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

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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

REPORT ON ESTONIA

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1. INTRODUCTION

- 1.1. Following the adoption of the Joint Action of 5 December 1997, a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime was established.
- 1.2. Following the discussion of a proposal introduced by the Luxembourg Presidency concerning the topic of the fourth round of mutual evaluations¹, the MDG of 11 July 2005 adopted the topic as proposed, namely "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States". It was also agreed at the MDG of 11 July that the evaluation questionnaire was to be prepared by the UK Presidency.
- 1.3. Experts with substantial practical knowledge of the European Arrest Warrant were nominated by Member States pursuant to a written request to delegations made by the Chairman of the MDG on 9 September 2005².
- 1.4. At its meeting on 28 October 2005 the MDG approved the evaluation questionnaire for the fourth round of mutual evaluations. The objectives of the evaluation exercise and the questionnaire itself are set out in document ST 14272/05 CRIMORG 131 COPEN 175 EJM 57 EUROJUST 77.
- 1.5. Also at its meeting on 28 October 2005 the MDG discussed and approved document 13824/05, the revised sequence for the mutual evaluation visits. Estonia is the fifth Member State to be evaluated during the fourth round of evaluation.
- 1.6. The experts charged with undertaking this evaluation were: Antoine MACDONNCHA (Legal Advisor with the Office of the Attorney General, Ireland), Inga MELNACE (Legal Adviser with the Ministry of Justice, Latvia) and Ernest NILLES (Investigating Magistrate, Luxembourg). Two observers were also present: Angelika MÖHLIG (Eurojust) and Sarah KEENAN (Commission), together with the General Secretariat of the Council.

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

² Document 6206/06/REV1 - Timetable for 2006 and designation of experts.

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- 1.7. This report was prepared by the expert team, with the assistance of the Council Secretariat, based upon their findings arising from the evaluation visit of 12 - 14 September 2006, and upon Estonia's detailed and helpful responses to the evaluation questionnaire and a written request for further information.
- 1.8. The report makes reference to differing processes in respect of arrest and prosecution cases only insofar as there is a divergence of practice between the two procedures.
- 1.9. The expert team's overarching purpose was to evaluate the distinct practical processes operated and encountered by Estonia both in its role as issuing and executing Member State, to assess relevant training provisions and the views of the defence, before moving on to conclude and to make such recommendations as they felt were appropriate to enhance the means by which the EAW and its corresponding surrender provisions may be further streamlined and improved.

2. THE AUTHORITIES AND THE LEGAL BASIS

2.1 THE AUTHORITIES

- Judicial Authorities (JAs) - Issuing Member State function.

Estonia has designated a two tier approach in respect of its activities relating to the issue of EAWs.

- In respect of EAWs required for the purposes of conducting criminal prosecutions - The Estonian Code of Criminal Procedure¹ mandates that EAWs are to be issued by a prosecutor.
- In respect of EAWs required for the purposes of executing custodial sentences - The competent JA is the Ministry of Justice (the Central Authority).
- Judicial Authorities (JAs) - Executing Member State function.
 - In respect of requested persons arrested in the north of Estonia - The first instance decision on surrender will be taken by a judge sitting at the Harju County Court.
 - In respect of requested persons arrested in the south of Estonia - The first instance decision on surrender will be taken by a judge sitting at the Tartu County Court.

¹ Section 507 of which sets down the respective competencies of Estonia's issuing JAs.

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The total number of competent judges working between these two County Courts is 67.

In either scenario a right of appeal exists to the Court of Appeal. The Appellate Court sits in similar geographical configurations to the Court of First Instance.

- The Central Authority

Estonia has elected to designate a Central Authority (CA) for the purposes of administrative transmission of EAWs and further information requested by executing Member States. It has the overarching remit of assisting its JAs in the discharge of their functions. The CA is also the competent body to determine temporary/postponed surrenders and to consent to requests for onward surrenders.

The EAW function of the CA is undertaken by the Courts Department¹ of the Ministry of Justice.

Three legally qualified members of this department are responsible for the totality of the Ministry's EAW business. The experts noted that no administrative support currently exists. These officials have additional responsibilities relating to:

- legislative consultation and drafting,
- representing Estonia at EU and international level,
- custody and child abduction advisory work, together with
- organisational superintendence of the transfer of sentenced persons.

- The Prosecutors

The prosecution service is hierarchical with the Office of the Prosecutor General sitting at the top of the structure. The Prosecutor General manages his staff, i.e. the Chief State Prosecutors, other state prosecutors and assistant prosecutors, who in turn exercise a central supervisory role over the EAW drafts prepared by their prosecutorial colleagues in the regions (both in terms of merit, content and of presentation).

¹ The International Judicial Cooperation Division.

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Below the Office of the Prosecutor General are 4 horizontal District Offices each headed by a Chief Prosecutor who manages a complement of operational staff, namely:

- special prosecutors (who deal with ongoing project based work, such as organised crime investigations),
- senior prosecutors,
- district prosecutors (who deal with general criminal files), and
- assistant prosecutors (who assist the district prosecutors).

Estonia has 190 prosecutors in total, all of whom are competent to apply for preliminary domestic arrest warrants¹ during the course of their investigative work, and to prepare an EAW draft for (consideration)/ratification by the small EAW specialist team led by the Chief State Prosecutor.

In respect of Estonia's executing Member State function, all prosecutors (save for the assistants) may undertake advocacy before the Harju and Tartu County Courts and plead the case for surrender.

The organisation of the prosecution service is such that each office will always have out-of-hours cover to deal with unforeseen developments on a 24/7 basis.

- The Criminal Information Department of the Central Criminal Police ("the CID")
The CID a central department which provides coordination and intelligence resources to the Central Criminal Police throughout Estonia. This department is comprised of 22 predominantly police staff who operate a 24/7 EAW duty rota. All staff have access to Interpol and all domestic police databases, the most important of which are POLIS² and KAIRI³ (in addition to prison, vehicle and property databases).

The CID⁴ receives all Interpol Red Notices/diffusions and should there be an indicator linking the requested person to Estonia, they run full data base checks on the individual in an attempt to verify his location prior to passing a copy of the Red Notice/diffusion together with an early investigation file to a local unit which could then effect the arrest.

¹ A prerequisite for the issue of an Estonian EAW for the purposes of conducting criminal prosecutions.

² POLIS - The incident reporting, processing of crime and statistical database.

³ KAIRI - The information system for criminal police, including intelligence data.

⁴ Which also contains the SIS project group.

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Any of the 3,412 officers from the 4 police prefectures¹ may conduct an arrest pursuant to an EAW received by direct transmission or via an Interpol Alert diffusion. Arrest may also be effected by Customs or Border Guard staff.

- The Court of Appeal.

The Court of Appeal hears appeals against decisions of one of Estonia's 2 County Courts. A requested person may appeal the surrender decision as of right (that is to say without leave of the County Court) but must file written grounds of appeal within 3 days of the surrender decision being handed down. This time limit reflects Estonia's domestic appeal rules.

Since the inception of the EAW in 2004, first instance decisions have been appealed (unsuccessfully) on 2 occasions.

The decision of the Appellate Court is final.

2.2 THE LEGAL BASIS

- The Code of Criminal Procedure - Articles 490 - 507, which pertain to the detailed transposition of the Framework Decision (FD).
- The Code of Criminal Procedure - Article 135 concerning the domestic regime governing bail/release.
- The Code of Criminal Procedure - Article 217 concerning the domestic regime relating to the detention of suspects.
- The Code of Criminal Procedure - Article 386 concerning the domestic regime relating to appeal protocols.

¹ North, South, East and West. Prior to police reforms effective on 01.01.2004 there were 17 such prefectures.

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- The Code of Criminal Procedure - Article 436 concerning certain prohibitions on international cooperation in criminal procedures (fundamental rights).
- The Estonian State Borders Act, which provides the legal basis for border guard superintendence of movements into and out of Estonia.
- Member States may also refer for assistance to Estonia's "Fiche Française", which sets out those practices which issuing Member States are to adopt when seeking the surrender of requested persons from Estonia.

3. ORGANISATION AND PRACTICES - ISSUING MEMBER STATE ROLE

The expert team were advised that, during the calendar year to September 2006, the appropriate JAs of Estonia had issued 28 EAWs, in respect of which 17 arrests had been made. Estonia reported that 1 surrender had been refused.

