third State with regard to an offence committed prior to extradition in the previous case, cf. Sec. 20 (1) of the Extradition Act.

d. Did your country appoint a central authority (Art. 7 FD)? What are the scope and tasks it is supposed to perform and its practical meaning?

In the above mentioned addendum to the cover note to the Secretary General of the Council of the European Union, received 14th January 2004, the Representative to Denmark provided the following information on behalf of Denmark:

“Art. 6 (3):
The following authority is competent to issue (Art. 6 (1)) and execute (Art. 6(2)) a European Arrest Warrant in Denmark:

Ministry of Justice, Slotsholmsgade 10 1216 Copenhagen K tel: +45 33923340 fax: +45 33933510 email: jm@jm.dk

396 Addendum to Cover note to the General Secretariat, Brussels 16th January. 5348/04 ADD 1, COPEN 13, EJN 5, EUROJUST 5.
397 Ibidem.
Art. 7 (2):
The designation of the Ministry of Justice as the competent judicial authority (cf. Art. 6 (3) of the Framework Agreement) means that there is no need to designate a central authority pursuant to Art. 7 of the Framework Agreement."

Thus, the Ministry of Justice is the only designated judicial authority under the EAW Framework Decision. As such the Ministry is the only authority with a competence to receive and execute European Arrest Orders, cf. Art. 6 (2) FD. Thus, the Ministry decides whether an EAW meets the necessary criteria for certification.

The Ministry of Justice is also the only designated judicial authority competent to issue European Arrest Orders, cf. Art. 6 (3) FD. The Ministry is responsible for any official correspondence relating to extradition requests and competent to make decisions. Regarding decisions on execution of an EAW, see Extradition Act Sec. 18 b (4).

In the Commission report on the EAW it is stated that it is difficult to view the designation of the Ministry of Justice as being in the spirit of the Framework Decision. Furthermore, the Commission states that the designation of an organ of the state as a judicial body in this context impacts on fundamental principles upon which mutual recognition and mutual trust are based. Denmark has commented that it disagrees altogether with the Commission’s views concerning Denmark’s designation of the Ministry of Justice as the competent judicial authority. The reasons for this are as follows: Art. 6 (1) FD and Art. 6 (2) FD state that the issuing judicial authority and the executing judicial authority shall be the judicial authority of the Member State which is competent respectively to issue or execute an EAW by virtue of the law of that State. Thus, under the Framework Decision it is for the individual Member State to decide who will issue and execute European Arrest Warrants, and it in no way conflicts with the wording of the Framework Decision to designate the Ministry of Justice of a Member State as the competent judicial authority, assuming of course that the relevant ministry is a judicial authority under national law.

Under Danish law, the concept of “judicial authorities” traditionally includes the courts and the Prosecution Service. According to the Danish law on the administration of justice, the Prosecution Service comprises the Ministry of Justice, the Director of Public Prosecutions, the regional public prosecutors, the Commissioner of the Copenhagen Police and the chief constables. Furthermore, it follows directly from the Danish Penal Code that charges for offences against certain provisions of the Penal Code may be brought only at the order of the Ministry of Justice.

Denmark maintains the position that there is no question of Denmark wishing to create some special arrangement for European Arrest Warrants by designating the Ministry of Justice as the judicial authority for the issue and execution of such warrants. Furthermore, under Danish law the Ministry of Justice has the central competence as regards extradition, and even before the adoption of the Framework Decision on the EAW, the Ministry dealt with cases involving the extradition of offenders to other EU Member States. Also, the designation of the Ministry of Justice as the competent authority in relation to the Framework Decision on the EAW took place after discussions with representatives from the Danish Judges’ Association, the Court Administration, the Director of Public Prosecutions, the public prosecutors’ association, the association of chief constables, and the Commissioner of the Copenhagen Police. Within this circle there was agreement that the authority to deal with extradition cases on the basis of an EAW should be placed
with the Ministry of Justice until further notice; consequently, a decision taken by the Ministry of Justice to extradite a person could always unconditionally be brought before the Danish courts and tested by two instances. Among the reasons for this was the fact that this would result in the same allocation of authority and procedure for handling extradition requests on the basis of an EAW as applied for extradition requests on the basis of e.g. the 1957 European Convention on the Extradition of Offenders. Denmark also wanted to ensure uniform practice in the handling of European Arrest Warrants, which, it was found, would best be achieved by giving authority to the Ministry of Justice.

Finally, it was pointed out that in actual extradition cases based on an EAW or involving the issue of a Danish EAW, the fact that the Ministry of Justice has competence in these matters has been neither questioned nor otherwise criticised.

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

Regarding *ne bis in idem* and the various grounds for refusal, please see section 2 above.

According to the amended Extradition Act, extradition shall be refused if the person has been convicted or acquitted of the same criminal act in Denmark or in a Member State other than the issuing State. Regarding refusal of extradition in instances where a waiver of prosecution has been issued in Denmark prior to reception of an EAW, non-execution has been made mandatory, provided that the decision to refrain from indictment has become final.

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?

The formulation of the amended Extradition Act does not require the second prosecution to be for an offence identical in law to the first. It is a sufficient ground for refusal of extradition that the second case aims at prosecution for any offence arising out of the same facts. Conduct covered by the Art. 2(2) FD list, for which double criminality is removed, would therefore also be protected by the double jeopardy rule in Denmark. This formulation of the double jeopardy rule is in line with the wording of the FD as well as with the ECJ judgment in Gözutok and Brügge.

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

Yes, if discontinuance is taken to mean waiver of prosecution. Please see section 2 above.

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

Yes, please see section 2 above.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 CISA in your country?

- Is such a disposal the valid decision on discontinuance of the criminal process because of its legal inadmissibility?

Please see a) under this section.
– Is such a disposal the valid decision on discontinuance of the criminal process because of lack of advisability of prosecution?
Please see a) under this section.

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)?
No.

4.4. The issuing of the EAW

General account of extradition procedures when an EAW is issued in Denmark

Extradition to Denmark from another State is not governed by any provision in the common 1967 Extradition Act 2003 nor the 1960 Nordic Extradition Act. Thus, the conditions under which a person may be extradited to Denmark from another EU Member State for prosecution or enforcement of a sentence in Denmark are not statutorily regulated. Whether a wanted person is extraditable to Denmark in a particular case will therefore depend on the rules in the Framework Decision and on the implementing legislation in the particular EU Member State from which extradition is requested.

**Emission of the warrant**

*Competent authority, Art. 6 FD*

As previously pointed out, the Ministry of Justice is the designated judicial authority under the Framework Decision regarding the EAW and as such the Ministry is the only authority with a competence to receive and execute EAWs. The responsibility for initial examination of cases involving extradition on an EAW and the actual issuing of an EAW lies with the Ministry of Justice. Thus, the Ministry decides whether an EAW meets the necessary criteria for certification.

The need for an EAW to be issued (signed) by the Ministry of Justice, as the competent judicial authority, is unaffected by the fact that the initiative in requesting a person’s extradition on an EAW will, as in the past, have to come from the public prosecutor (the local police commissioner).

**General procedure**

The local police commissioner will inform the relevant district prosecutor and the Ministry of Justice of the need to issue an EAW for a wanted person. This procedure shall be initiated, at the latest, when the police decide to present the case to the municipal court to obtain an order for remand in custody *in absentia* with a view to issue of an EAW.

The public prosecutor will prepare a draft EAW, while leaving section (i) of the certificate, concerning the issuing authority, to be completed by the Ministry of Justice.

After being submitted to the relevant district prosecutor, the draft European Arrest Warrant is to be sent electronically to the Ministry of Justice, via the National Police Commissioner’s Office (Communications Centre), for approval. It should be indicated whether the wanted person is also to be sought for in Third Countries.
Once the Ministry of Justice has approved and signed the European Arrest Warrant as issuing judicial authority, the original warrant is returned to the local police commissioner. A copy is also to be sent to the National Police Commissioner’s Office (Communications Centre), for issue of an alert for the wanted person in SIS, the Schengen Information System, and of an international wanted-person notice via Interpol.

If the wanted person’s whereabouts are known and the EAW can be sent straight to the authority required to execute it, the police commissioner must inform the Ministry of Justice whether, in addition to an alert in SIS, it would be expedient to have the warrant sent directly to the executing authority, which will normally be the presumption.

As soon as the notification is received from an authority in another EU Member State that someone wanted by the Danish authorities has been arrested and, if applicable, has been remanded in custody, that notification should be passed on to the relevant police commissioner. If the executing judicial authority in the EU Member State in question requires the original EAW, the police commissioner will supply the relevant materials, if necessary, in hard copy. The EAW must have been translated into a language acceptable to the Member State concerned, see further below.

In the guidelines issued be the Ministry of Justice it is stated that, under Article 10 (4) of the Framework Decision, an EAW may be forwarded by any secure means capable of producing written records, under conditions allowing the executing Member State to establish its authenticity.

Procedures for transmitting an EAW, Art. 10 (6) FD

If the authority which receives an EAW is not competent to act upon it, it shall automatically forward the European Arrest Warrant to the competent authority in its Member State and shall inform the issuing judicial authority accordingly, cf. Art. 10 (6) FD.

The Commission notes in its report on the EAW that Denmark is one of those Member States which have not specifically transposed Art. 10 (6). However, Denmark has pointed out that it is a basic principle of Danish law – enshrined in Sec. 7 (2) of the Public Administration Act – that an authority which receives any written communication on which it is not competent to act shall forward that communication to the correct authority. This also applies to any European Arrest Warrants which might be received by a Danish authority not competent to handle them. Thus Danish law – indeed, Danish legislation – already meets the requirement stemming from Art. 10 (6) of the Framework Decision, which is why it was not necessary to transpose a specific provision on this into the extradition law.

Particularly urgent cases

In particularly urgent cases in which the Ministry of Justice cannot be contacted outside normal office hours, the National Police Commissioner’s Office (Communications Centre) may be contacted and will then get in touch with the Ministry in order to agree how, as swiftly as possible, to issue and forward an EAW for someone who, usually after being arrested in another EU Member State, is to be extradited to Denmark for prosecution or enforcement of a sentence.

Languages in which European Arrest Warrants are issued

The Ministry of Justice has issued the following guidelines regarding the languages in which an EAW should be drafted:
“When forwarding an EAW to another EU Member State, unless it is known for sure that a different procedure can be followed, it should be ensured that the warrant has been translated into an official language of the country from which extradition is sought, in accordance with Art. 8 (2) of the Framework Decision.”

**Transmission of the warrant**

Art. 8 (1) of the Framework Decision requires an EAW to give a number of specified details, in accordance with the form annexed to the Framework Decision. Even though this cannot be regarded as a requirement under the Framework Decision, the Ministry of Justice has based the administrative guidelines on the assumption that a number of Member States will require supply of the actual certificate (a hard copy). Thus, it has been decided that, when an EAW for a wanted person is issued, an actual certificate containing the relevant information shall be drawn up, so that the certificate can be sent straight to the appropriate executing judicial authority in the EU Member State in question.

**Processing time**

Please see section above.

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

The Ministry of Justice, please see details above.

**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?**

The decision on issuing of the EAW made on a motion (on request) by the local police, please see further below.

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

Question not relevant. Under Danish law, courts are not entitled to issue an EAW. However, an issuing decision made by the Ministry of Justice may be subject to court review at the municipal court level with the possibility of appellate review by the High Court.

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

Parties or other participants do not take part in any session conducted by the issuing authority, i.e. the Ministry of Justice.

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

Normally, evidence procedure at the courts is not made in proceedings on the issuing by the Ministry of Justice of an EAW.

**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?**
The wanted person is entitled to court review of the decision on the issuing an EAW. A court review will then be conducted at the municipal court level with an access to appellate review by the High Court. In principle, no party is entitled to appeal against a decision whereby the Ministry of Justice rejects the issuing of an EAW.

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

Yes.

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

In 2005, the Danish Ministry of Justice issued 64 EAWs.

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?

Information not available.

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

Information not available.

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

Information not available. EAWs are issued on request by the local police/prosecution.

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?

Please, see below.

m. How many EAWs issued by the judicial authority in your country have been executed in other Member States? In how many cases has the requested person been effectively surrendered?

According to information available, there have been no refusals of execution by other Member States of EAWs issued by the Danish Ministry of Justice. No substantial problems regarding time limits have been reported. In the majority of cases, surrender has taken place less than 10 days after the final decision regarding execution. Excesses have been brief.

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

Please see above.
4.5. Executing of the European Arrest Warrant

General account of extradition procedures when an EAW is executed in Denmark

Extradition from Denmark to another EU Member State outside the realm of the Nordic countries is particularly governed by the following parts of the 1967 Extradition Act: Chapter 2 (a), covering Sec. 10 a – 10 j on the substantive requirements, and Chapter 3 (a), covering Sec. 18 a – 18 f on the procedural aspects.

Procedure when the wanted person’s whereabouts are known

In the cases in which the wanted person’s whereabouts in Denmark are known, an EAW may either be sent straight to the Ministry of Justice (as the designated competent authority) or be forwarded via the Schengen Information System or alternatively via Interpol, cf. Art. 9 FD and Art. 10 FD.

Direct submission to the Ministry of Justice (as the executing authority)

The issuing judicial authority in the relevant EU Member State may send the EAW directly to the Ministry of Justice in Denmark. The Ministry will determine whether the criteria for certification of an EAW are fulfilled and whether the EAW contains the necessary information to serve as a basis for extradition. The Ministry may ask the issuing judicial authority to supply missing information, cf. Art. 15 (2) FD.

When the necessary information is present, the Ministry of Justice will make a preliminary assessment of whether there is obvious reason to refuse extradition on the basis of the available information. If not, the EAW will be passed to the relevant law enforcement agency for execution. It is then sent to the police at the place where the person to be extradited is staying, cf. the Extradition Act Section 18 b (1). A copy of the EAW received will also be sent to the National Police Commissioner’s Office (Communications Centre), for the necessary updating of central information systems.

The local police commissioner must then, without delay, carry out the investigation required to determine whether the conditions for extradition are fulfilled.

Police investigation of whether the conditions for extradition are fulfilled in a particular case should be completed speedily and, if at all feasible, within three days following receipt of the EAW. As soon as the investigation has been completed, a recommendation concerning extradition should be submitted to the Ministry of Justice, so that the Ministry can make a decision on the case within a 10-day limit, cf. the Extradition Act Section 18 d.

Apart from considering whether the conditions for extradition are fulfilled, the police commissioner’s recommendation in the case must indicate how long the person concerned has been detained in Denmark, as that information will have to be passed on by the Ministry of Justice to the issuing foreign judicial authority in the event of the person’s extradition, cf. Art. 26 (2) of the Framework Decision.

The Ministry of Justice will inform the relevant local police commissioner of the decision made regarding extradition. The police commissioner will then notify the person concerned of the Ministry’s decision and, if extradition has been decided, of the possibility of judicial review and the three-day time limit within which to file a request, cf. the Extradition Act, cf. Sec. 18 b (4). If the person declines to seek a judicial review or fails to request it within the time limit, the Ministry of...
Justice shall be informed. Where a request is made for the matter to be referred to the courts, the Ministry of Justice shall likewise be informed. The Ministry shall be notified regarding the result of the court review, too.

**Entry of an alert in SIS, the Schengen Information System**

As an alternative to direct submission of an EAW to the Ministry of Justice, or possibly in addition to it, the issuing judicial authority may decide to enter an alert for the wanted person in SIS, the Schengen Information System. Under Art. 9 (3) of the Framework Decision, such an alert, based on Art. 95 of the Schengen Convention, is to have the same legal force as an EAW.

When an Art. 95 alert is entered in the national section of SIS, it will thus only be possible to check that the alert in question includes the necessary information to serve as a basis for extradition under the EAW rules, pursuant to Sec. 18 a of the Extradition Act. Such checking of an EAW is to be carried out by the National Police Commissioner’s Office (Communications Centre), which will also ensure that any missing information is obtained from the issuing judicial authority, in accordance with Art. 15 (2) of the Framework Decision.

As soon as the necessary information is available, the National Police Commissioner’s Office (Communications Centre) will notify the Ministry of Justice of the Art. 95 alert received for a person whose whereabouts in Denmark are known. The Ministry of Justice will then make a preliminary assessment of whether there is obvious reason to refuse extradition on the basis of the available information. The Ministry will inform the National Police Commissioner’s Office (Communications Centre) of the result of the assessment, in order for the wanted person to be entered in the data file of N.SIS, the national section of the Schengen Information System.

The Ministry of Justice will also ask the relevant local police commissioner to carry out, without delay, the investigation required to determine whether the conditions for extradition are fulfilled. In so doing, the police commissioner will follow the procedure described in the section above. The police investigation of whether the conditions for extradition are fulfilled in the particular case shall be completed as soon as possible and, if at all feasible, within three days following receipt of the EAW, so that the Ministry of Justice can make a decision on the person’s extradition, in the light of the police commissioner’s recommendation, within the ten-day limit set up in The Extradition Act Sec. 18 d.

The Ministry of Justice will inform the relevant local police commissioner and the National Police Commissioner’s Office (Communications Centre) of the decision made regarding extradition. The local police commissioner will then notify the person concerned of the Ministry’s decision and, if it has been decided to extradite, of the right to judicial review and the three-day limit, under Sec. 18 b (4) of the Extradition Act, within which to request it. For further details, see the section above regarding the general procedure.

The police will make an agreement with the issuing authority on practical arrangements for the person’s surrender. This may be done via the National Police Commissioner’s Office (Communications Centre).

**Submission via Interpol**

In accordance with Art. 10 (3) of the Framework Decision, those EU Member States which do not participate in SIS, the Schengen Information System, viz. the United Kingdom and Ireland, may
ask Interpol to forward an EAW. In that event, as with an alert in the Schengen Information System, the EAW will be received by the National Police Commissioner’s Office (Communications Centre), which will check that it is an EAW that may serve as a basis for extradition.

The EAW received should subsequently be sent to the Ministry of Justice, which will make a preliminary assessment of the basis for extradition. If the Ministry does not consider that the EAW should be rejected, the National Police Commissioner’s Office (Communications Centre) will be informed accordingly.

The Ministry of Justice will also ask the relevant local police commissioner to carry out, without delay, the investigation required to determine whether the conditions for extradition are fulfilled. In so doing, the police will follow the procedure described above.

The Ministry of Justice will inform the relevant local police commissioner and the National Police Commissioner’s Office (SIRENE and Communications Centre) of the decision made regarding extradition. The local police commissioner will then notify the person concerned of the Ministry’s decision and, if it has been decided to extradite, of the right to judicial review and the three-day limit, under Sec. 18 b (4) of the Extradition Act, within which to request it. For further details, see the section above regarding the general procedure.

The police will make an arrangement with the issuing authority on practical arrangements for the person’s surrender. This may be done via the National Police Commissioner’s Office (Communications Centre).

Procedure if the wanted person’s whereabouts are unknown

In cases in which the wanted person is not known to be staying at any particular location in Denmark an EAW may be received either as an alert in SIS or, alternately, via Interpol, in accordance with Art. 9 FD and Art. 10 FD.

**Alert in SIS, the Schengen Information System**

Under Art. 9 (3) of the Framework Decision, an alert based on Art. 95 of the Schengen Convention is to have the same legal force as an EAW. When an Art. 95 alert is entered in N.SIS, it is only relevant to check that the alert in question, constituting an EAW, includes the necessary information to serve as a basis for extradition pursuant to the Extradition Act Sec. 18 a. The checking of an EAW is carried out by the National Police Commissioner’s Office (Communications Centre), which will also ensure that any missing information is obtained from the issuing judicial authority as soon as possible, in accordance with Art. 15 (2) of the Framework Decision. Once the necessary information is available, the National Police Commissioner’s Office (Communications Centre) will enter the wanted person into the national section of the Schengen Information System.

If found, a wanted person (with no known address in Denmark) for whom an alert has been entered into SIS may be arrested. Then the local police commissioner will immediately notify the Ministry of Justice, via the National Police Commissioner’s Office (Communications Centre), so that the Ministry can make a preliminary assessment of whether there is an obvious reason to refuse extradition on the basis of the available information, under Sec. 18b(1) of the Extradition Act. The Ministry of Justice will inform the relevant local police commissioner and the National Police Commissioner’s Office (Communications Centre) of the result of the assessment and will also, if appropriate, ask the relevant local police commissioner to carry out, without delay, the investiga-
tion required for the final determination of whether the conditions for extradition are fulfilled. The investigation shall be conducted as described above.

The Ministry of Justice will inform the local police commissioner and the National Police Commissioner’s Office (Communications Centre) of the decision made regarding extradition. The police commissioner will then notify the person concerned of the Ministry’s decision and, if extradition has been decided, of the possibility of judicial review and the three-day limit within which to file a request, cf. the Extradition Act, cf. Sec. 18 b (4). For further details, see the section regarding the general procedure above.

**Forwarding via Interpol**

An EAW received via Interpol, i.e. one issued by the United Kingdom or Ireland, shall be dealt with in accordance with the procedure to be followed for an alert in the Schengen Information System, as described above.

**Languages in which the European Arrest Warrant is accepted**

Under Art. 8 (2) of the Framework Decision, the European Arrest Warrant must be accompanied by a translation in (one of) the official language(s) of the executing Member State. Any Member State may, at the time of adoption or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the institutions of the European Communities.

The Extradition Act does not set up any particular requirements as to languages usable by other EU Member States in submitting an EAW to Denmark. The Ministry of Justice has sent the General Secretariat of the Council a declaration to the effect that Denmark will accept European Arrest Warrants drawn up in Danish, Swedish or English, or translated into one of those three languages 398.

If appropriate, the local law enforcement agency will have an EAW received in Swedish or English translated into Danish, particularly for use in court proceedings.

**Consent to surrender**

If the arrested person indicates that he or she consents to surrender, that consent shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State, cf. Art. 13 (1) FD.

Under the Extradition Act Section 18 c, a person who consents to his or her surrender must do so before the court. The judge shall give the person the appropriate guidance as to the impact of consenting to extradition. In accordance with the Framework Decision, counsel will be provided, cf. Art. 13 (2)(2) FD.

Consent to extradition does not render a decision by the Ministry of Justice regarding extradition superfluous. The Ministry still has to ascertain that the relevant conditions are fulfilled.

A person who consents to extradition is not automatically taken to have waived his or her specialty rights. Such particular consent must be explicit.

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398 Cover note to the General Secretariat, Brussels 16th January. 5348/04 ADD 1, COPEN 13, EJN 5, EUROJUST 5.
Denmark has informed the General Secretariat of the Council that it will remain possible to revoke consent to surrender and express renunciation of entitlement to the “speciality rule” under Danish law, cf. Art. 13 (4) FD\textsuperscript{399}. Consequently, consent may be revoked at any time prior to surrender. The person must be legally represented at the time of consent.

In the cases where the requested person consents to his surrender, the final decision on the execution of the European Arrest Warrant should be taken within a period of 10 days after the consent has been given, cf. Art. 17 (2) FD. Under Danish law, the Ministry of Justice should make the decision regarding the person’s extradition “as soon as practicable” and, “if possible”, within 10 days of consent being given, cf. Extradition Act Sec. 18 d (1).

In other cases, the final decision on the execution of the European Arrest Warrant should be taken within a period of 60 days after the arrest of the requested person, cf. Art. 17 (3) FD.

Under Danish law, a final review decision made by the courts should, “if possible”, be made within a 60 days limit if the arrested person wants to challenge the decision in court, cf. Extradition Act Sec. 18 d (2).

Art. 13 (2) FD states that Member States are to adopt the measures necessary to ensure that consent to extradition on the basis of an EAW is established in such a way as to show that the person concerned has expressed consent voluntarily and in full awareness of the consequences. Regarding Denmark’s implementation of this provision, the Commission alleges in the report on the EAW that Danish legislation does not contain any specific reference to consent being “voluntary”. Denmark has commented that the expression “consent” (“samtykke”) as applied in the amended Extradition Act means a free expression of will by the person whose extradition is sought. Thus, there is no need to add in the legislation that consent must be voluntary. Furthermore, Section 18 c of the Extradition Act states that consent to extradition may be given only at a court hearing, and that the court shall provide guidance to the requested person on the consequences of giving consent. Denmark therefore does not accept that the Commission has found grounds to comment on the Danish legislation transposing this provision.

\textbf{a. Which judicial authority in your country decides on executing of the EAW?}

The Ministry of Justice, please see above.

\textbf{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?}

The executing authority is the Ministry of Justice, please see above.

\textbf{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?}

The Ministry of Justice shall make a decision on the case within a ten-day limit, cf. the Extradition Act Sec. 18 d. The Ministry of Justice will inform the relevant local police commissioner of the decision made regarding extradition. The police commissioner will then notify the person concerned of the Ministry’s decision and, if extradition has been decided, of the possibility of judicial review and the three-day time limit within which to file a request, cf. the Extradition Act, cf. Sec. 18 b (4).

\textsuperscript{399} Ibid. L 190/19 OJ 18\textsuperscript{th} July 2002.
d. Can the judicial authority deciding upon the execution of the EAW verify the information provided in the EAW? Can it perform evidence?

The Ministry of Justice will have to rely on information presented by the local police/prosecution.

e. How does your domestic law regulate the solution of concurrent EAWs?

The Ministry of Justice has expressed a willingness to deal with an EAW involving a number of offences and an expectation that other EU Member States are willing to accept an EAW issued for more than one offence\textsuperscript{400}.

\textit{From one Member State}

It is likely that if a Member State issues more than one EAW in respect of the same person, the Ministry of Justice will treat them as competing requests, but nothing has been officially stated regarding this issue.

\textit{From different Member States}

If two or more Member States have issued European Arrest Warrants for the same person, the decision on which of the European Arrest Warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European Arrest Warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order, cf. Art. 16 (1) FD. The executing judicial authority may seek the advice of Eurojust when making the choice, cf. Art. 16 (2) FD.

Art. 16 is bluntly cited in the 2003 amendment Act travaux préparatoires, but nothing is said regarding the issue in the Act or in the administrative guidelines.

In the Commission report on the EAW it is stated that Denmark has not specifically transposed this provision in its legislation. Denmark has commented that in the case of competing requests, the Ministry of Justice as competent authority will decide which request is to be complied with, taking into account the circumstances referred to in Art. 16 FD. In the Commission report it is further stated that this is not binding. Denmark does not accept the Commission’s remark. The reasons for the Danish view are as follows: There is no requirement for framework decisions to be implemented in the national legislation of the Member States by specific legal provisions. What is important is that individual Member States should meet the aims of the Framework Decision. The question of whether this requires the use of specific provisions must depend on the legal system and legislative traditions of the individual Member State. In the Danish legal tradition there is no need for an international obligation with the content of Art. 16 FD to be stated in a specific legal provision. As a result of Denmark’s participation in the Council’s adoption of the Framework Decision, Denmark is already committed towards the other EU Member States to take account of the circumstances set out in Art. 16 FD when deciding on competing extradition requests. This commitment must be observed whether or not a provision on this has been transposed into Danish law.

\textsuperscript{400} Cf. part 3.2.1 in the guidelines issued by the Ministry of Justice, 5348/04, COPEN 14, EJN 6, EUROJUST 6.
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f. Does the domestic law in your country envisage the collision of an EAW and extradition procedure? If so, please clarify.

*Competing warrants from a Member State and a third state*

In the event of a conflict between a European Arrest Warrant and a request for extradition presented by a third country, the decision on whether the European Arrest Warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances. Cf. Art. 16 (3) of the Framework Decision.

Art. 16 (3) is cited in the 2003 amendment Act travaux préparatoires, but nothing is said regarding the issue in the Act or in the administrative guidelines.

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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

Since an EAW involves a request for detention for extradition purposes, a decision will have to be taken, in the course of the investigation, as to whether the person should be arrested and brought before the court, for remand in custody. On the basis of the EAW received, the local police commissioner will decide whether to make an arrest in the case. The Ministry of Justice is to be informed of any arrest straight away so that, should a preliminary assessment of the basis for extradition not already have been made, the Ministry can make a decision on this as soon as possible, before the person is brought before the municipal court for a hearing regarding remand in custody.

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

An EAW involves not only a request for extradition, but also a request for arrest and custody for that purpose.

When a person is arrested on the basis of a European Arrest Warrant, the executing judicial authority shall make a decision on whether the requested person should be remanded in custody (be kept or remain in detention), in accordance with the law of the executing Member State, cf. Art.12 (1) FD.

Under the Administration of Justice Act, there is no absolute maximum period to remand in custody. However, it is stated in the Extradition Act that any custody is to be terminated if extradition has not been carried out within 10 days following a final decision on extradition, cf. Extradition Act Sec. 18 e (3)(2).

Upon expiry of the 10 days limit after a decision to extradite has been made, if the person is still being held in custody he shall be released, cf. Art. 23 (5) FD. Under Danish law, remand in custody may nevertheless be prolonged, if the court decides to extend the time limit for actual surrender, cf. Extradition Act Sec. 18 e (3)(3). In the travaux préparatoires of the 2003 amendment Act it was explicitly found that there is no obligation for the executing Member State to have such a detention lifted. In the administrative guidelines issued by the Ministry of Justice it is said that courts may extend the extradition time limit in special cases, “one effect of this being that any one in custody may, depending on the circumstances, continue to be held”\(^{401}\).

\(^{401}\) Part 2.3.4.2, 5348/04, COPEN 14, EJN 6, EUROJUST 6. Justitsministeriets vejledning 9498 of 19th December 2003 om behandlingen af anmodninger om udlevering af lovovertrædere p’ grundlag af en europæisk arrestordre.
Procedural rules for dealing with an EAW have been set up in Sec. 18 b of the Extradition Act. Unless the EAW is rejected on the basis of information on the face of it\textsuperscript{402}, the Ministry of Justice sends the EAW to the police at the locality where the wanted person is presently staying. The police must then, without delay, carry out the investigation required to determine whether the conditions for extradition are fulfilled. With the necessary adaptations, such investigations are subject to the common provisions of the Administration of Justice Act, AJA, Part Four. The AJA provides a series of checks and controls on investigation procedures and police powers to arrest, stop and search, detain and question suspects. It also contains rules on compensation for wrongful arrest and imprisonment. The police may conduct hearings, but cannot oblige anyone to make a statement, cf. Sec. 750 AJA. The police is obligated to attach any statements which have been given to their report, cf. Sec. 751 AJA.

In order to assist in the police investigation of the case and secure extradition, use may be made of coercive measures such as those regulated in Chapter 69 AJA (arrest) and Chapter 70 AJA (remand in custody). In principle, a person wanted on the basis on an EAW may be arrested or remanded in custody for an alleged offence fulfilling the substantive conditions under the Framework Decision, e.g. an arrest decision or remand order cannot be rejected with a reference to the conditions in domestic law regarding the nature of the criminal act\textsuperscript{403}. Likewise, double criminality is not required if the alleged offence is covered by the list in Art. 2 (2) FD.

In other respects, the Extradition Act brings proceedings in line with the provisions that apply regarding domestic criminal proceedings. Thus, reference in the Act to the aforementioned chapters in the Administration of Justice Act implies that, apart from ordinary conditions regarding the nature of the offence, other statutory conditions must be complied with in accordance with common considerations before a person is remanded in custody\textsuperscript{404}.

The most common reasons for remand in custody are that substantial grounds are found for believing that the defendant if released would:

(a) evade prosecution or execution; or
(b) commit an offence if at large; or
(c) interfere with investigation procedures.

The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding, cf. Art. 12 (2) FD.

Under Danish law, alternate measures may be applied at the court’s discretion if the person’s presence and the integrity of the investigation are sufficiently secured in such a way and the person consents\textsuperscript{405}.

A defence attorney must be appointed before the question of remand in custody is decided. The court may reject chosen counsel or decline to appoint a particular attorney as defence counsel if that person is found unable to cooperate in ensuring that the case is dealt with within the 50 day limit.

\textsuperscript{402} E.g. if the act to which it relates cannot entail imprisonment for at least one year under the law of the issuing Member State.

\textsuperscript{403} E.g. that the act is not punishable by imprisonment for 1 year and six months or more as required in the Administration of Justice Act with regard to cases prosecuted in Denmark.

\textsuperscript{404} Sec. 762 AJA.

\textsuperscript{405} Sec. 765 AJA.
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A decision to detain the defendant may be appealed to the High Court.

The provision concerning appointment of defence counsel in Sec. 14 of the Extradition Act is applicable *mutatis mutandis* to the police investigation, which means that defence counsel shall normally be appointed for a person whose extradition is sought.

When the police investigation has been completed, the extradition matter is presented to the Ministry of Justice for a decision. If it is decided to extradite, the person concerned has to be advised of the possibility of judicial review in accordance with the current provisions in the Extradition Act Secs 15 (2) and 16, see further below.

By and large, the described procedure under the Extradition Act Sec. 18 b is equivalent to the procedure applicable under the Extradition Act Sec. 12 to cases regarding extradition to third countries. The Ministry of Justice decides whether a wanted person shall be extradited, whereas use of powers of arrest and custody, etc., in the course of police investigation of whether the conditions for extradition are fulfilled is considered by the local police commissioner.

Basically, a wanted person’s consent to extradition does not basically affect the procedure to be followed.

A person who has been arrested under an EAW must be brought before a municipal judge as soon as practicable within a 24 hour time limit. As mentioned, the common rule regarding remand in custody applies with the necessary adaptations.

Under Art. 11 FD, a wanted person who is arrested has to be informed of the European Arrest Warrant, of its contents and of the possibility of consenting to extradition. The arrested person is also entitled to be assisted by a lawyer and an interpreter, in accordance with the requested country’s law.

Danish legislation was found to meet the requirements of Art. 11 FD in this respect. Thus, no particular provisions have been introduced in order to comply with the Framework Decision. Accordingly, it is stated in the Extradition Act that the general rules regarding appointment of counsel are applicable, cf. Sec. 18 b (3) which is equivalent to the common provision in Sec. 14 that now only covers cases regarding extradition to third countries. The Extradition Act does not contain any specific provision regarding the assistance of an interpreter, but under general principles of administrative law an interpreter will always be used if the person to be extradited does not fully understand or speak Danish.406 Interpreters are provided at public expense.

The police shall provide the wanted person with information regarding the content of the EAW as required by the Framework Decision and explain to the person that he or she may consent to return to the issuing state.

As in all other extradition cases, the police shall conduct an interview with the wanted person.

Under Art. 14 FD, an arrested person who does not consent to extradition is entitled to be heard by the executing judicial authority. Accordingly, the police shall inform the person of the right to a hearing and, if the person so wishes, make arrangements for a hearing. The hearing may be

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406  Cf. Circular 12154 of 12th June 2001 from the Ministry of Justice to the police and public prosecutors concerning the rights of those arrested, including the possibility of being assisted by an interpreter.

407  Under Art. 19 FD, the requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court.
held either in court or out of court. Consent to extradition may only be given in court, cf. the Extradition Act Sec. 18 c. Records of hearings shall be sent to the Ministry of Justice, annexed to the police recommendation concerning extradition.

In the Commission report on the EAW it is stated that all Member States have implemented Art. 14 FD correctly. However, in relation to Denmark the Commission alleges that a full hearing before a court is possible only if the requested person brings the Ministry of Justice's decision on extradition before a court. In Denmark’s comment to the report it is stated that the Commission’s interpretation of Danish implementation of the Framework Decision is not correct on this point. It is pointed out that with regard to the conducting of investigation, the provisions of Part Four of the Administration of Justice Act shall apply \textit{mutatis mutandis}, see above for further details.

Denmark has informed the Commission that in the administrative instructions it is stated that the clear starting point when handling extradition cases on the basis of such a warrant will be that – “as far as possible” – the police will hear the person whose extradition is sought. The guidelines also state that the requested person – under Art. 14 FD – has the right to be heard if that person does not give their consent to the extradition, and that accordingly, in connection with the investigation, the police should inform the person of that possibility, and organize a hearing if the requested person so wishes. Material from the hearing must be sent to the Ministry of Justice along with the police's opinion on the question of extradition. The Ministry of Justice's assessment of whether extradition can take place is thus on the basis of an investigation undertaken by the police, which will include a hearing of the requested person, on condition that that person – in accordance with the above-mentioned provision of Sec. 750 AJA – has voluntarily asked to be heard. Furthermore, the requested person or his lawyer is always able to present observations on the question of extradition to the Ministry of Justice. Given the above, Denmark finds that it has implemented Art. 14 FD in full.

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

As already mentioned, the executing authority is the Ministry of Justice. The Ministry's decision to execute an EAW may be presented in municipal court for review, and each party may appeal to the High Court.

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

The matter is handled by the Ministry of Justice on a written basis. The wanted person or other participants do not take part in any sessions. However, the issue regarding remand in custody is handled in court where the wanted person will be present in hearings. On judicial review, the wanted person is entitled to be present, too.

\textbf{k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?}

As previously mentioned, the Ministry's decision to execute an EAW may be taken to court for judicial review. If the Ministry of Justice decides to execute an EAW, the person concerned has a right to court review concerning the lawfulness of the decision to extradite. The provision to that effect is found in the Extradition Act Sec. 18 b (4) with a reference to common provisions regarding court review in the part of the Act covering the procedural aspects of cases regarding extradition to states outside the EU, cf. Secs 15 (2) and 16.
The local police commissioner shall notify the person concerned of the Ministry’s decision and of the possibility of judicial review, as well as of the statutory three day limit within which to file a request. If the person declines to seek judicial review or fails to request it within the time limit, the Ministry of Justice shall be informed. Where a request is made for the matter to be referred to the courts, the Ministry of Justice shall likewise be informed. The Ministry shall be notified regarding the result of the court review, too.

If the person wants to challenge the decision in court, a final review decision should, “if possible”, be made within a 60 days limit, cf. Extradition Act Sec. 18 d (2).

In the administrative guidelines issued by the Ministry of Justice, the following is stated:
“If the Ministry of Justice decides that the person is to be extradited and the case is then referred to the courts, a final judicial ruling on it should, as far as possible, be given within 50 days following the Ministry’s decision, so that the total processing time does not exceed 60 days, in accordance with Sec. 18 d of the Act and Art. 17 of the Framework Decision.”

Under the Extradition Act Sec. 18 c, a person who consents to his or her surrender must do so in court. As previously mentioned, Denmark has informed the General Secretariat of the Council that it will remain possible to revoke consent to surrender and express renunciation of entitlement to the “speciality rule” under Danish law, cf. Art. 13 (4) FD. Consequently, consent may be revoked at any time prior to surrender.

The court may approve or quash the Ministry’s decision to extradite the person. Remand in custody is decided by the courts, see above.

The rules of court referred to can be found in Part 4 of the Administration of Justice Act as amended.

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

- **the right to interpreter?**

  Yes.

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

Extradition of own nationals was not allowed under Danish law before 2002, except when the specific requirements under the 1960 Act regarding extradition to another Nordic country were fulfilled.

Where a person who is the subject of an EAW for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person,

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408 Under particular circumstances, the Ministry of Justice may grant permission to bring the case before the courts even if the three days limit has expired, cf. Extradition Act Sec. 16 (2)(2) as referred to in Sec. 18 b (4).


410 www.dca.gov.uk/civil/prorules_fin/contents/practice_directions/pd_part52.htm
after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State, cf. Art. 5 (3) FD.

Denmark has transposed Art. 5 (3) FD into domestic law by enacting a provision to the effect that surrender of a person who is a Danish national or resident in Denmark may, subject to a discretionary decision, be subject to the condition that the person is returned to Denmark in order to serve a custodial sentence or detention order passed against him in the issuing Member State, cf. Sec. 10 b (1) of the amended Extradition Act. Such a condition may be renounced in cases regarding very serious crimes and instances where a person is closely affiliated with the issuing Member State.

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

In 2005, the Danish Ministry of Justice received 33 EAWs. In all cases handled finally by medio 2006, a decision to execute was made.

No statistics have been available regarding 2006. However, information has been issued by the Ministry of Justice that execution has been refused in one case.

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

As mentioned above, execution has so far only been refused in one instance. Further information is not available.

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.

Information is not available.

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

Information is not available.

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

No.

s. How often does the requested person consent to the “fast track” surrender procedure?

Information is not available.

t. In how many cases has the decision on the execution of the EAW been 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?

Statistical information is not available. There seems to have been no cases in which a decision to execute an EAW has been revoked by the courts. In one reported case, execution was refused for two of alleged offences, as the double criminality requirement was not fulfilled. For one other
count, execution was refused as available information was not sufficient to establish whether a statutory limit had been reached. However, as all requirements were met for two other counts, the remaining part of the EAW was executed.

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

According to information issued by the Ministry of Justice, surrender is always effectuated within the 10 day limit in cases where the wanted person does not require court review. In the remaining cases, surrender is always effectuated within the 60 day limit.

**Immediate surrender**

Surrender must take place as soon as possible, normally within 10 days following a final order for a person’s extradition, cf. Extradition Act Sec. 18 e (2).

Normally, the person may not be surrendered before the expiry of the three day limit set up for the person to decide whether or not to have the decision of the Ministry of Justice referred to the courts. The same applies with regard to the three day limit for appealing against a judicial ruling on extradition. However, if the person renounces the right to a court review or an appellate review, the surrender may be accelerated, cf. Extradition Act Sec. 18 e (1)(1).

Under particular circumstances, the court may extend the extradition time limit, cf. Extradition Act Sec. 18 e (3)(3). In that case, remand in custody may be extended, too.

The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European Arrest Warrant. Cf. Art. 23 (1) and (2) of the Framework Decision.

Under Danish law, the person shall be extradited as soon as possible, normally within 10 days following the expiry of preceding time limits, cf. Extradition Act Sec. 18 e (2). If the decision to extradite is referred to the courts, the person shall not be extradited before the decision has been found to be lawful by a final court ruling, cf. Extradition Act Sec. 18 e (1)(2). Thus, the 10 days deadline does not begin until the extradition decision has been held lawful in a final judicial ruling, including in cases in which leave is granted for appellate review.

As a point of departure, the wanted person may not be extradited before the expiry of a three day limit set up for the person to decide whether or not to have the decision of the Ministry of Justice referred to the courts. The same applies with regard to a three day limit for appealing against

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411 Cf. Extradition Act Sec. 16.

412 If, in special circumstances, in particular having regard to the person’s age, health or other personal conditions, it is found that surrender would be incompatible with humanitarian concerns, actual extradition shall be postponed until the special conditions preventing surrender no longer apply, cf. Extradition Act Sec. 10 i. The cited provision reflects Art. 23 (4) FD: “The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person’s life or health. The execution of the European Arrest Warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.”

