



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMISSION STAFF WORKING DOCUMENT**

**Annex to the**

**REPORT FROM THE COMMISSION**

**on the implementation since 2005 of the Council Framework Decision of 13 June 2002  
on the European arrest warrant and the surrender procedures between Member States**

**[COM(2007) 407 final]**

## 1. INTRODUCTION

On 23 February 2005, under Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States<sup>1</sup> (hereafter ‘the Framework Decision’), the Commission adopted a written report on the measures taken by the Member States to comply with this instrument.<sup>2</sup> Paragraph (1) of that Article obliges the Member States to take the necessary measures to comply with the provisions of the Framework Decision by 31 December 2003. According to paragraph (2), Member States should forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

By 14 June 2005, the Commission had received all transposing legislation. All national transposing legislation and related materials can be found on the Council website.<sup>3</sup> The Commission also took into account the complementary information transmitted by the Council (Article 34(3)) as well as the responses provided to the questionnaires sent to all Member States by the Presidency<sup>4</sup>, the EJM and the Commission.

On 24 January 2006 a revised version of the report was adopted, whose purpose was to take account of the Italian transposing legislation as notified to the Commission on 14 June 2005.<sup>5</sup>

As requested by the Justice and Home Affairs Council of 2 June 2005, the Commission has drawn up the present report to take account of further information transmitted by Member States as well as of their comments on the initial version as published by the General Secretariat of the Council on 2 September 2005.<sup>6</sup> This annex incorporates all legislative changes that occurred in Member States since the date of adoption of their implementing legislation until 1 April 2007. It also encompasses analysis of the BU and RO implementing laws that entered into force on 1 January 2007.

This annex provides the detailed analysis on which the new report is based.

## 2. CRITERIA FOR EVALUATION FOR THIS FRAMEWORK DECISION

This Framework Decision is based on the Treaty establishing the European Union (TEU), and in particular Articles 31 (a) and (b), and Article 34(2) (b) thereof.

Framework decisions can best be compared with the legal instrument of a directive<sup>7</sup>. Both instruments are binding upon Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. However, Framework Decisions do not entail direct effect.

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<sup>1</sup> OJ L190, 18.7.2002, p.1

<sup>2</sup> COM(2005)63 final and SEC(2005)267

<sup>3</sup> [http://ue.eu.int/cms3\\_Applications/applications/PolJu/details.asp?id=66&lang=EN&cmsid=720](http://ue.eu.int/cms3_Applications/applications/PolJu/details.asp?id=66&lang=EN&cmsid=720)

<sup>4</sup> COPEN 96 of 10.10.2003 et COPEN 94 of 26.7.2004.

<sup>5</sup> COM(2006)8 and SEC(2006)79.

<sup>6</sup> COPEN 118 of 2.9.2005.

<sup>7</sup> Article 249 EC Treaty.

## 2.1. General criteria of evaluation

To be able to evaluate on the basis of objective criteria whether a framework decision has been fully implemented by a Member State, the Commission has identified some general criteria with respect to directives, which have been applied mutatis mutandis to framework decisions:

1. form and methods of implementation must be chosen in a manner which ensures that the directive functions effectively with account being taken of its aims<sup>8</sup>;
2. each Member State is obliged to implement directives in a manner which satisfies the requirements of clarity and legal certainty and thus to transpose the provisions of the directive into national provisions, which have binding force<sup>9</sup>;
3. transposition need not necessarily require enactment in precisely the same words in an express legal provision; thus a general legal context (such as already existing measures, which are appropriate) may be sufficient, as long as the full application of the directive is assured in a sufficiently clear and precise manner<sup>10</sup>;
4. directives must be implemented within the period prescribed therein<sup>11</sup>.

Both instruments are binding ‘as to the results to be achieved’. That may be defined as a legal or factual situation, which meets the objective, which in accordance with the Treaty, the instrument is set to ensure<sup>12</sup>.

The general assessment provided for in Article 34, i.e. an assessment of the extent to which the Member States have complied with the Framework Decision, is, where possible, based on the criteria mentioned above.

## 2.2. Specific criteria of evaluation

This particular Framework Decision will, in addition, be assessed through the following criteria, which are more specific to the concept and added value of the European Arrest Warrant (EAW) in the framework of an area of freedom, security and justice based on mutual trust:

1. The judicial nature of the EAW: decisions to surrender should be made by judicial authorities without interference by the Executive. Transmission of the EAW is also based on direct contacts between judicial authorities.

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<sup>8</sup> See relevant case law on the implementation of directives: Case 48/75 *Royer* [1976 ECR 497 at 518].

<sup>9</sup> See relevant case law on the implementation of directives: Case 239/85 *Commission v. Belgium* [1986] ECR 3645 at 3659. See also Case 300/81 *Commission v. Italy* [1983] ECR 449 at 456.

<sup>10</sup> See relevant case law on the implementation of directives for instance Case 29/84 *Commission v. Germany* [1985] ECR 1661 at 1673.

<sup>11</sup> See substantial case law on the implementation of directives, for example : Case 52/75 *Commission v. Italy* [1976] ECR 277 at 284, See, generally, the Commission annual reports on monitoring the application of Community law, for instance COM (2001) 309 final.

<sup>12</sup> See PJG Kapteyn and P. Verloren van Themaat ‘Introduction to the Law of the European Communities’, third edition, 1998, p. 328.

2. The efficiency of the EAW: grounds for refusal should be strictly limited to legal motives provided in the Framework Decision. The general principle is that surrender of nationals and residents is no longer prohibited.
3. The rapidity of the EAW: proceedings should be simplified and accelerated thanks to the transmission of an EAW through various means and based on a unique common form. Decisions on surrender and their execution should be subject to short time limits.

### **3. METHOD AND STRUCTURE OF THE ANNEX TO THE REPORT**

Implementation of the Framework Decision has in all Member States required the adoption of new legislation or at least the amendment of existing national provisions. Several Member States have revised their Constitutions (e.g. FR, PT, SI, DE, PL, CY). Some Member States have used, in addition to binding legislation, other procedures such as guidelines or circulars to ensure that particular articles of the Framework Decision are well carried out in practice.

For the purpose of this report, the Commission has considered that a particular provision is “explicitly transposed” only where national provisions are contained either in specific implementing legislation or in existing legislation which the Commission had the opportunity to examine. Where a Member State has indicated that a non-binding instrument had been used, the Commission has not considered this to be full transposition since each Member State is obliged to implement directives,<sup>13</sup> and *mutatis mutandis* Framework Decisions, in a manner which satisfies the requirements of clarity and legal certainty. Nevertheless, such instruments are referred to, where the Commission has been able to examine them, given their likely impact on the practical implementation of the Framework Decision.

This annex analyses transposing legislation article by article as applicable on 1 April 2007. For each article, Member States are identified according to whether there is full, partial or inadequate transposition. This annex, however, focuses on problematic areas and does not describe in detail situations of correct transposition.

### **4. ANALYSIS OF NATIONAL MEASURES TAKEN TO COMPLY WITH THE FRAMEWORK DECISION**

#### **Article 1 and Recitals 12 and 13 – Definition of the European Arrest Warrant and obligation to execute it**

Whilst all Member States have broadly covered the definition of the EAW (Article 1(1)), only 6 have made direct reference to the mutual recognition principle mentioned in Article 1(2) (ES, LV, AT, PT, SI, SK).

In relation to Article 1(1), however, it is noted that the UK refuses to surrender the requested person unless the investigations have been closed. Moreover the UK will rarely use provisional arrest in the process of executing an EAW, and therefore will not arrest the requested person until the certification has been granted. This appears to the Commission as

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<sup>13</sup> See relevant case law on the implementation of directives: Case 239/85 *Commission v. Belgium* [1986] ECR 3645 at 3659. See also Case 300/81 *Commission v. Italy* [1983] ECR 449 at 456.

contrary to the definition and the scope of the EAW as defined in Article 1(1) of the Framework Decision, and in practice leads to serious difficulties.

In certain Member States (IE, MT, UK) the transposing legislation applies only to the Member States which have been listed by Decree or Order. The Commission has not fully been informed of these lists, although it should be notified of any relevant transposing measure including secondary national legislation. It appears nevertheless that these Member States apply now the EAW towards all Member States. MT has modified its list as a result of the adoption of the new amending law and has informed the Commission that it will prepare a draft to list the new EU Member States. Under the Irish implementing law, the Minister for foreign affairs has designated all Member States except for Bulgaria and Rumania for the purpose of the Act, which have under their national law given effect to the Framework Decision. As far as IE is concerned, the use of secondary legislation to designate States rather than primary legislation was to allow extradition procedures to subsist for those Member States who were delayed in ratifying the Framework Decision.

In relation to Member States' implementation of Article 1(3) and integration into their laws of related recitals 12 and 13 (conformity with fundamental rights, e.g. Article 6 TEU), transposition was mixed, with some States making direct reference to all the provisions whilst others have not specifically referred to these rights (CZ, EE, ES, LU, HU, SK) since they are of the view that they exist independently of the Framework Decision and they are therefore bound to respect such rights in any case. For instance, SK did not refer to the provisions of the Framework Decision as its Constitution contains a provision which renders International Treaties superior to national law. PL has implemented Article 1(3) by making it an obligatory ground for refusal to execute an EAW. Those who have transposed the provisions have made breach of the mentioned rights referred to in Article 1(3) and recitals 12 and 13 a mandatory ground for refusal.

11 Member States have explicitly transposed Article 1(3) or referred to the European Convention on Human Rights (BE, DE, EL, IE, IT, CY, LT, NL, AT, SE and UK).

13 Member States have completely or to some extent integrated into their laws Recital 12 (DK, DE, EL, FR, IE, IT, CY, LV, MT, AT, SI, FI and UK). In this regard, the most commonly omitted grounds are "sex" or "sexual orientation" and "language". Furthermore, 11 Member States have either partly or fully integrated Recital 13 (DK, DE, EL, IE, IT, CY, LV, MT, AT, PT and FI).

4 Member States (EL, IE, IT and CY) have transposed the text into their legislation in such a way that it goes beyond the Framework Decision and therefore creates the risk that a EAW will be refused on the basis of grounds not envisaged in the Framework Decision.

In addition to referring to the European Convention of Human Rights, IE and IT require refusal where surrender would breach their national constitutions. Although this may cover situations arising under both Article 6 TEU and Recital 12 (such as rules on due process), it

nevertheless goes beyond the Framework Decision, in particular as Art 6 TEU refers only to those constitutional principles common to Member States.<sup>14</sup>

In relation to recital 12, EL and CY refer to an activity for the cause of freedom, as a ground for refusal, which is wider than the possibilities covered in the recital and which therefore creates the risk that a refusal will go beyond the Framework Decision. However, the Commission has been informed that the Cypriot government has deposited an amending bill before the House of Parliament which shall be adopted before summer 2007 and by which the domestic law would not go beyond the Framework Decision with regard to "activities for the cause of freedom" as a ground for refusal.

## **Article 2 – Scope of the European Arrest Warrant**

Few problems have arisen in relation to the scope of the EAW under Art 2(1), with 24 Member States having transposed it correctly (BE, BU, CZ, DK, DE, EE, EL, ES, FR, IE, CY, LV, LT, LU, HU, MT, PL, PT, RO, SI, SK, FI, SE, UK). In relation to a EAW for the purposes of serving a custodial sentence, both NL's and AT's legislation require not only that the sentence be for at least 4 months but **simultaneously** that the related offence be punishable by at least 12 months. This is the system that was in place under the old extradition regime. However, under the Framework Decision, there is no longer a link between the length of the actual and potential punishment. This means that where a person has already been sentenced, and that sentence is 4 months of imprisonment or more, the maximum possible sentence is irrelevant. As a result, NL's and AT's implementations are contrary to the Framework Decision.

In IT, aggravating circumstances are excluded when calculating the 12 month threshold. Moreover, where a EAW is issued by IT for execution, the legislation does not refer to the 4 month threshold referred to in the Framework Decision. It is also noticeable that not all Member States have made reference to detention orders; the reason usually being that this concept does not exist in their legal system. It is not clear at this stage whether this will cause any difficulties though of course if a Member State refuses to execute a EAW on the basis that it was for a detention order, this would be in contravention of the Framework Decision.

