European Arrest Warrants

Ensuring an effective defence

a JUSTICE report

European Arrest Warrants

Ensuring an effective defence

JUSTICE – advancing access to justice, human rights and the rule of law

JUSTICE is an independent law reform and human rights organisation. It works largely through policy-orientated research; interventions in court proceedings; education and training; briefings, lobbying and policy advice. It is the British section of the International Commission of Jurists (ICJ).

JUSTICE relies heavily on the help of its members and supporters for the funds to carry out its work. For more information visit www.justice.org.uk.

JUSTICE, 59 Carter Lane, London EC4V 5AQ
020 7329 5100
admin@justice.org.uk
www.justice.org.uk

ISBN 978 0 907247 54 8
Designed by Adkins Design
Printed by Short Run Press Ltd

Contents

Acknowledgements

This report was researched and written by Jodie Blackstock, Director of Criminal and EU Justice Policy at JUSTICE, with invaluable assistance of JUSTICE interns Barend van Leeuwen, Vasileios Fragkos, and Lena Donner.

We would like to offer our particular thanks to Jonathan Mitchell of the European Criminal Bar Association for all his assistance in setting up the project, helping with the methodology, locating lawyers and reviewing progress.

We also thank the International Commission of Jurists Secretariat in Geneva for their assistance in locating the EU sections and legal officers Róisín Pillay and Massimo Frigo for their assistance in devising the methodology.

The project team have all given their time for free in conducting the project over the past two years and the project would not have been possible without them. The members are set out in the table at the end of this chapter.

Particular thanks go to the Portuguese team for their time consuming and detailed efforts undertaken in reviewing files at the General District Prosecutor's Office in Lisbon, and Professor Christoph Safferling for visiting the General Prosecutor's Office of Nuremberg.

We are most grateful that the following were willing to be interviewed for the project and provided thoughtful and helpful information:

State representatives interviewed

Anders Nielsen, Head of Extradition Office, Ministry of Justice, Denmark
Dr. Ralf Riegel, Ministry of Justice, Germany
Reinhold Wenny, Senior Prosecutor of the General Prosecutor's Office, Nuremberg, Germany
Argiro Eleutheriadou, Head of Directorate on International Judicial Cooperation, and Mr Stalikas -Head of the law making department, Ministry of Justice, Greece
Mr Angelis, Senior Prosecutor, PPCA, Greece
Raymond Briscoe, Office of the Director of Public Prosecutions, Ireland
Billy Keane, Criminal Law Reform Division, Department of Justice and Law Reform, Irish Government
Mr Eugenio Selvaggi, Head of Department of Justice Affairs, Ministry of Justice, Italy
Marjorie Bonn, Ministry of Justice, Netherlands
Ms Marlèn Dane, Head of EU Division, European and International Affairs Department, Ministry of Justice, Netherlands
Mr Igor Dzialuk – Deputy Minister of International Relations, Poland
Tomasz Darkowski, Director of the Mutual Legal Assistance section of the Ministry of Jusitce, Poland
Anne-Marie Kundert Smith, Crown Advocate, Special Crime and Counter Terrorism Division, Crown Prosecution Service, England and Wales
David Dickson, Extradition Team Leader, International Co-operation Unit, Crown Office and Procurator Fiscal Service, Scotland

Defence lawyers interviewed or providing questionnaires

John Kahlke, Demark
Dr. Margarete von Galen, Germany
Ewa Lilliesköld, Sweden
Ouriana Karantinou, Greece
Vassilis Arvantis, Greece
Mr Scalia of the Criminal Law Committee, Bar Council of Rome, Italy
Rachel Imamkhan, Netherlands
Onno Van der Lee, Netherlands
Cristina Ventura, Portugal
Andrea Tavares, Portugal
Paulo Araújo Ferreira, Portugal
Filipe Falcão Oliveira Paulo Silva Santos, Portugal
Maria do Rosário Caldeira, Portugal
Anabela Anão, Portugal
Silvino Mendes, Portugal
Florentino Marabuto, Portugal
Pedro Dias Louro, Portugal
Paula Santos Morgado, Portugal
Charlotte Powell, Extradition Lawyers' Association, UK
Ben Keith, UK

Special thanks must also go to the General District Prosecutor's Office in Lisbon in allowing us to have access to the case files. Without this, we would not have managed to obtain so much data. The views mentioned in the Portuguese report are solely those of the Portuguese team and the defence lawyers and are not opinions expressed by the General District Prosecutor's Office.

JUSTICE is grateful to the EU Commission JPEN 2009 programme for assisting us in funding the project. The views expressed and suggested outcomes in the report are those of JUSTICE and not the Commission. We take full responsibility for its contents, including any opinion, error or use made of the information contained herein.

Participant	Country	Organisation	Capacity
Mike Evans	England	Kaim Todner	Lawyer
Niall McCluskey	Scotland	Connarty Advocates	Lawyer
Dr Adam Górski	Poland		Reviewer
Prof Zbigniew Lasocik	Poland	ICJ Poland	Reviewer
Anna Demenko	Poland		Reviewer
Mikołaj Pietrzak	Poland	Pietrzak & Sidor Spolka Jawna	Lawyer
Dominika Stepinska-Duch	Poland	Wardynski and Partners	Lawyer
Janus Tomczak	Poland	Wardyński and Partners	Lawyer
Ida Søholm	Denmark	ICJ	Reviewer
Jesper Nymann Nielsen	Denmark	Advokatfirmaet Schack	Lawyer
Thorkild Høyer	Denmark	Nyhavens Advokaterne	Lawyer
Kåre Pihlmann	Denmark	Forsvars Advokat	Lawyer
Bas Leeuw	Netherlands	NJCM/Erasmus School of Law	Reviewer
Jozef Rammelt	Netherlands	Kaiser Advocaten	Lawyer
Claudia Dirkzwager and Marielle van Essen	Netherlands	Korver-vanessen	Lawyer
Thom Dieben	Netherlands	Jahae Advocaten	Lawyer
Franco Vella	Italy	ICJ	Reviewer
Jean Pascal Obembo	Italy	ICJ	Reviewer
Paolo Iorio	Italy	Studio Legale Internazionale	Lawyer
Massimiliano Testore	Italy	Studio Legale Testore	Lawyer
Helen Ranelius	Sweden	ICJ	Reviewer
George Pyromallis	Greece	Georgios D. Pyromallis Law Office	Lawyer
Ilias Anagnostopoulos	Greece	IAG	Lawyer
James MacGuill	Ireland	MacGuill & Company Solicitors	Lawyer
Dara Robinson	Ireland	Garrett Sheehan and Partners	Lawyer
Catherine Almond	Ireland	Garrett Sheehan and Partners	Lawyer
Prof Christoph Safferling	Germany	Philipps-University Marburg	Reviewer
Oliver Wallasch	Germany	Wallasch & Koch	Lawyer
Dr Oliver Kipper	Germany	Kipper & Durth	Lawyer
Vania Costa Ramos	Portugal	Carlos Pinto de Abreu e Associados/ECBA	Reviewer
Maria Antónia Araújo	Portugal	Carlos Pinto de Abreu e Associados/ECBA	Lawyer
Miguel Santos Almeida	Portugal	Carlos Pinto de Abreu e Associados/ECBA	Trainee

Chapter 1
Introduction

The Council Framework Decision on the European arrest warrant and the surrender procedures between member states of 13 June 2002[1] had an implementation date of 31st December 2003. After a few years of teething problems concerning conflict with national constitutional laws,[2] all member states, including the most recent accession countries to the EU, are using the instrument and it is thriving.[3] In 2007 the European Commission declared the EAW as a success:[4] It is the first EU instrument to demonstrate the effectiveness of judicial cooperation in the area of criminal justice. The Commission explained that the use of the EAW has increased year on year with surrender taking place overall within the binding time limits, which are much shorter periods than following conventional extradition procedures.

JUSTICE has been engaged in policy and research in the area of EU criminal justice since the Tampere European Council Presidency Conclusions in 1999 that formed the incentive for judicial cooperation in criminal matters and the application of the mutual recognition principle to this area.

We held a conference focusing on the implications of the EAW in July 2003 titled *Eurowarrant: European Extradition in the 21st Century* and produced a publication in the same year, *European arrest warrant: a solution ahead of its time.*[5] Our work focused on whether the new streamlined process in the EAW could affect the protection of fundamental rights. In that report we concluded that:

> *The only way for member states to genuinely speed up and simplify extradition (or surrender) within the EU is to ensure that the criminal justice systems of each and every member state do, in fact, meet the standards that are set out in instruments such as the ECHR and the EU Charter of Fundamental Rights which are declared to represent common values.*[6]

We further observed that the introduction of the EAW makes the need for minimum standards in procedural safeguards in the Europe Union a matter of urgency if the new system is to work efficiently in practice:

---

1 (2002/584/JHA) OJ L 190 18/07/2002, p1 – 18.
2 See E. Guild, Constitutional Challenges to the European Arrest Warrant (Nijmegen: Wolf Legal Publishers, 2006).
3 See statistical information contained in annex 2.
4 Report From the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2007) 407 final, at page 2.
5 JUSTICE (2003), funded by the European Commission Grotius II Programme and the Nuffield Foundation.
6 P 73.

> *In the long term, EU commitment to fundamental rights in criminal justice across Europe must be demonstrated by ensuring that individuals facing criminal-type proceedings in the EU, whether domestic or otherwise, can be assured of the same standards of protection of their fundamental rights and access to justice wherever they are. Without such assurance, the EU's claim to 'common values' is hollow.*[7]

Despite the Commission's positive conclusions about the EAW in 2007, subsequent research commissioned by the European Criminal Law Academic Network (ECLAN) confirmed concerns amongst practitioners and academics in the field that mutual trust in criminal justice matters had been rather too easily assumed between member states and that, in fact, it was by no means evident in practice.[8] Furthermore, growing concern was expressed about the impact upon fundamental rights that the EAW was causing. In the ECLAN Study lawyers interviewed reported that the principle of mutual recognition does not benefit the defence and that there is no real balancing of interests between prosecution and defence. They argued that, since the time limits in the EAW scheme are very short and the grounds for refusal limited, defence lawyers play a minor role in the hearing and surrender procedures. In addition, they do not have access to the file or any contact in the issuing member state. Added to that is the fact that the legal profession does not have sufficient access to information and training on the new instruments, and lacks the means to ensure continuity and a fully effective defence in cross-border situations. Elsewhere, other research was revealing the wide disparity between member states in their approach to procedural safeguards for suspects in criminal proceedings[9] and action at the EU level was proposed for a roadmap on procedural safeguards.[10]

This project therefore builds upon our previous work and other research to focus in detail on the impact of the new system upon the defence of surrender requests under the EAW regime. In our view the actual defence of EAWs was not receiving sufficient attention from the review mechanisms in place.[11] *European Arrest Warrants: ensuring an effective defence* considers the EAW from the perspective of its impact upon the requested person. We look not at what outcome the requested person necessarily desires, as in most cases this is simply to remain in the executing state and not have to answer the charge in the warrant, but rather on what best practice in defending cases should be aiming to achieve within the structure of the Framework Decision.

By conducting a review of defence in EAW cases we aim to ascertain whether fundamental rights are adversely affected by the scheme and in particular whether the fundamental principle of equality of arms, which every EU justice system is premised upon, is being undermined by the operation of the system.

In devising the project, we were concerned, in particular, about how requested persons are able to defend themselves at all against an EAW which depends upon allegations raised under the system of law and evidence of another member state, given the impetus to afford mutual recognition to issuing state

7 p 76.

8 G. Vernimmen-Van Tiggelen and L. Surano, Institute for European Studies, Université Libre de Bruxelles; European Criminal Law Academic Network, Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union 20th November 2008, EC DG JLS (the ECLAN Study).

9 Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union T. Spronken and M. Attinger, University of Maastrict, EC, DG JLS, 12th December 2005.; followed by E. Cape, Z. Namoradze, R. Smith, and T. Spronken, Effective Criminal Defence in Europe (Antwerpen-Oxford: Intersentia, 2010). We were also a partner in the project Eurowarrant led by the Asser Institute, which established a consortium to provide cross EU information on the implementation of the EAW, concluding in 2006. This revealed the benefit of exchanging information about best practice but also the need to maintain a network once a project has concluded.

10 Resolution of the Council of 30 November 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1 (4.12.2009). For the history leading to the Roadmap and subsequent activity pertaining there to see J. Blackstock, Procedural Safeguards in the European Union: a Road well travelled? EuCLR 1/2012, p 20

11 The approach taken by the Commission in reviewing implementation and also the predominant focus of experts conducting the Council's evaluation report series was on whether national implementation met the intention and content of the Framework Decision.

judicial decisions. We, therefore, explore whether a dual defence is in practice being utilised by defence lawyers and what barriers there are to the operation of this defence. Furthermore, we establish contact between pan-EU lawyers through the project to ascertain whether a workable network can be established to provide an effective defence to EAW cases.

The project was conducted with the European Criminal Bar Association and the International Commission of Jurists who have provided invaluable assistance in devising its parameters and facilitating the introduction to lawyers and academics in order to compile the research. We obtained funding from the European Commission JPEN 2009 programme to assist us with conducting the two year study that the project entailed, the results of which are documented in this report. We are very grateful for that assistance.

The research became particularly timely with the presentation of a proposal for a Directive on the right of access to a lawyer and on the right to communicate upon arrest[12] by the Commission in 2011. The directive provides the opportunity to ensure a concrete and effective right to legal representation during EAW proceedings and our results aim to support the inclusion of robust and relevant measures to achieve this aim.

We set out the methodology for the project as a whole and the approach of this report in Chapter 3, followed by analysis of the information obtained. We then set out conclusions drawn from the information received and recommendations that we hope can be taken forward by the EU law making institutions and member states where possible but also, and perhaps most importantly, by the defence professions across the EU. The country reports are contained at the back of the report followed by relevant information in the annexes.

12 COM(2011) 326 final (Brussels, 8.6.2011)

Chapter 2
Recommendations

Our research suggests that there are five key areas in need of improvement to ensure the best possible defence within the framework of the current EAW scheme. These areas are:

(1) provision of training for defence lawyers;
(2) ensuring dual representation is afforded in both the executing and issuing state;
(3) creating a peer review database through which issuing state lawyers can be accessed;
(4) updating the Schengen Information System through which the majority of warrants are notified; and
(5) providing appropriate interpretation and translation for EAW proceedings.

We do not make recommendations drawn from our conclusions regarding concerns about the Framework Decision and implementing laws. This is because we recognise that many of these cannot be resolved without review of the Framework Decision. Given that all EU measures must be 'Lisbonised' by 2014, this is a sensible time to consider the concerns that member states have with the operation of the existing EAW scheme. No doubt the jurisdiction of the Court of Justice of the European Union will be invoked once it is available to resolve arguments about interpretation of the framework decision and its impact upon fundamental rights. However, member states have the opportunity now to resolve certain outstanding aspects of complaint, in particular how to ensure a proportionality test is properly considered prior to issuing an EAW. Focus should also be placed on application amongst the member states of the European Supervision Order[13] and the Commission should present a proposal on pre-trial detention as soon as possible.

We have therefore made recommendations for improving the current operation of the EAW rather than for amendment of an instrument whose prospects of review are uncertain. Recommendations need to be practical, achievable and lead to effective improvements. Our research reveals that more work is needed to ensure that EAW cases actually ensure an effective defence. Whilst the European Court of Human Rights (EctHR) has held that the extradition process does not fall within the ambit of article 6 of the European Convention on Human Rights (ECHR) because it is not determinative of a civil right or obligation in the

13 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention

executing state, the right to a fair hearing is nevertheless engaged under articles 47 and 48 of the EU Charter of Fundamental Rights (the Charter). It would be surprising if anyone were to argue that articles 47 and 48 do not apply to EAW cases given that it has an expressly wider mandate than article 6 ECHR. Since the Charter must be interpreted in light of the Convention and its jurisprudence, pursuant to article 52(3) CFR, it follows therefore that a person is entitled to *effective*, and not just nominal, advice and representation in the EAW process, as the provision of rights must be practical and effective.[14]

Training defence lawyers

The Framework Decision has specifically created a judicial process rather than a negotiation between sovereign states. This provides an arena for adversarial litigation in which the requested person must have equality of arms. This must be provided by a suitably qualified defence lawyer.

There are systems in place in each member state for training prosecutors and judges. The EU has produced and updated a Handbook on issuing an EAW which has proved invaluable for judicial and central authorities. Training for defence lawyers, however, is governed by bar associations and is nowhere mandatory, if provided at all.

EAW cases are complex and move very quickly in order to comply with the time limits set out in the framework decision. They require understanding of not only the executing state legal system but often knowledge of the issuing state system as well. If lawyers do not possess this expertise personally, they need to know where to quickly obtain it. They must be able to apply comparative analysis of both systems, as well as ensuring their arguments are within the structure afforded by the framework decision. They may have to work with interpreters and obtain evidence to support their arguments from outside their jurisdiction. More importantly, whilst in domestic cases it is assumed that standards of lawyers can be controlled through the ability of clients to complain to disciplinary bodies which can then hold the lawyer to account, this is virtually impossible for requested persons who are surrendered to another jurisdiction. This means that poor skills can remain undetected with the capacity to significantly affect the lives of the multiple persons the lawyer may act for.

Each country should, therefore, provide practical training to defence lawyers on how to defend EAWs effectively. This could be directed by the authority which administers legal aid in each jurisdiction so that at least duty lawyers who are engaged to undertake EAW cases are competent; In order to be listed on the duty list, training may be formally required. This is already the case in the Netherlands. However, this would not assist private lawyers who are not engaged through the duty list, which comprises a significant proportion of legal assistance in the member states in our project. In this scenario, the bar associations are in a position to provide practical training and whilst many are reluctant to make this an accredited course that would be obligatory for any lawyer undertaking EAW cases, it would certainly improve the standard of representation in these significant cases to have such a requirement. Almost all representatives in the project expressed caution about controlling defence lawyers, either through legal aid providers or through the bar associations because this could be seen as anti-competitive. We find this approach disappointing when the focus of all actors in the legal system should be to ensure that a person receives the best quality legal assistance possible in order to ensure that their fundamental rights are properly respected and the interference with their liberty is justified.

14 *Airey v Ireland*, application no. 6289/73, ECtHR, 9th October 1979.

We recommend, therefore, as a minimum,

(i) The development of a practical handbook on how to defend an EAW for each member state. This should include:

- a basic introduction to cross border proceedings, concepts such as specialty, dual criminality, double jeopardy, trial *in absentia*, grounds for refusal;
- where to go to obtain information about the issuing state's laws (such as using the e-justice portal as a starting point) and evidence to raise grounds for refusal effectively, ensuring that the substantive case in the issuing state is defended, negotiating withdrawal of the warrant and practical arrangements such as obtaining legal aid, complying with time limits and seeking adjournments;
- a notated example EAW certificate to indicate how to understand and verify each section;
- example pleadings that could be submitted under the national procedure to argue against surrender.

(ii) Training should be delivered through a seminar format where delegates can explore case scenarios with experienced practitioners. The programme should include the role-play of a case so that the delegates can engage in and understand how a case works in practice. This is the approach that the UK Extradition Lawyers Association took to training when the EAW came into force. It is considering re-running the course given the concerns raised in our research.

(iii) A training manual and course should be integrated into the professional training requirements of trainee lawyers to ensure that each new intake has some grounding in how to conduct these cases. This is the approach in Ireland, though at present it only comprises a small section in the training manual drafted by an experienced extradition solicitor, without a practical element.

(iv) Young or newly appointed duty lawyers should be encouraged to attend court and observe their experienced colleagues conducting these cases prior to beginning their practice.

(v) Update sessions with professional development credits should be held on developments in case law interpreting the domestic legislation and ECtHR or ECJ cases to ensure uniform knowledge amongst practitioners.

Whilst an EU-wide EAW defence handbook could be developed as a starting point, because the approach will be similar in each country, nevertheless we recommend a guide for each jurisdiction so that this will be readily accessible and understandable for local lawyers who have little time to prepare their cases. This could be developed in conjunction with experienced lawyers and the regional and national bar associations of each member state. The ECBA will work with its national members to produce suitable materials to be made available to practitioners and trainees. The training programmes offered by the European Academy of Law (ERA) could provide a good starting point for the development of an internal training programme. The project team considered the development of an EU-wide quality mark but this is something which will need the involvement of an organisation like ERA. It would allow lawyers to indicate their expertise in the EAW. Such a quality mark would require instruction and assessment in defending EAW cases and other relevant EU mutual recognition instruments. We think it would be a welcome addition to the ERA training programme. The ECBA will in any event liaise with bar associations to ensure training on the EAW is made available as part of professional development.

Offering a dual defence

In our view, provision for dual representation is imperative in EAW proceedings, so as to ensure expert knowledge is available to provide the best evidence to the court. Whilst it could be argued that these arrangements do not require any express provision, and with appropriate training of defence lawyers should be organised in each case by the defence, without a legal basis, it can be very difficult to arrange this assistance within the short time limits that are required under the EAW system. Courts in some member states can be reluctant to grant an adjournment to lawyers to seek advice and assistance in the issuing state as they are concerned that the time limits must be respected or that it would be against the mutual recognition of the EAW.

Article 11(2) of the Framework Decision provides for the assistance of 'legal counsel' However the content of that right is not specified. The European Commission has proposed a directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest in order to ensure that the right to a lawyer is effective.[15] In particular it has provided content to the right in EAW cases. In articles 11(3) to (5), dual representation was posed. The Commission recognised that in EAW cases it is not sufficient to simply have access to a lawyer in the executing state. The approach taken in the article of requiring dual representation in every case, appointed through the cooperation of the judicial authorities in the executing and issuing states is laudable. The justification for this approach is no doubt a result of the lack of a defence network through which lawyers are able to find an issuing state lawyer to assist them; making this appointment through a judicial act could alleviate that problem. However, assistance may not be needed in every case and the type of assistance will differ. It is also more appropriate for the client to contact their lawyer rather than a judge on their behalf. By having this process in the control of the executing state defence lawyer it is more likely that the issuing state lawyer will be the appropriate lawyer to enable accurate advice and assistance to be given. Nevertheless, the Council through its Working Party removed any reference from the text to the assistance of a lawyer in the issuing state. The Council's General Approach[16] therefore provides only for the right of access to a lawyer in the executing state. The European Parliament LIBE Committee has however retained the original wording of the Commission in its orientation vote.[17] It will therefore be necessary for the Council to review its position in order to reach a compromise.

We consider that an express provision on dual representation in the directive on the right of access to a lawyer would signal that this process simply aims to ensure that the best defence, in accordance with the requirements of the ECHR and the EU Charter is being afforded. It would also recall that the EAW system is designed to further the administration of justice. The withdrawal or refusal of a warrant, where this course of action is appropriate, is as much a part of the intention to create a more efficient system in the EU as the surrender of a requested person, and in suitable cases should be supported by the courts. Whilst in some cases this may mean that the warrant takes longer to process, because information is required from the issuing state, this is not a reason to prevent the adjournment. It is more appropriate to ensure that the defence is properly explored prior to interfering with the requested person's fundamental rights. In any event, often an issue will be resolved quickly and the adjournment will be only for a few weeks. Furthermore, where a case can be resolved by either an agreement to voluntarily return or by the withdrawal of a warrant, the time incurred in processing the EAW will be reduced. In cases where there is the prospect of delay to the proceedings, the Framework Decision affords for extension of time limits in

15 COM(2011) 326 final
16 10467/12, Brussels, 31 May 2012
17 DS 1518/12, Brussels, 11 July 2012

article 17 and the issuing state should not demand the return of the person within a rigid timeframe whilst at the same time being aware that the domestic matter is receiving attention in its own courts.

The Council's General Approach deals with the right of access to a lawyer in EAW cases in its current draft article [9]. We recommend an amendment to article 9(2) as follows:

> - *the right of access to a lawyer in such a time and manner so as to allow him to exercise his rights effectively and in any event as soon as practically possible after the deprivation of liberty;* ***This right shall extend, where necessary, to the advice and/or assistance of a lawyer in the issuing state for the purposes of resolving the EAW.***

The amendment would allow judicial discretion as to whether the assistance of an issuing state lawyer is necessary, and would therefore ensure that the executing state lawyer can provide some grounds upon which to justify the necessary adjournment to obtain this assistance. Ultimately, the process would not be open to abuse because the judicial authority of the executing state would be in control.

We have canvassed this amendment with the member states engaged in the project and the majority of representatives have indicated that they would support this qualified approach as pragmatic and focussed on what is required to progress a case. Many recognise that in practice defence lawyers do take this approach. The UK is awaiting a decision of the Home Secretary following a review of the EAW system and is not in a position to express a view on this. The Irish, Swedish and Portuguese Ministries were not able to provide their views at the time when we contacted them.

All prosecutors interviewed thought having a lawyer acting in the issuing state would be very useful to ensure the case was resolved appropriately and the requested persons were able to put forward the defence they needed. They supported the idea of training because they thought it would improve the equality of arms between the parties. They also all considered that if lawyers raise appropriate and persuasive challenges, the courts will properly scrutinise the case, which will raise standards.

Creating a peer reviewed database

In order to make dual representation operate effectively, as most member state representatives have observed and as lawyers have found to their detriment in practice, it is necessary to ensure quality of the advice and representation of the issuing state lawyers. In particular, where legal assistance is required to further and resolve the case in the issuing state, where a lawyer is not already instructed it is very difficult to know where to find a well respected and experienced lawyer who will be able to approach the prosecutor or court and make persuasive representations about the resolution of the case.

Our recommendation is for the establishment of a peer reviewed database that will enable executing state lawyers to search for a lawyer in the issuing state concerned, read testimonials from other lawyers who have found a particular lawyer to be helpful in the field or skill required and make a more informed decision about who to contact. Currently the ECBA operates a database on its website entitled 'Find a Lawyer'. The site explains:

> *Due to the increase in transnational criminal investigations, the ECBA believes it is important for lawyers and EU citizens to have easy access to details of criminal defence practitioners throughout all Council of Europe countries. This section of our website*

contains contact details of individual practitioners who confirm that they are specialist criminal defence practitioners.

Members of the ECBA can nominate themselves for entry into this database. This mechanism does not provide any indication of quality or experience. As such, we consider that by seeking testimonials from executing state lawyers with respect to lawyers they would recommend and why (see annex 3 for the pro forma information we have sought) it is possible to develop a standard of quality and expertise. We anticipate that once recommendations begin to be made for lawyers, they will see this as a useful tool and more will endeavour to provide the requisite information necessary to create extensive peer reviewed entries in the Find a Lawyer database. Over time it should be possible to move from a self-certified system to one that is entirely peer reviewed.

Furthermore, through this project it has been possible to exchange information about cases that the members have been involved in where human rights arguments have been upheld by the courts. We think this network of exchanging information should be formalised. We would recommend that the ECBA website have a facility for uploading important cases from the highest courts of the member states that can be utilised by defence lawyers in their own jurisdictions to demonstrate how the EAW is being applied amongst the member states. Such facility should operate in a similar way to the JUSTICE third party intervention web pages, which provide uniform information in summary about each case we have been involved in.[18] Since an area of mutual trust is to be fostered through the advancement of mutual recognition instruments, we consider it important for the courts of the member states to understand the approach their counterparts are taking on similar issues. It is very often difficult to obtain this information without knowledge that a case has taken place. The ECBA aims to develop this peer reviewed and case law database.

Furthermore, if an EU wide quality mark could be established through ERA or otherwise, the database could include those lawyers who have received the accreditation.

The EU Commission is due to present a proposal for a directive on legal aid in criminal proceedings during 2013. It is crucial that this directive should make provision for legal aid in both the executing and issuing states in accordance with our proposed amendment to allow for dual representation, where the requested person is already entitled to legal aid.

Alerts and notifications

The Schengen Information System is the main mechanism through which member states are notified that there is an EAW in place for a requested person (along with Interpol red notices). Despite the provision in article 111 of the Schengen Convention for courts in any contracting state to entertain an application for correction or deletion by the named person, this system is not operating in the EU.

We therefore recommend that a proposal is brought forward to discuss a mechanism for updating EAW entries in the system. This could be presented through a member state initiative or by the EU Commission under Title V of the Treaty on the Functioning of the European Union. Such a proposal should consider:

- providing a mechanism through which named persons can seek a correction or deletion from the SIS;

18 http://www.justice.org.uk/pages/third-party-interventions.html

- updating the SIS entry when a member state refuses to surrender with the reason(s) for refusal;
- Providing a mechanism whereby another member state which would refuse on the same grounds could take no action on the alert where a named person enters their territory;
- Agreeing circumstances where a refusal should lead to the withdrawal of the entry (and the EAW), such as misidentification.

Whilst we accept that reaching an agreement in relation to amending the SIS will be complex, where a person has succeeded in obtaining a refusal of a warrant, their right to move and reside freely within the territory of the member states, in accordance with article 45 CFR and article 21 Treaty on the European Union (TEU) will be inhibited. Specifically article 21(2) TEU imposes a positive obligation upon the member states, where action proves necessary to afford free movement, to adopt provisions that will facilitate this. We therefore consider that this unexpected consequence of the EAW system needs close and immediate scrutiny.

We also recommend that the EU focus on the creation of a streamlined summons procedure that could operate through the SIS, which would of course have the weight of an EAW behind it if the person ignored the summons. This would allow for return agreements, such as those already occurring, to be formalised, avoiding the draconian and sudden impact an EAW has upon requested persons.

Interpretation and Translation

The EU has identified that there is a need to improve interpretation and translation in criminal proceedings across the EU in order to ensure that the fairness of the proceedings is safeguarded and has taken legislative action to provide for this through Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. The scope is confirmed to include EAW proceedings. Article 5 of the directive requires member states to take concrete measures to ensure that the quality of interpretation and translation is sufficient to safeguard the fairness of the proceedings and in particular to ensure that the suspected or accused person has knowledge of the case against them and is able to exercise the rights of the defence. Article 5(2) requires member states to endeavour to establish a register of appropriately qualified interpreters and translators.

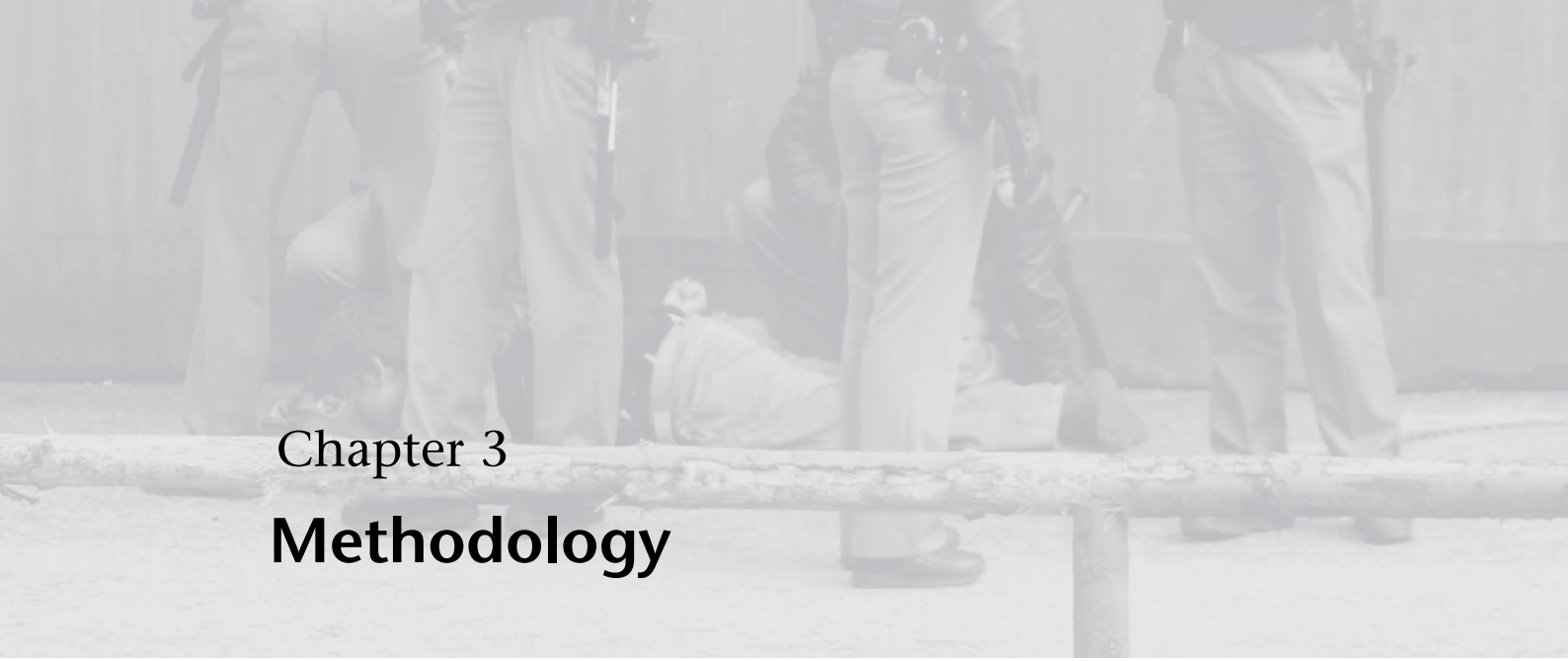
Member states must in our view endeavour to bring the legislation into force as soon as possible and in any event prior to the implementation deadline of the 27th October 2013. In EAW cases in particular, there is a need for interpretation and translation, of a sufficient quality for the requested person to understand the proceedings and to be able to put forward their grounds for refusal. Poor interpretation and translation compound the problem of inexperienced lawyers because the requested person is unable both to communicate their concerns to their lawyer, and explain their situation to the police, prosecutor and judge involved in the decision whether to execute the warrant.

Interpreters and translators in legal proceedings must be equipped not only with sufficient competence in the language of the requested person but also with sufficient knowledge of legal procedure to understand the terminology which is used in the court room. This is implicit in the purpose of this Directive, since it is focussed upon criminal proceedings rather than interpretation in general. The member states must therefore ensure that *legal* interpreters and translators are available in every language necessary. EULITA, the European Legal Interpreters and Translators Association, and Lessius University College Antwerp have been awarded EU funding under the EU Criminal Justice Programme for a project entitled *TRAFUT – Training for the Future* that is intended to assist in and contribute to the implementation of the EU Directive. The

project is conducting four workshops across the member states which aim to include as many practitioner and government representatives from each of the member states as possible. The workshops will cover:

- the issue of setting up mechanisms in a member state to ensure the systemic provision of quality legal interpreting and translation and how to avoid the detrimental consequences of insufficient quality;
- the issue of quality of interpretation and translation services, including specific interpreting and translation issues related to the European arrest Warrant;
- the issue of national registers of legal interpreters and translators (admission procedures, register management, integration into the planned EU electronic data base, etc.);
- the training and further training of legal interpreters and translators, and best practices for the effective communication between judges, prosecutors, lawyers, judicial staff and legal interpreters and translators;
- modern communication technologies in criminal proceedings such as video-conference interpreting) or special arrangements for vulnerable persons (e.g. sign-language interpreting)

We recommend all member states make use of these workshops and the materials on offer from EULITA to ensure that standards of interpretation and translation are improved and properly regulated in each member state.



Chapter 3
Methodology

Project methodology

The structure of the project was devised to encompass over the course of the two-year study the submission of case reports from lawyers to reviewers. The reviewers would evaluate the information revealed in the case from the perspective of the best defence and the identification of interference with human rights. They would do so with knowledge of the emerging EU judicial cooperation mechanisms. They would draw conclusions on the effectiveness of the defence and what obstacles it faced. Such lawyers and reviewers would be sought through the assistance of the European Criminal Bar Association (ECBA) and International Commission of Jurists (ICJ) respectively.

The information was then to be disseminated amongst the lawyers in each country team at six months reviews where assessment could be made of the cases and future goals of the project. The full team was due to meet on three occasions at the introductory seminar, end of first year review seminar and final conference to discuss progress so far and future focus. It was envisaged that lawyers would submit their cases monthly to their reviewer, who would respond the subsequent month and report back to the project partners. Email contract would be maintained throughout by way of a closed distribution list for the project so that lawyers could make use of each other's assistance during the project in the operation of a dual defence. Contact details were circulated and updated throughout the project to this end.

Countries

The project commenced with six member states: UK (comprising lawyers in England and Scotland to reflect that while the same Extradition Act applies across the UK, there are different criminal justice systems in the two countries), Denmark, Netherlands, Italy, Poland and Sweden as this is where EU sections of the ICJ are located and, therefore, reviewers could be established. We considered that two firms of lawyers from each country would be sufficient to observe over the two-year period in order to review a reasonable amount of case material.

At the end of the first year we decided to extend the reach of the project to ten member states as envisaged in our project proposal. Thus, the project was expanded to include Germany, Greece, Ireland and Portugal. Through the German ICJ section we were able to obtain the support of a reviewer. The other three countries do not have national sections of the ICJ but,nevertheless, lawyers were known there who were actively involved in both the ECBA and CCBE with knowledge of the EU criminal justice system and also engaged in academic work or training. Representatives from these teams therefore attended the end

of first year meeting. In addition to having good lawyer contacts in these countries, they were chosen to reflect a wider geographical pool of countries and legal systems.

Devising the team and materials

We spent the first three months identifying and inviting project participants, drafting a reference document about our initial presumptions and goals of the project and devising a questionnaire to capture information about the cases. The questionnaire closely followed the articles of the Framework Decision and was designed to establish what procedure was being adopted in the cases with some uniformity across the countries, bearing in mind national legislation implementing the measure may differ as to form but still must fulfill the result to be achieved[19] We met the project participants at an introductory seminar at the JUSTICE office in London in September 2010 where we presented the project aims, discussed initial concerns of the lawyers with the EAW scheme and reviewed the methodology of the project.

During the end of first year review we discussed the operation of the network and this led to consideration of the idea of a peer reviewed database. We, therefore, devised a lawyer recommendation form through which peer review could take place and a database be established.[20]

Obtaining results

Because the majority of lawyers reported low numbers of cases being received, at the end of first year meeting held at the ECBA office in London in October 2011, we decided to contact bar associations in each member state for the dissemination of our questionnaires amongst all practitioners. We updated the questionnaire to capture information about offences and family life in the executing state in response to the concerns raised by practitioners over the year about the proportionality in seeking EAWs. The questionnaire was translated by the project reviewers where this was deemed necessary for local lawyers.

We held a country team meeting in Poland in June 2011 as the Polish Presidency was due to commence the following month and would be tasked with taking forward the Commission proposal on the right of access to a lawyer. The Polish team met with the Ministry of Justice to discuss our concerns and observations about ensuring what was termed dual representation in the Commission proposal.

We reviewed the impact of the questionnaire having received feedback from bar association members and other lawyers that it should be shorter. We concluded that many of the questions went to practice that was the same in each case (for example the provision of legal aid, point at which the right to a lawyer arises, opportunity for release from detention, opportunity for appeal). Since we now had this information from prior questionnaires and discussion with lawyers from the first year of the project, we amended the questionnaire to focus specifically on the issues we were concerned about capturing in the final year – what the allegation was; what arguments were raised to resist surrender; whether contact was established with the issuing state what the outcome of the case was, as well as some details about the requested person's life in the executing state. The questionnaire was considerably shortened to three pages, which was manageable for both the lawyers in the project and the wider pool of lawyers we were seeking to include. Unfortunately, we received hardly any questionnaires through the bar associations despite the

19 Ex. article 34 Treaty on the European Union (Amsterdam Treaty).
20 See annex 3.

team's best efforts to encourage them to respond. Nor did we get a much better response from the lawyers in the project who were either too busy or had too few cases.

We responded to this paucity by conducting in-country interviews with the project team and a wider pool of lawyers. This gave us more narrative information. We also considered it appropriate, given the usefulness of the meeting with the Polish Ministry in June 2011, to meet with ministry of justice and prosecution representatives where possible to obtain their views concerning our findings. In particular, we took the opportunity to discuss with the ministries and prosecution representatives whether dual representation was considered a feasible part of EAW defence. This was given relevance by the ongoing process of working towards a directive on the right of access to a lawyer in the EU. The views of those consulted are contained in the reports and conclusions, though these do not necessarily present the official position of the member state. We held these meetings near the end of the project when we had obtained the majority of our data.