3.1. THE DECISION TO ISSUE

The Estonian authorities do not have a formal practice guide concerning the instigation of EAW proceedings or the subsequent steps to be taken. Standardised EAW practices have been outlined to all EAW stakeholders during training provision supplied by the CA together with professional trainers from the Estonian Law Centre.

- In prosecution cases - An initiator (a local police officer with conduct of an investigation) will submit a written request for an EAW to a Public Prosecutor's Office. This request will be considered by a lawyer and, in any case in which it is considered that a wanted person may not be physically present in Estonia, EAW proceedings will be commenced. The review by which this decision is reached will take into consideration various factors, such as the:
 - severity of the offence,
 - degree of participation,
 - extent of the injury/damage,

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- age of the offence¹, or
- whether the offence was completed or an attempt.

In cases where an EAW is felt to be the appropriate course, a concurrent application will be made by the prosecutor to the appropriate local criminal court for a domestic arrest warrant to be obtained. This domestic warrant is a prerequisite for the issue of an EAW. It may in addition be used as the basis for arrest should the person be identified within Estonia.

Prior to the EAW being formally issued, the pending EAW and case information will be transmitted to the Office of the Prosecutor General so that the issue decision can be reviewed and, if appropriate, ratified by the Chief State Prosecutor's team. The experts were advised that this practice is followed so that a degree of uniformity and central oversight can be applied to Estonia's outgoing EAWs practice.

- In cases concerning the enforcement of a sentence, officials within the CA will apply similar merit tests to assess the appropriateness of the application. They will then obtain, directly from the criminal court concerned, a copy of the order to be enforced and proceed to draft an EAW.

In real terms therefore a pragmatic de minimus test is brought to bear, balancing the seriousness of the criminality against the merits (costs or otherwise) of issuing an EAW. Estonia reported that their outgoing EAWs were all of a benchmarked standard.

Estonian issuing JAs may include any number of offences on a single EAW. Given that Estonia has made a declaration pursuant to Article 27 paragraph 1 of the FD they are at liberty to waive the rule of specialty in its relations with other Member States that have given the same notification.

¹ In general cases more than 5 years old will not be pursued, although this time limit will be waived in serious cases.

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3.2. VERIFYING THE POSSIBLE EXISTENCE OF MULTIPLE REQUESTS

The expert team were advised that such investigations may be undertaken prior to the issue of the EAW, either by the initiator raising a query in the police register of pending criminal investigations or by the CID (Interpol desk) raising a notification.

Neither course of action is commonly used.

3.3. THE COMPLETION OF THE FORMS

EAWs will in all cases be prepared in draft form in the first instance, either by the local prosecutors with jurisdiction¹ over any subsequent prosecution or, in conviction cases, by the CA.

This drafting exercise is conducted on the basis of the EAW form (available to all prosecutors and CA officials electronically) and of practical EAW training conducted on a cyclical basis by the CA and by other professional training providers².

The draft (prosecution) EAW will be e mailed to the Office of the Prosecutor General with such supporting information as is judged to be of assistance. The Chief State Prosecutor's team, in addition to the merit review described in 3.1, will conduct an additional quality control verification of the drafting exercise. Once these merit and drafting assessments have been completed, authorisation will be granted (i.e. centrally) for the EAW to be finalised and signed by the appropriate issuing JA.

Once the approved EAW has been formally issued by the appropriate body a paper copy will be sent to the CID (Interpol Unit) the original will be transmitted to, and/or held by, the CA pending the arrest of the requested person.

Once dispatched, the EAW is deemed to be a judicial order not capable of amendment. Should an executing Member State therefore request changes to the document, and that request is felt by Estonia to be appropriate, further information may be provided. No mechanism exists to withdraw/reissue an existing EAW.

¹ Although the CA may be consulted if required.

² See section 5 - Training provision.

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3.4. TRANSLATION OF THE EAW

The translation of an Estonian EAW into a language compliant version within the designated time-limits is the duty of the CA¹.

The CA has no internal translation capacity and as such is required to outsource this function. In order to best comply with the varying language regimes presented by different executing Member States the CA has established a central agreement with a single nationally based translation company. It has negotiated a service agreement whereby the provider endeavours to deliver translations "in all available languages and within 24 hours". Despite the fact that the CA provides the translation company with language compliant EAW forms electronically, the 24-hour deadline is not always met².

Difficulties have been experienced in respect of Member States who have designated short turnaround times for the delivery of language compliant EAWs, particularly in cases where recourse to a vehicular language has not been made.

The expert team were provided with one example of an arrest having being effected in Latvia at 20:00 on a Friday evening, that fact being notified immediately to the CA by Interpol. The CA was able to transmit the Estonian EAW to Latvia (via Interpol) on Monday morning with the Latvian translation following on Tuesday morning³. In that case, failure to comply with the requirement to supply a translation into Latvian within 72 hours of the arrest resulted in the release of the requested person.

¹ Criminal Procedure Code, Article 507(3) - the CA is the competent body to undertake translations of all EAWs issued by Estonia.

² Particularly at weekends.

³ On that occasion access to a suitable translation service was not possible over the weekend.

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3.5. TRANSMISSION OF THE EAW

Estonia is not currently a member of the SIS and therefore uses Interpol as its principle means of transmission. If there is information indicating the specific whereabouts of a requested person (country, region or address) that detail will be noted on the diffusion. In a limited number of cases where difficulties are anticipated, Estonia undertakes parallel transmissions via the Eurojust National Member for Estonia.

Estonia is not in the practice of undertaking direct transmission, but the CA may do so by post, e-mail or any form capable of producing written records. These avenues will be taken where such an option is felt to be the proper course.¹

Once the copy EAW is received by the CID its existence and contents are entered into a single police document register database (for statistical and record keeping purposes) and, following verification of the EAW and its entry into the Interpol system, the information is input into the police KAIRI information database. This latter process is necessary because enquiries made by roadside police controls/arrests access the national system only and a cross referencing exercise must therefore be conducted by the CID to ensure visibility of the EAW/Alert to all operational units.

Once CID/Interpol receive notification of an arrest, they contact the CA by e mail² or via GSM³ to ensure that the process of translation is commenced and that the transmission of the original EAW and the necessary translation proceeds in good time⁴. The expert team were advised that officials at the CA regularly use the Fiche Française created by Member States or the EJN atlas to determine the appropriate recipient and the applicable language and time requirements.

¹ Criminal Procedure Code, Article 508.

² The CA operates a centralised e mail drop box to ensure that anyone in the unit can access such messages.

³ Each member of the CA has posted their GSM numbers with the CID Interpol desk.

⁴ Criminal Procedure Code, Article 507(4) - the CA is the only body competent to undertake transmission of EAWs issued by Estonia.

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

Estonia considers that the system of surrender on the basis of mutual recognition of judicial decisions was functioning well, despite occasional tension. In respect of instances where the system had operated less than efficiently, three specific cases were brought to the attention of the expert team:

- IE - The Irish authorities had raised a number of sequential questions pertaining to substantive enquiries into a specific EAW case, raising matters such as requests for the provision of facts in respect of list offences, the need for typographical corrections and the submission of substantive texts of Estonian penal code¹. There was also a request that the EAW be amended which, insofar as Estonia is concerned, was not possible. In that instance Estonia provided further information but was unable to reissue the EAW itself.
- DE - During the period covered by the German Constitutional Court's setting aside of German implementing legislation, Estonia received requests for both EAW and extradition papers in the same case. In that instance Estonia declined to submit extradition papers and, after some dialog, the surrender was undertaken on the basis of the EAW request.

In each instance Estonia considered that the requests were indicative of core misunderstandings between the Member States and thus chose to communicate at specialist level, both directly with designated CAs and via Eurojust. Estonia was entirely content with the communication channels relied upon in each instance and particularly wished to record its satisfaction with the effectiveness of Eurojust.

¹ It was Ireland's contention that Estonia's definition of movable property was insufficiently clear.

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- UK - Estonia faces a general problem with the UK authorities who will only commence substantive tracing work on the basis of receipt of an original EAW. Given that it is Estonia's practice that all original EAWs are filed with the CA (which has a statutory obligation to undertake EAW translation and transmission following arrest), the release of the original EAW would leave them unable to comply with this obligation. Consequently, if information or intelligence exists identifying the UK is identified as the location of the requested person, this UK specific requirement cannot be complied with. In Estonia there can only ever be a single "original" EAW in existence.

In more general terms the CA confirmed that it had received requests for missing documentation such as photographs or fingerprints of the requested person which it obtained from Interpol and then transmitted to the executing Member State without undue incident.

