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Subject :	Member States' comments to the Report from the 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

On 24 February the Commission transmitted the above report to the Council. Given the fact that the Commission report was not submitted in draft form to delegations, the Presidency invited Member States to submit comments. Further to the invitation of the Presidency, Member States provided the following comments in writing.

The annex to the present note compiles all comments received on 2 September 2005.

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1. COMMENTS BY THE BELGIAN DELEGATION

Belgium would like to begin by correcting two factual errors in the Annex to the report:

- Article 4(6), page 10 of the Annex: Belgium applies Article 4(6) as an optional ground for refusal in respect of persons residing on Belgian territory (domiciled or resident), and not only in respect of its own nationals, as stated in the Annex to the report.

The only category mentioned in Article 4(6) of the Framework Decision that has not been incorporated into Belgian law is that of "persons staying on the territory", for the understandable reason that it is unclear to whom this category could apply. Unless this concept is regarded as referring to any person actually on Belgian territory, its addition would result in the creation of a new legal category that would then have to be precisely defined;

- Article 4(3) page 10 of the Annex: the case-law of the Court of Justice of the European Communities (H. Gözütok and K. Brügge Judgments of 11 February 2003) does not concern part 2 of Article 4(3) but part 3 relating to a "final judgment [... passed ...] in respect of the same acts, which prevents further proceedings". The judgments in the two above cases relate to mediation and an out-of-court settlement, not just a discontinuation of proceedings as referred to in part 2 of Article 4(3). Consequently, Belgian legislation has duly taken account of the Court's case-law.

As regards the partial abandonment of the double-criminality check, the Commission takes issue with the exception introduced into Belgian law that is aimed at expressly excluding euthanasia and abortion from the category of murder for which the double-criminality check has been removed.

However, Belgium regards this exception as being in accordance with the *ratio legis* of the Framework Decision. Negotiations at European level revealed a willingness to delete these offences from the list in Article 2(2) of the Framework Decision, even though this is not explicitly reflected in the texts. The Commission's initial proposal also included euthanasia and abortion in a negative list for which the double-criminality check was specifically being maintained. Partial abandonment of double criminality is intended to facilitate cooperation by excluding an often cumbersome check that causes delay in dealing with a request. However, it should be maintained for offences that involve ethical issues where such a check is particularly justified.

The Commission also challenges Belgium with regard to the 60-day time limit. In fact, Belgium has set a maximum time limit (64 days) that exceeds the 60-day norm by 4 days. More precisely, Belgian legislation is aimed at reconciling the time limits imposed by the Framework Decision with the guarantee of effective remedies for the individual affected by the surrender decision. To this end, Belgium has provided for a full system of legal remedies. Each stage of the proceedings is subject to a strict time limit.

The time limits chosen are comparable to those for pre-trial detention. Thus, the 60-day limit laid down by the Framework Decision will be exceeded only in specific cases, where all possible remedies have been exhausted (further appeal with refusal) and where, at each stage of the proceedings, the court has not given its ruling until the last day of the legal time limit.

2. COMMENTS BY THE CZECH DELEGATION

1. Transposition of Article 4 (6) – non-execution of the European arrest warrant in relation to own nationals and residents (page 11 of the annexe to the document COM(2005) 63 final)

This was considered a very sensitive issue during the parliamentary debate on the bill of the implementing legislation. Certain guarantees regarding the surrender of Czech nationals on the basis of the European arrest warrant were added to the text of the bill of the legislation by the Parliament. Therefore, Section 403 (2) of the Criminal Procedure Code subjects a surrender of Czech nationals to a condition of reciprocity, which was included primarily with regard to an exception negotiated by Austria in connection with the surrender of its own nationals [Article 33 (1) of the Framework Decision]. However, we believe that the principle of reciprocity is one of the fundamental principles governing international co-operation including judicial co-operation in criminal matters. Therefore, we do not regard an inclusion of this condition as a violation of the Framework Decision.

Section 417 of the Criminal Procedure Code, as well as the relevant provisions of Title 7 of Chapter XXV. of the Criminal Procedure Code on execution of foreign sentences, do indeed allow for a conversion of a sentence imposed by another Member State, execution of which is the Czech Republic obliged to undertake in the line with Article 4 (6) of the Framework Decision. It is necessary to point out particularly to Section 451(1) of the Criminal Procedure Code, which prevents from conversion of a sentence into another type of penalty than that imposed by a foreign judgment; reference is also made to Section 451(3) of the Criminal Procedure Code, which allows for an adjustment of an imposed prison sentence only in the case that its length is not compatible with the legal order of the Czech Republic. In reverse case, a prison sentence is executed in the length, in which it was imposed by the sentencing decision of a foreign country.

We regard as necessary to retain the requirement of double criminality, as far as the recognition and execution of foreign decisions within the territory of the Czech Republic and also the European arrest warrant, are concerned. It is not tolerable, that prison sentences for acts not punishable under the Czech criminal law are executed within the territory of the Czech Republic. This rule applies regardless a Czech national, a foreigner or a stateless person is concerned.

Bounding nature of persons' statement that he/ she will not submit to execution of a sentence in the requesting state [Section 411(6)(e) of Criminal Procedure Code] is not considered a violation of Article 4(6) of the Framework Decision. This provision only determines an obligation of the executing Member State to execute a prison sentence or detention order within its territory in the case that it refuses to surrender its citizen to the issuing Member State for execution of a sentence or detention order. Nevertheless, the Member State itself determines conditions of such a refusal.

2. **Transposition of Article 5 (3) – guarantee to be given with respect to surrender of own national to other Member State for prosecution takes place (page 12 of the annex to the document COM(2005) 63 final)**

Request to the issuing Member State for a guarantee (assurance) about that it shall transfer a Czech national back to the Czech Republic for the execution of a prison sentence or detention order, providing that this person applies for the transfer, is not regarded to be contrary to Article 5(3) of the Framework Decision as this provision does not exclude such procedure. On the contrary, wording “extradition may be subject to the following conditions:...” in our opinion just assumes that the executing Member State may request for assurance. Logically, such assurance must be provided before a decision on surrender of a person is rendered.

As of the issues of conversion of a foreign sentence and assurance of reciprocity, see the comments on point no. 1 above.

3. **Transposition of Article 8 – the content and the form of the European arrest warrant (page 14 and 15 of the annex to the document COM(2005) 63 final)**

The information on page 14 of the annex, that the Czech Republic requires additional information not contained in the form of the European arrest warrant, is not correct. Section 405 of the Criminal Procedure Code determines the obligatory elements of the European arrest warrant issued by the Czech courts, as it follows from subsumption of this provision in the part providing for ‘surrender of persons from another Member State into the Czech Republic’. The text of the provision takes into consideration the Czech law on limitation of criminal prosecution and the execution of punishment in the Criminal Code, as well as the law on proceedings against fugitive pursuant to Sections 302 – 306a of the Criminal Procedure Code. The Czech courts will enter these data in parts d) and f) of the European arrest warrant form. It is supposed that other Member States will require this information for the purpose of execution of the European arrest warrant.

In the chart on page 15 of the annex there is information missing regarding the language regime of the European arrest warrant in the sense that the Czech Republic in relation to Austria accepts European arrest warrants in German. Instruction of the Ministry of Justice of 30 December 2004, ref. no. 66/2004-MO-J/89, on judicial co-operation in criminal matters with the Member States of the European Union provides for a form of the European arrest warrant and the list of languages, in which other Member States accept the European arrest warrant.

4. **Transposition of Article 11 – rights of the requested person (page 18 of the annex to the document COM(2005) 63 final)**

The stated information is not correct. A requested person has a right to an interpreter pursuant to Section 2 (14) and Section 28 of the Code of Criminal Procedure.

5. **Transposition of Article 15 – decision on surrender (page 19 of the annex to the document COM(2005) 63 final)**

The Czech legislation indeed does not contain a provision which enables Czech courts to require additional information, or to determine a time limit for its delivery [Article 15 (2)]. An explicit transposition of this provision of the Framework Decision was not regarded as necessary. It is assumed that such practice will occur and the enacted legislation does not impede it anyhow. Similarly, a request for additional information is not provided for explicitly within the extradition proceedings, pursuant to the Title 2 of Chapter XXV of the Code of Criminal Procedure, even if the relevant international treaties allow for such procedure.

6. **Transposition of Article 17 – time limit and procedures concerning a decision on execution of the European warrant (page 22 of the annex to the document COM(2005) 63 final)**

The Czech Republic is reproved for not determining a binding time limit for a decision of the Constitutional Court on a constitutional complaint against a final meritorious decision on the European arrest warrant. The Constitutional Court is the judicial body responsible for the protection of constitutionality and as such, it stands outside the system of general courts. In the proceedings regarding a possible constitutional complaint against a final meritorious decision in the matter of surrender on the basis of the European arrest warrant, the Constitutional Court would review, as to whether the course of the proceedings, the decisive activity of the court as well as implementing legislation are in accordance with the Constitution of the Czech Republic, the Charter of Basic Rights and Freedoms and other constitutional acts. With regards to the fact that this is a matter of a protection of basic human rights and freedoms, protected by the constitutional order of the Czech Republic, which is fully in accordance with the recitals 12 and 13 and with Article 1(3) of the Framework Decision, we do not regard as appropriate to determine time limits for decisions of the Constitutional Court.

7. Transposition of Article 23 – time limit for surrender of a person (page 25 of the annex to the document COM(2005) 63 final)

The Czech Republic is reproved for not specifying explicitly „serious humanitarian reasons“, for which a realization of a surrender of a person can be postponed. However, Section 416 (4) of the Criminal Procedure Code is in accordance with Article 23 (4) of the Framework Decision. Serious humanitarian reasons are specified identically to the Framework Decision, i.e. the surrender would endanger the life or health of the requested person.

8. Transposition of Article 24 – postponed or conditional surrender (page 26 of the annex to the document COM(2005) 63 final)

The information stating that the Czech Republic did not transpose Article 24 (2) of the Framework Decision concerning temporary surrender of a requested person is not correct. Temporary surrender of a requested person after the permission of surrender is regulated by Section 411(10) of the Criminal Procedure Code (the Czech Republic as the executing Member State) and by Section 407 of the Criminal Procedure Code (the Czech Republic as the issuing Member State).

9. Transposition of Article 25 – transit (page 26 and 27 of the annex to the document COM(2005) 63 final, the last paragraph)

Pursuant to Sections 422 and 424 of the Criminal Procedure Code, the Supreme Court of the Czech Republic does not verify the double criminality of the act when deciding on permission of the transit of a person through the territory of the Czech Republic. This information can be added to the last paragraph on page 26.

However, we regard as fundamental to add the following data to the second and fourth paragraphs on page 27 of the annex . Article 25 of the Framework Decision (transit) is in the Czech legislation transposed in Section 422 “transit for the purposes of surrender” and Section 424 “transit for the purposes of extradition to a Member State”.

10. **Transposition of Article 26 – deduction of the period of detention or custodial sentence served in the executing Member State (page 27 of the annex to the document COM(2005) 63 final)**

The Czech Republic has transposed Article 26 of the Framework Decision in Section 22 of the Criminal Code.

11. **Transposition of Article 27 – possible prosecution for other criminal offences (page 28 of the annex to the document COM(2005) 63 final)**

Article 27 (3)(c) of the Framework Decision was transposed in Section 406 (1) (b) of the Criminal Procedure Code (the rule of speciality shall not be applied if an arrest warrant cannot be issued in the proceedings concerning this other criminal offence).

Furthermore, information stating that the Czech Republic has not fully transposed Article 27(4) of the Framework Decision is not correct. Section 418 (1) of the Criminal Procedure Code refers states that provisions of the entire Title 3 shall be adequately applied to proceedings regarding a request of another Member State for consent with prosecution of a surrendered person for other criminal offences. Relevant provisions for refusal of execution of the European arrest warrant shall thus be applied in such cases (see Section 411 of the Criminal Procedure Code). The 30-day period for decision on the request is also determined in Section 418 (2) of the Criminal Procedure Code.

12. **Transposition of Article 28 – surrender or subsequent extradition (page 29 of the annex to the document COM(2005) 63 final)**

Article 28 (3) of the Framework Decision is transposed in Section 418 of the Code of Criminal Procedure; the 30-day period for a decision on a request is determined in Section 418 (2) of the Criminal Procedure Code.

Mistaken is also the information stating that the Czech Republic has incorrectly transposed Article 28 (4) of the Framework Decision, if it allows for an extradition of a person to a third non-member state of the European Union without requesting for a prior consent of a Member State, from which this person had been surrendered on the basis of the European arrest warrant. The obligation of a court to require the consent of the executing Member State to re-extradition of a person is provided for in Section 397 (3) of the Criminal Procedure Code.

13. Transposition of Article 29 – handing over of property (page 30 of the annex to the document COM(2005) 63 final)

Article 29 of the Framework Decision is transposed in Section 441 of the Criminal Procedure Code.

14. Transposition of Article 30 – expenses (page 31 of the annex to the document COM(2005) 63 final)

Issue of expenses is governed by Section 382 of the Criminal Procedure Code. This provision is common to the entire Chapter 25 of the Criminal Procedure Code and is in accord with the wording of Article 30 of the Framework Decision.

15. Transposition of the Article 31 – relation to other legal instruments

The Czech Republic shall notify the Council and the Commission, pursuant to subparagraph 4 of Article 31 (2) of the Framework Decision of existing multilateral and bilateral agreements which it wishes to continue applying. Reference is also made to the notification of the Czech Republic in accordance with Article 28 (3) of the European Convention on Extradition (Paris, 13 December 1957), which was registered at the Secretariat General of the Council of Europe on 14 January 2005.

16. Transposition of Article 32 – temporary provisions (page 32 of the annex to the document COM(2005) 63 final)

The Czech Republic has restricted surrender of persons on the basis of the European arrest warrant to acts committed since 1 November 2004. The original government bill of the implementing legislation submitted to the Parliament of the Czech Republic did not contain such a substantial restriction of surrender of persons on the basis of the European arrest warrant. This restriction was added to the text of the bill of the implementing legislation upon a motion of a Member of the Chamber of Deputies and without its inclusion, passing of the implementing legislation in the Czech Republic would be blocked.

Further to the legislation passed in such a form, the Czech Republic has notified the Secretary General of the Council of Europe on 14 January 2005 information under Article 28(3) of the European Convention on Extradition (Paris, 13 December 1957), which implies that the Czech Republic wishes to continue to apply, in relation to other Member States of the European Union, the European Convention on Extradition, as well as its two Additional Protocols of 1975 and 1978, for an extradition of persons for criminal offences committed before 1 November 2004. Thus, in practice, the Czech Republic as the executing, as well as the issuing Member State will continue to deal with requests regarding acts committed before 1 November 2004 in accordance with the European Convention on Extradition, its two Additional Protocols of 1975 and 1978 and relevant bilateral treaties.

3. COMMENTS BY THE DANISH DELEGATION

On 23 February 2005 the Commission issued its report (COM(2005)63 final) on the Member States' implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. In the report – and in the Commission staff working document annexed to it – the Commission concluded that Denmark had not implemented some of the provisions of the Framework Decision and had not fully implemented others.

Denmark has the following comments to make on this:

Firstly, the Council Framework Decision on the European arrest warrant etc. was transposed into Danish law by Law No 433 of 10 June 2003 amending the Law on the extradition of offenders and the Law on the extradition of offenders to Finland, Iceland, Norway and Sweden.

In a circular dated 19 December 2003 the Ministry of Justice sent guidance to the police and Prosecution Service on the handling of requests for the extradition of offenders on the basis of a European arrest warrant. On 14 December 2004 the Ministry of Justice sent the police and Prosecution Service a circular supplementing the guidance provided on 19 December 2003.

The guidance sent by the Ministry of Justice to the police and Prosecution Service on the handling of requests for the extradition of offenders on the basis of a European arrest warrant constitutes binding instructions to the police and Prosecution Service, who are therefore obliged to follow the guidance when handling extradition cases on the basis of a European arrest warrant. Amongst other things, the guidance contains instructions on conditions which the Council Framework Decision obliges Denmark to ensure are fulfilled when handling extradition cases on the basis of European arrest warrants, including for example the requested person's rights and their hearing.

In Denmark's view the Council Framework Decision has been fully transposed into Danish law, and Denmark therefore cannot understand the Commission's criticism. Based on the Commission's comments in the more detailed working document (SEC(2005)267), a more precise account of Denmark's view is set out below.

Article 3 – Grounds for mandatory non-execution

Amnesty

In its report the Commission states that by using the word "pardon" in the Danish extradition law (second sentence of Section 10d(1)) rather than "amnesty", Denmark has not fully implemented Article 3(1) of the Framework Decision on the mandatory non-execution of an extradition request if the offence on which the European arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law. The Commission submits that pardon is a narrower concept than amnesty.

Denmark would comment that it follows from the first sentence of Section 10d(1) that extradition cannot take place when the requested person has been tried or acquitted of the same criminal act in Denmark. This also applies if the person whose extradition is sought has been granted a pardon in Denmark for the act (second sentence of Section 10d(1)). This means that extradition cannot take place if the person sought has been tried, acquitted or pardoned in Denmark for the act on which the European arrest warrant is based.

It also follows from the first sentence of Section 10d(2) that extradition shall be refused if charges against the person concerned have been dropped in Denmark, and if it is no longer possible to review this decision under the ordinary rules for reviewing such decisions pursuant to the law on the administration of justice. This means that extradition cannot take place if the Danish Prosecution Service has made a final decision not to press charges for the act on which the European arrest warrant is based.

In Denmark's view these provisions contain clear and full legal rules laying down that extradition from Denmark cannot take place, and that a request on the basis of a European arrest warrant must therefore be refused, if the criminal act at the basis of the extradition request is covered by amnesty in Denmark.

It should be noted that Denmark does not make use of general releases exemptions from punishment in the form of proper amnesties. In practice only individual pardons are used or – rarely – general anticipatory decisions not to press charges from the outset, for example, by granting safe-conduct to hand over illegal weapons to the police. Such general decisions not to press charges from the outset are covered by the first sentence of Section 10d(2).

The fact that the Danish extradition law does not use the same form of words – here the expression "amnesty" – as is used in the Council Framework Decision does therefore not mean that Article 3(1) of the Framework Decision has not been fully and correctly transposed into Danish law. It should be noted that Framework Decisions for the purpose of approximation of the laws and regulations of the Member States are binding upon the Member States as to the result to be achieved, but that the choice of form and methods for implementation is left to the national authorities. In other words, Member States are not obliged to use exactly the same form of words as is used in a Framework Decision.

Political persecution

The Commission states in its report that a number of Member States, including Denmark, have provided for mandatory refusal of an extradition request on the basis of a European arrest warrant if extradition would conflict with the fundamental rights of the person whose extradition is being sought. The Commission comments that there is a risk that Danish implementation of the Framework Decision on this point goes too far beyond the provisions of the Framework Decision, since extradition will be refused if there is a danger that the person will suffer persecution for "political reasons" (Section 10h of the extradition law).

Denmark does not agree with the Commission that Danish implementation of the Framework Decision goes too far beyond the provisions of that Decision.