Any project of this kind which involves multiple contacts within multiple countries will encounter problems. This project was no exception. We were dependent on diverse organisations and busy people in ten different countries. We encountered some insurmountable difficulties. We found ways of getting an adequate amount of information from most states but we were, for example, unable to recruit any lawyers to the Swedish team and otherwise obtained very limited information from defence lawyers in Sweden. For various reasons, it proved impossible to speak to the officials in the Swedish or Portuguese ministries of justice. However, we had some unexpected successes. The Portuguese team were able to prepare a large amount of case reports as a result of obtaining access to prosecution files, and the German team was also able to review some prosecution files to obtain a better picture of defence operation. Overall, we received useful and interesting information from our interviews across the member states.

Report methodology

This report sets out the results obtained. In each country report we take as our starting point the Council's 4th Evaluation Report since this is the most detailed review of EAW practice in each country and include brief information about the operation of the warrant as well as concerns raised by the experts which could impact upon effective defence. We then report the meetings we have had with state officials, followed by the defence perspectives of the lawyers in the teams and individual lawyers obtained over the two-year project.

We have documented a sufficient number of cases to reflect the volume of EAW requests submitted to each member state reviewed and the defence practice that pertains there. The case reports, supported by interviews in each country have enabled us to produce detailed conclusions and recommendations for improvement of the system.

We have used the term 'lawyer' throughout as this is the word used by the EU in the proposed directive on access to a lawyer. The term includes practitioners who under their professions are solicitors, barristers or counsel. We have also adopted the standard EU format for abbreviating member states where we consider appropriate for the flow of the text.

Chapter 4

Analysis of Case Questionnaires

The information contained in the cases reported gives an unrivalled snapshot of what requests have been made over the last two years. In this chapter, we have collated information concerning refusals, revocations, human rights or humanitarian grounds for refusal and information useful to review the proportionality of requests.

From this, it is possible to draw some observations about the EAW in practice. This is qualitative rather than quantitive research. The pool of cases is small and only involves 19 member states in total as issuing and executing states. This is, however, a pretty broad base of information. There will be a bias in the cases submitted; We have allowed for the fact that lawyers may well have submitted cases that they find to be interesting to us and were likely to be contentious. We have only included in the study those cases where the requested person initially did not consent to surrender (though their decision may have changed during the course of the proceedings for a reason that is recorded in the report, such as being advised that there is no prospect of challenging the warrant and therefore it is better to return as soon as possible; or where fears have been alleviated through contact with an issuing state lawyer). However, these cases are likely to be representative enough to give a picture of how the EAW is working in cases where the requested person does not initially consent to surrender.

In addition, we dealt necessarily with an unrepresentative sample of defence lawyers. Those involved in this cross-national study were specialists with knowledge and expertise in extradition law who had access to networks of lawyers to offer assistance. What has not been possible within the parameters of this project is a cross sectional study of all cases going through a particular member state court during the two year period to assess the varying quality of defence lawyers and approach to cases. Such a study would no doubt produce interesting data but would require far more resources than were available in this project.[21]

21 In fact, the Portuguese team did review 50 case files from the General District Prosecutor's Office in Lisbon and from these we chose a range of cases for inclusion in the report. They took this step because they had not received into their office a sufficient amount of cases to consider. We were not able to replicate this level of study in other member states, nor was it the original methodology that we chose to adopt. Therefore we did not include the analysis of all 50 cases in the report.

Within the context of our study, the information collected produces interesting results:

Number of cases reviewed: 72

Cases raising human rights/humanitarian arguments for refusal: 19

- IE3 (Lithuania IS[22]): Prison conditions in IS, amounting to violation of article 3 ECHR; criminal process in IS argued not to meet basic requirements of article 6 ECHR
- IE4 (UK IS): EAW based on political motives, abuse of process due to delay between bench warrant and EAW issue
- IE8 (France IS): The defence argued that there was a lack of correspondence in respect of some of the offences within a concurrent sentence. Surrender would breach constitutional and article 7 ECHR rights, as some of the offences were unknown to Irish law rendering the whole sentence uncertain. Furthermore, the trial was held *in absentia* in circumstance that the client alleged amounted to political persecution
- UK1 (Italy IS): No effective right to retrial following *in absentia* trial, preventing a fair hearing and therefore surrender would breach article 6 ECHR
- IT2 (Romania IS): The RP refused consent to surrender because (inter alia) he had submitted a complaint against Romania to the ECtHR and feared persecution.
- NL8 (Hungary IS): Dutch authorities agreed to execute EAW, however the imposed sentence was ordered to be served in the Netherlands as the requested person was a Dutch national. This was particularly important due to his age and health problems
- NL11 - prison conditions
- UK9 (Latvia IS): concerns about prison conditions amounting to violation of article 3 ECHR, discrimination due to membership of a nationalist organisation, passage of time since the alleged offence affecting article 6 ECHR right to a fair trial and impact upon established family life in the ES
- UK10 (Poland IS): passage of time since the alleged offence, poor remand and prison conditions as evidenced by adverse judgment of the ECtHR and an expert report of a Polish academic amounting to violation of article 3 ECHR.
- UK12 (Latvia IS): prison conditions amounting to violation of article 3 ECHR.
- UK15 (Poland IS): prison conditions amounting to violation of article 3 ECHR.
- DE3 (Greece IS): The decision of the lower court fell short of the standards required to deny a national the fundamental right of protection against extradition (lacking in reasons, inadequate review of the EAW) and infringed legal certainty; Such review being particularly important in cases where mutual recognition of another member state's court decision is required.
- DK2 (Romania IS): The mental health of the requested person would make them unfit to be returned to face trial or sentence.
- EL3 (UK ES, Greece IS): The passage of time would render a trial unfair; prison conditions amounting to violation of article 3 ECHR.
- EL4 (UK ES, Greece IS): Manipulation of evidence by the police during the investigation which would render the trial unfair.
- DE2 (Poland IS): Disproportionate impact upon established life in executing state with family and managerial employment position compared to an old and minor allegation.

22 Here we refer to executing state as ES and issuing state as IS. The country abbreviations adopted follow the standard EU format.

- IT3 (France IS): Prison conditions amounting to violation of article 3 ECHR.
- PT9 (Czech Republic IS): Postponement of execution of EAW due to health problems.

We have included this analysis given the concerns that we and other organisations have raised about the protection of fundamental rights in EAW cases. It is, therefore, interesting to consider whether these are in issue and what types of rights in particular are argued as being open to infringement by the EAW process. 25 per cent of the cases reviewed raised a human rights related argument. This demonstrates that human rights are not always claimed to be at risk in the issuing state. However, it is also important to recall from the country reports that some lawyers may not think it helpful to raise these arguments or that it may no longer be possible as a result of appeal court decisions precluding them from being raised. In almost all cases, the requested person did not wish to surrender because of concerns about how they would be treated in the issuing state. This could demonstrate that, irrespective of the relationships between member states and their practitioners, amongst EU citizens there is very little trust of the criminal justice system in other member states. We consider it disappointing, eight years since the introduction of the EAW, that the issue of compliance with human rights standards arises at all.

There are three most prevalent and identifiable arguments concerning human rights, health aside (because whilst interesting to document, this may go as much to the fact that the person is unfit to travel at all as to a concern about how their health might be treated in another member state). First, concerns about prison conditions were regularly raised, particularly as against conditions in Poland and other Eastern countries not reviewed by our project. None of these grounds were successfully upheld by a court, in the cases submitted to us. This demonstrates either that the claims were spurious, lacked sufficient evidence to support them, or the threshold for finding inhuman treatment is being interpreted as amongst EU member states as particularly high. From the information we have received, we consider it likely that all three reasons will play a role. Courts wish to have specific and current evidence about how the particular requested person will be treated. Given that no prisons in the EU are outright condemnable for their standards of accommodation provided, even with assistance in the issuing state it can be almost impossible to predict which prison a person will be sent to and what conditions they personally will be held in.

Second, trials *in absentia* without guarantees of re-trial also raise concern, of themselves and also within the context of passage of time making it problematic to mount a defence. Where a person has been tried in their absence and does not know what the allegations against them are, it is particularly concerning that concepts differ amongst member states as to what a re-trial actually requires, notwithstanding the only amendment to the Framework Decision so far concerns trials *in absentia*. Since this is a mutual recognition instrument it only considers how to ascertain that a trial has taken place in the absence of the requested person, and not what a 're-trial' must contain. In our view, however, in order to satisfy article 6 ECHR this must always afford the opportunity to examine witnesses and make representations upon the evidence against the accused person. Where a lengthy period of time has passed, even if a full trial is available, it must be questioned whether a fair trial can take place. Courts consistently consider that these arguments are a matter for the issuing state and will not be entertained by the executing court. In a clear case where it will be impossible to defend the charges because of either or both of these issues, it must be questioned whether it is appropriate *or proportionate* (see below) to actually extradite someone.

Third, arguments were raised about the impact of surrender upon established life in the executing state. Where requested persons have settled, found employment and founded a family it can be difficult to face a charge or sentence which is many years old, not because of the prospect of an unfair trial as considered above, but because of the detrimental impact upon the person's life, though the two arguments are often

made together. Again this argument is very rarely successful before executing state judges, particularly in specialist court centres where the court will see an impact upon the life of the person in every case, resulting from an EAW or domestic charge.[23]

Occasions surrender refused by executing state: 9

Reasons for refusal:

- IE5: Previous guarantee given to requested person
- IE7: Sentence revoked by court order in issuing State rendering EAW invalid
- IE8: Non-correspondence of composite sentence
- DK2 (Denmark ES): Humanitarian grounds based on mental health
- EL1 (UK ES): EAW invalid due to lack of lawful summons in the domestic proceedings
- PT10: Request for interrogation not prosecution
- PT11: Non-correspondence with Portuguese law
- UK12: Non-correspondence with UK law
- DE3 – precluded by statute of limitations

The instances where the courts in these cases found reasons to refuse the request were rare, amounting to 1 per cent of cases. Though some EAW proponents may think this in fact quite a high figure, subverting the mutual recognition principle, almost all the reasons were because of technical defects with the warrant or insurmountable grounds of refusal based upon national law. It is interesting to note that non-correspondence with an issuing state offence, in circumstances where the requested person was in the executing state at the time, is deemed an acceptable refusal ground, so as not to infringe the principle of legal certainty, but care for a young dependant child is not a sufficient reason.[24]

Total withdrawn EAWs: 20

Reasons for revocation:

- PL2 (Poland IS): Return by agreement
- PL3 (Austria IS): Unknown
- IE6 (Netherlands IS): Return by agreement
- IE9 (Poland IS): Unlawful procedure in issuing state in reactivating suspended sentence
- IT4 (Romania IS): Lawyer in IS negotiated withdrawal after refusal to execute in ES
- NL3 (Poland IS): Return by agreement
- DK1 (Slovenia IS): Unknown
- UK2 (Poland IS): Impact upon child and article 8 ECHR rights demonstrated to IS that surrender disproportionate
- UK5 (Poland IS): EAW invalid as time remaining on sentence too short

23 A recent UK Supreme Court judgment did however consider two joined cases where the rights of the dependent child were in issue. The Court held that article 8 ECHR rights must be properly assessed as to whether the interference with the right to family life is proportionate where the best interests of the child under the UN Convention on the Rights of the Child and the EU Charter of Fundamental Rights are a primary consideration. In one case, an offence of theft which was not considered particularly serious and over a decade in age, could not outweigh the severe impact the surrender would have upon the very young dependent child. However, in the other case where a conviction for drug trafficking which the requested persons had clearly evaded and carried lengthy sentences outweighed that same devastating impact upon the dependent children of the couple, who all would have to be cared for elsewhere, *HH and PH v Deputy Prosecutor of the Italian Republic, Genoa; FK v Polish Judicial Authority* [2012] UKSC 25.

24 This is a ground for refusal in Italy in fact, though it was not invoked in the cases we considered.

- DE2 (Poland IS): Return by agreement
- EL2 (Bulgaria IS): Voluntary return
- PT1 (UK ES, Portugal IS): Statute-barred
- PT2 (Germany ES, Portugal IS and report): EAW invalid
- PT4 (Italy IS): Return by agreement
- PT5 (Netherlands IS): Facts comprising basis of EAW no longer existed
- PT6 Poland IS): Unknown, obtained through efforts of Polish lawyer
- UK16 (Poland IS): Return by agreement
- UK17 (Poland IS): Payment of fine arranged by Polish lawyer

A surprising outcome in our view is that 28 per cent of cases reviewed resulted in the warrant being withdrawn by the issuing state. This must raise questions about how the issuing state considered the issue of the EAW appropriate in the first place. Closer inspection reveals, that whilst there were defects in a few cases, or the factual circumstances changed after issuing, in the majority of these cases it was an agreed return that led to the withdrawal of the warrant. Whilst the impact of arrest and detention can no doubt focus a person's attention on the appropriate course of action, we consider that this practice reveals the need for much more recourse to alternative mutual legal assistance measures prior to issuing an EAW. The EU should focus on the creation of a streamlined summons procedure, which would of course have the weight of an EAW behind it if the person ignored the summons. This would allow for voluntary arrangements, such as are already occurring, to be formalised avoiding the draconian and sudden impact an EAW has upon requested persons.

Cases involving assistance from issuing state/third state lawyer: 37

Executing State	*Issuing State*	*Type of Assistance*	*Outcome*
Germany	Portugal	Advice on law; representations concerning illegal issue	Withdrawn
Germany	France	Representation arranged for post-surrender proceedings	Surrender
Germany	Poland	Representation reaching voluntary arrangement	Withdrawn
Germany	Greece	Advice on law	Unknown; returned to lower court
Greece	Bulgaria	Advice on law and procedure	Voluntary surrender; withdrawal
Ireland	Lithuania	Advice on law and prisons	Unknown (arrested in another MS)
Ireland	UK	Advice on factual circumstances surrounding delay	Surrender
Ireland	Hungary	Advice on law, procedure and prisons	Refusal
Ireland	Netherlands	Representation reaching voluntary arrangement	Withdrawn

Ireland	Poland	Enquiry into issuing proceedings; representation to revoke warrant	Withdrawn
Italy	France	Expert advice	Surrender
Italy	Romania	Advice on law; concurrent representation in substantive proceedings	Surrender; re-trial
Italy	Romania	Representations on withdrawal	Surrender refused; Withdrawn
Netherlands	Poland	Representation reaching voluntary arrangement	Withdrawn
Netherlands	Belgium	Advice on law and procedure	Surrender
Netherlands	Hungary	Advice on law	Surrender
Netherlands	Poland	Advice on law; representation reaching voluntary arrangement including specialty arrangements	Withdrawn
Portugal	Italy	Post-surrender representations on voluntary arrangement	Surrender
Portugal	Italy	Advice on law; review of file; representations for voluntary arrangement; representation upon return	Surrender; discharge and withdrawal
Portugal	Poland	Representations	Withdrawn
Portugal	Switzerland	Review of case file	Consent
Sweden	Poland	Advice on law	Surrender
Sweden	Greece	Advice on law and procedure	Surrender
UK	Poland	Representations on proportionality to revoke warrant	WIthdrawn
UK	Spain	Representation arranged for post-surrender proceedings	Surrender; discontinuance on surrender
UK	Italy	Advice on law	Refused?
UK	Poland	Representation on surrender for discontinuance due to specialty	Proceedings discontinued
UK	Lithuania	Advice on law and procedure	Surrender
UK	Poland	Expert report on prisons	Surrender
UK	Czech Republic	Preparation of affidavit evidence to support factual argument	Surrender
UK	Poland	Representation reaching voluntary arrangement	Withdrawn

UK	Poland	Representation for payment of fine	Withdrawn
UK	Poland	Advice on outstanding matters for specialty purposes	Unknown – client failed to attend
UK	Portugal	Advice on law and procedure; review of file	Withdrawn
UK	Greece	Review of the file and advice on law	Refusal
UK	Greece	Representation arranged for post-surrender proceedings	Surrender; outcome of trial pending
UK	Greece	Advice on law; review of the case file; representation upon return	Surrender; acquittal at trial

In over half of the cases reviewed assistance was obtained from a lawyer in the issuing state. This does not include the further cases where assistance was desired by the executing state lawyer but could not be obtained. This demonstrates the importance of advice and/or assistance (approximately half of these cases involved solely advice on law or procedure) to executing state lawyers and clients in ensuring the best defence is put forward. Of real value is the fact that in almost all cases of withdrawal documented above, an issuing state lawyer was making representations to the issuing authorities. Furthermore, arranged return could not have taken place without the assistance of an issuing state lawyer. What is more, from the interviews held during the project, the practice occurred across all member states reviewed and can therefore be assumed to be useful across all EU member states. However, all lawyers, no matter how experienced a cross border practitioner, reported problems with accessing legal assistance: obstruction from the court, finding a lawyer, ensuring quality, paying for the assistance.

In a number of these cases, the contact was between lawyers in the project, either directly assisting each other, or in order to find a lawyer in a member state not involved in the project.

Types of offence for which requests are made

(where details are unknown the box is left blank)

Issuing State	*Offence*	*Sentence*	*Accused/ Convicted*	*Year of offence*
Poland	Fraud	Max. 10 years	Accused; Convicted	1991 2007
	Defrauding an insurance company		Accused	2001
	Assault and battery	10 months	Convicted	2004
	Receiving stolen property		Accused (2)	2009
	Threat and robbery	1 year 5 months left to serve	Convicted	
	Forgery of documents; forgery with intent to gain material profit		Accused (2)	1996 2009
	Possession of ammunition without permit		Convicted	
	3 property offences	2 months 10 days left to serve	Convicted	
	Causing bodily injury		Convicted	2005
	Appropriation		Accused	2001
	Robbery to obtain material benefit		Convicted	1996; 2000
	Burglary; membership of an organised criminal group; fraud		Accused	
	Money laundering		Accused	
	Supply of drugs		Accused	
	Theft		Accused Convicted	 2006
	Fraudulent use of hire purchase agreement	Fine	Convicted	

Italy	Extortion, incitement to prostitution	6 months, 6 years	Convicted	
	Drug offences, criminal organisation		Convicted	2004
	Fraud, criminal organisation and money laundering		Accused (3)	2000-2009 2000-2009
Romania	Aggravated robbery	3 years 8 months	Convicted	2007
	Possession of mercury		Convicted	1998
	Trafficking of illegal substances (mercury)	5 years	Convicted	
	Arson	5 years	Convicted	
	Fraud	4 years	Convicted	1999
Netherlands	Handling of stolen goods		Accused	
	Murder		Accused	2009
	Robbery and attempted robbery	13 years	Convicted	
	Abducting a minor under 12		Accused	2012
	Illicit trafficking in narcotic drugs		Accused	2009
	Concealment of stolen goods, laundering and unjust enrichment		Convicted	2005
Greece	Forgery of documents, fraud	5 – 10 years	Accused	2001-2003
	Insult to the international peace of the State	6 months	Accused	2001-2003 (in conjunction with above offence)
	Grievous bodily harm		Accused	2008
	Lethal bodily harm		Accused	2007
	Illicit appropriation of ancient Greek objects		Accused	
	Bribery, money laundering and fraud			

Portugal	Attempted murder		Accused	1994
	Counterfeiting currency Attempt	3 years 4 months 2 years	Accused	1995
	Swindling Attempt			
Bulgaria	Smuggling through criminal organisation		Accused	2010-2011
Austria	Burglary, criminal org, fraud		Accused	2009
	Removing child from the jurisdiction		Accused	
France	Drug trafficking on High Seas		Accused	1990
	Drug trafficking	4 years	Convicted	2004
	Violation of family obligations	1 year	Convicted	2006
	Swindling, aiding and abetting criminal bankruptcy, concealed work		Convicted	2003-2006
	Sexual offences involving a minor	20 years	Convicted	1989-1999
	Complicity to defraud		Accused	2004
Hungary	Negligent driving causing death		Accused	2000
	Fraud		Accused	2004
Lithuania	Handling stolen goods		Accused	2012
	Terrorism	max 20 yrs	Accused	
Germany	Fraud		Accused	2008-2011
Czech Republic	Evasion of alimony payments		Accused	1995; 2008;2009
Spain	Illicit trafficking in narcotics and psychotropic substances		Convicted	2010
Latvia	Fraud		Accused	2003/2004
	Driving under the influence of alcohol		Accused	
	Hooliganism and Assault	max 7 yrs	Accused	
UK	Terrorism	7 yrs	Convicted	

A review of the charges for which requested persons are wanted shows a real range of offending. It is unfortunate that in some of the vaguer and wide ranging offences, the proposed sentence is not included. Often in accusation cases, this will only be the statutory periods which does not give an indication of what the likely penalty will be a given a case.

There are certainly serious and cross border offences reflected here. However, there are also much less serious categories of offence included. Coupled with many offences listed as having occurred over five years ago it must be questioned whether an EAW was necessary and proportionate in all of these cases. The issuing state will not of course know of the life of the requested person, and may not even know what country there are in. This makes it difficult for a court to make a proportionality assessment in the abstract where the principle of legality is strongly favoured. Again, the use of an EU summons procedure through the SIS could alleviate the impact, in particular, of old and minor offences.

7. Established life in the executing state

(where details are unknown the box is left blank)

Case	*National/resident*	*Working*	*Family*
DK1	No		
DK2	National	Retired and incapacitated	
DK3	Resident		
DE1	No	N/A	N/A
DE2	Resident of 10 yrs	Management	Wife and three children
DE3	National		
EL1	National		
EL2	National	Own company	Yes
EL3	Nationals	Students	N/A
EL4	National	Students	N/A
IE1			
IE2			
IE3	National		
IE4	National		
IE5	Resident	Unknown	Wife and two children
IE6	National	Yes	Yes
IE7	Living in IE 3 yrs	Unknown	Wife and children
IE8	Living in IE 1-2 yrs	No	None
IE9	Living in IE 5 yrs	Working and studying	Partner

IT1	No	N/A	N/A
IT2	Resident		
IT3			
IT4	Resident		Wife
IT5			
NL1	Resident of 20 yrs	Yes	Yes
NL2			
NL3	Living in NL 2 yrs	Agriculture	Yes
NL4	Resident		
NL5			
NL6			
NL7			
NL8			
NL9	National		
NL11	National	Administration	Partner
PL1 (UK ES)	Lived in UK yrs	Yes	Yes
PL2 (UK ES)	Living in UK		Yes
PL3	Nationals		
PL4			
PT (UK ES)	National		
PT (DE ES)			
PT3	National		
PT4	Resident since child		
PT5	Living in PT 4 yrs		
PT6	Living in PT 9 yrs		
PT7	Living in PT 15 yrs		
PT8	No	N/A	N/A
PT9			
PT10	National		Yes
PT11	National		
PT12	National	Yes	Children
SE1	Living in SE 15 yrs	Yes	Yes
SE2	Resident	Studying	Yes
SE3			
UK1	Living in UK 10 yrs		Four children

UK2	Resident		Young child
UK3	National (10 yrs living in UK)		
UK4	Living in UK yrs		
UK5	Resident	Yes	Wife and young child
UK6	Resident		Yes
UK7	National but living in SP. Arrested while visiting	N/A	N/A
UK8			
UK9	Living in UK yrs		
UK10	Living in UK yrs		
UK11	Living in UK yrs		
UK12			
UK13			Baby
UK14			
UK15	Resident		
UK16			
UK17			
UK18			

It has not been possible to capture all three sources of information in every case, either because this was unknown to the lawyer, or because in the original questionnaire we did not ask these questions and it has not been possible to obtain further information from the lawyer. Nevertheless, assuming the unknown data is negative, 25 per cent of cases involved a request for a national of the executing state. Adding to this people who have lived in the executing state over 5 years, (and excluding the report of where the number of years is not specified), residents and nationals of the executing state were requested in 36 per cent of cases. These percentages could in fact be much higher if the unknown data revealed more nationals and residents. This therefore dispels the assumption that EAWs are simply for the removal of foreign criminals. In fact at least a third of cases from our review were not.

Often this person was also established with a family that they would have to leave behind once surrendered. Whist of course a domestic custodial sentence would have the same affect, there are much better arrangements in place in national cases for visits, phone calls, correspondence, early release provision and from the outset community penalties, where family ties can be demonstrated. A person returned on an EAW is deemed a fugitive and their family life in the executing state is unlikely to have any impact upon pre-trial detention or custodial sentences in the issuing state. In any event, release pending trial or a community penalty will not bring the person closer to their family unless arrangements allow them to return to the executing state. This arrangement would be possible with the European supervision order, which comes into force in December and could remove the detrimental impact of detention in EAW cases.

Chapter 5
Conclusions

Our research has revealed that there is a fundamental conflict in the EAW scheme. This is between what was intended by the swift surrender procedure and the duty to preserve fundamental human rights, ensuring the best defence for the client. This problem is not one simply for the defence. The criminal justice system should not be partisan: every actor holds the same duty whether they are prosecuting the offence, judicially presiding over the trial or arresting the suspect. The primary goal of all criminal justice systems is to ensure that the correct defendant is tried for the crime which is alleged and that the person identified is tried fairly, under the cornerstone principles of the presumption of innocence and equality of arms. This requires the best evidence to be put before the court and best practice from all those taking part. The EAW process serves the criminal justice system of issuing states and must therefore hold the same values.

The title of the project was initially derived from what we saw as the need to demonstrate the role of defence lawyers and the tools that they need to do their job. They must ensure that grounds for refusal are properly identified and based in evidence and that therefore requested persons have the best defence available within the parameters that the EAW framework decision permits. But the project has revealed a second purpose of this title which is to acknowledge the requirement of ensuring that the trial court process is also properly based in evidence and has fairly identified, and is trying the suspect on, the same principles as would ordinarily apply under national law, irrespective of whether an EAW is required to return them to face justice.

The problem with the EAW scheme is implicit in its purported intention: that is, to create a system of surrender which removes all consideration of the crime at the executing stage. The reality of extradition is that the executing proceedings cannot exist in a vacuum independent of the consequential criminal outcome. The approach to the EAW has created an artificially isolated procedure which often does not afford consideration of the offence for which the requested person is wanted within the surrender proceedings at all. This is understandable since the correct arena for actually trying the offence is the issuing state where the evidence is located. However, the surrender and criminal procedures are nevertheless inextricably bound. Therefore, the quandary for the defence lawyer is trying to put forward genuine arguments on behalf of their client at the surrender stage which the system, on a narrow reading, expects to be preserved for the trial. However, the defence lawyer is given an account by his client which may need addressing whilst they are in the executing state. This could be one of innocence, misidentification, persecution, passage of time, lack of knowledge, lack of evidence, impact upon established life in the executing state, or poor prison conditions. All of these reasons require exploration and evidence to support them. Whilst these arguments are mainly about the offence, all of them, properly argued, could give rise to a reason

for the EAW not to be executed within the existing EAW framework. It is, therefore, impossible to consider the EAW independently of the proceedings in the issuing state.

The European arrest warrant system has been inferred by a narrow reading to provide for a streamlined, single direction application of mutual recognition. In this, the executing state judge is to recognise the request from the issuing state judge and simply return the requested person. Yet, inspection of the EAW Framework Decision in fact reveals that the first article sets primacy for fundamental rights (article 1(3)) in the decision making process. Furthermore, the member states agreed not only to allow a significant list of grounds for refusing or postponing surrender but also made it a requirement that the requested person have access to a lawyer prior to exercising their decision to surrender, and to assist in challenging that surrender, making inspection of whether there are reasons to oppose surrender a legitimate aspect of the EAW scheme.

Of perhaps even more significance is the focus in the EAW scheme upon judicial decision making. The move from agreement between Governments, grounded in political expediency, has paved the way for greater scrutiny. Judges are custodians of the rule of law, which implicitly includes consideration of fundamental and human rights as provided by national and international convention. Judges presiding over EAW hearings and faced with the question of surrender must countenance proper enquiry into the validity of a warrant and grounds for refusal rather than a simplistic application of the principle of mutual recognition.

By contrast, defence lawyers are concerned that judges follow a narrow construction in the majority of cases. The project has highlighted many anxieties shared by defence lawyers - and some prosecutors and state representatives over both the operation of the EAW scheme in general and the individual implementing legislation in each member state. These concerns relate to how mutual recognition and trust are operating in practice and reveal that whilst the EAW scheme may appear efficient, there remain many concepts in criminal procedure which are not shared between member states and which cause conflict in the blind application of the principle of mutual recognition. From a defence perspective, this causes a lack of trust and generates opposition to surrender on the basis of the criminal procedure in other member states. The courts, however, have generally been robust in resisting these concerns and have upheld the intention behind the framework decision to ensure mutual recognition of judicial decisions in other member states based upon their law, unless a legitimate ground for refusal borne out of the implementing legislation in accordance with the framework decision can be identified.

Nevertheless, arguments based upon human rights considerations continue to arise and must be entertained, provided that they are based upon sufficient evidence to satisfy the stringent jurisprudence of the European Court of Human Rights. In streamlined EAW proceedings the requirement to obtain such evidence is difficult to satisfy. Yet defence challenges based on genuine evidence with well crafted arguments will assist in the raising of standards between member states. They create an incentive to improve mutual trust where states refuse to surrender to others on the basis of concerns about their human rights compliance. A good example of this has been the repeated argument concerning prison conditions in Poland, where overcrowding was a real cause for concern as much as three years ago. However, repeated findings against Poland in Strasbourg coupled with repeated requests for information on EAWs (and an Irish Supreme Court judgment[25]) have led to an increase in prison facilities and a reduction in overcrowding (though concerns still remain amongst Polish lawyers that standards are inadequate).

25 *MJELR v Rettinger* [2010] IESC 45. The case was referred back to the High Court which considered further evidence from Poland and considered that conditions were no longer in violation of article 3 ECHR or constitutional rights.

During the project, the EU Commission has issued a further report on implementation of the EAW across the member states.[26] This report observes the divergence in procedural safeguards between member states, despite uniform ratification of the ECHR, and the unsatisfactory resort to the Strasbourg court to rectify violations of rights, which has led to the agreement of the Swedish Roadmap for strengthening procedural rights for suspects in criminal proceedings and the programme of directives thereunder.[27] It observes in its conclusion 'protection of fundamental rights in particular must be central to the operation of the EAW system' and draws attention to the need to consider other instruments prior to issue calling for the swift implementation of complementary EU measures[28] and asserts in particular:

> *It is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions.*[29]

This change in focus from the Commission is to be welcomed and our research has revealed that the Commissions observations should be adhered to.

Proportionality of the decision to issue

Proportionality has been repeatedly raised as an issue of concern by all practitioners. Those interviewed have recalled the origin behind the EAW in the context of the terrorist attacks on the World Trade Centre on 9th September 2001 and, therefore, the aim to combat serious crime through a more efficient system. However, the EAW has been used, in vast numbers, for the return of people who have committed minor offences. Given the impact upon the lives of those surrendered, as well as the costs of EAW proceedings, practitioners continue to question whether it should be used in this way. There have been efforts amongst the member states in the past few years to look at alternatives to issuing an EAW. JHA Council conclusions recommended amendment to the EAW Handbook,[30] which has now taken place.[31] The advice places weight on the need to consider proportionality before issuing. In particular, an issuing state should assess a number of factors when deciding to issue a warrant, including: an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors include ensuring the effective protection of the public and taking into account the interests of the victims of the offence. The guidance suggests that the issuing state consider alternatives such as using less coercive mutual legal assistance measures, video conferencing, issuance of a summons over the Schengen Information System, or using the framework decision on the mutual recognition of financial penalties. These suggestions have been echoed by experts.[32] Poland has

26 Report from the Commission to the European Parliament and the Council, *On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2011)175 final (Brussels, 11.04.2011)

27 p 6.

28 P 9.

29 P 7.

30 Council, Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European arrest warrant, during the Spanish Presidency of the Council of the European Union - Draft Council Conclusions, 8436/2/10 REV 2 (Brussels, 28th May 2010), adopted at the 3018th JHA Council meeting 3rd and 4th June 2010, Press Release, p 33, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf

31 Council, Revised version of the European Handbook on how to issue a European Arrest Warrant, 17195/1/10 REV 1 (Brussels 17th December 2010), pp 14, http://register.consilium.europa.eu/pdf/en/10/st17/st17195-re01.en10.pdf

32 Implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant: The issue of proportionality (Brussels, 5th November, 2009) and see also Case Comment by Vogel and Spencer: [2010] 6 Crim LR 474).

been singled out as the repeat offender in this area. However, a number of other member states, have issued a significant number of warrants relative to their population, and the numbers do not seem to have reduced in the last three years (other than in Poland, where the numbers reduced by 1,000 between 2009 and 2010 and have remained at this level in 2011).[33] There are complex reasons behind the high volume of requests. Many EU citizens have exercised their right to free movement in significant numbers, from which it logically follows that a number of these will have outstanding criminal matters. There are also some criminal offences which cause a significant problem in some member states, despite not being considered an issue in others, as the report from Poland makes clear. For its part, Poland has made efforts to consider whether a warrant should be issued or whether there are other mechanisms that could be employed first, such as exploring the mutual legal assistance regime and liaising with other member states prior to issue. It has held meetings between its judges and representatives of some member states[34] to which it has made requests for judges and prosecutors to consider other options.

However, the numbers of EAW requests remain very high, and in many requests from Poland and other Eastern European countries, it has been reported (both by lawyers in the project and in other reports and the media) that the person is only required to return to serve a few days in prison or at the resolution of the case, to pay a fine, which demonstrates that it may be being resorted to in circumstances which have not been contemplated by the *Advocaten vor der Wereld*[35] decision of the European Court of Justice or the obligations under article 49 CFR that severity of penalties must not be disproportionate to the criminal offence. The prevalence of agreed returns and withdrawal of EAWs in the project was a surprising outcome, which further demonstrates that alternative mechanisms may have resolved the matter prior to resorting to an EAW.

Lawyers in Greece and Portugal complained of a problem in the issuing of domestic warrants, which is compounded in EAW cases. They explained that arrest warrants are issued by the police on the basis that a person cannot be found but in circumstances where the lawyers thought proper enquiries had not been made about where the person is residing. The EAW is therefore being issued by judges or prosecutors on the advice of police that the person's whereabouts are unknown in circumstances where a summons should have been possible. Given the advancement in modern technology and the presence of people on social networking sites as well as many businesses having webpages, there are plenty of mechanisms available to find a person's location prior to issuing a warrant. Furthermore, an entry on the Schengen Information System (SIS) to summons a person would have at least some success in locating them. Prosecutors are sceptical about whether summonsing would have any impact given that the person has often evaded the case or sentence, and that an EAW is therefore necessary to bring the case to justice. Nevertheless, in circumstances where an examining magistrate must ask questions of the suspect prior to the case progressing, and the amount of EAWs that can be resolved through an agreed return, summonses together with video conferencing would avoid the upheaval of an EAW where it is not absolutely necessary.

Furthermore, the cases documented in the project demonstrate a range of criminal offences, with a large number having occurred (or are alleged to have occurred) over 5 years ago. By no means are the majority of these the serious and pressing cross border offences that the EAW scheme was originally envisaged to encompass.

33 See Annex 2.
34 The author was also invited to speak with a delegation of Polish judges to the UK Home Office to discuss issue and execution of EAWs during December 2011.
35 Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-03633

Obtaining consent

In some member states, there is a concerning practice of asking requested persons to indicate whether they consent to surrender prior to either offering or obtaining legal advice. People are informed that they can surrender and have a right to a lawyer at the same time. The lawyers in the project agree that the question of consent can involve complex issues in the same way as whether someone agrees to plead guilty or not to a charge. This decision requires effective access to legal advice before it is taken, not afterwards. However, in the majority of member states the judicial authority overseeing the case enquires of the requested person if they consent at the extradition hearing and not prior to this by police or prosecutors. This is the correct practice pursuant to article 13(2) of the Framework Decision: measures should be adopted that ensure the person concerned has voluntarily and in full awareness of the consequences consented, to which end they shall have the right to legal counsel. However, in some member states (DE, EL, SE) police or prosecutors ask questions as to consent of the requested person prior to the hearing. Since the Framework Decision only allows for an extradition hearing before a judicial authority to consider whether surrender should take place, this questioning is both unnecessary and may influence the requested person's decision inappropriately. Whilst in Germany at least consent could be revoked, once given, the person may feel unable to do so. This process may limit the opportunity to take meaningful legal advice. Any defence to the EAW is for the judicial authority to consider alone.

Remand in custody

Pre-trial detention is already identified as an area of concern for the EU and in particular the adverse application to foreign nationals. The European Commission consulted on possible legislative acts in 2011 and an outcome of that process is pending. There have been varying reports in the project of recourse to detention where an EAW is being considered. In some member states, release is often awarded (IE, UK, PT) unless the offence is particularly serious and a flight risk shown. Often the case concerns a person who has been resident in the executing state for a long time and has community ties there. In the UK in particular prosecutors suggested that judges were reluctant to remand in custody because of the cost of housing foreign nationals who had not committed an offence in the country. In other member states, remand in custody can be more usual, though Greek prosecutors observed that they will apply domestic law where for serious offences detention is usual, irrespective of nationality.

Defence lawyers in the Netherlands reported concern about remand in custody pending removal, particularly to Poland where the Polish authorities only collect requested persons every few weeks and if the transport plane is full they will not collect until the next appointed date. This is despite the Framework Decision providing in article 23(5) that the person should be released where the 10 day period for return has expired (or exceptionally where the circumstances are beyond the control of either member state, a further 10 days by agreement). It was, however, observed by lawyers generally that it is unusual for a person to be returned to Poland within the 10 day period given the volume of surrenders to that country.

Lawyers generally reported that once a person is surrendered, they can often be remanded in custody for a significant period of time whilst the case is being prepared for trial. In some member states involved in the project (EL, PT), the request can be sought in order for the person to appear before the examining magistrate. Whilst this is part of the trial procedure, it is a pre-trial stage which may reveal further areas in need of investigation prior to the trial being ready. Video conferencing is not utilised to carry out this hearing, despite the EAW Handbook suggesting this mechanism be used. Greek prosecutors considered

that this would be a practical tool. Furthermore, it is rare for a country to allow the person to return to the executing state pending trial, notwithstanding the possibility to issue an EAW if they fail to appear (this was possible in one reported Greek case during the project, whereas in another anecdotal example given, a German national was required to live in their Greek holiday home for two years awaiting trial). In accusation warrants, the urgency with which the EAW system requires return is sometimes not replicated in the substantive proceedings, and there is limited use of other cross border measures during this phase to limit the impact of the EAW upon the life of the requested person. The European Supervision Order must be implemented through domestic legislation by December 2012. It is not clear as yet whether this will be utilised in these cases but it could alleviate unnecessary returns and lengthy pre-trial detention periods.

Appeals

The opportunity to appeal is important in EAW cases, as in any other procedure. This is particularly important where there has been poor defence at the earlier stages, as some of the cases from the UK have shown. There are differing experiences among member states as to the effectiveness of appeals. Again, lack of available legal aid is an issue. In the UK, the concern of lawyers is the shortness and rigidity of the time limits for appeal which can prejudice unrepresented people, though a recent decision of the UK Supreme Court has required judges to import discretion into allowing appeal applications.[36] Ireland has introduced a leave requirement for appeals so that applicants must now demonstrate that a point of general public importance is engaged. In the Netherlands, there is no opportunity to appeal at all. This raises concerns about ensuring that the requested person has the opportunity to have their case properly heard and the issues that they have raised properly scrutinised. As in domestic cases, there are often circumstances where lower courts repeatedly take a decision which is overturned on appeal. This occurred in one UK case where the UK Supreme Court held that it was necessary to properly scrutinise the impact upon the interests of affected children prior to surrender and they upheld an appeal seeking the refusal of a request from Poland concerning an old and relatively minor theft allegation.[37]

Trials in absentia

Many cases involve conviction warrants where the requested person has been tried *in absentia* and it is therefore necessary for the issuing state to undertake to allow a re-trial where the person was not informed of the trial.[38] The Italian lawyers raise concerns that under Italian law it is not necessary to actually re-hear the evidence in the case to afford a re-trial. Rather the appellate court will review the evidence that was submitted at trial along with the defence submissions. This does not appear to conform with what is expected by a rehearing and therefore comply with article 6 ECHR since the defendant does not have the opportunity to examine witnesses, as required by article 6(3)(d) ECHR.