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

Estonia has ratified the 1983 Council of Europe Convention on the Transfer of Sentenced Persons and uses that instrument as the sole underlying legal basis for the return of own nationals. The possibility exists that a guarantee based on this regime may not satisfy executing Member States in circumstances in which dual criminality could not be demonstrated.

The expert team noted that although there was consensus that the "Estonian authorities" would use their best endeavours to seek to provide an acceptable return guarantee, there were conflicting views expressed as to which body within Estonia was in fact competent to do so.

3.8. YOUTH SURRENDERS AND CORRESPONDING GUARANTEES

The age of criminal responsibility in Estonia is 14. The expert team were advised that this limit is absolute¹ and therefore in instances where the criminal conduct is alleged to have been undertaken by a person below that age, no EAW will be issued.

¹ With no derogations being possible in respect of age, severity or circumstances of the offence/victim.

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3.9. GENERAL COMMUNICATIONS WITH THE EXECUTING MEMBER STATE

Estonia's principal experience is that requests for information are forwarded via the Estonian CA or directly to its JAs, with either avenue being deemed to be acceptable¹. Communications to date have predominantly been by post and Estonia has responded in kind, generally using English as a vehicular language.

The expert team were advised that the CA would seek to accommodate other linguistic regimes where that was requested and would where necessary also seek to provide translations of substantive texts/documents required in support of requests for further information.

Communications relating to the apprehension of a requested person or the result of a surrender decision is relayed through police channels and cascaded to the relevant domestic agencies. Communications received via the CA are forwarded to the CID as a matter of course.

The expert team observed that the Estonian CID, the public prosecutors and the CA enjoyed an informal and close working relationship and were advised that electronic communication/updating was a feature of every day life².

3.10. THE MECHANICS OF SURRENDER/TEMPORARY SURENDER

On receipt of a notification that a surrender decision has been delivered, the CID seeks to establish whether the requested person is in possession of a valid travel document. It then sets out a preliminary transportation timetable and advises the Estonian Police Board (who are responsible for Estonia's travel costs in this regard) and the security staff at Tallinn airport or sea port as appropriate.

¹ Eurojust has been relied upon if repeated problematic issues present themselves.

² To minimise the chance of error/omission each organisation utilised communal electronic "in boxes" in respect of all communications relating to EAW case progression.

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The expert team were advised that Estonian border guards were obliged by statute¹ to prevent any and all persons not in possession of a valid travel document from crossing their border. This rule is strongly enforced at all times and has impacted on a number of surrender cases (both as issuing and executing Member State). On several occasions consular assistance had been necessary in securing, at very short notice, temporary travel documentation necessary to facilitate surrenders.

The expert team were further advised that draft legislation is being prepared with the object of precluding the possibility of refusals of entry at the border impacting on properly sanctioned surrenders.

Once the Estonian authorities take possession of a requested person on their own territory, they are obliged by virtue of their domestic Criminal Code to bring that person before a judge for questioning within 24 hours. At that time, the court will review the arrest and the further detention of the suspect and commence the normal domestic criminal process.

3.11. THE MECHANICS OF THE SURRENDER IN RESPECT OF REQUESTED PROPERTY/TIMELIMITS/GUARANTEES

So far, Estonia has no practical experience of the surrender of property or evidence within the EAW process (although such property may be requested either as evidence or by virtue of the fact that it was acquired as a result of the criminal conduct in issue²). Should such a requirement arise, the Criminal Procedure Code³ provides that evidence properly gathered pursuant to the laws and procedures of the executing Member State shall not be inadmissible in Estonian criminal proceedings⁴.

In such instances it is foreseen that the property/evidence is to be surrendered at the same time as the requested person himself.

¹ The Estonian State Borders Act.

² Criminal Procedure Code, Article 497.

³ Criminal Procedure Code, Article 65.

⁴ Actual admissibility will of course be a matter for the trial judge in each case.

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3.12. CONFLICT OF EAWs/EXTRADITION REQUESTS/ONWARD SURRENDER

Estonia has not encountered executing Member States advising them of EAW/extradition conflicts with Estonian EAWs and as such its authorities were therefore unable to comment on the resolution processes deployed to determine priority.

3.13. EXPENSES

Estonia reported no conflicts arising from the payment of expenses in EAW surrenders.

4. ORGANISATION AND PRACTICES - EXECUTING MEMBER STATE ROLE

The expert team were advised that for the calendar year to September 2006 a total of 26 EAWs had been received in respect of 26 requested persons. From this total Estonia has undertaken 26 arrests, with 26 persons having been surrendered and no surrenders having been refused.

4.1. RECEIPT PROCEDURES

The CA is the competent body to receive formal EAWs from issuing Member States. In discharge of this function it accepts any means of transmission capable of producing a written record in conditions in which the authenticity of the request may be established.

The vast majority of executing EAW activity in Estonia is initiated in consequence of Interpol Red Notices/diffusions which serve to trigger provisional arrests. The requirement for the receipt of original EAWs and language compliant versions arises following arrest. Should this documentation be received by the CID (rather than by the CA) it must be transmitted immediately to the competent JA with a copy forwarded to the CA¹.

4.2. THE FORM OF THE WARRANT AND REVIEW PROCEDURES.

On receipt of an Interpol Red Notice/diffusion, Estonia's CID will conduct a review of the request. The team were advised that the CID would raise an enquiry with their issuing Member State Interpol colleagues if details were missing, such as:

- the degree of participation,
- the location of the crime, or
- crime specific facts such as the quantity in a drugs matter.

¹ Criminal Procedure Code, Article 500(2).

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The expert team were advised that such matters would be expected to be within the knowledge of the issuing Member State Interpol desk and, although no statistics were available in support of the assertion, it was not felt that circulation or arrests were adversely impacted by such enquiries.

Within 3 working days of the arrest of a requested person the CA must receive the originating EAW and have transmitted it to the executing JA¹. Failure by the issuing Member State to discharge this function in accordance with this time limit will result in the mandatory release of the suspect from preventive custody^{2 3}.

Once the EAW is lodged in the court file it may, on application, be released to the defence.

A language compliant document, that is to say an EAW translated into either Estonian or English⁴, is not required to "stop the clock running" in respect of this time deadline. Once a duly issued EAW is received by the CA (and transmitted to the appropriate court), the executing JA is empowered to grant an extension of time to the issuing JA to provide such additional information as is deemed to be necessary⁵. The provision of the language compliant EAW is deemed to be such a request for further information.

It will be for the CA to undertake the translation of English language EAWs (where that language option has been used) into Estonian.

The CA stated that it reviews the completeness of the EAW document itself, that is to say that when the document created by the issuing Member State has been received in its entirety by Estonia (i.e. that transmission has been effective). The team were advised in express terms that the CA does not undertake a review of the completeness of the information comprising the EAW and will not take steps to have evident errors corrected⁶.

¹ Criminal Procedure Code, Article 500(1).

² Criminal Procedure Code, Article 499(5).

³ Although a re-arrest may be undertaken if the EAW is subsequently received.

⁴ Linguistic designation is not specified by the Criminal Procedure Code, but is set out in Estonia's declaration, made pursuant to Article 8 paragraph 2 of the FD.

⁵ Criminal Procedure Code, Article 502(5).

⁶ Errors such as failure to tick the list offences or errors such as the entry of incorrect dates on the form.

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The court may set a time limit for the provision of data required under these provisions but it must be mindful of the fact that it is required to deliver the surrender decision no later than 20 days from the date of receipt of the original EAW by the court (rather than receipt by the CA).

4.3. REQUESTS AND RESPONSES TO REQUESTS FOR FURTHER INFORMATION/CLARIFICATION

The expert team were advised that in respect of the review conducted by Estonia's CID, the CA reported that they were "quite likely to be called" by officers in respect of matters of which the police were uncertain. The CA accepted that they were not a JA for the purposes of the EAW but acknowledged that they would offer general guidance to the police if requested to do so.

The prosecutors interviewed confirmed that they conduct a further scrutiny of EAWs and may pose questions to an executing Member State of their own initiative. The team were advised that they may for example ask for further facts/evidence to be provided. The prosecutors stated that they adopted this course of action because of their experience of the questions raised by the JA.

Should a prosecutor deem that a request is necessary (the example cited being that they would ask for the quantity of drugs in a drugs related matter to be clearly stipulated) they would in all cases do so in writing and would send a copy of the request to the executing JA for information purposes. The team were advised that this would provide the JA with the necessary facts to consider the merits of a potential adjournment for the provision of information^{1 2}.

