



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 9 September 2011

13743/11

**CRIMORG 126
COPEN 204
EJN 103
EUROJUST 125**

NOTE

from:	Czech delegation
to:	Delegations
No. prev. doc.:	15691/2/08 REV 2 CRIMORG 194 COPEN 222 EJN 71 EUROJUST 95
Subject:	Evaluation report on the fourth round of mutual evaluations "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" - Follow-up to Report on Czech Republic

8. RECOMMENDATIONS

8.1. RECOMMENDATIONS TO THE CZECH REPUBLIC

GENERAL

Recommendation 1: Consider making a clear distinction in the domestic legislation between the provisions applicable to extradition and those applicable to surrender on the basis of an EAW (see 7.1.2).

The evaluation team of experts pointed out that although extradition and EAW procedures are regulated separately in the Code of Criminal Procedure, general provisions governing the former apply partly to the latter and provisions on extradition apply in a subsidiary manner to EAW

procedures. In the evaluation team's opinion, to legislate in this way not only weakens the impression that these two systems are radically different from each other, but may also lead to misunderstandings as to the applicability to the EAW of certain provisions rooted in the old extradition system. Furthermore, in this situation, the judicial authorities may automatically fall back on extradition legislation and case-law when provisions relating to the EAW are not completely clear to them, whereas in such a situation the development of specific case-law or even amending the legislation would help to find a solution more in line with the Framework Decision.

Although no cases have been noted in practice where public prosecutors or courts would be unsure of the difference between extradition and surrender (EAW) procedure (the provisions of the Criminal Code of Procedure (CCP) related to extradition procedure are followed within the surrender (EAW) procedure without any impact on the EAW procedure), the new Act on International Judicial Cooperation in Criminal Matters (AIJCCM), which is currently being prepared, will introduce separate regulation of these two procedures taking into account their specific features. Draft of the AIJCCM deals with the surrender (EAW) procedure separately and no longer applies procedural rules for extradition to EAW proceedings in general.

Recommendation 2: Adopt measures to upgrade the linguistic capacities of judges and prosecutors, as a means to enhance direct contacts with their foreign counterparts (see 7.1.10).

The extensive training programme on the EAW offered to judges and prosecutors in the Czech Republic was commended during the evaluation mission. However, the expert team considered that the linguistic capacities of judges and prosecutors should be improved as a means to enhance direct contacts with foreign colleagues.

CZ is aware of the fact that the linguistic capacities of judges, public prosecutors and other employees of the judicial authorities are absolutely vital with regard to the current functioning of the judiciary, with a constantly increasing number of cases with a foreign aspect.

The Judicial Academy, which provides educational activities for the staff from the competent branch of the Ministry of Justice, recently intensified its efforts in the organisation of regular language courses for judges, public prosecutors, trainees judges and trainee public prosecutors. The courses are aimed at English, French and German language skills and terminology within the field of judicial cooperation, including EAW procedures. The language courses are accompanied by e-

learning training. The judges and public prosecutors take part in exchange training schemes and specialised courses within EU countries in order to gain new expertise and language experiences. The Judicial Academy is one of the partners and coordinators within the European linguistic project organised by the European Network for Education and Training. This project focuses on terminology in the area of judicial cooperation in criminal matters.

AS ISSUING MEMBER STATE

Recommendation 3: Consider amending the legislation with a view to simplifying the procedure for issuing an EAW with regard to the requirement of personally serving the indictment to the person concerned beforehand (see 7.2.1.1).

CZ was criticised for the fact that the process leading to the issue of an EAW appears to be particularly complicated and that an EAW may not be issued for the arrest of a suspect. Initiation of criminal prosecution does not suffice either. An EAW can only be obtained for a person who has the legal status of "accused" (meaning that the person to whom the decision on the initiation of criminal prosecution relates has been personally notified) or has been legally declared as "fugitive" after all legal means to summon him have been exhausted. CZ was criticised for the fact that this may cause unnecessary delays, especially in cases where the individual cannot be found immediately after the crime. In purely domestic cases such a risk is diminished by the possibility of apprehending the person simultaneously with the delivery of the notification based on the "preliminary consent to the arrest" by the public prosecutor; no similar possibility in an EAW case exists.