The background to the Danish view is that recital 12 and Article 1(3) of the Framework Decision state that it respects fundamental rights and principles recognised in Article 6 of the Treaty on European Union and elsewhere. A consequence of this is that the Framework Decision respects the European Convention on Human Rights. Extradition will therefore have to be denied if there are objective grounds to believe that a European arrest warrant has been issued with the aim of persecuting or punishing a person amongst other things because of that person's political beliefs. Thus there is no question of the Danish extradition law going further than the Framework Decision.

Article 4 – Grounds for optional non–execution

Tax offences

The Commission states that the second part of Article 4(1) of the Framework Decision cannot be regarded as fully transposed into Danish law, since the Danish law does not contain a specific reference to the condition that, by virtue of the Framework Decision, a Member State cannot refuse to execute a European arrest warrant relating to taxes or duties, customs and exchange, on the grounds that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State.

Denmark does not agree with the Commission's assessment on this point. This is because the extradition law only provides rules on those cases in which a European arrest warrant may be refused, and thus does not indicate when a refusal may not be given. In Denmark's view such a provision would be unusual as regards legal technique.

In addition, as mentioned above, Article 34(2)(b) of the Treaty on European Union states that framework decisions for the purpose of approximation of the laws and regulations of the Member States are binding upon the Member States as to the result to be achieved, but leave to the national authorities the choice of form and methods. Thus it cannot be required that framework decisions should be implemented by specific provisions since the important point is that individual Member States should aim to achieve the aims of such decisions. The extent to which this requires the use of specific provisions has to depend on the legal system and legislative traditions of the individual Member State.

It should be noted here that the comments on the law transposing the Council Framework Decision into Danish law, as referred to in the introductory remarks above (comments on Section 10a of the extradition act), state that it follows from Article 2(4) of the Framework Decision that any condition of double criminality shall be administered flexibly, so that the condition is regarded as having been met if the acts described in the arrest warrant wholly or partly correspond to an offence in the executing State. The comments on the law also state that it is presumed that the condition of double criminality in Section 10a(2) and (3) of the law will be administered in that way. It follows that, when they are assessing in actual cases whether the law's condition of double criminality is met, the Ministry of Justice, the Prosecution Service and the Danish courts will be obliged to undertake that assessment in accordance with those comments. This means that there must be a flexible assessment of whether the double criminality condition has been fulfilled. This will of course also apply if the offence on which the extradition request is based is an offence against tax legislation.

Finally, by participating in the adoption of the Council Framework Decision, Denmark has under international law undertaken an obligation towards the other Member States to administer the Danish extradition law in accordance with the provisions of the Framework Decision. Thus the Danish authorities would not be able to refuse an extradition request on the basis of a tax offence on the grounds that Danish law did not contain the same type of taxes, duties, etc.

Halting of prosecution

Regarding the Member States' implementation of the second part of Article 4(3), the Commission states that it is not in accordance with the case-law of the Court of Justice that a number of Member States, including Denmark, have made it optional for extradition to be refused in cases where the executing State has decided to halt proceedings for the same offence as that on which the European arrest warrant is based.

Denmark would comment that it follows directly and expressly from Article 4 of the Council Framework Decision that Member States "may" refuse to execute a European arrest warrant in the cases listed in Article 4. Thus Member States have the option of deciding whether they wish to use the grounds for refusal in Article 4. The Commission's comment that this is not in accordance with the case-law of the Court of Justice is therefore misleading in relation to the question of whether the Framework Decision itself has been correctly implemented in the national law of the Member States.

Regarding the implementation of the second part of Article 4(3) in Danish law it should also be noted – as indicated above in relation to Article 3 (amnesty) – that it follows from the first sentence of Section 10d(2) that extradition shall be refused if charges against the person for the same act have been dropped in Denmark, and if it is no longer possible to review this decision under the ordinary rules for reviewing such decisions pursuant to the law on the administration of justice. This means that extradition cannot take place if the Prosecution Service has made a final decision not to press charges for the act on which the European arrest warrant is based.

It also follows from the second sentence of Section 10d(2) that extradition can be refused if charges have been withdrawn and if the conditions for reviewing the decision to withdraw the charges (under the ordinary rules pursuant to the law on the administration of justice) have not been met. The comments on the law state in relation to this provision (second sentence of Section 10d(2)) that there would for example be grounds to refuse extradition on the basis of a European arrest warrant if the Danish police and Prosecution Service had already assessed the case to which the arrest warrant related on the basis of the evidence, with a view to possible prosecution in Denmark, and had withdrawn charges because they had proven unfounded. On the other hand there would for example not be the same grounds to refuse to execute a European arrest warrant if the reason charges had been withdrawn in Denmark was that a prosecution could not be brought in Denmark because of a lack of jurisdiction, but had to be brought in the Member State now issuing a European arrest warrant.

Denmark believes that it has implemented the second part of Article 4(3) in accordance with the Council Framework Decision. When assessing whether extradition can take place on the basis of a European arrest warrant, proper attention must therefore be paid to legal certainty for the person whose extradition is sought.

Obligation to execute

Article 4(6) of the Framework Decision means that a Member State may refuse to execute a European arrest warrant issued for the purposes of execution of a custodial sentence etc where the requested person is staying in, or is a national or a resident of the executing Member State, and that State undertakes to execute the sentence etc in accordance with its domestic law.

Regarding Denmark's implementation of this provision in national law (where use of the provision is optional) the Commission comments that the Danish legislation does not oblige Denmark to execute the sentence.

Denmark would point out that under Section 10b(2) of the extradition law, a request for the extradition of a Danish national or a person who is permanently resident in Denmark for execution of a judgment can be refused if the punishment can instead be served in Denmark. Thus the law contains a condition that, when extradition for execution of a sentence is refused, the Danish national or permanent resident in question will serve their sentence in Denmark. This is covered in more detail in the comments on Section 10b(2), which state that extradition may be refused in such cases if Denmark gives a commitment that the sentence will be executed there.

Denmark therefore does not accept the Commission's comment on Danish legislation on this point.

Article 6 – Competent judicial authority

In relation to Article 6(3) of the Framework Decision, Denmark has designated the Ministry of Justice as its competent national authority under national legislation both to issue and to execute European arrest warrants. In its report the Commission criticises this, stating that it is difficult to view the designation of the Ministry of Justice as being in the spirit of the Framework Decision. Furthermore, the Commission states that the designation of an organ of the state as a judicial body in this context impacts on fundamental principles upon which mutual recognition and mutual trust are based.

Denmark must comment that it disagrees altogether with the Commission's views concerning Denmark's designation of the Ministry of Justice as the competent judicial authority. The reasons for this are as follows:

Articles 6(1) and (2) of the Framework Decision state that the issuing judicial authority and the executing judicial authority shall be the judicial authority of the Member State which is competent respectively to issue or execute a European arrest warrant by virtue of the law of that State. Thus under the Framework Decision it is for the individual Member State to decide who will issue and execute European arrest warrants, and it in no way conflicts with the wording of the Framework Decision to designate the Ministry of Justice of a Member State as the competent judicial authority, assuming of course that the relevant ministry is a judicial authority under national law.

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

As is apparent, there is no question of Denmark wishing to create some special arrangement for European arrest warrants by designating the Ministry of Justice as the judicial authority for the issue and execution of such warrants.

Furthermore, under Danish law the Ministry of Justice has the central competence as regards extradition, and even before the adoption of the Framework Decision on the European arrest warrant, the Ministry dealt with cases involving the extradition of offenders to other EU Member States.

Also, the designation of the Ministry of Justice as the competent authority in relation to the Framework Decision on the European arrest warrant took place after discussions with representatives from the Danish Judges' Association, the Court Administration, the Director of Public Prosecutions, the public prosecutors' association, the association of chief constables, and the Commissioner of the Copenhagen Police, and within this circle there was agreement that authority to deal with extradition cases on the basis of a European arrest warrant should be placed with the Ministry of Justice until further notice; consequently, a decision taken by the Ministry of Justice to extradite a person could always unconditionally be brought before the Danish courts and tested by two instances. Among the reasons for this was the fact that this would result in the same allocation of authority and procedure for handling extradition requests on the basis of a European arrest warrant as applied for extradition requests on the basis of e.g. the Council of Europe Convention of 13 December 1957 on the extradition of offenders. Denmark also wanted to ensure uniform practice in the handling of European arrest warrants, which it was found would best be achieved by giving authority to the Ministry of Justice.

Finally, in actual extradition cases based on a European arrest warrant or involving the issue of a (Danish) European arrest warrant, the fact that the Ministry of Justice has competence in these matters has been neither questioned nor otherwise criticised.

Article 10 – Procedures for transmitting a European arrest warrant

The Commission notes in its report that Denmark is one of those Member States which has not *specifically* transposed Article 10(6), which states that, if an authority which receives a European arrest warrant is not competent to act upon it, it shall automatically forward the warrant to the competent authority in its Member State.

It is a basic principle of Danish law – enshrined in Section 7(2) of the Public Administration Act – that an authority which receives any written communication on which it is not competent to act shall forward that communication to the correct authority. This also applies to any European arrest warrants which might be received by a Danish authority not competent to handle them. Thus Danish law – indeed, Danish legislation – already meets the requirement stemming from Article 10(6) of the Framework Decision, which is why it was not necessary to transpose a specific provision on this into the extradition law.

Article 13 – Consent to surrender

Article 13(2) of the Framework Decision states that Member States are to adopt the measures necessary to ensure that consent to extradition on the basis of a European arrest warrant is established in such a way as to show that the person concerned has expressed consent voluntarily and in full awareness of the consequences.

Regarding Denmark's implementation of this provision, the Commission comments that Danish legislation does not contain any specific reference to consent being "voluntary".

Denmark would observe that the expression "consent" ("*samtykke*") means a free expression of will by the person whose extradition is sought. Thus there is no need to add in the legislation that consent must be voluntary.

Furthermore, Section 18c of the extradition law states that consent to extradition may be given only at a court hearing, and that the court shall provide guidance to the requested person on the consequences of giving consent.

Denmark therefore does not accept that the Commission has found grounds to comment on the Danish legislation transposing this provision.

Article 14 – Hearing of the requested person

The Commission states that all Member States have implemented Article 14 correctly. However, in relation to Denmark it comments that a full hearing before a court is possible only if the requested person brings the Ministry of Justice's decision on extradition before a court.

The Commission's interpretation of Danish implementation of the Framework Decision on this point is not correct.

Article 14 of the Framework Decision states that where the arrested person does not consent to his or her surrender as referred to in Article 13, he is entitled to be heard by the executing judicial authority in accordance with the law of the executing Member State.

Section 18b(1) of the extradition law states that unless the Minister of Justice finds on the basis of information contained in the European arrest warrant itself that extradition should be refused, the warrant shall be sent to police with a view to the investigation necessary to determine whether the conditions for extradition have been met. In the investigation the provisions of Book 4 of the law on the administration of justice shall apply *mutatis mutandis* (the provisions relate to the administration of the criminal law, including Section 750, pursuant to which the police can undertake hearings but cannot oblige anyone to make a statement, and Section 751, which obliges the police to attach any statements which have been given to their report).

When the police have completed their investigation by virtue of Section 18b(1), the question of extradition is referred to the Ministry of Justice for decision (see Section 18b(4) of the law).

The Ministry of Justice's guidance of 19 December 2003 to the police and Prosecution Service on the handling of requests for the extradition of offenders on the basis of a European arrest warrant also states that the clear starting point when handling extradition cases on the basis of such a warrant will be that – as far as possible – the police will hear the person whose extradition is sought. The guidance also states that the requested person – under Article 14 of the Framework Decision - has the right to be heard if that person does not give their consent to the extradition, and that accordingly, in connection with the abovementioned investigation, the police should inform the person of that possibility, and organise a hearing if the requested person so wishes. Material from the hearing must be sent to the Ministry of Justice along with the police's opinion on the question of extradition.

The Ministry of Justice's assessment of whether extradition can take place is thus on the basis of an investigation undertaken by the police, which will include a hearing of the requested person, on condition that that person – in accordance with the abovementioned provision of Section 750 of the administration of justice act – has voluntarily asked to be heard. Furthermore, the requested person or his lawyer is always able to present observations on the question of extradition to the Ministry of Justice.

Given the above, Denmark finds that it has implemented Article 14 of the Framework Decision in full.

Article 16 – Multiple requests

Regarding Denmark's implementation of Article 16 of the Framework Decision (on decision in the event of multiple requests) the Commission states that Denmark has not specifically transposed this provision in its legislation. Denmark has stated that in the case of competing requests, the Ministry of Justice as competent authority will decide which request is to be complied with, taking into account the circumstances referred to in Article 16 of the Framework Decision. The Commission adds that this is not binding.

Denmark does not accept the Commission's remark. The reasons for the Danish view are as follows:

As indicated in relation to Article 4 above (tax offences) there is no requirement for framework decisions to be implemented in the national legislation of the Member States by specific legal provisions. What is important is that individual Member States should meet the aims of the Framework Decision. The question of whether this requires the use of specific provisions must depend on the legal system and legislative traditions of the individual Member State.

In the Danish legal tradition there is no need for an international obligation with the content of Article 16 of the Framework Decision to be stated in a specific legal provision. As a result of Denmark's participation in the Council's adoption of the Framework Decision, Denmark is already committed towards the other EU Member States to take account of the circumstances set out in Article 16 of the Framework Decision when deciding on competing extradition requests. This commitment must of course be observed whether or not a provision on this has been transposed into Danish law.

Articles 18 and 19 – Situation and hearing the person pending the decision

In its report the Commission states that Denmark has not specifically transposed these provisions into its legislation, and that it is not sufficient that Denmark has stated that the provisions will be carried out in practice. The Commission again states that proper transposition requires binding provisions.

Denmark does not agree with the Commission's conclusion as regards Danish implementation of Articles 18 and 19.

Firstly, Denmark would refer to what is stated above in relation to Article 4 (tax offences), namely that Member States are not obliged to transpose framework decisions by specific legal provisions, but that what matters is that individual Member States should fulfil the aims of a framework decision, and that it therefore depends on the national legal system of the individual Member State whether there is a need for actual legislation.

Furthermore, Section 21a(1) of the Danish extradition law states that a person who is detained in a foreign country and who has been extradited to Denmark with a view to prosecution there shall be transferred to the foreign state from which he was extradited when the prosecution has been concluded. Thus there is a clear legal provision in the extradition law which ensures that Denmark can fulfil the obligation stemming from Article 18(3) of the Framework Decision.

As regards the other parts of Article 18, under Danish law there is no need for any further provisions in order for Denmark to make use of them. Temporary transfer of the requested person *from* Denmark (see Article 18(1)(b) of the Framework Decision) will only be able to occur in accordance with the rules on extradition to an EU Member State laid down in Chapters 2a and 3a of the Danish extradition law.

Regarding hearing of the requested person in accordance with Article 18(1)(a) and Article 19 of the Framework Decision, it should be pointed out that it is already part of Danish legal practice that a hearing can take place in this situation by analogy with the provisions on criminal justice in the law on the administration of justice. Hearings will be undertaken by a Danish police officer observing the guarantees stemming from the law on the administration of justice, including that the requested person is entitled to be assisted by a defence lawyer and that the requested person has the right to remain silent (see Section 750 of the law on the administration of justice).

Denmark must therefore clearly reject the Commission's criticism of Denmark's implementation of Articles 18 and 19 of the Framework Decision.

Article 20 – Privileges and immunities

The Commission states that Denmark has not specifically implemented the whole of Article 20, and that transposing legislation is particularly necessary to ensure that time limits are respected.

Denmark does not agree with the Commission's criticism on this point. The reasons are as follows:

Article 20(1) of the Framework Decision states that where the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to in Article 17 shall start running only from the day when the executing judicial authority is informed of the fact that the privilege or immunity has been waived. Article 20(2) states that where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing judicial authority shall request it to exercise that power forthwith.

Under Danish law the use of Article 20(2) does not require national legislative provisions or the establishment of other specific provisions. The executing judicial authority in Denmark, i.e. the Ministry of Justice, will already (as a result of Denmark's participation in the adoption of the Framework Decision) be immediately obliged – where relevant – to make the request referred to in Article 20(2).

Regarding the question of observing the time limits laid down in the Framework Decision, reference should be made to Section 18d of the Danish extradition law, which states that the decision of the Ministry of Justice on whether extradition may take place on the basis of a European arrest warrant shall be taken as soon as possible and in any event within 10 days of the date when the requested person was detained in Denmark or gave his consent to extradition. Furthermore, if the Ministry of Justice's decision on extradition is referred to court, the court's final judgment must where possible be delivered within 60 days of the date when the person was detained in Denmark. This provision will also apply to the handling of European arrest warrants by the Ministry of Justice and the courts in cases where the requested person is covered by privileges and immunities in Denmark.

Article 21 – Competing international obligations

Denmark does not have a specific provision in its legislation transposing this Article. In this context, the Commission referred to its general comments at the beginning of the report stating that, in its view, the implementation of framework decisions in the national legislation of the Member States requires the use of binding provisions.

Denmark does not agree with the Commission's view. Please refer to Denmark's comments on Article 16 (multiple requests) above.

Article 23 – Time limits for surrender of the person

The Commission states that the provision on postponement of surrender of the requested person for serious humanitarian reasons has not been fully transposed by Denmark. The Commission refers to Denmark having no provision requiring the issuing authority to be informed of the postponement or for arranging a new date for surrender.

Denmark would point out that it follows from Section 10i of the extradition law that extradition shall be postponed if it must be accepted that it would be incompatible with humanitarian concerns. Extradition must be postponed until the special conditions preventing extradition no longer apply. Furthermore, it is evident for example from the comments accompanying the draft law (Section 10i) that the provision is a result of Article 23(4) of the Framework Decision, and that the judicial authorities of the Member State concerned shall be informed of the postponement at once, and a new date for surrender agreed if possible.

Please also refer to the comments under Article 4 (tax offences) above, concerning Member States' implementation of framework decisions in national law and the significance which comments on the law have for the Danish authorities' administration on the basis of the law.

Denmark therefore does not agree with the Commission's criticism as regards Article 23.

Article 27 – Possible persecution for other offences

The Commission states in its report that Denmark has not fully transposed Article 27(4), since Danish legislation does not mention the 30-day deadline for making a decision on consent or refusal of a request for there to be a prosecution of offences committed before the extradition, other than the one on which the extradition decision was based.

Denmark would point out that Section 20 of the extradition law states that a decision can be made that a person extradited under the extradition law may be prosecuted for an offence other than the one for which he was extradited. As a result of the obligation to the other EU Member States which follows from Article 27(4), Denmark will of course make such decisions within 30 days of receipt of the request.

Article 28 – Surrender or subsequent extradition

In the Commission's view, Denmark has not fully transposed Article 28. The Commission states that there is no reference to Article 27(3)(e) as referred to in Article 28(2)(c).

Here too, Denmark must reject the Commission's criticism.

Article 28(2)(c) of the Framework Decision states that a person who has been surrendered to the issuing Member State pursuant to a European arrest warrant may, without the consent of the executing Member State, be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant issued for any offence committed prior to his surrender under any circumstances if the requested person is not subject to the speciality rule, in accordance with Article 27(3)(e).