The Estonian authorities were content that their requests for information were dealt with in a reasonably timely manner by issuing Member State authorities.

4.4. INVESTIGATIONS CONCERNING THE LOCATION OF THE REQUESTED PERSON

The Estonian CID (Interpol desk) will only undertake database searches for requested persons if Estonia is referred to in the Red Notice/diffusion or if telling indicators are present, namely if the requested person/their associates:

- are Estonian or of Estonian origin,

¹ This was not stated to be for the purposes of adoption by the JA.

² Criminal Procedure Code, Article 502(5).

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- are linked to Estonia by a prior connection, or
- are otherwise linked to Estonia.

The expert team were advised that the average time required to undertake the necessary first instance database searches (aliens register, prison database, vehicle and property registers and the like) was in the region of 15 minutes per requested person. More focused secondary search methods would be undertaken on the basis of an initial hit and, once the location of the requested person had been established, local police units would be dispatched to undertake an arrest and put in place a preventive detention.

4.5. CIRCULATION PROCEDURES

Interpol Notices/diffusions which do not contain Estonian specific markers remain passively available to police officers through the Interpol automated search facility.

Requested persons may therefore also be apprehended pursuant to normal domestic controls via POLIS (incident reporting) searches. This domestic police database would yield a hit/no hit response if there were an Interpol diffusion. The detail of the EAW would thus come to light when a subsequent query were run in KAIRI (information system).

4.6. ARREST PROCEDURES/FIRST HEARING

All Estonian Law enforcement agencies are competent to arrest a requested person on the basis of an EAW, an Interpol Red Notice or diffusion (a diffusion referring to the intention to apply for an EAW will be sufficient to found an arrest¹).

¹ On the basis that a crime may have been very recently committed.

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The authorities conducting an arrest¹ undertaken pursuant to the direction of the CID (who may have located the individual by means of the investigative search techniques at their disposal) or by a general control operation are required² to advise the requested person of the purpose of the arrest and to enquire as to consent to surrender³. The arresting officers are empowered to enforce an immediate remand (preventive detention) of up to 48 hours. The expert team were advised that remands are made in all cases.

The expert team understand that during this period of detention the requested person is asked by the arresting authorities if he consents to surrender. In the event that such consent is given it must be subsequently verified by the JA in all cases⁴. It was the understanding of the expert team that once given to the arresting authorities, consent was, in practice, irrevocable. The team were advised that consent had been forthcoming in [statistics awaited] cases to date. The right to free legal representation and linguistic assistance arises on arrest.

Immediately following the arrest the officers will notify the public prosecutor who, prior to the expiry of the initial 48 hour period, will apply to the court for the detention to be validated and extended by judicial order (the formal application will be for a domestic arrest warrant to be obtained).

This application will be inter parties, that is to say that the requested person will be produced and his counsel heard by the court. For the purposes of this initial hearing the prosecutor will list the matter before the court closest to the site of the arrest, the judge will sit as a preliminary investigation judge (as in standard domestic criminal proceedings⁵) and will hear applications for bail and as to such other matters considered pertinent⁶.

CID/Interpol is also advised of the fact of the arrest so that that information may be relayed to the issuing Member State by fax or by e mail.

¹ The police, officers of the Tax and Customs Board or the Border Guard Administration.

² Criminal Procedure Code, Article 499(3).

³ The fact of consent may be noted in a written form but will in any event be reiterated before a judge at the formal surrender hearing.

⁴ Criminal Procedure Code, Article 502(4)(1).

⁵ Criminal Procedure Code, Article 217(8).

⁶ Criminal Procedure Code, Article 135.

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4.7. THE SURRENDER DECISION/ GUARANTEE REQUIREMENTS AND GUARANTEES PROVIDED

Estonia's executing JAs are geographically partitioned. In respect of requested persons apprehended in the north of the country, surrenders will be determined by the Harju County Court in Tallinn whereas, in respect of those apprehended in the south, surrenders will be determined by the Tartu County Court.

Surrender decisions are reached by single judges and are handed down within statutory time limits following the conclusion of the oral surrender hearing¹.

The evaluation team were advised that on average surrender decisions are reached by the executing JA 8 days from the time of arrival of the EAW in consent cases, and in 9 days in cases where consent is not forthcoming.

Estonia's Criminal Code provides that the surrender hearing is to be convened within 5 days of receipt of the (language compliant) EAW by the Court in consent cases² and 10 days in other cases.

The defendant will be produced at the surrender hearing and must be represented by defence counsel. During the course of the hearing the court is required³ to consider:

- the issue of consent,
- the issue of specialty,
- the issue of onward surrender/extradition,
- representations as to refusal grounds.

The expert team noted that the provision of legal counsel for the requested person was mandatory⁴, although it was unclear how matters would proceed if a requested person refused to appoint, ratify or otherwise instruct defence counsel.

¹ Criminal Procedure Code, Article 502(2).

² Consent given before the executing JA is irrevocable.

³ Criminal Procedure Code, Article 502(4).

⁴ Criminal Procedure Code, Article 501(2).

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The expert team examined with first instance and appellate judges the issues taken into consideration during the surrender hearing itself in very considerable detail. They were advised that, notwithstanding the 100% surrender record of Estonia's executing JAs, double criminality was examined in respect of each and every request. The team noted that the JAs considered that they derived their authority to act in this manner, and to consider the merits of the request itself, by virtue of the discretionary wording contained in the Criminal Code which sought to transpose the Article 2 paragraph 2 FD list, namely:

Article 2, paragraph 2 - "The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 3 years and as they are defined by the law of the issuing Member State, *shall* under the terms of this FD and without verification of the double criminality of the act, give rise to surrender pursuant to a EAW: ..."

Article 491(2) - "A person *may* be surrendered pursuant to the Estonian penal code regardless of the punishment for the act if imprisonment of at least 3 years is prescribed in the requesting Member State for the commission of the following criminal offences: ..."

The executing JA reported that an average contested surrender hearing could be expected to last for approximately 30 minutes.

The first instance decision to surrender must be handed down no later than 10 days from the receipt of the EAW by the court in consent cases and 20 days in all other instances¹. In cases of need these deadlines could be extended by the executing JA by up to 30 further days (with the issuing JA being advised of the fact of the extension in all cases).

Once handed down, a copy of the surrender decision is transmitted to the CID which has to notify the issuing Member State of the fact of the decision and to commence the physical surrender logistics.

¹ Criminal Procedure Code, Article 502(6).

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No bail is available to a requested person once a decision to surrender has been made¹. The expert team noted that although the grant of bail was permissible between the time of the first hearing (which reviewed the preventive detention undertaken by the police/arresting authority) and the surrender hearing, no examples of a requested person in fact being released were available. The judges confirmed that, in addition to usual bail considerations, they were mindful of the fact that surrender decisions were finalised and carried out within very short timescales in Estonia and considered this to be a factor carrying some weight.

The Estonian Criminal Code provides² that the requested person shall be surrendered within 10 days of the surrender decision or within 20 days of the surrender decision in the case of an intervening force majeure. Failure to comply with these stipulated time periods will result in the mandatory release of the requested person.

4.8. REFUSALS TO SURRENDER

Apart from the executing JA examining the facts of each case to determine if the double criminality rule has been infringed, it is also required to hear and consider statutory grounds of refusal which reflect, to a substantial degree, the grounds set out in Articles 3 and 4 of the FD.³

The expert team were advised by Estonia's JAs that the list of statutory refusal grounds is considered to be an open list and they are therefore at liberty to take into account such defence representations as are considered to serve the justice of the case. The authority to examine non-statutory pleas was said to arise as a result of the judicial discretion given by Article 491(2) of the Criminal Procedure Code and was seen by the judges as being an integral part of their role in examining the facts of the case.

The team noted that notwithstanding the additional and unforeseen levels of scrutiny that Estonia's JAs applied to incoming EAWs no surrender decisions had, at the time of the evaluation visit, in fact been refused over the entirety of Estonia's EAW experiences.

¹ Criminal Procedure Code, Article 503(4).

² Criminal Procedure Code, Article 505.

³ See Annex B.

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4.9. APPEALS PROCEDURES AND THE IMPACT ON TIME LIMITS

At the time of the evaluation visit, and notwithstanding the fact that the right to appeal is not subject to the granting of leave by the court of first instance, Estonia had experience of just 2 cases in which first instance surrender decisions had been appealed¹. On the facts of these two cases the appeals were rejected by the Court of Appeal.

