**Responses by the Irish Research Partner to Questionnaire on Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW)**

## Part 1: Preliminary matters

**1.** *Please indicate who completed the questionnaire in which capacity and how much years of experience you have had in dealing with EAW cases, in particular whether you have experience as issuing and/or executing judicial authority.*

## Response

The questionnaire was responded to by Mr Justice John Edwards, of the Court of Appeal of Ireland, primarily assisted by Ms Angela Brennan, B.C.L., Judicial Assistant and Researcher. Mr Justice Edwards would like to acknowledge the industry, commitment and considerable help provided to him by Ms Brennan in responding to the questionnaire.

Mr Justice Edwards has in excess of ten years' experience in dealing with EAW matters, both as a High Court judge and as an appellate judge. He was the judge in charge of the Irish High Court's EAW and Extradition list from December 2010 until December 2014, during which time he was engaged full time in EAW work acting both as an issuing and executing judicial authority and is the author of many judgments in EAW cases. Following his appointment to the Court of Appeal, which operates as a collegiate court and sits in panels of three judges, he has continued to deal regularly with EAW matters in an appellate capacity. He is now the Senior Ordinary Judge on the Court of Appeal, and as such is frequently the panel presider in appeals relating to EAW matters. He is currently one of three members of the Irish panel of *ad hoc* Judges who may be called upon to sit on the European Court of Human Rights.

Mr Justice Edwards is also an Adjunct Professor of Law at the University of Limerick, and in that capacity has conducted seminars and lectured on EAW law.

Mr Justice Edwards would further like to acknowledge additional assistance provided to him by his judicial colleagues, Ms Justice Aileen Donnelly and Mr Justice Donald Binchy, of the Court of Appeal, and Mr Justice Paul Burns of the High Court, all of whom were also at different times judges in charge of the High Court's EAW and Extradition list, and who willingly responded to queries and made available their expertise. He would also like to thank Mr Gareth Lynch, Ms Áine Burke, Mr Declan O'Reilly, Mr Michael O'Donoghue and Ms Louise Kelleher of the Chief State Solicitor's Office, for assisting with several queries relating to the management of incoming EAW cases and for providing the benefit of their expertise and valuable feedback. Finally, he would also like to acknowledge the assistance of Mr Declan Keating of the Office of the Director of Public Prosecutions for providing valuable insights into issues associated with the preparations for and management of outgoing EAW cases.

## Part 2: transposition of Framework Decision 2002/584/JHA

### A General questions –

**2.** (a) *Did your Member State transpose Art. 8(1) of FD 2002/584/JHA and the Annex to FD 2002/584/JHA (containing the EAW-form) correctly?*

**Response**

Yes.

The European Arrest Warrant Act 2003 ("the Act of 2003") gave effect to the provisions of FD 2002/584/JHA ("the Framework Decision") in Irish domestic law. The correct transposition of Art. 8(1) is given effect by Part 2 section 11 of the Act 2003 (as amended by the Criminal Justice (Terrorist Offences) Act 2005; the Criminal Justice (Miscellaneous Provisions) Act 2009; the European Arrest Warrant (Applications to Third Countries and Amendment) and Extradition (Amendment) Act 2012)("the Act of 2012); and by the European Union (European Arrest Warrant Act 2003) (Amendment) Regulations 2021 (S.I. No. 150 of 2021).

For convenience the reader is referred to the version of the Act of 2003 published as one of the Irish Law Reform Commission's "Revised Acts" which incorporates all relevant legislative changes and sets out the legislative history:

https://revisedacts.lawreform.ie/eli/2003/act/45/section/11/revised/en/html

It may be helpful to highlight specific provisions in the Act of 2003 which are relevant to the correct transposition of Article 8 (1) of FD 2002/584/JHA as amended by FD 2009/299/JHA.

In that regard s.4A of the Act of 2003, as amended, contains an important presumption. It provides

> "4A. It shall be presumed that an issuing state will comply with the requirements of the relevant agreement, unless the contrary is shown."

The term "relevant agreement" is defined in s.2 of the Act of 2003 as meaning:

> (*a*) in relation to a European arrest warrant, the Framework Decision,
>
> (*b*) in relation to a Trade and Cooperation Agreement arrest warrant, the Trade and Cooperation Agreement, and
>
> (*c*) in relation to an arrest warrant within the meaning of the EU-Iceland Norway Agreement, the EU-Iceland Norway Agreement;

The Trade and Co-Operation Agreement referred to is that entered into between the EU and the United Kingdom, consequent upon Brexit and which provides *inter alia* for the continued mutual recognition by judicial authorities in EAW member states, after 11.00pm UTC on the 31st of December 2020, of EAWs issued by the UK prior to that time and date.

In its most recent iteration, s.11(1) of the Act of 2003 now provides:

> "11(1) A relevant arrest warrant shall, in so far as is practicable - (a) in the case of a European arrest warrant, be in the form set out in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, (b) in the case of a Trade

and Cooperation Agreement arrest warrant, be in the form set out in Annex Law-5 to the Trade and Cooperation Agreement, and (c) in the case of an arrest warrant within the meaning of the EU-Iceland Norway Agreement, be in the form set out in the Annex to the EU-Iceland Norway Agreement.

Subsections (1A), (2) and (2A) of s.11 cumulatively give effect to transposing the specific information requirements in Article 8(1) of the Framework Decision as amended by FD 2009/299/JHA. These provide:

(1A) Subject to *subsection (2A)* , a relevant arrest warrant shall specify —

(*a*) the name and the nationality of the person in respect of whom it is issued,

(*b*) the name of the judicial authority that issued the relevant arrest warrant, and the address of its principal office,

(*c*) the telephone number, fax number and email address (if any) of that judicial authority,

(*d*) the offence to which the relevant arrest warrant relates, including the nature and classification under the law of the issuing state of the offence concerned,

(*e*) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the relevant arrest warrant relates,

(*f*) the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence, and

(*g*) (i) the penalties to which that person would, if convicted of the offence specified in the relevant arrest warrant, be liable,

(ii) where that person has been convicted of the offence specified in the relevant arrest warrant but has not yet been sentenced, the penalties to which he or she is liable in respect of the offence, or

(iii) where that person has been convicted of the offence specified in the relevant arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists.

(2) Where it is not practicable for the relevant arrest warrant to be in the form referred to in *subsection (1)*, it shall include such information, additional to the information specified in *subsection (1A)*, as would be required to be provided were it in that form.

(2A) If any of the information to which *subsection (1A)* (inserted by section 72(*a*) of the Criminal Justice (Terrorist Offences) Act 2005) refers is not specified in the relevant arrest warrant, it may be specified in a separate document."

Some uncertainty as to whether Article 8.1(f) of the Framework Decision was accurately transposed into Irish legislation by section 11(1A) of the Act of 2003 was recently highlighted in the Court of Appeal in the case of *Minister for Justice and Equality v Kubalek* [2021] IECA 21.

That case concerned, *inter alia*, an important difference between Article 8(1)(f) of the Framework Decision and Ireland's transposing provision relating to the case of a person who has already been sentenced, namely s.11(1A)(g)(iii) of the Act of 2003. The former only requires specification of the penalty imposed "if there is a final judgment", whereas the domestic provision does not qualify it's requirement in that way. The Court of Appeal held that it was required, if possible, to give s.11(1A)(g)(iii) of the Act of 2003 a conforming interpretation that aligned with the provision it was intended to transpose. It considered that there was nothing in s.11 of the Act of 2003, as amended, or indeed in the Act of 2003 as a whole, to indicate a specific intention by the Oireachtas (the Irish parliament) to impose a stricter requirement as to lawfulness than does the Framework Decision, in terms of what must be specified within an EAW in respect of the penalty imposed where a sentence has already been passed.

**2.(b)** *Was there any debate about the correctness of the transposition in your national law, e.g in academic literature or in court proceedings?*

**Response**

It is not clear to this respondent whether this sub-part of Q.2 question relates to transposition of the Framework Decision generally, or specifically in relation to the transposition of Article 8(1). It is proposed in the circumstances to address both.

Academic Literature

An authoritative legal commentary on the transposition of FD 2002/584/JHA ("the Framework Decision") into Irish law is that of Remy Farrell and Anthony Hanrahan '*The European Arrest Warrant in Ireland*' ("Farrell and Hanrahan"). Although written in 2010, it highlights some of the initial difficulties and challenges that judicial authorities encountered due to the expedited nature of the legislative drafting engaged in for the purpose of incorporating the Framework Decision into Irish law.

There is no commentary in Irish academic literature concerning the correctness of Ireland's interpretation of Article 8(1) specifically. There are, however, several cases concerning Article 8(1) and its transposing provisions:

These include:

*Minister for Justice, Equality and Law Reform v. Ferenca* [2008] 4 I.R. 480;

*Minister for Justice Equality and Law Reform v Dus* [2009] IESC 67;

*Minister for Justice, Equality and Law Reform v Kizelavicius* [2009] IESC 74;

*Minister for Justice, Equality and Law Reform v. SAS* [2010] IESC 16; and

*Minister for Justice and Equality v Kubalak* [2021] IECA 21 (cited above)

As regards transposition of the Framework Decision more generally there is both academic commentary and there is relevant jurisprudence. It is convenient to deal with this under the headings of "interpretation", "direct effect", and "other issues".

*Interpretation*

An early issue in interpreting the Act of 2003 was it's perceived "vagueness and loose drafting' as identified by Fennelly J. in the Supreme Court in *Dundon v Governor of Cloverhill Prison* [2006] 1 IR 518. He said:

> *"It has to be acknowledged, at once, that the legislation presents unusual problems of interpretation. The European arrest warrant is itself a novel instrument. It was adopted in the wake of the devastating tragic events of the 11th September 2001. The drafting is extraordinarily loose and vague, particularly in the manner in which offences are defined."*

Remarks to similar effect are to be found in the judgment of Geoghegan J. in the same case, who commented that the Act *"is not happily drafted"*; and in the judgment of Murray C.J., in *Minister for Justice, Equality and Law Reform v Ferenca* [2008] 4 IR 480, who remarked on the *"somewhat vague language and curious construction"* of the Framework Decision.

Compounding this difficulty was the inability of the domestic courts at the time to make preliminary references to the Court of Justice in relation to interpretation due to the non-declaration by Ireland that that Court can exercise jurisdiction in relation to determining the validity of a Framework Decision under Article 35 of the Treaty of the European Union. The position changed from 1 December 2014, in circumstances where Article 10(3) of Protocol No. 36 to the Treaty of Lisbon had provided for jurisdiction to make a reference after a five-year transitional period. Effect was given to this in 2014

*Direct Effect*

A major source of early difficulty, subsequently remedied by amendments to the legislation, was the decision by the drafters of the Irish transposing legislation to not only apprehend the Framework Decision to the Act of 2003 but also to refer to it in the body of the Act and incorporate parts of it in an operative fashion. The framework decision was not meant to be directly effective but it had effectively been transposed in a partially directly effective manner, thereby muddying the waters to a considerable extent in relation to the issue of direct effect (Farrell and Hanrahan : para 1-33). The difficulties in that regard were alluded to by Murray C.J. in *Minister for Justice, Equality and Law Reform v Altaravicius* [2006] 3 IR 148 at 27:

> *"Although the Framework Decision cannot, in terms of community law, have direct effect (since Article 34.2(b) of the Treaty on European Union expressly excludes such effect) the Oireachtas has chosen to give it, at least as regards a significant number of its provisions, such effect and make it directly applicable within the State. This is achieved, inter alia, by s.10 of the Act of 2003 which provides that where a European arrest warrant has been duly issued in respect of a person 'that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state'. The Act of 2003 does not confine itself to including the Framework Decision in a schedule for reference purposes. There are other provisions of the Act of 2003 which require the courts to interpret and apply the Framework Decision directly but it is sufficient for present purposes to note that s. 10 means that in deciding on an application for a surrender pursuant to the terms of the Act of 2003 the court must apply both the provisions of the Act and the Framework Decision. It is, to say the least, an idiosyncratic method of legislating and likely to create ambiguity."*

*Later in the same judgment, he further observed (at 156):*

> *"Thus, this court is in the unusual position of having to interpret and apply article 8 of the Framework Decision directly because of the effect given to it in national law by the Oireachtas and not by Community law".*

The problem was to manifest itself again in *Rimsa v Governor of Cloverhill Prison* [2010] IESC 47. In that case there was difficulty in effecting the surrender of Mr. Rimsa to Latvia within the standard ten day period following the making of an order for his surrender. In those circumstances the Irish Central Authority agreed the new surrender date with the Latvian Central Authority, purportedly pursuant to s.16(5)(b) of the Act of 2003 which *prima facie* empowered it to do so. However, the Supreme Court found that there was a clear and manifest conflict between Article 23 of the Framework Decision and s.16(5)(b) of the Act of 2003, the latter expressly empowering the Irish Central Authority to agree a new surrender date with the issuing state, whereas the Framework Decision provided that *"the executing and issuing judicial authorities … shall agree on a new surrender date"*. This was to ensure that any postponement took place under judicial control. Because of the manner in which transposition had been effected, national legislation had to be interpreted in light of the Framework Decision. There was difficulty at both ends. Neither the Irish Central Authority was authorised to enter such an agreement under the Framework Decision, nor was the Latvian Central Authority. Whilst subsection 5(b) referred to the "issuing state" it did not specify any authority in the issuing state, whereas there was an express requirement in Article 23(3) that any such agreement should be reached with the issuing judicial authority, which in this case was the Latvian Court. This accorded with the objectives of the surrender system. Since this was not done, there was no valid agreement to postpone the date of surrender.

In his judgment Murray C.J. observed (at paras 130-131):

> *"So far as this case is concerned s.10 of the Act of 2003 expressly requires that the surrender of the applicant in this case be done not only and in accordance with the Act but, additionally, in accordance with the Framework Decision. An individual must be able to rely on such provisions of the Framework Decision at least so far as that measure is made applicable in Irish law by the Act itself. If it were otherwise it would render the express reference to the Framework Decision in s.10 meaningless.*
>
> *Accordingly the applicant was entitled to place reliance, pursuant to s.10, on the provisions of the Framework Decision which applied to his surrender to the issuing state, Latvia."*

Recalling his earlier comments in the case of *Altaravicius* Murray C.J. again questioned the wisdom of incorporating a Framework Decision as part of domestic legislation (at para 136) :

> *"The issues in this case have been complicated by the fact that the Act has been drafted in such a way as to apply two legal norms to the same matter. In this instance s.16(5)(b) of the Act and article 23(3) of the Framework Decision are both applicable to the matter of agreeing a postponed surrender date. In Altaravicius the two applicable norms were s.11 of the Act and article 8 of the Framework Decision. In that case I referred to this manner of legislating, in restrained language, as "idiosyncratic". It is a most unsatisfactory way of legislating and I still consider that I am expressing myself in restrained terms. Framework decisions, as their name suggest, are legislative measures drafted in terms which range from the general to the specific, intended to be effectively implemented by each member state through its own national legislative measures as article 34(2((b) of the Treaty on European Union makes clear. In principle therefore it is national legislation which must give effect to the Framework Decision and achieve its objectives. That will usually mean that the provisions of the Acts of the Oireachtas themselves contain all the elements necessary to give effect to a Framework Decision. That would not preclude, however, an Act expressly requiring something to be done in accordance with a specific provision of a Framework Decision particularly, where such a provision is sufficiently clear and defined so as to be capable of being enforced or applied by a Court… provided a section of the Act itself does not at the same time, and in parallel with the particular provision of the Framework Decision, purport to give effect to the latter*

> *provision so as to ensure that there is only one legal norm or provision applying to a particular matter… What is unsatisfactory… is to have a provision of a Framework Decision made applicable to a particular matter at the same time or in parallel with a specific section or part of an Act governing the same matter."*

He went on (at paras 137 to 140):

> *"137. That might be done provided a section of the Act itself does not at the same time, and in parallel with the particular provision of the framework decision, purport to give effect to the latter provision so as to ensure that there is only one legal norm or provision applying to a particular matter.*
>
> *138. What is unsatisfactory and has given rise to litigation, and is likely to do so in the future, is the fact that a provision of a framework decision and a specific section or part of an Act are both applicable to and govern a particular matter at the same time or in parallel.*
>
> *139. Even where that is done so as to ensure that the provision in an Act is, at least on its face, in harmony with the applicable provision of the framework decision it means nonetheless that the Court has to interpret and apply two legal norms, as happened in the Altaravicius case.*
>
> *140. Such a situation is then exacerbated of course when there is a manifest divergence between the express terms of an Act and the express terms of a framework decision, as has happened in this case."*

It might be argued that quite apart from the manner of initial transposition of the Framework Decision into Irish domestic law, the very objective that was envisaged by the instrument, that of simplifying and expediting the procedure, was frustrated by it. As Farrell and Hanrahan have commented *"the 2003 Act in its unamended form succeeded only in complicating matters to a quite spectacular degree with its apparent requirement that multiple undertakings and guarantees be supplied in addition to the warrant itself."* Moreover, the Act of 2003 as originally enacted was replete with errors, rendering it practically unworkable. The Criminal Justice (Terrorist Offences) Act 2005 sought to rectify many of those errors, including by the insertion of s.4A in the Act of 2003 which provides for a statutory presumption that an issuing state will comply with the requirements of the Framework Decision unless the contrary is shown.

Further amendments were given effect to by later legislation such as the Criminal Justice (Miscellaneous Provisions) Act 2009 which, *inter alia*, removed the requirement, contained in s.10 of the Act of 2003 as originally enacted, to prove that the requested person had fled the issuing state before he/she could be surrendered for the purpose of executing a sentence.

The problem identified in *Altaravicius*, namely that s.10 of the Act of 2003 made the requirement to surrender a qualifying person in respect of whom a European arrest warrant had been issued, *"subject to and in accordance with the provisions of this Act and the Framework Decision"*, was only addressed in the Act of 2012. The effect of section 5 of that Act was to remove the words *"and the Framework Decision"* from s.10 of the Act of 2003 as originally enacted. The deletion of the reference to the European Union Framework Decision from s.10 of the Act of 2003 served to clarify that FD 2002/584/JHA did not have direct effect in Irish law.

The 2012 Act also applied provisions of the European Arrest Warrant Act 2003 to states other than the EU member states and made procedural and technical amendments to the Act to give effect to the EU Framework Decision 2009/299/JHA on the mutual recognition of judgments rendered in the absence of the defendant.

*Other issues*

Problems continue to arise in respect of how the Framework Decision was transposed, the most recent example being in the case of *Minister for Justice & Equality v Vilkas* [2018] IESC 69, where the Supreme Court held, following clarification by the CJEU concerning the correct interpretation of Article 23 of the Framework Decision in response to a request for a preliminary reference by the Irish Court of appeal – see Case C-640/15 *Tomas Vilkas,* that s.16(5) represented an insufficient transposition of Article 23 in as much as the Irish legislation allows for the fixing of a new date for surrender on just one occasion only, whereas the correct interpretation of Article 23, as clarified by the CJEU, allows, at least in principle, for a new date to be fixed on more than one occasion. The Court of Appeal had sought to give s.16(5) a purposive and conforming interpretation on the basis that, notwithstanding the literal meaning of how s.16(5) was phrased, the whole purpose of the Act of 2003 including the subsection at issue, had been to faithfully transpose the Framework Decision and the legislation contained nothing to expressly suggest an intention to deviate from that, but the Supreme Court held that such an interpretation was *contra legem*. As a result it is at this stage a matter for the legislature to introduce amending legislation to remedy the deficiency.

**2BIS.** *Have infringement procedures been initiated against your Member State by the European Commission for incorrect transposition of the EAW Framework Decision? If so, on which points?*

**Response**

On 30/10/2020 the EU Commission served a Formal Notice on Ireland (INFR (2020) 2072) under Art 258 TFEU. According to the Commission's website, (see: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&nonco ,) it related to "NON-COMMUNICATION AND NON-CONFORMITY OF NATIONAL MEASURES TRANSPOSING INTO NATIONAL LAW COUNCIL FRAMEWORK DECISION 2002/584/JHA (EUROPEAN ARREST WARRANT)"

The expert have tried without success to obtain a copy of the Formal Notice online. The impression is that the complaint was confined to failure to adhere to time limits, but the description in the link provided above suggests that there must also be some complaint about the adequacy of transposition.

**3.** *Did your Member State transpose all the grounds for refusal (Art. 3-4a of FD 2002/584/JHA) and all the guarantees (Art. 5 of FD 2002/584/JHA)?*

**Response:**

Ireland transposed all the mandatory grounds for non-execution of a European Arrest warrant as set out in Article 3 of FD 2002/584/JHA.

Section 39 of the Act of 2003 transposes Article 3.1 of the Framework Decision.

Section 41(1) & (2) of the Act of 2003 transposes Article 3.2 of the Framework Decision.

Section 43 of the Act of 2003 transposes Article 3.3 of the Framework Decision.

Ireland did not transpose all of the optional grounds for refusal set out in Article 4 of FD 2002/584/JHA.

Article 4.1 is fully transposed by s.38 of the Act of 2003 as amended.

Article 4.2 is transposed by s.42(b) of the Act of 2003 as amended.

Article 4.3 has only been transposed in part. The first clause has not been transposed. There is indeed a celebrated Irish EAW case involving a person whose rendition was sought by France in respect of the murder of a French citizen in Ireland in circumstances where the Irish Director of Public Prosecutions had declined to prosecute on grounds of insufficiency of cogent evidence. The case in question is *Minister For Justice, Equality and Law Reform v Bailey* [2012] IESC 16; [2012] 4 I.R. 1. The fact that the Irish authorities had decided not to prosecute did not provide a basis for objecting to the surrender, as at the time of the request Irish domestic law did not transpose the first clause of Article 4.3.

As originally enacted, s.42 of the Act of 2003 had provided:

"A person shall not be surrendered under this Act if —

1. (a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence,
2. (b) proceedings have been brought in the State against the person for an offence consisting of an act or omission that constitutes in whole or in part the offence specified in the European arrest warrant issued in respect of him or her, or
3. (c) the Director of Public Prosecutions or the Attorney General, as the case may be, has decided not to bring, or to enter a *nolle prosequi* under section 12 of the Criminal Justice (Administration) Act 1924 in proceedings against the person for an offence consisting of an act or omission that constitutes in whole or in part the offence specified in the European arrest warrant issued in respect of him or her, for reasons other than that a European arrest warrant has been issued in respect of that person."

However, s.42 of the Act of 2003 was amended by the Criminal Justice (Terrorist Offences) Act 2005, which provided in s.83:-

"The Act of 2003 is amended by the substitution of the following section for section 42:

'42.—A person shall not be surrendered under this Act if —

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

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

Thus para.(c), as appeared in the earlier statute, was not retained as part of Irish statute law from 2005, and this precluded Mr Bailey from relying on the fact that the DPP had opted not to prosecute him in Ireland. Surrender was however refused on other grounds. Following the refusal of surrender the French authorities then prosecuted Mr Bailey *in absentia* and he was convicted in France of murder and was sentenced to detention for 25 years. The French authorities then issued a further EAW requesting the Irish authorities to surrender him to serve

that sentence. This request has been challenged before the Irish Courts on grounds including, *inter alia*, abuse of process, and a decision is awaited from the Irish Supreme Court.

The second clause of Article 4.3, however, finds transposition in s.41 of the Act of 2003.

Article 4.4 is not transposed in circumstances where there is no Statute of Limitations in Ireland in respect of the prosecution of crimes. However, it is possible to seek an order before the Irish Courts prohibiting a prosecution from proceeding where the accused can establish a real risk that he would not get a fair trial due to the passage of time. Accordingly the Act of 2003 as originally enacted had contained a s.40 which provided, *inter alia*:

> "A person shall not be surrendered under this Act where –
>
> > (a)the act or omission constituting the offence specified in the European arrest warrant issued in respect of him or her is an offence under the law of the State, and
> >
> > (b) the person could not, by reason of the passage of time, be proceeded against, in the State, in respect of the second mentioned offence."

However, s.40 was repealed by s.19 of the Criminal Justice (Miscellaneous Provisions) Act 2009.

Article 4.5 of the Framework Decision is transposed by s.41(2) of the Act of 2003.

With regard to Article 4.6 of the Framework Decision, this has not been transposed. During the Committee Stage of debates in Seanad Éireann (the upper house of the Irish parliament) concerning the then European Arrest Warrant Bill 2003 an amendment was proposed that would, if it was accepted, have had the effect of transposing Article 4.6 . However, it was rejected, with the Minister for Justice at the time stating:

> *Mr. M. McDowell: Under international law, we are party to a convention for the repatriation of prisoners in certain circumstances. Two aspects of this matter should be considered – we are not obliged to send anybody back and we are not obliged to receive anybody. In my short period as Minister for Justice, Equality and Law Reform I have encountered a few cases in which it has been desirable for the Minister to be entitled to refuse, in the interests of public confidence in the administration of justice, to send somebody back to his or her country of origin. Similarly, I sometimes refused to make an order accepting a person who was trying to get back into this country. I have an element of discretion in that respect but this amendment would eliminate it. It would mean that if I raped and murdered a woman while on holiday in Italy, I would be entitled to serve my sentence in Ireland as of right if I fled back here and later became the subject of a European arrest warrant. It may or may not be desirable, depending on the individual case, that I should be repatriated. I can imagine that Italian public opinion might be one of outrage if somebody was repatriated in such circumstances.*
>
> Seanad Éireann Debate, Friday 19 Dec 2003 Vol 174 No 27.

Only one of the two separate and distinct grounds for refusing surrender in Article 4.7 of the Framework Decision has been transposed, namely that in Article 4.7(b) which is transposed by s.44 of the Act of 2003. Section 44 is in the following terms:

> "A person shall not be surrendered under this Act if the offence specified in the relevant arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the

> offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

Both Article 4.7 of the Framework Decision and s.44 of the Act of 2003 received detailed consideration by the Irish Supreme Court in *Minister For Justice, Equality and Law Reform v Bailey* [2012] 4 I.R. 1 (cited above).

In so far as Article 4a is concerned, this has been transposed in full by s.23 of the Act of 2012.

Turning to the guarantees which may be provided in accordance with Article 5 of the Framework Decision, paragraph 1 has of course been deleted by Council Framework Decision 2009/299/JHA. However, in so far as paragraphs 2 and 3 respectively are concerned, the position is as follows:

Ireland did not implement the optional ground for refusal of surrender contained in Article 5.2 or article 5.3 of FD 2002/584/JHA in the European Arrest Warrant Act 2003. However, as Farrell and Hanrahan note, notwithstanding that paragraph (h) of the European arrest warrant is routinely completed in the case of requests to this jurisdiction.

**4.** *Were those grounds for refusal and guarantees transposed as grounds for mandatory or optional refusal/guarantees? Do the travaux préparatoires of the transposing legislation and/or the parliamentary debates on that legislation shed any light on the choices made and, if so, what were the reasons for those choices?*

In Ireland most of the optional grounds enumerated in the Framework Decision are incorporated as mandatory provisions which prohibit surrender in the Irish legislation:

European Arrest Warrant Act 2003 – Part 3

S.38 – The option not to execute the warrant where the arrest is based on matters that do not constitute an offence in the executing State is prohibited.

S.42 – Prohibits surrender where the person is being prosecuted for the same act or there is a decision not to prosecute or halt proceedings in the executing state.

S.41 – Prohibits surrender on a matter that has already been finally judged by a third state.

S.44 – Prohibits surrender where the offence was committed outside the issuing state and the act or omission of which the offence consists does not by virtue of having been committed in a place other than the State, constitute an offence under the law of the State.

Much of the parliamentary debate at the time related to the surrender of nationals, trials in *absentia* and curtailment of dual criminality requirements for offences listed in Article 2.2 of the Framework Decision, which represented a departure from the law and practice of the Irish State at the time.

At the second stage of the parliamentary debate in Dáil Éireann (Ireland's lower house of parliament) the then Minister for Justice, Michael McDowell, in a lengthy speech (emphasised that:

> *"…as an overall comment on the framework decision, it is important to bear in mind at all times that it represents a careful balance between, on the one hand, the need for a more efficient system of extradition*

*and surrender of persons who have been convicted or who are being sought for prosecution and, on the other, the provision of safeguards to protect the rights of the individuals concerned."*

Dáil Éireann debate Friday, 5 Dec 2003, Vol. 576 No. 4.

https://www.oireachtas.ie/en/debates/debate/dail/2003-12-05/5/

Speaking with reference to the Framework Decision he said:

*"Traditionally, many states refused to extradite their own nationals and considered certain offences as being non-extraditable. The framework decision does not provide for exceptions based on, for example, categories of either offences or offenders. Therefore, there are no provisions permitting refusal to surrender on the grounds that the person being sought is a national of the executing member state or that the offence falls into a particular category of offences, such as revenue or political offences. This is a reasonable approach when we recall that we are dealing in this context with close allies who share our democratic values and respect for the rule of law. Ireland never had difficulty in principle with the extradition of our nationals, provided only that the arrangements were reciprocal. We have over many years greatly curtailed the political offence exception and we changed our law in 2001 to permit extradition for revenue offences."*

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The Minister had this to say with respect to safeguards, and with reference to the mandatory and optional grounds for surrender in Articles 3 and 4 of the Framework Decision:

*"I would like at this stage to draw the attention of Deputies to the safeguards in the Bill. These are designed to protect the rights of the arrested person. Most of them are to be found in the framework decision itself and are repeated in the Bill. I will also be drawing attention to the additional safeguards arising from the statement made by Ireland when the framework decision was being adopted.*

*Dealing first with the provisions of the framework decision, it sets out general principles on which the safeguard provisions are based. In addition, it contains specific provisions that list mandatory and discretionary grounds upon which requests for surrender can be refused. It also lists guarantees that may be sought before a person is handed over.*

*On the general principles, recital 12 affirms that the framework decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty of the European Union.*

*Article 6 states, inter alia: "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms", the ECHR. Article 1.3 of the framework decision also refers to article 6 of the Treaty on European Union and provides: "the Framework Decision shall not have the effect of modifying the obligations to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".*

*Recital 12 goes on to state: "nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of those reasons." Recital 12 adds that the framework decision "does not prevent a*

*Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."*

*Recital 13 is also important. It states: "no person shall be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." Section 29 reflects the provisions in article 1.3 and recitals 12 and 13.*

*In regard to the specific protections and guarantees, article 3 of the framework decision lists mandatory grounds for the non-execution of European arrest warrants. A person may not be surrendered if he or she has been the subject of an amnesty in respect of the offence in question. A person who has been finally judged and has completed a sentence imposed in a member state or is no longer required to serve it in respect of the offences in question may not be surrendered. A person who cannot be held criminally responsible for the offence in question by virtue of his or her age may not be surrendered. Sections 31, 33(1) and 35 of the Bill reflect these provisions.*

*Article 4 of the framework decision lists grounds upon which member states may rely, as opposed to non-mandatory grounds, for non-execution of European arrest warrants. Several of these are included in the Bill. Section 30 implements article 4.1 and requires that, with the exception of the offences on the "positive list", the offences specified in the warrant must correspond to offences under Irish law, with a necessary qualification to allow for variations in the designation of certain revenue offences. Clearly Revenue codes are not the same across Europe so that we will be dealing with substantial correspondence in those cases. Section 30 therefore implements the dual criminality requirement for offences other than those covered by the "positive list".*

*Section 34 implements article 4.2 and 4.3. It provides that a person may not be surrendered where he or she is being proceeded against in the State in relation to the same offence or where it has been decided not to proceed or to halt proceedings against the person in the State in respect of the offence on which the warrant is based. In other words, if in Ireland a person is being proceeded against for the offence or if a decision has been made to halt or not to prosecute, that is a ground on which Ireland can refuse to extradite. Section 32 implements article 4.4 in prohibiting surrender where a prosecution for the same offence would not be permitted in the State by virtue of lapse of time.*

*Section 33(2) implements article 4.5 by prohibiting surrender where the person had been finally judged in a non-EU state and had served the sentence imposed or was no longer required to serve it. Section 36 implements article 4.7. It prohibits surrender where the offence occurred on the territory of the executing state or outside the territory of both the issuing and executing states and the offence is one over which the executing state does not have jurisdiction. Extra territorial offences or offences committed in Ireland are dealt with by that provision.*

*Section 37 gives effect to article 5.1. It provides that where the person had been tried in absentia, surrender may be made subject to guarantees from the issuing state that the person will have an opportunity of a new trial and of being present at that trial. Article 11 contains the very important provision that a person must be informed of the right to legal assistance and interpretation services. A person arrested under either section 11 or section 12 of this Bill must be informed of these entitlements.*

*Article 12 provides that a person may be remanded on bail pending a decision on his or her surrender. Sections 11(5) and 12(5) of the Bill give effect to that provision. A person who consents to surrender, as provided for by article 13 and section 13(8) of the Bill may withdraw that consent. In such cases, the person is then entitled to a full hearing of the surrender application. Before accepting that the person has consented to his or her surrender, the court must be satisfied that the consent was voluntary and informed.*

*Article 14 provides a guarantee that an arrested person has a right to a hearing before being surrendered. This is given effect by sections 13 and 14 of the Bill.*

*Section 28 gives effect to article 26. It ensures that in the case of persons returned to Ireland, any time served in custody in the executing state pending a decision on the request will be taken into account in any sentence to be served here. A person surrendered by Ireland to another member state on foot of a European arrest warrant may not be surrendered or extradited by that other member state to a third member state or to a non-EU state without the consent of the Minister for Justice, Equality and Law Reform. Sections 18 and 19 make provisions in this regard.*

*Deputies will agree that the safeguards I have just outlined are real and comprehensive. However, before leaving this topic, I draw attention to the statement Ireland made when the framework decision was being adopted. The text of that statement is as follows: "Ireland shall, in the implementation in domestic legislation of this Framework Decision provide that the European arrest warrant shall only be executed for the purposes of bringing that person to trial or for the purpose of executing a custodial sentence or detention order." The important point to note is that in cases where the person has not yet been convicted, the emphasis is on ensuring that the person is being sought to face trial. This is designed to ensure that persons are not surrendered in custody for investigative purposes, with the possibility of prolonged detention before a decision is taken on whether to charge that person. That is the substance of the Irish declaration.*

*Section 9(3) gives effect to Ireland's statement. It requires that the issuing judicial authority must provide written undertakings that the warrant is for purposes of the person being charged with and tried for the offence specified. In addition, it requires that there must be written confirmation that the person has been charged and that a decision to bring the person to trial has been made or, alternatively, that a decision has been taken in the issuing member state to proceed to charge and try the person once he or she has been returned to that member state.*

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It is important to note that section numbers mentioned in the speech refer to the Bill as initiated, and not the Bill as passed and enacted. Although there were few substantive changes to the provisions mentioned relevant provisions were re-numbered.

Members of Daíl Eireann voiced concern during debates on the Bill regarding the offences listed in Article 2.2 which give rise to curtailment of the dual criminality safeguard. A member of the Daíl drew the minister's attention to the first of those offences which was membership of a criminal gang. There was no such criminal offence at the time in Irish law (although there is now since 2006). His concern was that once a warrant was issued by a judge in one state, it would then be executed in the other if it involved one of the offences on the positive list, and notwithstanding that there was no corresponding offence in Irish law.[1]

Concern was also raised in relation to ensuring safeguards were adhered to once surrender had occurred.[2]

Another concern expressed was that The Human Rights Commission had raised concerns that the measures were developed without giving adequate consideration to human rights and civil liberty standards. Its analysis had concluded that the Framework Decision on the European

[1] Second Stage of the Daíl Eireann debate of the European Arrest Warrant on the 5th December 2003.
[2] Second Stage of the Daíl Eireann debate of the European Arrest Warrant on the 5th December 2003.

arrest warrant was based on a flawed presumption of effective and equivalent protections of accused persons' rights between EU member states. It had also concluded that the original scheme of the Bill paid insufficient regard to the protection of human rights and that even with safeguards now included in the legislation, the Bill was still likely to diminish the constitutional protections regarding extradition. It was suggested that this Bill unacceptably negated certain fundamental rights, including the right not to be extradited for a political offence.[3]

Another member expressed concern about the dual criminality issue, stating:

> *I turn first to the issue of dual criminality. Countries have different historical and cultural frameworks and democratically elected governments in the European Union have varied positions on what we describe as ethical issues. There is no clear consensus as to the acceptability or criminality of issues like euthanasia or abortion. A positive list of 32 offences set out in the Bill will not have to meet the requirements of dual criminality. The offences will have to have at least a three-year maximum sentence. The positive list has been criticised for being vague and could, therefore, be open to wide interpretation, with such conduct as "swindling" mentioned on the list.*
>
> *Murder is also named on the list and although we all agree that murder is a crime, it is important to note that one man's euthanasia is another man's murder. A cocktail of a wide variety of cultural and legal backgrounds in the European Union clearly shows that even the most obvious common ground does not stand up to close scrutiny."*
>
> Dáil Éireann debate Friday, 5 Dec 2003, Vol. 576 No. 4.
>
> https://www.oireachtas.ie/en/debates/debate/dail/2003-12-05/5/

This member further raised concerns relating to trials *in absentia* while also highlighting that a person would not be able to argue for a new trial on grounds that he or she was inadequately represented.[4]

In relation to Article 5 of the Framework Decision, the then Minister for Justice Michael McDowell, was faced with a proposed amendment during the Committee Stage and Remaining Stages of the debate in Seanad Éireann in terms that:

> "A person shall not be surrendered under this Act to serve a life sentence or a sentence of over 20 years, or surrendered on a charge which carries such a sentence as a maximum penalty, unless the issuing state undertakes that the person will be subject to procedures for the review of his or her detention with a view to release after not more than 20 years if the person is not at that stage a danger to the community"

The Minister rejected that proposed amendment, which was subsequently withdrawn, stating:

> *"This is an optional matter for the law of the executing member state. Some member states, particularly Portugal, have this rule. I imagine that this provision was included in Article 5 of the framework decision primarily to facilitate it. Although people may be critical of the system we have in place here, I have not seen any convincing proposals to amend it. I remind Senators that persons convicted of murdering a member of the Garda Síochána, prison officer, diplomat or Head of State are liable to be imprisoned for 40 years without remission. The sentence for such crimes used to be the death penalty*

[3] Second Stage of the Daíl Eireann debate of the European Arrest Warrant on the 5th December 2003.
[4] Second Stage of the Daíl Eireann debate of the European Arrest Warrant on the 5th December 2003.

> *before it was made unlawful and unconstitutional. I do not want to begin to unravel this provision without first thinking very carefully about it. It is an option which we are free to choose. We are free to change our position at some future stage. We are not bound to keep this for all time. If Senator Tuffy's argument becomes attractive or persuasive at some future stage, we could adopt the provision she has recommended. I ask the House to bear in mind that a person who murders a policeman faces 40 years in prison, without remission or an entitlement to temporary release. I would prefer to leave the provisions in this area unchanged in such circumstances."*
>
> Seanad Éireann Debate, Friday 19 Dec 2003 Vol 174 No 27.
>
> https://www.oireachtas.ie/en/debates/debate/seanad/2003-12-19/5/

In relation to yet more concerns raised regarding dual criminality Minister McDowell added:

> *"Section 37(1)(b) states that a person shall not be surrendered if "his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies),"; in other words, the dual criminality requirement is not there. Effectively, Senator Tuffy's argument is that if dual criminality is required, then no Irish person should ever be extradited where dual criminality does not exist. That would fly in the face of the framework decision as eventually adopted by all member states. It provides for two bases for surrender under a European arrest warrant: first, that dual criminality applied and, second, that the case involved a positive list offence which carried a three year sentence in the requesting country. The Bill, as currently drafted in section 37(1)(b), gives the maximum constitutional protection to Irish citizens, consistent with our obligations under the framework decision to respect the positive list procedure."*
>
> Seanad Éireann Debate, Friday 19 Dec 2003 Vol 174 No 27.
>
> https://www.oireachtas.ie/en/debates/debate/seanad/2003-12-19/5/

He further addressed the safeguards with respect to fundamental rights:

> *"It is important to emphasise that section 37 provides very wide and thorough-going protection for Irish citizens. First, it gives any citizen – or, indeed, a person who is not a citizen – the right to object on the grounds that the convention or its protocols would be contravened. It allows them to invoke the Constitution, with the exception of the dual criminality rule and only to the extent that the dual criminality rule is relaxed by the framework decision. It goes on to give additional grounds, under subsection (1)(c), for not surrendering a person if the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation. Section 37(1)(c)(ii), goes on to outline the circumstances in which a person could resist a warrant by establishing that he or she would get less than fair treatment in the requesting state. Accordingly, one can plead the Strasbourg Convention and the European Convention on Human Rights, the Constitution, improper motive under section 37(1)(c)(i) or likelihood of unfair treatment under section 37(c)(ii). I wonder what other grounds we could have included as a basis for objecting to one's surrender. It is a very broad charter."*
>
> Seanad Éireann Debate, Friday 19 Dec 2003 Vol 174 No 27.
>
> https://www.oireachtas.ie/en/debates/debate/seanad/2003-12-19/5/

The issue of trials *in absentia* has subsequently been addressed by the Act of 2012. Section 23 thereof transposes the provisions of the EU Framework Decision on Judgments in Absentia,

2009/299/JHA, in relation to the European arrest warrant. It sets out the grounds on which the state executing an EAW may refuse surrender if the person to whom the EAW refers was not present at the trial which led to the sentence being imposed. The Parliamentary debates in relation to these changes are to be found at:

https://www.oireachtas.ie/en/debates/debate/dail/2012-05-15/30/

https://www.oireachtas.ie/en/debates/debate/seanad/2012-07-10/8/

**5.** *Does the national law of your Member State, as interpreted by the courts of your Member State, contain provision for applying the two-step test for assessing a real risk of a violation of Art. 4 of Art 47 of the Charter (see Part 4D)?*

**Response**

Yes, the jurisprudence of the Irish Superior Courts has in substance adopted the two stage test in *Aranyosi en Căldăraru.* Relevant decisions include:

*Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783;

*Minister for Justice and Equality v. Celmer (No 1)* [2018] IEHC 119;

*Minister for Justice and Equality v. Celmer (No 3)* [2018] IEHC 153;

*Minister for Justice and Equality v. Celmar* [2019] IESC 80;

At paragraph 81 of the Supreme Court's judgment in *Celmer*, O'Donnell J, giving judgment for the court, stated:

> *"It is unmistakable that the national court is required to conduct the second step of the Aranyosi and Căldăraru analysis."*

***5BIS.*** *How does your Member State implement the "dual level of protection" to which the requested person is entitled as required in the case law of the Court?*

**Response**

In Ireland, a national arrest warrant or a comparable measure, sufficient to ground an application for a European arrest warrant can only be issued by a court, usually but not invariably the District Court. Applications for European Arrest Warrants based on a national arrest warrant or a comparable measure, are scrutinised by the High Court in every case.

