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EVALUATION REPORT ON THE
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"THE PRACTICAL APPLICATION OF THE EUROPEAN ARREST WARRANT AND
CORRESPONDING SURRENDER PROCEDURES BETWEEN MEMBER STATES"

REPORT ON AUSTRIA

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1. INTRODUCTION

- 1.1. Following the adoption of the Joint Action of 5 December 1997, a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime was established.
- 1.2. Following the discussion of a proposal introduced by the Luxembourg Presidency concerning the topic of the fourth round of mutual evaluations¹, the MDG of 11 July 2005 adopted the topic as proposed, namely "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States". It was also agreed at the MDG of 11 July that the evaluation questionnaire was to be prepared by the UK Presidency.
- 1.3. Experts with substantial practical knowledge of the European Arrest Warrant were nominated by Member States pursuant to a written request to delegations made by the Chairman of the MDG on 9 September 2005².
- 1.4. At its meeting on 28 October 2005 the MDG approved the evaluation questionnaire for the fourth round of mutual evaluations. The objectives of the evaluation exercise and the questionnaire itself are set out in 14272/05 CRIMORG 131 COPEN 175 EJM 57 EUROJUST 77.
- 1.5. At its meeting on 28 October 2005 the MDG also discussed and approved 13824/05, the revised sequence for the mutual evaluation visits. Austria is the sixteenth Member State to be evaluated during the fourth round of evaluation.
- 1.6. The experts charged with undertaking this evaluation were: Mr Michael Weiss (Deputy Head of SIRENE, Czech Republic), Mr Ernest Nilles (Magistrate, Luxembourg) and Mrs Eve Olesk (State Prosecutor, Estonia). Two observers were also present: Mr Benedikt Welfens (Eurojust) and Mr Christoph Sajonz (Commission), together with the General Secretariat of the Council.

¹ Document 9602/05 - Orientation debate on a proposed Mutual Evaluation exercise.

² Document 6206/1/06 REV 1 - Timetable for 2006 and designation of experts.

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- 1.7. This report was prepared by the expert team with the assistance of the Council Secretariat, based upon their findings arising from the evaluation visit of 6-9 November 2007, and upon Austria's detailed and helpful responses to the evaluation questionnaire and a written request for further information.
- 1.8. The report makes reference to differing processes in respect of conviction and prosecution cases only insofar as there is a divergence of practice between the two procedures.
- 1.9. The expert team's overarching purpose was to evaluate the distinct practical processes operated and encountered by Austria both as issuing and as executing Member State, to assess relevant training provisions and the views of the defence, before moving on to conclude and to make such recommendations as they felt were appropriate to enhance the means by which the EAW and its corresponding surrender provisions may be further streamlined and improved.

2. THE AUTHORITIES AND THE LEGAL BASIS

2.1 THE AUTHORITIES

The Austrian Court System comprises four layers of courts of general jurisdiction:

- Supreme Court;
- 4 Courts of Appeal (Vienna, Graz, Linz and Innsbruck);
- 20 Regional Courts;
- 141 District Courts.

An EAW may be issued by the district ¹or the regional² court which is competent for the underlying criminal proceedings. The procedure and decision on the execution of an EAW fall within the competence of an investigating judge; there are investigating judges only at the level of regional courts. In this matter there is only one level of appeal, to the court of appeal.

¹ These courts are competent in cases of offences carrying a fine or a maximum prison term of one year.

² These courts are responsible for a first-instance ruling on all legal matters that are not reserved to district courts.

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The Public Prosecution Service of Austria consists of:

- General Prosecutor's Office (at the level of the Supreme Court);
- 4 Senior Public Prosecutor's Offices (at the level of the Courts of Appeal);
- 16 Public Prosecutor's Offices (at the level of the Regional Courts).

The prosecution service is part of the administrative organisation of the Federal Ministry of Justice. It has a hierarchical structure, and public prosecutors are subject to instructions of their superiors¹ up to the Minister of Justice². Therefore, the highest authority in the prosecution service is the Minister of Justice. In this role the Minister of Justice not only formulates the general prosecution policy by issuing ministerial orders, but may also issue general instructions on the exercise of tasks and powers of the prosecution service, as well as specific instructions concerning investigation and prosecution in individual cases. The power to issue these instructions is exercised on the basis of the public prosecutors' obligation to report to senior prosecutors on specific individual cases (e.g. cases of special public interest, or if there is an important legal question to solve); the Minister of Justice and senior prosecutors may ask for reports in individual cases as well.

As to pre-trial proceedings, Austria followed the so called "investigating judge model". However, as of 1 January 2008 this system will be changed so that the prosecutor will assume a leading role in pre-trial investigations. This will have an impact on EAW procedures, since in the new system the public prosecutor will be the authority competent to issue EAWs.

The Ministry of Justice

As to EAW-related matters, the Federal Ministry of Justice is competent to initiate the law-making process in order to implement the Framework Decision. It also provides courts and public prosecution offices with the necessary assistance³ and updated information, including training on the application of the EAW.

¹ Every public prosecutor's office and senior public prosecutor's office is headed by a chief public/senior public prosecutor.

² The senior public prosecutor's offices and the General Prosecutor's Office are on the same hierarchical level, only bound by instructions of the Minister of Justice.

³ Pursuant to Article 7(1) of the Framework Decision, the Federal Ministry of Justice was designated central authorities to assist the competent judicial authorities.

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Pursuant to the implementing law, the Federal Ministry of Justice can act as transmitting authority whenever direct communication fails. It is vested with the power to decide on precedence where there is a EAW concurring with a request for extradition, as well on granting permission in transit cases.

The Criminal Intelligence Service is included in Directorate-General II, Directorate-General for Public Security, Federal Ministry of Interior. Department 2 of the Criminal Intelligence Service deals with international law enforcement cooperation, and includes the Europol National Unit/Liaison Officers Service, SIRENE Austria and INTERPOL-National Central Bureau.

At the time of this report, SIRENE Austria and INTERPOL NCB were brought together, with a total of 45 staff.

Pursuant to Article 7(1) of the Framework Decision, the Federal Criminal Police Office was designated central authority to assist the competent judicial authorities.

2.2 THE LEGAL BASIS

- Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG), Federal Law Gazette I No. 36/2004, as amended by Federal Law Gazette I No. 164/2004. It entered into force on 1 May 2004, together with the 2004 Criminal Law Amendments Act of 29 March 2004, Federal Law Gazette I No. 15/2004.

Pursuant to Article 33 of the Framework Decision, § 77 of the EU-JZG provides that until 1 January 2009 the execution of an EAW against an Austrian national shall be refused in cases where the offence for which the EAW was issued is not punishable under Austrian law.

- Statement by Austria pursuant to Article 32 of the Framework Decision, according to which as executing State Austria would continue to deal with requests relating to punishable acts committed before 7 August 2002 in accordance with the extradition system applicable before that date.

- Extradition and Judicial Assistance Act (ARHG), Federal Law Gazette No. 529/1979, as amended by Federal Law Gazette I No. 164/2004, which, according to § 1(2) of the EU-JZG, shall apply in analogy, unless the provisions of the latter provide otherwise.

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- Code of Criminal Procedure of 1975, Federal Law Gazette No. 631/1975, as amended by Federal Law Gazette I No. 102/2006.

The following are also of relevance:

- Ordinance of the Federal Minister of Justice on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EU-JZV), Federal Law Gazette II No. 353/2005.
- Pronouncement on introduction by the Federal Minister of Justice to the Presidents and the Senior Public Prosecutors' Offices of Vienna, Graz, Linz and Innsbruck, of 30 April 2004, file number BMJ-F530.205/0005-IV 1/2004, in connection with the Federal law on judicial cooperation in criminal matters with the Member States of the European Union(EU-JZG).

3. ORGANISATION AND PRACTICES - ISSUING MEMBER STATE ROLE

In 2006 the Austrian judicial authorities issued 391 EAWs, of these 67 resulted in the effective surrender of the requested person¹.

3.1. THE DECISION TO ISSUE

The judicial authority competent to issue an EAW, in both prosecution and conviction cases, is the Regional or the District Court which is competent for the underlying criminal proceedings².

An EAW may be issued only upon an application by the public prosecutor, provided that a domestic arrest warrant has been issued and there is reason to launch a search for the apprehension of a requested person in at least one Member State. The competent prosecutor has discretion to assess the scope of the search and to apply for the issue of an EAW. The expert team was informed that whenever an international arrest warrant is issued, an EAW is issued at the same time.

¹ Replies to the questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2006, set out in 8111/05 COPEN 75 EJN 23 EUROJUST 24.

² As from 1 January 2008, the penal procedure will change. In the new system the public prosecutor is vested with the power to issue EAWs upon prior authorization of the arrest by the Court.

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In issuing an EAW the Austrian judicial authorities apply a proportionality test. This test relates not only to the gravity of the crime¹, but seems also to cover other issues, such as possible delays in the proceedings and specific costs/benefit analysis. The expert team noted, however, that there was no uniform practice concerning circumstances to be taken into consideration when issuing an EAW.

3.2. VERIFYING THE POSSIBLE EXISTENCE OF MULTIPLE REQUESTS

The courts and the public prosecutor's offices have the possibility of conducting computer-based inquiries into the registers on all criminal proceedings pending before judicial authorities in Austria, as well as on persons in custody (VJ and IVV Registers). They may thus also obtain information about all EAWs issued by Austrian courts. According to the information provided, this search function is used on a regular basis in specific individual cases.