The rules governing the process of appeal against an EAW surrender decision² are the same as those in domestic criminal provisions³. The appellant is provided with 3 days from the date of the contested decision to file a written notice of the grounds of appeal at the court of first instance. The appeal will then be transmitted to the Appellate (Circuit) Court and determined on the papers within 10 days of receipt.

The decision of the Appellate Court is not subject to further appeal.

4.10. OWN NATIONAL AND YOUTH ARREST AND SURRENDER ISSUES

Estonia surrenders its citizens on the basis that any sentence imposed as a result of a prosecution will be served in Estonia⁴. In the case of an EAW for the purposes of the execution of a sentence the surrender will be refused if the own national applies for the sentence to be served in Estonia⁵.

The expert team were advised that surrenders were subject to the constraints of the Transfer of Sentenced Persons regime in that double criminality and consent were required. The JA reiterated that, whereas in their view there would be no distinction between their treatment of Estonian and other citizens, they would be unlikely to order surrender in any case (prosecution or conviction) where the alleged acts failed the double criminality test.

The age of criminal responsibility in Estonia is 14. No surrender will be ordered in respect of a person who was below that age at the time of the alleged criminal conduct⁶.

¹ Tartu County Court and Harju County Courts (one appeal each in 2004).

² Criminal Procedure Code, Article 504.

³ Criminal Procedure Code, Article 386.

⁴ Criminal Procedure Code, Article 492(3).

⁵ Criminal Procedure Code, Article 492(1)(4).

⁶ Criminal Procedure Code, Article 492(1)(3).

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So far no surrender requests for minors have been received by Estonia and therefore no practical experiences could be related by the EAW authorities.

4.11. SPECIALTY

Estonia has made a declaration pursuant to FD Article 27(1)¹ and as such, save for an express statement to the contrary, has waived the rule of specialty in respect of Member States which have made the same declaration.

At this time Estonia reports no issues arising in respect of its stance on the specialty rule.

4.12. ONWARD SURRENDER/EXTRADITION

There have been no cases of requests by issuing Member States to conduct onward surrenders or extraditions in respect of requested persons surrendered by Estonia.

However the expert team noted that Estonia's implementing legislation² broadly reflects Article 28 of the FD in this regard and as such reiterates that, in the case of Estonian nationals, the consent of the Minister of Justice is required to facilitate the surrender and, in other cases, the general prohibition on onward surrender/extradition is subject to the specified caveats. The expert team noted that in cases of onward surrender, the decision making body was the CA rather than the executing JA as provided in the FD³

4.13. ARTICLE 32 EXPERIENCES

Estonia had no experience of requests impacting on the transitional provisions of Article 32 of the FD.

¹ "...Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution , sentencing or detention ... for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular caser the executing JA states otherwise in its decision on surrender."

² Criminal Procedure Code, Article 494.

³ FD Article 28 paragraph 3.

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4.14. TEMPORARY/CONDITIONAL SURRENDER

The Estonian Criminal Code provides¹ for temporary and conditional surrender although once again the expert team noted that in such instances the decision making body was the CA rather than the executing JA as provided in the FD².

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

Regulations concerning surrender³ specify that a copy of the surrender decision must be transmitted to the CID, which then undertakes the liaison and logistics necessary to facilitate surrender.

Estonia is obliged by its legislation to effect surrender within a maximum period of 20 days of the surrender decision being handed down. Failure to comply with this time limit triggers the immediate release of the requested person. The expert team noted that Estonia's implementing legislation had not transcribed the FD provision to the effect that surrender can be postponed for exceptional humanitarian reasons. Therefore, Estonia would have no option but to effect a release if a requested person became unable to travel because of illness or on similar humanitarian grounds.

4.16. THE MECHANICS OF THE SURRENDER OF REQUESTED PROPERTY/TIME LIMITS/GUARANTEES

At the time of the evaluation visit Estonia had no practical experience of requests for the provision of material or evidence. It was anticipated that property would be surrendered together with the requested person, where that were practicable.

4.17. CONFLICT OF EAWS/EXTRADITION REQUESTS

At the time of the evaluation visit Estonia had no practical experience of apportioning priority to conflicting EAWs/extradition requests.

The Criminal Procedure Code however had established procedures for such conflicts to be determined⁴.

¹ Criminal Procedure Code, Article 506.

² FD, Articles 18 and 24.

³ Criminal Procedure Code, Article 505.

⁴ Criminal Procedure Code, Article 495.

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In cases of conflicting EAWs the JA will consider the requests, taking into consideration the nature of the crimes, the order of the offences, the order of submission of the EAWs and whether the requests were for prosecution or for the enforcement of a sentence. The JA is permitted to seek the advice of Eurojust in such cases.

In cases of conflicting EAW and extradition requests the matter will be referred to the Minister of Justice who will determine the issue based on considerations similar to the JA (above).

4.18. EXPENSES

The Estonian authorities reported that matters relating to expenses were being properly discharged by its EAW partners pursuant to the letter and spirit of Article 30 of the FD.

5. TRAINING PROVISION

Judicial training is provided by the Estonian Law Centre, a non profit making organisation created and funded by the Estonian Parliament. The Law Centre is charged with delivering a 5 year training strategy across all judicial fields.

The Law Centre works in partnership with the CA to deliver ongoing web based publications¹ and EAW training using both internal and external trainers. These programmes are informative in nature (in that they deal with the nature of the instrument and general practical issues which may be encountered) rather than prescriptive. The JAs retain their independence in terms of judicial decision making and may not be advised on matters of interpretation. Attendance at training programmes is said to be voluntary.

The 5 year strategy encompasses the direct provision of EAW information as well as "training for trainers" styled courses which have been provided to 18 judges and 2 prosecutors who are in turn responsible for cascading the information gained to their colleagues in this field.

The Estonian Law Centre is obliged to report the scope of its training objectives and deliveries to Parliament each year.

¹ Principally "The Digesta" - an updated publication containing summaries of Supreme Court decisions.

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The CA and the Office of the Prosecutor General also cooperate with each other to deliver EAW training programmes and lectures to Estonia's prosecution service (all regions received a 1 day EAW specific training course during 2005).

In addition stakeholders have attended international seminars and symposia on the practical implementation of the EAW:

- In Porvoo, Finland, where a three day symposium was held for Finnish, Swedish, Estonian, Latvian and Lithuanian prosecutors and officials,
- In Tallinn where, in conjunction with TAIEX and Eurojust, an international seminar was held on the implementation of the EAW, and
- In Tallinn where, in conjunction with Eurojust, Estonian and Finnish judges and prosecutors met to discuss the practical application of the EAW.

The Central Criminal Police have also arranged EAW lectures at local police prefectures and have consulted the CA on content and procedural regulations to be applied.

During the evaluation visit the expert team posed questions pertaining to a series of hypothetical, yet by no means extraordinary issues to a range of different EAW stakeholders¹. The team noted that there was a general reluctance to be drawn on issues in respect of which no concrete experience had been gained. The team appreciated that in terms of volume Estonia currently had relatively limited EAW experience, but it was felt that training targeted towards a more proactive problem solving mindset might be of some benefit in terms of preparing the appropriate authorities for challenges or breaches of rules/deadlines (prior to encountering them in concrete cases).

6. DEFENCE PERSPECTIVES

The expert team met two senior members of the Estonian Bar Association who from direct experience, and by canvassing the views of their members, had direct experience of 5 of Estonia's 57 EAW surrender cases to date². The Association was also consulted as a stakeholder in the drafting process leading up to the implementation of Estonia's EAW legislation.

¹ For example, "would you expect defence representations to be restricted to the statutory refusal grounds or the practical matters set out in your Criminal Procedure Code. If not, what points might you anticipate and how might you respond?"

² EAW receipts : 2004 = 6, 2005 = 25, YTD 2006 = 26.

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Legal advice and assistance in all Estonian EAW proceedings must be provided by members of this Association¹. Entrance to the Estonian Bar Association requires further academic qualifications to be obtained over and above those held by domestic criminal lawyers.

The Estonian Criminal Code provides that requested persons must receive legal representation at the initial (48 hour) arrest hearing and at the eventual surrender hearing. Subject to an advocate being a member of the Bar Association there is no restriction on this representation. The team were advised that in the majority of cases the requested person would be unlikely to have a legal advisor of choice and as such the public prosecutor would contact the Bar Association who would review their own lists and appoint counsel.