Effective Defence

An effective defence must offer the best defence to a client. This is required in any EAW case just as in a domestic trial. It will require proper exploration of the applicable law, verification that the allegations comply with the law, and taking the clients instructions and crafting them into any applicable defence that

36 *Lukaszewski, Pomiechowski, Rozanski v Poland et al.* [2012] UKSC 20
37 *HH and PH v Deputy Prosecutor of the Italian Republic, Genoa; FK v Polish Judicial Authority* [2012] UKSC 25.
38 In accordance with the EAW framework decision as amended by Framework Decision 2009/299/JHA.

is available within the EAW regime. In order to submit that a ground for refusal applies, courts require an evidential basis. When human rights arguments are raised this is particularly hard to demonstrate because often the information upon which the person relies will be in the issuing state and the threshold to counter the presumption that all EU countries comply with the European Convention on Human Rights is very high. These are cross border proceedings and the lawyer needs to be able to act across those borders. We have found that there are a number of obstacles to ensuring this best defence in practice.

Legal aid

All member states in the project inform requested persons of their right, and allow access, to a lawyer. The legal aid system that applies in most member states is that pertaining to criminal cases (save for IE). However, in some member states legal aid is so poorly paid and administered that most lawyers of any experience and skill do not undertake legal aid work (EL, IT, PL, PT). As a result, the provision of legal representation in these jurisdictions is mostly limited to the young and inexperienced lawyers who agree to take these cases. The lawyers in these jurisdictions report that some lawyers undertaking these cases are not particularly interested in the area of extradition, or do not have the necessary experience, but will take what work they can receive. In Italy, there are a large number of lawyers and as a consequence they are in competition for any work. These factors can reduce the diligence with which a lawyer conducts a case.

In the other jurisdictions, whilst legal aid is available, it may not cover all the work undertaken or may not be fit for purpose (such as the Attorney General's scheme in Ireland which was not designed for EAW cases and does not recognise the time and complexity that can be incurred). In most jurisdictions, legal aid is qualified and eligibility can depend upon the seriousness of the case (by category, such as in Denmark where EAWs are always deemed serious because of the deprivation of liberty) or complexity (such as in Germany where often legal aid is not available because of the narrow test that applies in EAW cases). Eligibility can also be restricted through a means test, as in the UK and Italy. This may be understandable but can be particularly obstructive when foreign nationals are unable to evidence their income at the initial hearing. They are likely to be unrepresented while waiting for legal aid to be granted. This can either lead to delays in the progress of the case or, worse, to the requested person having to appear at hearings without representation at all. This is a real concern in Germany where provision of legal aid in EAW cases is very limited. In the UK it can mean having to submit an appeal without legal assistance.

The only mechanism which provides for legal aid for the assistance of lawyers in the issuing, rather than the executing, state is where the court accepts the need for expert advice in such cases. This process is only known to occur in the UK and Denmark, with rare examples in Ireland.

As a consequence of poor or sporadic legal aid provision, requested persons are not being provided with the best defence possible because the incentive for lawyers and the means to undertake all the work that is required is not supported. This is a real concern for ensuring proper scrutiny of EAW requests.

Standard of defence

Despite the EAW having been in force for eight years, in most member states, defence lawyers are generally not well equipped to deal with them. Only the Netherlands requires lawyers on an extradition duty list to have undertaken specific training. Elsewhere, though lists may exist, there are no special qualifications required. However, even the Dutch arrangements do not ensure that specialist lawyers undertake the

cases because often the requested person will have been arrested for some other domestic matter and will have appointed a known or duty criminal lawyer who then also conducts the EAW case. Whilst most member states have general professional training requirements, these can be satisfied by undertaking seminars rather than actual training courses with an examination element. No member state requires lawyers who conducting EAW cases to undertake an accredited, examined course and as far as we are aware, only the Extradition Lawyers Association in the UK has offered a course with a practical element to it. This course was run when the EAW came into force but is currently not being held. England and Wales requires domestic criminal duty lawyers to undertake an accredited course of this type. The course has elements of examination, observation and role-playing to ensure that they are able to advise adequately at what can be the most crucial stage of a case. No such similar course is available for what in our view is a similarly complex and serious procedure.

In some member states, there are practitioner texts available to buy and specialist lawyers will no doubt avail themselves of these guides. Equally, specialists like the majority of practitioners taking part in our project are sufficiently experienced to understand concepts and key elements of other member states' law as well as the nuances in the implementing law. Lawyers who regularly undertake these cases find that EAW requests will tend to come from neighbouring jurisdictions. Each case, therefore, will provide more knowledge and understanding about how that other member states' law operates. Even so, there will be requests from member states that are unfamiliar to these practitioners and raise offences or issues which have not been considered previously. Practitioner texts do not advise about how the law in each member state applies, or how to go about obtaining this information. A starting point will be the e-justice portal, but the lawyers we spoke to in the project were not convinced that this provides accurate, up to date information, nor did they consider that within the stringent time constraints and funding available they could always carry out a search of the internet to find useful and accurate information concerning the issue that the EAW or their client had raised.

An added complication to EAW proceedings is that in many member states there is not one specialised court dealing with these cases. Rather, any court in the jurisdiction of the police arrest can manage the case. Since all member states in this category apply the criminal court duty list, lawyers can be appointed who have very little knowledge or experience of these cases. These lawyers are unlikely to have purchased practitioner texts or attended seminars available in EAW cases. Nevertheless they are appointed to conduct the case. This can be compounded by a lack of knowledge and experience amongst the judges and prosecutors involved in the case. The result would appear to be from reports of defence lawyers and prosecutors during the project that often the person consents to the surrender without the consequences or the EAW being properly explored. It is more likely in Ireland, Netherlands and the UK that hearings are being conducted by experienced lawyers because of the singular court venue. However, even in jurisdictions where there is a specialised court, the volume of cases can be such that criminal duty lawyers are still obliged to take these cases with little knowledge of how to proceed, though the occasions are smaller (compare IE where the defence lawyers concerns are that Dublin agents are employed by local lawyers who do not have specialised knowledge). In the UK, where once specialist counsel could be instructed to undertake the extradition hearing, legal aid cuts have often restricted representation in these hearings to solicitors only, which means there is less time or resources to explore the issues in the case. In appeals where counsel can be instructed the possibility to raise arguments which ought to have been raised at the lower court is very limited.

Dual Representation

Every defence lawyer involved with or interviewed for the project has independently expressed the need to have access to assistance in the issuing state. Whilst the ministry representative from the Netherlands and UK prosecutors considered that EAW lawyers should be able to make use of online materials and prosecutors to obtain answers to their queries concerning the issue state, this will not always deal with the problem, as described above. From the cases we have reviewed, assistance is regularly required and in fact would be useful in most cases. The assistance issuing state lawyers can provide in a case varies greatly from a brief telephone call to explain or verify the law, to actually acting in the issuing state in order to seek withdrawal of the warrant, resolution of the case, or simply preparation for trial so that the requested person knows that this is in hand for their return. What is required is an all encompassing approach by the defence. The lawyers in the project team have on occasion been able to assist each other in their cases, which has allowed us to observe how a network might operate.

Our research has revealed that there are many circumstances where it is necessary to seek advice and assistance in the issuing state, which can be grouped under three main categories:

(1) Verifying validity of the EAW. There are many examples of enquiries that have to be made in order to ascertain this, such as:

(a) Whether the relevant offence is equivalent to an offence in the executing state. Even in framework list cases (the 32 agreed offences for which double criminality is not necessary) there are occasions where it is necessary to check if the offence actually fits within the envisaged framework offence;

(b) The passage of time since the (alleged) offence took place may invoke a statute of limitations in either the executing or issuing member state;

(c) The stage in the proceedings may not be clear on the face of the warrant and enquiries may be needed to verify the law and procedure generally and/or specifically to the case in the issuing member state;

(d) Whether the matter has in fact already been dealt with, thereby infringing the *ne bis in idem* rule.

Whilst these matters must be verified by the prosecution in any event, there may be circumstances where the defence lawyer has differing information as a result of his client's instructions and needs to make enquiries about what the actual position is. A criminal lawyer in the issuing state should be able to provide clarification where it is not possible to obtain this through the State. Caution is necessary here, as a prosecutor observed, that where the warrant does not look valid on its face, this should be a ground for refusal without trying to clarify the position because in fact the answer may not be what the client wishes to hear. However, often in some member states judges will not entertain any arguments without evidence to support them, and where there is a point which the defence lawyer is not sure about, there will be occasion to seek advice.

(2) A requested person may wish to rely on a ground for refusal or postponement of surrender. Often this will require evidence to be obtained from the issuing state. Again, whilst a request can be put through the prosecution, it may prove more appropriate for a criminal

lawyer in the issuing state to find this information, particularly if it relates to the requested person's family or life in the issuing state. Furthermore, the requested person may dispute the information that the issuing state has provided and it will then be necessary to make enquiries of a defence lawyer/issuing state expert in that field. This will foster equality of arms in a contested hearing, which is a fundamental principle in ensuring that the hearing process is fair, in accordance with article 47 CFR. There is certainly dispute amongst the defence lawyers and ministry or prosecution representatives that we have interviewed for the project about how useful prosecutors and judges are in resolving problems. This very much varies from state to state. In a jurisdiction like the UK or Ireland where often the prosecutor is a barrister who can act for either defence or prosecution it is more likely that their efforts will be trusted. But in other states where prosecutors are part of the judicial system rather than lawyers' profession, it is less likely that defence lawyers will seek their assistance, or that it will be given. However, there are certainly examples where this process has been useful for the resolution of a case. In many cases the requested person will simply be concerned about what will happen to them upon their return, about what the prison conditions will be like and how fair the trial will be. The cases in the project reveal that the involvement of an issuing state lawyer to reassure the requested person of the procedure and conditions in the issuing state can be extremely valuable in the resolution of the case, often where there are no grounds of challenge, to ready them for their return.

(3) There will be circumstances where an issuing state lawyer can provide assistance in furthering the administration of a case. For example, in an accusation warrant, there may be a genuine issue of identification which the executing state is unable to resolve, but a defence lawyer acting in the issuing state is in a better position to manage. In conviction warrant cases, there are some circumstances where warrants are issued for the activation of a suspended sentence. The defence lawyer may be able to demonstrate a lack of proportionality to the issuing state judge or prosecutor due to the lengthy period of time that has passed and the substantial impact upon the person's established life in the executing state that the EAW would pose (in terms of family, work and lack of offending there). Where EAWs are issued for failure to pay a fine or compensation and the consequence of breach is a custodial term of imprisonment, a defence lawyer can assist the requested person to pay the money due. In any of these scenarios, where a defence lawyer is able to discuss the case with the prosecutor and/or before the judge and they agree with the resolution of the matter, this will enable the warrant to be withdrawn. As a result, costly proceedings and custodial accommodation of the requested person in both member states may be reduced or avoided.

Whilst many experienced extradition lawyers involved in the project have developed their own contact points, even they were instructed in cases where they did not know a lawyer in the issuing state to seek advice from and could not find a recommendation for a suitable one. In these cases, they had to continue without this support and felt that their defence was lacking as a result. Often they would try to contact a lawyer through existing informal networks such as the Fair Trials International Legal Experts Advice Panel or through the ECBA. This was not a full proof method and they were not always able to obtain the assistance they needed. As these lawyers observed, inexperienced lawyers undertaking these cases had no contacts and no means of obtaining this support at all, if they even contemplated it. Courts in some member states regularly grant adjournments to allow a defence to be explored (IE, UK) however in most, this is not possible as the courts will not allow an adjournment and will see no reason to refuse the warrant on the basis that the issuing state is the correct jurisdiction to raise concerns. Whilst Denmark in principle will allow expert evidence, this must be obtained by the police authority upon the request of

the defence lawyer. It is therefore very difficult to make the same arrangements for assistance as in other member states.

It is difficult to assess the impact of a lack of expertise and recourse to advice or assistance in the issuing state with certainty because it is very difficult to know what difference this would have made to the particular case, bearing in mind that all factual circumstances are different. However, we consider the concern to be a valid one, when comparing the cases reviewed by the project where lawyers have not been able to obtain assistance. Cases where lawyers are paid adequately through legal aid or privately can also reveal more detailed work on the part of the defence lawyer: raising of grounds for refusal, communication with issuing state lawyers and experts, appeals through the domestic courts and to Strasbourg. A comparison of the cases reported in this project by known specialist lawyers and those who are not also reveals similar differences. It may be that the person could not carry out more detailed work given the funding regime in place, did not know how to go about obtaining advice and assistance in the issuing state, or through lack of training had not even thought as thoroughly about the possible challenges to employ. Whilst there is no suggestion that a dual defence equates to refusal of a warrant, nevertheless, the cases reviewed have demonstrated that where grounds for refusal are upheld, usually there has been assistance from the issuing state. Equally where warrants have been withdrawn almost always representations have been made by an issuing state lawyer to effect this.

Interpretation and Translation

Whilst interpretation and translation was available in all cases that required it through some mechanism or another (which in some cases even involved the instructed lawyers providing interpretation themselves), in almost half the member states reviewed (EL, IT, PL, PT) there were genuine concerns expressed by the lawyers that interpreters and translators were not only poor at offering the required language provision, but virtually none were skilled in court interpreting because these member states did not require this qualification. This has even been the case with interpretation into English (in particular in Greece where an Australian interpreter is used and English natives cannot understand their accent). In Portugal the lawyers expressed a particular concern that interpreters are provided through the prosecution and will interpret court and client-lawyer communications. With no accreditation a concern was expressed that there is no ethical requirement to preserve impartiality or confidentiality. However, this is not easily resolved; In Greece the ministry explained that they had people of all nationalities coming through their country as a gateway to the EU and it was very difficult to provide all the languages required. They considered this to be the priority and that with current funding constraints it was unlikely that legal interpretation would be required of those already providing the service. A large problem was in the low fees given to interpreters for their work. It is not possible to make a career of court interpreting because of the level of fee and as such, there is no incentive to learn legal terminology. However, in cases of poor defence and poor interpretation, the prospects of achieving an effective defence to an EAW are greatly reduced. Nevertheless, in none of the cases reviewed in the project was an issue raised about interpretation or translation.

No particular problems with interpretation and translation were recorded in the other member states, though there have been isolated incidents where the standard was poor.

Our work with the lawyers in the project has allowed us to see how a network might function to ensure dual representation is possible and how essential it is to provide lawyers who are not experienced extradition specialists with the advice and assistance they need, quickly and reliably. We have made recommendations

in the next chapter as to how we envisage this can operate. There is of course an obvious question about funding issuing state work. The lawyers in the project have observed that obtaining simple advice on criminal law and procedure and verification of an EAW can most likely be provided *pro bono* as in a network of lawyers it is anticipated that each will give and receive advice. However in a more complex case where expert evidence is required, the time spent by the lawyer in the issuing state must be properly recompensed in order to ensure quality and accuracy of the information obtained. Where representation is sought for assistance in the issuing state, this could be paid through legal aid in the issuing state as part of the domestic proceedings. This can be done in Germany already and is recommended by the UK Extradition Review.

Alerts and notices of warrants for arrest

Every participant in the project interviewed (other than the Greek ministry) expressed concern that, or acknowledged there were problems with, the operation of the alert system controlling notification of arrest warrants. In the EU this operation is provided through the Schengen Information System. In the rare cases where an executing state court refuses to surrender the requested person, they cannot leave the executing state for fear of arrest in another jurisdiction. Whilst the executing state notifies the issuing state of their refusal and reasons for doing so, there is no requirement upon the issuing state to take any action to withdraw the warrant. This causes real detriment for the requested person who is the beneficiary of a decision acknowledging that the warrant should not be enforced, yet they cannot travel because that decision is not mutually recognised amongst the member states.

The issue is complex because the grounds for refusal may often be based on national law in the executing state which the issuing state does not recognise, for example, non-correspondence of offences and expiration of limitation periods. In these circumstances, an issuing state is unlikely to withdraw the warrant. However, there is currently no cross border process through which they could be formally requested to do so and to consider the proportionality of continuing with the request.

In these cases, dual representation is the only mechanism to resolve the problem, by hoping that a lawyer in the issuing state can put forward representations to the relevant prosecutor or court seeking to the withdrawal of the warrant so that the person can exercise their free movement rights. On occasion, the cases documented reveal this has been possible, usually where a defect can be shown or a real interference with article 8 ECHR can be demonstrated.

Chapter 6
Denmark

4th Evaluation Report

The Evaluation Report on Denmark (Council Document 13801/2/06 REV 2 CRIMORG 149 COPEN 106 EJN 23 EUROJUST 47) was published on 12th January 2007. It includes an updating statement from the Danish authorities regarding proposed police and judicial reforms (page 51 and 52 of the report). Denmark has also replied to the report in a separate response paper on 2nd September 2011 (Council Document 13702/11 CRIMORG 125 COPEN 201 EJN 101 EUROJUST 123).

Defence

Two members of Denmark's unified Law and Bar Society were interviewed for the report (page 33). They reported no experience of the Court fettering the choice of counsel in any way, and that rates of remuneration in EAW cases were entirely in keeping with equivalent domestic criminal matters.

Arrest and Hearings

In Denmark, EAWs are received by the Ministry of Justice (Ministry) (page 21), scrutinised and forwarded to the local police district. The police have three days to conduct an investigation, followed by arrest and, where appropriate, preventative detention of the requested person. The police interview the requested person to establish identity; to discover whether he or she is likely to consent to surrender; and to obtain comments on the EAW. Consent may be withdrawn at any time before surrender. The requested person is entitled to legal representation throughout the proceedings. The police will inform the local prosecutor of the facts (page 22). He or she will then prepare a brief report on the case, summarising representations of the requested person and noting any information missing from the warrant.

The surrender decision in Denmark is decided by the Ministry at the earliest opportunity and as far as possible within 10 days of arrest (page 29). This is, however, only an indicative time limit. The report gives no information on the average time that surrender decisions take in practice.[39] The surrender decision is communicated to the requested person via the police, who also give information on any available methods of appeal.

39 See annex 2 for the figures from 2010

The requested person's first, and possibly only, court appearance is likely to be a hearing convened within 24 hours of a preventative detention to review and (if appropriate) continue such detention (page 36; 4.1.). In general, court hearings are public but can be conducted privately upon request from the public prosecutor. It is not stated how often this is done. The requested person is entitled to legal advice and interpretation and will be assigned a lawyer by the court if he or she does not nominate one.

The requested person has an unconditional right request judicial review of the lawfulness of a surrender decision within three days of that decision (Page 28; 4.7.). The report notes that one section of the Copenhagen District Court is very experienced in EAW matters. It is unclear from the report whether this is the only section that deals with EAW cases. A further appeal to the High Court is also subject to a three day notification period. A further appeal to the Supreme Court is only possible if special conditions are fulfilled and leave is granted by the Danish Court of Appeal. These are extremely short time limits, which may give rise to problems for the defence.

Training Provision

The report states that a wide range of training options is available to personnel engaged at all levels of administration of the EAW process (page 32) Among the trainees may be legal associates at the Ministry who gain frontline experience of defence cases at law firms one day a week. Individual police districts also run ad hoc courses on the practical application of EAWs, though the report also notes that the small size of Denmark's police districts (one of the issues subsequently reformed) means that some local officers and prosecutors were unaccustomed to dealing with EAWs on a regular basis (page 11). This has tended to lead to varied quality in the initial drafting of EAWs.

There is uniform guidance for dealing with EAW matters which is a concise and well thought through practical document including case examples ((page 41 – 7.3.2.)..The experts consider this to be good practice. Although not directed specifically at defence lawyers, the guidance seems a valuable resource that they could utilise. No other specific training is mentioned by the report.

The Ministry as the competent 'Judicial Authority' in EAW cases

Denmark has designated the Ministry of Justice as its judicial authority for EAW purposes (page 4). The report notes that everyone interviewed was confident that the guarantees of judicial scrutiny prior to surrender ensures that the rights of requested persons are safeguarded, and that, therefore, the overall process was considered to be a judicial one (page 27). In all cases, consent to surrender, which is initially given to police, must be reiterated by the requested person in court, where it will be for a judge to provide guidance as to any consequences this entails.

The Danish authorities are reported to be 'acutely aware' (page 38) that the decision to designate the Ministry has been cause for comment in other member states. However, they and the experts have not found any consequent practical weaknesses. The report does, however, note one significant issue, namely that the Minister for Justice herself has on one occasion personally received three EAW files. This raises the possibility of political pressure influencing what should be a purely judicial decision (page 38).

The report recommends that Denmark reconsider the competence of the Ministry of Justice (Recommendation 5).

Call with Danish Ministry of Justice

July 2012

The Ministry of Justice checks the validity of EAWs upon receipt before the requested person is arrested, and subsequently considers whether there are any grounds for refusal, raising any questions with the issuing state if required.

Legal Assistance and Legal Aid

When Denmark issues an EAW the requested person will be represented *in absentia* by a lawyer, who will represent their interests, as far as is possible without instructions.

Where Denmark is the executing state, the requested person is permitted access to a lawyer upon detention. Where the person cannot pay for a lawyer, legal aid is granted in cases of importance, which usually means those which involve a deprivation of liberty, and therefore always applies in EAW cases. The person's ability to pay is in any case assessed after access has already been granted.

While not all lawyers take on legal aid cases, such work is not exclusively done by young or inexperienced lawyers. Once a lawyer is included on the court appointed list, he or she must take legal aid cases.

Dual Representation

The Danish courts may allow expert advice from an issuing state lawyer on the law to be paid for by legal aid.

In principle, a provision in EU law to allow for advice and assistance from an issuing state lawyer should not pose problems in Denmark, since it is already possible to grant access to a lawyer in the issuing state if necessary, though Denmark does not have an official position on this as yet.

In any event, it is also usual for the Ministry to be in contact with the issuing State authorities. In approximately 25 per cent of cases the Ministry asks for more information from the issuing state in order to decide whether or not to surrender, following the report received from the police. In circumstances such as a breach for non payment of fine, the Ministry will ask the issuing state to withdraw the warrant where the person can pay or has already paid. However, in some cases the issuing state will say this is too late and will want to go ahead with the warrant.

Human rights as a ground for refusal

It would be extremely difficult to refuse an EAW on the basis of human rights considerations and in particular prison conditions, due to all EU Member States being ECHR contracting parties. Where there a genuine issue has been raised, the Ministry will, after assessing the reasonableness of the allegation, contact the Ministry of Foreign Affairs to find out whether any reports back up the concern. In general, however there is an underlying notion of mutual trust and it is extremely rarely that Denmark will refuse an EAW request.

SIS Alerts

The withdrawal of the EAW by the issuing state after refusal to surrender by the executing state is far from automatic, and can be problematic as laws differ greatly between the member states. Denmark will review the grounds of refusal if it receives such a notification, but will not necessarily decide to withdraw an EAW if the refusal is based on the national law of the executing state.

Defence Perspective

Legal assistance and legal aid

EAW proceedings are treated as criminal proceedings and legal aid is available on the same terms. There is no limit to this: the court will order what is necessary in the circumstances. Detention following arrest must always be authorised by a judge within 24 hours. Counsel is assigned by the court following arrest. The police investigate the circumstances which might lead to a refusal and it is usual for the defence lawyer to submit written pleadings to the police. The police submit their report to the Ministry which the defence can also seek requests for information from in the course of the proceedings.

The Ministry rarely considers applications for refusal seriously and it is content to surrender Danish citizens.

There is a duty list operated by each court but in most cases the requested person will nominate a named lawyer to act for them. The lawyers are not aware of a training requirement in EAWs for duty list lawyers. There certainly is no general training requirement or seminars being held. EAW cases are rare in Denmark and it is likely that most lawyers will only get a case once or twice in their lives. More specialist extradition and international crime lawyers are likely to do these.

Legal aid costs will be taxed at the end of the case on what is considered a reasonable amount of work. Usually, the amount claimed by the lawyer is paid. There is a substantial difference between private and public funding but it is possible to run a practice on legal aid.

Whilst the Ministry makes the initial decision to surrender, it is possible to seek a review hearing before the local judge and to appeal to the Court of Appeal and then Supreme Court, the only conditions being to comply with the stringent time limits. The courts can decide the matter on the papers alone but it is possible to seek a hearing and where there are humanitarian arguments it is necessary to do this so that the court has an impression of the requested person.

Interpretation and translation

Interpretation and translation is common and can be obtained by a number of routes Defence lawyers can hire their own translators and interpreters and the cost will be paid by the court. If it transpires that they are not very good, they will be replaced for future hearings. Interpreters are certified so that the standard is usually good, though for infrequently used languages there can be problems obtaining someone with the necessary skill.

Raising arguments

There are no problems in principle with raising arguments against surrender save for the fact that in the Danish system the defence does not investigate. The police identify what evidence they have and the defence then requests what evidence it requires, or matters for further investigation. There is could be a problem with this as the defence obviously might want to know what a witness is going to say before the police do. Equally, the police may consider something is irrelevant which requires the court to then decide whether it will be obtained. This also means that the defence cannot call its own experts, the appointed list has to be used. These are of high quality but are outside the control of the defence.

Dual representation

Dual representation is very limited because any issue is submitted to the police, Ministry or court and they will initiate the request with the issuing state to find the information. Where a lawyer is appointed by the court, it is not possible to simply seek advice from a lawyer in another state without authorisation by the court because of incurring public funds. In privately paying cases whilst the approval of the court is not needed, it could disregard the evidence. Without going through the official channels this course can be seen as obstructing the investigation.

Where the court does approve advice from the issuing state, it will be obtained through mutual legal assistance channels. In this case, it is important to draft the questions very carefully. Unofficial assistance from a lawyer in the issuing state is crucial to know what questions to ask. However it is not possible to submit any evidence from that lawyer to verify the answers received.

It is possible to rely upon reports prepared by organisations such as Amnesty International which are freely available as this will not impact upon the investigation by the police.

Assistance in resolving the case in the issuing state is very important and does not need approval of the Danish court. Clients are advised to instruct a lawyer in the issuing state and their Danish lawyer can be instrumental in arranging this. The courts will entertain granting adjournments where matters are being resolved in the issuing state, unless the person has been remanded in custody where there are strict time limits. Most citizens will not be detained as they are not considered a flight risk.

EU legislation indicating the right to advice and assistance from the issuing state could be helpful, though the court would still be likely to use the judicial assistance channels to obtain the information. Dual representation can solve a case much more quickly. Mr John Kahlke is often contacted to advise as to whether a person should resist an extradition request from Denmark or not.

SIS alerts

These cause great problems as people cannot leave Denmark even where the case has been refused. Requested people should be informed that there is an alert targeting them so that they can look into the matter to clarify what it relates to and try to have it resolved rather than being suddenly arrested and taken into custody.

Cases

DK1 – Slovenia – EAW withdrawn

The requested person was a Swedish citizen, and Sweden had previously refused to execute the EAW as it was considered invalid.

Legal representation

The requested person was informed of his right to a lawyer immediately upon arrest, and met with the lawyer within 24 hours. Legal aid was available for the 15 hours spent on this case by the lawyer.

Instructions from the client

The requested person refused to consent to surrender as he claimed he was innocent. He was detained pending the hearing and released when Slovenia withdrew the arrest warrant.

Contact with the issuing State

The defence lawyer directly contacted a Slovenian and a Swedish lawyer, both of whom were paid privately by the requested person's family. It is not known what the lawyers did, though presumably the Slovenian lawyer was engaged to liaise with the authorities and the Swedish lawyer was asked about the refusal by the Swedish court.

Final decision

Slovenia withdrew the EAW. The reason is not known.

DK2 – Romania – Surrender refused

The requested person was a Danish citizen convicted of fraud in 1999, and sentenced in 2006 *in absentia* to four years imprisonment.

Instructions from the client

The requested person never received any notification of the criminal proceedings against him in Romania. He was born in 1944 and had severe mental health problems stemming from a one-month imprisonment in Romania in 2000, and exacerbated by being remanded in custody in Germany in 2006 following an Interpol alert, also from Romania for the same offence.

Arguments raised against surrender

The surrender should be denied on humanitarian grounds as a result of the requested person's mental health under section 10(i) of the Danish Extradition Act, trial *in absentia* without guarantees for re-trial. Also it was submitted that the Danish State Attorney had considered and declined prosecution of the same offence although Denmark would arguably have had jurisdiction to do so. Finally it was requested that the requested person should be able to serve the sentence in Denmark.

Contact with the issuing State

It was necessary to determine whether the 2006 judgment of the Romanian court was final, or whether proceedings could be re-opened, whether the sentence was proscribed under Romanian law at the time the EAW was issued, and why the requested person had not been notified of the proceedings.

The Danish court refused to allow the court-appointed defence counsel to instruct a Romanian lawyer to give expert advice on Romanian law because this information was for the police to obtain because the offence was also being investigated in Denmark. Court-appointed defence lawyers must obtain the express authorisation of the court to obtain any information from outside Denmark otherwise the information will not be admitted as evidence, and the lawyer may possibly be subject to sanctions for attempting to obstruct police investigations. However, the police did not make these investigations because they did not consider it relevant to their enquiries.

Final Decision

The police investigation showed that the conviction had indeed taken place *in absentia* and had become final. The Danish Ministry had also asked the police to conduct a psychiatric examination, which the requested person consented to and revealed his poor state of health.

The Ministry ultimately refused surrender as a result of the requested person's mental health problems, but it did not make clear why it would not have refused the warrant on the ground of the *in absentia* trial or would not have allowed the requested person to serve their sentence in Denmark.

DK3 – Poland – non-consented surrender

The requested person was wanted for a conviction which was years old in order to serve a suspended sentence which was activated and he failed to report.

Instructions from client

The conviction followed a trial *in absentia* and the requested person did not want to leave Denmark.

Arguments raised against surrender

Trial *in absentia* without guarantees of re-trial, old conviction.

Contact with issuing state

The Danish authorities contacted Poland to find out about the trial process. Poland confirmed that the notification for the trial had been sent to the requested person's last known address so it was not clear if he had been aware of the trial. However a re-trial was possible at the discretion of the Polish court.

Final decision

The Ministry considered that there was no issue concerning the *in absentia* trial because the EAW concerned a sentence and ordered surrender. An application was made to the court which upheld this decision. Both the Court of Appeal and Supreme Court also upheld the decision to surrender.

Chapter 7
Germany

4th Evaluation Report

The Council issued its fourth evaluation report on the practical application of the EAW in Germany on the 30th April 2009 (Council Document 7058/2/09 REV 2), to which Germany responded on the 21st September 2011 (Council Document 14446/11 CRIMORG 157 COPEN 229 EJN 117 EUROJUST 139).

Defence

Two defence lawyers from the Federal Bar Association and the German Bar Association were interviewed by the experts (page 51).

Arrest and Hearing

The responsible authority is the Public Prosecutor at the Higher Regional Court. As soon as possible and at the latest one day after apprehension, the requested person must be brought before the nearest local court (page 18), where a magistrate will ask whether the requested person wishes to consent to surrender as well as inform him or her of the legal consequences of such a decision. Where there is no consent to surrender, the prosecutor will review whether the EAW request should be granted, giving reasons in case of a negative decision. The decision is then reviewed by the Higher Regional Court, although the defence lawyers interviewed cautioned that its powers of review are limited in practice. While an oral hearing is possible before the Higher Regional Court, it is not necessary (Section 30(3) of the implementing law IRG – International Assistance in Criminal Matters Act) and, in practice, proceedings are exclusively written. After this review the prosecutor makes the final decision on surrender.

Legal Assistance and legal aid

Section 40(1) of the implementing law (IRG) states that the requested person may have the benefit of a lawyer at any time during EAW proceedings, and must be informed of this right by the local court magistrate upon apprehension (Section 21(2) and (2) IRG). If no private lawyer is sought, a lawyer will only be assigned and paid for by the state in three situations (page 33): where the case is complex, the individual cannot adequately protect his or her rights, or the requested person is under 18 (Section 40(2) IRG).

There are three problems with this system. First, due to the tight deadline in the implementing law, the magistrate may have little time to prepare, a particular difficulty if they are inexperienced in EAW cases. In addition, no defence lawyer is required to be present before the magistrate, despite the requested person being asked for consent to surrender at this point.

Second, the Bar representatives interviewed stated that in practice a publicly funded lawyer will not be appointed in the majority of cases, as EAW cases are not considered to be complex enough (page 33). The experts note that this situation is unsatisfactory (page 42) as it is not always possible to assess at the outset of a case whether or not a case raises complexity or the person is unable to protect their rights.

Both of these issues are particularly problematic due to the lack of an oral hearing before the Higher Regional Court (page 41), elevating the importance of the hearing before the magistrate even further. As the interviewed lawyers also note, it is unlikely that all persons will be able to defend themselves adequately in writing before the Court.

The experts recommend that Germany should ensure that the requested person is heard by the Higher Regional Court in cases where he or she does not consent to surrender (Recommendation 5), and that appropriate measures are taken to ensure that legal assistance is provided to the requested person throughout the procedure (Recommendation 6).

Germany's response makes clear that measures to alleviate the situation have been seriously considered and initiated. Germany is passing legislation which will make oral hearings before the Higher Regional Court and a publicly funded lawyer the rule instead of the exception. It is also prioritising developments in line with the EU 2009 Roadmap on procedural safeguards to strengthen the procedural rights of suspects in criminal cases. It is cautioned however that hearings may result in delays which would in turn lengthen time spent in detention, thus not always being in the requested person's interests.

Training Provision

Regular EAW-specific training is provided to judges and prosecutors via the German Judicial Training Academy and the European Law Academy (Section 5). In-house training is also provided to the staff of the Federal Criminal Police Office. However, no mention is made of training for defence lawyers.

In its response, Germany emphasises that it provides comprehensive training programmes to practitioners at national and international level, including foreign language courses (page 13). It is unclear from this whether these extend to defence lawyers specifically.

Time Limits

Where Germany is the issuing state, the report notes that meeting the statutory time limits in EAW cases has proved difficult in relation to extensive requests for additional information from the UK and delays in confirmation of details from Italy and Spain.

Problems are also reported where Germany is the executing state. The German authorities reported significant difficulties in meeting the ten-day limit for surrender decisions under article 23(2) of the Framework Decision (page 30). The deadline was not met in a large number of cases (page 45). Reasons

included the size of the country and the fact that a federal, nation-wide system was employed for prisoner transport. The expert team however has 'severe doubts' as to the validity of such arguments as a justification for systemic breaches of the time limit (page 45).

Accordingly, the report recommends that Germany rethink the logistical procedures for physical surrender, so as better to meet the relevant deadline (Recommendation 12). Germany's response shows that these concerns are being addressed. Steps have been taken to ensure that EAW procedures are conducted as quickly as possible and, 'where possible' in the interests of requested persons (page 11). While Germany reiterates the problems arising from the size and structure of the country, possibilities for alleviating the situation are being discussed with practitioners and technical problems have been addressed with neighbouring countries.

Proportionality

Extradition can be denied on specified grounds. One is a breach by the issuing authorities of the principles in article 6 Treaty of the EU (now section 3 TEU)(Section 73 IRG), setting out the fundamental rights of EU citizens and which is in practice used where German judicial authorities deem that the issuing state has not observed a minimum proportionality standard. According to the case law of the German Constitutional Court, the OLG must examine whether the harm caused by surrender would be so disproportionate as to breach article 6 TEU.

Germany has constitutional protection to ensure that the prosecution of and penalty for crime is proportionate. Its Constitutional Court has not been afraid to invoke this principle in the face of EAW requests. While the experts share Germany's concerns regarding the proportionality of EAWs (page 44), they caution that such control should take place in the issuing rather than the executing state. They describe current practice as confrontational and contrary to the spirit of mutual trust, as well as risking the creation of a vague and unpredictable new category of grounds for non-execution.

The experts recommend that less reliance should be placed on the lack of proportionality by the issuing state as a ground for refusal (Recommendation 10), while also recognising that an EU standard on proportionality may be needed. Responding to this recommendation, Germany recognises that a proportionality test is primarily for the issuing state to conduct, yet reserves the right to refuse EAWs in cases of gross disproportionality.

SIS Alerts

When acting as the executing state, Germany's SIRENE Bureau may add restrictive validity flags to incoming article 95 Schengen Convention alerts, where surrender is considered to be obviously impermissible (4.14, page 31). Such flags are also added following the announcement by the German executing authority that the EAW underlying the SIS alert has been refused, and where the issuing state does not withdraw the alert after the requested person's surrender.

Meeting with Ministry of Justice

August 2012

Arrest and hearing

The general public prosecutor at the Higher Regional Court will try to establish the facts concerning the EAW and will contact the issuing state to seek further information. They will then present the case to the Higher Regional Court for a decision on whether it agrees with the prosecutor's approach. The Higher Regional Court was chosen for EAW cases because they are complicated and the judges are experienced and able to specialise more than at the local level.

Police questioning should not be happening in EAW cases but this is a usual domestic practice and because local police will not be specifically trained in EAW cases they may not know to conduct them differently. The police arrest the requested person, inform the prosecutor at the Higher Regional Court who will advise to take them to the local court the next day.

There the magistrate will identify the person, ask if they require legal assistance and ask whether they wish to consent, after advising the consequences of this. They should be asking whether the person has anything to say concerning the EAW in order to ascertain whether surrender should be ordered. In 2010 the Federal Constitutional Court held that the local court should be enquiring more into the EAW and not just leaving it the Higher Regional Court. The Ministry is still trying to work with states to train local judges to enquire more. But in many cases requested persons have not been asking for a lawyer, unless there is already an asylum claim.

The implementing law requires the local court to inform the prosecutor at the Higher Regional Court of the case who has a standard form to fill out for each case reminding the local court what it should do and to raise questions to be explored.

The Higher Regional Court will rarely hear arguments but will consider the case on the papers. This is because usually it is a matter or law rather than fact. But the procedure is different in EAW cases and it would be better for the Court to hear more from requested persons. The arguments are much more impressive and detailed in person. It is not possible to change the system for every case to be heard because there are insufficient resources to hear them all. In training the Ministry does advise that hearings should be held in serious and complex cases. It is a matter for each state how many judges are appointed to the Court. Training is still being used to demonstrate this need; It has not yet reached the point of requiring legislation.

Legal representation and legal aid

If a requested person does wish to have legal assistance, there are three requirements in section 40 of the implementing law to allow this to be funded by legal aid (see above). In practice, EAW cases are complicated and legal aid should be available for them. But it is the local judge that will consider whether legal aid should be granted. There are very few cases where legal aid seems to be provided and unfortunately no statistics are collected concerning this. In the 2011 questionnaire to the courts, however, the Ministry did ask local judges whether they thought lawyers were needed in EAW cases. There was a range of responses – some thought representation should be given more often, others thought it was not

necessary; Some observed that the system requires them to act very quickly and lawyers would prolong the time taken to decide. On average where a person does not consent, cases are currently concluded within 37 days. In some circumstances it does seem that judges can be more concerned about complying with the deadlines than ensuring fundamental rights of the requested person are protected.

A mandatory defence is not available in EAW cases, as provided in domestic criminal cases, because it is a matter for each state and probably due to budgetary restrictions. Legal aid does not pay very much in any event and therefore the requested person will not get the best representation anyway.

The prosecutor will check the EAW for grounds of refusal, however, though they will usually consider that most concerns are for the issuing state not for the executing court. Asylum claims will usually prevent a surrender. The prosecutor should ask about the person's personal circumstances and whether they have an established life in Germany, which should be taken into consideration when deciding whether a surrender is proportionate. However, it is rare that a case will now be refused on proportionality grounds. Some countries will also answer slowly or insufficiently.