413 Cf. Extradition Act Sec. 16.
a judicial ruling on extradition. However, if the person renounces the right to a court review or an appellate review, the surrender may be accelerated, cf. Extradition Act Sec. 18 e (1)(1).

If the surrender of the requested person within the stipulated period laid is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed, cf. Art. 23 (3) FD. Under such particular circumstances, the Extradition Act authorises courts to extend the 10 days limit that normally applies in instances where the person has brought the decision to extradite made by the Ministry of Justice before the court, cf. Extradition Act Sec. 18 e (3)(3).

The Extradition Act does not mention the 10 day limit for an extension as stipulated in the Framework Decision. However, it was mentioned in the travaux préparatoires of the 2003 Amendment Act, where the requirement to contact the issuing judicial authority was also cited. In the administrative guidelines issued by the Ministry of Justice it is stated that the police should notify the issuing judicial authority if the person to be extradited from Denmark cannot be surrendered within the 10 day limit. In that event, a new date shall be agreed for actual surrender, and it is mentioned that the extended time period for surrender may not exceed 10 days.

Where in specific cases the European Arrest Warrant cannot be executed within the time limits laid down, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay, cf. Art. 17 (4)(1) FD. The Extradition Act does not mention this requirement or the obligation to inform Eurojust of failure to comply with the requisite time limits, cf. Art. 17 (7) FD. However, the obligation to notify Eurojust is mentioned in the administrative guidelines issued by the Ministry of Justice.

Moreover, the Extradition Act does not mention the possibility of extending relevant time limits by a further 30 days, as provided for in Art. 17 (4)(2). However, the possibility of 30-day extension under exceptional circumstances was mentioned in the travaux préparatoires of the 2003 amendment Act, where a presumption regarding expedient information of the issuing judicial authority was also stated.

The provision in 2003 amendment Act was based on a notion that time limits stipulated in the Framework Decision are not of a binding nature, but merely guidelines. Thus, an excess of a time limit has not been found to imply immediate consequences for neither the decision regarding remand in custody nor the decision concerning extradition.

**Postponed or conditional surrender, Art. 24 FD**

Art. 24 (1) FD allows the executing judicial authority to postpone the surrender of a person so that he or she can first be prosecuted in the executing state for another offence or, if he or she has already been sentenced for another offence in the executing state, so that he or she may serve that sentence. Art. 24 (2) FD allows the executing authority, instead of postponing surrender, to temporarily surrender the requested person to the issuing Member State under conditions agreed between the executing and issuing judicial authorities and binding on all the authorities in the issuing Member State. Art. 24 FD is bluntly cited in the 2003 Amendment Act travaux préparatoires, but nothing is said regarding the issue in the Act or in the administrative guidelines.
Where a person in respect of whom an EAW is issued is charged with an offence in Denmark, has been imposed an incarceration sentence or is currently serving such a sentence, surrender may discretionarily be postponed by the Ministry of Justice in accordance with the general provision stating that the person shall be extradited “as soon as possible”, and “if possible”, within 10 days, cf. Extradition Act Sec. 18 e (2).

4.6. Others

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

   No.
5. Finland

(Raimo Lahti, Sami Kiriakos)

5.1. Constitutional issues

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

There is one recent precedent of the Finnish Supreme Court (see below point e on the matter). As to the Finnish doctrine, the ruling of the judgment of the ECJ in Case C-105/03 Pupino that “[t]he national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision” has been accepted e.g. by J. Salminen, Comment on ECJ Case C-105/03 Pupino, in: Lakimies 2006, pp. 286–299.

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?

Finland applies the “dualist“ approach with respect to international conventions, i.e. after signing the convention must be transferred into the national legal system with a separate Act of Parliament in order for it to have legal force within Finland. In principle there is no difference in legal effects between national norms resulting from a FD and the introductory acts of international conventions when the hierarchy of the norms is the same (e.g. both are Acts of Parliament).

See also below point e.

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?

Generally, yes. As to the doctrine, see e.g. J. Raitio: Eurooppaindeja sisárkkina (European Law and Internal Market), Helsinki 2006, pp. 199–203; T. Ojanen: EU-oikeuksen perustaitia (Fundamentals of the EU-Law), Helsinki 2006, pp. 286–290 (with references to Finnish case-law). As to a recent Finnish precedent, see below point e.

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

When applying “pro-European“ interpretation of domestic law, judicature may have references to ECJ-decisions. See e.g. the Finnish precedent explained below under point e.

e. Is the 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 FD is not yet implemented into the domestic legal order?
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In a recent EAW-case the Finnish Supreme Court (2005:139) relied on the EAW Framework Decision to interpret the terms in the Finnish implementing law. The case concerned an EAW issued by Sweden concerning a Finnish national who had fled to Finland after having been sentenced to long-term psychiatric treatment in custody (rättspsykiatrisk vårdförordning) by a Swedish Court in a criminal trial.

The Supreme Court was faced with the question whether psychiatric treatment in custody could qualify as a “custodial sentence”, i.e. as a valid basis of an EAW. The court of first instance had cancelled out this possibility referring to the terminology in the Finnish implementing law which seemed to have a more limited scope than the corresponding terms “a custodial sentence or detention order” in Art. 1(1) of the FD. The Supreme Court, on the other hand, referred to the Pupino case (C-105/03) and acknowledged that national law should be interpreted as far as possible in line with the wording and purpose of the FD.

The Court concluded that the Swedish EAW concerned a custodial sentence as it was meant in Art. 1(1) of the FD and that Finnish law had to be interpreted in the same way. Thus, the EAW in question was regarded as falling into the scope of the EAW-system. In the current case, however, the fact that the requested person was a Finnish citizen and had asked to serve his sentence in Finland barred the execution of the EAW (see also point 2.a. below).

It is worth noting that the Supreme Court did not rely on the FD solely but as a factor of a “pro-European” interpretation: “national law should be interpreted as far as possible in line with the wording and purpose of the FD”.

There is no Finnish case-law in interpreting domestic law in the light of a FD that is not yet implemented. In Finnish doctrine it has been emphasized that an EC directive or an EU FD cannot, if not implemented in national law, entail direct effect or interpreting effect against the interest of an individual. The discretionary power of the authorities is restricted by the profound principles such as the legality principle (nullum crimen sine lege) and the principle of legal certainty. See T. Pöysti: Tehokkuus, informaatio ja eurooppalainen oikeusalue (Efficiency, information and the European legal space). Helsinki 1999, p. 281.

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

Finland has declared that all of its courts may make references to the ECJ on the interpretation or validity of third pillar instruments in accordance with TEU Art. 35.

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 Code of Criminal Procedure, separate from extradition provisions, other ways)? When exactly did the law implementing the framework decision enter into force?

The FD was implemented by enacting a separate law, the Act on Extradition On the Basis of an Offence Between Finland and Other Member States of the European Union (“The EU Extradition Act”; an unofficial translation by the Ministry of Justice is available at: http://www.finlex.fi/laki/kaannokset/2003/en20031286.pdf), and by making some minor changes to other legislation. The implementing legislation entered into force on 1st January 2004.
h. Was the implementation the Framework Decision and the FD itself subject of proceedings of the Constitutional Court in your country?

Finland does not have a Constitutional Court. The Constitutional Law Committee (perustuslakivaliokunta) of the Parliament is generally regarded as highest authority interpreting the Constitution. The Committee was involved during the negotiations of the FD and its subsequent implementation process (i.e. when the Government proposal for the EU Extradition Act was under reading at the Parliament).

The Committee mostly scrutinized whether the proposed EAW regulation was in conformity with the provision in the Finnish Constitution which prohibits the extradition of a Finnish citizen against his will. It acknowledged that it was already possible to a limited extent to extradite Finns against their will to other Nordic and EU countries and that the Constitution did not fully correspond to the current practice. It also took into account that in the EAW system a custodial sentence would have to be carried out in Finland if the person concerned so requested (see below points 2a and 5m). Then again, the Committee noted that the partial abandoning of the double criminality requirement in the EAW system would considerably loosen up the preconditions for extraditing a citizen.

Consequently, the Committee took the view that the proposed EAW implementing Act would partially breach the Constitution, yet it could be passed by using the special procedure for quickened constitutional enactment. According to Sec. 95 (2) of the Constitution of Finland (731/1999): “if the proposal concerns the Constitution…, the Parliament shall adopt it, without leaving it in abeyance, by a decision supported by at least two thirds of the votes cast”. This flexibility of the Constitution enables the bringing into force of international obligations that are in their substance contrary to the Constitution – without amending the Constitution itself. The Parliament eventually used this procedure.

The Parliament has recently passed an amendment to the Constitution, according to which a Finnish national can be extradited against his will to a country where his human rights and due process of law is guaranteed. The amendment enters into force after it has been confirmed by the next elected Parliament.

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

The Government’s view, expressed in the travaux préparatoires, was that despite the new terminology, the EAW essentially concerns extradition. This idea remained in the main implementing Act, the “EU Extradition Act”, which uses traditional terminology such as “extradition” and “request for extradition” (though one should note that in the Finnish language it is difficult to find different translations for the terms “surrender” and “extradition”). Nonetheless, due to the new principles and procedures in the EAW system, “extradition” between EU Member States was regulated in a separate Act.

This solution has also been criticized in the Finnish doctrine; see J. Sihto: Den europeiska arrestersningsordern (The European Arrest Warrant). Tidskrift utgiven Juridiska Föreningen i Finland 2003, pp. 502–531, 530.
Chapter III. Country reports

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

a. Are there any 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 (compulsory and optional) of surrender?

The EU Extradition Act contains a Section for mandatory grounds for non-execution and a Section for optional grounds for non-execution, as in Arts 3 and 4 of the FD. There are certain differences however.

When the EAW has been issued for the purposes of execution of a custodial sentence or detention order and the person concerned is a Finnish national and asks to serve his sentence in Finland, the competent authority (Court) is obliged to refuse the execution of the EAW. See the EU Extradition Act, Ch. 2, Sec. 5 (1.4). According to the similar provision in Art. 4(6) of the FD the refusal is optional.

There is another mandatory ground for refusal, which in the FD is optional. The execution of the EAW must be refused when the act which constitutes the offence is deemed to have been committed in full or in part in Finland or on a Finnish vessel or in a Finnish aircraft and (a) the act or the corresponding act is not punishable in Finland, or (b) the right to bring charges, according to the law of Finland, has become time-barred or punishment may no longer be imposed or enforced. See The EU Extradition Act, Ch. 2, Sec. 5 (1.5); cf. Art. 4(7a) of the FD.

There are also two mandatory grounds for refusal which are not included in Arts 3 or 4 of the FD:

a) There is a justifiable ground to suspect that the requested person is threatened by capital punishment, torture or other degrading treatment or that he would be subjected, on the basis of origin, membership in a certain social group, religion, belief or political opinion, to persecution that threatens his life or liberty or to other persecution, or there is a justifiable cause to assume that he would be subjected to a violation of his human rights or constitutionally protected due process, freedom of speech or freedom of association. (The EU Extradition Act, Ch. 2, Sec. 5 (1.6).)

b) The execution of the EAW, in view of the age, state of health or other personal circumstances or special circumstances of the person in question would be unreasonable on humanitarian grounds and this unreasonableness cannot be avoided by postponing the execution. (The EU Extradition Act, Ch. 2, Sec. 5 (2).)

These provisions are, according to the travaux préparatoires, justified on the basis of the recitals 12 and 13 and Art. 1(3) of the FD.

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

Roughly, all of the crimes in the list are found in Finnish law.

– the period of time for execution of the EAW?

The time limits are slightly more rigid than in the FD. If the requested person has consented to the surrender, the district court (i.e. the executing judicial authority) must decide on the execution of the EAW within three days after the consent has been given. In any case the court must decide
on the question within 26 days after the requested person has been apprehended or otherwise found in Finland. However, if for a special reason the decision cannot be taken within the said time limits, it must be taken as soon as possible. See The EU Extradition Act, Ch. 2, Sec. 32.

- other issues; please specify

b. Can a 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)?

Lack of dual criminality always bars the execution of the EAW in cases other than those referred to in Art. 2(2). See The EU Extradition Act, Ch. 2, Sections 2–3.

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)?

Finland made the following statement:

“In Finland, consent to surrender and, where appropriate, express renunciation of entitlement to the specialty rule referred to in Article 27(2) may be revoked. Consent may be revoked in accordance with domestic law until surrender has been executed.”

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

Pursuant to Art. 7 FD Finland has appointed as central authorities the Ministry of Justice and the SIRENE Office at the National Bureau of Investigation (Keskusrikospoliisi).

The SIRENE Office is the competent authority for receiving EAWs and forwarding them to the competent prosecutors. EAWs may also be sent directly to the competent prosecutor.

The Ministry of Justice acts as a central authority which may be contacted with questions concerning the EAW. In case the abovementioned means of sending an EAW to Finland are inappropriate, the EAWs may be sent to the Ministry, which forwards them to the competent prosecutor.

5.3. 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?

The district court has to decide whether the concrete, historical event for which the person concerned has already been judged is the same as the one on which the EAW is based. The legal qualification of the events is not decisive. See in more detail on the Finnish doctrine and case-law, R. Lahti: Finland; Concurrent National and International Criminal Jurisdiction and the Principle of *ne bis in idem*. Revue Internationale de Droit Pénal (RIDP), Vol. 73, 2002, pp. 901–911, 903.

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

A valid (legally final) judgment by a court in Finland or in another EU Member State is a mandatory ground for non-execution. An additional prerequisite is provided in the case when the person has been sentenced to punishment: the person must have served or must serve the sentence or, in
accordance with the law of the of the Member State that has sentenced the person, the sentence may no longer be enforced. (The EU Extradition Act, Ch. 2, Sec. 5(1.2))

Grounds for optional refusal include: (a) a decision taken in Finland not to prosecute for the offence on which the EAW is based or an abandonment of prosecution that has been initiated; (b) a final decision taken in a Member State other than a judgment which prevents the bringing of charges; (c) The requested person has been finally judged in a state other than a EU Member State or by the International Criminal Court in respect of the act on which the request is based provided that where he or she has been sentenced, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country. (The EU Extradition Act, Ch. 2, Sec. 6 (1.2–3; 1.7).)

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

See above point b.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 Schengen Treaty in your country?

There is no case-law on this question. However, it is probable that the case-law of the European Courts in Strasbourg and Luxembourg will have harmonizing effects at the national level. In the Communication of the Government on the draft FD on the application of the “ne bis in idem” (13th February 2003) it was stated i.a. that “any decision which as the status of res iudicata under national law should be considered a final judgment, such as an extrajudicial mediated settlement in a criminal matter”.

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

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)?

So far there are no court decisions in which a reference to the case-law of the European courts had been made, but the judicial practice has been substantially in line with that practice. See, e.g. R. Lahti, RIDP 2002 p. 909–910 and P. Koponen: Talousrikokset rikos- ja prosessioikeuden yhtymäkohdassa (Economic crime in the point of convergence of criminal and procedural law) Helsinki 2004, p. 62–66.

5.4. The issuing of the EAW

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

The EAW for prosecution is made by the public prosecutor who is competent to bring charges in the criminal case in question. The EAW for enforcement of a custodial sentence is made by the Criminal Sanctions Agency.
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?

The decision is made by the issuing authority ex officio.

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

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

The process of issuing an EAW does not involve a session in which the parties or other participants could take part.

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

The prosecutor evaluates the evidence gathered by the investigative authority (usually the police) when taking the decision whether to issue an EAW.

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?

No special procedure exists for appealing against the issuing of the EAW.

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

The EAW can be issued for crimes committed before the implementation of the EAW, i.e. 1st January 2004. However, if another Member State has given notice that as the requested Member State it applies the provisions in force before the legislation on implementation of the FD to acts committed before a date that it specifies, also Finland as the requesting Member State applies the law in force before the EAW.

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

(a) EAWs issued by prosecutors (for prosecution):

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>75</td>
</tr>
<tr>
<td>2005</td>
<td>58</td>
</tr>
<tr>
<td>2006</td>
<td>44 (by 31st October)</td>
</tr>
</tbody>
</table>

Total: 177

(b) EAWs issued by the Criminal Sanctions Agency (for the enforcement of a custodial sentence):

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>24</td>
</tr>
<tr>
<td>2005</td>
<td>15</td>
</tr>
<tr>
<td>2006</td>
<td>11 (by 31st October)</td>
</tr>
</tbody>
</table>

Total: 50
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.

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

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

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?

SIS, EJN, Europol, Eurojust and Interpol are all valid channels. When the location of the person concerned is known, the competent authority may issue the EAW directly or through international channels of communication to the competent authority of another Member State. When the location is unknown, the EAW is entered into the SIS and the Interpol information system.

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

Persons apprehended/effectively surrendered to Finland:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>46/34</td>
</tr>
<tr>
<td>2005</td>
<td>55/38</td>
</tr>
<tr>
<td>2006</td>
<td>30/19 (by 31st October)</td>
</tr>
</tbody>
</table>

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

5.5. Executing of the European Arrest Warrant

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

The district courts (courts of first instance) of Helsinki, Kuopio, Oulu and Tampere. The district court is competent to decide on the matter when it consists of the chairman alone without the panel of lay judges. The decision of the district court is subject to appeal to the Supreme Court.

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?

The district court decides on the execution of the EAW on the request of the public 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?

See point 2a.
d. Can the judicial authority deciding upon the execution of the EAW verify the information provided in the EAW? Can it perform evidence?

The district court does not perform a verification of the EAW. Still, the district court must make sure that the matter is thoroughly examined before deciding on the execution of the EAW. The district court may, when finding it necessary, before taking the decision, request supplementary information from the competent authority of the requesting Member State. The court may set a time limit for receipt of the information. The requested person must be heard on the information received.

If the prosecutor, before taking the case to the district court, finds that information in the EAW is inadequate, he should ask for additional data from the issuing judicial authority in the other Member State. It is also stated in the EU Extradition Act (Ch. 2, Sec. 28 (1)) that the prosecutor should safeguard the interests of the issuing Member State in the district court session.

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

In the case of multiple EAWs, the court must, at the same time as deciding on the execution, decide also to which Member State the person is to be surrendered. The court must give consideration to all the relevant circumstances, especially the type and place of commission of the offences on which the EAWs are based, when the requests were made and whether the request is made for the purposes of prosecution or for the execution of a custodial sentence. If the requests refer to different offences, the court may order that the person surrendered to a certain Member State shall be subsequently surrendered to another Member State in accordance with the conditions of the EU Extradition Act. (The EU Extradition Act, Ch. 2, Sec. 34 (1–2).)

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

If both a Member State and a State that is not a Member State of the European Union or a Nordic country request the surrender/extradition of the same person and both request satisfy the conditions for surrender/extradition it is for the Ministry of Justice to decide which request (i.e. whether the EAW or the extradition request) takes precedence. Requests for surrender to the ICC should be given precedence. (The EU Extradition Act, Ch. 2, Sec. 34 (3–4).)

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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

A person may be apprehended by the police for the purpose of ensuring the execution of the EAW. After the person concerned is first apprehended the prolongation of the deprivation of liberty should be referred within 4 days to the district court. See the EU Extradition Act, Ch. 2, Secs. 16–19.

According to the travaux préparatoires of the EU Extradition Act, if the EAW exceptionally would clearly seem ill-founded, the deprivation of liberty should not be carried out or upheld.

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

The general rules on the duration of deprivation of liberty in pre-trial stage in the Coercive Measures Act (450/1987) also apply to the EAW procedure. There is no maximum period defined but the grounds for the deprivation of liberty (e.g. risk of escape) are reviewed every two weeks if
the detained person so requests. The law also contains a prohibition of excessive or disproportionate deprivation of liberty. In practice, the EAWs have usually been executed quite speedily after the requested person has been detained.

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

See point a above.

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

The prosecutor and the requested person must be present at the session. Other participants are not allowed to take part. The session and the relevant documents are not public.

**k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?**

The decision of the district court is subject to appeal to the Supreme Court without a request for leave of appeal. Both the prosecutor and the requested person may appeal.

**l. Does the person in question have the right to:**

- **the assistance by the defence lawyer?**
  
  Yes.

- **the right to interpreter?**
  
  Yes.

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

See point 2a.

Also, if a Finnish citizen has requested in connection with the consideration of the execution of the EAW for prosecution that he be allowed to serve the sentence in Finland, the execution of the EAW is subject to the condition that he is returned to Finland immediately after the judgment becomes final in order to serve the possible custodial sentence imposed on him. (The EU Extradition Act, Ch. 2, Sec. 8 (1).)

**n. How many EAWs issued by other Member State (MS) have been executed by your country since the date mentioned in 1g of the questionnaire? In how many cases has the person been effectively surrendered?**

Persons caught in Finland on the basis of an EAW:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>4</td>
</tr>
<tr>
<td>2005</td>
<td>10</td>
</tr>
<tr>
<td>2006</td>
<td>8 (by 31st October)</td>
</tr>
</tbody>
</table>
o. In how many cases has judicial authority in your country refused to execute the EAW? What were the grounds for non-execution?

There are no such cases.

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. Has the EAW been executed for crimes other than listed in the above mentioned Art. 2.2. FD? If so, in how many cases?

r. Have there been cases in your country, in which courts rejected the executing of the EAW because of possible violation of guarantees 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 has the decision on the execution of the EAW been 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?

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

   In cases where the person has agreed to the surrender: 17 days (time between the arrest and the decision on the surrender).

   In cases where the person has not agreed to the surrender: 37 days (time between the arrest and the decision on the surrender).

5.6. Others

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

   Traditionally, various ways and means of Nordic cooperation have been developed in Scandinavia, among them unified laws on extradition between the Nordic countries since the 1960s. These laws have enabled a more efficient extradition practice than other means. In the travaux préparatoires of the Finnish EU Extradition Act it was expressed that this smoother cooperation should be continued between Finland, Denmark and Sweden in those cases where the objectives of the FD on EAW would be extended or enlarged and the procedures for surrender of persons further simplified or facilitated. In fact, the EU Extradition Act and similar national laws for implementing the FD on EAW have been applied also between Finland, Denmark and Sweden. In order to create a unified extradition instrument between all the Nordic countries a convention on the extradition between the Nordic countries (Nordic arrest warrant) was signed on 15th December 2005, and this convention should be ratified by the end of 2007. After that this convention and the national laws implementing it would be applied in extraditions between the Nordic countries exclusively.
6. Germany

(Arndt Sinn, Liane Wörner)

6.1. Constitutional issues

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

Framework decisions do not directly bind or entitle German citizens, but rather have to be implemented into national laws, as already according to Art. 34.2 b. TUE. According to a decision of Germany’s Federal High Court of the Constitution, German legislators have to circle within the whole leeway given by the single framework decision implanting it into national law, but always in drafting the law to the extent, which is looking after the German constitutional rights to its best414.

At the same time, the fact that the third pillar framework decision is a legal action similar to the first pillar European directive provokes a specific responsibility for legislators to implement the new law constitutionally. As the Federal High Court of the Constitution in its decision conferring to the European Arrest Warrant Framework Decision correctly annotated, a framework decision is secondary not primary law that seeks to fulfill the goals of the Treaty of the European Union. As a result, a framework decision is according to Art. 34.2 b. TUE binding regarding to the aim stated in the TUE.

However, framework decisions do not directly affect the German people. In contrast to the first pillar directive, the implementation of framework decisions into national laws is not enforceable. German national courts as a result may not consider their decisions to framework decisions, which have not been implemented yet.

Nevertheless and according to a decision of the European Court of Justice, currently affirmed by the German Federal High Constitutional Court, German legislature, judiciary and executive has to directly consider a European framework decision in relation to other Member States, if the national implemented law was declared as nullified before415. Thus, German authorities are held to interpret national law in the spirit of European framework decisions, especially when dealing with other Member States, since these cannot be burdened with old and non-European-conformed proceedings just because German authorities were not able to enact a law and to attend to its European duty completely. While this does not result in a direct applicability of framework decisions within Member States, it still means that Art. 34.2 b. TUE has to be read as a principle to interpret all national laws conforming to European framework decisions as they are part of the law of the European Union.

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?

414 Cf. BVerfG 2 BvR 2236/04 v. 18.7.2005 MN. 80.
415 Cf. answer to question 1d. for more information. Also cf. BVerfG BvR 1667/05 v. 24.11.2005, Anm. 15 for the statement of the German Federal High Court of the Constitution.
According to Art. 25 German Basic Law (GG), the general rules of International law are part of the German federal law and overrule national statutory law. These general rules directly bind and entitle the inhabitants of the German territory. Art. 25 Basic Law refers only to the very general rules of International law. European Community law, framework decisions, but also Conventions about the European cooperation in criminal matters are, on the other side, International treaties, which have to be transformed into German national law according to Art. 59.2. Basic Law. All these specific International treaties basically have to be implemented into German national law and go into effect as German federal law beside other German federal laws.

Thus, in national law implemented European framework decisions (FD, third pillar) take effect as German federal law besides other German federal laws. Conventions on European cooperation in criminal matters are as other European conventions first adopted by the German parliament (Bundestag) and herewith become a federal law as well. Declaration of adoption and convention are published in the Federal Law Gazette as such. The adoption by the parliament meets the requirements of the need for implementation according to Art. 59.2. Basic Law. If now both federal laws contradict each other, rules of speciality or precedency are needed.

Referring to matters which are of interest herein, § 1.3. IRG represents a rule of speciality, saying that conventions and International treaties contain specific rules of assistance and that IRG provisions are only to be applied if no specific rule exists. Since the implementation of the Framework Decision on the European Arrest Warrant (EAW) would have partly contradicted to International treaties, now § 1.4. IRG provides a rule of precedency for all provisions in accordance to the EAW and the implementation of its Framework Decision. Thus, the European Arrest Warrant implementing Chapter 8 of the German IRG supersedes conventions on European cooperation in criminal matters according to § 1.4. IRG. Only if chapter 8 IRG does not provide a solution to a specific question, the other provisions of the IRG resp. of International treaties are to be applied, §§ 78, 1.3. IRG.

As a result, from the German point of view, the European Union wide extradition procedure applies first the provisions of the European Convention of Extradition (EuAlÜbk, Europäisches Auslieferungsübereinkommen), added by its second supplementary protocol and bilateral supplementary contracts, and the provisions of the European Union Convention of Extradition (EU-AuslÜbk, EU-Auslieferungsübereinkommen). Second, Articles 59–66 of the Schengen Treaty (SDÜ, Schengener Durchführungsübereinkommen) are applied. Additionally, the provisions of the IRG are to be applied. While the new provisions on the European Arrest Warrant, implemented in Chapter 8 of the IRG, privilege to all aforementioned treaties and provisions.

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?

German jurisdiction is generally held to argue and decide “pro-European”. European Union laws are precedence to national laws as also the German Federal High Court of the Constitution stated in its landmarking so called “As Long As” decisions (‘So lange’ I-III). This is true as long as and as far

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416 German Basic Law is the generally used term for Germany’s Constitution [Grundgesetz], abbreviated GG.
417 Specific ruling admittedly is done for European community law (first pillar), Article 24 GG.
418 Bundesgesetzblatt.
as necessary\textsuperscript{419}. The majority of Germany’s legal scholars agree to this opinion of the Federal High Court of the Constitution.

However, especially concerning questions of substantive and procedural criminal law great reservation towards European Union law prevailed for a long time. Indeed, this view has decreased within the last few years. \textit{Hecker} even describes the principle of the \textit{union-conform} interpretation (\textit{gemeinschaftsrechtkonforme Auslegung}) of national statutes as one of the one and most important Europeanisation factors\textsuperscript{420}. Solely union-conform interpretation of European Community legislation advantages to domestic notice. However, union-conform interpretation is often only defined as and in connection to “directive-conform” interpretation\textsuperscript{421}. Thus, considering the principle of union-conform interpretation, one only considers a union-conform interpretation of European Community (EC) or European Union (EU) directives. The principle was not yet applied to the third pillar of the European Union.

However, the comparability of EU directives and EU framework decisions and the similar writings of Art. 249.3. TEC and Art. 34.2. lit. b) TUE did not remain undetected. The ECJ (16.6.05 - Rs.C-105/03) recently approved that in its Pupino decision, stating that Member States are obligated to interpret union-conform also when framework decisions are concerned. Exceptions can only be made if the requested union-conform interpretation results in contradiction of the national law (\textit{contra legem} statement). Second, exceptions can be done if it results in penal law, not yet provided by the Member State\textsuperscript{422}. This ECJ decision has been overly criticised in Germany. The legal majority does not yet favour its consequences. The significant difference between Art. 249.2. TEC and Art. 34.2. lit. b) TUE lies in the addition of the wording “not directly entitling or binding” in Art. 34.2. lit. b) TUE. Nevertheless, the duty to also interpret union conform to third pillar European Union enactments, as set by the ECJ, leads to just this. Herewith, the ECJ indirectly creates “through its back door partial harmonization impermissibly stretching the law”\textsuperscript{423}.

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

ECJ decisions influence national jurisdiction especially in ‘crossing-border cases’\textsuperscript{424}. In stating its general procedural guaranties, the ECJ regularly affirms the already existing standard of guaranties in Germany.

Looking at Pupino shows that, indeed, the impact of ECJ statements is controversy discussed throughout Germany’s legal scholarship and literature. Nevertheless, also in Germany one will lean on the contents of framework decisions to interpret German national law. This is on bases of Pupino and to fulfil the goals of framework decisions as to its best\textsuperscript{425}. The German Federal High Court of

\textsuperscript{419} BVerfGE 73, 339 ff.
\textsuperscript{420} B. \textit{Hecker}, Europäisches Strafrecht, 1.A., 2005, § 10 Rn 1 (S. 327) m.w.N.
\textsuperscript{421} B. \textit{Hecker} (suprnote 414) § 10 Rn 2 (S. 327).
\textsuperscript{422} Vgl. EuGH v. 16.6.05-Rs.C-105/03 (Pupino) in JZ 2005, S. 838 f.
\textsuperscript{423} Cf. \textit{Hillgruber} criticizing EuGH v. 16.6.05-Rs.C-105/03 (Pupino) in \textit{Anmerkung}, JZ 2005, S. 838 ff.
\textsuperscript{424} e.g. Brügge EuZW 2003, 214.
the Constitution confirmed these conclusions already in a case concerning a German request for a European Arrest Warrant extraditing a Danish citizen from Spain to Germany. The Federal High Constitutional Court explicitly stated herein that German authorities were acting correctly based upon the European Arrest Warrant Framework Decision and as a result of European-conform interpretation, even though the German European Arrest Warrant law was nullified at that time. The court reasoned that other European Member States cannot have to bear the burden of Germany’s difficulties enacting a constitutional law.

Fulfilling herewith outspoken obligations to interpret framework decisions European-conform or even apply them directly will result in remarkable “Europeanization” on the one hand and speed up national ratification processes on the other hand. This is especially true for substantive and procedural criminal law, as this part of the law is, if at all questioned by European Union entities, mostly dealt within framework decisions. To ensure their own legal systems national legislators and authorities will always tend to apply their own national statutes and laws rather than to interpret or apply European Union laws.

e. Is the 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?

National law, which implements European framework decisions, is interpreted in sight of German national and especially German constitutional law, not just solely referring to a certain framework decision and its wording or content. Yet, the aims of those framework decisions are taken into account.

As an example, the herein questioned matter of the German national statute on the European Arrest Warrant was declared nullified by the German Federal High Court of the Constitution (BVerfG), because it contradicted German constitutional law and thus did not meet the standards as set by the German Basic Law. However, the ECJ decision Pupino and the German BVerfG decision on the extradition of a Danish citizen from Spain to Germany make clear that German national authorities will have to base their decisions and their acting on applicable European framework decisions. This is especially of effect if the framework decision allows a European conform solution while national laws lack implementation. According to the German BVerfG decision, this is true as far as and as long as the European framework decision concerned does not contradict German constitutional law. However, these decisions and developments do not allow simply and solely

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426 BVerfG, Bundesverfassungsgericht.

427 BVerfG BvR 1667/05 v. 24th November 2005; www.bundesverfassungsgericht.de/entscheidungen/.

428 Cf. affirming Tinkl, criticism to EuGH v. 16.6.05 C-105/03 (Pupino) in StV 2006, S. 36 etseq.


431 Cf. supranote 421.

432 Cf. decision of the German Federal High Court of the Constitution, as in supranote 421. The court stated explicitly on the matter of the nullified implemented European Arrest Warrant law, that the court in nullifying the law had not questioned the constitutionality of the European Arrest Warrant Framework Decision. Thus, German authorities had to interpret European-conform and had to base their extraditing decision directly on standard forms as provided in Art. 8 of the European Arrest Warrant Framework Decision and to use those ways of transmissions as they are provided in Art. 9 and 10 of the Framework Decision. This is in order to simplify the work of the Member States.
referring to provisions of framework decisions when deciding on punishability or criminal prosecution. A sole reference does not meet the German constitutional principle requiring a “law” when interfering with civil rights of the people.

As a result, German national statutes, which implement European law, have to be interpreted European-conform and according to the standards provided by the German constitution. Third pillar European framework decisions, however, will have to be questioned directly, if national law lacks implementation and if this lack is only due to national reasons and not to the fact that the framework decision itself contradicts national constitutional law. One has to be apprehensive that European framework decisions will be used as domestic laws.

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

For Germany, Art. 35 TUE and those provisions concerning proceedings for preliminary ECJ-rulings were implemented into the German European Court of Justice Statute (EuGHG, Gesetz zum europäischen Gerichtshof).

Every national court is entitled to issue questions to the ECJ concerning validity and interpretation of framework decisions and EU-decisions, concerning interpretation of conventions established under TUE and concerning validity and interpretation of the measures implementing them. National courts or tribunals may request ECJ’s preliminary ruling in those matters, if the national court considers that a ECJ decision on the case pending before it is necessary to enable the national court to give judgement, § 1.1. EuGHG. National courts have to request such ECJ preliminary ruling if there is no judicial remedy under national law, § 1.2. EuGHG.

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?

Germany implemented the Framework Decision on the European Arrest Warrant in the form of a statute. This European Arrest Warrant Statute (EuHbG, Europäisches Haftbefehlsgesetz) entered into force on 2nd August, 2006. It is the second statute to ratify the Framework Decision in Germany. The first EuHbG had been declared nullified by the German BVerfG for reasons of its unconstitutionality in particular. However, the statute did not enter into force as a separate law, but rather provisions amended the Act on International Assistance in Criminal Matters (IRG, Gesetz

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433 So called ‘Gesetzesvorbehalt’ (proviso of legality). The BVerfG decision (supranote 421) underlines that.

434 EuGHG, Act conferring the presentation to the European Court of Justice for preliminary ruling in the field of police and judicial cooperation in criminal matters according to Article 35 TUE 6th August 1998 (BGBl. I 1998, 2035), enforced since 1st May 1999.


436 According to Art. 35.3a and Art. 35.3b TUE.

437 EuHbG v. 20.7.2006, BGBl. I 1721.

438 EuHbG v. 21.7.04, BGBl. I 1748.

This is due to the German system of laws, which tries to include new forms of legal action into already existing forms, types or measures. Thus, the extradition on the basis of European Arrest Warrants is seen as a specific form of International extradition between Member States of the EU.

h. Was the law implementing the Framework Decision and the Framework Decision itself subject of proceedings of the constitutional court in your country?

The first German statute to implement the EU Framework Decision, the EuHbG from 21st July, 2004, indeed was subject of proceedings questioning its constitutionality. On 18th July 2005, the German Federal High Court of the Constitution declared that the law was null and void. As a part of the decision on the implemented law, the BVerfG stated that, as far as it is authorized and competent, the Framework Decision itself does not contradict German constitutional rights and law. The Federal High Court of the Constitution even confirmed this statement within a later decision.

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

The surrender procedure according to the European Arrest Warrant is understood as a specific form of international extradition. This becomes evident because of the implementation of the German EuHbG into the German IRG as a specific procedural form of International extradition, Chapter 8 of the IRG. The basic rules of extradition proceedings, especially the German “Bewilligungsverfahren” (proceeding for approval) were not changed.

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

a. Are there any 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 (compulsory and optional) of surrender?

The German EuHbfG tries to comply with the provisions of the Framework Decision to the most possible extent. This especially applies to the compulsory and optional negative premises of surrender, as stated in §§ 80–83, 83 b German IRG. Basically, compulsory reasons to deny a European Arrest Warrant (Art. 3 FD) are to be found in §§ 80–83 German IRG, optional reasons (Art. 4 FD) are to be found in § 83 b German IRG. The compulsory reasons to deny a European Arrest Warrant according to Art. 3 No. 2 and 3 FD are to be found in § 83 No. 1 and 2 IRG (extradition of Germans). At the same time, the guarantees that have to be granted according to Art. 5 FD were implemented in § 83 No. 3 and 4 IRG.

The system of the German statute thus differs between general compulsory reasons to deny European Arrest Warrants (§§ 81–83 IRG), specific reasons to deny only conferring to German

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440 IRG (Act on International Assistance in Criminal Matters), BGBl. I (2005), 1537.
442 Cf. supranote 421.
443 European Arrest Warrant Act, cf. supranote.
444 Act on International Assistance in Criminal Matters, cf. supranote 52.
445 Cf. supranote 431.
citizens (§ 80 IRG)\textsuperscript{446}, and reasons to deny approval, where the administrative body, the office for prosecution, has discretion (Ermessen) to decide whether to grant. The optional reasons to deny an extradition according to Art. 4 FD are subject of § 80.1 No.2, 3 IRG (for German citizens) and especially subject of § 83 b IRG. § 83 b IRG is concerned with the facultative (“can-do”) reasons to deny approval within the proceeding for approval (Bewilligungsverfahren). § 83 b.1a–c. IRG equals Art. 4 No. 2, 3, 5 FD.

Solely, the possibility to deny approval according to § 83 b IRG is not provided by Art. 4 FD. Herein approval can be denied if the requesting Member State cannot guarantee that it will itself act in accordance to the Framework Decision and to the provisions on the European Arrest Warrant. Further, approval can be denied, if expectations are that the requesting Member State will not allow an extradition according to the Framework Decision itself in a case similar to the request. The administrative body, which has authority to deny approval, arrives at a reasoned decision exercising its dutiful discretion even regards into account foreign affairs.

- 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 new § 81 No. 4 IRG (according to the 2. EuHbfG\textsuperscript{447}) refers directly to the catalogue of crimes as provided by Art. 2.2 FD. As provided in Art. 2.2 FD, § 81 No. 4 IRG exempts from proving the punishability in both the requesting and the executing Member State, if the request is based upon a European Arrest Warrant and refers to one of the catalogue crimes of Art. 2.2. FD. All these “crimes” are criminalised in Germany. Nevertheless, a few terms used by the framework decision are not to be found within the German substantive criminal law. This is due to the German specific system in its criminal law. For example, searching the substantive criminal law one will not find the wording “Cyberkriminalität” (cyber crimes) as it is used by the official translation of the European Arrest Warrant Framework Decision, which does not mean that cyber crimes are not punishable.

Staying with the wordings of the Framework Decision:
- participation in a criminal organisation is punishable according to § 129 German Substantive Criminal Code (StGB, Strafgesetzbuch),
- terrorism according to § 129a StGB,
- trafficking in human beings according to § 239 a, b StGB,
- sexual exploitation of children and child pornography according to § 174 etseq. StGB,
- illicit trafficking in narcotic drugs and psychotropic substances according to § 29 etseq. German Narcotic and Drug Law (BtMG, Betäubungsmittelgesetz),
- illicit trafficking in weapons, munitions and explosives according to § 51, 52 firearms law (WaffG, Waffengesetz),
- corruption according to §§ 297 etseq., 331 etseq. StGB,
- fraud (including affecting the financial interest of the EU) according to §§ 152 a, 152 b, 242 etseq., 246, 267 etseq., 259 etseq., 263, 263a, 266 b StGB,
- laundering the proceeds of crime according to § 261 StGB,

\textsuperscript{446} This is especially due to the decision of the German Federal High Court of the Constitution nullifying the 1.EuHbG for reasons of contracting with German civil rights of not being extradited as a German citizen (Article 16 German Constitution), cf. supranote 44 for references to the BVerfG decision.

\textsuperscript{447} Cf. supranote 431.
– counterfeiting currency according to §§ 146-148, 151 StGB,
– computer-related crime (Cyberkriminalität) according to § 303 a, 303 b StGB, see also §§ 263, 263 a, 266 b, 242, 246, 202 a, 269, 270, 271.1 StGB,
– environmental crime according to §§ 324, 324 a, 325, 330, 330 a StGB,
– facilitation of unauthorised entry and residence according to §§ 92, 92 a, 92 b Alien Law (Ausländergesetz),
– murder according to § 211 StGB, grievous bodily injury according to §§ 224 et sequ. StGB,
– illicit trade in human organs and tissue according to §§ 18, 19 Transplantation Act (TPG, Transplantationsgesetz),
– kidnapping, illegal restraint and hostage-taking according to §§ 239-239 b StGB,
– racism and xenophobia according to §§ 130, 185 et sequ., 86 et sequ. StGB,
– organised or armed robbery according to §§ 249, 250 StGB,
– illicit trafficking in cultural goods, including antiques and works of art, according to §§ 242, 243.1. No. 3-5 and 259 StGB,
– swindling according to §§ 263 et sequ. StGB,
– racketeering and extortion according to §§ 253 et sequ. StGB,
– counterfeiting and piracy of products according to §§ 106 et sequ. Intellectual Property Act (UrhG, Urheberrechtsgesetz),
– forgery of administrative documents and trafficking therein according to §§ 267 et sequ., 267.3 No. 1-3 StGB,
– forgery of means of payment according to § 263 a StGB,
– illicit trafficking in hormonal substances and other growth promoters according to §§ 95 et sequ., 6, 6 a Law on the Trade in Drugs (AMG, Arzneimittelgesetz),
– illicit trafficking in nuclear or radioactive materials according to § 326 StGB,
– trafficking in stolen vehicles according to § 259 StGB,
– rape according to §§ 177 et sequ. StGB,
– arson according to §§ 306, 306 a et sequ. StGB,
– crimes within the jurisdiction of the International Criminal Court according to the German Code of Crimes against International Law (VStGB, Völkerstrafgesetzbuch),
– unlawful seizure of aircraft/ships according to §§ 316 c, 316 b, 315 a, 315 b, 239 a, 239 b, 125 a, 126, 129 a, 211, 127, 310 StGB,

and

– sabotage according to §§ 303, 303 b, 304, 305 StGB.

Thus, a lack of criminality cannot be perceived.

– the period of time for execution of the EAW?