In practice, the lawyer's first meeting with the requested person will be immediately before the first hearing. The Bar Association was not satisfied with the general level of translation available for the first court hearing and reported one instance in which the defence had deemed it necessary to retain, and privately fund, their own translator. It was reported that it had proved difficult to persuade the executing JA that translation was inadequate (on the basis that the person best able to assess that would likely be the requested person himself).

The expert team noted the concern expressed by the defence lawyers as to the realistic possibility of obtaining bail/release for their clients. It was the view of the defence lawyers that they were permitted to argue this point and that the normal domestic criteria applied. However they believed that clients facing comparable charges in domestic proceedings would have a better prospect of obtaining bail/release than in EAW matters.

Contested cases were stated to be rare and, given the surrender record of Estonia, it was felt that the surrender process would almost inevitably result in surrender. Having stated that, the defence lawyers confirmed that they were entirely at liberty to argue the facts of the case, double criminality, merit-based considerations or indeed any matter which they felt would advance the case of the requested person.

¹ Criminal Procedure Code, Article 501(1).

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The defence lawyers also confirmed that in the case of an appeal it was permissible to revisit any issue or raise such new matters as they chose to plead in their written grounds.

7. GENERAL CONCLUSIONS

7.1 General Conclusions

7.1.1. The expert team wish to express their gratitude to the Estonian authorities for the cooperation and openness which was afforded to them throughout the evaluation visit. The team were able to discuss all EAW related matters in depth and without inhibition. The team were struck by the desire evident in all EAW stakeholders to see that the FD as transposed was effectively enforced.

7.1.2. The team also wish to formally record the willingness demonstrated by the Estonian authorities to abide by the spirit of the peer evaluation process. Specifically, they would like to recognise that in the light of the findings arising from the evaluation visit, draft remedial legislation has already been drawn up to bring aspects of the Criminal Procedure Code into closer conformity with the FD (see 7.3.1.7. and 7.3.1.10. below).

7.1.3. Evidence of the degree of priority afforded to this instrument by Estonia is amply demonstrated by the statistical record of the surrenders undertaken to date, both in terms of the surrender decision (at the time of the visit there were no recorded instances of surrender being refused) and the speed of the process itself¹. The Estonian authorities stated expressly that they viewed this instrument as an efficient and beneficial development in the fight against organised crime.

7.2. Conclusions in respect of Estonia's activities as an issuing Member State

7.2.1. Issues

7.2.1.1. Issuing JA lacunae

The expert team recognise that Estonia's Criminal Procedure Code designates the authorities competent to issue EAWs in pre-trial processes (the public prosecutors) and in conviction cases (the CA)².

¹ The 2005 figures provided for the delivery of the surrender decision being: 8 days from receipt of the EAW in consent cases and 9 days in non consent cases.

² Criminal Procedure Code, Article 507.

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They noted however that as the law is currently drafted no issuing JA is designated to deal with instances where a suspect might abscond during the preliminary stages of criminal proceedings (that is to say prior to the verdict being delivered).

The expert team understand that the designation of the (executing) JA as the body competent to issue this category of EAWs is thought to be the appropriate solution but, at the time of the visit, no legal basis had been enacted to empower them to proceed in that manner.

7.2.1.2. Translation capacity

The expert team noted that a shortage of translators, coupled with strict translation deadlines in certain other Member States, has already resulted in the release of a requested person. In that case, Estonia was unable to comply with the translation of an EAW from Estonian into Latvian within the 72 hour deadline imposed.

Despite the best efforts of the Estonian CA in that matter a requested person was able to evade due criminal process by virtue of linguistic hurdles being set at too high a level.

The expert team discussed the issue of translation with Estonia's CA and were advised that, given the size of the Estonian population,¹ and the fact that many qualified translators had moved to Brussels to work for the EU institutions, the shortage of translators was not an issue which was likely to be resolved in the immediate future. As noted in paragraph 3.4, efforts have been made to agree 24 hour translation deadlines with service providers. The team noted however that weekend cover had so far proved to be lacking.

Realistically therefore it was felt that the most effective way to minimise similar failings in the surrender process in future would be for certain Member States to consider relaxing the time limits for provision of language-compliant documentation and/or to provide for the possible use of vehicular languages.

The team noted that these difficulties were reported by the state and by the defence and, as such, appeared to be widespread.

¹ Roughly 1.5 million people.

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7.2.1.3. Early requests for the submission of original EAWs

The expert team were advised that it was the practice of the Estonian CA¹ to retain all original EAWs pending the arrest of the requested person by an executing Member State.

On this basis Estonia was unable to comply with the UK's requirement to provide original documentation prior to taking concrete steps to locate the requested person. In respect of non SIS countries, the expert team accepted that the FD did not create an express obligation for investigative work to be undertaken by an executing Member State in advance of the receipt of the EAW.

However, they were of the view that failure to act in such a manner was not in keeping with the spirit of the FD. Estonia's CA would only comply with this requirement if they had information which identified the UK as the location of the requested person, i.e. in those situations they would dispatch a targeted EAW rather than a general Interpol diffusion.

7.2.1.4. The provision of guarantees

At the time of the visit Estonia had no experienced of having been required to provide return guarantees in respect of Article 5 paragraph 3 of the FD. The expert team noted the view that (subject to the constraints incumbent on Estonia by virtue of its reliance on the return of sentenced persons regime) that Estonia would be willing to provide such guarantees. They noted also however the absence of a legal basis stating which body would be competent to provide such an undertaking.

7.2.1.5. Estonian border control

The expert team noted that the border guards were obliged by the Estonian State Borders Act to prevent any border crossing (even where such a crossing had been ordered by a JA pursuant to a properly issued EAW) in cases where valid travel documents were not available. This restriction had presented a significant barrier to a number of EAW surrenders and had necessitated urgent applications to consular staff so that temporary travel papers could be provided.

The expert team were of the view that this formality was entirely unnecessary in respect of EAW cases, particularly given the fact that the identity of all requested persons would already have been established, possibly by photographic and/or forensic means, before a criminal tribunal and to the satisfaction of criminal burden of proof.

¹ As the authority responsible for transmission and translation of Estonian EAWs.

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The CID also confirmed that the consent of the requested person was necessary to apply for such a temporary document. The experts speculated therefore that it might be possible for a particularly intransigent individual to frustrate the execution of a surrender order and, if this resulted in a breach of Estonia's 20-day time limit, secure his own lawful release. The team accepted that this potential issue was, at present, theoretical.

They noted also that there was no legal basis in the FD for any such travel document based requirement.

7.2.1.6. Withdrawal of EAW

The expert team understood that, other than by discontinuing the entirety of the domestic criminal process¹, once the Estonian issuing JAs had issued an EAW there was no mechanism to effect its discreet withdrawal. It was felt that further flexibility would benefit the Estonian EAW system so that EAWs could be withdrawn as a free standing measure leaving intact the potential for a domestic trial. The view of the team was that this weakness could be resolved by introducing simple withdrawal protocols.

7.2.2. Good practices

7.2.2.1. Centralised benchmarking

The expert team considered that the central review function undertaken by the Office of the Prosecutor General was of benefit to the process. It ensured that EAWs were drafted in a uniform manner by Estonia's 190 prosecutors and that the issue was considered to be proportionate, that is to say that the severity of the criminality and/or damage caused would be a factor in the decision making process, rather than the bare application of statutory criteria.

7.2.2.2. Electronic mailboxes

The team noted also that all agencies involved in the EAW process operated shared electronic mailboxes and as such had taken a simple but practical step to minimise the chance of time-critical data being overlooked.

¹ Criminal Procedure Code, Article 206(1)(2).

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7.3. Conclusions in respect of Estonia's activities as an executing Member State

7.3.1. Issues

7.3.1.1. CID and CA staffing levels

The expert team noted that staffing levels at the CID were such that it was only possible to undertake a search of Estonia's electronic databases in cases where there were markers relating to Estonia. This seemed to the team to be an issue which might be addressed if a review of staffing were to be undertaken with the object of establishing the human resource and material requirements for carrying out hit/no hit searches in all cases.

Additionally the team were struck by the fact that the 3 lawyers of the Courts Department of the Ministry of Justice covered a very broad series of portfolios entirely without administrative support. Give the volume of administrative tasks associated with many of their activities, including their EAW duties, it was felt that the general level of efficiency would be increased by measured staffing expansion in that area.