Moreover, pursuant to Article 101 of the Convention implementing the Schengen Agreement (hereinafter referred to as SAAC), both the criminal courts and the public prosecutors' offices are authorised to search the data entered in the SIS according to Article 95 of the SAAC.

The expert team was informed that, under § 56 of the Code of Criminal Procedure, all domestic proceedings against one person are to be centralized in one court. In practice, this also helps to avoid the risk of multiple EAWs in relation to the same person.

3.3. THE COMPLETION OF THE FORMS/COURT PAPERS

An EAW may be issued only by using the form provided for in Annex II to the EU-JZG², which mirrors the one provided for by the Framework Decision. This form is available on the Intranet of the Federal Ministry of Justice in the "Lotus Word" format, which can be filled with the inserted word processing program.

¹ § 68(2) of the ARHG, which applies in analogy, in keeping with § 1(2) of the EU-JZG.

² § 30(1) of the EU-JZG.

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Item 17 of the "Pronouncement on introduction in connection with the EU-JZG" contains additional details concerning the necessary content of the EAW. However, there are no written guidelines to assist judicial authorities to complete the EAW form, nor a catalogue of standard interpretations agreed at national or regional level in respect of prescribed elements of it. The officers from the Federal Ministry of Justice interviewed expressly supported the idea of producing an EU-wide drafting guide, to assist judicial authorities of all Member States with the standardisation of agreed practices for the completion of the EAW form.

Completion of the EAW is the sole responsibility of the competent investigating judge, although the assistance of the Federal Ministry of Justice can be sought¹ and in every Higher Court there is a specific nominee to provide advice on judicial cooperation-related matters.

When entering the corresponding alert in the SIS, the SIRENE officers check whether the EAW contains all the data required by the system and, where some deficiency is found, they contact the Central Authority at the Federal Ministry of Justice, which, in its turn, may contact the competent public prosecutor in order for the latter to apply to the court for amending the EAW or, where appropriate, issuing a new one.

The expert team noted that the fields concerning the description of the requested person and ID materials in box a) of the EAW form are often left unfilled by Austrian authorities, without a prior check on whether such information is available.

¹ Pursuant to Article 7 of the Framework Decision, the Federal Ministry of Justice and the Federal Ministry of Interior's Directorate-General for Public Security, Federal Criminal Police Office, were designated as the central authorities to assist the competent judicial authorities.

3.4. TRANSLATION OF THE EAW

When issuing an EAW, the Austrian judicial authorities produce a "preventive" translation only in exceptional cases, if the whereabouts of the requested person in a Member State are known, or if there are indications for such whereabouts, and the EAW is therefore communicated directly to the competent executing judicial authority. Otherwise, EAWs are translated only when the issuing court receives notification that the requested person has been arrested. In these cases, the Austrian issuing authority usually forwards the EAW in German in an advance transmission for information to the competent authority in the executing State, together with a standard accompanying letter explaining that a language-compliant EAW will be forwarded as soon as possible.

EAW forms in the official languages of other Member States are available on the Intranet of the Federal Ministry of Justice in the "Microsoft Word" format, with a view to being used when producing the necessary translations¹.

According to the information provided, the Austrian judicial authorities, particularly outside the major conglomerates, may face difficulties in providing adequate translations within the short deadline set by some Member States. In the view of the judges and prosecutors interviewed, it would be desirable that the time-limits for transmitting a language-compliant EAW established by some Member States be extended.

3.5. TRANSMISSION OF THE EAW

Even in those cases in which the whereabouts of the requested person are known and the EAW is sent directly to the executing judicial authority pursuant to § 29(2) of the EU-JZG, a search via SIRENE and, where appropriate, via INTERPOL is launched².

The transmission mode is determined by the investigating judge, taking account of possible relevant applications by the public prosecutor. The Austrian authorities reported individual cases in which EUROJUST was involved in the transmission of the EAW. SIRENE and INTERPOL channels are also used if necessary.

¹ In accordance with § 30(3) of the EU-JZG, the Ordinance of the Federal Ministry of Justice of 31 October 2005 on judicial cooperation in criminal matters with the Member States of the European Union provides information on those Member States that accept EAWs also in another than their own official language.

² As from 1 January 2008, SIRENE will be also competent for searches outside the SIS area.

The authorities competent for the receipt of EAWs in the different Member States are listed in the Ordinance of the Federal Ministry of Justice of 31 October 2005 on judicial cooperation in criminal matters with the Member States of the European Union (hereinafter referred to as EU-JZV). The EU-JZG provides that enquiries may be conducted with the help of Eurojust or the EJN to identify the executing judicial authority. In practice, if the information on the recipient authority is missing, the courts will, as a rule, establish it by means of the "Atlas" of the EJN; if this route is not successful, the courts will - in isolated cases - contact the EJN contact points. The use of the EJN Atlas was explained to courts and public prosecutor by means of a decree dated 5 December 2005.

3.6. ISSUES RAISED BY EXECUTING MEMBER STATES AND COMMUNICATION CHANNELS RELIED UPON

According to the information provided by the Austrian authorities, there are reports in relation to Italy concerning difficulties in complying with the time-limit (ten days) for the provision of language-compliant EAWs, especially since a transmission by fax or in electronic form is not accepted by the Italian authorities. In that connection, the following case was described in detail in the replies to the EAW questionnaire, and the judges interviewed during the evaluation visit also referred to it.

The Regional Court of Vienna reported about one case in which the communication relating to the arrest (on 9 January 2007) of a Serbian national in Italy, who had been requested by means of an EAW, was received on 12 January 2007 by way of SIRENE Austria. The Regional Court of Vienna then informed the Italian Ministry of Justice, in English, that the EAW would be translated into Italian and then transmitted. On 18 January 2007 the message was received via SIRENE Austria that the EAW would have to be forwarded within 10 days; otherwise the person concerned would have to be released. There was no indication as to the beginning of the ten-day period. The Regional Court forwarded a translation of the EAW to the executing judicial authority on 22 January 2007, and there was no reaction within a month. Finally, the information was received via SIRENE Austria that the person concerned had been released because the EAW had been received with a delay.

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The Federal Ministry of Justice gave information concerning isolated reports about cases in which the executing Member States questioned an EAW that had been duly completed from Austria's viewpoint. A few cases were recorded in the area covered by the Higher Regional Court of Vienna. For instance, the Netherlands requested a detailed description of the facts of the case and the transmission of the statutory stipulations invoked, although a box was ticked in the list of offences. In one case, Italy is said to have asked for more details of the suspected offence.

According to the information provided, in all those instances, if no solution was found by way of bilateral talks (possibly involving either Eurojust or the EJN), the Austrian courts opted to provide the information requested by the executing authority, even if they considered it exceeded the required scope, in the interest of successfully pursuing the case in question.

It was reported that some Member States applied the principle of reciprocity in connection with the surrender of their own nationals and refused to surrender them, with reference to Austria's transposition of the EAW Framework Decision and the special clause in Article 33 (1) thereof. In individual cases (Czech Republic¹) surrender was refused in spite of guarantees concerning the return of the requested person for the execution of the sentence passed against him in Austria.

3.7. REQUESTS FOR FURTHER INFORMATION MADE BY EXECUTING MEMBER STATES

The Austrian authorities reported that there had been relatively few cases in which a request for further information had been received from foreign authorities. Most of these came from the Netherlands.

No instance was reported in which Austria had been unable to comply with such requests. Austrian authorities, however, referred to the difficulties for the timely transmission of the additional information requested occasionally caused by the fact that requests are transmitted by some Member States exclusively in their own official language, and the need to translate any additional information into this.

¹ One of the experts informed the team that in these cases the principle of active personality applies and the requested person is prosecuted in the Czech Republic.

3.8. LEGAL REGIME GOVERNING THE RETURN OF OWN NATIONALS FOR THE ENFORCEMENT OF A SENTENCE

In the absence of any other legal basis, the legal arrangements governing the return of own nationals for the service of a sentence are to be found in the 1983 Council of Europe Convention on the Transfer of Sentenced Persons. The Austrian authorities explained that, as a rule, an application on the basis of this Convention is filed once an alien has been sentenced in Austria, provided that the conditions for the transfer are met.

The investigating judge who issued the EAW is the authority competent to provide any undertaking necessary in this connection, upon application by the public prosecutor. The guarantees so provided are binding upon all Austrian judicial authorities¹.

No issues were reported in connection with this matter.

3.9. YOUTH SURRENDERS AND CORRESPONDING GUARANTEES

At the time of the evaluation visit Austria had experienced no difficulty in this regard.

3.10. GENERAL COMMUNICATIONS WITH THE EXECUTING MEMBER STATE

Although the implementing law expressly intends to promote direct contacts between the Austrian judicial authorities and their counterparts abroad, it became clear from the interviews that, in practice, information is exchanged mainly via SIRENE or INTERPOL. The fact that it is fast and secure, and also language difficulties, seem to be the main reasons for the Austrian courts to use this channel instead of addressing themselves directly to the authorities abroad.

The expert team was informed that information about the progress of EAW procedures was exchanged on a regular basis only with Germany; in all other cases, a separate follow-up inquiry must be sent.

¹ § 29(3) of the EU-JZG.

