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| Subject: | <b>EVALUATION REPORT ON THE FOURTH ROUND OF MUTUAL<br/>EVALUATIONS "THE PRACTICAL APPLICATION OF THE EUROPEAN<br/>ARREST WARRANT AND CORRESPONDING SURRENDER<br/>PROCEDURES BETWEEN MEMBER STATES"<br/>REPORT ON HUNGARY</b> |
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# RESTREINT UE



**COUNCIL OF  
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**Brussels, 14 December 2007**

**15317/07**

**RESTREINT UE**

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

# **RESTREINT UE**

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## 1. INTRODUCTION

- 1.1. Following the adoption of the Joint Action of 5 December 1997, a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime was established.
- 1.2. Following the discussion of a proposal introduced by the Luxembourg Presidency concerning the topic of the fourth round of mutual evaluations<sup>1</sup>, the MDG meeting on 11 July 2005 adopted the topic as proposed, namely "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States". It was also agreed at the MDG meeting on 11 July that the evaluation questionnaire would be prepared by the UK Presidency.
- 1.3. Experts with substantial practical knowledge of the European Arrest Warrant were nominated by Member States in response to a written request to delegations made by the Chairman of the MDG on 9 September 2005<sup>2</sup>.
- 1.4. At its meeting on 28 October 2005 the MDG approved the evaluation questionnaire for the fourth round of mutual evaluations. The objectives of the evaluation exercise and the questionnaire itself are set out in doc. 14272/05 CRIMORG 131 COPEN 175 EJM 57 EUROJUST 77.
- 1.5. Also at its meeting on 28 October 2005 the MDG discussed and approved doc. 13824/05, the revised sequence for the mutual evaluation visits. Hungary is the fourteenth Member State to be evaluated during the fourth round of evaluations.

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<sup>1</sup> Doc. 9602/05 - Orientation debate on a proposed Mutual Evaluation exercise.

<sup>2</sup> Doc. 6206/1/06 REV 1 - Timetable for 2006 and designation of experts.

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- 1.6. The experts charged with undertaking this evaluation were: Ms. Eleni Loizidou (Head of the Extradition Section, Office of the Attorney General, Cyprus), Ms. Charlotte Lauritsen (Legal Adviser, International Division, Civil and Police Department, Ministry of Justice, Denmark) and Mr. Branislav Bohacik (Head of Judicial Cooperation in Criminal Matters Division, Ministry of Justice, Slovak Republic). Two observers were also present: Mr. Jürgen Kapplinghaus (SNE at the German desk, Eurojust) and Ms. Claudia Gualtieri (European Commission), together with the General Secretariat of the Council.
- 1.7. This report was prepared by the expert team with the assistance of the Council Secretariat, on the basis of the findings of the evaluation visit from 2 to 5 July 2007 and of Hungary's detailed and helpful responses to the evaluation questionnaire and written requests for further information.
- 1.8. The report makes reference to differing processes in respect of prosecution and conviction cases only insofar as there is a divergence of practice between the two procedures.
- 1.9. The expert team's overarching purpose was to evaluate the distinct practical processes operated and encountered by Hungary in its role as both issuing and executing Member State and to assess relevant training provisions and the views of the defence, before moving on to conclude and to make such recommendations as the team felt were appropriate to enhance the means by which the EAW and its corresponding surrender provisions may be further streamlined and improved.

## 2. THE AUTHORITIES AND THE LEGAL BASIS

### 2.1 THE AUTHORITIES

The Hungarian Court System comprises, apart from the Constitutional Court, four layers of courts of general jurisdiction:

- 1 Supreme Court
- 5 Regional Courts of Appeal;
- 19 County Courts and the Metropolitan Court of Budapest;
- 111 Local Courts (105 Municipal Courts and 6 District Courts).

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Only these courts of general jurisdiction play a role in EAW matters. In this matter there is only one level of appeal, to the Regional Court, and there is no possibility of cassation before the Supreme Court<sup>1</sup>.

Local Courts are located in the major cities and towns of Hungary (105 Municipal Courts) and in the districts of Budapest (six District Courts). They are competent to hear civil, commercial and criminal cases as first instance courts. As a general rule the local competence of courts conforms to the area of public administration.

County Courts (including the Metropolitan Court of Budapest) are competent to hear cases relating to certain types of crime established by Act No XIX of 1998 on the Criminal Procedure Code (e.g. homicides, acts of terrorism, trafficking in human beings) as first instance courts and review appeals lodged against the decisions of local courts in the second instance. There is a judge with jurisdiction on penitentiary issues (Penitentiary Judge) in every County Court.

There are Regional Courts of Appeal in Budapest, Debrecen, Győr, Pécs and Szeged. These courts are competent to give judgments on legal remedies submitted against the decisions of Local or County Courts. The Regional Court of Appeal is empowered to review the trial court's interpretation of the evidence, its decision to admit or reject evidence and its final judgment. In most cases it is possible to contest the Regional Court of Appeal's decision by appealing in cassation to the Supreme Court.

As regards EAW-related matters, the authority competent to issue an EAW for the purposes of criminal prosecution is the Local or the County Court which is competent for the criminal proceedings and, in conviction cases, the Penitentiary Judge competent to enforce the final sentence.

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<sup>1</sup> See, however, Chapter 3.3 below concerning the impact of the Supreme Court's Law Integration Decision No 1/2005 on the completion of EAW forms.

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The Metropolitan Court has exclusive competence to decide on the execution of an EAW. When acting in the capacity of EAW executing judicial authority, the Metropolitan Court acts as a single judge. There are fifty-four judges at the Metropolitan Court who deal with criminal matters; of those only some take cognizance of international criminal law-related cases (EAWs, as well as extradition and transfer of sentenced persons' cases). Unless otherwise provided by the law, the decisions of the Metropolitan Court in EAW cases are subject to appeal, to be adjudged by the Regional Court of Appeal of Budapest.

The Hungarian Prosecution Service has a hierarchical structure and is organised on four levels following the organisation of the courts. It consists of:

- the Office of the Prosecutor General of the Republic of Hungary;
- 5 Regional Prosecution Offices (in Budapest, Debrecen, Győr, Pécs and Szeged);
- 20 County Prosecution Offices (1 for Budapest and 19 for the counties);
- 137 Local Prosecutor's Offices (in the capital and in the counties).

There is only one prosecuting unit with nation-wide competence, namely the Central Prosecution Investigation Office, which conducts investigations of great importance falling within the sphere of prosecution investigation (see below).