**6. a)** *Did your Member State transpose the grounds for refusal and guarantees of Art. 3-5 of FD 2002/584/JHA correctly, taking into account the case-law of the Court of Justice? If not, please describe in which way the national legislation deviates from FD 2002/584/JHA. Was there any debate about the correctness of the transposition in your national law, e.g. in academic literature or in court proceedings? If so, please specify.*

**Response**

It has not been seriously suggested, as least in so far as this respondent is aware, that Ireland has incorrectly transposed the mandatory grounds for refusal in Article 3 of the Framework Decision.

The same cannot be said for the optional grounds for refusal of surrender in Article 4. Having opted to transpose the majority of these, those that have been transposed have been transposed as mandating refusal of surrender in all cases to which they apply, as opposed to being implemented as "optional", in the sense that the executing judicial authority should have discretion to decide on a case by case basis whether to apply them or not. While the question of whether this was the correct approach or not is not settled, there is some basis for concern that this may not have been the correct approach having regard to the judgments of the CJEU in cases such as *Popławski* C-579/15 and *Ministére public v Marin-Simion Sut* C-514/17.

Moreover, the caselaw specifically concerned with Article 4a, such as *Dworzecki C*-108/16 PPU, *Tupiskas* C-270/17 PPU and *Zdziaszek* C271/17 PPU adds to the uncertainty.

**6. b)** *If your Member State transposed Art. 4(6) of FD 2002/584/JHA, does your national legislation:*

> ***(i)*** *differentiate in any way between nationals of your Member State and residents, and, if so, in what way? According to which criteria is 'residency in the executing Member State' established?*
>
> ***(ii)*** *guarantee that, when the surrender of a national or a resident for the purposes of executing a sentence is refused, the foreign sentence is actually executed in your Member State and, if so, how?*

**Response (to both (i) and (ii))**

Ireland has not transposed Article 4(6) of FD 2002/584/JHA.

**7.** *Did your Member State include in the national transposing legislation grounds for refusal or guarantees not explicitly provided for in Art. 3-5 of FD 2002/584/JHA (apart from the two-step test referred to in question 5)? If so, which grounds for refusal or guarantee?*

**Yes.**

In 2001, when the draft Framework Decision was being discussed, there was some concern by the Irish Authorities as to what was meant by (or rather what would be included within) the phrase "conducting a criminal prosecution" in the proposed Article 1(1), particularly in certain civil law jurisdictions, and whether it would entitle an issuing state to request rendition of a person wanted solely for the purposes of an investigation or questioning.

Accordingly, when Ireland signed up to the Framework Decision it entered what was effectively a reservation by making a statement declaring that:

> *"Ireland shall, in the implementation into domestic legislation of this Framework Decision, provide that the European Arrest Warrant shall only be executed for the purpose of bringing that person to trial or for the purpose of executing a custodial sentence or detention order."*

This is recorded in a "Corrigendum to the Outcome of the Proceedings" at the Council of the European Union meeting of 6/7 December 2002 at which the Framework Decision was adopted. See: https://data.consilium.europa.eu/doc/document/ST%2014867%202001%20REV%201%20COR%201/EN/pdf

Curiously, the European Arrest warrant Act 2003 by means of which Ireland sought to implement the Framework Decision 2002 did not give effect to this reservation. The reason for this is unclear but it is possibly because the reservation was made late in the day. At any rate the

European Arrest warrant Act 2003 was substantially amended by the Criminal Justice (Terrorist Offences) Act 2005 and one the amendments effected was to add a new section to the 2003 Act, namely s.21A.

That new section was in the following terms:

> "21A.—(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.
>
> (2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

S.21A has received judicial consideration by both the High Court and the Supreme Court in a very large number of cases. Amongst those are the important decisions in:

*Minister for Justice, Equality and Law Reform v Olsson* [2011] IESC 1;

*Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16; [2012] 4 I.R. 1; (judgment of Hardiman J)

https://www.courts.ie/acc/alfresco/7433b00d-d0ef-4ad7-b45d-bba75ff75c2a/2012_IESC_16_5.pdf/pdf#view=fitH (judgment of O'Donnell J)

https://www.courts.ie/acc/alfresco/c134dfbd-83cc-4ec1-a9f6-9bd84ad8b5c3/2012_IESC_16_1.pdf/pdf#view=fitH (judgment of Denham CJ)

https://www.courts.ie/acc/alfresco/1098b84a-a5f9-4ddf-90e6-a2b565525326/2012_IESC_16_4.pdf/pdf#view=fitH (judgment of Fennelly J)

https://www.courts.ie/acc/alfresco/f82df692-edbb-437b-93b1-da885b89cab0/2012_IESC_16_2.pdf/pdf#view=fitH (judgment of Murray J)

Another respect in which the Irish legislation provides for a ground of refusal that is not expressly provided for in Articles 3 – 5 of the Framework Decision is in s.37 which allows for non-surrender on grounds of incompatibility with fundamental rights.

S.37 provides:

> **37.**—(1) A person shall not be surrendered under this Act if—
>
> (*a*) his or her surrender would be incompatible with the State's obligations under—
>
> (i) the Convention, or
>
> (ii) the Protocols to the Convention,
>
> (*b*) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the relevant arrest warrant is an offence to which *section 38 (1)(b)* applies),

(*c*) there are reasonable grounds for believing that—

(i) the relevant arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or

(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—

(i) is not his or her sex, race, religion, nationality or ethnic origin,

(ii) does not hold the same political opinions as him or her,

(iii) speaks a different language than he or she does, or

(iv) does not have the same sexual orientation as he or she does,

or

(iii) were the person to be surrendered to the issuing state—

(i) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or

(ii) he or she would be tortured or subjected to other inhuman or degrading treatment.

(2) In this section—

"Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994; and

"Protocols to the Convention" means the following protocols to the Convention, construed in accordance with Articles 16 to 18 of the Convention:

(*a*) the Protocol to the Convention done at Paris on the 20th day of March, 1952;

(*b*) Protocol No. 4 to the Convention securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto done at Strasbourg on the 16th day of September, 1963;

(*c*) Protocol No. 6 to the Convention concerning the abolition of the death penalty done at Strasbourg on the 28th day of April, 1983;

(*d*) Protocol No. 7 to the Convention done at Strasbourg on the 22nd day of November, 1984.

There is extensive jurisprudence in Irish law (literally hundreds of cases) concerning s.37 and its parameters. That having been said, non-surrender on human rights grounds has been rare.

## B. Your Member State as issuing Member State

**8. a)** 1. *Which authorities did your Member State designate as issuing judicial authorities?*

**Response**
The Act of 2003 authorises either a court which has issued a domestic warrant in Ireland, or the High Court, to act an issuing judicial authority in Ireland. In that regard, s.33(1) of the Act of 2003 provides:

> "(1) A court may, upon an application made by or on behalf of the Director of Public Prosecutions, issue a relevant arrest warrant in respect of a person where it is satisfied that —
>
> ( *a* ) a domestic warrant has been issued for the arrest of that person but has not been executed, and
>
> ( *b* ) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence concerned and the person is required to serve all or part of that term of imprisonment or detention, or, as the case may be, the person would, if convicted of the offence concerned, be liable to a term of imprisonment or detention of 12 months or more than 12 months."

In practice, however, all EAWs are issued by the High Court alone.

**8 a)2.** *Did your Member State centralise the competence to issue EAWs?*

**Response**
Although it is not required by legislation, the competence to issue European arrest warrants is in practice centralised in the High Court.

While section 33(2A)(b) provides:

> "2A) A relevant arrest warrant shall specify —
>
> (*b*) the name, address, fax number and e-mail address of —
>
> (i) the District Court Office for the district in which the District Court was sitting when it issued the relevant arrest warrant,
>
> (ii) the Circuit Court Office of the county in which the Circuit Criminal Court was sitting when it issued the relevant arrest warrant,
>
> (iii) the Central Office of the High Court, or
>
> (iv) the Registrar of the Special Criminal Court, as may be appropriate",

in practice it is exclusively the High Court which issues European Arrest Warrants in Ireland.

**8b)** *If your Member State conferred the competence to issue EAWs on public prosecutors,*

*(i) does the principle of mandatory prosecution apply, according to which a public prosecutor must prosecute each offence of which he has knowledge, and, if so, does that principle extend to the decision whether or not to issue an EAW,*

*(ii) do those public prosecutors meet the autonomous requirements for being issuing judicial authorities, and, if so, describe how they meet those requirements and if not, please specify why not;*

*(iii) if those public prosecutors meet the autonomous requirements for being issuing judicial authorities, can the decision to issue a prosecution-EAW taken by a public prosecutor, and, inter alia, the proportionality of such a decision, be the subject of court proceedings in your Member State – before or at the same time as the adoption of the national arrest warrant or afterwards – which meet in full the requirements inherent in effective judicial protection, and, if so, describe that recourse;*

*(iv) is the fact that the public prosecutor meets the autonomous requirements for being designated as an issuing judicial authority and is the availability of a recourse against the decision to issue a prosecution-EAW before a court in the issuing Member State mentioned in the EAW-form?*

**Response ((i) to (iv) inclusive)**
There is only one public prosecutor in Ireland, namely the Director of Public Prosecutions whose office was established under the Prosecution of Offences Act 1974, and whose remit extends throughout Ireland. The Director of Public Prosecutions does not have the competence to issue EAWS in any circumstances.

**9. a)** *Who prepares the decision to issue an EAW (e.g. who fills in the EAW-form), the representative of the issuing judicial authority, an employee of that authority or someone else*?

**Response**
A solicitor in the Chief State Solicitor's office drafts the European arrest warrant after consultation with the Director of Public Prosecutions Office and the Central Authority and the draft is then presented to the High Court in an *ex parte* application made in open court for approval and issuance by the High Court if approved.

**9. b)(i)** *What are the formalities for issuing an EAW?*

**Response**
Under section 33(1) of the 2003 Act an application by or on behalf of the Director of Public Prosecutions is made to the Court to issue a European arrest warrant in respect of a person. The application is made *ex parte* grounded on an affidavit of a person duly authorised on behalf of the applicant.[5] The High Court ensures that the warrant presented contains the prescribed information and is in the prescribed form before endorsing it with his/her signature. The consideration is quite rigorous, and the applicant may be closely questioned by the judge as to issues arising, e.g., the basis on which a box in Part E has been ticked, or as to potential problems that might arise.

The issue of an outgoing European arrest warrant is grounded upon a domestic arrest/committal warrant for the requested person, and will be either for the purpose of securing the requested person's surrender for the purpose of serving a sentence of imprisonment of not less than 4 months, or for the purpose of being tried for offences carrying a penalty of 12 months or more, unless in either case Article 2.2 of the Framework Decision is being invoked in respect of one or more offences in which case the court will be concerned to be satisfied that the offences in question are punishable in Ireland by a custodial sentence or detention order for a maximum period of at least 3 years.

Before issuing a European arrest warrant the court ensures the following:
(i) That the draft warrant presented to it is in the form prescribed by the Framework Decision and,
(ii) That the draft warrant contains the information required by section 11 of the Act of 2003.

S.11 of the Act of 2003, as amended provides:

[5] Order 98 rule 9(1) Superior Court Rules.

"**11.**— (1) A relevant arrest warrant shall, in so far as is practicable - (a) in the case of a European arrest warrant, be in the form set out in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, (b) in the case of a Trade and Cooperation Agreement arrest warrant, be in the form set out in Annex Law-5 to the Trade and Cooperation Agreement, and (c) in the case of an arrest warrant within the meaning of the EU-Iceland Norway Agreement, be in the form set out in the Annex to the EU-Iceland Norway Agreement.

(1A) Subject to *subsection (2A)*, a relevant arrest warrant shall specify —

(*a*) the name and the nationality of the person in respect of whom it is issued,
(*b*) the name of the judicial authority that issued the relevant arrest warrant, and the address of its principal office,
(*c*) the telephone number, fax number and email address (if any) of that judicial authority,
(*d*) the offence to which the relevant arrest warrant relates, including the nature and classification under the law of the issuing state of the offence concerned,
(*e*) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the relevant arrest warrant relates,
(*f*) the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence, and
(*g*) (i) the penalties to which that person would, if convicted of the offence specified in the relevant arrest warrant, be liable,
(ii) where that person has been convicted of the offence specified in the relevant arrest warrant but has not yet been sentenced, the penalties to which he or she is liable in respect of the offence, or
(iii) where that person has been convicted of the offence specified in the relevant arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists.

(2) Where it is not practicable for the relevant arrest warrant to be in the form referred to in *subsection (1)*, it shall include such information, additional to the information specified in *subsection (1A)*, as would be required to be provided were it in that form.

(2A) If any of the information to which *subsection (1A)* (inserted by section 72(*a*) of the Criminal Justice (Terrorist Offences) Act 2005) refers is not specified in the relevant arrest warrant, it may be specified in a separate document.
(3) [Repealed]

(4) For the avoidance of doubt, a relevant arrest warrant may be issued in respect of one or more than one offence."

**9 b)(ii)** *Does your Member State have a (digital) template of the EAW-form?*

**Response**

The form of the European arrest warrant in this jurisdiction is the form set out in the Annex of the Framework Decision and where this is not practicable the form contains the information set out in section 33(3) of the 2003 Act.[6] There is no specific digital template.

**9 c)** *When deciding on issuing:*

*- a national arrest warrant, do the judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that national arrest warrant?*

- *(i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;*
- *(ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;*
- *(iii) is the possibility of issuing a European Supervision Order (ESO) pursuant to Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ, L 294/20), instead of issuing a national arrest warrant, expressly addressed in that examination?*

- *an EAW, do the issuing judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that EAW? If so,*

  - *(i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;*
  - *(ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;*
  - *(iii) is the possibility of issuing a European Investigation Order (EIO) pursuant to Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ, L 130/1), in particular the possibility of issuing an EIO for the hearing of a suspected or accused person, by temporary transfer of a person in custody in the executing Member State to the issuing Member State, by video conference or other audiovisual transmission, or otherwise, instead of issuing a prosecution-EAW, or the possibility of applying Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ, L 327/27), instead of issuing an execution-EAW, expressly addressed in that examination, both in law and in practice?*

**Responses**

Re: *national* arrest warrant.

**(i)** Yes. Example – District Court Rules 1997 Order 16 stipulate that where a warrant is sought in the first instance in respect of an offence, the complaint must be made by information on oath and in writing to the judge. This information will contain a sworn statement of the belief that a specified indictable offence has been committed by an identified person, and the District Judge will make a proportionality assessment on that basis.

In the case of a domestic arrest warrant there is no general requirement for the issuing authority to be satisfied that the person identified in the information has actually committed the offence however there are statutory provisions which stipulate that the issuing authority must have reasonable grounds for suspicion against the person to be arrested. (Examples - see section 4 of

[6] Order 98 rule 9(1) Superior Court Rules.

Criminal Justice (Drug Trafficking) Act 1994; or section 30A of the Offences against the State Act 1939).
Where an information is made on oath and in writing, the judge before whom it is made may bind the informant by recognisance to appear to give evidence in the matter of the complaint at the court where the person concerned is to be tried or the complaint is to be heard.[7]

A warrant may not be issued on a bare statement of a member of An Garda Síochána who believes that an offence has been committed. The sworn information must show "good grounds" (i.e. some cogent evidence) on which the judge could be satisfied that there is a basis for the asserted belief – see *The People (DPP) v Kenny* [1990] ILRM 569. The judge will then be in a position to exercise his discretion to issue a warrant. The warrant must be signed by the judge who issues it. The judge also has a discretion to issue a summons in lieu of a warrant where it is believed that the summons is likely to secure attendance of the suspect in court - see *Aaron Judge v. District Judge Scally* [2006] 1 IR 491 where the High Court granted *certiorari* quashing a warrant on the basis that there was nothing in the information before the District Judge which could constitute "good grounds" for his issuing a warrant for the arrest of the applicant. The nature of the charge itself, which could not be described as being of a very serious nature, could not have justified the District Judge exercising his discretion in favour of issuing the warrant, for to do so ran contrary to the principle that where a summons would have been equally effectual in securing the appearance of the accused person, the issuing of a warrant instead of a summons could not be justified.

**(ii)** The fact that a requested person is a Union citizen who exercised his right to free movement does not play any role in the examination.

**(iii)** Ireland has only recently transposed FD 2008/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. By a Notice of 04/02/2021 Ireland notified the Commission of the transposition of this Framework Decision by the enactment and commencement of the Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020 ("the Act of 2020"). The Act was commenced with effect from 05/02/2021.[8] The effect of the Act is to provide for an Irish resident who is charged with an offence while in another Member State to have their bail conditions monitored in the State as opposed to the person being remanded in custody. Similarly, it will allow a resident of another Member State who is charged with an offence while in the State to be granted bail on condition that their bail is monitored in the Member State in which the person is legally and ordinarily resident.

As the Act of 2020 has only just been commenced it is unknown how the Irish courts of first instance are applying it in practice. No litigation concerning its application and practice has yet reached the Superior Courts. However, in principle, the possibility of bail supervision measures as an alternative to provisional detention could potentially impact a District Judge's decision on whether "good grounds" exist for issuance of a warrant, although the point remains to be determined.

*Re: An EAW*

[7] Order 16 rule 7 District Court Rules.
[8] Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020 (Commencement) Order 2021 (S.I. No. 15 of 2021), art. 2

**(i)** The issuing judicial authority in this jurisdiction examines whether in the light of the particular circumstances of each case, it is proportionate to issue a European arrest warrant. The Director of Public Prosecutions in this jurisdiction will generally only request a court to issue an EAW in cases where there is no doubt about issues of proportionality.

**(ii)** Before issuing a European arrest warrant, the court must satisfy itself that the draft warrant presented to it is in the form prescribed by the Framework Decision and that the draft warrant contains the information required by section 11 of the European Arrest Warrant Act 2003. This ensures that the Court is performing the second level of the dual protections set out in the Framework Decision. The court then considers the question of whether it is proportionate to issue the arrest warrant by taking into consideration, *inter alia*:

- The nature of the offence(s) and the overall gravity of the alleged offending conduct/offending conduct;
- The potential sentence that might be imposed or that has been imposed;
- The public interest in pursuing fugitives from justice;
- The age of the accused (e.g. if the accused was 16 years of age when the crime was allegedly committed);
- The passage of time / delay (if the crime was allegedly committed a considerable time ago);
- The likelihood of a custodial sentence (e.g. if the offence is one that is unlikely to lead to a custodial sentence in reality).

The assessment of proportionality by an Irish judge acting as an issuing judicial authority in relation to an EAW is very similar to the assessment that is carried out before a national arrest warrant is issued. However, in addition to the normal considerations that would be relevant in the case of a national warrant, when consideration is being given to issuing an EAW the public interest in pursuing fugitives from justice, and the Irish State's international obligations, pursuant to Framework Decision 584/2002/JHA, are also taken into account.

**(iii)** The fact that a requested person is a Union citizen who exercised his right to free movement could potentially, but does not often, play a role in that examination. For example, if the whereabouts of the requested person are known and he/she still has strong links to the Ireland, and is in another member state for some legitimate purpose, eg., work reasons, and there are no grounds to believe that he/she is actively trying to evade justice, the issuing judicial authority may enquire whether the person has been asked if they are willing to return voluntarily. If they have not been asked, the issuing judicial authority may question whether it is proportionate to issue an EAW at that stage. There will, of course, be many cases where the police for legitimate reasons would not wish to "tip off" a wanted person that their return was being sought.

**(iv)**Not applicable, as Ireland is not bound by the Directive 2014/41/EU, as it did not take part in the adoption of this Directive; however, the issue of opting in remains under consideration.

**9d)** *Did your Member State designate a central authority responsible for transmission of the EAW and all other official correspondence thereto? If so, which authority? Is that authority competent to answer requests for supplementary information (Art. 15(2) of FD 2002/584/JHA) or to forward additional information (Art. 15(3) of FD 2002/584/JHA) without supervision by the issuing judicial authority?*

**Response**

Section 6 of the European Arrest Warrant Act 2003 designates the Minister for Justice Equality and Law Reform as the Central Authority in the state.

As set out in Recital 9 of FD 2002/584/JHA the role of the Central Authority in Ireland is held as administrative, providing assistance to the competent judicial authority and may also, if necessary have responsibility for the administrative transmission and reception of European arrest warrants.[9] It is deemed not to have competency to answer requests for supplementary information or the forwarding of additional information without the supervision of the issuing judicial authority. Its role is facilitative only.[10]

In practice the Central Authority in conjunction with the Chief State Solicitor will draft relevant documents, such as replies to requests for additional information, which it will put before the court for scrutiny and approval.

**C. Your Member State as executing Member State**

**10.(a)** *Which authorities did your Member State designate as executing judicial authorities? Did your Member State centralise the competence to execute EAWs?*

**Response.**

In this jurisdiction the executing judicial authority is the High Court exercising exclusive competence to execute European arrest warrants. This is expressly provided for in s.9 of the Act of 2003.

**10.(b)** *As regards the competent executing judicial authority, does your national legislation differentiate between:*

***(i)*** *– Cases in which the requested person consents to his surrender and cases in which he does not?*

**Response**

As regards the competent executing judicial authority Ireland's national legislation does not differentiate between cases in which the requested person consents to his surrender and cases in which he does not. The High Court is exclusively competent to deal with both types of cases.

***(ii)*** *– The decision on the execution of an EAW, the decision on consent as referred to in Art. 27(3)(g) and (4) and Art. 28(2) – (3) of FD 2002/564/JHA and decisions regarding the (postponed or conditional) surrender of the requested person (Art. 23(3) – (4) and Art. 24 of FD 2002/584/JHA)*?

**Response**

As regards the competent executing judicial authority Ireland's national legislation does not differentiate between the above decisions. The High Court is exclusively competent to deal with all of these types of cases. All proceedings in relation to outward surrender are exclusively under the jurisdiction of the High Court.

**10.(c)** *When deciding on the execution of an EAW, can the executing judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to execute that EAW?*

**Response**

Yes, to a limited extent. The issue has been considered by the superior courts and is quite nuanced. Because rights to liberty and the right to a private and family life may be adversely affected by surrender the courts may be entitled to engage in an assessment of whether it is

[9] *Rimsa v Minister for Justice, Equality and Law Reform* [2010] IESC 47.

[10] *Minister for Justice and Equality v Haniszewski* [2014] IEHC 50.

proportionate to execute an EAW. However, the bar to be vaulted to achieve non-surrender on proportionality grounds is extremely high. It is possible in principle but to date no case has come before the Irish courts in which surrender has been successfully resisted on proportionality grounds.

See:

*Minister for Justice and Equality v Ostrowski* [2013] IESC 24 - judgment of Denham C.J.

https://www.courts.ie/acc/alfresco/84fd7cdb-529c-4f33-9ce4-29d0e29af750/2013_IESC_24_3.pdf/pdf#view=fitH – judgment of MacMenamin J.

https://www.courts.ie/acc/alfresco/5ad5c836-7b5f-4920-861d-bccd594a0116/2013_IESC_24_2.pdf/pdf#view=fitH – judgment of McKechnie J.

*Minister for Justice and Equality v D.E.* [2021] IECA 188

*Minister for Justice and Equality v Vestartas* [2020] IESC 12

*Minister for Justice and Equality v JAT (No 2)* [2016] IESC 17 - judgment of O'Donnell J.

https://www.courts.ie/acc/alfresco/1dbb8c02-c53c-4461-9eec-e857c16e27fd/2016_IESC_17_1.pdf/pdf#view=fitH – judgment of Denham C.J.

*Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783

In relation to a SIS alert as an alternative to the issuance of an EAW it is to be noted that Ireland has only recently joined the Schengen Information System (SIS). It did so with effect from the 15th March 2021. The situation has not yet arisen for consideration but in principle however, it could be envisaged that the possibility of an SIS alert as an alternative to the issuance of an EAW could be taken into account in deciding whether or not it is proportionate to issue an EAW.
If so,

**(i)** *please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;*

**Response**

In the most recent judgment on this issue, that of the Court of Appeal in *Minister for Justice and Equality v DE*, Donnelly J. distilled a number of principles from earlier jurisprudence which should guide the approach of an executing judicial authority in such matters:

> *"(i) In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State's obligations under the Convention. (Vestartas).*
>
> *(ii) Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition) carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (Ostrowski, JAT (No. 2), Vestartas).*

*(iii) When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is incompatible with the State's obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s.10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (Vestartas).*

*(iv) The evidential burden of proving incompatibility lies on the requested person. (Rettinger and Vestartas).*

*(v) The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (Rettinger and JAT (No. 2)).*

*(vi) The evidence must be cogent and must reach the level of incompatibility (Vestartas).*

*(vii) Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the State's obligations under Article 8 of the Convention. (JAT No. 2 and Vestartas).*
*25*

*(viii) For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s.4A of the 2003 Act. (Vestartas).*

*(ix) No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (JAT (No.2)).*

*(x) The requirement that the circumstances must be shown to render the order for surrender incompatible with the State's obligations under Article 8 necessitates that the incursion into the private and family rights referred to in Article 8(1) is such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself. (Vestartas).*

*(xi) Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances) of the requested person. That is a case-specific analysis which will be required in very few cases."*

The experience of the Irish courts has been that a proportionality argument is sometimes raised in cases where the offences appear to be relatively minor and thus it would be arguably disproportionate to surrender a person after a long period of time, having regard to consequences for family life. Another typical circumstance is where the offender is the sole carer of a disabled spouse/partner or of very young children.

As to whether an SIS alert might be considered as an alternative, this possibility has not yet been the subject of any reported High Court decision, because Ireland has only recently joined the Schengen Information System (SIS). It did so with effect from the 15th March 2021. In principle, however, it could be envisaged that the possibility of an SIS alert as an alternative to the issuance of an EAW could be taken into account in deciding whether or not it is proportionate to issue an EAW.

**(ii)** *does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination?*

**Response**

The fact that a requested person is a Union citizen who has exercised his right to free movement does not play any role in the examination of whether it is proportionate to execute a European arrest warrant.

**(iii)** *Is the possibility of issuing an EIO pursuant to Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ, L 130/1), in particular the possibility of issuing an EIO for the hearing of a suspected or accused person, by temporary transfer of a person in custody in the executing Member State to the issuing Member State, by videoconference or other audio visual transmission, or otherwise, or the possibility of applying Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ, L 327/27), instead of issuing an EAW, expressly addressed in that examination, both in law and in practice?*

**Response:**

Not applicable insofar as Directive 2014/41/EU does not apply to Ireland.

That having been said, it should be noted that as only a very limited consideration of proportionality is possible by an executing Judicial Authority in Ireland, trial readiness has never been relied upon as being a relevant factor in any case to date. The Irish courts are conscious of an accused's right to an expeditious trial, and operate on the presumption (which may of course be rebutted) that an issuing state will respect and vindicate a requested person's right to an expeditious trial. The Irish courts are always vigilant to inquire whether or not a requested person, if surrendered, will be held in pre-trial detention, and if so for how long that detention is likely to last.

The assessment of proportionality by an Irish judge acting as an issuing judicial authority in relation to an EAW is very similar to the assessment that is carried out before a national arrest warrant is issued. However, in addition to the normal considerations that would be relevant in the case of a national warrant, when consideration is being given to issuing an EAW the public interest in pursuing fugitives from justice, and the Irish State's international obligations, pursuant to Framework Decision 584/2002/JHA, are also taken into account.

However, in so far as Framework Decision 2008/909/JHA is concerned, Ireland is the subject of infringement proceedings by the Commission for failing to transpose this Framework

Decision. Ireland's response has been that it intends to implement this Framework Decision and has notified the Commission of draft legislation.
file:///C:/Users/edwardsj.JUDICIARY/Downloads/Criminal_justice__Commission_decides_to_refer_IRELAND_to_the_European_Court_of_Justice_for_failing_to_transpose_EU_rules_concerning_the_rights_of_suspects_and_prisoners_.pdf
The Commission has further been notified that the draft legislation if enacted will provide that in accordance with Article 7(4), Ireland declares that it will not apply paragraph 1 of Article 7 following the entry into force of this Framework Decision. Further, in accordance with Article 28(2), Ireland will also declare that, in cases where the final judgement has been issued prior to the date on which the Framework Decision enters into force, Ireland will, as an issuing and an executing state, continue to apply the legal instruments on the transfer of sentenced persons applicable prior to this Framework Decision.

https://www.ejn-crimjust.europa.eu/ejnupload/StatusImp/PracticalInfoCS.en20.pdf
https://www.ejn-crimjust.europa.eu/ejnupload/uploadFiles/ST09603-EN16.PDF

As Framework Decision 2008/909/JHA has not yet been transposed there is no question of it having had influence thus far on any Irish court examining whether it is proportionate to execute a European arrest warrant.

**10.(d)** *If your member State designated public prosecutors as executing judicial authorities,*
*- (i) do those public prosecutors meet the autonomous requirements for being executing judicial authorities, and, if so, describe how they meet those requirements;*
*-(ii) if those public prosecutors meet the autonomous requirements for being executing judicial authorities, can a decision be taken by a public prosecutor as executing judicial authority, and, inter alia, the proportionality of such a decision, be the subject of court proceedings, in your Member State, which meet in full the requirements inherent in effective judicial protection? If so, please describe that recourse.*

**Response**
Not applicable, as Ireland did not designate public prosecutors as executing judicial authorities.

**10.(e)** *Did your Member State designate a central authority responsible for reception of the EAW and all other official correspondence thereto? If so, which authority? Is that authority competent to request supplementary information (Art. 15(2) of FD 2002/584/JHA) without supervision by the executing judicial authority?*

**Response**
Ireland has designated the Minister for Justice and Equality (previously entitled the Minister for Justice, Equality and Law Reform) as the Central Authority for reception of the European arrest warrant and all other official correspondence there to.

If the High Court is of the opinion that the documentation or information provided is not sufficient to enable it to perform its functions it may, pursuant to section 20 of the Act of 2003 require the issuing judicial authority or issuing state to provide additional information or documentation. A 2019 amendment to section 20 provides that only a Court may make such a request, where previously the Central Authority would have done so on its own initiative.
As a facilitator for the flow of information between the Court and the issuing judicial authority or issuing state, the Central Authority preforms its role in an anticipatory manner under the supervision and direction of the High Court.

***10BIS*** *How does your country organise a temporary surrender (as meant in art. 24 (2) of FD 2002/584/JHA), what regime, what conditions? What is the legal basis for detention?*

**Response**

The position is governed by s.19 of the (Irish) European Arrest Warrant Act 2003, which provides:

19.— (1) Where a person to whom an order under section 15 or 16 applies—
(a) has been sentenced to a term of imprisonment for an offence of which he or she was convicted in the State, and
(b) is, at the time of the making of the order, required to serve all or part of that term of imprisonment,
the High Court may, subject to such conditions as it shall specify, direct that the person be surrendered to the issuing state for the purpose of his or her being tried for the offence to which the European arrest warrant concerned relates.
(2) Where a person is surrendered to the issuing state under this section, then any term of imprisonment or part of a term of imprisonment that the person is required to serve in the State shall be reduced by an amount equal to any period of time spent by that person in custody or detention in the issuing state consequent upon his or her being so surrendered, or pending trial.

Undertakings are usually required from the issuing state to keep the respondent in custody at all times and to return him to the State to serve the remainder of the existing prison sentence. See for example the decision in Minister for Justice and Equality v Gordon https://www.courts.ie/acc/alfresco/b45aed18-1673-4439-a2a9-92f29240c046/2013_IEHC_515_1.pdf/pdf#view=fitH

**D. EAW-Form**

**11.** *Does the national law of your Member State, as interpreted by the courts of your Member State, oblige the issuing judicial authorities of your Member State to use the amended EAW form? If not, please attach the document which is used for issuing an EAW.*

**Response.**

Before issuing an EAW the High Court will seek to satisfy itself that the draft warrant presented is in the amended form prescribed by the Framework Decision. Section 33(2) of the European Arrest Warrant Act 2003 as amended provides that:

> "A European arrest warrant shall, in so far as is practicable, be in the form set out in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA and shall specify –
>
> (a) The name and the nationality of the person to whom it relates,
> (b) The name, address, fax number and e-mail address of –
> (i) the District Court Office for the district in which the District Court was sitting when it issued the European arrest warrant,
> (ii) the Circuit Court Office of the county in which the Circuit Criminal Court was sitting when it issued the European arrest warrant,
> (iii) the Central Office of the High Court, or
> (iv) the Registrar of the Special Criminal Court,
> as may be appropriate,
> (c) The offence to which the European arrest warrant relates including a description thereof,
> (d) That a conviction, sentence or detention order is immediately enforceable against the person, or that a domestic warrant for his or her arrest has been issued in respect of that offence,

(e) The circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence, and

(f) (i)the penalties to which the person named in the European arrest warrant would, if convicted of the offence to which the European arrest warrant relates, be liable,
(ii)where the person named in the European arrest warrant has been convicted of the offence specified therein and a sentence has been imposed in respect thereof, the penalties of which that sentence consist, and
(iii)where the person named in the European arrest warrant has been convicted of the offence specified therein but has not yet been sentenced, the penalties to which he or she is liable in respect of the offence."

The Act of 2003 as amended provides for a situation that where it is not feasible for an EAW to be presented in the amended EAW form. Section 33(3) provides that:

> "Where it is not practicable for the European arrest warrant to be in the form set out in the Annex to the Framework Decision, the European arrest warrant shall, in addition to containing the information specified in subsection (2), include such other information as would be required to be provided were it in that form."

There is no need to have recourse to s.33(3) at the present time. However, in the early days after Ireland transposed Framework Decision 2009/299/JHA it was in receipt of many EAWs from Member States that had still not effected that transposition themselves and whose domestic legislation precluded the adoption of the new EAW form until that had occurred. In such circumstances, Ireland dealt with these incoming warrants by applying s. 33(3) of the Act of 2003, as amended. Conceivably the reverse situation might arise in the future, necessitating reliance by the High Court on s.33(3) for the purpose of issuing an EAW pending the completion of a transposition measure.

Order 98 rule 9 of the Rules of the Superior Court (these are procedural court rules, that have the status of secondary legislation) outlines the procedure in relation to an application for issue of a European arrest warrant.

> "9(1) Subject to sub-rule 2, an application under section 33(1) of the 2003 Act by or on behalf of the Director of Public Prosecutions to the Court to issue a European arrest warrant in respect of a person shall be made *ex parte* grounded on an affidavit of a person duly authorised on behalf of the applicant. A European arrest warrant issued pursuant to such application shall, in so far as is practicable, be in the form set out in the Annex to the Framework Decision and shall contain the information therein set out and such information as is required by section 33(2) of the 2003 Act or, where it is not practicable for the European arrest warrant to be in such form, shall contain the information set out in section 33(3) of the Act."

Similar wording in relation to the issuing of a European arrest warrant in the form set out in the Annex to the Framework Decision is to be found in Order 70 rule 2 of the Circuit Court rules and Order 16 Rule 8 of the District Court rules, although, as has been pointed out earlier, in practice only the High Court issues EAWs at the present time.

**E. Language regime**

**12.** *Has your Member State made a Declaration as provided for in Art 8(2) FD/2002/584/JHA? If so,*

*- what does this declaration entail?*
*- where was it published? Please provide a copy in English.*

**Response:**

Ireland has not made an Article 8(2) declaration.

**13. a)** *Have the issuing judicial authorities of your Member State had any difficulties in complying with the language requirements of the executing Member State? If so, please describe those difficulties and how they were resolved.*

**Response**
No, none to date.

**b)** *If the translation of the EAW deviates from the official EAW-form in the language of the executing Member State – or from the official EAW-form in the designated language –, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?*

**Response**

The executing judicial authority will attempt to confirm the true intention of the issuing judicial authority by requesting additional information with a view to executing the warrant if possible. Clearly in an egregious case of the official form being disregarded without good reason, and where the translation provided cannot be reconciled with the official EAW form, a court might find itself obliged to refuse surrender. There has been no case in which this has occurred that your respondent is aware of.

Part 3: problems regarding the individual sections of the EAW-form

**A. Information regarding the identity of the requested person**.

14. *Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (a)? If so, please describe those difficulties and how they were resolved.*

The issuing judicial authorities in this jurisdiction have not experienced difficulties with regard to section (a) as an Irish court will only issue a European arrest warrant in respect of a person where it is satisfied upon reasonable grounds that:

(i) the person whose surrender is to be requested is clearly identifiable;
(ii) a domestic warrant was issued for the arrest/committal of that person but was not executed, and
(iii) the person is not in the State.

Section 9 of Statutory Instrument Number 23/2005 - Rules of the Superior Court (European Arrest Warrant Act 2003 and Extradition Acts 1965 to 2001) 2005 [11]provides that an application for the issuance of a European arrest warrant will only be made in respect of a person where it is grounded on an affidavit of a person duly authorised by or on behalf of the Director of Public Prosecutions. Such an affidavit must verify the identity of the requested person. Similar statutory instruments apply to the lower courts requiring that applications are made by information on oath and in writing to the judge of the Court which issued the domestic warrant.[12] Again, the expectation is that any information on oath would verify the identity of the intended subject person.

15. *Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (a)? If so, please describe those difficulties and how they were resolved.*

Response

Objections have been raised from time to time that the EAW does not contain the information required by section 11 of the European Arrest Warrant Act 2003 as amended, which provides that said information is mandatory. If the court is of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions then it may, pursuant to section 20 of the Act of 2003, request the issuing judicial authority or state to provide such additional information as it may specify. The court is obliged to have trust and confidence in the issuing state, which means that unless there is evidence to the contrary, the court must accept what is stated in the EAW and in the additional information, at face value. This is reflected in section 4A of the Act of 2003 which provides that it shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown.

An example of a case in which a Part A issue arose for consideration is *Minister for Justice and Law Reform v PPH* [2011] IEHC 211.

[11] Section 9 of Statutory Instrument Number 23/2005 - Rules of the Superior Court (European Arrest Warrant Act 2003 and Extradition Act 1965 to 2001) 2005.
[12] Circuit Court: S.I. No 57 of 2005, District Court S.I. No 119 of 2005.