20 Member States have implemented the double criminality list in Art 2(2) in complete conformity with the Framework Decision (BU, CZ, DK, DE, ES, FI, IE, CY, LV, LT, LU, HU, MT, NL, AT, PT, RO, SK, SE and UK). In contrast, IT legislation disregards the list contained in Article 2(2) of the Framework Decision and replaces it with its own list of corresponding offences found in national criminal law. The consequence is that IT legislation reintroduces the principle of a control of dual criminality. Furthermore, IE has effectively reintroduced the double criminality regime in respect of all categories of offences when acting as the issuing Member State, by virtue of section 4(3)(e) of the EAW Act as regards the return of its own nationals.

In practice, as indicated in the Evaluation report on EE, however, the double criminality requirement is examined in all cases in EE. This practice is clearly contrary to the

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<sup>14</sup> Nevertheless as regards IT, this cannot take the form of a generic or abstract reference to a climate of social disquiet caused by international terrorist attacks. Furthermore, the civil tradition in the Member State issuing the warrant constitutes in itself an ample guarantee that the person requested will not be subjected to persecution or discriminatory treatment. (Court of Cassation (Ordinary Criminal Chamber), No 33642, 13.9.2005.

fundamental principles of the Framework Decision, namely the abolition of double criminality for 32 categories of offences based on mutual trust between the judicial authorities of the Member States. On this issue, the Commission has been informed that a draft legislation is to be adopted in the course of May 2007, which should reaffirm the explicit abolition of double criminality in all listed offences.

In PL, Article 607 (w) of the domestic law states that the fact that an act is not a criminal offence according to the PL law does not prevent the EAW from being executed as far as the EAW concerns a foreigner. A contrario, this could mean that there is no possibility to execute a EAW without checking the dual criminality even for the list of 32 offences contained in Article 2 of the Framework Decision when it concerns nationals and therefore render the domestic provision contrary to the Framework Decision.

With regard to the other Member States, it is possible that difficulties in translation or differences in the interpretation of the meaning of the categories of offences have resulted in alternative transposing texts. For instance, some Member States consider certain categories to be covered by other categories (racketeering and extortion (EE, EL, FR), where "racketeering" is not mentioned. One Member State has omitted categories of offences in the list which is, prima facie, contrary to the Framework Decision (SI). The list of offences as transposed by Article 607(w) of the Polish law does not seem to correspond to the list provided by Article 2(2) of the Framework Decision. Indeed, it appears that some categories of offences are split whilst some others are completed. Finally, BE has limited the category of murder and grievous bodily injury.

For the legal classification of an offence by the issuing Member State, the overall view adopted in practice has been that either there will not be a check carried out or there will only be a prima facie examination. However, BE legislation provides that abortion and euthanasia are not covered by "murder or grievous bodily harm". This is contrary to the Framework Decision since it is the law of the issuing state and not the executing state which determines whether an offence is within the list. Indeed Article 2(3) provides for the opportunity for the Council to review the double criminality list and some Member States have expressed the intention to do so in particular due to concerns in relation to abortion, euthanasia and possession of drugs.

There have not been any noticeable difficulties in relation to the 3 year limit in Article 2(2), except in the case of IT, where aggravating circumstances are excluded from the calculation of this threshold. The UK went even further than the Framework Decision in reducing the limit to one year for conviction cases. FI and SE have, however, legislated that in relation to a custodial sentence it must be for a length of at least 4 months as required in Art 2(1). AT accumulates the length of any punishment under 4 month and grants the execution of European Arrest Warrant, where several offences have been committed by the same person and at least one offence is punishable for at least one year.

In examining legislations the question arose of whether attempt and complicity are covered by the list of categories of offences and thus whether double criminality is also abolished in relation to them. The UK has included this in its implementing law whilst the PL penal code treats both as equivalent to the commission of the offence. 19 Member States (BE, EE, EL, ES, FR, IT, CY, LV, LT, LU, HU, MT, NL, AT, PT, SI, SK, FI, SE) have abolished double criminality in relation to attempt and complicity in line with the Framework Decision. No information was available for the remaining Member States.

In some Member States, the list provided for in the Framework Decision has been transposed with some adaptation made for linguistic reasons (EE, EL, FR, FI, IT) in order to comply with domestic law. For PL and RO those adaptations render the scope of the offences for which double criminality is abolished wider than what is provided for in the Framework Decision. In RO, there is no reference to kidnapping or to hostage taking, rather a general statement on illegal deprivation of freedom, illegal arrest and abusive investigation. Moreover, the implementing law for SI clearly restricts the list of offences as swindling has not been included and extortion and racketeering are only covered when committed in a group or with weapons.

### **Article 3 – Grounds for mandatory non-execution of the European Arrest Warrant.**

23 Member States have transposed Article 3(1) correctly (BE, BU, CZ, DE, EE, EL, ES, FR, IT, CY, LV, LT, LU, HU, MT, AT, PL, PT, RO, SI, SK, FI, SE). NL and UK have not transposed this paragraph since there is no possibility of amnesty in those countries and so this is obviously not viewed as being contrary to the Framework Decision. On the other hand, DK's implementation refers to a pardon rather than amnesty. However the use of the word "pardon" instead of "amnesty" in the Danish legislation does not contravene a good implementation of the Framework Decision. Finally IE has transposed this paragraph to allow for immunity by virtue of amnesty or pardon in the issuing Member State rather than the executing Member State. This is not in line with the Framework Decision which allows refusal only where there is amnesty in the Executing Member State. This may have an impact on the efficiency of the EAW system since it may result in IE always requiring this additional information, which was not foreseen in the EAW form.

In relation to paragraph 2, all Member States have carried out implementation correctly. In addition, although it should not pose a problem, PT legislation refers to the state where the decision was made rather than the sentencing state.

No difficulties were identified in relation to Article 3(3) with all Member States having properly transposed it.

Overall this Article has been well transposed. However, it is clear following analysis of legislations that some Member States have provided for additional mandatory grounds for refusal. Many of these correlate to the Article 4 optional grounds for refusal or to fundamental rights and are discussed under their respective headings. Others relate to the Article 5 guarantees and are dealt with under that Article. However, grounds in addition to these have also been included, which require mention here as they go beyond the Framework Decision.

Though not provided for by the national legislation, the judicial authorities in EE consider the merit of each case, applying a proportionality test in coming to a decision in respect of the surrender application. As a consequence, a Judicial Authority may refuse surrender purely on merit grounds rather than pursuant to any of the grounds stated in Article 3 and Article 4 of the Framework Decision. Such a practice is clearly contrary to the Framework Decision.

IT refuses the EAW on a series of grounds which appear contrary to the Framework Decision. For example, an executing authority in IT may refuse to execute a EAW:

- where, according to Italian law, the facts constituting the offence relate to the exercise of a right or a duty or if the offence was committed under “caso fortuito” or “forza maggiore”;



- where the victim has given his / her consent to the act;
- where the requested person is pregnant or is the mother of a child less than 3 years old, except in circumstances of an exceptional gravity;
- where the requested person is an Italian citizen who didn't know that the conduct was prohibited;
- where the offence is a political one (provided that terrorism cannot be considered as a political offence);
- where the evidence or grounds on which the EAW is based are insufficient;<sup>15</sup>
- where the requested person is subject to an indefinite period of preventive custody<sup>16</sup>. A recent decision by the Italian Supreme Court showed that it understood indefinite period of time widely. The Supreme Court confirmed on the 30<sup>th</sup> January 2006 the decision not to execute a Belgian EAW because Belgium does not provide for a determinate period of time during which the requested person can be held in custody. Indeed, the Belgian law provides that a first decision is given within 5 days after the person has been arrested, and then decisions about the custody are rendered every month with the overall period of time being in line with the reasonable time requirement of Article 3 of the ECHR. It thus appears to the Commission that Italy's position is contrary to the Framework Decision and could affect other Member State.

DK shall refuse surrender on the ground of possible threat with torture, degrading treatment, violation of due process as well as if the surrender appears to be unreasonable on humanitarian grounds. Such grounds for mandatory refusal go beyond the Framework Decision.

In LT, the Criminal Code provides for a mandatory ground for refusal in the case where "the surrender of the person would be in breach of fundamental rights and (or) liberty". The Commission has been advised that this ground of refusal may go beyond the provisions contained in the Framework Decision. Moreover, where a ground of refusal is to be applied, the Office of the Prosecutor general can directly stop the proceedings without asking for further evaluation by the judge of the ground of refusal.

In MT, surrender was to be refused where it would have been unjust or oppressive to surrender the requested person to a Member State, where that person had been extradited to Malta from a third State. Such a refusal could occur even where the consent of the third State had been given pursuant to Article 28(4), which could have been contrary to the Framework Decision if it were to go beyond Article 6 TEU or the ECHR. However, MT has modified its

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<sup>15</sup> Nevertheless the check on the existence of serious evidence of guilt by the Italian Court of Appeal does not involve a new, independent assessment of the sources of proof and the precautionary requirements. The check should be understood in the sense that, where the EAW has been issued on the basis of a precautionary measure, the Court of Appeal assesses whether such a measure has been substantiated and the precautionary requirements have been indicated (Court of Cassation (Ordinary Criminal Chamber), No 33642, 13.9.2005. Lastly, the Court of Cassation referred to the established practice whereby, when examining the different possible interpretations for applying domestic law, the court must choose the solution which is compatible with European law (Court of Cassation (Sixth Criminal Chamber), No 34355, 23.9.2005.

<sup>16</sup> Confirmed by the Court of Cassation, No 16542, 8.5.2006.

national transposing law in adopting an amending law which entered in force on 19<sup>th</sup> September 2006. Article 16(2) of its domestic law has thus been deleted from it and as a consequence the Commission considers that the new text is in conformity with the Framework Decision on this point.

NL shall refuse surrender if the Dutch executing judicial authority finds that there can be no doubt that the requested person is innocent. NL has stated this will only occur “in exceptional cases” and if “it has become crystal clear to the executing judicial authority that the person could not have committed the offence”, for instance “where the person can immediately prove beyond any doubt that he was being kept in custody at the time of the offence”. Nevertheless the Commission is of the view that making this a ground for refusal is contrary to the Framework Decision, since it might require an examination in substance of the case, and also contrary to the principle of mutual trust between Member States.

In PT, the surrender shall be refused if the arrest warrant is issued on account of political reasons. Although this ground of refusal may be justified by the prohibition of discrimination implied in recital 12, it may also be the means of reintroducing the political offence as a ground for refusal; in the latter case, the implementation of PT would go beyond the Framework Decision. In DK refusal shall occur where there is a danger that, after surrender, the requested person will suffer persecution for political reasons. Again, this creates the risk that a refusal will go beyond the Framework Decision.

For reasons of national security, the Secretary of State in the UK may overrule the decision of the judge or direct the judge if he believes that the requested person was acting in the interests of the UK by carrying out actions conferred or imposed by or under an enactment, or is not liable as a result of an authorisation given by the Secretary of State for his action. This is contrary to the Framework Decision, since this ground for refusal is not envisaged and moreover it transfers the decision making power from the executing judicial authority to the Executive.

UK has also introduced additional grounds for refusal based on the passage of time and extraneous considerations, which may go beyond the Framework Decision. Such grounds for refusal may be established on a relatively low standard of proof and once raised, compel the judge to look into the substance of the underlying case and the conduct of the issuing Member State.

In PL, amendments to the Criminal Procedure Code have extended the list of obligatory grounds for refusal. According to those amendments, the execution of a EAW is not possible if its execution would breach the freedoms and rights of a person, when EAW concerns (i) an offence committed without violence for political reasons, (ii) and offence committed by a national on the territory of Poland or on board of Polish aircraft or ship, and (iii) an act committed by a national abroad, which does not constitute an offence according to Polish law. Such grounds for refusal are not provided for in the Framework Decision and thus are contrary to it.