The AIJCCM as currently drafted implements this recommendation in its Section 193(1), which provides that the EAW may be issued not only on the basis of the national arrest warrant or of an order to commit a convict to prison or to a special detention facility, but also on the basis of a warrant of apprehension of a suspect. The EAW may be issued immediately without undue delay. It focuses on cases where an offender leaves the territory of the Czech Republic after committing a crime and for this reason the resolution to commence criminal prosecution cannot be served on him. With respect to the draft AIJCCM an amendment of the current Code of Criminal procedure – Section 77a – is currently being proposed in order to enable the issue of a warrant of apprehension of a suspect.

CZ was also reproached for the fact that as concerns the material grounds for issuing an EAW in relation to persons whose whereabouts are not known, it is the practice of the Czech judicial authorities not to issue an EAW unless there are relevant indications that the individual is located in another Member State. This results in a situation that ignores to a great extent the reality of open borders within the European Union, especially after 21 December 2007, when the Czech Republic joined the Schengen area. The expert team expressed the opinion that all these circumstances put together may jeopardise the efficiency of the EAW and that this may have an impact on other Member States.

This part of the recommendation is also implemented by Section 193(1) of the draft AIJCCM. The presiding judge issues an EAW without undue delay in cases where a warrant of apprehension, an arrest warrant or an order to commit a convict to prison or to a special detention facility has been issued, unless the requested person has not been detained, arrested or committed to a prison or special detention facility within the time limit of 6 months from the enactment of such a measure.

The EAW shall be issued in pre-trial proceedings by a judge upon application by a public prosecutor; a public prosecutor lodges an application without undue delay once the 6-month time limit expires. Should it be reasonably supposed that the requested person is staying in another Member State, the EAW may be issued even before the expiry of the time limit of 6 months.

Recommendation 4: Take the necessary measures (e.g. by setting up appropriate databases) to allow the Czech authorities to check the conditions of the surrender, irrespective of whether the person has been surrendered for prosecution or for conviction purposes, with a view to respecting the speciality rule (see 7.2.1.3).

CZ was criticised in connection with the issue of the exchange of information between the authorities acting in criminal procedures. The expert team was informed that, in conviction cases, the prison authorities do not keep specific records on the fact of the surrender indicating that the person cannot be prosecuted or sentenced for acts other than those for which he was surrendered. In this situation, there is a risk that the speciality rule may be violated when other authorities involved in criminal proceedings do not have such information to hand.

Although the officials interviewed explained that this issue is addressed in training activities, with a view to promoting the practice amongst police staff and public prosecutors of checking for a previous surrender with the SIRENE office and the Ministry of Justice, it seems that in such cases the operation of the speciality rule in practice relies solely on the fact that the surrendered person raises this question.

This recommendation has been partially implemented within the internal rules of the Prison Service¹. The Prison Service keeps a record of persons surrendered for the execution of a term of imprisonment (custody) from another Member State to the Czech Republic; this information is part of the personal file of the surrendered person. The fact that the person was surrendered from another State to the Czech Republic in order to serve a sentence (custody) there, is one of the facts which the Prison Service administration has a duty to notify to the authorities concerned in criminal proceedings – the public prosecution offices, the courts and the police (in the pre-trial stage of proceedings).

AS EXECUTING MEMBER STATE

Recommendation 5: Amend the implementing legislation so that the condition of reciprocity does not apply to surrender of Czech nationals (see 7.3.1.1).

CZ was criticised for the fact that under the Czech legal regulations additional restrictions apply under Czech law that are not at all in line with the Framework Decision, namely that Czech nationals will not be surrendered for offences committed before 1 November 2004, and that surrender of Czech nationals is subject to the condition of reciprocity. In the view of the expert team these restrictions are contrary to the Framework Decision.

