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COMMISSION STAFF WORKING DOCUMENT

Annex to the

REPORT FROM THE COMMISSION

based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

{COM(2005) 63 final}

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Annex to the Report from the Commission

1. INTRODUCTION

Under Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States¹ (hereafter ‘the Framework Decision’), the Commission has to establish a written report on the measures taken by the Member States to comply with this instrument.² This annex provides the detailed analysis of that report.

Paragraph (1) of that Article obliges the Member States to take the necessary measures to comply with the provisions of the Framework Decision by 31 December 2003. According to paragraph (2), Member States should forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

The quality and timeliness of the national information received by the Commission inevitably influences the value and the punctuality of the report and annex. The Commission reminded Member States of their obligation by means of letters sent in October 2003 and in July 2004. By 1st January 2004, only 6 Member States (BE, DK, ES, PT, SE, UK) had provided the Commission with the relevant transposing provisions. By 30.6.2004, 7 others (FR, IE, LT LU, NL, AT, FI,) had done so. The following 10 Member States only transmitted their transposing legislation in the third quarter of this year: DE, EE, EL, CY, LV, HU, MT, PL, SI, SK). By 15 December 2004, the Commission had received all transposing legislation with the exception of CZ which has not officially transmitted its legislation to the Commission and IT which at the time of writing has not adopted its national legislation, which is still under discussion in the Italian Parliament. The Commission has nevertheless examined the CZ legislation as informally transmitted. All national transposing legislation and related materials can be examined on the Council website.³

In addition to the transposition legislation, the Commission has also taken into account the complementary information transmitted by the Council (Article 34(3)) as well as the responses provided to the questionnaires sent to all Member States by the Presidency⁴, the EJM and the Commission. 19 of the 23 Member States requested by the Commission provided additional information. The Commission was able to take into account information received no later than mid January 2005.

¹ OJ L190, 18.7.2002, p.1

² COM(2005)XXX

³ http://ue.eu.int/cms3_Applications/applications/PolJu/details.asp?id=66&lang=EN&cmsid=720

⁴ COPEN 96 of 10.10.2003 et COPEN 94 of 26.7.2004.

2. CRITERIA FOR EVALUATION FOR THIS FRAMEWORK DECISION

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

Framework decisions can best be compared with the legal instrument of a directive⁵. Both instruments are binding upon Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. However, framework decisions shall not entail direct effect.

2.1. General criteria of evaluation

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

1. form and methods of implementation of the result to be achieved must be chosen in a manner which ensures that the directive functions effectively with account being taken of its aims⁶;
2. each Member State is obliged to implement directives in a manner which satisfies the requirements of clarity and legal certainty and thus to transpose the provisions of the directive into national provisions having binding force⁷,
3. transposition need not necessarily require enactment in precisely the same words in an express legal provision; thus a general legal context (such as appropriate already existing measures) may be sufficient, as long as the full application of the directive is assured in a sufficiently clear and precise manner⁸;
4. directives must be implemented within the period prescribed therein⁹.

Both instruments are binding ‘as to the results to be achieved’. That may be defined as a legal or factual situation, which does justice to the interest, which in accordance with the Treaty, the instrument is to ensure¹⁰.

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

⁵ Article 249 EC Treaty.

⁶ See relevant case law on the implementation of directives: Case 48/75 *Royer* [1976 ECR 497 at 518].

⁷ See relevant case law on the implementation of directives: Case 239/85 *Commission v. Belgium* [1986] ECR 3645 at 3659. See also Case 300/81 *Commission v. Italy* [1983] ECR 449 at 456.

⁸ See relevant case law on the implementation of directives for instance Case 29/84 *Commission v. Germany* [1985] ECR 1661 at 1673.

⁹ See substantial case law on the implementation of directives, for example : Case 52/75 *Commission v. Italy* [1976] ECR 277 at 284, See, generally, the Commission annual reports on monitoring the application of Community law, for instance COM (2001) 309 final.

¹⁰ See PJG Kapteyn and P. Verloren van Themaat ‘Introduction to the Law of the European Communities’, third edition, 1998, p. 328.

2.2. Specific criteria of evaluation

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

1. The judicial nature of the EAW: A decision should be made by the judicial authorities without interference of the Executive. In principle, the EAW is based on direct contacts between judicial authorities.
2. The efficiency of the EAW: Grounds for refusal have been strictly limited to legal motives provided in the Framework Decision. The general principle is that surrender of nationals and residents is no longer prohibited.
3. The rapidity of the EAW: Proceedings are simplified and accelerated thanks to the transmission of an EAW through various means and based on a unique common form. In principle decisions on surrender and their execution are subject to short time limits.

3. METHOD AND STRUCTURE OF THE ANNEX TO THE REPORT

As a first overview it can be noted that the implementation of the Framework Decision has in all Member States required the adoption of new legislation or at least the amendment of existing national provisions. Several Member States have revised their Constitutions, however, none have transmitted to the Commission the relevant amendments adopted in that respect. Some Member States have used, in addition to binding legislation, other procedures such as guidelines or circulars in order to ensure that particular articles of the Framework Decision are well carried out in practice. For the purposes of this report the Commission has indicated that a particular provision is “explicitly transposed” only where provisions are contained either in national implementing legislation or in existing national legislation which the Commission had the opportunity to examine. Where a Member State has indicated that a non-binding instrument has been used the Commission has not considered this to be full transposition since each Member State is obliged to implement directives¹¹ and *mutatis mutandis* Framework Decisions in a manner which satisfies the requirements of clarity and legal certainty. Nevertheless, such instruments are indicated, where the Commission has been able to examine them, since they will inevitably impact on the practical implementation of the Framework Decision.

At the time of drafting, 23 Member States have provided their implementing legislation. The Commission has also examined the CZ legislation. Where this report refers hereafter to “all Member States” it is meant to include only the 24 Member States under review.

Transmission of all implementing provisions including existing legislation combined with comparative tables and answers to questionnaires would have enabled a more complete analysis of implementation and resolved questions of interpretation. As such for specific provisions it has been indicated whether the position taken was based on full information or only on the provided legislation.

¹¹ See relevant case law on the implementation of directives: Case 239/85 *Commission v. Belgium* [1986] ECR 3645 at 3659. See also Case 300/81 *Commission v. Italy* [1983] ECR 449 at 456.

This annex analyses transposing legislation on an article by article basis. For each article, countries are identified according to whether there is full, partial or contrary transposition. The format of reporting has necessarily been adapted to take into account the enlargement of the European Union to 25 Member States. This annex will therefore focus on problematic areas and not describe in detail situations where countries have correctly implemented specific articles or will only mention briefly those articles which do not pose any significant problems. Synthesis of issues has been carried out where possible through general commentary but where there are detailed comments or interesting information on specific national situations, they are provided in the tables.