The respondent in that case had several aliases and an accompanying set of fingerprints bore the name of one of those aliases rather than the requested person's true name. The respondent maintained that there was insufficient proof of his identity, and that moreover the information provided in Part (a) of the warrant failed to comply with s.11(1A)(1) of the Act of 2003. The High Court resolved the issue as follows:

> *"The Court is satisfied that in so far as the European Arrest Warrant itself is concerned it contains sufficiently clear details relating to the identity of the person to which it relates, in terms of setting out that person's name and aliases, date of birth and nationality, to comply with s.11(1A)(a). The warrant makes it quite clear in Part A thereof that the name of the person in respect of whom it is issued is P.P.H, who was born on the 29th of May 1943 and who is Irish. The other names mentioned in the warrant itself are clearly identified as aliases.*
>
> *While the European Arrest Warrant in this case has appended to it a UK National Fingerprint Form that records the fingerprints on that form as belonging to a G.P.H alias P.P.H, born on the 29th of May 1943, and who is Northern Irish, these apparent inconsistencies are, in the Court's view, not particularly significant in the circumstances of this case. The National Fingerprint form is only an appendix to the European Arrest Warrant. It is not a part of it. It is provided as an aid to the police in the executing state in identifying the person to whom the warrant relates. The police in the executing State may or may not decide to make use of the fingerprint evidence provided. The same situation obtains with respect to any photograph appended to the warrant. There is no evidence that Sgt Kirwan, or any member of An Garda Síochána, made any use of the fingerprint material supplied for the purpose of identifying the respondent as the man named in the European Arrest Warrant. Certainly, Sgt Kirwan has not sought to rely on fingerprints to identify him before this Court. On the contrary, Sgt Kirwan's identification to this Court is primarily based on cautioned admissions made by the respondent when he was confronted both with the European Arrest Warrant and the photograph accompanying it.*
>
> *That said, the Court also notes that no evidence has been adduced by or on behalf of the respondent to suggest that the fingerprints appended to the warrant are not in fact the respondent's fingerprints.*
>
> *Further, the Court endorses the view expressed by Remy Farrell & Anthony Hanrahan, Barristers at Law, in their recent work entitled The European Arrest Warrant in Ireland (2011; Clarus Press) that the purpose of the details to be set out in accordance with s.11 (1A) (a) is to allow the Court to determine the question of identity rather than an exercise in formalism. In this case, the European Arrest Warrant states clearly the name, date of birth and nationality of the person to which it relates, and in the absence of cogent evidence from the respondent tending to suggest the contrary the Court is entitled to proceed on the basis that it accurately sets out the name, date of birth and nationality of the person to whom it relates.*
>
> *The Court has carefully considered the evidence of Sgt Kirwan and is fully satisfied that the person who has been brought before the court is one and the same person as the P.P.H named in the European Arrest Warrant."*

In general, there have not been many difficulties experienced in this jurisdiction in regard to section (a). The purpose of having to provide the details to be set out in para (a) is to enable the executing court to be satisfied as to the identity of the requested person. It is therefore more than an exercise of formalism.[13] The courts have held, e.g. in *Minister for Justice, Equality and Law*

[13] Remy Farrell and Anthony Hanrahan *"The European Arrest Warrant"* (Claus Press 2011) para. 2-37, p 35

*Reform v. Gokano*[14] that the greatest possible care must be taken to ensure that all documentation relied upon in relation to identity is correct. In that case a bald denial by the respondent that he was the person in respect of whom the warrant had been issued was deemed insufficient to contradict the evidence given by the arresting officer, in circumstances where the respondent had accepted at the time of his arrest that one of the names given in the warrant was his and that the date of birth therein corresponded to his own. However, as Farrell and Hanrahan point out in their commentary on the case (at para 5-23) somewhat unusually, although the court was satisfied that the respondent was the person in respect of whom the warrant had been issued, surrender was refused on the basis, *inter alia*, that the court was not satisfied that the respondent was the person referred to in certain undertakings provided by the issuing state as those undertakings referred to "Gokano Landi", whereas the person named in the warrant was "Landi Gokano".

In the case of *Minister for Justice, Equality and Law Reform v McGrath*[15] Macken J. held that in an application for surrender of a person there is an obligation on the court to take full account of the warrant and accompanying materials and to make appropriate inquiries including requesting further information from the issuing authority in order to ascertain whether the respondent is the person named in the warrant. In that case the court refused surrender as the issuing authority had not presented any material which connected the person named in the warrant with the respondent.

The issue of accompanying material attached to a European arrest warrant has featured in subsequent cases where there have been discrepancies in relation to identification details. In *Minister for Justice, Equality and Law Reform v. Betancourt* [16] counsel for the respondent objected that the name and date of birth on the EAW form did not match that of the person before the court and that there was no photograph attached to the warrant in respect of the person whose surrender was sought. However, Peart J. taking into consideration offences of which the respondent had already been convicted, held that he was capable of changing identity, availing of forged passports and other forms of identification in order to disguise his identity. He was satisfied, that after expert analysis of fingerprint evidence that did accompany the warrant, and fingerprint evidence taken while the person before the court was in custody on theft charges, that the person before the court was the person referred to in the European arrest warrant.

### B. Decision on which the EAW is based

16. *Have the issuing judicial authorities of your member State experienced any difficulties with regard to section (b)? If so, please describe those difficulties and how they were resolved.*

**Response.**

The issuing judicial authorities in this jurisdiction have not experienced difficulties with regard to section (b). As has been previously noted, a court will only issue a European arrest warrant in respect of a person where it is satisfied upon reasonable grounds that:

(i) the person whose surrender is to be requested is clearly identifiable;

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[14] Minister for Justice, Equality and Law Reform v Gokano [2004] IEHC 300.
[15] *Minister for Justice, Equality and Law Reform v. McGrath* [2005] IEHC 116.
[16] *Minister for Justice, Equality and Law Reform v. Betancourt* [2006] IEHC 423.

(ii) a domestic warrant was issued for the arrest/committal of that person but was not executed, and
(iii) the person is not in the State.

An application for the issuance of a European arrest warrant will only be made in respect of a person where it is grounded on an affidavit of a person duly authorised by or on behalf of the Director of Public Prosecutions, and in which the deponent verifies that a domestic warrant has been issued in respect of him/her. [17]

17. *Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (b)? If so, please describe those difficulties and how they were resolved.*

At times it has been unclear as to the domestic instrument on which the EAW is based. In the case of *Minister for Justice, Equality and Law Reform v. Kavanagh*[18] there was no reference to any arrest warrant having been issued nor a judicial decision which would have the same effect as an arrest warrant. While the High Court took the view that the omission was not a particularly serious one when viewed in context with other information provided in the warrant, the Supreme Court held that the EAW should not have been endorsed in the absence of an express reference to an underlying warrant.[19]

In *Minister for Justice, Equality and Law Reform v. Ostrowski* [20]a European arrest warrant contained incorrect details in relation to the underlying domestic warrant. The domestic warrant mentioned in Part (b) erroneously related to a completely different person to the person in respect of whom the warrant had been issued. The EAW was viewed by the High Court as fatally flawed, notwithstanding that the issuing authorities had later provided additional information explaining the error and providing details of the correct domestic warrant.

However, without expressing any view on whether the *Ostrowski* case was correctly decided it may be noted that, in contrast, in *Minister for Justice, Equality and Law Reform v. Spencer* [21]a respondent was surrendered notwithstanding that the EAW had cited itself as the basis for its issue. The High Court did not consider that defect to be fatal in circumstances where the issuing judicial authority had later provided clarifying information including details of a domestic warrant that was in fact relied upon.

In an unusual case, *SMR v. Governor of Wheatfield Prison* [2009] IEHC 442, the High Court had to consider the legal significance of an underlying domestic warrant being accidentally withdrawn in the issuing state (the UK) between the making of a s.16 surrender order and the hearing of an appeal in relation to same. The court had before it uncontroverted evidence that the issuing state intended to prosecute the respondent if surrendered. The High Court (McKechnie J.) held that the court did not have to decide any issues of U.K. law as the EAW, when validly issued, is a

[17] Section 9 of Statutory Instrument Number 23/2005 - Rules of the Superior Court (European Arrest Warrant Act 2003 and Extradition Act 1965 to 2001) 2005, Circuit Court: S.I. No 57 of 2005, District Court S.I. No 119 of 2005.
[18] *Minister for Justice, Equality and Law Reform v. Kavanagh* [2009] (*Ex tempore*, Supreme Court, 23 October 2009).
[19] Remy Farrell and Anthony Hanrahan "The European Arrest Warrant" (Claus Press 2011) para.2.41, p 36.
[20] *Minister for Justice, Equality and Law Reform v. Ostrowski* (unreported, High Court, 19 March 2010).
[21] *Minister for Justice, Equality and Law Reform v. Spencer* (*Ex tempore,* High Court, 19 February 2010).

separate and distinct document from the underlying domestic warrant. McKechnie J. at para. 67 held with respect to s.10 of the European Arrest Warrant Act, 2003 ("the Act of 2003") that:

> *"Once satisfied that the European arrest warrant has been 'duly issued' I cannot see how that part of s. 10 has any further application. Whilst I have no doubt but that the court when making a s.13 order (endorsement to execute) or a surrender order under s. 16, can operate the provisions of s.10, it is still confined by the recited wording to the same event; namely validity at date of issue. As that inquiry has no relevance to this case I cannot, therefore, find an entry point via this route."*

The High Court came to the view that it was not permissible for an executing judicial authority to engage in an analysis of whether the domestic warrant specified in part (b) of the EAW was valid at the material time under the law of the issuing state as this would offend against the principle of mutual trust. The domestic warrant had been in existence at the time of the endorsement of the EAW and the High Court considered that subsequent circumstances should not affect the proceedings in the executing state.[22]

In *Minister for Justice, Equality and Law Reform v. Michéal Ó Fallúin* [2010] IESC 37 the respondent argued that due to the circumstances of the case the underlying arrest warrant was spent. Murray CJ. in the Supreme Court held at para. 4;

> *"Neither the Act nor the Framework Decision in my view can be interpreted as permitting, let alone requiring, the courts of the executing state to embark on what would be in effect a judicial review of the validity of an order of the court or judicial authority of the requesting state according to the law of that State. I do not consider that there is anything within the Framework Decision and in particular the Act of 2003 which envisages that our courts would conduct a judicial inquiry in order to determine whether as a matter of German law, French law, United Kingdom law, Latvian law, or as the case may be, a European arrest warrant produced and authenticated as having been issued by the relevant judicial authority is valid. Issues concerning the validity of an order of a court within the meaning of its own national law invariably fall to be tried and determined by the courts of that country. It would be invidious, to say the least, if the court of one country were to pass judgment on the validity of an order or act of a court in another country under the latter's national law and set it aside as not having the effect which it purports to have on its face. Accordingly I do not consider that the use of the word "duly" in the Act of 2003 (though now removed by an amendment in the Criminal Justice (Miscellaneous Provisions) Act 2009) was ever intended to have such a meaning or effect which would require our courts, in the field of public law to exercise an unprecedented form of jurisdiction."*

The court further stated at para.40;

> *"While it may at times be necessary to consider the underlying domestic warrant in terms of the law of the issuing State, in general the courts of this jurisdiction are concerned with the European arrest warrant being duly issued in accordance with the European Arrest Warrants Act. If the European arrest warrant is in the prescribed from and contains the prescribed information this will, save in exceptional cases, be sufficient for an order of surrender to be made. It is assumed that the statement of facts contained in the European arrest warrant is a truthful statement of the facts in the case."*

– Judgment of Murray C.J.

– Judgment of Finnegan J.

[22] Remy Farrell and Anthony Hanrahan "The European Arrest Warrant" (Claus Press 2011) para.2.43, p. 36.

In the case of *Minister for Justice, Equality and Law Reform v A.B.* the original domestic warrant specified in Part (b) was a conviction warrant, but by the provision of additional information there was an attempt by the issuing judicial authority to change this to rely on a warrant for the purposes of prosecution. At the surrender hearing the moving party sought, *inter alia*, to rely on s.45C of the Act of 2003 which allows the High Court to forgive defects in an EAW involving a "non-substantial detail" or "technical failure" in certain circumstances, i.e., where no injustice would be caused. The High Court did not consider the misstated information in Part(b) to be either a mere insubstantial detail or a mere technical failure to comply with the Act of 2003. In reflecting that under the Framework Decision the issue of an EAW is premised upon either the existence of an enforceable judgment against a requested person or a warrant of arrest being in existence against the requested person, Donnelly J in the High Court in *Minister for Justice, Equality and Law Reform v A.B.* [2015] IEHC 338 refused surrender holding, at para 17, that;

> *"Fundamental to the entire system of surrender is that the EAW upon which a person may be arrested and surrendered is issued either for conducting a criminal prosecution or for the enforcement of a judgement… it is a fundamental requirement that the EAW, which forms the basis for surrender, reflects the purpose for which the EAW was apparently issued in Hungary and certainly endorsed in this jurisdiction. This is not a mere insubstantial detail or a mere technical failure to comply with the provision of the Act. It is clear from both the Act of 2003 and the Framework Decision that the purpose for which an EAW is issued is central to the obligation on an executing Member State to arrest and surrender the requested person. It is central to a consideration as to whether the warrant should be endorsed in this jurisdiction."*

***17BIS.*** *What is the position of your country on the conformity of the EAW and the national arrest warrant: should there be full conformity between the two documents or can they diverge from each other (can you add in the EAW offences that are not included in the national arrest warrant?) ? Do you as executing authority check on the national arrest warrant or do you ask for a (translated?) copy of the national arrest warrant (in case of doubt of conformity?). (possible issues: Bob-Dogi ruling, rule of speciality, deprivation of liberty, …)*

**Response**

The primary concern of an Irish court acting as an executing judicial authority is to ensure that the warrant identifies in part (b) the decision on which the warrant is based, being either an arrest warrant or judicial decision having the same effect, or an enforceable judgement. The certification of the issuing judicial authority in that respect will be accepted at face value, unless the requested person can point to cogent evidence tending to suggest that that which has been certified may not be correct. It is not usual for an Irish executing judicial authority to request a copy of, or to seek to check on, the national warrant in the absence of a challenge (although in practice a copy of the national warrant is often provided to the court in any event). That would not preclude an executing judicial authority from seeking a copy if a serious doubt was raised as to the conformity of the national warrant with the EAW, or from enquiring into the degree of conformity. The point has never been tested, but I think it is unlikely that an Irish Court would insist on exact conformity in every respect. A more likely approach would be to see if there was substantial conformity.

## C. Indications on the length of the sentence

18. *Does the national law of your Member State allow for issuing and/or executing an EAW with regard to accessory offences/sentences?*

**Response**

Ireland does not allow for the issuing / executing of a European arrest warrant with regard to accessory offences / sentences.

19. - *Does the national law of your Member State, as interpreted by the courts of your Member State, allow or require mentioning a single maximum sentence when a prosecution-EAW is issued for two or more offences?*

**Response.**

No, except where the offences are of the same nature and type. However, if the warrant is for two or more offences of a different nature or type then an individual potential maximum sentence must be indicated in respect of each such offence.

20. - *Concerning an execution-EAW for separate imposed sentences, does the national law of your Member State, as interpreted by the courts of your Member State, allow or require 'adding up' those sentences in order to cross the threshold of Art. 2(1) of FD 2002/584/JHA when deciding on issuing or executing that EAW?*

**Response.**

The answer is "No" in the case of issuing an EAW.

In the case of executing an EAW the answer is also "No". However, if a cumulative or aggregate sentence has been imposed in the issuing state surrender may be possible, providing minimum gravity thresholds are met and there is no difficulty with correspondence/reliance on Article 2.2. However the position is highly nuanced and there may potentially be difficulty if the warrant contains some offences in respect of which neither Article 2.2 has been invoked nor correspondence demonstrated. See the recent judgment of the Court of Appeal in *Minister for Justice and Equality v Kubalek* [2021] IECA 92.

21. - *Regarding the requirement of a sentence of at least four months, does the national law of your Member State, as interpreted by the courts of your Member State, refer to the duration of the sentence as it was imposed or to the duration of that part of the sentence which remains to be enforced?*

**Response.**

It refers to the duration of the sentence as it was imposed.

22. - *If an 'aggregate sentence' or a 'cumulative sentence' was imposed for multiple offences and one of those offences does not meet the requirements for surrender, does the law of your Member State allow or require the executing judicial authority to surrender without any restriction, to surrender for only those offences which meet the necessary requirements and, if so, is it necessary to know which part of the sentence relates to those offences (i.e. whether that part of the sentence is for four months) or to refuse surrender altogether?*

**Response**

Severance of the offence(s) for which surrender may not lawfully be effected may be possible, depending on the circumstances. What is not permissible, however, is that a respondent should be surrendered to serve an aggregate or composite sentence that was at least partly imposed for an offence or offences for which he could not be surrendered (the so-called *Ferenca* problem).

See: *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] 4 I.R. 480;

*Minister for Justice and Equality v Kubalek* [2021] IECA 92.

23. - *Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (c)? If so, please describe those difficulties and how they were resolved.*

**Response**

No. Irish law does not allow for the imposition of aggregate or composite penalties, so every EAW issued by the Irish High Court specifies information as to penalties imposed/potential penalties (as appropriate) for every individual offence on the EAW. Accordingly, queries from executing judicial authorities are rare.

24. - *Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (c)? If so, please describe those difficulties and how they were resolved.*

**Response.**

The main difficulty is as that previously described, in untangling the penalty information in the case of EAWs relating to multiple offences, where an aggregate or composite penalty has been imposed in respect of some or all of those offences in the issuing state, and lawful surrender is possible in respect of only some of those offences. The issue is always, can the impugned offences be satisfactorily severed? Again see:

See: *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] 4 I.R. 480;

*Minister for Justice and Equality v Kubalek* [2021] IECA 92.

Apart from that, lack of clarity in Part (c) as to precise penalties imposed/potential penalties can sometimes give rise to difficulty and necessitate the seeking of additional information.

D. Offences

Section (d) of the EAW-form was exhaustively dealt with in the InAbsenti EAW project. As far as we are aware, there are no new developments which would justify further questions concerning in absentia convictions.

E. Offences

25.– *Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (e)? If so, please describe those difficulties and how they were resolved.*

**Response**

The issuing judicial authorities have not experienced difficulties in regard to section (e). In every case there is rigorous judicial scrutiny of the form of EAW to be issued before it is issued, with the drafter being closely questioned by the relevant High Court judge on issues that might present a problem, and insistence that these are addressed before a draft EAW warrant is approved and issued. As a result, few queries are ever received. The precise level of detail required to be included in an EAW varies from judge to judge. The issuing Central Authority accommodates the various approaches adopted by different members of the judiciary in terms of the level of detail required to accurately describe the facts of each European arrest warrant.

26. *Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (e)? If so, please describe those difficulties and how they were resolved?*

There have been a number of difficulties experienced by the executing judicial authorities in this jurisdiction in relation to the issuing states completion of section (e) of the European arrest warrant. Omissions of significant information concerning time, place, degree of participation of the requested person in the offence and legal classification of the offence, have formed the basis of objections to surrender. Similarly omissions and inaccurate ticking of listed offences to which Article 2.2 of the Framework Decision are applicable have created difficulties in the courts determination of whether the status of the offence falls to be considered as necessitating correspondence or not.

However, notwithstanding the above deficiencies which may arise, the court in *Minister for Justice, Equality and Law Reform v. Stafford* [23] emphasised that;

> *"The principle of mutual recognition must be interpreted in a way which precludes the court, except in the most obvious and glaring inadequacy and failure in making any link between the person named in the warrant and the alleged offence, from seeking to go behind the description contained in paragraph (e) and in so doing questioning the bona fides of the warrant signed as it is by the issuing judge."*

In the above case it was argued that the facts on the warrant were insufficient in describing the circumstances in which the offences were committed and the level of participation of the requested person. The court held that it was not necessary to show a strong or *prima facie* case, as the issue of guilt or innocence was for a jury in the requesting state (the UK) and it was not for the requested state to consider the strength or weaknesses of the prosecution case against the respondent.

It is proposed to give examples of some specific issues that have arisen

*Offence*

[23] *Minister for Justice, Equality and Law Reform v. Stafford* [2006] IEHC 63.

In the case of *Minister for Justice, Equality and Law Reform v. Dolny* [24]the EAW failed to label or characterise the offence e.g. as an assault or a battery. It referred to "one criminal act" and went on to describe the conduct complained of. The Supreme Court held that a court could look at all of the information provided, the facts and acts described and give to words their natural and ordinary meaning. The court held that the acts alleged in the EAW, *"beat … on the face and head with his fists causing injury to his body"* were ordinary words and phrases which described an act which would have constituted an assault type offence if committed in this jurisdiction. They were therefore adequate to describe an offence of assault or battery, even if these labels or characterisations were not used.

In another case, i.e., *Minister for Justice, Equality and Law Reform v. Dicu* ,[25] in circumstances where the European arrest warrant failed to state the statutory provisions that created the offence, the High Court held that reading the warrant as a whole there was no doubt about the offences for which his surrender was sought.

As stated in the questionnaire at page 22, neither the Framework Decision nor the European arrest warrant provide a definition of the term 'offence'. The European Arrest Warrant Act 2003 does provide definitions of the word in relation to the various sections in order that contextual meaning can be established.

Section 5 of the Act of 2003 defines a corresponding offence for the purpose of the Act. It states;

> "… an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."

Section 22(1) of the Act of 2003 relating to the rule of specialty states;

> "In this section, except where the context otherwise requires, 'offence' means, in relation to a person to whom a European arrest warrant applies, an offence (other than an offence specified in the European arrest warrant in respect of which the person's surrender is ordered under this Act) under the law of the issuing state committed before the person's surrender, but shall not include an offence consisting, in whole, of acts or omissions of which the offence specified in the European arrest warrant consists in whole or in part."

Section 23(1) of the Act of 2003 relating to prohibition of the surrender of the requested person to another member state other than the issuing state provides;

> "In this section, except where the context otherwise requires – 'offence' means, in relation to a person to whom a European arrest warrant applies, an offence under the law of a Member State (other than the issuing state) committed before the person's surrender to the issuing state under this Act;"

The definition of the word in section 38(3) of the Act of 2003 is specific to that particular section, which states that;

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[24] *Minister for Justice, Equality and Law Reform v. Dolny* [2009] IESC 48.
[25] *Minister for Justice, Equality and Law Reform v. Dicu* [2020] IEHC 607.

> "In this section 'revenue offence' means, in relation to an issuing state, an offence in connection with taxes, duties, customs or exchange control.

In the case of *Minister for Justice, Equality and Law Reform v. Desjatnikovs*[26] the Supreme Court examined the methods open to the courts in identifying offences in a EAW and held that there were only two - on the basis that there is a corresponding offence, alternatively where Article 2.2 of the Framework Decision has been invoked by the ticking of a box in Part (e)I of the EAW. The court held that there is no third option by which an Irish court could go behind the warrant, consider facts and determine that under the law of the issuing state the offence is an offence in the issuing state and that it is one listed in paragraph (e)I, when an issuing state has not made such a decision or ticked a relevant box.

The absence of a definition within the Framework Decision and the European arrest warrant can occasionally create difficulties for an executing court, where correspondence cannot readily be demonstrated. Such a situation occurred in the case of *Minister for Justice v. Muntean*.[27] In this case the requested person was sought to serve a sentence for an offence in which she had used valid documents belonging to a friend to obtain travel documents so that she could return to Ireland from Romania. At para. E of the EAW, it was stated that the warrant related to one offence. The particulars of the offence were that on the 3rd February, 2015 the respondent used another individual's identity card and certificate of marriage, thereby assuming the identity of that person, for the purpose of obtaining a temporary visa. The offence was described as being the offence of false identity contrary to Art. 327 (paragraphs 1 and 2) of the Criminal Code. 10. No box was ticked at para. (e)I of the EAW. Accordingly, it was necessary for the actions of the respondent as described in the EAW, leading to her conviction of the offence in Romania, to correspond to an offence in this jurisdiction. The central authority in this jurisdiction, as the moving party in the application for an order for the respondent's surrender, relied on sections 6, 7 and 26 of the Criminal Justice (Theft and Fraud Offences) Act 2001 to establish correspondence with the offence stated in the EAW. However, it was objected by the respondent that the offence for which the respondent was sought did not correspond to an offence in the State. Neither, it was said, was it an offence to which Article 2(2) of the Framework Decision applied.

The High Court held that:

> *"27. Firstly, there is, in my view, no doubt at all that the actions of the respondent would not constitute an offence under either s. 6 or s. 7 of the Act of 2001. These sections are clearly linked to "gain" and "loss" as defined in the Act of 2001 and involve the loss or gain of money or other property. It is very clear that the actions of the respondent, as described in the EAW, do not involve such gain or loss.*
>
> *28. As regards s. 26 of the Act of 2001, I think that it is equally clear that the actions of the respondent would not constitute an offence under that section of the Act either. This section relates to the use of an instrument that is a false instrument. An instrument does not become a false instrument because it is being used by a person other than the person to whom it has been issued for illicit purposes. The instrument remains a valid instrument and may still be used by the person to whom it was issued. In any case, "false instrument" is defined in s. 30 of the Act of 2001, the provisions of which are set out above. It was not explained to this Court how a validly created and issued passport could fall within any of the descriptions of instruments referred to in this definition, and it does not appear to me that this is the case. Accordingly, surprising as it may seem, the actions of the respondent, as described in the EAW,*

[26] *Minister for Justice, Equality and Law Reform v. Desjatnikovs* [2008] IESC 53.
[27] *Minister for Justice, Equality and Law Reform v. Muntean* [2020] IEHC 413.

> *do not appear to constitute an offence in this jurisdiction, or at least they do not constitute any of the offences contended for on behalf of the applicant in the course of this application. Accordingly, it follows that the respondent should not be surrendered, and the application must be refused."*

*Incomplete description of the offence*

The importance of a complete description of the offence whether listed or non-listed was emphasised by Denham J. in the Supreme Court case of *Minister for Justice, Equality and Law Reform v. Desjatnikovs*[28] where she held at para 101 that;

> "*The fact that there is a precise description of the facts of the case is important, even though the issue of double criminality is not required to be considered. It is important that there be a good description of the facts. An arrested person is entitled to be informed of the reasons for his arrest and of any charge against him in plain language which he can understand. Also, in view of the specialty rule, the facts upon which a warrant is based should be clearly stated.*"

The warrant in the case above stated that it referred to one offence, but it was unclear from the facts relating to three alleged occasions, which was the offence.

Although a stricter view is taken today, early Irish case law on the EAW suggested that a failure to set out explicitly the extent of a requested persons involvement only became an issue where it gave rise to a specific difficulty. In Minister for *Justice, Equality and Law Reform v Hamilton* [29] the court held that although the warrant requires that the time and place of the offence is provided as well as the degree of involvement of the requested person it does not mean that anything akin to a *prima facie* case must be set forth. Peart J. went on to state that;

> *"… that type of matter will be a matter for the prosecution authority in the requesting country to deal with by whatever procedure applies in that jurisdiction, such as would occur by service of the Book of Evidence.*"

In that case the information provided in the narrative put the respondent in the flat where the murder occurred and in the bathroom where the injured person was found after the altercation but provided little else to indicate his degree of involvement.

Similarly in *Minister for Justice, Equality and Law Reform v. Stafford* [30] the requested person argued that there was insufficient detail given in the warrant linking him with the commission of the offences. The court relied on the principle of mutual recognition in finding that as long as some degree of participation is shown, the strength or weakness of the case against the requested person is of little relevance to the issue of surrender.

Such evidence of participation in an offence was not established in the case of *Minister for Justice, Equality and Law Reform v. Kasprowicz*[31] where persons other than the requested person were alleged to have committed the offence and there was no mention of the requested person's name in the warrant in relation to one of the offences. Similarly in the case *Minister for Justice, Equality and Law Reform v. McPhillips*[32] the court was unable to order surrender on foot of the EAW as its

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[28] *Minister for Justice, Equality and Law Reform v. Desjatnikovs* [2008] IESC 53.
[29] *Minister for Justice, Equality and Law Reform v. Hamilton* [2008] I IR 60.
[30] *Minister for Justice, Equality and Law Reform v. Stafford* [2009] IESC 83.
[31] *Minister for Justice, Equality and Law Reform v. Kasprowicz* [2010] IEHC 207.
[32] *Minister for Justice, Equality and Law Reform v. McPhillips* [2010] IEHC 468.

contents failed to specify enough information about the requested persons involvement in the offences notwithstanding the provision of additional information from the issuing judicial authority.

In the case of *Minister for Justice, Equality and Law Reform v. Zych* [33]the requested person argued that the descriptions as to the date or time of the relevant offences were too vague. However, the court held that;

> "*It is clear that the relevant provisions, both in the Framework Decision and in the implementing Act, do not exist in isolation. They are among a series of particulars or details that the warrant is required to contain so as to ensure that the executing judicial authority has sufficient information to enable it to determine whether an offence in the issuing state corresponds with an offence in the executing state.*"

The court held that the particulars as to date and time taken in conjunction with the description of the alleged offence under Polish law made it clear that what was alleged was perpetration of domestic violence on a spouse within a forty five month time bracket.

The correctness, or otherwise, of the reasoning in these cases must now be judged in the light of clarifications provided by the Court of Appeal in cases such as *Minister for Justice, Equality and Law Reform v. Harrison* [2020] IECA 159, and *Minister for Justice and Equality v Kubálek* [2021] IECA 92, following the decisions of the Court of Justice of the European Union (CJEU) in *Bob-Dogi* [34] and in *I.K.* [35];

> *"The Court has also held that those provisions are based on the premise that the European arrest warrant concerned will satisfy the requirements as to the lawfulness laid down in Article 8(1) of the Framework decision and that failure to comply with one of those requirements as to lawfulness, which must be observed if the European arrest warrant is to be valid, must, in principle, result in the executing judicial authority refusing to give effect to that warrant (see, to that effect, judgment of 1 June 2016, Bob-Dogi, C 241/15, EU:C:2016:385, paragraphs 63 and 64)."*
>
> [Para 43 of the judgment in *I.K.*]

In the recent case *Minister for Justice, Equality and Law Reform v. Harrison* [36]the UK sought the surrender, on foot of an EAW, of an Irish haulier who had transported 39 illegal Vietnamese immigrants to the port of Zeebrugge, Belgium in the trailer unit of his lorry. These immigrants all subsequently died from asphyxiation/heat stroke during the sea journey from Zeebrugge to the port of Purfleet, Essex, England. The respondent was charged with 41 offences, being 2 charges of conspiracy to engage in human trafficking and 39 charges of manslaughter. He objected to his surrender on various grounds, including that the EAW did not contain sufficient particulars of the nature and degree of participation by the respondent in the alleged offences. Additional information had been sought by the High Court as executing judicial authority, and it was provided by the prosecuting authority in the UK. However, the respondent objected that the additional information provided by the prosecuting authority was information required to be contained in the EAW pursuant to the provisions of Article 8 of the Framework Decision, and accordingly could only be provided by a judicial authority. The High Court granted surrender, and that decision was appealed to the Court of Appeal.

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[33] *Minister for Justice, Equality and Law Reform v. Zych* [2011] IEHC 161.
[34] *Case C-241/15, Bob-Dogi, Judgment of 1 June 2016*
[35] *I.K. (Case-551/18 PPU).*
[36] *Minister for Justice, Equality and Law Reform v. Harrison* [2020] IECA 159.

Giving judgment on behalf of the Court of Appeal rejecting the respondent's contentions, Donnelly J. highlighted how the courts have proceeded when uncertainty or ambiguity arises from details provided in European arrest warrants issuing from other member states;

> *"Given the information that was subsequently provided, it might have been preferable if some of that information had been provided in the original warrant. Whether an ideal amount of information is contained in the EAW is not the test, it is one of sufficiency. The experience of these courts when dealing with EAW's from across the other 27 Member States has been that the amount of information provided varies enormously, not just from Member State to Member State but from one judicial authority to another in a Member State. Sometimes much more information than necessary is provided. This makes the EAW more time consuming to read, particularly where there are pages and pages of extraneous information provided in a translation that is less than flowing. Occasionally when the information provided is insufficient to ensure that the requested person knows the reason why he is being sought and that the executing judicial authority can make a decision as whether the legal requirements have been met for surrender, the executing judicial authority is required to seek further information."*

Donnelly J. addressed the issue of mutual recognition and mutual trust in the provision of information relating to EAWs at para 80 and 81;

> *"The principle of mutual recognition is built on the concept of mutual trust… there is a residual trust between countries in any extradition arrangements though the extent of that trust may vary. Mutual trust within the EU is at a very high level.…There is always a level of mutual trust between Member States, but an executing judicial authority is bound to give information provided by a non-judicial authority greater scrutiny than information provided by another judicial authority."*

Ultimately, the Court of Appeal held that the EAW contained virtually all of the information required under Article 8(1) of the Framework Decision except for further information as to the degree of participation in the alleged offences and as such the executing judicial authority deemed it necessary to request further information in order to carry out its functions. The missing information was supplied in the additional information furnished. It was held that this was not improper, Donnelly J. stating:

> *"In my view, the reference in Bob-Dogi to Article 15(2) and to the issuing judicial authority being given the opportunity to provide information is not dispositive of the issue of whether information may be provided by an organ of the issuing Member State other than the issuing judicial authority. Even in Bob-Dogi, it was clearly acknowledged that other information could be put before the executing judicial authority. While that may have referred to information placed by the requested person, it is an acknowledgement that the executing judicial authority has an obligation to take on board all information before it when assessing legality. I also take the view as found in para. 76 of A.W* [Minister for Justice and Equality v A.W. [2019] IEHC 251]*., that the CJEU in Bob-Dogi did not seek to lay down a general requirement as to all information in Article 8 being required to be obtained from the issuing judicial authority. The decision must be read in the context of what was at issue in that case. By contrast, the issue of the provision of information by an authority other than the issuing judicial authority was directly raised in M.L.* [M.L. (Generalstaat-sanwaltschaft Bremen) [2018] C-220/18 PPU]. *The CJEU accepted that it could be received and assessed in the manner set out in the judgment as referred to above."*

In *Minister for Justice and Equality v Kubálek* [2021] IECA 92 Edwards J., giving judgment for the Court of Appeal, again referred to Article 8(1) requirements, and stated (at para 49):

> *"This brings me to the potential impact of s.11(1A) (g)(iii) of the Act of 2003 and the provision it transposes, i.e., Article 8(1)(f) of the Framework Decision. It seems to me that the importance of the judgments in Bob Dogi and in IK, (and indeed of the Piotrowski decision referred to in the quotation cited earlier from IK, which I consider it unnecessary to specifically review for the purposes of this judgment), in terms of the case before us lies in the CJEU's emphasis on the Article 8(1)(a) to (f) requirements as being requirements "as to lawfulness". Although the Bob Dogi case was specifically concerned with Article 8(1)(c), and the IK case was specifically concerned Article 8(1)(f), as is the present case, I am satisfied from the jurisprudence of the CJEU that the requirements of each sub-article of Article 8(1) are all to be regarded as being requirements as to lawfulness. If the mandated information is not provided in the warrant (or a separate accompanying document, which is allowed) with the required level of specificity the request will not meet minimum requirements for validity, such that the executing judicial authority may have no option but to refuse surrender on that basis."*

*Description of the investigation instead of description of the offence*

In the case *Minister for Justice, Equality and Law Reform v. Olssen* [37] the issuing judicial authority issued a warrant stating that it was to enable the police to interview the requested person in order to formally conclude their criminal investigation after which a final decision on whether or not to prosecute would be taken. In further information supplied by the issuing state it was clarified that while there was an intention to prosecute on the basis of the available evidence, the requested person had at all material times been abroad and not available for interview to enable the finalisation of the procedure. The Supreme Court dismissed the objection to surrender emphasising;

> *"…that it was permissible to do so where an intention to prosecute has been made even in circumstances where that decision is revocable upon further information or evidence coming to light which might indicate the requested person's innocence*."

O'Donnell J. stated that a court is only to refuse surrender when it is satisfied that no decision has been made to try the person. This is so where there is no intention to try the requested person on the charges at the time the warrant was issued.

The *Olssen* decision was followed in the case *Minister for Justice, Equality and Law Reform v. Nicola*.[38]

*Detailing the number of offences (and numbering them separately)*

While not specifically relating to the numbering of offences the case of *Minister for Justice, Equality and Law Reform v. Bednarczyk* [39]highlights an example of confusion sometimes faced by courts in terms of the form in which a warrant is presented. In the *Bednarczyk* case the same numbering system was adopted in both sections of Part (e) so that what should have been numbered (e)I (i.e. Roman numerals capital I). was in fact numbered (e)1 and what should have been numbered (e)II (i.e. Roman numerals capital II) was in fact numbered as (e)2. Because of this failure to adhere exactly to the numbering convention in the form of the EAW annexed to the Framework Decision there existed two (e)1's and two (e)2's within the same warrant.

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[37] *Minister for Justice, Equality and Law Reform v. Olssen* [2011] IESC 1.
[38] *Minister for Justice, Equality and Law Reform v. Nicola [*2020] IEHC 318.
[39] *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2012] IEHC 154.

In the recent case *Minister for Justice, Equality and Law Reform v. Tache* [40]the court reiterated the observation of the Supreme Court in *Minister for Justice and Equality v. Connolly* [41]that *"it is well established that a person whose surrender is sought pursuant to the Act of 2003 is entitled to know the number and nature of the offences for which his/her surrender is sought."* In *Tache* an earlier EAW in respect of the same respondent, and same offences, had stated the number of offences to be nine. However, in the opening line of part (e) of the new EAW it stated that the warrant related to a total of thirteen offences. Then six lines further down in part (e) in the same EAW it went on to state that the requested person was charged with a total of 28 offences. With the benefit of additional information the executing judicial authority was able to determine that the reference to thirteen offences had been an error.

Another recent example of confusion about the number of offences to which the warrant relates is *Minister for Justice and Equality v Gorczyca* [2020] IEHC 59, where Binchy J observed:

> *"19. At para. E.1 of the EAW it is stated that the warrant relates to nine offences. Even allowing for differences of procedures in jurisdictions, and the fact that sometimes separate incidents each of which would amount in itself to an offence are amalgamated so as to constitute a single offence, it is difficult reading this EAW to understand why it is stated to relate to nine offences.*
>
> *20. This is so because particulars of the convictions giving rise to the sentences for which the surrender of the respondent is sought are provided in para. E of the EAW, and it appears to me that there are no less than fifteen incidents, each of which constitutes an offence. …"*

*Divergence between number of offences described and the applicable legal classifications*

In *Minister for Justice, Equality and Law Reform v. Herman* [42]the surrender of the requested person was sought pursuant to three European arrest warrants. The requested person argued that the warrants were contradictory and contained a lack of clarity in both the warrants and in the additional information provided as to the purpose for which surrender was sought. The Supreme Court held that the requested additional information provided by the applicant demonstrated a fundamental change from the purpose for which surrender was sought in the original arrest warrant, and on that basis refused surrender on the warrants in controversy. Denham C. J stated;

> *"The position now is that instead of being sought for sentencing under Warrant No. 3 the appellant is now sought to be arrested and prosecuted. Further, the effect on Warrant No. 1 is that he may have to serve a different sentence on Warrant No. 1 to that set out in the warrant itself… Where the national judicial authority which issued a European arrest warrant seeks to change a fundamental element in the nature or purpose of the warrant, as opposed to providing further information or corrections of minor nature, a new warrant should be issued in the form required by the Act, namely, in the form in the Annex to the Framework Decision, so that it may be endorsed for execution in the State by the High Court."*

[40] *Minister for Justice, Equality and Law Reform v. Tache* [2020] IEHC 130.
[41] *Minister for Justice, Equality and Law Reform v. Connolly* [2014] IESC 34.
[42] *Minister for Justice, Equality and Law Reform v. Herman* [2015] IESC 49 .

In *Minister for Justice, Equality and Law Reform v. Horvath*[43] the requested person was sought for the purposes of being prosecuted for 17 similar offences where the warrant indicated that each offence came within the list of Article 2.2 of the Framework Decision. At issue in the case was whether all the offences met minimum gravity requirements. The court held that the statement at part (c) of the warrant, that the maximum sentence that may be imposed was between 5 and 10 years was not sufficient to indicate that the minimum gravity for each offence had been met for the purpose of Article 2.2 of the Framework Decision. The court held that;

> *"The information in relation to the minimum gravity requirement must be gleaned from that part of para. (e) thereof which is headed 'Nature and legal classification of the offence(s) and the applicable statutory provision/code'."*

That paragraph in the warrant made it evident under the issuing state's penal code that the offence was a misdemeanour and carried a penalty of up to one year and therefore did not meet the requirement for the purpose of Article 2.2.

In the previously mentioned case *Minister for Justice, Equality and Law Reform v. Bednarczyk* [44]the court noted that information contained in part (e)II was contradictory to the prosecutorial nature of the warrant. A reference to *"…acts for which Bednarczyk was sentenced"* was inconsistent with the fact that the warrant was for prosecution purposes and was not a conviction type warrant. The court was ultimately satisfied, in light of information contained in Part (f) of the warrant, that the contradiction was explicable on the basis that the requested person had been convicted and sentenced to a term of imprisonment in two other cases which were not the subject of the present warrant.

*Vague designations of listed offences*

Issues relating to the above arose in the case *Minister for Justice, Equality and Law Reform v. Ludwin* [45]where the court had to determine whether the designation of an offence came within the listed offences set out at Article 2.2 of the Framework Decision. The description of the offence as set out in part (e) of the EAW, being one that *prima facie* corresponded to burglary in this jurisdiction, had been designated as 'swindling and forgery of documents'. The court also noted that the offence of burglary was not an offence that came within the Article 2.2 list. In relation to this and two other offences the court held that though there was a manifestly incorrect reliance on the Article 2.2 procedure, correspondence with offences in this jurisdiction had been established.

