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**NOTE**

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from :	General Secretariat
to :	Delegations
No. prev. doc.:	11788/07 COPEN 110 EJN 22 EUROJUST 41 + ADD 1
Subject :	Report from the Commission on the implementation of the Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States since 2005 and accompanying Commission Staff Working Document - Comments on the report

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Delegations will find attached extracts from the responses of Ireland to comments in the Commission Report and the accompanying Commission Staff Working Document<sup>1</sup>.

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<sup>1</sup> 11788/07 COPEN 110 EJN 22 EUROJUST 41 + ADD 1

**Extracts from and responses to comments on Ireland**  
**in the Commission Report**

**Page 8**

The Commission notes the following defects in transposition by Ireland (and others)

**(a) decision making powers entrusted to the central authorities (Article 7)**

The Commission states “decision making powers entrusted to the central authorities, going beyond the mere role of facilitation which the Framework Decision makes it possible to assign to them (Article 7/EE, IE, CY)”.

*The decision of the Supreme Court in Minister for JELR v Rodnov makes it clear that the role of the Central Authority is to scrutinise warrants to ensure that they are correct in form as well as content before presentation to the High Court for endorsement. The CA also must make sure that EAWs are clear in the English translations. The Central Authority exercises its role to facilitate the prospects of surrender.*

**(b) alteration of grounds for mandatory non-execution (Article 3(1))**

The Commission Staff Working Document at page 8 states “IE has transposed this paragraph to allow for immunity by virtue of amnesty or pardon in the issuing Member State rather than the executing Member State. This is not in line with the Framework Decision which allows refusal only where there is amnesty in the Executing Member State. This may have an impact on the efficiency of the EAW system since it may result in IE always requiring this additional information, which was not foreseen in the EAW form”.

*There would seem to be a misunderstanding of the legislative provision transposing this provision. Section 39 of the European Arrest Warrant 2003 provides at subsection (1) for refusal of surrender where a person has been granted a pardon under Article 13.6 of the Constitution. There is no standing provision in Irish law for amnesty. From time to time amnesty is granted in relation to certain offences, but in each case an Act of the Oireachtas (Parliament) is required. The provisions of subsection (3) of section 59 cover this eventuality. Subsection (2) covers the situation where amnesty/pardon in the issuing state confers immunity from prosecution and it would be contrary to Article 1(1) of the Framework Decision to surrender in such circumstances as surrender could not be “for the purposes of conducting a criminal prosecution”. It should be added that the additional information in the Report envisages that Ireland might “always require” has never been sought to date.*

**(c) Introduction of grounds of refusal going beyond the Framework Decision -Article 1(3)**

Article 1.3 provides “This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty of the European Union”.

Recital 12 specifically states in its second paragraph that “This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process,. . . .”.

*Section 37 of the European Arrest Warrant Act 2003 provides that a person will not be surrendered under the Act if*

- (a) his or her surrender would be incompatible with the State’s obligations under the Convention or the Protocols to the Convention*
- (b) his or her surrender would constitute a contravention of any provision of the Constitution....*
- (c) there are reasonable grounds for believing that-*
  - (i) The European Arrest Warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation.....*

*In these circumstances we cannot accept that the legislative transposition goes beyond the scope of the Framework Decision or that it creates a risk of refusal to surrender on the basis of grounds not envisaged in the Framework Decision.*

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### **(d) Almost systematic seeking of additional information or an insistence that an EAW be re-issued**

The Commission states “In practice, some countries (UK, IE) seem to ask almost systematically for additional information or even to insist on the arrest warrant being re-issued”.

*Ireland would like to ascertain the basis for the assertion that Ireland seems “to ask almost systematically for additional information or even to insist on the arrest warrant being re-issued”. Ireland asks for additional information or for the re-issuing of an EAW only where the legal advice provided indicates that without this additional information or new EAW there is a reasonable risk that there will not be a successful surrender.*

**Extracts from and responses to comments on Ireland**  
**in the Commission Staff Working Document 11788/07 ADD 1 COPEN 110**

**Article 1 and recitals 12 and 13**

The Commission have stated that in IE, MT, UK “the transposing legislation applies only to the Member States which have been listed by Decree or Order. The Commission has not fully been informed of these lists, although it should be notified of any relevant transposing measure including secondary national legislation”. The Report goes on to note that “It appears nevertheless that these Member States apply now the EAW towards all Member States”.