Furthermore, NL and UK have introduced additional grounds for refusal arising from the application of Treaties or Conventions which have not been set aside by the Framework Decision. NL has specified that they shall not apply the Framework Decision to surrender of members of crews who are deserters, or to surrender of foreign military personnel, where such surrender takes place by virtue of an agreement with one or more states with which NL is allied. NL has stated that the former can be expelled and the latter have never been subject to

normal extradition procedures between Member States since specific Treaties apply to them. The UK has also specified that surrender to a Member State is barred by special hostage taking considerations in specific situations where the International Convention against the Taking of Hostages of 18 December 1979 applies. This is contrary to the Framework Decision as this instrument regulates relations between Member States in surrender procedures and as such the Framework Decision has replaced a number of other instruments which cannot be used in order to add grounds for refusal in dealing with Member States. However, those instruments remain unaffected when Member States deal with third countries.

#### **Article 4 – Grounds for optional non-execution of the European arrest warrant**

As mentioned above, many Member States have interpreted this article as meaning that the State may choose whether a judge is required to refuse surrender where one of the Article 4 grounds exists or whether the judge has discretion in the matter. As a consequence many States have made these grounds for refusal mandatory. At the same time, since this Article is optional some Member States have not transposed it at all. These Member States are therefore not mentioned below. Hence the implementation of this article amounts to a patchwork which is contrary to the Framework Decision. A total of 16 States have transposed **paragraph 1** as a mandatory ground (BE, CZ, FR, IE, IT, CY, LT, LU, HU, MT, NL, AT, SI, SK, FI, SE) with 9 maintaining it as an optional ground (BU, DK, DE, EL, ES, PL, PT, RO, UK). EE and LV have not transposed this paragraph but EE has stated it will apply it in practice, though this cannot be viewed as full transposition.

20 states referred to the tax exception in line with the Framework Decision (BE, BU, CZ, DE, EL, ES, FR, IE, CY, LT, LU, HU, MT, AT, PL, PT, RO, SI, SK, UK). SE has stated that they comply with this provision although the Commission has only been able to examine an explanatory and supplementing Government Bill to the national legislation. IT has transposed this paragraph but has made it subject to an additional condition of assimilation by analogy to Italian tax offences, for which the maximum penalty is at least three years. This appears contrary to the Framework Decision. The remaining states have not mentioned this whilst DK, LT, NL, SE have stated they will follow the Framework Decision in practice, however such statements do not amount to correct transposition of the Framework Decision.

In relation to **paragraph 2**, some Member States have implemented this as a mandatory ground (CZ, EL (for Greek nationals), IT, HU, MT (legislation is not completely clear on the matter however), NL, AT, SI (where offence committed against a Slovenian or the State), SK, SE). Most states have implemented it as an optional ground for refusal (BE, BU, DK, DE, EE, EL (for nationals other than Greek), ES, FR, CY, LV, LT, LU, PL, PT, SI (in all other cases), FI, RO, UK). IE allows for mandatory refusal where prosecution is being considered but has not yet been decided, which is more restrictive than envisaged by the Framework Decision.

Transposition of **Article 4(3)** requires a distinction between part 1 (where the executing judicial authorities decide not to prosecute for the offence on which the EAW is based), part 2 (where it is decided to halt prosecution) and part 3 (where a final judgment has been passed which prevents further proceedings).

Part 1 is mandatory in 6 Member States (IE, HU, NL, AT (with some exceptions for foreigners), SE, SK). It is optional in 17 Member States (BE, BU, DK, DE, EE, EL, ES, FR, CY, LV, LT, LU, PL, PT, RO, SI, FI).

Part 2 is mandatory in 6 Member States (CZ, IE, HU, NL, AT (with some exceptions for foreigners), SI). It is optional in 17 Member States (BE, BU, DK, DE, EE, EL, ES, FR, CY, LV, LT, LU, PL, PT, RO, SK, FI).

Part 3 is mandatory in 10 Member States (BE, CZ, IE, IT, HU, NL, AT (with some exceptions for foreigners), SI (only in relation to a final judgment passed by SI), SK, (with a series of exception), SE). It is optional in 11 Member States (BU, DE, EE, EL, ES, CY, LU, PT, SK, FI, RO). However, this is not always in line with the jurisprudence of the ECJ<sup>17</sup> to the extent that where a Member State has decided to halt proceedings once the accused has fulfilled certain legal obligations, refusal to execute a European Arrest Warrant should be mandatory. PL's legislation is not sufficiently clear in this matter and could allow for refusal where a final judgment has been passed in any other State, including third states.

Furthermore, the UK Act provides for the express possibility of refusing surrender on the basis of ECHR issues, even though the Strasbourg Court has stated that such arguments can only succeed if there is a flagrant breach of fundamental rights. As the UK has accepted this jurisprudence, however, refusal to surrender on such grounds should only happen in exceptional cases.

**Article 4(4)** has been transposed as a mandatory ground by 15 States (BE, CZ, EL, FR, IE, IT, LT, LV, HU, MT, NL, AT, SI, SK, SE, UK) and as an optional ground by states (BU, DK, DE, EE, ES, CY, LU, PL, PT, RO, FI).

**Article 4(5)** has been transposed as a mandatory ground by 13 States (CZ, FR, IE, LT, HU, MT, NL, AT, PL, SI, SK, SE, UK) and as an optional ground by 10 states (BE, BU, DK, EE, EL, ES, CY, LU, FI, RO).

PT has made this an optional ground for refusal. However, the legislation refers to the situation where the sentence can no longer be executed under PT law whereas it should refer to the law of the sentencing state.

**Article 4(6)**<sup>18</sup> has been transposed as a mandatory ground by 14 States (EE (for nationals), EL (for nationals), IT (for nationals), CY (for nationals), CZ (for nationals and long-term residents), DE (mandatory for nationals and residents unless the sentenced person consents to surrender), HU, LT, AT (for nationals unless the sentenced person consents to surrender), LV (for nationals), NL (mandatory with the offer to execute the sentence), PL (for nationals residents and people in asylum, which may be contrary to the Framework Decision), SI (for nationals who consent to sentencing in SI and in agreement with the issuing State), SE (mandatory unless the person has strong ties with the issuing State national law) and/or as an optional ground by 14 states (BE (for nationals and residents), BU (for nationals and residents), DK (for nationals and residents), EL (for residents), ES, FR (for nationals), CY (for residents), IT (for residents), LU, PL (for residents), PT (for nationals and residents), RO (for nationals and residents), SI (nationals and residents), FI).

Following the guidelines given by the German Constitutional Court in the *Darkazanli case* on 18 July 2005, the new national legislation in DE distinguishes between three categories of cases in order to protect nationals from being easily surrendered. Cases with "national

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<sup>17</sup> Joined Cases *Gozutok* (C – 187/01) and *Brugge* (C – 385/01) of 11 February 2003

<sup>18</sup> Source: Council document 12054/06 COPEN 88 of 28.07.2006 and 12054/06 ADD 1 of 3.10.2006 for SI.

reference" would constitute a mandatory ground for refusal, cases with a "foreign reference" would lead to a mandatory surrender and finally, "mixed cases" in which the lack of clear national or foreign reference would require a double criminality check, and a weighting up between effectiveness prosecution, the alleged offence and the guarantee of fundamental rights. It appears that the new implementing law for DE does not respect the Framework Decision since it could amount to a surrender of nationals only under exceptional circumstances (i.e. only those with "foreign references", or when the double criminality test has not been conclusive).

As mentioned below, it seems that the High Court in IE could refuse to surrender a person on the basis of article 4(6), although this provision has not been transposed into Irish law and the Framework Decision has no direct effect.

CZ and NL have also made this ground for refusal mandatory for nationals and long term residents. However in such a case they do not undertake to execute the sentence but rather to convert it in line with the Convention on sentenced persons. NL has informed that the provision has been implemented in accordance with its national law as allowed by the wording of the Framework Decision, yet the practical result is that, contrary to the Framework Decision's provision, execution of the sentence is subject to the control of double criminality for nationals and permanent residents.

Furthermore, it is to be noted that in CZ, the executing judicial authority is bound by the decision of the person requested. Furthermore, contrary to the Framework Decision, CZ applies reciprocity towards other Member States in order to surrender its nationals.

In LV this is a mandatory ground (for nationals) but there is no provision in the legislation requiring an undertaking to execute the sentence.

**Article 4(7a)** has been transposed as an optional ground by 15 States (BE, BU, ES, FR, CY, LV, LT, LU, HU, NL, PL, PT, RO, SI, FI) and as a mandatory ground by 9 States (EL, IE (if only proceedings have been brought in IE against the person concerned), IT, MT, AT (only in respect of nationals), SK, UK and also partly in DK and SE (where the act has been committed in these last two countries, even partly, but is not punishable therein).

**Article 4(7b)** has been transposed as an optional ground by 13 states (BE, BU, EE, ES, FR, CY, LV, LU, NL, PT, RO, SI, FI) and as a mandatory ground by 9 States (DK, EL, IE, IT, LT, MT, NL, AT (only in respect of nationals), SK). It can be noted that in NL, and only in terms of Dutch legislation, a refusal of surrender shall be waived at the public prosecutor's request, unless, in the opinion of the court, the public prosecutor could not reasonably have arrived at his request.

Where the act constitutes an extra-territorial offence, the UK executing judicial authorities shall refuse surrender if the conduct is punishable by less than 12 months under the UK law. This restriction is contrary to the Framework Decision.

As a general point, although a Framework Decision has no direct effect, it seems that the High Court in IE could refuse to surrender a person on the basis of an article of the Framework Decision which has not been transposed into Irish law. The Irish legislation referring directly to the Framework Decision bars surrender if the High Court assesses that the surrender is prohibited by Part 3 (of national legislation) or the Framework Decision (including the recitals thereto).

<i>Article 4</i>	<i>Provisions transposed as an optional ground for refusal</i>	<i>Provisions transposed as a mandatory ground for refusal</i>
<i>Paragraph 1</i> <i>(part 1)</i>	BU, DK, DE, EL, ES, PL, PT, RO, UK.	BE, CZ, FR, IE, IT, LT, LU, HU, MT, NL, AT, SI, SK, FI, SE.
<i>Paragraph 2</i>	BE, BU, DK, DE, EE, EL (for non nationals), ES, FR, IE (where prosecution is being considered) CY, LV, LT, LU, PL, PT, SI (in all other cases), FI, RO, UK.	CZ, EL (for Greek Nationals) IT, HU, MT, NL, AT, SI (where the offence is committed against a Slovenian or the State) SK, SE.
<i>Paragraph 3</i> <i>(part 1)</i>	BE, BU, DK, DE, EE, EL, ES, FR, CY, LV, LT, LU, PL, PT, RO, SI, FI.	IE, HU, NL, AT, (with some exceptions for foreigners) , SE, SK.
<i>Paragraph 3</i> <i>(part 2)</i>	BE, BU, DK, DE, EE, EL, ES, FR, CY, LV, LT, LU, PL, PT, RO, SK, FI.	CZ, IE, HU, NL, AT (with some exceptions for foreigners), SI.
<i>Paragraph 3</i> <i>(part 3)</i>	BU, DE, EE, EL, ES, CY, LU, PT, SK, FI, RO.	BE CZ IE IT HU NL AT (with some exceptions for foreigners) SI (only in relation to a final judgment passed by SI), SK (with a series of exceptions), and SE.
<i>Paragraph 4</i>	BU, DK, DE, EE, ES, CY, LU, PL, PT, RO, FI.	BE, CZ, EL, FR, IE, IT, LT, HU, MT, NL, AT, SI, SK, SE, UK.
<i>Paragraph 5</i>	BE, BU, DK, EE, EL, ES, CY, LU, FI, RO.	CZ, FR, IE, LT, HU, MT, NL, AT, PL, SI, SK, SE, UK.
<i>Paragraph 6</i>	<p><u>For nationals:</u></p> <p>ES, FR.</p> <p><u>For residents:</u></p> <p>EL, CY, IT, LU, PL.</p> <p><u>For nationals and residents:</u></p> <p>BE, DK, PT, SI, FI.,BU, RO.</p>	<p><u>For nationals:</u></p> <p>EE, , , , HU, LT, AT (unless the person consents to surrender), LV, SI (for nationals who consent to sentencing in SI and in agreement with the issuing state),</p> <p><u>For nationals and residents:</u></p> <p>CZ, DE (unless the person consents to surrender), PL (also for people in asylum),</p> <p><u>Other conditions:</u></p> <p>NL (mandatory with the offer to execute the sentence), SE (mandatory unless the person has strong ties with the issuing state)</p>

<b>Paragraph 7a</b>	<b>BE, BU, ES, FR, CY, LV, LT, LU HU, NL, PL, PT, RO, SI, FI.</b>	<b>EL, IE</b> (if only proceedings have been brought in IE against the person concerned), <b>IT, MT, AT</b> (only for nationals), <b>SK, UK</b> , and partly in <b>DK</b> and <b>SE</b> .
<b>Paragraph 7b</b>	<b>BE, BU, EE, ES, FR, CY, LV, LU, NL, PT, RO, SI, FI.</b>	<b>DK, EL, IE</b> (the Irish legislation refers directly to the Framework Decision though the latter has no direct effect), <b>IT, LT, MT, NT, AT</b> (only in respect of nationals), <b>SK, UK</b> (if the conduct is punishable by less than 12 months under the UK law, for extra territorial offences).

