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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 Slovenia

National recommendations

In February 2008 a new single act has come into force comprising all instruments of cooperation in the area of criminal law within the EU - Act on International Co-operation in Criminal Matters between the Member States of the European Union of 25 October 2007, which entered into force on 24 February 2008 (hereinafter referred to as: ZSKDČEU). The latter has among others substituted also the provisions of the Act on the European Arrest Warrant and Surrender Procedures (hereinafter referred to as: ZENPP), by which the Republic of Slovenia had initially implemented the Council Framework Decision of 13 June 2002 on the EAW and the surrender procedures. The ZSKZDČEU also supplemented, upgraded and eliminated some deficiencies that came to attention in the course of implementation of the act and in the evaluation process.

It should also be noted that amendments of ZSKDČEU are in preparation. There are several FDs that have to be implemented and in this process new amendments of existing provisions are prepared.

Recommendation 1 - To consider establishing tools aimed at facilitating the practical application of the EAW by practitioners, such as guidelines to assist judicial authorities to fill in the EAW and other means deemed appropriate to provide expertise to those involved in EAW procedures and to further circulate he information available on the application of the EAW in practice (see 7.1.9).

The Republic of Slovenia didn't adopt any special national manuals in connection with the practical application of the EAW. The European handbook on how to issue a European Arrest Warrant represents such a manual. Namely, it contains all necessary information in connection with the order and transmission of the warrant. The handbook as well as the revised version of the handbook has been transmitted to all competent Slovenian authorities, so we estimated that it is not practical to issue identical manuals or instructions, since too many tools – instruments can have negative impact on practitioners. Nevertheless there are some national tools as well. The Institute of Criminology at the Faculty of Law 2008 held a study on the EAW (*European arrest warrant - Comparative law and national law aspects*) and on the basis of the conclusions of the study a book (sort of explanatory memorandum of the implementing law with practical cases and recommendations) has been published, there are several articles dealing with this substance, which are undoubtedly useful for practitioners, etc..

In addition, the institute of the European arrest warrant was comprehensively and from various aspects also presented in different educational seminars for criminal judges and state prosecutors in the past 3 years. (There were several seminars which in a way touch the institute of the EAW, and in 2009 and 2010 there were also "workshops" on EAW, which focused manly on practical problems - transmission, issuance, fulfillment of the EAW, etc).

All practitioners who are responsible for the issuing and execution of European arrest and surrender warrants have access to the national case-law in connection with the implementation of the warrant in the Republic of Slovenia as well as to all other internet sites, which contain sufficient and comprehensive information on the EAW (such as http://www.ejn-crimjust.europa.eu/ejn/, http://www.consilium.europa.eu, http://www.ius-software.si/, http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/ , etc).

The Ministry of Justice as well as the EJN contact points regularly inform practitioners about new developments, modifications and recommendations adopted by or agreed upon various institutions (on the Handbook on the European arrest warrant, on the adoption of the standard form on EAW decision, on the agreement with the WP on the application of the FD in absentia, judgments of the ECJ, etc).

Recommendation 2 - To adopt measures to ensure that appropriate training programmes are put in place, so that extensive and regular training on EAW is provided to judges, state prosecutors and defense lawyers (see 7.1.10).

The institute of the European arrest warrant was comprehensively and from various aspects presented in various educational seminars for criminal judges, state prosecutors as well as lawyers. Several seminars on the application of the EAW in practice were also organized by the Ministry over the last three years.

Recommendation 3 - To re-examine the transposition into national law with regard to the penalty threshold for issuing an EAW in prosecution cases referred to in Article 2(1) of the Framework Decision (see 7.2.2).

According to old legislation on EAW (Art. 4 of ZENNPP), an EAW may have been issued in prosecution cases for acts punishable by a custodial sentence of at least one year and if detention is ordered against the defendant.

