



**COUNCIL OF
THE EUROPEAN UNION**

Brussels 2 September 2011

13691/11

**CRIMORG 124
COPEN 200
EJN 100
EUROJUST 122**

NOTE

from:	the Polish delegation
to:	delegations
No. prev. doc.:	14240/2/07/ CRIMORG 158 COPEN 144 EJN 29 EUROJUST 55 REV 2 8302/4/09 CRIMORG 55 COPEN 68 EJN 24 EUROJUST 20 REV 4
Subject:	Evaluation Report on the Fourth Round of Mutual Evaluations "Practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" -Report on Poland and Final report

Poland's reply to recommendations:

I. Report on Poland

Recommendation 1 – To consider solutions, which may for example include the setting up of a national platform involving all national authorities involved in EAW procedures, to increase standardisation of procedures and the search for common good practices.

In order to increase standardisation of procedures and establish common good practices all prosecutorial units which deal with the EAW requests receive regularly instructions from the supreme prosecutor's office (since 31 March 2010 – Prosecutor's General Office).

Recommendation 2 - To update the guidelines of the National Prosecutor of 2005, based on the experience gained during the last two years, and to ensure that they are well disseminated, including among judges.

In 2009 the National Prosecutor's Office published a joint publication entitled "Rules on mutual legal cooperation in criminal matters during the preparatory proceedings", concerning among others the specific issues of the EAW procedure. It is regularly updated through instructions sent to the appellate prosecutor's offices.

Recommendation 3 - During training sessions, to put specific emphasis on the use of the EAW form and on the use of the SIS.

Issues concerning the use of the EAW form and the SIS are regularly discussed with prosecutors and judges during the training sessions. Moreover, as a result of the meeting held between the representatives of the Ministry of Justice and Police Headquarters a letter with guidelines on how to use SIS was sent by the MoJ to appellate and circuit courts.

Recommendation 4 - To take appropriate measures to be able to provide detailed statistics on EAW procedures.

PL has provided statistics for 2007-2010.

Recommendation 5 - To amend the Constitution and the legislation regarding the surrender of Polish nationals in order to implement the partial abolition of double criminality check and to make it optional for the Courts to refuse the execution of the EAW on the basis of territoriality.

Recommendation 6 - To amend the Constitution and the legislation in order to abolish, in EAW procedures, the exception for political offences.

There has been no amendments introduced into the Constitution since the time of the adoption of recommendation. It should be stressed, however, that the provisions establishing grounds for refusal concerning double criminality have only marginal significance. Moreover, there has not been any example of the use of the ground relating to political offences. As regards territoriality it should be emphasised that although a Polish national will not be surrendered when an offence is committed in Poland, he/she will not avoid criminal liability in line with national jurisdictional principles.

Recommendation 7 – To finalise as soon as possible the legislative procedure already launched (draft bill already proposed in Parliament) and to adopt particularly the amendments relating to :

- the possibility for the competent Court to issue an EAW on its own initiative in trial and post-trial cases
- the deletion of the requirement of indications that the person is on the territory of an EU State
- the extension of the possibility to issue an EAW in cases where the Court has jurisdiction over the case even though the offence was not committed in Poland.

Appropriate amendments to art. 607a of CPC were adopted on 5 November 2009 and came into force on 8 June 2010. According to these amendments:

- the circuit courts have the possibility to issue EAW ex officio or upon the request of the district court in relation to the judicial and executive stage of proceedings;
- the provision which stipulates the competence for issuing EAW does not provide any more for the requirement of indication that the person is on EU territory. It was modified so as to give more flexibility in that respect;
- there is possibility to issue the EAW if the offence, which falls within the jurisdiction of Polish courts, not only on the Polish territory but also outside.

Recommendation 8 - To reflect at national level on the way to ensure that EAWs are issued only when the seriousness of the offence justifies the co-operation measures which the execution of the EAW will require.

The recommendation was discussed at length within the Ministry of Justice as well as with the Prosecutor's General Office.

The principle of proportionality was not included in the text of the framework decision, hence it cannot be viewed in the context of the proper implementation.

Statistical data on the application of the EAW in Poland in recent years clearly shows that there has already been a considerable evolution in this field. This is proved by a remarkable increase in the ratio of EAWs executed by Polish authorities to EAWs issued. Moreover, the number of EAWs issued has started to drop. Recent statistics for 2010 confirm this trend listing a nearly 25% drop (3753 EAWs issued in 2010 compared to 4844 in 2009 and 4829 in 2008).