In *Minister for Justice, Equality and Law Reform v. Desjatnikovs* the issuing authority had set forth factual details of the offences in part (e) which described fraudulent conduct, but had not ticked the offence of fraud in part (e)I although that might have been open to it. The High Court held that section 38(1)(b) of the Act of 2003 permitted the court to examine the facts alleged against the requested person in order to see whether what was alleged against the respondent could be placed within the general concept of one or more of the listed offences. If this was possible there was no bar to surrender. The Supreme Court subsequently disagreed stating;

> *"If the offence is identified by the issuing state then the matter comes within this new legal scheme. However, if the offence is not identified by the issuing state, the role of the requested state, as submitted in*

[43] *Miniser for Justice, Equality and Law Reform v. Horvath* [2008] IEHC 411.
[44] *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2012] IEHC 154.
[45] *Minister for Justice, Equality and Law Reform v. Ludwin* [2018] IEHC 220.

> *this case on behalf of the State, would be an extraordinary step. It would require an Irish Court to look behind the issuing authority, and its decision, and decide whether the act described is an offence under the law of the issuing state, and whether it comes within the list of offences in Article2.2. For the reasons given I am satisfied that the Act of 2003 does not create this third option."*[46]

*Divergent designations of listed offences*

In *Minister for Justice, Equality and Law Reform v. Kiernowicz*[47] the Court identified that the order in which offences were listed in part (e)I of the EAW was different to the order in which such offences were listed in Article 2.2 of the Framework Decision. It was also apparent that the number of offences on the (e)I list in the EAW was greater than that which appeared in the version set out in the Framework Decision. The Court held that the surrender process being one that affects the liberty of the individual, strict compliance with the terms of Article 2.2 was necessary in order to properly invoke its provisions so as to obviate the need to prove dual criminality in respect of an alleged offence. Notwithstanding the provision of additional information from the issuing judicial authority following a request from the applicant, the court found that such information was insufficient in providing clarity and there remained a manifest error such that the applicant was not entitled to rely on Article 2.2 to obviate the need to establish dual criminality.

In *Minister for Justice, Equality and Law Reform v. E.P.*[48] the court commented that "… *it was not overstating matters to comment that the drafting of the EAW left a lot to be desired*." Under part (e) of the EAW at the heading entitled E.1 (corresponding with (e)I in the form in the Annex), which purported to list the offences set out in Article 2.2 of the Framework Decision, a box referring to "*illicit production, processing, smuggling of narcotic drugs, precursors, substitution substances and psychotropic substances, or trafficking in them"* had been designated. That particular designation was not found in the Framework Decision. Additional information was sought to clarify whether the issuing judicial authority had intended to rely on the offence of *"illicit trafficking in narcotic drugs and psychotropic substances"* as set out in the list of 32 offences at Article 2.2 of the Framework Decision.

*Non-listed offence(s) not described under point II*

In *Minister for Justice, Equality and Law Reform v. Mika*[49] the issuing judicial authority had completed the first part of part (e) but had neither completed part (e)I nor part (e)II, thereby failing to indicate whether or not article 2.2 was being invoked. The application for surrender proceeded on the basis that correspondence must be established.

*Offences described both as listed and as non-listed*

An early example of this is provided by *Minister for Justice, Equality and Law Reform v Tighe* [2010] IESC 61. The respondent was charged with four offences, being two counts of conspiracy to cheat the public revenue, one count of cheating the public revenue and one count of conspiracy to commit money laundering. Hardiman J. identified that although the requesting state had invoked Art 2.2 of the Framework Decision ostensibly for all the offences by ticking boxes in part (e)I of the warrant relating to fraud and laundering of the proceeds of crime, they had gone

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[46] *Minister for Justice, Equality and Law Reform v. Desjatnikovs* [2008] IESC 53.
[47] *Minister for Justice, Equality and Law Reform v.* Kiernowicz [2014] IEHC 270.
[48] *Minister for Justice, Equality and Law Reform v. E.P.* [2015] IEHC 662.
[49] *Minister for Justice, Equality and Law Reform v. Mika* [2010] IEHC 208.

on in part (e) II to indicate that the conspiracy offences were "offence(s) NOT covered by Section I above".

Hardiman J. observed in his judgment in *Tighe* at page 11;

> *"However, in considering three of the four offences in question here, it may not be necessary to debate the question of correspondence, because correspondence is not relied upon in the warrant. On the contrary, it is certified that these three offences are within the list of criminal conduct in the Framework Decision and then later in the warrant, that they are not. In my view it is uniquely for the issuing State to say whether and if so where in the list of actions set out in the Framework Decision the offence for which they want to put a person on trial is to be found. The decision to charge conspiracy in this case was that of the United Kingdom Revenue Authorities and both the conflicting certifications, that conspiracy is/is not an offence within the Framework Document list is also of their making. I would decline to order the delivery of the applicant on these charges."*

In *Minister for Justice, Equality and Law Reform v. Paulauskas* [50]the issuing judicial authority had ticked a box in part (e)I of the EAW to indicate that a stabbing offence causing the victim serious health impairment was within the scope of a listed offence for the purposes of Article 2.2 of the Framework Decision, i.e., "grievous bodily harm". However, part (e)II of the warrant in respect of the same offence, describing it as "violation of public order; serious health impairment". Peart J. held that the fact that the offence of grievous bodily harm had been ticked in part (e)I, while at the same time details had been included in part (e)II, was not an error of such significance that surrender should be prohibited, in circumstances where correspondence could in any event be demonstrated, stating;

> *"What the issuing judicial authority has done in that regard does not offen[d] against Article 2 of the Framework Decision or the provisions of s.38 of the Act, even if it would be more correct for that authority to have simply marked that offence as an Article 2.2, or not to have done so and simply included it in paragraph E.II."*

A somewhat similar difficulty, amongst others, was encountered in the case *Minister for Justice, Equality and Law Reform v. Plecanciuc*, [51] involving three separate EAWS. In the first of these extradition was sought in respect of one offence. The requesting authority had ticked 'swindling' as the appropriate description of the offence from the list of offences as per Article 2.2 of the Framework Decision. It then proceeded to give a further description of the offence at part (e)II where the offence was described as 'forgery in deeds by private signature'. The High Court resolved the conflict in this way:

> *"6. The court is satisfied that in this instance it is necessary to look for correspondence in respect of the description of the offence set out at para. (e)(II). The description given as "forgery in deeds by private signature" must be read in the context of the overall terms of the warrant and the factual description of the circumstances in which the offence was committed. The offence is described as the taking of goods from an injured party using the documents of a trading company administered by the proposed extraditee's co-defendant. It appears therefore to correspond when considered under s. 30(d) of the 2001 and to be a forgery of documents purporting to be in terms made on the authority of a person or company who or which did not in fact authorise their making in those terms and inducing the injured party to accept them as genuine, thereby enabling the offender to obtain goods from the injured party. The use of such an instrument is also an offence under s. 26 which provides that a person who dishonestly, with the intention*

[50] *Minister for Justice, Equality and Law Reform v. Paulauskas* [2009] IEHC 32.
[51] *Minister for Justice, Equality and Law Reform v. Plecanciuc* [2015] IEHC 224.

*of making a gain for himself or another, or of causing loss to another by any deception, induced another to do or refrain from doing an act, is guilty of an offence. It is clear that the description of the offence at para. (e)(II) when combined with the description of the circumstances of the offence also corresponds with an offence under s. 6 of the Act of making gain or causing loss by deception. I am, therefore, satisfied that correspondence has been established in respect of this warrant."*

There was a further relevant issue in that case in respect of the third EAW. The respondent's surrender was sought by Romania to serve a sentence imposed in respect of two offences. The issue arising and how it was resolved was succinctly described in the judgment in these terms:

*"17. In respect of the two offences the facts are described as follows:- 'In fact it was retained (sic) that the defendant filled in one bank CEC, taken from the co-defendant Sorodoc Andrei, and used it to pay the equivalent value of the goods delivered by the civil party SC MONDO PLAST SRL – without having banking availability, forging the signature of Sorodoc Andrei on fiscal invoice.'*

*18. The nature and legal classification of the offences and the applicable statutory provisions were described as follows:- '1. Swindling – stipulated and punished by Article 215 para. 1, 2 and 4 from the Penal Code respectively: - the misleading of a person by presenting a lie as the truth or by presenting the truth as a lie, in order to obtain a material benefit for oneself of a third party and if a damage was caused; - use of false names or qualities or of another fraudulent means; - use of a bank cheque to a credit institution or to a person, knowing that for its cashing there is no necessary provision or coverage, and also the deed to withdraw, after issue, the provision, total or partially, or to forbid the withdrawal for payment before the expiration of the presentation term. 2. Forgery in deeds under private signature stipulated by Article 290 para. 1 from the Criminal Code respectively: - forgery of a deed under private signature by forging the writing or signature or by otherwise its altering, in order to cause legal consequences, if the doer uses the forged deed or gives it to another person to be used, in order to cause legal consequences'*

*19. In respect of both offences the box for 'swindling' in a list of offences relevant to the Framework Decision under Article 2.2 was ticked. However, once again, para (e)(II) was completed in respect of 'full description of offence(s) not covered by s. 1 above': as follows:- 'Accordingly to Art. 33 letter "A" and Art. 34 letter "B" from the Criminal Code, the two punishments were merged and it was decided that the defendant execute the largest punishment of 3 (three) years in prison. Thus it was applied Art. 71 related to Art. 64 para. 1, letter "A" thesis II and letter "B" from the Criminal Code. The defendant will execute a total punishment of three years in prison.'*

*20. I am not satisfied that the material set out at para. (e)(II) was intended or could be regarded as a full description of an offence not covered by s. 1 above. The only description of the offences set out under para. (e)(I) or (II) is the ticked box 'swindling'. The material set out in para (e)(II) is simply a description of how the sentence of three years imprisonment which it is claimed the respondent is required to serve, is calculated. There was ample material set our earlier in the warrant to demonstrate the nature of the offences for the purpose of establishing correspondence with offences under section 4, 25 and 26 of the 2001 Act but it is not set out in the appropriate sub-paragraph. In any event, a further description at e(II) was unnecessary having regard to the ticking of the Article 2.2 box. Therefore, I am not satisfied that it is necessary in the circumstances to examine the warrant for correspondence having regard to the complete absence of any description under para. (e)(II) which might merit such an examination. The material inserted in that section has no relevance to a description of the offences. The two offences described in the warrant outlined the circumstances in which they were committed, the nature and classification of the offences and the applicable statutory provisions. I am, therefore, satisfied that there is sufficient*

> *description of the two offences provided by the ticking of the box 'swindling' at para. (e)(I) for the purpose of authorising the respondent's extradition in that respect."*

Your respondent would suggest that an alternative way of dealing with the issues arising in both the *Paulauskas* and the *Plecanciuc* cases would have been for the executing judicial authority to have instead sought to clarify the position and resolve the contradictions arising through requests for additional information.

27. *How do the executing judicial authorities of your Member State assess whether:*

*(a) the requested person is the subject of a final judgment in respect of the same acts on which the EAW is based?*

**Response**

In assessing whether a requested person is the subject of a final judgment in respect of the same acts on which the EAW is based, the executing judicial authorities apply the autonomous concept of a final judgment as referred to by the CJEU in C-261/09 *Mantello*;

> *"For the purposes of the issue and execution of a European arrest warrant the concept of 'same acts' in Article 3(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States constitutes an autonomous concept of European Union Law."*[52]

And:

> *"Whether a person has been 'finally judged' for the purposes of Article 3(2) of the Framework Decision is determined by the law of the Member State in which judgment was delivered."*

In the case *Minister for Justice, Equality and Law Reform v. Renner-Dillon*[53] the Supreme Court examined the meaning of 'finally judged' in Article 3.2 of the Framework Decision and of "final judgment" as set out in section 41(2) of the European Arrest Warrant Act 2003. This case concerned a requested person who had some years earlier been acquitted of an offence in respect of which consent to further prosecution under s.22(7) of the Act of 2003 (which transposed Article 27(4) of the Framework Decision) was laterally being sought due to the emergence of fresh and compelling evidence. The law of the issuing state allowed for a re-trial by the prosecution in circumstances where new evidence which was not available at the time of the original trial had come to light.

Citing the decision of the CJEU in *Mantello* the Supreme Court determined that:

> *"Where under the law of the issuing Member State a judgment, in this case a judgment of acquittal, does not definitely bar further prosecution or as stated in Mantello 'constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person', then that person has not been finally judged. A judgment which does not definitely bar further prosecution does not constitute a ground for mandatory non-execution of a European arrest warrant."*[54]

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[52] C-261/09 *Mantello* para 51.
[53] *Minister for Justice, Equality and Law Reform v. Renner-Dillon* [2011] IESC 5.
[54] *Minister for Justice, Equality and Law Reform v. Renner-Dillon* [2011] IESC 5, para 85.

In a recent case *Minister for Justice, Equality and Law Reform v. Kubálek* [55]the requested person argued, *inter alia*, that his surrender was unlawful because the warrant failed to comply with section 11(1A)(g)(iii) of the Act of 2003, which was intended to transpose Article 8(1)(f) of the Framework Decision which in turn requires that a European arrest warrant shall contain, *inter alia*, information concerning "the penalty imposed, **if there is a final judgment**, or the prescribed scale of penalties for the offence under the law of the issuing Member State" (emphasis added). The transposing provision omitted the emphasised qualification. In identifying that the wording of section 11(1A)(g)(iii) aligned with the provision it was intended to transpose, notwithstanding the absence of the qualification present in Article 8(1) Edwards J. held;

> *"Applying the autonomous meaning of what it means to be finally judged or to be subject to a final judgment to the circumstances of the appellant's case, it does not seem to me that there has been a final judgment in the appellants' case. The possibility exists of a re-opening of criminal proceedings in the Czech Republic, both in respect of liability and sentence, based on the guarantee of a re-trial, alternatively the possibility of applying for a proportionate reduction of sentence, at the appellant's option, relating to the two offences for which correspondence can be demonstrated."*[56]

27(b) *How do the executing judicial authorities of your Member State assess whether the acts on which the EAW is based constitute an offence under the law of the Member State? Does such an assessment take place;*

*- ex tunc – according to law at the time the acts were committed;*

*- according to the law at the time of issuing the EAW; or*

*- ex nunc – according to law at the time of the decision on the execution of the EAW?*

*Have the executing judicial authorities of our Member State actually refused to execute an EAW, because the acts on which the EAW was based did not constitute an offence under the law of your Member State? If so, please give some examples.*

**Response**

The executing judicial authorities in Ireland assess whether the act on which the EAW is based constitutes an offence under the law of the State according to the law at the time of issuing the EAW.

This represents the position under Irish Statute as provided for in s.5 of the Act of 2003 as substituted by section 70 of the Criminal Justice (Terrorist Offences) Act 2005, which states:

> "For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."

The position in Irish domestic statute law does not appear to be anchored in either Art. 7(1) of the ECHR, or Art. 49(1) of the Charter, or more generally to have any relation with the *nulla poena* principle. It appears to be based simply on an understanding of what the Framework

[55] *Minister for Justice, Equality and Law Reform v. Kubálek* [2021] IECA 92.
[56] *Minister for Justice, Equality and Law Reform v. Kubálek* [2021] IECA 92, para 56.

Decision required, based on the reference in Article 2.4 thereof to "the acts for which the European arrest warrant has been issued" and in Article 4.1 thereof to "the Act upon which the European arrest warrant is based"

Correspondence is established under section 5 even where the offence was committed at a time when it would not have been deemed an offence in the State. What the statute requires to be established by the executing judicial authority is that the offence is one which amounts to an offence in the State on the date that the warrant was issued.

The position in regard to extradition is provided for in s.10 of the Extradition Act 1965. It provides:

> 10. – (1) Subject to subsection (2), extradition shall be granted only in respect of an offence which is punishable under the laws of the requesting country and the State by imprisonment for a maximum period of at least one year or by a more severe penalty and for which, if there has been a conviction and sentence in the requesting country, imprisonment for a period of at least four months or a more severe penalty has been imposed.
>
> (1A) Subject to subsection (2A), extradition to a requesting country that is a Convention country shall be granted only in respect of an offence that is punishable –
>
> (a) under the laws of that country, by imprisonment or detention for a maximum period of not less than one year or by a more severe penalty, and
> (b) under the laws of the State, by imprisonment or detention for a maximum period of not less than 6 months or by a more severe penalty.
>
> and for which, if there has been a conviction and sentence in the requesting country, imprisonment for a period of not less than 4 months or a more severe penalty has been imposed.
>
> (2) If a request is made for extradition in respect of an offence to which subsection (1) applies and the request includes also any other offence which is punishable under the laws of the requesting country and of the State but does not comply with the conditions as to the period of imprisonment which may be, or has been, imposed, then extradition may, subject to the provisions of this Part, be granted also in respect of the latter offence.
>
> (2A) If a request is made by a Convention country for extradition for –
>
> (a) an offence to which subsection (1A) applies, and
> (b) an offence punishable under the laws of that country and of the State in respect of which there is a failure to comply with subsection (1A),
>
> extradition may, subject to this Part, be granted in respect of the second-mentioned offence, but where extradition is refused for the first-mentioned offence it shall be refused for the second-mentioned offence also.
>
> (3) In this section ' and offence punishable under the laws of the State ' means –

(a) an act that, if committed in the State on the day on which the request for extradition is made, would constitute an offence, or
(b) in the case of an offence under the law of a requesting country consisting of the commission of one or more acts including any act committed in the State (in this paragraph referred to as 'the act concerned'), such one or more acts, being acts that, if committed in the State on the day on which the act concerned was committed or alleged to have been committed would constitute an offence,

and cognate words shall be construed accordingly.

(4) In this section ' an offence punishable under the laws of the requesting country' means an offence punishable under the laws of the requesting country on –

(a) the day on which the offence was committed or is alleged to have been committed, and
(b) the day on which the request for extradition is made,

and cognate words shall be construed accordingly.

A "Convention Country" is defined as a designated country under the Extradition (European Union Conventions) Act 2001, and in practical terms means a country which is a party to the Convention on simplified extradition between the Member States of the European Union drawn up on the basis of Article K.3 of the Treaty of European Union, by Council Act done at Brussels on 10 March, 1995 and /or the Convention relating to extradition between the Member States of the European Union drawn up on the basis of the said Article K.3, by Council Act done at Brussels on the 27 September, 1996.

As to the second part of the question, the executing authorities in this jurisdiction have refused to execute European arrest warrants where the acts on which the EAW was based did not constitute an offence in the State. The case *Minister for Justice, Equality and Law Reform v Tighe* [57] has already been alluded to. Apart from the difficulty that the warrant simultaneously indicated offences as being both listed and not listed, even if the court was prepared to consider surrender on the basis that correspondence would have to be demonstrated, there was an insurmountable difficulty in respect of three of the offences. The Supreme Court was not prepared to find correspondence in respect of the offences charging conspiracy to cheat the public revenue, or cheating the public revenue, in circumstances where the Supreme Court had earlier, in the case of *Attorney General v. Hilton* [58], held that such an offence was impermissibly vague and that there was no such offence in Irish law.

In the case *Minister for Justice, Equality and Law Reform v. Ferenca* [59]the requested person was sought for the purpose of requiring him to serve a single aggregate or composite term of imprisonment for 3 offences. Peart J. in the High Court held, in respect of one of those offences, that on the facts contained in the warrant, which stated that the requested person had received a bank card from another accused and had then handed it to another person so that it could be forged, the

[57] *Minister for Justice, Equality and Law Reform v. Tighe* [2010] IESC 61.
[58] *Attorney General v. Hilton* [2005] 2 IR 374.
[59] *Minister for Justice, Equality and Law Reform v. Ferenca* [2007] IEHC 199.

offence in question did not correspond to any offence in the State. This created a problem as the non-corresponding offence could not be severed due to the existence of an aggregate or composite sentence. As Murray CJ. in the Supreme Court explained:

> *"…that, as the sentence imposed was a single, composite, sentence imposed for the three offences collectively, if the respondent were to be surrendered to serve the sentence he would be surrendered to serve a sentence which was in part imposed for the first offence. As there was no basis on which part of the sentence could be severed and apportioned among the three sentences so that he could be surrendered for the purpose of serving the amount of the sentence which related to the second and third offences, the request for surrender had to be refused."*[60]

Although a superficially similar set of circumstances had arisen in relation to a composite sentence and the non-correspondence of two of the offences in the case *Minister for Justice, Equality and Law Reform v. Kubálek*,[61] Edwards J. in the Court of Appeal was able to distinguish the circumstances of that case from those in *Ferenca* because of certain "options" available to the respondent in the unique circumstances of his case. Those options were:

- the option of applying for a reduction of sentence to one proportionate to the offences for which he would be surrendered
- the option of a full re-trial in circumstances in which he had been tried *in absentia.*

In ordering surrender, Edwards J stated:

> *"It is my view that in consequence of the 'options' available to the appellant it cannot be said that, if he is surrendered, he will be returned to serve a sentence that was at least partly imposed for the two offences for which he could not be surrendered. Regardless of which option he avails of, he will be re-sentenced in a procedure that will advantage him by excluding the offences for which he was not surrendered from consideration. He will therefore only be required to serve a sentence or sentences for the two offences for which correspondence could be demonstrated. Accordingly, that which in Ferenca terms would be fundamentally objectionable does not obtain in his case."*

27.(c) – *the act for which the requested person is being prosecuted in the executing Member State are the same acts on which the EAW is based.*

**Response**

The situation has never arisen. Speculatively, your respondent would suggest that an Irish executing authority would again apply the autonomous EU concept of same acts as referred to in *Mantello.*

27.(d) – *the prosecution or punishment of the acts on which the EAW is based is statute-barred according to the law of the executing Member State?*

**Response**

[60] *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] IESC 52.
[61] *Minister for Justice, Equality and Law Reform v. Kubálek* [2021] IECA 92.

Under Irish law there is no Statute of Limitations in relation to the prosecution of criminal offences and therefore no point of reference is applied. Accordingly, an Irish executing judicial authority never has to consider whether the prosecution or punishment of the acts on which the EAW is based is statute barred according to the law of the executing state (i.e., Ireland).

27 A. *Regarding listed offences,*

- (a) *have the issuing judicial authorities of your Member State had any difficulty in deciding whether a certain offence constitutes a listed offence? If so, please describe those difficulties and how they were resolved.*

- *(b) do the executing judicial authorities of your Member State assess whether the issuing judicial authority correctly ticked the box of a listed offence? If so,*
    - *(i) please describe how they assess that.*
    - *(ii)are there instances in which the executing judicial authorities actually found that a listed offence was not applicable; if so, which listed offences(s) and did those listed offence(s) constitute an offence under the law of your Member State?*

**Responses (a) and (b)(i)**

The list of offences set out in Article 2.2 of the Framework Decision are incorporated into Irish Law by way of section 38(1)(b) of the European Arrest Warrant Act 2003 as amended;

> "38 – (1)(b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years."

Due to the manner of drafting of the Act of 2003 it is necessary to refer to the Framework Decision to establish with specificity the various categories of offences to which Art. 2.2 of the Framework Decision applies. The court must also ascertain that the requirement of minimum gravity has been met. In general the courts have taken the approach that the ticking of a box in para (e)I of the warrant is conclusive 'as to the issue of whether the offence comes within Art. 2.2, except in certain limited circumstances'.[62]

In the case of *Minister for Justice, Equality and Law Reform v. Butenas*,[63] Peart J. alluded to what such circumstances might entail:

> *"This is a case where the requesting state has ticked the appropriate box in relation to an Article 2.2 offence. The Court is precluded from looking at that question further, and there is absolutely no question in this case but that the facts set forth in the warrant justify the ticking of that box. There can be no question of it having been ticked through some manifest error, and neither is there any suggestion of bad faith on the part of the requesting authority."*

In the case *Minister for Justice, Equality and Law Reform v. Horvath* [64]where the "fraud" box was ticked in respect of 17 offences but the respondent was suggesting that the minimum gravity requirement was not met in respect of some of them, Peart J. held that while *"… it would require*

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[62] Remy Farrell and Anthony Hanrahan "The European Arrest Warrant" (Claus Press 2011) para10.10, p139.
[63] *Minister for Justice, Equality and Law Reform v. Butenas* [2006] IEHC 378.
[64] *Minister for Justice, Equality and Law Reform v. Horvath* [2008] IEHC 411.

*very clear evidence to the contrary before this Court would find that an offence [marked as an Article 2.2 offence] in the warrant was not appropriately marked*" he was entitled to do so in that case.

In *Minister for Justice, Equality and Law Reform v. Ferenca* [65]the Supreme Court held that;

> *"… that the principle of certainty or of legality of criminal offences and penalties 'implies' that legislation must define clearly offences and the penalties which they attract.*"

It was further observed (at para 5) that:

> *"Accordingly, while article 2.2 of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and the penalties applicable continue to be matters determined by the law of the issuing member state which…must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties."*

At para 6 it was stated:

> *"In short the principle of legal certainty or 'of the legality of criminal offences' is observed because the offences to which article 2.2 applies are not defined by the vague terms of article 2.2 itself but by the national law of the issuing state and only by that means. Thus it is not open to a court to ascertain whether an offence in a warrant is an offence to which article 2.2 applies by looking at some conceptual element by reference to article 2.2 alone."*

In a similar case *Minister for Justice, Equality and Law Reform v. Desjatnikovs* [66]Denham J. held that the courts must regard as significant the issuing judicial authority's failure to tick a box at para (e)I in respect of an offence, remarking that:

> *"It would be an extraordinary leap, a major step, to give to an Irish High Court the role of deciding whether on the facts the warrant refers to an offence in the issuing state. The words of Article 2.2 of the Framework Decision are clear, and they do not establish such a system."*

This decision was followed and applied in *Minister for Justice, Equality and Law Reform v. P.P.H* [67]where the court held that;

> *"Accordingly, in all the circumstances of the cases this Court is not disposed to look behind the ticking of the box relating to sexual exploitation of children and child pornography in Part E.I of the European Arrest Warrant in this case. Part E.II is not filled in at all and in the absence of any extraordinary or egregious circumstances there is nothing in this case to warrant any such enquiry by the Court."*

In cases where there is a lack of clarity in an EAW as to offences which an issuing judicial authority intends to rely upon at part (e)1 of the EAW the court will consider if the offences described in the EAW correspond to offences in the state. In *Minister for Justice, Equality and Law Reform v. Ludwin*[68] Donnelly J. in the High Court held;

> *"A number of decided cases have dealt with the situation where the issuing judicial authority has completed part E(1), indicating reliance on Article 2(2) Framework Decision , and part E(II), indicating non-reliance. Following on from the decision of Peart J. in Minister for Justice, Equality and*

[65] *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] IESC 52.
[66] *Minister for Justice, Equality and Law Reform v. Desjatnikovs* [2009] IR 618.
[67] *Minister for Justice, Equality and Law Reform v. P.P.H*. [2011] IEHC 211.
[68] *Minister for Justice, Equality and Law Reform v. Ludwin* [2018] IEHC 220.

> *Law Reform v. Paulauskas* [69] *the High Court has accepted that this is not a bar to surrender provided that correspondence has been met."*

An illustration of how the courts have addressed difficulties in identifying which offences the requesting state wishes to invoke under Article 2.2 of the Framework Decision is provided by *Minister for Justice, Equality and Law Reform v. Gorczyca*.[70] Particulars of the nine offences the subject matter of the EAW were set out in part (e)II of the EAW. However, notwithstanding this the issuing judicial authority had also indicated the possible intention to rely on Article 2.2 of the Framework Decision by underlining two categories of offences in part (e)I of the EAW relating to forgery of administrative documents and swindling. As a result there was uncertainty in respect of which, if any, of the offences there was an intention to invoke and rely upon Article 2.2. The High Court held at para. 21, that while there was no doubt as to the intention to invoke Article 2.2 in respect of offences that clearly qualified as forgery,:

> *"[i]n relation to all other offences however, these must comprise a mixture of offences in respect of which the issuing judicial authority intended to rely upon the Article 2(2) offence of swindling, and others in respect of which it did not intend to rely upon the Article 2(2) list at all. It is no function of this Court to attempt to distinguish one from the other. Where there is a lack of clarity about those offences in respect of which an issuing judicial authority is relying upon the Article 2(2) list, the executing state cannot place reliance on the latter and must instead consider whether or not the acts comprising those offences as set out in the EAW (and, if applicable, additional information) would, if committed in the State, constitute an offence in this jurisdiction."*

In an effort to establish clarity the executing judicial authority had requested additional information from the issuing judicial authority on multiple occasions, however the responses were somewhat contradictory. The court, although it did ultimately surrender the respondent for some offences, was not prepared to surrender for any offence in respect of which confusion and lack of clarity persisted.

In circumstances where the issuing judicial authority have indicated through additional information that a box should have been ticked in respect of an offence, and there was an omission to do so in error, it seems the High Court will not attempt to amend the warrant. In *Minister for Justice, Equality and Law Reform v. Laks* [71] the court stated;

> *"I am of the view that this Court must deal with the European arrest warrant on the basis of what it actually contains, and not on the basis of what it might have contained if it had been prepared differently. Fraud has not been marked. No offence has been marked, and accordingly correspondence must be made out."*

It may be relevant to mention that a draft statutory instrument has been prepared, entitled *"Specification of certain offences for the purposes of Paragraph 2 of Article 2 of the Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States Order, 202_"* which, if and when enacted as secondary legislation in Ireland, will specify certain offences under Irish criminal law as automatically coming under particular headings in the Article 2.2 list. At present the Irish Central Authority is operating on the basis that if an offence is designated in the draft statutory instrument as coming under a particular heading, it qualifies for invocation of Article 2.2 under that heading. The issuing judicial authority is aware of this practice. Concerns have

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[69] *Minister for Justice, Equality and Law Reform v. Paulauskas* [2009] IEHC 32.
[70] *Minister for Justice, Equality and Law Reform v. Gorczyca* [2020] IEHC 59.
[71] *Minister for Justice, Equality and Law Reform v. Laks* [2009] IEHC 3 .

been raised by the Central Authority that delay in relation to the enactment and implementation of this draft statutory instrument could present problems at a future date. Other issues of concern in relation to the proposed new statutory instrument include whether new offences created after its implementation can be included on an EAW by the issuing authority as 'ticked' box offences, and whether certain offences can only be designated as 'ticked' box offences in certain circumstances.

**Response (b) (ii)**

There have been cases in which the executing judicial authorities have found that a listed offence was not applicable, but these are rare and usually involve manifest error. In the previously mentioned case of *Minister for Justice Equality and Law Reform v. Tighe*[72] the issuing authority sought to rely on the offence of 'Fraud' contained within the Article 2.2 list of offences. Due to poor drafting of the warrant, it failed to distinguish between the completed offence of "Cheating the Public Revenue", which the court held might be capable of coming with the description of "fraud" and the offence of "Conspiracy to Cheat the Public Revenue" which it was satisfied did not come within the Framework list. The Supreme Court was satisfied that Article 2.2 had not been validly invoked in the circumstances. It went on to consider possible correspondence, and as has been mentioned found that dual criminality could not be established in respect of three of the offences

In *Minister for Justice, Equality and Law Reform v. Kiernowicz*[73] the court established that the list of offences set out in the Polish version of the Framework Decision did not correspond to the list of offences set out in the Polish language version of the warrant, which contained 33 offences. The court held that in the surrender process, a process which affects the liberty of the individual, there was a need of strict compliance with the terms of Article 2.2 in order to properly invoke its provisions so as to obviate the need to prove dual criminality in respect of an alleged offence. The applicant sought to provide clarity and confirm that an offence ticked in the warrant was in compliance with Article 2.2, i.e. that what was referred to as a "crime against sexual freedom or decency to the prejudice of a minor" was intended to be covered by the offence of "sexual exploitation of children and child pornography" in the Article 2.2 list. The issuing authority replied in the affirmative. However, the court ultimately held that their clarification was not sufficient, that there was a clear error on the face of the warrant and that such a manifest error did not entitle the applicant to rely on the exemption provided by Article 2.2 from the need to prove correspondence.

In *Minister for Justice, Equality and Law Reform v. Connors* [74]the court held that the error of including dangerous driving at Part (e)I of the EAW which carried a maximum penalty of two years imprisonment was not fatal as regards the execution of the EAW providing that correspondence could be established in accordance with section 38(1)(a) of the European Arrest Warrant 2003, which it could.

As previously mentioned *Minister for Justice, Equality and Law Reform v. Ludwin* [75] was a case where there had been an error in the designation of the offence of burglary as one pertaining to

[72] *Minister for Justice, Equality and Law Reform v. Tighe* [2010] IESC 61.
[73] *Minister for Justice, Equality and Law Reform v. Kiernowicz* [2014] IEHC 270.
[74] *Minister for Justice, Equality and Law Reform v. Connors* [2020] IEHC 598.
[75] *Minister for Justice, Equality and Law Reform v. Ludwin* [2018] IEHC 220.

'swindling and forgery of documents' on the listed offences. Although the offence of burglary was not included in the list the court held that it did correspond to an offence in this jurisdiction.

F. Other circumstances relevant to the case (optional information)

28.– *What kind of information do the issuing judicial authorities of your Member State usually provide in section (f)*?

**Response**

The issuing Central Authority includes the following in section (f) as standard text –

> *"*In the context of Article 5 (3) of the Framework Decision, Ireland has enacted the following legislation.
>
> Section 45 B of the European Arrest Warrant Act 2003 as inserted by Section 20 of the Criminal Justice (Miscellaneous Provisions) Act 2009 provides that:
>
> In the circumstances of an extradition order or consent in the Member State relating to this warrant the following legislation will apply accordingly:
>
> S45B (1): Where a national or resident of another state from which he or she is surrendered-
>
> (a). is surrendered to the State pursuant to a European Arrest Warrant with a view to being prosecuted in the State and;
>
> (b). whose surrender is subject to the condition that he or she, after being so prosecuted, is returned if he or she so consents to that other state in order to serve any custodial sentence or detention order imposed upon him or her in the State,
>
> the Minister shall, following the final determination of the proceedings and if the person consents, issue a warrant for the transfer of the person from the State to that other state in order to serve there any custodial sentence or detention order so imposed.
>
> (2) A warrant issued under subsection (1) shall authorise—
>
> (a) the taking of the person to a place in any part of the State and his or her delivery at a place of departure from the State into the custody of a person authorized by the other state to receive the person, for conveyance to the other state concerned, and the keeping of the person in custody until the delivery is effected, and
>
> (b) the removal of the person concerned, by the person to whom he or she is delivered, from the State.
>
> The issuing Judicial authority confirms that in the circumstances of an extradition order or consent relating to this Warrant, the ten day period for the surrender of the requested person will begin subject to the agreement of the executing Judicial authority, once the requested person's sentence/criminal matter(s) in the executing Member State have been completed (if applicable). Pursuant to Article 24 (1) of the Framework Decision.*"*

This information is added to alert the executing state that Ireland has not fully transposed the provisions of Article 5(3) of Framework Decision 2002/584/JHA.

29. (i)*What kind of information do the executing judicial authorities of your Member State usually encounter in section (f)? (ii)What kind of information would they like to see in section (f)?*

**Responses**

(i) The nature of the information provided in section (f) of European arrest warrants received by the State is varied and ranges from the clarification of national criminal codes and statutes relating to the warrant (*Minister for Justice, Equality and Law Reform v. M.J.B*[76]) to providing clarity as to whether the warrants before the High Court are for prosecution or conviction purposes as occurred in *Minister for Justice, Equality and Law Reform v. Bednarczyk*.[77]

Issuing judicial authorities have utilised section (f) of the EAW to raise awareness of other EAW's previously issued in relation to other offences not contained in the warrant before the court *(Minister for Justice, Equality and Law Reform v. Kasprowicz*).[78] Information has also been provided detailing previous offences and convictions and this has provided the basis for objections by requested persons that the issuing state intended to disregard the rule of speciality as set out in section 22(2) of the Act of 2003 ( *Minister for Justice, Equality and Law Reform v. Kasprowicz* and *Minister for Justice, Equality and Law Reform v Ciesielski*).[79]

Frequently, part (f) is used to particularise claims of extraterritorial jurisdiction.

Information provided in part (f) has occasionally had the opposite effect to its intended purpose of providing clarification of issues. In *Minister for Justice, Equality and Law Reform v. Tamulaitis* [80] it was argued that there was uncertainty as to whether a decision had been made to charge the requested person, taking account of the information provided in section (f) in conjunction with other statements in the EAW. Section (f) stated;

> "…absconded from the pre-trial investigation, therefore, on 13/09/2019 he was announced wanted".

However, the court noted that there was an express declaration that the warrant had been issued for the purposes of conducting a criminal prosecution of the requested person and that there was not sufficient uncertainty to displace the presumption contained in section 21A(2) of the Act of 2003.

An issue of uncertainty arose in *Minister for Justice, Equality and Law Reform v. Havránková* [81] where additional information was required to clarify the status of other criminal proceedings which were ongoing against the requested person as stated in section (f). The additional information when received clarified that the other proceedings were no longer being pursued.

In contrast, the court in *Minister for Justice, Equality and Law Reform v. Schoppik* [82] found the part (f) information to be of considerable assistance, noting in that case that the most appropriate way to

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[76] *Minister for Justice, Equality and Law Reform v. M.J.B* [2015] IEHC 170.
[77] *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2012] IEHC 154.
[78] *Minister for Justice, Equality and Law Reform v. Kasprowicz* [2013] IEHC 531.
[79] *Minister for Justice, Equality and Law Reform v. Ciesielski* [2013] IEHC 101.
[80] *Minister for Justice, Equality and Law Reform v. Tamulaitis* [2020] IEHC 433.
[81] *Minister for Justice, Equality and Law Reform v. Havránková* [2021] IEHC 197.
[82] *Minister for Justice, Equality and Law Reform v. Schoppik* [2018] IEHC 584.

assess the progression of the proceedings in the issuing state was to refer to the supplementary information provided by the issuing judicial authority in part (f) of the European arrest warrant.

Part (f) often enables an issuing state to provide information concerning national statutes of limitation in relation to criminal prosecutions and convictions and calculation as to time limits pertaining to offences on the warrant as demonstrated in *Minister for Justice, Equality and Law Reform v. Sciuka* [83] and in *Minister for Justice, Equality and Law Reform v. Holden*.[84] It has also provided a means of including an explanation for any delay in issuing the European arrest warrant. It is notable that in *Minister for Justice, Equality and Law Reform v. E.S*.[85] the executing authority commented upon the fact that the requesting state had failed to avail of this section to provide an explanation as to the delay in pursuing the requested person.

Prior to the implementation of FD 2009/299/JHA this section also offered a requesting state the opportunity to explain how the requested person was notified, where a conviction or sentence was imposed *in absentia*.[86](*Minister for Justice, Equality and Law Reform v. Schoppik*).

(ii) It is desirable that section (f) should only be used to provide relevant rather than superfluous information. To that end it should contain information potentially relevant to the issue of surrender not provided under other headings in the warrant, and not provide contradictory or misleading information. Any supplementary information provided needs to be clear, concise and accurate so as to limit the necessity for additional clarification.

Farrell and Hanrahan note that "the information provided under this heading is entirely optional and as such the omission of information in relation to, for example, extraterritoriality should not be regarded as an indication that an issue does not arise in relation to same."[87]

29a. *Did the issuing and/or executing judicial authorities of your Member State encounter any problems regarding the exercise of extraterritorial jurisdiction in the sense of Art. 4(7)(b) of FD 2002/584/JHA? If so, please describe those problems and how they were resolved.*

**Response:**

Article 4(7)(b) of the FD 2002/584/JHA is implemented by section 44 of the European Arrest Warrant Act 2003 as amended and states;

> "A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

In construing an accurate meaning to the second clause of section 44 Denham CJ. in *Minister for Justice, Equality and Law Reform v. Bailey* held that it would be beneficial to read said part of section as;

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[83] *Minister for Justice, Equality and Law Reform v. Sciuka* [2021] IEHC 31.
[84] *Minister for Justice, Equality and Law Reform v. Holden* [2013] IEHC 62.
[85] *Minister for Justice, Equality and Law Reform v. E.S.* [2014] IEHC 376.
[86] Farrell and Hanrahan, "*The European Arrest Warrant in Ireland*", (Claus Press, 2011) p.43.
[87] Farrell and Hanrahan, "*The European Arrest Warrant in Ireland*", (Claus Press, 2011) p.43.

> *"…and the act or omission of which the offence consists does not, constitute an offence under the law of the State, by virtue of having been committed in a place other than the State."*

By rearranging the order of the words the court determined that the section prohibits the surrender of a person where the act of which the offence consists does not constitute an offence in Ireland by virtue of having been committed, i.e. because it was committed, in a place other than Ireland.