The Prosecution Service of the Republic of Hungary is an independent constitutional body within the State organisation. As laid down in the constitution the Prosecution Service is led by the Prosecutor General, who is elected by the Parliament (National Assembly) for six years on the basis of a recommendation by the President of the Republic. The Constitutional Court has established<sup>1</sup> that the Prosecutor General and the Prosecution Service are not subordinate to the Parliament. The Prosecutor General is not politically answerable to the Parliament for his decisions in individual cases and may be discharged before the end of his term only if he has been convicted of a crime or has become incapable of performing his duties.

The Prosecution Service exercises rights specified by law relating to investigation, participates in judicial proceedings and supervises the legality of the execution of punishments.

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<sup>1</sup> Constitutional Court Decision of 16 February 2004.

## RESTREINT UE

The prosecutor supervises the legality of investigations carried out by police either on their own initiative or on that of the prosecutor. Instructions from the prosecutor relating to investigations must be followed by the police, and there are no avenues for complaint against them. As mentioned above, in certain cases<sup>1</sup> the investigation is in the exclusive power of the prosecutor. The aim of the investigation is to provide the prosecutor with sufficient information for him to make a decision on prosecution.

The decision whether to prosecute or dismiss a case is exclusively within the power of the prosecutor<sup>2</sup>. He or she can be instructed only *ex officio* or on complaint by a higher-ranking official. If the prosecutor decides to bring a case to court, no complaint can be made against that decision, while in the event of dismissal the persons concerned have the right to lodge a complaint, which is adjudged by the superior prosecutor.

In Hungary the prosecution system is based on the legality principle. The authorities are therefore bound to initiate proceedings and proceed with a case if legal conditions are met.

When an indictment is filed with the court a case reaches the trial stage, during which, in accordance with the principle of equality of arms, the prosecutor has the same rights and duties as the defendant as to the taking of evidence - having regard to the differences of their status in the procedure. The prosecutor retains his monopoly over the prosecution.

The participation of the prosecutor in the hearings before the Metropolitan Court which decides on the execution of an EAW is mandatory. The prosecutor's proposal on the surrender of the requested person is not binding on the court.

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<sup>1</sup> According to Article 29 of the Criminal Procedure Code the investigation is in the exclusive power of the prosecutor when a criminal offence has been committed by a person enjoying immunity based upon public or international law, by a judge, prosecutor, notary public or high ranking police officer as is the investigation of certain offences committed against these persons and of some offences regarding the administration of justice.

<sup>2</sup> That monopoly is, however, limited by the existence of so-called private prosecution.

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## The Ministry of Justice and Law Enforcement

Pursuant to Article 7(2) of the FD, the Ministry of Justice was designated as the central authority responsible for the administrative transmission and reception of EAWs and any official correspondence relating to them. Within the Ministry of Justice and Law Enforcement (hereinafter referred to as the MoJLE), the International Criminal Law Department is responsible for performing those tasks.

The International Criminal Law Department has a range of other competences such as mutual legal assistance, extradition cases, transfer of criminal proceedings, transfer of sentenced persons, law making and ECHR-related matters. It consists of seventeen lawyers (including the Head of the Department and two deputies), ten of whom deal with EAW matters on a regular basis.

## The International Law Enforcement Co-operation Centre (hereinafter referred to as NEBEK),

within the Hungarian National Police, is responsible for the exchange of information and data with other international law enforcement organisations, for processing such information and, in general, for supporting Hungarian law-enforcement agencies in international cooperation matters.

It consists of the following units: the Message Response and International Telecommunications Division, the INTERPOL National Central Bureau, the EUROPOL National Unit, the International Relations Unit and the SIRENE Bureau.

In matters relating to the issue of EAWs, NEBEK records all the EAWs issued by Hungarian courts, inputs the information in the national database of wanted persons and effects transmission through INTERPOL to the relevant Member States. As a matter of practice NEBEK is also used as a parallel channel for the forwarding of EAWs to executing authorities.

When Hungary acts as executing State, NEBEK handles every request circulated via INTERPOL/SIRENE or forwarded by the MoJLE in order to carry out the necessary checks and to locate the requested person before sending the relevant information to the local police with a view to arrest. NEBEK also liaises with the Metropolitan Court and the Prosecutor's Office so that the hearing following the arrest of the requested person can take place within the time limit set by law.

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NEBEK is responsible for all the arrangements necessary for the surrender of a requested person to take place.

At the time of the visit the expert team was advised that current references in the implementing legislation to INTERPOL were to be replaced by references to NEBEK.

## 2.2 THE LEGAL BASIS

- Act No CXXX of 2003 on Cooperation in Criminal Matters with the Member States of the European Union - Hungary's implementing legislation, which entered into force on 1 May 2004. That Act was amended by Act No CX of 2005, Act No LI of 2006 and Act No XIII of 2007.

At the time of the visit the expert team was informed that Act No CV of 2007, Article 41 of which introduced amendments to Act No CXXX of 2003, would enter into force on 10 August 2007. Those amendments are reflected in the relevant parts of this report.

The following Acts apply in surrender proceedings based on EAWs unless otherwise provided by Act No CXXX of 2003<sup>1</sup>:

- Act No XXXVIII of 1996 on International Legal Assistance in Criminal Matters;
- Act No IV of 1978 on the Criminal Code;
- Act No XIX of 1998, on the Criminal Procedure Code<sup>2</sup>.

The following are also of relevance:

- Act No LIV of 1999 and Act No LIV of 2002 on International Cooperation in law enforcement, as regards the functioning and tasks of NEBEK;
- Order No 11/2003 of the Prosecutor General, which lays down detailed rules for the supervision of investigations carried out by police;
- Order No 12/2003 of the Prosecutor General, which regulates the prosecutor's duties in the court.

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<sup>1</sup> Act No CXXX of 2003, Section 2

<sup>2</sup> It entered into force on 1 July 2003.

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The evaluation team was informed by MoJLE officials that on 27 June 2007, on the occasion of the sanction of the Agreement between the EU and Norway and Iceland on the surrender procedure between the MS of the EU and Iceland and Norway, the President of the Republic submitted an enquiry to the Constitutional Court regarding the issue of double criminality ("*nullum crimen, nulla poena sine previa lege*"), which could affect the internal legislation transposing the FD. The experts drew the attention of their interlocutors to the judgement of the Court of Justice of 3 May 2007 - *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* (case C-303/05) on that issue.