The time periods were exactly extracted from the framework decision, conferring Art. 17 FD and § 83 e IRG.

– other issues; please specify

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A special characteristic of German law is the so-called “two step procedure” of legal admissibility and proceeding for approval (Bewilligungsverfahren). The regional appeal court is competent to decide whether a European Arrest Warrant is legally admissible. The office for prosecution is competent to approve European Arrest Warrants. For that proceeding the prosecutor is given discretion to be dealt with as in duty bound. The ‘proceeding for approval’ was historically developed as for custody and extradition cases according to §§ 12, 13, 32 etseq. IRG. It now also applies to the specific form of extradition based upon European Arrest Warrants, § 78 IRG. It has its difficulties especially from an international aspect. However, it is traditionally based on the historical division of competence between the office for prosecution and the judges and courts in Germany. According to the Federal High Constitutional Court’s decision on the First European Arrest Warrant Act \textsuperscript{449}, the prosecutor’s decision on approving a European Arrest Warrant needs to be revisable. This is due to Art. 19.4. German Basic Law, which requires open recourse to law if decisions possibly interfere with constitutional rights.

As a result and according to Germany’s Second European Arrest Warrant Act, the approving authorities (prosecutors) decide beforehand, § 79.2 IRG. This is in order to guarantee the greatest possible extent of legal security and alongside still allow a speedy procedure without questioning the traditional division of admitting judge and approving prosecutor itself. Thus, now prosecutors inform judges about possible reasons to deny approval of a European Arrest Warrant together with their motion to decide upon admissibility of the warrant before the court decides\textsuperscript{450}. This procedure very well serves the prosecuted person’s interest. It guarantees greater legal protection, a speedy proceeding and may even avoid extradition custody. At the same time it serves the strict timetable set by the European Arrest Warrant Framework Decision.

b. Can a 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)?

For crimes listed within Art. 2.2. FD proving of dual criminality is exempted according to § 81 No. 4 IRG. § 80.2. No. 3 IRG applies, if a Member State’s request to extradite confers to other crimes than listed in Art. 2.2. FD. It states that in cases of requesting the extradition conferring to a non-catalogue crime the dual criminality has to be examined. Herewith Germany made use of Art. 4 No. 1 FD and the possibility herein to provide a rule of examining dual criminality in cases referring to non-catalogue crimes. This applies in cases extraditing German citizens according to § 80.2. No. 3 IRG and in cases extraditing aliens according to §§ 83b.2.a., 80.2. No. 3 IRG.

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)?

Germany did not respond to Art. 27.1. FD, as according to the documents of the Council of Europe No. 12510/04, Sept. 23\textsuperscript{rd} September 2004 (COPEN 108 EJN 60 EUROJUST 77, including explanations to notifications) and No. 12180/04, 8\textsuperscript{th} September 2004 (COPEN 103 EJN 57 EUROJUST 74), which do not include any notification to that matter.

\textsuperscript{449} See supranote 44.

\textsuperscript{450} According to the traditional ‘proceeding of approval’ (Bewilligungsverfahren), prosecutors first asked for admission, while reasons to deny were proven within a second step, after the court had already decided on admissibility. The new modification is similar to a proceeding used in Portugal. For a very detailed and critical view on this specific kind of proceeding, already at that early point suggesting what German legislation later indeed decided for, see Lagodny (supranote 421), StV 2005, pp. 515–519.
d. Did your country appoint a central authority (Art. 7 FD)? If so, which one? What are the scope and tasks it is supposed to perform and its practical meaning?

Germany, however, did not appoint a central authority body competent for the entire German State as suggested by Art. 7 FD.

According to its federal structure, Germany appointed the regional appeal courts (OLG, Oberlandesgerichte) in each of the German states (Länder) to be competent. From the viewpoint of the German Länder the Oberlandesgerichte are the highest judicial authorities in each of the states. They are traditionally responsible for questions of international assistance in criminal matters (Internationale Rechtshilfe). Thus, a certain amount of centralisation may be perceived herewith. While indeed it would have been possible to appoint one central authority for the German State on its federal level, still it would have been hard to realize that. Especially since the judiciary system is organized by the Länder. Additionally, the Oberlandesgerichte in each of the Länder are the highest courts in Germany with competence to negotiate cases by their facts (Tatsacheninstanz). The Federal High Court, Criminal Section, is not given the function to take evidence, but rather to decide solely legal matter appeals.

According to the official information from 23rd September 2004, performed by the German delegation assigned for dealing with the European Arrest Warrant in Germany and referring to Art. 6.3. FD, the competent authorities in Germany are the judicial bodies of the States and of the Federation. The judicial bodies of the Länder delegate the competence to issue European Arrest Warrants to the offices for prosecution, installed at the regional courts (Landgerichte), for those are responsible for investigation. They delegate the competence to approve European Arrest Warrants to the offices for prosecution, installed at the regional appeal courts (Oberlandesgerichte). This makes sense especially since the Oberlandesgerichte itself are competent for the decision on admissibility of European Arrest Warrants.

6.3. 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?

“Identity of an act” means the criminal action as a technical term according to § 264 German Criminal Procedural Code (StPO, Strafprozeßordnung). The criminal action includes all herewith committed crimes; in other words all offences to which the elements were fulfilled. This is called criminal action in procedural sense. According to its official definition, it means the deeds impeached by the prosecution, i.e. the consistent actions with all herein included offences committed by the prosecution, i.e. the consistent actions with all herein included offences committed by the prosecution. This makes sense especially since the Oberlandesgerichte itself are competent for the decision on admissibility of European Arrest Warrants.

To clarify, the wording does not mean just the criminal offence of the foreign criminal law.

\[451\text{Cf. document of the Council of Europe No. 12510/04.}\]

\[452\text{Handlung im prozessualen Sinn.}\]

\[453\text{Cf. Schomburg/Lagodny/Gless/Hackner § 3 Rn 6; BGH St 27, 168, 172 [continuous jurisdiction].}\]

\[454\text{”derselben Tat“.}\]
b. Is the valid judgement/conviction/discontinuance of the procedure in your country a mandatory ground for non-execution of the EAW?

§ 9 IRG provides a general obligatory rule of inadmissibility of an extradition, if already a valid judgement or conviction, respectively a decision of comparable validity or a decision of discontinuance of the procedure, either in rejecting the indictment (§ 174 StPO) or the opening of the main proceeding (§ 204 StPO), or adjustment (§ 153 a StPO) exists or if rules of limitation apply.

According to §§ 1.4., 78 IRG provisions of Chapter 8 of the IRG supersede its general rules. Additionally, Chapter 8 § 82 IRG declares that some of the Chapter 1–7 provisions are non-applicable in cases of European Arrest Warrants. However, § 82 IRG does not exclude § 9 IRG. At the same time § 78 IRG opens the provisions of Chapter 8 to the general rules of the IRG for additional application, if Chapter 8 does not provide an own specific rule. Thus, § 9 IRG can be applied herein and function as a mandatory ground for non-executing a European Arrest Warrant.

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

If identity of the act applies, the prosecuted person cannot be extradited, if a valid judgement of another Member State exists and this judgement was already or is being executed or if this judgement cannot be executed at all (§ 83 No. 1 IRG). Therefore, solely the existence of a valid judgement does not hinder the extradition of European Arrest Warrants. Extradition may take place in order to execute a judgement.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 CISA in your country?

– Is such a disposal the valid decision on discontinuance of the criminal process because of its legal inadmissibility?

The official German translation of Art. 54 SDÜ reads: “Wer durch eine Vertragspartei rechtskräftig abgeurteilt worden ist, darf durch eine andere Vertragspartei wegen derselben Tat nicht verfolgt werden, vorausgesetzt, dass im Fall einer Verurteilung die Sanktion bereits vollstreckt worden ist, gerade vollstreckt wird oder nach dem Recht des Urteilsstaats nicht mehr vollstreckt werden kann”.

This official translation uses the term Aburteilung (conviction), which indeed caused discussion whether and how to interpret it. Meanwhile, the term is read as Verurteilung (sentence). Still, the interpretation of its content is subject to a heated debate, which outcome is hard to predict.

Using teleological and systematical interpretation and taking into account the often unfamiliar wordings of the German language, legal scholarship and jurisprudence tends to interpret the wording rechtskräftige Aburteilung as all decisions, which adjust or otherwise close the proceeding and produce validity, which results in a consumption of the indictment in the state of original prosecution. This includes the Belgic/Netherlands transactie as well as the Austrian acknowledgement of guilt.

– Is such a disposal a valid decision on discontinuance of the criminal process because of lack of advisability of prosecution?
6. Germany

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

Two important decisions took place: The “Brügge” decision of the Federal High Court, Criminal Division (BGH St)\(^{455}\) and the decision of the Federal High Constitutional Court (BverfG) declaring the First European Arrest Warrant Act (EuHbG) for unconstitutional and nullified\(^{456}\).

6.4. The issuing of the EAW

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

According to the Second European Arrest Warrant Act (EuHbfG)\(^{457}\), the offices for prosecution installed at the regional courts issue European Arrest Warrants based upon national judicial arrest warrants according to § 114 StPO. If the request for extradition was issued as a European Arrest Warrant, it substitutes the national judicial arrest warrant according to Art. 12.2a. European Convention on Assistance in Criminal Matters. Additionally, the European Arrest Warrant is the basis on which tracing is conducted according to the Schengen Information System (SIS).

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?

In Germany prosecutors at the offices for prosecution have competence to issue European Arrest Warrants. According to an agreement between the German Federation and the constituent States of Germany (Bundesländer) the basically competent judicial bodies of the Bundesländer delegated the competence to issue European Arrest Warrants to the offices for prosecution, installed at the regional courts (Landgerichte)\(^{458}\), for those are responsible for investigation\(^{459}\). The prosecutor issues European Arrest Warrants in completing the official European Arrest Warrant forms *ex officio*, but based upon the existing domestic judicial arrest warrant.

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\(^{455}\) Decided before the case went to the ECJ. Cf. ECJ decision 2-11-2003 - C-187/01 and C-385/01 Gözütok and Brügge, JZ 6/2003, 303.

\(^{456}\) Cf. supranote 44. To this subject see as well ECJ NJW 2003, 1173 regarding the applicability of § 153a dStPO and BayOLG StV 2001, 263 regarding Austria.

\(^{457}\) Supranote.

\(^{458}\) The German Court system consists of local courts (Amtsgerichte), installed at almost each town, of regional courts (Landgerichte), installed as first and second level courts, which also review local court decisions and which are installed in all regions or districts. Additionally, regional appeal courts (Oberlandesgerichte) functioning as the highest courts of the German states, reviewing decisions by lower courts but also deciding on a first level in severe cases (also called Higher District Courts), and Federal High Courts of Justice (Bundesgerichtshöfe) functioning as appeal courts on lower courts decisions of all German states. Herein the terms regional court and Landgericht and regional appeal court for Oberlandesgericht are preferred, mainly because the terms district and high district courts can be very misleading. In many areas of Germany only one local court is installed for a whole district. Also, the term high district court does not necessarily include the imagination of being the highest court within the court system of a German state. The terms local, regional, and regional appeal court do not function perfectly, but seem of better help in understanding the difficult terming. Indeed not translating the terms at all and thus not confronting them with their original English meaning would be best.

\(^{459}\) As assigned by the German delegation dealing with the EAW in Germany in reference to Art. 6.3. FD, document of the Council of Europe No. 12510/04.
c. If a court is entitled to issue the EAW – of what rank and panel?

Since the European Arrest Warrant is issued ex officio, but based upon the domestic judicial arrest warrant in Germany (§ 114 StPO460), the presumptions to issue are those required for domestic judicial arrest warrants. This means, the investigative magistrate (Ermittlungsrichter) at the local court461 has jurisdiction over the subject, which is brought to him by motion of the office for prosecution. Exceptionally, in cases concerning the state security, the investigative magistrate at the regional appeal court (Oberlandesgericht) or at the Federal High Court, Criminal Division, (BGHSt, Bundesgerichtshof in Strafsachen) has jurisdiction (§ 169 StPO). The juvenile judge decides in juvenile cases (§ 34.1. JGG462). Nevertheless, regardless of which court in specific has jurisdiction over the matter, always one judge (and not a chamber) at this court solely decides on the domestic judicial arrest warrant.

As a result, the European Arrest Warrant itself issued by the prosecutor is an outgoing request for extradition.

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

Since the EAW is issued by the prosecution ex officio based upon the investigative magistrate reasoned decision to issue a domestic judicial arrest warrant, the parties or other persons involved do not participate in issuing the EAW. They may participate according to the proceedings in issuing and executing domestic judicial arrest warrants according to §§ 114 etseq. StPO, as relatives have to be informed (§ 114 b StPO) and the suspect has to be brought to the magistrate after arrested (§ 115 StPO).

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

To issue an arrest warrant the requirements of § 114 StPO have to be met. § 114.2. No. 4 StPO requires that in all cases (unless national security is thereby endangered) all facts disclosing the strong suspicion of the commission of the offence and the ground for arrest have to be presented to court. The investigative magistrate has to consider these facts and to decide whether facts and presented evidence can show strong suspicion of the commission of the offence. However, the investigative magistrate is not taking the evidence (like hearing witnesses) or considering the evidence itself before issuing an arrest warrant. This is because the investigative magistrate does not have to prove whether the suspect actually committed the crime, but rather whether there is a strong suspicion at the same time as formal requirements are fulfilled to arrest the suspect.

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460 § 114 StPO (German Criminal Procedural Code): [Warrant of Arrest]: (1) Remand detention shall be imposed by the judge in a written warrant of arrest. (2) The warrant of arrest shall indicate: 1. the accused; 2. the offence of which he is strongly suspected, the time and place of its commission, the statutory elements of the criminal offence and the penal provisions to be applied; 3. the ground for arrest, as well as 4. the facts disclosing the strong suspicion of the offence and the ground for arrest, unless national security is thereby endangered. (3) If it appears that Section 112 subsec. 1, second sentence is applicable, or if the accused invokes that provision, the grounds for not applying it shall be stated.

461 Also translated as summary judge or committing magistrate, it is a judge who is appointed by the allocation of duties to have jurisdiction in judicial questions of preliminary criminal investigation.

462 JGG = German Juvenile Courts Act.
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?

The decisions of the competent judicial authority itself cannot be made subject of any legal remedy\(^{463}\). However, the party has the right to appeal against the investigative magistrate’s decision upon which the issuance of the European Arrest Warrant was based. The German legal remedy within this case is a complaint for relief from pre-trial detention (§ 117 StPO).

If the prosecution, motion to issue or expand a European Arrest Warrant was denied by the investigative magistrate, the prosecutor can file a complaint according to § 304 StPO and a further complaint according to § 310.1. StPO.

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

Regarding incoming extradition requests, Art. 32 FD provides that any Member State of the European Union may give declaration to the Council of the European Union that it will execute extradition requests of other Member States before a certain determined effective date according to the rules, which were applied before the FD had gone into effect (such as before 1st January 2004).

This wording implies that Art. 32 FD only forbids to retroactively apply the provisions on the European Arrest Warrants if the executing Member State gave a compliant declaration. Germany did not submit such a declaration. Therefore the provisions concerning European Arrest Warrants do apply without any time restriction as long as Germany is affected as an executing Member State\(^{464}\).

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

In 2004 about 1300 European Arrest Warrants were granted in Germany according to an official document of the Council of the European Union of 9th March 2005\(^{465}\).

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

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

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

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

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

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

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\(^{464}\) Cf. supranote 457.

I. 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?

The prosecutor has an access to all domestic, European and International information channels when issuing a European Arrest Warrant (SIS, EJN, Europol, Inpol\textsuperscript{466}, etc.). The exact place of suspect’s residence does not have to be known in order to issue a European Arrest Warrant, already according to Art. 8 FD. The European Arrest Warrant is the basis for searching the suspect within the Schengen Information System (SIS), according to Art. 95 Schengen Agreement (SDÜ, \textit{Schengener Durchführungsübereinkommen}) and Art. 9 FD\textsuperscript{467}.

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

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

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

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

6.5. Executing of the European Arrest Warrant

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

The execution of the European Arrest Warrant focuses on incoming requests:

Only the State Attorney General\textsuperscript{468} is empowered to grant a European Arrest Warrant. His competence is to be traced back to the respective constituent state (\textit{Bundesland}) and, furthermore, by virtue of consent to the Federal Republic of Germany. Germany has declared that the powers to decide on incoming requests shall be brought forward to the State Attorney General as a general rule.

The Federation and the constituent states (\textit{Bundesländer}) have made an arrangement on that competence on 28\textsuperscript{th} April 2004. Therein, the performance of the granting authority is stipulated as being delegated to the \textit{Bundesländer}. The ruling of the Federal High Constitutional Court on the First European Arrest Warrant Act did not touch that competence agreement. The constituent states themselves transferred the granting authority to their State Attorney Generals. Independent from the nullification declared by the Federal High Constitutional Court, this transfer is leaving § 12 IRG untouched. Thereafter, except in the case of § 41 IRG (the so-called consented “fast track” proceedings) an extradition may only be granted if the court has held it being admis-

\textsuperscript{466} Inpol (\textit{Informationssystem der Polizei}) is the Information system for the German Police.

\textsuperscript{467} Cf. especially to the difficulties \textit{Schomburg/Lagodny/Gleß/Hackner}, Internationale Rechtshilfe in Strafsachen, 4. Aufl. 2006, before § 78 IRG MN. 10.

\textsuperscript{468} State Attorney General (Generalstaatsanwalt) is the prosecutor employed at the office for prosecution, which is installed at the regional appeal courts (\textit{Oberlandesgerichte}). Since \textit{Oberlandesgerichte} represent the highest jurisdictional body in each of the German Länder, the prosecutor at this court is translated as \textit{State Attorney General}. 
sible. Therewith, it is certain that even in case of the European Arrest Warrant the State Attorney General files the motion to execute the European Arrest Warrant and, as far as the suspect does not agree on the “fast track” proceedings, the Regional Appeal Court (Oberlandesgericht) has to decide on its admissibility.

Recapitulatory, the State Attorney General acts as the authority which is executing the European Arrest Warrant. In doing so, he may only grant its execution and the extradition respectively, if the Regional Appeal Court has declared it being admissible (cf. § 12 IRG). Since the Second German European Arrest Warrant Act is enforced, the waiver of the Regional Appeal Court’s decision on admissibility according to § 41 IRG applies to both foreign nationals (aliens) and Germans. By virtue of § 13.2. IRG the State Attorney General carries out the granted extradition.

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?

The decision to execute a European Arrest Warrant is made by the State Attorney General, who at the same time is the granting authority. The granting, however, is dependent on the approval by the Regional Appeal Court except in the cases of § 41 IRG. The Regional Appeal Court holds authority to review the domestic empowerment (the admissibility). In contrast the question, whether there is a duty to extradite being set by public International law, is to be answered by the granting authority (the State Attorney General) on its own competence. The Regional Appeal Court must examine the entire substantive legal situation of the defendant, both extensively and concludingly. This means that no legal guarantee of the wanted person might be examined by the granting authority single-handedly.

In § 79.2. IRG new, according to the Second European Arrest Warrant Act, further ways of legal protection are provided. Accordingly, the State Attorney General has to point out whether he or she intends to claim hindrances to the granting (§ 83b IRG new) in his or her reasons to extradite the defendant. This results in an anticipation of the granting decision prior to the Regional Appeal Court’s decision on admissibility. Because the motion of the granting authority not to claim hindrances to the granting in his or her later decision is being examined judicially within the proceedings on admissibility. The change in provision is justified in the law-making sources and material, for that way the courts do not have to deal with the same process repeatedly or even in several judicial cognizances. Additionally, a prolongation of the length of the extradition proceedings is avoided by the intended regulation. Ultimately, this means that the decision of the granting authority, presumably not to claim hindrances to the granting, will be submitted to and decided by the Regional Appeal Court in a body with the application to decide on admissibility of extradition. Thus, the decision is open to legal recourse as the Federal High Constitutional Court demanded.

469 This change of § 41 IRG was not demanded by the Federal High Constitutional Court but was due to requirements of the European Arrest Warrant Framework Decision to speed up proceedings of extradition between the Member States of the EU. According to the former version of § 41 IRG the Higher Regional Court’s decision on admissibility was indispensable for German nationals even if they agreed on the extradition.

470 See answer to question 5a for explanation.
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?

Both the void First German European Arrest Warrant Act (in its § 83 c)\textsuperscript{471}, as well as the Second European Arrest Warrant Act (also in § 83 c \textit{IRG new}) determine that it has to be decided on the extradition at the latest within 60 days after the defendant had been arrested.

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

As granting of extradition is dependent on the decision on admissibility by the Regional Appeal Court\textsuperscript{472}, the Regional Appeal Court even in the proceedings on the admissibility of extradition takes and performs evidence. This follows § 30 IRG which reads as follows:

\textbf{§ 30 IRG: Preparing the Decision}

(1) If the extradition documents do not suffice for making a judgment on the granting of the extradition, the Regional Appeal Court shall render a decision only after the requesting state has been given an opportunity to submit additional documents. A deadline for the submission of these documents may be set.

(2) The Regional Appeal Court may examine the accused. It may take other evidence regarding the admissibility of extradition. In the case of § 10.2., the taking of evidence regarding the admissibility of extradition shall also extend as to whether the accused appears to be under sufficient suspicion of the offence with which he is charged. The Regional Appeal Court shall determine the manner and extent of the taking of evidence without being bound by prior applications, waivers or decisions.

(3) The Regional Appeal Court may hold an oral hearing.

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

Neither the First nor the Second European Arrest Warrant Act provide for a regulation. § 83b lit. c \textit{IRG new} solely assigns for a hindrance to the granting, when a third state’s request for extradition shall be prioritised. Thus, it remains with the European-conform and Framework Decision-compliant interpretation and application of Art. 16 FD.

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

Both the obsolete void regulation, as well as the Second European Arrest Warrant Act provide for an overriding character of the specific regulations on the European Arrest Warrant at the expense of the general rules of the IRG. The specific rules on European Arrest Warrants had been laid down in the eighth part of the law on International Assistance in Criminal Matters, §§ 78-86 \textit{IRG}. The Second European Arrest Warrant Act stuck to that arrangement and the according sections.

\textsuperscript{471} Cf. supranote 432.

\textsuperscript{472} Except to the cases of § 41 \textit{IRG} as explained above within the answer to question 5a.
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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

In the German legal system, the European Arrest Warrant complies with the request for extradition. But with both, a request for extradition or a European Arrest Warrant, the basis for arresting the suspect prior to extradition is not yet given. Accordingly, the arrest prior to extradition is ordered by the Regional Appeal Court (§ 15 IRG). This decision is prepared by the State Attorney General (§ 13.2 IRG). As a consequence, the State Attorney General has to file an accordant application.

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

There is no legal regulation on the maximum period of arrest in extradition proceedings. Though, § 26.1. IRG requires an examination of the detention (Haftprüfung) every two month by the Regional Appeal Court. However, Chapter 8 of the IRG provides specific rules in cases of European Arrest Warrants due to the European Arrest Warrant Framework Decision. These specific rules do not terminate the term of arrest but require the authorities to react within certain time periods after the suspect is being arrested.

§ 83c.1. IRG, which has already been inserted due to the First European Arrest Warrant Act, only determines that the decision on extradition ought to be reached at the latest within 60 days after the suspect was arrested. § 83c.3. IRG assigns for the transfer date being at the latest within 10 days after the granting decision. Exceptions to those time limits are also laid down in § 83c.3. IRG. If the suspect affirmed to the “fast track” proceedings, the decision on extradition has to be reached within 10 days, § 83c.2. IRG. If, however, the decision cannot be reached within the time limits as set by § 83c.1-3. IRG, the German Government has to inform Eurojust of that circumstance and of reasons for the non-decision, § 83c.4. IRG. Finally § 83d IRG provides that the suspect has to be released from arrest, if the transfer to the requesting Member State has failed within 10 days after the assigned transfer date and if authorities were not able to agree on a new transfer date.

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

The German system of extradition adopts a two-stage scheme. Granting of extraditions is incumbent on the State Attorney General. This decision, however, is dependent on the approval of the Regional Appeal Court.

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

There is no right to presence in the granting proceedings on extradition by the State Attorney General.

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473 Cf. supranote 432.
474 § 41 IRG, see answer to question 5a for a detailed explanation of this kind of proceeding.
475 The suspect’s agreement to the so-called “fast-track” proceedings (§ 41 IRG) is the only way to abandon the approval of the Regional Appeal Court (see answer to question 5a for details on this proceeding).
Chapter III. Country reports

The Regional Appeal Court, however, may order an oral hearing according to § 30.3. IRG. The court has to give notice of time and place of such hearing to the State Attorney General’s office, to the defendant, and to the defendant’s counsel. In the hearing, a representative of the State Attorney General’s office must be present. The defendant has to be summoned when being imprisoned, unless he has waived his right to presence or there are other opposing obstacles. As far as he is not summoned for the hearing, his legal counsel (§ 40 IRG) has to attend to serve his interests in the hearing. As far as the defendant is not yet legally represented, a defence attorney must be appointed in the oral hearing to serve as legal counsel for him. In the oral hearing, the present parties must be heard and their statements must be minuted, § 31.4 IRG. If the defendant is at large, the Regional Appeal Court may order his or her personal attendance. As far as the defendant is called before the court properly and he or she does not attend without an excuse, the Regional Appeal Court may order his or her summoning.

k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?

According to the First European Arrest Warrant Act, the State Attorney General’s granting decision on executing an European Arrest Warrant had been declared final, § 74b IRG. Also, the German Federal Government’s draft to the Second Act stuck to that. However, in the recently adopted version this provision is deleted, for it cannot be made sure that the granting decision does not interfere with the defendant’s basic rights. Thus, the granting decision now ultimately is subject to judicial control as the Federal High Constitutional Court had required.

The State Attorney General’s decision not to claim hindrances to granting a European Arrest Warrant in a certain case is revised before the Regional Appeal Court, § 29 IRG. According to § 13.1. Sentence 2 IRG the Regional Appeal Court’s approval is final. Nevertheless, § 33 IRG allows for a new decision on the admissibility in certain cases:

§ 33 IRG: Reconsideration of Decisions Granting Extradition

(1) If, after the Regional Appeal Court’s decision regarding the admissibility of the extradition, circumstances arise which furnish a basis for a different decision, the Regional Appeal Court shall ex officio, on motion by the public prosecutor at the Regional Appeal Court or on application by the accused, reconsider its decision.

(2) If, after the Regional Appeal Court’s decision, circumstances become known which furnish a basis for a different decision, the Regional Appeal Court may render a new decision.

(3) § 30 (2), (3) and §§ 31, 32 shall apply correspondingly.

(4) The Regional Appeal Court may order that extradition be deferred.

It may be appealed against the approval only by means of the constitutional complaint as an extraordinary appeal. Thus, the defendant is given at least the possibility to reprove violation of constitutional law.

476 The State Attorney General’s office is the office for prosecution at the Regional Appeal Court.
477 Second European Arrest Warrant Act.
478 Cf. BTDr. 16/2015 from 28th June 2006, p. 28.
479 Cf. supranote 44.
The currently passed Second European Arrest Warrant Act is responsive to the former problem lacking legal protection against the State Attorney General’s granting decision as revealed by the Federal High Constitutional Court. It consequently provides for a review of the State Attorney General’s denial of hindrances by the Regional Appeal Court. The innovation is contained in § 79 IRG new. Thus, the Regional Appeal Court is empowered to revise the hindrances to the granting considering the State Attorney General’s wide discretionary powers. According to the hitherto existing legal situation, the defendant was refused to allege hindrances to the granting by virtue of § 83b IRG old (of the void European Arrest Warrant Act), for those hindrances were thought to predominantly address the granting authority (State Attorney General) and not the person affected.

I. Does the person in question have the right to:

- the assistance by the defense lawyer?
- the right to interpreter?

The person affected has the right to legal counsel at any time of the proceedings, § 40 IRG. If he or she is unable to speak the German language, this triggers-off the duty to call in an interpreter, §§ 77 IRG, 185 GVG.482

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

The extradition of German nationals had been regulated in the outdated First European Arrest Warrant Act in § 80 IRG. It was regarded as one of the most controversial rules of the entire statute. Due to the Federal High Constitutional Court’s reprovals with the reprehension of a breach of the Basic Right not to be extradited in particular, § 80 IRG in its recent version has been remodelled significantly.

According to § 80.1. IRG new, extradition of German nationals for the purpose of prosecution is admissible, if “[No. 1] it is assured that after the imposition of a prison-sentence or another sanction the requesting Member State will offer the defendant to be committed back for the purpose of execution on his demand to the jurisdiction of that code, and [No. 2] the offence shows some proper reference to the requesting state.” § 80.1. No. 1 IRG stands for the so-called ‘back-committal rule’. The requirement of back-committal is aiming at rehabilitation. § 80.1. No. 2 IRG addresses the reference of the offence to both home and overseas territory. In its ruling on the First German European Arrest Warrant Act the Federal High Constitutional Court has referred to that explicitly. As to offences referring to home territory being in Germany, extradition is not admissible without interfering with the basic right not to be extradited in particular, § 80 IRG in its recent version has been remodelled significantly.

As far as no proper reference to overseas territory can be determined, still German nationals may be extradited for the purpose of prosecution by virtue of § 80.2. IRG, if a back-committal ar-

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480 For the constitutional decision cf. supranote 44.
481 Cf. OLG Braunschweig NStZ-RR 2005, S. 18; OLG Stuttgart NJW 2004, S. 3437; OLG means Oberlandesgericht (Regional Appeal Court).
482 GVG (Gerichtsverfassungsgesetz, German Judicial Court’s Act).
483 Art. 16 Basic Law.
rangement according to § 80.1. No. 1 IRG has been made, § 80.2. No. 1 IRG, and if the offence does not show some proper reference to the Federal Republic of Germany, § 80.2. No. 2 IRG. The proper reference to the inland is defined by the (not concluding) requirements as set out in § 80.2. IRG. Additionally, § 80.2. No. 3 IRG demands amongst others the appreciation of opposing values of the defendant not to be surrendered.

A German national’s extradition solely for the purpose of executing a sentence is admissible by virtue of § 80.3. IRG only if he agrees after being cautioned and after this consent is taken to the minutes judicially.

n. How many EAWs issued by other MSs, have been executed by your country since the date mentioned in 1g of the questionnaires? In how many cases has the person been effectively surrendered?

In 2004, 71 European Arrest Warrants had been addressed to the Federal Republic of Germany. Until nullification of the dated First European Arrest Warrant Act, 23 European Arrest Warrants had been executed.

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

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

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.

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

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

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

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

Not specified.

s. How often does the requested person consent to the “fast track“ surrender procedure?

Thereto, no data is known.

484 „Ein maßgeblicher Bezug der Tat zum Inland liegt in der Regel vor, wenn die Tathandlung vollständig oder in wesentlichen Teilen im Geltungsbereich dieses Gesetzes begangen wurde und der Erfolg zumindest in wesentlichen Teilen dort eingetreten ist.“ (A proper reference to the inland exists, if the criminal action completely or at least in its substantial parts was committed within the area of application of the inland law and if the effect of that action at least in its substantial parts has been realized there).
t. In how many cases has the decision on the execution of the EAW been 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?

Beyond the problem of constitutional law no specific difficulties that could be owing to the different national systems of criminal justice have been observable so far.

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

Affirming on inquiry, the Federal Government, the Federal Statistical Office and the Federal Ministry of Justice responded that no such data has yet been collected centrally.

6.6. Others

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

Beyond the problem of constitutional law no specific difficulties that could be owing to the different national systems of criminal justice have been observable so far.
7. Greece

(Dionysios Spinellis)

7.1. Constitutional issues

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

The Framework Decisions (FD) provided by Art. 34.2 (b) of the Treaty of the European Union (TEU) which concern criminal matters tend to form, each of them separately, a clear and analytical guide to the criminalization and the penal treatment in general of certain forms of behavior. Several such FDs which have been issued so far have some important common characteristics. The total of them forms a body of European penal legislature binding upon the EU Member States. Greek legal scholars have described and also criticized the legal character of the FD. Their main objections to the FDs are the following:

It has been maintained that the FD usually aims at binding upon national parliaments to create, amend or abolish criminal provisions. This is not in conformity with the principle nullum crimen, nulla poena sine lege (parlamentaria), provided inter alia in Art. 7.1 of the Greek Constitution, which demands that an act is criminalised and penalties are provided for it by a law. A penal law should be created by an organ having the necessary democratic legitimacy and therefore should be voted by a representative parliament with clear legislative powers. The FDs, however, are created by the Council, which is an organ composed of representatives of the EU Member States (MSs) at ministerial level (Art. 202 TEC), i.e. members of the executive power. So, the national parliaments do not decide freely on the national penal law corresponding to the FD, since they are under the obligation to vote for such a law, the contents of which are essentially predetermined by the FD drafted and decided by the Council, an organ lacking democratic legitimacy.

It has been also maintained that, since the EU is not (yet) a unified judicial space, and the European Arrest Warrant (EAW) is issued by the authority of a MS and not by a supranational organ, the framework in which the procedure is performed is in reality a framework of intergovernmental cooperation, i.e. an extradition procedure under another name.

All the regulations of the FDEAW are based on the principle of the reciprocal recognition of the judicial decisions of the MSs (Art. 1 para 2 FDEAW). However, that principle, although it is mentioned by the Council as “the cornerstone of the judicial cooperation in penal matters” is not included or provided anywhere in the TEU. It should be stressed that the Council had no competence to introduce such a principle and corresponding powers which were not founded in the Treaties.

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485 Pavlou, The penal law and the Framework Decisions of the EU, in PChr. 54 (2003), 961 f. (974). (The titles of publications in Greek have been translated into English for the convenience of the readers.)


487 Psarouda-Benaki, PChr. 53 (2003), 962.

Hence, the initiative of the Council which was not within its purview could not form a legal basis for the FDs\textsuperscript{489}.

Further reservations have been expressed concerning dogmatic sides of this new institution, such as\textsuperscript{490}: (a) The subjects on which FDs have been issued concern mainly a “symbolic” penal law following the current international trends. (b) In some FDs priority is given vaguely to the “security” as their function, so that a confusion is created as to which clearly defined legal interest is to be protected by the relevant provisions. (c) The criminal offences are often described in the FDs as offences of “abstract endangerment”\textsuperscript{491} or as more than one alternative methods of commission of certain offences. Endangerment offences and damaging offences are penalized by sanctions of equal severity (although they should be differentiated). (d) Sometimes, even mere convictions and opinions are penalized. (e) The ambiguous institution of the criminal liability of legal persons or entities is imposed on national legislations, which creates problems. (f) Traditional institutions and mechanisms of flexibility in sentencing, of considering attenuating circumstances and of applying parole are adulterated in certain FDs.

In the opinion of the author of these answers, the above observations are somewhat exaggerated. Furthermore, the freedom of choice of means and methods provided in Art. 34 pp. 2 (b) for the national legislators gives them many possibilities to adapt the FD to national circumstances and traditions. It should be noted, however, that the Greek legislator has not made much use of such possibilities\textsuperscript{492}.

Some legal scholars in Greece have criticized the FDEAW also because it does not include provisions permitting the refusal to execute a EAW for the reason that the person sought is a citizen of the executing state. It should be noted that the prohibition to extradite Greek citizens is not provided in the Greek Constitution (as is the case with the Constitutions of other countries, e.g. Germany, Austria and Poland), but only in Art. 438 (a) of the Code of Penal Procedure (CPP) and in all the international treaties concerning extradition which Greece has entered into. Consequently it could be superseded by subsequent laws and conventions, such as the TEU. However, according to the opinion of these legal scholars, the prohibition to extradite Greek citizens has a legal basis in Art. 5 pp. 2 of the Constitution\textsuperscript{493}, which provides that “the extradition of aliens prosecuted for their action as freedom fighters shall be prohibited.” It is maintained that this provision, although it does not mention a prohibition to extradite Greek citizens, nevertheless presupposes it as self understood. In my opinion, such an interpretation cannot stand against the clear wording of the Constitution\textsuperscript{494}. It has been rejected by a recent decision No. 591/2005 of the Areios Paghos (the Greek Supreme Court in Civil and Criminal Matters). The above have been silently accepted also by several other decisions of Areios Paghos (AP), which applied the above Law and approved at last instance the surrender of persons arrested under EAWs\textsuperscript{495}.

\textsuperscript{489} Kaďafa-Gbandi ibid.
\textsuperscript{490} Pavlou, supra, 975.
\textsuperscript{491} Cf. in German: “abstracte Gefährdungsdelikte”.
\textsuperscript{492} Pavlou, supra, 976-977, Kadafa-Gbandi, PoinDik, 7, (2004), 1296.
\textsuperscript{493} It should be noted that, according to an opinion still prevailing in Greek doctrine and court decisions, the international treaties which prevail over ordinary laws (= acts of parliament), (cf. infra 1 b) do not prevail over provisions of the Constitution. With respect to EU law, however, this opinion is now strongly challenged.
\textsuperscript{494} Spinellis, P.Chr. 51 (2001), 680; cf. also the same in K.H. Gössel Festschrift (2002), 692.
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?

According to Art. 28, pp. 1, first sentence of the Greek Constitution, “the generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein, shall be an integral part of domestic Greek law and shall prevail over any contrary provisions of the law.”

Art. 34 pp. 2 (b) TEU provides the procedure by which FDs are adopted by the Council, as well as their contents and validity; especially, it clarifies that they shall not entail direct effect. However, since according to that provision, the FD shall be binding upon the MSs as to the results, leaving to the national authorities the choice of form and methods, this delineation of powers allows a certain room for dispute.

Art. 31 of the FDEAW provides that, from 1st January 2004 it shall replace the corresponding provisions of all the conventions of the Council of Europe and of the European Union – enumerated in it – applicable in the field of extradition in relations between MSs\footnote{Without prejudice to their application in relations between MSs and third States.}. Of course, since the provisions of the FDEAW are not directly effective in the MSs, the provisions of Greek Law 3251/2004 which incorporated the regulations of the FDEAW shall apply. Consequently, as of the date of entering into force of that law (publication in the Greek Government Gazette: 9th July 2004), the old provisions of the international treaties and conventions have been replaced by the provisions of that Law, which have incorporated mostly (with small variations) the ones of the FD. It should be noted that since the above Greek Law entered into force later than the 1st January 2004, when the FD provides that it should have replaced the old conventions, the same Law includes a special transitional provision (Art. 39) by which extradition requests received before the date of entering into force of Law 3251/2004 are still governed by the provisions previously in force. The same applies to extradition requests from MSs which have not yet been adapted with the FDEAW.

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?

A great part of the doctrine in Greece has expressed reservations toward the “europeisation” of the Greek and other national criminal laws. Their main argument is that, since the EU is not (yet) a unified judicial space, the criminal law, which belongs to the hard core of the national sovereignty and is traditionally considered as the most “national” branch of the law, belongs to the exclusive power of each State. This traditional doctrine has presented recently some basic breaches, first by the creation of supranational penal provisions and, secondly, by the approaching and reciprocal influencing of the case law of various States. However, it would be an exaggeration to allege that this traditional principle is no more valid\footnote{Anagnostopoulos, From the national penal law to the penal law of the nations, in: The Penal Law in the New International Environment, (2001), 31 ff.; Kadafa-Gbandi PoinDik, 7, (2004), 1296.}. 
d. What is the influence of ECJ judicial decisions on the implementation of domestic law (e.g. the Pupino case)?

Greece, along with four other EU MSs, has declared, already on signing the Amsterdam Treaty, that it opts for the alternative that any Greek court or tribunal may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it (alternative of Art. 35 pp. 3 (b) TEU). Therefore, the ECJ decisions may have direct influence on the implementation of domestic law and the national law must be interpreted according to the Communal law. (ECJ judgment of 16th June 2005 in Case C-105/03, Pupino case, related to the conforming interpretation of domestic provisions).

e. Is the 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?

As already stated, the contents of the FDEAW have been transposed into domestic Greek Law 3251/2004. The interpretation of this Law is effected as the interpretation of any other Greek Law. I think that reference to the text of the FDEAW for reasons of better interpretation of Law 3251/2004 is not excluded, since the FDEAW is the source of that Law. However, the text applicable is that of the Greek Law 3251/2004 and not the FDEAW. Furthermore, the text of the FDEAW, before being transposed into the Greek legal order by means of Law 3251/2004 has been presented and commented in Greek Law reviews.

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

According to Art. 35 p. 2, Greece has declared at the time of signature of the Treaty of Amsterdam that it accepts the jurisdiction of the ECJ to give preliminary rulings. Since in Greece the control of constitutionality is a diffused one, also the putting of preliminary questions to the ECJ may be effected by any court.

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?

See answer under 1 (b).

h. Was the implementation of the Framework Decision and the Framework Decision itself subject of proceedings of the constitutional court in your country?

No procedure before a constitutional court was followed, since there is no constitutional court in Greece. The contents of the FD have been transposed by Law 3251/2004 and the lawmaking is an exclusive jurisdiction of the Parliament.

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

498 Cf. the authors cited supra in Fn. 2.
The surrender procedure under the EAW is treated as a legal procedure different from extradition, although there is an opinion considering it as a form of extradition\textsuperscript{499}. It should be noted, however, that the extradition procedure is still valid and applies in relations between Greece and countries outside the EU.

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

a. Are there any 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 (compulsory 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

The main variations between the “pattern” of the FDEAW and Law 3251/2004 concern the surrender of Greek nationals. There are two provisions in the FDEAW labelled grounds for optional non-execution of the EAW (Art. 4), aiming at covering human rights problems which may arise by the abolition of the prohibition to extradite citizens of the requested state. The Greek legislator has availed himself of both.

The one is Art. 4 para 6 FDEAW, which provides that “the executing judicial authority may refuse to execute the EAW if it has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that state undertakes to execute the sentence or detention order in accordance with its domestic law.” (Undertaking of execution of sentence already imposed).

The other is Art. 5 pp. 3 FDEAW, whereby “the execution of the EAW by the executing judicial authority may, by the law of the executing Member State, be subject to (inter alia) the following condition: where a person who is the subject of the EAW for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.” (Undertaking of execution of sentence to be imposed).

The purpose of both these provisions is clear: while the prosecution and trial in the issuing state will be facilitated, as the best interest of administration of justice dictates, however, the responsibility of the execution of the sentence is transferred to the state with which the person sentenced has the closer relations – i.e. not only the citizenship, but also the residence. In this way the execution of the sentence will become more human and the resocialisation of the person sentenced will be easier.