The expert team within the working group which is in charge of preparation of a new AIJCCM consistently considers the principle of reciprocity to be one of the basic principles of international cooperation and its application as a necessary result thereof. The FD on the EAW is based on

¹ Guidance notes of the Director of Administrative Department No. 10/2008, laying down detailed activities resulting from the Regulation of the General Director of the Prison Service of the Czech Republic No. 50/2008 on good practice of the Prison Service staff as concerns administrative practice relating to custody, execution of a term of imprisonment or a criminal measure (Guidance on Prison Service - Administrative).

the mutual recognition principle. Since the term "reciprocity" is de facto a synonym for "mutuality", it follows that the principle of mutual recognition is based on reciprocal procedures in the Member States. It is precisely this mutuality/reciprocity which is one of the cornerstones of mutual trust between the Member States. If some Member States make a reservation with regard to surrender of their own nationals (which the new Member States were not allowed to do by the EU authorities), the fact that some other Member States apply rules on reciprocity in this area should be considered justified.

The current draft AIJCCM stipulates in Section 189 that "a Czech citizen cannot be surrendered to another Member State unless the procedure is based on the EAW and reciprocity of surrender is ensured. " Nevertheless, the final wording and application of the reciprocity rule to the EAW surrender procedure in the draft AIJCCM is currently being discussed within the comment phase of the legislative procedure.

Recommendation 6: Amend the implementing legislation so that no limitation applies to the surrender of Czech nationals on the basis of the date of the offence underlying the EAW (see 7.3.1.1).

As stated above (Recommendation No. 5), CZ was criticised for additional restrictions applied under Czech law which are not at all in line with the Framework Decision; one of the criticised points was the fact that Czech nationals are not surrendered for offences committed before 1 November 2004.

The draft AIJCCM reflects Recommendation No. 6. The current draft AIJCCM does not impose any limitation on surrender of Czech nationals to other Member States on the basis of the date of the offence underlying the EAW. The provision applying the principle that Czech citizens cannot be surrendered to other Member States of the EU for offences committed before 1 November 2004 is no longer included in the draft act ¹.

¹ The restriction as concerns the surrender of Czech citizens without any time limitation applies to Norway and Iceland – as stated in the Declaration of the Czech Republic to Art. 7(2) of the Agreement between the EU and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the EU and Iceland and Norway. This Declaration was made by the Czech Republic with respect to Art. 14(4) of the Charter of Rights and Freedoms and Art. 10(2) of the Criminal Code. The legal provision implementing the Agreement between EU and Iceland and Norway is applicable to offences committed before 1 November 2004.

Recommendation 7: Consider rewording Section 377 of the CCP in conformity with the Framework Decision (see 7.3.1.2).

CZ was criticised for the fact that Section 377 does not correspond to anything in the Framework Decision and is contrary to the principle of mutual trust. Moreover, uncertainty about the meaning of *"damage (to) some other significant protected interests of the Czech Republic"* may cause problems in practice and creates the risk of misuse. CZ was therefore recommended to consider changing the wording of Section 377 as concerns the EAW procedure.

This recommendation has been duly discussed and considered within the working group for preparation of a new AIJCCM. Section 377 of the CCP is reflected in Section 5 of the draft AIJCCM, according to which international judicial cooperation cannot be provided to the foreign authority where it would be in conflict with the constitutional order of the Czech Republic, or where it would be contrary to a legal provision of Czech law that must be insisted on unconditionally. It shall not apply where the national security or other similarly important legally protected interest of the Czech Republic would be affected. It is also necessary to state that the necessity of the incorporation of the "Protection of State Interests" principle was confirmed by a judgment of the Constitutional Court dated 3 May 2006 (No. 434/2006 Coll.). According to this judgment "protection of state interests" must be a part of the act with regard to all forms of international judicial cooperation; it may be concluded that "state interests" primarily refers to the prevention of violations of fundamental human rights protected by the constitutional order of the Czech Republic, which includes the Charter of Rights and Freedoms as an integral part.

The AIJCCM as currently drafted reflects Recommendation No. 7 in Section 5, where it is stated that international judicial cooperation need not be provided where it would damage some other significant protected interest of the Czech Republic. At the same time it is stated that this principle does not apply to procedures under Chapter 5 of the AIJCCM. The provision assumes a high level of cooperation and mutual trust among judicial authorities within the EU, as Chapter 5 regulates special procedures of international judicial cooperation among the Member States including the EAW surrender proceedings.

Recommendation 8: Amend the implementing legislation in order to bring Section 409(3) of the CCP, namely as regards paragraph (h), into line with the Framework Decision (see 7.3.1.3).