## 3. ORGANISATION AND PRACTICES - AS ISSUING MEMBER STATE

In 2006 the Hungarian judicial authorities issued 115 EAWs, all of them transmitted via INTERPOL, and 55 resulted in the effective surrender of the wanted persons<sup>1</sup>.

### 3.1. THE DECISION TO ISSUE

In prosecution cases the judicial authority competent to issue an EAW is the Local or the County Court which is competent for the criminal proceedings and, in conviction cases, the Penitentiary Judge competent to enforce the final sentence.

There is no special procedure whereby the decision to issue an EAW is taken by the competent court. If the case is at the prosecution stage, a motion by the prosecutor conducting the criminal investigation concerning the requested person is required. After the indictment - trial stage - there is no need for such a motion for the court to be able to issue an EAW. Nor is there any need for a motion by the prosecutor in conviction cases.

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<sup>1</sup> Replies to the questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2006 set out in doc. 8111/05 COPEN 75 EJM 23 EUROJUST 24.

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In prosecution cases, where there is some circumstantial evidence to support the belief that the wanted person is in another MS, an EAW can be issued without its being necessary to issue a national arrest warrant first. The existence of a national arrest warrant is not therefore a prerequisite for the issue of an EAW. In such cases the indictment by the prosecutor - which is not a judicial decision having the same effect as an arrest warrant - is regarded by the Hungarian authorities as providing a basis for the issue of an EAW; that is accordingly indicated in box (b) of the form<sup>1</sup>.

When the formal requirements are met and penalty thresholds are reached, the court, by virtue of the principle of legality, cannot refuse to issue an EAW on the basis of any proportionality test.

Accessory offences cannot be included in an EAW issued by a Hungarian court.

## 3.2. CHECKING FOR THE POSSIBLE EXISTENCE OF MULTIPLE REQUESTS

The issuing court has to transmit a copy of every EAW to NEBEK<sup>23</sup>. In order to check for the existence of other requests concerning the same person, NEBEK checks the national database of wanted persons<sup>4</sup>, where EAWs, INTERPOL requests and national warrants are recorded. If outstanding national warrants against the wanted person are found, NEBEK sends a detailed list of those warrants to the MoJLE, which informs the judicial authorities concerned, so that the latter can issue an EAW in their own proceedings.

If earlier EAWs are discovered or even where several courts have outstanding national arrest warrants against the same person, there is no means of merging them in a single unified EAW that covers all the possible offences with which the person concerned can be charged.

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<sup>1</sup> Article 41(3) of Act no CV of 2007 reads: "Article 25 of Act No CXXX of 2003 shall be supplemented by the following paragraphs (7) and (8): (7) The scope of the European arrest warrant shall also extend to the territory of the Republic of Hungary". That act entered into force on 10 August 2007.

<sup>2</sup> Act No CXXX of 2003, Section 25(1).

<sup>3</sup> Article 41(2) of Act No CV of 2007 reads: "Article 25(1) of act No CXXX of 2003 shall be replaced by the following provision: "(1)... The European arrest warrant shall be sent to the International Centre for Cooperation in Criminal Matters. The European arrest warrant shall also be sent to the local police station of the registered domicile of the accused or, in the absence of this, to the local police station of his registered place of residence. Where neither are provided it shall be sent to the local police station of the issuing court.". According to the information provided by the Hungarian authorities, this modification is in line with the rule that the scope of the European arrest warrant shall also extend to the territory of Hungary.

<sup>4</sup> The national database of wanted persons is accessible to NEBEK, prosecutors and law-enforcement agencies. Neither the courts nor the MoJLE have access to it.

## 3.3. THE COMPLETION OF THE FORM

The drafting of an EAW is done by the competent courts. Written guidance of best practice to assist them in completing the form has been prepared by the MoJLE and is available on the National Council of Justice website. The Department of International Criminal Law of the MoJLE also provides individual assistance at the request of the judicial authorities concerned.

Act No CXXX of 2003 has in its Annex a table setting out mandatory instructions for issuing Hungarian judicial authorities regarding which of the offences specified in the Hungarian Criminal Code corresponds to the categories listed in box (e) of the form.

When an EAW is received for transmission to a foreign executing authority, the MoJLE checks whether the form is duly completed and, where necessary, contacts the issuing court and asks it to amend, correct or modify the form before sending it for translation.

The expert team noted that under the implementing legislation, when an EAW is issued to replace a pre-existing international arrest warrant owing to the fact that the wanted person is known to be in another MS, the former retains the date of issue and file number of the latter<sup>1</sup>. During the interviews it was explained that under that provision the real date of issue of the EAW is not indicated and the date of the pre-existing international arrest warrant is reflected in box (b) and at the end of the form instead; further explanation is given in box (f). The experts were advised that that provision is in accordance with the criteria adopted by the Supreme Court<sup>2</sup> to the effect that in such cases the issuing of the EAW has to be considered as an administrative action so that it does not interrupt the prescription period.

## 3.4. TRANSMISSION OF EAWS

After receiving a copy of an EAW from the issuing court, NEBEK prepares a formal request for international search in one of the official Interpol languages (usually in English or French) and circulates it through INTERPOL.

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<sup>1</sup> Act No CXXX of 2003, Section 26.

<sup>2</sup> 1/2005 Law Integration Decision.

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When a notification of arrest is received through that channel, NEBEK immediately informs the MoJLE, in order to request the issuing judicial authority to send the EAW for forwarding to the MoJLE within three days of the notification of the arrest<sup>1</sup>.

Once the MoJLE has received the EAW, it checks that the EAW is formally correct, makes the necessary arrangements for the translation of the EAW and takes care of its transmission within the time limits specified by the executing authority.

The EAW is forwarded to the executing authority together with an accompanying letter signed by the Deputy Head of the Department of International Criminal Law of the MoJLE. As a matter of practice the EAW is also forwarded via INTERPOL/SIRENE - this is also mentioned in the accompanying letter.

In the event of multiple EAWs issued by Hungarian courts, the executing authority is informed of their existence via INTERPOL/SIRENE.

Direct transmission of an EAW by the issuing court to the judicial or central authorities of an executing MS when the location of the person is known is not permitted under Section 27 of the implementing law, the Ministry of Justice having been designated for this effect<sup>2</sup>.

The expert team was advised that there is no official on duty at the MoJLE - nor judge on call for the issuing of an EAW- at weekends (or on official holidays). That means that if a notification of arrest is received at the weekend or on an official holiday, no action will be taken until the working day next following.