It is not clear why people are not requesting a lawyer. There is standard wording which the local judge should follow in advising of this right. It may be that because it is difficult to obtain legal aid people assume they will have to pay for their lawyer. There may also be a concern about the standard of duty representation and that a duty lawyer will be unlikely to have access to legal assistance in the issuing state.

Dual representation

Whilst prosecutors can make some enquiries, it is much better to have the assistance of a lawyer in the issuing state. Germany supported the original proposal for a directive on the right of access to a lawyer, which included dual representation, and continues to support the need for this in principle. There needs to be some sort of network to make this possible in each case.

Training

Some training is organised by bar associations, for example the National Association of EU and International Criminal Matters in North Rhein-Westphalia has an annual conference. There are specialised courses available after which a lawyer can formally take up a specialism. There is not one for extradition. Duty lawyers should have some training so they at least have basic knowledge from which to start. Although the state pays legal aid, it would be very difficult to demand training requirements.

SIS

Germany will not remove an EAW request where a refusal is based on the national law of the requesting state. If it is a more general objection or there is ECtHR case law concerning the issue then the EAW will be reviewed. It is difficult for a state other than the issuing state to remove an alert. It would in any event remain in the Interpol system. The requested person would need a very experienced and specialised lawyer to try and argue for this removal in the executing state and there is no legal aid available for this. It is another reason why dual representation is important so that this can be looked at in the issuing state.

Defence perspective

Legal assistance and legal aid

Most lawyers in Germany have a very formal method of advising clients. Many do not know anything about the EAW process or how to defend such cases. This means that most do not explain specialty which can result in a person waiving their rights. Lawyers, often advise over the phone, not appearing in court at all. It seems that the overall aim and methodology of mutual recognition is being rigidly adhered to by defence lawyers as well as the courts. This is compounded by the fact that although there is a new law that came into force in 2011 requiring mandatory defence which is publicly funded in criminal cases, where the suspect is arrested, this has not been extended to EAW cases and the grounds for obtaining legal aid are extremely limited. When the new law was being considered by the parliament, the position of the EAW was inadequately considered. However no efforts have been made to amend this.

Legal aid is much more poorly remunerated than private work. This does not allow a case to be properly prepared so it is not possible to make a reasonably remunerative practice out of this work alone, though some lawyers try to do so. The lower fees are justified on the basis that undertaking legal aid work is to provide a benefit to society. The danger will be that lawyers will not spend a sufficient amount of time on these cases. Any lawyer could be appointed by the court but, in practice the court tends to appoint those lawyers with which it is familiar but may not be the best or most specialised. The bar associations have provided lists of lawyers to the courts to use, but this is in their discretion.

It is quite possible that there are people not being adequately represented in EAW cases. Given that the police will in practice question the requested person upon arrest and enquire about their consent to surrender prior even to the opportunity to have legal assistance, representation is important. Whilst any consent indicated prior to appearance at court can be revoked, as it is this hearing where consent is formally entered (section 21(2); 28(2) IRG), without the assistance of a lawyer the consequences or benefits of this may not be clear to the requested person.

Training

Seminars are held by the various bar associations. One in particular has an annual congress which includes a session on 'news from Europe.' There were training sessions when the EAW first came into force the lawyers are not aware of any being currently held. In any event, such training is not obligatory. Specialised criminal practitioners must undertake 15 hours of CPD but they can choose their subject which may not include extradition. The lawyers are not aware of any element of the professional training for trainee lawyers covering the EAW.

Grounds for refusal

The prosecution of EAW cases in Germany consists mainly of checking the formalities of an EAW (for example: Is there an EAW offence? Has the EAW been delivered in time? Is there a guarantee of appeal in the issuing state?) rather than verifying whether there are other substantive problems with extradition. Probably 45 per cent of warrants in Germany are refused due to statutory limitation. While it is possible at least to use proportionality as a ground for refusal, and there have been some successes, this is rare.

The principle of mutual recognition underpins the decision so that, for example, it is not possible to challenge the dual criminality of a framework list offence; if the EAW specifies fraud, it is to be assumed that this is fraud in the German sense as recognised under German law.

It is not really possible to argue human rights points because there is an assumption that all countries in the EU comply with the ECHR. It would be necessary to prove there was a threat to life or something very serious before a court would refuse a warrant. Even so, a case might need to be taken to the constitutional court.

Nevertheless, a lawyer can raise any argument they choose before the court, relying on constitutional and human rights standards and it is possible that a court might entertain these (for example, there was recently a case concerning prison conditions in Greece in a deportation case where the German Constitutional Court refused removal. The same principle could apply to extradition).

Dual representation

Most of the work that a lawyer can provide in an EAW case is to give support while the person is in custody and to arrange for a proper defence in the issuing state. A good network of lawyers is paramount to the successful handling of EAW cases. There is a problem of payment for advice and assistance. If it is a colleague known through an informal network, the ECBA or CCBE, they may provide some advice *pro bono*. But where actual representation is required this can be difficult unless the requested person or their family or friends are able to pay.

In Germany it is possible to start preparation on the case whilst the proceedings are happening in the executing state. This is very important, even where the person consents because if the lawyer knows the file they can immediately make representations on the person's behalf (for example concerning release from detention or the weakness of the case) when they are returned. It is, therefore, important to have the right set out in the proposed directive on the right of access to a lawyer to ensure that this opportunity for representation is available.

Detention

There is a problem that once a decision is made for surrender the requested person is not returned quickly enough. If they are not released from custody pending the return they can spend two to five weeks in prison. If a person is not a German national they are unlikely to be released pending the return.

Meeting with a Senior Prosecutor with the General Prosecutor in Nuremberg

July 2012

The Reviewer in the German team visited the office and reviewed three case files chosen by the prosecutor.

Legal representation

The prosecutor had difficulties finding files in which the person concerned was actually represented by a lawyer. Out of three files reviewed, only one displayed some activity by a lawyer in order to avoid extradition on the basis of a request from Austria. In the other two cases there was no activity whatsoever by the lawyer. In the one case where there was some activity these gave an impression of being somewhat helpless and uninformed even though the lawyer concerned was a very renowned criminal defence lawyer in Germany. Nevertheless, such a person may have no experience in extradition cases. This seemed to be the case on this occasion.

Every person who is brought before the regional court the day after his apprehension is questioned whether or not he consents to the extradition. At the same time, he is informed of his right to a lawyer. Very few persons ask for legal advice. If they do so, however, the office of the prosecutor will arrange this.

Grounds for refusal

The only cases raising issues with the validity of the EAW were where the requested person concerned was still in the SIS even if the proceedings against them had already taken place. This might mean the person is re-arrested on their return to Germany.

There are also major problems in dealing with EAW requests following trials *in absentia*, and proportionality is an issue concerning not only the requested prosecution and but also the level of punishment.

Dual representation

The biggest concern with the European arrest warrant is the lack of background information concerning the actual conduct or history of the person concerned. It would be helpful to have contact between the defence lawyer and a lawyer in the issuing state.

Delay in transportation

There were no problems in transporting the requested person for surrender in this area. According to his experience in particular with regard to Bavaria no delays are being observed. The Bavarian police have a unit which is responsible exclusively for the transportation of prisoners. This unit seems to be working impeccably.

Cases

DE1 – France – consented surrender

The requested person had been convicted *in absentia* for drug trafficking in 2004 and sentenced to 4 years imprisonment. He was arrested on arrival into Germany from Columbia.

Instructions from the client

The requested person refused to surrender as they considered the allegations against him to be completely false. The lawyer however advised that there were no grounds for refusal. The client therefore consented, whilst preserving specialty.

Contact with the issuing state

The lawyer immediately contacted a lawyer in Paris to organize an appeal against the *in absentia* judgment. The lawyer was paid privately.

Final decision

The court ordered surrender as there were no objections against the EAW.

DE2 – Poland – voluntary surrender/warrant withdrawn

The requested person was accused of defrauding an insurance company in 2001 with a faked car accident allegedly causing damage of approximately €2,500. He had lived in Germany for 10 years with his wife and three children and had been working in a managerial role.

Instructions from the client

The requested person did not believe he could be arrested after 11 years and on the grounds of such a comparatively small sum. He wanted to settle the case from Germany where had been living for the past 10 years and where he was never approached by any authority regarding the matter.

Non-detention measures or detention

The prosecutor had real doubts about the proportionality of the surrender so requested that the court release the requested person pending the surrender.

Arguments raised against surrender

Proportionality – old and minor offence compared with the established life of the person in Germany.

Contact with the issuing state

A Polish lawyer was contacted to try and settle the issue in Poland. The lawyer arranged for a meeting between the requested person and the prosecutor which he could attend freely. He answered their questions and the case was closed. The lawyer was paid privately for their assistance.

Final decision

Since a voluntary arrangement was reached it was not necessary to reach a decision on the warrant. Despite the proportionality concern the lawyer considered that the court would have surrendered the requested person without this arrangement.

DE3 – surrender refused on three EAWs – media and court report consulted rather than lawyer

The requested person was a Greek and German national who was wanted for accusations of bribery, money laundering and fraud in connection with deals between the Greek government and Siemens between 1999 and 2003 which came to light during the 2004 Athens Olympics. The requested person was the CEO of Siemens Hellas. Three separate warrants were requested.

Contact with the issuing state

The requested person had instructed both German and Greek lawyers to advise on the relevant law of each country.

Final decision

The case was heard and appealed to the German Constitutional Court three times on the three warrants, and on each occasion the Court found that the lower court had failed to inspect the EAW sufficiently to the standards required to deny a national the fundamental right of protection against extradition (in that the decisions were lacking in reasons, and contained an inadequate review of the EAW – e.g. did not consider possible statutory limitation and correspondence of offences with German law). On each occasion the case was sent back to the Higher Regional Court to review the decision. In particular the Court held:

> *In European Arrest Warrant proceedings as well, which serve to simplify extradition between the European Union Member States within an economic and judicial area that grows ever closer together, the non-constitutional courts must therefore examine as carefully as possible whether the specific charges describe punishable behaviour. They may not content themselves with merely performing a rough legal review. (English press release provided by the court, no. 116/2009)*

The Higher Regional Court then refused the surrender as a result of statutory limitation.

Chapter 8
Greece

4th Evaluation Report

The Council published its Fourth Round Evaluation Report on EAW practice in Greece on 3rd December 2008 (Council Document 13416/2/08 REV 2 CRIMORG 146 COPEN 167 EJN 58 EUROJUST 78). There has not to date been any formal response from Greece.

The report states that there was a certain 'diversity of interpretations offered by the Greek authorities' (page 31) regarding Greek law and practice on EAW cases, which means that many answers may not necessarily be decisive, and practice may vary.

Defence

Section 6 of the Report deals specifically with defence perspectives. Eight defence lawyers from the Athens and (mainly) Thessaloniki Bar Associations were interviewed for this purpose, a larger number than those interviewed for the other Evaluation Reports.

Arrest and Hearing

Where Greece is the executing state, the key authority for EAW matters is the Public Prosecutor at the Court of Appeal (PPCA) (Page 6). The PPCA is competent to issue EAWs and is responsible for receipt of EAWs as well as the arrest and detention of requested persons, the submission of the case to the competent judicial body, and the execution of the court decision on surrender.

Following arrest, a requested person must be brought before the PPCA 'without delay' (article 15.1. of the implementing law). The PPCA must then verify the identity of the requested person and inform him or her of the EAW and its contents, his or her right to be assisted by legal counsel and interpreter, and the possibility of consenting to surrender.

The timing of this information means that the appointed lawyer may not have been able to assist at the crucial moments following arrest, and that the scope for informing the requested person about his or her rights and the proceedings in question before the hearing are very limited (page 40).

Legal assistance

The interviewed lawyers also noted that the implementing law does not explicitly grant the right to a publicly appointed lawyer, but rather simply to a lawyer, which might affect the decision of the requested person whether or not to request legal assistance, if he or she is unaware that a lawyer could be appointed for them. The Greek law on publicly funded lawyer predates the EAW implementing law, meaning that it contains no EAW-specific provisions and is of no assistance in this regard (7.3.1.7.).

Furthermore, if a requested person asks for legal aid, he or she is appointed a defence counsel from a list. The lawyers on this list do not necessarily have any expertise on EAW matters. Due to the very low fees, it is in generally very unattractive for specialised lawyers to join.

There is no body of court interpreters in Greece, and freelancers are very poorly paid. This could adversely affect a person's right to interpretation (page 30). Requested persons are only entitled to receive copies of the case documents at their own expense. (Art. 15.2.)

The experts make three recommendations on these issues (pages 43 and 44). First, fill the gap in Greek law regarding the right to a state-paid lawyer in EAW cases (Recommendation 17). Second, and in the meantime, ensure that the requested person is duly informed of his or her rights immediately after arrest and is provided with quality linguistic assistance where necessary (Recommendation 18). Thirdly, amend article 15.2 of the implementing law so that the requested person is provided with free copies of the relevant documents.

Time limits

The time limit of 24 hours for appealing surrender decisions is especially short in light of the requirement to lodge the appeal with the secretary of the Court of Appeal, which requires time-consuming practical arrangements and is particularly cumbersome if the requested person is in prison. While short deadlines are deemed to be conducive to rapid procedure, the interviewed lawyers considered that the limit may hinder a requested person's ability to find a lawyer if he or she so wishes, and also that lawyer's ability to work thoroughly (7.3.1.8.).

The rigid time limit and strict formalities imposed may hamper a requested person's right to appeal (page 41), especially as the person may not at that time be assisted by a lawyer, nor in possession of all relevant documents.

In light of the above considerations, the experts recommend that Greece take necessary measures to ensure that the requested person can effectively exercise the right to appeal surrender decisions.

Performance of judicial authorities in handling EAW cases (page 31)

The representative of the Athens Bar was positive about efforts made by the Greek judicial authorities in EAW matters. However, he also stated that some are unfamiliar with the system and its implications and stressed the need to provide judges and prosecutors dealing with EAW cases with proper resources. The Thessaloniki Bar representatives further criticised the quality of some EAW judgments as being too rigidly following the letter of the law and unwilling to adapt to new developments in the case law.

Grounds for refusal: Human rights concerns

Greece is reported (7.3.1.4.) to have converted Recital 12 of the Framework Decision on human rights into a mandatory ground for non-execution (Art. 11.e implementing law). The experts believe this to be contrary to the text in so far as it exceeds the exhaustive list of grounds for refusal found in articles 3 and 4 of the framework decision, as well as being redundant in light of the protection offered by the ECHR. The Greek legislator is considered to have overstepped the Framework Decision in adding to the grounds for refusal where the requested person is found to have been conducting 'activities for freedom', which is in line with the Greek Constitution (Article 6), but in conflict with the supremacy of EU law. Accordingly, it is recommended that this situation should be reconsidered (Recommendation 15).

Training Provision

The interviews conducted for Section 5 of the Report show that the majority of key actors in Greece lack EAW-specific training (7.1.5), and any training that does exist is not regular or ongoing (page 28). The report also notes that language skills are insufficient to establish appropriate contacts with foreign authorities (with the exception of the Public Prosecutor's office in Athens), as basic skills in foreign legal terminology are lacking (page 28). The experts recommend the organisation of training in basic foreign legal language for judges and prosecutors (Recommendation 6).

The Athens Bar Association held two one-day seminars in October 2006 for defence lawyers that touched upon, but were not exclusively devoted to, EAW matters. In addition, the Northern Greece Jurists Society held a meeting on the EAW in February 2007 in collaboration with the PPCA of Thessaloniki (page 29). No particular recommendations are made in this regard.

In addition to Sections 5 and 6 of the Report, it is possible to identify two further issues in Greek EAW practice which could significantly affect defence lawyers. The first of these, namely the highly divergent practice on EAW cases in Greece, is intimately related to the issue of insufficient training and expertise discussed above, and the recommendations issued in regard to the former may equally apply.

Diverging Practice

As there is no systematic coordination of prosecutors' offices, no guidelines and no meeting for the exchange of views, largely divergent EAW practices exist in Greece (7.1.3.). This leads to great uncertainty and lack of transparency, which complicates the work of defence lawyers in such cases.

The expert team is therefore of the opinion that it is of 'paramount importance' to disseminate accumulated experience effectively to all practitioners in order to improve the efficiency of the system.

In line with this, it is recommended to establish mechanisms to ensure appropriate coordination among prosecution offices with a view to avoiding divergent practices in the processing of EAWs (Recommendation 4), and to take measures such as drawing up a handbook providing detailed guidance on EAW practice, providing extensive and regular training and/or establishing centres of expertise (Recommendation 5).

The Greek Implementing Law

On page 31 of the Report it is noted that the Greek implementing law is a direct copy of the text of the Framework Decision, which disregards the possible problematic interaction of this law with other areas of Greek criminal law. This may potentially make practitioners' work difficult due to lack of clarity concerning the relationship between the different areas.

The experts thus consider it to be advisable that practitioners are invited to produce written guidelines on how the Greek implementing law should be applied in practice (Recommendation 1), which could in particular help judges and prosecutors (page 32). However a redrafting of the implementing law with a view to solving this problem is preferred as an alternative or supplement to such measures by the experts.

SIS Alerts

SIS alerts are issued by Greece even where the whereabouts of the requested person is known to the authorities (page 10).

The validity of incoming SIS alerts is checked at the SIRENE Bureau under the supervision of judges and prosecutors expressly seconded to the office for that purpose (4.16., page 28). Prohibitive validity flags can only be added following the orders of the PPCA competent to process the EAW, which is described as 'good practice' by the experts (7.3.2.1., page 41).

The report further notes that 'no clear answer' was given by Greek officials as to which authority is competent to hear actions to delete, correct or obtain information or compensation pursuant to Art. 111.1 Schengen where the EAW underlying the SIS alert was not issued by Greece (7.1.7, page 34).

Meeting with Greek Ministry

July 2012

The Ministry of Justice is not the competent authority in Greece. This is the Public Prosecutor's Office of the Court of Appeal (PPCA). Therefore, the role of the Ministry is limited.

Legal Aid

Whilst legal aid lawyers are paid by the state, the creation of a specialised EAW list is a matter for the bar associations and prosecutors to decide. It is not something that the Ministry would interfere with. It would be the public prosecutor of each court who makes the decision concerning the appointment of a legal aid lawyer. The Ministry could advise the bar associations and the prosecution to appoint a competent lawyer but this department would not have the authority to action such advice. However, requiring an accredited list of lawyers would not be possible given that they are not paid for quite some time after the case concludes and already complain about the fee structure. Another requirement prior to being paid would discourage lawyers from registering on the list at all.

Interpretation and translation

Each court controls the list of interpreters and not the Ministry and it would not therefore know how they are appointed. Greece had not yet done anything to comply with the directive on the right to interpretation and translation.

Dual representation

It would be sensible to have the advice and assistance of a lawyer in the issuing state where necessary for the defence and this could be reflected in the directive on the right of access to a lawyer by suitable form of words. There was a major problem in Greece with implementation because there is immigration from many countries and it is difficult to find interpretation for all languages. This was more of a problem than ensuring that the interpreters understand about the legal process.

SIS notices

No problems were known in Greece but Greece would participate in any meetings to review its operation. There were no other identifiable problems with the system.

Meeting with PPCA

July 2012

The Council 4th Round evaluation report did not speak to the PPCA so the concerns raised there are not accurate.

At least 100 people are actually arrested a year on an EAW in Greece. 80 per cent of these or more are foreign. Many are from Poland and Bulgaria who come for work.

Issue

Greece does not use a central authority in EAW cases which makes the procedure quicker. They have not had any complaints from other member states about their procedure and response to requests. As the public prosecutor, they are obliged to present the EAWs that they receive. It is their job to issue and execute EAWs as well as present the cases in court. They handle 99 per cent of EAW cases in the Athens office, though each district handles its own cases. There are nineteen public prosecutor offices and they all deal with EAWs which are then brought before the Court of Appeal. Last year they created an unofficial network to help each other with their cases due to the lack of central authority. This works well, they all have contacts for Interpol and other European networks to deal with urgent issues.

EAWs are only issued for indictable offences, respecting proportionality. It is up to the PPCA in charge as to how to proceed but all follow the instructions in the EU EAW handbook on how to proceed and the Greek law. To issue an EAW there needs to be a national arrest warrant or judgment with a specific penalty. The examining judge issues a national warrant and because the person cannot be found, issues an EAW. In domestic proceedings it is obligatory to send a notice to appear before the examining judge.

If it is known that the person is abroad, the PPCA will use the mutual legal assistance system to send them the summons. It is not difficult to use this. Countries respond to the request and follow the 2nd protocol to the Council of Europe Convention on Mutual Legal Assistance.

The PPCA will confirm in the EAW their attempt to summons the requested person. It is, thus, clear that Greek law has been followed but the person has ignored the summons. In most serious cases where it has been possible to summons a person first, the person will send their lawyer or come themselves. The lawyer can seek further information about the case and make some representations on their client's behalf to then advise them further about returning. Deposition proceedings are also utilised. A video link hearing would, however, be useful as it would allow the magistrate to examine the suspect directly. It would not be difficult to arrange as it is used in civil cases. It is not clear why this is not possible.

It is very difficult under Greek law to proceed without an examination by a magistrate. The case file is passed from the police to the prosecution and from there once the proceedings have started, it goes to the examining magistrate. Although, in simple cases there will be sufficient suspicion to issue a warrant without an examination.

Consent

There is no problem with the PPCA asking a requested person for consent. It is a well understood concept and the PPCA is obliged to explain the consequences. The prosecutor advises on the right to a lawyer, legal aid, rights and consequences. The requested person signs an irrevocable agreement with regard to consent. The agreement sets out their rights. It is signed by the requested person to say he has been informed of his rights, his lawyer and interpreter to say that it has been translated. If a lawyer is requested at this stage, the PPCA will wait for the lawyer to arrive before proceeding. This is not usually long because there is a department of the bar association in the same building.

Non- detention measure or remand in detention

Greek law is very strict that in serious crimes detention is required. The decision to detain is one taken on the basis of the crime committed not the nationality of the person. Many foreign people have been released on conditions, if they have a bail address. It will also depend on the approach of each judge.

Interpretation and translation

The Judicial Council looks at applicants' qualifications and places them on the list of interpreters. It is not necessary to have a qualification in legal process because the prosecutor will explain this and will ensure that they use non-legal jargon to explain rights and the process.

There is not a profession of full-time interpreter in Greece. The fees are so low that people used as interpreters also have other employment . Often people will come to court and identify themselves as speaking a language and say they are willing to interpret. PPCAs will also ask embassies and the department of immigration to find people. Sometimes a person will have their own interpreter, e.g. the lawyer will bring a junior colleague from the office, or a family member, someone from the local community. There can be a problem of standards with these people. The PPCA will start by looking at the list and if no-one

is available will look elsewhere. They don't ask the alternative person for their credentials, they trust the referral from wherever the person comes. In practice it will be obvious in the case if they are not good enough.

Defence lawyers

A list of legal aid lawyers is sent by the bar association and PPCAs are obliged to use the list. The bar associations may organise courses, and some lawyers on the list will have a specialism. Most people bring their own lawyer anyway as they are entitled to choose their own. This can work by nationality. Foreign communities will often have their own lawyers that they are well known. People usually try to choose their own lawyer to ensure that they are represented properly. It is not very common to see legal aid lawyers doing these cases. It would however be very useful to have a requirement that the legal aid lawyers undertake training.

Dual representation

The lawyer can ask the PPCA for assistance with legal and factual issues. The European Judicial Network (EJN) website can provide helpful information and prosecutors have contact points in the EJN to ask for this information. However, it is always useful to have a well informed lawyer to ensure equality of arms. It is also very useful if the lawyer has assistance in the other country to try to withdraw the warrant as it makes the system much more efficient. There needs to be a lawyer in the other country and requested persons can ask for an adjournment from the court to find a lawyer in the issuing state. The role of the lawyer is crucial – if they know how to deal with the case properly it will ensure the best outcome. Training on practical outcomes is therefore crucial.

Defence perspective

Legal representation

There are grave problems with the qualification and quality of legal aid lawyers in EAW cases in Greece. Each bar association provides a list of legal aid lawyers, not listed by specialty, from which a lawyer will be assigned to the requested person by the public prosecutor if he or she does not have their own lawyer. However, in the majority of cases requested persons or their families contact a lawyer privately, and it is rare to see legal aid lawyers representing requested persons in EAW cases. Even if lawyers were listed by specialty, the list would never include truly experienced lawyers because the fees are too low.

As a result, lawyers on the list tend to be very young and very inexperienced (especially regarding EAW matters), and sometimes will only have a couple of hours to prepare for a hearing. Most also will not ask for an adjournment even where one would be possible and necessary because of inexperience. The dual cause of this is insufficient training for legal aid lawyers coupled with dismal fees.

Lawyers are not obliged to be on the list. Legal aid lawyers are paid by appearance. They are awarded only the minimum fee by the state, which can then take two to three years to be paid by the Ministry. As EAW cases are highly time-sensitive, complex and require a lot of work, they are a very unattractive prospect.

Training provision

While the Bar Association does hold seminars for defence lawyers, they cover only general subjects and attendance is not mandatory. The need to make time for such attendance could be an issue for some lawyers, but all should be prepared to undertake professional training.

Interpretation and translation

The defence lawyers in the project tend not to use the court appointed list of interpreters as the quality is so poor, particularly in certain languages. The lack of full-time interpreters is a particular problem in EAW proceedings because of the speed at which the process takes place. A poor lawyer coupled with bad interpretation can lead to a requested person, in essence, giving uninformed consent to be surrendered. The lawyers considered that the EU Directive on the Right to Information could help with this once it is brought into force as requested persons would have their letter of rights with them at all times rather than having to listen and rely on interpretation. Consent should be revocable where a lawyer is later engaged and advises of its implications.

Dual representation

Lawyers can obtain translations of the relevant issuing state laws from the prosecution, but they are not always of a good quality and it is difficult to determine their accuracy. It also depends on the prosecutor how open they will be to addressing issuing state issues. Whilst the defence lawyers could look for information on websites, this may not be accurate and it will be time-consuming in a very time limited process. In any case, judges will often decide that a matter is best resolved in the issuing state, especially concerning ECHR issues, which is very frustrating.

When appointed as the issuing state lawyer in a case, it is often necessary to travel to the executing state in order to be fully prepared for the hearing upon surrender. This means that a requested person is often required to pay for two lawyers at the same time.

Dual representation is essential to fully protect the requested person's rights and to ensure an effective procedure.

Cases

EL1 – Greece – surrender refused - Issuing state lawyer

The UK was the executing state in this case. The requested person was a UK citizen charged with illicit appropriation of 639 ancient Greek objects.

Instructions from the client

The requested person refused to consent to surrender as he denied the offence, claiming that he had commercially obtained the items.

Arguments raised against surrender

EAW invalid – the case had not yet reached the stage of a 'criminal prosecution.'

Contact with the issuing State

The UK solicitors representing the requested person contacted a Greek firm of lawyers to obtain information about the pending charges and the stage of the proceedings in Greece, which they used to challenge the surrender. The Greek lawyers were paid privately. They advised that the Greek issue of the EAW was invalid because a lawful domestic summons had not first been issued.

Final decision

The UK court refused the warrant, accepting the EAW to be invalid.

EL2 – Bulgaria – EAW withdrawn and Non-surrender ordered by Supreme Court

The requested person was a Greek citizen with his own company and with a family in Greece, accused of smuggling cigarettes by criminal organisation from August 2010 to January 2011.

Instructions from the client

The requested person refused to consent to surrender as he claimed he was innocent. After receiving advice from a Bulgarian lawyer he changed his mind and voluntarily surrendered himself to Bulgaria.

Non-detention measures or detention

The requested person had health problems and was released pending the surrender hearing.

Arguments raised against surrender

Substantive errors with the dates listed in the EAW and insufficient detail concerning the alleged offence.

Contact with the issuing state

The defence contacted the requested person's own lawyer in Bulgaria. He was paid privately and provided all necessary documents as well as detailed and clear advice on Bulgarian law. He advised that for the alleged offence, the person would not receive a custodial sentence or be remanded in custody pending the trial. He also advised that the person would receive a fair trial in the Bulgarian courts. The court also sought information from the Bulgarian authorities about the ambiguities in the EAW. As a result of the requested person's voluntary surrender, Bulgaria withdrew the warrant.

Final decision

Despite the fact that the requested person had already voluntarily surrendered himself to Bulgaria and Bulgaria had withdrawn the warrant, the court ordered surrender because the warrant was still showing on the SIS as in force. On appeal, the Supreme Court held that the EAW should not have been executed, because the Bulgarian authorities had withdrawn their application for execution. The decision was important because the requested person could have been re-arrested on the EAW on his return home from Bulgaria since his surrender had been ordered.

EL3 – Greece – non-consented surrender – issuing state lawyer

The requested persons were wanted for an alleged offence of grievous bodily harm from 2008. They were young British citizens who had only visited Greece as tourists, having just finished school. The EAW was issued in 2010.

Legal representation and legal aid

The requested persons had legal representation throughout the UK proceedings which was paid by legal aid.

Instructions from the client

They did not want to return as they disputed the allegation.

Arguments raised against surrender

Passage of time; prison conditions

Final decision

The court considered that they had failed to appear before the investigating judge in Greece despite being summonsed and therefore they had evaded justice, and there was no oppression from the relatively short passage of time; the evidence of prison conditions did not necessarily mean that these persons would go

to the same prison nor that the standards fell below what was required in article 3 ECHR. The decision was upheld on appeal.

Contact with the issuing state

The UK lawyers contacted a Greek lawyer once the decision had been made to surrender to represent the requested persons in Greece, who was paid privately. He received all the papers from the UK, which were helpful for preparing the case in Greece. On appearing before the investigation judge, with the consent of the public prosecutor, the judge bailed the requested persons back to the UK. The trial is pending and due to be heard in November 2012.

EL4 – Greece – non-consented surrender – issuing state lawyer

The requested person was accused of lethal bodily harm in 2007. The EAW was issued in 2009. He was a British citizen in his first year of university. He who had visited Greece as tourist after school finished. All his family were in the UK but they moved to Greece after he was surrendered to Greece and imprisoned there.

Instructions from the client

The defendant argued that the EAW was not legally issued as he has never been summoned before. Moreover the defendant refused to surrender on the ground that he was innocent.

Non-detention measures or detention

The requested person was on bail throughout the UK proceedings.

Arguments raised

The EAW was invalid because the domestic proceedings for the issue of a warrant were not lawfully followed; irregularities in the pre-trial proceedings in Greece and clear manipulation of evidence during the police investigation which would affect the fairness of the trial.

Contact with the issuing state

The UK barrister contacted the Greek lawyer and asked several questions on issues of Greek Criminal Law, such as the procedural stage of the case, the validity of the Greek arrest warrant, the possibility of annulling the latter, and consequential legal remedies. The lawyer obtained copies of relevant documents from the Greek case file, translated these and sent them to the English colleague. From those documents it was obvious that the domestic arrest warrant was not issued legally, as the defendant had never been summonsed to appear and present his defence. There was also much evidence that the whole pre-trial procedure in Greece was defective. The Greek lawyer drafted four legal opinions on the case, which the barrister filed with the English Courts, at various stages of the appeals. He was paid privately.

Final decision

Surrender was ordered. There must be mutual confidence in the procedure in Greece and that the trial would be fair. On appeal, the lower court decision was upheld. The requested person was surrendered to Greece and brought before the investigating judge. The latter, with the consent of the public prosecutor ordered pre-trial detention where he stayed for eleven months and until he was finally bailed with the restriction to stay in Greece (plus depositing ₹€30,000). He had to stay under these restrictive measures for another 11 months until his case was tried. He was finally acquitted, as a result of the dubious evidence, and returned to England.

Chapter 9
Ireland

4th Evaluation Report

The Council issued its fourth evaluation report on the practical application of the EAW in Ireland on the 5th October 2006 (Council Document 11843/1/06 REV 1 CRIMORG 129 COPEN 84 EJN 19 EUROJUST 35), and a follow-up to this was published by Ireland on 12th November 2007 (Council Document 14309/07 CRIMORG 162 EJN 33 COPEN 147).

Defence

Two defence lawyers were interviewed for the purposes of the evaluation (page 54), with varying experience of practice. They expressed dissatisfaction with the time taken for the payment of their fees in EAW cases by the Attorney General's (AG) legal aid scheme. The report also notes that there is a feeling at the Bar that they are financially disadvantaged compared with State lawyers (page 46). The experts consider that, should this sentiment remain unaddressed, it could have undesirable consequences for the choice and quality of the lawyer currently available in EAW cases.

The report notes, however, that, while there is some uncertainty as to the root cause of the delay in payment (7.3.1.10), delays may be due to late submission by instructing solicitors of counsel's fee notes. Ireland is recommended to examine whether practical measures could be put in place to accelerate payments made to defence lawyers in respect of properly submitted fee notes (Recommendation 13). Furthermore, despite the feeling at the Bar, there is parity in payment between defence and State lawyers (page 37), a fact that Ireland also considers in its follow-up to the report as a possible cause of delay, as defence lawyers cannot be paid until the State lawyers have submitted their fee slips, as payment is limited to that which State lawyers claim.

The report noted that the lawyers were complementary regarding the quality of the judiciary and linguistic interpretation' (38).

Arrest and Hearing

The requested person is informed of his or her right to consent to surrender, to obtain or be provided with legal advice and representation regarding all EAW matters, and to interpretation immediately upon arrest (4.7., page 26; s. 13(4) EAW Act). The requested person is then taken to the closest police station

and afforded interpretation if necessary and legal advice if requested (page 27). Where interpretation is needed, the police must arrange for an interpreter to be present upon arrival of the requested person in the station, and must meet the arising costs (35). It will also arrange for the same interpreter to be present at the first court appearance (4.20).

'As soon as may be' (s. 13(5) EAW Act) after arrest, the requested person is brought before the High Court in Dublin, which reiterates the person's rights, considers applications for legal aid for continued representation and certifies that provision for interpretation should continue as appropriate. If the requested person wishes to consent to surrender, he or she must sign a surrender form in the presence of the court registrar, upon which a 10-day postponement of surrender will be ordered to allow consent to be revoked (s. 15(3) EAW Act). In non-consented cases, the judge will set a date for the substantive surrender hearing within 21 days from arrest. The experts explicitly state the protection of the rights of requested persons in Ireland to be 'good practice' (7.3.2., page 47).

Training Provision

The courts, prosecution and police provide ongoing in-house training for their staff, in order to promote understanding of the Framework Decision and implementing legislation, as well as of the drafting of EAWs. Each course is specific to the relevant agency and accompanied by seminars where appropriate (page 36). In addition, the Attorney General's Office and the Department of Justice, Equality and Law Reform organise an EU Criminal Law Education programme, and the court sponsors its staff to attend EAW meetings and provides study leave for staff diplomas in the area of Public Administration. Staff members of the court are reported to have some ability in Spanish and German, as well as a degree of oral French.

No comment is made on the training of defence lawyers.

Time Limits

Even if the requested person initially consents to surrender, this will be postponed where an application for leave of a writ of Habeas Corpus is submitted to the High Court or where an appeal is made on a point of law to the Supreme Court (4.10., page 30).

While the time taken by the High Court to deal with such cases depends on several factors, appeals to the Supreme Court usually take 14 months to be heard (page 31). In EAW cases the prosecutor will apply for priority and the matter may then be heard more quickly, sometimes in just three weeks. However, the report noted that, irrespective of how speedy the process is, written judgment can be withheld for around two months, which can conflict with EAW time limits. Delays might further be worsened by the fact that requested persons are able to examine any witness in person with leave of the High Court (page 45), and that the Court is, in the view of practitioners interviewed, inclined to accede to requests that surrender hearings be adjourned.

In the opinion of the interviewed defence lawyers, the time limits in the Framework Decision and Ireland's implementing legislation are merely aspirational targets with little practical value (page 37), and the 21 day limit for final surrender decisions is breached more often than not.

The experts therefore recommend that Ireland undertake a review of the appeal remedies available to requested persons in order to explore how these rights may be streamlined and brought more closely into line with the time limits in the Framework Decision (Recommendation 12).

In its follow-up to the report, Ireland submitted that delays in the hearing of appeals before the Supreme Court have been mitigated by a Practice Direction from the Supreme Court indicating that the Court is aware of the priority which these cases must be given and is listing EAW cases weekly, and that any breaches will be notified to both Eurojust and the CA.

Meeting with the prosecution

July 2012

Contact with the executing state

The Office of the Director of Public Prosecutions is responsible for issuing EAWs and will communicate with executing states where these seek additional information. The majority of these requests are from the UK and relate to passage of time, prison conditions and medical treatment or security.

Usually informal contacts are used to obtain information concerning the other state through Eurojust or other channels. Eurojust is also used to check whether there will be any problems in issuing should there be no direct contact available.

Grounds for refusal

The overwhelming majority of EAWs issued by Ireland are granted as there is a quality control and a monitoring mechanism in place encouraging diligent issue, and it is general practice to conduct research to confirm correspondence of offences. Irish EAWs have been occasionally, but not often, refused for reasons that have included lack of correspondence of the offence.

Dual Representation

A defence network could be beneficial to ensuring a proper defence and equality of arms. However, quality control of the lawyers involved would be a key issue to be resolved in making this work effectively.

Training Provision

Accreditation of defence lawyers would be favourable to requested persons. This should not be seen as anti-competitive. While there is no EAW module included in the Law Society training, it should be possible to run a short and comprehensive training session including best practice and practical guidance. Continuing Professional Development (CPD) courses should also include more practical training rather than just case law updates and, a practical suggestion would be to hold such courses towards the end of the CPD year in order to attract more takers.

Meeting with the Ministry of Justice

July 2012

Legal Aid

Funding for EAW cases was included in the AG's scheme due to the hasty implementation of the Framework Decision. The Minister of Justice has indicated that a review is planned and if it is does take place, the issue of the scheme's appropriateness – especially its discretionary nature - in EAW cases should be raised. In the recent past been two statutory schemes for mental health cases have been arranged and it would be possible that an EAW scheme could similarly be developed. The Law Society, the Bar, and in particular specialist extradition lawyers should be consulted in case of a review in order to comment on actual EAW practice.

Training

The Government should not become involved in the training of defence lawyers, as this is for the Law Society and Bar Association. Even the recommendation of accreditation for EAW lawyers would be considered a huge interference, as lawyers in domestic cases are not subject to any quality control.

Dual Representation

There has been much reluctance in the Council of Ministers working group on the Directive on the right to a lawyer to look into this. This may be as a result of the original wording in the Commission proposal. It is possible that the working group could review this. The Irish position would need some further consideration.

Defence perspective

Legal Aid

Legal aid in Ireland is grossly inadequate for EAW cases. Under the AG's scheme, which was conceived for habeas corpus and judicial review applications, it is only possible to claim a fixed fee for one consultation, irrespective of how complex the case is and whether there are any adjournments. Furthermore, if the case is withdrawn no payment will be made except so as to cover out of pocket expenses and consultation. If surrender is postponed, which can last for years e.g. if due to a medical condition of the requested person, the lawyer will not receive payment until the surrender is completed. This system does not encourage a diligent defence as those who are conducting cases appropriately are often underpaid for their work. This can create inequality of arms since the state lawyers have much more resources and better remuneration.

Because there is only one extradition judge in Ireland, sitting in the High Court in Dublin, requested persons must travel to Dublin for hearings. Where the person is dependant on legal aid this is problematic because their travel expenses are not reimbursed.

Arrest and Hearing

After the requested person is arrested by the local police, local lawyers will be appointed, who will likely have no experience in EAW or extradition law. The requested person is then taken to the High Court for a decision on bail and a substantive hearing date, which may be adjourned for objections to be lodged should the person not consent to surrender, or more information be required. This date can be far in the future due to the case overload of the Dublin court. Cases are much slower than in other member states because of this, but also because the court requests written pleadings and regularly grant adjournments. The lawyer originally advising the requested person will usually not travel to Dublin so as not to incur the extra costs, but will instruct a lawyer in Dublin to represent the person in court.

It is usual for a requested person to be released on bail given that most have community ties in Ireland.