Denham CJ explained that:

> *"The reciprocity in this case requires Ireland to examine its law as if the circumstances of the offence were reversed. Here the circumstances are that a non-citizen of either the issuing or executing State is sought by the issuing State in respect of a murder of one of its citizens which took place outside the issuing State. The Court must then determine under Irish law if Ireland could request the surrender of a non-citizen of either Ireland or the executing State in respect of a murder of one of its citizens which took place outside Ireland. Ireland does not have jurisdiction to seek the surrender of a British citizen from France in respect of a murder of a person of any citizenship and which took place outside Ireland."*

Based on the principle of reciprocity section 44 prohibits surrender in circumstances where the State would not be entitled to prosecute the same offence on an extraterritorial basis. Farrell and Hanrahan note that:

> *"This necessarily requires the court to engage in a hypothetical exercise of considering whether, if the respondent committed the offence in a third country, he could be prosecuted for that offence within the State on the basis of his nationality or some other feature of the offence which gives rise to an extraterritorial jurisdiction. It is immediately obvious that such an exercise is far from straightforward and will require the court to consider first whether or not the offence is in fact an extraterritorial one and second, on the assumption that it is, on what basis it might be hypothetically prosecuted in this jurisdiction."*

The case *Minister for Justice, Equality and Law Reform v. Bailey* raised a number of issues for which there was no precedent. The case concerned the murder of a French national on Irish soil. The French judicial authority sought surrender of an Irish resident (not an Irish citizen) who was long established in the State so that he could be the subject of proceedings for an offence allegedly committed in Ireland. However, the request was made more than 13 years after the crime was allegedly committed and after the Director of Public Prosecutions in Ireland had decided that the evidence did not warrant a prosecution against the requested person.

In relation to section 44 of the Act of 2003 Hardiman J. explained the elements of reciprocity which precluded surrender due to the different manner in which Ireland and France exercised extraterritorial jurisdiction over non-nationals in relation to a murder committed outside their respective territories.

> *"Where it is clear that the offence in the warrant is an extraterritorial offence, the court must consider whether the offence would be amenable to prosecution on an extraterritorial basis in this jurisdiction. This clearly, amounts to the court engaging in a hypothetical test whereby it essentially substitutes the State for the position of the requesting State in relation to the offence described in the warrant."*

Citing Farrell and Hanrahan he continued;

> *"Presumably where the place of commission of the offence is Ireland the court must essentially ignore this fact and assume for the sake of the exercise that the place of the offence is another State. It is less clear*

> *what the position is where the requesting State has asserted extra territorial jurisdiction on a particular basis. Is the Court restricted to considering whether the State would exercise as extraterritorial jurisdiction on the same basis or can it consider whether extraterritorial jurisdiction might be exercised on an alternative basis? The Act provides little assistance in this regard. However, the underlying principle or reciprocity would seem to predicate in favour of the Court being restricted to considering whether extraterritorial jurisdiction could be exercised in theory on a similar basis as opposed to some other ground."*

Taking the view that the sensible and fair interpretation of Article 4(7)(b) required the recognition of the principle of reciprocity, he held that the second phase of section 44 could only refer to a corresponding but hypothetical offence of murder committed outside Ireland. Stating the facts of the case;

> *"The crime was committed not only outside France, but in Ireland.*
>
> *If the positions were reversed, a murder outside Ireland is not a crime in Irish law, unless committed by an Irish citizen.*
>
> *The requested person was not an Irish citizen (and, in any event, the D.P.P. has determined there is no case against him).*
>
> *Section 44 operates to preclude his forcible delivery to France because Irish law does not confer a power to prosecute on the same basis as France: there is an absence of reciprocity."*

Hardiman J.'s judgment was amongst those of the majority of the Supreme Court who decided to refuse surrender of the requested person. It should be noted that the basis upon which Ireland exercises extraterritorial jurisdiction in respect of the offence of murder has since been amended by section 3(5) of the Criminal Law (Extraterritorial Jurisdiction) Act 2019. Ireland can now seek to prosecute an offence of murder committed outside Ireland where the alleged perpetrator is an Irish citizen or is ordinarily resident in Ireland.

In relation to extraterritoriality and retrospectivity, section 44 of the Act of 2003 is not explicit as to whether the issue of reciprocity should be considered by reference to a hypothetical set of facts at the time of the offence or at the time of the issue of the European arrest warrant or even at the time of the hearing. *Minister for Justice, Equality and Law Reform v. Aamond* [88] concerned the surrender of a requested person sought in respect of an international drug trafficking offence which had taken place on the high seas some years earlier. The boat was registered on the Island of Vanuatu and as such it was only possible to seek surrender once that island signed the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The issue of whether the State had jurisdiction to try such an offence at the time of the section 16 hearing as opposed to when the alleged offence was committed was addressed by Peart J. who held that it was not restricted to considering the hypothetical issue only in relation to the date of the offence but could consider it on a contemporary basis. Placing emphasis on the use of the present tense in section 44 Peart J. stated;

> *"It must be remembered that it is not the ratification of that Convention which has given rise to the offence under the laws of Denmark and for which he is sought to face trial. The ratification of the Convention has relevance only as to whether the acts committed in 1988 now would be an offence under Irish law. That is the basis which the Oireachtas has laid down for deciding whether or not the surrender*

[88] *Minister for Justice, Equality and Law Reform v. Aamond* [2006] IEHC 382.

*of a respondent should be prohibited in respect of an extraterritorial offence. That is clear from the words used. According to those words, the surrender is not prohibited, and I am satisfied that this is consistent also with the terms of Article 7.4 of the Framework Decision. This is a relevant finding in view of the provisions of section 16(1) of the Act which require the Court when making an order for surrender under that section to be satisfied, inter alia, that the surrender is not prohibited by 'Part 3' or the Framework Decision. "*

A similar approach was adopted in *Minister for Justice, Equality and Law Reform v. Cidylow*.[89]

Another problem encountered regarding the exercise of extraterritorial jurisdiction in the sense of Article 4(7)(b) of FD 2002/584/JHA was identified in the case *Minister for Justice, Equality and Law Reform v. Gustas*,[90] (also referred to as *Minister for Justice, Equality and Law Reform v. JR*. [91] in the example on page 24 of the questionnaire). These proceedings presented a novel point where the original sentence and conviction were ordered in a third state, but by a bilateral agreement between a member state and the third state, there was recognition given to the judgment of the third state and it was decided to enforce the sentence of imprisonment in the issuing state. Following a failure on the part of the requested person to fulfil the injunctions and parole conditions imposed on him he travelled to Ireland. The issuing judicial authority sought surrender of the requested person for the purpose of executing the sentence of imprisonment.

As there was no relevant guiding judgment from the CJEU in relation to these novel points the High Court sought clarification in relation to the interpretation of European Union Law through the preliminary reference procedure. Two questions were referred to the CJEU;

A. *Does the Framework Decision apply to the situation where the requested person was convicted and sentenced in a third state but by virtue of a bilateral treaty between that third state and the issuing state, the judgment in the third state was recognised in the issuing state and enforced according to the laws of the issuing state?*

B. *If so, in circumstances where the executing member state has applied in its national legislation the optional grounds for non-execution of the European arrest warrant set out in Article 4.1 and Article 4.7(b) of the Framework Decision, how is the executing judicial authority to make its determination as regards an offence stated to be committed in the third state, but where the surrounding circumstances of that offence display preparatory acts that took place in the issuing state?*

In a judgment of the CJEU the above questions were responded to as follows;

A. *"…the answer to the first question is that Article1(1) and Article 8(1)(c) of the Framework Decision 2002/584 must be interpreted as meaning that a European arrest warrant may be issued on the basis of a judicial decision of the issuing Member State ordering the execution, in that Member State, of a sentence imposed by a court of a third State where, pursuant to a bilateral agreement between those States, the judgment in question has been recognised by a decision of a court of the issuing Member State. However, the issuing of the European arrest warrant is subject to the condition, first, that a custodial sentence of at least four months has been imposed on the requested person and, second that the procedure leading to the adoption in the third State of the judgment recognised subsequently in the issuing Member*

[89] *Minister for Justice, Equality and Law Reform v. Cidylow (Ex tempore*, High Court, Peart J, 22 April 2010).
[90] *Minister for Justice, Equality and Law Reform v. Gustas* [2019] IEHC 558.
[91] *Minister for Justice, Equality and Law Reform v. JR*. (Conviction by an EEA third State), C-488/19,ECLI:EU:C:2020:738

*State has compiled with fundamental rights and in particular, the obligations arising under Articles 47 and 48 of the Charter.*

B. *…the answer to the second question is that Article 4(7)(b) of Framework Decision 2002/584 must be interpreted as meaning that, in the case of a European arrest warrant issued on the basis of a judicial decision of the issuing Member State allowing execution in that Member State of a sentence imposed by a court of a third State, where the offence concerned was committed in the territory of the latter State, the question whether that offence was committed 'outside the territory of the issuing Member State' must be resolved by taking into consideration the criminal jurisdiction of that third State – in this instance, the Kingdom of Norway – which allowed prosecution of that offence, and not that of the issuing Member State."*

As part (f) would appear to be the part of the warrant that indicates that a requesting state is exercising extraterritorial jurisdiction it is unfortunate that completion of this part is optional and therefore there is no obligation on an issuing State to set out in definitive terms that an offence is indeed one in which extraterritorial jurisdiction is being claimed, as occurred in *Minister for Justice, Equality and Law Reform v. D.S.*[92]

G. The seizure and handing over of property.

30. *Does the national law of your Member State, as interpreted by the courts of your Member State, contain restrictions similar to the restriction contained in Dutch law or other restrictions? If so, describe the restriction(s).*

**Response**:

Article 29 of the Framework Decision 2002/584/JHA is given effect by section 25 and section 26 of the European Arrest Warrant Act 2003. Section 25 states;

> "25.—(1) A member of the Garda Síochána, may, for the purposes of performing functions under section 13 or 14, enter any place (if necessary by the use of reasonable force) and search that place, if he or she has reasonable grounds for believing that a person in respect of whom a European arrest warrant has been issued is to be found at that place.
>
> (2) Where a member of the Garda Síochána enters a place under subsection (1), he or she may search that place and any person found at that place, and may seize anything found at that place or anything found in the possession of a person present at that place at the time of the search that the said member believes to be evidence of, or relating to, an offence specified in a European arrest warrant, or to be property obtained or received at any time (whether before or after the passing of this Act) as a result of or in connection with the commission of that offence.
>
> (3) Subject to subsection (4), a member of the Garda Síochána, who has reasonable grounds for believing that evidence of, or relating to, an offence specified in a European arrest warrant, or property obtained or received at any time (whether before or after the passing of this Act) as a result of, or in connection with, the commission of that offence

[92] *Minister for Equality and Law Reform v. D.S.* [2015] IEHC 459.

is to be found at any place, may enter that place (if necessary by the use of reasonable force) and search that place and any person found at that place, and may seize anything found at that place or anything found in the possession of a person present at that place at the time of the search that the member believes to be such evidence or property.

(4) (a) A member of the Garda Síochána shall not enter a dwelling under subsection (3), other than—
(i) with the consent of the occupier, or
(ii) in accordance with a warrant issued under paragraph (b).
(b) On the application of a member of the Garda Síochána, a judge of the District Court may, if satisfied that there are reasonable grounds for believing that—
(i) evidence of, or relating to, an offence specified in a European arrest warrant, or
(ii) property obtained or received at any time (whether before or after the passing of this Act) as a result of or in connection with the commission of that offence, is to be found in any dwelling, issue a warrant authorizing a named member of the Garda Síochána accompanied by such other members of the Garda Síochána as may be necessary, at any time or times, within one month of the date of the issue of the warrant, to enter the dwelling (if necessary by the use of reasonable force) and search the dwelling and any person found at the dwelling, and a member of the Garda Síochána who enters a dwelling pursuant to such a warrant may seize anything found at the dwelling or anything found in the possession of a person present at the dwelling at the time of the search that the member believes to be such evidence or property.

(5) A member of the Garda Síochána who is performing functions under this section may—

(a) require any person present at the place where the search is carried out to give to the member his or her name and address, and
(b) arrest otherwise than pursuant to a warrant any person who—
(i) obstructs or attempts to obstruct that member in the performance of his or her functions,
(ii) fails to comply with a requirement under paragraph (a), or
(iii) gives a name or address which the member has reasonable cause for believing is false or misleading.

(6) A person who—
(a) obstructs or attempts to obstruct a member of the Garda Síochána in the performance of his or her functions under this section,
(b) fails to comply with a requirement under paragraph (a) of subsection (5), or
(c) gives a false name or address to a member of the Garda Síochána,
shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000, or to imprisonment for a period not exceeding 6 months, or to both."

Accordingly, this provision of the Act of 2003 does not impose the restrictions contained in Dutch law.

An issue as to the interpretation of the words "any place" as set out in set out in section 25(4), was examined in the case *Minister for Justice, Equality and Law Reform v. Doyle*.[93] The court held that:

> *"In particular, s.25 makes it clear that "any place" can include dwelling. There is nothing to suggest that the words "any place" as used in s.25(3) (to which s.25(4) is referable and must be read in conjunction) are to bear a different meaning to the same words when used in s.25(1) and s.25(2) respectively. Moreover, the definition of "place" in s.25(7) says that it "includes" a ship or other vessel, an aircraft, a railway wagon or other vehicle, and a container used for transporting of goods. The purpose of s.25(7) is quite clear. The concept of a place in normal parlance imports a fixed location or an immovable structure, such as land or buildings. Vehicles or vessels are normally spoken of as being in or at a particular place but are not normally spoken of as constituting a place in themselves. The purpose of s.25(7) is clearly to indicate, for the avoidance of doubt, that for the purposes of s. 25 a "place" includes a ship or other vessel, an aircraft, a railway wagon or other vehicle, and a container used for the transporting of goods."*

Section 26(2) and (3) of the Act of 2003 do contain restrictions in relation to the handing over of seized property which pertain to pending proceedings in the State;

> "(2) Any property seized under section 25 may, if any criminal proceedings to which the property relates are pending in the State, be retained in the State for the purposes of those proceedings or may, if the Central Authority in the State, after consultation with the Director of Public Prosecutions, so directs, be handed over to the issuing state subject to the issuing state agreeing to return the property.
>
> (3) This section shall not operate to abrogate any rights lawfully vested in the State, or any person, in any property to which this section applies and, where any such rights exist, the property shall not be handed over unless an undertaking is given by the issuing state that it will return the property as soon as may be after the trial of the person surrendered and without charge to the State or person in whom such rights vest."

Paragraph (g) of the European arrest warrant is not often completed and section 25 of the Act of 2003 does not make a distinction between property seized as potential evidence and property viewed as the proceeds of an offence.[94]

31. *Have the issuing judicial authorities of your Member State experienced any difficulties when requesting the seizure and handing over of property pursuant to section (g)? If so, please describe those difficulties and how they were resolved.*

**Response:**

The issuing judicial authorities of the State have not experienced difficulties in relation to part (g). Part (g) in issued European arrest warrants is predominantly marked as 'not applicable'.

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[93] *Minister for Justice, Equality and Law Reform v. Doyle* [2012] IEHC 433.

[94] Farrell and Hanrahan, "*The European Arrest Warrant in Ireland*", (Claus Press, 2011) p.43.

32. *Have the executing judicial authorities of your Member State experienced any difficulties when confronted with a request for seizure and handing over of property pursuant to section (g)? If so, please describe those difficulties and how they were resolved.*

**Response:**

The executing judicial authorities in this jurisdiction have not experienced any difficulties when confronted with a request for seizure and handing over of property pursuant to part (g). Such requests are rare, with issuing states tending to avail of mutual legal assistance legislation in preference to making part (g) requests.

H. Guarantees concerning life sentences

33. – *Have the issuing judicial authorities of your Member State experienced any difficulties when applying section (h)? If so, please describe those difficulties and how they were resolved.*

**Response:**

The issuing judicial authorities of the State have not experienced difficulties in relation to section (h). Where a penalty/potential penalty of life imprisonment exists the following is included in the European arrest warrant;

> *" The legal system of the issuing Member State allows for applications by prisoners who have served 7 years or more of a life sentence to have their sentences reviewed and the Minister of Justice may order the release of a prisoner on foot of such an application."*

34. *Have the executing judicial authorities of your Member State experienced any difficulties when confronted with EAW's in which section (h) was applicable? If so, please describe those difficulties and how they were resolved.*

The courts have had to address complex issues of law arising from the interaction between this jurisdiction and the legal systems of other member states. This was demonstrated in the case *Minister for Justice, Equality and Law Reform v. Brennan* [95]where the requested suspect had escaped from lawful custody, a common law offence with a maximum sentence of life imprisonment. The requested person argued that the setting of a minimum tariff and subsequent detention did not take account of the circumstances of sentencing under the Irish Constitution. The Supreme Court disagreed stating at para 39 and 40;

> *"The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country*

[95] *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21.

*for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.*

*That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."*

The obligation to protect fundamental constitutional rights and rights protected by the European Convention on Human Rights is provided for by section 37 of the European Arrest Warrant Act 2003 which states;

"37.- (1) A person shall not be surrendered under this Act if –

(a) his or her surrender would be incompatible with the State's obligations under –
  (i) the Convention, or
  (ii) the Protocols to the Convention,
(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies,…"

In the case *Minister for Justice, Equality and Law Reform v. Laurence Kelly aka Gavin Nolan* [96] the requested person had been sentenced in the UK for a determinate period of two years, to be followed by an indeterminate sentence for the protection of the public. Thus, the sentence was in two parts. The first part was the minimum term of imprisonment (the tariff period) and the second part was an open-ended period of detention deemed preventative in nature and necessary for the protection of the public. Under this "Indeterminate Sentences for Public Protection" (IPP) scheme the Parole Board could only direct release once the defendant was assessed as being no longer a risk to the public. Having served the determinate portion of his sentence the respondent was refused parole. After serving 5 years of his sentence he absconded to Ireland and his surrender was sought in Ireland pursuant to a European arrest warrant.

The High Court in *Minister for Justice, Equality and Law Reform v. Nolan* [97] held that surrender was prohibited by Article 40.4.1°of the Constitution of Ireland. Following analysis of the decision in *Harkin and Edwards v. U.K* [98], and consideration of a potential breach of Article 3 of the European Convention on Human Rights (ECHR), the court having refused surrender certified leave to appeal to the Supreme Court as to whether the sentence which the requested person had

[96] *Minister for Justice, Equality and Law Reform v. Laurence Kelly aka Gavin Nolan* [2013] IESC 54.
[97] *Minister for Justice, Equality and Law Reform v. Nolan* [2012] IEHC 249.
[98] *Harkin and Edwards v U.K.* (9146/07 and 32650/07; 17th January 2012).

to serve in the UK was so contrary to the ECHR that the executing judicial authority was obligated to refuse surrender. Following the decision of the European Court of Human Rights in *James, Wells and Lee v. The United Kingdom* [99]where the court held that such tariffed detention was *"arbitrary and therefore unlawful within the meaning of Article 5.1 of the Convention"*, the Supreme Court held that to surrender the requested person would be in breach of Ireland's obligations under the European Convention on Human Rights. Refusal of surrender in accordance with s.37 (1)(a)(i) of the European Arrest Warrant Act 2003 was therefore affirmed.

That case was distinguished from the case *Minister for Justice, Equality and Law Reform v. Craig*[100] with Edwards J. stating:

> *"It requires to be stated that the life sentence imposed upon the respondent in this case is a fundamentally different form of sentence to the I.P.P. sentence that the Court had occasion to consider in the Nolan case and the circumstances of the present case are clearly distinguishable from those in Nolan. In the circumstances the principle of stare decisis is not engaged and the Nolan case does not represent a binding precedent that this Court must follow."*

The requested person argued that surrender was prohibited under section 37(1) of the Act of 2003 where the second element of a life sentence was preventative in nature, thus contravening Article 40.4 of the Irish Constitution. Drawing on the Supreme Court decision in *Lynch* and *Whelan*[101] Edwards J. held;

> *"In circumstances where the Supreme Court has also held in the conjoined cases of Lynch and Whelan that the mandatory life sentence as we know it is a sentence of a wholly punitive nature and does not incorporate any element of preventative detention, this Court must inevitably conclude that, notwithstanding the tariff period that was fixed by the trial judge in the respondent's case, the life sentence imposed upon the respondent by Preston Crown Court was also, in its legal nature, a sentence of a wholly punitive nature that does not incorporate any element of preventative detention."*

The High Court held that surrender of the requested person to serve the balance of a life sentence did not constitute a contravention of any provision of the Constitution of Ireland and surrender was not prohibited by section 37(1)(b) of the European Arrest Warrant Act 2003.

In a further case *Minister for Justice, Equality and Law Reform v. Balmer*[102] involving similar circumstances and the imposition of a life sentence for the offence of murder, the requested person's licence of release was revoked stating that he had *"allegedly committed a further offence"* and because of *"poor behaviour"*. The requested person absconded to Ireland. Among the objections proffered by the requested person to the High Court was that surrender should be refused under section 37(1)(a) of the Act of 2003 on the basis that the respondent's continued detention was arbitrary, in that there was a failure to demonstrate that it was sufficiently causally connected to the original conviction for murder. As such, it was argued, to surrender him would be incompatible with the State's obligation under Article 5 of the European Convention on Human Rights. In dismissing that argument, the High Court held;

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[99] *James, Wells and Lee v. The United Kingdom*,(App. Nos. 25119/09, 57715/09)(Unreported, European Court of Human Rights, 18th September 2012).

[100] *Minister for Justice, Equality and Law Reform v. Craig* [2014] IEHC 460.

[101] *Lynch v Minister for Justice Equality and Law Reform* [2010] IESC 34.

[102] *Minister for Justice v. Balmer* [2014] IEHC 459.

> *"The starting point is that it is to be presumed that the issuing state will respect the respondent's rights and that they do not intend to place him in arbitrary detention. That presumption may of course be rebutted but the respondent bears the evidential burden of adducing cogent evidence to suggest that that which is presumed is not the case. The sole evidence relied upon is the fact that the reasons for the revocation are stated in short form in the notice that was sent to the respondent…What is of considerable significance is that the respondent was informed in the recall notice that he would be provided with more detailed reasons once he had returned to custody, including the information on which the decision to recall was based. Moreover, he was given an indicative timeframe in which that would occur… Most crucially he was informed about a process of review by an independent body i.e. the Parole Board, of which he could avail for the purpose of appealing against the decision to recall him."*

The court held that the Article 5 complaint was one to be determined by the Parole Board in the requesting state and it was not the executing court's role to embark on a form of judicial review of a decision to revoke the licence to determine whether or not there was sufficient causal connection between the reasons for revocation of said licence and his original murder conviction. The High Court held that it was appropriate to surrender the requested person in respect of the offences to which the European arrest warrant related to.

In both the above cases the High Court certified that the decisions involved a point of law of exceptional importance and it was desirable that in the public interest an appeal should be taken. The question certified to the Court of Appeal was one that enquired;

> *"Where the requested person has been sentenced in the United Kingdom to a life sentence for murder, and has served a portion of the sentence consisting of his/her individualised tariff, and which are said by the issuing state to have constituted the entirety of the punitive element of the said sentence, would the surrender of that person to serve the balance of his/her sentence constitute a contravention of any provision of the Constitution of Ireland, and in particular Article 40.4 thereof, such that the contemplated surrender would be prohibited by section 37.(1)(b) of the European Arrest Warrant Act 2003?"*

The Court of Appeal upheld the decision of the High Court and dismissed the appeal. The requested person in *Balmer* subsequently sought and was granted a determination under Article 34.5.3° of the Constitution of Ireland permitting an onward appeal to the Supreme Court from the decision of the Court of Appeal. The decision of the Supreme Court ultimately held that a person sentenced in another jurisdiction to a life sentence and who had served a portion of that sentence (the punitive element) could be surrendered in accordance with the European arrest warrant.

> *"Given the difficulty of any analysis of, and adjudication on, propensity, and given the nature of decision making, this can lead to a situation of prolonged incarceration for periods well in excess of what a person convicted of a similar offence in Ireland would expect. Length of sentence is a matter specifically addressed by the Framework Decision and is clearly a matter of some concern to Member States. This judgment only addresses the argument of principle that the UK tariff-setting system requires refusal of surrender under section 37(1)(b). Just as under the ECHR, it cannot be ruled out that exceptional cases on the facts may arise in which the courts may have to consider the obligation of surrender in the light of the length of the sentence served. In that regard, it is also necessary to point out that Mr Balmer was released from custody in the United Kingdom… This Court has no reason to doubt the decision to recall the appellant."*

> *"Unlike the Irish Constitution, the ECHR applies with full force in the requesting state. The only question, therefore, for the requested court, is whether the requesting state will comply with its own*

> *obligations under the Convention. The potential for international friction is further reduced by the existence of institutions which are entitled to report, and in the case of European Court of Human Rights, to determine, whether or not a regime is compatible with the dictates of the Convention. Furthermore, the Irish court is entitled to apply a presumption that the national court of the requesting state is best placed to make a determination as to compatibility, at least in the first place. Such a state has, after all, the obligation of conducting the trial and administering the sentence."*

The Supreme Court also held that the provision of information and the capability to review or appeal a decision to recall a release licence were sufficient to comply with the requirement to afford the respondent fair procedures, both under the Constitution of Ireland and the European Convention on Human Rights.[103]

I. Information about the issuing judicial authority and the Central Authority signature.

35. *Have the issuing judicial authorities of your Member State experienced any problems regarding section (i)? If so, please describe those difficulties and how they were resolved?*

**Response:**

No.

36. *Have the executing judicial authorities of you Member State experienced any problems regarding section (i)? If so, please describe those difficulties and how they were resolved.*

**Response:**

The executing judicial authorities in this jurisdiction have not encountered many difficulties in relation to section (i). In *Minister for Justice, Equality and Law Reform v. Ostrovskij* [104], the requested person argued as part of his section 16 objection to surrender that the European arrest warrant had not been signed by the Prosecutor General but by the Acting Prosecutor General in Lithuania and this amounted to a discrepancy of a serious nature. Peart J. rejected this argument stating;

> *"The acting prosecutor general is still the prosecutor general for the time during which he or she is so acting. Furthermore it is not the Prosecutor General himself/herself which is the judicial authority, but rather the "Prosecutor General's Office"….This court could not for one moment, in the absence of something very concrete being put forward in that regard, consider that an Acting Prosecutor General who has signed and issued a European arrest warrant has not the entitlement to do so on behalf of the Office of the prosecutor General, under Lithuanian law. In addition of courts the seal of that office is affixed to the warrant."*

The court ordered the surrender of the requested person pursuant to the European arrest warrant.

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[103] *Balmer v Minister for Justice and Equality* [2016] IESC 25.

[104] *Minister for Justice, Equality and Law Reform v. Ostrovskij* [2006] IEHC 242.

Apart from that there is clearly an awareness by executing judicial authorities in Ireland, and by counsel expert in EAW law, of the import of the CJEU's judgment in *OG* and *PI* C-508/18 and C-82/19PPU. A recent case in which the status of an issuing judicial authority in the light of the CJEU's ruling in those cases was a feature, was *Minister for Justice and Equality v Fassih* [2021] IECA 159.

## Part 4: problems not directly related to the EAW-form

### A. Supplementary/additional information (Art. 15(2) – (3)

**37.** *Did your Member State confer the competence to provide supplementary information either at the request of the executing judicial authority or on its own initiative (see Art. 15(2)-(3) of FD 2002/584/JHA) – on another authority than the issuing judicial authority? If so which authority?*

**Response:**

Prior to 2019 Article 15(2) – (3) was given effect by section 20(1) and (2) of the European Arrest Warrant 2003 as amended by the Criminal Justice (Terrorist Offences) Act 2005 in the following manner;

> *20 –(1) In proceedings to which this Act applies the High Court may, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority or the issuing state as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify.*
>
> *20 –(2) The Central Authority in the State may, if of the opinion that the documentation or information provided to it under this Act is not sufficient to enable it or the High Court to perform functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify.*

It is unclear why the Central Authority was given the role contained in s.20(2). However, as the Central Authority's role is, *inter alia*, to offer logistical assistance to the relevant Irish executing judicial authority and because it facilitates the exchange of information between an Irish executing judicial authority, and an issuing judicial authority in another member state, I would speculate that the parliamentary draftsman may have envisaged that the CA would conduct a preliminary screening of incoming warrants to identify manifest defects (if any), or missing supporting information (if any), before presenting such warrants to the court, and have the ability to pre-emptively request any supplementary information considered necessary to address such issues, on the basis that the executing judicial authority would almost certainly need to have such information, thereby speeding up the process and reducing the length of court proceedings. It is academic now, as the legislation has been amended so that it now reads:

> *20 –(1) In proceedings to which this Act applies the High Court shall, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify.*
>
> *20 –(2)* [Deleted (04/09/2019) by *Criminal Justice (International Co-operation)Act 2019*(27/2019), s.4(b)]"

The previous provisions contemplated that additional information could be sought from either a judicial authority in the issuing state or from the issuing state itself. The courts in this jurisdiction had interpreted the terms of s.20 broadly as was demonstrated in the case of *Minister for Justice and Law Reform v. Sliczynski*[105] where the Supreme Court held;

> *"27.…Section 20 must be interpreted in the light of the objectives of the Framework Decision and its provisions. In my view it specifically gives effect to Article 15(2) and (3) of the Directive….*
>
> *23.Article 15 of the Framework Decision, having provided that the executing Judicial Authority shall, in certain circumstances, request that supplementary information be provided then goes on, at paragraph 3 of the Article to make provision for the general supply of information additional to that in the warrant in the following terms: "The issuing Judicial Authority may at any time forward any additional useful information to the executing Judicial Authority…*
>
> *25. I have no doubt that it was foreseen by the drafters of the Framework Decision that even with a carefully designed form of warrant and one which has been properly filled in that, in the ordinary nature of things, in particular cases ambiguities might arise, or some lacunae on points of detail in the information found to exist, particularly when the standard form of arrest warrant fails to be issued by a Judicial Authority in one legal system and executed by a Judicial Authority in another legal system."*

In the case of *Minister for Justice, Equality and Law Reform v. Ward*[106] the requested person argued that correspondence could not be demonstrated in relation to the offences on the EAW (which arose out of a road traffic incident) by reference to the facts disclosed in the warrant. Counsel for the moving party seeking the respondent's surrender, i.e., the Minister, argued in turn that the court could have regard to additional information contained in an affidavit sworn by a police constable who had attended at the scene. The respondent objected to the admissibility of that affidavit before the executing court on the basis that it could not be said to be additional information provided by the issuing judicial authority in the requesting State. Peart J in the High Court disagreed stating:

> *"15. … I am satisfied that if the Central Authority or indeed the High Court is of the view that some further detail in relation to the act or omission by the respondent giving rise to the offence in the issuing state is required to be provided to the Court for the purpose of enabling this Court to satisfy itself that the act or omission alleged would if committed here constitute an offence in this State, the Central Authority or the High Court can seek that information from the issuing judicial authority. Under s. 38 of the Act this Court must be satisfied that "the offence corresponds to an offence under the law of the State", and s. 5 of the Act simply provides that the offence specified in the warrant so corresponds "where the act or*

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[105] *Minister for Justice, Equality and Law Reform v. Sliczynski* [2008] IESC 73.
[106] *Minister for Justice, Equality and Law Reform v. Ward* [2008] IEHC 53. https://www.courts.ie/acc/alfresco/480112d5-d291-4a22-a5b6-f4679df0ca6a/2008_IEHC_53_1.pdf/pdf#view=fitH

*omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."*

*16. The statutory scheme is one based on mutual cooperation between Member States and is based on mutual trust and confidence between Member States. To conclude that this Court could not even seek further information on any matter from the requesting judicial authority in order to satisfy itself as to the facts underlying the offence referred to in the warrant and in order to comply with its obligation to surrender, simply on the basis that information which is available from the issuing authority could not be sought because of a very narrow interpretation of section 5, would run contrary to the purpose and objective of the Framework Decision. There is nothing in the Act which precludes this Court from seeking further information. In fact the contrary is the case given the provisions of s.11 and s.20 to which I have referred, and it could not been seen as 'contra legem' to interpret s.5 in this way so as to conform with the purpose and objective of the Framework Decision."*

In 2019 section 20 of the Act of 2003 was amended by section 4 of the Criminal Justice (International Co-operation) Act 2019 stating ;

*"Amendment of section 20 of the European Arrest Warrant 2003*

*4. Section 20 of the European Arrest Warrant Act 2003 is amended –*

*(a) in subsection (1), by the substitution of "the High Court shall", for "the High Court may", and*

*(b) by the deletion of subsection (2)."*

Accordingly, in its present form s.20 now reads:

*20 –(1) In proceedings to which this Act applies the High Court shall, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify.*

*20 –(2)* [*Repealed*]

These amendments have (i) made it mandatory rather than discretionary for the executing judicial authority to seek additional information *"if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions"*; and (ii) removed the power of the Central Authority to make a request for additional information of its own volition in relation to a EAW.

Procedurally, post the 2019 statute, the Central Authority will usually draft a letter requesting additional information it views as necessary for a determination (by the court) as to whether surrender is permitted and bring it before the High Court for its' approval and endorsement. If the High Court approves the draft, the letter will then be issued by the Court's Registrar in the name of the issuing judicial authority.

In relation to the request for information and its subsequent source, an analysis of Article 15 of the Framework Decision and section 20 of the Act of 2003 was conducted by Donnelly J. in

*Minister for Justice, Equality v. A.W.* [107]. Relying on the decision of the CJEU in *M.L* [108] the trial judge held;

> *"73. Article 15 of the Framework Decision provides for the situation where an executing judicial authority may find that the information provided to it by the issuing member state is insufficient to allow it to decide surrender. It cannot be considered merely accidental that Article 15(2) and Article 15(3) use different language to describe the manner in which additional information may be either requested by or forwarded to the executing judicial authority. Article 15(2) permits the executing judicial authority to seek further information. It does not however require that the additional information be furnished by the issuing judicial authority. Furthermore, Article 15(2) refers to a situation where information communicated by the issuing member state is insufficient. Article 15(3) on the other hand allows the issuing judicial authority at any time to forward additional useful information.*
>
> *74. In the view of this Court, the case of ML puts beyond doubt any question of whether information may only be received from an issuing judicial authority. At para. 108, having referred to Article 15(2) which permits an executing judicial authority to request that the necessary supplementary information be furnished as a matter of urgency, the CJEU went on to state:-*
>
> > *'In addition, under Article 15(3) of the Framework Decision, the issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'*
>
> *In the view of this Court, that is an indication that the sub paragraphs of Article 15 are to be considered separately. …. further emphasised by…. the principle of sincere cooperation set out in the first sub-paragraph of Article 4(3) Treaty on European Union ('TEU') in which it is said that the 'European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties.*
>
> *77. Even if the request is made of the issuing judicial authority, the decision in M.L. clearly envisages the reply being provided by a competent authority of the member state. That reply must be assessed by the executing judicial authority. The principle of judicial supervision is one which in accordance with recital 8 is one which is primarily to be carried out by the executing judicial authority. The process is commenced by an EAW issued by a competent judicial authority in the issuing state. Without such a judicial decision, there is no request for surrender within the meaning of the Framework Decision or the Act of 2003. However, in context of taking a decision on the execution of that judicial decision in this member state, the High Court as executing judicial authority, must take into account all of the information provided to it by the issuing state. The fact that the information is not provided by the issuing judicial authority, is a factor that the executing judicial authority must take into account when making a decision to surrender in reliance on that information.*
>
> *78. This Court must also have regard to s.20 of the Act of 2003. Section 20 provides express authority for both the Central Authority and the High Court to seek information from either the issuing judicial authority or the issuing state. The purpose of this information can only be to assist in the carrying out of the functions under the Act of 2003. In light of the specific provisions of s.20, this Court must be entitled to rely upon the receipt of that information in making its determination as otherwise the enabling provision would be otiose. The Oireachtas cannot be considered to have legislated in vain. In those circumstances, the Act of 2003 must be interpreted as permitting the High Court to rely upon the information obtained from a competent authority within the issuing state. That provision would apply*

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[107] *Minister for Justice and Equality v. A.W.* [2019] IEHC 251.
[108] *M.L (Generalstaatsanwaltschaft Bremen)* [2018] C-220/18 PPU.

> *even if the Framework Decision did not permit the obtaining of such information. To hold otherwise would be to act contra legem to the provisions of the Act of 2003. On the basis of the decision in ML and the express provisions of Article 15 of the Framework Decision, it is however clear that the provisions in s.20 are not in any way in opposition to the provisions of the Framework Decision."*

In the more recent case *Minister for Justice and Equality v. Harrison* [109] the requested person objected to surrender pursuant to s.16 of the Act of 2003 arguing that the High Court, in considering whether it should execute an EAW, was not entitled to rely upon additional information provided by a prosecuting authority rather than by the issuing judicial authority. These arguments were premised on the basis that the additional information provided by the prosecuting authority was information required to be contained in the EAW pursuant to the provisions of the Council Framework Decision and the European Arrest Warrant Act 2003 as amended. In the Court of Appeal Donnelly J., giving judgment for the court, cited her earlier judgment in the High Court in *A.W.*, and held;

> *"69. By contrast with Article 16 of the Framework Decision, Article 15(2) does not restrict the information to that of the issuing judicial authority. In the absence of that clarity, the appellant submits that a harmonious interpretation of the Framework Decision requires Article 15(2) to be read as requiring the information to be provided by the issuing judicial authority when the additional information relates to essentials which should have been in the European arrest warrant. The detail of that argument will be addressed further below. Suffice to say at this stage, that no clear contraindication is given in Article 15(2) that would demand an interpretation of s.20 that only the issuing judicial authority may provide information as set out in Article 8.*
>
> *70.Section 20 refers separately to the issuing State and to the issuing judicial authority. Indeed, the legislative history demonstrates that the reference to the "issuing State" was added into the section by an amendment in 2005. The section permits the request to be made to either the issuing judicial authority or the issuing State as appropriate, to provide the High Court with the information. The appellant confirmed at the oral hearing that the case was being presented on the basis that it was not appropriate that information that was required to be contained in the EAW pursuant to Article 8 could be provided by the issuing State.*
>
> *71.In my view, the analysis of the High Court in A.W. at para. 73 as to the different language between Article 15(2) and (3) is correct. Ultimately, there is no requirement set out in Article 15(2) that information be provided by or through the issuing judicial authority. Indeed, the Article expressly refers to Article 8 but also to Articles 3-5, which are the grounds for mandatory and optional refusal to surrender and to guarantees that must be given. Moreover, there is reference in Article 15(2). to the information being furnished as a matter of urgency. That indeed may be part of the consideration of the "appropriate" body to send on the information."*

**38. -** *When the (issuing judicial) authorities of your Member State are asked to provide supplementary information, what kind of information are they asked for?*

**Response:**

Due to the rigour of the approach adopted in relation to the drafting of outgoing EAWs and the comprehensive nature of information that is provided, and efforts to anticipate the needs of executing judicial authorities and provide maximum clarity in relation to the procedural history of a case, Irish judicial authorities do not often receive requests for supplementary information from executing authorities.

[109] *Minister for Justice and Equality v. Harrison* [2020] IECA 159.

The exception to this is that "standard" queries are invariably raised by the UK in any case in which the Crown Prosecution Service (CPS) of England and Wales is involved. Regardless of whether the information is already contained in the EAW, a letter requesting the following information will usually be received:

- The date of direction to prosecute.
- Details of any interviews with the requested person including any admissions.
- When did the requested person first become aware of the pending prosecution?
- Was the requested person under an obligation to remain in Ireland?
- What, if any bail conditions, did the requested person breach?
- Did the requested person seek to evade prosecution?
- Reasons for any delay?
- Is the prosecution in a position to proceed? Are all prosecution witnesses still available?

**39. -** *When the (issuing judicial) authorities of your Member State are asked to provide supplementary information proprio motu, what kind of information do they usually provide?*

**Response:**

It is impossible to generalise. Every effort is made to anticipate the needs of executing judicial authorities. Information provided *proprio motu* may depend on where the requested person is located and whether the jurisdiction concerned is a civil law or common law jurisdiction, and what is known about how surrender requests are approached in the jurisdiction in question. In the case of some jurisdictions such as England and Wales, Scotland or Northern Ireland (henceforth, and in consequence of Brexit, requests from these jurisdictions will be under the Trade and Co-operation Agreement) much is known about how surrender requests are approached by them, and as they are common law counties, and there is a shared language, it is easier to anticipate their needs and to have confidence that explanations provided will be comprehended. The same cannot be said in the case of some other Member States. In general, an Irish issuing judicial authority, informed by the Central Authority and the excellent lawyers in the Chief State Solicitors Office and the Chief Prosecution Solicitors Office, will seek to err on the side of caution and will try to be as comprehensive as possible in anticipating the likely or even possible needs of executing judicial authorities, and in providing supplementary information in response to that. Moreover, as stated, it is policy to make every effort to provide maximum procedural clarity, with sensitivity to differences in criminal procedures, language difficulties and so on, and not to make assumptions concerning the executing judicial authority's level of knowledge or understanding of the Irish legal system.