There are several reasons justifying the great number of Polish EAWs like significant emigration of Poles abroad, legality principle, difficulties in assessment of the severity of a case.

It is worth noting that a high number of EAWs issued does not in itself mean that they were used disproportionately in relation to less serious offences. It must be appreciated that the relatively high number of EAWs issued is due to the fact that Poland is a populous state which has additionally experienced a massive wave of emigration in the last several years. According to data provided by Eurostat, 1,5 million Polish citizens had permanent residence in other EU Member States in 2009 alone.

Additionally, according to the principle of legality applicable in Poland, whenever an offence is committed, effective steps should be undertaken to prosecute it. In this context the use of the EAW does not allow offenders who have fled abroad to escape justice and by that enables all suspected and convicted persons to be treated equally, irrespective of which Member State they are in.

Moreover, certain misinterpretation of the actions of Polish courts is observed. A number of EAW is issued for offences for which a suspended sentence has been previously passed and some obligations imposed upon the convicted person (such as a compensation for a victim). However, an infringement of such an obligation is considered a breach of the probation conditions and therefore of the legal order and requires enforcement action from the authorities. Secondly, contrary to certain opinions, Polish authorities may not issue an EAW for any slight breach of the law, such as a minor theft. A theft of an object with value below a set limit is considered a petty offence, where Polish law does not allow for the issue of an EAW. Additionally, issuing EAW is preceded by issuing the order for preventive detention. The use of such a measure is subject to a number of conditions (such as the expected punishment or the suspected or convicted person being on the run) and considered a last resort – it can only be employed if no other preventive measure would be effective.

Furthermore, some practical steps have been taken to improve the practice of application of EAW. The new handbook on how to issue EAW which expressly addresses the question of proportionality is available on the Internet site of the Ministry of Justice and will be promoted among judicial authorities. Moreover, the Ministry of Justice issued a note to courts stressing that before resorting to an EAW, measures relating to legal assistance in criminal matters and mutual recognition of judgments should be employed. EAW as a final measure should only be exercised if other means have proven to be inadequate.

Recommendation 9 - To consider solutions to ensure, before the issuing of the EAW, a systematic verification of the existence of other EAWs or criminal proceeding against the same person.

The question of verification of the existence of EAW before issuing another one was thoroughly considered. Since then such verification has been carried out by prosecutorial units due to instructions from the supreme prosecutor's office addressed to them.

Moreover, amendment was introduced to the Regulation on the rules of procedure of common courts and came into force on 31 March 2010. According to § 325 thereof the circuit court when issuing EAW should aim to include all the offences (prosecuted even under different criminal proceedings) committed by the person concerned.

Recommendation 10 – To reflect upon the possibilities to create direct links between the two EAW registers kept by the Ministry of Justice and by the National Prosecutor's Office or to merge these registers.

Due to the establishment of the General Prosecutor's Office outside of the structure of the Ministry of Justice, currently there is no possibility to merge these registers. Moreover, unlike the MoJ register the prosecutor's office register does not include the comprehensive data on EAW.

Recommendation 11 – To consider using the assistance of the College of Eurojust in cases where repeated difficulties are experienced with a specific Member State and where the practice in that Member State seems to be in contradiction with the Framework Decision on the EAW.

Appeal and circuit prosecutors, if consider it necessary, are entitled to undertake direct contacts with Eurojust on the basis of § 316 of Regulation on the rules of procedure of prosecutor's offices. In 2010 there were 80 cases reported which were examined in cooperation with Eurojust.

Recommendation 12 - To rectify the EJA Atlas with regard to the designation of the authorities competent to receive an EAW.

Data in the EJA Atlas has been modified to include recent structural changes. Further works are under way to make a present distinction between the competent receiving and executing authorities EAW more clear.

Recommendation 13 - To initiate work in order to allow the reception of original EAWs in electronic format.