It is very difficult to appeal since proceedings start in the High Court and the Supreme Court is the next and final level of appeal for which a leave requirement of demonstrating a point of general public importance has recently been extended to EAW cases.

Dual representation

It is common for adjournments to be granted to allow contact to be made with lawyers in the issuing state to e.g. clarify the state of proceedings in the issuing state, or to achieve a withdrawal of the warrant. Irish courts are often sympathetic and will grant adjournments if contact needs to be made to resolve a point of law, especially given the slowness of proceedings. However obtaining information from issuing state lawyers is very difficult as Irish lawyers cannot guarantee payment and often those in the issuing state end up offering *pro bono* assistance.

Training

The lawyer advising at the police station is unlikely to have EAW or extradition experience. Their agent in Dublin may not either since this will be someone they know through other proceedings. This can lead to low standards of defence. The previous arrangements for centralised processing of this type of case encouraged a pool of specialised extradition lawyers. However, delegation of arrest to local police officers has opened this work to all lawyers. Unfortunately, lawyers may join the legal aid panel on the basis of their basic qualification and further specialised accreditation is not required. Quality is inadequately and variably controlled by the judiciary.

It is a general point of criticism of the Irish criminal justice system that there are no training requirements for defence lawyers. The Law Society penalises failure to comply with regulations concerning fees and ethics. However, the imposition of training requirements is seen as anti-competitive. Equally, the Bar's disciplinary process does not extend to assessment of the quality of advice or representation. The Bar imposes continuing professional development requirements and holds seminars on the EAW. However, the interviewed lawyers thought that there should be proper accreditation for EAW work as a separate specialism and that this include examination.

Irish project team participant Catherine Almond has written a section on the EAW in the criminal procedure manual issued to trainees, however she considers this to be too short to replace training in a

meaningful way. The criminal law training module is also insufficient and does not include extradition. There is however little enthusiasm by lawyers for specialised extradition education since accreditation is not required.

Grounds for Refusal

It is often difficult to oppose surrender successfully. This is compounded by the fact that communications between executing and issuing states are often not fully disclosed, making the lawyer's ability to challenge State submissions limited.

It is rare for surrender to be successfully refused on constitutional grounds, and EAWs are usually refused on validity rather than human rights grounds, notwithstanding that by statute the court is obliged to consider whether or not there is compliance with the ECHR. This is because there is a presumption that other member states are fully compliant. Judgments have consistently emphasised the heavy onus on the requested person to show that the requesting state is non-compliant with human rights obligations. The recent case of Tobin (see IE5 below) has afforded the opportunity to pay closer attention to refusal grounds.

SIS alert

The only way properly to resolve a case in the interest of the requested person is for the warrant to be withdrawn in the issuing state, as otherwise requested persons cannot leave the executing state even after refusal of an EAW by that state. For this reason, it is imperative for the defence to work closely with lawyers in the issuing state to ensure that the case is resolved and the requested person's freedom of movement restored.

Cases

IE1– Latvia – Consented surrender

The procedure lasted 6 days (22 October – 28 October surrender hearing.).

Legal representation and legal aid

The requested person was informed promptly upon his arrest about his right to a lawyer and a lawyer was appointed on the day of his arrest. Legal aid was provided in this case and the lawyer spent 10h 36mins on the case.

Instructions from the client

The requested person consented to surrender following advice from a Latvian lawyer.

Non – detention measures or remand in detention

The requested person was released on bail under certain conditions.

Contact with issuing state

There was no contact between the lawyers of the two states, although there was an attempt to contact the Latvian lawyer.

Final Decision

The main hearing took place 6 days after the initial arrest. The Court ordered surrender.

IE2– Sweden – non-consented surrender ordered

The first instance proceedings lasted approximately 164 days. An appeal to the Supreme Court followed. The requested person was eventually surrendered approximately 4 years and 6 months after arrest.

Legal representation and legal aid

The requested person was appointed a lawyer following his arrest. The lawyers did not apply for legal aid as they wanted to retain the right to later complain about the deficiencies in the system. The 154 hours spent on the case by the lawyers were not billable.

Instructions from the client/Arguments raised against surrender

The person refused to surrender as the warrant was issued to continue an investigation in Sweden and not to prosecute an offence, and there was no possibility of bail in Sweden if surrendered.

Non – detention measures or remand in detention

The requested person was released on bail 6 days after his initial arrest under strict conditions, pursuant to a court application.

Contact with issuing state

There was direct contact and exchange of information between the lawyers of the two states concerning the Swedish prosecution system.

Final decision:

The court ordered surrender as article 6 ECHR does not apply to the surrender procedure. Furthermore, surrender for the purposes of interviewing the suspect, without having filed charges, can be considered to fall into the ambit of 'conducting a criminal prosecution' under article 1 of the Framework Decision.

There is no 'bail' as such in Sweden but there is a provision for pre-trial release.

Appeal

It was argued before the Supreme Court that the legal aid regime was defective. The Court ruled that article 11.2 F.D. does not provide a right to legal aid but only a right to legal representation.

IE3 – Lithuania – arrested in Northern Ireland - proceedings in the UK

The process lasted for 182 days (arrest on 20 January – main hearing on 22 July 2009. 8 adjournments)

Legal representation and legal aid

The person saw his lawyer the day of arrest and was represented through legal aid. 128 hours were spent on the case.

Instructions from the client/ Arguments against surrender

The requested person refused to surrender due to lack of correspondence of one listed offence, prison conditions in Lithuania, concern over the fairness of trial proceedings in Lithuania, whether there was an actual 'prosecution' of the offence, the offences were extra-territorial and therefore ought to be tried in Ireland, failure in Lithuania to designate a judicial authority,

Non-detention measures or remand in detention

Bail was granted after 6 days, pursuant to an application.

Contact with issuing state

A Lithuanian lawyer was instructed privately to advise on whether the Lithuanian law was extra-territorial and prison conditions following CPT reports and an Independent Ombudsman investigation. Lithuanian authorities indicated that a programme for prison refurbishment is in place.

Hearing

The surrender hearing took place after 8 adjournments. Substantial issues: extraterritoriality, prison conditions. (Far from a typical process). Main hearing 182 days after initial arrest.

Final decision

The requested person was arrested again in Northern Ireland on the same warrant and dealt with by the UK authorities.

IE4 – Northern Ireland – non-consented surrender

Procedure took more than 99 days with 5 adjournments.

Legal representation and legal aid

The requested person was represented from the day of his arrest and granted legal aid. The lawyer spent 29 hours in total on the case.

Instructions from the client

Requested person refused surrender. Initially the requested person denied he was the correct suspect however the police produced evidence to the contrary.

Arguments raised against surrender

The issuing state did not provide for guarantees of review mechanisms or clemency measures for life sentences; The EAW was not necessary in that Northern Ireland should have applied other measures for apprehending the requested person before issuing an arrest warrant.

Contact with issuing state

A British lawyer worked *pro bono* on the case. Issues explored included whether there was culpable delay from Northern Ireland in making the surrender request and the motivation for this delay.

Final decision

Surrender was ordered, and an application to appeal to the Supreme Court was rejected by the High Court.

IE5 – Hungary – Surrender refused on appeal by Supreme Court

The requested person, an Irish resident with a wife and two children, was accused of a negligent road traffic offence causing death in 2000.

Instructions from the client

The requested person refused to surrender due to fearing for his life in Hungary.

Contact with issuing state

Contact was made with a Hungarian lawyer to ascertain the prospective sentence to be imposed. This lawyer extensively reviewed the original trial file, advised on court proceedings and prison conditions in Hungary.

Final decision

Surrender was ordered by the High Court but refused on appeal by the Supreme Court, as that court had previously refused surrender of the requested person based on a former Hungarian extradition request and it would have breached constitutional and ECHR rights, as well as constituting an abuse of process to go back upon any assurances given previously.

IE6 – Netherlands – Voluntary agreement reached, EAW withdrawn

The requested person who was an Irish national was sought for murder in 2009. He had been working in all Ireland all his life and had a family there.

Instructions from the client

The requested person refused to consent to surrender based on their innocence.

Contact with issuing state

Contact was made with a Dutch lawyer to ascertain whether the requested person was being sought for prosecution or merely for questioning. This lawyer liaised with the Dutch prosecutor and represented the client in the Netherlands. An agreement was reached so that the requested person returned voluntarily to the Netherlands for questioning, and the EAW was subsequently withdrawn.

IE7 – Romania – Surrender refused at first instance

The requested person was convicted of possession of mercury in 1998. He had lived for three years in Ireland with his partner.

Instructions from the client

The requested person refused to consent to surrender as the sentence imposed had been withdrawn by court order.

Contact with issuing State

Although important information pertaining to the court order withdrawing the sentence and the Romanian court procedure was needed, this was obtained through a court document produced by the requested person themselves. No contact was made with a lawyer in Romania.

Final Decision

Surrender was refused as the sentence had been revoked.

IE8 – France – Surrender refused at first instance

The requested person was convicted of swindling, aiding and abetting criminal bankruptcy and concealed work from 2003 – 2006.

Instructions from the client

The requested person refused to consent to surrender on grounds of wrongful conviction and persecution by the French authorities.

Arguments raised against surrender

Non-correspondence of offence; malicious and politically motivated prosecution; trial *in absentia*; breach of constitutional and ECHR rights as a result

Final decision

The court agreed that offences in the composite sentence did not correspond with Irish law and the sentence should not therefore be enforced because one concurrent term was specified.

IE9 – Poland - EAW withdrawn

The requested person was convicted of bodily injury and theft from 2005 and 2006 respectively and was wanted for service of the suspended sentence which the Polish court had now activated. He had been living with his partner and working and studying in Ireland for 5 years.

Instructions from the client

He did not wish to return to Poland because he was fearful of how he would be treated during the proceedings and of the prison conditions.

Arguments raised

EAW invalid because the correct Polish procedure had not been followed; non-correspondence of offence with Irish law.

Contact with the issuing state

A Polish lawyer was instructed by the client directly to enquire into whether the proceedings had been followed correctly. The lawyer brought proceedings in the Polish court against the reactivation of the sentence. It was not known how the lawyer was paid.

Final decision

The EAW was revoked by the Polish authorities as a result of the proceedings in Poland.

Chapter 10
Italy

4th Evaluation Report

The Council issued its fourth evaluation report on the practical application of the EAW in Italy on the 18th March 2009 (Council Document 5832/1/09 REV 1 CRIMORG 19 COPEN 18 EJN 8 EUROJUST 6), as well as a "Follow-up" report on the 17th November 2011 (Council Document 17113/11 CRIMORG 206 COPEN 326 EJN 164 EUROJUST 192).

The report, despite its length of 93 pages, does not touch upon many issues of particular interest to the defence in EAW cases. This is, in part, because the experts were received only by senior members of the Italian bar association and it was not possible to arrange a meeting with lawyers experienced in EAW cases (page 52, Section 6 'Defence Perspectives'). Hence, they had insufficient evidence to evaluate whether, in practice, defence rights are guaranteed in Italy in EAW surrender procedures, or to obtain any comments from experienced defence lawyers. This reduces the utility of the report forand is regrettable especially as the reasons as to why such a meeting was not possible seem unclear.

Nevertheless, it is possible to identify several issues which are of relevance.

Grounds for refusal: Lack of conformity with the Framework Decision

The most significant problem exposed by the report is the lack of conformity of the Italian implementing Law 69/2005 with the Framework Decision (pages 54 and 55), the consequences of which are likely also to have effects on the defence in EAW cases. The Italian law lists 20 mandatory grounds for refusal of EAW execution, including articles 3 and 4 EAW FD, as well as twelve additional grounds (page 38). Some of these are based on Recitals 12 and 13 of the Framework Decision, including article 18(a) 69/2005 and article 18(h) 69/2005, which prohibit extradition in case of a breach of human rights or where the death penalty or torture are likely in the issuing state.

Article 18 of the implementing law also contains several completely new grounds for refusal (see article 18 (b) – (c); (e) –(g); (s) – (v)), and the prosecutor has on occasion further modified these or made them subject to additional conditions (page 46).

The experts are of the opinion that implementation is contrary to the text and spirit of the Framework Decision and that such grounds for refusal 'could be interpreted as an expression of mistrust in the legal and judicial systems of (certain) other member states' and in any event 'are redundant particularly in the

light of the ECHR" (page 66, 7.3.2.1. (c)). They also note that verification of such grounds may require factual examination and thus take additional time, which is contrary both to the principle of mutual recognition and the notion of a simplified extradition procedure.

The lack of conformity means that Italian judges have to interpret the implementing law in accordance *Pupino*,[40] while simultaneously being limited by the impossibility of a *contra legem* interpretation (7.1.2.1.). This leads to differences in interpretation and a lack of certainty.

Italy, both as an issuing and an executing state, is thus strongly recommended to modify its implementing law (7.3.1), regardless of the fact that only a few of the additional grounds for refusal have in fact been used to date (page 64).

The initial report notes an indication by the Italian authorities that several changes to Law 69/2005 are being considered in light of the experience gained thus far, and that a first set of proposals to this effect has already been submitted to the Minister of Justice (page 50). This is repeated in the follow-up report, where it is stated that the Ministry of Justice is considering amendments to Law 69/2005, including provisions on some grounds of refusal.

Legal assistance

The Italian implementing law provides that where Italy is the executing State, the police officer carrying out the arrest shall inform the requested person in a language that he or she understands of the EAW and its content, as well as the possibility to consent to surrender (4.5. page 29). In addition, the requested person shall be informed of his or her right to legal counsel and the assistance of an interpreter (article 12(1) Law 69/2005).

Within 48 hours and after informing the public prosecutor, the President of the Court of Appeal shall conduct the first examination of the requested person (page 29), during which the presence a lawyer, either chosen by the requested person or appointed *ex officio* by the court, is mandatory. In addition, such hearing shall, if necessary, be conducted in the presence of an interpreter (Art. 13(1) 69/2005).

At this first examination, the requested person is asked by the President of the Court of Appeal whether or not he or she wishes to consent to surrender, the answer being recorded and a transcript produced (4.6.). Where there is no consent to surrender, the Court of Appeal discusses the case *in camera* following the hearing, and gives its decision immediately afterwards. Under article 17(4) 69/2005, the Court can only issue a positive surrender decision if there are 'serious indications of his or her guilt or when an irrevocable sentence has been passed.'

A single and final appeal can be lodged against this surrender decision before the Court of Cassation (page 6) by either the requested person or their lawyer within 10 days. In such a case, the Court of Cassation holds a hearing of which the prosecutor and lawyer are notified five days in advance. Contrary to ordinary proceedings, requested persons in EAW cases may be present and speak before the Court, although this is rarely taken advantage of.

40 Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285, which requires domestic courts to interpret domestic implementing legislation where it appears to depart from the Framework Decision, or is ambiguous, so far as is possible in accordance with it.

The provisions of the implementing law thus seem to provide for the right to a lawyer and interpretation at all stages of EAW procedures. Due to the lack of interviews with defence lawyers in Italy however, the report is unable to confirm whether this is always the case in practice. There is also no indication as to whether and to what extent costs are covered by the state.

Training provision

The experts' comments on training provision and dissemination of information on EAW matters in Italy are largely positive. The Superior Council of the Judiciary, academic institutions as well as the competent issuing and executing authorities in Italy all organise EAW-specific activities with a view to making practitioners acquainted with the theoretical and practical implications of the implementing Law 69/2005. Such courses are predominantly addressed to administrative, judicial and police staff.

Regular refresher courses and follow-up activities, as well as EAW-related meetings organised by the Superior Council of the Judiciary also take place at national and local level (page 51).

The Ministry of Justice issues circulars on EAW issues and a *vademecum*, which explains practicalities of the procedure to be followed for issuing an EAW and includes case law. This is particularly commended by the experts (7.2.2.1), who express the wish that this should be updated regularly.

The experts also praise the creation of formal and informal 'centres of expertise' within and outside the Ministry of Justice, and their productive interaction (7.1.3.1., page 57). For example, a contact point for EAW matters has been established at the Court of Cassation to facilitate contacts with issuing authorities in other Member States (page 32). Accordingly, it is recommended that other member states create such centres, which practitioners could contact with questions and for assistance (Recommendation 23). The experts further commend the collection of EAW case law prepared by the Court of Cassation, which includes some information on case law of Supreme Courts in other member states and by the Court of Justice of the European Union and is regularly updated and available online (7.3.3.1).

English and French language courses for staff involved in EAW cases are periodically organised by the Ministry of Justice. However, very few Italian judges and prosecutors speak a second or third language (7.1.2.2.), which makes it more difficult for them to establish direct contact with the competent authorities in other member states, and impossible for groups of practitioners to attend seminars in other states or to participate in exchange programmes. The experts, therefore, recommend that Italy should increase measures to promote training for 'judges, prosecutors and judicial staff' in foreign languages, in order to alleviate such difficulties (Recommendation 1). The follow-up report explains that Italy's programme of English courses for magistrates and administrative officials has been increased, so it seems that this recommendation may have been taken on board. However, no mention is made of any measures directed specifically at defence lawyers in EAW proceedings.

Time limits

The average time for surrender decisions to be issued in Italy as an executing state is relatively short and mostly in line with the Framework Decision in cases involving consent. In cases without consent, Law 69/2005 conforms to the Framework Decision in that it allows 60 days to reach a surrender decision, with an extension of 30 days possible in cases of *force majeure*. However, the Italian authorities acknowledge

that these deadlines have sometimes proved impossible to meet (page 31). In such cases, Law 69/2005 provides that the requested person shall immediately be released.

The experts recommend that Italy should inform Eurojust where the 90-day limit is exceeded and should consider involving the latter more to facilitate contacts with the competent authorities in other Member States (Recommendation 21). The follow-up report indicates that there have been no recent cases in which the 90-day limit was exceeded. This is attributed to better management of procedures and the increased involvement of Eurojust. It also notes that 'in general, procedures have speeded up considerably thanks to ongoing interpretation by the courts' and due to the involved authorities improving implementation practice.

SIS Alerts

The report notes that Italian authorities will sometimes review or retract issued EAWs without giving proper notice to the SIRENE Bureau (page 20), and that this gives rise to significant difficulties e.g. where the requested person later wishes to leave the country and is then arrested again. They recommend that the competent Italian authorities keep SIRENE informed of any changes regarding issued EAWs.

While there is a procedure under Italian law enabling Italian citizens to correct, obtain or delete information under Art. 111 of the Schengen Convention, this only relates to alerts entered by Italy, and the Italian authorities have no power to rectify alerts entered by other Member States (7.1.2.3., page 57).

Meeting with Ministry of Justice

July 2012

The EAW has created the possibility for the rights of the defence to be enhanced in extradition proceedings. These have traditionally been between states and with little direct consideration of individual rights. The fact that decisions are now made by judicial authorities reduces the risk of political decision-making and requires an adversarial assessment with more involvement of defence lawyers. Furthermore, the Framework Decision, if correctly implemented by the EU member states, adds greatly to the 1957 Convention in providing a collection of rights for defendants, such as the right to a lawyer in the executing state and the grounds of refusal.

Grounds for refusal

Italy has not implemented the Framework Decision correctly as regards grounds for refusal, and in some respects even took a step backwards in facilitating extradition, for which it was criticised in the 4th Evaluation Report. Although no legislative amendments are planned or likely, the Court of Cassation has been applying *Pupino* to the Italian legislation. While generally supporting the scope of the Framework Decision, the Court has further strengthened certain rights, for example it is unlawful under Italian law to arrest a pregnant woman.

Legal representation and legal aid

If no privately paid counsel is chosen by the requested person, a court appointed publicly funded lawyer will be allocated, either through a request to the Bar Council or through allocation to a lawyer present at the court. Improvements to this system are not a matter for Government as it is not in control of payment. Legal aid is means tested, but it is not set at a prohibitively low level to obtain it.

There are 230,00 lawyers practising in Italy, of whom 1,500 can appear before the Court of Cassation so there is a lot of competition for work and lawyers will take whatever is available to them.

Often if a lawyer obviously does not understand the law properly the judge will intervene and carry out the checks the lawyer would be expected to of the EAW. However, they cannot mount the defence for the lawyer and will not know if there is an arguable ground for refusal because this will not have been properly canvassed with the requested person.

Training Provision

It was estimated at this meeting that in 90 per cent of EAW cases the lawyer will not be specialised (there are only roughly 10 such lawyers in all of Italy in Mr Selvaggi's opinion). A defence handbook should be compiled to set out how to defend an EAW, specifying such matters as double criminality, limitation periods, double jeopardy etc, in the same way that there is a handbook for issuing EAWs. If lawyers were properly trained and asking the right questions, this would oblige the courts to review these arguments which would lead to a better quality of defence. This however is not a matter for the Government to arrange. It is for the bar associations to carry out training. Furthermore, compelling lawyers to undertake training in such matters would be a difficult undertaking in Italy.

Dual Representation

A provision on the right to advice and assistance from the issuing state in EAW cases would provide more support for the requested person. It is possible to argue that dual representation is foreseen by the Framework Decision because it provides for respect for fundamental rights. Because states are limited by borders and need cooperation, the EAW is necessary to administer access to justice. Therefore, the procedure which the EAW is part of contemplates the proceedings in the issuing state. It cannot be avoided that the executing state will in some cases have to consider the issuing state law in order to ensure that fundamental rights and grounds for refusal or postponement are appropriately reviewed.

Where a requested person has a lawyer in the issuing State, this should be indicated on the EAW, making it easier for them to be contacted by authorities and lawyers in the executing state.

Any proposed reform should indicate the length of time that is envisaged for communications between issuing and executing state lawyers since adjournments can potentially cause delays although on balance the requested person's fundamental rights should prevail, but they may have to remain in prison in the executing state for longer as a result.

Defence Perspective

Legal representation

EAWs are dealt with by general criminal lawyers in Italy and these usually have no knowledge of the special features of EAW proceedings. It is usual for requested persons to be defended by a court appointed lawyer. Legal aid lawyers are placed on a duty list, but tend to be inexperienced and poorly paid. Low remuneration is a reason why more experienced lawyers refuse to undertake legal aid work. It is possible to pay privately for an experienced lawyer following arrest. They are remunerated according to a tariff fixed by the Ministry of Justice. The speed required in EAW cases compounds the problem of appointing a suitably qualified lawyer and any lawyer having sufficient time to prepare the case.

Training provision

The criminal bar does not provide any training courses for defence lawyers or prosecutors, except for seminars at the end of which lawyers will receive a certificate of participation. There is no advocacy training or examination.

Interpretation and translation

There is a problem with the quality of interpreters, who may be very competent on paper but often have no knowledge about legal procedure.

Domestic issues

In absentia judgments are often the basis for an EAW issued by Italy, sometimes many years after the conviction in order for persons to be returned to serve their sentences. These cases can be very difficult to re-open and appeal the sentence as this is not automatic and, in any event, involves a re-consideration of the evidence heard at trial rather than a re-hearing.

Judges and prosecutors follow the same career path in Italy. Individuals often switch between the two, and it is widely suspected that some judges may be pre-disposed to grant the prosecution leniency, which is also a problem in ensuring proper scrutiny of EAWs.

Furthermore, the role of the judicial authority in issuing EAWs is very limited and in most cases where a warrant is applied for by the prosecutor, it is simply granted by the authority.

Meeting with Bar Council of Rome Representative

July 2012

Legal Aid

Legal aid is means-tested and available only to those whose earnings are under €10,000. Eligibility for foreign nationals is usually ascertained by contacting the relevant diplomatic authorities. However, in EAW

cases a deposition from the requested person is accepted in order not to prolong the proceedings. Most lawyers undertaking legal aid work tend to be very young and inexperienced. In criminal cases, defence lawyers are taken from a duty list controlled by each court.

EAW cases are often dealt with by privately paid lawyers. Fees are often subject to significant tax reductions ordered by the trial judge with no regard to the complexity of the case.

Training

There are no limitations regarding what types of cases a lawyer can take. However, there are ethical principles prohibiting lawyers from taking cases they are not experienced enough to conduct. This has recently been the subject of disciplinary proceedings by the Bar Council.

The Bar Council organises seminars and conferences each year, including seminars on the EAW, for which delegates obtain a certificate of attendance. There is also a general obligation on lawyers to undertake 18 hours of professional development and 6 hours of ethics training per year.

Cases

IT1- France – Consented to surrender

The requested person was accused of violations of family obligations in 2006, entailing a sentence of one year's imprisonment. He was arrested while travelling in Italy and surrendered within 12 days.

Non-detention measures and detention

The requested person was detained pending the surrender hearing for an offence which does not involve such a procedure under Italian law.

Legal representation and aid

The requested person was informed of his right to legal representation immediately upon arrest by the judiciary police, and met with the defence lawyer at the moment of arrest. Legal aid was not available in this case as it is means tested and the requested person was very well off. The lawyer spent 10 hours on this case which was privately paid for.

Instructions from the client

The requested person voluntarily consented to surrender in awareness of the consequences due to his complete trust in the French justice system.

Contact with issuing state

No contact was needed with a lawyer in the issuing State.

Final decision

Surrender was ordered.

IT2 – Romania – Non-consented surrender, appeal dismissed

The requested person, resident in Italy, was accused of aggravated robbery which occurred in December 2007 in Bucharest, the sentence under Romanian law being 3 years and 8 months imprisonment, one day of which had been served in pre-trial detention in 2007.

Legal representation and legal aid

The requested person met with the defence lawyer upon arrest. Legal aid was partially available until the hearing before the Court of Cassation. The lawyer spent 20 hours on this case, all of which were billable. No legal aid was available for final appeal because it was ruled inadmissible and the requested person was ordered to repay €1000.

Non-detention measures or remand in detention

The requested person was detained pending the hearing.

Instructions from the client

The requested person refused to consent to surrender in order to preserve protection under the specialty rule and for fear of judicial persecution as he has an application pending before the ECtHR against the Romanian State. The application concerns two previous extradition requests: The Appeal Court in Turin had previously rejected an extradition request from Romania concerning an allegation of acting on false pretences, which was refused as it was statute barred, and then an EAW for corruption in judicial office (to avoid the proscription but concerning the same facts), which was rejected for *ne bis in idem*. He was also tried *in absentia* for this third offence whilst he was in detention in Italy concerning the previous requests.

Arguments raised against surrender

Trial *in absentia* and no guarantees given; requested person should serve the sentence in Italy. This was supported by the ongoing judicial proceedings in Romania concerning the re-trial and a complaint lodged by the requested person against Romania with the ECtHR.

Contact with issuing state

Direct contact was made with the Romanian lawyer who had represented the requested person in Romania, as regards procedure for retrial. No information was given by Romanian authorities as to this procedure in the EAW form. The Italian lawyer does not know how the Romanian lawyer was paid.

Final decision

Surrender was ordered by the court due to failure to show a real connection with Italy for service of the sentence. Romania submitted evidence concerning the offence tried in Romania and guarantees to hold a re-trial, which was accepted by the court. An appeal was lodged with the Court of Cassation which reviews the application on paper without defence counsel present. The same arguments as at first instance were raised, additionally with a request for guarantees on the possibility of a retrial and request for clarification of the effective conditions of the execution of the sentence. The appeal was considered to be manifestly unfounded and thus declared inadmissible. He was surrendered within 90 days, following appeal.

IT3 – France – non-consented surrender

Legal representation and legal aid

The defence lawyer was instructed from the outset of the case and paid through legal aid. He conducted about 72 hours of work in the case which was recoverable.

Instructions from the client

He did not want to consent because he was scared of violence in prison in France since he was homosexual.

Non-detention measures or remand in detention

The requested person was held in detention throughout the proceedings.

Arguments raised against surrender

In absentia trial and no guarantee of re-trial, right to service of sentence in Italy; prison conditions amounting to inhuman or degrading treatment.

Contact with the issuing state

The defence lawyer relied upon a report from the Council of Europe for that year.

Final decision

No inhuman or degrading treatment or violation of other complaints established. Upheld by the Supreme Court on appeal.

IT4 – Romania - Surrender refused on appeal

The requested person was a Romanian citizen who had established his residence in Italy with his wife, and who had been convicted in Romania of the trafficking of mercury and sentenced to five years imprisonment.

Instructions from the client

The requested person did not consent to surrender as he didn't accept the charge. The amount of substance was too low for the making of weapons, which was its alleged purpose.

Contact with the issuing state

The Romanian judicial authority sent a translation of the Romanian legislation upon the request of the Italian court, however this was not properly dealt with by the Court of Appeal and the non-correspondence in Italian law was only recognised by the Court of Cassation.

Final decision

The Court of Cassation refused surrender due to non-correspondence of a non-list offence with Italian law.

IT5 – Romania – EAW retracted

The requested person was convicted of arson in Romania, and a five year sentence of imprisonment was imposed.

Instructions from the client

The requested person refused to consent to surrender as the offence had taken place over ten years ago, and a defence was impossible after such a long time.

Arguments raised against surrender

Statute of limitations applied to the offence.

Contact with the issuing state

The requested person's own and privately paid lawyer in Bucharest was contacted after the Italian court refused to execute the warrant in order to try and get the warrant withdrawn. This enabled the requested person to leave Italy after the Italian court's final decision, which would otherwise have been impossible. The Romanian lawyer was successful in obtaining the withdrawal on the basis of proscription under Romanian law.

Final decision

The Italian court refused surrender due to the offence being statute-barred in Italy.

Chapter 11

Netherlands

4th Evaluation Report

The Council issued its Evaluation Report on the 4th Round of Mutual Evaluations on the Netherlands on 8th December 2008 (Council Document 15370/1/08 REV 1). The Netherlands responded to the Evaluation Report by way of a letter from the Ministry of Security and Justice (Council Document 15383/11 CRIMORG 182 COPEN 269 EJN 132 EUROJUST 157) on the 13th October 2011.

Defence

Five defence lawyers were interviewed by the experts (page 58). They were critical of the lack of an appeal in EAW cases in the Netherlands; the automatic link between the consent to surrender and waiver of protection by the specialty rule; and the difficulty in directly contacting the judicial authorities in the issuing state (page 43).

Appeals

The Amsterdam District Court is the only judicial authority in the Netherlands competent to execute EAWs (7.3.1.10; page 49). The Report stipulates that interviewed judges and lawyers have expressed the view that an appeal process would be desirable. In light of this, the experts recommend that some mechanism to review the public prosecutor's decision to refuse an EAW be introduced (Recommendation 12, page 54). The Ministry of Security and Justice however has declined to act upon this suggestion, noting that members of the Amsterdam District Court have continuously denied the need for such a review (page 7).

Specialty

The experts consider that the abbreviated procedure for EAW cases could be used more frequently and delays thus reduced if the automatic link between loss of specialty and the consent to surrender were removed (page 48). Thus, Recommendation 9 calls for the amendment of the implementing legislation in this respect so as to encourage the use of the abbreviated procedure (page 54). This is based on interviews with public prosecutors and defence lawyers who suggested giving a requested person the opportunity to waive the right to formal surrender procedure, while maintaining protection under the specialty rule (7.3.1.7; page 48). In its response, the Ministry states that no negative link between the abbreviated

procedure and the abandonment of protection under the specialty rule could be found based on careful consideration of surrender practice. Accordingly the need for any further action in this regard is refuted (page 6).

Contact with the issuing state

The Report recommends that 'certain other Member States' need to facilitate communications with the authorities in the executing state in order to ensure the progress of their EAW requests (Recommendation 15). Furthermore, the EU itself is advised to further develop methods of mutual assistance based on mutual recognition in this respect (Recommendation 21), as well as to enhance the operation of expert groups and joint meetings of national competent authorities, so as to facilitate the exchange of views and the creation of personal contact networks (Recommendations 23 and 24).

Significant emphasis is therefore placed upon further development of judicial cooperation and the enhancement of mutual trust as vital to the efficient functioning of the EAW system. However, no more specific guidance or recommendations are given as to the particular concerns of the defence lawyers interviewed.

Legal Aid

Legal aid is available in the Netherlands and is extensive, including the services of an interpreter free of charge whenever needed (page 42). The Amsterdam District Legal Aid Service has a list of specialists(page 51).

The defence lawyers did not report any procedural difficulties relating to the provision of legal aid in EAW cases and gave positive feedback as to the performance of the relevant judicial authorities. Furthermore, the Netherlands enables payment of pro deo defence lawyers in EAW cases, a system explicitly commended by the experts in the Report (page 51) as enabling a high quality defence. Based on this generally positive assessment, no recommendations are made in the Report regarding legal aid.

Grounds for refusal: Human rights concerns

Under article 11 of the Netherlands' implementing legislation, justified suspicion of a flagrant breach of the requested person's ECHR rights prevents the execution of an EAW. This is criticised in the Report as showing a lack of confidence in other member states' criminal justice systems (7.1.3.5, page 47). The group of experts recommends repealing article 11 of the implementing law so as to remove this ground of refusal (Recommendation 8, page 54).

However, the Ministry considers that there has been a 'drastic change of views' throughout the EU regarding this issue since the 4th Evaluation Report (page 5), especially concerning the scope of mutual recognition obligations, and that the recommendation is thus 'no longer valid.' This is in light of the EU Charter becoming binding and supported by the Commission's 2011 evaluation report on the implementation of the EAW. Accordingly, no action is necessary to comply with it.

Training Provision

Extensive training is provided to prosecutors and judges relating both to the EAW and more general language training. The Report notes that in order to be registered on the list used by the Amsterdam Legal Aid Service in EAW cases, defence lawyers must complete a four-hour mandatory training course on the EAW and extradition-related issues (page 40). No recommendations concerning training or cooperation are made.

Time Limits

The Report notes that the trial capacity of the Amsterdam District Court as the only competent body in EAW cases appears to be insufficient (page 50), and that this lack of capacity paired with a steady increase in EAW cases has led to delayed procedures. Thus, Recommendation 13 suggests reorganising or enlarging the trial capacity of the Court, so as to ensure compliance with the time limits stipulated by the EAW (page 54).

In its response, the Ministry notes that the Court's trial capacity has in fact been enlarged (page 7). However, it also calls to attention the increasing number of EAWs received by the Netherlands and emphasises the need to limit the use of EAWs for minor offences, especially at a time where government expenditure is restricted by virtue of the general economic downturn.

SIS Alerts

EAWs issued by the Netherlands are sent to the SIRENE Bureau 'as a general rule' (page 8). SIS alerts are even issued where the whereabouts of the requested person is known and an EAW is additionally sent directly to the judicial authority of the executing state (3.5, page 9).

When the Netherlands is acting as the executing state, SIRENE officials conduct prior checks of incoming SIS alerts and may add restrictive validity flags to them (4.18, page 39). For example, this may be done based on lack of dual criminality for non-list offences and is done by officers based on their own knowledge and experience. Alerts referring to execution of sentences passed against Dutch nationals are systematically flagged (page 40). The experts note that there was no consistent policy for flagging in place, and recommend that this should be clarified by establishing guidelines to this effect (Recommendation 7, page 48).

Meeting with Ministry of Justice and Security

May 2012

Contact with the issuing state

It is not only difficult for defence lawyers to obtain information from the issuing state, prosecutors and judges also struggle in this regard. Eurojust and the European Judicial Network are not there to assist with EAWs and whilst informally colleagues in the Hague might be able to ask each other what the process is, the reality for prosecutors and judges in cases is that they can find it very difficult to receive answers

about issues on cases from the issuing state as well, particularly with newer member states and those further away from the Netherlands where there is less established cooperation through mutual legal assistance. Central authorities might be able to call a contact at another central authority and obtain an answer, this is not so easy for prosecutors and judges. The reality is that prosecutors and judges have to use all the contacts that they have built up through networking to assist in cases. Eurojust largely only provides a place to meet when it is necessary to facilitate an issue of a general nature between countries, not a specific EAW case. Defence lawyers should take the same approach and use all the networking opportunities they have to build up contacts that they can then go to for assistance.

Dual representation

It is not possible to limit dual representation to what is 'necessary' in a case. It may not always be the best outcome in the case to argue about issues concerning the issuing state as this is not what is intended in the EAW scheme. It will be rare cases where there is actually a need for assistance from a lawyer in the issuing state: the majority (95 per cent) are foreign nationals who know what they have done and should go back to answer the charges against them. If dual representation is about trying to solve the case in the issuing state, this is not what the EAW is for. If it is about the EAW itself, in most cases the prosecution/ judge will be able to assist with clarifying the information that is needed, it is only in cases where this is not forthcoming that assistance from an issuing state lawyer should be seen as necessary. If there really is an issue of concern it is better to liaise with the prosecutor who will then ask the issuing state, and is in a better position to deal with the problem than a lawyer in the issuing state anyway.

However the UK Home Office review of the EAW carried out by Sir Scott Baker came to helpful conclusions about how dual representation should operate.[41]

Training

Defence lawyers need to become more familiar with the EAW scheme. Most cases will concern a few countries with similar types of offence. They should familiarise themselves with the law of these countries. There is lots of information available on the internet. If they wish to raise an issue with the court or prosecutor, defence lawyers should strengthen their argument by looking at the information that is available on websites, Committee for the Prevention of Torture reports, and NGOs such as Amnesty International that are active in the issuing state..

Furthermore, the defence should utilise European Commission funding to enable more networking and familiarity with the law.

Proportionality

Proportionality is a diminishing problem and passing issue; It was unsurprising with a new instrument that there would be some problems at the beginning. Of course, judicial authorities made use of the EAW because mutual legal assistance was so ineffective and this was a great way to clear up all the cases they had outstanding. The European Commission pushed the benefit of the EAW enormously at the outset.

41 See Chapter 5

However, the EAW should not be used as a substitute for mutual legal assistance. This was raised in the Fourth Evaluation Report. A percentage of cases never actually went to court and the requested person was back in the executing state in a matter of days. This is because some member states use the EAW for initial questioning of the requested person to decide whether they are a suspect or not (Spain in particular takes this approach). This is not what the EAW is for and has given rise to an unexpected effect. This is a real disproportionate use of the procedure. The European Investigation Order may help with this if video conferencing and taking witness evidence is able to work efficiently, once it is adopted and implemented.

SIS alerts

Refusal will depend upon the law of the executing state which may not be accepted by the issuing state, for example where there is a law of limitation on prosecution set at a period which the issuing state does not recognise. This is not a reason to withdraw the warrant because the issuing state law still allows the prosecution. The case C-150/05 *Van Straaten* (28/09/06) does illustrate the problem however, where it is more than a technical issue and will prevail across all member states, like in that case which concerned the application of *ne bis in idem*, or of false identification.

Second Meeting

Dual representation

If something were to be included in the directive on the right of access to a lawyer concerning advice and assistance in the issuing state it must be concrete and make the right accessible. There is no point in negotiating a recital about dual representation because member states would be free to choose whether to do anything with it. The directive must make access to a lawyer properly accessible in general the Netherlands supports this.

This could entail a positive obligation to enable the executing state defence lawyer to access information about the issuing state, or enable effective access to a lawyer in EAW cases (which may include access to expert advice or assistance in the issuing state).

Training

Practical steps could include ensuring certified EAW lawyers and a requirement for training before being certified. The key to improving defence in EAW cases is training of lawyers, accessing funding opportunities to enable this (through the European Commission for example which has specific funding for this), using the E-justice portal to provide fact sheets on how to defend an EAW, with information about issuing state legal systems in criminal proceedings. A measure in the directive on access to a lawyer will be insufficient on its own.

Defence perspective

Legal Representation and legal aid

The Amsterdam Legal Aid Service provides a long-standing duty scheme for extradition cases, in the framework of which lawyers have alternate weekly duties. There are currently twenty-nine lawyers on it with a long waiting list for more to be added. These lawyers have an excellent reputation and whilst they may not in fact be personably able to conduct the case, they will refer it to another lawyer in their firm who is suitably qualified, if not actually on the list already. Legal aid properly remunerates for the work undertaken.

However it is not compulsory to be represented by one of these lawyers and most EAW cases are not dealt with by one of them as most people are arrested concerning a domestic matter at which point the EAW is discovered. The EAW case can then be undertaken by the general criminal duty lawyer, even if they don't have the necessary knowledge or experience.