**40.** *What kind of supplementary information do the executing judicial authorities of your member state usually ask for?*

Again, it very much depends on the circumstances of the case. The case of *Minister for Justice and Equality v Siklosi* [2020] IEHC 682;[110] [2021] IECA 210, represents a good recent illustration. In that case, despite a total of seven requests/further requests for additional information, for the

[110] https://www.courts.ie/acc/alfresco/f85bde7a-f64f-476e-bee0-9a157c89a39e/2020_IEHC_682.pdf/pdf#view=fitH

Irish executing judicial authority there remained some pertinent unanswered questions as Collins J. makes clear in the interim judgment of the Court of Appeal.[111] He observed:

> *"[The High Court Judge] observed – with conspicuous understatement – that the number of requests for further information here was "far from ideal", noting correctly that "one led to the need for another" (at para 33). Of course, allowances must be made for language differences and the requirement for requests and responses to be translated and the risk that meaning may be lost in translation. Even making every such allowance, however, a prolonged cycle of request and response such as occurred here ought not to be necessary. If comprehensive and accurate information had been set out in the EAW in the first instance, significant confusion and delay could have been avoided. That would also have been the case, if the very clear and specific requests for information made by the High Court had been properly addressed."*

Under the terms of s.20 of the Act of 2003 and Article 15(2) of the Framework Decision the executing judicial authority is empowered to request additional information which it considers necessary to enable it to take a decision on the surrender of the person concerned. [112] Section 20 enables the High Court to seek further information where it considers that this is needed to enable it to reach a decision as to whether the requirements of the Act of 2003 are met in any particular case. The following cases provide some indication of the varied requests sent from the executing judicial authority in this jurisdiction.

In *Minister for Justice and Equality v. Sadiku* [113]the High Court's decision to seek further information in order to satisfy itself that the requirements of s.45 of the Act of 2003 had been met was upheld on appeal. The information provided in the EAW was insufficient to allow the executing judicial authority to complete his task therefore additional information could be sought even though the information deficit resulted from a failure by the issuing judicial authority to properly complete the box-ticking exercise required in Part (d).

In *Minister for Justice and Equality v. Cahill* [114]additional information was sought in relation to the provision of;

i) a more comprehensive account of each offence. Details as to circumstances in which the offences were committed including time, place and degree of participation.
ii) clarity as to what convictions had resulted from the description of the offending conduct provided.
iii) The length of sentence still to be served.

In *Minister for Justice and Equality v. Nicola* [115] additional information was sought as to whether a decision had been made to charge the requested person or whether he was being sought for investigative purposes. A similar issued arose also in the case of *Minister for Justice Equality and Law Reform v. Olssen* [116]. Indeed, this information is very commonly required by an Irish executing judicial authority having regard to the Statement made by Ireland on the adoption of the Framework Decision (see reply to Q.7 in Part 2 of this questionnaire for greater detail) that it will not surrender a requested person solely for investigative purposes, and the terms of s.21A of the Act of 2003.

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[111] The Court of Appeal has made a reference to the CJEU under Article 267 TFEU and a final judgment on outstanding issues must await the CJEU's judgment on the reference.
[112] Farrell and Hanrahan, "*The European Arrest Warrant in Ireland*", (Claus Press, 2011) p.99.
[113] *Minister for Justice and Equality v. Sadiku* [2016] IECA 65.
[114] *Minister for Justice and Equality v. Cahill* [2012] IEHC 315.
[115] *Minister for Justice and Equality v. Nicola* [2020] IEHC 318.
[116] *Minister for Justice, Equality and Law Reform v. Olssen* [2011] IESC 1.

In *Minister for Justice and Equality v. Sevcik*[117] additional information was sought in relation to;

i) clarity as to the number of offences the warrant related to.
ii) the application of the rule of speciality and seeking confirmation that the requested person would not be proceeded against, or detained in respect of any offence, other than for the offence in the warrant, unless prior consent was obtained from the High Court.

In *Minister for Justice and Equality v. Jaworski* ,[118]additional information was sought;

i) To confirm whether the legal classifications of the crimes in the warrant were correctly stated (in circumstances where there was some ambiguity).
ii) To confirm whether the offences in the warrant were offences at the time they were committed.

In *Minister for Justice and Equality v. Harrison* [119] additional information was sought as to;

i) which of the offences the issuing judicial authority claimed fell within Article 2.2 of the Framework Directive. The clarification was sought in light of contradictory statements in the EAW.
ii) more detailed particulars in relation to each of the 41 offences referred to in the EAW.

In *Minister for Justice and Equality v. Henn* [120] additional information was sought;

i) To confirm the exact period of imprisonment Mr Henn would be required to serve in relation to each of the sentences imposed on him and whether he was required to serve these sentences concurrently or consecutively.
ii) To explain why the EAW said he only had one year remaining to serve when his surrender was sought in respect of a sentence of two years duration.
iii) To confirm which of the offences were felonies and which were misdemeanours.
iv) To indicate the relevant section of the criminal code and to confirm that regardless as to whether the status was felony or misdemeanour that each offence carried a period of imprisonment of at least three years.
To further explain the issuing state's cumulative penalty provisions.
v) To confirm that a guarantee of a retrial applied to both cases in circumstances where the respondent had been tried *in absentia* on two separate occasions for offences on the EAW .

In *Minister for Justice and Equality v. Zylka* [121] additional information was sought to assist in determining whether correspondence could be established for offences involving possession of documents that the requested person was not authorised to have. Information was requested concerning whether it was established that the documents in question were stolen and that the requested person knew that the documents were stolen. Further, it was enquired whether the requested person had the document for the purpose of committing fraud.

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[117] *Minister for Justice and Equality v. Sevcik* [2017] IEHC 421.
[118] *Minister for Justice and Equality v. Jaworski* [2017] IEHC 417.
[119] *Minister for Justice and Equality v. Harrison* [2020] IEHC 29.
[120] *Minister for Justice and Equality v. Henn* [2019] IEHC 378.
[121] *Minister for Justice and Equality v. Zylka* [2020] IEHC 357.

**41. -** *When requesting supplementary information, do the executing judicial authorities of your Member State fix any time limit for receipt of that information?*

**Response:**

For many years, time limits were not fixed. However, in recent years Irish executing judicial authorities have been fixing time limits, usually involving a number of weeks (the exact number depending on the level of detail and complexity of information being sought).

An executing judicial authority will be conscious of the Article 17 time limits, and where possible will seek to fix time limits that will enable the Article 17 requirements to be complied with.

**41a. -** *Have the issuing judicial authorities of your Member State experienced receiving irrelevant questions and requests for irrelevant information? If so, please specify what were the questions and information.*

**Response:**

In general, this is not an issue that has arisen to any great extent however, the Crown Prosecution Service of England and Wales does regularly request supplementary information which is already included in the European arrest warrant.

**41b. -** *Have the executing judicial authorities of your Member State experienced receiving irrelevant information? If so, please specify what information.*

**Response:**

This respondent is slow to criticise other judicial authorities for providing too much, or irrelevant, information, and indeed the judgments of the Irish superior courts have rarely done so, in circumstances where the view is taken that an issuing judicial authority may have been incorrectly anticipating, but in good faith, what the executing judicial authority might need.

It has already been stated that the approach of an Irish issuing judicial authority is always to try to anticipate what the executing judicial authority might need. However, correct anticipation can be difficult in circumstances where the Framework Decision is not directly effective and may have been transposed in different ways in another, or other, Member States, where there are substantial procedural differences in the criminal justice systems of the issuing and executing Member States, and where there are language difficulties.

In general, it is better to have too much information than too little. Having to sift through superfluous information can sometimes be an inconvenience, but it is not perceived by Irish executing judicial authorities as presenting a significant problem.

However, all of that having been said, it is fair to level criticism where additional information is sought in the clearest of terms, and there is neglect or unwillingness to engage properly with the request. This was the situation in *Minister for Justice and Equality v Siklósi* (cited in response to Q. 40 above), prompting Collins J., in the Court of Appeal, to observe:

> *"If comprehensive and accurate information had been set out in the EAW in the first instance, significant confusion and delay could have been avoided. That would also have been the case, if the very clear and specific requests for information made by the High Court had been properly addressed."*

**B. Time Limits (Art.17)**

**42a.** *Have the executing judicial authorities of your Member State had any cases in which the time limits of 60 and/or 90 days could not be observed, because information contained in the EAW was insufficient to decide on the execution of the EAW? If so, please state the decision taken by the executing judicial authority.*

**Response:**

There have been cases where the time limits of 60 and/or 90 days could not be observed because the information contained in the EAW was insufficient to determine whether surrender of the requested person should be executed. In the past Irish executing judicial authorities were not as rigorous as they are now in seeking to achieve the 60 and/or 90 day limits. These days significant rigour is applied, with short but reasonable time limits being imposed for responding to requests for additional information, some procedural changes and tighter case management. Nevertheless, on occasion and with the best will in the world, it is still not possible to adhere to the time limits and unless there has been wilful default, surrender will not be refused solely on that account.

Moreover, the uniqueness of Ireland's situation as the sole remaining exclusively common law jurisdiction within the EU, can sometimes present a particular difficulty in achieving the 60 and 90 day time limits. Everybody else operating the EAW system is functioning in a civil law milieu and has an inherent and fundamental understanding of civil law procedures. That is not the case for Irish judges acting as executing judicial authorities. Accordingly, their need to seek explanations and additional information, in order to reach an understanding concerning what has happened in the issuing state, is in general greater than for many of their counterparts dealing with surrender requests from other member states with legal systems quite similar to their own.

Section 20(1) of the European Arrest Warrant 2003 as amended by section 4 of the Criminal Justice (International Co-operation) Act 2019 states;

> *"In proceedings to which this Act applies the High Court shall, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority to provide it with such additional documentation or information as it may specify, within such period as it may specify."*

Prior to the amendment of 2019 the power to request additional information was discretionary. Post amendment and the substitution of the word 'shall' for the word 'may' the High Court is obligated to require the issuing judicial authority to provide additional information to enable it to perform its functions under the Act of 2003.

An example in which noncompliance with the 60/90 day time limit was not achieved due to insufficient information in an EAW is provided by the protracted cases of *Minister for Justice and Equality v. Gherine and Gherine* [2012] IEHC 536[122] and the subsequent case *Minister for Justice and Equality v. Gherine* [123][2016] IEHC 501, in the latter of which Donnelly J. stated,

> *"57. Surrender under the EAW system is ideally a simplified system of extradition. Although it is never a simple system, it is simplified by the provision of a set form which covers set information. In this case, the second EAW was clearly deficient in two significant respects: the completion of point (d) concerning trial in absentia and the completion of point (e) regarding the description of the circumstances in which the offence was committed. The failure to complete point (d) was compounded by a persistent failure to*

[122] *Minister for Justice and Equality v. Gherine* [122][2012] IEHC 536.

[123] *Minister for Justice and Equality v. Gherine* [2016] IEHC 501.

*respond to requests for completion of same. That failure to respond at an early stage led, ultimately, to the s. 20 request and to the appeal and to the consequential delay which followed.*

*58. The Court is presented with a situation where the very question it would now ask under s. 20 of the Act, i.e. confirmation of the date of commencement of the proceedings, has already been asked a year ago in unequivocal terms by the central authority. It has not been answered. In light of the persistent failures to answer what are reasonable requests, combined with the particular history of the earlier proceedings, which, even accepting that there may be an explanation based upon the Italian legal system (which said explanation should have been given in the original proceedings), has meant that what should have been a straightforward application for surrender has instead progressed over many years and over two sets of proceedings. While some of the delay has been as a result of the manner in which the respondent ran his case, the bulk of the delay has been caused by the failure of the issuing judicial authority/issuing state to respond within a reasonable time frame to the requests which have been posed by the central authority in the State and by this Court under s. 20 of the Act of 2003."*

In light of the European arrest warrant system being based on a system of mutual trust and confidence and being predicated on the principle of mutual recognition and judicial co-operation, Edwards J. in the former set of proceedings was so concerned in relation to the deficiencies in both the delay and the information communicated, that he directed the Central Authority in this jurisdiction to inform both the issuing judicial authority and Eurojust of the reasons for the court's refusal to order surrender. Similar circumstances arose in the case of *Minister for Justice and Equality v. Kosterri*. [124]However, it has to be said that these cases were atypical, and they are not representative. In most cases where it is necessary to seek additional information the experience of Irish executing judicial authorities is that there is co-operation and a ready willingness by issuing judicial authorities to assist. It is just that the process can be time consuming and is not always straightforward.

**42b**. *Is recent statistical data available concerning compliance with the limits by the authorities of your Member State?*

**Response:**

Section 16(10) of the European Arrest Warrant Act 2003 applies where the High Court has not ordered a surrender within 60-90 days of an individual's arrest. The High Court is required to direct the Central Authority to notify an issuing judicial authority and Eurojust as to the reasons why. The Ministry for Justice's Annual European Arrest Warrant Report of 2020 indicates that in 2019 there were 61 notifications made.[125]

**42c. -** *Pursuant to Article 17(7) of FD 2002/584/JHA, does your Member State inform Eurojust when it cannot observe the time limits and does your Member State give the reasons for the delay?*

**Response:**

In relation to the observance of time limits sections 16(9) and 16(10) of the European Arrest Warrant Act 2003 states;

[124] *Minister for Justice and Equality v. Kosterri* [2013] IEHC 96.

[125] Department of Justice and Equality Report made to the Houses of the Oireachtas by the Central Authority in in the person of the Minister for Justice and Equality pursuant to section 6(6) of the European Arrest Warrant Act 2003. Page 6.

*"16(10) If the High Court has not, after the expiration of 60 days from the arrest of the person concerned under section 13 or 14, made an order under subsection (1) or (2) or subsection (1) or (2) of section 15, or has decided not to make an order under subsection (1) or (2), it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reasons therefore specified in the direction, and the Central Authority in the State shall comply with such direction.*

*16(11) If the High Court has not, after the expiration of 90 days from the arrest of the person concerned under section 13 or 14, made an order under subsection (1) or (2) or subsection (1) or (2) of section 15, or has decided not to make an order under subsection (1) or (2), it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reason therefor specified in the direction, and the Central Authority in the State shall comply with such direction."*

## C. Guarantee of return (Art. 5(3))

43. *According to the national law of your Member State, as interpreted by the courts of your Member State, is the decision to subject surrender to the condition that the issuing Member State give a guarantee of return dependent on whether the requested person expressly states that he wishes to undergo any sentence in the executing Member State? If so, does your national law distinguish between nationals and residents of your Member State in this regard?*

**Response:**

**(a)** Ireland has only partly transposed Article 5(3) of the Framework Decision. It has done so by s.45B of the Act of 2003 which provides:

*"45B. — (1) Where a national or resident of another state from which he or she is surrendered —*

*(a) is surrendered to the State pursuant to a relevant arrest warrant with a view to being prosecuted in the State, and*

*(b) whose surrender is subject to the condition that he or she, after being so prosecuted, is returned if he or she so consents to that other state in order to serve any custodial sentence or detention order imposed upon him or her in the State,*

*the Minister shall, following the final determination of the proceedings and if the person consents, issue a warrant for the transfer of the person from the State to that other state in order to serve there any custodial sentence or detention order so imposed.*

*(2) A warrant issued under subsection (1) shall authorise —*

*(a) the taking of the person to a place in any part of the State and his or her delivery at a place of departure from the State into the custody of a person authorized by the other state to receive the person, for conveyance to the other state concerned, and the keeping of the person in custody until the delivery is effected, and*

*(b) the removal of the person concerned, by the person to whom he or she is delivered, from the State.*

*(3) Where a warrant has been issued in respect of a person under this section, the person shall be deemed to be in legal custody at any time when he or she is being taken under the warrant to*

*or from any place or being kept in custody under the warrant and, if the person escapes or is unlawfully at large, he or she shall be liable to be retaken in the same manner as any person who escapes from lawful custody.*

*(4) The Minister may designate any person as a person who is for the time being authorised to take the person concerned to or from any place under the warrant or to keep the person in custody under the warrant.*

*(5) A person authorized pursuant to subsection (4) to take the person concerned to or from any place or to keep the person in custody shall, while so taking or keeping the person, have all the powers, authority, protection and privileges of a member of the Garda Síochána.*

*(6) The order by virtue of which a person is required to be detained at the time a warrant is issued in respect of him or her under this section shall continue to have effect after his or her removal from the State so as to apply to him or her if he or she is again in the State at any time when under that order he or she is to be or may be detained.*

Accordingly, the possibility of return is subject to final determination of the proceedings and the consent of the requested person.

Article 5(3) of FD 2002/584/JHA has only been partly transposed. We will facilitate requests from executing judicial authorities surrendering persons to Ireland for trial to return such persons to the executing state to serve any custodial sentence or detention imposed following a conviction in Ireland provided the requested person consents. There is no provision for reciprocal conditional surrender in the other direction. i.e., where Ireland is the executing state and another member state acting as issuing judicial authority is seeking the return of an Irish national or resident for trial, Ireland has no entitlement or ability to seek to have the requested person serve any custodial sentence that might be an imposed sentence in Ireland.

**(b)** The wording of s.45B does not distinguish between nationals and residents of the Member State concerned.

**44.** *Which authority of your Member State is competent to give the guarantee of return?*

**Response:**

The (limited) guarantee of return is expressly provided for in statute law and the High Court as executing judicial authority will make the issuing judicial authority aware of the statutory position and act accordingly. The guarantee is limited in the sense of being subject to two qualifications, i.e., it can only apply in cases (i) where there has been a final determination of the proceedings, and (ii) where the requested person is willing to consent to being returned to serve his/her sentence in the executing state.

The possibility of this form of conditional surrender is expressly provided for in Irish domestic law, i.e., s45B of the European Arrest Warrant Act 2003. Accordingly, the Irish issuing judicial authority routinely communicates the existence of the guarantee in law to facilitate surrender on that conditional basis to its counterpart in the executing state by including the statement below in part (f) of an EAW, but will also do so where the executing judicial authority enquires expressly as to the availability of such a guarantee. Upon being notified of fulfilment of the relevant conditions, the Minister for Justice (who is responsible for running Irish prisons and detention centres) is required to issue the necessary transfer warrant under s. 45B(1).

All EAWs issued by an Irish issuing judicial authority contain the statement at part (f) of the warrant that:

> *"In the context of Article 5(3) of the Framework Decision, Ireland has enacted the following legislation.*
>
> *Section 45B of the European Arrest Warrant Act 2003 as inserted by Section 20 of the Criminal Justice (Miscellaneous Provisions) Act 2009 provides that:*
>
> *In the circumstances of an extradition order or consent in the Member State relating to this warrant the following legislation will apply accordingly:*
>
> *S45B (1): Where a national or resident of another state from which he or she is surrendered-*
>
> > *(a). is surrendered to the State pursuant to a European Arrest Warrant with a view to being prosecuted in the State and;*
> >
> > *(b). whose surrender is subject to the condition that he or she, after being so prosecuted, is returned if he or she so consents to that other state in order to serve any custodial sentence or detention order imposed upon him or her in the State,*
>
> *the Minister shall, following the final determination of the proceedings and if the person consents, issue a warrant for the transfer of the person from the State to that other state in order to serve there any custodial sentence or detention order so imposed.*
>
> *(2) A warrant issued under subsection (1) shall authorise—*
>
> > *(a) the taking of the person to a place in any part of the State and his or her delivery at a place of departure from the State into the custody of a person authorized by the other state to receive the person, for conveyance to the other state concerned, and the keeping of the person in custody until the delivery is effected, and*
> >
> > *(b) the removal of the person concerned, by the person to whom he or she is delivered, from the State.*
>
> *The issuing Judicial authority confirms that in the circumstances of an extradition order or consent relating to this Warrant, the ten day period for the surrender of the requested person will begin subject to the agreement of the executing Judicial authority, once the requested person's sentence/criminal matter(s) in the executing Member State have been completed (if applicable). Pursuant to Article 24 (1) of the Framework Decision."*

**45**. a) **-** *Do the issuing judicial authorities of your Member State use a uniform text for the guarantee of return? If so, what text?*

**Response:**

As the limited guarantee that is available is provided for in statute, the words of the relevant statutory provision are used. See the immediately preceding response above.

**45. b) -** *Does a guarantee of return given by the competent authority of your Member State refer to 'other procedural steps forming part of the criminal proceedings relating to the offence underlying the [EAW], such as the determination of a penalty or an additional measure'?*

**Response:**

No

**45.c)** *Does the national law of your Member State, as interpreted by the courts of your Member State:*

**i)** *Either require the consent of the surrendered person with his return to the executing Member State in order to undergo his sentence there, or, at least allow him to express his views on such a return.*

**Response:**

Yes, the possibility of return is subject to the consent of the requested person.

**ii)** *Prohibit a return to the executing Member State to undergo the sentence there, if the answer to question (i) is in the affirmative and the surrendered person withholds consent to a return or is opposed to a return.*

**Response:**

In principle, yes. This respondent is unaware of any such case having arisen in practice.

**iii)** *differentiate between nationals of the executing Member State and residents of that Member State in this regard?*

**Response:**

There is no differentiation in this context between nationals of the executing Member State and residents of that Member State.

**45d) -** *When is the surrendered person returned to the executing Member State to undergo his sentence there? Which authority of your Member State determines when the surrendered person is to be returned and according to which procedure?*

**Response:**

In the circumstances contemplated by s.45B and to which that section applies, the normal ten-day period for the surrender of the requested person will begin subject to the agreement of the executing judicial authority, once the requested person's sentence/criminal matter(s) in the executing Member State have been completed (if applicable), such postponement being permitted pursuant to Article 24 (1) of the Framework Decision.

Further, practical effect is given to this by the Minister, following the final determination of the proceedings and subject to the consent of the requested person, issuing a warrant for the transfer of the person from Ireland as issuing Member State to the executing Member State concerned in order to serve there any custodial sentence or detention order so imposed.

**46. -** *Have the (issuing judicial) authorities of your Member State experienced any difficulties when they provided a guarantee to return? If so, please describe those difficulties and how they were resolved.*

**Response:**

The requirement to have the consent of the requested person under section 45B of the Act of 2003 has presented issues in a number of recent EAW cases, the effect of which has been to cause surrender to be postponed under Article 24(1) of Framework Decision 2002/584/JHA.

To date, Ireland has not yet implemented FD 909/2008. The present procedure is as provided for in s.45B of the European Arrest Warrant Act 2003, the text of which is set out in my response to question 44. However, there is draft legislation in preparation which, when enacted, will implement FD 909/2008. It is the Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2021 (the Bill of 2021). S.53 of that Bill provides for the amendment of s.45B of

the European Arrest Warrant Act 2003 removing from the wording of s.45B the condition on foot of which the requested person's consent is presently required. See the text of s.53 of the Bill of 2021 https://data.oireachtas.ie/ie/oireachtas/bill/2021/103/eng/initiated/b10321d.pdf.

Within sections 10 and 13 in particular of Part 2 of the Bill of 2021, there are provisions which cater for the consent by the requested person to the forwarding of a judgment for enforcement purposes in the context of the proposed replacement scheme intended to implement FD 909/2008.

Another difficulty which arises under the existing section 45B of the Act of 2003 is that any warrant issued by the Minister will only authorise the taking of that person 'to a place of departure from the State'. This has caused difficulties in one EAW issued to Sweden where it would have required the Swedish police authorities to perform their official duties at Dublin Airport.

**47. -** *Have the executing judicial authorities of your Member State experienced any difficulties with a guarantee of return? If so, please describe those difficulties and how they were resolved.*

**Response:**

No, the provision is hardly ever invoked.

### D. Detention conditions/deficiencies in the judicial system

### Detention conditions

**48.** *Have the executing judicial authorities of your Member State had any cases in which they established that detainees in general would run a real risk of being subjected to inhuman or degrading detention conditions in the issuing Member State on account of systemic or generalised deficiencies, deficiencies which may affect certain groups of people, or deficiencies which may affect certain places of detention (the first step of the Aranyosi and Caldararu test)? If so*

- *with respect to which Member State*(s):

**Response:**

In the case of *Minister for Justice, Equality and Law Reform v. McGuigan* [126] the requested person was the subject of a European arrest warrant issued by the Republic of Lithuania. The requested person objected to his surrender under section 37 of the European Arrest Warrant Act 2003, stating that the places of detention in the Republic of Lithuania would breach the human and constitutional rights of the requested person, and specifically his rights under Article 3 of the European Convention on Human Rights. It was contended that he would suffer inhuman or degrading treatment or punishment if surrendered due to Lithuanian prison and detention conditions.

*Section 37 of the European Arrest Warrant Act 2003 states;*

> *"**37.**—(1) A person shall not be surrendered under this Act if—*
>
> *(a) his or her surrender would be incompatible with the State's obligations under—*

[126] *Minister for Justice, Equality and Law Reform v. McGuigan* [2013] IEHC 216.

*(i) the Convention, or*

*(ii) the Protocols to the Convention,*

*(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies),*

*(c) there are reasonable grounds for believing that—*

*(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or*

*(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favorably than a person who—*

*(I) is not of his or her sex, race, religion, nationality or ethnic origin,*

*(II) does not hold the same political opinions as him or her,*

*(III) speaks a different language than he or she does, or*

*(IV) does not have the same sexual orientation as he or she does,*

*or*

*(iii) were the person to be surrendered to the issuing state—*

*(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or*

*(II) he or she would be tortured or subjected to other inhuman or degrading treatment. "*

In its judgment, the High Court held that the strength of the evidence submitted created reasonable grounds for believing that surrender would pose a real risk to the requested person of exposure to inhuman and degrading treatment.

Edwards J. in the High Court refused surrender of the requested person but emphasised that each case must be decided on the strength of the evidence before it and the application of the well-established law to that evidence. At para. 142 he held that his judgment;

*"… does not purport to propound any new principle of law and does not therefore have precedent value".*

It is important to note that this case pre-dates the *Aranyosi en Căldăraru* jurisprudence and the High Court had approached the matter in the manner commended by domestic Supreme Court jurisprudence i.e., *Minister for Justice, Equality and Law Reform v. Rettinger* [127].

In substance that approach, as applied in *McGuigan*, was largely consistent with that later commended by the CJEU in *Aranyosi en Căldăraru.*

The High Court examined and took account of objective evidence of significant deficiencies in the conditions in which prisoners were accommodated in the Lithuanian prison system based on country information from reputable sources; but in addition, went on to consider whether there was evidence overall of a real risk that the respondent personally would be exposed to inhuman or degrading treatment in the event of being surrendered.

The High Court concluded that such a real risk did indeed exist, based on evidence concerning the conditions in which the appellant's co-accused, who was still in Lithuania, was being held at the time. The evidence was that, if surrendered, the respondent would likely be held in pre-trial detention, and if convicted would serve a sentence, in the same place as his co-accused was at that point in time detained, namely in Lukiškės prison. There was evidence from an expert in prison conditions who had been able to visit the co-accused in Lukiškės prison and ask questions concerning the actual conditions in that place, and in particular he had evidence from him that it was overcrowded and that material conditions to be endured by prisoners there were poor. Indeed, the expert had received a tour of the prison from the prison governor who had spoken candidly about the very unsatisfactory conditions obtaining, notwithstanding unsuccessful efforts on his part to secure meaningful improvements.

Supplementary information had been sought by the executing authority from the issuing state in the light of the observations of the expert. The expert had provided his evidence on affidavit, and his affidavits had been furnished to the issuing judicial authorities for their observations. The supplementary information provided in response asserted a long-standing resolve by the Lithuanian prison authorities to see prison conditions improved and a planned programme of new prison building and refurbishment. However, the High Court's concerns were not allayed by this supplementary information. Edwards J held:

> *"While the Court has no reason to doubt the bona fides of the Lithuanian resolve to implement a programme of new prison building and refurbishment of existing prison buildings, and to close or partially close, some of the older prisons, and to alleviate overcrowding in that way, I remain concerned that that which is planned has not yet been achieved certainly in the case of Lukiškės, and will not achieved before 2014 at the earliest.*
>
> *In the case of the rights guaranteed to the respondent under Article 3 ECHR, and the respondent's personal right to bodily integrity and his right to be treated with human dignity arising under Article 40.3 of the Constitution of Ireland, there can be no margin of appreciation. These rights are absolutely guaranteed. While the evidence does not go so far as to establish that any or all of these rights will definitely, or even probably, be breached in the event of the respondent's surrender, it is not necessary to go that far. It is sufficient if there are reasonable grounds for believing that there is a real risk of those rights, or some of them, being breached in the event of the respondent being surrendered. The Court's concerns, particularly with respect to overcrowding and poor material conditions, in remand prisons have not been allayed. These concerns coupled with somewhat lesser concerns about ongoing issues with respect to*

[127] *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45.

*material conditions in police detention centres cumulatively give rise to reasonable grounds for believing that there is a real risk that this respondent's rights under Article 3 of the ECHR, and under Article 40.3 of the Constitution of Ireland, may be breached in the event of him being surrendered, particularly where he is likely to be in pre-trial detention for at least some months.*

*Conclusion*

*In all the circumstances of the case the Court is disposed to uphold the s.37 objections raised by the respondent in respect of conditions of detention in Lithuania. That being the position the Court considers that it is prohibited from surrendering the respondent under Part 3 of the Act of 2003."*

In the Supreme Court case of *Minister for Justice, Equality and Law Reform v. Rettinger* [128] Denham J. set out the applicable legal principles when considering a claim of apprehended prohibited treatment;

*"(i) A court should consider all the material before it, and if necessary material obtained of its own motion;*

*(ii) A court should examine whether there is a real risk, in a rigorous examination;*

*(iii) The burden rests upon an applicant, such as the appellant in this case, to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR;*

*(iv) It is open to a requesting State to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from an applicant as to conditions in the prisons of a requesting State with no replying information, a court may have sufficient evidence to find there are substantial grounds for believing that if the applicant returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR. On the other hand, the requesting State may present evidence which would, or would not, dispel the view of the court;*

*(v) The court should examine the foreseeable consequences of sending a person to the requesting State;*

*(vi) The court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the U.S. State Department;*

*(vii) The mere possibility of ill treatment is not sufficient to establish an applicant's case;*

*(viii) The relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this Court an application could be made under the rules of court, seeking to admit additional evidence, if necessary."*

Thus, per the *Rettinger* jurisprudence, which pre-dates *Aranyosi en Căldăraru,* an evidential burden is placed on a requested person to adduce cogent evidence of the existence of substantial grounds for believing that he/she personally would be exposed to a real risk of being subjected to treatment prohibited by Article 3 ECHR in the event of being surrendered.

In a subsequent case *Minister for Justice and Equality v Pal* [129] McDermott J., referring to *Aranyosi en Căldăraru,* stated that where there are substantial grounds to believe that the requested person

[128] *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45.
[129] *Minister for Justice and Equality v Pal* [2020] IEHC 143.

will run a real risk of being subject to inhuman or degrading treatment the executing authority must;

> *"… pursuant to article 15(2) of the Council Framework Decision, request of the judicial authority of the issuing member state that there be provided, as a matter of urgency, all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that member state. This, in effect, means that the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end."*

Following the review of the relevant authorities carried out by McDermott J.in *Pal* there emerged a non-exhaustive list of principles for judicially assessing whether a requested person would run the risk of being subject to inhuman and degrading treatment:

*(a) The cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and mutual trust;*

*(b) A refusal to execute a European arrest warrant is intended to be an exception;*

*(c) One of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to article 3 ECHR or article 4 of the Charter of Fundamental Rights of the European Union;*

*(d) The prohibition of surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objective of the Framework Decision cannot defeat an established risk of ill-treatment;*

*(e) The burden rests upon a respondent to adduce evidence of proving that there are substantial/reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;*

*(f) The threshold which a respondent must meet in order to prevent extradition is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights. Whilst the presumption can be rebutted, such a conclusion will not be reached lightly;*

*(g) In examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;*

*(h) The Court may attach importance to reports of independent international human rights organisations or reports from government sources;*

*(i) The relevant time to consider the conditions in the requesting state is at the time of the hearing;*

*(j) When the personal space available to a detainee falls below 3m2 of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of article 3 ECHR arises. The burden of proof is then on the issuing state to rebut the presumption by demonstrating that there are factors capable of adequately compensating for the scarce allocation of personal space, and this presumption will normally be capable of being rebutted only if the following factors are cumulatively met:*

> *1.The reductions in the required minimum personal space of 3m2 are short, occasional and minor,*
>
> *2. such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities and*
>
> *3. the detainee is confined to what is, when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention.*

(k) *a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. The executing judicial authority should request of the issuing member state all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained.*

(l) *an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhuman or degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member states on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter;*

(m) *it is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member state.*

The supplementary information requested in the *Pal* case related to the pre-trial conditions in which the requested person would be held, prison regimes applicable to the respondent should he be convicted, information in relation to a specific maximum security regime, specific assurance that the requested person would not be held at a particular prison the subject of a CPT report, and specific assurances in respect of certain matters which would honour the requested person's article 3 rights if he was detained at this particular prison. Further requests were necessary to address the last two points where the issuing authorities were ultimately able to confirm the location where the requested person would be detained and the conditions under which he would be held.

Subsequent case law pertaining to the issue of detention conditions suggests that the judgment in *McGuigan* was exceptional in relation to the quality and cogency of the evidence provided by the requested person. In *Minister for Justice and Equality v. Liam Campbell* [130], where the requested person was yet another co-accused of *McGuigan,* and where similar points of objection in relation to detention conditions were raised, the High Court, taking into account recent undertakings given by the Lithuanian authorities, held that there was no longer a basis for being concerned about the possible risk of being subjected to inhuman and degrading treatment arising from detention in Lukiškės prison as it had now closed. Donnelly J. stated:

> *"There is simply no other evidence (or even submission) before me that demonstrates that there is a real risk that the respondent will be subjected to inhuman and degrading prison conditions should he be surrendered to Lithuania. Indeed, the respondent's own expert, Professor Morgan had no issue with the conditions in Kaunas Remand Prison, which was the alternative prison to which the respondent was liable to be sent (and the subject matter of an assurance by the Lithuanian prison authorities)."*

Subsequent cases where a requested person has failed to overcome the evidential burden of adducing cogent evidence necessary to prove that they would be exposed to a real risk of being subjected to inhuman and degrading prison conditions include:

[130] *Minister for Justice and Equality v. Campbell* [2020] IEHC 344.

*Minister for Justice and Equality v. Tagijevas* [131] (Lithuania)

*Minister for Justice and Equality v. T.N.* [132] (Lithuania)

*Minister for Justice and Equality v. Wlodarczyk*[133] (Poland)

*Minister for Justice and Equality v. Johnston*[134] (UK and NI)

*Minister for Justice and Equality v. Pal* [135] (Romania)

*Minister for Justice and Equality v. Tache* (Romania)[136]

*Minister for Justice and Equality v. Iacobuta* [137](Romania)

*Minister for Justice and Equality v. Iancu*[138] (Romania)

However, it should be noted that in the recent case of *Minister for Justice and Equality v. Dicu* [139] Binchy J. considered the case law of the ECtHR in *Simulescu and others v. Romania* (No. 17090/15 and 8 others), *Calin and others v. Romania* (No. 55593/15 and 8 others) *Mursic v. Croatia* [GC], no. 7334/13 in refusing surrender. He held that;

> *"…the combination of inadequate personal space (2m2) for an extended period in Jilava prison, coupled with those other aggravating aspects of conditions of detention that have already been found as a fact by the ECtHR to be present in both Rahova and Jilava prisons, all taken together constitute substantial grounds for believing that there is a real risk that the respondent, if surrendered, will be exposed to conditions of detention that would violate the respondent's rights as guaranteed by Article 3 of the Convention."*

This finding was in circumstances where, per the second part of the *Aranyosi en Căldăraru* test, supplementary information had been requested from the issuing judicial authority concerning how identified deficiencies might be addressed in Mr Dicu's case. The High Court judge observed with respect to the reply received, that:

> *"The IJA replied by letter of 15th August. It confirmed that the room of 3 m² in which the respondent will be accommodated in Rahova prison measures 3 m², excluding sanitation facilities. While the letter provides a general and positive description about the facilities in respect of which queries were raised, regrettably, it does not address at all the decisions of the ECtHR in the cases of Simulescu and Calin, and as a consequence, there is no information provided as to what measures, if any, were taken to address the conclusions of the ECtHR in those cases, and specifically as regards the matters which the ECtHR considered as constituting a violation of Article 3 of the Convention."*

Similar consideration was given to the principles set out in *Pal* and the decision of the European Court of Human Rights in *Rasinski v Poland* [140]by Burns J. in *Minister for Justice and Equality v. Angel*

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[131] *Minister for Justice and Equality v. Tagijevas* [2015] IEHC 455.
[132] *Minister for Justice and Equality v. T.N.* [2015] IEHC 661.
[133] *Minister for Justice and Equality v. Wlodarczyk* [2015] IEHC 804.
[134] *Minister for Justice and Equality v. Johnston* [2019] IEHC 168.
[135] *Minister for Justice and Equality v. Pal* [2020] IEHC 143.
[136] *Minister for Justice and Equality v. Tache* [2019] IEHC 68.
[137] *Minister for Justice and Equality v. Iacobuta* [2019] IEHC 250.
[138] *Minister for Justice and Equality v. Iancu* [2020] IEHC 316.
[139] *Minister for Justice and Equality v. Dicu* [2020] IEHC 607.
[140] *Rasinski v. Poland* (42969/18), [2020] ECHR 363.

[141]. In refusing surrender based on the additional information received from the issuing member state relating to personal cell space, Burns J. noted;

> *"I am satisfied that such a reduction in personal space will be accompanied by significant freedom of movement outside the cell and adequate out-of-cell activities …other than reduced personal space there are no other aggravating aspects of the likely conditions of his detention.*
>
> *However, in light of the decision of the ECtHR in Rasinski (that detention of approximately 1 year and 8 months with a personal space of less that 3m2 was a breach of article 3 ECHR despite mitigating factors) it appears that despite the existence of such mitigating circumstances, the likely conditions of his detention will be in breach of the respondent's right not to be subjected to inhuman and degrading treatment under article 3 ECHR and article 4 of the Charter"*

- *on the basis of which sources*;

**Response:**

Evidence supporting objections in *McGuigan* included-

> a) US Department of State 2007 Country Reports on Human Rights Practices – Lithuania.
>
> b) The Reports to the Lithuanian Government on the visits to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 17th – 24th February 2004 and 14th – 23rd February 2000.
>
> c) Report by Professor Rod Morgan on Prison Conditions in Lithuania dated 2nd November 2008. Professor Morgan was a professor of Criminal Justice in the Department of Law, University of Bristol and Home Office advisor to five criminal justice inspectorates (including prisons) for England and Wales. He was also co-author of the official Council of Europe's guide to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2001, *Combating Torture in Europe*).

- *did the executing judicial authorities use the database of the Fundamental Rights Agency in stabilising that risk*;

**Response:**

The executing judicial authorities did not use the Fundamental Rights Agency in stabilising the risk. The decision in *McGuigan* predates the database. However, your respondent is unaware of any Irish case in which the executing judicial authority has used this database.

- *what role, if any, did (measures to combat) COVID – 19 play in establishing that risk*?

**Response:**

Again, all of the relevant Irish EAW cases on prison conditions pre-date the COVID-19 pandemic. However, the issue was raised in the case of *Minister for Justice and Equality v. Kaleja* [142]where the respondent's asserted belief that he would be at a real risk of contracting Covid-19

[141] *Minister for Justice and Equality v. Angel* [2020] IEHC 699.
[142] *Minister for Justice and Equality v. Kaleja* [2021] IEHC 206.

in a Czech prison if surrendered to the Czech Republic to serve an outstanding 10 month sentence in respect of a driving offence, was rejected, effectively *in limine*, as being mere assertion unsupported by any evidence. Burns J. stated that s.4A of the Act of 2003 provides that it shall be presumed that the issuing state shall comply with the requirements of the Framework Decision unless the contrary is shown. The Framework Decision incorporates respect for fundamental human rights including the ECHR.