*Section 3 of the European Arrest Warrant Act provides that the Minister for Foreign Affairs may, by order, designate a state for the purposes of the Act that has, under its national law, given effect to the Framework Decision. The Minister for Foreign Affairs has designated all Member States for the purposes of the Act. Details of states designated in 2004 and 2005 were provided to the Commission on 15 January 2007 in respect of 25 Member States of the EU.*

*The European Arrest Warrant Act 2003 (Designated Member States) (No 2) Order 2007 (SI No 59 of 2007), designating Bulgaria and Romania for the purposes of the Act, was made by the Minister on 13 February 2007. The Commission was notified of the making of the Order by the Central Authority for the European Arrest Warrant on 2 March 2007.*

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

\*In addition to referring to the European Convention on Human Rights, IE and IT require refusal where surrender would breach their national constitutions. Although this may cover situations arising under both Article 6 TEU and Recital 12 (such as rules on due process), it nevertheless goes beyond the Framework Decision, in particular as Art 6 TEU refers only to those constitutional principles common to Member States.

*As indicated previously Section 37 of the European Arrest Warrant Act 2003 provides that a person will not be surrendered under the Act if, inter alia, his or her surrender would constitute a contravention of any provision of the Constitution. Recital 12 specifically states in its second paragraph that “This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, . . . ”. In these circumstances we cannot accept that the legislative transposition goes beyond the scope of the Framework Decision or that it creates a risk of refusal to surrender on the basis of grounds not envisaged in the Framework Decision.*

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

IE has effectively reintroduced the double criminality regime in respect of all categories of offences when acting as the issuing Member State, by virtue of section 4(3)(e) of the EAW Act as regards the return of its own nationals.

*The Commission would appear to be in error in relation to their understanding of this matter. Firstly, there is no section 4(3)(e) of the European Arrest Warrant Act and therefore the reference to it is not understood. Secondly, Ireland does not discriminate between its own nationals or nationals or residents of other member states in its application of the European Arrest Warrant Act 2003 (as amended).*

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

### **\*Article 3.1**

IE has transposed this paragraph to allow for immunity by virtue of amnesty or pardon in the issuing Member State rather than the executing Member State. This is not in line with the Framework Decision which allows refusal only where there is amnesty in the Executing Member State. This may have an impact on the efficiency of the EAW system since it may result in IE always requiring this additional information, which was not foreseen in the EAW form.

*There would seem to be a misunderstanding of the legislative provision transposing this provision. Section 39 of the European Arrest Warrant 2003 provides at subsection (1) for refusal of surrender where a person has been granted a pardon under Article 13.6 of the Constitution. There is no standing provision in Irish law for amnesty. From time to time amnesty is granted in relation to certain offences, but in each case an Act of the Oireachtas (Parliament) is required. The provisions of subsection (3) of section 59 cover this eventuality. Subsection (2) covers the situation where amnesty/pardon in the issuing state confers immunity from prosecution and it would be contrary to Article 1(1) of the Framework Decision to surrender in such circumstances as surrender could not be “for the purposes of conducting a criminal prosecution”. It should be added that the additional information the Report envisages that Ireland might “always require” has never been sought to date*

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

##### **\*Article 4.2**

IE allows for mandatory refusal where prosecution is being considered but has not yet been decided, which is more restrictive than envisaged by the Framework Decision.