This provision has not been amended in the new legislation implementing EAW. After a thorough consideration and discussion among different authorities it was decided that provision as it is provides for a certain "proportionality test". As we already mentioned the precondition for issuance of the EAW is the existence of the detention order, which is normally issued due to the reason of flight risk, which is indicated under Point 1 of the first paragraph of Article 201 of the Criminal Procedure Act of the Republic of Slovenia. One of the circumstances which should be ascertained before ordering a detention a is the proportionality of the measure vis-a-vis the violation of the constitutionally protected right to personal liberty. If a concrete criminal offence, of which an individual is suspected on good grounds, is either by its content or due to the anticipated “minor” sentence (that is, regardless of the statutory sentence), a detention order is not issued for this individual. In such a case, a European arrest warrant cannot be issued, since the supposition for issuing such a arrest warrant has not been substantiated.

However, even if a final detention order is issued in accordance with domestic legislation, this does yet not mean that an European arrest warrant will be issued, since the proportionality of such a measure has to be considered each time.

The verification of proportionality is indeed not written expressly in the secondary legislation; however, it proceeds from the Constitution of the Republic of Slovenia and is part of the criminal proceedings of the Republic of Slovenia, since it is mandatory for the court always to verify proportionality between the weight of the criminal offence, the validity of suspicion and the reasons for detention or arrest. In practice, this means that the proportionality verification has been performed while issuing the decree on detention, and without a decree on detention, it is not possible to issue a European arrest warrant. Verification of the principle of proportionality when deciding on the issue of detention orders (and on their subsequent prolongation) and other measures related to the violation of personal liberty is generally accepted in case-law, also due to the decisions of the Constitutional Court of the Republic of Slovenia.

Recommendation 4 - To re-examine the transposition of the Framework Decision into national law as regards the speciality rule, so that the taking of the surrendered person into custody is expressly included in the scope of the domestic legislation (see 7.2.4).

As we already explained during the evaluation stage, it is not possible to impose a detention against the person to which the principle of speciality applies, however the requesting person may be put in the police "custody" before the latter is brought before the investigative judge.

However, the provision of the ZSKZDCEU regulating the speciality principle is in the process of amendmends, so that all aspects of the speciality principle determined in the framework decision will be explicitly included in the provision. (*Person surrendered to the Republic of Slovenia or to other member state shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he or she was surrendered, nor shall he be for any other reason restricted in his or her personal freedom or surrendered to other member state or extradited to a third State, except if determined otherwise by this Act.)*

Recommendation 5 - To consider establishing a mechanism allowing the Slovenian judicial authorities, when proceeding against a person surrendered pursuant to an EAW, to check the conditions of the surrender, with a view to respecting the speciality rule (see 7.2.4).

As pointed out before, only the court may issue a decision on detention in criminal proceedings, that is, in a judicial procedure. Indeed, the court does not verify ex officio in the process of surrender whether the person sought has already been convicted or other criminal proceedings against him or her are underway. It is, however, a fact that Act on criminal procedure makes provision in Article 227 that the person charged has to be asked at the first hearing whether he or she has already been convicted and whether the conviction has been erased, when and why and whether and when he or she has served the sentence, whether another procedure for another criminal offence against him or her is underway, meaning effectively that the court also verifies the provision of the principle of speciality.

Recommendation 6 - To re-examine the transposition of the Framework Decision into national law as regards the subsequent surrender, so that the surrendered person may be resurrendered solely with his consent to a Member State other than the executing State without the consent of the latter (see 7.2.4).

The provision of Article 28/2 (b) of the FD is implemented in the Article 44 in relation to Article 45 of the ZSKZDČEU[1], which among others determines that the principle of speciality shall not apply if the person expressly renounced his entitlement to the speciality rule before or after the surrender. The person surrendered to the Republic of Slovenia may renounce his entitlement to the principle of speciality for criminal offences committed prior to his surrender only before the court - either national court where the criminal procedure for the criminal offence committed prior to the surrender is being conducted or before the investigating judge of the court competent for the execution of the sentence or surrender procedure. The person must be informed about the content (meaning) of the principle of speciality, the consequences of renunciation of entitlement to the principle of speciality and on the fact that renunciation is voluntary and may not be revoked.