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

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

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

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

In relation to Member States’ implementation of Article 1(3) and the related recitals 12 and 13 (the issues in these recitals are covered by Article 6 TEU), there has been a varied transposition, with some States making direct reference to all the provisions whilst others have not specifically referred to these rights (CZ, EE, ES, LU, HU, PL, SK) since they are of the view that they exist independently of the Framework Decision and they are therefore bound to respects such rights in any case. Those who have transposed the provisions have made a breach of the mentioned rights (in Article 1(3) and recitals 12 and 13) a mandatory ground for refusal.

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

12 Member States have completely or to some extent transposed Recital 12 (DK, DE, EL, FR, IE, CY, LV, MT, AT, SI, FI and UK). In this regard, the most commonly omitted grounds are “sex” or “sexual orientation” and “language”. Furthermore, 10 Member States have either partly or fully transposed Recital 13 (DK, DE, EL, IE, CY, LV, MT, AT, PT and FI).

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

IE in addition to referring to the ECHR, requires refusal where surrender would breach its national constitution. Although this may cover situations arising under both Article 6 TEU and Recital 12 (such as rules on due process), it may nevertheless go beyond the Framework

Decision, in particular as Art 6 TEU refers only to those constitutional principles common to Member States.

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

Article 2 – Scope of the European Arrest Warrant

Few problems have arisen in relation to the scope of the EAW under Art 2(1), with 22 Member States having transposed it correctly (BE, CZ, DK, DE, EE, EL, ES, FR, IE, CY, LV, LT, LU, HU, MT, PL, PT, SI, SK, FI, SE, UK).

In relation to an EAW for the purposes of serving a custodial sentence, both NL's and AT's legislation require not only that the sentence is for at least 4 months but **simultaneously** that the related offence is punishable by at least 12 months. This is the system that was in place under the old extradition regime. However, under the Framework Decision, there is no longer a link between the length of the actual and potential punishment. This means that where a person has already been sentenced, and that sentence is 4 months or more, it is irrelevant what the maximum possible sentence was. As a result, NL's and AT's implementation is considered to be contrary to the Framework Decision. Moreover, AT accumulates the length of the sentences or the punishments if there are more offences committed by the same person.

It is also noticeable that not all countries have made reference to detention orders; the reason usually being that this concept does not exist in their legal system. It is not clear at this stage whether this will cause any difficulties though of course if a Member State refuses to execute an EAW on the basis that it was for a detention order this would be in contravention of the Framework Decision.

17 Member States have implemented the double criminality list in Art 2(2) in complete conformity with the Framework Decision (CZ, DK, DE, ES, IE, CY, LV, LT, LU, HU, MT, NL (extended list to include manslaughter), AT, PT, SK, SE and UK). With regard to the other Member States, it is possible that difficulties in translation or differences in the interpretation of the meaning of the categories of offences have resulted in alternative transposing texts. 4 Member States have omitted categories of offences in the list which is, prima facie, contrary to the Framework Decision (EE, EL, FR, and SI). At the same time, some Member States may consider certain categories to be covered by other categories e.g. racketeering and extortion (EE, EL, FR); bribery and corruption (FI). Finally, BE has limited the category of murder and grievous bodily injury.

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

There have not been any noticeable difficulties in relation to the 3 year limit in Article 2(2). The UK even reduced the limit to one year for conviction cases. Though it does not pose a problem, FI and SE have, however, legislated that in relation to a custodial sentence it must be for a length of at least 4 months as required in Art 2(1).

In examining legislations the question arose of whether attempt and complicity are covered by the list of categories of offences and thus whether double criminality would also be abolished in relation to them. The UK has included this in its implementing law whilst the PL penal code treats both as equivalent to the commission of the offence. 15 Member States (BE, EL, FR, CY, LV, LT, LU, HU, MT, NL, AT, SI, SK, FI, SE) have indicated to the Commission that they consider double criminality to be abolished in relation to attempt and complicity in the listed offences. Only EE and IE have explicitly stated they will apply the double criminality principle to such acts. No information was available for the remaining Member States.

EE	Not all the categories have been transposed exactly but this hasn't limited those categories. Thus in relation to laundering there is no mention of "the proceeds of crime" or reference to trafficking in cultural goods without mention of "antiques and works of art". At the same time there has been no reference to "racketeering". This is not in line with the Framework Decision.
EL	Some of the categories of offences are in fact wider than in the Framework Decision e.g. illicit trading and trafficking in drugs, corruption and bribery. At the same time there has been no reference to "racketeering". This is not in line with the Framework Decision.
FR	Slight adaptations of the wording have been made. At the same time there has been no reference to "racketeering". This is not in line with the Framework Decision.
NL	NL extended the list by including manslaughter though of course this does not limit the category.
PL	Most of the list has been transposed differently but in line with the Framework Decision. Several offences appear wider than the Framework Decision e.g. "illegal production, processing trafficking or smuggling of intoxicating substances, precursors, replacement substances or psychotropic substances".
SI	Most of the list has been transposed correctly although swindling has not been included and racketeering and extortion are only covered when committed in a group or with weapons. This is clearly a restriction of the category as defined in the Framework Decision.
FI	Differences to the list exist such as reference to bribery which is not necessarily as wide as the category of corruption or to deliberate homicide rather than just murder although this does not limit the category.

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

20 Member States have transposed Article 3(1) correctly (BE, CZ, DE, EE, EL, ES, FR, CY, LV, LT, LU, HU, MT, AT, PL, PT, SI, SK, FI, SE). NL and UK have not transposed this paragraph since there is no possibility of amnesty in those countries and so this is obviously

not viewed as being contrary to the Framework Decision. On the other hand, DK's implementation refers to a pardon rather than amnesty. Since in DK a pardon is only part of the wider term of amnesty it is therefore more restrictive and cannot be viewed as being completely in line with the Framework Decision. Finally IE has transposed this paragraph to allow for immunity by virtue of amnesty or pardon in the issuing Member State rather than the executing Member State. This is not in line with the Framework Decision which allows refusal only where there is amnesty in the Executing Member State. This may have an impact on the efficiency of the EAW system since it may result in IE always requiring this additional information, which was not foreseen in the EAW form.

In relation to paragraph 2, 21 Member States have carried out implementation correctly (BE, CZ, DK, DE, EE, EL, ES, FR, CY, LV, LT, LU, HU, MT, NL, AT, PL, PT, SI, SK and SE). IE's legislation on this paragraph allows for refusal where the person is being proceeded against rather than where there has been final judgment and therefore does not refer to whether the sentence has been, is being or cannot be served. The result could be that a person can be surrendered for the purposes of executing a sentence contrary to the Framework Decision. The UK's implementation is also contrary to the Framework Decision since it requires that the offence is also an offence in the UK for the *ne bis in idem* principle to apply. The Framework Decision does not allow for this restriction and moreover the European Court of Justice has held in its judgment in *Gozutok* that the application of *ne bis in idem* is not conditional on harmonisation of criminal procedural laws whereby further prosecution is barred¹². In addition, although it should not pose a problem, PT legislation refers to the state where the decision was made rather than the sentencing state.