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<sup>1</sup> Section 27 of Act No CXXX of 2003.

<sup>2</sup> Section 27 of Act No CXXX of 2003 reads: "The European arrest warrant shall be sent for forwarding to the Minister of Justice within three days of the notification of the arrest of the accused person".

## 3.5. ISSUES RAISED BY EXECUTING MEMBER STATES

- The Hungarian authorities referred, as the most problematic grounds experienced for refusal/difficulties in execution, to two similar cases with IE and DK, in which an EAW, issued for the purpose of executing a sentence imposed on a person who was not present during the trial because he had made a deposit at the court, was refused.

In the case of IE, the decision not to execute the EAW was based on the existence of a provision in national law to the effect that an EAW can be executed only if the person has fled from the execution of the sentence imposed on him.

DK refused the execution of the EAW on the basis of the argument that there was no certainty that the convicted person had been aware of the exact date and time of the hearing.

The Hungarian authorities noted that in those cases the sentence was not imposed by a decision rendered *in absentia*, since a different procedure took place<sup>1</sup>. In their view the problem here rested on the different interpretation of the FD as regards "decision rendered *in absentia*" and the differences between national legislations on this point.

- The Hungarian authorities reported that they had encountered problems with UK and IE in respect of the manner in which the form was completed. According to the information provided, in one case with UK the EAW had to be re-issued in accordance with the requirements of the UK authorities; finally the person was arrested in Spain and surrendered to Hungary.
- Problems were also reported regarding cases in which an arrest was made on the basis of alerts where there was difficulty in complying with a short deadline - 48 hours - imposed by some MSs for the transmission of duly translated EAWs.

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<sup>1</sup> According to Section 586 of the Hungarian Code on Criminal Procedure, in some cases if the accused pays a deposit and the court authorises it, the procedure may be conducted in the absence of the accused and the documents addressed to him are served on the defence counsel (in the request for permission to pay a deposit, the accused has to authorise the defence counsel to receive the official documents addressed to him). Section 586(5) provides that if the defendant leaves the territory of the Republic of Hungary, the legal provisions applicable to trials *in absentia* (Chapter XXIV) may not be applied in the procedure. That means, among other things, that there is no possibility of a retrial (provided for in Section 392(1)(e) of the Criminal Procedure Code).

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- Information was given concerning a case with BE in which the person requested was released because the original of the EAW did not arrive in time although it had already been forwarded by fax and in parallel via INTERPOL.

### 3.6. REQUESTS FOR FURTHER INFORMATION MADE BY EXECUTING MEMBER STATES

According to the information provided by the Hungarian authorities, requests for additional information received from foreign authorities were mainly intended to clarify certain points of the form, and they replied to them accordingly. No case was reported in which HU had been unable to comply with such requests.

In the view of the Hungarian authorities problems might arise from the fact that the FD does not include any specific provision on the language arrangements either for requests for or for the provision of additional information, in connection with the practice of several MSs which request the translation of any additional information into their official languages.

The Hungarian authorities reported one case with Italy in which evidence to support an EAW was requested, although they did not consider that it was in accordance with the FD.

### 3.7. LEGAL REGIM GOVERNING THE RETURN OF OWN NATIONALS FOR THE ENFORCEMENT OF SENTENCES.

The legal arrangements governing the return of own nationals for the service of sentences are to be found in the 1983 Council of Europe Convention on the Transfer of Sentenced Persons and Act No XXXVIII of 1996 on International Legal Assistance in Criminal Matters<sup>1</sup>.

The MoJLE is the authority competent to provide any undertakings necessary in this connection and to guarantee that such undertakings are fulfilled. To that end, the MoJLE provides the information appropriate and asks the issuing judicial authority to be updated on the progress of the criminal procedure and provided with the final judgment.

No problems have been encountered in connection with the provision or the acceptance of such undertakings.

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<sup>1</sup> Articles 55 to 60.

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## 3.8. YOUTH SURRENDERS AND CORRESPONDING GUARANTEES

The age of criminal responsibility in Hungary is fourteen years and no derogations are possible. At the time of the evaluation visit Hungary had experienced no difficulty in that regard.

## 3.9. GENERAL COMMUNICATIONS WITH THE EXECUTING MEMBER STATE

Communication with executing Member States was said to be adequate in general terms. The experts are, however, concerned that the fact that there is no official on duty at the MoJLE at weekends or on official holidays could lead to difficulties, e.g. when additional information is requested in urgent cases.

Interpol informs the MoJLE of the measures taken by foreign authorities with regard to the progress of the execution of EAWs.

## 3.10. THE MECHANICS OF THE SURRENDER (INCLUDING TEMPORARY SURRENDER) OF REQUESTED PERSONS/PROPERTY

On receiving notification of the decision of an executing judicial authority to surrender a requested person, NEBEK is responsible for all necessary preliminary arrangements concerning the surrender - including contacts with the authorities involved in the executing MS - and for organising the physical surrender itself in cooperation with the Security Service of the Hungarian National Police<sup>1</sup>.

Under Act No XXXVIII of 1996 on International Legal Assistance in Criminal Matters<sup>2</sup>, if a request for legal assistance is granted, no passport, visa, foreign exchange or customs regulations may hinder the entry of persons or the transfer of objects into Hungary. That applies to EAW cases.

At the time of the evaluation visit no EAW with a request to seize and hand over property had been issued by the Hungarian authorities.

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<sup>1</sup> Act No CXXX of 2003, Section 33.

<sup>2</sup> Article 9.

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## 3.11. CONFLICT OF EAWS/EXTRADITION REQUESTS/ONWARD SURRENDER

At the time of the visit Hungary had received no notification of any conflicting EAW or extradition request and had no experience of the subsequent onward surrender of a requested person to a third MS.

## 3.12. EXPENSES

The Hungarian authorities reported that they had not so far encountered any inappropriate practices in respect of the expenses arrangements laid down in Article 30 of the FD.

## 3.13. MISCELLANEOUS COMMENTS

As for the functioning of the rule of speciality in practice, the expert team was advised that no means existed for the judicial authorities undertaking criminal proceedings against a person surrendered for acts not covered by the EAW to check properly and in good time whether the conditions of the surrender had been fulfilled.

At the meeting held at the Court of Ráckeve, where that question was expressly raised, the judges stated their opinion that that would not have a real impact on such proceedings, i.e. on the validity of the evidence gathered, apart from the fact that the court would not be able to make a decision until the consent of the MS that surrendered the person was received.