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3.11. THE MECHANICS OF THE SURRENDER (INCLUDING TEMPORARY SURRENDER) OF REQUESTED PERSONS/TIMELIMITS/GUARANTEES

In most cases, the agreement on the surrender date is reached via the SIRENE office or Interpol. In any event, the Federal Office of Criminal Investigations at the Federal Ministry of the Interior must be informed of the agreed date so that the security authorities with local competences can be informed of the surrender.

The SIRENE office is responsible for all the necessary preliminary arrangements and participates itself in the surrender by air; otherwise the surrender at the border land is carried out by the local police. According to the information provided, there is a bilateral agreement with Germany allowing the hand-over of the requested person directly at the prison of the executing Member State.

As for time-limits, the Austrian authorities reported instances in which difficulties had been caused by the delay of the executing Member State in informing about the possibility of carrying out surrender. They also confirmed that in some cases of surrender by air, mainly in the absence of suitable flight connections, the 10-day limit had not been enough. It was stressed, however, that in all such cases an extension of the time-limit had been granted.

No reports on cases of temporary or conditional surrender were recorded at the time of the evaluation visit.

3.12. THE MECHANICS OF THE SURRENDER IN RESPECT OF REQUESTED PROPERTY/TIME-LIMITS/GUARANTEES

At the time of the evaluation visit, no problems in connection with evidentiary material, or with the use of it in the course of criminal proceedings pending in Austria, had arisen.

3.13. CONFLICT OF EAWS/EXTRADITION REQUESTS/ONWARD SURRENDER

At the time of the evaluation visit, Austria had experienced no difficulty in connection with these matters.

3.14. EXPENSES

No issues have been recorded in respect of the payment of expenses associated to EAW procedures.

3.15. MISCELLANEOUS COMMENTS

Replacement of pre-existing alerts with EAWs

Since 1 May 2007, in the course of periodical reviews of SIS alerts pursuant to Article 112(1) of the SAAC, the existing alerts based on International Arrest Warrants have been almost totally replaced by EAWs. The expert team was informed that there were few cases in which this has not been possible, namely because the competent courts refused to issue the corresponding EAW with the argument that the International Arrest Warrant already covers the European Union and therefore there is no need to do so, or based on the consideration that the EAW does not apply to acts committed before 7 August 2002.

Speciality rule

§ 31(4) and (5) of the EU-JZG provide respectively that, where appropriate, the consent of the executing Member State to prosecute the surrendered person, and to surrender him to another Member State, for offences other than that for which the person was surrendered, will be regarded as having been granted if the executing judicial authority does not communicate a decision on the related request submitted by the Austrian judicial authority within 30 days after receiving it.

While admitting that these provisions may contribute to speeding up the process, the expert team note that they do not correspond to anything in the Framework Decision.

4. ORGANISATION AND PRACTICES - EXECUTING MEMBER STATE ROLE

During the calendar year 2006 Austria received 250 EAWs, of these 157 resulted in the effective surrender of the requested person and 38 were refused¹.

4.1. RECEIPT PROCEDURES

An EAW may be sent to the Austrian executing authority by mail, facsimile transmission, electronic data transmission, or any other technical means that facilitates the production of a written version under conditions that make it possible for the recipient to establish the authenticity of the documents². However, in case of serious doubts concerning the authenticity of the request, an original of the EAW may be requested.

¹ See chapter 4.7 below.

² § 14(3) of the EU-JZG.

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An EAW may also be forwarded to the Austrian executing authority through the good offices of the Federal Ministry of Justice, if there are difficulties in transmitting or verifying the authenticity of the documents which cannot be resolved through direct exchange between the authorities involved¹.

According to the information provided by the Austrian authorities, at the time of the visit there had been no reports in connection with certification issues, and, apparently, no serious concerns had arisen in practice concerning the authenticity of incoming EAWs.

It was reported that individual Member States (especially Poland) used the Central Authority at the Federal Ministry of Justice for transmitting EAWs, without resorting to the possibility of identifying the judicial authority in Austria with competence for a direct exchange between authorities. The Austrian authorities are of the view that this intermediate step leads to avoidable delays in the procedure.

The implementing law lays down no specific time-limits for the presentation of translations. If necessary, the executing court will provide such translations, with a view to ensuring compliance with the EAW procedure statutory time-limits. On the other hand, Austria accepts an EAW in any official language of those Member States which accept EAWs in German issued by Austrian courts².

4.2. INVESTIGATIONS CONCERNING THE LOCATION OF THE REQUESTED PERSON/CIRCULATION PROCEDURES

If an EAW-based search request is received via INTERPOL or there is an alert pursuant to Article 95 of the SAAC, INTERPOL Vienna and SIRENE Austria respectively will make a check, already when entering it into the national electronic search and information system (EKIS - Electronic Information System of the Criminal Police), as to whether there is any indication that the requested person is staying in Austria. For this purpose, the findings of the criminal police, the registration files and other available registers on persons are used to attempt to verify the presence of the requested person in Austria.

¹ § 14(5) of the EU-JZG, although no Central Authority, as defined in Article 7(2) of the Framework Decision, has been designated.

² Doc. No. 9608/04 - Notifications and declarations of Austria to the General Secretariat of the Council regarding the implementation of the EAW with reference to the Framework Decision.

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A prior check for the existence of specialities and/or limitations arising from national legislation is made by INTERPOL Vienna and SIRENE Austria. This covers the age and nationality of the wanted person, the date and place where the acts were committed, and whether the EAW relates to a listed offence. As a result of such a check, the SIRENE office, where appropriate after having consulted with the Central Authority at the Federal Ministry of Justice (where several public prosecutors are seconded on a permanent basis), may add a restrictive validity flag to the SIS alert. According to the information provided by the SIRENE officials interviewed, this flagging takes place in approximately 1% of cases.

In case of a hit in any of the national databases, or if a probable location in Austria is already mentioned in the request, the locally competent security authorities are contacted in order to verify whether the person is actually staying at the presumed location and, where appropriate, to undertake the arrest. At the same time, the competent public prosecutor on duty is informed.

If an EAW is received directly by the court responsible for its execution, upon application by the public prosecutor, the investigating judge shall launch a surrender procedure pursuant to § 16 of the EU-JZG, and will involve the security authorities in order to verify the whereabouts of the person sought.

4.3. THE FORM OF THE WARRANT AND REVIEW PROCEDURES

The verification of EAWs is guided by § 19 (1) to (3) of the EU-JZG. These provisions refer to the check for accuracy of the EAW carried out by the investigating judge in the course of the surrender procedure.

Under § 19(1), first sentence, the prerequisites for the surrender shall be verified by way of the information contained in the EAW. The expert team, however, was not clear about the second sentence of this provision, and how it applies in practice. It reads: "A verification of the suspicion is only required to the extent stipulated in § 33(2) of the ARHG". Pursuant to the latter, a check based on suspicion is admissible only if there are considerable doubts in this context, especially if evidence is available or can be offered which would invalidate the suspicion immediately.

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During the interviews § 19(3) dealing with the issue of checking double criminality was also discussed. According to this provision, where the legal classification as a listed offence is obviously erroneous or where the person concerned raises justified objections against it, the investigating judge must ask the issuing judicial authority for the transmission of the necessary additional information, whenever the surrender would not otherwise be admissible. The expert team was informed that the court practice is to check first, on the basis of the factual description, whether the act is punishable under the Austrian law; only in the negative the investigating judge checks whether any of the boxes of the form is ticked off. Therefore, a check based on § 19(3) would only apply where there is no double criminality. In the view of the Austrian authorities, such a practice is not contrary to but supportive of the system set up by the Framework Decision. They emphasised that, in practice, no difficulties had occurred in connection with the classification of an offence as a list offence.

4.4. REQUESTS AND RESPONSES TO REQUESTS, FOR FURTHER INFORMATION/ CLARIFICATION

Under § 19 (2) of the EU-JZG, it is for the investigating judge to require from the issuing judicial authority any additional information that he deems necessary in order to take a decision on the surrender. A "reasonable" time-limit has to be set for receiving such information; in any event this will affect the statutory time-limits for decision on surrender.

According to the information provided in advance by the Austrian authorities, these requests are usually formulated in the language of the issuing State or in English. Some of the judges interviewed indicated, however, that such requests are forwarded to the issuing judicial authority in German.

As to the most common grounds for these requests, the Austrian authorities reported instances in connection with proceedings in absentia (especially with a view to being certain of the subsequent guarantee concerning new proceedings for the case, because item d) on the form sheet was not or only insufficiently completed), as well as when data on the identity of the requested person were missing, when information about the maximum punishment was missing (when indicating other offences than those listed in Article 2 of the EAW Framework Decision), or if the data of the issuing authority was missing. Individual cases in relation to box e) of the form, where it only contained a legal evaluation of the facts or the description of these was incomplete, were also reported.

4.5. ARREST PROCEDURES/FIRST HEARING

All Austrian security authorities and security service units have access to the EKIS (including SIS) and are authorised to arrest a person sought on the basis of an EAW/SIS alert/EAW-based INTERPOL diffusion.

Once the requested person is apprehended, the police contact by phone the competent public prosecutor on duty, who, based on the information provided, may request that the arrested person be taken to the court prison, together with the appropriate documentation.