### **Article 5 – Guarantees to be given by the issuing Member State in particular cases**

All Member States except ES and LV require the **Article 5(1)** guarantee. Of these only UK imposes additional conditions, not envisaged in the Framework Decision, in relation to the conduct of the hearing, such as the right to defend oneself in person or through legal assistance of one's own choosing or where appropriate to be given free legal assistance and to obtain the examination of witnesses on one's behalf under the same conditions as witnesses against oneself. MT used to impose such additional conditions; however it has modified its domestic legislation by an amending law which came into force on 19<sup>th</sup> September 2006, as a result of which MT's implementation of the Framework Decision is now correct. In DE, the guarantee to be given under Article 5(1) is subordinated to the condition that the person has voluntarily fled as a result of which he/she has not been aware of the proceedings nor been notified the sentence. Indeed, in such a case, the issuing Member State is under no obligation to give the guarantee under Article 5(1).

IE requires an additional guarantee that the person be notified of the time and place of any retrial in respect of the offence concerned if such a retrial was to take place and that in such cases, he or she will be permitted to be present.

Furthermore, in relation to Article 5(1), the Commission has been informed that NL would refuse to execute a EAW if the issuing Member State did not provide for the possibility of a retrial in cases where the requested person has not taken part in the proceedings. At least 2 Member States do not provide for such retrial possibility which may in practice be a serious issue. Indeed, it has already been the ground for refusals to execute European Arrest Warrants issued by PT, and could also apply for European Arrest Warrants issued by IT which domestic law does not provide for a possibility to retrial.

13 Member States require the **Article 5(2)** guarantee (BU, DE (as an mandatory ground for refusal no matter the nationality or the residence of the requested person), EE, EL, ES, IT, CY, LT, PL, PT, SI, RO, FI (the guarantee only requires the possibility of amending the sentence or clemency)) whilst 13 States do not impose this condition (BE, CZ, DK, FR, IE, LV, LU, HU, MT, AT, SK, SE, UK). In RO, however Article 5(2) has not been properly implemented as the domestic law states that a EAW will be executed if the legal system of the issuing Member State provides for the possibility of reviewing the sentence after a service of at least 20 years. As a result, this provision appears to be contrary to the Framework Decision. Moreover in BU, such a review may only be done ex officio, and not on request for the first 20 years of serving a sentence. Again, this appears to be contrary to the provision of Article

5(2) of the Framework Decision. In relation to paragraph 2, PL does not require the possibility of a retrial within the 20 year-limit.

In relation to the **Article 5(3)**<sup>19</sup> guarantee, 22 States have this requirement: BE (optional for nationals and residents), BU (optional for nationals and residents) DK, DE (mandatory for nationals and optional in relation to residents), EE (for nationals though there is no legal basis as to which body would be competent to provide such an undertaking), EL, ES (optional), FR (optional), IT (mandatory in relation to nationals and residents), CY (mandatory for nationals and optional for residents), LV (for nationals), LT, LU (optional), HU (mandatory where the person requests it), AT (mandatory for nationals), PL (for nationals and those granted asylum), PT (optional relating to nationals and residents), RO (mandatory for nationals but optional for residents), SI (for nationals and residents under the condition that the court undertakes to enforce foreign sentence), FI (for nationals where requested or residents where requested and with regard to the circumstances), SE (for nationals unless the person has strong ties with the issuing State) and NL (mandatory). Moreover, EE relies on the 1983 Convention on the Transfer of Sentenced Persons, which can render the guarantee under Article 5(3) of the Framework Decision very problematic, and may be at odds with the judiciarisation of the surrender process. IE, MT and SK do not impose this condition. The Commission has been informed that provisions to enable IE to give the guarantee required by 5(3) are being included in a Criminal Justice (Miscellaneous Provisions) Bill, which should be published by the end of 2007. This is still a difficult issue as for those above listed countries, the return of own nationals is regulated by the Transfer of Sentenced Persons Act which places the right of initiative exclusively on the requested person (save for the cases of mental incapacity). Indeed the Minister may not compel such a person to return to any particular Member State to continue serving a sentence. Given this, the Irish authorities, for example, cannot give any undertaking, should one be required by the executing Member state pursuant to Article 5(3) of the Framework Decision. A requested person, being a national of the executing Member State requiring such an undertaking is therefore in the position to render null and void the efforts of both states to have him or her surrendered.

Article 607(t) of the Polish law states that surrender can be granted under the condition that the requested person will be sent back to PL when the final judgment is rendered. This would amount to the guarantee under Article 5(3) being made automatic as the judge would have no discretion in deciding whether or not he could ask for the guarantee. Although this has not yet been confirmed by PL, it appears that the provision of the domestic law may not be in line with the Framework Decision.

Furthermore IT may require an additional guarantee in respect of fundamental rights or Italian constitutional principles on guarantee, which might be contrary to the Framework Decision.

NL legislation states that 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 NL. NL has stated that it will not surrender a national for the prosecution for an offence that is not an offence under Dutch law, because it is impossible under the relevant treaties and the national law to transfer a person where the requirement of double

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<sup>19</sup> Source: Council document 12054/06 COPEN 88 of 28.07.2006 and 12054/06 ADD 1 of 3.10.2006 for SI.



criminality has not been met. It does not see a contradiction with the Framework Decision, since the Framework Decision does not regulate return but leaves that to the Member State. Nevertheless it is clear that one of the principal advantages of this Framework Decision compared with previous extradition arrangements is the removal of the double criminality requirement in relation to the Article 2(2) list of categories of offences. NL's position obviously runs counter to this.

Similarly, regarding the conversion of the sentence, the CZ executing judicial authority shall only recognise the judgment of the issuing judicial authority by converting the sentence (for nationals and long term residents). Also CZ systematically requires the guarantee provided in Article 5(3). However such surrender is subject again to a reciprocity condition which is contrary to the Framework Decision. See comment made above under Article 4(6).

Finally, with regard to Article 5, SE has placed a limitation on its guarantees such that if the person resides for more than 2 years in the issuing Member States, surrender can take place even without the guarantees, unless there are particular reasons why the sentence should be executed in SE.

### **Article 6 – Determination of the competent judicial authorities**

Article 6 has been transposed by all countries with almost no difficulties. All of them have notified the General Secretariat of their relevant authorities.

It should be noted at this point that DK transposing legislation specifies that the Minister of Justice, in his capacity of the head of the Prosecution service, is designated as the competent executing and issuing authority. As such the Minister of Justice (in practice the decision will be made by civil servants in the Ministry, with the Minister having ultimate responsibility) has the final say on whether surrender can be rejected or not and ultimately whether to issue a European Arrest Warrant.

In terms of execution of the warrant, arrest and custody powers in the course of police investigation will be considered by the relevant police chief. The person has the right to judicial review of the decision to surrender before a court, which is an important safeguard for the person. This right is not limited to specific grounds and can occur at any point up to 3 days after the final decision to surrender has been made. The person may consult the Ministry on his or her case though this is done in writing and not through a hearing. However, there is no such possibility of appeal against a decision not to surrender the person by the prosecutor. Although the decision is made on the basis of the prosecutor's recommendations, the possibility exists that the Ministry will not follow them. In terms of the Ministry's role in issuing a warrant, the actual request for a person's surrender is at the initiative of the public prosecutor (the police chief) who will prepare a draft European Arrest Warrant and apply to a court for remand in custody *in absentia*, with a view to issuing the warrant. The prosecutor will then forward it for approval by the Ministry.

The Framework Decision does not define what a judicial authority is, this question being left to the national law of Member States. Whilst it is understood that the Minister of Justice is designated by national Danish law as being a judicial authority, it is difficult to view such a designation as being in the spirit of the Framework Decision. Similarly, DE has designated the Federal Ministry of Justice and the Ministries of Justice in the Länder as the competent judicial authority. The latter have very often transferred the exercising of their powers to submit outgoing requests to public prosecutor's offices in the Länder as well as the regional

Courts while their powers to allow incoming requests have generally been transferred to regional public prosecution authorities in the Länder. One of the main advances of the European Arrest Warrant system is the removal of the possibility of political involvement from the surrender proceedings. The Commission therefore considers that the designation of an organ of the Executive as a judicial body will adversely impact on fundamental principles upon which mutual recognition and mutual trust are based.

The competent judicial authority when EE stands as the issuing Member State is the prosecutor when the EAW is delivered in order to conduct criminal prosecutions and the Ministry of Justice when the EAW is delivered in order to execute a custodial sentence. Moreover as the national legislation is currently drafted, there is no competent issuing judicial authority designated to deal with instances where a suspect might abscond during the preliminary stages of the criminal proceedings. This is not in line with the Framework decision. However, when EE is acting as the executing Member State, its judicial authorities are district or appeal judges.

In addition, LT has indicated that an EAW for enforcement of a sentence is issued by the Ministry of Justice but only at the request of the judicial authority or the authority executing the sentence, that is the relevant prison department which is, however, under the control of the Ministry of Justice. The Ministry of Justice is not a judicial authority, but rather part of the executive. In particular, in the case the issuing of a EAW is asked by the prison department, there is no involvement at all of the judiciary. As to the Office of the Prosecutor General, it is considered as judicial authority in LT because the related provision is inserted in Chapter 9 of its Constitution entitled "The Court" of the judicial Procedure. Hence, there is no strong support to the argument that the Office of the Prosecutor General is a judicial authority in LT. Again, the Framework Decision states that an EAW must be issued or executed by a judicial authority and as a consequence LT's implementation of Article 6 is contrary to the Framework Decision.

For FI, the Criminal Sanctions Agency shall issue the warrant for the enforcement of a custodial sentence.

Last but not least, whilst CY has indicated that the Office of the Attorney General is neither a political, judicial nor an administrative authority, the Commission is concerned by the role it plays in the issuing of an EAW. Indeed, for a EAW to be issued in a prosecution case, the consent of the Attorney General must be given in writing prior to the EAW being produced before the competent judicial authority. The Commission has not been informed of what would happen to a EAW if the consent by the Attorney General is refused and as a consequence the Commission fears that the Attorney General, in practice, will endorse the role of a judicial authority.

#### **Article 7 – Recourse to the central authority**

16 Member States have indicated that the central authority is the Ministry of Justice (BE, BU, EE, EL, ES, FR, IE, IT, CY, HU, AT, PL, RO, SI, FI (as well as the SIRENE Bureau) and SE). In the case of LV and PT they have specified the office of the Public Prosecutor as the central authority, MT has done so for the Office of the Attorney General and the UK has named the National Criminal Intelligence Service (in the Home Office) or the Scottish Crown Office (if the person is in Scotland). CZ, DK, DE, LT, LU, NL, SK have not declared a Central Authority. The latter has informed the Commission that a central authority may be designated by a new amending legislation which should be adopted in June 2007.