In Law 3257/2004, Art. 11 (lett. g and j) these two possibilities are provided as grounds for refusal to execute the EAW.

\textsuperscript{499} See: supra under 1 (a).
Furthermore: Art. 3 Law 3251/2004 provides that the Greek Ministry of Justice is the central authority assisting the judicial authorities on the administrative transmission and reception of EAWs, as well as for all other official correspondence relating thereto.

Art. 4 provides that competent judicial authority for the issue of EAWs is the public prosecutor at the court of appeals in the purview of which belongs: (a) the *ratione loci* competent court to try the accused sought or (b) the execution of the custodial penalty or measure imposed.

**b. Can a 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)?**

Yes, dual criminality in cases other than the ones listed in Art. 2 pp. 2 of the FDEAW and Art. 10 pp. 2 Law 3251/2004 remains a condition to surrender (Art. 10 pp. 1 (a)). However, in Art. 10 pp. 1 (a) it is also provided that, if the criminal offence for which the EAW has been issued is connected with taxes, tolls, customs duties or currency exchange regulations, the fact that the Greek State does not impose the same kind of charges or does not have the same form of regulations related to such charges, as the ones of the Member State which issued the EAW, does not constitute a ground for refusal to execute the EAW (cf. Art. 4 pp. 1 FD).

**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)?**

No, it did not. Art. 34 of Law 3251/2004 includes more or less the contents of paras 2-4 of the FD.

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

Yes it did. According to Art. 3 pp. 3 of Law 3251/2004 the Ministry of Justice is responsible to notify the General Secretary of the Council of EU which Greek judicial authorities are competent to perform the duties provided in the FD and Law 3251/2004 (supra under 2 a).

**7.3. 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?**

According to the doctrine and court decisions practice prevailing in Greece, the concept of the “same act”, which is the basis of the *ne bis in idem* principle is understood as the same facts irrespective of their legal qualification. This concept is also based on the wording of Art. 57 of the Greek Code of Penal Procedure. Considering the differences of languages and terminology as well as of legal systems in the various MSs it is also reasonable.

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

According to Art. 11 lett. (b) Law 3251/2004, the judicial authority deciding on the execution of an EAW shall refuse the execution (mandatory non-execution) of it, if it is informed that the requested person has been finally judged by a MS with respect to the same acts, provided that, where there has been a sentence, the sentence has been served or is being served or may no longer be executed under the law of the sentencing MS.
Furthermore, Art. 12 lett. (a) provides that the judicial authority may refuse the execution of the EAW (optional non-execution) if, *inter alia*, the person referred to in the EAW is being prosecuted in Greece for the same offence or (lett. b) if the Greek authorities have decided not to prosecute for that act or to discontinue the prosecution for it.

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

An optional ground of refusal is provided in Art. 12 lett. (c) of Law 3251/2004 if the person sought has been finally tried in another EU MS, so that a new prosecution is barred.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 Schengen Implementation Convention in your country?

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

Art. 54 of that Convention uses the expression “finally judged”, which means that the person concerned has been finally judged by a MS in respect to the same acts, provided that, where there has been a sentence, the sentence has been served or is being served or may no longer be executed under the law of the sentencing MS.

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)?

Not to my knowledge, since the meaning of that article is quite clear.

7.4. The issuing of the EAW

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

Art. 4 of Law 3251/2004 provides that competent judicial authority for the issue of EAWs is the public prosecutor at the court of appeals in the purview of which belongs: (a) the court which is *ratione loci* competent to try the accused sought or (b) the authority competent for the execution of the custodial penalty or measure imposed.

Art. 9 of the same Law provides that competent judicial authorities to receive an EAW, to arrest and keep in custody the person sought, to introduce the case to the competent judicial authority and to execute the decision on the surrender or not, is the public prosecutor at the court of appeals in the district of which the person sought is living or the public prosecutor at the court of appeals of Athens, if the domicile or residence of the person sought is unknown.

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?

The Greek public prosecutor system is governed by the principle of mandatory prosecution (or legality principle). Consequently, if a public prosecutor receives a denunciation by any citizen, or a report by a civil servant or a complaint by the victim or any other information on a crime, he is
obliged to prosecute the case, initiating criminal proceedings (Arts. 36 and 43 pp. 1 CPP). Generally competent to receive all these forms of information concerning criminal offences is the public prosecutor of the first instance court (Art. 42 pp. 2 CPP). Especially, warrants of arrest are issued by the investigating judge (with the concurrent agreement of the public prosecutor), by the indictment chamber of the court and, in the particular case of the EAW, by the public prosecutor at the court of appeals (cf. supra 4a).

The public prosecutor, as any other of the above competent authorities, shall issue an arrest warrant (and therefore also an EAW) if the conditions for temporary detention are met (Arts. 276 pp. 2 and 282 pp. 3 CPP) and in the case provided by Art. 5 Law 3251/2004 (same as art. 2 pp. 1 FDEAW). Consequently, the decision to issue an EAW is taken by the public prosecutor ex officio.

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

Not applicable.

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

The decision to issue an EAW is taken by the competent public prosecutor alone, not in a public hearing.

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

As mentioned above, in general, under Greek law an arrest warrant is issued if the conditions for temporary detention are met (Arts. 276 pp. 2 and 282 pp. 3 CPP). These conditions are: (a) during the pre-trial proceedings the investigation has found serious indications and suspicions of a felony and (b) the accused has no known residence in the country; (c) or he had made preparatory acts in order to facilitate his absconding; (d) or he has been in the past a fugitive from justice or from prison or has been found guilty of escaping from prison or for breaching residence restrictions imposed upon him; (e) or it is judged by deducing from specially mentioned circumstances of his previous life or from characteristics of the act he is accused of that if he remains free he will commit more crimes (Art. 3 CPP). Consequently, there is no special hearing in which the decision to take a suspect or accused in custody and issue an arrest warrant is taken, but the competent authority decides to issue an arrest warrant after considering the evidence gathered each time.

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?

As mentioned in the answer to questions 4b and 4d, the decision to issue an arrest warrant is taken by the public prosecutor alone, without a contradictory procedure (Art. 6 pp. 1 Law 3251/2004). No appeals are provided.

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

Since no express provision exists regulating the case of crimes allegedly committed before the implementation of the EAW procedure, an EAW may be issued concerning such crimes. A different matter concerns EAWs or requests for extradition received before the date in which Law 3251/2004
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entered into force. These are governed by the previous provisions on extradition (see supra 1b, on Art. 39 pp. 1, Law 3251/2004).

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

Before the date in which Law 3251/2004 entered into force (9th July 2004), obviously, no EAWs were issued in Greece, since, then, there was no legal basis for issuing such EAWs.

After the 9th July 2004 more than 55 EAWs\(^{500}\) have been issued in Greece.

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

Such crimes were the following:

– participation in a criminal organisation,
– trafficking in human beings,
– illicit trafficking in narcotic drugs and psychotropic substances,
– illicit trafficking in weapons, munitions and explosives,
– corruption,
– laundering of the proceeds of crime,
– facilitation of unauthorised entry and residence,
– organised or armed robbery,
– illicit trafficking in cultural goods, including antiques and works of art,
– swindling,
– extortion,
– forgery of administrative documents and trafficking therein,
– trafficking in stolen vehicles,
– rape,
– arson.

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

In one case concerning taxation offences (Law 1882/1990).

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

No EAWs are issued “on request” but only ex officio (see supra 4 b).

\(^{500}\) The gathering of relevant statistical data has met with some difficulties. Since the responsibility of issuing EAWs to be executed by foreign States and of executing EAWs issued by the authorities of foreign States is the responsibility of the public prosecutors at the courts of appeals (Arts 4 and 9 Law 3251/2004), a survey has been conducted in order to gather information from all these public prosecutors’ offices. Out of 14 such offices, 10 answered the part of the Questionnaire sent to them at my request through the Ministry of Justice. The rest of them did not answer it, or anyway did not answer within the reasonable time period of three months, at the expiration of which the survey was closed. However, since the public prosecutors’ offices at the courts of appeals which answered the Questionnaire are estimated to cover the 80% of the judicial activity of the whole country, the answers reported above may be considered as representative and giving approximately the same percentage of the data on the EAWs in the whole country.
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?

All information channels may be used. The exact place of residence of the requested person is not an information to be included in the mandatory contents of the EAW, as provided in Art. 2 pp. 1 of Law 3251/2004 (Art. 8 pp. 1 FD). If it is known, of course it would facilitate the arrest, but if it is not known, the authorities of the executing MS are going to search for the person concerned as with any other accused person wanted, especially requesting the help of the police. Furthermore, the public prosecutors ask for the assistance of the Interpol, SIS, EJN, but also of foreign authorities by telephone or by e-mail.

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

13 EAWs were executed, 11 persons were surrendered, 1 EAW was refused, the procedures on another 3 are still pending.

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?

The execution of EAWs were refused in 2 cases, on the ground that the persons sought were nationals of the executing State. In 2 cases the German authorities refused the execution of EAWs, one concerning a German citizen and one a Greek one, because the German Constitutional Court had decided that the German law on the EAW is unconstitutional. In one of these cases the traditional extradition procedure concerning a Greek citizen has been followed.

7.5. Executing of the European Arrest Warrant

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

If the person sought consents to be surrendered to the issuing MS, the judicial authority competent to decide that the EAW shall be executed is the president of the court of appeals in the district of which the person sought has been arrested (Art. 9 pp. 2 of Law 3251/2004).

If the person sought does not consent to be surrendered to the issuing MS, the judicial authority competent to decide that the EAW shall be executed is the indictment chamber of the court of appeals in the district of which the person sought has been arrested (Art. 9 pp. 3 of Law 3251/2004).

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?

Art. 9 of Law 3251/2004 provides that competent judicial authority to receive an EAW, to arrest and keep in custody the person sought, to introduce the case to the competent court and to execute the decision to surrender the person sought or not are: (a) the public prosecutor at the court of appeals in the district of which the person sought has his residence; (b) the public prosecutor at the court of appeals of Athens if the residence of the person sought is unknown.
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?

If the person sought consents to be surrendered to the issuing MS, the president of the court of appeals decides within ten days as of the date in which the person sought has declared his consent (Art. 21 pp. 1 of Law 3251/2004).

If the person sought does not consent to be surrendered to the issuing MS, the indictment chamber of the court of appeals issues its final decision within sixty days as of the date in which the person sought has been arrested (Art. 21 pp. 2 of Law 3251/2004).

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

Art. 19 pp. 2 Law 3251/2004 provides (cf. FD 15 pp. 2) that if the judicial authority which decides on the execution of the EAW (i.e. the indictment chamber of the court of appeals) finds the information transmitted to it by the issuing MS insufficient to allow it to decide on surrender, it shall request, through the public prosecutor at the court of appeals, from the issuing MS as a matter of urgency the necessary supplementary information, in particular with respect to Art. 2 (necessary contents of the EAW) and 11 to 13 (cases where the EAW shall not or may not be executed and guarantees in the execution of it). The court may also fix a time limit for the receipt of such information, taking into account the need to observe the time limits set in Art. 21 hereof (see answer to the previous question). Neither the FDEAW nor Law 3251/2004 provide for the taking of evidence by the deciding judicial authority.

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

The questions of concurrent EAWs are provided and regulated by Art. 20 Law 3251/2004, which incorporates the contents of Art. 16 FD.

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

The same applies to conflicts between a EAW and a request for extradition by a third country (Art. 20 para 3 Law 3251/2004).

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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

The only legal basis for the deprivation of liberty for the sake of the execution of a EAW is that EAW. The judicial authority which is competent to arrest and decide to keep the person sought in custody is the public prosecutor at the court of appeals, who then introduces the case to the competent court for decision on the surrender (see supra 5b and 5c). He may also decide to release that person and impose upon him restrictive conditions. Against his decisions the person sought may lodge an objection before the indictment chamber of the court, which decides finally (Art. 16 pp. 2 Law 3251/2004).

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

The period of custody of the requested person before his or her effective surrender is provided in Art. 15 pp. 3 Law 3251/2004. If the person sought has been included in the Schengen Information
System (SIS) under Art. 95 of the Schengen Implementation Convention 1985, which procedure does not constitute yet an EAW, it is possible to effect the arrest of that person by instruction of the public prosecutor at the court of appeals. The person thus arrested may remain in custody up to 15 days within which the EAW must be received. This time limit may be extended by the public prosecutor for serious reasons. Anyway, 30 days after the arrest, the person arrested must be released.

The person arrested may, if he contests his identity, lodge objections to the indictment chamber within 24 hours of his arrest. The chamber hears the objections within ten days as of the date of the objections and decides within five days as of the date of the hearing (art. 15 pp. 4 Law 3251/2004).

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

See supra para 5a.

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

The indictment chamber of the court of appeals decides on the surrender of the person sought (Arts. 9 pp. 3 and 18 pp. 1 Law 3251/2004). As a rule, the hearing shall be public, except if the person sought requests that it is held without publicity or if he does not appear at the hearing (Art. 448 pp. 2 CPP). The person sought has the right to appear at the hearing with his counsel and an interpreter. If he does not have a counsel, he may ask the president of the chamber to appoint a counsel for him.

k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?

According to Art. 22 of Law 3251/2004, in cases where the person sought does not consent to his surrender, the decision of the indictment chamber of the court of appeals may be appealed against either by the person sought or by the public prosecutor within 24 hours to Areios Paghos (Greek Supreme Court). The indictment chamber of Areios Paghos shall decide within eight days as of the date of the appeal. The person sought is summoned to be present at the hearing, either personally or represented by his counsel.

l. Does the person in question have the right to:

- the assistance by the defense lawyer?
- the right to interpreter?

See answers to the two previous questions.

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

See answer to question 2 a.

n. How many EAWs issued by other MSs have been executed by your country from the date mentioned in 1g of the questionnaire? In how many cases has the peson been effectively surrendered?

Thirty two (32) EAWs issued by other Member States have been executed in Greece. In 23 cases the persons sought have been already surrendered to the issuing authorities.
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o. In how many cases has judicial authority in your country refused to execute the EAW? What were the grounds for non-execution?

In 7 cases. Of these: (a) In three cases the persons sought had been already convicted and they were sought in order to serve their sentence. The Greek authorities applied Art. 4 pp. 6 of the FDEAW (Art. 11 (f) Law 3251/2004), because these persons were Greek nationals and Greece undertook to execute the sentence in accordance with its domestic laws. (b) In another three cases, because the criminal offence, were regarded by the Greek law as having been committed in part in the territory of Greece (Art. 4 pp. 7 (a) FDEAW and Art. 11 (g) Law 3251/2004) and were prosecuted in Greece. In one case the EAW from Germany was not executed on the ground that the German law on the application of the FDEAW has been declared null and void as unconstitutional by the German Federal Constitutional Court.

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.

For the following crimes:
- participation in a criminal organisation,
- trafficking in human beings,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- laundering of the proceeds of crime,
- facilitation of unauthorised entry and residence,
- organised or armed robbery,
- swindling,
- extortion,
- forgery of administrative documents and trafficking therein,
- trafficking in stolen vehicles.

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

No.

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

No.

s. How often does the requested person consent to the “fast track” surrender procedure?

In 10 cases.

t. In how many cases has the decision on the execution of the EAW been 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?
In all cases where the person sought does not consent to the surrender the indictment chamber of the court of appeal decides, and in all cases where the person sought consents to the surrender, the president of it decides; therefore judicial control always takes place. Appeals to the Areios Paghos (the Supreme Court) were lodged against the decision of the indictment chambers in 7 cases. Six were rejected, one was sustained and the decision of the indictment chamber of the court of appeals was quashed.

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

The time limits provided in the Law 3251/2004 are usually met. As to the average period of time the answers varied: 10 days in case of consent of the person sought, according to the law; in other cases 20 days, 30 days, two months were reported (according to Art. 17 FDEAW and Art. 21 pp. 1 and 2).

**7.6. Others**

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

No special difficulties.

**ABBREVIATIONS:**

CPP = Code of Penal Procedure  
EAW = European Arrest Warrant  
EU = European Union  
FD = Framework Decision  
FDEAW = Framework Decision on the European Arrest Warrant  
MS = Member State  
P.Chr. = Poinika Chronika (a Penal Law Review)  
PoinDik = Poiniki Dikaiosyni (a Penal Justice Law Review)
8. Hungary

*(Karoly Bard)*

8.1. Constitutional issues

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

Once an FD is adopted by the Council, it is binding upon Hungary as to its results in accordance with the fidelity clause of the Accession Treaty promulgated in 2004. In accordance with Art. 34 (2) of the Treaty on the European Union, it does not have any direct effect. The Framework Decision on the European Arrest Warrant has been implemented in the domestic legal system by the Act no. CXXX of 2003, on cooperation with other Member States of the European Union in criminal matters.

**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?**

As concerns the relation between international and domestic law, the Hungarian legal system follows the dualist theory; international treaties need transformation in order to become part of the legal system. Depending on the nature of the treaty, they are transformed in the form of an act of parliament or a government decree. Art. 8 (2) of the Constitution requires that issues related to fundamental rights are regulated by an act (Gesetz) of Parliament: “In the Republic of Hungary rules pertaining to fundamental rights and duties shall be determined by acts, which, however, may not limit the essential content of any fundamental right.”

There is no explicit provision in the Hungarian law on the status of international treaties in the hierarchy of norms.

Art. 7 (1) of the Constitution merely states the following: “The legal system of the Republic of Hungary accepts the generally recognized rules of international law, and shall further ensure the harmony between domestic law and the obligations assumed under international law.” Although there is no explicit provision in the Constitution on the hierarchy of international treaties and “ordinary” acts the Constitutional Court (CC) defined the place of acts transforming international treaties above the ordinary acts and below the Constitution. The CC came to this conclusion with reference to the wording of the Act on the Constitutional Court. Arts. 44-47 of this Act establish the competence of the CC to examine the conflicts between domestic law and international treaty. The Hungarian title of these provisions suggests that it is the domestic law which collides with the international treaty, not the international treaty with the national regulation. In the view of the CC, this wording implies that an act transforming an international treaty is superior to an ordinary act of the Parliament. However, if the examined domestic law is higher than the transforming law (this may happen if the treaty is transformed not by an act of Parliament but by a government decree and the transforming decree is in conflict with an “ordinary” act), the Constitutional Court is entitled to make a – political – decision: it can call on either the organ or person concluding the
international treaty, or the organ issuing the domestic law to eliminate the constitutional conflict. Thus, in this case the primacy of the international law is not assumed.

This general framework applies to the instruments – framework decisions and conventions – adopted within the EU/Council of Europe. Their status within the domestic legal system depends on the form of transformation. The CoE conventions are generally transformed by an act of Parliament, as most of them affects fundamental rights. Similarly, the EU instruments touching upon basic rights are promulgated in the form of Act, such as the Act no. CXXX of 2003 on the cooperation with other Member States of the European Union in criminal matters.

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?

The Constitutional Court has not been very receptive for a pro-European interpretation until now. As an example, see the Constitutional Court’s decision no. 17/2004 finding the bill on agricultural surplus unconstitutional. (On the decision see: Andras Sajo, Learning co-operative Constitutionalism the Hard Way, in Zeitschrift fur Staats und Europawissenschaften, 3/2004, p. 351).

In a more recent resolution (1053/E/2005) the Court rejected to treat the founding treaties of the European Union as international treaties, and declined to examine the violation of assumed international obligations in this regard. Thus, the mere fact that there is an omission contrary to EU law does not necessarily give rise to unconstitutionality.

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

The influence of the decisions of the ECJ is not apparent yet in the Hungarian system.

e. Is the 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?

Transposition is needed, as the framework decision is not directly binding on the Member States. There is no possibility to rely on a framework decision, which is not transformed in the domestic system.

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

Hungary accepts the jurisdiction of the ECJ in accordance with Art. 35 of the TUE. Only national courts or tribunals against whose decisions there is no judicial remedy under national law can request a preliminary ruling. The Constitutional Court is not entitled to do it, as apart from constitutional complaints, it does not deal with individual cases. As regards the constitutional complaint, the Court does not deliver a judgment on the merits, it only reviews the constitutionality of the law applicable for the case, but even if it finds the applicable provision unconstitutional, the individual case will be reviewed by a court within the ordinary court system.
Chapter III. Country reports

**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?**


**h. Was the law implementing 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?**

The procedure is defined as a separate procedure; however Act CXXX of 2003 provides that in cases not regulated by the act itself the provisions of the act on international cooperation in criminal matters (Act XXXVIII of 1996), which also deals with extradition, shall apply.

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

**a. Are there any 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 FD lists in Art. 4 the grounds for optional non-execution of EAW, the grounds in subparagraphs 1-6 are mandatory non-execution grounds in the Hungarian Act. Only the ground defined by pp. 7 of Art. 4 of the FD is left to the discretion of the Hungarian authorities.

– **the catalogue of “crimes” listed in Art. 2.2. FD. Are all those “crimes” criminalised in your country? Please specify which are not criminalised?**

  The Annex of the Act does not define the matching crime contained in the Hungarian Criminal Code. However, a comparison of the crimes listed in the FD and those contained by the Hungarian Penal Code reveals that only the illicit trafficking in hormonal substances and other growth promoters are not criminalized under Hungarian law.

– **the period of time for execution the EAW?**

  It is in accordance with the FD.

– **other issues; please specify**

**b. Can a 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)?**

According to Art. 4 b of the Act, if the offence on which the EAW is based is not punishable under the Hungarian law, the execution of the EAW shall be refused. The refusal is mandatory.
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)?

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

Yes, the Hungarian National Office of Interpol in the National Police Headquarters is responsible for handing over the requested person (Art. 20 of the Act).

The EAW is received by the Minister of Justice.

8.3. 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?

In line with the general practice which applies in cases which have no “external” element, it is the description (the constitutive elements) of the criminal offense and not the legal qualification that is decisive.

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

Yes (Art. 4 points g-h).

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

Yes (Art. 4 point d).

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 SIC in your country?

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

The court under certain conditions may discontinue the process for expediency considerations. All the cases mentioned come under the term “final disposal”.

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)?

No.

8.4. The issuing of the EAW

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

It is the court of general jurisdiction. If the EAW is to be issued for the purpose of executing a custodial sentence the competent judicial authority is the penitentiary judge. This judge is a single
judge operating within the regional courts and decides on matters requiring a judicial decision in the course of the enforcement of sentences.

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?

Ex officio.

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

It is the court which, according to the general rules of the Code of Criminal Procedure, is competent to try the case. The EAW is issued by a single judge.

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

In the surrender proceedings the participation of the prosecutor and the defense counsel is mandatory; if the person against whom the EAW is requested does not speak Hungarian a translator must be provided too. The Court examines the person against whom the EAW is requested.

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

No.

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 against the decision.

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

No.

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

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?

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

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

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?
m. How many EAWs issued by the judicial authority in your country have been executed in other Member States? In how many cases has the requested person been effectively surrendered?

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

8.5. Executing of the European Arrest Warrant

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

The Metropolitan Court. The Metropolitan Court is a court located in Budapest hearing serious crimes as first instance court and at the same time reviews appeals submitted against the first-instance decisions of the district courts. Against its first instance decisions appeal is possible to the Metropolitan Court of Appeal.

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?

Ex officio.

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?

If the person concerned consents to the surrender, the decision shall be taken within ten days; otherwise within sixty days, which might be prolonged by thirty days.

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

The Court in the hearing examines whether the conditions of issuing an EAW are fulfilled; if the data provided by the requesting national authority are not sufficient, it may request additional information from the issuing authority through the Minister of Justice.

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

The domestic law uses the text of the “pattern” provided by the FD in Art. 16:

1. If two or more Member States have issued European Arrest Warrants for the same person, the decision on which of the European Arrest Warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European Arrest Warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.

2. The executing judicial authority may seek the advice of Eurojust (9) when making the choice referred to in pp. 1.

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

In case of a conflict between an EAW and a request for extradition submitted by a third country, the procedure shall be conducted in accordance with the Act no. XXXVIII of 1996 on international judicial
cooperation in criminal matters. According to Art. 17 of the act, the competent authority has to take into consideration the place of the commission of the crime, the nationality of the offender, the date of the requests and if the requests are submitted in relation to different criminal offenses. Also, the seriousness of the criminal offenses have to be taken into account. If there has been an International Arrest Warrant issued against the person concerned, the later issued EAW takes precedence.

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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

A separate decision is required.

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

In case the person requested is apprehended, he/she is first arrested for 72 hours. If in the lack of an EAW the person refuses to consent to surrender, he/she is taken into provisional surrender detention until the receipt of the EAW but for a maximum period of 40 days. Should the EAW not be submitted within 40 days the person has to be released. If an EAW is submitted at the time the person is apprehended or if the person consents to the surrender, the detention lasts until the surrender is effectuated.

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

A single judge in the Metropolitan Court.

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

The presence of a defence counsel and prosecutor is mandatory; an interpreter may be provided if the person concerned does not speak Hungarian.

k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?

The prosecutor, the requested person and his/her defence counsel have the right to appeal. They shall pronounce their intention to appeal against the decision on issuing the EAW immediately after the decision was delivered by the Metropolitan Court. The appeal is decided by a panel of the Competent Higher Court Metropolitan Court of Appeal.

l. Does the person in question have the right to:

- the assistance by the defence lawyer?
  Yes.

- the right to interpreter?
  Yes.

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

1. If the European Arrest Warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is a national and resident of Hungary,
the EAW cannot be executed and Hungary undertakes to execute the sentence or detention order in accordance with its domestic law (Art. 5 pp. 1 of the Act).

2. Where a person who is the subject of a European Arrest Warrant for the purposes of prosecution is a national and resident of Hungary, surrender may be subject to the condition that the person, after being heard, is returned to Hungary in order to serve there the custodial sentence or detention order passed against him in the issuing Member State (Art. 5 pp. 2 of the Act).

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

o. In how many cases has judicial authority in your country refused 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. Has the EAW been executed for crimes other than listed in the above mentioned Art. 2.2. FD? If so, in how many cases?

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

s. How often does the requested person consent to the “fast track” surrender procedure?

t. In how many cases has the decision on the execution of the EAW been 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?

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

8.6. Others

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

(Darius Mickevičius)

9.1. Constitutional issues

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

Lithuania is a Member State of the European Union since 1st May 2004. Thus, the Union law is a constituent part of Lithuanian legal system. Where it comes out of the treaties upon which the European Union is founded, legal acts of the European Union are applied directly, and in the case of the collision they have supremacy over Lithuanian laws or other legal acts (see Art. 2 of Constitutional Act of the Republic of Lithuania “On Membership of the Republic of Lithuania in the European Union”). It must be noted, that the supremacy principle covers both the European Union and the European Community law.

In its recent ruling on 14th March 2006 the Constitutional Court stated that: “under Paragraph 2 of the Constitutional Act On Membership of the Republic of Lithuania in the European Union”, the norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania, and where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania. Thus, the Constitution consolidates not only the principle that in cases when national legal acts establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied, but also, in regard of European Union law, establishes expressis verbis the collision rule, which consolidates the priority of application of European Union legal acts in the cases where the provisions of the European Union arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal power is), save the Constitution itself.”

This is a general principle of supremacy of founding Treaties of the European Union and legal acts of the European Union that are adopted on the basis of these treaties, e.g. regulations, decisions, directives, framework decisions, etc. On the other hand, possibility to apply each of the legal acts depends on its legal nature: regulations and decisions are applied directly, but directives and framework decisions require national implementing provisions.

Framework decisions have no direct effect in national law as they are “binding upon the Member States as to the result to be achieved but (…) leave to the national authorities the choice of form and methods” (Art. 34 (2) (b) of the TEU). Legal nature of framework decisions was clarified by the European Court of Justice in the Pupino case, where it stated that although framework decisions have no direct effect, “the national court is required to take into consideration all the rules of national law and to interpret them, as far as possible, in the light of the wording and purpose of the framework decision”.

However, there were no wider discussions on the legal nature of framework decisions in Lithuanian legal doctrine, as well as in national jurisprudence.
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?

At the moment Lithuania is a party to a lot of important international treaties that are significant for its penal and procedural system. The question on the relationship between national law and international treaties was much discussed in Lithuanian legal doctrine and national jurisprudence.

Lithuania applies a monistic approach on the international treaties. According to Art. 138 of the Constitution, international agreements which are ratified by the Seimas shall be the constituent part of the legal system of the Republic of Lithuania. Thus, the Constitution provided a certain division of international treaties into ratified international agreements and not-ratified international agreements. According to pp. 1 of Art. 11 of the Law on International Treaties, all international agreements (both ratified and not-ratified) shall be executed. Pp. 2 of the same Article states that if the ratified international agreement provides for other rules than national laws or other legal acts, provisions of international agreement shall prevail (thus controversially suggesting that in a case of collision provisions of simple national laws should prevail over not-ratified international agreements). This approach was much criticized and rejected by academics and finally clarified by recent Constitutional Court ruling of 14th March 2006. The Constitutional Court stated that “(this) doctrinal provision cannot be construed as meaning that, purportedly, the Republic of Lithuania may disregard its international treaties, if a different legal regulation is established in its laws or constitutional laws than that established by international treaties. Quite to the contrary, the principle entrenched in the Constitution that the Republic of Lithuania observes international obligations undertaken on its own free will and respects universally recognised principles of international law implies that in cases when national legal acts (inter alia laws or constitutional laws) establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied.” On the other hand, Constitutional Court has several times noted that in any case Constitution prevails over international agreement, as Pp. 1 of Art. 7 of the Constitution establishes that any law or other statute which contradicts the Constitution shall be invalid501.

On the other hand, there were no discussions on the relationship between provision of international agreement and a particular national legal provision that implements the framework decision. It seems that in such situation court should base its decision on two principles: 1) principle of international law supremacy over national law; 2) derogation principle that allows applying more strict (progressive) provisions than those in the framework decision.

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501 There is an academic discussion on this issue. “Constitutionalists” emphasize the meaning of national Constitution and support constitutional provision that no legal act (including international agreement) may contradict Constitution. “Internationalists” object that, according to international law, any international agreement must be observed, as Article 27 of Vienna Convention on the Law of Treaties states that “(a) party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” (See more in: D. Jociene, K. Cilinskas. Human right protection issues in international and Lithuanian law (in Lithuanian) 2005, Centre for Legal Projects and Research, Vilnius, p. 24; D. Jociene. Application of European Convention of Human Rights in law of foreign states and the Republic of Lithuania (in Lithuanian). 2000, Eugrimas, Vilnius, pp. 132–143). However, there are no major practical problems on this, as a deep analysis on conformity of national law to international agreement must be taken before entering any international agreement and, if necessary, certain amendments to laws or even Constitution must be adopted.
It must be noted that in the area of extradition and surrender it is presumed that at the moment surrender under the European Arrest Warrant is more progressive, thus surrender procedures instead of extradition under European Convention on Extradition or extradition under bilateral agreements are applied between Lithuania and other EU Member States.

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?

It seems that Lithuanian legal doctrine and national jurisprudence at the moment are more “pro-European” than “Euro-sceptic”. On the other hand, Constitutional Court has several times noted that in any case Constitution prevails over international agreement, as pp. 1 of Art. 7 of the Constitution establishes that any law or other statute which contradicts the Constitution shall be invalid (see more in previous answer).

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

Lithuanian legal doctrine and national jurisprudence generally is more concerned with European Court on Human Rights jurisprudence that is often cited in legal literature, as well as in national courts rulings. Nevertheless, European Court of Justice judicial decisions also start to find their place in Lithuanian legal literature and in court jurisprudence.

e. Is the 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?

Lithuanian legal doctrine allows different methods of the interpretation of law, e.g. systematic, grammatical, theological, historical, etc. All of them are equally used by scholars, as well as courts. This applies also to the interpretation of framework decisions.

Personally, I do not know cases where Lithuanian courts have taken into account the provisions of framework decision that had not yet been implemented into national law.

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

This question is dealt by the Article 40 of Law on Courts. Para 1 of this Article states that any court, which is applying the norms of the EU law and which encounters a questions of their interpretation or validity, has a right to ask ECJ for a preliminary ruling. However, para 2 of this Article provides for that Supreme Court or Highest Administrative Court502 or any other court, which decision is final in the case, in such an event are obliged to ask ECJ for a preliminary ruling.

Laws do not provide for such a right to Constitutional Court.

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?

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502 Highest Administrative Court is the supreme court of the specialised administrative courts system.
Most of provisions have been implemented into the Criminal Procedure Code. However some provisions, relating to the issuance of the EAWs, were regulated by 26th August 2004 joint order of Minister of Justice and Prosecutor General “On rules of issuance of the European Arrest Warrant and order of transfer of a person to another state under the European Arrest Warrant”.

h. Was the law implementing 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?

It is difficult to provide an answer to this question as the law does not resolve this issue. In fact, national law avoids mixing up terms “extradition” and “surrender”, thus surrender under EAW is surely not equated to extradition. However, the law does not define these conceptions. Legal doctrine is also evolving on this question, but it seems that it is opting for a separate legal instrument.

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

a. Are there any 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?

Art. 9 of the Penal Code provides for some additional grounds for non-execution that were not explicitly included in the Framework Decision:

1) mandatory human rights clause;
2) optional ground “where it is not enough the information provided in the European Arrest Warrant to decide on surrender and the issuing judicial authority has not provided it within the fixed time limit” (pp. 4 (5));
3) some listed grounds for refusal are implemented more broadly than they are formulated in the Framework Decision, e. g. not only amnesty, but also pardon, etc.

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

Lithuania has not criminalized illicit trafficking in hormonal substances and other growth promoters. Also, although such crimes as counterfeiting and piracy of products, sabotage, illicit trafficking in cultural goods, including antiques and works of art, racism and xenophobia are criminalized (at least partially), their definitions and scope are not clear enough.

– the period of time for execution the EAW?

No major differences.

– other issues; please specify

Issuing authorities: the Office of the Prosecutor General is a “judicial authority” that is competent for the issuing of an EAW for the purpose of criminal prosecution and the Ministry of Justice is a “judicial authority” that is competent for the issuing of an EAW for the purpose of execution of
a sentence. However, these authorities cannot issue an EAW without a valid court ruling on detention of a suspect or a judgement imposing imprisonment.

b. Can a 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)?

It is a mandatory ground for non-execution. It is embedded in pp. 3 (5) as “where the committed acts are not regarded as crimes or misdemeanours under the Lithuanian Penal Code except for the cases when the European Arrest Warrant is issued for the criminal act provided in pp. 2 of Art. 2 of the Council Framework Decision of 13th June 2002 “On the European Arrest Warrant and the surrender procedures between Member States” whereas criminal laws of the country issuing the European Arrest Warrant determine a custodial sentence of no less than three years for this criminal act”.

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)?

Lithuania has not made and does not intend to make declarations under pp. 1 of Art. 27 and pp. 1 of Art. 28 of the Framework Decision.

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

Lithuania has not designated the “central authority” for assisting the competent judicial authorities, because there are only two competent judicial authorities designated to deal with an EAW. These authorities are able to exercise functions of the central authority if it is necessary.

9.3. 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?

The court must check the accuracy of the issued EAW and if necessary may ask for additional information from the issuing authority. The omission of the issuing authority may result in non-execution of the EAW on the ground “not enough information”.

Accordingly, the EAW must provide enough information so that the executing authority was convinced that the offence for which the EAW was issued and as it is defined by the law of the issuing country corresponds to one of the 32 offences listed in Art. 2 (2) of the Framework Decision.

The question whether the crime was reasonably qualified under certain category is not elucidated in national legal provisions. However, it may be presumed that if the court finds out that legal qualification of a committed offence is manifestly incorrect and it cannot be qualified as one of the categories of crime mentioned in Art. 2(2) of the Framework Decision, the court must take a negative decision on execution of the issued EAW.

Thus, in practice the Office of the Prosecutor General and the Vilnius Region Court always requires a full description of the offence even if it is a listed offence. E.g. there was a case where
"armed robbery" was ticked in the list although the actual legal qualification was theft under the national law of issuing state. A full description of the offence allowed considering whether "armed robbery" was ticked correctly.

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

Yes. It is a mandatory ground for non-execution. It is embedded in pp. 3 (3) of Art. 9 of Penal Code as “where the person has already been sentenced for the committed crime in the Republic of Lithuania or any other country and the imposed sentence has been served, is currently being served or may no longer be executed under the laws of the state that has passed the conviction”.

The provision “is currently being served” includes not only the actual imprisonment, but also the probation, conditional release, etc., where a person may be imposed to serve the rest of the penalty in case of non-compliance with the imposed obligations or restrictions.

Also, there is an optional ground, that is embedded in p. 4 (2) as “where the decision not to prosecute for the act committed by the requested person has been taken or the criminal procedure has been terminated in the Republic of Lithuania”. This ground is formulated more broadly than in the Framework Decision. It embraces cases where: a) a prosecutor or an investigating officer has taken a decision not to start the pre-trial investigation; b) a prosecutor decided to terminate the pre-trial investigation; c) the criminal proceedings were terminated in the court.

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

Yes. It is embedded in pp. 3 (3) of Art. 9 of Penal Code (see answer “b”). As it may be seen, it also applies on court decisions of non-Member States.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 SIC in your country?

− Is such a disposal a valid decision on discontinuance of the criminal process because of its legal inadmissibility?

Yes.

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

Yes, in part.

However it must be mentioned that Lithuanian prosecuting system is governed by the principle of legality, which means that a prosecutor must start criminal proceeding on every case where there is evidence that a criminal offence was committed. Nonetheless, this principle in not absolute and there are limited possibilities for not starting criminal proceedings or terminating them where it is not expedient.

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)?

No. However, Lithuanian courts interpret principle of ne bis in idem in quite a broad way.
9.4. The issuing of the EAW

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

The Office of the Prosecutor General is a “judicial authority” that is competent for the issuing of an EAW for the purpose of criminal prosecution and the Ministry of Justice is a “judicial authority” that is competent for the issuing of an EAW for the purpose of execution of a sentence. However, these authorities cannot issue an EAW without a valid court ruling on detention of a suspect or a judgement imposing imprisonment.

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?

It is possible in both ways. Usually initiators are territorial police and prosecuting offices, courts, also prison institutions in cases of the surrender for sentence execution purposes.

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

Courts do not issue EAWs.

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

No.

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

This question is not clear.

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?

Neither Criminal Procedure Code, nor the rules by the joint order of Minister of Justice and Prosecutor General provide for appeal possibility against a decision to issue the EAW. Thus, generally this decision is not subject to appeal.

However, it might be argued that a person may nevertheless ground his appeal on a constitutional right for judicial review. The person in question may also challenge the issued EAW in the executing country, as well as during the trial after surrender.

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

Yes.

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

Question is not clear.

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?

This statistical data is not available.
j. Were the EAWs issued in your country subject to crimes other than “crimes” mentioned in Art. 2.2. FD? If so, in how many cases?

Yes. However, this statistical data is not available.

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

This statistical data is not available.

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?

As Lithuania is not a part of the SIS, it mainly uses services of the Interpol. If the person in question is located, then a copy of the issued EAW is forwarded by fax and an original of this EAW is sent by post to the competent executing judicial authority of another Member State. A copy of this EAW is also forwarded to the International Relations Service of Lithuanian Criminal Police Bureau (Interpol Vilnius).

If the whereabouts of the person in question are unknown, then a copy of the EAW issued by the Ministry of Justice or by the Prosecutor General’s Office translated into English is forwarded by fax to the International Relations Service of Lithuanian Criminal Police Bureau (Interpol Vilnius), which forwards an alert on the issued EAW to all other Members States via its channels. If there is information about possible location of a person in one Member State, a copy of the issued EAW is transmitted by fax to a competent authority of that Member State. A copy of this EAW is forwarded to the International Relations Service of Lithuanian Criminal Police Bureau (Interpol Vilnius) too.

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

This statistical data is not available.

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

This statistical data is not available.

9.5. Executing of the European Arrest Warrant

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

There are two bodies that share competence of the executing authority: the Office of the Prosecutor General and Vilnius Region Court.

The Office of the Prosecutor General is a competent body to receive EAWs. It has an active role in the surrender procedure: communicates with the issuing authority, organises the search and the arrest of the person in question, informs him about the specialty rule, may even refuse the execution of the EAW if there are obvious grounds for refusal. However, the decision to surrender
the person is taken by Vilnius Region Court. Its decision may be subject to appeal to Lithuanian Court of Appeal, the decision of which is final.

The Office of the Prosecutor General (specifically – the Department of International Relations and the Legal Assistance of the Office of the Prosecutor General) is responsible for organizing the surrender procedure. It cooperates with the competent police authorities, including the Bureau of the International Relations of the Lithuanian Criminal Police Office.

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?

The decision to surrender the person is taken by Vilnius Region Court after the motion of the prosecutor of the Office of the Prosecutor General.

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?

Deadlines are directly prescribed by the law. Pp. 2 of Art. 71 of the Criminal Procedure Code provides for that if a person has given his consent to be surrendered to the country issuing the European Arrest Warrant, the decision on his surrender must be taken no later than 10 days after the receipt of his written consent. In other cases the decision on his surrender must be taken no later than 60 days from the day of the person’s detention. In exceptional cases, these periods might be prolonged to 30 days (thus totally – 90 days); however, the requesting institution of the country issuing the European Arrest Warrant must be immediately notified about the reasons thereof. If in special cases it is still not possible to stick to the term, Eurojust must be informed about the reasons for the delay.

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

No.

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

Pp. 3 of Art. 73 of the Criminal Procedure Code provides for that when there are several requests to extradite one person from the Republic of Lithuania or surrender him to the International Criminal Court or under the European Arrest Warrant, the Regional Court of Vilnius shall take a decision under the following rules:

1) the request to surrender to the International Criminal Court prevails over other requests;

2) the request for criminal prosecution prevails over the request to execute a penalty imposed by a judgement;

3) in remaining cases, the court must take into account all circumstances significant for the extradition (surrender) of the person, especially those regarding the nature and seriousness of the committed criminal act, the place of the committed criminal act and the dates of the receipt of the respective requests for extradition (surrender) of the person. In the cases provided by legal acts, the court takes into account consultations of international criminal prosecution institutions (including Eurojust).
f. Does the domestic law in your country envisage the collision of an EAW and extradition procedure? If so, please clarify.

Yes. See answer e.

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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

The received EAW (even its fax copy) is a sufficient basis for temporary detention of the person. The grounds and conditions for imposing detention are provided for in Art. 122 of the Criminal Procedure Code. According to pp. 5 of this Article, an EAW is also a ground for a detention, as well as a request of a foreign state for a provisional arrest of the wanted person until the original EAW is sent.

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

Generally it is up to 3 months.