Article 27(3)(e) means that the speciality rule is not applied if the person extradited has consented to surrender, possibly at the same time as he renounced the speciality rule in accordance with Article 13 (which states that consent, and if appropriate renunciation of entitlement to the speciality rule, shall be given to the executing judicial authority in accordance with the domestic law of the executing Member State).

It should be pointed out that Section 10j(3) of the Danish extradition law states that an extradited person can subsequently be extradited to a third Member State without the authorisation of the Minister of Justice if, in connection with consenting to extradition to the Member State in which the extradition took place, he has given his consent to being held responsible and subsequently extradited to a third Member State for criminal acts committed before extradition other than that for which he has been extradited (see second sentence of Section 18c – a person can give his consent at a court hearing to being held responsible and further extradited to a third Member State for criminal acts committed before extradition other than that for which he is being extradited).

In Denmark's view, this provision includes a correct and full transposition into Danish law of Article 28(2)(c) with Article 27(3)(e), taken with Article 13.

Article 29 – Handing over of property

In its report the Commission states that Denmark has only partly transposed Article 29(2) of the Framework Directive (on the handing over of property required as evidence or which has been acquired by the requested person as a result of the offence, even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person), and that Denmark has not transposed Article 29(3) of the Framework Decision (on temporarily retaining or conditionally handing over property required as evidence or which has been acquired by the requested person as a result of the offence, if there are pending criminal proceedings in the executing Member State).

Denmark does not agree with the Commission's criticism since Section 18(f) of the Danish extradition law states that chattels that have been seized during the case shall, if so requested and subject to any third parties' rights, be transferred to the requesting authority if they constitute evidence or they originate in the offence. In the comments on provision it also states that this provision is a consequence of Article 29 of the Framework Decision, and that handing over of property requires a decision to have been taken to extradite the person in question. However, property must be handed over even if a decision on extradition cannot be executed because the requested person has died or escaped. It also states that property to be handed over to another Member State by virtue of Section 18f may be temporarily retained or handed over on condition that it is subsequently returned.

Please see comments on Article 4 (tax offences) above as regards the significance of comments on a draft law.

Overall, Denmark therefore maintains that there is no basis for the criticism of its transposition of the Framework Decision on the European arrest warrant and the surrender procedures between Member States which the Commission has put forward in its report.

4. COMMENTS BY THE GERMAN DELEGATION

The Commission seems to take the view that the provisions of both Articles 16 and 21 require legal transposition. The German delegation would disagree.

In the case of decisions on multiple requests (Article 16), the criteria laid down in the Framework Decision are observed as a matter of course, without the need to prescribe this in law. The rule basically corresponds to Article 17 of the European Convention on Extradition of 13 December 1957. The German judicial authorities will continue to take appropriate decisions "with due consideration of all the circumstances" (Article 16 of the Framework Decision) – as they have done for years with regard to Article 17 of the Council of Europe Convention.

Nor is legal transposition required for what is prescribed in Article 21 concerning competing international obligations. Of course, upon receipt of a European arrest warrant for a person covered by the "speciality rule", since being extradited by a third State, that State's consent to re-extradition will be sought forthwith, as in the past. This is the only means of fulfilling the obligations regarding execution of the European arrest warrant which ensue from the Framework Decision and which are, of course, incorporated into German transposition legislation (e.g. section 79(1) of the IRG [*Law on international legal assistance in criminal matters*]).

5. COMMENTS BY THE ESTONIAN DELEGATION

The Republic of Estonia has implemented the European arrest warrant and the surrender procedures between European Union Member States since July 1, 2004, as the new Code of Criminal Procedure was enacted in Estonia since that date. Surrender procedure is one part of the mentioned Code (CCP 19th chapter 8th section). The Republic of Estonia has also previously informed the Council of European Union of the abovementioned two-month delay in the implementation of the EAW. Since the surrender procedure forms one part of the entire Code of Criminal Procedure, certain aspects, which have been established by the present framework decision, were implemented not in the section dealing with the surrender, but in some other section (cf. subsequent more detailed commentaries).

The concepts of *crime attempt and complicit acts* are established in the Code of Criminal Procedure, and utilizing the concept *crime* in the criminal procedure, it also encompasses both crime attempt and complicit acts, etc., therefore the conclusion of the Commission that in Estonia in case of 32 crimes the control of the bilateral punishability is not taken into account is incorrect.

Given the size of Estonia, or more precisely the fact that it is one of the smallest Member State, Estonia considered it rational taking into account the speed and efficacy of the surrender procedure to leave and assign to the Ministry of Justice as central authority several concretely bounded functions: transmission of EAWs to other Member States, and reception of EAWs coming from the other Member States to the competent judicial authorities together with the obligation to translate EAWs into the Estonian language or the language determined by the Member State. We are also of opinion that given the stringency of resources and the availability of the complete necessary information in the Ministry of Justice, it is rational to delegate to the central authority also certain bounded decision powers: submission of EAWs for the execution of custodial sentences, postponement of surrender and in case where the EAW and extradition request presented in relation to the same person making the decision, which application is subject to execution.

As concerns the 32 crimes mentioned in the Article 2(2) of the framework decision, in case of which the double criminality is not verified, the Estonian legal terminology has only one concept – väljapressimine, as the counterpart to the English-language terms *racketeering* and *extortion*, therefore emanating from the linguistic differences it was impossible for Estonia to elicit the two English-language terms as the same repeated Estonian-language concept; the English-language term *laundering of proceeds of crime* was expressed in the Estonian language as the one-word concept rahapesu, and in the case of smuggling the cultural values the Article 107 of the Estonian Penal Code describes the concept of the cultural values, which accommodates both antiquities and work of art.

As mandatory ground, presented in the Article 4(6), is applied in Estonia as pertaining to the citizens of Estonia.

The guarantee presented in the Article 5(3) is applied in Estonia exclusively as pertaining to the citizens of Estonia.

Article 17(7) – the obligation to inform the Eurojust of the surrender procedure, which has lasted for more than 90 days and where Estonia has not been informed of the reasons of delay, was not indeed included in the corresponding legal act, but leaning on the framework decision Estonia has already once informed the Eurojust of the similar situation, therefore Estonia always utilizes the opportunity established by the framework resolution in case of necessity.

Articles 18 and 19 have been implemented in relation to the EAWs presented to Estonia (§ 502 Code of Criminal Procedure), at the same time, Estonia's internal legislation cannot determine the prescriptions for the order of procedures of the EAWs sent out of Estonia. Numerous aspects mentioned in the Articles 18 and 19 of the framework decision can be solved on the basis of the Convention on Mutual Assistance in Criminal Matters.

The legal basis for the provisions of the Article 20 (2) is established by the 14th chapter of the Code of Criminal Procedure (§ 375-382).

Article 21 is established in the part of the Code of Criminal Procedure concerning the extradition.

Article 22 is established in by § 503 section 7 of the Code of Criminal Procedure.

The conclusion of the Commission that on the basis of the Article 23 the agreement on the appropriate deadline of surrender and in case of necessity the agreement on the new deadline is in the competence of the central institution is incorrect. The current legislation of Estonia does not establish any role for the central institution in the practical arrangement of the surrender.

Article 25(5) – the appropriate transit of the extradited person from the third country is established in the part of the Code of Criminal Procedure concerning the extradition.

The possible prosecution for other offences, mentioned in the Article 27 is conducted in Estonia on the basis of the same rules and within the same deadlines as the conventional surrender procedure, the total length of which in accordance with the internal legislation cannot exceed 30 days envisioned by the framework decision.

Article 28 has been implemented in Estonia in the § 494 of the Code of Criminal Procedure.

Article 29(1) – Estonian judicial authority can seize property on its own initiative on the basis § 126 of the Code of Criminal Procedure, therefore it was not rational to repeat the regulations in another paragraph of the same Code. The Code is applicable is the single legal act.

The position of the Commission that costs of return the property by the issuing state are levied on an ad hoc basis is incorrect – the Estonian legislation does not contain such provision.

In order to avoid the abovementioned misunderstandings in the future, Estonia opines that it would be rational prior to the confirmation of the Commission's reports provide the Member States with the opportunity to familiarize with the report drafts and liquidate the contradictions they contain already in the process of the preparation of the report.

6. COMMENTS BY THE GREEK DELEGATION

The Commission states that Greece has transposed its legislation in relation to Recital 12 in such a way, that goes beyond the Framework Decision and therefore creates the risk that an EAW will be refused on the basis of grounds not envisaged in the Framework Decision.

The Greek Law 3251/04 provides in Article 11 point e for a mandatory non execution ground a case where the EAW has been issued for the purpose of prosecuting or punishing a person on the grounds of his/her sex, race, religion, ethnic origin, nationality, language, political opinions, sexual orientation or his/her activities for freedom. This provision is in accordance with the rule laid down in recital 12 of the FD and the last indent of par.2 Article 5 of the Greek Constitution.

Regarding the double criminality list of Art.2(2) of the FD the Commission states that in the Greek transposing text there is no reference to "racketeering".

The Greek legislator considered that the meaning resulting from the translation of "racketeering" (unlawful protection in order to gain illegal profit) is covered by the crime of extortion and therefore need not to be concluded in the list.

Furthermore the Commission states that in the Greek transposing text some of the categories of offences are in fact wider than in the FD, e.g. illicit trading and trafficking in drugs, corruption and bribery.

According to Greek legislation trading of drugs and trafficking in drugs are two different crimes, so the legislator thought that both should be concluded in the list. Regarding the crime of bribery, this is included in the wider meaning of the term "corruption". In this latter term are also other crimes included, so the legislator considered as appropriate to put also the crime of corruption in the list, so as to cover with its wideness other crimes relevant to bribery. It's worth mentioning that in the Greek version of the Framework Decision is used the word "δωροδοκία" which means bribery, while in the English version is used the word "corruption".

7. COMMENTS BY THE SPANISH DELEGATION

Remarks concerning the Commission's Report

The information contained in the Annex in what refers to the Spanish legislation responds, in general terms, to the content of the Spanish provisions implementing the Framework Decision.

However, in page 7, the Report does not make referent to the Spanish legislation as regard to the inclusion of attempt and complicity in the list of offence for which double incrimination is abolished, in application of Article 2 of the Framework Decision. The Spanish penal Code punishes the crimes, including attempt and complicity, without prejudice of taking into account the differences between them in order to decide the penalty to be imposed. Therefore, in accordance with the Spanish law, attempt and complicity are considered in the same way when the list of categories of offences is applied.

8. COMMENTS BY THE FRENCH DELEGATION

At the meeting of the Working Party of Experts on the European arrest warrant on 15 March 2005, the Presidency invited delegations which so wished to send their written comments on the report drawn up by the European Commission under Article 34 of the Framework Decision on the European arrest warrant.

The French delegation would like to make the following comments.

The report comprises a detailed document setting out, for each provision of the Framework Decision, the transposition choices adopted by the Member States, and a summary document highlighting the main difficulties noted by the Commission.

In terms of method, although exchanges took place between the Commission and experts from the Ministry of Justice to make additions and clarifications to the content of the implementing law of 9 March 2004, the submission of the report itself was not preceded by any communication of the draft to the French authorities. The French delegation considers that it would be desirable in the future for the Commission, prior to submitting its report, to send each of the Member States concerned, a list of the points for which it was considering presenting comments amounting, directly or indirectly, to a finding of non-compliance. Such communication would enable those Member States to provide explanations which could enlighten the Commission in its understanding of the national legislation.

On a more general level, the French delegation welcomes, once again, the quality of the work carried out by the Commission on the European arrest warrant. It hopes that, on this priority subject, consultation between the Member States and the Commission can continue to grow, also covering the operational aspects connected with the effective implementation of the instrument, and bringing in Eurojust. Regular discussions, in the Article 36 Committee and, where necessary, in the JHA Council, will enable us to move forward towards a genuine evaluation system linked to the relevant provisions of the draft Constitutional Treaty, while registering a concern for overall balance.

On the content, two grievances are raised concerning the implementing legislation adopted by France. They relate, firstly, to the abolition of the check on double criminality, and secondly, to the time allowed to French courts to act on the execution of European arrest warrants issued in another Member State. The French delegation has comments to make on both of these.

1. On the check on double criminality

The Commission considers that "obligations were breached by those Member States which reduced the substantive scope as regards either the minimum thresholds for sentences (...), or certain categories of offence, for which they have reintroduced (...), or **created the risk of reintroducing (...), FR), a check on double criminality.**" (COPEN 42, page 3; annexed document, Article 2, pages 6 and 7.)

With regard to France, the Commission considers that certain categories of offence in the Framework Decision have not been transposed or have been regarded as included in others. More specifically, the Commission criticises the French authorities for having made no reference to "racketeering", which the Framework Decision includes in the same category as extortion.

In reply to the Commission's comments, we would point out that the term "racketeering" was deleted from the text during the parliamentary debates for several reasons.

The first of those reasons is linguistic. The word "racket" does not exist in French. Furthermore, the only term which comes close to it is "extorsion" [extortion]. To transpose a meaningless word into French law would itself have been meaningless both as regards faithfulness to the Framework Decision and as regards the effectiveness of the European arrest warrant.

A second reason relates to the scope of the offence of extortion in French criminal law. Far from being limited to the acquisition of money, the crime of extortion covers, in addition to the acquisition of money by violence, threat of violence or coercion, the acquisition by those means of a signature, an undertaking, a relinquishment, the disclosure of a secret, or the handing over of shares or assets of any kind (Article 312-1 of the Penal Code).

It thus seems clear that the French word "extorsion" refers to a legal reality which encompasses what is covered by "racketeering" as well as the extortion of money.

Far from being contrary to the Framework Decision, the term "extorsion" is perfectly in line with it.

Moreover, the risk of reintroducing the check on double criminality referred to by the Commission seems to be unfounded. The Framework Decision encompasses, in the same categories of offence, both "racketeering" and extortion. Therefore, the indication by a foreign judicial authority that the acts fall into this category, without further specification, will have no consequence with regard to the risk of checking of double criminality by the French authorities.

2. On the time limits for executing European arrest warrants

The Commission notes, in 2.2.2, that "in the event of an appeal, some Member States have not agreed to put a time limit on their higher courts (...), or have set a maximum period for the proceedings which exceeds the norm of 60 days (...) **or even the ceiling of 90 days (FR)**. It should be noted in this respect that a domestic appeal is not in itself an exceptional circumstance (Article 17(7))". (page 6 of the Report).

Firstly, the assertion that an appeal to the Court of Cassation, which in French law constitutes extraordinary redress, cannot be regarded as an exceptional circumstance is a questionable premise, not sustained by argument in the Commission's analysis.

Also, the time limits laid down by the legislature are, in any case, less than the 90-day time limit referred to by the Commission. It should be pointed out that when the investigating court (the judicial authority responsible for ordering the surrender of a wanted person on the basis of a European arrest warrant) has delivered its decision (a maximum of 27 days after the person's arrest), that decision may be appealed against within a time limit of three clear days, whereupon the Court of Cassation must rule within a maximum of 40 days. It is therefore incorrect to state that the organisation of the appeal procedure by the French legislature in the matter of European arrest warrants in itself involves exceeding the 90-day ceiling.

Although the cumulation of the various time limits laid down in the Law of 9 March 2004 may slightly exceed the 60 days provided for in Article 17(3) of the Framework Directive, it should be pointed out that these are maximum time limits, and European arrest warrant execution procedures lead to a final decision within 60 days of arrest in almost all cases even in the event (exceptional in practice) of an appeal to the Court of Cassation.

The statistics available illustrate the wholly exceptional nature of any overrun of the time limits allowed to French courts for a decision. Since the entry into force of the European arrest warrant, 48 appeals have been lodged with the Court of Cassation. The time limit was exceeded on two occasions, reported to Eurojust. While these were both cases in which the wanted persons had filed an appeal, it can nevertheless not be inferred that the way in which the French legislature has framed the appeals procedure regarding the European arrest warrant has created a maximum time limit exceeding the 90-day ceiling.

Lastly, we deplore the fact that this part of the Commission's report relating to the time limit for the execution of a European arrest warrant, contains no analysis whatsoever of the situation of Member States whose replies to the statistical questionnaire reveal a greater number of overruns of the 90-day ceiling.

9. COMMENTS BY THE IRISH DELEGATION

Ireland welcomes the opportunity to respond to certain matters raised in the abovementioned documents. The comments below relate only to some of the matters about which Ireland is most anxious to allay any mistaken impressions about its legislation and practice.

A. The MAIN REPORT (Commission document COM (2005) 63 final {SEC (2005) 267})

1. Paragraph 2.1.1 (Attempted and complicit acts)

When dealing with the implementation by Member States of Article 2.2 of the Framework Decision, the report states: " It remains regrettable that a few Member States thought it (i.e. the abolition of dual criminality for offences on the 'positive list') did not cover attempted and complicit acts". Ireland is one of two Member States mentioned in that regard. The source of this view is not stated and is unknown to the Irish authorities.

Irish law does not include any provision for looking behind the 'ticked box' on the EAW so, as a result, the position is that, as executing state, Ireland accepts the issuing state's position as set out on the EAW concerned, i.e. it is a matter for the issuing state to determine whether a particular offence comes within the list in Article 2.2 of the FD.

As issuing state, Ireland has regard to its own law in relation to such offences and completes the relevant parts of the EAW accordingly.

2. Paragraph 2.1.2 (Role of Central Authority)

In this paragraph, the report notes that in Ireland "the decision-making powers conferred on central authorities exceed the simple facilitating role permitted by the FD". Although the report gives no further details of the issue(s) in question, it is noted that the Staff Working Document, when dealing with Articles 7, 27 and 28 of the FD, refers to the powers given to the Irish CA in relation to the consent required by Articles 27 and 28 of the FD.

Ireland's legislation on this matter has been amended* and the powers to give consent are now vested in the judicial authority. [* see Part 8 of the Criminal Justice (Terrorist Offences) Act 2005]

The Commission Staff Document (when dealing with Art 7) also refers to the role of the CA in relation to agreeing a new date for surrender, where surrender had been postponed in accordance with Article 24 of the FD. The role assigned to the CA in this regard under section 18(4) of Ireland's law is administrative rather than executive.

3. Paragraph 2.2.1 (Mandatory grounds for refusal)

It is stated in the second paragraph of this section of the report that there are deficiencies in Ireland's implementation of the mandatory grounds for refusal set out in Articles 3.1 and 3.2 of the FD.

The position under Irish law in relation to these matters was explained in replies to questions 9 and 34 of the Commission's questionnaire addressed to Ireland (reply issued by email on 1 Sept '04). That information does not appear to be reflected in the Commission's report.

For the avoidance of doubt all of the mandatory grounds for refusal as set out in Article 3 of the Framework Decision are fully implemented in Ireland's legislation by means of, inter alia, sections 15(1)(c) and 16(1)(e) of the European Arrest Warrant Act 2003 which provide that the executing judicial authority must be satisfied, inter alia, that "the surrender of the person is not prohibited by the Framework Decision (including the recitals thereto)" before making an order for their surrender.

4. Paragraph 2.2.2 (Number of offences per EAW)

The report states that "some Member States impose requirements not provided for in the FD, such as the obligation ... to issue a separate warrant for each offence (IE)".