*There may be some lack of understanding of the legislative transposition of this provision. Section 42 of the European Arrest Warrant Act 2003 provides that a person shall not be surrendered if;*

*(a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for **an offence**, (emphasis added) or*

*(b) proceedings have been brought in the State against the person for an offence consisting of an act or omission of which the offence specified in the European arrest warrant issued in respect of him or her consists in whole or in part.*

*It should be noted that subsection (a) above relates to any offence. It is intended to cover the situation where a prosecution is about to be commenced in this jurisdiction in respect of a person who is the subject of an EAW. It would lead to an absurdity if Ireland was required under the terms of our legislation to surrender a person who we were about to prosecute and then to request their return to Ireland under a new EAW (i.e. an EAW issued by Ireland) addressed to the original issuing state. Of course this section would no longer apply after the Irish proceedings had concluded or after a decision had been taken not to prosecute. Its effect is to postpone rather than to permanently prohibit the surrender.*

*Notwithstanding the above we are, at present, reviewing this provision of the EAW Act and the views of the Commission will be taken into account in the review.*

**\*Article 4(6), IE refusal to surrender under Article 4(6) and general point.**

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

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

*It is incorrect to say that the High Court could refuse to surrender based on Article 4(6) of the Framework Decision. Article 4(6) does not prohibit surrender rather it permits MS to refuse surrender on this basis. The High Court must refuse to surrender where surrender is prohibited by the Framework Decision (e.g. Article 3) but cannot refuse to surrender because the Framework Decision permits refusal. In any event Ireland does not differentiate between nationals or residents or other persons in relation to EAWs. The exact same criteria are applied in all cases.*



*In relation to the general point raised at page 13 of the Working Document there would appear to be a mistaken understanding of the Irish position. A person can only be surrendered in circumstances where such surrender is not prohibited by the Framework Decision. This general prohibition does not apply to the optional grounds for refusal set out in Article 4. While all the mandatory grounds for refusal in the Framework Decision have been transposed into Irish law, the wording of the legislation allows the High Court the option of refusing surrender on the basis of an article in the Framework Decision not specifically transposed into Irish law if the article clearly prohibited surrender in the particular circumstances of the case. Sections 15, 16, 22 and 23 of the EAW Act (extracts at Appendix 1) refer directly to the Framework Decision and although there are articles of the Framework Decision not specifically transposed into the legislation the cumulative effect of the above mentioned sections of the Act is to give those articles domestic legal effect.*

\*Article 4(7a) has been transposed as an optional ground by IE (if only proceedings have been brought in IE against the person concerned).

*Art 4(7) (a) of the Framework Decision offers some flexibility in this area, it talks about offences “which are regarded ..... as having been committed in whole or in part in the territory of the executing MS or in a place treated as such.” Proceedings could not be brought in Ireland in circumstances where the offence did not fall within the terms of Article 4(7) (a) of the Framework Decision.*

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

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

*Ireland’s legislative provision in this regard – Section 45 of the European Arrest Warrant Act - mirrors the provisions of Article 5(1). The grounds on which the original decision was rendered in absentia - as set out in the Framework Decision are reflected in the guarantee required. This is not in excess of what is provided for in the Framework Decision.*

*[Section 45 of the European Arrest Warrant Act provides*

*“A person shall not be surrendered under this Act if-*

*(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and*

*(b) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence or*

*(ii) he or she was not permitted to attend the trial in respect of the offence concerned, unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered-*

*(i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,*

*(ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and*

*(iii) be permitted to be present when any such retrial takes place.]*

**Article 5(3) guarantee, IE, MT and SK do not impose this condition.**

*As the Working Document notes provisions to enable Ireland to give the guarantee required by Article 5(3) are being included in the Criminal Justice (Miscellaneous Provisions) Bill to be published shortly. In addition, Ireland was also able to provide an undertaking acceptable to the executing Member State in a particular case where this issue arose and the person concerned was surrendered to Ireland.*

**Article 7 Recourse to the central authority**

*As is noted in the Staff Working Document, the decision of the Supreme Court in Minister for JELR v Rodnov makes it clear that the role of the Central Authority is to scrutinise warrants to ensure that they are correct in form as well as content before presentation to the High Court for endorsement. The CA also must make sure that EAWs are clear in the English translations.*

## **Article 8 Content and form of the European Arrest Warrant**

The UK and Ireland have imposed a certification or pre-endorsement stage for an EAW to be valid. This supplementary formality is to be complied with by the central authority, which, in practice, often acts as an executive authority.