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

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

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

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

¹² Joined Cases C – 187/01 *Gozutok* and *Brugge C* – 385/01 of 11 February 2003

In PT, the surrender shall be refused if the arrest warrant is issued on account of political reasons, while in DK refusal shall occur where there is a danger that, after extradition, the requested person will suffer persecution for political reasons. In both cases this creates the risk that a refusal will go beyond the Framework Decision.

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

On a further note, NL and UK have introduced additional grounds for refusal arising from the application of Treaties or Conventions which have not been set aside by the Framework Decision. NL has specified that they shall not apply the Framework Decision to surrender of members of crews, who are deserters, or to surrender of foreign military personnel, where such surrender takes place by virtue of an agreement with one or more states with which NL is allied. NL has stated that the former can be expelled and the latter have never been subject to normal extradition procedures between Member States since specific Treaties apply to them. The UK has also specified that surrender to a Member State is barred by reason of hostage taking considerations in specific situations where the International Convention against the Taking of Hostages of 18 December 1979 applies. The Commission has not examined these Treaties or the Convention but it can be noted that they have not been set aside by the Framework Decision. Furthermore, following Article 307 of the EC treaty and the ECJ's Jurisprudence¹³, a Member State cannot rely on the provisions of an international agreement preceding the Treaty in order to avoid its Community law obligations or restrictions. These requirements developed under community law apply *mutatis mutandis* to Framework Decisions through the application of the principle of loyalty for intra-Union relations.

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

As mentioned above, many Member States have interpreted this article as meaning that the State may choose whether a judge is required to refuse surrender where one of the Article 4 grounds exists or whether the judge has discretion in the matter. As a consequence many States have made these mandatory grounds for refusal. At the same time, since this Article is optional some Member States have not transposed at all. These Member States are therefore not mentioned below.

A total of 15 States have transposed **paragraph 1** as a mandatory ground (BE, CZ, FR, IE, CY, LT, LU, HU, MT, NL, AT, SI, SK, FI, SE) with 7 maintaining it as an optional ground (DK, DE, EL, ES, PL, PT, UK). EE and LV have not transposed this paragraph but EE has stated it will apply it in practice, though this cannot be viewed as full transposition.

17 states referred to the tax exception in line with the Framework Decision (BE, CZ, DE, EL, ES, FR, IE, CY, LU, HU, MT, AT, PL, PT, SI, SK, UK). The remaining states have not

¹³ Case C-473/93 Commission v Luxembourg [1996] ECR 3207, paragraph 40

mentioned this and whilst DK, LT, NL have stated they will follow the Framework Decision in practice, this cannot be viewed as full transposition.

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

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

Part 1 is mandatory for 5 Member States (IE, HU, NL, AT (with some exceptions for foreigners), SE). It is optional for 16 Member States (BE, DK, DE, EE, EL, ES, FR, CY, LV, LT, LU, PL, PT, SI, SK, FI).

Part 2 is mandatory for 6 Member States (CZ, IE, HU, NL, AT (with some exceptions for foreigners), SI). It is optional for 15 Member States (BE, DK, DE, EE, EL, ES, FR, CY, LV, LT, LU, PL, PT, SK, FI). However, this is not in line with the jurisprudence of the ECJ¹⁴ to the extent that where a Member State has decided to halt proceedings once the accused has fulfilled certain legal obligations, refusal to execute a European Arrest Warrant should be mandatory.

Part 3 is mandatory for 8 Member States (BE, CZ, IE, HU, NL, AT (with some exceptions for foreigners), SI (only in relation to a final judgment passed by SI), SE). It is optional for 9 Member States (DE, EE, EL, ES, CY, LU, PT, SK, FI). PL's legislation is not sufficiently clear in this matter and could allow for refusal where a final judgment has been passed in any other State, including third states.

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

Article 4(5) has been transposed as a mandatory ground by 12 States (CZ, FR, IE (however, there is no mention here of where the sentence may no longer be executed), LT, HU, MT, AT, PL, SI, SK, SE, UK) and as an optional ground by 9 states (BE, DK, EE, EL, ES, CY, LU, NL, FI)

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

Article 4(6) has been transposed as a mandatory ground by 7 States (EE, EL (for nationals), CY (for nationals), LU (nationals and well integrated residents), HU, AT, SE (for nationals who consent to sentencing in SE and in agreement with the issuing State)) and as an optional ground by 11 states (BE (only in respect of nationals), DK (although the legislation does not

¹⁴ Joined Cases *Gozutok* (C – 187/01) and *Brugge* (C – 385/01) of 11 February 2003

oblige DK to undertake the execution of the sentence), DE, EL (for residents or persons staying in EL), ES, FR (for nationals), CY (for residents or persons staying in CY), LT, PT, SI, FI).

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

PL has made this a mandatory ground for refusal for nationals and those granted asylum whilst it is optional for residents. However, in relation to the undertaking to execute the sentence it is not clear whether the court has retained a discretion on the execution.

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

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

In LV this is a mandatory ground but there is no provision in the legislation requiring an undertaking to execute the sentence. Nevertheless, LV has stated that such an undertaking would be given.

Article 4(7a) has been transposed as an optional ground by 13 States (BE, ES, FR, CY, LV, LT, LU, HU, NL, PL, PT, SI, FI) and as a mandatory ground by 8 States (EL, IE (if only proceedings have been brought in IE against the person concerned), MT, AT (only in respect of nationals), SK, UK and also partly in DK and SE (where the act has been committed in these last two countries, even partly, but is not punishable therein).

Article 4(7b) has been transposed as an optional ground by 11 states (BE, EE, ES, FR, CY, LV, LU, NL, PT, SI, FI) and as a mandatory ground by 7 States (DK, EL, IE, LT, MT, AT (only in respect of nationals), SK). It can be noted that in NL, at the public prosecutor's request, and only in terms of Dutch legislation, a refusal of surrender shall be waived, unless, in the opinion of the court, the public prosecutor could not reasonably make such a request.

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

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

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

All Member States except ES and LV require the Article 5(1) guarantee. Of these MT and UK impose additional conditions, not envisaged in the Framework Decision, in relation to the conduct of the hearing, such as the right to defend oneself in person or through legal assistance of ones own choosing or where appropriate to be given free legal assistance and to obtain the examination of witnesses on ones behalf under the same conditions as witnesses against oneself.

11 Member States require the Article 5(2) guarantee (DE (as an optional ground for refusal), EE, EL, ES, CY, LT, NL, PL, PT, SI, FI (the guarantee only requires the possibility of amending the sentence or clemency)) whilst 13 States do not impose this condition (BE, CZ, DK, FR, IE, LV, LU, HU, MT, AT, SK, SE, UK).

In relation to the Article 5(3) guarantee, 18 States have this requirement (BE, DK, DE (this is a mandatory requirement in relation to DE nationals/residents), EE, EL, ES, FR (only in relation to nationals), CY (mandatory for nationals and optional for residents), LV, LT, LU (for nationals and well integrated residents only), HU (mandatory where the person requests it), AT, PL, PT, SI, FI (for nationals where requested or residents where requested and with regard to the circumstances), SE) whilst IE, MT and SK do not impose this condition.