## 4. ORGANISATION AND PRACTICES - AS EXECUTING MEMBER STATE

According to the information provided, during the calendar year 2006 Hungary received fifty-three EAWs; of those forty-four resulted in surrender orders and nine were refused. Of the forty-four cases in which surrender orders were made, the effective surrender of the requested persons followed in forty-three cases, all of them by means of the simplified procedure with consent, and in one case (IT) the person had to be released owing to the fact that the issuing State authorities did not take the person over within the ten days time limit laid down in Article 23(2) of the FD and in Section 20(2) of the implementing law.

### 4.1. RECEIPT PROCEDURES

At the time of the visit Hungary had no access to the SIS and therefore INTERPOL was the standard channel for the receipt of EAW surrender requests.

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Hungarian law-enforcement officers can arrest a person under a request transmitted through this channel - Interpol diffusion, Interpol Red Alert or EAW transmission. The EAW therefore needs to be sent to the Hungarian authorities only for the purposes of the subsequent court hearings. More precisely, the EAW is not indispensable for the purposes of the first hearing that takes place before the Metropolitan Court following arrest, but must always be available for the purposes of the second court hearing that must be held when a requested person does not consent to his or her surrender (see Chapter 4.5 below).

In such cases the competent foreign authority must send the EAW to the MoJLE, which will forward it to the Metropolitan Court, in Hungarian or accompanied by a Hungarian translation. Hungary also accepts EAWs in English, French or German or accompanied by a translation into one of those languages when issued by another MS which accepts EAWs in languages other than its own official language.

An EAW may be sent to the MoJLE in any written form guaranteeing authenticity, together with a translation. Accordingly EAWs transmitted by fax or even by e-mail will suffice for the purposes of the proceedings. The accuracy of the documents is checked by verification of the identity of the sender with the help of the information provided in the so-called "Fiches Françaises".

An EAW must arrive at the Metropolitan Court within forty days of the provisional arrest for surrender order - rendered at the first hearing - otherwise the order for provisional arrest must be lifted.

When, before the arrest, an EAW is sent directly to the MoJLE, the latter will forward it to NEBEK, so that the checks explained below can be carried out.

## 4.2. INVESTIGATIONS CONCERNING THE WHEREABOUTS OF THE REQUESTED PERSON/CIRCULATION PROCEDURES

The SIRENE Bureau at NEBEK handles every request for search and arrest which comes from the present Schengen States or from States which are expected to join the Schengen Area as from the beginning of 2008; in other cases the request is handled - the procedure is similar - by INTERPOL.

## RESTREINT UE

When a new request is received through the Interpol telecommunications system - the Message Response and International Telecommunications functions as the 24/7 duty service front office for NEBEK- the head of the unit carries out a preliminary check for the existence of specialities – age of majority, Hungarian citizenship - and forwards the file to an officer via the electronic case-handling system.

Irrespective of whether there are indications that the requested person is in Hungary or not, the case officer checks all the available police databases to attempt to verify the presence of the requested person in Hungary. Where the person is a Hungarian national, has a registered address in Hungary or, on the basis of the intelligence of the requesting country, there are specific grounds to consider that the person might stay in Hungary, further checks are made. If identification material is included in the request, checks are carried out in the dactyloscopic or DNA databases as well. If there is a hit in any of those databases the requesting country is informed.

The officer also assesses the request to ensure that it contains all the necessary data; if the officer discovers that any information is missing, the issuing MS authorities will be requested to provide it. Once the information is complete, the request is displayed in the national database of wanted persons.

When the whereabouts of a requested person have been established, the file is referred to local law-enforcement officers for them to carry out further checks and undertake the arrest.

### 4.3. THE FORM OF THE WARRANT AND REVIEW PROCEDURES/ REQUESTS AND RESPONSES TO REQUESTS FOR FURTHER INFORMATION/CLARIFICATION

Assessment of the content of the form is done solely by the Metropolitan Court in the course of the judicial proceedings. No preliminary assessment is undertaken by the MoJLE following the receipt of an EAW.

Only the Court is empowered to request additional information, either *ex officio* or upon the application of the prosecutor or the defence lawyer. The Metropolitan Court can make enquiries of the issuing judicial authority in all instances and may ask it to supply the additional information requested as a matter of urgency and set a time limit for its receipt. All requests must be routed through the MoJLE.

# RESTREINT UE

## 4.4. ARREST PROCEDURES/FIRST HEARING

When a wanted person is found, he or she will be arrested, taken into custody and transferred to the Metropolitan Court in Budapest, where a hearing must take place within the time limit of seventy-two hours following the arrest. As mentioned before, all Hungarian law-enforcement agency officers are able to arrest requested persons on the sole basis of Interpol alerts/notices and an arrest may be made before the issue of an EAW<sup>1</sup>.

In the interval NEBEK informs the Metropolitan Court and the Prosecutor's Office of the arrest, and sends them the request translated into Hungarian together with a copy of the EAW, if available, by fax. The court must order a hearing within the time limit of seventy-two hours; it informs the public prosecutor for the purpose of having a motion made and invites defence counsel to the hearing.

The requested person is entitled to legal advice and to an interpreter and will nominate his own counsel (subject to the availability of the appointee to conduct the case without interference with the EAW time limits) or else must have a defence counsel appointed by the court. Before the hearing takes place the defence counsel will be provided with a copy of the request; he also will be able to meet the requested person. Attendance by the public prosecutor and the defence counsel at the hearing is mandatory.

As regards the contents of the hearing, the court will, after having identified the requested person and informed him or her of the reasons for the arrest, the possibility of consenting to surrender and renouncing entitlement to the application of the speciality rule and the legal consequences thereof, ask him or her whether he or she consents to surrender and whether he or she renounces entitlement to the application of the speciality rule.

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<sup>1</sup> Act No CXXX of 2003, Section 10: "A person arrested in the territory of the Republic of Hungary under an international arrest warrant issued by another Member State shall be taken into custody and brought before the Metropolitan Court *if a European arrest warrant may be issued for him or her based on the offence specified in the international arrest warrant* or if a European arrest warrant has already been issued for him/her. Such detention may extend to seventy-two hours".

# RESTREINT UE

The court is under a statutory imperative<sup>1</sup> to order either the arrest for surrender where the person consents to surrender or, provided that the grounds for refusal of an EAW do not apply, the provisional arrest for surrender if the person does not consent. Neither the arrest for surrender nor the provisional arrest for surrender can be replaced by any other coercive measures or be waived or terminated by replacement by bail<sup>2</sup>.