That is an incorrect statement of Ireland's law. Attention is drawn to sections 11(4) and 33(4), both of which state, in relation to EAWs received by and issued by Ireland, respectively, that a warrant may be in respect of "one or more than one offence". In addition, section 17 of Ireland's law provides that surrender may be granted in respect of some but not all of the offences on the EAW in cases where several offences appear on a single EAW.

B: COMMISSION STAFF WORKING DOCUMENT (Annex to the Report from the Commission) COPEN 42 ADD 1 {SEC(2005) 267}

1. Article 9 (Transmission of an EAW)

The document states that "in spite of the general philosophy of the FD IE does not allow an EAW to be transmitted directly (between judicial authorities) where the location of the person is known".

Ireland has taken account of the organisation of its judicial system and has availed of the possibility of having CAs, as provided by Article 7.2 of the FD. Ireland's requirement that transmission, etc should be effected via its Central Authority is not, therefore, repugnant to nor is it at variance with the terms of the FD.

2. Article 17 (Time limits, etc for decision to execute the EAW)

The document states that "IE does not provide a deadline for the taking of the decision following consent". It will be noted that Article 17.2 requires only that the decision should be taken within 10 days – the FD does not state that it shall be taken within that period.

The document adds that Ireland "cannot meet the 10 day deadline in paragraph 2 (of Art 17) since its final decision will not take effect within the aforementioned deadline, but rather upon its expiration". This statement appears to confuse the position between the execution of the decision to surrender the person (section 15(5) of Ireland's law) and the taking of the decision.

In relation to the period between the making of the surrender decision and its execution, the revised law (referred to at A.2 above) now provides that surrender may take place earlier than the deadline for its execution if the person so requests and the Court agrees.

10. COMMENTS BY THE CYPRUS DELEGATION

In Document COPEN 42, on page 5, the following, in our opinion, inaccurate statement is made:

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

Moreover on page 6, second paragraph, it is mentioned that:

“In relation to recital 12, EL and CY refer to an activity in the cause of freedom which is wider than the possibilities covered in the recital and which therefore creates the risk that a refusal will go beyond the Framework Decision”.

Moreover, in Document COM (2005) 63 final, Report from the Commission based on Article 34 of the Council Framework Decision, on page 5, second paragraph, the following is mentioned:

“However legitimate they may be, however, apart from where they exceed the Framework Decision (EL, IE, CY) these grounds should be invoked only in exceptional circumstances within the Union.”

As we pointed out on the 15th March, during the meeting of the Working Party on Cooperation in Criminal Matters (Experts on E.A.Ws), the Cyprus implementing law does not, we believe, go beyond the Framework Decision as it merely provides, in section 2(2) that:

“The implementation of the provisions of this Law shall not have the effect of violating the obligation to respect fundamental rights and fundamental legal principles, according to section 6 of the Treaty of the European Union. In any case, the requested person shall not be extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

The above provision, we believe, strictly implements article 1(3) of the Framework Decision, as well as Recital 13.

11. COMMENTS BY THE LATVIAN DELEGATION

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

Since this Article is optional Latvia has chosen not to transpose the optional ground of non-execution as provided in Paragraph 1 of this Article.

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

Since the transposition of Article 5 of the Framework Decision is not mandatory unless the Member States consider it necessary to require the guarantees provided therein Latvia has opted not to require the guarantees provided in Paragraph 1 of this Article.

Article 8 – Content and form of the European arrest warrant

The Commission has noted that Latvia has not provided for the inclusion of aliases in its form unlike in the form in the annex to the Framework Decision.

Originally the line “aliases” was intentionally omitted in the form which is an annex to Latvian Criminal Procedure Code. This was done because according to Latvian forensic registration in cases where the person has been using several names (he/she has had several documents of identification) all the person’s names shall be indicated in the line “name” or “surname” separated with a word “also” or with a Latin word “alias”. Therefore, according to Latvian standards there was no need for a separate line “aliases” in the form of European arrest warrant.

However, in practice there were some problems of co-operation identified because other Member States considered the European arrest warrant issued by Latvia to be incompatible with the requirements because technically there were less lines than in the form in the annex to the Framework Decision. Therefore, the Ministry of Justice of Republic of Latvia sent a sample form, which was identical to the one in the Framework Decision, to the Courts Administration for distribution to all the judicial authorities in Latvia in order to use it as a standard form for requesting surrender from EU Member States.

On April 21, 2005 a new Criminal Procedure Law was adopted in Latvia, it will enter into force on October 1, 2005. The Criminal Procedure Law does not include an exact sample of the form. Its Article 693 only stipulates what mandatory information should be included in the European arrest warrant:

“Article 693. European arrest warrant

European arrest warrant shall state:

- 1) information on the identity and nationality of the person requested;
- 2) decision on which the European arrest warrant was issued;
- 3) type of the offence, its legal qualification and the applicable provision of the Law;
- 4) circumstances in which the offence was committed;
- 5) consequences of the offence;
- 6) the sentence adjudged, if the decision is final, or the limit of the sentence that may be imposed for the offence;
- 7) material evidence or documents that must be seized and handed over;
- 8) name, address, phone and fax No., and e-mail address of the court that made the decision.”

In practice, also after the entry into force of the Criminal Procedure Law, the same form (which is identical to the one in the Framework Decision), that was distributed by the Courts Administration to the judicial authorities, will be used in Latvia.

Thus in practice it is ensured that the judicial authorities in Latvia currently use the form of the European arrest warrant as stipulated by the Framework Decision and they will continue using the same forms when the newly adopted Criminal Procedure Law enters into force.

Article 13 – Consent to surrender

The Commission has stated that there are some shortcomings in Latvian law transposing this Article, in particular, concerning vague procedural rules.

Paragraphs 1, 2, and 3 have been transposed into Article 506.1, Paragraph 2 of the Criminal Procedure Code which provides that: “The person to be surrendered shall express to the prosecutor in the presence of a defence lawyer his or her consent to surrender and the renunciation of entitlement to be charged and sentenced only for the offences he or she is being surrendered for. The minutes shall be kept of the proceedings.” This provision stipulates the authority to which the person shall express the consent, and it sets forth the mandatory presence of a defence lawyer. This prevents the possibility of forcing the person to consent and eliminates the possibility that the person might not understand the consequences. Besides, the provision also stipulates that the minutes of these proceedings shall be kept. Furthermore, the person to be surrendered is ensured all the rights enshrined in Article 491 of the Criminal Procedure Code, i.e., 1) to know who and on what basis is requesting his or her surrender; 2) to use a language he or she understands during the procedure of surrender; 3) to present explanations connected with surrender; 4) to put forward requests; 5) to get acquainted with all the materials of examination; 6) to request a defence lawyer of the Republic of Latvia to provide legal aid.

Paragraph 4 is explicitly transposed into Article 506.7, Paragraph 1 which provides for the following: “The decision on surrender is not subject to appeal if the person has consented to surrender”.

The aforementioned provisions have also been incorporated into the newly adopted Criminal Procedure Law. With regard to the “speciality rule” in Article 13(1) the newly adopted law, which is differently structured, provides for additional provisions:

“Article 759. Imposing a valid Verdict of a Foreign Country in Criminal Proceedings Taking Place in Latvia.

(1) In the case of a person transferred to serve sentence in Latvia pursuant to the request of the other country, the sentence to be served shall be determined in compliance with the procedure provided in the Latvian Criminal Law on determining sentence in accordance with several verdicts.”

and

“Article 739. Limits of Criminal Liability and Punishment under the Transferred criminal proceedings

(1) The accused shall be incriminated only those acts which are criminal under the laws of both countries.

(2) The imposed sentence shall not be more severe than that provided by the laws of the requesting country if the offence is under the Latvian jurisdiction only on the basis of the submitted request.”

Latvia considers that the provisions described above sufficiently transpose Article 13 of the Framework Decision since all the necessary procedural rights of a person to be surrendered are ensured. Neither the provisions of the currently effective Criminal Procedure Code so far have caused any problems in practice nor will the provisions of the newly adopted Criminal Procedure Law which are even more detailed in this area.

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

Paragraph 6

The Commission has indicated that Latvia has made no mention of reasoned decision to refuse the execution of EAW in the transmitted legislation.

According to the principles of Latvian criminal procedure every decision shall be reasoned (reasoning is an indispensable part of the decision). Therefore such requirement is not repeatedly stipulated in each specific Article of the Criminal Procedure Code. The general application of such principle in Latvia means that also the decision to refuse the execution of a European arrest warrant will necessarily state reasons of such decision.

PARAGRAPH 7

The Commission has indicated that Latvia has made no mention in its national legislation of the requirement to inform Eurojust if the time limits to execute the European arrest warrant cannot be observed.

First of all, Latvia's position is that violation of the time limits may not take place. According to the principles of Latvian law the procedural time limits shall always be met.

Second of all, if there are justified reasons for the delay, then according to Criminal Procedure Code the Latvian competent authority – Prosecutor General's Office – will inform thereof the competent authority in the issuing Member State.

Latvia does not see it possible not to observe the procedural time limits on a systematic basis, therefore the practitioners and the law drafters in Latvia did not find it necessary to provide a specific procedure according to which Eurojust should be informed of the delays.

Article 24 – Postponed or conditional surrender

The Commission has indicated that Latvia has transposed correctly only article 24(1), and does not provide for temporary surrender pursuant to article 24(2).

Article 506.8, Paragraph 3 of the Criminal Procedure Code provides a possibility for the competent authorities to agree upon other time for surrender: "The Prosecutor General's Office shall inform the competent authority of the Member State of European Union of the decision to postpone the surrender and it will agree upon other time for surrender of the person." The possibility to temporary surrender a person is provided in Article 506.3 of the Criminal Procedure Code: "If the Member State of the European Union has issued a warrant in order to ensure the person's prosecution, before the decision is taken to surrender the person or not, the Prosecutor General's Office, upon request of the judicial authority of the Member State, shall interrogate the person under the presence of a person chosen by the judicial authority of the Member State, or shall agree to temporarily surrender the person having determined the time when the person must be returned."

Article 24(2) of the Framework Decision provides for that "the executing judicial authority may temporarily surrender the requested person" which means that this is not mandatory. Therefore Latvia considers that every Member State may decide whether such a possibility should be provided in its national law. However, the provisions of Latvian Criminal Procedure Code provide sufficient possibilities for mutual agreement between the competent authorities, including temporary surrender.

Article 27 – Possible prosecution for other offences

The Commission has stated that Latvia has not transposed exceptions b), c), d), and e) under Article 27(3) and neither has it transposed provisions on requests for consent under Article 27(4).

Latvia does admit the shortcomings of transposing the provisions of Article 27(3). Originally there were no specific national provisions drafted because according to Latvian Criminal Law those would be the least serious crimes which are not punishable by a custodial sentence, besides there are very few such crimes in Latvia. Even criminal violations (misdemeanors) are subject to deprivation of liberty for a term up to two years in Latvia.

However more specific provisions relating to Article 27(3) have been incorporated into the following provisions of the newly adopted Criminal Procedure Law:

“Article 759. Imposing a valid Verdict of a Foreign Country in Criminal Proceedings Taking Place in Latvia.

In the case of a person transferred to serve sentence in Latvia pursuant to the request of the other country, the sentence to be served shall be determined in compliance with the procedure provided in the Latvian Criminal Law on determining sentence in accordance with several verdicts.”

and

“Article 739. Limits of Criminal Liability and Punishment under the Transferred criminal proceedings

(1) The accused shall be incriminated only those acts which are criminal under the laws of both countries.

(2) The imposed sentence shall not be more severe than that provided by the laws of the requesting country if the offence is under the Latvian jurisdiction only on the basis of the submitted request.”

Latvia has not provided a specific procedure of requesting consent for prosecution for other offences as provided by Article 27(4) of the Framework Decision because such consent would have to be requested with the same type of a document as the originally sent European arrest warrant.

Therefore, Latvia is of the opinion that its competent authorities are provided with sufficient legal basis in the national legislation to operate according to the requirements of Article 27 of the Framework Decision.

Article 28 – Surrender or subsequent extradition

The Commission has indicated that Latvia has not transposed paragraph 2(a) and (c) nor 28(3).

Latvian Criminal Procedure Code provides for a possibility to prosecute or try a person for offences other than the ones for which he or she was surrendered to Latvia, provided that the person having had an opportunity to leave the territory of Latvia has not done so within 45 days from final discharge, or has returned to Latvia after leaving it. However, the person's further surrender from Latvia to a member state other than the executing state in all cases, including the ones described above, is possible only with consent of the person to be surrendered or with consent of the executing state.

Latvia agrees with the Commission that article 28(2)(a) has not been transposed correctly. This matter will be reexamined by Latvian experts drafting the amendments to the newly adopted Criminal Procedure Law. Initiation of any additional amendments on criminal procedural issues became possible very recently, since the aforementioned law was only adopted on April 21, 2005.

With regard to transposition of article 28(2)(c) see comments concerning article 27 above.

The issue of the executing state's consent to surrender to another member state according to article 28(3) is covered by article 506.6(2) of the Criminal Procedure Code which provides for the procedure according to which Latvia shall request the executing state's consent to surrender the person from Latvia to another member state. However, there is no specific procedure according to which Latvia shall consent to further surrender of the person to another member state because Latvian competent authorities will follow all and the same procedure regardless of the fact whether they have received a request for such consent or the European arrest warrant.

Since the rules according to which European arrest warrants are examined in Latvia correspond with the rules provided by article 28(3) of the Framework Decision, Latvian law drafters did not consider it necessary to provide any additional procedure according to which exclusively requests for consent to further surrender would be examined.

Article 29 – Handing over of property

The Commission has indicated that Latvia has not transposed paragraph 4 on rights acquired in the property

Although the provisions on handing over of property to a member state of the European Union as contained in article 506.9 of Latvian Criminal Procedure Code do not specifically provide that the property acquired by the executing state or a third party in any case shall be returned to the executing state as soon as the proceedings have been terminated, it should be noted that no provision of the Criminal Procedure Code prevents Latvian competent authorities from returning such property if it is requested from the executing state. Besides, the said article provides that the Prosecutor General's Office (in Latvia) may request the return of the property when handing it over. This indirectly means that such request can be sent to Latvia, too.

Latvia would like to point out that property rights are highly respected in Latvia and although Latvian national law does not contain exactly the same provisions as in article 29(4) of the Framework Decision no provisions of Latvian law prevent Latvian competent authorities from returning the property to the executing member state. Thus co-operation in this area is ensured within the spirit of the Framework Decision.

In addition to the comments provided above it should be noted that Latvian experts, while drafting the amendments to the Criminal Procedure Law, may decide to reexamine any of the issues raising concerns to the Commission.

12. COMMENTS BY THE LITHUANIAN DELEGATION

Art. 4(1)

The Criminal Code of the Republic of Lithuania does not specify types of taxes or customs in articles on crimes related to e. g. tax evasion. Thus the criminal laws are applied to any type of taxes or other duties, where such duty exists according to current tax legislation. Consequently, there is no legal basis to refuse a request of another state on the ground that Lithuanian laws do not provide for the same kind of tax or duty or does not contain the same type of rules regarding taxes, duties and customs and exchange regulations as the law of the issuing Member State.

Art. 4(3) Part 2

Article 217 of the Criminal Procedure Code of the Republic of Lithuania allows reopening of the pre-trial investigation, which was halted, if there is a basis for it, e. g. new crime was committed where the person was conditionally exempted from criminal liability. Therefore it is presumed that sometimes there might be serious reasons for re-establishing of previously halted criminal proceedings and the person might be surrendered to that state. The decision is taken by judicial authority in this case.

Art. 5(2)

There is a mistake in the English translation of Art. 9-1 (6) of the Criminal Code of the Republic of Lithuania. It should be read: "6. When the European arrest warrant has been issued for a criminal act, for which the laws of the issuing state provide life imprisonment, a citizen of the Republic of Lithuania or a foreigner shall be surrendered to a country issuing European arrest warrant only if the laws of the issuing state provide a possibility to apply for release from the punishment or its remittal after ~~no less~~ **not later** than 20 years of the sentence have been served."

Art. 17(2)

Art. 71-1 (2) of Criminal Procedure Code of the Republic of Lithuania states that "if the person has given his consent to be surrendered to the country issuing European arrest warrant, the decision on his surrender must be taken no later than in 10 days after the receipt of his written consent." Three day period for the judge decision (Art. 75 (3)) is counted after the request of the prosecutor for the surrender of the person is received.

Art. 23(4)

The Lithuanian delegation is of the opinion that the statement of the Commission (page 25) that "LT has not fully transposed the postponement of surrender for serious humanitarian reasons" is not accurate. This issue governed by Art. 76 (3) of Criminal Procedure Code of the Republic of Lithuania:

"3. In exceptional cases when there is substantial ground to believe that the surrender of a person would endanger his life or health or when there are any other important humanitarian reasons, a person's surrender to other country in accordance with the European arrest warrant can be postponed. After the conditions determining the delay disappear, an appropriate institution of a foreign country and the Office of the Prosecutor General of the Republic of Lithuania shall set another date of the surrender. In such case a person must be surrendered within 10 days from that day when the date was set."

Art. 25(1)

Interpretation of Art. 77-1 (2) (1) of Criminal Procedure Code of the Republic of Lithuania is misleading. Lithuanian laws allow the surrender of nationals to the EU Member States, therefore this ground will never be applied in cases of EAW. This ground is used only for extradition cases with third countries.

Art. 25(3)

Art. 77-1 of Criminal Code of the Republic of Lithuania is applicable not only in EAW cases, but also in cases of extradition to third countries cases. Therefore conditions for the transit of person depend on different legal acts. The consent for transit in EAW cases must be given anytime, except where provided by the Framework Decision and national law. In extradition cases this is subject to the conventional framework, where the transit country authorities have more possibilities to refuse the transit.

Art. 28(4)

There is a mistake in the Criminal Procedure Code of the Republic of Lithuania, but it is intended to be rectified, as it was mentioned in the Report from the Commission.

13. COMMENTS BY THE LUXEMBOURG DELEGATION

- Article 4(6) of the Framework Decision has not been transposed as a ground for mandatory non-execution of the EAW, but rather as a ground for optional non-execution (see Article 5(5) and (6) of the transposing law of 17.3.2004).
- With regard to the comment on Article 8, relating to the list of Member States which set time limits for the provision of additional information, Luxembourg should also be mentioned (see Article 6(3) of the transposing law of 17.3.2004).
- The observation that Articles 18 and 19 of the Framework Decision have not been transposed is incorrect; Article 11 of the law of 17.3.2004 provides that, where an EAW has been issued for the purpose of conducting a criminal prosecution, and consent to surrender has not been obtained, the examining magistrate, pending a decision on surrender, holds a hearing with the person sought under conditions laid down by mutual agreement with the issuing authority.
- With regard to Article 29 of the Framework Decision, it should be noted that the provisions of that Article have been transposed in full by Article 17 of the law of 17.3.2004; in accordance with the law of 8.8.2000 on international mutual assistance in criminal matters, to which it refers, the handing over of property seized is subject to the agreement of the court which rules on the surrender of the person sought, to which third parties in possession of such property or others with rights in respect of it may apply for its return.