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

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

IE	IE also requires a guarantee that the person will be notified of the time when, and place where any retrial in respect of the offence concerned will take place and that her or she will be permitted to be present when any such retrial takes place.
LT	NB the penal code only provides for a possibility of review after 20 years and not within 20 years.
NL	NL has legislated that for surrender purposes, life sentences and custodial sentences of indefinite period shall be equated to custodial sentences longer than twelve months. The paragraph 2 guarantee is therefore likely to be required in most cases.
PL	In relation to paragraph 2 of the FD, PL does not require the possibility of a retrial

	within the 20 year limit.
SE	SE has placed a limitation on its guarantees such that if the person resides for more than 2 years in the Issuing Member State, surrender can take place even without the guarantees, unless there are particular reasons why the sentence should be executed in SE.

Article 6 – Determination of the competent judicial authorities

Article 6 has been transposed by all countries with almost no difficulties. Only SK failed to notify the General Secretariat of its relevant authorities.

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

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

The Framework Decision does not define what a judicial authority is, this question being left to the national law of Member States. Whilst it is understood that the Minister of Justice is designated by national Danish law as being a judicial authority, it is difficult to view such a designation as being in the spirit of the Framework Decision. One of the main advances of the European Arrest Warrant system is the removal of the possibility of political involvement from the surrender proceedings. It must be noted as a result that the designation of an organ of the state as a judicial body impacts on fundamental principles upon which mutual recognition and mutual trust are based.

In addition, EE and LT have indicated that an EAW for enforcement of a sentence is issued by the Ministry of Justice. Again, the Framework Decision states that an EAW must be issued or executed by a judicial authority.

For FI, the Criminal Sanctions Agency shall issue the warrant enforcement of a custodial sentence and in SE, the National Police Board (Rikspolisstyrelsen) will enforce a custodial sentence or other form of detention.

Article 7 – Recourse to the central authority

13 Member States have indicated that the central authority is the Ministry of Justice (BE, EE, EL, ES, FR, IE, CY, HU, AT, PL, SI, FI (as well as the SIRENE Bureau) and SE). In the case of LV and PT they have specified the office of the Public Prosecutor as the central authority, MT has done so for the Office of the Attorney General and the UK has named the National Criminal Intelligence Service (in the Home Office) or the Scottish Crown Office (if the person is in Scotland). CZ, DK, DE, LT, LU, NL, SK have not declared a Central Authority.

It is clear, that EE and IE have provided additional powers for their respective Central Authorities not envisaged by the Framework Decision. In EE and IE, these powers relate to the agreement of a new date under article 23(3-4) and to consent under Article 27(3), 28(2-3). In EE, these powers relate also to issuing a EAW for executing a custodial sentence under article 6(1). These powers are detailed under the specific articles.

DE	The situation differs from one Land to another.
IE	The Central authority is the Minister or those designated by order, as he considers appropriate to perform such functions of the central authority.
MT	The Attorney General is required to transmit and certify EAWs (in particular that the incoming request has come from an authority having the function of issuing arrest warrants in the requesting country), renunciations to the speciality rule, consents to further surrender to a third Member State and consents to further extradition to a third country. The Attorney General is also in charge of consenting to the issue of a EAW and lodging an appeal in respect of a person.

Article 8 – Content and form of the European arrest warrant

All Member States except 2 have transposed this article. MT and the UK have not indicated in their legislation all the information in Article 8(1) or whether they use the correct form. The UK has, nevertheless, stated that in practice it uses the form in the annex to the Framework Decision.

Although the model form should be sufficient, CZ requests additional items if the person was sentenced in absentia or, as regards time limitation, if a period of more than 3 years has lapsed between the commission of the offence and the issuing of the EAW. MT legislation seems to request additional certificates on the nature of the offence from the issuing judicial authority.

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

The Commission was informed that Irish authorities have requested the issuing of a different EAW for each offence committed by the same person.

At least 12 Member States can set time limits for the provision of additional information or translation (DK, DE, ES, FR, LV, LT, NL, HU, AT, PL, PT, SE). Of these at least 6 will either refuse the warrant or set the person free if the information is not received in time or if the warrant is not complete (DE, ES, LT, PT, SK, SE). CY on the other hand will send back an incomplete form and require it again.

Accepted languages pursuant to Article 8(2):

BE	Dutch, French or German
CZ	Czech. In relation to the Slovak Republic the Czech Republic shall accept a EAW produced in the Slovak language or accompanied by translation into the Slovak language The Ministry of Justice shall specify by Decree the model for the EAW and the language other than the official language(s) in which, curiously, the Member States will accept a EAW.
DK	Danish, Swedish, English. If the case is urgent they will translate the warrant but generally they ask for translation.
DE	Any official language of any Issuing Member State which recognises EAWs in German issued by German judicial authorities
EE	Estonian or English
EL	Greek
ES	Spanish. Where a EAW is issued through a Schengen alert, the Executing Judicial Authority will ensure translation if it is not in Spanish.
FR	French. The Issuing Judicial Authority must provide additional information within 10 days.
IE	Gaelic or English or a language that the Ministry of Justice may by order prescribe, or the EAW with a translation into Irish/English.
CY	Greek, Turkish, English.
LV	Latvian and English
LT	Lithuanian and English
LU	French, German or English
HU	Hungarian or a translation of the warrant into Hungarian. In relation to Member States which do not exclusively accept the EAW in their own official language or in one of their official languages, HU accepts the EAW in English, French or German, or accompanied by a translation in one of those languages.
MT	Maltese or English
NL	Dutch or English, or any another official language of the European Union provided that an English translation is submitted at the same time
AT	German or any official language of those Member States which accept EAWs in German issued by Austrian courts.
PL	Polish.
PT	Portuguese

SI	Slovenian
SK	Slovakian or any other language based on reciprocity
FI	Finnish, Swedish and English
SE	Swedish, Danish, Norwegian, English or a translation to one of these languages.
UK	English or a translation of the warrant into English.

Article 9 – Transmission of a European arrest warrant

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

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

Time limit after the arrest of the person sought, for the receipt of the European arrest warrant¹⁵:

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

¹⁵ The days are to be understood as calendar days unless indicated otherwise.