Training

Lawyers on the extradition duty list were required to undertake EAW training in 2004 when the law was implemented. No other training is provided elsewhere. No other lawyer have been appointed to this list. Nevertheless, knowledge about the EAW procedure and about the law of the issuing state is essential.

Grounds for refusal

The courts only review the formal validity of an EAW and not the underlying case. Therefore it is very difficult to challenge requests but can lead to misuse of the system, for example where people are returned for questioning prior to a prosecution which is not what the EAW is for.

Dual Representation

The defence lawyers were all of the opinion that dual representation can be extremely useful, for example in cases where an EAW has been issued prematurely and instead of recourse to mutual legal assistance, a lawyer in the issuing state can often give guidance as to the reasons behind the issue and can negotiate a voluntary return or immunity, which is often not possible to obtain through the executing state prosecutor alone.

They stressed that dual representation is not concerned with establishing the requested person's innocence but with clarifying issues of law or negotiating an agreement or settlement of the case. This should be welcomed by member states as cutting down costs of proceedings and detention of the requested person. The EAW should also not be seen in isolation but rather as a part of the trial process which should lead to the best possible outcome in each case.

With regards to establishing a peer review database and the payment of issuing state lawyers, it is important to determine what a typical fee for advice and assistance is in each EU country so that a fixed fee can be determined for services and lawyers in the executing state are not required to cover unreasonable

costs. However, if issuing state lawyers know the executing state lawyer they are far more willing to give some advice without requesting payment, and if they are asked to investigate something the fact that they will take the case on return to the issuing state can sometimes be enough of an incentive because payment will be received for their services at that stage. This is why networking through the ECBA and other organisations is so important.

They also all agreed that factsheets on the law of all countries would be a helpful resource, coupled with a forum or email group to exchange views and experiences, so that helpful judgments from a superior court of one jurisdiction could be utilised by another. There is insufficient exchange of judicial interpretation of the Framework Decision amongst the member states. This should further mutual recognition.

Detention and surrender

There is a real problem with requested persons being required to remain in custody after surrender decisions have been taken. Even though physical surrender is to take place within 10 days of the surrender decision, sometimes the issuing state will not collect them until much later. Also where there is an ongoing prosecution in the Netherlands, requested persons will have to remain in custody at the executing state's costs, where they may otherwise have been released on bail. This is a problem especially in cases of consented surrender, where the requested person will have to remain in custody in the Netherlands despite wishing to be extradited swiftly. The Dutch courts have refused to request a preliminary ruling from the ECJ on this point and consider that the arrangement is lawful.

There is a particular problem with transportation to Poland. This is arranged by Poland because of the number of people to be surrendered. However, an old military plane is used. It is designed to hold only 95 people but can average 125 being transported at a given time; the guards are not trained with respect to flight safety; the requested persons are handcuffed to their chairs and can be in the plane for approximately 23 hours as it goes round and picks up all those to be returned. Flights can also be delayed meaning a requested person has to wait longer in detention in the executing state.

Cases

NL1 – Italy – Non- consented surrender

The requested person was accused of drug offences and membership of a criminal organisation in 2004. He had been living in the Netherlands throughout his life, had been working there for more than 20 years and had two adult children.

Instructions from the client

The requested person refused to surrender claiming innocence and no trust in the Italian legal system.

Arguments raised against surrender

Insufficient detail of the allegations against the requested person.

Contact with issuing state

The court requested additional information about the circumstance of the offence as a result of the lawyer's submissions. The authorship of the information received was deemed dubious by the lawyer.

Final decision

Surrender was only ordered regarding the criminal organisation accusation, not for the drug offences on the basis of an insufficient description of the facts. As a Dutch citizen, surrender was also premised upon a guarantee that if convicted he would be returned to serve the sentence in the Netherlands.

NL2 – Lithuania – Non-consented surrender

The requested persons were accused of handling stolen goods in 2012.

Legal representation and legal aid

The requested persons were informed of their right to a lawyer upon arrest, and met with the lawyer before the hearing before the prosecutor. Legal aid was available in this case. The lawyer spent 300 hours on the three cases combined, all of which were billable.

Instructions from the client

The requested persons refused to consent to surrender on the grounds that prison conditions in the Netherlands are better than in Lithuania.

Final Decision

Surrender was ordered as no formal grounds for refusal were found. The surrender hearing lasted 30 minutes, no expert evidence was given and no further information was requested by the court. The time limit for surrender was exceeded by one day (61 days).

NL3 – Poland – EAW withdrawn - willingly surrendered pursuant to an arrangement made with the Polish court

The requested person was accused of having committed fraud in March 2007. He refused to surrender on the basis of work and family in the Netherlands, having lived there for two years and working in the agricultural sector.

Contact with the issuing state

The defence lawyer contacted a Polish lawyer to seek an alternative solution and the withdrawal of the EAW. The Polish lawyer met with prosecutors and the judges to this effect. The EAW was ultimately withdrawn by Poland after the requested person agreed to a voluntary arrangement, had pled guilty and was sentenced to a suspended custodial sentence.

NL4 – Hungary – Non-consented surrender

The requested person was a Dutch resident who was accused of fraud in 2004.

Instructions from the client

The requested person refused to surrender as he submitted the crime upon which the EAW was based did not exist, but concerned rather a civil dispute (the construction of a house had been left unfinished). It was alleged that the EAW was used to exert pressure and resolve this civil dispute.

Arguments raised against surrender

Non-correspondence of a non-list offence with Dutch law.

Contact with the issuing State

No contact was made with a lawyer in the issuing State, as none was available. The requested person did have a lawyer in Hungary however he was unhelpful and did not answer the defence lawyer's questions.

Final decision

The court ordered surrender as it considered the facts to constitute fraud. It also refused to seek service of the sentence in the Netherlands, as it did not consider itself to have jurisdiction in this case, contrary to the arguments of the defence: Dutch courts will only require a guarantee for return if 1) the person is a Dutch national or registered alien legally residing in the Netherlands for more than 5 years; and 2) in the case of non-nationals, the Dutch courts would have had jurisdiction to try the case themselves in the Netherlands (pursuant to article 6, section 5 of the implementing legilsation) – which was found not to be satisfied in this case.

NL5 – Belgium – non-consented surrender

Procedure lasted for 39 days

Legal representation and legal aid

The requested person met with his lawyer prior to the initial hearing who acted through legal aid. In total the lawyer spent 13 hours on the case.

Instructions from the client

The requested person refused to surrender due to his medical condition.

Non-detention measures or detention

The requested person was released under specific conditions three days after his initial arrest.

Arguments raised against surrender

Double jeopardy; medical condition.

Contact with issuing state

There was no contact with a lawyer in Belgium. However the court sought information from the issuing state and asked for guarantees from the Belgian authorities that if the requested person was convicted he would be sent back to serve his sentence in the Netherlands, which was given.

Final decision

Surrender ordered.

NL6 – Germany – non-consented surrender ordered by the court

Instructions from the client

Requested person did not consent to surrender as he did not want to go to Germany.

Contact with the issuing state

There was no contact with a lawyer from Germany.

Arguments raised against surrender

Insufficiency of details in the request.

Final decision

Surrender ordered by the court as there were no grounds to deny surrender.

NL7 – Belgium – non-consented surrender ordered by the court, EAW partially refused

The main hearing took place 3 months after the arrest.

Legal representation and legal aid

The requested person sought legal aid in this case, and the lawyer spent a total of 9 hours on the case.

Instructions from the client

The requested person refused to surrender as it was unclear what his alleged part in the offence was.

Contact with issuing state

A Belgian lawyer was contacted by e-mail to try and ascertain the participation of the requested person. The court also requested further information from Belgium setting a time limit of 3 weeks, asking for an explanation of the offence.

Final decision

The court ordered surrender for one of the offences particularised in the EAW but execution for the others was refused as the information did not meet the formal requirements on the EAW.

NL8 – Hungary – surrender ordered by the court but sentence executed in the Netherlands

Legal representation and legal aid

Legal aid was available for this case, and the lawyer spent a total of 9 hours on the case.

Instructions from the client

The requested person refused to surrender as the EAW concerned a sentence of a juvenile court and the person was now 32 years old.

Non-detention measures or detention

The person was released unconditionally 3 days after her arrest pursuant to an application to the court.

Contact with issuing state

A Hungarian lawyer was paid privately.

Final decision

Surrender was ordered by the court as the EAW was valid. The requested person was surrendered but served her sentence in the Netherlands.

NL9 – Poland – non-consented surrender (for 1 of 4 charges) – voluntary arrangement

The requested person was a Dutch citizen accused of forgery of documents and forgery with intent to gain material profit in 1996, along with 4 other charges. The EAW was only executed in respect of the former two charges.

Legal representation and legal aid

The requested person met with a lawyer 2 hours after his arrest who was paid through legal aid. The lawyer spent 12 hours in total for preparation of the case.

Instructions from the client

The requested person did not consent to surrender as he wanted to prepare his defence in the Netherlands for the Polish case. However he eventually consented to surrender pursuant to advice from his lawyer that the warrant would be lifted.

Non-detention measures or detention

The requested person was released on bail two days after his arrest, under the condition to surrender his passport to the police. He was released on bail in Poland 4 days after his arrival there, pursuant to an application to the court. He was then allowed to return to the Netherlands pending the trial pursuant to an agreement with the Polish court.

Arguments against surrender

Statutory limitation for 3 out of 4 offences on the EAW.

Contact with issuing state

A polish lawyer was contacted to give advice by the Dutch lawyer as to the difference between the laws of the two states on periods of limitation. The Polish lawyer liaised with the Polish courts to seek a voluntary return and expedited hearing. Poland agreed, and also agreed not to try the person for offences which

were prescribed according to Dutch law as a result of specialty arrangements. The Polish lawyer was paid privately.

The court also requested information (to be given within 2 weeks) from the issuing state on whether the requested person would receive medical assistance if surrendered.

Final decision

Surrender was ordered for one of the charges but the person had arranged for voluntary return.

NL10 – Italy – Surrender refused – historic case (extradition not EAW)

The requested person, who had been resident in the Netherlands for over 20 years, was convicted of robbery and attempted robbery in 1974 by Italy, and sentenced to 13 years imprisonment.

Instructions from the client

The requested person refused to consent to surrender as he had been acquitted at trial in Italy, which the government had subsequently successfully appealed after he had already left the country for the Netherlands.

Contact with the issuing State

An Italian lawyer was contacted who obtained a transfer for service of sentence in the Netherlands from the Italian Ministry of Justice and also secured a reduction in sentence from 13 to 8 years on appeal.

Final decision

The court originally refused surrender of the then extradition request as it was accepted that the requested person was a Dutch resident and could not be extradited. Despite this decision, Italy has not withdrawn the warrant and the requested person has been unable to leave the Netherlands. The Netherlands also could not accept the transfer of sentence because it deemed the requested person to have fled which disapplied this option. The new framework decision on transfer of sentenced persons could not be invoked because the sentence is too old. The case is included as it shows the extreme of the problem with alert system: The requested person has been unable to travel since the extradition request. The case is not included in Chapter 4.

NL11 – Lithuania - non- consented surrender ordered

The requested person was a Dutch citizen, living with his girlfriend in the Netherlands and working in administration, accused of illicit trafficking in narcotic drugs in 2009.

Instructions from the client

He refused to surrender and was concerned about prison conditions in Lithuania.

Final Decision

Surrender ordered. The offence had taken place in Lithuania and the investigation had taken a long time.

Chapter 12
Poland

4th Evaluation Report

The Council issued its fourth evaluation report on the practical application of the EAW in Poland on the 7th February 2008 (Council Document 14240/2/07 REV 2 CRIMORG 158 COPEN 144 EJN 29 EUROJUST 55). Poland responded to this on the 2nd September 2011 (Council Document 13691/11 CRIMORG 124 COPEN 200 EJN 100 EUROJUST 122).

Arrest and Hearing

The requested person is informed of the right to legal counsel upon his or her arrest (page 51). Following arrest, the Circuit Prosecutor must hear the requested person and submit a motion to the court within 48 hours (4.4, page 19). The court must sit within 24 hours of receipt of the motion and decide on the temporary detention, and may also decide on the execution of the EAW (page 19). At this hearing, the requested person will be asked whether he or she wishes to consent to surrender and, separately, whether to renounce the specialty rule. Consent and renunciation are both irrevocable (page 20).

It is 'usual practice' for the requested person to be allowed to see a legal counsel within the first 72 hours following arrest and during the hearing before the prosecutor, however there is no legal obligation upon the prosecutor to authorise such contact during the preliminary phase (7.4.1.5). Although the Polish authorities submit that it is 'rarely the case' that contact is delayed, the experts are greatly concerned that there may, in principle, be cases in which requested persons are held for 72 hours without being authorised to see a defence counsel (page 52).

The experts recommend that amendments of the Polish legislation are considered to ensure that the requested person has the right to see a lawyer during the period of provisional arrest (Recommendation 16). In its response, Poland insists that there is no need to do so because the general rules of the Criminal Code of Procedure give the person arrested the right to legal representation and legal aid. There is, therefore, no legal basis for the prosecutor to refuse such representation during the hearing.

While it is legally possible for the Polish courts not to decide to keep the requested person in temporary detention following the first hearing, in practice most persons subject to EAW proceedings are temporarily detained (page 20).

The report notes a discrepancy between the statement by the Polish authorities that requested persons will be supplied with a list of lawyers prepared by the Bar should he or she not be able or willing to choose their own lawyer, and the Bar Association's assertion that it prepares no such list (page 52). In any event such a list would not provide any indication as to the field of expertise of the persons it contains. The experts call for clarification of this state of affairs (page 52). Poland does not offer any such clarification in its response to the report.

Where the requested person does not contact a lawyer, the court will designate one in most cases as the assistance of a lawyer is mandatory under Polish law in proceedings where a person's liberty is at stake.

Legal aid is available to persons who can prove that they are unable to pay the defence costs (Art. 79 CCP).

The implementing law includes provisions on the rights of persons who do not speak Polish, including the right to a free interpreter whose services are compulsory from the provisional arrest onwards. Key documents are translated (page 28).

Grounds for refusal

Article 55 of the Polish Constitution was amended in 2006 in order to allow the extradition of Polish nationals, albeit subject to the mandatory conditions of dual criminality and territoriality (7.2.1, pages 31 – 34). The experts consider both conditions to be a violation of the Framework Decision and its objective of preventing discrimination between nationals and non-nationals, possibly leading to delays and providing more opportunity for lawyers to oppose the execution of an EAW (page 32). It is recommended that the Constitution be amended accordingly (Recommendation 5).

Paragraph 4 of article 55 of the Constitution also prohibits the execution of an EAW for non-violent political crimes and where extradition would violate rights and freedoms (page 34). The experts note that the executing authority should consider whether a violation of human rights could be dealt with more effectively in the issuing state. They do not discuss whether recitals 12 and 13 of the Framework Decision are a sufficient basis for such a mandatory ground for refusal. The experts are particularly concerned that the prohibition on non-violent crimes is a violation of articles 3 and 4 of the Framework Decision and contrary to the principle of mutual recognition (page 35). It is noted, in particular, that this may obstruct surrender of persons sought in other EU Member States for the financing of terrorism or related activities (page 36). Amendment of the Constitution is also recommended in this regard (Recommendation 6).

Poland has responded to both of the above criticisms by stressing that the former ground of refusal is only of 'marginal significance' and that the latter has never been used. No amendments have been made to the Constitution since these recommendations.

Where Poland is the issuing state, article 607a of the Criminal Code of Procedure, which contains the majority of provisions on the EAW, stipulates that an EAW may only be issued where the requested person is suspected to be in one of the EU Member States, and where the offence was committed on Polish territory. The experts consider that both conditions unduly limit the possibility for EAWs to be issued, and thus welcomes Polish draft legislation seeking amendment of this article (page 40).

Training Provision

The National Training Centre for Employees of Courts of General Jurisdiction and Public Prosecutors was established in 2006 and provides training sessions for judges and prosecutors on practical problems in EAW cases (page 26). In addition, the National Prosecutor's Office and the Ministry of Justice organise in-house training. The experts, therefore, do not believe that there are significant gaps in the training offered (7.1.5.), and recommend placing an emphasis on the format of EAWs and the use of SIS in training (Recommendation 3). In its response to the report, Poland has confirmed that these issues are regularly discussed at training sessions, and that a letter including guidelines on how to use SIS has been sent to appellate and circuit courts by the Ministry of Justice.

The report notes that there are certain difficulties in coordinating the activities of judges and prosecutors due to the decentralised EAW procedure in Poland (7.1.4., page 29), which is otherwise recognised as good practice (7.3.2.1, page 43). The experts suggest that these difficulties could be alleviated by creating a common platform for all authorities involved, for example by organising an annual meeting in order to discuss common difficulties and exchange best practice (Recommendation 1). The report also suggests that the National Prosecutors' 2005 guidelines should be updated and disseminated among judges (Recommendation 2). Poland has responded to this, stating that the National Prosecutor's Office published a joint publication in 2009 concerning amongst others the specific issues of the EAW procedure, and that the guidelines are regularly updated through instructions sent to the appellate prosecutors' offices.

All available training seems to be directed at judges and prosecutors, and it is unclear whether any is made available to defence lawyers.

Time Limits

There is controversy among the Polish authorities over whether the proceedings mentioned in the implementing law, which are to be conducted within the 60 or 90-day limit stipulated in the Framework Decision, concern final or preliminary decisions (7.4.1.10). The experts are of the opinion that, based on the general understanding of the provision, the legislation should be amended so as to use the wording 'final decision' (page 59; Recommendation 21), and to indicate clearly the maximum time limit for first instance and appeal decisions. In the meantime it is suggested to use the doctrine in *Pupino* to come to the same conclusion. In response, Poland has introduced an amendment concerning time limits which came into force on 8 June 2010, courts must now decide on surrender within 40 days of the arrest, or within three days following consent.

Proportionality

The possibility of introducing a proportionality test into Poland's practice as an issuing state was discussed at length with judges and prosecutors (7.3.1.2.). It appears from the report that both groups have inconsistent perceptions of their respective roles in EAW procedures (page 37). Prosecutors were of the opinion that they are unable to refuse to file a motion for the issuing of an EAW on the basis of proportionality. Some prosecutors considered that such a test would be conducted by the Circuit Court. The judges, on the other hand, did not feel they had the right to dismiss an EAW if all legislative conditions

were fulfilled. Some judges thought that the prosecutors had discretion on whether or not to file a motion on this ground.

In practice, however, EAWs have been refused because the alleged offence caused only little damage to society or the value of the damage was low (page 37). The experts caution that, although the EAW presents a simplified and more efficient extradition procedure, regard should be had to the effect that it can have on the resources in the executing state. Thus, they recommend that an EAW be issued in principle when an offence would lead to an arrest at the national level, coupled with a balancing of the resources required to execute the EAW with the seriousness of that offence (page 38, also Recommendation 8).

In its reply to this recommendation, Poland notes that there has already been a considerable evolution in this respect (page 4), and that the number of EAWs issued by Poland has started to decrease. Poland is of the opinion that the high number of issued EAWs is not necessarily disproportionate. There may be ,a number of underlying justifications. It notes that Poland's principle of legality requires it to take all possible steps to bring an offender to justice. An EAW often presents the only opportunity to do so and, in any case, EAWs are issued only as a final measure if other means have proven to be inadequate (page 5). The response states that practical steps to improve the practice have been taken. For example, a new handbook addressing the issue of proportionality is available on the Ministry of Justice website and is being disseminated among judges (page 5).

Meeting with Ministry of Justice

July 2011

Poland considered re-opening the amendment of the Framework Decision as part of the Presidency but decided against it. Whilst the Ministry would be interested in review, it doubted other member states would be. They were open to considering holding an event on it, particularly connected with the access to a lawyer directive and the fourth round evaluation report and conclusions of the Council. However, it seems that there was not time during the Presidency to do so and a priority was to hold a conference on legal aid.

Dual representation

The Minister confirmed that the EU directive on the right to a lawyer was a priority for the EU Polish Presidency and it would take the negotiations forward (which it did during July to December 2011). However there was strong opposition to dual representation as drafted by the Commission in article 13 of the proposal. It was seen as particularly problematic as it would double the costs of legal representation. There is a difference in philosophy between member states on how mutual recognition instruments are approached and how much scrutiny is given to requests. Continental countries do not dwell on merits whereas common law countries are much more sceptical. Whilst Poland can assist on issues in the UK, would this same role be required in Poland where the issues are much narrower in non-adversarial proceedings. Would the Polish lawyer require assistance where a person was requested back to the UK? In addition, how is this assistance to be paid for?

Proportionality

The issuing of EAWs is diminishing in Poland. Prosecutors request a first instance court for an EAW. It is then reviewed by a second instance court before being transmitted. The second instance court issues the warrant. The ministry had reviewed a large number of requests to ascertain the reasons for issue. Half were issued by the court after a breach of a suspended sentence. It is not disproportionate to request people to serve a sentence whose terms they have breached (since there are not statistics for the type of offence it is not possible to know what type of sentences have been breached). There is the constitutional principle of legality, but this does not require all cases are pursued. Nevertheless, assumptions were made in the British press about trivial cases being brought, but these cases may not be minor in Poland. Money has more value in Poland and for example where theft is committed of something valued at 250 PZL (€62) is stolen, this is worth considerably more in Poland than it would be in the UK.

Nevertheless, guidance has been issued by letter to courts and prosecutors about the need to use alternative measures before resorting to an EAW. Correspondence was provided to the project team detailing this guidance. In a letter to the Undersecretary of State dated 22nd June 2011, the Director of the National School of the Judiciary and Public Prosecution, judge Leszek Pietraszko states that the School is undertaking activities to improve EAW practice, including training for judges and prosecutors in EAW matters, and the inclusion of EAW education in postgraduate studies. Furthermore, Polish judges participate in international training including EAW issues. A letter from the First Deputy Public Prosecutor General sent on the same day informs the Undersecretary of State that an EAW training session took place in the Prosecutor General's Office on the 9th June 2011, and suggests that any further judicial training is the responsibility of the National School of the Judiciary and Public Prosecution.

At a meeting with Dutch officials concerning the problems arising between the two countries based on EAW practice, the Polish authorities reiterated the binding legal obligations on Polish authorities which could give rise to questions of proportionality, and further submitted that the high rate of emigration of Polish nationals means that an EAW is often the only method available to meet such obligations (letter from February 2011 (reference symbol DWM-V-083/1/10)). They agreed however that the procedure would be more effective if Poland detailed in the EAW all measures taken prior to issuing an EAW to effect the resolution of the matter. Equally, if the EAW is the result of non-payment of a fine, the Polish authorities agreed that they would indicate in the warrant that payment of the fine would revoke the requirement for the custodial penalty consequent upon the breach.

In a letter to the Undersecretary of State, the First Deputy Public Prosecutor General Marek Jamrogowicz declares that he is of the opinion that prosecutors too frequently have recourse to EAWs, rather than using other (less intrusive) measures available (letter dated 22 June 2011 (reference symbol PG VII G 073/37/11)).

Remand and prison conditions

There is a problem with the length of remand detention in EAW cases, particularly in awaiting return of people for service of sentence. The framework decision allows someone to be returned to serve a four month sentence. In some cases, the length of time spent in custody in the executing state can reach or exceed the time to be spent in prison on return serving the sentence (this occurred in a recent request from Ireland where the High Court discharged the warrant because the requested person had spent time in custody equivalent to the outstanding sentence while waiting for the case to be heard. Had Ireland

agreed the EAW, there is no procedure in Poland to treat the time spent in another country in pre-trial detention towards the Polish sentence.

With respect to the prison conditions in Poland, in 2005 and 2007 there was overcrowding and the ECtHR had found a violation of article 3 ECHR. There has since been a change in prison policy and most prisons are now at capacity (99.8 per cent) but not currently overcrowded. There are still some geographical variations but prisoners are transferred to ensure usage of spare capacity. The Irish Supreme Court decided in an EAW request from Poland that prison conditions could be reviewed as a reason for refusal.[42] The Polish authorities gave statistics on overcrowding to the Irish High Court when it re-heard the request for surrender and it concluded that there would not be a breach of article 3 ECHR to surrender.

Defence perspective

Legal representation and legal aid

Legal representation in EAW cases is mandatory. However, there is no opportunity for legal representation during the decision to issue a warrant and there is no legal remedy available once it is issued. Legal aid rates are very low in Poland and therefore it is extremely unattractive for lawyers to take on technical and time-consuming EAW cases. There is not a specialist extradition court so any duty lawyer assigned by the court could undertake one of these cases. There is little specialism in Poland, all lawyers can undertake any type of case. This issue will be compounded when the new law allowing anyone who holds a law degree to provide representation in court comes into force. It is difficult to know who is actually conducting these cases across Poland. The Polish project team did attempt to contact the courts for this information but were unsuccessful. Legal aid is means tested and always available for children.

Training

Despite what the 4th Evaluation Report suggests, Poland is very much in need of training in EU instruments, not only for defence lawyers but for judges, prosecutors and police as well because all locations can receive or issue a warrant. There is no training provision for lawyers regarding EAW matters.

Proportionality

Contrary to public opinion, prosecutorial discretion does exist in Poland and there is a provision which requires prosecutors to consider the degree and social impact of an offence before proceeding with a case. The lawyers considered that in fact, prosecutors have targets to meet and are encouraged to prosecute as few cases as they can in Poland. It may therefore be that the authorities are prioritising bringing back requested people on EAWs where they would not bother domestically. A provision is needed in Polish law to limit the issuing of requests in minor cases. The Criminal Law Legislation Commission has proposed a limitation to issuing EAW cases where the sentence is expected to be over four months. This does not go far enough for the defence lawyers however.

42 MJELR v Rettinger

Pre-trial detention and prison conditions

There is much recourse to remand in pre-trial detention during investigation and pending trial or hearing in Poland, where it is thought that the requested person would interfere with witnesses or evidence. This is not based upon nationality but release is difficult to obtain if the requested person has no Polish address. There continue to be problems with conditions in prison as documented by the Committee for the Prevention of Torture report from 2011 following visits at the end of 2009. There were noted problems with overcrowding in prisons, issues relating to the provision of medical care for detainees, ill-treatment of detainees by police officers and the lack of a properly developed legal aid system. At a press conference organised by the Helsinki Foundation for Human Rights in June 2011 the Prison Service Authority accepted that prison conditions remained overcrowded and the reality remained far from the 4m2 ideal space for each prisoner.[43]

Grounds for refusal

Polish judges tend not to check the basis of an EAW. Full effect is given to the principle of mutual recognition. It is extremely rare for a court to check if a warrant has been issued correctly.

Dual representation

The defence lawyers agreed that dual representation would allow lawyers to liaise with the prosecution in the issuing state about how a case can be resolved without the return of the person. A type of duty scheme for dual representation was suggested, meaning that a lawyer would always be available to assist in the issuing state and costs would be kept down.

Language and other barriers to communication might make direct contact between lawyers and clients in different States difficult and even ineffective, a matter which should be addressed for the purpose of making dual representation work in practice.

Cases

PL1 – Poland – Non-consented surrender – Issuing state lawyer

The requested person was a Polish citizen convicted of robbery to gain material benefit in 1996 and 2000 and was wanted for service of the sentence. The UK was the executing State. He had lived for many years in the UK and had a family and employment there.

Legal representation and legal aid

This is unknown as the UK was the executing State. The Polish lawyer met with the requested person after his transfer to Poland, after being contacted via telephone by the requested person's partner. The Polish lawyer was paid privately and spent approximately 30.5 hours on the case.

43 See Helsinki Foundation for Human Rights, 13th July 2011, http://www.hfhr.pl/en/po-raporcie-cpt-o-sytuacji-zatrzymanych-i-wiezniow-wciaz-te-same-zarzuty-wobec-polski/

Instructions from the client

The requested person did not want to surrender as his life was established in the UK.

Non – detention measures or remand in detention

The requested person was released on bail in the UK.

Contact with issuing state

Contact was established directly by the requested person and his partner. The UK lawyer was not cooperative with the Polish lawyer's attempts to help, e.g. by preparing documents regarding the Polish proceedings.

Final decision

Surrender was ordered by the UK court to carry out an old sentence, the sentence in the second case of 1 year and 5 months.

PL2 – Poland – surrendered voluntarily – EAW withdrawn – issuing state lawyer

The requested person was a Syrian national and British citizen living in the UK with his family accused of receiving stolen property and forgery of documents in May 2009.

Legal representation

There were no proceedings in the executing state (UK) since the requested person voluntarily surrendered from a third country to Poland and the EAW was revoked. The requested person initially had come into contact with a lawyer in the UK who was unable to help due to lack of expertise.

Contact with issuing state

The lawyer in Poland was contacted by a lawyer in the third country where the requested person was at the time the EAW against him was issued. The Polish lawyer arranged with the prosecutor that the warrant would be withdrawn if he surrendered himself voluntarily.

Final Decision

The requested person surrendered himself voluntarily to the Polish authorities prior to the proceedings commencing in the UK.

PL3 – Austria – Non-consented surrender – EAW later withdrawn, surrender decision revoked

The requested persons were Polish citizens accused of seven separate offences of burglary, membership of an organised criminal group and fraud between May and November 2009.

Legal aid

The lawyer in the executing state spent a total of 16 hours in the case, which were covered by legal aid (however, only by fixed fee, irrespective of time incurred)

Instructions from client

The requested persons revoked their consent to surrender, that they had given earlier to the public prosecutor prior to having legal advice, before the court of first instance. The ground for revocation of their consent was that the evidence indicated in the EAW does not in fact exist.

Non – detention measures or remand in detention

The requested persons were detained on another criminal case in Poland in any event.

Arguments raised against surrender

The cumulative effect of the 7 sentences could lead to a life sentence for which there were no guarantees about review of the sentence. The EAW gave information only about the possible sentences for each offence and did not provide information as to whether a cumulative sentence for these offences could amount to a life sentence.

Contact with issuing state

There was a relevant point of Austrian law at issue concerning concurrent sentencing and the defence counsel asked the Polish court to request this information or allow the appointment of an Austrian expert. The Polish court refused to do so. Without court approval it was not possible to obtain expert assistance through legal aid and the clients were not willing/able to pay privately, meaning that the lawyer could not properly argue the defence about length of sentence.

Final decision

Surrender was ordered by the court as it considered that there were no grounds for refusal. An appeal was filed as of right after six weeks from the decision and was also covered by legal aid. The grounds of appeal were the same as argued at first instance, and the appeal was equally refused due to lack of any grounds to refuse extradition.

The requested persons were to be surrendered to the issuing state after serving their sentences in the executing state for other crimes. However on 8th July 2011 this decision was revoked as Austria withdrew the EAW for unknown reasons.

PL4 – Poland – surrender ordered, proceedings partially discontinued in issuing state (issuing state lawyer

An EAW was initially issued in 2006. The requested person was arrested but the warrant was refused. He was then arrested again in 2010 for a different offence. He was accused of possession of 165 items of ammunition for a 5.6 mm calibre long rifle firearm without a proper permit.

Contact with the issuing state

The lawyer was appointed publicly in Poland after the requested person was returned, to argue for discontinuance of the proceedings which was granted. The Prosecutor appealed the decision to discontinue the original warrant. The lawyer spent 8.2 non-billable hours on the case. Legal aid was available, but was limited to a lump sum concerning the proceedings on the dismissal of the EAW.

Final Decision

The offence was not properly particularised on the first EAW and the UK therefore initially refused to extradite. However, there were no defects with the second warrant and the court ordered surrender. The requested person was finally extradited to Poland and was being dealt with not for the possession offence, but for the pre-existing EAW in breach of specialty. The Polish court discontinued the former proceedings.

Chapter 13

Portugal

4th Evaluation Report

The Evaluation Report on Portugal (Council Document 7593/2/07 REV 2 CRIMORG 59 COPEN 37 EJN 8 EUROJUST 17) was published on the 27th July 2007, and Portugal responded on 1st September 2011 (Council Document 13706/11 CRIMORG 123 COPEN 202 EJN 102 EUROJUST 124).

Defence

Three Bar Association representatives of varying seniority were interviewed for the report (page 32). The Bar in Portugal is responsible for maintaining lists of on-call lawyers, but while they must be qualified lawyers, such lists do not include any further details concerning the experience of the lawyers available. The Bar is of the opinion that it is their role to ensure full compliance with the EAW implementing law.

The requested person can apply for release from custody at any stage of the EAW procedure, but such requests are nearly always refused so as to assist surrender (page 24). The defence representatives were of the opinion that the requested person is not likely to be released from protective custody during EAW proceedings, even concerning relatively minor offences. They are concerned about this but aware that this practice is supported by Supreme Court jurisprudence.

Arrest and hearings

In Portugal, all arrests are undertaken using domestic arrest powers; are deemed to be provisional; and must be validated within 48 hours by the executing judicial authority (page 23). The requested person is brought before a public prosecutor 'immediately' for a personal hearing at the court of appeal within their locality. The prosecutor will summarily hear and advise the requested person on his or her right to legal assistance, after which the prosecutor must bring him or her before the appropriate executing judicial authority within 48 hours for judicial questioning.

At the hearing the judge will validate the arrest and consider whether the requested person should remain in detention as well as advising on the contents of the EAW and the possibility of consenting to surrender and renouncing specialty. If the requested person does not elect a defence counsel, the judge must assign one (page 24; Art. 18 (4) Law 65/2003), and the costs of legal and interpretive advice and assistance are

borne by the state subject to means testing.. Legal advice is also compulsory at the appellate stage (page 26; Art. 64(1)(d) Code of Criminal Procedure).

Training Provision

The Centre for Judicial Studies is responsible for the initial and ongoing training of judges and public prosecutors (page 30) and seeks to inform them about the legal basis and practical application of the EAW. Trainee magistrates also receive 1.5 hours of mandatory weekly language training in either English or French during the initial phase of their training. Portuguese authorities take advantage of interchanges with the Centre for Legal Studies in Madrid and the French National Magistrates' College to broaden their own knowledge base.

The experts considered that the mandatory training for judges, including a training module on the EAW, is very well-structured and methodological (page 31), and are impressed by its range and depth (7.2.2.1.).

The experts consider it good practice that the practitioners involved in EAW proceedings have created national programmes which have been drawn together in the form of an EAW handbook published in September 2006 (page 37). It is concluded that the inter-agency coordination shown in the drafting of this substantive guide reflects the well-coordinated approach applied to EAW procedures in Portugal (page 34, 7.1.2.).

Accordingly the only recommendation is to ensure that the handbook is published electronically on the HABILUS case management system utilized by Portugal's court clerks (Recommendation 5). In its response, Portugal states that the Attorney General's Office has developed a thematic area within the website of the Documentation and Comparative Law Office displaying information for practitioners on the EAW including the EAW handbook in order to comply with this recommendation.[44]

Time Limits

The average time from arrest to surrender in Portugal is 22 days in consented cases, and 47 days in non-consented cases (page 25).45

In Portugal, the appeal process is conducted in the context of the maximum possible time limits for the detention of a requested person, namely 60 days from the day of arrest.

The time limit to lodge an appeal is five days from the surrender decision. The respondent to the appeal (be it prosecution or the requested person) is allowed a further five days to provide a written reply to the notice of appeal, after receipt of that reply the appeal file is transmitted to the Supreme Court. The Judge-rapporteur has five further days to submit a draft ruling to the appeal tribunal, which shall hear the matter at the first available session.

44 http://www.gddc.pt/MDE/Manual_MDE_EN.pdf

45 Current statistics from the Replies to Questionnaire on quantitative information on the practical operation of the European arrest warrant http://register.consilium.europa.eu/pdf/en/12/st09/st09200-re04.en12.pdf: 12,7 days for people who consent; 67,01 days for people who do not consent

Implementing Legislation

In its conclusions on Portugal as an executing state (7.3.), the report notes several issues regarding its implementing legislation. First, the Law 63/2005 contains two mandatory grounds for refusal of surrender which the experts deem to be superfluous in light of articles 2 and 6 ECHR, namely where the EAW offence is punishable by the death penalty in the issuing state, and the EAW is issued on account of political reasons (page 38).

Second, a problem arises regarding the lack of clarity of several of the law's provisions, as issuing and executing states seem to have been confused in them (page 39).

Finally, article 24 of the implementing law does not seem to prescribe a time limit in which the appeal decision should be made.

The experts recommend that Portugal should review its implementing legislation with a view to amending those provisions that are contrary to the Framework Decision or lacking in legal certainty (page 44). In its response, Portugal indicates that the Directorate-General for Justice Policy has recently prepared the revision of Law 65/2003, taking these observations into account.

Defence Perspective

Legal Aid

Legal aid in Portugal does not work well in practice. Provision is means tested. The current system has been criticised by the Ministry of Justice for lack of control over the lawyers' fees. This gave raise to a tough discussion between the Ministry and the Bar Association. The former alleged that lawyers request payments to which they are not entitled. The latter argued that this problem concerns a minority of the lawyers and that the funding for legal aid per case was amongst the least paid of any Council of Europe country. The lawyers who provide legal aid work tend to be those who do not have enough clients to survive on income from privately paying clients. They are unlikely to know much about the EAW scheme because they are not necessarily specialised as the number of EAW cases they get does not justify investment in training and payment is poor. These factors can lead to missing deadlines; invoking irrelevant facts or laws as a ground for refusal; not invoking relevant grounds of refusal; not giving proper advise on the consequences of consent or renunciation of the specialty principle. Furthermore, there can be a communication gap because of language differences. The majority of representation in EAW cases is, nevertheless, provided through public funding.

Training provision

The Fourth evaluation does not give the defence perspective .It suggests that the system is working well, with training for the judiciary and practitioners. However, there is no specific regular training for lawyers provided by the Bar Association or otherwise. One of the project lawyers held a seminar with a prosecutor which was unfortunately poorly attended. This may demonstrate a lack of diligence amongst those lawyers in need of greater knowledge. In comparison with the very useful website and handbook

available to prosecutors through the Attorney General's Office, there is no equivalent concerning how to defend these cases.

Interpretation and Translation

Interpretation and translation is provided free of charge. However there is no accredited scheme in place and, therefore, no quality control. Interpreters are usually not qualified and have no ethical training about how to remain impartial and retain confidentiality. This is a concern because the interpreters are provided by the court and the same person is likely to be retained to interpret private consultation and hearings. The law foresees the possibility of retaining a second interpreter for the conversations between the person and his lawyer. However, the lawyers are not aware of a case where any requested person has sought to have a second interpreter appointed.

There is a new Legal Interpreters Association (APTIJUR – Associação Portuguesa de Tradutores e Intérpretes Jur'dicos), established through the incentive of EULITA and having regard to the Directive on Interpretation and Translation in Criminal Proceedings which aims to improve the current provision.

Detention

Often people who are residents in Portugal are released pending the surrender decision (with the exception of severe crimes, for example organised crime or drug trafficking.

Sometimes an EAW may be issued for minor offences where in Portugal a suspect would never be detained for more than 24 or 48 hours following arrest but give raise to a much longer detention period in the executing state. Some courts (namely the Courts of Appeals of Coimbra) have ruled against the issuing of EAWs in these situations, where an EAW has been issued 'automatically' without a prior assessment of proportionality. Furthermore, in Portugal, an EAW is sometimes issued where it is not possible to summons a person. But, often, the problem is that the Portuguese authorities do not make sufficient efforts to first summons the person. Instead of introducing a location request in SIS and Interpol and trying to summons the person once they find them, they just issue an EAW. This might be acceptable in cases of severe criminality but is wrong in respect of minor offences.

Defence lawyers' comments on the 4th Evaluation Report

The law has not been reported accurately in some places or has been updated since:

- Whilst the law provides that the requested person first sees and is interviewed by the prosecutor, in practice this does not occur. The prosecutor has to initiate the surrender proceedings by bringing the person before the Court of Appeals, but usually does not conduct a formal hearing of the person. This hearing is conducted by a Court of Appeals judge, with all parties present (judge, prosecutor, lawyer, defendant, court clerk, interpreter).
- Although the report mentions that Portuguese officials make use of the arrangements with the Centre for Legal Studies in Madrid and the French National Magistrates' College, this does not seem to be accessible for all officials, especially at the lower courts, where any court can issue an EAW.