The Czech Republic was reproached for the fact that according to the implementing legislation a public prosecutor must "return" the EAW without referring the case to the court if the criminal prosecution or punishment is statute-barred "in the issuing State". This return has in practice the same consequences as a decision by the court not to execute an EAW, since in such instances a decision by the court on the execution of the EAW does not follow.

The current wording of Section 203(8) of the draft AIJCCM no longer takes the fact that a criminal prosecution or punishment has been statute-barred in the issuing State to be grounds for termination of the preliminary proceedings by a public prosecutor.

Recommendation 9: Consider amending the legislation in order to simplify/speed up the procedure to be followed when the requested person consents to surrender (see 7.3.1.4).

The Czech republic was reproached for the fact that in summary transfer proceedings, in cases where the person consents to surrender, the procedure is the same as for non-consensual cases: the preliminary investigation must still be carried out in order to verify whether grounds for refusal concur, a request for a decision on surrender must be filed by the public prosecutor; the case can only be tried by the court upon receipt of the original EAW duly translated, and the court decision may be appealed against. According to the evaluation expert team this provision of the law affects the length of proceedings in cases where a person consents to be surrendered.

Section 208 of the current draft AIJCCM deals with what are known as "simplified surrender proceedings" and takes account of a recommendation addressed to the Czech Republic. The simplified proceedings are conducted in cases where the requested person, in the presence of his/her counsel, consents to surrender to another Member State before the court. The person must be informed by the court of the meaning and consequences of such consent, including the fact that consent to the simplified surrender cannot be revoked and results in renunciation of entitlement to the speciality rule.

If the requested person consents to surrender the public prosecutor must make an application to a court in order:

- to take a person into a surrender custody;
- to convert a preliminary custody into a surrender custody;
- not to proceed with the case.

In certain cases stipulated by the draft AIJCCM, where any of the grounds for refusal of the person's surrender are applicable (*e.g. the requested person has been finally judged in the Czech Republic in respect of the same acts*), the public prosecutor proceeds as in cases without the person's consent to surrender. As a result, a normal procedure is followed in those cases and a decision on execution of the EAW is taken by the court.

Where the simplified proceedings are applied, it is necessary to execute the surrender of the requested person within 10 days of the decision on taking a person into surrender custody, of the decision on conversion of preliminary custody into surrender custody or of the extinguishing of the grounds for not proceeding with the case.

Recommendation 10: Consider amending the implementing legislation in order to introduce clear and strict time limits for the public prosecutor's preliminary investigation and court proceedings (including proceedings before the appeal court and the Constitutional Court), thereby ensuring that the time limits prescribed in the Framework Decision are met (see 7.3.1.4).

The Czech Republic was reproached for the fact that there are no specific time limits for the public prosecutor to complete the preliminary investigation and submit the corresponding motion for a decision on surrender to the court in Czech national legislation. Moreover, no specific time limit is set in national legislation for the decision by the Constitutional Court, to which a complaint may be filed at any time.

Attention should be drawn to the fact that the time limits prescribed by the Framework Decision are procedural time-limits and according to the Framework Decision non-compliance with these time-limits merely results in a duty to inform the issuing authority and Eurojust. To lay down binding time limits for a decision to be taken by an independent court, especially the Constitutional Court, is unacceptable. Moreover, the Framework Decision is not clear about what part of these time limits is to be attributed to what judicial authorities (public prosecutor or court).

However, Recommendation No. 10 was duly considered during the preparatory work on a new AIJCCM and the draft Act is largely in compliance with it.

Section 209 of the currently proposed draft AIJCCM stipulates the time limits for handing down a decision. It determines a general rule according to which proceedings on the basis of an EAW must be conducted as speedily as possible. The court must generally decide on the execution of the EAW within 60 days from the person's detention. In cases of the simplified proceedings, a public prosecutor must generally make an application for a court decision so that the court can deliver a decision within 10 days from the person's consent to the surrender. In specific and exceptional cases when the stipulated time limits cannot be observed, a court should decide on execution of the EAW or surrender custody within a time limit extended by 30 days. The judicial authorities are legally bound to inform both a competent authority of the issuing State and Eurojust of the reasons for failure to observe time limits.