	(A time limit of 7 days will apply when the SIS will be applicable to Ireland.)
CY	3 days provided that the EAW has been issued before the arrest of the person sought
LV	72 hours
LT	48 hours after the arrest of the person
LU	6 working days
HU	40 days
MT	The 48 hour limit applies only in cases where a provisional arrest has been effected in the absence of an EAW. It is only in exceptional circumstances that provisional arrests will be made.
NL	In relation to Member States who participate in the SIS: at least 20 days when the arrest is based on a SIS alert. In relation to Member States who do not participate in the SIS, the EAW has to be received as soon as possible.
AT	40 days
PL	48 hours. That is the maximum period of “normal police detention”. It is applied in cases where the executing authority is not convinced that a EAW (irrespective of the language) has been issued. In cases where the executing authority is convinced that a EAW has been issued and where only the translation is lacking, the translation of the EAW has to be received within the “general rules” applicable to detention (3 months).
PT	left to discretion of courts, usually 10 days
SI	20 days
SK	a) <u>48 hours</u> after the person has been arrested (for the receipt of a <u>copy</u> (e.g. fax) of the EAW with translation into the Slovak language, where applicable, even if it is a provisional translation); <u>18 days</u> from the arrest of a person for the receipt of the <u>original EAW</u> and the <u>original</u> document containing the <u>translation</u> of the EAW into the Slovak language. If the mentioned documents are not received within 18 days, a prosecutor can make a motion to the judge for the release of a person from custody, where applicable; if the documents are not received within 40 days, the release of the person is mandatory.
FI	as soon as possible (some days)
SE	as soon as possible (a few days, decided by the prosecutor)

UK	48 hours after a provisional arrest; however, provisional arrest will only be used in exceptional circumstances; if requested, the EAW must be supplied or the subject will be released.
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Source : Council Document COPEN 111 rev1 of 12.10.2004.

Article 10 – Detailed procedures for transmitting a European arrest warrant

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

There is an acceptance to using the European Judicial Network (Article 10(1-2)) and Interpol (Article 10(3)) where it is necessary. It seems apparent that Interpol is regarded as the main alternative to transmission through the SIS with 18 Member States specifically referring to Interpol in their legislation and all States actually making use of Interpol. Only 10 refer to the EJM as per paragraph 2 (BE, EL, ES, FR, IE, CY, LT, AT, PT, SI).

In relation to Art 10(5), few States have specifically transposed this provision. Many were of the opinion this would be done as a question of good practice and did not require legislation. The Commission is not aware of cases where this issue has been raised.

The automatic retransmission of a EAW to the competent executing authority in a given Member State (article 10(6)) has been explicitly provided by the legislation of all Member States except the following 7 (DK, EE, LU, HU, MT, FI and UK).

Article 11 – Rights of a requested person

All Member States have shown that they have either fully transposed this article or already have provisions in place. MT and FI have not, however, transmitted any provision (or no binding provision was available in the case of CZ) in respect of the right to an interpreter pursuant to article 11(2).

Article 12 – Keeping the person in detention

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

Article 13 – Consent to surrender

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

Nevertheless, BE, MT, NL, AT and the UK have implemented Article 13(1) in such a way that where consent to surrender is provided there is an automatic renunciation of the speciality rule. This is a continuation of the system they used under the 1995 Simplified Extradition Convention, Art 13(1) Framework Decision being similar to Article 7 of the Convention. Although in line with the explanatory report of the aforementioned Convention, the link used by the mentioned States obviates the opportunity for express renunciation. The risk engendered with such a rule is that consented surrender in such countries may be less common than in other countries and thus the efficiency of the surrender procedure may be reduced.

Paragraphs 2-4: There has been a variable explicit transposition of the remaining provisions in Article 13. Most Member States have included everything in their provisions (BE, EL, ES, FR, IE, CY, LT, LU, HU, MT, NL, AT, SI, SK, FI, SE, UK), others have stated that legislation already exists or that these issues are carried out in practice. For instance, in DK, LV, PL and PT there is no specific reference to consent being voluntary. Nevertheless, legal assistance is provided and the consent is given in court which should be a sufficient guarantee. Moreover some legislations are more detailed as regards the rules applied to consent to surrender than as to renunciation to the speciality rule. In summary no states are clearly in breach of the provisions though there was insufficient information in some cases to gain an accurate picture.

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

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

Article 14 – Hearing of the requested person

All Member States have implemented this Article correctly.

However it should be noted that in relation to DK, as previously discussed, the executing judicial authority is the Ministry of Justice. As a result, when the Ministry is taking its decision, lawyers may make written representations to it. A full hearing before a court is only possible on appeal by the person against the Ministry's decision. Of the 10 surrenders that had occurred at the time of writing, about half went before a court.

Article 15 – Surrender decision

All Member States have implemented Article 15(1) regarding the principle of the decision on surrender whilst 21 of the 24 Member States have done so for paragraph 2 which deals with requests for supplementary information. CZ, MT and the UK have not explicitly transposed this paragraph, though at least in the UK in practice if further information is needed it may be requested. Several Member States allow the judicial authority to place time limits on the receipt of information and some have stated or legislated that if information is lacking or not

received in time the person may be released or surrender refused.¹⁶ In relation to Article 15(3), only 16 States (BE, EE, EL, ES, FR, IE, LT, LU, HU, NL, AT, PL, PT, SI, SK, SE) specifically refer to the possibility for the Issuing Judicial Authority to provide additional information. For many other states this possibility exists in any case.

Furthermore, it has been reported that IE requires additional information on a systematic basis, which would be contrary to this article if it does indeed occur in practice.

Article 16 – Decision in the event of multiple requests

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

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

LU and UK have transposed paragraphs 1 (competing EAWs) and 3 (competing EAW and extradition request) of this article in the transmitted legislation whilst 2 others have transposed only one paragraph (DE (§4), LV (§3)). DE has stated, however, that provisions will be contained in guidelines to be published next year. LV does not have legislation in particular in relation to competing requests between Member States. It has stated, however, that in practice this issue is dealt with by the Prosecutor General's office.

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

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

In relation to competing extradition and EAW requests the following 8 countries also allow an executing judicial authority to make the decision: DE, EL, FR (the Chief Prosecutor must always consult the Ministry of Justice in EAW and extradition mixed cases before presenting to the Court which makes the decision), IE, LV, LT (specific prioritisation is given with ICC cases first, followed by prosecution cases, followed by circumstances raised in the Framework Decision), PT and SI. The remaining countries require the Ministry of Justice or, in the case of the UK, the Home Office, to make the decision.

The question of multiple offences and accessory surrender is also raised as an issue (i.e. where a EAW is issued for a surrenderable offence but also refers to other offences which do not

¹⁶ See for more details Article 8.

come within the scope of the Framework Decision), since it is not dealt with under the Framework Decision but is contained in the 1957 Council of Europe Convention on Extradition¹⁷. It should be noted that this is a different matter to the question of speciality which refers to subsequent offences which were not contained in the warrant.

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

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

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

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

Paragraph 2: 22 Member States have fully transposed the deadline on taking the decision on consented surrender with a further 2 States partially implementing it (BE, IE).

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

IE does not provide a deadline for the taking of the decision following consent. In addition, they cannot meet the 10 day deadline in paragraph 2, since the final decision will not take effect within the aforementioned deadline, but rather upon its expiration.

FR	The decision to surrender must be made within 7 days of consent.
LT	The judge must make his decision on surrender within 3 days of consent.