In *Minister for Justice and Equality v. Sciuka*,[143] following postponement of surrender on humanitarian grounds under s.18 (1)(a) of the Act of 2003 by the High Court as a consequence of COVID-19 related travel restrictions, the Minister appealed the postponement to the Court of Appeal, maintaining that the evidence relied upon was too indirect to be capable of satisfying s.18 humanitarian conditions, as in truth the reason for the inability to surrender was the cancellation of flights (admittedly due to pandemic travel restrictions) rather than being directly due to humanitarian considerations, and further maintaining that time limits for transfer had been breached. Donnelly J. rejected the appeal for the following reasons;

> *"(a) The public health requirements arising from the Covid-19 pandemic apply to the public and not simply to specifically identified individual;*
>
> *(b) The Covid-19 pandemic has created a significant risk to life and health and has required limitations on "normal" life;*
>
> *(c) The Covid-19 pandemic has not created a single "new normal". What has emerged is a series of "surges" requiring different responses by public health/governmental authorities;*
>
> *(d) The Covid-19 pandemic itself is exceptional;*
>
> *(e) The decision to shut down all flights from one member state to another based upon public health conditions is exceptional;*
>
> *(f) The stopping of flights from Ireland (and the UK) to Germany was based upon public health considerations arising from the Covid-19 pandemic;*
>
> *(g) The evidence from the issuing judicial authority establishes that because of the German authorities' decision which itself was based upon the Covid-19 pandemic that there was no possibility of extradition; and*
>
> *(h) The evidence therefore establishes that the serious risk to life and health arising out of the Covid-19 pandemic has led to a situation where exceptionally the postponement of surrender of the appellant is required by the issuing judicial authority of Lithuania as there is no possibility of arranging his surrender within the statutory time-frame."*

The Court of Appeal held that the High Court judge had correctly applied the law to the evidence before him and applied the proportionality principle to assessing the period of the postponement.

A list of measures taken by member states to protect prisoners from covid-19 infection is available at www. Europris.org.[144]

**49.** *Having established a real risk as referred to in the previous question:*

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[143] *Minister for Justice and Equality v. Sciuka* [2021] IECA 79.

[144] IRISH PRISON SERVICE - COVID-19 Update of 18 May 2020.

***(i)*** *what kind of information did the executing judicial authorities of your Member State request from the issuing judicial authorities in order to assess whether the requested person would run such a risk if surrendered (the second step of the Aranyosi and Caldararu test).*

**Response:**

The case of *Minister for Justice and Equality v. Pal*, previously mentioned, provides a good illustration as to the type of information sought by executing judicial authorities in this jurisdiction when assessing whether a requested person would run the risk of being subjected to inhuman and degrading treatment upon surrender. Information was sought as to:

- The pre-trial conditions in which the requested person would be held.
- The prison regimes applicable should the requested person be convicted. Information in relation to a specific maximum security regime.
- The name and location of prison where the convicted or detained requested person would be held.
- A specific assurance that the requested person would not be held at a particular prison the subject of an adverse CPT report.
- Specific assurances in respect of certain matters which would ensure respect for the requested persons ECHR Article 3 rights if he were to be detained at a particular prison.
- A detailed description of conditions under which the requested person would be held.
- An estimation of time to be spent on remand.

In the case of *Minister for Justice and Equality v. Iacobuta* the court sought confirmation that the requested person would be;

- Kept in a prison with 4m$^2$ of living space in shared cells;
- Kept in a prison with adequate sanitary conditions;
- Have access to natural light and artificial lighting and ventilation;
- Would be provided with a clean mattress and bedding;
- Would be provided with adequate and partitioned toilet facilities;
- Would have access to basic hygiene products;
- Would have outdoor exercise of at least one hour a day;
- Would be provided with satisfactory food.

In the case of *Minister for Justice and Equality v Angel* [145] the issuing judicial authority was asked to provide the name of the prison or prisons where the respondent would be detained and for precise information in relation to the conditions in the said prison or prisons. The executing judicial authority was satisfied with the replies received, stating:

> *"In answer to the said request, the issuing judicial authority sent two separate replies dated 16th June, 2020 and 17th June, 2020, respectively. The reply of 16th June, 2020 dealt with the issue of prison conditions. It indicated that if surrendered, the respondent would initially spend a period in quarantine of 21 days in the Bucharest Rahova penitentiary where he would have a minimum space of 3m$^2$. Further, it indicated that subsequent to the quarantine period, the respondent would most probably be detained under a semi-open regime at the Bistrița penitentiary where rooms had appropriate natural ventilation and*

[145] *Minister for Justice and Equality v Angel* [2020] IEHC 699.

> *lighting, heating and permanent access to water and sanitary items, while inmates had an individual bed comprising a mattress and bedding, as well as furniture for storing personal items and eating. Details were provided of regular disinfection, pest control and lighting conditions. Under the semi-open regime, inmates are able to walk unaccompanied in areas within the detention area and manage their own leisure time under supervision, while the doors of the rooms remain open during the entire day. Details were given in relation to access to telephone calls and information points in relation to prisoners' detention status. Inmates could perform work and attend educational and cultural events and therapeutic and psychological counselling, as well as social support and moral / religious activities in schools or professional training outside of the penitentiary under supervision. It was stated:-*
>
> > *'Hence, the prisoners executing the sentences under the semi-open regime have the possibility to spend their leisure time outside of their detention room during the entire day. They are put in their rooms only for having their meals and half an hour before making the evening call. In conclusion, apart from the time assigned for attending activities and programmes, as well as for enforcing their rights, this category of prisoners can spend leisure time outside of their detention room, in open air, practically using their detention room only to rest or for various administrative and individual hygiene activities.' "*

Irish EAW procedure is neither wholly adversarial nor wholly inquisitorial, rather it is sui generis; nevertheless in truth it leans towards being more adversarial than inquisitorial. There is no legal burden of proof to be discharged. However, in practice, the party asserting the existence of a real risk bears an evidential burden of adducing sufficiently cogent evidence to prompt the court to engage with the issue. The issue must be raised by the relevant party, the court will not raise it of its own motion. Once it is raised, by the adducing of evidence of sufficient cogency to cause the court to engage, the court will hear submissions from both sides but ultimately makes its own assessment.

**(ii)** *Did the executing judicial authorities of your Member State actually conclude that the requested person would run such a real risk if surrendered?*

**Response:**

In *Minister for Justice and Equality v. Pal* the High Court concluded that, following assessment of the information submitted by the issuing state, the surrendered person would not run a real risk of being subjected to inhuman or degrading treatment as stated by McDermott J. at para.110:

> *"I regard the assurance given by the issuing judicial authority that the respondent will be detained at Marginei prison as evidence that he will, if imprisoned following conviction, be detained under Article 3 compliant conditions. This includes an assurance that he will be imprisoned under Article 3 compliant conditions in any prison to which he may be transferred during the currency of any sentence imposed. I am satisfied to interpret and accept this assurance as constituting an assurance that he will not serve any sentence which may be imposed upon him at Lasi prison but will serve it in Margineni prison. If his transfer is contemplated for any reason to any other prison while serving a sentence at Margineni prison the court has been assured that it will be Article 3 compliant and that he will not be subjected to conditions that constitute inhuman or degrading treatment or give rise to any risk that this may happen. This in effect is an assurance that if now surrendered and convicted he will not be imprisoned in Lasi prison as that prison is, on the materials available, not Article 3 compliant at this time."*

However, a different view was taken by Binchy J, in the circumstances obtaining in *Minister for Justice and Equality v. Dicu,* previously mentioned.

**(iii) (a)** *If so, was such a real risk excluded within a reasonable delay? If not, what was the decision taken by the executing judicial authorities of your Member State?*

At paragraphs 111 and 112 of his judgment in *Pal*, McDermott J. commented on the regrettable delay on the part of the Romanian authorities in providing required supplementary information to enable him to address the second part of the *Aranyosi en Căldăraru* test. He remarked:

> *"It is hoped that in future applications for surrender by the Romanian authorities it will not be necessary to engage in the [same] type of protracted search for information which should be very easily accessible." It is regrettable that the responses framed in respect of Iasi prison were of such a nature as to give rise inevitably to the necessity to requests for further information. The delay in processing this application was wholly avoidable by the requesting authorities had the prison authorities in Romania been more focussed in their responses: the difficulties that arose from their responses were not conducive to adherence to the time-frame for decision-making under the Framework Decision and frustrated the prompt processing of this application.*
>
> *112. I am, notwithstanding these difficulties, satisfied that the respondent's surrender does not give rise to a real or substantial risk that he will be subject to inhuman or degrading treatment if convicted on the charges set out in the warrant."*

However, in *Minister for Justice and Equality v. Dicu* the real risks were not excluded despite repeated requests for specific information relating to places of detention. In refusing surrender Binchy J. stated;

> *"Insofar as it may be argued that this information is not sufficiently up to date, it was for this reason that the Court asked the IJA to identify any measures taken in Rahova and/or Jilava to address the problems identified by the Simulescu and Calin decisions. The IJA was asked to do so specifically and not in a general way. It is not unreasonable to surmise therefore that insofar as it has failed to provide any specific response to these queries, that no specific measures have been taken to remedy these problems, and , as I have said earlier, it is reasonable in these circumstances for this Court to infer that those problems persist in the institutions where the respondent is likely to be detained."*

He continued at para. 59 to address the issuing judicial authority's resistance in submitting requested information:

> *"On the basis of the decisions of the ECtHR in Simulescu and Calin, in so far as they are concerned with Bucharest-Jilava prison, I consider that there are significant other aggravating aspects of detention in that institution. While it may be argued that the information to be gleaned in the reports of the ECtHR in Simulescu and Calin is insufficiently up to date or precise, I afforded the IJA two opportunities to address those decisions and to let the Court know if the grievances that gave rise to the decisions in those cases as to violations of Article 3 of the Convention in Jilava, had been addressed since those decisions were handed down. As I have mentioned above, the IJA did not respond to these questions with any degree of specificity, and accordingly I think it is reasonable to rely on the decisions in those cases insofar as the ECtHR reached conclusions that conditions of detention in both Rahova and Jilava prisons constitute a violation of Article 3 of the Convention. It is no understatement to say that the 19 grievances identified relate to some of the most fundamental of human needs, including (but not limited to) access to potable water, quality of food, inadequate temperatures and lack of privacy for toilet use."*

**(b)** *If the(judicial) authority of the issuing Member State gave guarantees that the detention conditions would comply with Article 4. of the Charter, did the executing judicial authorities of your Member State rely on that guarantee?*

**Response:**

In the above case of *Pal* the executing judicial authorities did rely on the guarantee and assurances provided by the issuing judicial authority. However, in *Dicu,* such assurances could not be relied on due to the absence of adequate replies to requested information. A similar determination was held in *Minister for Justice and Equality v. Ggeorghe* [146].

In *Minister for Justice and Equality v. Henn* [147] the requested person claimed that his surrender was prohibited because there was a real risk that he would be exposed to inhuman and degrading prison conditions in Hungary. Donnelly J. held that there was no basis for the Court to reject the assurances that had been given as to conditions in the prisons in which the respondent would be held and the assurances that his rights under Article 3 ECHR and Article 4 of the Charter would be respected. Commenting on the assessment necessary in relation to acceptance of assurances given Donnelly J. stated at para.63;

> *"In my view, therefore, the Framework Decision and the Act of 2003 requires this Court to carry out an overall assessment of all the information available to the executing judicial authority including the assurance given by the authorities of the issuing state. The assessment of those assurances must be carried out in accordance with the principles laid out in the Othman decision by the European Court of Human Rights. It is noted and was accepted by the respondent in the present case that the list set out in that case at para. 189 was not a 'tick list' to be applied in every case. For example, in the present case not only is Hungary a party to the ECHR, but it is a member of the EU and has specific obligations arising from that membership. The Court considers that this has been given by the competent authority dealing with prison conditions in Hungary. It has been transmitted by the Hungarian Ministry of Justice. These are competent organs of the member state. The principle of mutual trust and confidence must apply to the granting of those assurances."*

**49.a** *In case of a refusal to execute an EAW on account of detention conditions, what steps did your Member State take, as issuing or executing Member State, to prevent impunity (e.g. in case of execution – EAW, initiating proceedings to recognise the judgment and enforce the custodial sentence in the executing Member State on the basis of FD 2008/909/JHA)?*

**Response:**

The Irish State has not yet transposed Framework Decision 2008/909/JHA although the Minister for Justice did publish the general scheme of a proposed Criminal Justice (Mutual Recognition of Custodial Sentences) Bill in July 2020, which it is intended will transpose that Framework Decision. However, the European Commission is unhappy with the delay and has announced its decision to refer Ireland to the European Court of Justice for failing to transpose the Framework Decision to date.

**50.** *Have the issuing judicial authorities of your Member State experienced any difficulties when requested to provide additional information in application of the Aranyosi and Caldararu test? If so, please describe those difficulties and how they were resolved.*

**Response:**

The question of Irish prison conditions has only been raised by the requested person when seeking to resist surrender from the United Kingdom on foot of a European arrest warrant.

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[146] *Minister for Justice and Equality v. Gheorghe* [2020] IEHC 618.
[147] *Minister for Justice and Equality v. Henn* [2019] IEHC 379.

Various grounds have been raised as points of objection to surrender including, recently, the extent of Covid-19 precautions in detention centres and prisons. These issues have been addressed by way of confirmation provided to the issuing judicial authority by the Irish Prison Service of the relevant procedures in place.

**51.** *Have the executing judicial authorities of your Member State experienced any difficulties when applying the Aranyosi and Caldararu test? If so, please describe those difficulties and how they were resolved.*

**Response:**

None, in principle. The test is clear in its terms. In practice, however, issues have arisen around delays and sub-optimal engagement on the part of some issuing judicial authorities in providing supplementary information, as illustrated in the previously mentioned cases of *Pal* and *Dicu*.

In *Minister for Justice and Equality v. R.O.*[148] the Supreme Court considered the limitations which may be placed on the principles of mutual recognition and mutual trust between Member States in 'exceptional circumstances' (82 para. *Aranyosi and Caldararu*) with the advent of Brexit. In light of the uncertainty as to whether the rights enjoyed by the requested person following surrender pursuant to the Framework Decision (including those under Article 3 ECHR) would continue to be safeguarded by the issuing state after its withdrawal from the European Union, the Supreme Court referred the following questions, through the expedited procedure, to the Court of Justice;

(1) *Having regard to :-*
   a. *The giving by the United Kingdom of notice under Article 50 of the TEU;*
   b. *The uncertainty as to the arrangements which will be put in place between the European Union and the United Kingdom to govern relations after the departure of the United Kingdom; and*
   c. *The consequential uncertainty as to the extent to which Mr O'Connor would , in practice, be able to enjoy rights under the Treaties, the Charter or relevant legislation, should he be surrendered to the United Kingdom and remain incarcerated after the departure of the United Kingdom,*

   *Is a requested Member State required by European Union Law to decline to surrender to the United Kingdom a person the subject of a European arrest warrant, whose surrender would otherwise be required under the national law of the Member State,*

      *(i) In all cases?*
      *(ii) In some cases, having regard to the particular circumstances of the case?*
      *(iii) In no cases?*

(2) *If the answer to Question 1 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether surrender is prohibited?*

(3) *In the context of Question 2 is the court of the requested Member State required to postpone the final decision on the execution of the European arrest warrant to await greater clarity about the relevant requesting Member State from the Union,*

      *(i) In all cases?*
      *(ii) In some cases, having regard to the particular circumstances of the case?*
      *(iii) In no cases?*

(4) *If the answer to Question 3 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether it is required to postpone the final decision on the execution of the European arrest warrant?*

[148] *Minister for Justice and Equality v. R.O.* [2018] 2 ILRM 199.

In its ruling the CJEU in *Minister for Justice and Equality v. R.O.* [149] stated at paras. 50 and 51;

> *" 50. As regards the fundamental rights enshrined in Article 4 of the Charter, which correspond to those stated in Article 3 of the ECHR (judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 86), in a situation where the referring court were to consider, as appears to be the case, given the wording of the questions referred for a preliminary ruling and the documents sent to the Court, that the information received enables it to discount the existence of a real risk that RO will suffer, in the issuing Member State, inhuman or degrading treatment, within the meaning of Article 4 of the Charter, it would not be appropriate, as a general rule, to refuse to surrender him on that basis, without prejudice to RO's opportunity, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies that may enable him to challenge, where appropriate, the lawfulness of the conditions of his detention in a prison of that Member State (see, to that effect, judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 103).*
>
> *52. However, the Court must also examine whether the referring court might contest that finding on the ground that the rights enjoyed by an individual following his surrender pursuant to the Framework Decision would no longer be safeguarded after the withdrawal from the European Union of the issuing Member State.*

In answer to questions referred, the CJEU ruled at para. 60;

> *"Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European Union in accordance with that article does not have the consequence that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the European Union. In the absence of substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of rights recognised by the Charter of Fundamental Rights of the European Union and Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European arrest warrant while the issuing Member State remains a member of the European Union."*

### Deficiencies in the judicial system

**52.** *Have the executing judicial authorities of your Member State had any cases in which they established that there is a real risk of a violation of the right to an independent tribunal in the issuing Member State on account of systemic or generalised deficiencies liable to affect the independence of the judiciary (the first step of the Minister for Justice and Equality (Deficiencies in the judicial system)? If so:*

- *with respect to which Member State(s);*
- *on the basis of which sources?*

**Response:**

[149] *Minister for Justice and Equality v. R.O.* (C-327/18 PPU)

It was concerns of this nature by an Irish executing judicial authority in the case of *Celmar* that led to an application to the CJEU for a preliminary ruling. See *Minister for Justice and Equality v Celmer (No 1)* [2018] IEHC 119.

The text of the request for a preliminary ruling is to be found in *Minister for Justice and Equality v Celmer (No 3)* [2018] IEHC 153.

Following the ruling of the Court of Justice of the European Union (CJEU) in *Minister for Justice and Equality (Deficiencies in the judicial system)* [150]the High Court in *Minister for Justice and Equality v. Celmer (No 5)* [2018] IEHC 639 held that;

> *"In light of the objective, reliable, specific and properly undated evidence before the court, I now conclude that there is a real risk connected with the lack of independence of the courts of Poland on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached."*

Such conclusion was based on;

- Affidavit evidence from the requested person concerning previous terms of imprisonment in Poland.
- A Reasoned Proposal of the European Commission in accordance with Article 7(1) of the Treaty on the European Union regarding the rule of law in Poland date 20th December 2017.
- Opinions of the Venice Commission, an advisory body of the Council of Europe on the situation in Poland.

  > *"Taken together, the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary (Act on the organisation of Common Courts) and the weak position of checks to these powers (National Council of Public Prosecutors) result in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from a political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland."*

In *Minister for Justice and Equality v. Orlowski* [151] the respondent unsuccessfully opposed his surrender, *inter alia*, on the basis of asserted concerns about the rule of law in Poland. Binchy J. was the executing judicial authority in the High Court, and at paragraphs 98 to 101 of his judgment (in which he rejected the objections raised), he sets out the arguments that were put forward by the respondent in support of his objection and the sources relied upon:

> *"98. Counsel for the respondent argued that, insofar as the EAWs are concerned with prosecution of offences, the respondent cannot be assured of a fair trial, to which he is entitled pursuant to Article 6 of the Convention, because he cannot be assured that such a trial will be conducted before a member of the judiciary who is independent of the executive. However, at the initial hearing of these applications, counsel conceded that he would not be able to demonstrate that if surrendered, "there is a real risk of trial before a court that [is] not independent and therefore a breach of his fair trial rights" (per O'Donnell J., at para. 87 of his judgment in the Supreme Court, in the case of Minister for Justice & Equality v. Celmer [2019] IESC 80). Nonetheless, it was submitted on behalf of the respondent that developments on the*

[150] *Minister for Justice and Equality v. L.M.* (Case C-216/18).
[151] *Minister for Justice and Equality v. Orlowski* [2021] IEHC 109.

*political stage in Poland since the decision of the Supreme Court in that case have been "stark", and that it should no longer be necessary for a person whose surrender to Poland is sought to demonstrate such individual prejudice as is required by Celmer. Counsel placed before the Court a Financial Times article dated 9th February, 2020 in which the author opines that the rule of law in Poland is under ever greater threat.*

*99. Subsequent to the initial hearing of this application, counsel for the respondent approached the Court, ex parte, to say that a decision had been handed down on 17th February 2020, by the Higher Regional Court of Karlsruhe, Germany, that might influence the decision of the Court in relation to this point of objection. Having heard counsel, I acceded to his request to make further submissions arising out of further developments in the law of the requesting state since the decision of the Supreme Court in Celmer, which decision in turn arose out an appeal from a decision of Donnelly J. in this Court in the case of Celmer (no. 5) [2018] IEHC 639, following upon the decision of the CJEU in case C-216/18 PPU, the case known as L.M., a decision of the CJEU following a referral by Donnelly J. in the case of the same Mr. Celmer.*

*100. There then followed a full hearing arising out of these submissions which took place on 27th July, 2020. On that date, counsel for the respondent opened to the Court advices dated 9th July, 2020 and 17th July, 2020 received from a Polish lawyer, namely Katarzyna Dabrowska (who was the same Polish lawyer who provided an expert opinion to the court in Celmer) in relation to developments in the law of Poland subsequent to both the decisions of the CJEU in L.M. and the Supreme Court in Celmer. Specifically, the opinion provided addressed laws passed on 20th December, 2019 and adopted by the Polish legislature on 23rd January, 2020, being an act on the system of common courts, (the "new laws"), which the respondent claims, inter alia, restrict the ability of an accused person to challenge the jurisdiction of a court of trial on grounds of its composition, including whether or not the appointment of the judge was in accordance with law or on grounds relating to the independence or impartiality of the judge or tribunal. The respondent relies upon not just the advices received from Ms. Dabrowska, but also on an opinion on the new laws delivered by the Polish Commissioner for Human Rights, as well as reports on the same from the Organisation for Security and Cooperation in Europe (the OSCE) and a report of the Venice Commission of 30th December, 2019, in which it stated, inter alia, that the new laws:- 'Diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union and other international instruments.'*

*101. The respondent also referred the Court to infringement proceedings launched by the European Commission against Poland on 29th April, 2020, arising out of the new laws. Counsel for the respondent acknowledged that the information concerning legislative developments in Poland since December 2019 is of a general nature and is not sufficient for the purpose of conducting an assessment of the risk to the respondent personally. The court in Karlsruhe had directed a series of questions to the issuing judicial authority in Poland in connection with the legal effect of the new laws, but, before a response had been delivered to those questions, it had declined the application because it was satisfied on the basis of the information before it that there were specific and precise reasons amounting to substantial grounds for believing that the requested person in the case would not receive a fair trial, if surrendered."*

**53.** *Having established a real risk as referred to in the previous question;*

*- what kind of information did the executing judicial authorities of your Member state request from the issuing judicial authorities in order to assess whether the requested person would run such a risk if surrendered (the second step of the Minister for Justice and Equality (Deficiencies in the judicial system) test).*

Following the ruling from the CJEU in *Minister for Justice and Equality v. L.M.* the High Court in *Minister for Justice and Equality v. Celmer* (No.5)[152], cited previously, sought additional information from the issuing judicial authority relating to the following media reports of remarks made by the Deputy Minister for Justice in Poland;

(a) *"The general situation of the rule of law in Poland as set out in the report;*
(b) *The removal of presidents and vice-presidents of the Ordinary Courts in general;*
(c) *The part of the report specifically with the removal of the presidents and vice-presidents of the Regional Courts in Wloclawek, Poznan and Warsaw, which are the relevant issuing judicial authorities;*
(d) *The nexus between the removal of the court's presidents and the remarks of the Deputy Minister for Justice relating to the respondent;*
(e) *How the removal of the court presidents might have any effect on the trial of Mr Celmer if he was to be surrendered."*

The court also made an order joining the Irish Human Rights and Equality Commission (IHREC) as an *amicus curiae*, seeking their specific assistance on the assessment of evidence.

In light of the evidence and the responses received, Donnelly J. in the High Court held that surrender was not prohibited. However, the High Court granted leave to appeal on the following question:

> *"Is the decision of the CJEU in L.M. to be interpreted as meaning, where there are systemic and generalised deficiencies in the independence of the judiciary which affect the level of the court in the Member State before which a person requested for surrender pursuant to a European arrest warrant will be tried in the event of being surrendered, that those deficiencies are sufficient, on their own [and in the absence of evidence of deficiencies in other safeguards for a fair trial], to establish substantial grounds that there is a real risk of a breach of the essence of the requested person's right to a fair trial?"*

Given the urgency of the matter a 'leapfrog' appeal (by-passing the Court of Appeal) was permitted by the Supreme Court. The Supreme Court's judgment is to be found at *Minister for Justice and Equality v Celmar* [2019] IESC 80 .

The Supreme Court, upholding the decision of the High Court judge, answered the certified question in substance in the following passages in the judgment of O'Donnell J:

> *"81. It should be said that the test posited in the judgment of the C.J.E.U. is not one that is easy to apply. Normally, it might be said that where systemic deficiencies of any kind are identified, it becomes unnecessary to identify the possibility of those deficiencies taking effect in an individual case. This is particularly so where the value concerns one that is essential to the functioning of the system of mutual trust. Indeed, it was this difficulty that led the trial judge to make the reference to the C.J.E.U. in the first place. It may also be questioned, at least in the abstract, whether once such systemic deficiencies have been found there is then room or need for further inquiry. It is not, however, for the national court to interrogate the logic of the reasoning of the C.J.E.U. This is a difficult and unprecedented situation where the C.J.E.U. has set out the steps to be taken by the national court. It is unmistakable that the national court is required to conduct the second step of the Aranyosi and Căldăraru analysis. It is also inescapable in the logic of the judgment of the C.J.E.U. that it is possible that there should be systemic deficiencies*

[152] *Minister for Justice and Equality v Celmer (*No. 5) [2018] IEHC 639.

*apparent at the level of the court before whom the individual is to be tried and, yet, for it to be determined that surrender should not be refused because it has not been established that those deficiencies will operate at the level of the individual case, having regard to the person charged, the offence with which he is charged, and the factual context which forms the basis of the European arrest warrant (para. 75 of the L.M. judgment).*

*82. There are, perhaps, good reasons why this should be so. The problem posed for the European Union by systemic changes in a Member State, apparently inconsistent with fundamental values of the Union, is one which may require a co-operative and coherent response from all the institutions of the Union. The national court faced with a request for surrender is a court of the Union, but it is not intended to have the primary role in the enforcement of the fundamental values of the European Union in another Member State. Refusal of surrender under the Framework Decision by one Member State can only be one part of the response of the European Union to issues concerning the rule of law in another Member State and why the national court may be required to focus precisely on the particular circumstances concerning the individual whose surrender is sought, and the offences for which they are sought to be tried.*

*83. The matters identified in the respective judgments of the High Court are substantial and grave issues which require careful consideration. Apart from the difficulties and discomfort involved in attempting to analyse the system in another Member State, there are significant difficulties in applying a test which requires not just a breach but a breach of such a degree as to reach a particular threshold. That necessarily involves a qualitative assessment and there is always a real risk that individual incremental breaches will not themselves be seen as sufficiently serious but could collectively amount to a gradual erosion and removal of the essence of a right required to be protected. While, here, it is clear that a finding that the tribunal in question lacks independence is a breach of the essence of the right, the judgment of the C.J.E.U. requires an inquiry which focuses on the individual case and seeks to draw connections between the systemic deficiencies identified and the particular case. This can arise because of the nature of the deficiency itself, or the particular charge, or the particular individual concerned. For this reason, the High Court sought further information in particular as to the impact of the legislative changes concerning the removal and replacement of court presidents at the regional court level.*

*84. In this case, the decision of the C.J.E.U. on the reference by the High Court and the subsequent decision in Commission v. Poland are both instructive. The obligation of trust and confidence is a basic requirement, and normally requires surrender and prohibits any exercise by national courts in the checking or assessment of the legal system of another Member State. Exceptionally, however, an executing court may be required to consider if there has been a breach of the essence of a right or a flagrant denial of the right of such a degree as to require that court to refuse to surrender. Such an exception must be interpreted strictly. The independence of a court is an important component of any fair trial. Moreover, it has both external and internal aspects. Independence is necessary for impartiality in the particular dispute, but it is not limited to that. It involves independence from outside bodies or, indeed, internal hierarchical structures. This aspect of independence is plainly in issue in this case. The independence of a court is of the essence of the right to a fair trial. All of this emphasises the significance of any finding of a breach of independence even at a general level.*

*85. I would tend to agree with the trial judge that the possibility that systemic deficiencies in a particular system could, by themselves, amount to a sufficient breach of the essence of the right to a fair trial, requiring an executing authority to refuse surrender, cannot and should not be ruled out in the abstract. That could occur, for example, where the deficiency identified at a systemic level is so far-reaching and pervasive as it would plainly and unavoidably take effect in the requesting court, and on any individual trial on a particular charge. However, I also agree with the trial judge that it is clear from the judgment of*

*the C.J.E.U., that the systemic changes in Poland, while undoubtedly both serious and grave, cannot themselves be seen as sufficient to reach that point in this case. This follows from the fact that the changes referred to in the reasoned proposal apply in different ways at different levels of the Polish courts system and the C.J.E.U., being fully apprised of the relevant changes, considered that the referring court was nevertheless obliged to consider whether the identified deficiencies reached the level of the court before which the person would be tried, and, furthermore, was obliged to conduct a specific and precise evaluation of the individual case. Here, further information about the operation of the changes at regional court level was forthcoming and indicated that presidents and vice-presidents had been dismissed in at least 130 cases, one of which was the regional Court of Wloclawek, which was itself one of the requesting courts in this case. However, there was no evidence, even anecdotal, suggesting such changes had affected the hearing or determination of charges generally or, more specifically, charges such as those involved in this case. Furthermore, there was no evidence of the impact of any of the criticised changes upon trials conducted in any of the three regional courts involved. It appears, therefore, that although there was clear evidence of breach of Poland's Charter and Treaty obligations (as indeed the C.J.E.U. found in Commission v. Poland) and further evidence leading the trial judge to conclude that a breach of the principle of independence did operate at the level of the courts involved, the available evidence did not, on its own, satisfy the third stage of the test set out by the C.J.E.U. of requiring a real risk that the impact of the legislative changes would mean that this appellant would be tried before a court that was not independent and would therefore suffer a breach of the essence of his right to a fair trial."*

O'Donnell J indicated the Supreme Court's conclusion on the merits of the case as follows:

87. … *while the individual features of this case are undoubtedly troubling, I agree with the trial judge that, in the light of the evidence, they do not bring the case over the threshold. On the evidence adduced, the statements made cannot lead to the requisite finding on an individual basis that there is a real risk that that the appellant will suffer a breach of the essence of his right to a fair trial. It is, however, necessary to observe that no court, in any jurisdiction, operating under an obligation of impartiality and independence and obliged to refrain from involvement in public controversies, should be subjected to irresponsible or abusive commentary from governmental or official sources. This is particularly so where the court which is the subject of the commentary is considering the effect of changes to a judicial system which are alleged to make the judicial system subordinate to and subject to the influence of the executive and the legislature.*

*88. It is of the essence of the test which the national court is required to apply that once there has been a claim of a generalised or systemic breach of independence, there must nevertheless be an individual, specific and precise determination of whether that, in the particular case, on its own or in conjunction with other factors, amounts to a breach of the essence of the right to a fair trial. The dangers of relativism already adverted to suggest that it is desirable to indicate what matters could be taken into account which might lead to a conclusion that surrender in respect of a European arrest warrant from a Polish court should be refused. Among the matters to which weight may properly be given, and which might affect that determination, are: whether further changes are made to the structure of the administration of justice in Poland affecting the court of trial; the manner in which the reasoned proposal in accordance with Article 7(1) TEU may proceed before the Council; the response of the Republic of Poland to that proposal and indeed to decisions such as that in the recent case of Commission v. Poland. A court would be entitled to have regard to any evidence of the practical impact of the legislative changes already made on court hearings and decisions in Poland at the trial level, and any evidence in relation to trials of particular classes of offence or defendants. It must also be recalled that, under para.78 of the judgment of the C.J.E.U., when a court is required to consider the impact of systemic changes on the individual sought for trial on particular charges, a court is obliged to refuse surrender ("must refrain"), when the information*

> *does not "lead [the court] to discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial". In that regard, the progress of this particular case, which has attracted such attention, may itself be instructive. However, on the evidence currently before the court, and applying the approach of the C.J.E.U., I conclude that the trial judge was correct in her determination, and I would accordingly dismiss the appeal."*

Accordingly, the succession of *Celmer* cases culminating in the Supreme Court's decision in *Minister for Justice and Equality v. Celmer* [153] ultimately resulted in a decision to surrender the respondent on all three EAWs presented in respect of him.

In *Minister for Justice and Equality v. Orlowski*, Binchy J. in the High Court requested further information in light of a referral made to the CJEU from a Dutch court seeking guidance in relation to the implementation of new laws affecting the independence of the judiciary in Poland and having consideration of the decision of the CJEU in *L.M.* The following questions were asked of the issuing judicial authority;

> *"Question 1: Do the laws of Poland as summarised in the High Court judgment of Minister for Justice v. Celmer [2018] IEHC 153, para. 28 […] and the reasoned proposal of the European Commission pursuant to Article 7 of the TEU apply to the courts before which Mr. Orlowski will stand trial, including any courts to which he may appeal after the first instance decisions?*
>
> *Question 2: Does the law dated 20th December 2019, being an Act on the system of common courts, including the Act on the Supreme Court, and published in the Journal of Laws 2019, No. 190, apply to the courts before which Mr. Orlowski will stand trial, including any courts to which he may appeal after the first instance decision?*
>
> *Questions 3 and 4: Have any judges assigned to the courts before which the respondent will stand trial - including any appellate court judges - been subjected to disciplinary proceedings since the above laws came into force?*
>
> *If so, please provide details of the disciplinary charges and the outcome of such proceedings including any penalties imposed.*
>
> *Question 5: Is it possible for a judge before whom the respondent may stand trial, including any appellate court judges, to be disciplined on account only of any decisions that he or she may make in the ordinary performance of his or her duties?*
>
> *Question 6: Is it possible for an accused person who has concerns about the (a) appointment and/or (b) impartiality before whom he/she may stand trial to challenge and/or request that judge to recuse him or herself i.e. to request the judge not to preside over or participate in the trial in any way? If so, will that challenge or request be decided on before the trial proceeds any further?"*

- *Did the executing judicial authorities of your Member State actually conclude that a requested person would run a real risk, if surrendered?*

**Response:**

No. The Supreme Court in *Minister for Justice and Equality v Celmar* dismissed the appeal and held that the High Court judge was correct in finding that the requested person had not established

[153] *Minister for Justice and Equality v. Celmer* [2019] IESC 80.

grounds for believing that he would run a real risk of a breach of his fundamental right to a fair trial.

Similar determinations were made in *Orlowski* [154] and subsequent cases in which the same or similar arguments were relied upon. In *Minister for Justice and Equality v. Lyszkiewicz* [155] Binchy J. in the High Court held that;

> *"It must be demonstrated that, for reasons associated with the requested person specifically, or the nature of the offences for which his surrender is sought or the factual context in which the warrant is issued, that there are substantial grounds for believing the requested person will not receive a fair trial. No argument was advanced to this effect in this case, and nor was any information provided to the Court that could support such an argument. This objection to surrender must therefore be dismissed in so far as it is concerned with issues relating to the independence of the judiciary and fair trial rights."*

Binchy J. further commented at para. 52 on the difficulty the requested person faced in establishing that any such deficiencies in the rule of law would impact on his personal situation;

> *"Through no fault of his own, the respondent is unable to advance any evidence regarding the legality of the appointment of the judges who will be in charge of the proceedings that he faces, if surrendered. So the furthest that the respondent can put this argument is to say that there is a possibility that, if surrendered, he will be put on trial before a court that has not been established in accordance with the law. A mere possibility that this might occur is not sufficient to refuse an application for surrender."*

It was also found in *Minister for Justice and Equality v. Latek* [156]that there had been a failure to establish any substantial grounds for believing that the respondent would run a real risk of a breach of his fundamental right to a fair trial, if surrendered.

*- If so, was such a real risk excluded within a reasonable delay? If not, what was the decision taken by the executing judicial authorities of your Member State?*

The *Celmer* case was protracted due to its complexity, numerous subsidiary issues necessitating individual judgments, a reference to the CJEU and a Supreme Court appeal. However, it was effectively a test case on this issue. Subsequent cases advancing similar arguments have been much more expeditiously dealt with. To date, no case arguing a violation of the right to an independent tribunal in the issuing Member State on account of systemic or generalised deficiencies liable to affect the independence of the judiciary has succeeded in Ireland.

**54. -** *Have the issuing judicial authorities of your Member State experienced any difficulties when requested to provide additional information in application of the Minister for Justice and Equality (Deficiencies in the judicial system) test? If so, please describe those difficulties and how they were resolved.*

**Response:**

No. Ireland fully respects the rule of law, and the independence of the judiciary is constitutionally protected and jealously guarded. It has never been suggested that a person in respect of whom Ireland has issued an EAW would face a violation of the right to an independent tribunal in the issuing Member State on account of systemic or generalised deficiencies liable to affect the independence of the judiciary.

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[154] *Minister for Justice and Equality v. Orlowski* [2021] IEHC 109.
[155] *Minister for Justice and Equality v.Lyszkiewicz* [2021] IEHC 108.
[156] *Minister for Justice and Equality v. Latek* [2021] IEHC 27.

**55.** *Have the executing judicial authorities judicial authorities of you Member State experienced any difficulties when applying the Minister for Justice and Equality (Deficiencies in the judicial system) test? If so, please describe those difficulties and how they were resolved.*

**Response:**

In *Minister for Justice and Equality v. Lyszkiewicz* [157] the High Court considered recent legislative changes in the appointment of judges in Poland and the possibility of challenging the composition of a court. The requested person objected to surrender on the ground that there were concerns that judges may be appointed or have been appointed contrary to law and that some of the provisions of the new laws prohibit any challenge to the validity of a judge's appointment. Article 42a of the new law in controversy provided;

> *"Within the framework of the activity of the courts or organs of the courts, it is unacceptable to question the powers of courts and tribunals, constitutional state bodies and law enforcement and control bodies."*

Moreover, Articles 26(2) and (3) of the (Polish) Act on the System of Common Courts 2019 provided;

> *"(2) The competence of the Extraordinary Control and Public Affairs Chamber includes consideration of motions or statements concerning the exclusion of a judge or the designation of the court before which the proceedings are to be conducted, including the allegation of lack of independence of the court or lack of impartiality of the judge. The court examining the case shall immediately forward the motion to the President of the Extraordinary Control and Public Affairs Chamber in order to give it further course of action under the rules specified in separate regulations. The submission of the motion to the President of the Extraordinary Control and Public Affairs Chamber does not stop the ongoing proceedings.*
>
> *(3) The motion referred to in paragraph 2 shall be left unprocessed if it involves determining and assessing the legality of the appointment of a judge or his authority to preform judicial tasks."*
>
> *"The real purpose of the Act and of the definition in question [definition of judge] is to legalise the legal status of persons who have been appointed as judges, even if their appointment was in gross violation of the law."*

In the High Court, Binchy J. acknowledged that in respect of Articles (2) and (3) aforesaid, even if a person were to issue a motion challenging the validity of a judge's appointment, that motion was unlikely to be heard. However, this was only one element in the objection raised by the requested person in his contention that he would not receive a trial before a court established by law. Cognisant of the rulings in *L.M.*, *L* and *P* (C 354/20 PPU and C 412/20 PPU) and the Supreme Court decision in *Celmer*, the High Court held that the CJEU in *L.M* had addressed the issue of legislative changes including those relating to the appointment of judges and that it could reasonably be interpreted as an acceptance that matters concerning the regularity of the appointment of judges had been addressed by *L and P*. In his judgment Binchy J. stated;

> *"… it has been recorded many times, and was repeated again in L and P at para. 37 'execution of the European Arrest Warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly.*
>
> *"While the general and systemic deficiencies that have been identified and addressed in L.M. and L and P are of profound concern, it does not follow that all appointments made pursuant to the new laws will be*

[157] *Minister for Justice and Equality v. Lyszkiewicz* [2021] IEHC 108.

*contrary to law. Before the Court may refuse surrender on the basis of this objection, it must be satisfied that there are substantial grounds for believing that the requested person will, if surrendered, run a real risk of breach of his or her fundamental right to a fair trial, before a tribunal established in accordance with law. Those substantial grounds in turn can only be established by reference to a specific and precise examination of the personal situation of the respondent."*

Binchy J. added that a final decision on the application (to surrender the respondent) had been deferred pending the determination of objections raised in other cases grounded on concerns relating to generalised and systemic deficiencies in the rule of law in Poland. It had not been possible to resolve those objections until the CJEU had handed down its ruling in the *L and P* case.

***55BIS.*** *Did your courts consider to refer questions to the Court of Justice? If so, on which issues? Why did they not do so in the end?*

**Response:**

Yes, the Irish Courts have referred questions in the cases of *Lanigan* - Case 237/15 PPU; *Vilkas,* -C640/15 PPU; *Celmar, LM,*(*Minister for Justice - Deficiencies in the Judicial System*) - 216/18 PPU, *SN & SD,* Case C-479/21 PPU, *R.O.* Case C 327/18; *Siklosi* (pending).