## 4.5. THE SURRENDER DECISION

As already indicated, the Metropolitan Court has exclusive competence to decide on the execution of an EAW. The procedure leading to the surrender decision will vary depending on whether the requested person consents to surrender or not.

- Where the requested person has consented to surrender the Metropolitan Court must order it, provided that the conditions for the execution of the EAW and the surrender are met<sup>3</sup>. The consent cannot be withdrawn and the order for simplified surrender is not subject to appeal<sup>4</sup>.

The expert team noted that in this simplified surrender procedure the order for surrender could be made on the sole basis of the request transmitted via Interpol/Sirene bureau and any additional information requested by the Court before the hearing. That could cover not only cases in which the EAW has not been forwarded timeously but also cases in which an EAW has not actually been issued. In this connection the expert team was advised by the lawyer who was interviewed during the evaluation visit that in approximately 60 % of cases in which he had intervened no copy of the EAW had been provided before the hearing, although in all of these he was of the opinion that the information available sufficed to assess whether the conditions necessary for surrender concurred<sup>5</sup>.

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<sup>1</sup> Act No CXXX of 2003, Sections 12(1) and 11(1)(c).

<sup>2</sup> Act No CXXX of 2003, Section 15(3).

<sup>3</sup> Act No CXXX of 2003, Section 12.

<sup>4</sup> Act No CXXX of 2003, Section 12(3).

<sup>5</sup> As indicated above, in 2006 the simplified surrender procedure was used in every case that resulted in the surrender of the requested person.

## RESTREINT UE

- Where the requested person does not consent to surrender a second court hearing is held on receipt of the EAW<sup>1</sup> with a view to a decision on surrender<sup>2</sup>. Attendance by legal counsel, interpreter and prosecutor is also mandatory. The motion by the prosecutor asking for the execution of the EAW is not a precondition for the court's deciding to execute it. If it is decided to execute the EAW, the court must order the arrest of the requested person for surrender.

The expert team was advised that it is also possible for the requested person to consent to surrender at that stage and in such a case the provisions on simplified surrender proceedings apply, although that had not so far happened at the time of the visit.

Immediately after the decision rendered at the hearing is announced, the public prosecutor, the requested person and his defence counsel can make a statement on an appeal against the decision. In such a case the appeal, together with the relevant documents, must be submitted directly to the Regional Court of Appeal of Budapest within two days.

### 4.6. REFUSALS TO SURRENDER

During the calendar year 2006 the Hungarian authorities refused the execution of EAWs in nine cases. The grounds for refusal were: prescription (two cases), the existence of criminal proceedings in course in Hungary for the same acts (three cases), the acts on account of which the EAW had been issued not constituting an offence under Hungarian law (two cases), the identity of the arrested person not corresponding to that of the wanted person (two cases).

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<sup>1</sup> See Chapter 4.1 above.

<sup>2</sup> Act No CXXX of 2003, Section 13.

## RESTREINT UE

The grounds for refusal listed in the implementing legislation are in principle in accordance with the FD<sup>1</sup>. During the meeting with the magistrates of the Metropolitan Court, however, it appeared that there was no common view on the question whether the refusal grounds laid down in Sections 4, 5(1) and 6 of Act No CXXX of 2003 are an exhaustive list. One of the magistrates expressed the opinion that pursuant to Section 2 of the abovementioned Act<sup>2</sup>, this Section could be interpreted as providing that additional grounds for refusal might exist on the basis of the Act on International Legal Assistance in Criminal Matters. Under that Act refusal based, for example, on humanitarian considerations, fundamental rights and freedoms or insufficient mental capacity was not ruled out even though not expressly provided for in the implementing legislation.

A number of questions were raised by the expert team in relation to certain specific grounds for refusal as laid down in the implementing law.

- Section 4(c) provides for a mandatory ground for refusal based on the lapse of time. It does not, however, include the condition imposed in Article 4(4) of the FD that the acts must fall within the jurisdiction of the executing MS under its own criminal law. The Magistrates of the Metropolitan Court explained that they always applied the provisions of Hungarian Law. That means that the execution of an EAW will be refused on the grounds of the lapse of time even when the crime is not within the jurisdiction of the Hungarian judicial authorities.
- Section 4(g) corresponds to Article 4(3) of the FD. The latter, however, refers to "judicial authorities of the executing Member State", whereas the former refers to "the Hungarian judicial authority (Court of Public Prosecutor) or *the investigating authority*"<sup>3</sup>.

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<sup>1</sup> Hungary has implemented Article 4(1) to (6) of the FD as mandatory and Article 4(7)(a) as an optional ground for refusal.

<sup>2</sup> See Chapter 2.2 above.

<sup>3</sup> In the Hungarian system "investigating authorities" means not only the law-enforcement agencies but also the prosecutor's office when conducting investigation in a series of cases listed in Section 29 of Act No XIX of 1998 on Criminal Proceedings, which fall within its exclusive competence. See Chapter 2.1 above.

## RESTREINT UE

The expert team was advised that according to Hungarian law police and other special investigating authorities (such as the Border Guard and the Customs and Excise Authority) are empowered to dismiss a case on their own initiative on the conclusion of an investigation, e.g. when the conduct does not constitute an offence, the defendant is dead or has been pardoned or the statutory period of limitation has expired. In such a case - also when the investigation is discontinued - a written decision is rendered and officially forwarded to the prosecutor, who assesses the decision and, if he deems it necessary, may order the investigation to be continued, either upon the complaint of an interested party or *ex officio* - throughout the whole period of prescription. Where the dismissal decision by the investigating authority is taken after the suspect has been heard, the decision to re-open the case can be taken only by the investigating judge<sup>1</sup> on the basis of new evidence.

### 4.7. OWN NATIONAL AND YOUTH ARREST AND SURRENDER ISSUES

As regards the surrender of nationals, Hungary opted for the regulations of both Article 4(6) and Article 5(3) of the FD, limiting their scope, however, to Hungarian nationals resident in Hungary<sup>2</sup>. Hungary will accordingly surrender own nationals residing in Hungary only for the purpose of conducting criminal proceedings on the condition that a guarantee is given that, if convicted in the issuing Member State, the requested person is returned to Hungary, on his or her request, to serve the sentence.