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

The surrender decision is taken by a single judge of Vilnius Region Court. There are five region courts in Lithuania. Their competences are mainly those of instance court for serious crimes and appeal instance for decisions of district courts.

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

Criminal Procedure Code provides for that during the surrender procedure in Vilnius Region Court, the participation of the person in question, his defence lawyer and the prosecutor is obligatory. As for any other persons, the Code is silent.

k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?

The decision of surrender (or rejection of surrender) by the judge of Vilnius Region Court may be subject to appeal to a Lithuanian Court of Appeal. This court’s major competence is appeal instance for decisions of all five region courts. The EAW appeal procedure is dealt by a single judge as well.

The appeal against the decision to surrender may be lodged by a person in question or his defence lawyer. Appeal against the decision to reject surrender of person may be lodged by a prosecutor of the Office of the Prosecutor General.

l. Does the person in question have the right to:

- the assistance by the defence lawyer?

  Yes. In all cases, if a person requires, he can receive a free legal aid.

- the right to interpreter?

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

A Lithuanian citizen or permanent resident may be surrendered for prosecution purposes on condition of their return to Lithuania for serving the sentence, if he/she requests so.

If the EAW is issued for the purpose of execution of sentence, the surrender of the citizen or permanent resident may be refused if Lithuania undertakes to execute the sentence in accordance with its national law.

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

This statistical data is not available.

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

This statistical data is not available.

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

This statistical data is not available.

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

Yes. The statistical data is not available.

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

Question is not clear enough. There were several cases, where the court refused to surrender the person, e.g. not enough information was provided.

There were no cases where court refused surrender on human right clause.

s. How often does the requested person consent to the “fast track” surrender procedure?

Question is not clearly formulated. If this means cases where person consents surrender, these situations emerge quite often.

t. In how many cases has the decision on the execution of the EAW been 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?

Decision on surrender is always taken by the court, thus the answer below deals with appeal procedure of the court decision. As it was mentioned, Vilnius Region Court decision may be subject to appeal for Lithuanian Court of Appeal.

The statistical data on appeals is not available.
u. What is the average period of time between the execution of the EAW and the effective surrender of the requested person?

This statistical data is not available.

9.6. Others

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

No major difficulties.
10. Malta

(Stefano Filetti)

10.1. Constitutional issues

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

The FD is applicable to Malta. Due to Parliamentary Sovereignty however and also given the fact that Malta is a dualist state, all international obligations (including the FD in this case) have to be specifically implemented by legislation. In this case it was implemented by subsidiary legislation.

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 Courts take cognizance only of matters arising from principal and subsidiary legislation and cannot apply directly EU/COE treaties or FDs.

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?

Malta is traditionally very conservative, however recent trends show a movement towards a “pro-European” interpretation of domestic law, including constitutional law.

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

ECJ judicial decisions at best assist the court in interpreting law but do not constitute any form of precedent.

e. Is the 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?

Interpretation is made according to local norms although the reason and scope of the law are always taken into consideration.

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

Preliminary questions can be referred to the ECJ by the local Civil and Constitutional Courts.
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?

Implemented by way of a subsidiary legislation awarding the Extradition Act.

h. Was the 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?

It is a special type of extradition (simplified version), but intrinsically an extradition.

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

a. Are there any 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 (compulsory and optional) of surrender?
  All grounds for refusal of EAW are compulsory grounds for refusal

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

- the period of time for execution of the EAW?
  The EAW must be executed within 48 hrs and within such time the arrested person must be brought before the court for the initial hearing

- other issues; please specify

b. Can a 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)?

Yes. Specialty is regulated under Arts. 10(3) and (4) of the Extradition Act. The former sub-article provides that a person must not be returned or committed to or kept in custody for the purposes of such return, unless the laws of the requesting country or the contents of an arrangement with that country provide that he will not be dealt with in that country for or in respect of any offence committed before his return other than (a) the offence/s in respect of which the person is returned; (b) an extraditable offence disclosed by the same facts as the offence (c) an extraditable offence in respect of which the Court during a consent hearing gives its consent to the person being dealt with (d) an offence not punishable with imprisonment or detention (e) an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal or (f) an offence in respect of which the person waives the right that he would not have to be dealt with for the offence. However, such a person can be dealt with by the requesting country in respect of any
of these offences only if he is given the opportunity to leave the country and fails to do so before the lapse of 45 days from his return, or if he leaves the country and then returns.

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)?

No waiver.

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?

The Attorney General’s Office is the central authority competent to receive and send EAWs.

10.3. 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?

Ne bis in idem under our law has a specific meaning, being that one cannot be tried twice for the same Fact.

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

Yes.

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

Yes, provided that there is a proper conviction or acquittal and provided further that the conduct constituting the extraditable offence constitutes an offence in Malta.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 CISA in your country?

– Is such a disposal a valid decision on discontinuance of the criminal process because of its legal inadmissibility?

The final disposal of trial means a res iudicata and consequently is legally inadmissible. A mere nolle prosequi from the prosecution is not sufficient.

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

No.

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)?

No, the definition emanates from the Constitution and the Criminal Code.
10.4. The issuing of the EAW

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

The issuing judicial authority is a magistrate sitting in the Court of Magistrates.

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?

The AG receives the EAW who transmits the matter to the Magistrate sitting in the Court of Magistrates. The Magistrate needs to be satisfied with the availability and quality of the evidence and the EAW is issued ex officio.

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

Magistrate sitting in the Court of Magistrates (inferior courts).

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

None has a right to participate.

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

No, the evidence is presented to the Magistrate, who is to be satisfied with the evidence.

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?

None.

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

No.

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

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?

Mostly drug trafficking, human trafficking and fraud.

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

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

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

Europol and Interpol.

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

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

10.5. Executing of the European Arrest Warrant

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

The execution of an EAW rests on the Court of Magistrates sitting as a Court of Criminal Inquiry (Committal).

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?

The order allows any gazette police officer to execute an EAW.

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?

The arrested person must be brought for initial hearing within 48 hours. Within 20 days from initial hearing there must the Extradition hearing. There is no time-limit for the surrender decision (depends on facts of the case and the evidence). Further, it is suggested that the duration of surrender decision should not exceed ordinary committal proceeding time-limits, that is of one month.

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

Judicial authority is to examine all evidence and decide on balance of probabilities. All parties may adduce and present evidence in court.

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

The matter is to be resolved by the Minister for Justice through diplomatic channels.

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

Yes, and this matter again is to be resolved by the Minister for Justice through diplomatic channels. He is to determine the order of precedence.

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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

No, it is not automatic. If the issuing magistrate is convinced of reasons for immediate arrest, then a provisional warrant of arrest will be issued.
h. What is the maximum period for the arrest of the requested person before his or her effective surrender?

Maximum of 10 days (subject to certain exceptions).

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

Court of Magistrates sitting as a Court of Criminal Inquiry (Committal).

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

The arrested person and the Prosecution have a duty to appear whereas other interested persons (e.g. Parte civile) have a right to participate.

k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?

Yes. Prosecution and the arrested person can appeal the court decree to the Court of Criminal Appeal. A human rights reference can also be made to the competent court in Malta by the arrested person.

l. Does the person in question have the right to:

– the assistance by the defence lawyer?

Yes, and if he does not have the means he has a right to legal aid.

– the right to interpreter?

Yes and free of charge.

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

None.

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

o. In how many cases has judicial authority in your country refused 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.

Mostly drug trafficking, human trafficking and fraud.

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

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

The Court will reject EAWs on the grounds of violation of human rights.
s. How often does the requested person consent to the “fast track” surrender procedure?
   Rarely.

t. In how many cases has the decision on the execution of the EAW been subject to the judicial control? What were the results of such control? In how many cases was the decision on the execution of the EAW revoked?
   EAW was revoked due to *ne bis in idem* and prescription.

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

10.6. Others

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

(Harmen van der Wilt)

The answers provided to this questionnaire are based on an unofficial translation of the Dutch Surrender Act (Overleveringswet).

11.1. Constitutional issues

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

In general, it may be noted that in the Netherlands international law (including extradition treaties) prevails over national law (including the Constitution) ref. Art. 93/94 Constitution. The Dutch constitution states (Art. 2 (3)) that extradition is only possible pursuant to a treaty. The question arises whether the framework decision can be regarded as a treaty. The Council of State considers that the framework decision provides for an adequate basis for surrender.

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?

Domestic provisions do not obtain a higher ranking as a result of their emanation from – and serving to – implement international law. So in the case of collision the international conventions would still prevail, provided they entail ‘direct effect’. In the light of Pupino, the Dutch state would be accountable to the European Union for failure to implement properly the Framework Decision.

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?

See under a.

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

In rendering their decisions, courts would be bound to take ECJ decisions into account. To our knowledge, however, the District Court of Amsterdam has not ‘disqualified’ domestic provisions because of their incompatibility with the FD.

e. Is the 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?

Yes, there are a number of concrete examples. Even if the framework decision has not been implemented, but the period to do so has expired, interpretation of domestic legislation in conformity with the framework decision is mandatory. We may point at a construction, analogous to ‘Kolpinghuis’.

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

The Netherlands allow all of its courts to raise preliminary questions on the interpretation of framework decisions (including the Hoge Raad (Supreme Court)) See OJ C 120/24 of 1st May 1999.

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?


h. Was the late implemention the Framework Decision and the Framework Decision itself subject of proceedings of the constitutional court in your country?

A Constitutional Court is unknown in the Netherlands.

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

It is treated as a separate legal instrument.

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

a. Are there any 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 (compulsory and optional) of surrender?

The Netherlands law does not recognize the possibility of an amnesty. Hence there is no ground for refusal.

See Art. 9 Surrender Act:

“1. Surrender of the requested person shall not be permitted for an act concerning which: (…)d. he has been acquitted or discharged from prosecution by final judgment of a Dutch judge, or a judge of another Member State of the European Union or of a third country has given a corresponding final ruling concerning him; e. he has been sentenced by final judgment in cases where: 1. the sentence or order imposed has already been served; 2. the sentence or order imposed is no longer eligible for execution or further execution; 3. the sentence and conviction do not entail imposition of a punishment or order; 4. the imposed punishment or order is served in the Netherlands.”
The territoriality exception may be waived at the public prosecutor's request.

See Art. 13 Surrender Act:

“1. Surrender shall not be allowed if the European Arrest Warrant concerns an offence which:
a. is regarded as having been committed in whole or in part in the territory of the Netherlands or outside the Netherlands on board a Dutch vessel or aircraft; or b. was committed outside the territory of the issuing state, while under Dutch law no prosecution could be brought if the offence had been committed outside the Netherlands.

2. At the public prosecutor’s request, and only in the terms of paragraphs 1a and 1b, a refusal of surrender shall be waived, unless, in the opinion of the court, the public prosecutor could not reasonably make such a request.”

The Surrender Act contains a restricted human rights exception.

See Art. 11:

“Surrender shall not be allowed in cases in which, in the opinion of the court, there is justified suspicion, based on facts and circumstances, that granting the request would lead to flagrant breach of the fundamental rights of the person concerned, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome of 4th November 1950”.

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

Most ‘crime categories’, mentioned in Art. 2.2 FD are indeed criminal offences under Dutch law.

There are a number of interesting issues which deserve some short comments:

• Abortion does not constitute ‘homicide’ or murder and is not even a criminal offence, if the treatment is performed by a doctor in a hospital, in conformity with the Act on the Interruption of Pregnancy (Art. 296, section 5 DPC).

• Euthanasia does not constitute a criminal offence, if performed by a doctor who meets the caution requirements, as spelled out in Art. 2 of the Act on Testing Termination of Life on Request (Art. 294, section 2 DPC).

• Contrary to popular belief, simple possession of (small amounts of) soft drugs is a criminal offence, according to our Act on Narcotics (‘Opiumwet’) the Public Prosecutor has discretionary powers not to prosecute this minor offence and smoking of marihuana is therefore condoned. The District Court of Amsterdam has incorrectly held that a Dutch national could not be surrendered, as he would not be able to serve the foreign sentence in Holland, because of a lack of double criminality (DC Amsterdam, 3rd December 2004).

• In his contribution on double criminality in Blekxtoon, 2005 (p. 155) Keijzer wonders whether the Dutch translation of computer related crime (informaticacriminaliteit) is a proper equivalent of the original, as it arguably covers crimes committed with a computer as instrument (obscene publications, blackmail) as well.

The period of time for execution the EAW?

In line with the FWD the deadline is 90 days. See Art. 22 Surrender Act:

“1. The court shall deliver the verdict containing the decision on surrender within sixty days of the requested person’s arrest as per Art. 21.

2. If the surrender also depends on the consent of the competent authority of another Member State or of a third state, the period as per paragraph 1 shall start from the date of receipt of the requisite consent.

3. Exceptionally, provided reasons are given to the issuing judicial authority, the court may extend the term of sixty days by a maximum of thirty days.

- other issues; please specify

b. Can a 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)?

No, not an optional ground for refusal. However, Art. 7, Surrender Act converts the optional ground into a mandatory ground, in case the act for which surrender is sought, does not feature on the list and/or is not punishable with deprivation of liberty for three years or more in the issuing state.

Furthermore, as indicated in the previous paragraph, the rule of double criminality still applies to the full extent in case of Dutch nationals (in view of the guarantee that they are allowed to return to their home country in order to serve their foreign sentence).

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

No, Holland has made no such declaration. In other words: the rule of specialty is to be observed, even if the issuing state itself has waived the rule. Usually, the District Court will be confident that the rule will be observed. A special guarantee to this purpose is not required, cf. DC Amsterdam, 19th November 2004.

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

No central authority.

11.3. 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?

This is a difficult issue indeed. The prevailing rule in case law is that we deal with the same facts if “facts were committed under circumstances which apparently show a link between the temporal coincidence of the acts and the essential coherence between the acts and the guilt of the perpetrator”. Dutch case law follows a ‘middle of the road’ approach, combining the historical facts with the legal qualification. In a more recent decision, the Supreme Court added the clarification that a bis in idem issue would not arise, if the same historical fact would qualify as different offences and the purpose of those offences would be divergent to a considerable extent, Supreme Court, 2nd November 1999.
b. Is the valid judgement/conviction/discontinuance of the procedure in your country a mandatory ground for non-execution of the EAW?

I understand this question as “valid judgment etc. emerging from a Dutch court”. A final judgement, entailing an acquittal serves as an impediment to surrender. The same applies in the case of conviction, provided that the sentence or measure has been served completely. A decision by the Dutch Prosecutor to drop charges/discontinue criminal proceedings is an impediment to surrender as well (Art. 9, section 1, sub b Surrender Act).

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

Not entirely. An unconditional discontinuance of criminal proceedings would not normally serve as an impediment. However, if the suspect has reached a settlement with the Prosecutor’s Office and he has complied with the conditions by paying a fine, the execution of the EAW will be refused. Art. 68, section 3 DPC puts foreign settlements out of court on the same par as their Dutch equivalents.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 CISA in your country?

– Is such a disposal a valid decision on discontinuance of the criminal process because of its legal inadmissibility?

Lack of evidence (for instance) is a proper reason to discontinue criminal proceedings. Such a decision by the Prosecutor is considered as a ‘final disposal’. Interestingly, Art. 9, sec. 3 of the Surrender Act provides that the ceasing of criminal proceedings because of a lack of jurisdiction or because the authorities have decided to give precedence to transfer of proceedings does not bar the execution of the EAW.

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

The Dutch criminal law system is predicated on the principle of expediency. The Prosecutor is allowed to stop proceedings if prosecution would not meet the general interest. According to Art. 12 of the Dutch Code on Criminal Proceedings, those persons harbouring a direct interest in the prosecution (victims et al.) are authorized to appeal against the decision of the Prosecutor at the Court of Appeal.

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)?

The Van Straaten-judgement (ECJ, 28th September 2006, C-150/6) emerged from a request of the District Court of ’s-Hertogenbosch for a preliminary decision on the exact scope of the concept ‘same act’ in Art. 54 Schengen. The case concerned the well-known problem whether importation and exportation of drugs amounted to the same ‘act’.

11.4. The issuing of the EAW

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

Any public prosecutor in the Netherlands may act as an issuing judicial authority (Art. 44 Surrender Act). A SIS alert can only be issued, on behalf of the issuing public prosecutor, by the
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International Networks Service of the National Police Services Agency (KLPD) (Art. 46 (2) Surrender Act).

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?

The decision-making process as to the issuing of EAWs is entirely decentralized. The Public Prosecutors enjoy full discretionary powers in this regard.

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

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

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

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?

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

Yes, decisive is the moment of issuance and reception of the EAW, not the moment of commission of the crime (cf. Art. 74, sec. 4 Surrender Act, per analogiam).

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

Unknown.

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?

This information is not collected.

See Art. 70 Surrender Act:

The public prosecutor shall ensure six-monthly reporting to our minister on:

a. the number of European Arrest Warrants received and dealt with;

b. the number of times the abridged procedure has been used;

c. the number of hearings by the court;

d. the number of times the court has refused surrender; and

e. the average duration of the proceedings as per b and c.

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

See answer under i.

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

If the place of residence of the requested person is unknown, an alert can be issued through the Schengen Information System (SIS) (Art. 4(1) Surrender Act). The services of Interpol will be used in case the place of abode of the person is not known and there is a possibility that the person might be present in a country not connected to SIS, but connected to Interpol.

m. How many EAWs issued by the judicial authority in your country have been executed in other Member States? In how many cases has the requested person been effectively surrendered?

I have requested statistical data from the Prosecutor’s Office, but we are awaiting permission from the Ministry of Justice to pass the information.

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

See answer to previous question.

11.5. Executing of the European Arrest Warrant

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

The District Court of Amsterdam (see Art. 22 (1) Surrender Act):

“The court shall deliver the verdict containing the decision on surrender within sixty days of the requested person’s arrest as per Art. 21”.

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?

On the request of the Public prosecutor at the District Court of Amsterdam.

See Art. 23 Surrender Act:

“1. If the public prosecutor is already of the opinion that surrender cannot be allowed on the basis of the European Arrest Warrant received, he shall immediately notify the issuing authority accordingly.

2. In all other cases, no later than the third day after receipt of the European Arrest Warrant, he shall make a written request for the court to deal with the Arrest Warrant. For this purpose he shall pass to the court the European arrest warrant with translation and any supplementary information received from the issuing judicial authority”.

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?

See Art. 22 Surrender Act:

“1. The court shall deliver the verdict containing the decision on surrender within sixty days of the requested person’s arrest as per Art. 21.”
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2. If surrender also depends on the consent of the competent authority of another Member State or of a third state, the period as per paragraph 1 shall start from the date of receipt of the requisite consent.

3. Exceptionally, provided reasons are given to the issuing judicial authority, the court may extend the term of sixty days by a maximum of thirty days.”

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

See Art. 20 pp. 4 Surrender Act:
“If, in the opinion of the public prosecutor, particulars supplementary to the European Arrest Warrant are necessary, specifically relating to Arts. 7–9 and 11–13, he shall give the issuing judicial authority the opportunity to supplement or improve them, allowing for the periods stated in Art. 22”.

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

See Art. 26(3) Surrender Act:
“If there are concurrent European Arrest Warrants, the public prosecutor shall also state which of the European Arrest Warrants is to be assigned priority, provided surrender can be allowed on the basis thereof. In doing so, he shall take account of the concern for good administration of justice and, furthermore, of the following in particular:

a. the greater or lesser seriousness of the various acts for which surrender is requested;
b. the place or places where the acts were committed;
c. the dates of the various European Arrest Warrants;
d. the purpose of surrender;
e. the degree to which the requested person’s nationality may pose an obstacle to onward handover;
f. the possibility that, once the requested person has moved to the territory of one of the Member States concerned, the judicial authorities of that Member State may then place him at the disposal of the issuing judicial authority of another Member State.

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

According to Art. 31, section 2 of the Surrender Act, the Minister of Justice will decide in the case of concurrence between EAW and extradition request or request for surrender by the International Criminal Court which of those requests shall take precedence and will therefore be executed.

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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

If a requested person is arrested in the name of a SIS-report, the requested person will be held in provisional arrest until an EAW is received. This will be the procedure until SIS-reports contain all information listed in Art. 2. As from the moment a SIS-report can contain all information listed in Art. 2, the SIS-report will be used as the equivalent of an EAW (Art. 4 (3)). If the EAW is not rece-
ived within the maximum period of provisional custody, the examining judge at the Amsterdam District Court can, on the demand of the public prosecutor, order the provisional detention of the requested person with a maximum of 20 days. If the EAW has not been received before the end of this period, the requested person has to be released.

See Art. 4(1)+(3) Surrender Act in conjunction with Art. 15 Surrender Act.

Art. 4

“1. The issuing authority may decide to issue an alert for the requested person in the Schengen Information System, in accordance with Art. 95 of the Convention Implementing the Schengen Agreement.

3. For the purposes of this Act, an alert as per paragraph 1 shall be equivalent to a European Arrest Warrant, provided that it includes all the particulars listed in Art. 2.2.”

Art. 15

“The provisional arrest of a requested person who is in the Netherlands may be ordered on the basis of a report in the Schengen information system, as per Art. 4.1”.

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

See Art. 35 Surrender Act:

“1. As soon as possible after the verdict allowing surrender in whole or in part, and no later than ten days after the date of the verdict, the requested person shall actually be surrendered. The public prosecutor, in consultation with the issuing judicial authority, shall decide the time and place.

2. If special circumstances mean that actual surrender cannot take place by the deadline set in paragraph 1, a new date shall be set by mutual consultation. Actual surrender shall then take place no later than ten days after the set date.

3. As an exception, the actual surrender may be omitted where there are serious humanitarian reasons against actual surrender, especially where it is irresponsible for the requested person to travel, given his state of health. The issuing judicial authority shall immediately be informed of this. The public prosecutor, in consultation with the issuing judicial authority, shall decide the time and place at which actual surrender can yet take place. Actual surrender shall then take place no later than ten days after the set date.

4. The detention of the requested person shall end on expiry of the deadlines of paragraphs 1–3”.

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

Surrender Division, composed of three judges.

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

At the Court hearing the requested person has the right to be assisted by a legal counsel. If the requested person does not have a counsel, the presiding judge arranges counsel for him through the legal aid office. If the requested person does not appear in court, he can be summoned to appear. The Court can even summon a warrant to bring the requested person before court. The Court hearing takes place in the presence of the public prosecutor.
See Arts. 24 and 25 Surrender Act:

Art. 24

“1. Immediately after receipt of the request as per Art. 23.2, the presiding judge of the court shall set the time at which the court is to hear the requested person, allowing for the deadlines set in Art. 22. In doing so, he may order the requested person to appear.

2. The clerk of the court shall immediately notify the public prosecutor and the requested person of the time set for the hearing. Such notification and, where the person is ordered to appear, a copy of that order, shall be served on the requested person.

3. If it appears that the requested person does not yet have a legal counsel, the presiding judge shall appoint the legal aid office to provide such a counsel”.

Art. 25

“1. The requested person shall be heard in public unless a request has been made for the matter to be dealt with in chambers or the court has ordered that it be thus dealt with, for good cause, which shall be recorded in the report of the session.

2. The hearing shall be held in the public prosecutor’s presence.

3. The requested person may be assisted by his legal counsel at the hearing.

4. If the requested person has not appeared, and the court thinks his presence at the hearing is desirable, the court shall order him to be summoned, backed where necessary by an order to appear, allowing for the deadlines set in Art. 22, by such time as the court shall determine”.

k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?

No appeal is possible except for cassation in the interest of the law, but this legal remedy is of no influence to the ruling given by the Court.

See Art. 29 Surrender Act:

“1. The court’s verdict shall be enforceable immediately unless a competing extradition or surrender request has been made by the International Criminal Court, or other international tribunal, and is being dealt with.

2. There shall be no recourse against the court’s verdict, other than an appeal for it to be quashed on legal grounds, as per Art. 456 of the Code of Criminal Procedure”.

l. Does the person in question have the right to:

– the assistance by the defence lawyer?

Yes, Art. 30 of the Surrender Act declares Art. 275 of the Code on Criminal Proceedings (right to have an interpreter) applicable by analogy.

See answer under j.

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

The Dutch extradition law has allowed for the extradition of nationals since 1986 (only for the purpose of prosecution and under the restriction that if a custodial sentence was imposed the sentence could be served in the Netherlands).

See Art. 6 Surrender Act:

“1. Surrender of a Dutch person may be allowed where requested because of a criminal investigation against that person if, in the opinion of the executing judicial authority, it is guaranteed that, if he is given a non-suspended custodial sentence in the issuing Member State for acts for which surrender can be allowed, he will be able to serve that sentence in the Netherlands.

2. Surrender of a Dutch person shall not be allowed if the person is requested for execution of a custodial sentence imposed upon him by final judgment.

3. If a surrender is refused solely on the grounds of pp. 2, the public prosecutor shall notify the issuing judicial authority of the willingness to take over execution of the judgment in accordance with the procedure envisaged in Art. 11 of the Convention made at Strasbourg on 21st March 1983 on the transfer of sentenced persons (Treaty Series, 1983, 74), or on the basis of another applicable convention.

4. The public prosecutor shall immediately notify our minister of any surrender with return guaranteed as per pp. 1, and of any refusal of surrender under the declaration of willingness to take over execution of the foreign judgment in the terms of pp. 3.

5. Pp. 1–4 shall also apply to an alien with a residence permit for an indefinite time, where he can be prosecuted in the Netherlands for the acts underlying the European Arrest Warrant and provided he is expected not to forfeit his right of residence in the Netherlands as a result of a sentence or order imposed upon him after surrender”.

n. How many EAWs issued by other MSs have been executed by your country since the date mentioned in 1g of the questionnaire? In how many cases has the person been effectively surrendered?

See answer to question 4 m.

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

Idem.

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.

To give you an impression:
• drug related crimes (vast majority of cases);
• participation in terrorist organization (DC, 20th August 2004);
• computer related crime, in combination with racism/xenophobia (DC, 25th October 2005).
q. Has the EAW been executed for crimes other than listed in the above mentioned Art. 2.2. FD? If so, in how many cases?

Yes, but only rarely.

r. Have there been 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)?

Only in cases of a ‘flagrant’ denial of human rights, especially fair trial. A good example is DC Amsterdam, 1st July 2005, in which execution of the EAW was refused because of undue delay.

s. How often does the requested person consent to the “fast track” surrender procedure?

Unknown (yet). See answer to question 4 m.

t. In how many cases has the decision on the execution of the EAW been 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?

Appeal is not possible. See answer under k.

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

Unknown.

11.6. Others

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

(Adam Górski, Piotr Hofmański, Andrzej Sakowicz, Dobrosława Szumiło-Kulczycka)

12.1. Constitutional issues

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

It can be stated in brief that the legal character of the framework decision is perceived in Polish jurisprudence in two ways: as one of the instruments of international law, a kind of a simplified international agreement, or as a *sui generis* instrument of Union law. However, there is no consensus among the doctrine experts, whereas perceiving the framework decision as an instrument of international law has been decided by the judgment of the Constitutional Court. On the other hand, the case law of the European Court of Justice (although not binding upon the Polish courts, regarding the Pupino case) seems to increasingly enhance the Community nature of this legal instrument.

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?

At present, it is difficult to judge unambiguously what kind of position will be elaborated on this subject by judicature. In Polish law, there is a certain problem results from the fact that pursuant to Art. 615 § 2 of the Code of Criminal Procedure (hereinafter: CCP), the provisions of the Code are applied only if the international agreements to which Poland is a party do not provide otherwise. This rule – *lege non distingente* – formally covers these provisions of the CCP which result from the implementation of the UE Council framework decisions. Since both the implementation of the framework decision concerning the EAW and of other framework decisions in the area of criminal matters is pursued through adding new chapters to the CCP, the provisions of international treaties binding Poland should formally “precede” the provisions resulting from the implementation of framework decisions. Thence, e.g. the conventions of the Council of Europe and of the European Union concerning extradition or other forms of international cooperation have the formal precedence before the special cooperation instruments created under the third pillar. In practice, however, without giving much thoughts to look for more profound justification, in mutual relations with EU Member States, the provisions of the CCP are being applied (particularly these concerning the EAW and joint investigation teams). In the case of the EAW, however, the notification presented to the Council of Europe by the Council of the European Union, to the effect that the conventions of the Council of Europe are not applicable in legal transactions with Member States. Thus, the problem is of more theoretical nature.

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 the doctrine, there is an increasing body of opinion based on assumption that the pro-European interpretation should also be applied to the third pillar instruments, and that the provisions
implementing framework decisions are of special character. This position emerges largely in opposition to the stated position of the Constitutional Court which opted for an absolute primacy of the Constitution of the Republic of Poland over the statutes implementing framework decisions.

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

As regards the implementation of European law into Polish domestic law, the practice of totally consistent implementation (in line with the language and content of the framework decision) prevails. However, the most recent amendment to the Constitution seems to indicate an opposite trend. In the jurisprudence of the Polish Supreme Court, the need to take a pro-Community interpretation of the provision implementing the framework decisions of the EU Council seems to solidify, as pronounced in one of the very recent decisions of this court concerning the enforcement of EAW originating in Belgium (the case of Adam G.).

e. Is the 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?

To date, we have not dealt in Poland with a situation where courts would have been forced to refer directly to framework decisions not yet implemented, because Poland had not been behind implementation deadline. However, there is no obstacle to courts referring to the content of framework decisions when interpreting domestic provisions. In practice, this is quite a frequent occurrence.

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

Poland has not yet submitted the declaration referred to in Art. 35 TUE. The Polish Constitutional Court has no powers whatsoever do provide interpretation of laws, including the framework decisions. This does not affect the fact that it takes into account the framework decisions when ruling on the consistency of legislation with the Constitution when the legal acts under scrutiny result from the implementations of these framework decisions (which was the case when the court ruled on the EAW). The interpretation of framework decisions may, however, be provided by the Supreme Court under the institution of legal questions submitted thereto. The Supreme Court provides resolutions containing the interpretation of law (it is accepted in practice that it concerns not only the Polish statutes but also, to the necessary extent, the provisions of treaties and framework decisions), if the decision in a specific case depends upon such considerations. The interpretation so provided by the Supreme Court is not, however, binding erga omnes.

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?

The implementation of the Framework Decision on the EAW has been done, as for any previous framework decisions in the area of international cooperation in criminal matters, through adding
new provisions to the Code of Criminal Procedure now in force. Specifically, it was done through the Act of 4th March 2004 which went into effect on 1st May 2004 published in the Dziennik Ustaw (Journal of Laws) of 2004, No. 69 item 626, i.e. with the date of the accession of Poland to the European Union). By this act, two new chapters were added to the CCP, numbered as 65a and 65b, concerned with issuing the EAW, and executing the EAW, respectively.

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

Yes, although the matter examined by the Constitutional Court was limited to the issue of the consistency of the CCP provisions with the Polish Constitution in the context of Art. 55 of the latter, which prohibited extradition of Polish citizens. The Court resolved that the handing over, a person requested under the EAW, is a type of extradition, hence is paramount to extraditing its own citizens. The result of the Constitutional Court’s resolution was not, however, to amend the provisions of the CCP (because after such an amendment, these provisions could not be made consistent with the content of the framework decisions), but to achieve an amendment to Art. 55 of the Constitution. This article so amended allows surrendering over Polish citizens under the EAW, although makes it subject to some further conditions which – as it seems – are not in compliance with the requirements stemming from the Framework Decision on the EAW.

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

See above under h. The position of the Constitutional Court has not been universally accepted yet. There is also an opinion among some legal experts that the EAW is an instrument qualitatively different than extradition.

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

a. Are there any 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 (compulsory and optional) of surrender?

The negative mandatory premises for executing the EAW in Poland are governed by the provisions of Art. 607p CCP. The Polish Code treats this issue in a broader manner than the framework decision concerned, introducing an additional obligation to refuse the execution in the case when a valid decision had been issued with respect to this person on surrender to another EU Member State. Moreover, another negative mandatory premise is set out as any valid decision in another country, not necessarily in another EU Member State. When treated literally, this provision means that we would not be able to execute ANA when the person concerned was validly sentenced in a foreign state (not necessarily an EU Member State).

Moreover, even though the Code does not enumerate Polish citizenship among the mandatory obstacles to surrendering a person, the existence of such prohibition was derived by the Constitutional Court in its decision of 27th April 2005 (P1/05). It is thus tantamount to a broader catalogue of negative mandatory premises both with respect to the catalogue in the Framework Decision, but also with the provision of Art. 607p CCP. However, the decision of the Constitutional
Court precipitated the amendment to Art. 55 of the Constitution (implemented by the statutes approved by the Sejm on 8th September 2006, and by the Senate on 14th September 2006) which although opening the possibility to surrender a Polish citizen under EAWs, introduced in this case such additional negative premises of EAWs execution which cannot be reconciled fully with the content of the Framework Decision. These premises are: committing the act outside the national territory of the Republic of Poland, the absence the of the so-called double criminality of the act concerned, as well as conviction that the surrender of a Polish citizen would prejudice his/her fundamental rights and freedoms.

The optional premises of the EAW execution were included in Art. 607r CCP. The full reception of the FD's contents was granted only to the premises of Art. 4 pp. 1 FD (the act being the grounds for the EAW does not constitute an offence under Polish law (nevertheless, see the preceding comments on surrendering a Polish citizen), Art. 4 pp. 2 (the person involved in the EAW proceedings is also subject to criminal proceedings in Poland for the same offence as the one underlying the EAW), Art. 4 pp. 3 (there was a valid judgment against the person subject to the EAW in connection with the act underlying the EAW: refusal to institute, discontinuation or other judgment concluding the proceedings in the case), and Art. 4 pp. 7 a) (the EAW concerns the offences which were committed fully or partly within the national territory of Poland or on board of a Polish vessel or aircraft – but again see the comments above about surrendering a Polish citizen). The Polish legislator has adopted also, as optional grounds for non-execution of the EAW, the circumstance covered in Art. 4 pp. 4 FD (prosecution or penalising the person concerned by the EAW is prohibited by law, and the acts providing grounds for the EAW are also subject to the jurisdiction of the country of execution). The CCP has nevertheless restricted the circumstances under which the prosecution or penalising is prohibited to the sole condition of time limit for prosecution. On the other hand, the Polish Code did not include at all such grounds for the non-execution of the EAW as: the fact of issuing a valid judgment in a third country against the person concerned for the same offence (Art. 4 pp. 5 FD); the European Arrest Warrant was issued in order to execute a custodial sentence or a precautionary measure, and the person concerned by a request is a citizen of the country of execution or resides there permanently, and this country takes upon itself the obligation to execute the penalty of deprivation of liberty or the preventive measure (Art. 5 pp. 6 FD); acts concerned in the EAW were committed outside the territory of the country of execution and the law of this country prohibits their prosecution under the circumstances (Art. 5 pp. 7b FD). Finally, the Polish CCP envisages one optional premise for non-execution of the EAW, not present in the framework decision. This is the case when, in the country of EAWs issuance the offence is subject to the penalty of life imprisonment or other penal measure resulting in the deprivation of liberty without the possibility to apply for its curtailment (Art. 607r pp. 6 CCP).

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

In principle, this catalogue has been fully adopted by the Polish code in Art. 607 CCP. All the acts described in the catalogue are also criminalised in Poland. Nevertheless, some problems may arise because of the descriptive approach adopted in Art. 2.2 FD, and also in Art. 607 of the Polish CCP which follows it closely. For example, the Polish code adopted an equivalent of “grievous bodily injury” referred to in the framework directive under so-called “serious impairment to health” i.e. an offence typified in w Art. 156 of Polish Penal Code, which involves deprivation of a human being of sight, hearing, speech or the ability to procreate, or inflicting a serious crippling injury, an incurable
or prolonged illness, an illness actually dangerous to life, a permanent mental illness, a permanent total or substantial incapacity to work in an occupation, or a permanent serious bodily disfigurement or deformation. It seems at least doubtful that the Framework Decision wording has narrowed the scope of the “grevious bodily injury” only to the results listed in the Polish Penal Code.

**– the period of time for execution of the EAW?**

Both the FD on EAW and the Polish CCP provide two basic time limits for the execution of the EAW. It is either 10 or 60 days, depending whether the person concerned by the requests consents to the surrender or not. Even though the time limits there seem quite matching, there is an essential difference between the regulation in the FD and the CCP. The Framework Decision sets the time limits for the final decision on the execution of EAW while the Polish CCP uses these time limits (Art. 607m) as concerning the first, i.e. yet not finally valid ruling on surrendering. In practice this may result in some differences between the time required in the Framework Decision and the time required under Polish law.

**– other issues; please specify**

The Polish Criminal Procedure Code permits the issuance of the EAW only for an offence committed within the territory of the Republic of Poland, a restriction not envisaged under the relevant framework decision. The lack of implementation concerning the SIS (the Schengen Information System) results from inability on the part of Poland to enforce such regulations. Other differences in the Polish implementation can be inferred from the answers to further questions of this questionnaire. These are principally associated with the issuance of the EAW based on a sole request from a prosecutor (rather than from a court acting *ex officio*).

**b. Can a 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)?**

Yes, pursuant to Art. 607r § 1.1 CCP, and of Art. 4.1 of the FD. After the Constitution has been amended by the Acts of Sejm (lower chamber of the Polish Parliament) of 9th September 2006 and of the Senate, the lack of the dual criminality has become the obligatory grounds for refusal of executing the EAW (surrendering a person) when involving a Polish citizen. This issue has not been addressed yet (as of 20th September 2006) in a relevant provision in the CCP.

**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)?**

No.

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

According to the notification submitted pursuant to Art. 7 FD, the central authority which may act as an intermediary link in the passing to the competent prosecutors in Poland of the EAWs issued by the authorities in other Member States, as well as any other official correspondence associated with theme, is the Minister of Justice – Prosecutor General.
12.3. 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?

The regulation in Art. 3 (2) of the Framework Decision was implemented through Art. 607p para 2 CCP. It is based on the assumption that the legal qualification of the act is identified by its description (*idem factum*), rather than the legal qualification. Under the Polish legal doctrine of criminal law, the predominating opinion is that the concept of an act should be understood as a certain human activity undertaken towards the surrounding reality. Such an activity may be, on the one hand, characterised by the presence of certain features (i.e. actions) whereas on the other hand, by the absence of other features (nonfeasance). Each time the set of actions demonstrated is established against the uniformity of time and place of action; the identity of the legal interest (possibly of the person injured) and the uniformity of the perpetrator’s intent (goal). This opinion has prevailed also in the jurisprudence of the Supreme Court which stated on many occasions that the identity of an act is determined by factual frames of an event rather than by its description and legal grounds included in the indictment.

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

Art. 607p para 2 CCP includes a mandatory (negative) premise for executing the EAW vis-à-vis the *ne bis in idem* principle. Firstly, the refusal to execute the EAW occurs always when the “a valid judgment was issued in other country” against the requested person concerning the same acts. Secondly, the refusal will happen also in the case when the requested person, having been validly sentenced for the same acts, either serves or has served the sentence, or the sentence could not be carried out according to laws in the country where the “convicting judgment” was issued.

The concept of “valid judgment” shall be construed as:

a) the judgment of acquittal,

b) the convicting judgment, and

c) a ruling on substance, deciding the issue of responsibility for the act committed, issued by either a prosecuting authority or a court.

In Art. 607p para 2, the legislator used the term “other country” without specifying it any further, i.e. without indicating whether it concerned an EU Member State or a country from outside the EU. Considering the provision of Art. 3(2) of the Framework Decision it should be inferred that the concept of “other state” in Art. 607p para 2 includes also the EAW executing Member State (e.g. if Poland is the state, a potential acquittal, convicting judgment or other decision on merit, deciding the issue of responsibility, issued in Poland – and concerning the same act – enables the execution of the EAW).

Apart from the above mandatory premise of refusal to execute the EAW, Polish law knows also an optional premise placed in Art. 607r § 1 para 3 CCP (which is an implementing provision of Art.
4(3) FD, which provides that the refusal to execute the EAW is possible when the person requested for an act on which the EAW is based, a valid judgment was issued:

a) refusing to institute the proceedings,

b) discontinuing the proceedings, or

c) or other judgment concluding the proceedings.

The regulation included in Art. 607r § 1 para 3 CCP regards the situation when in an EU Member State (other that the issuing Member State) a judgment is pronounced without deciding the substantive responsibility for the act imputed to the person requested. The grounds for such a decision could only be a formal issue, except for limitation statute which in the Polish CCP is provided as a separate reason for refusal to execute EAW (Art. 607r § 1 para 6 CCP).

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

The discussion of the ne bis in idem principle and the concept of a “valid judgment” issued by a judicial authority (broadly defined) of another EU Member State follows the same lines as in the case of a “valid judgment” issued by a Polish court or prosecutor. See above: Part 3, point b.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 CISA in your country?

– Is such a disposal a valid decision on discontinuance of the criminal process because of its legal inadmissibility?

In Poland there is no uniform interpretation of the phrase “the final disposal of the trial”. As deemed by some of the experts in legal doctrine, this term should be construed as including, apart from a sentencing or acquitting judgment, also other substantive decisions which determine the issues of responsibility for the acts committed (i.e. determining the issue of guilt of the perpetrator), e.g. decision on discontinuation of proceedings. On the one hand, the followers of this interpretation assume that the recognition of the decisions made by a judicial authority of one EU Member State by a judicial authority of another Member State may not be made conditional upon the fact that these judgments are made in some countries during the investigative phase of the proceedings (carried out by prosecutors) whereas in other countries – during the court stage. Given the diversity of legal systems among the EU Member States, these authors indicate, referring also to the case law of the ECJ: the judgment in joined cases Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01) of 11th February 2003 and the judgment in Filomeno Mario Miraglia (C– 469/03) case of 10th March 2005) – that linking the ne bis in idem principle with the subject of the case and the person of the perpetrator can allow effective implementation of the principle. On the other hand, other authors emphasize that Art. 54 of the CISA Convention implementing the Schengen Agreement of 14th June 1985 refers only to sentencing judgments (they refer also to the ECJ's case law comments on “discontinuation of probationary nature”) to the exclusion of acquittals, refusals to institute proceedings of conditional discontinuances.

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

Pursuant to the Polish Criminal Procedure Code, the state prosecutor has powers to issue an order on the refusal to institute or discontinue the preliminary proceedings (investigation or inquiry).
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In the event that such a decision is issued by the Police, its approval/ratification by a prosecutor is necessary (Art. 305 § 3 CCP; Art. 325e §§ 1 and 2 CCP).

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)?