7.3.1.2. Consent

The expert team felt that there was some degree of conflict between the practice of consent being obtained by police officers prior to a court hearing and the mandatory role of the court to "verify whether the person consents to surrender"¹. The team felt that a significant degree of importance was attributed to police obtained consents and were unclear as to the possibility of revoking such consent before the JA².

7.3.1.3. Fiche Française

The expert team noted that the Estonian EAW authorities confirmed that the correct position, in respect of consents to surrender, is that they are irrevocable. The guidance given to Member States in the Estonian Fiche Française however inaccurately states that "Consent may be revoked until the decision of the Court of Appeal". Clearly this drafting error should be corrected as soon as possible.

¹ Criminal Procedure Code, Article 502(4)(1).

² FD Article 13 paragraph 1.

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7.3.1.4. Bail/Release criteria

The expert team considered that there was a degree of uncertainty as to the legal basis to be applied when coming to a decision on bail/conditional release during the EAW process (prior to the surrender decision being handed down). Estonia's EAW implementing legislation does not contain criteria specific to the EAW process and so domestic rules were applied¹. The defence lawyers however were of the firm view that domestic rules were applied more stringently in EAW matters than in comparable domestic proceedings.

7.3.1.5. Release protocols

The expert team appreciated that Estonia had mandated that requested persons would be "immediately" released from preventive custody if the EAW had not been transmitted to the CA within 3 working days of the arrest². They were not however confident that the necessary protocols had been put in place to ensure that any such release would in fact take place as soon as practicable.

The team were of the view that the power of the prison authorities to detain a requested person derived from a judicial order which was not, in itself, limited in time (i.e. linked to the 3 working day limit for submission of EAWs); it was therefore incumbent on the CA to advise the prosecution authorities immediately of any breach so that they in turn could draft a release order to the prison authorities, who would enforce the release.

Given that this notification burden lay with the CA, and notwithstanding the relatively low volumes of EAW requests currently experienced, the expert team felt that some form of electronic diary system was merited to safeguard the rights of the requested person and ensure that unlawful detentions did not arise by virtue of oversight.

7.3.1.6. Mandatory representation by defence counsel

The team applauded Estonia's efforts to ensure that the rights of the requested person were protected by the requirement that they had to be represented in surrender proceedings by defence counsel³. They were however concerned at the lack of provision in respect of how the surrender process could proceed if such representation were rejected and the requested person elected, for example, to represent himself or to be unrepresented.

¹ Criminal Procedure Code, Articles 135 and 499.

² Criminal Procedure Code, Article 499(5).

³ Criminal Procedure Code, Article 501(2).

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7.3.1.7. Examination of double criminality

The expert team were of the view that they were confronted on the one hand with exemplary surrender statistics for Estonia's activities as an executing Member State and, on the other, by a clear assertion by the judges interviewed that double criminality was examined in all cases. Further, the JA took the view that the discretionary wording contained in Estonia's enabling legislation required that they examine all aspects of the case.

The team were aware that the Criminal Procedure Code, as currently drafted, does not preclude unfettered discretion by the JAs to open and examine any aspect of the case they see fit. The experts were however extremely concerned by a practice that is so clearly contrary to the fundamental principles of the FD, namely the abolition of the rule of double criminality for several categories of offences based on mutual trust between JAs of Member States.

Given the gravity of these findings the team felt that it was appropriate to advise the CA, whilst in situ, that they were unable to discern any practical difference between the JAs treatment of list and non-list offences. Prior to the completion of the expert report the team were provided with draft legislation that aims to reaffirm the explicit abolition of double criminality¹ in all list offences.

The current wording of that section of the draft bill is set out below:

Amended Article 491 - "A person shall be surrendered pursuant to the Estonian Penal Code regardless of the punishment for the act of imprisonment of at least three years is prescribed as punishment in the requesting state for commission of the following criminal offences: ..."

7.3.1.8. Refusal grounds

The team were again forced to reconcile what is an impressive surrender record with a clear statement that the JA will consider the merits of each case in coming to a decision in respect of the surrender application.

The judges asserted that in each instance they would consider the justice of the case and the proportionality of the application (over and above the facts of the case) before ordering surrender.

¹ Should it be enacted in its current form.

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Three examples were given, and reiterated during the course of an animated exchange:

- if a father of a large family of young children was requested on the basis of an EAW, considered by the executing JA to be for an offence of lower order criminality, the JA may refuse surrender purely on merit grounds rather than pursuant to any of the grounds stated in Articles 3 and 4 of the FD (or expressly repeated in the Estonian Penal Code),
- if an alibi were to be established by the defence, to a criminal standard, no surrender would be ordered,
- If double criminality were not satisfied. i.e. if a person were to be requested in respect of acts which were not an offence in Estonia, surrender would be refused. Estonia's current Fiche Française reiterates this general point (on page 6) but links possible surrender refusal to the surrender of nationals and reliance on the Transfer of Sentenced Persons Convention rather than merit based justifications.

The expert team considered that this legal basis is clearly contrary to the letter and the spirit of the FD and as such should be addressed as a matter of priority.

7.3.1.9. Temporary surrender/onwards surrender

The team noted that the Estonian executing JAs were involved in the rendering of the surrender decision itself, but were not party to consideration of the merits of postponed or temporary surrender in any way. Such decisions were entirely a matter for the CA¹ which would not notify the JA (contemporaneously or retrospectively) for information or ratification purposes.

The team noted that the process of temporary/conditional surrenders functioned well and in accordance with the legal basis established by Estonia's Criminal Code but were not being undertaken as judicial functions as was intended by the provisions of Article 24 of the FD. Similarly, the CA was competent to consent to onwards surrender whereas the FD provides that this competence should lie with the executing JA².

7.3.1.10. Failure to transpose humanitarian grounds for postponement in line with Article 23(4) of the FD.

¹ Criminal Procedure Code, Article 506.

² FD Article 28 paragraph 3.

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The experts noted that although Estonia had provided very direct transposition of many elements of the FD, the above basis for the postponement of surrender had been omitted.

The team considered that this omission would result in the release of a requested person whose surrender was, for genuine humanitarian reasons, not possible within the standard 20 day maximum time limit currently provided for. Once again the team were provided with a copy of a proposed amending bill, drafted following the evaluation visit, which aims to address this issue.

The current wording of that section of the draft bill is set out below:

Amended Article 505(4) – *“The surrender may exceptionally be temporarily postponed if there are substantial grounds for believing that enforcement would endanger the requested persons life or health. The execution of the European Arrest Warrant shall take place as soon as the grounds have ceased to exist and the person shall be surrendered within 10 days of the new date thus agreed.”*

7.3.1.11. Transfer of Sentenced Persons Convention

Reliance on the 1983 Convention on the Transfer of Sentenced Persons as the basis for the return of executing Member State nationals for the service of sentences imposed places the right of initiative on the requested person and reintroduces a (further) examination of double criminality. The expert team noted that this made the provision of FD Article 5(3) guarantees extremely problematic and could affect the surrender process in such cases.

The expert team felt that this basis was at odds with the judicialisation of the surrender process in general and an impediment to compliance with the stringent time-limits set down by the FD.

7.3.2. Good practices

7.3.2.1. Linguistic flexibility

The expert team noted that Estonia's acceptance of EAW's in the issuing Member State language to "stop the clock running" was a pragmatic and extremely helpful contribution to the functioning of the process. They also felt that the acceptance of a vehicular language made general communications with other Member States far simpler and hence reduced the chance of language based misunderstandings impeding the process.

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7.3.2.2. Speed of decision making

The team felt it appropriate to reiterate that in consent and non consent cases the Estonian EAW process delivers surrender decisions in just 8 days and 9 days respectively from the receipt of the EAW. This achievement was even more worthy of note given that the requested person is provided with unfettered access to Estonia's Appellate Court.

8. RECOMMENDATIONS

8.1. RECOMMENDATIONS TO ESTONIA

8.1.1. As issuing Member State

Recommendation 1 – That domestic legislation is put in place designating the competent issuing JA in EAW cases arising in respect of persons who abscond during the course of criminal proceedings (see 7.2.1.1)¹.

Recommendation 2 – That a study be undertaken of the translation capacity available to Estonia's CA in EAW matters so that areas of weakness may be clearly identified and, if possible, rectified (see 7.2.1.2.).

Recommendation 3 - That consideration be given to clarifying which Estonian authority would be best placed to provide guarantees which may be required by executing Member States pursuant to Article 5(3) of the FD (see 7.2.1.4.).