Art. 10.4 of the FD on EAW provides for the possibility to forward EAW by any secure means capable of producing written records under conditions allowing the executing Member State to establish its authenticity. Its purpose is to facilitate and accelerate the EAW procedure. Although provisions of Code of Criminal Procedure does not stipulate for such a possibility in relation to the execution of EAW (Poland did not implement it since the execution of EAW may influence the basic freedoms of the persons concerned and thus there should be no doubts as regards the reliability of EAW), it should be stressed that Polish courts can decide on provisional detention upon the information on a judgment or other decision depriving the liberty of the person concerned. This solution gives more time for the courts of other Member States to issue and send original EAWs in the standard way. The new provision regulating this situation came into force on 8 June 2010.

Recommendation 14 - To ensure that the National Prosecutor's Office and, at circuit level, prosecutors with adequate experience in EAW procedures are available 7 days a week.

The prosecutors are already available 7 days a week at circuit prosecutor's offices.

Recommendation 15 – To accelerate the preparations and internal discussions related to the use of the SIS, especially regarding the judicial control on flagging (see 7.4.1.4.).

As a result of internal discussions amendments were introduced to the Regulation on the rules of procedure of the common prosecutor's office (§ 326) as well as to the Regulation on the rules of procedure of common courts (§ 328a). They came in force in March 2010.

According to § 326 prosecutor dealing with mutual assistance in criminal matters informs promptly SIRENE Office on the necessity of flagging whenever conditions referred to in art. 604 § 1 point 1 or art. 607p § 1 point 4 or § 2 CCP appears. Those conditions includes selected grounds for refusal of extradition and surrender.

According to § 328a after the decision to reject the surrender has been passed the court informs the SIRENE Office about the necessity of flagging. When the decision is overruled the court informs SIRENE to remove the flagging.

Recommendation 16 – To consider amending the legislation to ensure that, in all cases, the person arrested on the basis of an EAW has the right to see a defence counsel during the period of provisional arrest.

There is no need to amend the legislation since based on the general rules of the CCP, that apply to EAW procedure as well, the person arrested on the basis of the EAW has the right to legal aid and legal counsel. Moreover there is no legal base according to which the prosecutor could refuse the presence of a legal counsel during the hearing of the arrested person.

Recommendation 17 – To amend the legislation in order to provide explicitly that the original EAW and its official translation are not necessary for the decision of the Court on temporary detention and to set longer time limits for the production of such material for the decision on the execution of the EAW.

Relevant amendments were introduced to the CCP and came into force on 8 June 2010. They give the possibility for Polish courts to decide on temporary detention before the EAW is received and to provide courts of other Member States with more time for issuing EAW and accompanying documents. According to those amendments: the circuit court on the request of the prosecutor can apply provisional detention on the basis of information that in the issuing State there is a final and valid custodial sentence or a detention order (art. 607k § 3 of CPC). Moreover, the court may apply provisional arrest up to 7 days before receiving the EAW, if the issuing authority requests so and ensures that there is a final and valid custodial sentence or a detention order (art. 607k § 3a of CPC).

Recommendation 18 - To consider amending the legislation in order to accept EAWs in languages other than Polish, including, if possible, English.

The possibility to amend legislation in order to accept EAW also in other languages was thoroughly considered. However, since this issue has a horizontal character and any amendment in this field would have also an implication on basic rules concerning procedure before the Polish authorities, decision was to concentrate on solutions that could accelerate EAW procedure. One of them was the amendment described in recommendation 17. According to it courts of other Member States have more time to provide Polish courts with EAW - translated into Polish - while the person sought can be already under temporary detention.

Recommendation 19 – To consider amending the legislation and increasing the awareness among judges regarding the partial abolition of the double criminality requirement.

From the time of the implementation of the FD on EAW no problems have appeared in the application of provision on exclusion of examination of double criminality in respect of the list of 32 offences and non-nationals (art. 607w CCP). There have been no cases of refusal to surrender non-nationals based on the lack of double criminality for offences enumerated in the list. Therefore, amendment of Polish legislation in this regard was considered unnecessary.

Recommendation 20 - To consider amending the legislation in order to make it (at least) possible to execute the EAW with regard to accessory offences.

Unlike the Convention on extradition of 1957 that provides for the possibility to extradite for accessory offences, the FD on EAW does not stipulate such a provision. In order to make the execution of EAW with regard to accessory offences effective, the amendment should be adopted in all Member States. To reach this aim it would be advisable that appropriate legal base be introduced to the FD on EAW. Therefore, it was decided to postpone any amendments in that regard.