Within 48 hours of the apprehension, the investigating judge shall examine the person in connection with the EAW, provided that in the meantime the public prosecutor submits a written application for the launching of the surrender procedure. Where the public prosecutor, based on the contrast between the information provided in the documents available (EAW, SIRENE A & M forms, Interpol diffusion) and the domestic provisions, or an error in the identity of the person, decides not to apply for the launching of the surrender procedure, the requested person is set free without a need to appear before the court. These instances are communicated to the police authorities of the issuing Member State by SIRENE Austria.

When examining the requested person, the investigating judge must inform him of the possibility of a simplified procedure. Upon application by the public prosecutor, he shall decide on detention of the requested person. Pursuant to § 18(2) of the EU-JZG, the provisions on detention pending extradition apply in analogy to detention pending surrender¹.

A hearing on the extension of the detention period will take place within 14 days from the arrest, with the participation of the public prosecutor and a defence counsel.

¹ § 29(2) of the ARHG.

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Pending surrender, the court may apply coercive measures more lenient than detention in suitable cases, whenever the risk of absconding need not be feared. Both the person concerned and the prosecutor have the right to apply for such measures. If the sole reason for confinement is the risk of absconding, the person concerned must be offered the possibility of depositing bail, whenever the criminal offence is punishable by a prison term of not more than 5 years. Whenever the likely punishment is more than 5 years of imprisonment, the possibility of depositing bail may be offered¹. A danger of absconding shall not be presumed if the punishable act does not carry more than a five-year prison term and the person concerned lives in orderly living circumstances and has a fixed residence in Austria, unless he already made preparations to escape². According to the case law of the Supreme Court, depositing bail is ruled out in surrender procedures for the enforcement of a court sentence.

Once the decision on surrender has been taken, courts are empowered to issue an arrest warrant for those who have not been kept in custody pending surrender, if there are reasons to believe that they will not obey the summons, or if they actually have not obeyed the summons to give effect to the surrender.

4.6. THE SURRENDER DECISION/ GUARANTEES - REQUIREMENTS AND GUARANTEES PROVIDED

The procedure and decision on the execution of an EAW fall within the competence of an investigating judge of the Regional Court covering the area where the requested person is domiciled or resident, or is apprehended. If the requested person is kept in court confinement, the place of confinement is the determining factor³.

The procedure leading to the surrender decision varies depending on whether the requested person consents to surrender or not.

¹ § 190(1) of the Code of Criminal Procedure.

² § 180 (3) of the Code of Criminal Procedure.

³ § 13 of the EU-JZG in combination with § 26(1) of the ARHG. According to the latter, if the competence of a specific court cannot be determined according to the abovementioned connecting factors, the Regional Court of Vienna has the relevant competences.

RESTREINT UE

- Simplified procedure

When examining the person concerned in connection with the European arrest warrant, the investigating judge must inform him of the possibility of a simplified procedure, that consenting to the execution of the EAW entails a renunciation of the protection afforded by the speciality rule, and that his consent cannot be revoked.

The requested person may already at that stage state his consent to the surrender on the basis of the alert request or the communication about the alert pursuant to Article 95 of the SAAC, and agree to the execution of the surrender without a formal surrender procedure. However, if the person concerned is kept in custody pending surrender, he only may express this consent effectively at the hearing on his detention, at the earliest, which, as it has already mentioned, must be scheduled within 14 days after the arrest. The expert team was informed that, in practice, if the requested person has announced his wish to consent to the surrender, the hearing takes place as soon as a defence counsel is appointed.

The consent will become legally effective only if it is put on record in court.

In such a case, the investigating judge shall "immediately" pronounce the decision ordering the surrender, provided that the prerequisites for the surrender are met, and a written copy of the decision shall be served upon the person concerned and the prosecutor. The decision shall state the underlying European arrest warrant and indicate that this simplified surrender does not entail any entitlement to the speciality rule. Where appropriate, the decision shall also contain a decision on a postponement of the surrender¹.

The person concerned and the prosecutor may appeal the decision ordering the surrender by filing a complaint with the Court of Appeal within 3 days of the pronouncement of the decision. The expert team was informed, however, that renunciation of legal remedies can be announced during the hearing conducted by the investigating judge. The complaint has suspensive effect, and the Court of Appeal must decide on it within 40 days of the consent given by the person concerned.

¹ § 20(2) of the EU-JZG.

RESTREINT UE

The investigating judge must inform the issuing judicial authority on the status of the procedure within 10 days of the consent given by the person concerned or send, without delay, a copy of the final and enforceable decision which constitutes the decision on the European arrest warrant¹.

During the interviews a number of questions were raised by the expert team in relation to the simplified surrender, namely the following:

- Need of the EAW. The expert team noted that there was no common understanding of how the order for surrender could be made in this simplified surrender procedure. The judges of the Regional Court of Eisenstadt who were interviewed expressed the view that such a decision could be made only when consent had been given on the basis of the EAW. On the contrary, representatives of the Federal Ministry of Justice and some judges at the Regional Court of Vienna assumed that consent expressed on the basis of an alert sufficed, without the EAW form being required.
- Assistance of a defence counsel. The expert team noted that for the consent to be effective the assistance of a defence counsel is mandatory only if the person concerned is kept in detention, but not where other more lenient means, e.g. bail, have been applied.
- Consent to surrender linked to automatic renunciation of speciality protection. The Austrian authorities were of the opinion that this approach is in line with the 1995 European Union Convention on Simplified Extradition Procedure, and that such an option is open in the Framework Decision. They noted that the view of the European Commission² that this system could discourage the requested person to consent to surrender, whereby the effectiveness of the EAW procedure might be reduced, did not concur with the Austrian experience³.

¹ § 20(4) of the EU-JZG.

² COM(2005) 63 final - Report from the European Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

³ According to the information provided by Austria in the replies to the questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2006 (Doc 11371/2/07), in 2006 157 persons were surrendered by Austria under an EAW, of these 146 consented to the surrender; 23 persons who did not consent were surrendered.

RESTREINT UE

- Where the requested person does not consent to surrender, a second court hearing is held with a view to a decision on surrender. The investigating judge must issue a decision in writing within 30 days of the arrest of the requested person. This decision may be appealed in the Court of Appeal.

The expert team noted that there are no time-limits for the second hearing before the investigating judge to take place. They also noted that § 21(2) of the EU-JZG, when imposing a deadline of 60 days for taking a decision on the execution of the EAW "with final and enforceable effect", refers specifically to the case where detention pending surrender was imposed on the person concerned.

Re-opening of the surrender procedure

§ 27(1) of the EU-JZG provides that in unconsented cases the decision on surrender shall be revoked by the investigating judge "if new facts or evidence emerge that - either as such or in connection with the executed EAW - give rise to considerable concerns about the correctness of the decision", and a new surrender procedure will take place.

If the re-opening of the surrender procedure is granted, the surrender of the requested person to the issuing Member State will be postponed¹. In those instances in which the person concerned has already been surrendered to the issuing Member State, and if an originally granted surrender is refused in the re-opened proceedings, the file shall be submitted to the Federal Ministry of Justice and this shall request the return of the person concerned from the issuing State².

The expert team noted that there are no corresponding provisions in the Framework Decision.

¹ § 25 (1) item 2 of the EU-JZG.

² § 27 (2) of the EU-JZG.

4.7. REFUSALS TO SURRENDER

According to the information contained in the replies of Austria to the questionnaire on quantitative information on the practical operation of the European arrest warrant¹, during the calendar year 2006 the Austrian authorities refused execution of EAWs in 38 cases. These included instances where the EAW was withdrawn by the issuing Member State (7 cases), and where an existing alert was not followed by the corresponding EAW (5 cases). As for the rest, according to the information provided by the Austrian authorities, the grounds for refusal were: Austrian nationals (6 cases), acts not punishable according to Austrian law (3 cases), no provision of guarantees (1 case), existence of domestic proceedings (number of cases unknown) and arrest in another State (number of cases unknown).

Austrian nationals.

Apart from the requirement of double criminality for a transitional period until 31 December 2008, pursuant to § 77(2) of the EU-JZG and Article 33 of the Framework Decision, the expert team noted that the surrender of Austrian citizens is guided by the following principles:

- No surrender for acts that are subject to the jurisdiction of the Austrian criminal law. It has to be noted that the Austrian system follows the principle of active personality, whereby Austrian courts will prosecute those Austrian citizens who committed a crime abroad, provided that the double criminality standard is met. In these cases, the EAW is handed over to the prosecutor with a view to instituting proceedings against the requested person.
- All grounds for refusal regarded as optional in the Framework Decision are taken as mandatory for Austrian citizens. For non-Austrian nationals some of them are taken as optional: this is the case of § 6-"Place of offence in Austria" and § 7(2)-"Austrian jurisdiction"², which correspond to Articles 4(7) item (a) and Article 4(2) and (3) of the Framework Decision respectively. The ground for refusal laid down in Article 4(7) item b) of the Framework Decision applies to Austrian nationals only³.

¹ Doc. 11371/2/07.

² § 7(3) of the EU-JZG reads: "Paragraph (2) does not prevent the execution of a European arrest warrant against a person who is not an Austrian national if...". There is no similar provision in § 6, but, according to the information provided by the Federal Ministry of Justice, most of the commentaries point out that § 6 and § 7 are intended to be applied as a whole, and therefore paragraph (3) of § 7 applies to cases that fall under § 6.

³ § 5(3) of the EU-JZG.