Concerning Article 31, Luxembourg's declaration under Article 28 of the European Convention on Extradition was registered with the General Secretariat of the Council of Europe on 2.11.2004 (and published in the Official Journal of the Grand Duchy of Luxembourg on 10.3.2005).

14. COMMENTS BY THE MALTESE DELEGATION

Article 1-Definition of the European Arrest Warrant and obligation to execute it

It should be noted that in MT and UK the transposing legislation applies only to those Member States which have been listed by Decree or Order. The list refers to those Member States (referred to as "scheduled countries") which have transposed the Framework Decision. The Commission has not been informed whether these lists have been updated in line with the pace of transposition in the EU (Page 5).

The list of scheduled countries contained in L.N. 320 of 2004 is due to be supplemented by a list of those countries which to date have implemented the Framework Decision.

Article 2-Scope of the European Arrest Warrant

"17 MS have implemented the double criminality list in Art.2(2)....." (page 6). ".....15 MS have indicated to the CION that they consider double criminality to be abolished in relation to attempt and complicity in the listed offences." (page7 para2).

Article 3 – Grounds for mandatory non-execution of the European arrest warrant

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

In MT, surrender shall be refused where it would be unjust or oppressive to surrender the requested person to a Member State, where that person has been extradited to Malta from a third State. Such a refusal can occur even where the consent of the third State has been given pursuant to Article 28(4), which could be contrary to the Framework Decision if it were to go beyond Article 6 TEU or the ECHR. (Page 8 annex to report)

And

More noticeable still is the introduction of other reasons for refusal, which are contrary to the Framework Decision (Article 3: DK, MT, NL, PT, UK) ...(report)

This is incorrect since Article 16(2) of the Order refers to Article 20(b) of the relevant act, namely the Extradition Act, Chapter 276 of the Laws of Malta which states: 20. On an appeal made to the Court of Criminal Appeal or on an application for redress to the Constitutional Court under Article 46 of the Constitution of Malta, either of the said courts may, without prejudice to any other jurisdiction, order the person committed to be discharged from custody if it appears to such court that -.....

(b) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be;

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

*In relation to **paragraph 2**, some Member States have implemented this as a mandatory ground (...HU, MT (legislation is not completely clear on the matter however)...) (Page 10)*

In terms of Article 28 of the Order, when a person is charged with an offence in Malta, whether or not it is the same act on which the EAW is based, the Court must adjourn the extradition hearing until the domestic proceedings are determined, discontinued etc. Following determination of those proceedings, the Court will decide whether to execute the warrant or not. In the circumstances *ne bis in idem* might be applicable.

Article 4(7a) and (b) has been transposed...as a mandatory ground by 8 States (...MT, AT (only in respect of nationals) (Page 11)

This observation is not understood since Articles 59 and 60 do not distinguish between nationals or non-nationals.

Article 5-Guarantees to be given by the issuing Member State in particular cases

"All MSrequire the Article 5(1) guarantee. Of these MT and the UK impose additional conditions not envisaged in the FD..."(page 12)

It is not correct to say that Malta requires additional conditions. The relevant provisions of the Maltese legislation correspond perfectly with the Framework Decision's requisites and are meant to ensure that the objective of the FD is achieved by ensuring that the assurances given are adequate and consonant with Recital 12 of the Framework Decision.

Article 8 – Content and form of the European arrest warrant

MT and the UK have not indicated in their legislation all the information in Article 8(1) or whether they use the correct form. The UK has, nevertheless, stated that in practice it uses the form in the annex to the Framework Decision.(Page 14, Annex)

Although there is no specific reference to the form in the transposing legislation, there is nothing which prevents acceptance of same. Indeed it is worth noting that before the extradition hearing can commence upon receipt of a Part II warrant (the EAW) a certificate must be presented by the Attorney General which is "*conclusive of its contents*" (Article 7) stating that "*..the [issuing] authority has the function of issuing arrest warrants*" (ibid). Moreover Article 5 of the transposing legislation simply refers to an "arrest warrant" and goes on to stipulate as requisites the information contained in the Form found in the Annex of the FD. Hence there is certainly no bar to receiving the warrant in the said form which will, in any event and in turn, be certified by the Attorney General as afore-said.

As to the comment by the CION that "MT legislation seems to request additional certificates as to the nature of the offence from the issuing judicial authority", the fact that MT legislation requires particulars of facts and particulars of law, as well as a legal description of the offence and a copy of legal enactments or a statement of the relevant law, is thought to be fully consonant with what is envisaged in Article 8(1)(d)-(g) of the FD and in paragraphs (e, (eII) and f) of the Form.

Article 9 – Transmission of a European Arrest Warrant

...in spite of the general philosophy of the Framework Decision, 5 States do not allow a EAW to be transmitted directly where the location of the person is known (EE, IE, HU, MT, UK) (Page 16)

Bearing in mind the geographical limitations of the island, Malta hardly considers this observation to be relevant in the Maltese Context.

Article 10 – Detailed procedures for transmitting a European arrest warrant

All Member States have either transposed into national legislation or carry out in practice the provisions of Article 10. In effect, for the large majority of Member States, EAWs can be transmitted by any secure means capable of producing written records and allowing an authenticity check, although MT and PL have not specifically transposed Article 10(4) (Page 18)

This observation has been noted for any adjustments that could be warranted.

Article 11 – Rights of a Requested person

MT and FI have not... transmitted any provision in respect of the right to an interpreter pursuant to Article 11(2) (Page 18)

By virtue of Articles 8(4) and 9(2) of the Order, the proceedings before the Court of Committal are rendered equivalent to proceedings before a Court of Criminal Inquiry which are regulated by the Criminal Code and provide for legal assistance and assistance of an interpreter where necessary.

Article 15 – Surrender Decision

Paragraph 1 – *CZ, MT and the UK have not explicitly transposed this paragraph, though at least in the UK in practice if further information is needed it may be requested Page 19)*

It is not considered that an explicit transposition is required but the matter shall be considered further in the light of the CION's observations.

Article 16 – Decision in the event of multiple requests

... The lowest implementation occurred in relation to paragraphs 2 (advisory role of Eurojust) with 14 Member States (BE, CZ, EE, EL, ES, FR, CY, LT, HU, AT, PL, PT, SI, SK) and paragraph 4 (Statute of the International Criminal Court) with 19 (BE, CZ, DE, EE, EL, ES, FR, IE, CY, LT, HU, MT, NL, AT, PT, SI, SK, FI, SE). In both cases this was due to Member States considering that existing legislation or practice made them unnecessary to transpose (page 20)

13 Member States (BE, CZ, EE, EL, ES, FR, CY, LT, HU, AT, PT, SI, SK) have transposed fully this article in the transmitted or available legislation. In addition, 6 other Member States have also transposed this article with the exception of paragraph 2 (IE, MT, NL, FI, SE) or paragraph 4 (PL).

In reaching a decision the Court may take into account all the relevant circumstances and therefore there is nothing prohibiting the Court from referring a matter to Eurojust for consultation either directly or through the prosecution and/or the Central Authority. It is also envisaged that in a bid to assist the authority in reaching a decision as well as to provide the said authority with all relevant information, the Central Authority, of its own accord or on the demand of the prosecution, may also have recourse to Eurojust and present any advice and consultation results to the Court for its consideration.

The question of multiple offences and accessory surrender is also raised as an issue.....Details of Member States' views on this issue are as follows: accessory surrender is stated to be possible in at least 8 Member States (DK, DE (under certain conditions – not provided), EE, ES, LV, LT, AT, SE (where there is double criminality)), whilst it does not seem to be permitted in at least 4 others (CY, HU, NL, SI). In FR, it is for the Courts to decide if accessory surrender is possible since this matter is not legislated for. However no cases have arisen as at the time of writing. No information was available in respect of the other Member States. (page 20-21)

In terms of Maltese legislation, surrender can only be granted for extraditable offences.

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

***Paragraph 7:** In terms of the result of the 90 day deadline being exceeded, only 15 States have indicated that Eurojust shall be informed, in accordance with paragraph 7. 9 Member States (DK, EE, LV, LU, MT, NL, AT, PL, UK) make no mention in legislation of this requirement although DK, EE and NL have stated that in practice they will inform Eurojust and LU and PL do not see any obstacle to informing it.*

There is nothing precluding informing Eurojust about such an eventuality particularly through the Central Authority.

Article 18 and 19 – Situation and hearing the person pending the decision

Articles 18 and 19 have been transposed in a varied manner ranging from no apparent implementation (EE, LU, MT),

EE, LU, MT have not transposed either of these articles and no further information on the matter has been made available (Page 23)

A hearing of the requested person is mandatory under domestic legislation and the other requirements of Article 19 may be secured through mutual assistance measures. The situation is being reviewed in the light of the CION's comments in this regard but it will prove difficult to provide alternatives to what is in place.

Article 20 – Privileges and immunities

15 Member States have completely transposed Art 20 (BE, CZ, DE, EL, ES, FR, CY, LT, LU, HU, NL, AT, PT, SI, SK). 2 Member States have not specifically transposed the whole provision (DK, MT)(Page 24 Annex).

The issue addressed in Article 20 is in practice considered to be an academic one since the possibilities of immunities and/or privileges are extremely limited while with respect to privilege/immunity which lies with an authority of another State or International organization, this would be a matter for the Issuing judicial authority. Nonetheless further thought is being given to address the issue.

Article 21 – Competing International Obligations

MT legislation is contrary to this article.....MT has provided that where there is a speciality condition imposed by a third state this constitutes a mandatory ground for refusal. In addition there is no provision to request the consent of the third state. This is considered to be contrary to the Framework Decision since refusal should only be possible once it is established that consent has not been given (Page 24)

In practice consent will be requested and in fact Article 20(c) of the Order implies that such a request has been made.

Article 22 – Notification of the Decision

4 Member States have partially transposed this article (EE, IE, ES, LT) with a further 3 not having transposed in the provided legislation (MT, PL, UK) (Page 25)

The issuing judicial authority is notified of the decision as a matter of course and of good practice.

Article 23 – Time Limits for the Surrender of the Person

MT and the UK have in transposing Article 23(4) allowed for discharge of the person as an alternative to postponement. The grounds for discharge have not, however, been specified.

MT	<i>Surrender is not allowed before 7 days from the arrest.</i>
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It is not correct to state that the grounds for discharge have not been specified because in terms of Articles 34(3) & 34(5) of the Order, the reason for discharge can only be unreasonable delay in taking over the requested person whilst in terms of Article 36(7), the reason is that no undertaking as requested is received from the issuing State.

Article 24 – Postponed or conditional surrender

14 Member States have fully transposed Article 24 (BE, EL, ES, FR, IE, CY, LT, LU, HU, AT, PT, SI, FI, SE).... whilst in MT and NL, the competent national authorities have no discretion but to postpone surrender where the requested person is to be prosecuted or sentenced in these countries.

Contrary to Article 24(1), postponement is possible before the final decision on surrender and not "after deciding to execute the EAW" in MT.

Malta believes that its legislation may be applied in conformity with the Framework Decision. However further consideration is being given to the CION's observations in a bid to see whether clarification is required.

Article 25 – Transit

All Member States, except MT and the UK, have in their legislation allowed for transit of non-nationals in conformity with Article 25(1) (Page 26)

It is not considered that explicit transposition of this Article is required since the issue can be adequately addressed under other legislation.

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

19 Member States have explicitly transposed all of Article 26 whilst 4 States (HU, MT, SI, UK) have not transposed Article 26 in the notified legislation (Page 27)

It is considered that Article 22 of the Criminal Code, Chapter 9, Laws of Malta which caters for this, would apply.

Article 27 – Possible prosecution for other offences

22 Member States have transposed the speciality rule pursuant to article 27(2). However MT and UK legislation allows refusal of surrender by reason of speciality if there is no speciality arrangement with the issuing Member State. Such a refusal would be contrary to the Framework Decision if this results in surrender being refused even where the Article 27(3) (a-f) exceptions apply which do not require consent of the executing judicial authority.

According to the Order the speciality arrangement is precisely Article 27 of the Framework Decision and therefore, in so far as Member States are concerned, the hypothesis raised by the CION cannot arise.

Article 29 – Handing over of Property

MT	<i>Article 29(1) has only been partly transposed since it is the Ministry may, through the Commissioner of Police, rather than the judicial authority which is competent to seize or hand over property.</i>
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This issue is being considered.

Article 30 – Expenses

On the other hand, 11 others have not transposed it in the transmitted legislation (BE, CZ, FR, LU, MT, PL, SE, UK) ...

Malta does not see any need to transpose this Article.

15. COMMENTS BY THE NETHERLANDS DELEGATION

Before entering into detail, the Netherlands delegation wishes to make some general comments.

General

1. The Commission's final conclusion would seem to be that the EAW functions well despite implementation shortcomings. In this connection, the Netherlands delegation would like to observe that the comments on Articles 31 and 32 in the staff working document suggest that 12 of the 25 Member States have restricted the EAW's scope to such an extent that there is scarcely any question of Union-wide replacement of extradition by surrender. It seems odd that the Commission does not draw attention to this in its report.
2. The evaluation in the staff working document lacks consistency. Conclusions at both the beginning and end of that document highlight the fact that national legislation conflicts with the FD on a number of points. The central section does mention discrepancies but gives no evaluation of them. Nor does the document reflect a balanced assessment of the various Member States.

Part I

Comments on the report from the 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 (Brussels, 23.02.2005 – COM (2005) 63 final)

- "The Commission has based the report, primarily, on national provisions giving effect to the arrest warrant, as communicated to it by the Member States (Article 34(2)), and the supplementary information supplied by the Council (Article 34(3)), in particular the available replies provided to the questionnaires addressed to the Member States by the Council presidency.

The Commission has also tried to supplement its information, both by using the replies given to the European Judicial Network's questionnaire, which concerned the practical aspects of the arrest warrant prior to 1 September 2004, and by maintaining a bilateral dialogue with the designated national contact points. The contents of this report and its annex have nevertheless been affected by the many delays and shortcomings in transmission, the uneven quality of the information obtained and the brevity of the period examined."

Comment:

The Netherlands delegation favours sound evaluation, but wants it to abide by predetermined rules. In the case in point, such rules are to be found in Article 34 of the EAW Framework Decision (hereafter: "FD"). However, the working method chosen by the Commission deviates from those rules. Article 34 FD contains a limitative summary of the documentation to serve as a basis for the Commission's report on the FD's transposition into national legislation. This does not include the questionnaires referred to by the Commission which are, moreover, of a different complexion. They were neither drawn up with a view to the Commission's evaluation nor answered for that purpose. Nor were Member States informed beforehand that their replies would be taken into account in the Commission's evaluation.

- "Obligations were also breached by those Member States which reduced the substantive scope as regards either the minimum thresholds for sentences (Article 2: NL.....)." (p. 3)

Comment:

See the comment under II, Article 2, first bullet.

- "The variety of national arrangements also stems from the fact that not all Member States have opted to subject the execution of warrants to the three specific guarantees provided for in the Framework Decision. Where they have done so, however, some Member States have provided that extra conditions should be required (..... Article 5(3): NL)." (p. 4)

Comment:

See the comment under II, Article 5(3).

- "Another also considered that, with regard to its nationals, it should reintroduce a systematic check on double criminality and make their surrender conditional on the assurance that it would be able to convert their sentences (Article 5(3): NL). However, this condition, authorised by the Convention of 21 March 1983 on the Transfer of Sentenced Persons, is not reproduced in the Framework Decision." (p. 5)

Comment:

See again the comment under II, Article 5(3).

- "More noticeable still is the introduction of other reasons for refusal, which are contrary to the Framework Decision (Article 3: NL), such as or those involving examination of the merits of a case." (p. 5)

Comment:

See the comment under II, Article 2, third bullet.

- "This overall success should not make one lose sight of the effort that is still required by Italy and certain other Member States (in particular NL) to comply fully with the Framework Decision and for the Union to fill certain gaps in the system." (p. 7)

Comment:

It will be clear from the comments under II that, as regards the Netherlands, the Netherlands delegation does not share this assessment by the Commission.

Part II

Comments on the "Staff working document, Annex to the report from the Commission (Brussels, 23.02.2005 – SEC(2005)267)"

Article 2

- "In relation to an EAW for the purposes of serving a custodial sentence, both NL's and ... legislation require not only that the sentence is for at least 4 months but simultaneously that the related offence is punishable by at least 12 months. As a result, NL's and ... implementation is considered to be contrary to the Framework Decision."(p. 6)

Comment:

The Netherlands delegation disagrees with this.

The Commission justifies its assessment as follows: "However, under the Framework Decision, there is no longer a link between the length of the actual and potential punishment. This means that where a person has already been sentenced, and that sentence is 4 months or more, it is irrelevant what the maximum possible sentence was." This passage reflects the Commission's opinion. It is not substantiated, nor can any substantiation be derived from the content of the Framework Decision. The Netherlands delegation would further point out the following: the wording of Article 2(1) FD manifestly draws upon Article 2(1) of the 1957 European Convention on Extradition. During the negotiations, no consideration was given to the fact that the Framework Decision breaks with the past on this point. Otherwise the Netherlands delegation would have opposed it on the ground of lack of proportionality, because the sole requirement of a 4-month custodial sentence would mean that very minor punishable acts not qualifying as offences could also give rise to surrender. Given the minor nature of such acts, recourse to surrender would constitute a disproportionate measure.

- "NL extended the list by including manslaughter though of course this does not limit the category." (p. 7)

Comment:

This claim by the Commission is factually incorrect.

There is no question of the Netherlands legislator having extended the list.

The Netherlands *Overleveringswet* [Law on Surrender] reproduces the text of the Dutch language version of the Framework Decision as published in the EU Official Journal. The relevant entry on the list in Article 2(2) FD in that publication reads: "*moord en doodslag, zware mishandeling*" [murder, grievous bodily injury].

For the record, it should be noted that the list in Article 2 largely draws upon Article 2 of the Europol Convention and the Annex relating to that Article. The Dutch language version in Official Journal C 316 of 27 November 1995 also contains the expression "*moord en doodslag, zware mishandeling*", whilst the English language version reads: "murder, grievous bodily injury". The divergence from the English language version may be due to the fact that the scope of the punishable offence "*moord*" in the Dutch language is more limited than, for example, the English term "murder".

- "NL shall refuse surrender if the Dutch executing judicial authority finds that there can be no suspicion that the requested person is guilty. NL has stated this will only occur if "it has become crystal clear to the executing judicial authority that the person could not have committed the offence" and has acknowledged that this is a deviation of the FD. The Commission is of the view that this is contrary to the Framework Decision, since it requires an examination of the substantive case, and also contrary to the principle of mutual trust between Member States." (p. 8)

Comment:

The Netherlands delegation objects to this passage, on the ground that the relevant legal provision is fully in line with the spirit of the FD.