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[1] ***Art. 44 of ZSKDČEU***: The principle of speciality as referred to in Article 4 hereof shall not be applied in the following cases:
1. when the sentenced person, having had an opportunity to leave the territory of the Republic of Slovenia, has not done so within 45 days of his final discharge, or if he has returned to that territory after leaving it;
2. if the other offence committed by the person before his surrender is sanctioned only with a financial penalty;
3. if the person expressly renounced his entitlement to the speciality rule before or after the surrender;
4. if the Member State that surrendered the person consents to the prosecution, execution of sentence or surrender to another Member State for another criminal offence committed by the person before the surrender.
Art. 45 of ZSKZDČEU: "(1) The person surrendered to the Republic of Slovenia may renounce his entitlement to the principle of speciality for criminal offences committed prior to his surrender before the national court where the criminal procedure for the criminal offence committed prior to the surrender is being conducted or before the investigating judge of the court competent for the execution of the sentence or surrender procedure. (2) The person as referred to in the preceding paragraph shall be instructed on the meaning of the principle of speciality, the consequences of renunciation of entitlement to the principle of speciality and on the fact that renunciation is voluntary and may not be revoked. The surrendered person without a counsel shall be instructed that he is entitled to engage a counsel of his own choice.
(3) The advice from the preceding paragraph, renunciation of entitlement to the rule of speciality and declaration that the renunciation was given on a voluntary basis shall be entered in the records. If the person was not duly instructed or the advice was not written, the court may not ground its decision on the declaration of the surrendered person. (4) If the person surrendered to the Republic of Slovenia does not renounce his entitlement to the speciality rule, the court from the first paragraph of this Article must ask for the consent that the surrendered person may be prosecuted, that a sentence may be enforced on him or that he may be surrendered to another Member State for another criminal act committed prior to his surrender. "

Recommendation 7 - To amend the implementing law so that it conforms to the Framework Decision as regards the list of offences not covered by double criminality (see 7.3.1.1).

ZSKZDČEU implements in Art. 8 the entire list of criminal offences referred to in Article 2 of the Framework Decision. Consequently, the criminal offence of »swindling«, as well as the "illicit trafficking in prohibited drugs" is included in the list and the criminal offence of extortion is no longer limited only to the qualified form. The list is as follows:

- participation in a criminal organization;
- terrorism;
- trafficking in human beings;
- sexual exploitation of children and child pornography;
- illicit trafficking in prohibited drugs;
- illicit trafficking in arms, ammunition and explosives;
- corruption;
- fraud, including fraud that threatens the financial interests of the European Communities within the context of the Convention on the Protection of the Financial Interests of the European Union of 26 July 1995;
- money laundering;
- forgery of money;
- computer-related crime;
- criminal acts against environment and natural goods, including unlawful trade in threatened animal species and plant species and varieties;
- facilitation of unlawful crossing of the state border and residence within the state;
- murder and grievous bodily injury;
- illicit trade in human organs and tissue;
- kidnapping, unlawful deprivation of liberty and hostage taking;
- racism and xenophobia;
- group robbery or armed robbery;
- illicit trafficking in cultural goods, including antiquities and works of art;

- swindling;
- racketeering and extortion;
- forgery of industrial products and sale of such products;
- forgery of official documents and trading in them;
- forgery of payment instruments;
- illicit trafficking in hormonal substances and other growth promoters;
- illicit trafficking in nuclear and radioactive substances;
- trafficking in stolen vehicles;
- rape;
- arson,
- criminal acts within the jurisdiction of the International Criminal Court, established by the Rome Statute,
- hijacking of an aircraft or ship;
- sabotage.