It is clear, that EE has granted its Central Authorities additional powers not envisaged by the Framework Decision. In EE, these powers relate to the agreement of a new date under article 23(3-4), to consent under Article 27(3), 28(2-3) and to issuing a EAW for executing a custodial sentence under article 6(1). These powers are detailed under the specific articles. IE has amended its domestic law with effect from March 8<sup>th</sup> 2005 so that it now complies with the provisions of Article 7. However the Irish Supreme Court in the Rodnov Case decided on the 1<sup>st</sup> June 2005<sup>20</sup> held that the Central Authority should ensure that there is clarity before the warrant is brought before the High Court. The Commission believes that the role played by the Central authority in the pre-endorsement procedures, though one to perfect the application for the benefit of the ultimate surrender is clearly outside the scope of the Framework Decision which attributes this role to the judicial authorities.

The UK has designated the SOCA (Serious Organised Crime Agency) as Central Authority. Until the House of Lords decision in *Dabas v. high Court of Madrid*<sup>21</sup>, the SOCA played a very important part in the execution of an EAW as it is responsible for the certification of the EAW once received by an issuing Member State. Before the Dabas decision, the certificate was a separate document issued by the SOCA after it had conducted a very close check of the EAW. In the *Dabas 'case*, the House of Lords, however, gave an interpretation of the Extradition Act, 2003 that entirely complies with the Framework decision as the certification is no longer a separate document to the EAW.

In IE the Central Authority is the Minister of Justice or those designated by order, as he considers appropriate to perform such functions of the central authority.

Furthermore, the Attorney General in MT is required to transmit and certify EAWs (in particular that the incoming request has come from an authority having the function of issuing arrest warrants in the requesting country), renunciations to the speciality rule, consents to further surrender to a third Member State and consents to further extradition to a third country. The Attorney General is also in charge of consenting to the issue of a EAW and lodging an appeal in respect of a person. Given the attributions of the Attorney General which are of an administrative nature as well as of a judicial nature, the Commission believes that MT has not properly transposed the Framework Decision.

## **Article 8 – Content and form of the European arrest warrant**

All Member States except one have transposed this article. MT has amended its legislation in order to be in line with the Framework Decision since the 19<sup>th</sup> September 2006. The UK has not included in its legislation all the information in Article 8(1) nor indicated whether it uses the correct form. It has done so because a non EU Member State may be designated under Part One of the Act provided that it does not operate the death penalty and is a Schengen State. The UK has, nevertheless, stated that in practice it uses the form in the annex to the Framework Decision. This again does not satisfy the requirement of legal certainty. Moreover, the UK's legislation may give rise to difficulties, as it appears to be somewhat confusing. Also problematic, the UK form must indicate that the requested person was convicted in his presence or give evidence that the individual “deliberately absented himself from his trial” whereas the form annexed to the Framework decision simply states that the requested person shall be present unless indicated otherwise.

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<sup>20</sup> Minister of Justice, Equality and Law Reform v. Rodnov, ex tempore, unreported

<sup>21</sup> (2007) UKHL 06

Along with IE and CY, the UK has added a stage for the execution of a EAW, which is not required by the Framework Decision and according to how it is dealt with may be contrary to the Framework Decision. Whilst in CY, the Attorney general’s consent is necessary for a EAW to be presented before a judicial authority, the UK and IE have imposed a certification or pre-endorsement stage for a EAW to be valid. This supplementary formality is to be complied with by the central authority, which, in practice often acts as an executive authority. The recent judgment of the House of Lords in *Dabas v. HCJ Madrid (2007) UKHL 06*, has however reduced the importance of the certification stage in the UK, finding that the EAW in itself could constitute a certificate.

Although the form should be sufficient, if the judicial authority is acting in its capacity of issuing authority, CZ requests additional items if the person was sentenced in absentia or, as regards time limitation, if a period of more than 3 years has lapsed between the commission of the offence and the issuing of the EAW. In IT, the legislation provides that the EAW shall be accompanied by additional documents. These include: a copy of the applicable provisions; the initial decision of the issuing judicial authority on which the EAW is based; information regarding the sources of evidence; all personal identification data available; and, any other documents considered necessary according to the Italian issuing judicial authority to verify all additional grounds for refusal. MT legislation seems to request additional certificates on the nature of the offence from the issuing judicial authority.

At the same time it should be noted that LV has not provided for the inclusion of aliases in its form unlike in the form in the annex to the Framework Decision.

At least 13 Member States can set time limits for the provision of additional information or translation (DK, DE, ES, FR, IT, LV, LT, NL, HU, AT, PL, PT, SE). Of these at least 7 will either refuse the warrant or set the person free if the information is not received in time or if the warrant is not complete (DE, ES, IT, LT, PT, SK, SE). Some Member States (CY, UK) seem to send back an incomplete form and to require almost systematically that a new EAW is issued which cause great difficulties to some MS which cannot reissue EAW and cause delays in any event. For PL, it is important to note that under Article 611(k) of the Polish law, additional information can be asked to the Court by the Ministry of Justice. The intervention of the Ministry of Justice at this stage of the proceedings does not seem to be in line with the Framework Decision.

**Accepted languages pursuant to Article 8(2):**

<b>BE</b>	Dutch, French or German.
<b>BU</b>	Bulgarian.
<b>CZ</b>	Czech. In relation to the Slovak Republic the Czech Republic shall accept a EAW produced in the Slovak language or accompanied by translation into the Slovak language, whilst in relation to Austria the Czech Republic shall accept a EAW in German.
<b>DK</b>	Danish, Swedish, English. If the case is urgent they will translate the warrant but generally they ask for translation.

<b>DE</b>	Any official language of any Issuing Member State which recognises EAWs in German issued by German judicial authorities.
<b>EE</b>	Estonian or English.
<b>EL</b>	Greek
<b>ES</b>	Spanish. Where a EAW is issued through a Schengen alert, the executing judicial authority will ensure translation if it is not in Spanish.
<b>FR</b>	French. The issuing judicial authority must provide additional information within 10 days.
<b>IE</b>	Gaelic or English or a language that the Ministry of Justice may by order prescribe, or the EAW with a translation into Irish/English.
<b>IT</b>	Italian.
<b>CY</b>	Greek, Turkish, English.
<b>LV</b>	Latvian and English.
<b>LT</b>	Lithuanian and English.
<b>LU</b>	French, German or English.
<b>HU</b>	Hungarian or a translation of the warrant into Hungarian. In relation to Member States which do not exclusively accept the EAW in their own official language or in one of their official languages, HU accepts the EAW in English, French or German, or accompanied by a translation in one of those languages.
<b>MT</b>	Maltese or English.
<b>NL</b>	Dutch or English, or any another official language of the European Union provided that an English translation is submitted at the same time.
<b>AT</b>	German or any official language of those Member States which accept EAWs in German issued by Austrian courts.
<b>PL</b>	Polish.
<b>PT</b>	Portuguese.
<b>RO</b>	Romanian, French and English.
<b>SI</b>	Slovenian.
<b>SK</b>	Slovakian or, based on prior bilateral treaties, German with AT, Czech with CZ, Polish with PL.
<b>FI</b>	Finnish, Swedish and English.

<b>SE</b>	Swedish, Danish, Norwegian, English or a translation into one of these languages.
<b>UK</b>	English or a translation of the warrant into English.

### **Article 9 – Transmission of a European arrest warrant**

This article has generally been well transposed with all the Member States who are able to use the Schengen information system transposing paragraphs 1 and 2 correctly (BE, BU, DK, DE, EL, ES, FR, IT, LU, NL, AT, PT, RO, FI, SE). Of the other Member States, 7 allow for direct judicial contacts as per paragraph 1 (CZ, CY, LV, LT, PL, SI, SK) whilst contrary to the Framework Decision, 5 States do not allow a EAW to be transmitted directly where the location of the person is known (EE, IE, HU, MT, UK).

Some Member States will initially accept a copy of the EAW though most of them require the original at a later date.

### **Time limit after the arrest of the person sought, for the receipt of the European arrest warrant<sup>22</sup>:**

<b>BE</b>	10 days.
<b>BU</b>	7 days from the beginning of the detention.
<b>CZ</b>	40 days.
<b>DK</b>	10 days.  Danish executing authorities do not need to receive the EAW insofar as the information resulting from the SIS alert is sufficient.
<b>DE</b>	40 days.
<b>EE</b>	3 working days.
<b>EL</b>	15 days, can be extended to 30 days.
<b>ES</b>	The Spanish legislation does not provide for a deadline for the receipt of the original of the EAW. However, the executing judicial authorities ask to receive the EAW as soon as possible and, in any case, within 10 days after the arrest of the person.
<b>FR</b>	6 working days.
<b>IE</b>	The person sought is arrested after the EAW has been received and endorsed by the High Court.  A time limit of 7 days will apply when the SIS will be applicable to Ireland.
<b>IT</b>	10 days.

<sup>22</sup> The days are to be understood as calendar days unless indicated otherwise.

<b>CY</b>	3 days provided that the EAW has been issued before the arrest of the person sought.
<b>LV</b>	72 hours.
<b>LT</b>	48 hours after the arrest of the person.
<b>LU</b>	6 working days.
<b>HU</b>	40 days.
<b>MT</b>	The 48 hour limit applies only in cases where a provisional arrest has been effected in the absence of an EAW. It is only in exceptional circumstances that provisional arrests will be made.
<b>NL</b>	In relation to Member States who participate in the SIS: at the latest on the 23 <sup>rd</sup> day following the arrest when this is based on a SIS alert.  The Commission has been informed that the time limit for Member States who have requested surrender via Interpol is exactly the same as for SIS alert.
<b>AT</b>	40 days.
<b>PL</b>	48 hours.
<b>PT</b>	left to discretion of courts, usually 10 days.
<b>RO</b>	48 hours after the person has been arrested with participation from the public prosecutor, the arrested person's counsel, and if necessary an interpreter according to the Romanian Criminal Procedure Code.
<b>SI</b>	20 days.
<b>SK</b>	48 hours after the person has been arrested (for the receipt of a copy (e.g. fax) of the EAW with translation into the Slovak language, where applicable, even if it is a provisional translation);  18 days from the arrest of a person for the receipt of the original EAW and the original document containing the translation of the EAW into the Slovak language. If the mentioned documents are not received within 18 days, a prosecutor can make a motion to the judge for the release of a person from custody, where applicable; if the documents are not received within 40 days, the release of the person is mandatory.
<b>FI</b>	as soon as possible or upon request within a time limit set by the Finish executing competent authority however, the FI legislation does not require mandatory submission for EAW when the request of EAW has already been included in the SIS alert.
<b>SE</b>	as soon as possible (a few days, decided by the prosecutor).
<b>UK</b>	48 hours after a provisional arrest; however, provisional arrest will only be used in exceptional circumstances; if requested, the EAW must be supplied or the subject will be released.

## **Article 10 – Detailed procedures for transmitting a European arrest warrant**

All Member States have either transposed into national legislation or implement in practice the provisions of Article 10 (MT has transposed the provisions of Article 10 via its amending law). In effect, for the large majority of Member States, EAWs can be transmitted by any secure means capable of producing written records and allowing an authenticity check, although IT and PL have not specifically transposed Article 10(4).

There is general acceptance of using Interpol (Article 10(3)) where it is necessary. It seems apparent that Interpol is regarded as the main alternative to transmission through the SIS with 20 Member States (including NL, as a result of the amendments passed in 2005 and SE, further to the recent amendments entered into force on 1 July 2006) specifically referring to Interpol in their legislation and all States actually making use of Interpol. IT refers to that point in an administrative circular dated June 2005.

In relation to Art 10(5), few States have specifically transposed this provision. Many were of the opinion this would be done as a question of good practice and did not require legislation.

The automatic retransmission of a EAW to the competent executing authority in a given Member State (article 10(6)) has been explicitly provided by the legislation of all Member States except the following 6 (EE, LU, HU, MT, FI and UK).