It is clear from the information given by the Hungarian authorities that Hungary will not execute a sentence if the offences do not constitute a criminal offence according to Hungarian law. The enforcement of sentences imposed by foreign courts is regulated by Articles 47 to 51 of Act No XXXVIII of 1996 on International Legal Assistance in Criminal Matters, which introduces the examination of double criminality as a condition of execution of the sentence<sup>3</sup>.

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<sup>1</sup> The role of the investigating judge in the Hungarian system is to guarantee protection of the rights of the person during the investigations.

<sup>2</sup> Act No CXXX of 2003, Section 5(1) and (2).

<sup>3</sup> Article 48(2) in conjunction with Article 5(1)(a).

## RESTREINT UE

The expert team was advised that, in addition to the restrictions on the surrender of nationals already mentioned, a Hungarian national resident in Hungary and sentenced *in absentia* abroad cannot be surrendered, even if a guarantee of retrial is given. The Hungarian authorities noted, however, that in such a case the EAW is sent to the Office of the Prosecutor General for consideration of the initiation of criminal proceedings or other measures. That could take place under Article 3(1) of Act No IV of 1998 on the Criminal Code<sup>1</sup>.

The Hungarian authorities reported that they had no experience of surrender requests made in respect of minors.

### 4.8. ACCESSORY OFFENCES

Section 3(4) of Act No CXXX of 2003 allows surrender in respect of such offences provided that they constitute offences under Hungarian law.

### 4.9. SPECIALITY

Hungary has no experience of difficulties arising from this issue.

### 4.10. ONWARD SURRENDER/EXTRADITION

The Hungarian authorities reported no experience of cases involving onward surrender or extradition.

### 4.11. ARTICLE 32 EXPERIENCES

Hungary has reported no cases involving Article 32 of the FD derogations.

### 4.12. TEMPORARY/CONDITIONAL SURRENDER

At the time of the visit Hungary had had no temporary surrender cases as executing state.

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<sup>1</sup> It reads: "Hungarian law shall be applied to crimes committed in Hungary, as well as to any actions of Hungarian citizens abroad, which are deemed criminal by Hungarian law".

# RESTREINT UE

## 4.13. THE MECHANICS OF THE SURRENDER (INCLUDING TEMPORARY AND CONDITIONAL SURRENDER) OF REQUESTED PERSONS

The MoJLE must notify the issuing judicial authority and NEBEK of any decision on the execution of an EAW and the surrender, as well as of the duration of the detention, of the requested person pursuant to the EAW.

NEBEK is responsible for all the arrangements necessary for surrender to take place, including contacts with the foreign authorities involved, arranging travel documents for the requested person where necessary, liaising with the Border Guards and organising the transport in cooperation with the Security Service of the Hungarian National Police.

Under Act No XXXVIII of 1996 on International Legal Assistance in Criminal Matters<sup>1</sup>, no passport, visa, foreign exchange or customs regulations may hinder the departure of requested persons or the transfer of objects out of Hungary.

The MoJLE is kept informed of every step taken in the handing over of the requested person.

## 4.14. CONFLICT OF EAWS/EXTRADITION REQUESTS

The implementing legislation takes account of Article 16 of the FD in the determination of priority. If there is conflict between an EAW and a request for extradition submitted by a third country, the provisions of the Act on International Legal Assistance in Criminal Matters apply<sup>2</sup>. The Hungarian authorities reported no problems in that connection.

## 4.15. EXPENSES

Hungary has no experience of any problems arising in connection with Article 30 of the FD.

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<sup>1</sup> Article 9.

<sup>2</sup> Act No CXXX of 2003, Section 8(3). Article 17 of the Act on International Legal Assistance in Criminal Matters reads: "If two or more States request the extradition of the same person, the decision on extradition shall take into account in particular the location of the offence, the citizenship of the person sought for the extradition, the order of arrival of requests and, if the requests relate to different offences, the relative gravity of each".

## 5. TRAINING PROVISIONS

The expert team was advised that International criminal law is one of the topics in the annual training plan for judges and prosecutors organised by the National Council of Justice<sup>1</sup> and the Department for Professional Training of the Office of the Prosecutor General respectively. Participation by judges and prosecutors in international seminars organised, for example, by Eurojust or the ERA was also reported.

Judges attend training activities on a voluntary basis, whereas for prosecutors such attendance is both a right and an obligation. In that context the expert team was informed that in March 2007 the Hungarian Centre for the Training of Prosecutors in Balatonielle organized a seminar on those issues in which two prosecutors from each county took part. It was also reported that there were prosecutors specialising in international law-related matters in every county.

According to the replies to the questionnaire, language training is available for the officials of the Department of International Criminal Law in the MoJLE, as well as for judges and prosecutors. In that connection, the expert team was advised that only 15% of the latter have a basic knowledge of English. At police level, all staff working at NEBEK demonstrated a fair knowledge of English.

As mentioned before, the MoJLE has drafted guidance of best practice to assist courts to complete the EAW form which is also available on the National Council of Justice website.

## 6. DEFENCE PERSPECTIVES

The expert team had the opportunity to meet one member of the Bar who usually appeared as a defence counsel before the Metropolitan Court in the execution of EAW cases.

In his view the person receives timely and complete information on the reasons for arrest and on what he or she could expect from that procedure. To that end, after the arrest police officers give the person a form informing him/her of his/her rights. He or she is also given copies of the documents on the basis of which the arrest took place within the seventy-two hours following the arrest, translated into his or her own language. The person is assisted by an interpreter throughout the proceedings if he or she does not know Hungarian. The decision taken by the court is available for the requested person in his or her own language as well.

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<sup>1</sup> The National Judicial Academy in Budapest started work in September 2006.

# RESTREINT UE

The lawyer gave details of the mandatory presence of defence counsel when the surrender of an individual on the basis of an EAW was being examined. Defence counsel is called after the arrest of the requested person. He is either selected by the person concerned or appointed by the Metropolitan Court from among those on a list of expert lawyers in criminal law on hand at the Attorney Chamber. Legal aid is available for such situations.

In his opinion communication with both the Police and the court is appropriate. He explained that since arrest can not exceed seventy-two hours, it is preferable for contacts to be made by telephone. Defence counsel receives copies of the documents, duly translated, by fax and can apply to the court to request the issuing authority to provide additional information.

Defence counsel is given the opportunity to meet the requested person shortly before the hearing before the Metropolitan Court so that he, assisted by the interpreter if necessary, can provide him/her with detailed information concerning the procedure.