- The person concerned may waive the right not to be surrendered by applying the formal requirements for simplified surrender¹.

The conditions for the surrender of Austrian nationals are therefore extremely restrictive. Even after 31 December 2008, such a surrender will be possible, in prosecution cases, only if the EAW is based on a list offence committed in the territory of the issuing Member State, which is not punishable under the Austrian law, provided that guarantees to serve the sentence in Austria are given. Surrender will not be possible in conviction cases.

Grounds for refusal inspired by paragraph 12 of the Preamble to the Framework Decision

A specific ground for refusal inspired by paragraph 12 of the Preamble to the Framework Decision and Article 1(3) thereof is laid down in § 19(4) of the EU-JZG. However, the possibility to refuse the execution of an EAW on these grounds is rather theoretical, since, according to that provision, the objections of the person concerned need not be verified if he could have claimed them before the competent judicial authorities of the issuing State, before the European Court of Human Rights or before the Court of the European Communities.

Scope of application of the EAW (conviction cases).

The expert team noted, as regards the scope of application of the EAW, that in conviction cases the Austrian implementing law imposes additional requirements compared with the Framework Decision, which can result in refusal of an EAW. Namely, § 4(2) of the EU-JZG requires that the acts on which the sentence is based are punishable by virtue of the law of the issuing Member State by a custodial sentence for a maximum period of at least one year, and of which another four months, as minimum, still need to be served. This was already recorded by the European Commission², whose criticism focused on the requirement relating to the length of the sentence applicable³.

¹ § 5 (6) of the EU-JZG.

² COM(2005) 63 final - Report from the European Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

³ The European Commission was of the opinion that this was the system under the old extradition procedure and is not in line with the Framework Decision, where there is no connection between the length of the sentence actually imposed and the sentence applicable.

RESTREINT UE

The Austrian authorities informed the expert team of their willingness to review this provision in line with the European Commission's remarks.

4.8. OWN NATIONAL AND YOUTH ARREST AND SURRENDER ISSUES

Austria opted for regulations applying both Article 4(6) and Article 5(3) of the Framework Decision. As already mentioned, the former was transposed as a mandatory ground for refusal. Pursuant to § 5(5) of the EU-JZG, the provision of a return guarantee in cases where an Austrian national is surrendered for conducting a criminal prosecution is mandatory.

The enforcement of a sentence imposed by a court of another Member State is guided by § 39 and § 40 of the EU-JZG. According to these provisions, in conviction cases, the EAW itself will be considered as a request to execute the sentence or detention order, whereas in prosecution cases a request by the competent authority is required. The sentence will be executed even if the act underlying the EAW is not punishable according to Austrian law, provided that it has been identified by the issuing Member State as a list offence.

If the act underlying the EAW is a list offence, the sentence will be enforced "one to one", even if the act is not punishable according to Austrian law¹; otherwise, the sentence will be converted following the system of the 1983 Convention on the transfer of sentenced persons.

As for youth surrenders, at the time of the evaluation visit no issues had been reported.

4.9. ACCESORY SURRENDER

§ 4(5) of the EU-JZG allows surrender in respect of such offences.

4.10. SPECIALITY

In its statements to the General Secretariat of the Council regarding the implementation of the EAW with reference to the Framework Decision, Austria included the notification envisaged in Article 27(1) of the Framework Decision. § 31(7) of the EU-JZG imposes on the Federal Ministry of Justice the obligation to proclaim, by way of ordinance, those Member States that have made a like statement².

¹ This would be the case, for instance, of trade in human organs and tissues in certain circumstances.

² § 5 of EU-JZV. Only Estonia is listed.

No specific issues in connection with this matter were reported.

4.11. ONWARD SURRENDER/EXTRADITION

At the time of the evaluation visit there were no reports in this connection.

4.12. ARTICLE 32 EXPERIENCES

According to the statement made pursuant to Article 32 of the Framework Decision, when acting as executing State Austria will continue to deal with requests relating to acts committed before the date of entry into force of the Framework Decision in accordance with the extradition system applicable before that date.

During the visit to SIRENE Austria, the experts were informed that where an EAW issued for an offence committed prior to 7 August 2002 is received, this is automatically recognised as a request for extradition.

4.13. TEMPORARY/CONDITIONAL SURRENDER

At the time of the visit there were no reports about actual instances of conditional surrender.

Conditional surrender is only envisaged for those instances where the postponement of the surrender was ordered in order to execute a custodial sentence or a preventive measure involving deprivation of liberty, imposed by an Austrian court or administrative authority¹.

4.14. THE MECHANICS OF SURRENDER (INCLUDING TEMPORARY AND CONDITIONAL SURRENDER) OF REQUESTED PERSONS

Pursuant to § 24 (2) of the EU-JZG, if the surrender is made to a neighbouring Member State, the investigating judge shall order - informing the issuing judicial authority at the same time - that the person concerned be surrendered at a specified border post, or an agreed place of surrender², within 10 days after the permission of the surrender has become final and enforceable. In all other cases, the investigating judge shall request the issuing judicial authority, in writing and without delay, to accept the person concerned within 10 days, after the permission of the surrender has become final and enforceable, as well as to propose the time and place of the surrender.

¹ § 26 of the EU-JZG.

² See chapter 3.11 above as regards the bilateral agreement with Germany.

RESTREINT UE

In most cases, the agreement on the surrender date is reached via the SIRENE office or INTERPOL.

Under § 24 (3) of the EU-JZG, if charge of the person concerned is not taken within 10 days after permission to the surrender has become final and enforceable, he shall be released, unless a later date is agreed for the surrender during that period, or circumstances prevail that are beyond the control of the Member States involved. The Austrian authorities confirmed that in some cases of surrender by air the 10-day limit had not been sufficient, mainly due to the absence of suitable flight connections,. It was stressed, however, that in all such cases agreement on a later date had been reached within the abovementioned deadline, and an extension of the time-limit for the surrender had been granted.

The Court Prison officers are responsible for all the practicalities necessary for the surrender to take place, and for organising the transport and the handing over of the requested person to the foreign authorities, in liaison with the Border Police.

4.15. CONFLICT OF EAWS/EXTRADITION REQUESTS

The implementing legislation takes account of Article 16 of the Framework Decision in the determination of priority. In case of conflict of an EAW and a request for extradition by a third country, the transposing law imposes on the investigating judge the obligation to communicate his decision on the execution of the EAW to the issuing State, indicating that the Federal Minister of Justice will decide whether the EAW takes precedence, and to inform the issuing State of the decision of the Federal Minister of Justice¹.

4.16. EXPENSES

See chapter 3.14 above.

¹ § 23(2) of the EU-JZG.

4.17. MISCELLANEOUS COMMENTS

Offer to surrender

Pursuant to § 17 of the EU-JZG, the public prosecutor must examine, even when no EAW has been received, whether there are grounds for offering to surrender a person apprehended in Austria to another Member State, if, on account of specific facts, there are reasons to presume that that person has committed an offence that could be a basis for such an arrest warrant.

In the affirmative, the prosecutor must apply for the launching of a surrender procedure, for the examination of the person concerned by the investigating judge, and for asking the judicial authority of the Member State in question whether an EAW will be issued against the person concerned. On application by the prosecutor, the investigating judge must impose detention pending surrender upon the person concerned; the provisions on detention pending extradition apply by analogy.

A reasonable time-limit, in any case no longer than 40 days after apprehension, must be set for the judicial authority of the Member State in question to issue such an arrest warrant, indicating that the person concerned will otherwise be released. If the time-limit expires without any reaction, the person concerned must be released without delay, unless the prosecutor demands immediately that pre-trial detention be imposed on him.

Transit cases

Pursuant to § 35 of the EU-JZG, the Federal Minister of Justice, in agreement with the Federal Minister of Interior, shall decide on transit requests. According to the information provided, as a rule the whole process is completed within 48 hours of receipt of the request.

5. TRAINING PROVISION

The Training Department of the Federal Ministry of Justice is responsible for continuous training (including external training) of judges and public prosecutors. There are also training activities organised at a regional level by the Courts of Appeal and the corresponding Public Prosecutor's Offices. National associations of judges and prosecutors organise a limited number of training activities. Courts of Appeal are responsible for initial training of trainee judges.

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Participation of judges and prosecutors in training activities is not mandatory, except for trainee judges.

According to the information provided, judges and public prosecutors were offered seminars on the European arrest warrant before the EU-JZG entered into force. In 2004, an international seminar on first practical experience with the EAW was organised in the framework of AGIS 2004. During Continuing Training Year 2006/2007, a specific seminar on the EAW was held (October 2006). During Continuing Training Year 2007/2008, training activities have focused on the subject of the reform of the criminal procedure that will come into force on 1 January 2008; no special seminar on the EAW is planned. The President of the Court of Appeal of Vienna confirmed that training on the EAW is included in the regular training programme for trainee judges.

The expert team was informed that in connection with the application of the European arrest warrant, any identified deficiencies may be discussed at the service meetings of judges and public prosecutors, which are held at regular intervals. Furthermore, the Federal Ministry of Justice can react to serious problems identified on a federal level, by issuing decrees.

The Austrian authorities explained that judges and public prosecutors are able to have cross-border exchanges of practical experiences both at international seminars and as part of the EJTN exchange programme, in which Austria participates. In this respect, the judges and prosecutors interviewed in Eisenstadt confirmed that meetings with their Hungarian colleagues take place regularly.