    Until now (i.e. 21st September 2006), there has been no request (legal question) submitted to either the Supreme Court or the Constitutional Court to interpret or elucidate the *ne bis in idem* as viewed from the European perspective. It does not mean, however, that the issue of the European *ne bis in idem* is somewhat passed over in legal writings or practice. Apart from comments in paragraph above, it should be noted that under the provisions of Art. 114 § 1 of the Polish Penal Code, the judgement rendered abroad does not prevent instituting or carrying out the criminal proceedings before a Polish court. This principle is not, however, an absolute one because § 3 of the same provision contains some exceptions. One of them is essential, as it says that the principle may not be applied “if an international agreement binding the Republic of Poland stipulates otherwise” (Art. 114 § 3 para 3 of the Polish Penal Code). Using the term “court judgments” prevents the application of this provision to, for example, prosecutors’ decisions of probationary nature. Such problems have been indicated by judges and prosecutors.

12.4. The issuing of the EAW

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

    Pursuant to Art. 607a CCP, the only authority which can issue the European Arrest Warrant, irrespective of the stage of proceedings at which this necessity occurs, is the court of territorial jurisdiction over the place of proceedings.

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?

    The court may not act *ex officio* even when the necessity to issue the European Arrest Warrant occurs only after the indictment is served on the prosecuted person. In any case (which is criticised in the legal doctrine) it is necessary that a prosecutor submits such a request.

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

    In each case it is a district court (*sąd okręgowy*), irrespective of the court of jurisdiction (under the Polish legal system, in the first instance, a district court considers major cases, whereas a precinct court (*sąd rejonowy*) considers minor cases).

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

    The issue of participation by the parties (or other participants in the proceedings) in the procedural action where a decision on an EAW is sued has not been regulated by any special provision. For this reason no rules are applied whatsoever as to the participation of the parties in the procedural action concerned. Thus, pursuant to the Art. 96 § 2 CCP, the parties (in this case it concerns the prosecutor and the requested person) may participate in the procedural action if they put on the appearance, which means that they are not notified of the date and place of the of the proce-
dural action, but if they themselves inquire about its date, they create the right to participate in it (together with the right to present their opinions on all matters being decided) through the fact of the appearance. However, if the issue of applying preliminary detention or its extension is considered (which is the basis for the EAW), the issue of the right to participate in the procedural action changes. The prosecutor and the defence counsel for the requested person (Art. 249 § 5 CCP), who are then notified of the date of such a session (Art. 117 § 1 CCP) have the right to participate.

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

Again, there are no special legal regulations governing this issue. Under general principles the court may, however, undertake some verification measures aimed at elucidation of factual circumstances (Art. 97 CCP). These do not concern, however, the circumstances underlying the decision to deprive a prosecuted person of his or her liberty, which provide grounds for the issue of EAW. These circumstances are examined during a hearing or court session when the decision is made and may not be later verified in connection with issuing an EAW. It does not preclude, though, issuing EAW in the same session where the decision is taken on preliminary detention. In such an event full verification of the factual grounds for EAW takes place during that session.

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?

Polish law does not provide for an appeal measure concerning the issuance of the EAW (this was confirmed by a Supreme Court resolution of 20th January 2005, I KZP 29/04). The challenges are however available against any procedural decisions which provide grounds for issuing the EAW, such as ruling on applying or extending the preliminary detention, or confining the person concerned in a psychiatric institution).

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

There are no procedural impediments to issuing an EAW with respect to persons who committed an offence prior to 1st May 2004. According to Polish legal doctrine, the procedural law, in contrast to substantive criminal law, captures matters „in passing“.

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

Until 30th June 2006 Poland had issued 2756 EAWs (2005 – 1448). Such a number is undesirable situation when the EAW in Poland mostly aims at searching the prosecuted person, whose place of residence is unknown, and does not serve as a measure sent directly to competent judicial authority of the executing Member State.

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

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

k. How many such requests, were rejected by the deciding judicial authority (applies only if EAWs are issued on request)?
I. 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?

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

Until 30th June 2006 the judicial authority in other Member States had executed 167 EAWs.

n. In how many cases was the execution of the EAW issued by judicial authority in your country refused? What were the grounds for refusal?

The Ministry of Justice responded that no such data has been collected centrally. Mainly the grounds for refusal were nationality of the requested person and lack of formal prerequisites.

12.5. Executing of the EAW

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

The decision is always taken by the court having territorial jurisdiction (Art. 607k § 2 CCP), irrespective of the judicial authority of another EU Member State which issued the EAW.

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?

The court issues the ruling always upon the motion from the prosecutor (Art. 607k § 2 CCP), also when the EAW delivered by the judicial authority of another Member State was addressed to the court.

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?

Yes, such a deadline is envisaged. The ruling on surrendering shall be issued within 60 days of the date of arresting the prosecuted person, and in the event that the person consents to surrender or to waving the restriction of not prosecuting him or her for offences other that those underlying the EAW – the time limit is 10 days. In justified cases, when meeting these deadlines is not possible the decision on surrender may be taken within 30 more days of the date of these deadlines passing. All the time limits concern, however, the rulings issued in the first instance. In practical terms this may mean that more time could pass before the decision on surrender becomes valid.

Furthermore, when Polish law makes the prosecution of the person requested under the EAW conditional upon an approval of the competent authority, the time limits do not run for the time needed to obtain such an approval (Art. 607m CCP).

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

Polish law does not provide the direct option of verifying the information communicated in an EAW request by the adjudicating court. The court may, however, request supplements. Thus, in the event that information provided in the EAW is not sufficient for the decision on surrendering the
requested person, the Polish court may request the court issuing the EAW to supplement it within a prescribed period. After that time lapses without effect, the EAW is subject to consideration based on the earlier information (Art. 607z CCP). In the resolution of 20th July 2006, I KZP 21/06, the Polish Supreme Court stated that before examining the premises of admissibility of the EAW execution and the circumstances under which the execution can be refused, specified in Art. 607p, 607r and 607s, the court has to examine whether the judicial authority which issued the EAW fulfilled the premises specified in the law of the country of issue. As the Supreme Court underlined in the reasons for the resolution, the refusal to execute the EAW on the grounds of not meeting the prerequisites for issuing should be reserved to exceptional cases, e.g. when the EAW has been issued by an unauthorized body, or when the EAW was issued for the purpose other than the criminal proceedings. It is not, however allowed to verify the grounds for prosecution of a person by means of EAW, e.g. by examining the evidentiary basis of the decision to take the person into custody, issued in the country of issue.

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

The issue of concurrent EAWs has been regulated by the provision of Art. 607 x CCP. In the event that the orders are submitted before decision is made on any of them, the court shall examine both warrants jointly. When adjudicating on the surrendering the person requested to a certain country, the court should take into consideration the circumstances of the underlying offences, the gravity and place where committed, the time sequence of the EAWs, as well as their purposes. When the next warrant comes after the decision has been made in the first instance on the earlier one, the court shall adjourn the examination of the second warrant till the first decision on EAW becomes valid. In the event that the appeal court quashes the decision and returns for re-examination in further proceedings both warrants shall be then examined together.

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

The Code resolves the issue in Art. 607y CCP. The court receiving the EAW and the request for extradition to a foreign country, after examining the warrant decides on the admissibility of its execution then stays the proceedings and notifies the Minister of Justice about the contents of its decision. Should the Minister of Justice decide about extraditing the person requested under the EAW was issued, the proceedings on the EAW execution shall be discontinued. In the event that extradition request is rejected, the court reopens the proceedings and gives the order concerning surrendering the person.

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 (preliminary detention) required?

In Poland, the EAW issued in another country is not a legal basis for the deprivation of liberty of the prosecuted person. There is obviously an option of preliminary detention of such a person for the period of pending proceedings, but this requires a relevant decision from a Polish court which adjudicates on the execution of the EAW (Article 607 l § 1 CCP). The Polish code does not envisage any special grounds for preliminary detention to be ordered. So the arrest will be possible only after the conditions normally required under Polish law are met. These are: 1/ securing the proper conduct of the proceedings (Art. 249 § 1 CCP), 2/ existence of evidence indicating a high probability that
the accused has committed the offence (Art. 249 § 1 CCP); 3/ existence of other specific premises, such as justified fear that the accused will try to escape or go into hiding, or justified fears that the accused will try to influence others to give false testimonies or explanations, and finally the need to secure proper proceedings in view of severe penalty threatening the accused.

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

As the Code does not provide any specific provisions on the duration of preliminary detention during the proceedings concerning the execution of the EAW, similarly there are no provision for the maximum period for the application of this measure. It is obvious, however, that it would not be admissible to prolong extend the period of preliminary detention over the time required to complete the proceedings of the execution of the EAW, extended by the time for its effective performance in the event of positive decision on execution.

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

A district court sitting in a panel of three career judges (Art. 607 k § 2 in conjunction with Art. 607 l § 1 and Art. 30 CCP).

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

In accordance with the provisions of Art. 607 l CCP, the prosecutor and the defence counsel may participate in the session of the court considering the execution of the EAW. The Code does not, however, regulate the issue of the participation of the prosecuted person in such a session.

It is fairly often, that such a person is subject to compulsory appearance in the session. It would be so in the event that the prosecutor submits the request for the execution of the EAW together with the request for preliminary detention of the person covered by the EAW. According to the provision of Art. 249 § 3 CCP, the prior hearing of the accused is a prerequisite for applying the preliminary detention.

k. Can the decision on surrender be complained? Who has the right to complaint? Which judicial authority reviews this decision?

Yes. The complaint against the decision on surrender may be brought by the prosecutor, the prosecuted person (or his/her defence counsel). The complaint shall be examined by the appellate court sitting in the panel of three career judges (Art. 607 l § 3 CCP).

l. Does the person in question have the right to:

– the assistance by the defence lawyer?

Yes, according to the general rules. It means that the prosecuted person can retain the defence lawyer himself, may request the court to appoint a defence lawyer indicating that he/she is unable to pay the defence costs without prejudice to his and his family’s necessary support and maintenance. The prosecuted person may also give up retaining any lawyer and take upon himself the duties of defence. However, if the person concerned is deaf, blind, mute, juvenile or if the court has the doubts as to his mental soundness – then, in the absence of a retained lawyer, the court has to appoint a defence lawyer ex officio.
– the right to interpreter?

Yes, according to the general rules. The prosecuted person uses the services of an interpreter free of charge, if he/she does not have a sufficient command of the Polish language. The interpreter should be present at any action performed with the participation of the prosecuted person. Additionally, the prosecuted person should be given a translated version of the arrest warrant and the decision concluding the proceedings on the arrest warrant, as well as any other judgement issued in the course of such proceedings which is subject to review (Art. 72 CCP).

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

The Code has not introduced any general prohibition of surrendering of its own citizens requested under the EAW. In Art. 607t it envisaged only that the surrender of a Polish citizen might be combined with a requirement that after the valid conclusion of the case such a person should be sent back to the territory of the Republic of Poland. The prohibition to surrender Polish citizens under the EAW has been, however, derived by the Constitutional Court from the Art. 55 of the Constitution which stipulates that “the extradition of a Polish citizen is prohibited”. For more on this issue, see para 2a of this questionnaire.

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

Until 30th June 2006 in Poland 159 EAWs (2005 – 80) had been executed.

The Ministry of Justice does not have adequate statistics after the first half of 2006.

o. In how many cases has judicial authority in your country refused to execute the EAW. What were the grounds for non – execution?

The Ministry of Justice does not have such statistics.

Poland courts have effectively refused the execution of EAW for the following reasons:

• lis pendens;
• ne bis in idem (the fact that an offence has been committed in whole or in part in the territory of Poland);
• the sentence is currently being served;
• the European Arrest Warrant has been issued for the purposes of execution of a custodial sentence where the requested person is a Polish national who did not consent to surrender.

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

The EAW applies mainly to crimes live or health and against property (for example, fraud).

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

We do not have such statistics.
r. Have there been cases in your country, in which courts rejected the executing of the EAW because of possible violation of quarantines of the requested person in the country of issuing of the EAW (esp. human rights)?

We do not have such statistics.

s. How often does the requested person consent to the “fast track” surrender procedure?

We do not have such statistics. The “fast track” has often practical applications.

t. In how many cases has the decision on the execution of the EAW been 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?

We do not have reliable statistics. In practice the decisions on the execution of the EAW were revoked and cases were sent to judicial review.

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

We do not have such statistics. In effect the period of time between the execution of the EAW and the effective surrender of the requested person is not invade.

12.6. Others

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

None.
13. Slovenia

(Katia Šugman)

13.1. Constitutional issues

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

Judicature

Currently, there are no domestic judicial decisions on the legal character of the FD.

Doctrine

In legal doctrine, the “inter-governmental” nature of the third pillar EU law is beyond any doubt, the main argument being the consensual character of decision-making process.

As to the effect of the FD, it is necessary to note that prior the accession to the EU on 1st May 2004, Slovenian constitution was amended, introducing Art. 3a. It, inter alia, states that:

“Legal acts and decisions adopted within international organizations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organizations.”

Therefore, Art. 34(2) of the TUE is relevant in its entirety, when stating that:

“Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.”

In criminal matters, the contents of FD will be typically introduced into the domestic legal system in a form of law, passed by the Slovenian parliament.

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?

After the contents of FD are introduced (implemented) into the Slovenian legal system, they are considered a norm of domestic origin. When discussing the relations between the implementation of an FD and conventions, that is, international treaties, the relevant question must be the position of international treaties in the domestic legal system.

According to Art. 8 of the Slovenian constitution:

“Laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.”

503 For complete translation, see: http://www.us-rs.si/en/index.php?sv_path=6
The doctrine and the Constitutional Court (CC) have made it clear that the stated article, along with other relevant provisions (Art. 157: “Laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly...”) establish a hierarchy of legal acts, the constitution being of the highest rank, followed immediately by the treaties (ratified by the National Assembly), followed in turn by laws.

Therefore, an international treaty between the EU or CoE states can theoretically be in conflict with laws, implementing an FD. In principle, there are two available solutions (disregarding any intervention on the part of the EU or other international bodies): (1) either Slovenia passes the laws that comply with the ratified treaty – and risks failure in implementing the FD, or (2) Slovenia refuses to pass the laws in compliance with the international treaty and risks being in breach of its international obligation.

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?

Judicature

Until this moment, the judiciary (regular or the Constitutional Court) have not shown any signs of opting for “anti-European” interpretation. An overview of Slovenian court practice shows that courts – although not in criminal matters – have no trouble in accepting the supremacy of EC law (first pillar), especially when it comes to the recognition and execution of foreign judgments in civil and commercial matters, in matters of asylum or in matters of intellectual property law. Constitutional Court, too, has recognized the nature of the EU legal order. In cases No. Up 328/04 and No. U-I-186/04, the Constitutional Court referred both to Art. 249 of the EC treaty and the relevant ECJ decisions (Costa v. ENEL etc.) in recognizing the effects of regulations, putting aside legal rules of domestic origin. Issues of conflict between first pillar mechanisms and Slovenian constitution have as yet not been a matter of Constitutional Court rulings.

As to the third pillar instruments, there are few relevant court decisions.

In cases of surrender procedure before Slovenian courts, the Supreme Court refuses to accept as admissible the filing of so-called requests for the protection of legality, an extraordinary legal remedy aimed at rectifying any errors in law, against decisions on detention of the requested person during the proceedings under EAW implementation act and against decisions on surrender.

There have been attempts to challenge the constitutionality of the law implementing the Framework Decision on EAW (hereinafter referred to as FD EAW). In a particular case, the complainant was a suspect detained and facing surrender to Italy. The challenge was not aimed at the FD but at the implementing act – as was in the case of Germany and Poland. The core of the argument was, essentially, that the implementing act was in breach of the constitutionally agreed right to fair trial before Slovenia’s courts, since according to EAW law Slovenia’s courts are not empowered to decide on the merits of the warrant. Constitutional Court refused to rule on the issue due to the fact that the complainant has been successfully surrendered before Constitutional Court managed to decide the case. CC found that after the successful surrender to Italy the complainant fails to maintain any legal interest in obtaining CC’s ruling, since no improvement of his legal position can be expected after his surrender (Decision No. U-I-14/06).
Responding to a somewhat different complaint, CC refused to rule on the issue of fulfillment of conditions for surrender, finding that the complainant was arguing errors of fact. These, however, are not a matter of adjudication before CC (Decision no. Up 261/06).

Doctrine

We can conclude that at the moment, no serious challenges to the “pro-European” application or interpretation of domestic law can be noted. This is not to say that – especially in legal doctrine – some fairly critical views are present. EAW has been severely criticized. Besides the before mentioned lack of any judicial control on the merits of the warrant, theoreticians find the EAW lacking in view of:

- failure to properly determine (lex certa) the offences to which the double criminality condition no longer applies;
- failure explicitly to take into account potential breaches of human rights as reasons to refuse the surrender, thus running contrary to the ECHR judicature.

On a more general level, the mentioned Art. 3a of the Slovenian constitution, stating in para 1 that:

“Slovenia may transfer the exercise of part of its sovereign rights to international organizations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law”.

has been interpreted – on the basis of discussions when drafting the cited paragraph – so as to provide the possibility for the CC to interfere in cases where a breach of human rights occurs. Others view the paragraph as not applicable in individual cases, but solely when the EU as a whole predominantly fails to respect human rights.

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

Currently, it is not possible to estimate the influence of ECJ decisions. Available resources (digital database of judicial decisions) show no reference to the mentioned case, or other relevant cases (e.g. Brügge or Gözütük).

e. Is the 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 line with the above stated articles of Slovenian Constitution and taking into account that ECJ decisions are relevant regarding the nature of EU law and its extent, it is reasonable to conclude that Slovenian courts will have to interpret domestic law – including any act, implementing FDs – so that it follows EU law as much as possible. That might also be the case when an FD is not yet implemented in Slovenia’s domestic legal system.

The general rule, stated by ECJ in the Pupino case, regarding the interpretation of domestic law in case of non-implimented FDs, is very much relevant. However, since no rulings citing the Pupino case have been found in available databases, its effect on Slovenian judicature remains to be seen.
b. To what scope, if at all, is it possible to ask ECJ preliminary questions as refers to the interpretation of framework decisions (Art. 35 TUE)? Can such a question be asked by constitutional court (or equivalent)?

Slovenia has issued the declaration accepting the jurisdiction under Art. 35 TEU. Under Slovenia’s Judiciary Act, preliminary questions regarding the validity and interpretation of EU law are, in principle, optional, if the court considers that its decision depends on the issue of validity/interpretation of EU law. Referring a preliminary question is mandatory for the Supreme Court and other courts of last resort.

Slovenia’s Constitutional court is not considered a part of the judiciary. The constitution clearly designated the Supreme Court as the highest court in the state. The cited Judiciary Act does not, therefore, apply to the Constitutional Court. It remains unlikely that the Constitutional Court will refer any preliminary questions.

c. 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?

After an extensive debate on the question of whether Slovenia should implement the FD EAW in the form of a special statute or as an amendment of the CCP – since Slovenian national law already contains provisions on that topic – the decision was passed that the best solution is to pass the special act on that question. Therefore, the “Act on the European Arrest Warrant and Surrender Procedures Between Member States” ([hereinafter referred to as EAWSP] has been adopted by the National Assembly on 26th March 2004 (O. J. RS no. 37/2004). The Act came into force on the day of accession (1st May 2004).

The Act provides for the subsidiary use of the CCP concerning the procedure of extradition and concerning the confiscation of the property benefits acquired though the commission of a criminal offence. The CCP’s provisions are also still in force regarding the extradition with third states. The relationship between the CCP and the Act on the Procedure of the Extradition of the Accused and Convicted Persons among the Member States of the EU is the one between lex generalis and lex specialis; therefore lex specialis prevails against lex generalis (lex specialis generalis derogat lex generalis)\textsuperscript{504}.

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

Yes. The Constitutional Court recently (U-I-14/06, from 22\textsuperscript{nd} June 2006) decided the case regarding the EAW. The applicant (the requested person and his attorney) claimed that the EAWSP was not in accordance with the Slovenian Constitution. Unfortunately, the application (the so-called request for assessment of the constitutionality and legality of a law) was rejected by the CC since the applicant (the requested person) was already surrendered to the issuing Member State. Art. 24 of the Constitutional Court Act (CCA) namely provides that only a person holding a so-called ‘legal interest’ may file a request. Since the applicant was already surrendered the CC assessed that he/she has no legal interest in the case and therefore rejected the Request.

\textsuperscript{504} For more see Šugman, in: Evropski nalog za prijetje in: predajo, Pravna praksa: (2004), pp. 22-25.
e. Is the surrender procedure according to the EAW understood as a form of extradition or is it treated as a separate legal instrument?

Slovenian legal system recognises the concept of “extradition” and “surrender” as two separate entities. The term surrender was primarily introduced through statues governing the cooperation between Republic at Slovenie RS and the international criminal courts. It was defined simply as a measure that provides for handing over the person in question which is distinctly different from extradition.

With the accession to the EU, the law on implementation of FD EAW entered into force, adding a new dimension to the term surrender in Slovenian legal system. If prior to the implementation of FD EAW the term surrender was used solely regarding the handing over to international judicial bodies (since the constitution only prohibited extradition to other states!), it currently applies also to handing over suspects to EU Member States in accordance with the provisions of law on the EAW.

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

a. Are there any differences between the way of implementation of the EAW in your country and the “pattern” provided by the framework decision?

There are slight differences – see the description below.

If so, do the differences concern:

– the negative premises (compulsory and optional) of surrender?

Mandatory premises

Amnesty

According to Slovenian law, the surrender of a requested person must be refused if a warrant has been issued for a criminal offence covered by an amnesty in the Republic of Slovenia, if a domestic court be competent to prosecute (Art. 12(1a) EAWSP).

Ne bis in idem

The surrender must be refused if the warrant has been issued for a criminal offence for which the requested person has already been finally acquitted or convicted in Slovenia, in another Member State (or in a third country), on condition that, in the event that a sentence was passed that sentence has been served or is being served, or that according to the legislation of the country that passed the sentence, the sentence can no longer be executed (Art. 12(1b) EAWSP – (ne bis in idem)). The surrender must as well be refused in the case when the warrant has been issued for a criminal offence for which criminal proceedings against the requested person in Slovenia were finally halted or the charge finally rejected, or if the competent state prosecutor has rejected the criminal charge because the suspect has met the agreed conditions in the settlement procedure or because he has fulfilled the tasks imposed to lessen or rectify the damaging consequences of the criminal offence in accordance with the instructions of the state prosecutor and with the provisions of the act regulating the criminal procedure (Art. 12(1c) EAWSP).

Age limit
Chapter III. Country reports

The surrender must be refused if the warrant has been issued for a criminal offence committed by a requested person who is under the Slovenian domestic age limit for criminal responsibility (Art. 12(1č) EAWSP) – this is 14 years of age. This ground will certainly prove an obstacle to surrender, since the age limit for criminal responsibility is substantially lower in some of the Member States.

Slovenian legislator did make some of the optional grounds from Art. 4 FWD mandatory. Besides the grounds mentioned above, there are also other grounds for mandatory non execution: 
(1) if the warrant has been issued for a criminal offence for which prosecution of the execution of a sentence has become statute-barred, if a domestic court is competent to prosecute or to execute the sentence (Art. 12(1d) EAWSP); (2) if the warrant has been issued for a criminal offence that is not punishable in domestic criminal legislation and the exceptions from the second para of Art. 2 FWD may not be applied (Art. 12(1e) EAWSP); (3) if criminal proceedings are taking place against a requested person in Slovenia for the same criminal offence for which the warrant was issued and that criminal offence was committed against the Republic of Slovenia or against a citizen of Slovenia but no insurance has been given for enforcement of the pecuniary claim of the victim (Art. 12(1f) EAWSP); (4) if there are reasonable grounds to concluding that the warrant was issued for the purpose of instigating criminal prosecution against and sentencing the requested person because of their sex, race, faith, ethnic origin, nationality, language, political conviction or sexual orientation, or if their position would be made significantly worse for these reasons (Art. 12(1g) EAWSP); and if the issuing judicial authority has not given certain assurances, defined in Art. 14 EAWSP (Art. 12(1h) EAWSP).

Optional premises

The surrender of a requested person may be refused (Art. 13 EAWSP): (a) if criminal proceedings are taking place against the requested person in the Republic of Slovenia for the same criminal offence for which the warrant was issued and if it would clearly be easier for criminal proceedings to be held in Slovenia; (b) if a request for investigation has been rejected in Slovenia in a final decision because no reasonable grounds were adduced for suspecting that the requested person had committed the criminal offence for which the warrant was issued; (c) if the warrant has been issued for the execution of a custodial sentence and the requested person is a citizen of Slovenia or an MS resident on the territory of Slovenia, or a foreign person with a permit for permanent residence in Slovenia, if the requested person so wishes and provided the domestic court undertakes to execute the judgement of the court of the issuing MS in accordance with domestic law; (d) if the warrant has been issued for criminal offences that, according to domestic criminal law, are dealt with as if they have been committed wholly or in part in Slovenia; (e) if the warrant has been issued for criminal offences committed outside the territory of the issuing MS but domestic law does not permit prosecution for the same offence when committed outside the territory of Slovenia.

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

As in every other country, it is difficult to compare the national legislation with relatively broad and unspecified categories enumerated in the Art. 2.2. of the FD EAW. More or less every category in the Art. 2.2. FD is penalized in Slovenian national legislation. Sometimes it is “covered” by more than one criminal offence and sometimes by a more general incrimination. A good example is the category of “illicit traffic of hormonal substances and other growth promoters” which is not spe-
cifically penalized under the Slovenian Penal Code, but could be subsumed under more general criminal offence of “Smuggling” Art. 255 PC.

- **the period of time for execution of the EAW?**
  The time limits are exactly the same as in the FD.

- **other issues; please specify**

b. *Can a 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)*?

The general rule of CC is applying double criminality as is the EAWSP. Art. 11(1) provides for the surrender to be permitted if the issued warrant is for a criminal offence punishable in the issuing Member State by a custodial sentence of at least one year or, where a sentence has already been passed, by a custodial sentence of at least four months, and if the offence for which surrender is being requested is also punishable according to domestic criminal legislation.

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

No, we did not.

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

According to the Slovenian notification concerning the EAW505 Slovenian law does not provide for the designation of the central authority according to the Art. 7(2) FD. However, the notification states, Ministry of Justice of the Republic of Slovenia acts as the central authority to assist the competent judicial authorities if difficulties arise in transmitting the arrest warrant. In practice it is the Sector for the international police cooperation at the General police directorate – department “SIRENE” acts as the de facto central authority and also keeps the directory of all the EAWs.

Judiciary and the police feel the need for the existence of a central authority, since the need for central evidence of EAWs was frequently expressed. Right now it is only SIRENE (managed by Slovenian Interpol Unit) that performs, at least partly, the role of a central authority. They keep the register of EAWs but only when the whereabouts of the requested person are unknown. Otherwise, they are sent directly to a competent judicial authority. When they are executed (the person is surrendered) the EAW also enters the SIRENE system. Therefore, if certain judicial authority wants to know whether there was a warrant issued for certain person, there is no a Slovenian authority which can provide the information in case the whereabouts of the person are known and the EAW process is still going on. There is also no central evidence of outgoing EAWs. Judicial authorities as well as police also miss an authority to provide them with advice or expertise.

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505 Slovenian notification concerning the EAW http://www.eurowarrant.net/documents/cms_eaw_2_1_EJNS37.pdf (20th October 2005)
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13.3. 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?

Slovenian translation of the term “same act” (Art. 3(2) FD) very much resembles the English version, especially in leaving out the adjective “criminal”. However, the law implementing the FD uses the term equivalent to “criminal offence”. One could, therefore, conclude that the law implementing the FD is considering the identity of an act rather restrictively (in comparison to the FD text), requesting that it be identical in both description and legal qualification (thus narrowing the scope of application of the *ne bis in idem* rule).

However, the traditional interpretation of the *ne bis in idem* rule in Slovenian court practice shows that it is the description of the offence and not its legal qualification that is relevant. The court has to apply the rules of objective identity. The rule itself is not an absolute one. The courts have followed the view that the identity of an act is maintained even if the description is somewhat different, as long as it does not refer to some other act.

We can add that arguing the identity of the act as the identity of legal qualification might render this ground for refusal meaningless. One can hardly expect that the identity could ever be maintained due to the differences in the incriminations under local penal codes. If, however, this “identity of act” were in fact transformed into establishing the double criminality in concreto, the very essence of EAW would be undermined.

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

The surrender must be refused (mandatory ground for non-execution) if the warrant has been issued for a criminal offence for which the requested person has been finally acquitted or convicted in Slovenia, in another state and or in the third country, on condition that, in the event that a sentence was passed that sentence has been served or is being served, or that according to the legislation of the country that passed the sentence, the sentence can no longer be executed (Art. 12(1b) EAWSP - (*ne bis in idem*)). The surrender must as well be refused in the case when the warrant has been issued for a criminal offence for which criminal proceedings against the requested person in Slovenia were finally halted or the charge finally rejected, or if the competent state prosecutor has rejected the criminal charge because the suspect has met the agreed conditions in the settlement procedure, or because he has fulfilled the tasks imposed to lessen or rectify the damaging consequences of the criminal offence in accordance with the instructions of the state prosecutor and with the provisions of the act regulating the criminal procedure (Art. 12(1c) EAWSP).

The surrender of a requested person may be refused (optional ground for non-execution) in two cases: (a) if criminal proceedings are taking place against the requested person in the Republic of Slovenia for the same criminal offence for which the warrant was issued and if it would be clearly be easier for criminal proceedings to be held in Slovenia and (b) if a request for investigation has been rejected in Slovenia in a final decision because no reasonable grounds were adduced for suspecting that the requested person had committed the criminal offence for which the warrant was issued (Art. 13. EAWSP).
c. Is the valid judgement/conviction/discontinuance of the procedure in other UE Member State the same ground for refusal as in “b”?

See the answer to the previous question.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 CISA in your country?

The issue at hand is, of course, whether the wording of the article will be interpreted so as to refer also to prosecutorial decisions to discontinue the proceedings.

The term “finally disposed of [trial]” in Art. 54 of the Convention. Implementing the Schengen Agreement (CISA) is currently officially translated in Slovene so as to stand for the finality of judicial decisions. The term “trial” is translated so as to stand for a judicial criminal proceeding. Therefore, the official translation runs contrary to the decisions of ECJ Gözütok and Brügge, where the court found for the application of the article also in cases of prosecutorial stay of proceeding, following the suspect’s fulfillment of certain tasks, determined by the prosecutor.

However, current commentators of the Code of Criminal Procedure (hereinafter referred to as CCP) write in favor of applying ne bis in idem in cases of successful diversion proceedings, therefore adopting a view very much in line with the cited ECJ decisions. In addition, court practice (partly) bars the prosecutor from requesting the initiation of proceedings after prosecutorial dismissal of the denunciation due to the lack of probable cause (reasonable belief) that an offence was committed. The prosecutor has to present further evidence if he wishes to succeed in initiating the proceedings.

Although no court practice regarding the application of Art. 54 CISA is available we can determine that Slovenian courts will apply the rule of ne bis in idem in accordance with the mentioned ECJ decisions.

- Is such a disposal the valid decision on discontinuance of the criminal process because its legal inadmissibility?

In Slovenian law, it is possible to issue a decision on discontinuance (or similar) during (1) the phase of judicial investigation (decision), (2) the phase of the control of indictment (decision), and (3) at trial (judgment):

1) if the offence described is not a criminal offence (cannot be subsumed to any of the incriminations in the Penal Code)
2) a. if there are circumstances precluding criminal responsibility (guilt) of the accused and there is no indication for the application of security measures (judicial investigation, the control of indictment)
   b. if the accused is not guilty (trial)
3) if the prosecution is barred under the statute of limitations
4) if the offence is subject to general amnesty or the accused was pardoned
5) if there are other circumstances permanently barring prosecution (e.g. entrapment under Slovenian Criminal Procedure Code)
The stated reasons are all predominantly related to the application of legal rules and can be labeled as “reasons of legal inadmissibility”, as opposed to the reasons of failure to establish probable cause or guilt beyond reasonable doubt. To all of these, *ne bis in idem* applies.

*Ne bis in idem* does not apply to decisions on discontinuance based on circumstances temporarily barring prosecution, such as:

1) the proceedings were not initiated by the rightful prosecutor
2) the proceedings were initiated without the motion of the victim, when such a motion is required
3) the proceedings were initiated without the required authorization of a state body (e.g. ministry of justice in cases of prosecution under the universality principle etc.)

The decision, based on the stated reasons, will not, however, be a matter of consideration under Art. 54 of the CISA. The stated article clearly refers solely to those decisions of discontinuance that contain the imposition of penalties and similar sanctions.

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

  Public prosecutor – in addition to diversion mechanisms (conciliation, deferring of prosecution) – has the power to dismiss the denunciation or the power to withdraw the indictment:

  1) if, according to the law, it is possible for the court to remit the sentence, and the prosecutor finds the judgment without the imposition of a penalty unnecessary;

  2) if the penalty, prescribed for the offence, does not exceed one year of imprisonment and the accused prevented the occurrence of harmful consequences due to remorse, and the prosecutor finds that punishment would not be justified under the specific circumstances of the case.

  If the prosecutor decides to dismiss the denunciation in preliminary proceedings, *ne bis in idem* does not apply. However, prosecutor’s withdrawal of indictment will normally cause the court to issue a decision on discontinuance (during preparations for the trial) or a judgment, rejecting the charge (at trial). *Ne bis in idem* does apply in this case.

  Regarding the application of these rules under Art. 54 CISA, see above.

**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)?**

According to available resources, no.

### 13.4. The issuing of the EAW

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

The competent judicial authorities for issuing EAW for the purpose of criminal prosecution and for the purpose of the execution of the sentence are district courts.\(^{506}\)

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\(^{506}\) *Ibidem.*
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?

An EAW may be issued (1) for offences punishable by domestic law *ex officio* and punishable by a custodial sentence of at least one year for which a decision on a pre-trial detention of the defendant has been passed, or (2) where a sentence has been already passed, by a custodial sentence of at least four months (Art. 4(1) EAWSP).

In Slovenia the state prosecutor must start (when certain conditions exist) the prosecution for all criminal offences prosecutable *ex officio* (the term criminal offence liable to public prosecution is also used) regardless of the wishes of the victim. Offences prosecutable *ex officio* constitute the great majority of all criminal offences (Art. 135 CRS, Art. 45 CCP, Art. 1, 8 SPA, for more see 1.2.1 initiation of criminal procedure).

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

The competent judicial authorities for issuing EAW for the purpose of criminal prosecution and for the purpose of the execution of the sentence are district courts (okrožno sodišče). District courts are courts of the first instance with jurisdiction for more serious cases of criminal offences (ones punished by more than 3 years of imprisonment). There are 11 of them in Slovenia.

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

The EAWSP does not mention any such rights.

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

It is not made in the proceedings on issuing the EAW, but before that. The EAW is a result of a judicial decision establishing that there exists a “well-founded” suspicion that a certain criminal offence has been committed. Such a judicial founding is, of course, based on the assessment of the evidence produced by the prosecutor. Usually this assessment is made at the beginning of the phase of investigation.

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?

“Act on the European Arrest Warrant and Surrender Procedures Between Member States” provides for different legal remedies. The appeal against the decision on surrender issued by the investigating judge (after he requested person consented to surrender) can be filed by the requested person, or his/her counsel, to the panel of 3 judges of the District court within 24 hours of the decision being served on them. The panel has to pass their decision within 48 hours. (Art. 20, para. 5 EAWSP)

“In cases where the requested person doesn’t consent to the surrender, the decision on whether or not to execute the extradition is taken by the panel of 3 district court judges. The requested person, his/her counsel and the state prosecutor can file the appeal within three days of the decision

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507 Art. 135 (1) CRS, Art. 45 CCP.
508 See: Slovenian notification concerning the EAW and Art. 3(1) EAWSP.
being submitted to them. The appeal is decided by the panel of 3 judges of the Court of appeals” (Art. 21, para 7 EAWSP).

In case more Member States have issued European Arrest Warrants for the same person, the decision on which of the warrants shall be executed is taken by the panel of 3 judges and the requested person, his/her counsel and the state prosecutor can file the appeal within three days of the decision being submitted to them (Art. 23, para 6 EAWSP). The appeal is decided by the high court. If the decision on surrender of the same person to the Member State and the extradition to the third state is final, the decision on whether to surrender the requested person to the Member State or extradite that person to the third state is taken by the panel of the 3 judges of the Supreme Court. Such a decision can be appealed by the requested person, his/her counsel and the state prosecutor within three days of the decision being submitted to them. The appeal is decided by the panel of 5 judges of the Supreme Court of the Republic of Slovenia (Art. 24, para 2 EAWSP).

The national legal system also provides for the possibility of filing a constitutional appeal in matters relating to breaches of the Constitution involving individual acts infringing human rights and fundamental freedoms (Art. 160 CRS). A constitutional complaint can be filed after all other legal remedies have been exhausted, within 60 days of the day of the acceptance of a particular act against which a constitutional appeal is permitted (Arts. 51-52 Constitutional Court Act).

Appeal can also be filed against the investigating judge’s decision that the required person shall be put to detention. The requested person and his/her legal counsel can appeal against such a decision to a panel of 3 district court judges within 24 hours of the decision being submitted to them. However, the appeal shall not stay the execution of the decision (Art. 22, par 3 EAWSP).

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

A general rule is that the extradition requests from MSs received before 1st May 2004 shall be handled in accordance with the classical extradition procedures rules (CCP) and international treaties binding RS, while extradition requests from MSs received after May 1st 2004 are handled in accordance with the provisions of EAWSP. However, there is a special regime relating to the date of commission of the infraction put down in Art. 36(3) EAWSP which provides that, notwithstanding the general provision described above, the extradition and surrender requests from MS that relate to criminal offences committed before 7th August 2002 (even if they are received after 1st May 2004) shall not be handled in accordance with the provisions of EAWSP but according to the “classical” extradition procedures laid down in the CCP and international treaties. Such a notification was also made to the Council.

Ministry of Justice in its opinion no. 761-2/2004 (2121) from 16th September 2004 and Supreme Court of the Republic of Slovenia in its opinion Su 76/2004-88 from 11th October 2005 expressed the same opinion about special regime relating to the date of commission of the infraction. They stated that the provision from Art. 36(3) EAWSP regulates situation in which Slovenia is an executing state and does not present a limitation when Slovenia actually issues the EAW. Such a provision therefore does not present a limitation to our issuing authorizations. For those situations the legislation of the executing state is crucial.

\[509\] O. J. RS 15/94
h. How many EAWs had been issued in your country until the day mentioned above in point 1g of the questionnaire?

Since 1st May 2004, 92 EAWs have been issued by Slovenian courts.

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

The following offences mentioned in Art. 2.2. of the FD were subject to issuing EAW by Slovenia’s courts:

- sexual exploitation of children and child pornography --> 3
- illicit trafficking in narcotic drugs and psychotropic substances --> 12
- illicit trafficking in weapons, munitions and explosives --> 2
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26th July 1995 on the protection of the European Communities’ financial interests --> 21
- laundering of the proceeds of crime --> 2
- facilitation of unauthorised entry and residence --> 6
- murder, grievous bodily injury --> 7
- organised or armed robbery --> 2
- racketeering and extortion --> 1
- rape --> 9
- crimes within the jurisdiction of the International Criminal Court --> 2
- forgery and counterfeiting (unspecified) --> 2

63 EAWs altogether referred to the listed offences.

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

There were 29 such cases.

k. How many such request have been rejected by the deciding judicial authority (applies only if EAWs are issued on request)?

No data available.

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?

Slovenian police makes use of Europol, Interpol and SIRENE network system.

Generally, if the competent executing judicial authority is not known, the court makes enquiries at the Ministry of Justice or/and through contact points of the European Judicial Network (Art. 6(1) EAWSP). If the whereabouts of a requested person are unknown, the competent judicial authority sends the warrant to the police (Art. 6(2) EAWSP); more specifically to national regional police units.
who are in charge of the operational aspects of a search. They act in accordance with the provisions of CCP (Art. 547-551 CCP). A copy of the warrant is sent to the Ministry of Justice.

Our law provides for the possibility of the warrant being sent also through the Interpol channels (Art. 6(2) EAWSP). This possibility (through the SIRENE channel run by Slovenian Interpol Unit) is most frequently used in cases when neither of the regional police units can locate the requested person. In such a case the police contact Slovenian Interpol Unit which puts the requested person on the national register of persons sought and puts the person on the Interpol search list (if necessary).

The information is therefore currently sent in the form of an Interpol “diffusion”. The “diffusion” contains the information about the personal data of the requested person, the offence for which he/she is wanted, details of the warrant(s) issued, a summary of the case and identification information.

When the person is located, the national SIRENE unit is contacted first; they inform the regional police units and the court which issued the warrant in the first place. The issuing judicial authority then contacts the competent executive judicial authority in the country where the requested person was found and sends the EAW directly to them.

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

The number of executed EAW issued by Slovene authorities, is not available. However, to this day (11 October 2006) there have been 23 successful surrenders to Slovenian authorities 2005 and 2006, based on:
- 15 EAWs issued in 2004 (starting from 1st May 2004)
- 53 EAWs issued in 2005, and

For 1 EAW, the data received are incomplete.

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

No available data.

### 13.5. Executing of the European Arrest Warrant

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

The EAWSP determines legal provisions for the reception of the warrant. The judicial authority competent for the execute surrender procedures is an investigating judge from the district court covering the area in which the requested person resides or is located (Art. 15(1) EAWSP).

**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?**

It is adopted ex officio by the investigating judge.
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?

All the surrender decisions must be treated as a matter of urgency. If the requested person consents to the surrender, the final decision on surrender must be made within 10 days of consent being given (Art. 25(2) EAWSP). If the requested person does not consent to surrender, the final decision on surrender must be made within 60 days of the arrest or first hearing of the requested person (Art. 25(3) EAWSP). If the decision cannot be made within these time limits, the competent court must inform the issuing judicial authority and explain the reasons for delay; the limit may be extended by further 30 days (Art. 25(4) EAWSP). If exceptional circumstances occur and the decision on surrender cannot be made within the given time limits the court has to inform Eurojust and explain the reasons for the delay (Art. 25(5) EAWSP).

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

EAWSP does not provide for the possibility of the legal context of the request to be examined. Art. 16(3) EAWSP provides only for the duty of the investigating judge to check whether the EAW contains all the required information (Art. 16(1) EAW implementing Art. 8(1) FWD). If all the conditions are met the investigating judge must schedule the meeting and no other check is provided for.