Recommendation 21 - To amend the legislation regarding the time limit for the whole procedure leading to the decision on the execution of the EAW and, in the meantime, to interpret the current legislation as providing that the 60 days time limit covers both the first instance procedure and the appeal procedure.

The amendment concerning time limits was introduced and came into force on 8 June 2010. According to amended legislation the court decides on the surrender within 40 days from the date the prosecuted person has been arrested. If the prosecuted person has agreed to his/her surrender, this time limit is 3 days and it starts from the date on which the statement has been made. Moreover, final decision on surrender shall be made in 60 days from the date the prosecuted person has been arrested or 10 days from the date when the person has agreed to surrender (art. 607m § 1 and § 1a of CCP).

Recommendation 22 - To ensure that all breaches of time limits are notified to Eurojust and to clarify, for example through training efforts, the division of tasks regarding this notification to Eurojust.

Both the courts and the prosecutors are obliged to notify the Ministry of Justice or the General Prosecutors' Office respectively on the breaches of time limits provided for in the FD on EAW (§ 308 – Regulation on the rules of procedure of common prosecutor's offices; § 329 – Regulation on the rules of the procedure of common courts).

Only the information gathered by the Ministry of Justice in this regard is forwarded directly to Eurojust. Such an obligation to inform Eurojust stems from the Regulation on the rules of procedure of the Ministry of Justice (§ 17.4).

Recommendation 23 - To ensure that the information provided to the executing State at the time of the physical surrender of the person includes information on the duration of the detention.

The scope of information to be forwarded to the issuing state connected with the execution of EAW is addressed during the training sessions for judges.

II. Final report

Recommendation 1: The Council calls on those Member States that have not done so to consider restricting the mandate of non-judicial authorities, or to put equivalent measures in place so as to ensure compliance with the Framework Decision with regard to the powers of judicial authorities.

In Poland judicial authorities' competence is within the courts and prosecutors' offices in accordance with the FD on EAW. The Ministry of Justice plays only administrative role aiming at facilitating the EAW transfer as well as controlling time limits and collecting statistical data.

Recommendation 2: The Council urges Member States to analyse their practices and, where necessary, to take measures to promote direct communication between national judicial authorities dealing with EAW cases and their counterparts abroad.

The cooperation between courts and prosecutors' offices in Poland and other Member States is based on the principle of direct communication. The Ministry of Justice, as the central authority, facilitates this cooperation only occasionally.

Recommendation 3: The Council calls upon Member States to provide, or continue to provide, judges, prosecutors and judicial staff with appropriate training on EAW and foreign languages (in particular those most useful for making direct contact with competent authorities in other Member States), including meetings and joint activities with authorities from other Member States involved in EAW cases, and to explore ways to promote training on EAW matters for defence lawyers. Given the fact that the defence lawyers' organisation and training, in many Member States, is outside the State administration, methods to promote this training should be explored. This topic is in general one that the European Judicial Training Network could examine. Financial support should be provided for that kind of activities under EU JHA financial programmes.

Intensive training sessions organized by the National School for Courts and Prosecutors' Offices are addressed to judges and prosecutors on EAW procedure. By the end of 2011 approximately 550 judges and prosecutors will have been trained on different aspects of EAW procedure. Apart from that the National School in cooperation with Warsaw University organizes postgraduate studies (for judges and prosecutors) within which great number of issues concerning EAW are touched upon. Moreover, judges and prosecutors participate in international and regional conferences devoted to that subject. It is worth noting that on 5-6 September 2011 a conference will be held in Budapest for judges and prosecutors from Czech Republic, Hungary, Slovakia and Poland.

Recommendation 4: The Council calls upon Member States and the EJM to explore ways of optimising the use of the support tools available to facilitate the application of the EAW (e.g. by making the EAW Atlas, part of the EJM website, available in all EU official languages). Member States, EJM and Eurojust are called upon to take measures to raise awareness of the role of these latter so that practitioners make full use of specific capacities of each of them when processing EAWs.

EAW Atlas was built on the EJM website. It includes all the necessary information available in all EU official languages (such as official notifications, practical information on national EAW procedures, warrants available in electronic format). In December 2009 detailed information about the functioning of EJM was provided to the appellate prosecutor's offices. Moreover, during the training sessions, updated information on EAW Atlas is regularly forwarded to participants.