6. DEFENCE PERSPECTIVES

The implementing law has no specific provisions on the rights of the requested person to be informed and to be assisted by a legal counsel and by an interpreter, and therefore the general regime applies.

RESTREINT UE

The requested person requires the services of a defence counsel (necessary defence) if and as long as he is kept in detention pending surrender. It means that the person concerned may select a defence counsel by himself, or apply for the assignment of a legal-aid counsel, following the decision on detention taken by the investigating judge when examining him in connection with the EAW (within 48 hours as of the apprehension). If the requested person does not have yet a defence counsel and the hearing on detention must be held (within 14 days as of the apprehension), a court-appointed counsel shall be assigned to him directly.

The defence counsel represents the defendant as long as he is held in custody, especially at the hearing on his detention and in complaints against court decisions. Unless the court orders otherwise for specific reasons, the assignment of a legal-aid or ex officio defence counsel applies for the entirety of the further proceedings, until its outcome becomes final and enforceable. This assignment expires as soon as a selected defence counsel intervenes.

As to the right to an interpreter, under § 38a of the Code of Criminal Procedure, if the person concerned does not have sufficient command of German, an interpreter shall be assigned to him by the court, ex officio or upon his application. This applies in particular to hearings and access to files, and on the occasion of being informed of court dispositions or a petition by the public prosecutor.

According to the information provided, at the time of the arrest the police must inform the apprehended person on the reasons for the arrest. The expert team, however, was not clear on how such information is provided when the arrested person does not have sufficient command of German¹.

¹ See footnote in recommendation 14.

The expert team had the opportunity to meet representatives of the Bar Association in Vienna and Eisenstadt. While admitting that their practical experience was rather limited, they reported that no major problems had arisen in relation to the operation of the EAW in Austria. They complained that the information was received by the defence counsel very shortly before the hearing, although it was admitted that the situation is similar in domestic proceedings. They also called for legal assistance to be provided at an earlier stage. In this respect it was noted that, as from 1 January 2008, there will be a possibility for the defence counsel to be present already during police interrogations (although this will not apply to EAW procedures, since the apprehended person is not interrogated by the police) and when the arrested person is examined in court.

According to the information provided, any defence counsel can be appointed as legal-aid or ex officio defence counsel to provide legal assistance in EAW procedures. There is therefore no special list for EAW cases. On the other hand, the lawyers interviewed confirmed that no training on the EAW had been organised for defence counsels so far.

7. CONCLUSIONS

The expert team would like to emphasize the high level of organization of the visit. A comprehensive agenda was prepared and the team had the opportunity to discuss in depth with the professionals interviewed any questions raised during the visit. The team appreciated the quality of the experts interviewed and their receptiveness. The substance of the information provided enabled the team to get an overview of implementation of the EAW in Austria.

7.1. GENERAL CONCLUSIONS

Implementing legislation

7.1.1. The Austrian transposing legislation is mostly in line with the Framework Decision. Divergences can, however, be observed between the implementing law and the Framework Decision, e.g. as regards the scope of application of the EAW in conviction cases¹, with a potential impact on EAW procedures.

7.1.2. The optional grounds for refusal laid down in the Framework Decision have been transposed in a way that may give rise to differences of treatment between Austrian nationals and non-Austrian nationals far beyond those stemming from the Framework Decision (see chapter 4.7).

¹ See chapter 4.7 above.

Procedures

7.1.3. In general the procedures put in place under the Austrian law are adequate for the purposes of the Framework Decision.

7.1.4. However, certain procedures still remain in the implementing law that have roots in the old extradition regime or simply do not fit in with the EAW system, namely the verification of suspicion.

Practice

7.1.5. Practitioners are aware of the advantages of the EAW. Most of them consider the EAW as a really efficient tool and are confident about its added value compared with the extradition system.

7.1.6. Practical implementation of the EAW in Austria seems to be clear and simple. No serious difficulties in relations with other Member States have been reported.

7.1.7. This situation should be further supported by specific and regular training of judges and prosecutors dealing with EAWs, in order to make practice more uniform and to enhance cooperation with foreign authorities, especially in light of the suppression of border controls with other Member States as a result of the extension of the Schengen area. Training in these matters should be extended to counsel for the defence.

7.1.8. The close cooperation, involving a high level of mutual trust, between judges, prosecutors, the Central Authority and police officers, contributes to the smooth functioning of the system. This cooperation is supported by an impressive IT system.

7.1.9. In most cases, communication between the Austrian judicial authorities and their partners in other Member States is channelled via SIRENE. Although this channel has proved to be extremely effective to date, the expert team is of the opinion that direct contacts between the judicial authorities involved in a particular case should be promoted in line with the letter and the spirit of the Framework Decision.

7.2. CONCLUSIONS IN RESPECT OF AUSTRIA'S ACTIVITIES AS AN ISSUING MEMBER STATE

7.2.1. Issues

7.2.1.1. Uneven practice concerning circumstances to be considered when issuing an EAW.

In issuing an EAW the Austrian judicial authorities apply a proportionality test, which the expert team considers to be a correct approach. It seems, however, that there are no clear rules or uniform practice concerning the circumstances to be taken into consideration, or criteria to be applied when deciding on the issue of an EAW. There was no definitive answer to this question during the evaluation visit; on the contrary, in the interviews it was openly admitted that some courts issued far more EAWs compared with others.

On the other hand, it became clear that the criteria applied when issuing an EAW are not the same as those applied when issuing a domestic arrest warrant. In the view of the expert team, it seems that there is still confusion with the old and lengthy extradition procedure in the mind of judges when they decide on proportionality. This question was made visible during the visit to the SIRENE office, where a big difference between the number of entries related to active domestic arrest warrants (9,419) and the number of entries related to active EAW (925) was highlighted¹. Those figures also revealed that the reality of open borders, especially after 21 December 2007, was not reflected to a relevant degree.

¹ The expert team was also informed that, contrary to initial expectations, the number of EAWs registered in 2007 (819) was decreasing compared within 2006.

7.2.1.2. Quality control.

Although during the interviews it was admitted that the filling of the EAW form might create difficulties, no written guidance has been produced to assist judicial authorities to complete it. The assistance provided on call by the Central Authority, or by the specific nominee appointed in each Court of Appeal to give advice in judicial cooperation-related matters, seems to be insufficient. The expert team is of the view that such guidance, providing updated and practical advice on the filling of the form, is highly recommendable, not only to prevent further requests by the executing authority (this seems not to constitute a problem in Austria for the time being), but also to establish uniform practice in the country. This consideration is emphasized by the fact that in the Austrian system completion of the EAW is the sole responsibility of the judge, and therefore there is no possibility of a quality check by third parties¹.

7.2.1.3. Box a) of the EAW.

The expert team noted that the fields concerning the description of the person and ID materials in box a) of the EAW form are often left unfilled by the issuing judicial authority, without a prior check on whether such information is available. The experts are of the view that such a check should be made instead and, in the affirmative, at least the remark "available on request" should be made in the form.

7.2.2. Good practice

7.2.2.1. Proportionality test.

In issuing an EAW the Austrian judicial authorities always apply a proportionality test. Several elements are weighted in this context. In the view of the expert team this is, in principle, a correct approach.

¹ During the visit to the SIRENE office, it became clear that the check made by this office, when entering the corresponding alert into the SIS, focuses on whether the EAW contains all the data required by the system. See chapter 3.3 above.

7.2.2.2. Court information system.

Austria has an excellent tool in that its court information system provides the judicial authorities with comprehensive information concerning all criminal proceedings pending in Austria as well as persons in custody. This system is connected to EKIS (Electronic Information System of the Criminal Police), where all EAW-based searches (incoming and outgoing) are registered. All judges and prosecutors can access the system and conduct computer-based inquiries directly from their office.

7.2.2.3. Use of the SIS in parallel to the direct transmission of an EAW.

It should be recognised as a good practice that even when the whereabouts of the requested person are known and the EAW is sent directly to the competent authority, an alert is entered into the SIS, so there is a "backup" solution in case the wanted person moves to another Member State, or the information concerning his whereabouts is wrong.

7.2.2.4. Replacement of pre-existing alerts with EAWs.

According to the information provided during the visit to SIRENE Austria, the process of converting the existing SIS alerts based on International Arrest Warrants into SIS alerts based on EAWs has been completed, except for a few cases in which the competent court refused to issue the corresponding EAW (see 3.15 above).

The expert team is of the opinion that this practice should be followed by all Member States. As for cases still pending, while recognising that currently the Ministries of Justice are dealing with this issue, the expert team notes that some Member States no longer accept International Arrest Warrants coming from another Member State. The experts would also like to emphasise that, when acting as issuing State, no restriction on the application of the EAW based on the date in which the offence was committed is envisaged in the Framework Decision, since Article 32 thereof refers exclusively to situations where the Member State concerned acts as executing State (as reflected in the subsequent statement made by Austria)¹.

¹ See footnote in recommendation 6.

7.3. CONCLUSIONS IN RESPECT OF AUSTRIA'S ACTIVITIES AS AN EXECUTING MEMBER STATE

7.3.1. Issues

7.3.1.1. Scope of application of the EAW in conviction cases.

In conviction cases, Austrian implementing law requires not only that the custodial sentence be of at least four months, but, simultaneously, that the related offence be punishable by a custodial sentence involving deprivation of liberty of at least one year.