Recommendation 8 - To re-examine the transposition into national law with regard to the penalty threshold referred to in Article 2(2) of the Framework Decision (see 7.3.1.1)

The wording regarding the threshold for sentences has been amended in Article 8 of ZSKZDČEU in order to be more understandable.

The new provision of the Article 8 of the ZSKZDČEU determines that "…notwithstanding the double criminality, surrender shall be admissible if the warrant is issued for the criminal offence sanctioned by the law of the issuing Member State by imprisonment of not less than three years as the maximum sentence of deprivation of liberty and if such offence is classified under the law of this Member State as one of the following types of criminal offences…" - consequently providing for the same threshold as the Article 2(2) of the Framework Decision.

Recommendation 9 - To take steps to correct the current judicial practice of checking the factual description of the EAW against their own Penal Code in respect of the offences listed in the Framework Decision (see 7.3.1.2).

This issue has been discussed on various seminars as well as workshop on EAW, so the practitioners are well aware that double criminality should not be checked in respect of the list offences.

To avoid any further misinterpretations we are planning to change the provision, which is transposing Article 2 of the FD in a way – "*Double criminality shall not be checked if the warrant is issued for the criminal offence punishable by a custodial sentence or a detention order for a maximum period of at least three years and if such offence is classified under the law of this Member State as one of the following types of criminal offences….*

Recommendation 10 - To take steps to correct the practice and the underlying legal criteria applicable to detention in EAW proceedings, in particular as regards Slovenian nationals and residents (see 7.3.1.3).

The institute of detention or other alternative measures is regulated in the Article 23 of ZSKZDČEU. It provides the possibility for a court to order a measure, proportionate to a concrete situation. That is in line with Article 192 of ZKP, which provides that to ensure the presence of the person charged (or to successfully complete the procedure of the surrender of the person sought) instead of detention, the following measures may be ordered: writ of summons, compulsory appearance, promise of the charged person not to leave his or her residence, restraining orders, reporting to a police station, bail and house arrest. When deciding on which measure to apply, the court has to comply with the conditions laid down for individual measures. When deciding on the measure, the court may not use measures more stringent than those required to achieve the court's purpose, since the Constitutional Court of the Republic of Slovenia has decided that automatic detention is not in compliance with the Constitution. Therefore, for each individual case, it has to be assessed whether to issue a detention against the person or a whether a more lenient measure is more appropriate (bail, house arrest etc). Moreover, for a detention order to be issued, more facts need to be considered, such as flight risk (decision of the Constitutional Court, No. U-I-18/93).

However, we should point out that indeed there were some changes in the ZSKZDČEU. According to Article 17 of the ZSKZDČEU, the investigative judge, after the verification that EAW contains all the data required for taking a decision on its execution and if it complies with the terms as stated in Article 8 of the FD, issues an order for compulsory appearance of the requested person. If an arrest warrant has been issued, police officers may arrest the requested person also without a prior order for compulsory appearance as referred to in the preceding paragraph if there is a risk that he will abscond or go into hiding. Consequently the provision that investigative judge must first summon the individual to a hearing has been abolished.

Recommendation 11 - To take the necessary steps to ensure that in the course of an EAW procedure the existence of ongoing investigations or proceedings against the requested person, or prior convictions, is checked (e.g. through appropriate databases or other means) (see 7.3.1.5).

The uniform electronic evidence which enables the systematic verification of current investigations or proceedings against the person sought is already applicable in practice (separate evidence for courts as well as for the prosecutor's offices).

Recommendation 12 - To take the necessary measures to ensure that Slovenia will enforce sentences passed against its own nationals and residents in the issuing Member State for offences not punishable under Slovenian law (see 7.3.1.6).