*Ireland does not have a certification or pre-endorsement stage for an EAW to be valid nor does the central authority act as an executive authority. Ireland proceeds with warrants where the essential requirements of the warrant are present, but it has to be recognised that warrants indicative of a lack of care would, under Irish Constitutional law, be looked upon adversely by the courts where the liberty of the person is at stake. Presenting documentation to an Irish court despite legal advice that it is likely to be found to be flawed increases the risk that surrender will not be successful.*

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

\*5 States do not allow an EAW to be transmitted directly where the location of the person is known (EE, IE, and HU, MT, UK).

*Ireland has taken account of the organisation of its judicial system and has availed of the possibility of having a Central Authority, as provided in Article 7(2) of the Framework Decision. Ireland's requirement that transmission and reception be effected via the Central Authority is clearly not at variance with the Framework Decision.*

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

Furthermore, it has been reported that IE requires additional information on a systematic basis, which is contrary to this article.

*It is not clear by whom this has been reported. Additional information is sought from the Issuing Judicial Authority if the EAW is clearly deficient. This information is sought on a case by case basis.*

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

6 other Member States have also explicitly transposed this article with the exception of paragraph 2 (IE, MT, NL, FI, and SE).

*Article 16(2) states that “the executing judicial authority may seek the advice of Eurojust when making the choice referred to in paragraph 1”. This is a matter entirely for the discretion of the High Court and it would be inappropriate, having regard to the separation of powers between the executive, legislature and the judiciary to legislate for it. We have separate legislation on the International Criminal Court.*

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

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

*There would appear to be some confusion here. Having stated the above, the Working Document continues at the foot of the same page - page 28 - to state "**IE has fully transposed the 10 day deadline in paragraph 2 for the taking of the decision following consent.**" It is our position that the latter statement is the correct statement of the position. Should there be any doubt on this point Ireland's position as previously advised is set out below, yet again, for your information.*

*The Commission has previously been informed of Ireland's position on this Article, see Copen 118, 11528/05 referred to above. It should be noted that Article 17(2) requires only that the decision **should** be taken within 10 days, the Article does not state that it **shall** be taken within that period.*

*The Working Document appears to confuse the position between the execution of the decision to surrender the person (section 15(5) of Ireland's law – Appendix 1) and the taking of the decision. In consent cases the decision is always given on the day consent is given since consent is given before the executing judicial authority. In such circumstances it would be redundant to provide a statutory rule that a decision would be made within 10 days. However it is recognised that such a decision may not be “final” having regard to the right to revoke consent and the right of appeal.*

*In relation to the period between the making of the surrender decision and its execution, the European Arrest Warrant Act as amended now provides (at Section 15(3) - See appendix 1) that surrender may take place earlier than the deadline for its execution if the person so requests and the Court agrees.*

Paragraph 2: However, at the pre-endorsement stage, the central authority is not bound by any time limit. As a consequence, the average time between receipt of the EAW and endorsement in IE is 88 days.

*Section 13(1) of the European Arrest Warrant Act 2003 (as amended) provides that the Central Authority shall, as soon as may be after it receives a European arrest warrant, apply or cause an application to be made to the High Court for the endorsement by it of the European arrest warrant for execution of the European arrest warrant concerned. The High Court would look unfavourably on any unreasonable delay on the part of the central authority in applying for endorsement of an EAW. In addition, out of the 114 EAWs endorsed by the High Court in 2006, 58 were endorsed within one month of receipt by the Central Authority and 13 were endorsed within two months of receipt. Up to 6 July 2007 out of the 60 EAWs endorsed by the High Court, at least, 39 were endorsed within one month of receipt by the Central Authority and 10 were endorsed within two months of receipt.*

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

19 Member States have correctly transposed this article with DK, DE, and IE not having implemented it .

DE and IE have stated that this Article does not need transposition as it is declaratory by nature or it will be dealt with administratively. Whilst this may be true in relation to the Framework Decision not affecting international obligations, the Framework Decision nevertheless also requires that the executing Member State requests consent from the Third State. DE and IE legislation should therefore ensure that provisions are in place to make certain that all necessary measures for requesting consent are taken.