The expert team notes that this is the system that was in place under the extradition system. However, under the Framework Decision, there is no longer a link between the length of the actual and the potential punishment; this means that whenever a person has already been sentenced, provided that the penalty imposed is of at least four months, the maximum possible sentence is irrelevant.

7.3.1.2. Notification to the issuing Member State authorities of the decision not to launch a surrender procedure.

The expert team was informed that those cases where the public prosecutor does not apply for the launching of a procedure for the surrender of a person arrested on the basis of an EAW¹, are communicated only to the police authorities of the issuing Member State via SIRENE.

The expert team is of the opinion that such instances should always be officially and directly communicated to the issuing judicial authority, explaining the reasons. In particular, in cases where the EAW is recognised as being erroneous in relation to the identity of the person, the practice of the Austrian authorities does not suffice, as such an informal means of communication might fail to correct the EAW. In such cases, there should be an official statement, highlighting the error, from the executing authority to the issuing authority.

¹ In such cases, the requested person is released without the need to appear before a court.

7.3.1.3. Detention pending surrender in cases of less serious crimes.

In cases of less serious crimes, the Austrian system is very restrictive as regards the possibility to impose detention during surrender. According to the general rules, the person must be offered the possibility of depositing bail, whenever the criminal offence is punishable by a prison term of not more than 5 years. The expert team, however, is of the view that the fact that the person absconded from the issuing country should be an important consideration when taking a decision on detention.

7.3.1.4. Basis for the decision on surrender in simplified procedures.

The expert team found out that there was no uniform practice on how the order for surrender was made in the simplified surrender procedure. For some of the judges interviewed, such a decision may be made only when the requested person consents on the basis of an EAW, while for others the consent expressed on the basis of a SIS alert suffices, without the need to have the EAW form. In the view of the expert team, the latter option, while helping to speed up the process, requires that the information provided is accurate and sufficient to establish all the important considerations for the decision on surrender.

7.3.1.5. Verification of suspicions.

§ 19(1) of the EU-JZG, concerning the verification of EAWs, reads: "A verification of the suspicion is required only to the extent stipulated in § 33(2) of the ARHG". Pursuant to the latter, a check based on suspicion is admissible only if there are considerable doubts in this context, especially if evidence is available or can be offered which would dispel the suspicion immediately.

The experts were not clear about the meaning of such a provision, and how it applies in practice in relation to EAW procedures. In any case, taken literally, this provision is rooted in the old extradition regime and does not fit in with the EAW system, based on the principle of mutual recognition.

7.3.1.6. Surrender of Austrian nationals.

The presentation on the limitations for the surrender of Austrian nationals provoked many doubts whether such intensive use of possibilities for refusing the surrender, provided only for own nationals¹, is in line with the aim of the Framework Decision to allow trial in the Member State where the crime was committed and to avoid the necessity for transfer of proceedings, including problems of hearing witnesses abroad and the like. Such arrangements may also give rise to differences of treatment between nationals and non nationals (even those with permanent residence in Austria) far beyond those stemming from Article 4(6) and 5(3) of the Framework Decision.

7.3.1.7. Re-opening of the surrender procedure.

In unconsented cases, the implementing law allows the executing judge to revoke his decision granting surrender, "if new facts or evidence emerge that - either as such or in connection with the executed EAW - give rise to considerable concerns about the correctness of the decision". In such case, a new surrender procedure takes place, even if the person has been already surrendered to the issuing Member State².

The expert team notes that neither this provision nor the associated effects (postponement of the surrender and, where it already took place, request to the issuing Member State to return the person concerned if the originally granted surrender is refused) are based on the Framework Decision.

7.3.1.8. Time-limits in "offers to surrender"³.

The expert team noted that the deadline for issuing an EAW (40 days after apprehension) that is imposed upon the issuing authority to which surrender is offered, is longer than that provided for the Austrian executing authority to decide on surrender in standard EAW procedures (30 days).

7.3.2. Good practice

7.3.2.1. Translation of EAWs.

The Austrian authorities do not refuse an EAW for the sole reason that a language-compliant copy is missing. Where necessary, the Austrian executing court will on its own initiative order the translation of the EAW into German, with a view to ensuring compliance with the statutory time-limit to issue a decision on surrender.

¹ See chapter 4.7 above.

² See chapter 4.6 above.

³ See chapter 4.17 above.

7.3.2.2. Permission for transit

According to the information provided, in transit cases the decision on permission is issued by the Austrian authorities within 48 hours of receipt of the request. In the view of the expert team this is a clear example of good practice.

7.3.2.3. Transit cases in connection with the Slovak Republic.

In cases of surrender to the Slovak Republic, Austria systematically provides transit and escort from the Vienna International Airport to the Slovak border, based on considerations of proximity and the fact that Slovakia does not have an air connection to many destinations.

7.3.2.4. Communications between the authorities involved in the operation of the EAW.

The excellent level of communication, including informal contacts, between all actors involved in the operation of the EAW at internal level, has a very positive impact on the smooth progress of the procedure and contributes to the efficiency of the system.

7.3.2.5. Automatic recognition of EAWs relating to offences committed prior to 7 August 2002 as requests for extradition.

The expert team is of the opinion that this practice should be followed by all those countries that continue to apply the extradition system to requests relating to acts committed before a specific date.

8. RECOMMENDATIONS

8.1. RECOMMENDATIONS TO AUSTRIA

GENERAL

Recommendation 1 - To adopt measures to ensure that appropriate training programmes are put in place, so that extensive and regular training on EAW is provided to judges, public prosecutors and defense lawyers (see 7.1.7).

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Recommendation 2 - To take measures to promote further use by judges and prosecutors of the possibility of communicating and exchanging information directly with the judicial authorities of other Member States, while continuing to provide appropriate support to current communication channels (SIRENE, Eurojust). (see 7.1.9).

AS ISSUING MEMBER STATE

Recommendation 3 - To promote, in a manner considered appropriate (e.g., by producing written guidelines, or by including specific provisions in the implementing law), uniform practice as regards criteria to be applied when deciding on issuing an EAW (see 7.2.1.1).

Recommendation 4 - To produce written guidelines providing updated and practical guidance to assist judicial authorities when issuing an EAW (see 7.2.1.2).

Recommendation 5 To promote the practice that, when available, the information on the description or the ID materials of the requested person are provided with the EAW, or, at least, the mention "available on request" is made in box a) of the EAW form (see 7.2.1.3).

Recommendation 6 - To take the necessary steps to complete the process of converting the existing SIS alerts based on International Arrest Warrants into SIS alerts based on EAWs (See 7.2.2.4)¹

AS EXECUTING MEMBER STATE

Recommendation 7- To amend the implementing law so that it conforms to the Framework Decision as regards the scope of application of the EAW in conviction cases (see 7.3.1.1).

Recommendation 8 - To amend the legislation regarding the surrender of Austrian nationals so that, as from 1 January 2009, the same grounds for refusal as for non-Austrian nationals apply, with the only specialties of Article 4(6) and Article 5(3) of the Framework Decision (see 7.3.1.6).

Recommendation 9 - To amend the legislation in order to abolish, in EAW procedures, any possibility of verification based on suspicion (see 7.3.1.5).

¹ According to the information provided by the Austrian authorities during the preparation of the report, from the beginning of 2008 EAWs have been issued for all Austrian alerts in the SIS.

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Recommendation 10 - To amend the implementing legislation, so that once the requested person has been surrendered, any assessment of new facts that might have an impact on the decision to surrender is referred to the authorities of the issuing Member State (see 7.3.1.7).

Recommendation 11 - To amend the legislation so that the time-limit for the foreign judicial authority to whom the surrender is offered to issue an EAW, and that imposed on the Austrian judicial authorities to decide on surrender in standard EAW procedures, are consistent (see 7.3.1.8).

Recommendation 12 - To take the necessary measures to ensure that the decision not to launch a surrender procedure following the arrest of the requested person is communicated directly to the issuing judicial authority, explaining the reasons for such a decision (see 7.3.1.2).

Recommendation 13 - To consider amending the legislation so that in all EAW procedures, even for less serious crimes, detention pending surrender may be ordered in view of the circumstances of the case and giving appropriate consideration to the fact that the requested person absconded from the issuing Member State (see 7.3.1.3).

Recommendation 14 - To take the necessary measures to ensure that, at the time of the apprehension, the person arrested on the basis of an EAW is informed, in a language that he understands, of the reasons for the arrest (see 6)¹.

8.2. RECOMMENDATIONS TO CERTAIN OTHER MEMBER STATES

Recommendation 15 - To consider setting up a judicial information system following the model of Austria and making use of the experience gained by this country, as an effective solution to support judicial authorities, increase the efficiency of the system and reduce costs (see 7.2.2.2).

Recommendation 16 - To consider setting reasonable time-limits and language requirements concerning the provision of language-compliant EAWs (see 3.4).

¹ According to the information provided by the Austrian authorities during the preparation of the report, pursuant to the new Code of Criminal Procedure, in force since 1 January 2008, the person arrested on the basis of an EAW has the right to be informed on the grounds of the arrest at the first hearing by the police, which has to be conducted with the help of an interpreter if necessary. The Austrian Federal Ministry of Justice, together with the Austrian Ministry of Interior, has issued an "Information Sheet for Detainees" to be handed out by Police when apprehending a person, available in 33 languages.