The Netherlands executing judicial authority does not conduct a substantive examination into the criminal case, nor is there any question of lack of confidence in the issuing judicial authority. This ground for refusal has been included in the *Overleveringswet* in order to prevent a requested person being surrendered if it is immediately obvious that he cannot have committed the punishable offence. This is more specifically the case where the requested person can immediately prove beyond any doubt that he was, for instance, being kept in custody at the time of the offence. Experience with Netherlands extradition practice clearly shows that this type of defence is only upheld in exceptional cases. Where this happens, the Netherlands public prosecutor will, moreover, upon questioning the requested person, immediately contact the issuing judicial authority in order to inform it, thereby providing the issuing authority with an opportunity to withdraw the EAW, thus obviating the need for refusal.

- "On a further note, NL and ... have introduced additional grounds for refusal arising from the application of Treaties or Conventions which have not been set aside by the Framework Decision. NL has specified that they shall not apply the Framework Decision to surrender of members of crews, who are deserters, or to surrender of foreign military personnel, where such surrender takes place by virtue of an agreement with one or more states with which NL is allied. NL has stated that the former can be expelled and the latter have never been subject to normal extradition procedures between Member States since specific Treaties apply to them." (p. 9)

Comment:

This claim by the Commission is factually incorrect.

There is no question of the Netherlands having introduced an additional ground for refusal.

Article 69 of the *Overleveringswet*, to which the Commission refers, is not relevant to implementation of the EAW. That Article was only included in the *Overleveringswet* to avoid confusion arising in Netherlands law from the fact that a provision of this kind appeared in the Extradition Law but not in the *Overleveringswet*. Regarding substance, this concerns categories of persons in particular circumstances who may be subject to removal under immigration law, or surrender pursuant to NATO treaties, and who, consequently, would never be liable to extradition or surrender on the basis of an EAW.

Article 4(1)

- "The remaining states have not mentioned this and whilst ... NL have stated they will follow the Framework Decision in practice, this cannot be viewed as full transposition." (p. 10)

Comment:

The Netherlands delegation disagrees with the Commission's assessment.

In view of the approach underlying the *Overleveringswet*, the Netherlands considers it pointless to include Article 4(1) FD in it. The *Overleveringswet* contains a limitative list of grounds for refusal, thereby preventing the Netherlands executing judicial authority from invoking any grounds for refusal other than those explicitly listed in the law. Accordingly, explicit inclusion in the law of a prohibition on refusal on account of the fiscal nature of an offence would be pointless given the aforementioned approach, and would even go against the exhaustive nature of the grounds for refusal listed. In the view of the Netherlands delegation, it follows on from the above that the Netherlands legislator has fully complied with the assessment criterion in point 3 on page 3 of the Annex.

For the record, it should be noted that the Netherlands has already been extraditing persons for fiscal offences for many decades; consequently, regarding this point, the FD does not imply any change in Netherlands practice.

Article 4(4)

- "has been transposed asan optional ground by 10 states (.....NL.....)" (p. 10)

Comment:

This claim by the Commission is factually incorrect.

The Netherlands is one of those States which have transposed Article 4(4) FD as a mandatory ground for refusal. We would refer to Article 9(1)(f) of the *Overleveringswet*.

Article 4(5)

- "has been transposed asan optional ground by 9 states (.....NL,.....)" (p. 10)

Comment:

This claim by the Commission is factually incorrect.

The Netherlands is one of those States which have transposed Article 4(5) as a mandatory ground for refusal. We would refer to Article 9(1)(d) and (e), points 1 to 4, of the *Overleveringswet*.

Article 4(6)

- "... and NL have also made this a mandatory ground for refusal for nationals and long term residents. However in such a case they do not undertake to execute the sentence but rather to convert it in line with the Convention on sentenced persons. The practical result is that, contrary to the Framework Decision's provision, execution of the sentence is subject to the double criminality principle for nationals and permanent residents." (p. 11)

Comment:

The Netherlands delegation rejects this assessment: there is no question of conflict with the Framework Decision.

First and foremost, the FD contains no rules on transfer of the execution of a sentence, so that it cannot be claimed that the conversion procedure should not be applied. Also, the link made by the Commission with the double criminality principle is confusing because this – wrongly – gives the impression that the double criminality principle has been abolished by the FD. This is not so. The effect of the double criminality requirement has been restricted: it no longer applies to the (categories of) offences listed in Article 2(2) FD. These acts are generally considered to come under criminal law in the Netherlands. There could be doubts about the term "racketeering", but this has since been found to be an alien concept in almost all Member States' legal orders. In conclusion, it should therefore be noted that for the acts listed the risk of double criminality actually being ruled out is rather theoretical.

The Netherlands' position about refusal to execute sentences passed upon nationals or persons deemed equivalent to nationals in the absence of double criminality *de facto* concerns offences other than those listed in Art. 2(2) FD. Due to Art. 2(4) FD the principle of double criminality may be applied in respect of these offences in the case of surrender.

Article 4(7a) and (7b)

- "Article 4(7a) has been transposed as an optional ground by 13 States (.....NL....)." (p. 11)
- "Article 4(7b) has been transposed as an optional ground by 11 states (.....NL....)It can be noted that in NL, at the public prosecutor's request, and only in terms of Dutch legislation, a refusal of surrender shall be waived, unless, in the opinion of the court, the public prosecutor could not reasonably make such a request." (p. 11)

Comment:

These claims by the Commission are incomplete and – in part – factually incorrect; at any rate, they are confusing.

Regarding both Article 4 (7a) and (7b), Netherlands law prescribes that surrender must be refused. In both cases there is one exception, namely where the public prosecutor requires that the ground for refusal should not be applied. The court does not have full discretion in considering this requirement. It may only overrule the public prosecutor's requirement if – upon cursory examination – it finds that the public prosecutor could not reasonably have arrived at his requirement.

Article 5(2)

- "11 Member States require the Article 5(2) guarantee (.....NL.....)." (p. 12)

Comment:

This claim by the Commission is factually inaccurate.

The Netherlands does not require the guarantee referred to in Article 5(2) FD under the *Overleveringswet*. Article 45(1)(b) of the *Overleveringswet* only states that such a guarantee can be provided to a foreign State when an EAW is issued in the Netherlands.

- "NL has legislated that for surrender purposes, life sentences and custodial sentences of indefinite period shall be equated to custodial sentences longer than twelve months. The paragraph 2 guarantee is therefore likely to be required in most cases." (p. 12)

Comment:

This claim by the Commission is also factually incorrect.

The provision in the *Overleveringswet* to which the Commission refers (Article 8) was included for a completely different purpose. It is inappropriate to refer to it in this connection. As already stated above, the second sentence is incorrect.

Article 5(3)

- "NL legislation states that surrender of a Dutch person may be allowed where requested because of a criminal investigation against that person if, in the opinion of the Executing Judicial Authority, it is guaranteed that, if he is given a non-suspended custodial sentence in the issuing Member State for acts for which surrender can be allowed, he will be able to serve that sentence in the NL. NL has stated that it will not extradite a national for the prosecution for an offence that is not an offence under Dutch law, because it is impossible under the relevant treaties and the national law to transfer a person where the requirement of double criminality has not been met. It does not see a contradiction with the Framework Decision, since the Framework Decision does not regulate return but leaves that to the Member State. Nevertheless it is clear that one of the principle developments of this Framework Decision compared with previous extradition arrangements is the removal of the double criminality principle in relation to the Article 2(2) list of categories of offences. NL's position obviously runs counter to this." (p. 12)

Comment:

The Netherlands delegation rejects this assessment, referring to the reasons given under II, Article 4(6), above.

Article 9

- "NL: In relation to Member States who participate in the SIS: at least 20 days when the arrest is based on a SIS alert." (p. 17)

Comment:

This claim by the Commission is factually incorrect.

In the Netherlands the maximum period for receiving an EAW following an arrest based on a SIS alert is: at the latest on the 23rd day following arrest.

Article 13(1)

- "Nevertheless, NL.... and the ... have implemented Article 13(1) in such a way that where consent to surrender is provided there is an automatic renunciation of the speciality rule..... The risk engendered with such a rule is that consented surrender in such countries may be less common than in other countries and thus the efficiency of the surrender procedure may be reduced." (p. 19)

Comment:

The Netherlands disagrees with the Commission's assessment.

The summary procedure has been used in the Netherlands for well over 40 years; therefore, the Netherlands has ample experience with it. On that basis, it considers that the risk indicated by the Commission which, moreover, is not substantiated in any way, does not exist.

We are also surprised by the Commission's criticism in view of Article 27(1) FD.

Article 16

- "The question of multiple offences and accessory surrender is also raised as an issue (i.e. where a EAW is issued for a surrenderable offence but also refers to other offences which do not come within the scope of the Framework Decision), since it is not dealt with under the Framework Decision but is contained in the 1957 Council of Europe Convention on Extradition. It should be noted that this is a different matter to the question of speciality which refers to subsequent offences which were not contained in the warrant. It has become clear that a lack of EU legislation in this area has resulted in varied practices occurring with some Member States accepting the possibility of accessory surrender whilst others do not. To reduce the lack of certainty in this regard it would be advisable to further examine this issue in the future and possibly provide additional legislation." (p. 20)

Comment:

The Netherlands delegation considers that the passage "the question of speciality which refers to subsequent offences which were not contained in the warrant" betrays an erroneous legal approach. The speciality rule applies solely to offences committed prior to surrender, i.e. not to "subsequent offences".

The Netherlands delegation further does not consider additional legislation on accessory surrender to be a matter of priority. Indeed, in view of the low penalty threshold, this can only be about trifling offences. Also, the simplified rules in Article 27 FD, in particular paragraph 3 thereof, already afford more scope to ensure by other means that a person can still be prosecuted and sentenced for offences committed prior to his surrender but which were not the subject of an EAW.

Article 17

- "At the same time it is understood that deadlines in relation to court proceedings are difficult to legislate for." (p. 21)

Comment:

The Netherlands delegation is surprised at the absence of a detailed analysis concerning this point. Compliance with deadlines is very important as one of the pillars of the FD is to improve and expedite the surrender procedure. No reasons are given why some Member States do not impose deadlines for judicial procedures, and others do. All Member States recognise the courts' independence in reaching decisions, but this does not prevent deadlines being imposed on them.

Article 17(3)

- "NL legislation has transposed the provision and set the required deadlines. However, it has also stated that if the deadlines cannot be met the court may again extend the term indefinitely." (p. 22)

Comment:

The Netherlands delegation rejects this criticism.

In line with Article 17 FD, the *Overleveringswet* specifies a time limit within which the court must decide on an EAW. It further specifies what needs to be done in the – unlikely – event of the court being unable to decide within that time limit. This does not include extending the term indefinitely. Had this provision been omitted, a decision would no longer be possible once the time limit had been exceeded. In the view of the Netherlands delegation, that would be contrary to the Framework Decision.

The question of an executing authority exceeding a deadline was discussed during the negotiations. It transpired at the time that deadlines had to be met, but that failure to do so ought not to rule out a decision at a later date. Article 17(3) FD was included for that purpose.

Articles 18 and 19

- "The legislation of at least NL..... provides for a hearing only, not for a temporary transfer, as is possible under the Framework Decision." (p. 22)

Comment:

This claim by the Commission is factually incorrect.

Article 18(1)(b) FD has been fully transposed: cf. Article 54 of the *Overleveringswet*.

- "NL: It is obligatory for NL to accept a request for a hearing." (p. 23)

Comment:

We do not understand why the Commission has made this comment.

The *Overleveringswet* provides for witnesses to be heard: cf. Article 53.

Article 24

- "whilst in ... and NL, the competent national authorities have no discretion but to postpone surrender where the requested person is to be prosecuted or sentenced in these countries."
(p. 26)

Comment:

This claim by the Commission is factually incorrect.

A requested person can be temporarily surrendered: cf. Article 36(2) of the *Overleveringswet*.

- "Finally, in spite of Article 24, in 3 Members States (... NL...), the Ministry of Justice rather than the executing judicial authority is responsible for postponed or temporary surrender."
(p. 26)

Comment:

Firstly, the Netherlands delegation would point out that the Commission's harsh judgment regarding this point contrasts sharply with its mild judgment on how another Member State has transposed Article 6.

The Netherlands delegation would further highlight that the role conferred upon the Netherlands Minister for Justice is a consequence of concentrating all surrender procedures in a single court. Such concentration benefits both the promptness and quality of decisions on European arrest warrants. Meanwhile, it could happen that while an EAW is being processed in Amsterdam, criminal proceedings against the person concerned are underway in, say, Rotterdam. Internal relations in the Netherlands preclude the public prosecutor responsible for the surrender procedure from taking decisions that have a direct bearing on criminal proceedings by another public prosecutor underway in a Netherlands criminal case. In order to ensure that the interests involved are weighed accurately and objectively, this task has been entrusted to the Minister for Justice. The Netherlands delegation considers this to be fully in line with the spirit of the Framework Decision.

16. COMMENTS BY THE AUSTRIAN DELEGATION

1. Article 2(1)

The Commission's opinion on this matter is that Austria's (and other Member States') implementation of this provision is not in line with the Framework Decision. In the case of surrender for enforcement purposes it is sufficient under the Framework Decision if the requirement for a remaining sentence of at least 4 months is satisfied. However, it is not necessary for the offence resulting in the European arrest warrant to be punishable under the law of the issuing State by a custodial sentence of a maximum period of at least twelve months. This was the system under the old extradition procedure. Under the Framework Decision, on the other hand, there is no connection between the length of the sentence actually imposed and the sentence applicable.

The Commission's view that Article 4(2) of the Austrian implementing law contradicts Article 2(1) of the Framework Decision is not shared by Austria. There is no evidence that the drafters of the Framework Decision on the European arrest warrant intended to depart from the condition that even in the case of extradition (surrender) for enforcement purposes a requirement for an offence punishable by a maximum period of at least twelve months exists in addition to that for a remaining sentence of at least 4 months.

Irrespective of the fact that these cases hardly occur in practice (remaining sentence of 4 months where the offence is punishable by a sentence of less than 1 year), the Austrian delegation considers that there are good grounds for allowing the surrender for enforcement purposes to take place only on condition that the surrender is for criminal prosecution purposes. Until now there was no doubt that an extradition for criminal prosecution purposes also encompassed consent to the subsequent enforcement of the custodial sentence that might be imposed, which meant that, once the criminal proceedings had been completed, the requesting State did not have to ask the requested State again for its consent to enforcement. If, on the other hand, these requirements are separated, the executing State would have to be contacted again, following surrender for criminal prosecution purposes, for its consent to surrender for enforcement of the sentence imposed. In addition, custodial sentences of less than 4 months could no longer be enforced despite approval having previously been given for surrender for criminal prosecution purposes because the conditions (to be assessed separately in the Commission's view) appertaining to surrender for enforcement purposes do not obtain in the case of such sentences.

2. Article 13(1)

Here the Commission correctly finds that Austria and other Member States have implemented this provision in such a way that the consent of the person concerned to the surrender is linked to automatic renunciation of speciality protection. This is a continuation of the system used in the 1995 Convention. Although the Commission admits that Article 13(1) of the Framework Decision on the European arrest warrant corresponds to Article 7 of the 1995 Convention and the procedure mentioned is in line with the explanatory report to the Convention, it takes the view that such a provision involves the risk that in the countries mentioned the person concerned will give his consent to surrender less often, whereby the effectiveness of the surrender procedure may be reduced.

This view does not concur with the experience acquired by the relevant Austrian authorities dealing with extradition cases. It should be pointed out in this connection that more than two thirds of all extradition cases in Austria involve simplified extradition, although consent to a simplified extradition is generally linked under Austrian law to renunciation of speciality protection.

3. Article 17(3)

Attention is drawn to the fact that the statement in the middle of page 22 of the Annex to the Commission report, that under Austrian law a person can be surrendered before the conclusion of an appeal, and if it is successful the person will be returned to Austria, is inaccurate.

4. Articles 18 and 19:

The Commission points out here that under Austrian and other Member States' law only a hearing as defined in Article 18(1)(a) and Article 19 is provided for but not a temporary transfer of the requested person as defined in Article 18(1)(b). Austria fails to understand why this gives cause for criticism. We would point out here that Article 18(1)(a) and (b) are alternatives.

The Commission states that Article 18(1)(a) has been implemented by several Member States, including Austria, through a reference to general mutual legal assistance provisions. Although the relevant provisions to some extent contain the same possibilities as the Framework Decision, such a reference can, however, be seen only as partial implementation. The conformity of national mutual legal assistance provisions with the Framework Decision cannot be assessed for lack of information. Moreover, in accordance with Article 8, the decision has to be taken by the relevant judicial authority whereas under the mutual legal assistance scheme it is taken by the relevant Ministry of Justice on the basis of a request for mutual legal assistance.

The Austrian delegation is adamant that separate implementation of Article 18(1)(a) is not necessary. Instead, the issuing State has the option under the general rules of making a mutual legal assistance request for the hearing of the accused under the mutual legal assistance procedure. In accordance with Article 53 of the Schengen Convention – contrary to the statements made in the Commission report – a decision on this matter is to be taken not by the Ministry of Justice but by the competent court.

In conclusion, the Austrian delegation takes the view that informal contacts between the Commission and those responsible for implementing the Framework Decision in the Member States prior to publication of the Commission report could help to remove any unclear points and prevent incorrect findings in the evaluation report.

17. COMMENTS BY THE POLISH DELEGATION

The Republic of Poland welcomes the Report of the Commission and hereby would like to express its appreciation to the efforts made and an excellent work done. The remarks and opinions presented in the Report constitute both a solid comparative base and may serve as a guideline for those countries that have not fulfilled all the requirements stemming from the Framework Decision on the EAW.

Poland also understands the difficulty in preparing such a comprehensive analytical document. Nevertheless, some statements contained in the Report can be regarded as having a strongly misleading character and for that reason call for some clarification.

Poland would appreciate if the information presented below was disseminated in the way that would allow all possible readers of the Report to get a full picture of the issue.

1. **Reference to 2.1.1. of the Report** (comments on the alleged breach of art. 2 of the Framework Decision):

Poland has been mentioned as the state which is in breach of the obligations under Article 2 of the Framework Decision, by reducing its substantive scope regarding the certain categories of the offences for which it has re-introduced a double criminality checks.

The Report does not specify the categories of the offences in question and therefore it is difficult to respond directly to that statement. In general, Poland is strongly convinced, that it has fulfilled its obligations under Article 2 fully and correctly in Article 607w of the Code of criminal procedure. Moreover, Commission staff working document, annexed to the report (page 7) states that *"Most of the list has been transposed (by Poland) differently but in line with the Framework Decision. Several offences appear wider than the Framework Decision.."* There is no mention of any problems in this area.

The abolition of the double criminality checks is one of the core elements of the Framework Decision, so it is of utmost importance to have a clear picture of the state of its implementation. It goes without saying, that ensuring an effective transposition of the Article 2 requires the translation of the list of 32 offences into the national legal language. There is no other way to fit the list in the national legal system. This has been done by Poland correctly and in a manner that ensures that the scope of the acts for which double criminality check is abolished is not narrower than in the Framework Decision on the one hand and that the provision of Polish law is clear for practitioners who have to apply it.

2. Reference to 2.1.3 of the Report (comments on the notification to the European Convention on Extradition):

Although the Report refers to the situation as it was by 15th January 2005, it is nevertheless worth mentioning that Poland made, on 24 February 2005, a notification to the Council of Europe under art. 28 of the European Convention on Extradition of 13 December 1957.