The institute of the execution of sentences passed against Slovenian nationals and residents imposed in the issuing state is also regulated by the new implementing law - Article 72, which determines that if the national court receives an order against a national of the Republic of Slovenia or of another Member State residing in the territory of the Republic of Slovenia, or an alien who is in possession of a permanent residence permit in the Republic of Slovenia, with the aim of executing a custodial sentence, precautionary or other sanction that is carried out by detention order, and all other conditions are met for the surrender of such a person, and the person has agreed to serve the sentence in the Republic of Slovenia and the national court binds itself to enforce the judgment, the order shall be treated as a request for the execution of a custodial sentence, precautionary or other sanction that is carried out by detention order. In such a case, the criminal judgment imposed in the issuing State, shall be enforced in the Republic of Slovenia also if the offence in the order is not a criminal offence under the law of the Republic of Slovenia.

If the order allowed for the surrender of a national of the Republic of Slovenia, or a national of a Member State, residing in the territory of the Republic of Slovenia, or an alien who is in possession of a permanent residence permit in the Republic of Slovenia, conditioned by returning the person to the Republic of Slovenia after the proceeding is concluded, the criminal judgment imposed by the court of the ordering State shall be enforced in the Republic of Slovenia, even if the offence in the order is not a criminal offence under the law of the Republic of Slovenia as well as without the consent of the person.

Recommendation 13 - To abrogate Article 36(3) of the implementing law (see 7.3.1.7).

Art. 36/3 of ZENPP, with which Slovenia limited the application of EAW to criminal offences committed after 7 August 2002, is no longer applicable, since it was abrogated by ZSKZDČEU.

Recommendation 14 - To consider amending the implementing legislation with a view to establishing clear rules enabling courts executing EAWs to proceed to seize property in the possession of the requested person that may be used as evidence, or that has been acquired by him as a result of the offence, without a prior request from the issuing authority (see 7.3.1.8).

With regard to this recommendation it has to be mentioned that the provision of the Framework Decision that governs the seizure of items is partly implemented in Article 24 of ZSKZDČEU and partly also in the existing national regulations – Criminal Code. In accordance with the Slovenian legislation, items from a criminal offence must be seized – this includes items that were used or intended for use while committing a criminal offence, or were produced with a criminal offence, as well as unlawful pecuniary advantage and items that could be used as evidence in a criminal proceeding.
Article 24 of the ZSKZDČEU also determines that if the issuing judicial authority so orders in a warrant or when so determined by the national criminal code, the investigating judge shall seize and hand over the items that might serve as evidence in criminal proceedings to the issuing judicial authority. If the issuing judicial authority orders a temporary protection of the request for the seizure of financial profit, the investigating judge shall order temporary protection of the property in the Republic of Slovenia. The court shall decide on the seizure in a decision whereby it decides on the surrender. Items, financial benefit or property as referred to in the preceding paragraphs shall be seized and handed over also in the case when the surrender cannot be carried out because the requested person has died or absconded. If the domestic court seized items or financial benefit or property in criminal proceedings that is underway, it shall retain the items or hand them over temporarily to the issuing Member State, on condition that they are returned.

Recommendation 15 - To re-examine the transposition of the Framework Decision into national law as regards transit of non-Slovenians in conviction cases, so that a statement by the requested person that he wishes to serve the sentence in the issuing Member State is not required (see 7.3.1.9).

The provision in the ZSKZDČEU is the same as it was in the ZENPP.

In the beginning it should be clarified that explicit consent of the person to serve sentence in the issuing member state is not required for all requested persons, but only for a citizen of the Republic of Slovenia, a citizen of a Member State residing on the territory of the Republic of Slovenia or a foreign person with a permit for permanent residence in the Republic of Slovenia and the warrant was issued in connection with the execution of a sentence of imprisonment.

However the limited provision of ZSKZDČEU (*If the requested person is a citizen of the Republic of Slovenia, a citizen of a Member State residing on the territory of the Republic of Slovenia or a foreign person with a permit for permanent residence in the Republic of Slovenia and the warrant was issued in connection with the execution of a sentence of imprisonment, the transit shall be refused. Transit shall be permitted if the requested person who is not a citizen of the Republic of Slovenia explicitly states that he wishes to serve his sentence in the issuing Member State)*, will be canceled/ abolished with the amendments to the ZSKZDČEU.