*This is a matter which can be (and is) dealt with administratively and does not require specific legislative provisions. Please note that Ireland is bound by the Framework Decision and is therefore obliged to give effect to Article 2. It is not therefore necessary to provide for this specifically in legislation, because the obligation is not being imposed on a third party, but on Ireland itself. Insistence that Ireland should legislate for this Article is to suggest that we do not take our international obligations seriously which presumably is not the intention.*

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

4 Member States have partially transposed this article (EE, IE, ES, LT). IE has stated that this article does not need specific legislation and will be carried out administratively through its central authority.

*As with Article 21 this can be (and is) dealt with administratively and does not require specific legislative provisions. In addition this is transposed to a certain extent by the provision of Section 16(10) & (11) of the European Arrest Warrant Act –see Appendix 1. Please note that the state is bound by the Framework Decision and is therefore obliged to give effect to Article 22. It is not therefore necessary to provide for this specifically in legislation, because the obligation is not being imposed on a third party, but on the State itself.*

#### **\* Article 23(2)**

"... as a principle in IE, the effective surrender after the final decision will only take effect upon the expiration of an additional 10 day deadline."

*Article 23(2) provides that surrender shall take place no later than 10 days after the final decision on the execution of the EAW. Orders for surrender under Section 16 of the EAW Act, copy at Appendix 1, become final on the expiration of 15 days after the making of the order (S.16(3)). Section 16(5) provides that surrender shall be surrendered not later than 10 days after that date. Accordingly Ireland's legislation is fully in line with the provisions of the FD in providing for surrender no later than 10 days after the final decision.*

### **\*Article 23(3)**

The respective legislations of EE and IE provide that an authority other than their judicial executing authority is authorised to agree a new date.

*In relation to the agreement of a new surrender date under Article 23 (3-4) the role assigned to the Central Authority under the European Arrest Warrant Act is an administrative rather than an executive act and as such is clearly envisaged by Article 7 of the Framework Decision. It will be noted that in Article 23 (1) the date of surrender shall be agreed between the authorities (judicial or central not specified) concerned.*

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

IE has not explicitly transposed exception g). Initially consent could only be provided by the central authority contrary to article 27(3)(g) and 27(4) of the Framework Decision. IE has stated that they have amended their legislation to vest the powers to give consent in the judicial authority.

*As pointed out, the Commission has previously been informed (see COPEN 118 , 11528/05) that the EAW Act had been amended, with effect from 8 March 2005, to vest the power to give the consents required under Articles 27 and 28 in the judicial authority. See Sections 22, 23 and 24 of the EAW Act (as amended) in Appendix 1.*

IE has not transposed the provisions on requests for consent under article 27(4).

*Ireland has transposed the provisions on requests for consent under article 27(4). See Section 22(7) and section 22(8) of the EAW Act (as amended) in Appendix 1.*

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

IE was in the same position initially but has later stated that they have amended their legislation to vest the powers to give consent in the judicial authority.

*As pointed out, the Commission has previously been informed (see COPEN 118 , 11528/05) that the EAW Act had been amended, with effect from 8 March 2005, to vest the power to give the consents required under Articles 27 and 28 in the judicial authority. See Sections 23 and 24 of the EAW Act(as amended) in Appendix 1.*

**\*Article 30 – Expenses**

IE has also transposed it at least in part.

*As the Commission has been advised previously, Section 8 of the EAW Act provides that expenses incurred by the Minister in the administration of the Act, which transposes the Framework Decision, shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas. This covers expenses as both issuing and executing state and accordingly it would be more accurate to say that Ireland has transposed the Article completely.*

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