First and foremost the Republic of Poland welcomes the Annex to the Report of the Commission and hereby would like to express its appreciation for the efforts made and an excellent work done. The remarks and opinions presented in the Annex constitute both a solid comparative base and may serve as a guideline for those countries that have not fulfilled all the requirements stemming from the Framework Decision on the EAW.

Poland also understands the difficulty in preparing such a comprehensive analytical document. Nevertheless, some statements contained in the Annex to the Report can be regarded as having a strongly misleading character and for that reason call for some clarification.

Poland would appreciate if the information presented below was disseminated in the way that would allow all possible readers of the Annex to get a full picture of the issue.

1. Reference to comments on art. 4 of the Framework Decision (Grounds for optional non-execution of the EAW):

Contrary to the Annex (page 11) it is clear that, according to Polish law, the court has no discretion on the execution of the sentence. Art. 607s § 3^[1] of the Code of Criminal Procedure uses the expression "the court (...) shall decide" which should be construed in as "the court is obliged to decide". The decision is therefore mandatory and leaves no space for judicial discretion. Also the length of the penalty imposed is binding for the court (art. 607s § 4.^[2]

Possible confusion may have been caused by wording of § 5 which reads:

"§ 5. The penalty shall be executed pursuant to Polish law."

This paragraph however refers exclusively to the "technical aspects" of serving the prison term and not to any judicial decision taken in respect of the execution of the foreign sentence.

2. Reference to comments on art. 9 of the Framework Decision (Transmission of the EAW)

The time limit after the arrest of the person sought, for the receipt of the European Arrest Warrant, is 48 hours. The comments explaining the procedure, quoted after the Council Document COPEN 111 rev1 of 12.10.2004, do not reflect the current legal state of affairs (page 17 of the Annex).¹ The explanation provided in the table is applicable only when the proper warrant in Polish has been received.

^[1] "§ 3. When **the court** refuses surrender of a person on grounds described in § 1 or § 2, it **shall decide** on the execution of the penalty or measure imposed by a judicial authority of the State that issue the European Warrant.

^[2] § 4. In the decision referred to in § 3 the court indicates the legal qualification of an act according to Polish law. The **length of the penalty imposed shall be binding for the court (...)**"

¹ Although the comments are indeed based on the information provided by the Polish delegation in the course of the EAW experts meeting, they are however the result of misunderstanding and misinterpretation.

3. Reference to comments on art. 13 of the Framework Decision (Consent to surrender)

The report is correct as for the absence of a specific reference to voluntary consent for surrender of the wanted person (page 19 of the Annex). However according to the system of the Polish law, the consent for surrender of the wanted person has to be voluntary otherwise cannot be valid in law. The issue is explicitly mentioned in the civil law which provides that expression of the will could only be voluntary.

4. Reference to comments on art. 17 of the Framework Decision (Time limits and procedures for the decision to execute the EAW)

The information that Poland did not make any mention of a reasoned decision for the refusal to execute a EAW in the legislation implementing the Framework Decision is correct (page 22 of the Annex). There was however no such need as in this respect a general provision in art. 94 of the Code of Criminal Procedure. is applied^[4]

^[4] "Art. 94. § 1. An order should include:

- 1) the designation of an agency and a person(s) issuing the order,
 - 2) the date of the order,
 - 3) an indication of the case subject matter to which the order pertains,
 - 4) the decision and legal grounds,
 - 5) **the reason for the order**, unless the law excuses from the stipulation of the reason. (...) "
- The decision for the refusal to execute the EAW is given just in the form of an order.

5. Reference to comments on art. 20 of the Framework Decision (Privileges and immunities)

Polish legislation provides for a full implementation of art. 20 (page 23-24 of the Annex). In this case the provisions of the art. 13, 607k § 4 and 607m § 3 of the Code of Criminal Procedure^[5] give a clear indication as to the applicable procedure. The immunities are lifted by competent authorities upon request from public prosecutor. The time limits start running from the reception of the immunity waiver, or if they have already started to run, they are suspended till the waiver is received.

^[5] “**Art. 607k. § 4.** Where the separate provisions of Polish law provide that prosecution of a person, in relation to whom the European Warrant has been issued, is conditioned upon a permission of an competent authority, before the case is referred to a court art. 13 shall apply.”

“**Art. 13.** The prosecutor shall obtain the permission of an authority to prosecute, if such permission is required by law to institute proceedings.”

“**Art. 607m. § 1.** The court shall decide on surrender within 60 days from the date the prosecuted person was arrested. If the prosecuted person has made a statement referred to in art. 607l § 2, this time limit is 10 days and it starts from the date on which the statement has been made.

§ 2. In particularly justified case, where the time limits referred to in § 1 may not be complied with, the decision on surrender may be issued immediately within the next 30 days following the date on which such time limits elapsed. The authority that issued a European Warrant shall be notified of the delay and its cause.

§ 3. In the event described in art. 607k § 4, the time limits referred to in § 1 and 2 shall start from the date the permission for prosecution has been obtained. If the time limits has started, they shall be suspended until the permission is obtained.”

6. Reference to comments on art. 23 of the Framework Decision (Time limits for the surrender of the person)

Contrary to the comments made in the Annex (page 25), the issue of time limits on surrender as regards the precise moment of the beginning of their lapse, is regulated in art. 607n § 1 and 2 of the Code of Criminal Procedure.^[6]

7. Reference to comments on art. 30 of the Framework Decision (Expenses)

As far as art. 30 is concerned, the Annex (page 31) alleges that no specific provision related to the EAW has been introduced. There is however no such need, as this issue is governed by general provisions on costs incurred in the criminal proceedings. The provision in question is art. 618 of the Code of Criminal Procedure.^[7] It states that all costs related to the relevant proceedings are incurred by the State Treasury.

^[6] “**Art. 607n. § 1.** *The prosecuted person, in relation to whom the decision on surrender has become final and valid, shall be surrendered to a competent authority of the State that issued the European Warrant, within 10 days from the date on which the decision has become final and valid.*”

§ 2. Where surrender of the prosecuted person within the time limit prescribed in § 1 is not feasible due to a force majeure or due to a threat to life or health of such person, the prosecuted person referred to in § 1 shall be surrendered to a competent authority of the State that issued the European Warrant **within 10 days from the date on which a newly prescribed time limit for surrender has elapsed. (...)**”

^[7] “**Art. 618.** *The expenses incurred by the State Treasury shall include, in particular, the costs(...): 13) related to the execution of international agreements to which Poland is a party and the proceedings carried out on the basis of provisions contained in Chapter XIII (...)*”

8. Reference to comments on art. 31 of the Framework Decision (Relation to other legal instruments)

Although the Annex refers to the situation as it was by 15th January 2005, it is nevertheless worth mentioning that Poland made, on 24 February 2005, a notification to the Council of Europe under Art. 28 of the European Convention on Extradition of 13 December 1957.¹⁸¹ The text of the notification has already been uploaded on the official website of the Council of Europe in the list of reservations and declarations to the Convention.

¹⁸¹ "In accordance with art. 28, paragraph 3 of the European Convention on Extradition, the Republic of Poland hereby declares that since 1 May 2004 r. in relations with the Member States of the European Union, it will apply the internal legal provisions implementing the provisions of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) insofar as the Framework Decision is applicable in relations between Poland and these states. The provisions of the aforementioned Framework Decision were implemented in the Polish law by virtue of the statute amending the Penal Code, Code of Criminal Procedure and the Code of Misdemeanors, dated 18.03.2004 r."

18. COMMENTS BY THE PORTUGUESE DELEGATION

Report from the Commission:

A) Point 2.1.3 - article 31 of the FD Notification of the Council of Europe

The internal arrangements for the notification of the Council of Europe are being made so that the notification can be made as soon as possible.

B) Point .2.2.1 – Mandatory Ground for refusal – Article 11 (e) of the Law 65/2003, of 23 of August (law implementing the EAW)

Internally it is understood that this ground must be interpreted on the basis of the preamble - Recital 12, which does not prohibit refusal to surrender where an EAW has been issued for, amongst others, a persons political opinions.

Thus, article 11 (e) of the law 65/2003 refers that the execution of the arrest warrant shall be refused if it has been issued on account of political reasons.

This is also a constitutional guarantee (article 33 (6) of the Portuguese constitution law amended by the law 1/2004 of 24th of July sent hereby).

C) Point 2.2.2 Time limits for the execution of EAW in an appeal case

The guiding principle for the courts at all levels is the urgent nature of the EAW. The constitutional court will also deal with these cases as urgent in nature.

Furthermore, it should be taken into account that the appeal to the constitutional court is in some way exceptional, given the restricted grounds to lodge an appeal as established by the Portuguese law.

D) Point 2.2.3 Procedural rules for Consent to Surrender article 13.º of the FD on EAW

The regime for the consent to surrender is stated on articles 17 to 20 of the Portuguese law 65/2003 of 23 of August corresponding to article 13 of the FD.

The procedural Portuguese rules on the consent to surrender states the following regarding the right to consent:

When the requested person is arrested the she/he shall be informed of the EAW contents and of the possibility of consenting to surrender. She /he have the right to be assisted by a legal counsel.

(Article 17 (1) and (2) entitle rights of the arrested person).

After the arrest the requested person is presented before the prosecution office as soon as possible and must be brought to a judge within at most 48 hours of the detention for confirming the detention or imposing other coercive measures.

In this first hearing the person must be assisted by a lawyer or by a legal counsel and the judge-rapporteur shall inform the person among others of the possibility of consenting to surrender and the procedure for namely, that it can't be revoked and will result of the renunciation of entitlement to the execution procedure of the EAW. The consent to surrender given before the judge shall be recorded in a written record signed by the requested person and by his/her legal council or lawyer article 18 (2) (3) (5) and (6) entitle hearing of the arrested person).

In the execution phase when the person had consented to surrender the judge shall ensure that the consent referred was given voluntarily and in full awareness of the consequences (Article 20 (2) of the law 65/2003 – Execution of the European Arrest warrant with the consent of the requested person).

Having this regime into account we believe that the rights of the requested person in given the consent are fully accomplished namely his/her all the guarantee that the consent is given with full awareness of the procedural implications.

Annex to the report

A) 3. Amendment of the Portuguese Constitution

For the purposes of the comment set on part 3 of the annex we are sending hereby the concrete Constitutional provision that was amended for the purposes of EAW surrender its nationals (article 33 of the Portuguese constitution amended by the law 1/2004 of 24th of July).

B) Article 2 of the FD – Attempt and complicity covered by the list of categories of offences

The complicity (article 27 of the Portuguese penal code) is treated as one of the forms of being author of a crime.

We believe that the FD The Portuguese regime for the attempt (articles 22 and 23 of the penal code) also covers the list of offences referred in article 2§ 2 of the FD. Although, only in respect of offences punishable with imprisonment of more than 3 years.

Nonetheless, and given the fact that the list indicates a broad category of offences and is not a list of specific crimes, we tend to believe that both situations - complicity and attempt - are included in the scope of the EAW.

C) Article 17 time limits and procedures for the decision to execute the EAW

Please see above comment C) of the report

D) Article 18 DQ

We are not aware that application by Portuguese Courts of articles 6 and 22 of the Portuguese law 65/2003 on the EAW has arisen any difficulties in contradiction with the aims of article 18 of the FD.

E) Article 23 FD

The obligation to release the person is already foreseen in other provisions of the Portuguese legal order (eg: article 27 (3) of the Portuguese Constitution, article 215 on pre-trial detention of the Code of Criminal Procedure and article 52 (4) of the law on international judicial co-operation in criminal matters law 144/99 of 31 august).

F) Article 25 FD

We would like to clarify that the aim of the provision on the transit for the purposes of criminal proceedings is to state as far as Portuguese nationals are concerned the possibility to subject the granting of transit to certain conditions, which do not apply to the transit of non-nationals. Therefore, this provision is in line with the purposes of article 25 of the FD.

19. COMMENTS BY THE SLOVAKIAN DELEGATION

The Slovak Republic welcomes the Report of the Commission, which can be considered an appropriate basis for the improvement of the system created by way of transposition of the abovementioned Framework Decision. The Slovak Republic expresses its regret that it was not consulted on the final version of such an important document prior to its approval.

There is only one point for clarification concerning last paragraph of the part 2.2.2. It is correct to state that the Slovak Republic did not decide to put a time limit for the Supreme Court decision in the event of an appeal. However, the right for an appeal is limited to the extent, which allows applying it only for one of the grounds for refusal.

The Slovak Republic wishes to comment on the following parts of the Staff working document:

- **Part 4, page 5, paragraph 3**, of the English version concerning **Article 1 and recitals**:
According to the Constitution of the Slovak Republic the international treaties, which regulate the human rights issues (Article 6 of the EU Treaty, ECHR) have the precedence over the national law. The Constitution, which regulates the human rights as well, has also the precedence over the laws of the Slovak Republic. Therefore it was not appropriate to add any provision into the Act on the European Arrest Warrant.
- **Part 4, page 10, paragraph 5** of the English version concerning **Article 4(3) part 2**:
Findings of the COM are not correct. The decision to halt prosecution is a mandatory ground for refusal.
- **Part 4, page 13, paragraph 1** of the English version concerning **Article 6**: The Slovak Republic failed to send a notification of the relevant authorities, since such notification is a part of the Declarations and Fiches français. The comprehensive document will be sent to the Secretariat on 24 March 2005.

- **Part 4, page 14, paragraph 1** of the English version concerning **Article 7**: The Slovak Republic did not establish a Central authority. According to first experience with the application of the European Arrest Warrant it may re-consider this issue during the next year.
- **Part 4, page 16, first table** of the English version concerning **Article 8**: The Slovak Republic would like to draw the attention of the COM, Secretariat of the Council and the Member States, that document is not correct in relation to the SK. The Slovak Republic accepts only the European Arrest Warrants in Slovak or translated into the Slovak language. There are three exceptions based on the previous bilateral treaties with the Czech Republic, Austria and Poland. The Slovak Republic does not accept any other language based on reciprocity.
- **Part 4, page 18, paragraph 2** of the English version concerning **Article 10 (2)**: The Annex to the Report is incorrect. The Article 5 para 1 of the Act No. 403/2004 Coll. on the European Arrest Warrant explicitly provides for the possibility of using the European Judicial Network for establishing the competent executing judicial authority. Therefore the Slovak Republic shall be listed among those Member States, which refer to the EJN and that it is not a minimum transposition.
- **Part 4, page 20, paragraph 1** of the English version concerning **Article 16(2)**: The Slovak Republic does not agree with the wording used by the Commission staff. The Slovak Republic fully transposed paragraph 16 (2) of the Framework Decision. The Article 25 para 1 last sentence ("Prior to its decision the executing judicial authority may seek the advice of the Eurojust.") of the Act No. 403/2004 Coll. fully corresponds with Article 16(2) of the Framework Decision. The same applies to the issue related to the Statute of the International Criminal Court. The Court is covered by definition of the "third state" in the transposing legislation of the Slovak Republic.
- **Part 4, page 26, paragraph 2** of the English version concerning **Article 24(2)**: The Slovak Republic considered findings of the COM interesting. The reason for a partial transposition is based on a different understanding of Article 24(2), where the words "after deciding to execute the EAW") are not included. The Slovak Republic shall consider a possible change of its legislation in the light of the COM findings in the year 2006.

- **Part 4, page 27, paragraph 5** of the English version concerning **Article 25(5)**: The general provisions of the Code of Criminal Proceedings shall apply in the case of the transit from a third state, so there was no reason to mention it in the Act No. 403/2004 Coll. However the Slovak Republic took into consideration findings of the COM, which will be further analysed.
- **Part 4, page 28** of the English version concerning **Article 28**: Since the Commission is of a view that the Slovak Republic did not transpose Article 28 (except of paragraph 1 of this Article, which is optional) the Slovak Republic will consider the opinion of the Commission and, if necessary, provide for changes in its transposing law.

20. COMMENTS BY THE FINNISH DELEGATION

Following Tuesday's discussions at the EAW Expert Group (although I was not present) Finland would like to enter the following corrigendum to COPEN 42 ADD 1: (I'm not sure whether you are the person whom this communication should be sent to. If not, I trust however that you will forward this to the appropriate person.)

Page 8 second paragraph: Also Finland has carried out implementation of Article 3 para 2 correctly (cf. our law 5 § 2), although FI seems to be missing from the list.

Pages 16-17: Time limit after the arrest of the person sought, for the receipt of the European arrest warrant:

Finnish legislation does not provide for a mandatory submission of the EAW. However, upon request the EAW shall be provided to the executing judicial authority within a time limit set by that authority.

21. COMMENTS BY THE SWEDISH DELEGATION

Introductory remarks

Sweden appreciates the efforts made to fulfil the Commission's obligation according to the Council Framework Decision. Overall, the information in the Report and the Annex is correct and the judgements are well founded.

However, Sweden notes that there seems to be some misunderstandings with regard to the Swedish implementation of the Framework Decision. In order to avoid such misunderstandings in the future, Sweden would propose that Member States have a chance to participate more actively in the evaluation process.

The Report from the Commission

The Commission states that Sweden has designated an executive body as the competent judicial authority for some aspects (2.1.2). Even though the Commission does not indicate to which aspects it refers and corresponding information has not been found in the Annex, Sweden remains confident that the Swedish implementation in this respect complies with the Framework Decision.

The Annex

The Swedish implementation of the Framework Decision is mentioned in several places in the Commission Staff Working Paper. Sweden is of the opinion that the Swedish implementation fully complies with the Framework Decision. The criticism is mostly due to misunderstandings or inadequate acceptance of the Swedish legal system and/or Swedish law drafting tradition, a tradition based on constitutional rules on legislation.

Sweden would like to comment on the following.

Article 4(1)

Sweden is not amongst the Member States mentioned to have referred to the tax exception in line with the Framework Decision. The Swedish rule on double criminality shall, however, be interpreted in line with the tax exception (Government bill 2003/04:7, page 79). In the Swedish Extradition for Criminal Offences Act, a similar provision has for decades been interpreted in that way, an interpretation based on a well-established statement in preparatory works.

Article 18

Sweden regrets to note that in the Commission Staff Working Paper there is a reference to lack of information on national Mutual Legal Assistance provisions. Sweden was under the impression that no more information was needed and would be glad to submit additional information as needed. Chapter 4 of the International Legal Assistance in Criminal Matters Act provides for the possibility of the hearing of the person pending the decision.

Article 20

Sweden has, contrary to what is expressed in the Commission Staff Working Paper, provided that when an authority in Sweden has the power to waive the immunity, the Swedish Executive Authority shall request that authority to do so. According to Swedish tradition on law drafting, this is not laid down in any provision of the law, but is provided for in the preparatory works (Government bill 2003/04:7, page 176). Moreover, analysing the possibility to take legal actions in cases of immunity lies within the prosecutor's obligations in a preliminary investigation in criminal cases (see reference to these provisions in Chapter 4, Section 3, paragraph 2, of the Swedish EAW Act).