## **Article 11 – Rights of a requested person**

All Member States have shown that they had either fully transposed this article or already had provisions in place. MT has transposed this provision by its new amending law. CZ's domestic law provides for the right to be assisted by a legal counsel as well as the right to be assisted by a legal interpreter.

## **Article 12 – Keeping the person in detention**

All Member States have implemented this article, although PL legislation does not specifically refer to measures to prevent absconding.

## **Article 13 – Consent to surrender**

**Paragraph 1:** All States expressly allow the possibility to consent to surrender or to renounce the speciality rule before a judicial authority. FR and SK have specified that renunciation may only occur where the person has consented to surrender. LU has indicated that this Article does not apply with regard to its relations with BE and NL. SE has indicated that in practice consent and/or renunciation are likely to occur before the public prosecutor or at his request before the police. They must be given in writing in accordance with the form established by the Office of the Prosecutor-General and will be sent to the Judge for a decision on surrender to be made. In EE, the consent is given to police officers and there is some uncertainty as to whether or not a person can withdraw his/her consent before the judicial authority as provided in the Framework Decision.

Nevertheless, BE, MT, NL, AT and the UK have implemented Article 13(1) in such a way that where consent to surrender is provided there is an automatic renunciation of the speciality rule. This is a continuation of the system they used under the 1995 Simplified Extradition Convention, Art 13(1) Framework Decision being similar to Article 7 of the Convention. Although in line with the aforementioned Convention, the method used by the mentioned



States obviates the opportunity for express renunciation. The risk engendered by this method is that consented surrender in such countries may be less common than in other countries and thus the efficiency of the surrender procedure may be reduced.

**Paragraphs 2-4:** There has been a mixed transposition of the remaining provisions in Article 13. Most Member States have included everything in their provisions (BE, EL, ES, FR, IE, IT, CY, LT, LU, HU, MT, NL, AT, PT, SI, SK, FI, SE, UK), others have stated that legislation already exists or that these issues are carried out in practice. In particular, in DK, and PL it is considered that there is no need for specific reference to consent being voluntary. For instance, in PL the civil law provides that expression of the will could only be voluntary. Nevertheless, legal aid is provided and the consent is given in court which should be a sufficient guarantee. Moreover some legislations are more detailed as regards the rules applied to consent to surrender than as to renunciation of entitlement to the speciality rule. In DK, the Extradition Law Act states that consent to extradition may only be given at a Court hearing during which the Court shall provide guidance to the requested person on the consequences of giving consent. LV has not expressly transposed this provision, however its domestic criminal procedure makes it clear that the consent must be given voluntarily. In summary no states are clearly in breach of the provisions though there was insufficient information in some cases to gain an accurate picture.

All Member States have implemented the principle laid down in paragraph 4 (implicitly in the case of EE) and stipulated that consent to surrender is not revocable, except 6 (BE, DK, IE, LT, FI, SE). The latter have implemented the exception provided in paragraph 4 and stipulated that consent to surrender is revocable.

It can be further noted, without being exhaustive, that there is explicitly no possibility of appeal once consent has been given in FR, CY, LV, HU, MT and RO whilst an appeal against the decision to surrender is possible within 3 days of consent in AT and PL.

#### **Article 14 – Hearing of the requested person**

All Member States have implemented this Article correctly.

However it should be noted that in relation to DK, as previously discussed, the executing judicial authority is the Ministry of Justice. As a result, when the Ministry is taking its decision, lawyers may make written representations to it. A full hearing before a court is only possible on appeal by the person against the Ministry's decision.

#### **Article 15 – Surrender decision**

All Member States have implemented Article 15(1) regarding the decision on surrender whilst 21 Member States have done so for paragraph 2, which deals with requests for supplementary information. CZ and the UK have not explicitly transposed this paragraph, though in practice if further information is needed it may be requested. MT has implemented this paragraph in its new amending law. Several Member States allow the judicial authority to place time limits on the receipt of information and some have stated or legislated that if information is lacking or not received in time the person may be released or surrender refused.<sup>23</sup> In relation to Article 15(3), only 16 States (BE, EE, EL, ES, FR, IE, LT, LU, HU, NL, AT, PL, PT, SI, SK, SE)

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<sup>23</sup> See for more details Article 8.

specifically refer to the possibility for the issuing judicial authority to provide additional information. For many other states this possibility exists in any case.

However, as mentioned above under Article 8, IT legislation requires additional documents, which is likely to lead to requests for further information.<sup>24</sup> Furthermore, it has been reported that IE requires additional information on a systematic basis, which is contrary to this article.

In UK, requests for further information before the surrender decision comprise details concerning the statutory requirement that the requested person in any conviction case is declared to be "unlawfully at large" i.e. the person has been convicted and is liable to immediate arrest and detention. However the Commission has been informed that such a requirement should be abolished pursuant to the adoption of the Police and Justice Act, which entered into force on 1<sup>st</sup> January 2007.

### **Article 16 – Decision in the event of multiple requests**

This article has for the most part been well transposed with few Member States failing to include the provisions.

Member States (BE, BU, CZ, EE, EL, ES, FR, CY, LT, HU, AT, PT, RO, SI, SK) have transposed fully this article. In addition, 6 other Member States have also explicitly transposed this article with the exception of paragraph 2 (IE, MT, NL, FI, SE) or paragraph 4 (IT). LU and UK have transposed paragraphs 1 (competing EAWs) and 3 (competing EAW and extradition request) of this article whilst LV has only transposed paragraph 3. LV does not have legislation in particular in relation to competing requests between Member States. Though it has stated that in practice this issue is dealt with by the Prosecutor General's office, this is not in line with the Framework Decision.

Lastly, only DK has not specifically transposed this article according to the legislation transmitted. DK has stated that in the case of competing requests the Ministry of Justice as competent authority will decide which request is to be complied with. When making its decision the Ministry of Justice will take into account the circumstances in Article 16 and if need be, consult Eurojust. Nevertheless this is not binding.

In relation to competing EAWs all Member States allow the executing judicial authority, generally a court, to make the decision on priority. For DK, it is the Ministry of Justice who is responsible for such decisions.

In relation to competing extradition and EAW requests the following 9 Member States also allow an executing judicial authority to make the decision: DE, EL, FR (the Chief Prosecutor must always consult the Ministry of Justice in mixed EAW and extradition cases before applying to the Court which makes the decision), IE, IT (after consulting the Ministry of Justice), LV, LT (specific prioritisation is given with ICC cases first, followed by prosecution cases, followed by circumstances raised in the Framework Decision), PT and SI. The

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<sup>24</sup> Nevertheless a request made by the Italian judicial authority to the issuing authority for additional information cannot relate to the taking of new evidence (evidence not obtained or not yet obtained), since that would be incompatible both with the principle of the sovereignty of the individual Member States and with the time necessary for taking evidence (Court of Cassation (Ordinary Criminal Chamber), No 33642, 13.9.2005).

remaining Member States require the Ministry of Justice or, in the case of the UK, the Home Office, to make the decision.

The question of multiple offences and accessory surrender is also raised as an issue (i.e. where a EAW is issued for a surrenderable offence but also refers to other offences which do not come within the scope of the Framework Decision), since it is not dealt with under the Framework Decision but is contained in the 1957 Council of Europe Convention on Extradition<sup>25</sup>. It should be noted that this is a different matter than the question of speciality which refers to subsequent offences which were not contained in the warrant.

It has become clear that a lack of EU legislation in this area has resulted in varied practices occurring with some Member States accepting the possibility of accessory surrender whilst others do not. To reduce the lack of certainty in this regard it would be advisable to further examine this issue in the future and possibly provide additional legislation.

Details of Member States' views on this issue are as follows: accessory surrender is stated to be possible in at least 9 Member States (DK, DE (as provided for in paragraph 4 of the IRG), EE, ES, FI, LV, LT, AT, SE (where there is double criminality)), whilst it does not seem to be permitted in at least 4 others (CY, HU, NL, SI). In FR, it is for the Courts to decide if accessory surrender is possible since this matter is not covered by legislation. No information is available in respect of the other Member States.

#### **Article 17 – Time limits and procedures for the decision to execute the European arrest warrant**

Member States have generally well transposed this article, although some insufficiencies are noticed. These highlight the difficulties created by providing for deadlines in the Framework Decision with no sanction for failure to meet such a deadline. At the same time it is understood that deadlines in relation to court proceedings are difficult to impose by legislation

**Paragraph 2:** 25 Member States have fully transposed the deadline on taking the decision on consented surrender with a further 2 States partially implementing it (BE, IE).

BE legislation does not provide for a formal deadline though it has been stated that the decision should in practice be taken within 5 days. At the same time consent is revocable until effective surrender and so a change in plea will result in a full hearing occurring.

In BU, the court shall immediately issue a decision for the surrender of the requested person or for refusal to execute the EAW. However, where the requested person has consented to his or her surrender, the court shall issue a decision within 7 days of the expiry of the 3-day period for revocation of consent. As a consequence, the 10-day time limit provided for in Article 17(2) should be respected in practice by BU.

IE has fully transposed the 10 day deadline in paragraph 2 for the taking of the decision following consent. However, at the pre-endorsement stage, the central authority is not bound

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<sup>25</sup> Article 2 – Extraditable offences: *“If the request for extradition includes several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences.”*

by any time limit. As a consequence, the average time between receipt of the EAW and endorsement in IE is 88 days. Given this additional delay, it seems that IE will hardly be in the position to comply with the Framework Decision.

**Paragraph 3:** In terms of the deadlines where there is no consented surrender, 17 Member States have correctly transposed the Framework Decision with 8 Member States partially transposing it (BE, CZ, FR, IT, MT, PT, SK, UK).

BE legislation provides that the initial decision on surrender must be taken within 15 days of arrest. However, there are two possibilities of appeal, which will, if granted, mean that the deadline of 60 days cannot be met (with appeals, the deadline is 64 days). Although this is still less than the full 90 day limit, the opinion of the Belgian “Conseil d’Etat” was that the use of appeal proceedings could not be regarded as “specific cases” in line with Art 17(4).

FR provides that a final decision must be taken within 30 days of arrest. However where an appeal in cassation leads to a referral to another Court, which FR considers as an exceptional case, the deadlines mentioned total 90 days.

In the case of IT, the deadline is also compliant again provided no appeal occurs. Where the Court of Cassation sends the case back to the Court of Appeal, the length of the whole procedure might exceed 90 days.

NL legislation has transposed the provision and set the required deadlines. In addition it has also stated that if the deadlines cannot be met the court may again extend the term indefinitely so that the Court will still be in a position to render a judgement.

For CZ, MT, PT, SK, UK no deadline is provided for making the decision following the highest appeal (respectively before the CZ Constitutional Court, the MT Court of Criminal Appeal, the PT Constitutional Court, the SK Supreme Court or the UK House of Lords). Thus both the 60 and 90 day deadlines could in principle be exceeded.

CZ has specified that when two competing EAWs are served, the time limits provided in Article 17 shall only start to run from the date on which the last one was served.

Times limits are far from being respected by the UK, as they are not transposed in the Extradition Act 2003 and are often delayed by appeal procedures. No 60 day time limit is imposed for surrender after the arrest of the requested person. The only time limit which is mentioned in the Extradition Act 2003 is the 10 day limit after the final decision of Article 17(2). A first instance appeal must be lodged within 7 days of the surrender decision with the hearing taking place within 40 days of the arrest of the requested person. A second appeal to the House of Lords or to the Privy Council is then possible, provided the requested person obtains leave to do so. The leave application may be made to the Appeal Court within 14 days after the 1<sup>st</sup> decision or if it is refused directly to the House of Lords within 28 days of that refusal. If the leave is granted (and there is no statutory limit set for the granting of leave), the appeal shall commence within 28 days of the grant for leave. No statutory limit is set neither for the hearing nor for the decision. As a result of this procedure, the UK's average time for a surrender procedure to be completed is 28 days when the requested person has agreed to the surrender and 65 days when the requested person does not consent to the surrender and appears to be exceeding the delays set by the Framework Decision.