On at least two occasions, in the cases of *Minister for Justice and Equality* v *Lipinski,*and in *Minister for Justice and Equality v O'Connor*, reference procedures which had been initiated by the Irish Supreme Court were discontinued in circumstances where it was learned that a reference had coincidentally been submitted by another court asking, in substance, the same question. In the *Lipinski* case the point at issue was the ultimately the subject of the *Ardic*judgment in C571/17 PPU on foot of a reference by a Dutch court, while in the *O'Connor*case, the point at issue was ultimately the subject of the *R.O.*judgment in Case C 327/18 on foot of a reference from the Irish High Court.

**E. Surrender to and from Iceland and Norway**

**56. -** *Have the issuing judicial authorities of your Member State issued any Arrest Warrants under the EU Agreement with Iceland and Norway? If so, have they experienced any difficulties? If so, please describe those difficulties and how they were resolved.*

**Response:**

There has been just one warrant issued to Norway in 2020 pursuant to the EU Agreement with Iceland and Norway. No difficulties were encountered. As of time of responding to questionnaire the warrant has not been executed.

**57. -** *Have the executing judicial authorities of your Member State been confronted with any Arrest Warrants under the EU Agreement with Iceland and Norway? If so, have they experienced any difficulties? If so, please describe those difficulties and how they were resolved.*

**Response:**

No, the executing judicial authority in Ireland has not been confronted with any Arrest Warrants under the EU Agreement with Iceland and Norway.

***57BIS****. How would you answer questions 56 and 57 in relation to the United Kingdom?*

**Response:**

Yes, Ireland has both issued and executed arrest warrants under the new Trade and Cooperation Agreement (TCA) which, inter alia, provided for the continuation of EAW arrangements between the UK as a third country and EU member states after the expiration of the transition period at 11.00pm on the 31st of December 2020. As far as quotidian issues are concerned there have been no usual difficulties. However, there have been a number of what might be called "systemic" challenges.

For example, there was an unsuccessful challenge to implementing secondary legislation in *Gallagher v Minister for Foreign Affairs & Ors* [2021] IECA 123 *see* https://www.courts.ie/acc/alfresco/a01c6ce0-fcbb-45fc-9570-f72d93b37dec/2021_IECA_173.pdf/pdf#view=fitH .

In addition, the issues raised in *Minister for Justice and Equality v R.O.*, resulting in the preliminary ruling of the CJEU in *R.O.*Case C 327/18, were unsuccessfully pursued.

More recently, in *SN & SD,* Case C-479/21 PPU the CJEU ruled that the provisions in the EU-UK Withdrawal Agreement concerning the European arrest warrant regime with respect to the United Kingdom and the provision in the Trade and Cooperation Agreement between the EU and the United Kingdom concerning the new surrender mechanism, are binding on Ireland. https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210205en.pdf

***57TERTIUS*** *Does your Member State's legislation provide for executing EAW's issued by the EPPO?*

**Response:**

Not at present.

## F. (Analogous) application of the *Petruhhin* judgment

### *Petruhhin* judgment

**58. -***Does the national law of your Member State, as interpreted by the courts of your Member State, prohibit the extradition of nationals, but allow the extradition of nationals of other Member States? If so:*

*- have the competent authorities of your Member State applied the Petruhhin-mechanism (i.e. informed the Member State of which the requested person is a national) and to what effect;*

*- what kind of information was provided to the competent authorities of the Member State of which the requested person is a national?*

**Response:**

No, in the context of Irish EAW law because Ireland's European Arrest Warrant Act 2002 (as variously amended) which was enacted to transpose FD 2002/584/JHA does not prohibit the extradition (strictly speaking the rendition or surrender) of nationals but allows for the extradition (again strictly speaking the rendition of surrender) of nationals of other member states.

However, re Irish Extradition law i.e., in the case of traditional extradition based on bilateral or multilateral extradition treaties, the position is different. It is governed by s.14 of the Extradition Act 1965, the terms of which state::

> "***14.*** *Extradition shall not be granted where a person claimed is a citizen of Ireland, unless—*
> *(a) the relevant extradition provisions or this Act otherwise provide, or*
> *(b) the law of the requesting country does not prohibit the surrender by the requesting country of a citizen of that country to the State for prosecution or punishment for an offence.*

The *Petruhhin* judgment has never been applied in Ireland, in circumstances where there is no provision in Irish EAW law for discrimination based on nationality. Moreover, no case requiring its consideration in any context has yet arisen.

**59. -***Have the competent authorities of your Member State been notified by another Member State of requests for extradition concerning nationals of your Member State, pursuant to the Petruhhin judgment? If so:*

*- was the information provided by that Member State sufficient to decide on issuing an EAW? If not, why not;*

**Response:**

Your respondent has been advised that the Irish Central Authority has been notified in two cases in the last two years of requests for extradition concerning a national of the State. In each case difficulties have arisen where the information provided by the Member State has been limited to the extradition request from the third country. In one of the cases this did not present a significant problem as there existed information from a previous Garda investigation. However, in the second case there was no such information in existence and only limited time available to consider the matter by the Gardaí and the office of the Director of Public Prosecutions.

*- did the competent issuing judicial authority of your Member State actually issue an EAW;*
**Response:**

It is unclear why the issuing judicial authority did not proceed to issue an EAW. I do not wish to speculate as to the reason. However, I understand it to be the case that there was no lack of willingness on the part of the Irish authorities to co-operate and provide such information as they could.

**Response:**

No

*and*

*- if so, did the EAW actually result in surrender to your Member State?*

**Response:**

Not applicable, as no EAW was issued.

***Ruska Federacija*** **judgment**

**60. -***Does the national law of your Member State prohibit the extradition of nationals, but allow the extradition of nationals of EEA States?*

**Response:**

No case has ever arisen in Ireland requiring consideration of the *Ruska Federacija* judgment. In principle, however, the response must be "No", in circumstances where there is no provision in Irish EAW law for discrimination in terms of whether or not a person will be surrendered or rendered to another Member State, based on nationality.

*If so:*

*- have the competent authorities of your Member State applied the Petruhhin-mechanism by analogy (i.e. informed the Member State of which the requested person is a national) and to what effect;*

*- what kind of information was provided to the competent authorities of the EEA State of which the requested person is a national?*

**Response:**

Not applicable

**G. Specialty Rule**

**61.** *Does a decision to execute the EAW state:*

***- a)*** *for which offence(s) the surrender of the requested person is allowed and, if so, how;*

**Response:**

A decision by an Irish Executing judicial authority allowing surrender will state the offences for which surrender is granted. Such information is contained in the judgment of the High Court and in the Court's Order, which should be read together.

Any description contained in a court's judgment and formal order, is likely to be cross referable to the offences for which the warrant was issued as enumerated in Part E of the EAW. Thus, whatever form of description and numbering has been used in Part E will most likely be replicated in the court's judgment and formal order.

**- b)** *whether the requested person renounced his entitlement to the specialty rule?*

The question raised is a hypothetical one. I am not aware of any case having arisen in Ireland in which the scenario postulated has in fact obtained. Approaching the matter from first principles, I would expect that if it were to arise that a person consenting to his/her surrender in circumstances where he/she was also waiving the rule of specialty, then both the judgment of the court and the formal order of the court would expressly record the existence of both of those circumstances.

When executing a European arrest warrant, where surrender is contested, the High Court will state that the requested person has renounced his entitlement to the specialty rule, if that be the case; and will identify the applicable section of the Act of 2003 in its ruling on which it is proceeding.

A respondent may also consent to their surrender under section 15 of the Act of 2003 however the High Court must be satisfied that the requested person is aware of the consequences of such action and will ensure that they have been provided with the opportunity to obtain legal advice including advice relating to the rule of speciality. Farrell and Hanrahan highlight the obligation on the High Court;

> *"It should be clear from the foregoing [consent procedure] that the making of an order under s.15 is not simply a formality but rather presupposes a reasonably detailed enquiry by the court….[under s.15(4)(c)] the court is obliged to record in writing that the respondent consented to surrender. In this regard a form of consent is prescribed by Order 98* [158] *of the Rules of the Superior Courts which the respondent is required to sign."* [159]

This finds reflection in section 22(6)(b) and (d) of the Act of 2003 which provides;

> *(6) The surrender of a person under this Act shall not be refused under subsection (2) if the High Court –*
>
> *(b) is satisfied that –*
>
> *(i) the person consents to being surrendered under section 15,*
>
> *(ii) at the time of so consenting he or she consented to being so proceeded against, to such a penalty being imposed, or being so detained or restricted in his or her personal liberty, and was aware of the consequences of his or her so consenting, and*
>
> *(iii) the person obtained or was afforded the opportunity of obtaining, or being provided with, professional legal advice in relation to the matters to which this section relates,*
>
> *(c)….*
>
> *And*
>
> *(d) is satisfied that such proceedings will not be brought, such penalty will not be imposed and the person will not be so detained or restricted in his or her personal liberty unless –*
>
> *(i) the person voluntarily gives his or her consent to being so proceeded against, such a penalty being imposed, or being so detained or restricted in his or her personal liberty, and is fully aware of the consequences of so doing.*
>
> *(ii) that consent is given before the competent judicial authority in the issuing state, and*
>
> *(iii) the person obtains or is afforded the opportunity of obtaining , or being provided with, professional legal advice in the issuing state in relation to the matters to which this section relates before he or she gives that consent."*

In relation to the European Arrest Warrant Act 2003 as amended there is no specific form prescribed by the Rules of the Superior Court where a respondent may record a waiver of consent in relation to the rule of specialty. This is in contrast to the Extradition Act 1965 where O.98, r.17(2) and Appendix AA, form 12[160] provide for such waiver of consent.

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[158] Order 98 Rule 4 of the Rules of the Superior Courts.

[159] Farrell and Hanrahan, "*The European Arrest Warrant in Ireland*", (Claus Press, 2011) p.83.

[160] Order 98, rule 17(2) and Appendix AA, form 12.

**62. -** *Are the issuing judicial authority and the requested person provided with a copy of the (translated) decision to execute the EAW?*

**Response:**

No. The relevant documents are only made available in the English language. Moreover, the judgment, or a summary of it, will usually be read out in Court in English. If the respondent is present in court (as is usually the case) for the oral delivery of the court's judgment/the summary of its judgment, he/she is entitled to the benefit of a court provided interpreter.

**63.** *How does the national law of your Member State, as interpreted by the courts or your Member State, ensure that the specialty rule is complied with after surrender to your Member State?*

**Response:**

The relevant provisions of the Act of 2003 are s.22(7) and (8), which transpose Article 27(4) of the Framework Decision. They are in the following terms:

> (7) The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to —
>
> > (*a*) proceedings being brought against the person in the issuing state for an offence,
> >
> > (*b*) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or
> >
> > (*c*) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence,
>
> upon receiving a request in writing from the issuing state in that behalf.
>
> (8) The High Court shall not give its consent under *subsection (7)* if the offence concerned is an offence for which a person could not by virtue of *Part 3* be surrendered under this Act.

Farrell and Hanrahan highlight the fact that although Article 27 of the Framework Decision is based upon an assumption that "Member States will include as part of their domestic law a prohibition on the prosecution of a surrendered person for offences" other than those contained in the EAW, it would appear that there is an absence of such a presumption in the European Arrest Warrant Act 2003 or any other piece of domestic legislation providing for the operation of the rule of specialty in this jurisdiction.

The authors continue;

> *"As to whether the courts would be prepared to give effect to the State's obligation under Article 27 of the Framework Decision vis-á-vis other Member States that operate the rule of specialty very much remains to be seen. On the one hand there is no clear obligation under domestic law to do so, whilst on the other a failure to give effect to the rule of specialty would effectively preclude surrender into the State for any offence from a large number of other Member States."*[161]

[161] Farrell and Hanrahan, "*The European Arrest Warrant in Ireland*", (Claus Press, 2011) p. 219.

This commentary was provided in 2010. In the intervening years the apprehended possible difficulty has not manifested itself.

Issues in relation to the operation of the rule in the domestic context can usually be overcome by waiver of the rule of specialty as set out in Article 27.4 of the Framework Decision.

Where there has been an alleged breach of the rule of specialty the surrendered person may bring judicial review proceedings under Article 40.4. 2 of the Constitution of Ireland or seek an order of *certiorari* as in *Adams v. DPP and Others* [162]. In this case the surrendered person sought to prohibit the DPP from continuing the prosecution of the offences pending before the Criminal Court and an order of *certiorari* in order to quash the executing authority's certificate purporting to wave specialty in respect of the offences.

In the Article 40.4.2 proceedings in *Corcoran v Governor of Castlerea Prison* [163] Barrett J. outlined four reasons why the doctrine of specialty confers personally enforceable rights on a person the subject of a request;

> *"(1) the surrender of a party to this jurisdiction pursuant to a European arrest warrant affords the courts of Ireland personal jurisdiction over that party. Without that personal jurisdiction, a court is generally powerless to proceed. So that party must have a right to challenge the court's jurisdiction…and if s/he cannot invoke the rule of specialty in this regard, that would constitute a denial of his ability to challenge the court's exercise of personal jurisdiction.*
>
> *(2) a surrendering state depends entirely on the state to which surrender is made to conform faithfully with its obligations under the European arrest warrant process. Two consequences appear to flow from this; (i) a country implicitly protests any prosecution to which it did not consent; and (ii) as it is impracticable for a surrendering country to monitor every trial that follows a surrender, each surrendered person should surely be treated as having been implicitly vested with the right to challenge a breach of a doctrine that informs that process..*
>
> *(3) the fact that the doctrine of specialty is designed to protect the interests of a surrendering state does not have as a necessary logical consequence that the person who is the subject of the process of surrender maintains no right to protest a violation of the process by the country that has sought the surrender.*
>
> *(4) applying the doctrine of specialty only to the state that makes the surrender places an unreasonable burden on a surrendered person to ensure that the state making the surrender protests any violations of e.g. the doctrine of specialty."*

**64. -** *Have the authorities of your Member State as issuing Member State experienced any difficulties with the application of the specialty rule? If so, please describe those difficulties and how they were resolved.*

**Response:**

The issuing authorities in the State have not experienced any difficulties with the application of the specialty rule.

In a proposed amendment to the Act of 2003, the European Arrest Warrant (Amendment) Bill 2021 provides for the insertion of a new section 33A which addresses the area of the disapplication of the rule of specialty pursuant to Article 27 of Framework Decision

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[162] *Adams v. DPP and Others* [2001] IESC 27.
[163] *Corcoran v. Governor of Castlerea Prison* [2016] IEHC 267.

2002/584/JHA for outgoing European arrest warrants. Under the existing Act of 2003, s. 22 is confined in its effect to incoming arrest warrants.

**64BIS.** *What is the position of your country regarding the basis of requests for additional surrender (art. 27 (4) of FD 2002/584/JHA): should these be based on a specific national arrest warrant or could it be possible that the request is not based on a national arrest warrant if the issuing authority states that the additional surrender will not bring about an additional deprivation of liberty?*

**Response:**

The Irish Courts treat Art 27(4) requests in the same way as an actual EAW. The same proofs are required. Since a national arrest warrant or judicial decision having the same effect, or an enforceable judgement, is required to under pin an actual EAW, fulfill of the same requirements is expected in respect of Art 27(4) requests for additional surrender. I do not think the alternative postulated in the question is viable. It would have the effect of constraining judicial independence concerning what sentence might be merited and imposed.

**65.** *Have the authorities of your Member State as executing Member State experienced any difficulties with the application of the specialty rule? If so please describe those difficulties and how they were resolved.*

**Response:**

The rule of specialty is catered for in section 22 of the Act of 2003 as amended by s.80 Criminal Justice (Terrorist Offences) Act 2005, s.15 European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 and S.I. No. 150/2021.

> *"22 – (1) In this section, except where the context otherwise requires, 'offence' means, in relation to a person to whom a relevant arrest warrant applies, an offence (other than an offence specified in the relevant arrest warrant in respect of which the person's surrender is ordered under this Act) under the law of the issuing state committed before the person's surrender, but shall not include an offence consisting, in whole, of acts or omissions of which the offence specified in the relevant arrest warrant consists in whole or in part.*
>
> *(2) Subject to this section, the High Court shall refuse to surrender a person under this Act if it is satisfied that –*
>
> > *(a) the law of the issuing state does not provide that a person who is surrendered to it pursuant to a relevant arrest warrant shall not be proceeded against, sentenced or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence , and*
> >
> > *(b) the person will be proceeded against, sentenced, or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence.*
>
> *(3) It shall be presumed that, in relation to a person to whom a relevant arrest warrant applies, the issuing state does not intend to –*
>
> > *(a) proceed against him or her,*
> >
> > *(b) sentence or detain him or her for a purpose referred to in subsection (2)(a), or*
> >
> > *(c) otherwise restrict him or her in his or her personal liberty, in respect of an offence, unless the contrary is proved.*

*(4) The surrender of a person under this Act shall not be refused under subsection (2) if –*

*(a) upon conviction in respect of the offence concerned he or she is not liable to a term of imprisonment or detention, or*

*(b) the High Court is satisfied that, where upon such conviction he or she is liable to a term of imprisonment or detention and such other penalty as does not involve a restriction of his or her personal liberty, the said other penalty only will be imposed if he or she is convicted of the offence.*

*(5) The surrender of a person under this Act shall not be refused under subsection (2) if it is intended to impose in the issuing state a penalty (other than a penalty consisting of a restriction of the person's liberty) including a financial penalty in respect of an offence of which the person claimed has been convicted, notwithstanding that where such person fails or refuses to pay the penalty concerned (or, in the case of a penalty that is not a financial penalty, fails or refuses to submit to any measure or comply with any requirements of which the penalty consists) he or she may, under the law of the issuing state be detained or otherwise deprived of his or her personal liberty.*

*(6) The surrender of a person under this Act shall not be refused under subsection (2) if the High Court –*

*(a) is satisfied that –*

*(i) proceedings will not be brought against the person in respect of an offence,*

*(ii) a penalty will not be imposed on the person in respect of an offence, and*

*(iii) The person will not be detained or otherwise restricted in his or her personal liberty for the purposes of an offence, without the issuing judicial authority first obtaining the consent thereto of the High Court,*

*(b) is satisfied that –*

*(i) the person consents to being surrendered under section 15,*

*(ii) at the time of so consenting he or she consented to being so proceeded against, to such a penalty being imposed, or being so detained or restricted in his or her personal liberty, and was aware of the consequences of his or her so consenting, and*

*(iii) the person obtained or was afforded the opportunity of obtaining, or being provided with, professional legal advice in relation to the matters to which this section relates,*

*(c) is satisfied that –*

*(i) such proceedings will not be brought, such penalty will not be imposed and the person will not be so detained or otherwise restricted in his or her personal liberty before the expiration of a period of 45 days from the date of the person's final discharge in respect of the offence for which he or she is surrendered, and*

*(ii) during that period he or she will be free to leave the issuing state, except where having been so discharged he or she leaves the issuing state and later returns thereto (whether during that period or later), or*

*(d) is satisfied that such proceedings will not be brought, such penalty will not be imposed and the person will not be so detained or restricted in his or her personal liberty unless –*

*(i) the person voluntarily gives his or her consent to being so proceeded against, such a penalty being imposed, or being so detained or restricted in his or her personal liberty, and is fully aware of the consequences of so doing.*

*(ii) that consent is given before the competent judicial authority in the issuing state, and*

*(iii) the person obtains or is afforded the opportunity of obtaining , or being provided with, professional legal advice in the issuing state in relation to the matters to which this section relates before he or she gives that consent.*

*(7) The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to –*

*(a) proceedings being brought against the person in the issuing state for an offence,*

*(b) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or*

*(c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence, upon receiving a request in writing from the issuing state in that behalf."*

*(8) The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part 3 be surrendered under this Act."*

As will be apparent, the Act of 2003 does not set out in detail the procedure to be adopted for requests for consent to further prosecution or sentence provided by section 22(7), merely that they be in writing. As Farrell and Hanrahan have noted;

*"In practice such requests have substantially followed the format of the European arrest warrant and the same degree of information has tended to be supplied. Such an approach makes sense when one considers that the criteria which the court will apply to such a request are in effect the same as apply to a request for surrender under s.16. In this regard s.22(8) imposes an almost identical obligation on the court to refuse to give consent as appears in s.16.*

*…All of the potential bars to surrender that would be available to a respondent on a surrender hearing will similarly be available for the purpose of resisting an application for consent."*[164]

As an application under s.22(7) will tend to only arise subsequent to surrender of the requested person practical difficulties can arise for their legal representatives in relation to notification of same to the respondent and the obtaining of instructions "*particularly where the respondent is in custody and there is also a language barrier. Neither the Act or the Framework Decision makes any particular provision for this notwithstanding the clear entitlement of the respondent to contest such an application.*"[165]

*Examples of difficulties in the application of the Rule of Specialty*

The case of *Minister for Justice, Equality and Law Reform v. Gotszlik* [166] concerned multiple European arrest warrants. The High Court refused surrender on the basis of its interpretation of s.22 of the European Arrest Warrant Act 2003, as substituted by s.80 of the Criminal Justice (Terrorist Offences) Act 2005. The High Court held that s.22 applied in such a manner as to prohibit

[164] Farrell and Hanrahan, "*The European Arrest Warrant in Ireland*", (Claus Press, 2011) p. 213.
[165] Farrell and Hanrahan, "*The European Arrest Warrant in Ireland*", (Claus Press, 2011) p. 213.
[166] *Minister for Justice, Equality and Law Reform v. Gotszlik* [2009] 3 IR 390.

surrender where two warrants were received from the same issuing state on the basis that surrender in respect of one would inevitably lead to a situation whereby the respondent would be prosecuted for offences not referred to in that warrant, namely the offences referred to in the other warrant.

In overturning the decision of the High Court, Denham J. in the Supreme Court held;

> *"Bearing in mind the words of section 22, and taking a purposive interpretation, noting especially the qualifying words "except where the context otherwise requires", considering the Framework Decision which could not be construed as requiring all offences to be on a single warrant, and the European principles of law enunciated in Pupino, I am satisfied that a court may order the surrender of a person on more than one European arrest warrant. Thus, as existed in the High Court in this case, the respondent may be ordered to be surrendered on two warrants. Such an approach preserves the rule of specialty and is consistent with the terms of section 22 and with the purpose of the Framework Decision."*

In the *Minister for Justice, Equality and Law Reform v Renner-Dillon* [167] the respondent was the subject of a European arrest warrant which was executed by the High Court for the offence of rape in 2002. He was subsequently convicted of the offence in 2008. He had been previously acquitted of a similar offence in 1982. However forensic samples taken at the time were re-examined in 2005-2006 and in consequence the prosecuting authorities decided to seek to avail of a statutory entitlement to have the appellant's acquittal quashed and a re-trial ordered. Peart J. in the High Court gave consent pursuant to s.22(7) aforesaid to him being proceeded against for the offence committed in 1982. In relation to that consent the Supreme Court had to determine whether an order of acquittal is a final judgment within the meaning of s.41 of the European arrest warrant. Finnegan J. held;

> *"From the judgment in Mantello [168] it is clear that "finally judged" in the Framework Decision has an autonomous meaning in the law of the European Union. Where under the law of the issuing Member State a judgment, in this case a judgment of acquittal, does not definitively bar further prosecution or as stated in Mantello 'constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person', then that person has not been finally judged. A judgment which does not definitively bar further prosecution does not constitute a ground for mandatory non-execution of a European arrest warrant."*

In *Minister for Justice, Equality and Law Reform v. Dundon* [169] the Supreme Court considered the decision of the High Court which had ordered the surrender of the appellant to authorised officers in England in order that he might be prosecuted for the offence of murder. Undertakings for the purposes of s.22 (1) (b) and s.24 of the Act of 2003 were provided to the High Court judge, in his capacity as executing judicial authority, by the Parliamentary Under Secretary of State, being the competent authority under section 98 of the UK's Extradition Act 2003, and the Director of Public Prosecutions, as Head of the Crown Prosecution Service of England and Wales. The requested person submitted that the said undertakings ought not to be relied upon as such undertakings required to be given by the issuing judicial authority personally and accordingly the undertakings provided were not given in accordance with s. 22(1) and 24(1) of the Act of 2003. The High Court rejected this argument, and the respondent appealed.

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[167] *Minister for Justice, Equality and Law Reform v. Renner-Dillon* [2011] IESC 5.
[168] *Mantello* Case C.261/09.
[169] *Minister for Justice, Equality and Law Reform v. Dundon* [2005] IESC 13.

Denham J, in giving judgment for the Supreme Court, observed:

> *"I believe that a literal approach to the provisions of s.22 and s.24 gives rise to an absurdity and that the court should apply a purposive interpretation to these sections. In this regard I accept the submissions of counsel for the Minister and I also have regard to cases applying such a rule such as Director of Public Prosecutions (Ivers) v. Murphy [1999] 1 I.R. 98. In applying such an approach I believe that this Court must act upon the undertakings furnished by the issuing judicial authority which have been received in turn from the Director of Public Prosecutions and from the Parliamentary Under Secretary of State. I am also satisfied, having regard to the terms of the Framework Decision itself and in particular Article 28 para 1 thereof, that if this Court is to decide on the surrender of the respondent that it is entitled in its decision to indicate that no consent for the surrender of the respondent to a Member State other than the executing Member State for an offence committed prior to his or her surrender is given. I am further more satisfied that having regard to the provisions of Article 27 that it is clear that in the instant case the respondent may not be prosecuted, sentenced or otherwise deprived of his or her liberty of an offence committed prior to his or her surrender other than for which he is being surrendered. In light of that fact no question arises of this Court giving its consent otherwise. I also take the view that in light of the fact that it is proposed to proceed against the respondent for the offence of murder that this necessarily entails that in the context of the matter going to a jury that a verdict may be returned in relation to a lesser offence as indicated in the undertaking furnished by the Director of Public Prosecutions."*

In affirming the High Court's decision Denham J. went on to state:

> *"The ordinary meaning of the word 'give' was to hand over, to transfer, to deliver. The ordinary meaning of 'given' in the sections 22(1) and 24(1) did not require that the undertaking had to be made by the issuing judicial authority, or given personally, it simply had to be handed over or delivered by such authority. Consequently, the certificate in this case from the issuing judicial authority, with the attached undertakings from the two relevant authorities met the requirements under the Act of 2003."*

In *Minister for Justice and Equality v. Sliwa* [170], following being surrendered, the respondent objected to consent being given pursuant to s.22(7) of the 2003 Act to his further prosecution in respect of the complaints referred to in five petitions in Poland. In the appeal from the High Court he submitted that that Court was prohibited from giving consent pursuant to s.22(7) of the 2003 Act by virtue of ss.22(2) to (6) and a breach or a prospective breach of those provisions by Poland.

In upholding the decision of the High Court to grant consent the Court of Appeal stated*;*

> *"…the Oireachtas has made a clear distinction between the position of the person facing surrender on the one hand (s,22(2)) and the person already surrendered (s.(7)) on the other. The Oireachtas has accordingly elected to provide for prescriptive rules set out in s.22(2) in the case of the application of the rule of specialty to the position of the offender first awaiting surrender. These prescriptive rules have not been applied in the case of the person who has already been surrendered. The only prohibition against giving consent specified by the Oireachtas is that contained in s.22(8). There is, accordingly, simply no basis as a matter of statutory interpretation in seeking to apply the special rules in s.22(2) applicable to one situation (i.e., the person awaiting surrender) to another (i.e., the person who has already been surrendered).*

[170] *Minister for Justice and Equality v. Sliwa* [2016] IECA 130.

*In reaching this conclusion we have not overlooked the submission made on behalf of Mr. Silwa that in Strzelecki [171] Denham C.J. had said that a request for consent pursuant to s.22(7) "is in essence for consent for the surrender to cover the additional offences" and, accordingly, an application for consent should be treated as if it was a an application for surrender. In Strzelecki the Chief Justice was simply considering the inclusion of s.37 in the prohibition in s.22(8). She was not, however, addressing the separate question of the submission that an application post-surrender for consent to prosecution, conviction or execution of a custodial sentence should in all respects be treated as if it was an application for surrender."*

**Part 5: conclusions, opinions *et cetera***

66. *Do requests for supplementary information by the executing judicial authority have an impact on the trust which should exist between the cooperating judicial authorities?*

**Response:**

Yes, particularly if there is a failure by the issuing judicial authority to engage meaningfully with the request and to make every effort to assist. Somewhat less so, if the IJA is simply slow and there is some delay. Delay is regrettable, and efforts should be made to avoid it, but for the most part it does not *per se* undermine trust. Rather it is simply frustrating.

67. *What kind of questions should an executing judicial authority ask when requesting supplementary information?*

**Response:**

As can be seen from this respondent's replies to Parts 2, 3 and 4 of this questionnaire the circumstances that might precipitate a request for additional information are many, and they are highly variable. It very much depends on the nature of the objection to surrender being pursued, the domestic statutory framework, and the tests/standards set down in respect of issues by the CJEU e.g. the two stage test in *Aranyosi en Căldăraru*. It is therefore impossible to generalise.

In the case of Ireland, because of the Statement made at the time of the adoption of the Framework Decision that Ireland would not surrender a person solely for the purpose of investigation, an Irish executing judicial authority will wish to obtain evidence in prosecution cases that ensure decisions have been made in the issuing state both to charge the requested person and also to place him/her on trial.

[171] *Minister for Justice and Law Reform v. Strzelecki* [2015] IESC 15.

68. *Do executing judicial authorities occasionally ask too much supplementary information? If so, on what issues?*

**Response:**

I don't believe so. The executing judicial authority is best placed to know what he/she needs or may need. Executing judicial authorities should be trusted to only seek that which they actually need, or there is a reasonable probability that they may need. A single comprehensive request, anticipating potentially problematic issues that might, but which may not necessarily, require to be addressed is preferable to the possibility of having to revert to the issuing judicial authority several times and seeking information incrementally through successive requests. In the long run it is likely to be faster, and more efficient.

Information exchange should be a co-operative partnership. An issuing judicial authority should endeavour to anticipate, in so far as possible, the likely needs of the executing judicial authority and in that way try to keep requests for supplemental information to a minimum. Equally, the executing judicial authority who needs to request supplementary information should, as a matter of good practice, explain to an issuing judicial authority why the information sought is needed, if only so that the next time the IJA might volunteer it, or include it in the EAW, in anticipation of the EJA's needs.

69. *In your opinion, do issuing and executing judicial authorities adequately inform each other about the progress in answering a request for additional information in the issuing Member State and the progress in the proceedings in the executing Member State?*

**Response:**

Your respondent is not aware that progress is routinely reported. However, I consider that it would be a good idea if time limits were always specified, and that there should be a general obligation on an issuing judicial authority who anticipates difficulty in meeting that deadline to apprise the executing judicial authority of his/her difficulty, stage of progress, and the amount of further time, if any, required.

70. *In your opinion, would designating focal points for swift communications within the organisations of both issuing and executing judicial authorities enhance the quality of communications between issuing and executing judicial authorities?*

**Response:**

Yes, in my belief that would be a good idea, particularly where judicial authorities, whether issuing or executing, may be inexperienced. There are decided advantages in my belief in centralising the jurisdiction both to issue and to execute EAWs, not least of which is the development of a pool of experience amongst a cadre of judges who specialise in such cases and who are available to offer counsel to colleagues on a collegiate basis if consulted. Failing that, having focal points for swift communications within the organisations of both issuing and executing judicial authorities, whose staff are experienced and who may be consulted by judges who are non-specialists in EAW law but who may be required from time to time to act as IJA's or EJA's would definitely be of benefit.

71. *Are there Member States whose EAW's and/or whose decisions on the execution of EAW's are particularly problematic in your experience? if so, what are the problems that emerge?*

**Response:**

I do not believe that there is a systemic difficulty in that respect. However, cases from particular member states can sometimes represent a disproportionate number of overall problem cases. However, there may be many reasons for this, including case volume relativity, legal cultural difficulties, lack of judicial expertise, and the attitudes and personalities of individual judges. In the circumstances I consider it would not be appropriate to point a finger or to seek to nominate requests from any particular state or states as being particularly problematic. My strong sense is that many problems stem from judicial inexperience; or lack of commitment by individual judges to the ideals of mutual trust and confidence, and the imperative of affording mutual recognition to judicial decisions, including decisions to seek supplementary information, where at all possible.

72. *Do you have any suggestions to improve FD 2002/584/JHA. If so, which suggestions?*

**Response:**

This question largely involves issues of political policy which as a judge I would prefer not to express views on. However, I would put forward a small number of suggestions.

Firstly, while fully understanding the reasons for, and background to, why Ireland made its Statement in the lead up to the adoption of the Framework Decision that it would not surrender persons solely for investigation, the fact that the Framework Decision contains no such ground of refusal, either on a mandatory basis, or on an optional basis, persistently presents problems. Many issuing judicial authorities are unaware of the Irish Statement and are puzzled by it, particularly in circumstances where the EAW system was designed to eliminate the complexities caused under the old extradition system by reservations, declarations and opt outs. It would have been better in my view to incorporate an additional optional ground of refusal in the Framework Decision catering for what was a "deal-breaker" in the case of Ireland, alternatively not to permit Member States to incorporate additional grounds of refusal, such as Ireland's s.21A of the Act of 2003, in their transposing legislation. I suggest this, purely on the basis that these would have represented a cleaner technical solution, than that which was adopted. In doing so, I am not to be taken as expressing personal views one way or the other concerning the wisdom or propriety of the Irish Declaration and s.21A. These are political not legal questions and if I were to address them it would place me in an invidious position. The Irish judiciary have always maintained a policy of reticence with respect to potentially controversial issues of political policy, and it is not my intention to deviate from that.

My second suggestion, having regard to how EAW jurisprudence on fundamental rights issues has developed, is that it would have been better if the Framework Decision had addressed potential fundamental rights issues with greater clarity. I think it is regrettable that the only references to fundamental rights are in the recitals and that there is no substantive provision that engages directly with what has become a very substantial area of EAW law. Some individual states, such as Ireland , have specifically addressed fundamental rights in their transposing legislation (e.g., s.37 of the Act of 2003 in our case) but others have not. There is therefore a lack of uniformity of approach. Moreover, the fact that the possibility of refusing surrender on fundamental rights grounds is not provided for in the Framework Decision as either a mandatory or optional ground for refusal of surrender (indeed it is hard to see how it could be optional, given the values expressed in the recitals) is confusing for many and sub-optimal. That is not to suggest that the bar to be vaulted for non-surrender on fundamental rights grounds

should be low. Quite the contrary. However, the need to be able to refuse surrender on fundamental rights grounds in rare and egregious cases, and notwithstanding the worthy aspiration of mutual trust and confidence, is a reality that the current Framework Decision sidesteps.

I would also suggest that the 60 -90 day time limits need to be looked at as one size does not fit all cases. I think there should be a single time limit, say 60 days which should be mandatory rather than aspirational, but that it should not be triggered until there has been certification by the executing judicial authority that it has received any supplementary information it deems necessary to adjudicate on a surrender request.

**73**. *In particular:*

- *a) in your opinion, should one or more grounds for refusal and/or guarantees:*
    - *(i) be totally abolished or amended? If so, which ground(s) and/or guarantee(s) and why;*
    - *(ii) be introduced? If so, which ground(s) and/or guarantee(s) and why?*

**Response:**

In effect I have responded to this query in answering the last question. However, as your respondent is awaiting observations from a number of judicial colleagues who specialise in EAW work I may forward some supplementary observations for inclusion and consideration by the research analysis team if time constraints permit them to do so.

- *b) given that surrender proceedings are increasingly becoming more complex and protracted, what, in your opinion, is the effect on mutual trust*?

**Response:**

I don't believe mutual trust is impacted at the judicial level, i.e., EJA v IJA, because in general there is an understanding of the reasons for the increase in complexity and prolongation of proceedings. It is however essential that in dealings between judicial authorities there is a constant effort to explicate each sides respective needs and enhance trust and understanding.

It is more uncertain as to whether it will give rise to an adverse impact at a political level. However, it is clear from the Brexit situation that the EAW system, though capable of improvement in some respects, is highly valued. On leaving the EU the one part of EU membership that the UK did not want to relinquish was the possibility of continuing to participate in the EAW system, or at least to be able to participate thereafter in an analogous but parallel rendition system. The EAW system may not be perfect, but it works.

- *c) in your opinion, should the speciality rule be maintained, amended or abolished? Please explain.*

**Response:**
This is a question of political policy that it would be inappropriate for me as a judge to express a view on.

My reluctance to express a view on this is due to the fact that extradition policy has traditionally been a very politically sensitive issue in Ireland due to the Northern Ireland conflict. This was ameliorated somewhat post the Good Friday agreement, and the adoption of the European arrest warrant system. In a situation where we are still finding our way in terms of the Trade and Cooperation Agreement entered into between the EU and the United Kingdom, I am loath to express a view on this particular question. I have no difficulty discussing issues of law, but the potential abolition of the rule of specialty is not a matter of law but a question of policy.

Treading carefully, I think I can safely say this. There has been a long standing debate amongst international lawyers concerning whether the rule of specialty operates solely to protect the sovereignty and extradition process of the executing state; alternatively, confers rights upon the requested person; alternatively operates both to protect the process of the executing state and to confer rights upon the requested person. I personally am most sympathetic to the former view, namely that specialty is primarily a right of nations not of individuals, although I am aware that Article 13.1 of the Framework Decision speaks of a requested person's "entitlement to the 'specialty rule' ". Arguably, the need for a rule of specialty to protect the sovereignty and extradition process of the executing state is somewhat less pressing under the EAW system in circumstances where the process is no longer an inter-state one, but rather is an inter-judicial authority one, based upon mutual recognition of judicial decisions, and a high level of trust and confidence between participating member states. Nevertheless, there are challenges at present to the rule of law in the EU, and particularly with respect to the independence of the judiciary. Some might therefore suggest that trust and confidence is not perhaps at the level at which it should be. Accordingly, there is arguably still a residual need for the rule of specialty to protect the process of the executing state.

74. *What is your opinion on the usability of the HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRANT (COM(2017) 6389 final) for judicial practitioners? If, in your opinion, the Handbook does not live up to expectations, how could it be improved?*

**Response:**

It is a useful addition to the toolkit of any inexperienced judge or lawyer starting out on EAW work. It is usable as a reference work and clear in its exposition. However, it is not much used by experienced judicial or legal practitioners. It might be more readily used if it was constantly updated to incorporate accounts of how particular, and unanticipated, difficulties were resolved in practice

75. *Do the issuing and/or executing judicial authorities of your Member State use the Handbook in the performance of their duties? If not, why not?*

**Response:**

Infrequently. Once a judge has gained experience of EAW work, it is too generic to be useful as a daily reference work.

76. *a) What is your opinion on the relationship between the EIO and the ESO on the one hand and the EAW on the other, in particular with regard to the proportionality of a decision to issue a prosecution-EAW?*

**Response:**

In circumstances where Ireland has not opted in to the EIO and does not at present intend to do so, and in relation to the ESO, has not yet transposed FD 2008/909/JHA, Irish EAW practitioners have no experience of either measure, and your respondent is not therefore in a position to comment.

*b) What is your opinion on the relationship between FD 2008/909/JHA and the EAW, in particular with regard to the proportionality of a decision to issue an execution-EAW?*

**Response:**

In circumstances where Ireland has not yet transposed FD 2008/909/JHA, Irish EAW practitioners have no experience of that measure, and your respondent is not therefore in a position to comment.

*c) Should the FD's and/or the directive establishing the instruments concerning the EAW, the transfer of the execution of custodial sentences, the EIO and the ESO be amended in this regard and, if so, in what way?*

**Response:**

In circumstances where Ireland has not opted in to the EIO and does not at present intend to do so, and in relation to the ESO has not yet transposed FD 2008/909/JHA, Irish EAW practitioners have no experience of either measure, and your respondent is not therefore in a position to comment.

*77. What relevance, if any, do your answers to Parts 2-4 have for other framework decisions or directives concerning mutual recognition of decisions in criminal matters?*

**Response:**

I have no observations.

78. *What consequences, if any, do measures to combat COVID-19 have on the operation of the EAW-system?*

During Covid 19 lockdowns most EAW hearings before the Irish Courts were conducted by video-link technology. In most cases this proved an effective means of transacting business. There were difficulties however in making arrangements for the physical transfer from Ireland as executing state to various issuing states of prisoners in respect of whom surrender orders were made, due to travel restrictions and reduced transport capacity by land sea and air. In many instances this necessitated the postponement of surrenders on force majeur grounds.

In the long term, I don't believe it will have any. Proceeding on the basis of mutual trust and confidence Member States can be trusted to put in place measures to ensure that prisoners are at no more risk than persons in the general population. Short term, however, pending implementation of population wide vaccination of those who are prepared to accept it, and the development of herd immunity, Covid 19 risks may have to be taken into account in proportionality assessments. In addition, the logistics of effecting surrenders have been impacted by travel restrictions. However, the existing Framework Decision, and in particular Article 23 thereof as clarified in Case No C-640/15 *Vilkas*, a reference by the Irish Court of Appeal, has sufficient in-built flexibility to ensure that these logistical difficulties can be accommodated.