- If there is an appeal from the first instance decision (of the Court of Appeals) to the Supreme Court of Justice, the person may in fact be detained for up to 90 days, and not just 60 days pursuant to article. 30 (2) Law 65/2003. Furthermore, if an appeal to the Constitutional Court is lodged, the person may be remanded in custody for up to 50 days pursuant to article 30(3).
- Whilst article 24 of the implementing law does not prescribe a time limit in which an appeal decision is to be made, article 26 (2) specifies 60 days as the general time limit for a definitive decision (i.e., after all appeals). Furthermore article 25 provides very strict time limits for the proceedings in the Supreme Court of Justice and in any event the Courts tend to make a decision as soon as is possible, in order to respect the terms mentioned above and avoid the release of the person
- There has been no amendment to the implementing legislation and the lawyers are not aware of any proposed amendments or legislation before parliament.
- The 4th Evaluation Report also mentioned that there is an 'informal working party' on the EAW in Portugal. The report recommended inviting a representative of the judges and Portugal followed this. Nevertheless there are no defence representatives at these meetings. There should be a representative of the defence in this working party (if not in all meetings, due to confidentiality issues concerning ongoing proceedings, at least in some).

Cases

Cases 4 to 12 are included as a result of reviewing the files of the General District Prosecutor's Office in Lisbon and contact with some of the lawyers who conducted these cases. 50 files were reviewed by the Portuguese team and the cases reported here are a reflection of the proceedings in Portugal.

PT1 – Portugal – EAW revoked – issuing state lawyer

The requested person was accused of attempted murder in 1994 and requested from the UK. Proceedings were nearly statute-barred in the issuing state (Portugal) when the warrant was issued and the EAW was finally revoked due to statutory limitation, before any decision on surrender was reached.

Contact with the issuing state

The case was conducted on a *pro bono* basis by the Portuguese lawyer after legal aid was not granted for assistance and the person had no funds to pay a private fee. The Portuguese lawyer advised the UK lawyers on the basis of the information in the EAW form and contacted the Portuguese court and court appointed lawyer to confirm the position as regards limitation where it was confirmed that the EAW had been revoked and the case closed.

PT2 – Portugal – EAW revoked, Surrender ordered – issuing state lawyer

The requested person was accused of counterfeiting of currency and swindling in August 1995. Portugal was the issuing state, Germany the executing state.

Legal representation and legal aid

The requested person was entitled to a lawyer after arrest or after the first interrogation in Germany. She was informed of this right immediately after her arrest by a private lawyer, legal aid was available but not requested.

Instructions from the client

The requested person refused to surrender as she alleged to not have committed the crime she was sought for.

Non-detention measures or remand in detention

The requested person was detained pending the hearing and released by the German court upon information that the EAW had been revoked by Portugal.

Arguments raised against surrender

Statute limitation and length of sentence.

Contact with issuing state

The Portuguese lawyer was asked by a UK lawyer to take over the case and liaise with the lawyer in Germany. The Portuguese lawyer verified whether the warrant complied with domestic law concerning the issue of an arrest warrant. The lawyer advised that the EAW was in fact illegal and unconstitutional as it was issued on the grounds of a national arrest warrant order for an offence which a person can only be detained on arrest for a maximum of 48 hours. The lawyer asked for the revocation of the EAW and release of the requested person. Contact was made with this lawyer through personal networks and the ECBA. The Portuguese court then withdrew the EAW and asked for the requested person's release and acknowledged that the proper means would have been to send a summons by letter of request.

Final decision

Surrender was ordered by the court within the 60-day limit as there was no issue of limitation. The warrant was subsequently withdrawn by Portugal but prior to the person's surrender so they remained in Germany. Despite the withdrawal it was not possible to appeal the surrender decision.

PT3 – Italy – Non-consented surrender

The requested person was a Portuguese citizen living in Portugal all her life and accused of fraud, criminal organisation and money laundering between 2000 and 2009.

Contact with the issuing state

Contact with a lawyer in the issuing state was only established after the decision to surrender. The lawyer in the issuing state then tried to arrange for a voluntary return, but was unsuccessful, so that the EAW remained in force and the person was surrendered.

Arguments raised against surrender

The case should be tried in Portugal because the offence occurred within its territory.

Final decision

The court ordered surrender as Portugal had no interest in prosecution, but subject to the return of the person to serve their sentence in Portugal if convicted.

PT4 – Italy – Surrender ordered – Initially non-consented, then voluntary return, EAW revoked

The requested person was born in South Africa and had lived in Portugal since she was 16. She was accused of fraud, criminal organisation and money laundering between 2000 and 2009.

Contact with the issuing state

The defence lawyer sought information from lawyers in the issuing State regarding whether the arrest had been lawful and whether there was sufficient evidence in the case file to prove the alleged crimes. Lawyers were privately paid in the issuing State to undertake this work however the Italian authorities invoked the confidentiality of the ongoing investigation to deny them access to this information.

The lawyers in the issuing State worked to convince the judicial authority that the requested person would return voluntarily, and that the EAW should accordingly be withdrawn. Upon the advice of these lawyers the requested person returned voluntarily to Italy on the assumption that she would not be detained. Despite their efforts, she was held in custody until a hearing four days later, after which the EAW was revoked.

Arguments raised against surrender

The case should be tried in Portugal because the offence occurred within its territory.

Final decision

Surrender was ordered by the court as it did not accept the defence's argument. An appeal based on insufficient information in the EAW was refused as unfounded.

PT5 – The Netherlands – EAW revoked

The requested person, who had lived in the Netherlands for four years, was accused of abducting a minor under the age of 12 in March 2012.

Instructions from the client

The requested person refused to surrender as the facts underlying the EAW were no longer applicable.

Contact with the issuing state

The Portuguese authorities communicated the client's instructions to the Dutch authorities which then withdrew the EAW.

PT6 – Poland – EAW revoked

The requested person, who had lived in Portugal for nine years, was accused of appropriation in 2001.

Contact with the issuing state

Contact with a lawyer in Poland was established through the requested person himself and his family. Action in the issuing State led to the EAW being revoked, although it was unclear to the lawyer in the executing State why this was the case.

PT7 – France – Non-consented surrender ordered

The requested person, who had been living in Portugal for 15 years, was convicted of sexual offences against a minor (his daughter) between 1989 and 1999. He had been sentenced to 20 years imprisonment.

Instructions from the client

The requested person refused to consent to surrender because he had not been summonsed and did not know the trial had taken place.

Contact with the issuing state

No contact was established with lawyers in the issuing State.

Arguments raised against surrender

Trial *in absentia* without guarantees for a retrial.

Final decision

Surrender was ordered by the court conditional to an undertaking that a retrial would take place at which the requested person would be present. On appeal it was argued by the requested person that these guarantees were not given by the issuing state, however this was dismissed.

PT8 – Germany – Consented surrender

The requested person was accused of fraud between 2008 – 2011. He was a Swiss citizen flying from Brazil to Switzerland when he was arrested.

Instructions from the client

The requested person consented to surrender without renouncing the application of specialty.

Contact with the issuing state

The requested person was a notary and was treated very respectfully by the Portuguese courts. He made himself available to cooperate personally with the issuing State authorities. Contacts were used in Switzerland to obtain information about the case, however not in Germany, from where it is difficult to obtain detailed information on proceedings.

Final decision

Surrender was ordered due to consent and validity of the EAW.

PT9 – Czech Republic – Non-consented surrender

The requested person was accused of the evasion of alimony payments between June 1995 and September 2008, and October 2008 and February 2009, carrying a custodial sentence of six months.

Instructions from the client

The requested person refused to consent to surrender because the trial had taken place *in absentia*, and that they wished to remain in Portugal because they had just moved there to take up employment.

Arguments raised against surrender

In absentia trial without guarantees in place for a re-trial and that any sentence should be served in Portugal.

Contact with the issuing state

It was very difficult to establish contact with the Czech authorities but because it was not clear whether the offence corresponded to an offence under Portuguese law, more information was required. For this reason the surrender decision was postponed several times. No assistance was sought from a Czech defence lawyer.

Final decision

Surrender was ordered by the court, however it was delayed due to the defendant's health problems.

PT10 – France – Surrender refused despite consent given

The requested person was a Portuguese national, working in Portugal with a family. He was accused of complicity to defraud in 2004.

Instructions from the client

The requested person consented to surrender.

Contact with the issuing state

The Portuguese authorities proactively sought information from France, as there was a lack of information on the EAW rendering it invalid: It was unclear for what purpose surrender was sought. Upon request, France clarified that it in effect wanted a temporary transfer of the requested person to interrogate him, not arrest him.

Final decision

The Portuguese court refused to execute the EAW despite the requested person's consent because it was not for a prosecution but simply for questioning. France should simply send a letter of request for a deposition hearing to be held in Portugal.

[The case raises the question of why the lawyer advised the client to surrender when there was an inaccuracy in the warrant. The lawyer in the case could not be contacted.]

PT11 – The Netherlands – Surrender refused at first instance

The requested person was a Portuguese citizen of 30 years, who was convicted of the concealment of stolen goods, money laundering and unjust enrichment in 2005. He was at the time in prison in Portugal for another offence.

Instructions from the client

At the first hearing the requested person refused to consent to surrender because he wanted to remain in Portugal.

Arguments raised against surrender

Non correspondence of the offence; service of sentence in Portugal.

Contact with the issuing state

The Portuguese court requested the Dutch authorities to clarify the exact terms of the conviction in order to establish whether they corresponded with Portuguese law. This was a very technical issue, as the offence concerned money laundering, which is a framework list offence. However the prosecutor and the judge took up the defence's argument that the EAW was in fact based on 'negligent' money laundering, which is not a list offence, and sought to verify this.

Final decision

Surrender was refused based on non-correspondence. The EAW was issued for a formally listed offence, but the court still analysed the dual criminality on constitutional reasons and concluded there was no dual criminality and the person was a Portuguese citizen who had never left the country, was socially integrated and had no connections to the issuing state.

PT12 – Spain – Consented surrender

The requested person was a Portuguese citizen, working in Portugal with children. He was convicted of illicit trafficking in narcotic drugs and psychotropic substances in 2010.

Instructions from the client

There was some conflict between the requested person and his Portuguese lawyer. The person initially refused to surrender, the defence arguing family and professional commitments in Portugal, as well as an *in absentia* trial for the sentence imposed. However the requested person contacted the court directly and said they wanted to surrender as soon as possible to explain his position to the Spanish authorities.

Contact with the issuing state

No contact was made with spain.

Final decision

The court held a second hearing as a result of the letter of the requested person and surrender was ordered.

Chapter 14
Sweden

4th Round Evaluation Report

The Council issued its Evaluation Report on the 4th Round of Mutual Evaluations on Sweden on 21st October 2008 (Council Document 9927/2/08 REV 1). Sweden responded to the Evaluation Report (Council Document 14876/11 CRIMORG 169 COPEN 259 EJN 128 EUROJUST 153) on the 29th September 2011.

The group interviewed by the experts consisted mainly of judges and prosecutors but two representatives of the Swedish Bar Association were also questioned (page 50).

Defence Perspectives

Section 6 of the report states that the Swedish Bar is in general quite actively against the EAW system (page 36) because of the absence of a possibility to consider the material grounds of the case; the limitations on challenging judicial decisions; and the fact that it may force those member states with higher procedural standards to allow their nationals to be put in a situation where those standards aren't met.

In addition, the Bar Association representatives stated that the public defence lawyer guaranteed by the Swedish implementing legislation is appointed from a general list provided by the Association. Due to the low number of EAW cases in Sweden, very few lawyers on that list possess any expertise on EAW matters.

Finally, it was submitted that the defence lawyer was often not granted access to documents early enough in view of the tight time limits in EAW cases.

No further comment is made on either of these issues in the report, and no response is offered by Sweden.

Legal assistance and legal aid

A requested person in Sweden has the right to legal assistance from the moment of arrest by virtue of the Swedish implementing legislation (4.5, page 24). This includes hearings on surrender decisions (page 26). Public defence counsel will be provided if requested or necessary (Chapter 4, section 8 of the

implementing Act) and will be appointed by the court upon request by the prosecutor. Where necessary, the requested person also has the right to be assisted by an interpreter. Costs for both lawyer and interpreter are borne in full by the State. However, the quality of representation given the lack of expertise in these cases is of concern.

Consent to surrender and a waiver of protection under specialty may be given by the requested individual to a number of different officials. Swedish law makes no mention of a right to a lawyer in this regard (3.17, page 17). Assistance of a lawyer is, thus, not necessary for consent to surrender to be valid (page 28).

After such consent, the court will reach a decision within ten days. There is no appeal. The report says that, in practice, often no lawyer will be present at the first interview of a requested person with the police, at which the individual will be asked for consent to surrender, despite the statutory provision to the contrary (7.3.1.3, page 43). The experts say that this conflicts with the Framework Decision's inclusion of a right to legal counsel, as well as the requirement for consent to surrender to be given before a judicial authority under article 27(3)(f) EAW (7.2.1.5, page 41).

In light of this, the report recommends amendment of the implementing legislation so that the waiver of protection by specialty will be valid only if given before a judicial authority and after consultation with legal counsel both when this is sought after surrender to Sweden (Recommendation 7, page 47) and where Sweden is the executing state (Recommendation 11, page 47)

Sweden has responded to both recommendations. It submits that the government has proposed the ratification of the Nordic Arrest Warrant, in a bill which also includes amendments of the EAW Act. Following the passing of this bill, the government plans to further amend the ordinances supplementing the EAW Act, in which context the issues raised regarding consent to surrender and specialty will be addressed.

Grounds for refusal; Human rights concerns

The Swedish implementing legislation (Chapter 2, Section 4) contains a specific ground for refusal of execution based on the ECHR (4.7, page 30). While this is in principle to be welcomed, the report also notes that there is a very high burden of proof upon the defendant for such a ground for refusal to be successful. The experts considered that it would be of limited application due to the principle of mutual trust, and noted that it had not been used to date.

Detention

The Swedish implementing law stipulates that, as an executing State, detention of the requested person shall not take place if this deprivation of liberty would be unreasonable on the facts of the case (4.5, page 25).

Training Provision

The report indicates that information flow regarding EAW practice is well-executed in Sweden. There is a detailed and comprehensive manual (7.1.9) as well as extensive EAW-specific training for prosecutors

(Section 5, page 36). A coordinating group includes all stakeholders and meets up to four times a year (7.1.10). The report recommends other member states follow Sweden's example and initiate similar arrangements (Recommendations 15 and 16).

However, the report notes that training is lacking in certain respects for judges (7.1.8, page 39), and completely absent for defence lawyers, a matter which is confirmed by the representatives of the Swedish Bar Association (page 36). The experts note that, in particular, the discrepancy in training between judges and prosecutors has led to misunderstandings between both groups regarding EAW practice. The experts recommend the adoption of measures to put training provisions in place, enabling extensive and regular training on the EAW (Recommendation 2, page 45).

In its response to the report, Sweden reiterates the existence of the manual and the regular meetings, which in its view provide guidance and allow for discussion of contentious issues between all stakeholders, including judges. However, no direct reference is made to the lack of training for defence lawyers: it does not seem that any changes in this regard are planned.

Time limits

There is no time limit for surrender decisions by the Swedish authorities under the implementing legislation (page 26). Instead, the prosecutor's investigation is to be coordinated with the timetable of the courts to reach a decision within 30 days (Chapter 4, section 3 of the implementing legislation). . The experts note, however, (7.3.1.4) that this has given rise to ambiguities – for example, whether the 30-day limit is binding on the prosecutor - and may lead to problematic ambiguities in practice. The experts, therefore, recommend clarification of the deadline for the prosecutor to refer a case to the court, in order for the latter to comply with the time limits set out in article 17 EAW (Recommendation 12).

In its response, Sweden reiterates the need for the prosecutor to handle the case with dispatch, and to take the courts' time limits into account (page 5). It says that prosecutors do comply with these limits and that where the Framework Decision time limits are exceeded this is due to the lengthier statutory time limits in the appeals process.

According to the report, the limits in question are structurally too long for EAW cases, and risk conflicting with the 90-day limit (7.3.1.7, page 45). Recommendation 13 of the report thus suggests amending these statutory time limits for appeal, so as not to breach those set out in article 17 EAW (page 47). Sweden has replied that amendments have been made to the implementing legislation in the process of ratifying the Nordic Arrest Warrant, which is likely to alleviate this problem.

SIS Alerts

When acting as an issuing authority, the International Police Cooperation Division (IPO) in Sweden issues an SIS alert after verifying briefly that an EAW contains all necessary data (page 12).

Where Sweden is the executing state and limitations arise from Swedish legislation, the IPO enters a flag to prevent arrest which is scrutinised by IPO's lawyer and can be discussed with a prosecutor in case of doubts (page 21, also 7.3.1.1). The experts note however that in practice flagging is undertaken by duty

officers or senior officers in cases of doubt, without the prior consultation of a judicial authority (page 43). The experts recommend that this practice be reconsidered (Recommendation 9).

Defence perspective

In the three EAW cases conducted by the lawyer all have resulted in the requested person being surrendered against their will.

The lawyer has not discussed the topic in more depth with colleagues. However, most lawyers have little or no experience of this legislation while the prosecutors tend to be more specialized. .Defence lawyers have an additional disadvantage as they do not have the same international network as the prosecutors.

The differences between the legal systems of the member states has been another major difficulty as, inter alia, it is difficult to verify double criminality and validity in relation to length of sentence and detention. It is also difficult to raise grounds for refusal relating to human rights concerns unless the lawyer has a thorough knowledge of the relevant country´s legal system.

Cases

These case reports were prepared by the Swedish reviewers based upon the judgments of the court rather than the lawyers in the cases.

SE1 – Poland – Non-consented surrender

The requested person was accused of fraud in 1991, carrying a maximum penalty of 10 years imprisonment in Poland. The EAW was not accompanied by an enforceable judgment or arrest warrant as required by the EAW Framework Decision.

Instructions from the client

The requested person refused to surrender due to having lived in Sweden for 15 years. He had a wife and children, as well as a job in Sweden. Furthermore, he was concerned about his Article 6 ECHR rights being breached in Poland.

Arguments raised against surrender

No enforceable arrest warrant attached to the EAW; extradition incompatible with Article 6 ECHR; Article 9 UN Convention on the Rights of the Child (though this is not applicable when separation is the result of action initiated by a state, including arrest or detention), and Article 7 ECHR on the ground that Poland was not an EU member state at the time of the alleged crime.

Contact with issuing state

An issue arose as to the statutory limitation of the offence (in Sweden: 10 years, in Poland: 25 years), and which standard should apply. The Swedish court decided the Polish time should apply. It appears that contact was made with a lawyer in Poland who expressed doubts over the Polish prescription times, but it is unclear whether this contact was made by the Swedish lawyer or by the Swedish authorities. A polish lawyer involved in the project advised that the limitation period is clearly 25 years. However, had he been asked to assist he could have looked at the Polish case file to see if there was anything too support the article 6 ECHR argument.

Final decision

Surrender was ordered by the court, stating that the arguments against extradition were insufficient. The final decision by the Supreme Court was taken over 130 days after arrest.

SE2 – Greece – non-consented surrender at first instance, consent on appeal

Two separate EAWs were issued, alleging different counts of forgery of documents and fraud, as well as an 'insult to the international peace of the State' between April 2001 to September 2003. These crimes attracted sentences of between 5 and 10 years and 6 months and 3 years imprisonment respectively. However the reason put forward by the Greek authorities to request surrender was the non-payment of telephone bills, the lines of which had been obtained by use of forged documents. He had been studying in Sweden and had founded a family with a Swedish woman.

Instructions from the client

The requested person consented to surrender after a period of time. No reasons for this are indicated. He had initially refused to surrender on the grounds that the accusations brought against him were manifestly ill-founded and based on political motives, as he had been politically active in Greece.

Non-detention measures or detention

The requested person was detained until he agreed to surrender.

Arguments raised against surrender

Incomplete EAW; No dual criminality concerning 'insult to the international peace of the State'; Requested person enjoyed diplomatic immunity as he claimed to be the Honorary Consul of Sweden (rejected by the court as an issue to be considered by the issuing State before issue of an EAW); No evidence of the requested person having committed the alleged crimes and that Swedish police had terminated a domestic investigation for this offence; Disproportionate sentence in relation to the alleged crimes, therefore information in the EAW must be false; article 1 of Protocol 4 ECHR protects individuals from being deprived of liberty for not being able to fulfil an obligation (payment of bills); articles 3, 6 and 8

ECHR; No evidence of an enforceable arrest warrant (however Swedish implementing law doesn't require 'evidence' unlike the EAW Framework Decision); Political motives; Medical grounds.

Contact with issuing state

ICJ Sweden consider that there is no causal link between the non-payment of the requested person's telephone bills and the alleged forgery of identification documents, and that Greek law should have been considered during the hearing, especially as non-payment of telephone bills is not an offence punishable by imprisonment in Sweden. The defence was in contact with a Greek lawyer during the trial though none of these arguments was made. A Greek lawyer involved in the project has advised that if a criminal lawyer in Greece had been contacted in this case he could have advised that some of the offences were only misdemeanours and should not therefore have been requested in an EAW. In any event, Greece has a statutory limitation period of five years so the EAWs were unlawfully issued because the allegations had lapsed. Furthermore, the warrants were issued by an investigating magistrate and the circumstances of the proper summonsing of the suspect should have been examined.

Final decision

Surrender was ordered because all arguments for refusal were dismissed, save in relation to 'insult to the international peace of the state' as it was accepted that this did not correspond with a Swedish offence. There was no real risk of a breach of Article 3, and Articles 6 and 8 ECHR are rarely used to prevent extradition. Medical grounds did not appear to be assessed. The final decision by the Supreme Court was taken within one month of the arrest.

Although there is a right to appeal (which is covered by legal aid), the requested person agreed to surrender before the Court of Appeal had granted a hearing.

SE3 - Poland

The requested person was Polish and convicted of assault and battery in 2004 and given a 10 month sentence which was suspended. In 2006 the same Court ruled that the sentence should be carried out since the requested person had not fulfilled the conditions of surrender. An EAW was issued in 2008.

Arguments raised against surrender

Trial and decision to execute suspendered sentence rendered *in absentia*; no supporting evidence in the EAW.

Contact with the issuing state

It is unknown whether the lawyer sought assistance from a Polish lawyer. The Court contacted the Polish authorities to ascertain if the requested person had been given notification of the trial and asserted that the person had been called to attend the trial, but did not produce any evidence.

Final decision

The first instance court granted surrender, which was overturned on appeal to the Court of Appeal. The Supreme Court however approved the surrender, on the basis of mutual recognition and that the executing state courts should not go behind the information provided in the EAW, even if this did not appear to comply with the framework decision. The case took eight months until the final appeal decision.

Chapter 15
United Kingdom

4th Evaluation Report

The Council issued its fourth evaluation report on the practical application of the EAW in the United Kingdom on the 8th October 2007 (Council Document 9974/1/07 REV 1 EXT 1 CRIMORG 96 COPEN 76 EJN 12 EUROJUST 26).

Defence Perspectives

No defence representatives from Northern Ireland or Scotland were interviewed for the purpose of the report (page 56). Five defence lawyers from the same office were interviewed on matters concerning the defence in England and Wales (page 73). Their main criticisms concerned the structure, drafting and wording of the 2003 Extradition Act, which they argued have led to uncertainty and a lack of clarity.

Arrest and hearing

After certification of an EAW received in England or Wales by the central authority which is the Serious Organised Crime Agency and the arrest of a requested person on the basis of that EAW, a Special Crime Division prosecutor will examine the EAW to confirm that it complies with section 2 of the Extradition Act (by including all the information necessary on the form) and in order to pre-empt any legal challenges (page 30). This is done with a view to advising the issuing state as to the success of the request, and is considered by the Crown Prosecution Service to lessen the possibility of extradition hearings being adjourned.

In Northern Ireland, a certified EAW is subjected to scrutiny by police officers and similarly forwarded to the Crown Lawyers Office for a review for flaws on the face of the document (page 30). Any issues with the EAW are reported to SOCA, which will, before the arrest of the requested person, consider whether further information is needed from the issuing state. Requested persons will, after arrest, be held in designated police stations and provided with a copy of the EAW and access to legal representation by the police officers. The court will be asked to hold the initial hearing as soon as is practicable.

Where a requested person is provisionally arrested (prior to the receipt of an EAW) in England or Wales, he or she must be brought before the City of Westminster Magistrates' Court within 48 hours of arrest (page 36, sections 5 – 6 Extradition Act), together with a certified EAW and an English translation. Where the person is arrested pursuant to a certified EAW, the Extradition Unit police officers must ensure that he

or she is produced before an appropriate judge as soon as practicable. The report notes that the arresting officers will seek to provide the requested person with a copy of the EAW at the time of arrest or as soon as is practicable thereafter (page 38, section 4(3) Extradition Act). The report notes one case in which the High Court discharged the requested person because he was not brought before a court as soon as practicable, the arrest taking place on a Friday and the hearing scheduled for Monday.[46]

The police are responsible for the provision of linguistic assistance concerning the period before the first hearing, and lists of interpreters are kept at all police stations authorised to detain (page 38). After the first hearing the court will assume responsibility for this service.

If the court considers that a number of conditions relating to form and content of the EAW are satisfied, it must fix the substantive extradition hearing to commence within 21 days of the requested person's arrest (page 40, section 8(1)(a) Extradition Act). At this stage the issue of irrevocable consent will be raised, and the requested person will be advised that in if they don't consent, they can change their mind at any time. Bail will also be considered at this stage, and is reported to be not uncommon.

In Scotland the issue of irrevocable consent is addressed in open court at the first hearing, and a record of the signed form of consent, if given, will be prepared (page 41). While bail is a matter for the court and fact-dependant, the report notes that it is more likely to be granted in prosecution than in conviction cases (page 42).

Legal representation and legal aid

Changes made to the criminal legal aid system in England and Wales in October 2006 (introducing a means test to accompany the existing merits test) are reported to have significantly hampered the ability of requested persons to obtain ongoing legal aid, and representation by a duty lawyer at initial hearings is limited to a single appearance. The report also states that unrepresented clients are now making bail applications, considering consent to surrender and seeking to adjourn substantive surrender hearings. In Scotland legal aid is available for the initial representation, after this the requested person must submit a separate application to be assessed in the same way as domestic criminal proceedings.

It is thus recommended that immediate measures be put in place to facilitate the timely and adequate provision of legal aid to persons subject to EAW surrender requests in England and Wales (see 7.3.1.6, Recommendation 8).

Grounds for refusal

The Extradition Act lists ten specific grounds of refusal which apply equally in all three jurisdictions (page 45). These include where no guarantee for a retrial is given in *in absentia* cases and where the surrender (as opposed to the substantive proceedings) would be incompatible with ECHR rights (s. 21 Extradition Act, NB mainly Art. 6 and 10 ECHR). The experts are critical that these include grounds for refusal not found in the Framework Decision and which are at odds with the principle of mutual recognition page 46). The report recommends that these statutory issues be addressed in the light of *Pupino* so that the UK position may be brought more into line with the Framework Decision (Recommendation 1).

46 See *Nikonovs v The Governor of HM Prison Brixton* [2005] EWHC 2405 (Admin).

Time limits

In England and Wales the average period between arrest and first instance surrender decision is 28 days in consented cases, and 65 in non-consented cases. The experts note that the use of written pleadings by all parties contributed to restricting the average duration of surrender hearings to one hour where no consent is given. Where EAW requests are straightforward judges seek to hand down the judgment immediately. In other cases judgment can take up to two weeks. Contested hearings in Scotland may take 2 to 3 days (page 44) at first instance, which leads to considerable delay in the proceedings.

Requested persons are provided with the full range of appeal procedures available in the UK, which effectively precludes the UK authorities from complying with the Framework Decision surrender timetable (4.8, page 46). It is noted that the Extradition Act does not cite a time limit for the overall period between arrest and the final surrender decision, but only for each limb of the appeal proceedings.

The report recommends that the UK authorities re-examine the avenues of appeal available to requested persons and consider how best domestic practices may be streamlined to give effect to the surrender time limits set out in the Framework Decision (7.3.1.3, Recommendation 2).

After the final decision physical surrender must take place within 10 days (Extradition Act section 35), otherwise the requested person must be discharged (page 51, Extradition Act section 35(5)). This has recently been amended by the 2006 Police and Justice Act to take into account the 7 day window of appeal open to requested persons (page 51).

In England and Wales, all first instance appeals are as of right, and available within 7 days of the surrender decision (page 47). The appellate hearing must have commenced within 40 days of arrest; will be before two judges of the High Court; and will typically be listed for half a day. Following this hearing, either party may then appeal to the Supreme Court with leave. The substantive appeal to the Supreme Court must then be commenced within 28 days of the decision to grant leave, and there is no statutory limit as to when an ultimate ruling must be given (page 48).

In Scotland, while the appeals process regarding the first instance decisions is the same as in England and Wales, there is a limited appeal to the Supreme Court with the leave of that court where a case raises a matter of compatibility with the ECHR or EU law.

Specialty

The experts are of the opinion that the UK position regarding specialty is not compatible with the Framework Decision (page 49), as the Extradition Act introduces additional requirements before an agreement concerning prosecution of an offence not included in the EAW can be reached.

Training Provision

The report notes that the UK authorities have implemented a comprehensive package of training measures (pages 53 to 56), including a series of measures devised by the Crown Prosecution Service for its own staff and a variety of other stakeholders including specialist practitioners.

No specific mention is made of training for defence lawyers

Review of the UK's Extradition Arrangements[47]

In 2010, the UK Home Office commissioned a review of extradition under the Extradition Act 2003 be carried out by experienced extradition judge Sir Scott Baker and two practitioners. The review took evidence over the subsequent year from all available sources and compared the procedures in place in other jurisdictions.

Dual Representation

Article 11.2 of the Framework Decision provides that a requested person shall have the right to be assisted by legal counsel and an interpreter in accordance with the law of the executing member state (page 182). There is no corresponding requirement for the person to be represented in the issuing state (5.186).

The authors are in broad agreement that accused and convicted persons should be represented in both executing and issuing states as this should minimise delay through enhanced confidence of the executing state in the proper representation of the requested person in the issuing state (1.188). In the UK, legal representation in incoming cases is expressly provided for by sections 182-184 of the 2003 Extradition Act.

The report expresses the concern that dual representation should not be used as a device to impede the surrender process. It cautions that this should not be used for the purpose of conducting investigations or hindering the surrender process, as this would cause delay and not be in the requested person's interest.

As for outgoing requests (5.191), the review argues that the jurisdiction to grant legal aid usually only arises when a summons or a warrant is issued. Granting legal aid for the benefit of a person whose return to the UK is sought would require an amendment to the current legislative scheme, and while the authors are 'not against' such amendment, they 'appreciate that the allocation of funds from a limited budget to provide legal aid for a person overseas (…) is likely to be controversial'.

The report notes that representation in issuing member states cannot be achieved by the UK's unilateral action (5.190). In conclusion, any move towards dual representation would have to proceed on the basis of an EU-wide initiative (5.192). While the notion of dual representation is favoured in the report, its principal value is seen as strengthening of mutual recognition.

Time Limits

The general rule is that an EAW is dealt with and executed as a matter of urgency (5.223), which has led to the criticism of the short time limits in which surrender is to take place under article 17 EAW (page 194). The UK Extradition Act contains time limits which are considered to be in line with the Framework Decision and with the interests of justice generally (5.226). However, the report considers that the UK is

47 *A Review of the United Kingdom's Extradition Arrangements*, 30th September 2011, available at http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review?view=Binary

failing to meet the 90-day limit in a number of cases (5.228). There is no evidence that compliance with the time limits in the 2003 Act are a source of injustice or oppression, especially as extradition judges grant adjournments where necessary (5.229). However, there is such evidence in relation to the time limit on applying for an appeal, which should be increased from 7 to 14 days (10.09) amongst other procedural simplifications.[48]

Detention

The experts are concerned that early surrender may lead to lengthy periods of pre-trial detention in the issuing state and that once surrendered, defendants are held in prison establishments that fall far short of UK standards (5.230). This could be addressed in several ways, for example by encouraging Member States at EU level to ensure that proceedings are brought without unreasonable delay, and as required by article 6 ECHR, and by making use of the European Supervision Order. A more radical solution requiring an amendment of the Framework Decision is suggested of including a system of postponed surrender, so that the requested person is retained on bail in the executing member state until his or her appearance is required in the issuing state (5.223).

The report notes that the creation of an Area of Freedom, Security and Justice requires comparable treatment of individuals across the EU regarding prison conditions (5.234), which requires further coordination at the EU level.

In order to promote a culture of mutual confidence and trust, the report recommends the promotion of communication between judges and lawyers throughout the EU, as well as greater efforts to improve conditions of detention for persons detained both pre and post-trial (5.235).

Legal Aid

The report notes (10.26) uncontradicted evidence from extradition judges and practitioners of problems and potential injustice caused by the delay in means testing for legal aid (page 310). In the experts' opinion, such testing results in serious delay and adds to costs, for example through accommodation in prison on remand and wasted court and prosecution time (10.30). Means testing is also difficult where the individual is in custody, may not speak English or have access to the relevant documents.

The experts are particularly concerned about the increasing volume of extradition work, the slowness of process and the need to reduce time between arrest and final extradition hearing, and are of the opinion that legal aid should automatically be available at the time of the requested person's first appearance in court. The High Court has confirmed that it may be reasonable to postpone initial hearings until the requested person has been able to obtain legal aid and legal representation, which is welcomed by the authors (10.27).

The cost-effectiveness of any changes and the fairness and efficiency of the extradition process cannot be considered in isolation (10.34). They recommend careful but urgent consideration of reintroducing non means-tested legal aid in England, Scotland and Wales, which would promote fairness, assist in

48 The Supreme Court recently held that there should be flexibility in the approach to applications for appeal bearing in mind the lack of legal representation at this stage and the right to a fair hearing under article 6 ECHR. Therefore an extension to 14 days may also be too rigid a rule, *Lukaszewski, Pomiechowski, Rozanski v Poland et al.* [2012] UKSC 20

reducing the length of the extradition process and alleviate the burden on extradition judges. Should the government decide not to reintroduce non-means based testing, other steps need to be urgently taken, for example by giving courts the discretion to grant legal aid (10.35).

Training

The report notes that interviewed extradition judges would welcome a mandatory extradition training scheme for lawyers (page 314). The authors agree that this would enable them to advise clients better and advance cases expeditiously (10.36), but consider it to be largely the responsibility of the legal profession to develop such training.

Meeting with Crown Prosecution Service

17th July 2012, we met with a senior extradition prosecutor and a seconded barrister who acts for both the defence and prosecution

Arrest and hearing

At the initial hearing, the judge must ask whether the requested person wishes to consent, which requires access to legal advice. Accordingly, requested persons usually see a duty lawyer at this stage, or counsel in high profile cases. This initial hearing will cover issues surrounding identification of the requested person and consent, unless there are outstanding domestic proceedings or the requested person is currently serving a sentence, in which case the hearing will be adjourned. If the requested person consents to surrender (which is irrevocable and happens fairly frequently), he or she waives the right to specialty protection, and must be physically surrendered within 10 days. If the person does not consent, the case will be adjourned for a contested hearing.

Legal representation and legal aid

In the past, duty lawyers would pick up all extradition cases at court, now the court clerk tries to split the cases between courts, averaging at three cases per lawyer. The court deals with an average of five to six cases per day. The time for the duty lawyer to speak to the requested person at court is very limited, increasing the need for specialist training for such lawyers in order to know how to use that time wisely and ask the correct questions.

Sometimes a successful argument generates a trend of similar cases (for example with suicide risk/medical treatment). As a result, courts question whether some cases resisting extradition are genuine. In some of these cases it has been decided on appeal that the judge should have requested more information such as medical reports. But spurious claims make it harder for genuine cases to succeed. This is a matter which could be mitigated by a well-qualified lawyer who could advise the requested person as to the potential success of a claim and make well-founded arguments in his or her favour.

The lawyers were appreciative of the practice developed by some defence lawyers of establishing a checklist for EAW cases which they would use as a template for each case to make sure all elements were properly covered and dealt with.

Forms for legal aid are often not filled in properly by duty lawyers, which can delay cases for weeks. The requirement to fill these in at the first hearing is in any case problematic, as they are lengthy, in English, and difficult for a requested person to fill out. The forms should be available online to fill in electronically so that lawyers can do this more easily for their clients. They need to be much simpler.

Means testing is also generally impracticable in extradition cases, as it unduly prolongs the process. There are many questions which are difficult to answer, particularly about foreign nationals who may not be able to evidence their means easily. A decision on legal aid may still be pending when a hearing comes up. While it is outstanding, a judge may adjourn upon the merits if issues have been are raised, In some cases the requested person is therefore unrepresented despite requesting a lawyer.

In appeals, many requested persons are unrepresented because the duty lawyer will not help them with the notice, and only the good firms will assist with these because there is no legal aid at this stage. The court prepares an appeals pack but the system is overly complex. If the requested person could have someone to help them it would be much better for the system. Often no grounds or other information are included on appeal notices so prosecutors cannot prepare until further information is provided.

The representatives questioned whether an unfettered right to appeal is really useful in all cases, as occasionally lawyers draw out cases and give false hope, or unrepresented requested persons continue to appeal without any chances of ultimate success, whilst remaining in custody.

Training Provision

Generally duty lawyers are going to court daily so have built up experience and provide a good service. However, there is still no requirement to be accredited, and it is possible that a duty lawyer has no relevant experience. This means some requested persons do not have appropriate legal advice at the initial hearing, leading to problems later on in raising arguments on appeal, wasting time and money. If the duty lawyer is inexperienced, a case is more likely to go uncontested as many lawyers are also hesitant to ask for an adjournment. There are, accordingly, now several cases in which it has been alleged that lawyers were negligent in these early stages of the proceedings. If there is an obvious defect the court or prosecutor can intervene, but they can't know matters within the personal knowledge of the requested person alone.

The need for practical training is crucial, especially as lawyers only have a very limited time and often have to read through very long, technical, and badly translated EAW forms. Training sessions have been held including on the bars to extradition The prosecutor is involved in training and always advises that if there is an issue the defence want to raise, the lawyer should provide a statement of issues and where possible a proof of evidence from the client. The judge will test the issues at the first hearing and it is often hard to have a successful argument unless it is properly prepared. Accreditation to do legal aid work in EAW cases would be a positive improvement.

It would also be very helpful to have factsheets outlining procedures and conditions in each member state, for example concerning prison conditions, the availability of medical care and access to treatment. This could potentially prevent contentious cases.

Time Limits

The time limits under the new EAW procedure are much stricter than those of the old extradition procedure, and judges therefore expect a case to progress swiftly. However they will adjourn where a case raises serious issues.

Dual Representation

Dual representation should be funded through legal aid, as those wealthy enough to pay privately are already being represented in both executing and issuing states anyway so there is already an inequality. Time could be saved in many cases by providing representation in the issuing state to resolve the substantive issue. Judges are reluctant to grant adjournments that are seen as fishing expeditions when there are strict time limits to keep to so a provision allowing for this would help further such enquiries.

Issues can arise in practice regarding responsibility for instructing the lawyer in the issuing state, and also who will fund this. Usually, this is done through the requested person's family in the issuing state and lawyers are paid privately. Qualifications and fees of such lawyers need to be controlled somehow. This practice can be difficult as, where the family gets involved, the requested person may not know that they have even contacted a lawyer on their behalf. Hence it needs to be clear that the instructions have come from the requested person.

With respect to seeking advice on the warrant, if an EAW has been filled out in accordance with the EAW handbook, all pertinent information should be contained within it so there should be no reason for a defence lawyer to contact his or her counterpart in the issuing state. All EU criminal codes should be freely available for defence lawyers to access online. The particulars of a conviction are already checked by SOCA under section 2 and High Court case law has also clarified in the UK many aspects of how to approach validity of a warrant and limited these avenues of argument (for example, issue by a judicial authority/ limitation periods/ correspondence of offence). Equally where the EAW looks to be invalid it would better serve the requested person by arguing that the EAW is deficient and aim to have it struck down than seeking more detail that might point more towards validity than against.