The 90 day time limit provided for in paragraph 4 may also be exceeded in BE where several appeals against the decision to execute an EAW may be lodged before the Supreme Court as in the Moreno-Garcia case, in which the decision on the execution was appealed to and revoked twice. The third and final decision was rendered by the Court of Appeal of Anvers on the 22<sup>nd</sup> June 2004 after the Prosecutor decided not to lodge an appeal against this 4<sup>th</sup> decision.

**Paragraph 6:** In relation to the provision of reasons for refusal, almost all Member States have transposed the paragraph. LV and UK make no mention of a reasoned decision in their transmitted legislation. However UK indicated that a reasoned decision would be provided in practice and LV stated that the transposition was fulfilled through a general provision of the code of criminal procedure. In any case, it should be borne in mind that most, if not all, Member States require a reasoned decision to be provided as a principle of due process.

**Paragraph 7:** The Commission wants to stress that it is necessary for the Member States to report not only breaches to the 90 day deadline, but also breaches to the 10 and 60 day deadlines, although very few Member States do so and have implemented this fully in their legislation. In terms of IT's transposing legislation, informing Eurojust is a mere possibility rather than an obligation. 10 Member States (DK, EE, LV, LU, MT, NL, AT, PL, RO, UK) make no mention in legislation of this requirement although DK, EE NL and UK have stated that in practice they will inform Eurojust and LU and PL do not see any obstacle to informing it. Indeed PL has informed the Commission that the content of Article 17(7) is reflected in the Regulation of the Organisation of the Ministry of Justice. Paragraph 18 of the above mentioned regulation specifies which department of the Ministry of Justice is to deal with the execution of the obligation to communicate information to Eurojust. According to Eurojust annual report for 2006, 12 of the 25 Member States reported about breaches of time limits in their countries; of these 12 Member States five had no breaches. The breakdown of the seven Member States who did report breaches is as follows: CZ (4), IE (9), ES (2), PT (4), FI (1), SE (2), UK (50). Although the notifications are not yet systematic, Eurojust is pleased to note the progress concerning the application of Article 17(7). The Commission wants also to remind Member States that the reasons for exceeding these time-limits should also be reported. However, this is only done in half of the cases. When reasons have been reported for 2006, they mostly concern the right of appeal lodged by the subject and sometimes by the prosecutor (15), or the fact that the subject for the EAW was released during the proceedings (9), preventing a final decision concerning the execution of the EAW. In three cases, the final decision was suspended due to domestic proceedings and in three others, the final decision was adjourned by the judge.

#### **Article 18 and 19 – Situation and Hearing the person pending the decision**

Articles 18 and 19 have been transposed in a varied manner ranging from no apparent implementation (MT), to including practical but not legislative transposition (DK except as regards article 18(3) FD), to full legislative transposition. In fact only 13 States have completely transposed both of these articles (BU, CZ, DE, EL, ES, IT, CY, LV, LT, NL, PT, RO, SI, SK). FR has also transposed both articles although this is implicit for Article 18(2). DK has only partially transposed art 18(3) as the requested person may be transferred to the foreign state from which he was extradited only when the prosecution has been concluded. The legislation of at least LU, AT, PL, SE provides for a hearing only, not for a temporary transfer, as is possible under the Framework Decision.

MT has transposed these articles in its amending legislation which came into force on 19<sup>th</sup> September 2006.

It should be noted that several countries (BE, DK, EE, IE, HU, AT, SE, LT, PL, FI, UK) consider that more specific transposition is not necessary as the existing rules on Mutual Legal Assistance (MLA) resulting from the 1959 MLA Convention are sufficient or because they consider that pre-existent national legislations will suffice. Although the relevant provisions to some extent provide for the same possibilities as in the Framework Decision, this can still only be considered as partial implementation. Firstly, due to a lack of information on national MLA provisions it is not possible to assess Member States' conformity with the Framework Decision. Secondly whilst Art 18 requires that the executing judicial authority makes the decision on a hearing or temporary transfer, the MLA regime, allows such a decision to be taken by the relevant Ministry in response to a Rogatory letter. Finally, the Convention allows for the refusal of transfer in wide ranging circumstances. The Framework Decision on the other hand requires either transfer or a hearing but not the exclusion of both. Thus the notes below for each Member State should be viewed with these comments in mind. In general, the Commission considers that proper transposition requires binding provisions

### **Article 20 – Privileges and immunities**

19 Member States have completely transposed Art 20 (BE, BU, CZ, DE, EL, ES, FR, IT, CY, LT, LU, HU, NL, AT, PL, PT, RO, SI, SK). 2 Member States have not specifically transposed the whole provision (DK, MT) with a further 3 only transposing the first paragraph fully (EE, LV, FI). DK has stated that there is no implementing legislation on this matter and that they consider this issue to be regulated between Member States. This is not considered sufficient in particular since national measures are necessary to transpose time limits, as Framework Decisions are not directly applicable. The UK also has no transposing legislation on this matter although it has stated that immunity or privilege will take precedence over the possibility to surrender a person. However this should not be regarded as an additional ground for non execution as the Framework Decision provides for an obligation for the executing judicial authority to request the waiving of privilege or immunity.

In EE and LV, national transposing legislation only refers to Art 20(1). Nevertheless, they have stated that legislation also exists for paragraph 2 but it was not possible to examine this legislation.

IE, IT and SE have made the existence of a privilege or immunity a mandatory ground for refusal. As there is no Irish authority with the power to waive immunity, the question of legislating for such a body did not arise. In SE, only the preparatory works provides that the Swedish executive authority shall request the Swedish authority having the power to waive the immunity to do so. As such and in view of the first paragraph, surrender should only be refused where the lifting of immunity itself has been refused. Otherwise, the effect could be a slowing down in surrender procedures since a new Warrant will have to be issued where the immunity is lifted.

### **Article 21 – Competing international obligations**

19 Member States have correctly transposed this article with DK, DE and IE not having implemented it whilst PL and the UK have carried out partial implementation. EE has stated that legislation exists but the Commission has not been in a position to examine it. MT legislation is contrary to this article.

MT has provided that where there is a speciality condition imposed by a third state this constitutes a mandatory ground for refusal. In addition there is no provision to request the consent of the third state. However MT has informed the Commission that in practice, MT will always ask for a third state's consent. This may not be in line with the Framework Decision since refusal should only be possible once it is established that consent has not been given.

DE and IE have stated that this Article does not need transposition as it is declaratory by nature or it will be dealt with administratively. Whilst this may be true in relation to the Framework Decision not affecting international obligations, the Framework Decision nevertheless also requires that the executing Member State requests consent from the Third State. DE and IE legislation should therefore ensure that provisions are in place to make certain that all necessary measures for requesting consent are taken. PL and the UK have also failed respectively to require a request for consent or to include a reference to the time limits in that respect. DK has not transposed this provision as there is no specific legislation on this matter and though it has stated that it will carry this out in accordance with the Framework Decision on a case by case basis<sup>26</sup> this is not in line with the Framework Decision.

HU has made a general reference to its 1996 national legislation on international cooperation in criminal matters. To the extent that this legislation has ratified correctly the 1957 Convention on extradition it is in conformity with the Framework Decision.

#### **Article 22 – Notification of the decision**

19 Member States have explicitly transposed this article (BE, BU, CZ, DE, EL, FR, IT, CY, LV, LU, HU, NL, AT, PT, RO, SI, SK, FI, SE) with DK transposing through existing national legislation although this has not been examined. 4 Member States have partially transposed this article (EE, IE, ES, LT) with a further 3 not having transposed in the provided legislation (MT, PL, UK), although MT and UK have stated that any decision would be notified in practice.

IE has stated that this article does not need specific legislation and will be carried out administratively through its central authority. ES and LT have also stated that notification will occur as a matter of good practice without the need for specific legislation (for ES through the liaison magistrate, SIRENE or Eurojust).

#### **Article 23 – Time limits for the surrender of the person**

The essential elements of this article have been transposed by almost all Member States with the main difficulties being some variation in interpretation or a lack of clarity in relation to some paragraphs.

In relation to the period between the making of the surrender decision and its execution in normal circumstances, as a principle in IE, the effective surrender after the final decision will only take effect upon the expiration of an additional 10 day deadline. IE has nevertheless amended its legislation, which now provides surrender *may* take place earlier than the additional deadline for its execution *only* if the person so requests and the Court agrees. Although closer to article 23(2), this provision is still not fully in line with the FD.

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<sup>26</sup> See general comment on binding provisions, p. 4.

In relation to Article 23(2), MT and UK have gone beyond the Framework Decision in its implementing law in specifying that the surrender is not allowed before 7 days from the arrest.

In spite of Article 23(3), BE, DK, EE and ES have introduced an additional deadline whereby surrender in exceptional circumstances can only be postponed by a further 10 days i.e. surrender must occur at the most within 20 days of the final decision. This contrasts with the Framework Decision which requires that surrender occurs within 10 days of the newly agreed surrender date whilst not specifying the time limit for that new date. The additional deadline is not contrary to the Framework Decision but risks requiring the release of the person where surrender has been legitimately delayed. Furthermore, the respective legislations of EE and IE provide that an authority other than their judicial executing authority is authorised to agree a new date. DE's national legislation only refers to circumstances beyond the control of the issuing Member State. As such DE's transposition of article 23(3) is only partial.

Postponement of surrender for serious humanitarian reasons is not specifically (in EE) or fully transposed (in DK, LT, PL and UK). In particular in DK, there is no provision requiring the issuing judicial authority to be informed or for arranging a new date for surrender when the "serious humanitarian reasons" foreseen in article 23(4) have ceased to exist. DK has stated that this is covered by comments accompanying the draft law, which COM has not been in a position to examine. In addition, the point from which the time limits on surrender start is set in a slightly different manner in the legislation of LT and PL. Furthermore, PT has provided for the necessary deadlines, and whilst it has not mentioned in its legislation, as required in the Framework Decision, the obligation to release the person should the time limit not be met, such an obligation is provided for in PT's Constitution.

MT and the UK have in transposing Article 23(4) allowed for discharge of the person as an alternative to postponement. The grounds for discharge (where it would be "unjust or oppressive" to extradite the person) are vague to contrast with the Framework Decision. The postponement of the surrender for humanitarian reasons is not specifically foreseen as it is for the hearing according to their legislation.

#### **Article 24 – Postponed or conditional surrender**

18 Member States have fully transposed Article 24 (BE, BU, CZ, EL, ES, FR, IE, IT, CY, LT, LU, HU, AT, PT, RO, SI, FI, SE). Moreover, in Spain, the Spanish executing judicial authority is required to temporarily surrender the person on the request of the issuing judicial authority whilst in MT, the competent national authorities have no discretion but to postpone surrender where the requested person is to be prosecuted or sentenced in these countries.

DK has no binding transposition for Article 24 and has stated that the Ministry of Justice will consider what the best option is on a case by case basis. At the same time, 3 States (DE, LV, SK) have transposed correctly only article 24(1), and do not provide for temporary surrender pursuant to article 24(2). SK has informed the Commission that the provisions contained within Article 24 of the Framework Decision may be implemented by a new amending legislation which should be adopted in June 2007.

Finally, in spite of Article 24, in NL and PL (in case of suspicion of violation of human rights according to Article 611(2) of the Polish law), the Ministry of Justice rather than the executing judicial authority is responsible for postponed or temporary surrender. In EE, it is the central authority which is the competent authority to decide on the merits of postponed or



temporary surrender and not the judicial authorities, contrary to Article 24 of the Framework Decision.

### **Article 25 – Transit**

All Member States, the UK, have in their legislation allowed for transit of non-nationals in conformity with Article 25(1). It appears that PT has not explicitly foreseen the possibility of transit of non-nationals where surrender is for the purposes of prosecution but has stated that this was implicitly allowed. MT has transposed this provision by its new amending law.

The legislations of 16 Member States (BE, CZ, DE, EL, FR, IT, CY, LV, LU, HU, NL, AT, PL, PT, SI, FI) permit the refusal of transit of their own nationals.