Recommendation 17 - To take steps to ensure, when acting as executing Member State, that the issuing authority is regularly provided with updated information on the progress of the EAW procedure (see 3.10).

Recommendation 18 - To consider following the simple and fast practice of Austria concerning transit of surrendered persons (decision within 48 hours of the request). (see 7.3.2.3).

Recommendation 19 - To consider following the Austrian practice, when acting as executing state, of translating EAWs on one's own initiative where necessary (see 7.3.2.1).

Recommendation 20 - (To those Member States that made a statement pursuant to Article 32 of the Framework Decision) To consider following the Austrian practice regarding the automatic recognition of EAWs relating to offences committed prior to 7 August 2002 as requests for extradition (see 7.3.2.5).

8.3. RECOMMENDATIONS TO THE EUROPEAN UNION

Recommendation 21 - To continue the ongoing discussions on the benefits of instituting a proportionality test for the issue of EAWs, including the identification of common standard criteria (see 7.2.1.1 and 7.2.2.1).

Recommendation 22 - To consider amending box d) of the EAW form in order to provide more clear and detailed information (e.g. adding a reference list with boxes) on how the requested person was informed about the hearing and the conditions under which he may apply for a retrial of the case (see 4.4).

Recommendation 23 - To consider discussing measures aimed at simplifying the escorting by air of the surrendered persons (e.g. not requiring ID documents to allow surrendered person to board), in order to enable the authorities involved to comply with the mandatory 10-day time-limit for the surrender of the person (see 3.11 and 4.14).

Recommendation 24 - To make further efforts to provide judicial authorities of Member States with appropriate language training, with a view to promoting direct contacts between them (see 3.10).

PROGRAMME OF VISITS

Tuesday, 6 November 2007

- 09.00 INTRODUCTORY DISCUSSION WITH REPRESENTATIVES OF THE CENTRAL AUTHORITY
General brief introduction to the Austrian court system (Pr3)
Transposition of the Framework Decision - EU-JZG, EU-JZ-VO and Pronouncement on Introduction (II2, IV 1)
Electronic information tools/Intranet/Register (Pr 5, IV 1)
Statistics (Pr 3/Pr 5 and IV 1)
EAW in basic and continuing training (III 3)
- 12.30 Lunch
- 14.30 VISIT TO THE REGIONAL CRIMINAL COURT (VIENNA) AND THE PUBLIC PROSECUTOR'S OFFICE (VIENNA)
Welcome by the agency head/court president
Discussion with judges and public prosecutors, presentation of individual cases
Visit to the transfer unit at the Josefstadt prison
Meeting with representatives of the Vienna Bar Association

Wednesday, 7 November 2007

- 09.00 Bus transfer to Eisenstadt
- 10.00 VISIT TO THE REGIONAL COURT (EISENSTADT) AND THE PUBLIC PROSECUTOR'S OFFICE (EISENSTADT)
Welcome by the agency head / court president
Discussion with judges and public prosecutors,
Visit to a court department, presentation of the procedure by way of a court file, discussion of individual cases
Meeting with representatives of the Burgenland Bar Association
- 13.00 Lunch
- 15.30 VISIT TO THE KLINGENBACH BORDER STATION
Welcome by the agency head
Presentation of the practical steps in a procedure to verify a possible alert in the course of border checks
- 17.00 Visit to a typically Austrian wine tavern ("Heurigen"), followed by transfer to Vienna

Thursday, 8 November 2007

- 09.00 VISIT TO THE FEDERAL OFFICE OF CRIMINAL INVESTIGATIONS, FEDERAL MINISTRY OF THE INTERIOR
Welcome by the agency head
Visit to the SIRENE office, presentation of the steps in a procedure to obtain a search and in the event of a hit
Visit to the INTERPOL office, presentation of the steps in a procedure to obtain a search and in the event of a hit
- 11.30 MEETING WITH REPRESENTATIVES OF THE HIGHER REGIONAL COURTS
Welcome by the President of the Higher Regional Court Vienna, discussion with members of the senates of all higher regional courts with competences for legal remedies in transfer proceedings
- 12.30 Lunch (top floor of the "Justizpalast" court building)
- 15.00 FINAL ROUND OF DISCUSSIONS AT THE FEDERAL MINISTRY OF JUSTICE
- 17.00 End of evaluation visit.

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ANNEX B

LIST OF PERSONS INTERVIEWED

1) Visit to the Federal Ministry of Justice on 6 and 8 November 2007

Dr. Maria BERGER	Federal Minister of Justice
Dr. Franz PLÖCHL	Director of the Directorate for Criminal Justice
Mag. Barbara GÖTH-FLEMMICH	Head of Dept. for International Criminal Cases
Dr. Fritz ZEDER	Head of Dept. for Criminal Legislation
Dr. Irene GARTNER	Legal Adviser/ Dept; for Criminal Legislation
Mag. Gertraud EPPICH	Legal Adviser/ Dept; for Criminal Legislation
Dr. Stefan BENNER	Legal Adviser/Dept. for International Criminal Cases
Mag.Dr. Johannes MARTETSCHLÄGER	Legal Adviser/Dept. for International Criminal Cases
Mag. Martin ZUCKER.	Legal Adviser/ Training Dept.
Mag. Christian GESEK.	Legal Adviser/ Information Technology Dept.
Mag. Georg STAWA.	Legal Adviser/ Dept. for International Contacts

2) Visit to the Vienna Regional Criminal Court and the Prosecution Office Vienna on 6 November 2007

Mag.Dr. Ulrike PSENNER	President of the Court
Mag. Christina FORSTNER	Investigating Judge
Mag. Georg ALLMAYER	Investigating Judge
Mag. Frederic ARTNER	Investigating Judge
Dr. Otto SCHNEIDER	Director of the Prosecution Office Vienna
Dr. Peter SEDA	Public Prosecutor/ Prosecution Office Vienna
Dr. Andreas POLLAK	Public Prosecutor/ Prosecution Office Vienna
Ernst KRIEGER.	Prison Administration
Dr. Elisabeth RECH.	Lawyer

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- 3) Visit to the Eisenstadt Regional Court and the Eisenstadt Prosecution Office on 7 November 2007

Mag. Alfred ELLINGER	Vice-President of the Court
Dr. Karl MITTERHÖFER	Judge
Ri. Mag. Doris HALPER-PRAUNIAS	Investigating Judge
Ri. Mag. Gabriele NEMESKIERI	Investigating Judge
LStA Dr. Karl RABONG	Director of the Prosecution Office, Eisenstadt
StA Mag. Alexandra MARUNA	Public Prosecutor/Prosecution Office, Eisenstadt
StA Mag. Roland KOCH	Public Prosecutor/Prosecution Office, Eisenstadt
Dr. Thomas SCHREINER	President of the Bar Association, Burgenland
Dr. Elisabeth HRASTNIK	Lawyer
Mag. Martin BECK.	Lawyer
Mag. Dieter GSCHIEL	Lawyer

- 4) Visit to the Klingenbach Border Station on 7 November 2007

Christian KNOPF	Colonel
Max MANNINGER	District Inspector
Ewald HAUSLEITNER	Chief Inspector
Friedrich TINHOF	Lieutenant Colonel
Berthold HAHNEKAMP	Chief Inspector
Mag. Andreas GUTMANN	Deputy Head of SIRENE Bureau Austria

- 5) Visit to the Ministry of the Interior/Federal Bureau of Criminal Investigation on 8 November 2007

Mag. Regine WIESELTHALER-BUCHMANN	Deputy Head of Dept. for General and Organised Crime
Mag. Andreas GUTMANN	Head of Judicial Services at SIRENE Austria
Mag. Brigitta RANNICHER	Translation Services
Werner BOGART	Case Officer/ SIRENE Bureau
Roman GFRERER	Case Officer/ SIRENE Bureau

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6) Meeting with Representatives of the Austrian Courts of Appeal on 8 November 2007

Dr. Harald KRAMMER	President of the Vienna Court of Appeal
Dr. Leopold VEIGL	Head of Senate at the Vienna Court of Appeal
Dr. Leo LEVNAIC-IWANSKI	Judge at Vienna Court of Appeal
Dr. Heimo KOLLMANN	Head of Senate at Graz Court of Appeal
Dr. Wolfgang ROTTER	Head of Senate at Graz Court of Appeal
Dr. Ulrich PAUMGARTEN	Head of Senate at Innsbruck Court of Appeal
Dr. Monika GFÖLLNER	Judge at the Linz Court of Appeal

LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

ACRONYM ABBREVIATION TERM	ENGLISH EXPLANATION
ARHG (German acronym)	Federal law of 4 December 1979 on extradition and judicial assistance in criminal matters (Extradition and Judicial Assistance Act – ARHG, Federal Law Gazette No. 529/1979, as amended by Federal Law Gazette I No. 164/2004
EKIS (German acronym)	Electronic Information System of the Criminal Police
EU-JZG	Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG), Federal Law Gazette I No. 36/2004, as amended by Federal Law Gazette I No. 38/2007
EU-JZV (German acronym)	Ordinance of the Federal Minister of Justice of 31 October 2005 on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZV), Federal Law Gazette II No. 353/2005
SAAC	Schengen Agreement Application Convention – Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Federal Law Gazette III No. 90/1997