Paragraph 3: In terms of the deadlines where there is no consented surrender, 16 Member States have correctly transposed the Framework Decision with 8 Member States partially transposing it (BE, CZ, FR, MT, NL, PT, SK, UK).

¹⁷ Article 2 – Extraditable offences: “If the request for extradition includes several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences.”

BE legislation provides that the initial decision on surrender must be taken within 15 days of arrest. However, there are two possibilities of appeal, which will, if taken, mean that the deadline of 60 days cannot be met (with appeals, the deadline is 64 days). Although this is still less than the full 90 day limit, the opinion of the Belgian “Conseil d’Etat” was that the use of appeal proceedings could not be regarded as “specific cases” in line with Art 17(4). As of 30 September 2004 a maximum of four cases were expected to exceed 60 days.

FR provides that a final decision must be taken within 30 days of arrest. However where an appeal in cassation is lodged which FR considers as an exceptional case, the deadlines mentioned total more than 90 days. It is too early to obtain statistics on the use of appeal proceedings in these circumstances.

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

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

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

AT	Interestingly in Austria, a person can be surrendered before the conclusion of an appeal and if it is successful AT will request the Issuing Member State to return the person.
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Paragraph 6: In relation to the provision of reasons for refusal, 21 Member States have transposed the paragraph. LV, PL and UK make no mention of a reasoned decision in the transmitted legislation and no further information on the matter was supplied to the Commission. At the same time it should be borne in mind that most if not all Member States require a reasoned decision to be provided as a principle of due process.

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

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

Articles 18 and 19 have been transposed in a varied manner ranging from no apparent implementation (EE, LU, MT), to including practical but not legislative transposition (DK), to full legislative transposition. In fact only 10 States have completely transposed both of these articles (CZ, DE, EL, ES, CY, LV, LT, NL, SI, SK). FR has also transposed both articles although this is implicit for Article 18(2). The legislation of at least NL, AT, PL provides for a hearing only, not for a temporary transfer, as is possible under the Framework Decision.

EE, LU, MT have not transposed either of these articles and no further information on the matter has been made available. PT has only partly transposed the obligation provided in article 18. The possibility exists for the issuing authority to request a hearing or the temporary transfer of the person. However, there is no obligation for PT to accept the request, contrary to the Framework Decision.

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

BE	There is no provision in the Act but it has been stated that both Articles are possible only under the standard conditions on judicial co-operation. However, option b (temporary transfer) is considered unrealistic in view of the time limits. See general comment above.
DK	DK has once again indicated that legislation was not required but that these articles will be carried out in practice in line with mutual legal assistance. Proper transposition requires binding provisions.
IE	IE has stated that there is no specific legislation but that national legislation exists which provides for a hearing in the context of mutual legal assistance. For instance, where a specific request has been made to IE for assistance in obtaining evidence. Section 51 of the Criminal Justice Act 1994. See general comment above.
HU	General reference to Mutual legal assistance measures resulting from the 1959 Convention is mentioned but there is no specific transposition. See general comment above.
NL	It is obligatory for NL to accept a request for a hearing.
AT	AT transposed Art 18(1)(a) only and has done through a reference to general MLA provisions. Art 19 (which results from 18(1)(a)) has been transposed. See general comment above.
LT	Whilst temporary transfer is specifically transposed, the Article 19 hearing comes under LT's MLA section of the Criminal Procedure Code which seems to permit such hearings in conformity with the Framework Decision. It further states that in cases provided for in an international agreement, courts, institutions of prosecution and pre-trial investigations shall execute requests of foreign states received directly.
PL	Allows the possibility of a hearing but not of temporary transfer. However, there are no detailed provisions on Article 19 and thus there is no provision on mutual

	agreement.
FI	FI allows the possibility of a hearing in accordance with its MLA legislation. See general comment above. Temporary transfer is only mentioned in relation to the postponement of the execution of the decision to surrender and is not therefore considered to be a transposition of Article 19.
SE	Both articles are covered by reference to SE national law on MLA. See general comment above.
UK	General reference to MLA seems to cover Article 18(1)(b) only. See general comment above.

Article 20 – Privileges and immunities

15 Member States have completely transposed Art 20 (BE, CZ, DE, EL, ES, FR, CY, LT, LU, HU, NL, AT, PT, SI, SK). 2 Member States have not specifically transposed the whole provision (DK, MT) with a further 3 only transposing the first paragraph fully (EE, LV, FI). An analysis of PL legislation in this regard was not possible since reference is made to legislation not available to the Commission. DK has stated that there is no implementing legislation on this matter and that they consider this issue to be regulated between Member States. This is not considered sufficient in particular since transposing legislation is necessary to ensure time limits are respected. The UK also has no transposing legislation on this matter although it has stated that immunity or privilege will take precedence over the possibility to surrender a person.

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

IE and SE have made the existence of a privilege or immunity a mandatory ground for refusal. At the same time they have not provided, contrary to the Framework Decision, that the authority which has the power to waive the immunity is requested to do so. As such and in view of the first paragraph, surrender should only be refused where the lifting of immunity itself has been refused. Otherwise, the effect could be a slowing down in surrender procedures since a new Warrant will have to be issued where the immunity is lifted.

Article 21 – Competing international obligations

16 Member States have correctly transposed this article with DK, DE, EE, IE and FI not having implemented it whilst PL and the UK have carried out partial implementation. MT legislation is contrary to this article.

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

DE and IE have stated that this Article does not need transposition as it is declaratory by nature or it will be dealt with administratively. Whilst this may be true in relation to the Framework Decision not affecting international obligations, the Framework Decision

nevertheless also requires that the executing Member State requests consent from the Third State. DE and IE legislation should therefore ensure that provisions are in place to make certain that all necessary measures for requesting consent are taken. PL and the UK have also failed to require a request for consent. For DK there is no specific legislation on this matter but it has stated that it will carry this out in accordance with the Framework Decision on a case by case basis¹⁸.

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

Article 22 – Notification of the decision

16 Member States have explicitly transposed this article (BE, CZ, DE, EL, FR, CY, LV, LU, HU, NL, AT, PT, SI, SK, FI, SE) with DK transposing through existing national legislation although this has not been examined. 4 Member States have partially transposed this article (EE, IE, ES, LT) with a further 3 not having transposed in the provided legislation (MT, PL, UK).

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

Article 23 – Time limits for the surrender of the person

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

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

Postponement of surrender for serious humanitarian reasons is not specifically (in EE) or fully transposed in CZ, DK, LT, PL and UK. In particular in CZ and DK, there is no provision requiring the issuing judicial authority to be informed or for arranging a new date for surrender when the “serious humanitarian reasons” foreseen in article 23(4) have ceased to exist. In addition, the point from which the time limits on surrender start are not specified in the legislation of LT and PL. Furthermore, whilst PT has provided for the necessary deadlines, it has not mentioned in its legislation, as required in the Framework Decision, the obligation to release the person should the time limit not be met.

¹⁸ See general comment on binding provisions, p4.