Recommendation 4 – That domestic legislation be put in place to permit surrendered persons to cross Estonia's borders in the absence of international travel documents (see 7.2.1.5.)².

Recommendation 5 - That domestic legislation be put in place to permit EAWs to be withdrawn where the basis for the issue of the EAW no longer exists but the need to preserve domestic criminal proceedings remains (see 7.2.1.6.).

¹ The expert team have subsequently been advised that draft legislation has been prepared to address this recommendation.

² The expert team have subsequently been advised that draft legislation has been prepared to address this recommendation.

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8.1.2. As executing Member State

Recommendation 6 – That an examination of Estonia's CID resources be undertaken to ascertain if increased staffing would contribute to increased screening of Interpol Red Notices/diffusions (see 7.3.1.1.).

Recommendation 7 - That the practice of police obtained consents be examined with a view to clarifying the process by which the requested person may grant or refuse their consent to surrender before the executing JA (see 7.3.1.2).

Recommendation 8 - That Estonia's Fiche Française be reviewed by the relevant EAW authorities to verify its accuracy, and that any errors and/or omissions discovered be remedied as soon as practicable (see 7.3.1.3)

Recommendation 9 - That domestic legislation be put in place to clarify the precise criteria applicable to the issue of bail/release in EAW proceedings (see 7.3.1.4).

Recommendation 10 - That mechanisms be established to ensure the timely release of requested persons in keeping with mandatory release provisions established by the Criminal Procedure Code (see 7.3.1.5.).

Recommendation 11 – That domestic legislation be amended to provide for the possibility that a requested person may elect not to be represented by a defence advocate during the surrender proceedings (see. 7.3.1.6.).

Recommendation 12 - That domestic legislation be put in place to expressly assert that surrender in respect of FD list offences is to occur without verification of the double criminality of the act (see 7.3.1.7.)¹.

¹ The expert team have subsequently been advised that draft legislation has been prepared to address this recommendation.

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Recommendation 13 – That domestic legislation be put in place to clearly define and limit the precise legal grounds by which Estonia’s executing JAs may refuse surrender (see 7.3.1.8)¹.

Recommendation 14 – That domestic legislation be considered whereby Estonia’s executing JAs are designated as the body competent to authorise temporary or conditional surrenders and onwards surrenders (see 7.3.1.9.).

Recommendation 15 – That domestic legislation be put in place to ensure that humanitarian grounds are established as a permissible basis for the postponement of surrender of the requested person in appropriate cases (see 7.3.1.10.)².

Recommendation 16 - That the Estonian Law Centre review the various legislative amendments made pursuant to this report, together with their concrete consequences, and submit an appropriate training programme to Estonia's Training Council to ensure that the necessary training regimes are put in place as soon as practicable (see 5.8.1.).

8.2 RECOMMENDATIONS TO CERTAIN OTHER MEMBER STATES

Recommendation 17 – To consider measures which would allow for increased flexibility in respect of time requirements for the provision of language-compliant EAWs (see 7.2.1.2 and 7.3.2.1.).

Recommendation 18 – That those Member States who require receipt of original EAWs prior to commencing substantive tracing work in respect of requested persons reconsider those demands in light of the difficulties caused to issuing Member States which rely upon the SIS and Interpol as their primary transmission options. (see 7.2.1.3).

8.3 RECOMMENDATIONS TO THE EUROPEAN UNION

Recommendation 19 - To discuss the merits of adopting a core of vehicular languages in EAW matters, so as to alleviate foreseeable conflicts in the provision of language compliant documentation. (see 7.2.1.2 and 7.3.2.1.).

¹ The expert team have subsequently been advised that draft legislation has been prepared to address this recommendation.

² The expert team have subsequently been advised that draft legislation has been prepared to address this recommendation.

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ANNEX A

STATISTICS

Number of EAWs issued by Estonia from 1 January 2006 up to September 2006:

Issued	Arrest made	Refused
28	17	1 (by Latvia)

Number of EAWs received by Estonia from 1 January 2006 up to September 2006:

Received (EAWs and persons)	Surrendered	Refused
26	26	none

From these 26 surrenders 21 were decided by consent.

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ANNEX B

PROHIBITIONS ON SURRENDER

Statutory Reference	Précis	Corresponding FD Article
Article 492(1)(1)	Alleged offence is covered by amnesty in executing Member State where jurisdiction is shared	Article 3.1
Article 492(1)(2)	Double jeopardy	Article 3.2
Article 492(1)(3)	Requested person being under the age of criminal responsibility at the time of commission of the offence	Article 3.3
Article 492(1)(4)	Execution of sentence request for own nationals	Article 4.6
Article 492(2)(1)	Domestic proceedings	Article 4.2
Article 492(2)(2)	Executing Member State has decided not to prosecute or to discontinue proceedings in respect of the same acts	Article 4.3
Article 492(2)(3)	Alleged offence is statute barred in executing Member State where jurisdiction is shared	Article 4.4
Article 492(2)(4)	Double jeopardy	Article 4.5
Article 492(2)(5)	Extra territoriality	Article 4.7 b
Article 492(2)(6)	Failure of the issuing Member State to provide information required by the executive JA	N/A
Article 492(3)	Return of own nationals	N/A
Article 492(4)	In absentia guarantees	N/A
Article 492(5)	Review of imposition of life sentence	N/A
Article 492(6)	Requested person enjoys immunity	Article 20

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ANNEX C

PROGRAMME OF VISITS

Tuesday 12 September

9.30 transport from hotel to the Ministry of Justice (*Tõnismägi 5a, Tallinn*)

10.00 – 10.30 Welcome at the Ministry of Justice

10.30 – 12.30 Ministry of Justice (international unit)

12.30 – 13.45 Lunch at the Ministry of Justice

short walk /or transport from the Ministry of Justice to the Prosecutor General's Office (*Wismari 7, Tallinn*)

14.00 – 16.30 Prosecutor General's Office

transport from the Prosecution Office to the Hotel

Dinner

Wednesday 13 September

07.00 transport from hotel to Tartu

10.00– 11.30 Tartu County Court (*Kalevi 1, Tartu*)

11.30 – 12.00 Tartu Court of Appeal (*Kalevi 1, Tartu*)

12.00– 12.45 South Regional Prosecution Office (*Kalevi 1, Tartu*)

13.00 – 14.30 Lunch

short walk/ or transport to the Estonian Law Centre (*Lossi 19, Tartu*)

14.45 – 16.00 Estonian Law Centre

16.00 transport back to Tallinn

Thursday 14 September

9.00 transport from hotel to the Estonian Central Criminal Police (*Tööstuse 52, Tallinn*)

9.15 – 11.00 Estonian Central Criminal Police

transport from CCP to the Estonian Bar Association (*Rävala pst. 3; Tallinn*)

11.15 – 11.45 Estonian Bar Association

12.00 – 13.30 Ministry of Justice – roundtable

transport to the Airport

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LIST OF PERSONS INTERVIEWED

Ministry of Justice

Imbi Markus – Head of the International Judicial Co-operation Unit
Astrid Laurendt-Hanioja – Assistant Adviser to the International Judicial Co-operation Unit

Estonian Prosecutor General's Office

Alar Kirs – Leading Public Prosecutor
Eve Olesk – Public Prosecutor
Kristel Praun – Assistant Prosecutor
Viiu-Marie Rummo – Assistant Prosecutor

Tartu County Court

Ene Muts – Judge
Rutt Teeveer – Judge

The Southern Circuit Prosecutor's Office

Raul Eido – Special Prosecutor
Küllli Saks – Circuit Prosecutor

Estonian Law Centre

Michael Gallagher – Head of the Law Centre
Andreas Kangur – Methodologist in the field of criminal law
Janika Friedenthal – Methodologist in the field of EU law

Estonian Central Criminal Police

Sergo Eelmäe – Superintendent
Marko Vahtra – Leading Police Inspector
Enrik Luts – Leading Police Inspector

Estonian Bar Association

Rein Kiviloo – Advocate, Chancellor of Estonian Bar Association
Jaanus Tehver – Advocate

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ANNEX E

LIST OF ABBREVIATION/GLOSSARY OF TERMS

ACRONYM ABBREVIATION TERM	ENGLISH EXPLANATION
CA	Central Authority
CID	Central Criminal Police
FD	Framework Decision
JA	Judicial Authorities
KAIRI	Information system for Criminal Police, including intelligence data
POLIS	The incident reporting, processing of crime and statistical database

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