In practice, prosecutors will pass on defence enquiries to the judicial authority in the issuing state, as long as the request from the defence is sufficiently precise and relevant to the case, though at the outset it can be difficult to know whether the enquiry is relevant. A proof of evidence is helpful because the prosecutor can pass this on to the issuing state to help explain the issue.

SIS Alerts

It is necessary to look at the reasons for refusal, as these can involve a technical point of the executing state's law. There are, however, cases where clearly the warrant should be withdrawn, for example cases of mistaken identity. In one such case, the requested person then travelled to Greece and was re-arrested on the same EAW which should be rectified.

Observations from Crown Office and Procurator Fiscal Service in Scotland

August 2012

The EAW has greatly increased the number of cases in court (to the frustration of all court users) as the issuing state will proceed at its own pace despite the Crown Office acting on their behalf and it has sought to encourage decisions to made in such a time as to coincide with Scottish court surrender hearings. Unlike the reported situation in Westminster Magistrates court they receive relatively few EAWs seeking surrender for trivial offences.

Legal representation

There is a small Bar of lawyers at Edinburgh, where the court is located and not much appetite for this type of work and counsel are infrequently sanctioned to be instructed on legal aid at first instance. There is also no one firm or person who has a significant practice in this area of work. The level of representation can be variable. However almost everyone who is ordered to be extradited appeals and the appeal court will look at resolving any defects from the lower decisions or consequences of poor representation.

Dual representation

There has been a significant increase in the number of cases with activity between the Scottish and mainly Polish lawyers seeking withdrawal of the EAW in Poland, once the requested person has been arrested and made aware the Polish authorities are pursuing the case. This has lead to increases in the number of cases deferred to await the outcome of those discussions; the consequent work of the prosecutor seeking verification of the position from the Polish authorities; and the number of EAWs that are withdrawn. It is however not universally successful and some requested persons find themselves waiting quite some time for a decision from Poland only to then have to consent. As this discussion only takes place after arrest, a number of requested persons have had to remain in custody waiting for a decision and then the EAW is withdrawn some weeks later.

Unfortunately, The Crown Office only receive notification to withdraw the EAW and are not generally provided with reasons and therefore it is not possible to draw any patterns of the circumstances in which Poland will withdraw EAWs.

Prosecutors will offer the issuing state advice (pursuant to section 191 of the Extradition Act) if they take the view that having been made aware of the requested person's circumstances, the EAW might be considered for withdrawal.

Defence perspective

The defence lawyers generally concur with all the problems highlighted above.

Legal representation and legal aid

There is a duty scheme in place for representation where a person does not have a lawyer. A representation order is for a solicitor only which restricts counsel being instructed inless a solicitor pays for them out of their fee. It is possible to apply for a certificate for counsel but it is necessary to demonstrate grave or unusual circumstances. This means the opportunity to access specialised advice is reduced and can risk duty lawyers with poor knowledge being instructed. By the time of appeal counsel can then be pretty limited in the arguments available to raise as unless there is new evidence, arguments should have been raised at first instance. There is a general limit as to how much legal aid can be spent on a case, however there are not specific EAW provisions although an increase can be applied for in extradition cases in England and Wales.

Training

There is no requirement for duty lawyers to undertake training in the EAW prior to acting. An accredited scheme is necessary akin to police station representation in England and Wales. A duty list specifically for EAW cases rather than a general criminal list has been proposed which may alleviate some of these concerns.

Proportionality

EAWs are issued for minor offences and for sentences where the requested person only has a short sentence left to serve which can have a grave impact on his or her life, especially if they are transferred to a country of which they are not a national. This was not the intention of the EAW Framework Decision. It is very difficult successfully to raise proportionality in the UK courts. A suggested alternative would be to have a duty lawyer scheme in the issuing state where a lawyer should be able to make representations as to whether the EAW should be issued. An impartial, independent duty defence lawyer could at least examine issues of proportionality and any other obvious matters at this stage which could prevent the injustices of the scheme.

Dual Representation

This is essential in conducting a case properly.

In Scotland, there is a problem obtaining the assistance needed to support arguments from the issuing state. It is very hard for Scots lawyers who generally do not have cross border specialism to obtain this information. All the cases are dealt with in Edinburgh where there is now some expertise and experience but lawyers have still not got to grips with how to find experts and address certain conditions where assistance is needed from the issuing state.

The prosecution can be unhelpful in providing answers to questions raised, despite having access to resources in the other member state.

Grounds for refusal

The threshold test for human rights arguments is far too high so that it is almost impossible to obtain a refusal on these grounds. Again dual representation is essential to obtain evidence to support these arguments. With specialist courts, although judges are familiar with the system, they can become set in their ways when dealing with similar points and are reluctant to fully explore the arguments being raised.

Detention

A lot more cases are being granted bail now, though when the EAW first came into force this was not so prevalent. Over time, many people established a life in the UK and can demonstrate community ties. Often people stay out of crime in the new country and their past comes back to haunt them with an EAW issued after many years.

Cases

England and Wales

UK1 – Italy - Non-consented surrender –issuing state lawyer

The requested person had been living in the UK for 10 years and had four children.

Instructions from the client

The requested person refused to consent to surrender due to the EAW being issued on the basis of a conviction *in absentia*. The conviction was later quashed, but the judicial authority did not withdraw the EAW.

Arguments raised against surrender

Inequality of treatment caused by Italian law, which does not grant those appealing *in absentia* judgments the same benefits usually granted in the first instance phase. Article 175 of the Italian Criminal Procedure Code does not guarantee the right to a fair trial in *in absentia* cases but merely at the possibility to request an appeal, for which conditions must be satisfied. If an appeal is granted, the appellate court will only review the evidence already heard at trial without re-hearing the evidence.

Contact with the issuing state

The British lawyer instructed the Italian lawyer to act as an expert witness in the surrender hearing. He was paid through public funding. He also acted in Italy in obtaining the quashing of the conviction and appealing the decision of the issuing judicial authority not to withdraw the warrant.

Decision

Surrender was ordered as the English court was satisfied by assurances from Italy that a re-trial would take place, notwithstanding the expert evidence about this.

UK2 – Poland – EAW withdrawn

Instructions from the client

The requested person did not want to return because she had an established life in the UK and a young child. She was advised by the duty solicitor that no arguments could be raised as the threshold is too high for making human rights based claims. The client contacted another defence lawyer because she was desperate and knew that there was a possibility to appeal. The requested person was advised that it would be difficult to utilise Rule 39 of the ECtHR rules of court to seek an injunction but an appeal was made in any event to the High Court.

Arguments raised against surrender

None by the duty solicitor; on appeal: disproportionate interference with article 8 ECHR right to family life as a result of separation from child who would have to be taken into care.

Contact with the issuing state

The problem of raising proportionality at the issuing stage only is that the issuing state authorities have no information as to the requested person's life in the executing state when they decide to issue a warrant. In this case therefore a Polish lawyer who was known to the requested person made submissions to the Polish court concerning his life in the UK and that the return would be disproportionate. As a result the court withdrew the EAW.

Final decision

At first instance surrender was ordered. The appeal was refused because the argument was not raised at first instance and there was no fresh evidence to be heard. Following the refusal of the article 8 argument, the requested person sought Rule 39 interim measures from the ECtHR as a result of the impact a separation from the requested person's children would cause, which were granted and remained until Poland subsequently withdrew the warrant.

UK3 – Spain – Non-consented surrender ordered

The requested person had spent 10 years in the UK.

Instructions from the client

He refused surrender as a result of the age of the allegation.

Arguments raised against surrender

At first instance and on appeal: Passage of time.

Final decision

Surrender ordered and upheld on appeal as there was no oppression from the passage of time.

Contact with the issuing state

The requested person was advised to instruct a Spanish lawyer for the proceedings in Spain, which he did. Following surrender to Spain, the judge declared the case inadmissible due to lack of evidence and the requested person was acquitted.

UK4 - Italy – Non-consented surrender ordered

The requested person was sentenced *in absentia*. He worked in the UK and had a wife and young child there.

Instructions from the client

He did not know about the trial and did not want to leave the UK as a result of his family and established life.

Contact with the issuing state

The defence lawyer obtained information from an independent expert (covered by legal aid) on the possibility of retrial in Italy and compatibility with s. 20.

Final decision

Surrender ordered. However, on appeal it was held that the judge had erred in the decision on s. 20

UK5 - Poland – EAW withdrawn

The requested person came to the UK looking for work after being convicted of 3 property offences (in 2005) in Poland. Part of the sentence had been served, but an EAW was issued for the outstanding 2 months and 10 days. The requested person was arrested on a domestic matter in the UK, and later on the EAW. After 3 months the prosecution discontinued domestic proceedings and asked for the requested person to be discharged but on bail for the EAW.

Arguments raised against surrender

EAW invalid because sentence to serve was too short (must be at least 4 months to serve on a listed offence conviction warrant); Disproportionate impact upon article 8 ECHR family and private life as only a short period of time left to serve.

Contact with the issuing state

The prosecution requested that the judicial authority in Poland withdraw the EAW because of the short time left to serve; It was unclear at the time whether this was upheld but it was thought by the defence lawyer that the proceedings were suspended.

Final decision

The EAW was withdrawn as a result of the time already served and the short time left to serve of the sentence.

UK6 – Czech Republic – surrender refused

The requested person had already been extradited a few years previously on accusation of a minor offence carrying a potential 6 months sentence, for which he was convicted and served 2 months in prison. He was then released and he returned to his family in the UK. A second warrant was issued by the Czech Republic for an offence allegedly committed before the above-mentioned one. An EAW was issued in 2011 stipulating that a 6 month sentence was left to serve for this offence.

Instructions from the client

The requested person refused to surrender as he was convicted *in absentia* and did not know about the offence.

Arguments raised against surrender

Abuse of process; shortness of sentence rendering warrant invalid/impact upon article 8 ECHR rights. The defence lawyer made an application for Rule 39 interim measures to the ECtHR but this was refused. , and repeatedly wrote to the Czech judge asking for the warrant to be withdrawn.

Contact with the issuing state

An issue of Czech law arose as to what point in a sentence a person is finally released at and is deemed to have served their sentence. The lawyer wrote directly to the Czech judge asking for them to withdraw the warrant, since only six months were left to serve and about automatic release/ right to re-trial on trials held *in absentia*. The judge replied after a number of chasing letters that the requested person is entitled to apply for release but needs to be in the Czech Republic to do so.

Final decision

The court refused to surrender due to confusion concerning the pre-existing warrant and also the time served: Half of the sentence was served in the UK because the requested person was remanded in custody.

UK7 – France – Ongoing

The requested person is accused of drug trafficking 20 years ago on the High Seas. The requested person is a UK citizen but lives in Spain, was arrested in Spain in 1990 and then released on bail and allowed to travel after the French authorities did not collect him. France issued an EAW in 2008 for the same offence. The requested person was again arrested in Spain but the warrant was refused due to statutory limitation under Spanish law. The requested person travelled to the UK and was arrested again in November 2011 for the same offence.

Instructions from the client

The requested person does not want to return for an offence that allegedly happened so long ago.

Arguments raised against surrender

There will be an issue as to the French law concerning and passage of time.

UK8 – Lithuania – non-consented surrender

Legal representation and legal aid

The requested person was represented by a lawyer from the first hearing who was paid through legal aid and spent 23 hours on the case which were all recoverable.

Instructions from the client

The requested person did not want to consent to surrender.

Non-detention measures or remand in detention

The requested person was released on bail subject to conditions.

Arguments raised against surrender

The EAW was not properly particularised; passage of time.

Contact with issuing state

Information was requested from Lithuania in relation to the passage of time argument. Contact with the Lithuanian lawyer was established via Fair Trials International. The lawyer's work was paid through legal aid as an expert witness. The Lithuanian lawyer submitted a report on Lithuanian law to the court.

The court requested further information from the issuing state, asking for a response to the defence's arguments on the passage of time and the particularisation argument.

Final decision

The court ordered surrender as it found that the warrant was valid and there was no oppression in the passage of time argument. The case took four months to conclude as a result of the requests for information.

Scotland

UK9 – Latvia – non-consented surrendered

The requested person was accused of a fraud offence from 2003/2004. He had lived in Scotland for some years. Main hearing took place several months after the arrest (no dates are given) - appeal hearing took place 18 months after the arrest – surrender 10 days after the appeal decision

Instructions from the client

The client refused to surrender because they thought the allegation was made as a result of persecution by the authorities for the fact that he is Russian and had refused to apply for Latvian nationality, due to his objections with the system and historical differences between Russia and Latvia. He was also concerned about the prison conditions and treatment he might receive in custody and in Latvia generally from national organisation Zemezardse.

Non-detention measures or remand in detention

Person was released under conditions on bail at the first hearing pursuant to an application

Arguments raised against surrender

Passage of time under section 14 of the Extradition Act 2003 (which is largely based on the argument that it will not be possible to have a fair trial because too much time has passed since the offence and it would be unjust or oppressive to extradite), prison conditions, in particular cell size, and 'extraneous considerations' under section 13 Extradition Act 2003 (political motivations (recital 12 of the framework decision – prosecuted on the grounds of ethnic origin/political opinion or that the person's position may be prejudiced as a result).

Contact with issuing state

The defence lawyer tried to get an expert opinion from Latvia about the prison conditions and to enquire about persecution but could not obtain one.

Final decision

The court ordered surrender as it did not find any of the arguments to be made out.

The appeal is as of right and was taken on the passage of time ground alone. This was covered by legal aid. The appeal decision was taken 18 months after the arrest and was refused.

UK10 – Poland – non-consented surrendered

The requested person was wanted for an allegation of money laundering and supply of drugs. Extradition hearing took place a few months after the arrest, appeal decision taken several months after arrest but appeal abandoned. Surrender took place 10 days after the appeal decision.

Non-detention measures or remand in detention

Person released on bail.

Arguments raised against surrender

Passage of time/article 6 ECHR arguments because files which would be important to defending the case had been lost; prison/remand conditions.

Contact with issuing state

An expert report was obtained with legal aid from a university professor with respect to prison condition and remand conditions given the repeated decisions in Strasbourg against Poland in Strasbourg on the grounds of prison conditions falling below the article 3 ECHR standard.

Hearing

The main hearing, after two adjournments for defence motions, took place few months after the arrest.

Final decision

Expert report too general, not helpful as to the impact upon the requested person in this case. Because the requested person fled the jurisdiction the passage of time argument was rejected. The appeal was abandoned as unsustainable on the prison conditions argument due to a higher court decision that found against the issue.

UK11 – Poland – non-consented surrendered

The requested person was wanted for theft having lived for many years in the UK, with an established family. The extradition hearing took place three months after the arrest following two adjournments for defence motions. The appeal decision was taken five months after the arrest. He was surrendered within 10 days from the appeal decision

Instructions from the client

He did not want to return because the allegation was very old and minor and he had an established life in Scotland with his family.

Arguments against surrender

Passage of time and oppressive impact upon life in UK. The defence were going to run prison conditions but because of the High Court decision making this argument very difficult to run, they decided not to use the expert report (same as above) because of it being too general.

Contact with issuing state

No contact was made with an issuing state lawyer.

Final Decision

No oppression, so no affect from the passage of time. An appeal was submitted on the grounds of passage of time but was refused.

UK12 - Latvia – surrender refused

The requested person was wanted on two warrants for allegations of a driving under the influence of alcohol offence with another offence. Extradition hearing took place two months after initial arrest.

Arguments raised against surrender

Non correspondence of the offence with a domestic offence; no specialty guarantee for the second offence; would have also argued prison conditions if required.

Final Decision

The court accepted the offence was not specific enough at the initial hearing and found the warrant invalid on that offence. An adjournment was made for Latvia to provide assurances that if returned for the second offence, the requested person would not also be tried for the driving offence. No guarantees were supplied. Therefore the request was refused by the court on the adjourned hearing.

UK13 - Austria – consented surrender on assurances

The requested person was wanted for taking of her children out of the jurisdiction illegally (effectively kidnapping).

Instructions from the client

The requested person was concerned about how her contact with children would be maintained in Austria, in particular that her youngest would be able to stay with her in prison (because of only being 6 months old)

Non-detention measures or remand in detention

Released on bail under condition to surrender her passport

Contact with issuing state

The Scottish authorities made enquiries about arrangements that would be made for returning them to Austria and placement upon return. Austria advised that it was usual to allow mother and baby to remain together in prison and that whilst they could not guarantee this because the prison would have to carry out an assessment, it was likely that this would be possible.

Final Decision

The requested person consented and the court ordered surrender.

UK14 – Czech Republic – non-consented surrender ordered at first instance; appeal outcome unknown

The requested person was wanted for service of a sentence. The main hearing took place 2 months after the arrest (following two adjournments on defence motion).

Instructions from client

The client said that they did not know of the court dates.

Arguments raised against surrender

Trial *in absentia*, guarantees needed for re-trial; passage of time making re-trial unfair in any event.

Contact with issuing state

Affidavits were sought from family members as to what was known and received about the court dates. These were arranged through the requested person's Czech lawyer, which the client liaised with personally.

Final decision

The court favoured the Czech account which was that the requested person had been informed of the trial and considered that he was a fugitive. Lawyer no longer acting on appeal.

UK15 - Poland – consented surrender

Main hearing took place many months after the arrest (many adjournments) – time limit was exceeded by 16 months, because the requested person had outstanding domestic matters.

Non-detention measures or remand in detention

The person was released on bail.

Instructions from the client

The client did not want to return because they were concerned about the prison conditions in Poland.

Arguments raised against surrender

The defence lawyer advised that given the high court case about prison conditions it was no longer possible to argue about this, so they simply preserved specialty arrangements and the client consented.

Final decision

The court ordered surrender.

UK16 – Poland – warrant withdrawn

Instructions from the client

The requested person did not wish to return because of prison conditions and the length of time that would be spent on remand awaiting trial.

Contact with the issuing state

The requested person's Polish lawyer (it is assumed he was privately paid for his work) was able to liaise with the court to arrange an expedited hearing and safe passage so that the person would not have to spend time in custody. As a result the warrant was no longer necessary so was withdrawn.

UK17 – Poland - withdrawn

The requested person was wanted for breach of payment of fine for a fraudulent use of a hire purchase agreement and as a result a custodial sentence was due to be served.

Non-detention measures or remand in detention

The requested person was released on bail on condition that she surrender her passport.

Instructions from client

The client advised that she could pay the fine.

Contacting with the issuing state

The client's Polish lawyer liaised with the court and made an ad hoc arrangement for the payment of the fine. As a result the warrant was withdrawn.

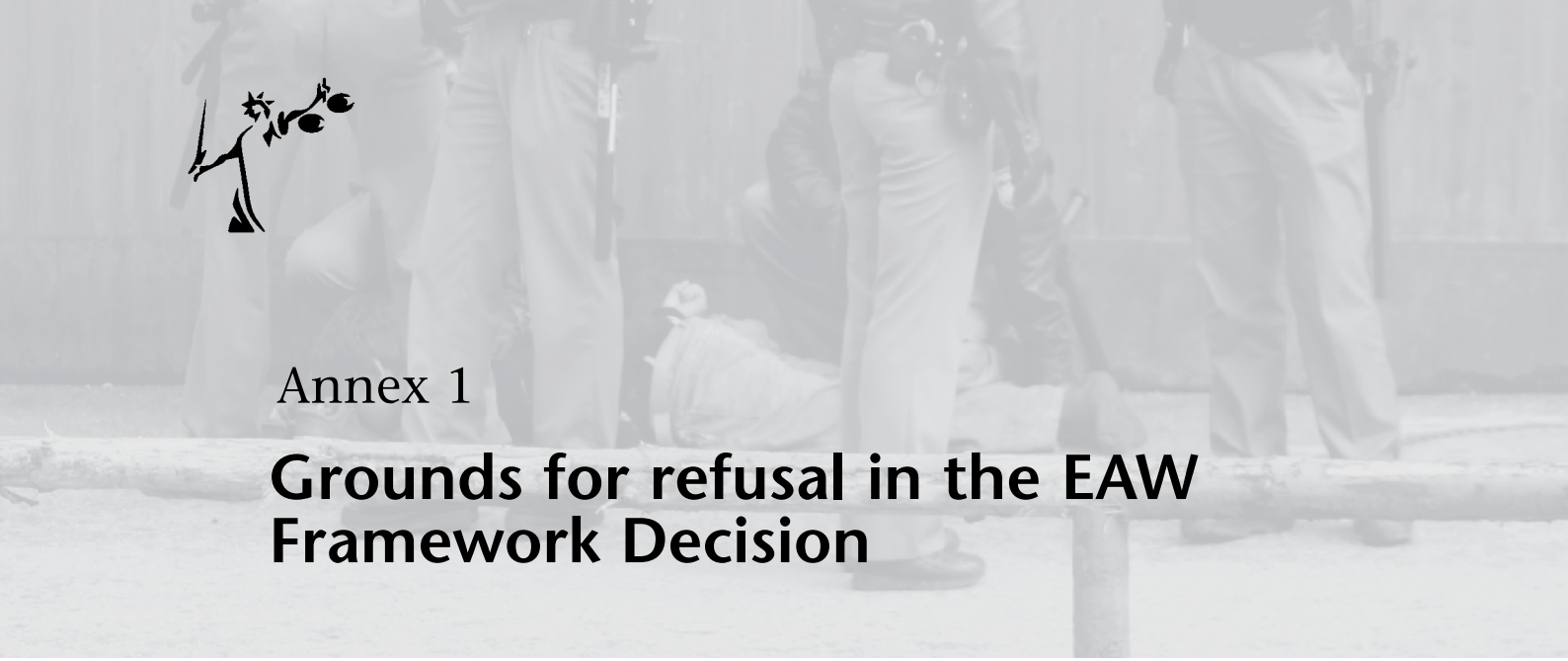
UK18 – Poland - Failed to attend

The client failed to attend the extradition hearing and nothing further has been heard by the lawyer. The lawyer had been looking in to specialty.

Contact with the issuing state

The requested person's Polish lawyer was asked to check if there were other matters outstanding.

The outcome of the case is unknown.



Annex 1

Grounds for refusal in the EAW Framework Decision

Article 1(3): Human rights

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 on the European Union.

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

The judicial authority of the Member State of execution (hereinafter .executing judicial authority.) shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

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

The executing judicial authority may refuse to execute the European arrest warrant:

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of

rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;

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

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

4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

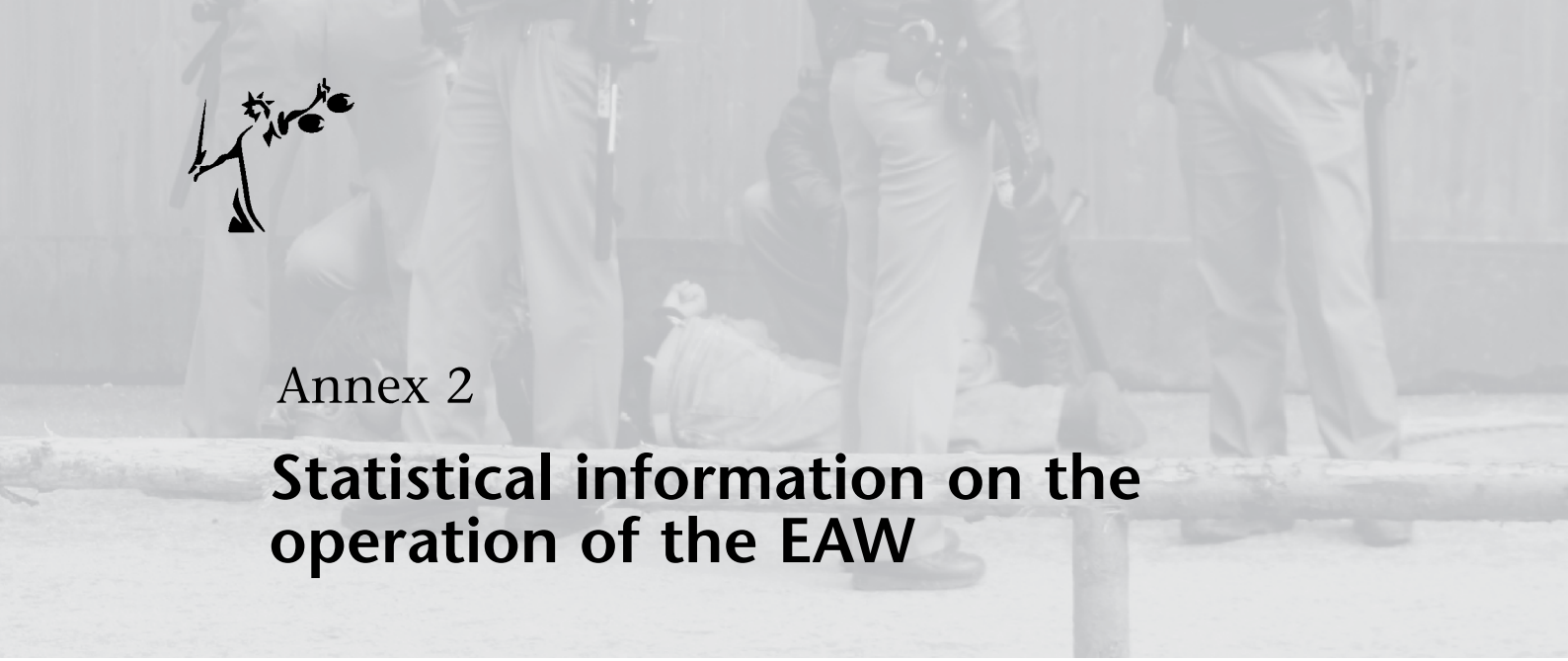
5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

7. where the European arrest warrant relates to offences which:

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

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



Annex 2

Statistical information on the operation of the EAW

The information contained below is sourced from the Council questionnaire on the operation of the EAW compiled over the last three years.[49] We have included the information most relevant to our project.

2011

	DE	*IE*	*PL*	*PT*	*SE*
EAWs received	14034	384	286	114	163
Surrender	979	177	186	68	137
Consented surrender	565		111	49	34
Non-consented	414		75	19	67
Refusal	135		60	10	7
Average surrender procedure/ Consent	15 days	4 weeks	17 days	12,5 days	ca 14 days
Average surrender procedure/ Non-consent	37 days	5,5 months	21 days	ca 68 days	ca 63 days
90-day limit not met	20		3	0	3
10-day limit not met	468	0	22	0	0

49 Replies to Questionnaire on quantitative information on the practical operation of the European arrest warrant, Years 2009 http://register.consilium.europa.eu/pdf/en/10/st07/st07551-re07.en10.pdf, 2010 http://register.consilium.europa.eu/pdf/en/11/st09/st09120-re02.en11.pdf and 2011 http://register.consilium.europa.eu/pdf/en/12/st09/st09200-re04.en12.pdf

Grounds for refusal

Germany

- Requested person not in Germany (7)
- EAW didn't satisfy formal requirements (6)
- Offence not punishable by a maximum period of at least 12 months in Germany (1)
- *Ne bis in idem* (1)
- *In absentia* without Art. 5 conditions being fulfilled (18)
- Statute-barred (19)
- No dual criminality for non-list offence (9)
- Extradition would have violated European public policy (1)
- Prosecution for same offence in Germany (1)
- Non-reciprocity (1)
- Non-national German resident refused to consent to surrender (22)
- Own national refused to consent to surrender (44)
- Extradition request from a third State had been given priority (3)

Ireland

- Correspondence couldn't be established
- Issuing State couldn't guarantee retrial
- Cumulative sentence on multiple offences, correspondence couldn't be established for one offence
- Invalid warrant
- Non-refoulement
- Art. 26 EAW FD
- Identification
- Health
- Extraterritoriality

Sweden

- Statute-barred (2)
- Own national wanted sentence to be executed in Sweden (3)
- No dual criminality for a non-list offence (1)
- No guarantee for retrial could be established (1)

Poland

- Art. 3(2) EAW FD
- Art. 4(2) EAW FD (*ne bis in idem*)
- Art. 4(2) EAW FD (parallel prosecutions in Poland)
- Art. 4(7)(a) EAW FD (crime committed on Polish territory)
- Art. 4(6) EAW FD (Polish national or resident, Poland undertakes to execute sentence)

- Art. 5(3) EAW FD (Own national or resident, no guarantee of return to serve sentence in Poland)
- Art. 1(1) EAW FD (EAW issued for purpose other than conducting a criminal prosecution or executing a sentence)

Portugal

- Statute-barred (2)
- Execution of sentence in Portugal (5)
- Dual criminality (1)
- *Ne bis in idem* (1)
- No confirmation of requested guarantees (1)

2010

	DK	*DE*	*EL*	*PL*	*PT*	*SE*	*UK*
EAWs received	64 (8 withdrawn)	/	213	297	/	117	4578
Surrender	35	1006	139	162	73	99	1068
Consented surrender	17	543	82	102	/	53	77
Non-consented	19	463	57	60	15	46	991
Refusal	1	153	20	71	8	6	58
Average surrender procedure/ Consent	16,5 days	15,4 days	10 – 30 days	21 days	ca 13 days	ca 13 days	ca 16 days
Average surrender procedure/ Non-consent	38 days	ca 37 days	20 – 80 days	25 days	67 days	ca 60 days	ca 93 days
90-day limit not met	2	32	0	5	0	3	/
10-day limit not met	21	521	0	20	0	4	0

Grounds for refusal 2010

Germany

- EAW doesn't fulfil formal requirements (9)
- Offence not punishable for a maximum period of at least 12 months in Germany (1)
- Remaining custodial sentence to be executed is less than four months (1)
- *Ne bis in idem* (3)
- *In absentia* without Art. 5 conditions being fulfilled (7)
- Statute-barred under German law (24)
- No dual criminality for a non-list offence (16)
- Extradition would infringe European public policy (1)
- Requested person is being prosecuted for same offence in Germany (3)
- Non-reciprocity (3)
- German non-national resident refused to consent to surrender (32)
- No guarantee for German national to be returned to serve sentence in Germany (2)
- Domestic connection of the offence (2)
- Own national has refused to consent to surrender for execution of a sentence (50)

Sweden

- *In absentia* (1)
- No dual criminality for a non-list offence (3)
- Statutory limitation (1)
- Own national refused to consent to surrender for execution of a sentence (1)

Portugal

- Error of identity (2)
- Sentence to be executed in Portugal (4)
- Lack of dual criminality for a non-list offence (2)

Poland

- Extradition would violate human or citizens rights under recital 12 of the EAW FD
- Own citizen or resident under Art. 4(6)
- Prosecution of the requested person in Poland for the same acts under Art. 4(2)
- Offence committed on Polish territory under Art. 4(7)(a)

2009

	DK	*DE*	*EL*	*IE*	*NL*	*PL*	*PT*	*SE*	*UK*
EAWs received	58	11.310 (SIS) 2.142 (Interpol)	216	326	683	286	99	93	4004
Surrender	25	982	127	263	408		61	87	628
Consented surrender	13	564	94	153	67	95	53	43	67
Non-consented	12	418	33	110	341	68	8	43	433
Refusal	5	174	23	27	50	/	6	4	10
Average surrender procedure/ Consent	19 days	15.7 days	10-30 days	6 weeks	10 days	24 days	14 days	ca 15 days	ca 16 days
Average surrender procedure/ Non-consent	35 days	37.8 months	15-20 days	4.5 months	76 days	31 days	70 days	ca 60 days	ca 93 days
90-day limit not met	1	36	1	101 since 2007	16	12	1	2	112
10-day limit not met	12	501	1	0	73	23	0	2	0

Grounds for refusal 2009

Germany

- The requested person is not resident in Germany: 14
- The European arrest warrant does not satisfy the formal requirements: 7
- Under the law of the requested Member State, the offence is not punishable by a custodial sentence for a maximum period of at least 12 months: 1
- The remainder of the custodial sentence still to be served is less than four months: 1
- The requested person has already been finally judged by another Member State in respect of the same act: 3
- Execution is requested on the basis of a decision rendered *in absentia* without the conditions permitted in Article 5 of the Framework Decision being fulfilled: 4

- Prosecution or punishment is statute-barred under German law: 42
- There is no double criminality in respect of an offence not listed in Article 2(2) of the Framework Decision: 6
- Extradition would contravene European public order: 2
- Criminal proceedings are being conducted against the requested person in Germany in respect of the same act: 5
- The requesting State cannot be expected to grant a similar request from Germany (lack of reciprocity): 0
- A foreign national habitually resident in Germany has not consented to extradition for the purpose of execution of a sentence: 34
- It cannot be guaranteed that a German national extradited for the purpose of prosecution will be returned to serve his sentence: 2
- In respect of the offence of which a German national is accused, there is a significant link with Germany within the meaning of § 80(2) of the Law on International Judicial Assistance in Criminal Matters (IRG): 2
- A German national has not consented to extradition for the purpose of execution of a sentence: 47
- Other (death of the requested person, residence in a third country): 4

Ireland

- Correspondence could not be established
- Issuing state could not provide guarantee of retrial
- Cumulative sentence on multiple offences where correspondence could not be established for one offence
- Invalid warrant (not signed by judicial authority)
- Identification
- Health

Sweden

- The wanted person could not be found in Sweden (1)
- The statutes of limitation in Swedish law (2)
- The arrest warrant concerned a custodial sentence and the wanted person was a Swedish national that demanded that the sanction should be enforced in Sweden (1)
- In addition, in one case a court reversed the decision to grant surrender due to the fact that the decision to surrender was not enforced within the stipulated time-limit.

Greece

- Law 3251/2004 : 11 par f (8 cases), 11 par d (2 cases), 11 par h (2 cases), 10 par 1a (1 case), 11 par
- b (7 cases), 11 par g (1 case), 12 par a (2 cases)

Netherlands

- Incompleteness of the EAW: 6
- Art. 2 (4): 7
- Art 3 (2): 2
- Art 5(1): 5
- Art. 4 (4): 1
- Art. 4 (6): 14
- Art. 4 (2): 2
- After the arrest of the person mentioned in the EAW it became clear that that was not the person wanted by the issuing judicial authority
- Different reasons (as the withdrawal of the EAW by the issuing authority after the court procedure started, the person was not in the Dutch territory, the judgement underlying the EAW was annulled in the issuing State, the issuing authority chose in a later stage to transfer the execution of the judgement): 13.

Denmark

In 2 cases execution was refused on the basis of the Danish Extradition Act Section 10e, cf. Article 4 (4) of the Framework Decision (statute-barred), in 2 cases execution was refused on the basis of the Danish Extradition Act Section 10g, cf. Article 5 (1) of the Framework Decision (absentia) and in 1 case the fingerprints of the person arrested did not comply with the fingerprints of the person sought.

Portugal

Art. 4 n°6 of the FWD.

United Kingdom

Discrepancies with the EAW, lack of evidence from requesting State, identity of arrested person in question, not a criminal offence in the UK and not a framework offence.

Annex 3

Pro formas used in the project

JUSTICE

INTERNATIONAL COMMISSION OF JURISTS

ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

BEST EVIDENCE IN EAW CASES

CASE QUESTIONNAIRE

Case name/reference: .....

Defence lawyer: .....

Issuing State: .....

Date form filled in:

1. Offence

1.1 What offence was the person accused/convicted (delete as appropriate) of?

.....

1.2 When did the offence (allegedly) take place?

.....

3 Instructions from the client

3.1 What were their reasons for refusing to surrender?

.....

4 Contact with issuing state

4.1 Was a point of the issuing state's law relevant to the case? YES / NO
If YES, please explain:

.....

4.2 Was a factual issue relating to the issuing state relevant? YES / NO
If YES, please explain:

.....

4.3 Were you able to obtain information about this from the issuing state? YES/NO
If no, why was this not possible?

.....

4.4 Who did you contact for the information and why?

(e.g. lawyer/academic/NGO)

.....

4.5 Please describe the work they did.

.....

4.6 Was the work:
Paid through public funding/ Paid privately/ *Pro bono* (delete as appropriate)

5 Submissions

5.1 What arguments did you make to oppose the execution of the EAW?

.....

6 Decision

6.1 How was the case resolved?

Surrender ordered by court/ Non-surrender ordered by court/ Voluntary arrangement (delete as appropriate)

6.2 What were the reasons for this decision?

.....

7 Appeal

7.1 If there was an appeal, did you raise different arguments than at the first hearing? Please describe these here and why

.....

7.2 Was the appeal allowed or refused?

.....

7.3 What reasons were given by the court?

.....

8 Client's Life in Executing State

8.1 How long had the person been living in the executing state?

.....

8.2 Did they have citizenship/residency (delete as appropriate)? YES/NO

8.3 Was the person working? YES/NO

8.4 If Yes, how long had they been working and in what field

.....

8.5 Please state what family members they had there. If children, state their ages.

.....

ADDITIONAL INFORMATION

Please provide any further important information about the case here

.....

.....

.....

.....

.....

.....

BEST EVIDENCE IN EAW CASES

LAWYER RECOMMENDATION FORM

The contents of this form will help establish a directory of peer recommended lawyers across the EU to assist in the provision of legal advice in cross border cases. Please complete it as honestly and accurately as you can. These will be lawyers you have approached for:

- Advice about the criminal law and/or its operation in practice in their country
- Assistance in your case(s) with negotiating/representations to their state authorities
- Acting as an expert in proceedings in your state

Your name and email address .....

Date.....

1.

Lawyer's name	
Firm (if applicable)	
Address (including email)	
Qualifications and experience	
Any particular expertise	
Languages spoken	
Work carried out for you	
Quality of work	

2.

Lawyer's name	
Firm (if applicable)	
Address (including email)	
Qualifications and experience	
Any particular expertise	
Languages spoken	
Work carried out for you	
Quality of work	

3.

Lawyer's name	
Firm (if applicable)	
Address (including email)	
Qualifications and experience	
Any particular expertise	
Languages spoken	
Work carried out for you	
Quality of work	

The European arrest warrant (EAW) came into force in 2004. It brought in radical change to the extradition process across the European Union. This has led to vast numbers of speedy hearings and surrenders. The EAW was originally promoted as a weapon in the fight against serious cross border crime, but warrants are requested for a wide range of offences and sentence lengths. They may also relate to alleged crimes that occurred many years ago.

There has been much discussion about the merits of the EAW. To date, the majority of reviews have focussed on the legislation and implementing laws. But, in spite of the mechanism afforded for doing so in the enacting legislation, little attention has been given to how a requested person may go about defending an EAW.

This report is the culmination of a two year study reviewing the opportunities to defend a warrant in practice. The study has looked in detail at the operation of the EAW in ten EU member states – Denmark, Germany, Greece, Ireland, Italy, Netherlands, Poland, Portugal, Sweden and the UK. It has reviewed cases from the perspective of the defence and made assessments of whether it is possible to put forward an effective defence to an EAW request.

The report raises concerns about the absence of effective procedural safeguards and the need to utilise other EU legislation to reduce the draconian and disruptive impact on those subject to an EAW. It makes five key recommendations, concerning:

1. provision of training for defence lawyers
2. ensuring dual representation is available in both the executing and issuing states
3. creating a peer reviewed database through which issuing state lawyers can be accessed
4. updating the Schengen Information System, through which the majority of warrants are notified, to remove inappropriate alerts
5. providing appropriate interpretation and translation for EAW proceedings.

The report concludes that, without these changes, safeguards intended to provide an effective defence will continue to fail – leaving the rights of individuals subject to a European arrest warrant inadequately protected.

JUSTICE is grateful to the EU Commission JPEN 2009 programme for assistance in funding this project.

JUSTICE – advancing access to justice, human rights and the rule of law

JUSTICE is an independent all-party law reform and human rights charity. It works largely through policy-orientated research; interventions in the higher courts; education and training; briefings, lobbying and policy advice.

JUSTICE, 59 Carter Lane, London EC4V 5AQ
Tel: +44 (0)20 7329 5100
Fax: +44 (0)20 7329 5055
admin@justice.org.uk
www.justice.org.uk

ISBN 978 0 907247 54 8