The exception in 25(1) applies to residents of the above countries with the exclusion of DE, FR, LV, LT, NL, PL.

At least 14 Member States (BU, DE, DK, EE, ES, FR, IE, CY, LU, AT, PT, RO, SI, SE) will also allow transit where the warrant is based on an act that is not an offence under the law of the transit state. This is in contrast to practices in LV, HU, NL who check the double criminality of the offence where it is not found in the article 2(2) list. No information was available for the other Member States.

Though UK allows transit in practice, it has not explicitly transposed any of Article 25 in its legislation contrary to the Framework Decision. UK has, however, made a notification under Article 25(2).

In relation to Article 25(2), all Member States have provided notifications of the authority responsible for receiving transit requests.

In relation to Article 25(3), only 15 Member States have explicitly referred to the procedure for requesting transit (BE, BU, DE, EL, FR, IE, IT, CY, LU, HU, AT, PT, RO, SI, SK, FI, SE).

21 Member States have fully transposed Article 25(4) (BE, BU, CZ, DE, EL, ES, FR, IE, CY, LV, LU, HU, NL, AT, PL, PT, RO, SI, SK, FI, SE) with 6 States making no mention of transit by air in legislation (DK, EE, IT, LT, MT, UK). PL, however, requires notification of a transit by air where there is no scheduled landing. This is obviously not covered by the Framework Decision.

Finally, 21 States have transposed Article 25(5) (BE, BU, CZ, DK, DE, EL, ES, FR, IE, CY, LV, LT, LU, HU, NL, AT, PT, RO, SI, FI, SE) whilst 6 states have made no provision for transit from a third state in their legislation (IT, MT, PL, SK, UK). The Commission has not been in a position to examine the legislation referred to by EE.

### **Article 26 – Deduction of the period of detention served in the executing Member State**

22 Member States have explicitly transposed all of Article 26, whilst 2 States (HU, SI) have not transposed Article 26 in the notified legislation. MT has transposed the provisions of Article 26 in its new amending law. PL and UK refer to paragraph 1 (deduction of periods of detention) in their legislations but there is no reference to informing the issuing judicial authorities of the detention period as per Article 26(2), although for the UK provisions of Article 26 are covered by other legislation, namely section 47 of the Criminal Justice Act

1991 or conduct that occurred prior to the 4<sup>th</sup> April and section 243 of the Criminal Justice act 2003 for conduct that occurred on or after the 4<sup>th</sup> April 2005.

Neither HU nor SI have specifically transposed Article 26. Whilst HU legislation refers to international mutual assistance instruments no further information is available providing details and there is no additional information in relation to SI criminal code which is relevant here.

### **Article 27 – Possible prosecution for other offences**

Only EE and AT have used the possibility to notify that, in their mutual relations, renunciation of entitlement to the speciality rule under the conditions of article 27(1) is presumed to have been given. RO has made a notification under Article 27(1), which is to be applied in its relation with any other Member States, which has made the same notification. 24 Member States have transposed the speciality rule pursuant to article 27(2). MT and UK legislation allows refusal of surrender by reason of speciality if there is no speciality arrangement with the issuing Member State. Meanwhile, although the Framework has no direct effect, UK and MT regard article 27 itself, as speciality arrangement with all Member States. Otherwise such a refusal would be contrary to the Framework Decision if this could result in surrender being refused even where the article 27(3) (a-f) exceptions apply which do not require consent of the executing judicial authority.

The transposition of the series of exceptions to the specialty rule laid down in article 27(3) a) to g) varies according to Member States.

- All Member States under review have transposed exception a).
- LV has not transposed exception b) whilst PL has only partially transposed it as the transposition of article 27(3)(b) seems to refer to where a penalty involving deprivation of liberty has not been imposed, as opposed to a penalty which is not punishable by deprivation of liberty.
- 5 States have not (DK, FR, LV, LT) or not fully (PL) transposed exception c). Indeed transposition of article 27(3)(c) in PL seems to refer to proceedings which do not result in a measure involving deprivation of liberty applied against the prosecuted person, as opposed to a measure restricting personal liberty.
- 4 have not (DK, LV, LT) or not fully (UK) transposed exception d). In UK, transposition of article 27(3)(d) does not mention the provision “even when that penalty or other measure may give rise to a restriction of his personal liberty.” This could result in the UK having to request consent more often than would have been necessary with complete transposition.
- DK and LV have not transposed exception e).
- UK has not fully transposed exception f) whilst EE has only partially transposed it. The transposition of this exception by IT is not strictly in line with the Framework Decision, which refers only to the fact that the renunciation has to be given in accordance with the issuing Member State’s domestic law, whilst in the legislation of IT, reference is made to renunciation according to similar forms to those of the Italian law. Nevertheless, due to the

wording “similar forms” and the question of actual enforcement, the impact may not be so significant.

- FR has indicated that they will modify their implementing law (Article 695-46) which is not in conformity with f) since the infringement for which the extension of the surrender is requested shall be committed before the surrender of the person (not before the infringement that has motivated the surrender).
- IE has not explicitly transposed exception g). Initially consent could only be provided by the central authority contrary to article 27(3)(g) and 27(4) of the Framework Decision. IE has stated that they have amended their legislation to vest the powers to give consent in the judicial authority.

Lastly in 6 Member States the provisions on requests for consent under article 27(4) have not (LV, IE), not correctly (UK) or not fully (DK, EE, MT) been transposed; the main difficulty with these last 3 countries being in respect of the 30 day deadline for making a decision on consent. In UK, transposition of article 27(4) lays down an extension of the speciality rule, when the offence is disclosed by the same facts as the extradition offence.

### **Article 28 – Surrender or subsequent extradition**

RO has used the possibility of notification under article 28(1). However as no other Member State has used such a possibility, in practice, RO's notification will be of no effect.

17 Member States have fully transposed the rules on subsequent surrender to a third Member State pursuant to article 28(2) (BE, CZ, DE, EL, ES, FR, IE, IT, CY, LT, LU, HU, NL, PL, PT, SI, FI) whilst 8 Member States have either not implemented this paragraph completely correctly (AT, UK), only partly (DK, EE, LV, MT, SE) or not at all (SK). However the latter has informed the Commission that the provisions contained in Article 28 of the Framework Decision will be implemented by a new amending legislation which would be adopted in June 2007.

Subsequent surrender in AT is regulated in the same way as the speciality rule as laid down in Article 27 which means that the conditions for subsequent surrender are broader than in the Framework Decision. As a result although those conditions are more permissive, the rights of the executing Member State may be encroached upon. The UK has not transposed correctly Article 28(2)(b) since it refers to the consent of the judge rather than the requested person.

The provisions of article 28(3) have not been transposed by LV and SK whilst EE has not implemented it correctly since the Central Authority/Ministry is to provide consent for subsequent surrender to another Member State in EE as opposed to the competent judicial authority. IE was in the same position initially but has later stated that they have amended their legislation to vest the powers to give consent in the judicial authority. CZ, LU, MT and UK have partly transposed Article 28(3).

20 States have transposed the rules on subsequent extradition to a third country pursuant to article 28(4) (BE, DE, EL, ES, FR, IE, CY, LV, LU, HU, MT, NL, AT, PL, PT, SI, FI, SE, UK), and EE and LT have incorrectly implemented it, as they have allowed the possibility for subsequent extradition to a third state without the permission of the original executing Member State contrary to the Framework Decision. LT has, however, confirmed this was

unintentional and that they intend to rectify the problem. IT has not transposed Article 28(4) as issuing Member State.

SK has not transposed Article 28 at all in the transmitted legislation.

### **Article 29 – Handing over of property**

19 Member States have fully transposed Article 29 (AT, BE, BU, CY, CZ, DE, DK, EL, ES, IE, IT, LT, HU, MT (in its new amending law), NL, , PT, RO,SI, SK, UK).

4 Member States have partly transposed paragraph 1 on seizure and handing over of property (FR, MT, PL, and SE). In particular in FR the legislation transposing 29(1) does not explicitly provide for the executing judicial authority to seize property on its own initiative. EE has stated that their judicial authority can seize property on their own initiative on the basis of a general legislation which the Commission has not been in a position to examine.

6 Member States have either not specifically transposed (DK, EE, PL, SE, UK) or have partly transposed (FI) paragraph 2 which deals with situations where the EAW cannot be carried out.

5 Member States have either not transposed (DK, EE, SE) or have partly transposed (PL and FI) paragraph 3 on temporary or conditional handing over of property.

4 Member States have not transposed paragraph 4 on rights acquired in the property (LV, MT, SE, UK), whilst EE and FI have only partly transposed it. In EE, the transposing Act does not state that the return of property shall be affected without charge.

### **Article 30 – Expenses**

16 Member States have fully transposed article 30 (BU, DE, EE, EL, ES, IT, CY, LV, HU, AT, PL, PT, RO, SI, SK, FI). IE has also transposed it at least in part.

On the other hand, 9 others have not transposed it in the legislation transmitted (BE, FR, LU, MT, UK) or have no binding provisions in that respect (DK, LT, NL, SE).

### **Article 31 – Relation to other legal instruments**

Pursuant to Article 31(1), 16 Member States have indicated to the Commission that they have made a notification to the Council of Europe under Article 28 of the European Convention on Extradition of 13 December 1957 (BE, CZ, DK, DE, ES, IE, LT, LU, HU, NL, PL, PT, SI, FI, SE, UK).

At least 8 Member States continue to be able to apply existing bilateral or multilateral agreements as per Article 31(2) (CZ, DK, DE, ES, CY, MT, SK, FI, SE). DK, FI and SE refer to the law on extradition to Finland, Iceland, Norway or Sweden. ES refers to the arrangements agreed in relation to Gibraltar. CZ refers to the Treaty of Mutual Legal Assistance with SK and the Treaty with AT.

No Member State has made a notification of new agreements as envisaged in paragraph 2.

Article 31(3) has been explicitly used by at least NL in respect of the Netherlands Antilles or Aruba.

## Article 32 – Transitional provision

3 Member States made a notification, in conformity with the Framework Decision, namely at the time of its adoption (FR, IT, AT). As a consequence, requests received by FR for offences committed prior to 1st November 1993 will be treated under previous extradition arrangements whereas requests received by IT and AT for offences committed prior to 7 August 2002 will be treated under previous extradition arrangements. However, 3 other States apply transitional provisions in breach of the Framework Decision (CZ, LU, SI). Article 40§1 of the Italian Law however states that the provisions of the aforesaid law could not apply to European Arrest Warrants issued or received before its entry into force, i.e., prior to 14 May 2005.

- LU did not make any statement at the time of the adoption of the Framework Decision (JO L 190 of 18.7.2002, p. 19). The transitional provision is applicable where LU is both the issuing and executing Member State contrary to the Framework Decision. This means that LU will not apply surrender arrangements to EAWs issued by other Member States for offences before 7 August 2002 but they will not, in addition, be able to issue EAWs for offences committed prior to that date. Contrary to the Framework Decision, requests for offences committed prior to 7 August 2002 will be treated by LU under previous extradition arrangements.
- The possibility to make such a statement was not available to CZ and SI to the extent that they joined the Union after the adoption of the Framework Decision but they have nevertheless made use of the provision. As such, it is contrary to the Framework Decision that requests received by SI for offences committed prior to 7 August 2002 will be treated under previous extradition arrangements.
- Moreover, CZ legislation does not respect the absolute limit provided in the Framework Decision of 7 August 2002. Instead it sets its own date of application of the EAW of 1st November 2004. Since the amending act of 19 April 2006 that entered into force on 1 July 2006, this time-limit applies for Czech nationals only. Moreover, until the amending Act referred to above, the declaration made by CZ under Article 32 was also incorrect in that the transitional provision was applicable where CZ was both issuing and executing Member State. In practice this has raised serious difficulties as some other Member States had no other possibility to request or surrender a person than by the use of the EAW. Furthermore, contrary to the Framework Decision, requests for offences committed by Czech nationals prior to 1 November 2004 will be treated by CZ under previous extradition arrangements.