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

DE	In relation to Article 23(3) although legislation refers only to circumstances beyond the control of the Issuing Member State , in practice this will also cover DE as executing Member State.
MT	Surrender is not allowed before 7 days from the arrest.
UK	It is not clear whether postponement of the surrender for humanitarian reasons is specifically foreseen as it is for the hearing according to UK legislation.

Article 24 – Postponed or conditional surrender

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

DK has no binding transposition for Article 24 and has stated that the Ministry of Justice will consider what is the best option on a case by case basis. At the same time, 4 States (CZ, DE, LV, SK) have transposed correctly only article 24(1), and do not provide for temporary surrender pursuant to article 24(2).

Contrary to Article 24(1), postponement is possible before the final decision on surrender and not “after deciding to execute the EAW” in MT. Finally, in spite of Article 24, in 3 Members States (EE, NL, UK), the Ministry of Justice rather than the executing judicial authority is responsible for postponed or temporary surrender.

Article 25 – Transit

All Member States, except MT and the UK, have in their legislation allowed for transit of non-nationals in conformity with Article 25(1). It appears that PT has, however, excluded the possibility of transit of non-nationals where surrender is for the purposes of prosecution, whereas the Framework Decision foresees this possibility only in relation to nationals.

The legislations of 16 Member States (BE, CZ, DE, EL, FR, CY, LV, LT, LU, HU, NL, AT, PL, PT, SI, FI) permit the refusal of transit of their own nationals. However, LT refuses transit of its nationals even when requested for prosecution. This is contrary to article 25(1) which allows this possibility only when the transit is requested to execute a sentence. In addition, the transposition legislation allows for refusal of transit where a legal act does not allow surrender of a national. This is contrary to the Framework Decision although, in general, circumstances in which transit is refused are not clear enough to draw further conclusion.

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

At least 14 Member States (DE, DK, DE, EE, ES, FR, IE, CY, LU, AT, PT, SI, SE and UK) will also allow transit where the warrant is based on an act that is not an offence under the law of the transit state. This is in contrast to LV, HU, NL who check the double criminality of the

offence where it is not found in the article 2(2) list. No information was available for the other Member States.

MT and UK have not explicitly transposed any of Article 25 in the notified legislation. However they have both made notifications under Article 25(2) and UK has in practice allowed transit.

In relation to Article 25(2), all Member States except SK have provided notifications of the authority responsible for receiving transit requests, though SK specifies its authority in the legislation (Ministry of Justice).

In relation to Article 25(3), only 14 Member States have explicitly referred to the procedure for requesting transit (BE, DE, EL, FR, IE, CY, LU, HU, AT, PT, SI, SK, FI, SE) although PL does state that a request be made to the Ministry of Justice.

19 Member States have fully transposed Article 25(4) (BE, CZ, DE, EL, ES, FR, IE, CY, LV, LU, HU, NL, AT, PL, PT, SI, SK, FI, SE) with 5 States making no mention of transit by air in legislation (DK, EE, LT, MT, UK).

Finally, 18 States have transposed Article 25(5) (BE, DK, DE, EL, ES, FR, IE, CY, LV, LT, LU, HU, NL, AT, PT, SI, FI, SE) whilst 6 states have made no provision for transit from a third state in their legislation (CZ, EE, MT, PL, SK, UK).

DK	The explanatory memorandum of the transposing legislation allows for transit of nationals with the provision that the person is returned to DK. It should be noted that, according to DK, although an explanatory memorandum is not binding, parliamentary approval is required to change it.
EE	Traditionally, EE allows extradition of its nationals. As regards article 25(1-2), the legislation does not mention the applicable proceedings. .
LT	It is not specified under what conditions consent to transit through LT is given.
PL	PL requires notification of a transit by air where there is no scheduled landing. This is obviously not covered by the Framework Decision (Article 25(4))

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

19 Member States have explicitly transposed all of Article 26 whilst 4 States (HU, MT, SI, UK) have not transposed Article 26 in the notified legislation. PL refers to paragraph 1 (deduction of periods of detention) in its legislation but there is no reference to informing the issuing judicial authorities of the detention period as per Article 26(2)

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

Article 27 – Possible prosecution for other offences

Only EE and AT have used the possibility to notify that, in their mutual relations, renunciation to the speciality rule under the conditions of article 27(1) is presumed to have

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

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

- All Member States under review have transposed exception a).
- LV has not transposed exception b) whilst PL has only partially transposed it.
- 6 States have not (CZ, DK, FR, LV, LT) or not fully (PL) transposed exception c).
- 4 have not (DK, LV, LT) or not fully (UK) transposed exception d).
- DK and LV have not transposed exception e).
- UK has not transposed exception f) whilst EE has only partially transposed it.
- IE has not explicitly transposed exception g). Consent can only be provided by the central authority contrary to article 27(3)(g) and 27(4) of the Framework Decision. IE has made a declaration in this respect.

Lastly in 7 Member States the provisions on requests for consent under article 27(4) have not (LV, IE), not correctly (UK) or not fully (CZ, DK, EE, MT) been transposed; the main difficulty with these last 4 countries being in respect of the 30 day deadline for making a decision on consent.

CZ	Transposition of article 27(4) does not specifically refer to the ground for refusal and does not mention the 30 day deadline for making a decision on consent.
DK	Transposition of article 27(4) does not mention the 30 day deadline for making a decision on consent.
EE	Transposition of articles 27(3)(f) and 27(4) does not mention the applicable proceedings and guarantees. In addition, transposition of article 27(4) does not mention the 30 day deadline for making a decision on consent.
IE	No binding transposition of article 27(4). It is only arranged administratively.
MT	Although the required period is 21 days in principle, this can be adjourned or extended more than once if the court believes it to be in the interests of justice. As a result, the 30 day deadline for making a decision on consent might not be met.
PL	The transposition of article 27(3)(b) seems to refer to where a penalty involving deprivation of liberty has not been imposed, as opposed to a penalty which is not punishable by deprivation of liberty. Transposition of article 27(3)(c) seems to refer to proceedings which do not result in a measure involving deprivation of liberty applied against the prosecuted person, as

	opposed to a measure restricting personal liberty.
UK	<p>Transposition of article 27(3)(d) does not mention the provision “even when that penalty or other measure may give rise to a restriction of his personal liberty.” This could result in the UK having to request consent more often than would have been necessary with complete transposition.</p> <p>Transposition of article 27(4) lays down an extension of the speciality rule, when the offence is disclosed by the same facts as the extradition offence.</p>

Article 28 – Surrender or subsequent extradition

No Member State has used the possibility of notification under article 28(1).

16 Member States have fully transposed the rules on subsequent surrender to a third Member State pursuant to article 28(2) (BE, CZ, DE, EL, ES, FR, IE, CY, LT, LU, HU, NL, PL, PT, SI, FI) whilst 8 Member States have either not implemented this paragraph completely correctly (AT, UK), only partly (DK, EE, LV, MT, SE) or not at all (SK).