Recommendation 16 - To re-examine the transposition of the Framework Decision into national law, so that transit cases from third States to another Member State are expressly addressed by the implementing legislation, and so that conditions similar to those of transit within the European Union apply (see 7.3.1.9).

To avoid any further misinterpretations we are planning to change the provision, which is transposing Article 25 of the FD, so that that it would be clear that all situations – active as well as passive transit from third state to a member state will be covered.

General recommendations

Recommendation 2 - Principle of direct contacts

According to the first paragraph of the Article 14 of the implementing law (ZSKZDČEU) the issuing and executing judicial authorities must communicate directly as a rule.

Recommendation 3 - Training issues

The institute of the European arrest warrant was comprehensively and from various aspects presented in various educational seminars for criminal judges, state prosecutors as well as lawyers, moreover several publications regarding the implementation as well as the application of the EAW are available to all practicians, so we believe that all interesting parties have enough information on the EAW. Several seminars on the application of the EAW in practice were also organized by the Ministry over the last two years. However, we would like to add that all practicians who are responsible for the issuing and implementation of European arrest and surrender warrants have access to the national case-law in connection with the implementation of the warrant in the Republic of Slovenia as well as to all other internet sites, which contains sufficient and comprehensive information on the EAW. They are also in due time notified by the Ministry as well as the EJN contact points about new developments, modifications and recommendation adopted or agreed upon among various institutes.

Recommendation 4 - Facilitating mechanisms

The role and competences of EJN contact points as well as Eurojust national member were presented during several seminar, "criminal schools" as well as other occasions, consequently practitioners are aware of various possibilities of transmission of EAW, however it is up to them which channel of communications would use.

Recommendation 5 - Language requirements

It is possible to submit EAW either in English or in Slovene language (Article 15 of the ZSKZDČEU) - additional flexibility - the investigative judge has the possibility to order that the warrant is ex officio translated into the Slovenian or English languages, when the detention has been imposed against the requested person.

Recommendation 6 - Transmission of the EAW

According to Slovenian legislation as well as practice the copy of the EAW or the extract from the SIS system is enough to start the surrender procedure – it is not necessary to transmit the original EAW.

Recommendation 11 - Speciality rule

As pointed out before, only the court may issue a decision on detention in criminal proceedings, that is, in a judicial procedure. Indeed, the court does not verify ex officio in the process of surrender whether the person sought has already been convicted or other criminal proceedings against him or her are underway. It is, however, a fact that Act on criminal procedure makes provision in Article 227 that the person charged has to be asked at the first hearing whether he or she has already been convicted and whether the conviction has been erased, when and why and whether and when he or she has served the sentence, whether another procedure for another criminal offence against him or her is underway, meaning effectively that the court also indirectly verifies the provision of the principle of speciality. It is also the role of the District state prosecutor that on the "surrender hearing" brings up all circumstances, relevant to a decision on surrender, among which is also the circumstance about the ongoing investigations - criminal proceedings against the requested person before the competent Slovenian authorities.

Recommendation 16 - Information deficits

The standard form on the EAW decision adopted within the COPEN WP during the Spanish presidency was already transmitted to all competent judicial authorities, with the recommendation to use it in practice, since it would facilitate and smooth the cooperation as well as accelerate transmission of relevant information. We would also like to stress that practitioners in accordance with article 33 of the ZSKZDČEU, are obligated to inform the issuing authority about the decision on surrender as well as provide all other relevant information (specialty rule, detention, etc)

Recommendation 17 - Additional information

There are no provisions in national legislation, which would oblige practitioners to seek – demand more information or documentation, and to our knowledge practitioners normally do not demand additional information or documents.