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

If the judicial authorities of two or more Member States have issued warrants for the same person the panel of 3 district court judges decides to which of the Member States in question the requested person shall be surrendered (Art. 23(1) EAWSP). If the investigating judge before whom surrender procedures are taking place is informed of the fact that multiple warrants have been issued for a requested person and if the decision permitting surrender has not been issued yet, he/she halts the surrender procedures and refers the case to the panel of 3 district court judges. When deciding the case the panel takes proper account of all the circumstances of the case, in particular the severity of the criminal offence in question, the place of commission of the offence, the dates of the individual warrants (earlier ones have the priority) and whether the warrants were issued in connection with the execution of criminal proceedings or the execution of the custodial sentence. Before the case is submitted for a decision, the competent investigating judge may seek the advice of Eurojust (Art. 23(4) EAWSP).

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

The EAWSP answers only the question of what happens when a final decision has been taken against the same person to surrender him/her to a Member State or extradite him/her to the third country. In such a case it is a panel of 3 Supreme Court judges which decides whether the person is to be surrendered to the Member State or extradited to a third country (Art. 24(1) EAWSP). Same as above (point e) the panel takes proper account of all the circumstances of the case, in particular the severity of the criminal offence in question, the place of commission of the offence, the dates of the individual warrants or extradition requests (earlier ones have the priority) and whether the warrants or extradition requests have been issued in connection with the execution of criminal
Proceedings or the execution of the custodial sentence. Therefore, it seems that only one request will be executed and that EAW does not automatically have priority to extradition request. Since no such case occurred in practice, I cannot answer this question in more detail.

**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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?**

Not every requested person will be put in detention. It all depends on the personal and other circumstances on the side of the requested person. The decision whether to put a requested person in the detention is passed by the investigating judge. He/she can decide that in order for the surrender procedures to be executed smoothly, especially if circumstances exist that indicate that there is a risk of the requested person absconding (e.g. citizen of a foreign country, unemployed, no family ties in Slovenia) the requested person has to be put in detention. The investigating judge can instead of detention order some other milder measure provided by the domestic law for ensuring the person’s presence (Art. 22(1) EAWSP). Other such measures are: promise of the person not to leave the place where he/she is living at (Art. 195 CCP), reporting at the police station (Art. 195b CCP), bail (Arts. 196-199 CCP), house detention (Art. 199a CCP). The decision on these measures can be passed _ex officio_ or following the decision of the issuing judicial authority, or at the proposal of the state prosecutor.

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

Once an EAW is issued and a requested person summoned to the hearing, an investigating judge may issue an arrest warrant according to the provisions of the CCP (Art. 16(3) EAWSP). CCP provides for the authorization of the police to deprive a person of liberty (arrest) in order to bring him/her in, detain him/her or conduct some other activity in accordance with the law (arrest also includes “stop and frisk” investigation). The police may also arrest a person if any grounds for pre-trial detention exist, but are bound to take him to the investigating judge without delay (Art. 157 (1) CCP). The requested person must be taken to the investigating judge immediately.

Once an arrest warrant is issued, police officers may arrest the requested person even without the prior judicial order to bring the requested person before the investigating judge for hearing if there is a risk that he/she will abscond or go into hiding (Art. 16(4) EAWSP). In such a case the requested person must be taken to the investigating judge within 6 hours.

Upon arresting the requested person the police must advise him/her that they are arresting him/her pursuant to an EAW and inform him/her of the country that is requesting the surrender and why it is doing so. The arrested person must be advised immediately that he/she is not obliged to make a statement, that he/she has a right to the immediate legal assistance of an attorney freely chosen and the competent authority is obliged, if so requested, to inform the next of his/her kin of the detention. If the requested person is not a Slovenia citizen, he/she must also be advised that the competent authority is obliged, if so requested, to inform his country’s consulate of his/her detention (Art. 17 EAWSP in accordance with Art. 4(1) CCP).

The police can detain persons found at the scene of a crime for 6 hours if such persons can supply information for criminal procedure. In exceptional circumstances, the police may detain a person (for the maximum of 48 hours) if grounds for suspicion exist that he has committed a criminal
offence liable to state prosecution, if detention is necessary for identification, the checking of an
alibi, the collecting of information and items of evidence for the criminal offence in question and
if grounds for pre-trial detention exist. After 6 hours the written decision has to be issued for the
detainee concerning the grounds on which he has been deprived of liberty. The detainee has the
right to complain against the decision. After 48 hours the detainee has to be released or sent to
the investigating judge for a hearing.

The pre-trial detention must be ordered by the investigating judge upon the request of the state
prosecutor\(^{510}\). The hearing is organized in an adversarial way. Pre-trial detention can be ordered
only when there is a well grounded suspicion (probable cause) that a certain person has committed
the criminal offence to be prosecuted ex officio and for one or more of the following reasons:
– if the person is hiding, if his identity cannot be established or if other circumstances exist which
point to the risk of his attempt to flee;
– if there are grounds for believing that he will destroy the traces of crime or if specific circum-
stances indicate that he will obstruct the criminal procedure by influencing witnesses or
accomplices;
– if severity of the criminal offence, the mode of accomplishing the criminal offence, the perso-
nal characteristics of the person in question, or any other special circumstances cause concern
that he will repeat the criminal offence, bring to completion an attempted criminal offence or
commit the criminal offence he is threatening to commit.

The detainee may remain in pre-trial custody for the maximum of three or six months from
the day he was arrested – depending on the severity of the charges (for criminal offences punish-
able by more than 5 years of imprisonment). Before the filing of summary charge in the summary
proceedings, the pre-trial custody may not last beyond a period of fifteen days. The defendant
and his counsel may request a review at any time during the detention. Every two months from
the last ruling, the panel of judges is also bound to consider whether the reasons for the remand
in pre-trial detention still exist. The trial court must, in the case of a judgement by which the de-
fendant is found guilty, include the whole time spent in the pre-trial detention in the extent of
punishment.

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

In the case the requested person consents to the surrender it is the investigating judge who
issues the decision (Art. 20(1) EAWSP). In the case the requested person does not consent to the
surrender it is the panel of 3 district court judges which issues the decision on permitting or re-
fusing surrender after they receive a reasoned proposal from the investigating judge (Art. 21(4)
EAWSP).

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

Yes. The procedure cannot go on without a requested person being present. On the hearing fol-
lowing the summoning or the arrest of the requested person the presence of the state prosecutor
is obligatory. The requested person must have legal counsel for the entire duration of surrender
procedures, from the time he/she is brought before the investigating judge or from the first hearing

\(^{510}\) General provision Article 20 (1) CRS and more specific provision of Article 201 (1) CCP.
to decide on the surrender to the surrender itself. If the requested person does not engage legal council, the president of the competent court appoints one *ex officio* (Art. 15(4) EAWSP).

**k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?**

“Act on the European Arrest Warrant and Surrender Procedures Between Member States” provides for different legal remedies. The appeal against the decision on surrender issued by the investigating judge (after he requested person consented to surrender) can be filed by the requested person, or his/her counsel, to the panel of 3 judges of the District court within 24 hours of the decision being served on them. The panel has to pass their decision within 48 hours. (Art. 20, para 5 EAWSP).

In cases where the requested person does not consent to the surrender, the decision on whether or not to execute the extradition is taken by the panel of 3 district court judges. The requested person, his/her counsel and the state prosecutor can file the appeal within three days of the decision being submitted to them. The appeal is decided by the panel of 3 judges of the Court of appeals (Art. 21, para 7 EAWSP).

In the case more Member States have issued European Arrest Warrants for the same person, the decision on which of the warrants shall be executed is taken by the panel of 3 judges and the requested person, his/her counsel and the state prosecutor can file the appeal within three days of the decision being submitted to them (Art. 23, para 6 EAWSP). The appeal is decided by the high court. If the decision on surrender of the same person to the Member State and the extradition to the third state is final, the decision on whether to surrender the requested person to the Member State or extradite that person to the third state is taken by the panel of the 3 judges of the Supreme Court. Such a decision can be appealed by the requested person, his/her counsel and the state prosecutor within three days of the decision being submitted to them. The appeal is decided by the panel of 5 judges of the Supreme Court of the Republic of Slovenia (Art. 24, para 2, EAWSP).

The national legal system also provides for the possibility of filing a constitutional appeal in matters relating to breaches of the Constitution involving individual acts infringing human rights and fundamental freedoms (Art. 160 CRS). A constitutional complaint can be filed after all other legal remedies have been exhausted, within 60 days of the day of the acceptance of a particular act against which a constitutional appeal is permitted (Arts. 51-52 Constitutional Court Act)511.

Appeal can also be filed against the investigating judge’s decision that the required person shall be put to detention. The requested person and his/her legal counsel can appeal against such a decision to a panel of 3 district court judges within 24 hours of the decision being submitted to them. However, the appeal shall not stay the execution of the decision (Art. 22, para 3 EAWSP).

**l. Does the person in question have the right to:**

– the assistance by the defence lawyer?

The requested person must have legal counsel for the entire duration of surrender procedures, from the time he/she is brought before the investigating judge or from the first hearing to decide on the surrender to the surrender itself. If the requested person does not engage legal council, the

511 O. J. RS 15/94.
president of the competent court appoints one ex officio (Art. 15(4) EAWSP). The requested person is informed of his/her rights on the hearing following the summoning or arrest of the requested person immediately after checking his/her identity (see 5h and Art. 4(1) CCP).

– the right to interpreter?

According to the provisions of EAWSP, the requested person specifically has the right to request the warrant to be translated into his native language or into the language he/she understands (Art. 15(5) EAWSP). The requested person also has a right to an interpreter according to the CCP provisions. In case the hearing does not take place in a language spoken by participants, a simultaneous translation will be provided by court interpreters (Art. 8(1) CCP). Same goes for any written materials relevant to the case. Persons entitled must be warned of their right to translation (Art. 8(2) CCP). Motions and other written statements filed with the court must in principle be drafted in the Slovenian language. Persons deprived of their liberty may file any statements in their own language. In other cases foreign nationals may file motions and statements in their own language under the condition of reciprocity (Art. 7 CCP).

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

Prior to entering the EU, Slovenia chose to amend its constitutional provision on prohibition of extraditing Slovenian nationals to other states (Art. 47 CRS). The amended text introduces the term surrender as a separate notion at a constitutional level and surrender of the nationals is allowed. Currently there is a constitutional ban on extradition or surrender of a Slovenian nationals (to other states or judicial bodies), unless otherwise provided by an international treaty – such as, e.g. the treaty on accession to the EU.

The newly adopted Art. 47 CRS512 provides that “No citizen of Slovenia may be extradited or surrendered unless such an obligation to extradite or surrender arises from a treaty by which, in accordance with the provisions of the first paragraph of Art. 3a, Slovenia has transferred the exercise of part of its sovereign rights to an international organization”. Art. 3a was also added to the Slovenian Constitution, making it possible for Slovenia to join the EU, “transferring the exercise of part of its sovereign rights to international organizations…”

n. How many EAWs issued by other MSs have been executed by your country since the date mentioned in 1g of the questionnaire? In how many cases has the person been effectively surrendered?

In 2005 and 2006, there were 28 cases of persons being handed over to other EU countries. However, the data received do not refer specifically to EAW based surrenders.

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

No available data.

Chapter III. Country reports

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

No available data.

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

No available data.

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

No available data.

s. How often does the requested person consent to the “fast track” surrender procedure?

No available data.

t. In how many cases has the decision on the execution of the EAW been subject of the judicial control? What were the results of such control? In how many cases has the decision on the execution of the EAW been revoked?

No available data.

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

No available data.

13.6. 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)?

No.

Sources:


B. Kovačič, Je zakon o evropskem nalogu za prijetje in predajo v neskladju z Ustavo? Is the Act on EAW not in Accordance with the Constitution?, Pravna praksa, 14/2006, p. 13–14


– http://www.sodnopraksa.si
– http://www.us-rs.si
– Constitutional Court Opinion No. Rm 1/97, at http://www.us-rs.si
14. Spain

(Mar Jimeno Bulnes)

14.1. Constitutional issues

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

According to Art. 34.2 TUE framework decisions and decisions are binding but they do not have a direct effect by opposite to directives and decisions in first pillar. Also another important difference it is the “intergovernmental” character (Mangas Martín) of the legislation adopted under the third pillar, i.e., the nature as Classical International law (Jimeno Bulnes) and not Community law as it takes place under the first pillar. Anyway, Spanish doctrine and jurisprudence admits unanimously its binding character as well as its prevalence over national Law for the first and third pillar, then also for framework decisions.

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?

As far as domestic norms implementing framework decisions belong to national legislation, they have same consideration and hierarchy as any other national law. According to Art. 96.1 Spanish Constitution “validly concluded treaties, once officially published in Spain, shall form part of the internal legal order”, which means its position in the legal hierarchy at that same level as national laws themselves. For that both kinds of rules, implementation laws and European conventions coexist at the same level.

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?

Yes. Today more and more judgments pronounced by Spanish Judges and Courts proportionate an interpretation of national law according to principles and objectives of European Law, including third pillar instruments. No problems occur with first pillar instruments as they have a direct effect and priority over national law, but even binding effect of third pillar legislation is also recognized and all of them used as a framework for the interpretation of domestic rules.

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

As it has been immediately exposed, Spanish law is usually interpreted according to EU law before and after the Pupino case.

e. Is the 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?
Domestic law implementing framework decisions has its own wording and content in order to be interpreted, although it always suggested the employment of the framework decision itself as a framework of interpretation; e.g. in relation to Spanish EAW according to International Judicial Cooperation Guide elaborated jointly by the General Council of Judiciary Branch (Spanish Judicial Network-REJUE), the General Attorney Office and the Ministry of Justice joint, which is available on www.prontuario.org.

To be honest and according to previous experience, Spanish laws on implementation of framework decisions are usually almost a copy of those ones; see, for example, Act 3/2003, 14th March, on the European Arrest Warrant.

I am not sure to have understood the second question but, as far as the framework decisions are not yet implemented, they are not used as a possible interpretative framework. Nevertheless, their binding effect requires to be implemented before the indicated date and Spain usually makes such an implementation on time; remember, for example, that Spain was the first country to implement the EAW.

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

According to Art. 35 TUE, it is necessary for the Member States to formulate by a declaration in order to provide the prejudicial competence of ECJ in relation with third pillar legislation (this fact was already criticized by me in previous comments, e.g., M. Jimeno Bulnes, ‘La cooperación judicial y policial en el ámbito de la Unión europea,’ (1998) Revista del Poder Judicial, n. 50, pp.79–118, eat p.113). Spain declared to accept the ECJ competence when it ratified the Treaty of Amsterdam and made an option in favour of Art. 35.3.a TUE.

As a supporter of the inclusion of constitutional courts in Art. 177 TCE because of its jurisdictional character (see M. Jimeno Bulnes, La cuestión prejudicial del art.177 TCE, Bosch, Barcelona 1996, pp. 209 et seq.), such constitutional courts not only can, but also must ask preliminary rulings as court, whose decisions have no possibility of appeal (Jimeno Bulnes, La cuestión prejudicial...loc.cit., pp.281 et seq.). Some discussion was produced years ago in Italy because of the regulation of Corte Costituzionale in a different constitutional title as the judiciary but that is not the case with Germany, where the regulation of the Bundesverfassungsgericht takes place jointly with the ordinary judiciary. Spanish Constitution also provides regulation in a separate title for the Tribunal Constitutional, but the common of the doctrine has admitted the existence of such a duty also for him according to Art. 177.3 TCE.

At the moment and as far as I know, no preliminary ruling has been promoted by the Spanish Constitutional Court. But notice that the Constitutional Court in Spain is competent in order to know the defence appeals caused by particulars as the last judicial remedy (e.g., despite the provision of no appeal against EAW decisions, such a defence appeal was sometimes promoted as it already happened according to extradition proceeding). If in such defence appeals any EU rule should be applied, whose interpretation or validity is doubtful, Constitutional Court shall also adjourn the proceeding a quo and ask the preliminary ruling to ECJ.

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?

Normally and according to the previous experience, Spanish implementation of framework decisions is done under separate law in the form of ordinary laws or acts. Sometimes this ordinary laws
or acts need to be accompanied by a superior law as it is in Spain the Organic Law, which requires its adoption under a qualified majority at the Parliament and, according to constitutional rules, it is required in order to regulate some important matters in Spain. That is the case, for example, with the judicial organization according to Art. 122.1 Spanish Constitution and for that any modification of such Organic Law of the Judiciary must be done by another Organic Law.

In the cases of implementation of EAW and Joint Investigation Teams both Spanish Acts were accompanied by both Organic Laws published in the same Official Journal in order to amend Organic Law of the Judiciary 1/1985, July 1st (henceforth LOPJ). In the case of EAW, the judicial competence of the Central Investigative Judges and National Court was added as it is provided in such LOPJ; in the case of the Joint Investigation Teams, the criminal liability of their members should be done under organic law as it is constitutionally required for any kind of criminal legislation.

In both examples implementing framework decisions as they are Act 3/2003, 14th March, on EAW and Act 11/2003, 21st May creating Joint Investigation Teams, the entry into force took place the day following its publication in the Spanish Official Journal, exactly, Boletín Oficial del Estado (henceforth BOE) according to its final provisions. Although general rule contemplated in Art. 2.1 Civil Code establishes a vacatio legis of 20 days, the fact is that since some years ago it has been a common practice to dispose the entry into force next day of publication (sometimes before the physical reception of BOE in Judges and Courts offices although now with new technologies it is available on time through web page).

h. Was the implementation the Framework Decision and the Framework Decision itself subject of proceedings of the constitutional court in your country?

Not at all. No problem for the surrender of nationals exists in Spain because no provision against that is contained in the Spanish Constitution as it is in Germany or Poland and for that the well known constitutional jurisprudence in these countries (BverfGE 2005, 18th July in Germany, Polish Constitutional Court decision on 27th April; also Constitutional Court in Cyprus has pronounced a judgment on it last October, and probably next one will be or has been the Czech Constitutional Court).

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

Surrender procedure according to the Spanish implementation on EAW under Act 3/2003 is treated as a separate and different legal instrument from the extradition itself. This difference can be appreciated formally because no mention to the denomination of extradition is employed (as it happens in other Member States, e.g., the UK according to Extradition Act 2003) but another legal denomination has been created, namely, the European Arrest Warrant and surrender (orden europea de detención y entrega), which also gives title to the Spanish Act. Such a new legal expression is used along the articles on national law and in most of the Spanish literature; only a few of Spanish scholars still make reference to the EAW as a kind of ‘simplified extradition’ (e.g., M. de Hoyos Sancho and J. de Miguel Zaragoza).

Of course, such a formal distinction established between the EAW and extradition proceeding is caused by the material differences between both legal proceedings. As is well known, under EAW classical principles provided in extradition proceedings are now abolished, i.e. the double criminality principle, the specialty rule, the surrender of a national, the political clause for such kind of offences and so on.
14.2. The implementation of the FD on the EAW in the domestic legal order

a. Are there any 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 (compulsory and optional) of surrender?

No difference, because Spanish Act contemplates some compulsory and optional grounds as a framework decision in order to refuse the execution of an EAW.

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

Spanish Criminal Code promulgated by Organic Law 10/1995, 23rd November, does not typify the following crimes according with provision on the EAW:

i. trafficking in human beings; only trafficking in workers and immigrants is contemplated

ii. corruption; such an expression is related in Spain with the ‘corruption of minors’ and crimes committed by civil servants (private corruption in not envisaged in Spain) are typified under another denominations, i.e. “influence peddling, prohibited negotiations or activities by public officials and unfairness in office, …”

iii. laundering of the proceeds of crime is only regulated in Spain under the denomination of ‘handling of stolen goods’ in general terms

iv. computer-related crime itself is not provided, except as a method to commit swindling or produce the violation of the intimacy

v. illicit trade in human organs and tissue is not typified as a crime itself

vi. illicit trafficking in cultural goods, including antiques and works of art is not typified either; only theft of cultural goods, such as antiques and works of art is regulated, as well as offences against historical patrimony

vii. unlawful seizure of aircraft/ships is not typified either

viii. sabotage; such an expression is not included but the ravage and the public disorders are contemplated as equivalent offences

- the period of time for execution of the EAW?

Spanish Act provides same periods of time for execution of an EAW (10 days or 60 days according to the existence or the inexistence of consent) and also the possibility to extend both delays for further 30 days.

- other issues; please specify

One important issue, which is absent from the Spanish legislation is the omission of the guarantee relating to decisions taken in absentia as laid down under Art. 5.1 FWD. Art. 11 Act 3/2003 only reproduces the two other guarantees in relation with custodial-life sentences and the serving of the sentence in Spain for Spanish citizens or residents. This absence may be explained by the existence of the bilateral agreement signed on 28th November 2000 between Spain and Italy for a fast-track extradition procedures, which avoids any reference to such judgments.

Also what must be pointed out is the exclusion of any reference to procedural guarantees which are mentioned in the Prologue to the EAW Framework Decision (Recital 12) and in the implementation laws of other Member States.
b. Can a 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)?

Yes. According to Art. 9.2 Act 3/2003 the judicial authority must decide himself or herself on the existence of a dual criminality requirement in order to execute an EAW issued by other offences than those contemplated in the positive list of 32 European offences.

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)?

At the moment no declaration by Spain has been done according to information provided by the practical guide or protocol elaborated by the Ministry of Justice with intervention also of the Ministry of Home Affairs, General Attorney’s Office, prosecutors and members of the General Council of the Judiciary (available on www.mju.es/euroorden/protocol.htm).

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

Spain has appointed the Ministry of Justice as central authority, which has competence in order to decide in the event of multiple requests and exactly, in the event of conflict between a European warrant and a request for extradition presented by a third country (Art. 23.2); also it is competent to receive transit information (Art. 25.3) and has the duty to elaborate statistics and for that, there is the requirement to forward to the Ministry of Justice a copy of the EAW issued by Spanish judicial authorities (Art. 7).

14.3. 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?

Art.12. 1) Act 3/2003 provides as mandatory cause for refusal the existence of a previous judgment by another Member State ‘in respect of the same acts’ for the same requested person. In this sense as in many others, Spanish Act makes literal copy of the Framework Decision (henceforth FWD) provisions, which has been criticized by Spanish scholars because some questions are still arguable.

In interpretation of such precept, it can be concluded: 1) the previous judicial decision can be a sentence or an acquittal because what it explicitly required is a ‘final judgment’; 2) such a previous judicial decision must be ‘final’, that is, no appeal is possible except exceptional appeals as ‘defence appeal’ in Spain (neither ordinary appeal nor cassation will be possible as pointed above).

In relation to any interpretation of the concepto of *ne bis in idem* and, more exactly, *res iudicata* by any domestic court it can be exposed how precisely Spanish courts deny *res iudicata* authority to decisions pronounced in the framework of extradition proceedings or EAW. Not only National Court but also Constitutional Court have argued that decisions estimating or refusing extradition or EAW requests do not know about a possible culpability or innocence of the requested person; they are only resolutions in order to put in practice international judicial cooperation. For this reason such a kind of judicial resolutions cannot have material *res iudicata*. 
b. Is the valid judgement/conviction/discontinuance of the procedure in your country a mandatory ground for non-execution of the EAW?

As it has been exposed, Art. 12 Act 3/2003 reproduces same redaction as Art. 3 FWD; especially Art. 12.1.a) is a literal copy of Art. 3.1.b) FWD. In order to interpret such a precept, some discussion is produced between scholars. For example, about the inclusion of ‘non-suit judgment’ (sobresitimiento libre), which, according to scholars (e.g., M. de Hoyos Sancho), should also be included because such a judgment is final too; but according to Spanish legislation on the EAW this last case constitutes a ground for optional non-execution and as such it is provided in Art. 12.2.c) Act 3/2003.

As it happens according to FWD, Spanish implementation on the EAW does not make any difference in order to a possible difference between a previous decision pronounced in Spain for the same acts or in another Member State. For this reason the treatment in both cases must be the same and in each case a previous judgment for the same acts again the same requested person produced in a ‘Member State other than the issuing state’ is a mandatory ground for non-execution of the EAW.

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

As it has been exposed, Spanish legislation, as the FWD itself does not make any difference between previous judgments for the same acts against the same person, has been pronounced in Spain or in another Member State. In both cases it constitutes a mandatory ground for refusal. But as it has been also said, the discontinuance or, more precisely, a non-suit judgment has separate regulation in Art.12.2.c Act 3/2003 as optional cause for refusal and in this case this previous non-suit judgment must have been pronounced in Spain. By opposite, no provision for non-suit judgments or discontinuance decisions given in another country (Member State or not) different to the execution country is contemplated neither in the Spanish legislation nor in the FWD (see Art.4.3).

d. What is the meaning and/or interpretation of “the finally disposal of the trial” in Art. 54 CISA in your country?

According to jurisprudence and scholars such an expression contained in Art. 54 Convention on Schengen Agreement application must be interpreted in the sense that it requires: a) a final decision, where no possibility of appeal (generally or particularly) is provided except a possible defence appeal before the Constitutional Court if any fundamental right is violated; b) not only an estimative sentence with the imposition of a punishment, but also an acquittal decision must be included. See in the Spanish literature, specifically, M. de Hoyos Sancho ‘Eficacia transnacional del non bis in idem y denegación de la euroorden’ (2005) Diario La Ley, 30th September, n. 6330, pp.1–6; also F. Jimeno Fernández ‘Algunas reflexiones sobre el principio ne bis in idem y el artículo 54 del Convenio de aplicación de Scheme’, (2006) Diario La Ley, 2nd June, n. 6496, pp.1–5.

By opposite, as it has been immediately exposed, discontinuance or non-suit judgments have a different treatment in the Spanish system, either because of its legal inadmissibility or the lack of advisability of prosecution; for example, in relation with EAW, it is contemplated as an optional cause of refusal although some scholars – e.g. M. de Hoyos, p.3 – have argued that such non-suit judgment is a final decision and for that it should be included also as mandatory ground.
It must be also explained that according to the Spanish procedural legislation for criminal process –exactly, Criminal Procedural Act or Ley de Enjuiciamiento Criminal, henceforth LECrim– there are two different kinds of non-suit judgments or sobreseimiento: one is called ‘free’ (sobreseimiento libre) and its decision is considered final producing also res iudicata according to constitutional jurisprudence. The other one is called ‘provisional’ (sobreseimiento provisional) and for that is not considered as a final decision although constitutional jurisprudence is homologating more and more the effects of last one to the previous one. Specific grounds for both of them are legally contemplated.

- **Is such a disposal the valid decision on discontinuance of the criminal process because its legal inadmissibility?**

   As it has been explained causes for a legal inadmissibility are explicitly provided in the Spanish, legislations as causes for a free and provisional non-suit. Mention here can be attached more to a ‘free non-suit’ (sobreseimiento libre), which according to Art. 637 LECrim requires one of these reasons: a) there is no evidence about the commission of the fact, which has caused the criminal prosecution; b) the fact does not constitute a criminal offence; c) the persons accused as authors, cómplices or congealers have not criminal liability.

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

   This case can refer more to the provisional non-suit (sobreseimiento libre), which according to Art. 641 LECrim is due to one of these causes: a) The commission of the fact, which has motivated the prosecutions, does not appear as enough justified; b) There is the existence of the offence but not enough evidence in order to accuse a person or persons as authors, complices or concealers.

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, and besides in relation with an EAW proceeding as it has been mentioned. National Court and Constitutional Court have agreed that it was exposed, in relation with the decisions pronounced in the resolution of extradition requests or EAW executing decisions, as a kind of resolution promoting international juridical cooperation, but not solving specifically a case in order to condemn or acquit the requested person. For such a reason both Courts consider that extradition and EAW executing have not material res iudicata and in practice the execution of an EAW has taken place for the same requested person and fact, whose extradition was previously denied. An application of Art. 3.2 FWD or Art.12.1.a) Act 3/2003 has taken place.

   It can be quoted as examples National Court Order 60/2004, on 3rd June (JUR 2004/236150) and Constitutional Court decision 83/2006, 13th March (RTC 2006/83), last one solving a defence appeal promoted by the requested person in defence of the res iudicata authority of an extradition refusal.

**14.4. The issuing of the EAW**

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

   Art. 2 Act 3/2003 designates competent authorities for issuing and executing EAW as well as central authority. In this extreme, Spanish legislation maintains a different point of view because
it is admitted that all kinds of judges and courts in Spain with competence to issue warrants also have competence to issue the EAW; on the other side, the competence to execute EAW is only attributed to a specific judge and court as it will be indicated afterwards.

Literally, Art. 2.1 Act 3/2003 states that “issuing judicial authorities competent for the purpose of issuing the European Warrants are the judge or court hearing the case in which this type of warrant is in order”. In Spain, according to the Organic Law of the Judiciary and the Criminal Procedural Act, they are the Investigative Judges located in cities and towns, which are the judicial authorities competent in order to conduct criminal investigation in Spain (investigative period in Spain is still directed by judge) and also to adopt personal and patrimonial precautionary measures in order to proceed such investigation in criminal causes; one of these personal measures is precisely preventive custody, known in Spanish procedural law as ‘detention’, where orden de detención europea (FWD Spanish version) or orden europea de detención y entrega (Spanish implementation on EAW version) is included.

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?

According to previous Art. 2.1 Act 3/2003 only judges and courts are considered as judicial authorities and, between them, the judge or court who issues an EAW must be hearing the criminal cause. Such a judge or court will issue the EAW ex officio or by request of parties in criminal process; in Spain they are public prosecutor and also private accusation (victim), as well as even more popular accusation (citizens in use of Art. 125 Spanish Constitution).

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

As indicated, single judges as they are investigative judges located in cities and towns (on the municipal-wide basis), which conduct investigation in criminal causes in the first instance in Spain and whose judgment will take place after Criminal Judges or Provincial Courts for the most serious crimes. The judicial order adopted by such investigative judges can be appealed according to Criminal Procedural rules provided by similarity of extradition proceedings (Arts. 829 and 830 LECrim).

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

As indicated, they can request the issue of EAW but parties do not have the duty to ask for it, because EAW can also be adopted ex officio by investigative judge. In investigative period there are no sessions or hearings with parties on the procedure with the exception of the adoption of provisional incarceration (prisión provisional); this exceptional personal precautionary measure must be adopted on request of the public prosecutor or other private accusation parties and a hearing must be developed with all the criminal parties.

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

No. As indicated, the EAW is issued in investigative periods, where no sessions or hearings take place. Of course, requirements referring to criminal punitive limit provided in Art. 2.1 FWD and now Act 3/2003 must be observed.
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?

As indicated, the appeal is provided by similarity with extradition proceedings despite silence of Act 3/2003 the appeal can be promoted by both parties, accusation (public or private) and defence. It will depend on the sense of the judicial order, issuing or rejecting issuing the EAW.

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

Yes. According to transitional provision two number one of Act 3/2003, the Act shall apply to EAWs issued subsequently to its entry in force, even when they refer to acts previous to its entry in force.

Also Spanish Constitutional Court in previous decision number 83/2006, on 13th March, has argued that rules referring to extradition and EAW proceedings are neither criminal nor punitive laws and for this reason irretroactivity constitutional prohibition for such laws not favourable to the accused is not applied here (Art. 25.1 CE: “none may be convicted or sentenced for any act or omission which at the time it was committed did not constitute a felony, misdemeanour or administrative offence according to the law in force at that time”).

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

No idea. There are no official statistics on it. Only statistics compiled by the Office of the General Attorney in annual reports is available. Last statistics belong to year 2004 because, unfortunately, statistics on 2005 will not appear until the start of the judicial year next September-October, at which time, as every year, the retrospective annual report is presented.


At present, Spain has issued more EAWs than any other Member State, although not all have been executed. Only 80 of the requested persons were arrested to this moment, of whom only 29 were surrendered to Spain in 2004. It is, of course, foreseen that further surrenders arising from these EAWs may have taken place in 2005 and beyond.

Also of interest is the fact that most of these arrests have taken place in France – 47 to be precise – which is also logical due to the border shared by the two countries and the type of offence for which the EAW was conceived. Many criminal offences that lead to an EAW being issued in Spain are linked to ETA terrorism, whose activists often attempt to evade arrest in France. The first EAW for this reason was issued by Central Investigative Judge Baltasar Garzón, on 16th April 2004, against Araitz Zubimendi, Ibon Arbulu and Unai Berostegieta, who escaped to France in April 2003.

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.

As indicated, most EAWs issued by Spain are related to terrorism, especially Basque separatist terrorism – the ETA terrorist group – and now Islamic terrorism following the attacks in Madrid
on 11th March 2003. Also illicit drug trafficking, because Spain is geographically located on ‘drug routes’ between Latin America and Europe as well as Africa and Europe. Another common crime in order to issue EAWs is swindling, because Spain is also a place where to make housing investments, for example, on the coast.

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

Not known.

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

No statistics are provided.

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?

It is a common practice for Spain to issue an SIS alert via SIRENE through its national office, a recognized fact among the law enforcement officers responsible for this service (see J.M. de Frutos ‘La transmisión de ordenes de detención europea a través del SIS e Interpol’, International Conference: ‘La orden de detención europea’, Toledo, 8–11th November 2004, available on www.uclm.es/espaciojudicialeuropeo.com/eaw) or to proceed with a call to the OCN Interpol Spanish office, as explicitly set out in Art. 6.5 Spanish Act on EAW.

However, due to problems noted in European Commission (EC) reports (COM (2006) 8 final, p. 8 as well as previous COM(2005) 63 final; in fact, the possible use of Interpol alerts is not included under Art. 9.3 FWD) surrounding recognition of the ‘red form’ issued as a formal request by Interpol, the working guide provided by the Ministry of Justice recommends alerts be sent to both offices. See such practical guidelines or protocol on issuing and executing EAW by Spain elaborated by a working group composed of members drawn from the General Attorney’s office, prosecutors of the National Court and members of the General Council of the Judiciary Branch, as well as the Ministries of Justice and Home Affairs, which may be consulted at the official Ministry of Justice website www.mju.es/euroorden/protocol.htm.

m. How many EAWs issued by the judicial authority in your country have been executed in other Member States? In how many cases has the requested person been effectively surrendered?

As indicated, according to official statistics provided by the General Attorney’s office for 2004, although 668 EAWs were issued by Spain in 2004, only 80 of the requested persons were arrested to this moment, of whom only 29 were surrendered to Spain in 2004. As also exposed, it is foreseen that further surrenders arising from these EAWs may have taken place in 2005 and beyond.

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

Not known and no official statistics is provided respect this question.
14.5. Executing of the European Arrest Warrant

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

According to Art. 2.2 Act 3/2003 Central Investigative Judges and National Court (Criminal Chamber) are entitled as ‘executing judicial authorities’. Notice that the translation as Central Investigative Judge instead the official one as ‘Central Preliminary Investigative Court’ employed by Act 372003 English version is preferred; in Spain the difference between single judicial authorities and collegiate ones is very important.

Competence for execution of EAWs in Spain differs for the cases where:
- there is a consent of the requested person and the public prosecutor does not see grounds for refusing surrender: competence belongs to Central Investigative Judge
- there is no consent of the requested person or the public prosecutor sees any ground for refusing the surrender: proceeding shall be referred by the Central Investigative Judge to the National Court (Criminal Chamber).

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?

According to Art. 10.1 Act 372003, if any Spanish judge or court different to Central Investigative Judges or National Court receives an EAW, such judge or court must forward the European warrants directly to the competent ones for execution; also shall inform the issuing judicial authority accordingly. So the only executing judicial authorities are the indicated Central Investigative Judges and National Court and shall act ex officio with the mentioned exception.

Also practical guidelines elaborated by Ministry of Justice remember that in cases where EAWs are issued as consequence of SIS alerts, Spanish police officers can practice directly the arrest. After that, such an arrest or ‘detention’ must be notified to the Central Investigative Judge, who will require to the issuing judicial authority the transmission of the European Warrant with indication of a delay for it. Also information is provided by the office of the Central Investigative Judge to the National Court prosecution office as well as the International Judicial Cooperation Office of the Ministry of Justice.

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?

Periods of adopting the decision on the execution of the EAW by the executing judicial authority are envisaged in Arts. 18 and 19 Act 3/2003. They are different according to the existence of a consent to the surrender by the requested person and the public prosecution sees no grounds for refusing the surrender (10 days after the hearing) or the non-existence of such a consent or the grounds for refusing the surrender according to the public prosecutor (60 days after the arrest of the requested person).

In both cases and for grounded reasons, the time limit may be extended by further 30 days with notification of it to the issuing judicial authority according to Art.19.4 Act 3/2003. And if time limits are not observed in any case for exceptional circumstances, “the Spanish executing judicial authority shall inform Eurojust giving the reasons for the delay” (Art. 19.5 Act 3/2003).
d. Can the judicial authority deciding upon the execution of the EAW verify the information provided in the EAW? Can it perform evidence?

According to Art. 10.2 Act 3/2003 only verification to be done by the Spanish executing judicial authority concerns the translation into Spanish; if there is no such translation, a Spanish judge shall require the issuing judicial authority to send this translation as soon as possible with postponement of the EAW proceeding. Only when the EAW is a consequence of an SIS alert translation shall be provided by the Central Investigative Judge office ex officio.

Also the performance of the evidence is provided according to Art. 14.2 Act 372003 along with the celebration of the hearing. There is even a special provision in order to make a posterior evidence submission possible when it cannot be submitted during the course of the hearing.

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

Decision on priority of execution shall be taken by the Spanish executing judicial authority with due consideration of all the circumstances and specially the relative seriousness and place of the offences, the respective dates of the European Warrants and whether the warrant has been issued for the purpose of prosecution or for execution of a custodial sentence or detention order (Art. 23.1 Act 3/2003); also the advice of Eurojust can be asked for. Then, it is the same Central Investigative Judge a quo, who decides such priority.

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

Same Art. 23.2 Act 3/2003 regulates that, when a conflict takes place between an EAW and a request for extradition presented by a third country, the Spanish executing judicial authority shall suspend the proceedings and remit the documentation to the central authority. In this case the decision belongs not to the judicial authority but to the executive, exactly the central authority, that is in Spain the Ministry of Justice according to Art. 2.3 Act 3/2003.

It is specifically the Office of International Juridical Cooperation on the Ministry of Justice the authority, which takes care of such cases according to the protocol elaborated by the Ministry of Justice. Also the proceeding in order to decide the priority is contemplated; the proposal elaborated by the Ministry of Justice will be referred to the Council of Ministries. Proceeding shall continue as indicated according to Passive Extradition Act 4/1985, 21st March.

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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

The same Central Investigative Judge a quo decides about deprivation of liberty and concrete personal precautionary measure to be adopted, which can be preventive prison or incarceration (‘provisional prison’ in Spain) but also release from prison on bail (‘provisional release’) according to Criminal Procedural Act and having heard the prosecutor in every case. Remission to national rules on adoption of such personal precautionary measures is provided under Art. 17 Act 3/2003.

Spanish implementation on the EAW only contemplates specifically as such personal precautionary measures due to the execution of EAWs this provisional incarceration or provisional release and afterwards makes a remission to ordinary criminal procedural rules; in this sense Arts. 486–489
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Criminal Procedural Act includes another precautionary measure as it is the ‘citation’ or summons, the adoption of which would be also possible here. But also the possibility to adopt any other personal precautionary measures provided in special legislation and, explicitly, in the Passive Extradition Act has been argued (see M. Jimeno Bulnes ‘La adopción de medidas cautelares de carácter personal con motivo de la ejecución de una orden europea de detención y entrega’, (2005) Revista Penal, No. 16, pp.106–122, at pp.114–115).

As a result, Art. 8.3 Organic Law 4/1985 contemplates “vigilance in domicile, order not to be absent of a determined place without a judicial authorization, order to present oneself periodically before the authority nominated by the judge, withdrawal of the passport and render on bail”. To be honest, some of these measures as, for example, the withdrawal of passport, can be convenient in the case of the execution of an EAW because of – usually – the foreign nationality of the requested person.

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

According to Art. 13.2 Act 3/2003 the maximum period for police arrest is 72 hours; before such a period expires, the requested person shall be brought before the Central Investigative Judge. A possible contradiction with ordinary rules can be foreseen because Art. 96 Criminal Procedural Act contemplates a maximum period of 24 hours and Art. 13.1 Act 3/2003 makes remission to this ordinary legislation in order to proceed for the arrest (see: M. Jimeno Bulnes, M. ‘La orden europea de detención y entrega: aspectos procesales’ (2004) Diario La Ley, 19th March, No. 5979, pp.1–7, on p.4).

In fact, the initial provision on the Spanish Bill implementing EAW proceeding indicated a maximum period of 24 hours. The same period is contemplated for an arrest in extradition proceedings (Art. 8.2 Act 4/1985). But 72-hour period is set out as maximum period in Spanish Constitution according to Art. 17.2 Spanish Constitution, precept which also reminds that “preventive detention may last no longer than the time strictly required in order to carry out the necessary investigations aimed at establishing the facts”. A possible opposition between ordinary and constitutional rules have been also exposed by constitutional jurisprudence and scholars.

Even maximum period of 72 hours is not always an easy deadline to meet when detentions take place in geographically isolated areas and/or for other reasons such as police organisation, poor communications or even severe weather (e.g. heavy winter snowfalls in the north of Spain). Previous judicial practice on conventional extradition proceedings suggests the possible use of the nearest regional judicial authority – specifically, district judges – delegated to replace the competent judicial authority authorised to enforce preventive custody as laid out in Spanish Criminal Procedural Act (Art. 505.6 LECrim).

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

Same Central Investigative Judge or National Court (Criminal Chamber) if there is no consent of the requested person or the public prosecutor (see grounds for refusing or setting conditions on surrender). Both authorities are located in Madrid and are provided as specialized competent authorities for a list of crimes included in Art. 65 Organic Law of the Judiciary, whose common characteristics are, for example, the relation with the whole Spanish territory or even their international character.
j. Do parties or other participants of the proceedings have the right or duty to take part in the session?

Under Art. 14.1 Act 3/2003 in provision of the hearing of the requested person, this one will be held with the attendance of the public prosecution and defence. Both parties then have the duty to be present along this hearing.

k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?

Spanish implementation on the EAW does not provide any kind of appeal against the decision on surrender by opposition mostly of national legislations implementing EAW in the Member States; this fact has been strongly criticized (e.g. Jimeno Bulnes, Diario La Ley, loc.cit., pp.4–5). Explicitly, Art.18 Act 3/2003 establishes that the ‘writ’ containing the decision on surrender and pronounced, either by the Central Investigative Judge when there is a consent of the surrender person and no grounds for refusal according to the public prosecution, or by the National Court (Criminal Chamber) if there is no consent or any ground for a refusal according to the public prosecution, shall admit no appeal.