Recommendation 5: The Council encourages Member States that have not yet done so to consider adopting a flexible approach to language requirements in the light of Article 8(2) of the Framework Decision, so that EAWs and additional information in languages other than the Member State's own official language(s) are accepted.

See recommendation 18 above.

Recommendation 6: The Council calls on Member States that have not yet done so to reconsider the practice of requiring the original EAW and to accept the validity at all the stages of the procedure of EAWs transmitted by any secure means capable of producing written records and allowing their authenticity to be established.

See recommendation 13 above.

Recommendation 8: In view of the fact that the interpretation of some of the relevant provisions is currently pending before the European Court of Justice, the Council refrains from commenting on these issues. The Council, however, calls upon Member States to review their legislation in order to ensure that only grounds for non-execution under the Framework Decision may be used as a basis for refusal to surrender.

Grounds for refusal were implemented in art. 607p, art. 607r, art. 607s CCP. Those grounds include also fundamental rights as referred to in art. 1 (3) and the relevant motive in the preamble of the FD on EAW, political offences committed with violence, double criminality requirement as regards nationals. Moreover some of the grounds provided for in were made mandatory.

In practice, only in few cases additional grounds for refusal were invoked by Polish courts within the EAW procedure.

As regards fundamental rights, it should be stressed that although they are not explicitly envisaged to be one of the ground for refusal, they can be regarded as such ground in line with the spirit and aim of the FD on EAW. According to preamble nothing in FD on EAW 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 these reasons. In this view introduction of the new ground for refusal does not seem to be in breach of the FD.

As regards optional grounds for refusal it should be emphasised that their facultative nature gives discretion either to the government (as regards the way of their implementation) or to the courts (as regards their application). In Wolzenburg case (C-123/08) ECJ seemed to accept the situation in which Member State implemented the ground for refusal referred to in art. 4 (6) as a mandatory one in case of nationals and optional one hedged with some conditions in case of non-nationals (§ 61, 62). Therefore, it does not seem necessary to amend the legislation by changing the character of the grounds for refusal in accordance with the literal wording of the FD.

Recommendation 11: The Council encourages Member States to analyse their practice with a view to identifying means of resolving problems associated with the practical application of the speciality rule. The coordination within Member States should be improved. Consideration should also be given to the possibility of making the notifications envisaged in Article 27(1) and 28(1) of the Framework Decision.

Speciality rule was implemented in art. 607I § 2 CCP. Poland did not make any notification in accordance with art. 27 (1) nor 28 (1) of the FD on EAW. Since the application of speciality rule was envisaged to be dealt with on EU level (see recommendation 12 of the Final report on the fourth round of mutual evaluation concerning the EAW and surrender procedures among the Member States of the UE) it seems advisable, firstly, to work on it further on that level.

Recommendation 13: The Council recommends Member States to apply the practice of flagging EAW-based SIS alerts according to the criteria provided in the Decision on SIS II.

See recommendation 15 above.

Recommendation 16: The Council calls on Member States to check their practice when acting as executing Member State and, where necessary, to take measures to ensure that the issuing authority is provided with timely and accurate information on the progress of the EAW procedure, in particular on the final - enforceable - decision, as well as on the period of detention of the requested person, bearing in mind that the length of the EAW procedure should not be extended. To that end, it agrees that the possibility of developing a standard form for providing information be examined by its preparatory bodies.

See recommendation 23 above.

Recommendation 17: The Council calls upon Member States, wherever possible, follow the rules in the Framework Decision as regards the information communicated by the issuing Member State on the EAW form and avoid requests for additional information from the issuing Member State for which there is no legal basis in any provision of the Framework Decision and which run counter to the principle of mutual recognition.

Polish courts require only this information which is necessary to proceed with EAW. There is no legal basis for demanding more information than it is envisaged in FD on EAW. Moreover, if the information is not provided within the given time limit, the court examines EAW on the basis of the information received so far.

Recommendation 18: The Council encourages those Member States that have not yet done so to set up appropriate mechanisms for gathering, processing and circulating information on EAW cases and other items relevant to them, such as investigations pending and arrest warrants already issued.

There exists electronic data bases in courts and prosecutors' offices where information about the stages of proceedings are put. This bases allow for collecting statistical data on EAW.