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

The provisions of article 28(3) have not been transposed by LV, SK and SE, whilst EE and IE have not implemented it correctly since the Central Authority/Ministry is to provide consent for subsequent surrender to another Member State in EE and IE (it has made a declaration to that effect) as opposed to the competent judicial authority. CZ, LU, MT and UK have partly transposed Article 28(3), especially in relation to the 30 day deadline for making a decision on consent.

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

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

CZ	No reference could be found to Article 27(3)(g) mentioned in Article 28(2)(c), nor to Article 28(3)(a), (b) and (d).
DK	There is no reference to Article 27(3)(e) mentioned in Article 28(2)(c).
EE	The applicable procedure is not mentioned regarding Article 28(2)(b) and 28(3). The 30 day deadline is not referred to but in practice is complied with. In addition it is not clear if there is a reciprocal provision where EE asks for consent to subsequent surrender.

LV	LV has not transposed paragraph 2(a) and (c) nor 28(3).
LU	Article 28(3)(b-d) has not been explicitly transposed.
MT	Article 28(2)(b-c) has not been explicitly transposed. In relation to para 3(c), although the required period is 21 days in principle, this can be adjourned or extended more than once if the court believes it to be in the interests of justice. As a result, the 30 day deadline for making a decision on consent might not be met.
SE	Article 28(2)(a,c) and 28(3) have not been transposed.
UK	Article 28(2)(c) has not been transposed. Article 28(3)(a) has not been implemented since the conditions required to submit the consent to subsequent surrender are not specified. In relation to para 3(c), although the hearing for consent shall take place within 21 days there is no 30 day deadline for making a decision on consent as required in the Framework Decision. Furthermore, Article 28(4) has not been transposed.

Article 29 – Handing over of property

13 Member States have fully transposed Article 29 (BE, DE, EL, ES, IE, CY, LT, HU, NL, AT, PT, SI, SK).

6 Member States have partly transposed paragraph 1 on seizure and handing over of property (DK, EE, FR, MT, PL, and SE). In particular in EE and FR the legislation transposing 29(1) does not explicitly provide for the executing judicial authority to seize property on its own initiative. CZ has not transposed this paragraph.

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

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

EE has incorrectly transposed paragraph 4 on rights acquired in the property whilst 6 Member States have not transposed it (CZ, LV, LU, MT, SE, UK) and FI has only partly transposed it. In EE, Article 29(4) is implemented contrary to the Framework Decision to the extent that costs will be levied on an ad hoc basis for return of property by the issuing Member State. 29(4) clearly states that return shall be affected without charge.

DK	<p>Although DK legislation could be interpreted in a restrictive way so as not to allow transfer of property unless it was seized during the case, DK has stated that they can transfer irrespective of the timing of the seizure.</p> <p>Article 29(2) and 29(3) have not been explicitly transposed in national legislation but DK has stated that it will comply with Article 29(2) and that Article 29(3) is referred to in the Explanatory Memorandum.</p>
LT	Article 29(2) is not explicitly transposed in the provided legislation but is said to be possible under national mutual legal assistance provisions.

MT	Article 29(1) has only been partly transposed since it is the Ministry may, through the Commissioner of Police, rather than the judicial authority which is competent to seize or hand over property.
PL	There is no mandatory requirement to seize and hand over property when requested as required under Article 29(1). Article 29(1)(a) has not been transposed since there is no mention of seizure in respect of evidence. Article 29(2) has not been transposed. Furthermore, there is no mention of temporary transfer in relation to Article 29(3).
FI	National Mutual Legal Assistance legislation applies in relation to this Article. However, it has not been possible to examine this Act. In so far as this Act follows the 2000 MLA Convention this legislation should be sufficient. However, in relation to Article 29(2) it is possible that national legislation is contrary to the Framework Decision if it allows the possibility to refuse assistance where the prosecution is no longer possible.
SE	Articles 29(1)(b), (2), (3) and (4) have not been explicitly transposed. In implementing this legislation reference has been made to the Swedish Act (2000:562) on International Legal Assistance in Criminal Matters which could not be examined.

Article 30 – Expenses

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

On the other hand, 11 others have not transposed it in the transmitted legislation (BE, CZ, FR, LU, MT, PL, SE, UK) or have no binding provisions in that respect (DK, LT, NL).

BE	BE has stated this Article is regulated by rules on legal expenses though these provisions were not available for examination.
FR	FR has stated this Article is regulated by overall budgetary provisions though these regulations were not available for examination.
IE	The transposition of article 30 provides without further specification that expenses incurred by the Minister in the administration of the Act which transposes the Framework decision, shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

Article 31 – Relation to other legal instruments

Pursuant to Article 31(1), by 15th January 2005, at least 13 Member States have indicated that they have made a notification to the Council of Europe under Article 28 of the European Convention on Extradition of 13 December 1957 (BE, CZ, DK, DE, ES, IE, LT, HU, NL, SI, FI, SE, UK).

At least 6 Member States continue to be able to apply existing bilateral or multilateral agreements as per Article 31(2) (DK, DE, ES, CY, MT, SK, FI, SE). DK, FI and SE refer to the law on extradition to Finland, Iceland, Norway or Sweden. ES refers to the arrangements agreed relative to Gibraltar.

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

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

Article 32 – Transitional provision

3 Member States made a notification, in conformity with the Framework Decision, namely at the time of its adoption (FR, IT, AT).

However, 3 other States apply transitional provisions in breach of the Framework Decision (CZ, LU, SI).

- LU did not make any statement at the time of the adoption of the Framework Decision (JO L 190 of 18.7.2002, p. 19). The transitional provision is applicable where LU is both the issuing and executing Member State contrary to the Framework Decision. This means that LU will not apply surrender arrangements to EAWs issued by other Member States for offences before the given date but they will not, in addition, be able to issue EAW for offences committed prior to that date.
- The possibility to make such a statement was not available to CZ and SI to the extent that they joined the Union after the adoption of the Framework Decision but they have nevertheless applied the provisions.
- Moreover, CZ legislation does not respect the absolute limit provided in the Framework Decision of 7th August 2002. Instead it sets its own date of application of the EAW of 1st November 2004. This is applicable where CZ is both the issuing and executing Member State and therefore entails the same problem as for LU but with the later date, more restrictive date.

CZ	Contrary to the Framework Decision, requests for offences committed prior to 1st November 2004 will be treated by CZ under previous extradition arrangements.
FR	Requests received by FR for offences committed prior to 1st November 1993 will be treated under previous extradition arrangements.
IT	Requests received by IT for offences committed prior to 7 th August 2002 will be treated under previous extradition arrangements.
LU	Contrary to the Framework Decision, requests for offences committed prior to 7 th August 2002 will be treated by LU under previous extradition arrangements.
AT	Requests received by AT for offences committed prior to 7 th August 2002 will be treated under previous extradition arrangements.
SI	Contrary to the Framework Decision, requests received by SI for offences committed prior to 7 th August 2002 will be treated under previous extradition arrangements.