This regulation is even more criticised because in other similar proceedings like the extradition proceedings there is, at least, a formal appeal (i.e., ‘petition appeal’) before the Plenary of the Criminal Chamber of the National Court according to Art. 15.2 Passive Extradition Act. Also, under the extradition appeal exceptional defence appeal before Constitutional Court has been admitted when the violation of any fundamental right takes place (e.g., STC 87/2000, 27th March).

Same solution – that is, the possibility to promote a defence appeal before Constitutional Court – has already taken place under EAW proceedings. The following constitutional jurisprudence pronounced in following affairs can be quoted as an example: SSTC 211/2005, 18th July, 339/2005, 20th December, 81 and 83/2006, 13th March. And they will not be the last ones.

l. Does the person in question have the right to:

– the assistance by the defence lawyer?

Yes, with the duty to attend the hearing of the requested person, according to previous Art. 14.1 Act 372003. In Spain the lawyer and procurator are also provided ex officio without charge under legal assistance rules (Art. 6.3 Act 1/1996, 10th January, on Free Juridical Assistance Act)

– the right to interpreter?

Yes, ‘when necessary’, also with the duty to attend the same hearing as it is explicitly contemplated in previous Art. 14.1 Act 3/2003. Spanish Constitutional Court has defended even the right of Spanish citizens to be assisted by interpreters if they do not understand or speak Castilian Spanish, despite it being the duty of Spanish citizens to learn it as official (or co-official) language of the state according to Art. 3.1 Spanish Constitution (see, e.g., STC 74/1987, 25th May).

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

Not at all. In fact, no specific reference to this point is found in the Spanish Constitution. The only references in the Spanish Act on implementation on the EAW are done in correlation with Arts. 4.6 and 5.3 FWD containing provisions on conditional surrender (Arts. 11.2 and 12.2.f) Act
According to statistics contained in previous report elaborated by the General Attorney’s Office for 2004, a surrender of 20 Spanish citizens was ordered, some of them conditional upon the return of the accused to serve out their custodial sentence in Spanish prisons in accordance with the guarantee provided in Art. 5.3 FWD.

As an example, Order by National Court on 3rd June, 2004, no. 60/2004; in fact the allegation of the Spanish nationality was alleged by the defence but refused by the National Court under provisions on the EAW, making a conditional surrender to the serving of the custodial sentence in Spain. Also a ground founded in material res iudicata was alleged because a previous extradition requested was refused because of the Spanish nationality; such a ground was dismissed first by National Court and afterwards by Constitutional Court under STC 83/2006, 13th March, already commented.

As the last comment about this question, it must be remembered the Agreements adopted by the Plenary of the Criminal Chamber of the National Court on 21st July and 20th September 2005 after the decision of the German Constitutional Court on 18th July 2005 (2BvR 2236/04) in the context of Darkazanli case, as a consequence of a defence appeal on behalf of a Syrian and German citizen, whose surrender was requested by order of the Central Investigative Judge number 5, Baltasar Garzón. In short, National Court agreed to declare null and void all pending EAWs issued by Germany by virtue of the ex officio nullity proceeding, which thereupon were to be treated as extradition requests; also any future EAWs issued by Germany will be treated in the same way in application of the ‘reciprocity principle’.

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

According to the aforementioned Annual Report of the General Attorney’s Office, Spain has received 475 EAWs throughout 2004. As to the issuing country of the EAWs, 162 were issued by France, 83 by Portugal, 61 by Belgium, 48 by Germany, 38 by Lithuania, 19 by UK, 14 by Poland, 11 by Austria and also the Netherlands, 6 by Finland and Hungary, 5 by Sweden, 3 by Estonia, 2 by the Czech Republic, Denmark and Slovakia and just one by Ireland and Luxembourg.

As regards the decisions to proceed with their execution, 149 were decided by the Central Investigative Judge and 172 by the National Court (Criminal Chamber) because consent to the surrender was not forthcoming. The first one was pronounced by the latter court on 10th February 2004, to surrender Finland an English citizen to who was accused of swindling.

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

According to some statistics elaborated by the General Attorney’s Office, there were only 14 cases of refusal to surrender in 2004, all decided by the National Court. The causes of which were, by and large, prosecution in Spain for the same criminal acts (8 litispendencia) and, in some cases, negative prescription, both of them optional causes of a refusal (Arts. 2.b) and i) Act 3/2003).

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

According to the jurisprudence I possess, the most common crimes were swindling, participation in criminal organization and, especially, illicit trafficking in drugs.
q. Has the EAW been executed for crimes other than listed in the above mentioned Art. 2.2. FD? If so, in how many cases?

   No idea. No statistics about it.

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

   As far as I know, none.

s. How often does the requested person consent to the “fast track” surrender procedure?

   No statistics provided. Precisely jurisprudence exposed is pronounced by National Court, when the consent of the requested person does not take place.

t. In how many cases has the decision on the execution of the EAW been 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?

   As commented, no appeal is provided against the decision on surrender according to Spanish implementation on the EAW. Only the exceptional remedy to defence appeal before Constitutional Court has been admitted if a possible violation of any fundamental right contained in Spanish Constitution is complained. At the moment and as far as I know, Constitutional Court has estimated such a defence appeal only twice, in both cases founded in the violation to a defence counsel of a free choice by the requested person as any restriction is provided under previous Art. 14.1 Act 3/2003: SSTC 339/2005, December 20th and 81/2006, 13th March, already exposed.

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

   No statistics. The one provided is only about the length of procedure, since the reception of the EAW and the pronouncement of the decision on the surrender: of course, it depends on the proceeding difficulties but even in the cases where there is no consent of the requested person or grounds for refusal are promoted by the public prosecution and case is forwarded to the National Court, the decision on the surrender by the latter takes place more or less for 15-25 days, in any case never more than a month.

14.6. Others

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

   No.
15. Sweden

(Christoffer Wong)

15.1. Constitutional issues

a. Please specify the views of doctrine and judicature in your country concerning the legal character of the third pillar Framework Decisions (FD) issued on the basis of Art. 34.2 TUE

Framework decisions are treated as agreements under international law. As a general rule, it is the Government that concludes international agreements on behalf of Sweden. However, the consent of Parliament is required where the agreement entails legislation that falls under the power of the Parliament (e.g. adoption and/or amendment of criminal law provisions). With regard to third pillar framework decisions, a special provision of the Constitution enables the Parliament to give its consent to an international agreement (i.e. a draft framework decision in this case) despite the fact that the final agreement is not yet available. The normal procedure for the adoption and implementation of framework decisions (where legislation is required) is thus as follows: (1) the Government presents a Bill to Parliament before the Council adopts the framework decision outlining the content of the framework decision based on the latest available draft; (2) Parliament either gives its consent or rejects the Bill; (3) if a framework decision is adopted by the Council, the Government presents a new Bill to Parliament with proposals for legislation after the Council’s decision; (4) Parliament adopts the legislative proposal that implements the framework decision.

The Reporter’s comments: The above process presumes that the final version of the framework decision is substantially the same as the draft to which Parliament has given its consent. The Government should therefore not accept any amendments in the draft framework decision during the final negotiation if these amendments differ fundamentally from the draft, without first obtaining the consent by Parliament. Sweden is bound under international law even if the Government acts beyond the limit of Parliament’s consent and theoretically a problem may theoretically arise if the Parliament later refuses to adopt legislation that implements a framework decision – a scenario that may arise if, for instance, there is a general election between the initial consent and the adoption of the Council’s framework decision.

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

The Swedish legal system is dualistic, international conventions thus need to be implemented to acquire the force of law. The Swedish practice in foreign affairs is, however, normally based on the principle that, after the signature, a convention will only be ratified after domestic implementation measures (where necessary) have been adopted by Parliament. Of the conventions adopted within the European Union and the Council of Europe, only the European Convention (1950) on the Protection of Human Rights and Fundamental Freedoms (ECHR) has the force of a superior law occupying a position between ordinary Acts of Parliament and the Constitution, i.e. the ECHR overrides provisions in ordinary Swedish Acts of Parliaments and other regulations but not the Constitution.
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?

The Swedish courts comply with the normal standard of interpretation of domestic law having a ‘European’ origin. This entails that there has been a change in the method of statutory interpretation since Sweden joined the European Union in 1995. Prior to this date, statements made in the travaux préparatoires of legislative proposals are usually followed by the courts as authoritative statements of legislative intention. Where legislation is required by a directive of the European Community, the travaux préparatoires play a much less significant role. This change is seen most clearly in the area of administrative law (mainly in cases dealing with the tax law concerning VAT and social security law).

Worth mentioning is also the fact that Sweden belongs to the circle of Member States that tend not to use the possibility of request for preliminary rulings under Article 234 EC. This can partly be explained by the fact that Swedish courts have applied the European law without requesting preliminary rulings. At present, there is a proposal by the Government which would require the courts to give reasons for not requesting a preliminary ruling.

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

The decisions of the ECJ are treated as an integral part of EC law, so the answer to part (d) is substantially the same as for part (c) as far as the first pillar is concerned.

Thus far, there has been no Swedish court decision that refers to the Pupino-ruling of the ECJ. The rulings of the ECJ on, for instance, the concept of ne bis in idem would however without doubt be applied when domestic rules on this matter is considered.

e. Is the 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?

It is clear that domestic legislation will not be interpreted in a way that conforms with a framework decision if the result of this interpretation affects the rights of a person adversely or is contrary to the principle of legality in criminal law. The position is however unclear whether an interpretation conforming with a non-implemented framework decision is possible if this will lead to a result that is beneficial to the person affected, e.g. if the framework decisions provides a more extensive right for the defence than is provided for under Swedish law.

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

Sweden has made the necessary declaration to enable all courts to request preliminary rulings by the ECJ for the interpretation of framework decisions. There is no constitutional court as such in Sweden, all courts may rule on the issue of constitutionality of statutes with the possibility of appeal to either the Supreme Court (for civil and criminal matters) or the Supreme Administrative Court (for administrative matters).
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?

The Framework Decision on the European Arrest Warrant is implemented through (1) a separate Act of Parliament, (2) amendments in the existing legislation on extradition, and (3) statutory instruments decreed by the Government, i.e. without the need for parliamentary approval. The system of surrender by means of a European Arrest Warrant entered into force on 1st January 2004.

(1) The Act (2003:1156) on the surrender of persons from Sweden according to a European Arrest Warrant (lag om överlämnande från Sverige enligt en europeisk arresteringsorder) was adopted on 18th December 2003 and entered into force on 1st January 2004. This Act of Parliament governs only the surrender of persons from Sweden, i.e. when Sweden is the executing state. See (3) below on surrender requests made by Sweden.

(2) Amendments were made to the Extradition Act (1957:668) and the Nordic Extradition Act (1959:254) so that Act (2003:1156) on European Arrest Warrant takes precedence where applicable. Provisions have also been made on the application of the Nordic Extradition Act with respect to Denmark and Finland instead of Act (2003:1156) on European Arrest Warrant.


h. Was the implementation the Framework Decision and the Framework Decision itself subject of proceedings of the constitutional court in your country?

There is no constitutional court as such in Sweden.

The reporter’s note: In many countries constitutional issues arise due to the prohibition of own nationals in accordance with the constitution. For Sweden this is not an issue as there is no constitutional provision against extradition of Swedish citizens and this is in fact permissible already under the pre-existing Extradition Act and Nordic Extradition Act.

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

The official term of the procedure is ‘surrender’ under the separate Act 2003:1156. It differs from the procedure of extradition in that surrender according to an European Arrest Warrant is a purely judicial process whereas extradition involves a political decision.

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

a. Are there any 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:

1. the negative premises (compulsory and optional) of surrender?

Sweden has chosen to avail itself of several optional grounds of refusal specified in Article 4 of the Framework Decision, namely point 2, point 3, point 4, point 5, point 6 and point 7 (a).
Sweden also requires that surrender of a Swedish citizen for trial purpose is conditional on the return of the surrendered person for the purpose of execution of the sentence passed.

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

It is well-known that the list of offences in the Framework Decision is highly problematic due to its vagueness and it is not necessary here to point to the general defects of the list as such. The following are the clearest examples of ‘list crimes’ that are not criminalized under Swedish law, for the other crimes, it may be possible to find some corresponding offences under other labels.

‘Participation in a criminal organisation’ is not a crime as such under Swedish law, however participation in the commission of crimes is dealt with under the general part of the criminal law.

‘Computer-related crime’ is not a separate criminal offence.

‘Facilitation of unauthorised residence’ is not a crime under Swedish law. There are know cases where the church has sheltered persons facing deportation and sheltering such persons does not constitute a crime.

- the period of time for execution of the EAW?

I interpret this question as relating to the time limit for implementation of the Framework Decision.


- other issues; please specify

A special system of rules applies in Sweden with regard to crimes committed in the printed media and public broadcast. Rules of the constitution may be applicable instead of the ordinary criminal code. A conflict may therefore arise between a constitutional rule and a provision of the ordinary Acts of Parliament.

There is also a problem where a Swedish citizen is surrendered on the condition that he or she is returned to Sweden for the execution of sentences. If the surrender is granted for a conduct that is not a crime under Swedish law on the basis that it is a ‘list offence’, it is questionable on what basis a Swedish court may determine an appropriate sentence for the person when he or she is returned to Sweden for serving the sentence.

b. Can a 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)?

Sweden will not surrender a person if the conduct in question was committed wholly or partly in Sweden and does not correspond to a crime according to Swedish law.

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)?

Sweden has not waived the requirement of consent in individual cases concerning the specialty rule; such a notification has therefore not been made.
Chapter III. Country reports

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?

In practice the National Coordination Office (Nationella sambandskontoret NSK) of the National Police Board (Rikspolisstyrelsen) functions as the centre for coordinating different Swedish authorities as requests through the SIS and Interpol will have to pass through the police data system. However, different Swedish authorities have different competences with regard to different aspects of the European Arrest Warrant. Please see Section 4 below for further details.

15.3. 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?

In determining whether the conditions in Article 3 of the Framework Decision are fulfilled, the Swedish legislation requires that the courts examine the conduct described and ask whether this *conduct* is covered by amnesty or a final judgment.

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

A valid Swedish judgment, a formal decision not to prosecute as well as a formal pardon constitute mandatory grounds for non-execution. *Lis pendens*: an on-going prosecution in Sweden constitutes also a mandatory ground for non-execution if the Swedish prosecutor objects to the surrender.

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

Judgments etc. of other Member States constitute mandatory grounds for non-execution, provided that in cases of conviction, the sentences has been served, are under execution, or can no longer be executed in accordance with the legislation of that Member State.

d. What is the meaning and/or interpretation of “the final disposal of the trial” in Art. 54 CISA in your country?

- Is such a disposal a valid decision on discontinuance of the criminal process because of its legal inadmissibility?

A judicial decision would finally dispose of a case if it leads either to a conviction or acquittal, provided that the merit of the case has formed a part of the ground of the decision (applying C-439/03 Miraglia). A formal decision not to prosecute will – following C-187 and 385/01 Gözütok and Brügge – will also be considered as a final disposal of the case. The fact that a case has been finally disposed of constitutes a legal ground of inadmissibility.

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

In the present context, judgments from the Member States of the European Union will constitute legal ground of inadmissibility. However, in a wider context, the effect of foreign final judg-
ments varies according to the crime concerned, where the crime is committed, whether the judgement state is party to different conventions etc. In cases where a foreign final judgment does not constitute grounds of inadmissibility, rules exist in Swedish law as to the appropriateness of bringing prosecution.

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)?

The issue of ne bis in idem following the decisions of the European Court of Human Rights has been addressed in the Swedish courts in a case concerning tax crime and administrative fines. This issue has however arisen in another context and has not been relevant for the application of the Act on European arrest warrant.

15.4. The issuing of the EAW

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

For the purpose of facing trial, an European Arrest Warrant is issued by a prosecutor.

For the purpose of execution of sentences, the European Arrest Warrant is issued by the National Police Board (Rikspolisstyrelsen) on the request of the Prison and Probation Service (Kriminalvårdsstyrelsen), the National Board of Health and Welfare (Socialstyrelsen) for execution of sentences involving compulsory psychiatric care and the National Board of Institutional Care (Statens institutionsstyrelse) for sentences involving young persons.

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?

The competent authorities described in (a) above issue the European Arrest Warrant ex officio.

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

The Swedish courts cannot issue an European Arrest Warrant. However, for the purpose of facing trial the prosecutor only issues an European Arrest Warrant if a court has previously made a decision on the remand in custody (häftning) of the requested person.

The reporter's note: In the Swedish legal system, the prosecutor is in charge of making many pre-trial decisions that in many other legal systems are made by a juge d'instruction.

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

The competent authorities make the decision on the issue of an European Arrest Warrant independently. The conditions and factors to be taken into account for issuing an Arrest Warrant are given in Statutory Instrument 2003:1178 mentioned above. No other parties are involved in this procedure.

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

An order made by a court of law for remand in custody (häftning) is a prerequisite for the issue of an European Arrest Warrant. This order is made pursuant to the ordinary criminal procedure on
the motion of the prosecutor. The court will assess whether the person in question ‘can reason-
ably be suspected of’ or ‘on reasonable is suspected of’ having committed a crime. The degree of
suspicion required varies according to the graveness of the crime and other circumstances.

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?

The decision to issue an European Arrest Warrant cannot be appealed against separately, i.e. it
may only be opposed to in the normal way after the warrant is issued.

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

The European Arrest Warrant can be applied to crimes committed prior to the entry into force

The reporter’s note: Sweden issued an European Arrest Warrant on 7th January 2004 – six days
after the system of European Arrest Warrant entered into operation – for the surrender of a Swe-
dish citizen in Spain for a crime committed. The person was surrendered to Sweden two weeks
after he was arrested in Spain.

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

I interpret the question as ‘how many European Arrest Warrants were issued from the date of
implementation?’

Statistics are available for the period of 1st January 2004 to 30th June 2005.
For the purpose of facing trial:
2004: 74 European Arrest Warrants issued
2005 (up to 30th June): 41 European Arrest Warrants issued

Of the above, 16 European Arrest Warrants have been recalled mainly due to the fact that the
persons requested are subsequently found in Sweden.

For the purpose of execution of sentences the available statistics do not distinguish between
surrender according to an European Arrest Warrant and extradition. The total number of surren-
der/extradition requests for the period is 89.

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.

The following table shows the statistics for the number of requests classified according to offen-
ce definitions in Swedish law for the period 1st January 2004 to 30th June 2005. Where applicable,
the number of requests treated as ‘list crimes’ are also indicated.
<table>
<thead>
<tr>
<th>Offence according to Swedish law</th>
<th>Number (total)</th>
<th>Treated as ‘List Crimes’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross narcotic crimes and gross smuggling of narcotics</td>
<td>14</td>
<td>13</td>
</tr>
<tr>
<td>Gross abduction of children</td>
<td>12</td>
<td>1</td>
</tr>
<tr>
<td>Murder</td>
<td>9</td>
<td>9</td>
</tr>
<tr>
<td>Gross fraud</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Gross accounting crimes and tax crimes</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Trafficking in human beings</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Gross narcotic crimes (not involving smuggling)</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Gross rape</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Gross robbery</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Gross assault</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Fraud</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Gross tax crimes</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Abduction of children</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Aiding and abetting gross fraud</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Gross blackmail and gross assault</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Murder, robbery and kidnapping</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Murder and gross rape</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Murder and gross theft</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gross handling of stolen goods</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Gross handling of stolen goods and accounting crimes</td>
<td>1</td>
<td>1 under the heading of ‘money laundering’</td>
</tr>
<tr>
<td>Murder or aiding and abetting murder</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Murder and gross assault</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gross kidnapping and blackmail</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Conspiracy to murder</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Gross kidnapping and attempt to blackmail</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Kidnapping</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Robbery and assault</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Assault</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Gross narcotic crimes and gross theft</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gross smuggling of narcotics</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Smuggling of narcotics</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Arson</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Arson and gross fraud</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gross illegal handling of smuggled goods</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Gross customs and excise crimes</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Smuggling</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Gross smuggling</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Trafficking in human beings and gross sexual procurement</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Offence according to Swedish law</th>
<th>Number (total)</th>
<th>Treated as ‘List Crimes’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual procurement</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Sexual exploitation of minors</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Assault, threats, deprivation of freedom and sexual exploitation of minors</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gross abduction of children and gross assault</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Gross assault and gross breach of women’s peace</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gross breach of women’s peace and sexual coercion</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

j. Have the EAWs issued in your country been subject to crimes other than “crimes” mentioned in Art. 2.2. FD? If so, in how many cases?

See table above.

k. How many such requests have been rejected by the deciding judicial authority (applies only if EAWs are issued on request)

Not applicable.

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?

The European Arrest Warrants may be issued in respect of persons with no known address and are usually issued through the SIS. For Member States that have not implemented the SIS, the Interpol system is used. Only when the exact address of the requested person is known will the prosecutor communicate directly with the competent authority of the executing state.

m. How many EAWs issued by the judicial authority in your country have been executed in other Member States? In how many cases has the requested person been effectively surrendered?

During the period from 1st January 2004 to 30th June 2005, 32 persons have been surrendered to Sweden to face trial. No separate statistics are available for the execution of sentences.

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

Requests have been definitely refused in two cases. In one case the ground for a refusal was that the crime was committed when the person was below the age of criminal responsibility under the law of the executing state. The statistics do not show the grounds for refusal in the other case.

15.5. Executing of the European Arrest Warrant

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

A decision by a court of law is required for the remand in custody and the surrender of the requested person. However, a prosecutor have the power to decide on the initial arrest of the requested person.
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?

The court’s order to surrender a person must be based on a motion of the prosecutor. A decision *not to surrender* may however be made by the prosecutor if the conditions for surrender is clearly not fulfilled.

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?

The court is required to decide on the matter at the latest 30 days after the initial arrest of the requested person. Where the person consents to the surrender, the decision must be made within 10 days of the consent. Extension of the above time limits – without further specification in law – is permitted if special reasons exist.

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

The Swedish authority will not seek to verify the information given in the European Arrest Warrant, except that it may ask for additional information if the information provided is not sufficient for or against a decision to surrender.

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

According to Act 2003:1156 concurrent requests for surrenders shall be decided within the frame of one and the same judicial process, i.e. by the court seized with respect to the first European Arrest Warrant. The Act also gives some guidelines as to the factors to be taken into consideration: the nature of the offence, the place of commission of the offence, the time of the arrival of the European Arrest Warrants as well as whether the surrender relates to trial or execution of sentences.

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

Act 2003:1156 states explicitly that the system of European Arrest Warrant shall apply in relation to the Member States of the European Union. As Denmark and Finland are Member States of the European Union as well as Nordic states covered by the special Nordic Extradition Act, special provisions exist with respect to Denmark and Finland, according to which the requesting authority may choose between the Nordic extradition procedure and the procedure according to the European Arrest Warrant.

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 the procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

The prosecutor may arrest (*anhälla*) a person solely on the basis of a European Arrest Warrant. This, however, is a provisional measure limited in duration. If the person is to be deprived of liberty for a lengthier period of time, the prosecutor must ask for a court order for remand in custody (*häktning*).
h. What is the maximum period for the arrest of the requested person before his or her effective surrender?

The same period of detention is applied as for the decision on surrender, i.e. in a normal contested case, up to 30 days from the initial arrest. The surrender must take place within 10 days from the day when the decision on surrender acquires finality.

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

The district court (tingsrätt), i.e. the normal court of first instance in all criminal cases, has the competence to decide on the requests according to a European Arrest Warrant and coercive measures associated with the procedure.

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

Both the prosecutor and the requested person have the right to take part in the proceeding. The requested person has a duty to be present personally at the oral proceeding only if he or she is under arrest or is remanded in custody.

k. Can the decision on surrender be complained? Who has the right to complain? Which judicial authority reviews this decision?

The decision of the district court (tingsrätt) to surrender a person can be appealed against by the requested person to the court of appeal (hovrätt) and ultimately to the Supreme Court (Högsta domstolen).

A decision not to surrender cannot be appealed against.

l. Does the person in question have the right to:
– the assistance by the defense lawyer?

The requested person always has the right to a public defence counsel when he or she requests it. This is a right specifically related to the surrender proceedings in accordance with Act 2003:1156 on European Arrest Warrant.

– the right to interpreter?

The requested person has the right of interpreter in accordance with the ordinary rules of criminal procedure not specific to the surrender procedure.

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

Act 2003:1156 permits the surrender of own nationals. The surrender may however be conditioned upon the return of the surrendered person to Sweden for the execution of sentence.

n. How many EAWs issued by other MSs have been executed by your country since the date mentioned in 1g of the questionnaire? In how many cases has the person been effectively surrendered?

Statistics is available for the period 1st January 2004 to 30th June 2005.

2004: 19 requests received
2005 (up to 30th June): 22 requests received
In 2004, requests to surrender were granted in 17 cases. During the first 6 months of 2005, requests to surrender were granted in 18 cases.

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

In 2004, surrender was refused in 1 case due to the expiration of time limit for prosecution of a crime committed in Sweden. In 2 cases surrender was delayed to a time when the requested persons had served their current sentence in Sweden.

During the first 6 months of 2005, the district court’s decision to surrender was subsequently quashed in 1 case as the European Arrest Warrant was recalled. Surrenders were carried out in the other cases.

**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.**

The table below shows the offence classifications of European Arrest Warrants received during the period from 1st January 2004 to 30th June 2005. The number of cases where the request has classified the conduct in question as a 'list crime' is also indicated.

<table>
<thead>
<tr>
<th>Offence classification</th>
<th>Number (total)</th>
<th>Treated as ‘List Crime’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forgery of means of payment</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Extortion</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Abduction of children</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Fraud and gross fraud</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Armed robbery</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Swindling and gross swindling</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Attempted murder</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Theft and gross theft, attempt to gross robbery</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Aiding and abetting gross robbery</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Illicit trafficking in narcotic drugs</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Murder and attempted murder</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Unknown</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Robbery, gross robbery, narcotic crimes</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Gross swindling and counterfeiting currency</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gross narcotic crimes</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Murder, rape and sexual exploitation of minors</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gross endangerment to the public</td>
<td>1</td>
<td>1 under the heading of ‘organised or armed robbery’</td>
</tr>
<tr>
<td>False attestation and dishonesty to creditors</td>
<td>1</td>
<td>1 under the heading of forgery of administrative documents</td>
</tr>
<tr>
<td>Trafficking in human beings and crimes against alien legislation</td>
<td>1</td>
<td>1 under the heading of ‘facilitation of unauthorised entry and residence’</td>
</tr>
</tbody>
</table>
Chapter III. Country reports

<table>
<thead>
<tr>
<th>Offence classification</th>
<th>Number (total)</th>
<th>Treated as ‘List Crime’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trafficking in human beings</td>
<td></td>
<td>1 under the heading of ‘participation in criminal organisations’</td>
</tr>
<tr>
<td>Aiding and abetting gross tax fraud</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Bank robbery</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Rape</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

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

See the table above.

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

According to Chapter 2 Section 4 point 2 of Act 2003:1156 on European Arrest Warrant it is a mandatory ground for refusal if the surrender would contravene the ECHR.

The reporter’s comments: The issue of human violations are often raised in extradition cases but are seldom successful. This also applies with regard to surrender according to an European Arrest Warrant. In this connection, human rights issues have been raised in a case concerning the surrender of a person to Finland. The Swedish Supreme Court dismissed summarily the defendant’s appeal to human rights (Judgment of the Supreme Court of 22nd December 2005 in case Ö 4202-05).

s. How often does the requested person consent to the “fast track” surrender procedure?

According to the statistics available, in 2004, 11 persons (out of 17 surrendered) consented to the surrender and during the first 6 months of 2005, 9 persons (out of 19 surrendered) consented to the surrender.

t. In how many cases has the decision on the execution of the EAW been 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?

As described above, the decision on surrender is always made by a court of law. See also point (o) above.

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

Detailed statistics are not available. The following has, however, been reported, which constitute exceptions to the 30 days’ limit.

In two cases, the district court’s decisions on surrender were made a few days after the 30 day’ limit.

In one case, where appeals were made to the court of appeal and the Supreme court, the decision on surrender was not made until a few days after the expiry of the 60 day limit.

In another case, the total time for the proceeding took 3 months and 8 days.
15.6. Others

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

No particular difficulties have been reported. A report on the application of the system with European Arrest Warrant was presented on 15th December 2005 by the Government to the Parliament (Regeringens skrivelse 2005/06:62).
Summary
(Adam Górski)

At the time of adopting the Framework Decision of 13th June 2002 on the European Arrest Warrant and the surrender procedures between the Member States it was difficult to foresee how many practical and theoretical questions it would prompt. These questions concern both fundamental problems (especially – constitutional issues) or utterly pragmatic ones (like asking for the purpose and means of certain regulations). Considering them in the above order, these questions have been raised by constitutional lawyers, experts in international law, European law, and – finally – in criminal law. Beyond any doubt, the comprehensive nature of the issues of applying the European Arrest Warrant justified the need to organise a forum to contrast and compare the view concerning the EAW and its practical functioning. The discussions which took place during the Kraków Conference, documented in this collection, evidently confirmed such a need. After reading through these materials it would seem difficult to simply dismiss the issues of the EAW by saying ‘nothing new’, as it was done often in the early days of the arrest warrant operation. Traditionally, the criticisms to which the EAW is subject by penal legal doctrine, should be augmented by an enhanced and comprehensive attention and approach which should be both multidisciplinary and interdisciplinary. One cannot deny also that rarely has the aspect of comparing legal systems been more important. One of the basic questions raised in discussions was the issue of democratic legitimisation of the instruments of a legal cooperation in criminal matters in the European Union. In practice, the obligation to implement the Framework Decision through ordinary legislation raises more questions as to the democratic legitimacy of such a norm than would do the act ratifying an international agreement. This situation occurs not only in these countries which, like Poland, have not participated in the drafting of the Framework Decision on the EAW and of other framework decisions. It appears that the issue of ‘democratic deficit’ is being discussed also in the countries which have been fully involved in preparing and drafting the Framework Decision on the EAW in question. In these countries the lack of democratic consultation procedures with the national parliaments came along with enjoying the mandate to give the executive branch the right to act. The procedures applied prior to the adoption of the Framework Decision would definitely blunt the edge of criticism based on the ‘democratic deficit’ argument. However, also important is the argument saying that the framework decision is a a sui generis instrument for cooperation in criminal matters and the obligation to implement it without any additional formal consultations stems from its very nature, which was given to this instrument by the Treaty of European Union. This legal instrument is binding on the Member States by a consensus resulting from a democratically confirmed and treaty-formulated will to accede to the European Union. According to this argument, a Member State could question the constitutionality of the implementing act solely by argument saying that it cannot accede to the European Union because of a future and potential infringement of the constitution. Coupled with that argument is another one concerning the conformed interpretation of national law, including constitutional law, obviously the one following strictly
defined rules. The discussion of this subject, once initiated (in an utterly different subject matter) by a reference for preliminary ruling in the case of Maria Pupino, is still in a very preliminary phase. In no circumstances, however, the interpreting court may take the place of the legislator. The obligation of a conformed interpretation comes under criticism, and is being over interpreted and treated somewhat instrumentally. Finally, the obligation of conformed interpretation is the most distinct difference between the framework decision and an ‘classical’ international law, making the former instrument resemble first-pillar instruments (directives). The differences between the convention and a framework decision have been already highlighted as early as in the opening lectures of this conference.

Even provided that we accept the obligation to interpret national law in accordance with the wording and purpose of the framework decision, another problem would remain to be solved still: the scope of competence with which the EU has to regulate the issues of criminal law and procedure, in particular through the means of framework decisions. The point which is still contentious is what competences in this area are implied by the Treaty establishing the European Union. The Treaty considers the harmonisation of criminal law in the Member States. In this connection the doubt is primarily cast on deciding whether this concept includes a mandate to regulate the issues of cooperation in criminal matters between the EU the Member States by framework decisions. If it is assumed that the mandate results from the Treaty on the European Union, the question still remains whether a framework decision can affect the legal relationships between the Member States. Indeed, the Framework Decision on the EAW and the relevant statement from the Council of the European Union, expressly derogates the existing international extradition regulations. The competence in question is even more problematic because the TEU itself does not provide for any hierarchy among the third-pillar instruments, among which there are also conventions. We thus have evidently began to deal with two areas of regulation circles: obligations resulting from the Treaty and being made more detailed in framework decisions, and the classic obligations under international law. The former may be more important than the already committed obligations of states in the field of combating crime. Such a statement is still very controversial, but its rationale may come from the particular values articulated by the Treaty itself.

It is just these values which are to be justifying the particular obligation to create an area of freedom, security and justice. It is noteworthy to add that common values or, most generally speaking, the sense of community can hardly be recognised as an axiological basis for the functioning of classic instruments of international criminal law outside the area of the European Union. For instance, hiding behind the prohibition on extradition of a citizen is a mediaeval right of a feudal lord (ius de non evocando), therefore it constitutes a total lack of trust to other legal systems and the presumption of its enmity or at least the désintéressement in cooperation. Similar aspects pertain to other classic principles of cooperation, such as the principles of specialty, dual criminality or even the ban or extradition in case of political offences.

The issue of the prohibition of extradition of a citizen has caused particular controversies in the discussions on the EAW implementation. This was discussed at similar length as the issue of partial abolition of the principle of dual criminality. These two issues are specific benchmarks of the advancement in the European integration in criminal matters. The issue of the abolition of dual criminality is indeed essential to the creation of a set of instruments which was built by the EU Council for the cooperation in criminal matters.
The Framework Decision on the EAW abolishes much of the principle of dual criminality, which is somewhat classic in the system of international criminal law. The legal nature of this principle is the most debated issue. It seems that the opinion that it should be based on the rights of an individual and therefore represent a sort of international-law consequence of the *nullum crimen sine lege* principle seems to prevail at least in the discussion on the EAW. According to these views, the state should abstain from any form of cooperation in criminal matters concerning acts which are not illegal in the light of the national criminal law. The Polish constitutional law-makers expressed that view in a fairly radical manner, amending the Constitution for the first time since its adoption. Paradoxically, however, the total abolition of the dual criminality expressed in Art. 2.2 of the Framework Decision on the EAW, concerns these criminal phenomena which should, beyond any doubt, be covered by criminalisation at Union level. Thus it represents a kind of encouragement for further harmonisation of legal enactments of the Member States in the area, as well as increased institutionalisation of the cooperation in criminal matters. It should be also remembered that the abolition of this principle brings about serious problems, particularly when concerning the surrender in order to conduct a trial, as it is usually limited by the condition of returning the convict to serve the penalty in the state which issued the European Arrest Warrant. The abolition of dual criminality is a universal problem: it exceeds much the scope of issues of the warrant itself. It represents a challenge to the European cooperation in criminal matters. When the principle of dual criminality is being identified with the *nullum crimen sine lege* it should be remembered that the place (country) where the offence was committed would be important rather than the place (country) where a legal cooperation is rendered. The latter statement weakens the argument which confers on the double criminality principle solely the nature of a guarantee.

No lesser challenge than the proper functioning of the EAW is presented by appropriate regulation of the procedural guarantees at an individual. This issue should permanently accompany the discussion on the European Arrest Warrant. Viewed in this perspective, the EAW is a kind of crowning of the entire edifice, which should nevertheless be built from a foundation. The foundations include: the map of procedural guarantees in the area of freedoms, security and justice which should be constructed in such a way that each of European citizens will somewhat ‘carry with him’ his procedural guarantees for the trial. It would give them the comfort of enjoying the same guarantees of a due process throughout the whole legal space. This would also strengthen the argument indicating the will to secure a fair trial for its citizens rather than a trial before the court of a given person’s country whose citizenship is the essence of all prohibitions of surrendering its own citizens. The European Arrest Warrant is not in itself the ‘vehicle’ of uniform procedural rights. The issue of any procedural guarantees, including these pertaining directly to the issuance and execution of the EAW is mostly left to the Member States, only stating in the Framework Decision that the execution of the EAW should be made subject to proper control. This ‘directive’ has been treated by the Member States in as diverse ways as has been possible, sometimes failing to guarantee appeal against decisions involved in the implementation of the EAW, sometimes providing these guarantees only partly. It is difficult not to observe that the efficiency of the entire procedure is an antinomy of the guarantees. The former has been a great success of the reform with which we are occupied during the Conference. It has turned out that ‘depoliticising’ of the cooperation in cooperation in criminal matters, therefore ‘judiciarising’ it, is not a propaganda slogan but brings in an essential change and provides a good example for other instruments of cooperation in criminal matters.
Already stated, the classic systems of cooperation in criminal matters may be much more aptly described as ‘separate’ rather than ‘common’. Actually, all the follow-up obstacles are certain emanations of geographical, political or legal borders. For this reason it is so important to make the choice of the way of moulding the legal cooperation in criminal matters with such an instrument as framework decision – an instrument which has a number of Community features. When reading the laws implementing the EAW Framework Decision one cannot fail to notice that Member States modify obligations derived from the Framework Decision. This is most often dictated by practical considerations (obligatory surrender of a citizen under condition that he/she will be returned to serve the sentence in the country of citizenship) or sometimes by premises which are difficult to explain rationally (e.g. adding the premise of reciprocity as an obligatory obstacle to the execution of the EAW). A question remains open whether the additional obstacles may be derived from the constitutions of Member States despite their absence in the Framework Decision, or relevant pieces of ordinary legislation. Certain noticeable discretion of implementation may result in us having to deal with a ‘jungle’ of regulations instead of a harmonious network. In a number of implementations, alterations deviating from the framework decisions can be found, which are there by a pure chance. One of the examples can be found in Art. 607a of the Polish Code of criminal procedure, where the possibility for issuing an EAW has been narrowed to the cases where the offence in question has been committed within the territory of Poland.

More thoughts must be given to the manner of creating of the regulations of ‘European criminal law and process’. A question has been raised, for example, whether it is worthwhile to confer special powers to the laws which result from the implementation of the framework decisions, treating them somewhat as ‘special’ laws. Obviously, de lege lata, the negative answer results from the national constitutions which do not know such differences. The dynamics of the changes in European law and the mutual interaction of national and European laws encourage careful weighing of any argument. The increasing weight is in particular assumed by the argument of the Union-friendly interpretation of criminal law, discussed earlier. In any case, it does not mean relativisation of the constitutional rights and freedoms. It would rather encourage more profound analysis of the meanings of constitutional concepts.

The necessity to construct the ‘European criminal process’, whose cornerstone is going to be provided by the EAW, is a reaction to the Community ‘added values’ such as free movements of persons. The rights of the individuals should, however, be associated with their obligations. The obligations which are indirectly brought upon individuals within the scope of the ‘European criminal law and process’ result just from the common rights and values we have. Such values cannot be found in any other ‘international legal space’.
ANNEX: List of participants of the Conference

Dr Joanna Banach – Gutierrez, University of Opole, Poland
Prof. Dr Karoly Bard, Central European University, Hungary
Prof. Dr Stanislaw Biernat, Jagiellonian University, Poland
Prof. Dr Zbigniew Ćwiąkalski, Jagiellonian University, Poland
Prof. Dr Władysław Czapliński, Polish Academy of Sciences, Poland
Dr Joanna Długosz, Viadrina European University, Germany
Igor Dzialuk, Ministry of Justice, Poland
Dr Stefano Filetti, Malta Chamber of Advocates, Malta
Primož Gorkič, University of Lubliana, Slovenia
Dr Adam Górski, Jagiellonian University, Poland
Marek Grochowski, Office of the Committee for European Integration, Poland
Dr Artur Gruszczak, Jagiellonian University, Poland
Dr Agnieszka Grzelak, Warsaw School of Economics, Poland
Prof. Dr Marian Grzybowski, Jagiellonian University, Poland
Prof. Dr Piotr Hofmański, Jagiellonian University, Poland
Prof. Dr Mar Jimeno Bulnes, University of Burgos, Spain
Prof. Dr Andreas Kapardis, University of Cyprus, Cyprus
Sami Kiriakos, Ministry of Justice, Finland
Dr Světlana Kloučková, Supreme Public Prosecutor’s Office, Czech Republic
Prof. Dr Marianna Korcył – Wolska, Jagiellonian University, Poland
Dr Małgorzata Kożuch, Jagiellonian University, Poland
Prof. Dr Krzysztof Krajewski, Jagiellonian University, Poland
Prof. Dr Cezary Kulesza, University of Białystok, Poland
Prof. Dr Otto Lagodny, University of Salzburg, Austria
Prof. Dr Raimo Lahti, University of Helsinki, Finland
Katarzyna Leder, LL.M, University of Lodz, Poland
Annex

Darius Mickevicius, Ministry of Justice, Lithuania
Paweł Nalewajko, LL.M, University of Poznań, Poland
Dr Michał Rusinek, Jagiellonian University, Poland
Dr Andrzej Sakowicz, University of Białystok, Poland
Privatdozent Dr Arndt Sinn, Augsburg University, Germany
Judge Barbara Skoczkowska, Court of Appeal Warsaw, Poland
em. Prof. Dr Dionysios Spinellis, University of Athens, Greece
Dr Sławomir Steinborn, University of Gdańsk, Poland
Prof. Dr Katia Sugman, University of Lubliana, Slovenia
Prof. Dr Maria Szewczyk, Jagiellonian University, Poland
Dr Dobroslawa Szumiło-Kulczyka, Jagiellonian University, Poland
Dr Andrzej Światłowski, Jagiellonian University, Poland
Ilona Topa, LL.M, University of Silesia, Poland
Prof. Dr Harmen van der Wilt, University of Amsterdam, Holland
Prof. Dr Gert Vermeulen, University of Ghent, Belgium
Prof. Dr Joern Vestergaard, University of Copenhagen, Denmark
Prof. Dr Stanisław Waltoś, Jagiellonian University, Poland
Dr Małgorzata Wąsek-Wiaderek, University of Lublin, Poland
Prof. Dr Tadeusz Wludyka, Jagiellonian University, Poland
Prof. Dr Christoffer Wong, University of Lund, Sweden
Liane Woerner, LL.M, University of Giessen, Germany
Prof. Dr Józef Wójcikiewicz, Jagiellonian University, Poland
Prof. Dr Andrzej Wróbel, Polish Academy of Sciences, Poland
Prof. Dr Włodzimierz Wróbel, Jagiellonian University, Poland
Prof. Dr Kazimierz Zgryzek, University of Silesia, Poland
Prof. Dr Andrzej Zoll, Jagiellonian University, Poland