Articles 28(2)(a, c) and 28(3)

In the Commission Staff Working Paper it is stated that Sweden has not or only partly implemented the provisions. Conditions stipulated in connection with surrender or extradition from a foreign state to Sweden shall according to Chapter 2, Section 8, of the Swedish Penal Code be complied with in Sweden. Thus, the conditions laid down in Article 28(2) apply in Sweden. Chapter 6, Section 8, of the Swedish EAW Act implements article 28(3).

Article 29

See comment on Article 18 above. The Act on International Legal Assistance in Criminal Matters regulates seizure and transfer of seized property to another state, and the provisions complies with the Framework Decision (Chapter 4, Sections 16–22, and Chapter 5, Section 2).

Article 30

The Article regarding expenses regulates apportionment of costs between states. According to Swedish law drafting tradition, rules relating to the relationship between states are not laid down in law, but are of course respected.

22. COMMENTS BY THE UNITED KINGDOM DELEGATION

Article 1 and Recitals 12 and 13 – Definition of an EAW and obligation to execute it

The Commission Report correctly identifies that the UK and Malta cannot operate the EAW with Member States until they have been listed by Decree or Order and that they have not been informed whether these lists have been updated in line with the pace of transposition in the EU. To date three statutory instruments have been passed by Parliament in order to designate countries as Part 1 territories who have implemented the Framework Decision (FD). These instruments are: The Extradition Act 2003 (Designation of Category One Territories) Order 2003, The Extradition Act 2003 (Amendment to Designations) Order 2004 and the Extradition Act 2003 (Amendment to Designations) Order 2005. A further statutory instrument is currently going through the parliamentary process in order to designate Italy who have only recently implemented the FD.

It has been necessary to pass a number of designation orders as many Member States missed their implementation deadlines (1 January 2004 and for the new Member States 1 May 2004). There is no requirement within the FD for us to notify the Commission of any secondary domestic legislation, however we did inform Member States and the Commission of each order and explained its function and the date that it would come into force.

Article 2 – Scope of the EAW

The Report points out that the UK has reduced the time period in conviction cases for conduct that falls under the FD list of offences and thereby removes dual criminality for all conduct covered by the list that has received a custodial sentence of 12 months or more as opposed to the 3 years listed in the FD. We consider that 12 months is sufficient – it seems odd to abolish dual criminality in accusation cases where someone may be punishable by a custodial sentence of 12 months or more then raise that threshold in conviction cases to three years. Our decision to go further than the FD cannot be considered to be in breach of our obligations as we would clearly not apply the dual criminality for conduct in the list that has led to a custodial sentence of three years or more.

Article 3 – Grounds for mandatory non-execution of the EAW

The Commission correctly identifies that we have not transposed Article 3(1) into our national law as we do not have a possibility of an amnesty under UK law. In addition, the Report states that our implementation of Article 3(2) is contrary to the Framework Decision because we require the dual criminality test to be met for double jeopardy to apply. We do not agree with this assessment of the Commission and believe that they have misunderstood Section 12 of the Act which states that the District Judge must be satisfied that had the conduct occurred in the UK then the double jeopardy would apply. Section 12 does not require that the conduct has to satisfy the dual criminality test. We therefore consider that we have transposed the provisions of Article 3(2) correctly.

In addition, the Report criticizes the UK for introducing an additional ground for refusal (Section 208 of the Act) that allows a judge to refuse a request if he believes that the requesting person was acting in the interests of the UK by carrying out the actions conferred or imposed by or under an enactment, or is not liable as a result of an authorization given by the Secretary of State for his action. We consider that this merely introduces another category of what is envisaged in Article 20 of the Framework Decision that allows an EAW not to be acted on if the subject of the warrant enjoys certain privileges or immunities. We have very limited immunities in our domestic law and Section 208 of the Act is necessary in order to protect these.

The Commission Report also notes that the UK (as well as the Netherlands) has introduced additional grounds for refusal arising from the application of Treaties or Conventions which have not been set aside by the Framework Decision. It is correct that Section 16 of the Act allows for a request to be refused for reasons of hostage taking considerations in specific situations where the International Convention against the Taking of Hostages of 18 December 1979 applies. We believe that this ground for refusal is necessary in order to ensure that we meet our international obligations under the Hostage Taking Convention and would welcome the Commission's further views on this matter, in particular whether this International Convention should have been set aside by the Framework Decision in order to ensure that Member States can meet both their obligations under the Framework Decision and that particular Convention.

Article 4 – Grounds for optional non-execution of the EAW

The Report states that the UK implementation of Article 4(7)(b) is contrary to the FD as the UK is required to refuse surrender for extra-territorial offences if the conduct is punishable by less than 12 months under UK law. It is true that the UK has imposed a threshold of 12 months when considering EAW requests from Member States who are exercising extra-territorial jurisdiction. However, it should be noted that in comparison to other Member States the UK's application of extra-territorial jurisdiction is limited and we would only normally assume extra-territorial jurisdiction for serious offences. We therefore consider that there would not be many, if any, cases where we would refuse an EAW request for conduct that occurred outside of the Category 1 Territory because it failed to meet the 12 month threshold as it is unlikely that the UK would be able to exercise jurisdiction for the same conduct had it occurred outside of our territory. We therefore believe that whilst the Commission has made a valid point, that there is no need for any concern as to how we have implemented this provision in our national law.

Article 5 – Guarantees to be given by issuing state in particular cases

This article deals with the guarantees that may be required by the executing State in relation to particular cases before the judicial authority agrees to execute the EAW. Only the guarantees envisaged under Article 5(1) apply to the UK as we do not require assurances in respect of life sentences and we have no restrictions on surrendering our own nationals. The Commission report states that the UK has gone further than the terms of the FD by not restricting our assurance to guarantee that a person who has been convicted in absentia has a right to apply for a retrial and be present at the judgment but that we also request additional assurances. Section 20 of the Extradition Act 2003 requires the District Judge to discharge a requested person where they have been convicted in their absence and it is clear that they did not deliberately absent themselves from the trial and he is not satisfied that they have a right to a retrial or (on appeal) a review amounting to a retrial (Section 20(5)). If a person is entitled to a retrial or a review then they must have “the right to defend himself in person or through legal assistance of his own choosing, or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required” in addition to having the “the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

Article 8 – Content and form of EAW

Both the UK and Malta are criticized for not transposing the requirement for all information listed in Article 8(1) of the FD or indicating whether we use the correct form. It is possible for a non EU Member State to be designated under Part One of the Act providing that they do not operate the death penalty. This explains why the Act does not specifically detail everything contained within the Framework Decision to allow it to cater for any other agreements that may occur in the future to introduce a similar simplified extradition procedure with other states. There are no plans at present to extend Part One to any non-Schengen states. This explains why Section 2 of the Act which lists the information that must be contained in a Part One request does not include, for example, the nationality of the subject of the warrant or the full contact details of the issuing judicial authority. Our legislation merely cites the minimum information requirements for a request to be processed under Part One of the Act and this does not prevent us from going beyond the legislation by providing more detailed information than listed in Section 2 of the Act. In practice, the UK judicial authority uses the template EAW which can be found attached as an annex to the Framework Decision. Any UK EAW request to another Member State contains all the information required by the Framework Decision and we are therefore fully compliant with the provisions contained within Article 8.

Article 9 – Transmission of an EAW

The Report states that “in spite of the general philosophy of Article 5 of the Framework Decision” the UK does not allow for the direct transmission of an EAW where the exact location of the person is known. The UK, along with a number of other Member States, decided to have a designated central authority to handle EAW requests. Article 7(2) of the Framework Decision states:

“A Member State may, if it is necessary as a result of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.”

In the UK, the National Criminal Intelligence Service acts as a central authority for all EAW requests (except for where the subject of the warrant is known to be in Scotland in which case it is the Scottish Crown Office) including the transmission of any official correspondence relating to a request. We therefore do not consider that the manner in which the UK handles EAW requests is not in the spirit of the FD. Experience, has proven that the majority of EAWs received are general circulations which require research in order to establish whether the person is in the UK or not. NCIS are best placed to conduct such research as they have all the necessary resources to hand and the Fugitives Unit is staffed 24 hours a day. Even if the location of the person is known it is useful to have a central authority to coordinate and advise local police forces who frequently have no experience of EAW cases and need to be guided through the arrest process.

Article 10 – Detailed procedures for transmitting an EAW

The Report states that UK national law has failed to transpose the provisions of Article 10(6) which require the re-transmission of an EAW if it is received by an authority that is not competent to act upon it. Whilst the Extradition Act 2003 does not have explicit provisions to allow for the re-transmission of an EAW if it is sent to the wrong authority it does not prevent this from taking place. For example, there have been a few occasions where EAWs were sent to the Home Office in error who subsequently forwarded the request to NCIS for action. We therefore consider that it is not necessary to transpose this provision in primary legislation as we are able to comply with the terms of Article 10(6) and are doing so when necessary.

Article 13 – Consent to surrender

Although the Report does not consider that the UK's transposition of Article 13(1) is contrary to the FD, concerns are expressed that the practice of not allowing an individual to withdraw consent once it has been made may lead to there being a risk that consented surrender is likely to be less common in Member States who adopt this approach. We have noted the Commission's comments but to date do not believe there has been a noticeable reduction in consent cases for requests dealt with under Part One of the Act.

Article 15 – Surrender decision

The Report states that the UK has not explicitly transposed the provision within the FD that allows for the request of additional information, in terms of imposing a time-limit for the provision of any such information. Section 9 of the Extradition Act 2003 clearly sets out the District Judge's powers which include the power to adjourn the extradition hearing. Therefore, if the District Judge decides that he or she requires additional information from the Issuing State then they would adjourn the hearing to another date in order to allow the additional information to be provided. NCIS, as Central Authority, then forward the request for information to the Issuing State stating that the information has to be available before the date of the next hearing or else there is a very high likelihood that the person will be discharged. Requests for additional information have not occurred very often and, to date, no fugitive has been discharged because the Issuing State has failed to provide the requested information. We therefore consider that despite there being no explicit provision in the Act we are fully compliant with the Framework decision in this area.

Article 17 – Time-limits and procedures for the decision to execute the EAW

The Report states that the UK has only partially transposed the provisions that relate to time-limits in cases where there has been no consent in terms of there not being a time-limit imposed on any appeal to the House of Lords. Section 114(7) of the Act states:

“If leave to appeal under this section is granted, the appeal must be brought before the end of the permitted period, which is 28 days starting with the day on which leave is granted”

We therefore disagree with the comments of the Commission on this point.

The UK is also criticized for not including the requirement to provide a reasoned decision to the issuing state if there is a decision not to execute the EAW in our domestic law. We consider this to be an administrative point and not one that needs to be contained in primary legislation. In practice, the UK always provides a reasoned decision to the issuing State, including copies of any relevant judgment if a person is discharged.

The Report also states that the UK has failed to transpose the provision which requires the executing state to notify Eurojust of any cases where the time-limits have been exceeded. Again, this is an administrative point not one that needs to be covered in primary legislation. In practice we always inform Eurojust of the small number of cases where it has not been possible to adhere to the time-limits set by the Framework Decision.

Article 18 and 19 – Situation and hearing the person pending the decision

The Report states that the UK along with Belgium, Ireland, Hungary, Austria and Sweden considers that it is not necessary to transpose the provisions of Article 18 because the existing rules on mutual legal assistance are sufficient. It is somewhat unclear why the UK has been criticized for its implementation of this Article of the Framework Decision, perhaps this is because a limited number of Member States apply the scope of the EAW slightly differently in that they are able to issue EAWs to return persons to assist in criminal prosecutions. The UK does not make use of the EAW procedure in this manner. If the UK certifies an EAW request from another Member State then we must proceed to an extradition hearing as required by Article 19 of the Framework Decision. In the event that it is clear that an individual cannot be surrendered in the near future (e.g. they are already serving a lengthy custodial sentence here for other domestic offences) then Section 37 of the Act allows for a person to be temporarily surrendered to the Issuing State to stand trial as described in Article 18(1)(b) and 18(2) of the Framework Decision. We would expect Member States who are seeking the return of an individual to assist in a criminal prosecution (i.e. they are not accused of the conduct themselves) then we would expect them to go through the usual mutual legal assistance channels. We are of the opinion that our implementation of this Article is satisfactory and is in keeping with the spirit of the Framework Decision.

Article 20 – Privileges and immunities

The Commission Report states that the UK has not specifically transposed the provisions contained in Article 20 which allow an EAW not to be acted on where a person enjoys privilege or immunity regarding jurisdiction or execution in the executing Member State. It is correct that there is no specific transposition of this Article in our national law, however, Section 208 of the Act does allow the Secretary of State not to allow extradition on grounds of national security.

Article 21 – Competing international obligations

In respect of requests for onward extradition, the Report claims that the UK has only partially implemented the provisions contained in Article 21. We believe that we have satisfactorily transposed the provisions of this Article into our national law. Section 19 of the Act deals with earlier extradition to the United Kingdom from a non-category 1 territory and bars extradition unless the consent of that State has been obtained if there are arrangements with that state that require the consent before onward extradition can take place. That complies with the first part of Article 21 in terms of taking “all necessary measures for requesting forthwith the consent of the State from which the requested person was extradited”. We have not included a specific reference to the time-limits for the EAW process not beginning until consent has been obtained as we do not think that this is necessary. In practice, if consent of another third State is required then we would always try to attempt to obtain this before the beginning of the extradition hearing. If for exceptional reasons it was impossible to achieve this then it is up to the District Judge to decide whether to adjourn the hearing to allow consent to be obtained or to discharge the requested person.

Article 22 Notification of the decision

The Report states that the UK has not transposed this Article. Again, this is an administrative matter and not one that requires primary legislation. The National Criminal Intelligence Service as our Central Authority notifies the Issuing State of a decision in all cases as soon as they are aware of it.

Article 23 – Time-limits for the surrender of the person

The Report refers to the UK failing to fully transpose the provisions that allow the postponement of surrender for humanitarian reasons and raises concern that postponement on these grounds may not be specifically foreseen as it is decided at the hearing. In addition, the Report points out how the District Judge can discharge the person under these circumstances but there is no clarity on what the grounds for discharge are. Article 23(4) The Framework Decision states:

“The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person’s life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist...”

It is correct that it is the District Judge who must either adjourn or discharge the subject of the warrant if he or she considers that their physical or mental condition “is such that it would be unjust or oppressive to extradite him” (Section 91(2) of the Act). Given that the EAW procedure is generally very short (average time from arrest to surrender in straightforward cases for requests made to the UK is 17 days), any condition so serious to require the adjournment or discharge of the person is likely to be apparent before the end of the extradition hearing. We do, however, accept that there may be an exceptional case where there could have been a lengthy appeal process and reasons and any such condition does not become apparent until after the extradition hearing. Clearly, we would not surrender anyone to another Member State if they were not considered to be medically fit to travel.

In terms of there being no clarity on what the grounds for discharge should be where there are serious mental or physical conditions that prevent surrender, we are of the opinion that the District Judge will be able to assess from the information available (and where appropriate take into consideration any relevant existing case law) whether surrender would be unjust or oppressive under the existing circumstances and there is therefore no need to clarify this in legislation.

Article 24 – Postponed or conditional surrender

The Report states that the decision on postponed or temporary surrender is taken by the Ministry of Justice rather than the executing judicial authority. We do not understand the Commission’s comments in relation to transposition of this Article. It is the District Judge who decides whether or not to postpone or temporarily surrender the requested person and it is clear in our official notification to the EU, in respect of our operation of the Framework Decision, that we have declared that the District Judge is the executing judicial authority in the UK.

Article 25 – Transit

The UK is criticized for not implementing the provisions that relate to transit in our domestic law. It is correct that there is no reference to transit in our national legislation; however, in practice we do consider transit requests – in accordance with the requirements of the Framework Decision we declared that NCIS would be the responsible authority to decide on transit requests in our official notification to the EU dated 22 December 2003.

The Report also states that the UK is one of 14 Member States that allows transit where the warrant is based on an act that is not an offence under the law of the transiting state. We can only assume that this is a typographical error as, pointed out in the previous paragraph we have not explicitly transposed this article in our law despite operating it in practice.

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

The UK is criticized for not transposing the provisions of Article 26 into our national extradition law. However, this is covered by other legislation. For conduct that occurred prior to 4 April 2005 Section 47 of the Criminal Justice Act 1991 allows any time spent on remand to be credited by the judge. Section 243 of the Criminal Justice Act 2003 covers conduct that occurred on or after the 4 April 2005. The UK always provides details of any time spent on remand to the Requesting State when the subject of the request is surrendered.

Article 27 – Possible prosecution for other offences

The Report states that the UK has introduced the possibility for a District Judge to refuse surrender if there are no speciality arrangements in place with the issuing State and points out that any such refusal would be in breach of the FD. Section 17(1) of the Act states:

“A person’s extradition to a category 1 territory is barred by reason of speciality if (and only if) there are no specialty arrangements with the category 1 territory.”

We consider that the Framework Decision establishes speciality arrangements in Article 27 and therefore do not envisage that a District Judge would ever refuse extradition to a Category 1 territory on the grounds that there are no speciality arrangements in place.

In addition, the Report states that the UK has failed to transpose Articles 27(3)(d) and “7(3)(f) of the Framework Decision. We disagree with this assessment of our implementation of these provisions as they have been implemented by Section 17(3)(d) and 17(3)(f) of the Act.

The Report also states that the UK has not correctly implemented Article 27(4) which relates to consent to prosecution for other offences, post-surrender. We do not agree with this assessment of our implementation of this provision. Section 55 of the Act sets out the process a District Judge must go through before consent can be given which includes a full consent hearing where the judge must consider the same bars to extradition as he would do in a full extradition hearing. We do not consider that we have failed to implement this article of the Framework Decision.

Article 28 – Surrender or subsequent extradition

The Report states that the UK has not correctly implemented Article 28(2)(b) as our national law refers to “consent of the judge” rather than “consent of the requested person”. It is correct that it is the District Judge who decides whether or not to consent to allowing the prosecution of any additional offences post-extradition. This procedure is clearly set out in Sections 54 and 55 of the Act and includes the requirement for the District Judge to serve notice on the person that a request for consent has been received unless he is satisfied that it is not practicable to do so in addition to conducting a hearing where the various bars to extradition must be considered before consent can be agreed to.

It is also stated that the UK has not correctly transposed Article 28(3) as we have not allowed for the 30 day deadline for making the decision on consent. It is correct that we have not transposed the 30 day deadline, however, Section 54(5) of the Act requires that the consent hearing has to begin within 21 days of receipt of the request for consent. We do not anticipate that we would fail to meet the 30 day deadline.

Article 29 – Handing over of Property

The Report states that the UK has not specifically transposed Articles 29(2), 29(3) and 29(4) which deals with the handing over of any property which has been seized as evidence. The Commission is not correct in its assessment of our implementation of this provision. Section 172 of the Act which covers the delivery of seized property implements the provisions contained in Article 29 of the Framework Decision.

Article 30 Expenses

The Report states that the UK has failed to implement this article of the FD which clearly sets out who is responsible for costs incurred during the EAW process. We do not consider that there is a need to explicitly transpose this into our national law. In practice we are fully compliant with Article 30 of the Framework decision.