Recommendation 11: Take the necessary measures to ensure that the possibility of extending the time limit for a decision on surrender envisaged in Article 17(4) of the Framework Decision is used only as an exception (see 7.3.1.4).

During the evaluation mission, attention was drawn to the fact that the Czech judicial authorities systematically make use of the option of extending the standard time limits for a final decision on surrender, which is not in conformity with Article 17(4) of the Framework Decision as it envisages such a possibility only for specific cases.

Although it may certainly be agreed in general that the proceedings concerning the execution of the EAW should be as short as possible, the Czech Republic considers Recommendation No. 11 to be beyond the scope of the Framework Decision. Article 17(4) of the Framework Decision, which is referred to, stipulates that the executing authority shall immediately inform the issuing authority and indicate the grounds for failure to observe time limits unless the EAW cannot be executed within the stipulated time limits (60 days and 10 days). The time limits may be then extended by another 30 days. Nevertheless, the Framework Decision does not merely lay down that this should be applied exceptionally (it refers to specific cases only). On the other hand, the criticised Czech legislation (Section 411(12) CCP) already rules (beyond the current scope of the Framework Decision) that the time limits should be extended in exceptional cases only.

As regards the currently drafted AIJCCM - Section 209, which stipulates the time limits for delivering a decision, we refer to our comment on Recommendation No. 10.

In general, it may be stated that rapidity of the proceedings cannot in itself be regarded as a guarantee of the due legal consideration of the case, which should be considered a priority of all authorities acting in criminal proceedings.

Recommendation 12: Amend the implementing legislation so that all grounds for non-execution of EAWs regarded as mandatory in the Framework Decision are examined in summary transfer proceedings (see 7.3.1.5).

CZ was reproached for the fact that in cases where the requested person consents to surrender and at the same time there are grounds for obligatory refusal of the surrender in connection with an amnesty in the executing State or with minors, as stated in Art. 3(1 and 3) of the Framework Decision, the decision taken in those cases is not subject to court examination. Should the grounds for refusal envisaged in Art. 3(2), Art. 4 (2), Art. 4(3), Art. 4(5) or Art. 4(6) of the Framework Decision be present, the execution (surrender) of the EAW must be dismissed even if the requested person consents to surrender.

The above mentioned deficiency is removed by:

- the currently drafted AIJCCM – Section 208(2), according to which in cases where the requested person consents to the surrender, a public prosecutor (among others) shall lodge a request to the court to decide on non-execution of the surrender in respect of the same act (Art. 3(2) of the FD) or in respect of an act covered by amnesty in the executing Member State (Art. 3(1) of the FD);
- the currently drafted AIJCCM – Section 203(8), according to which a public prosecutor (among others) shall terminate the preliminary investigation if the requested person owing to his/her age is not held criminally responsible under the law of the Czech Republic (Art. 3(3) of the FD).

Recommendation 13: Revise the current practice of requiring the original of the EAW for the court decision on surrender, and accept for that purpose a copy of the EAW sent by any secure means able to produce written records under conditions allowing authenticity to be established (e.g. scanned copies sent by verifiable e-mail) (see 7.3.1.7).

It was proposed by the evaluation mission to consider discontinuing any further obligation to submit original documents within the EAW procedure and to allow the option of working with scanned copies sent by verifiable e-mail, in order to speed up the proceedings. Section 203(8)a) of the currently drafted AIJCCM stipulates that a public prosecutor shall terminate the preliminary proceedings (the type of procedure is not specified) when the Member State which is in a position to issue the EAW does not serve the EAW on him despite having been duly invited to do so.

In our opinion, such a recommendation is beyond the scope of the Framework Decision. Art. 9 (3) of the FD stipulates that for a transitional period, until the SIS is capable of transmitting all the information described in Article 8, an alert in the SIS shall be equivalent to an EAW pending the receipt of the original document in due and proper form by the executing judicial authority. In most cases the Czech judges request the original EAW accompanied by a signature and the stamp of the competent authority. It may be assumed that their requests will remain the same unless the possibility is introduced of transmitting the EAW within the SIS by electronic means capable of ensuring both authenticity and personal data protection. The fact should be stressed that these requirements are not beyond the scope of the Framework Decision, nor are they in breach of it.