The enquiries of the expert team focused mainly on the simplified surrender procedure. In that connection the lawyer interviewed confirmed that in a number of cases in which he had been involved the decision to surrender was taken without an EAW. He was not, however, critical of that fact. In his view Interpol alerts were soundly based in general and he in any case felt that the information provided before the hearing was sufficient. He also noted that in all cases the Metropolitan Court assessed whether the conditions for the execution of an EAW and surrender were met, regardless of whether the requested person consented to surrender.

## 7. CONCLUSIONS

The expert team would like to emphasize the high level of the organization of the visit by the Hungarian authorities. The team appreciated the professional attitude of the persons involved in the visit, the quality of the experts the team had the opportunity to meet and their openness to the discussion of any question raised during the interviews. The substance of the information provided enabled the team to achieve the objectives of the evaluation visit.

# RESTREINT UE

## 7.1. GENERAL CONCLUSIONS

7.1.1. Hungarian implementing legislation is mostly in line with the FD and procedures under Hungarian law are adequate for the purposes of the latter.

7.1.2. The practical implementation of the EAW in Hungary seems to be simple and clear.

7.1.3. The Hungarian authorities and professionals have a very positive opinion of the EAW. Their wish to see the EAW effectively enforced is evident. That attitude results in a flexible approach to overcoming any obstacles that arise in practice.

7.1.4. As a result of what has been described, the EAW generally works very effectively in Hungary.

7.1.5. There are, however, certain issues regarding both the transposing legislation and the practical implementation that should be improved.

7.1.6. There are still a number of subjects of which Hungary has no experience (e.g., conflict of EAWs, onward surrender). The implementing law does contain relevant legal provisions concerning these matters, however no cases emerged in practice. The question of how national provisions would be implemented in practice in such cases therefore remains open.

## 7.2. CONCLUSIONS IN RESPECT OF HUNGARY'S ACTIVITIES AS AN ISSUING MEMBER STATE

### 7.2.1. Issues

7.2.1.1. No need for a national arrest warrant or a judicial decision having the same effect for the issue of an EAW.

## RESTREINT UE

According to the information provided during the visit, if there are well-founded reasons to believe that the wanted person is located in another MS, the Hungarian courts proceed directly with the issue of an EAW. In such a case the Hungarian authorities refer to the indictment by the prosecutor in box (b) 1 of the form as the decision on which an EAW is based. The evaluation team did not feel that that was an arrest warrant or an enforceable judicial decision as required in Article 8(1)(c) of the FD and box (b) 1 of the form. While no problems had been reported in that respect, it cannot be totally excluded that it could cause problems for the execution of the EAW in some MSs, which might insist on evidence of a national arrest warrant or another decision having the same effect. The recent change in Hungarian legislation providing that an EAW is also an order for arrest in Hungary ensures that every EAW also has the effect of a national arrest warrant. That change of legislation is in accordance with the spirit of the EAW as a judicial decision taken by a judge in one MS which can be executed in all States (including the State in which it was issued). The question of the compatibility of Hungarian legislation with Article 8(1)(c) of the FD on this point remains open.

### 7.2.1.2. Proportionality

The principle of legality that governs the Hungarian prosecution system is interpreted in the sense that an EAW must be issued whenever the penalty thresholds laid down in Article 25 of the implementing law are reached. In the view of the judges and prosecutors which participated in the evaluation visit, there is no margin of discretion for the Hungarian courts to assess the appropriateness of issuing an EAW whether the acts fall within the scope of the aforementioned provision.

The expert team notes that the FD does not include any obligation for judicial authorities to apply any proportionality test in issuing an EAW. It deems it appropriate however to discuss at EU level the advisability of introducing such a test in the EAW system.

### 7.2.1.3. Multiple EAWs.

If two or more EAWs have been issued by Hungarian courts in respect of the same person, there is no possibility of merging them (even if they were issued by the same court) into a single unified EAW. That may cause problems if the executing Member State does not receive (or is not informed of) all existing EAWs with regard to the same person at the same time.

## RESTREINT UE

The alert system set up to warn the executing authority that there are multiple EAWs - communication through SIRENE Bureau - might not suffice in some cases.

7.2.1.4. Date of the EAW issued to replace a pre-existing international arrest warrant.

Under the implementing Act, the EAW issued on the basis of a previous international arrest warrant retains the date of the latter. It is therefore the date of issue of the pre-existing international arrest warrant and not the real date of issue of the EAW that is indicated on the form. The Hungarian authorities argued that the effect of that practice should not be overstated since further explanation could be provided in box (f) of the form.

The team was advised that this provision was adopted pursuant to the criterion adopted by the Supreme Court that in such cases the issue of an EAW should not interrupt the period of prescription. The expert team is, however, of the opinion that such a question could be solved by other means at national level to prevent the potential problems relating to the proper completion of the form that could arise from that practice.

7.2.1.5. No official on duty at the MoJLE at weekends or on official holidays.

According to the information supplied, there is no official on duty at the MoJLE – nor a judge on call for the issuing of an EAW- at weekends. That could cause problems in urgent cases, e.g. when the requested person is found in another MS which requires an EAW to be issued or forwarded so that the arrest may be made, or when information is requested as a matter of urgency by the executing authority.

7.2.1.6. *In absentia* judgments.

When reporting on the most problematic grounds experienced for refusal/difficulties in the execution of an EAW, the Hungarian authorities referred to two similar cases with IE and DK in which the EAWs issued by the Hungarian courts for the purpose of executing sentences imposed on persons who were not present during their trials were refused. In the view of the Hungarian authorities the reason for such refusal had to be found in the different understanding of the FD as regards "decision rendered *in absentia*" and the differences between national legislations on that point (see Chapter 3.5).

# RESTREINT UE

Within the expert team the opinion was expressed that, in principle, it should be solely for the trial court in the issuing MS to assess whether the person concerned had been properly informed of the date and place of the hearing and it should suffice that the issuing MS had provided the relevant information in box d) of the form. The executing MS which is called upon to execute an EAW for the purpose of enforcing such a judgment should not in principle be allowed to ask for evidence that the accused was duly informed of the date and place of the trial, as it is solely for the trial court in the issuing MS to assess that matter.

## 7.2.1.7. Functioning of the rule of speciality in practice.

The expert team examined the practical difficulties that might be encountered by competent authorities initiating criminal proceedings against a person surrendered for acts not covered by the EAW in checking the previous surrender; this could create conditions for a breach of the rule of speciality. The judges who were interviewed expressed the view that they would accept evidence gathered before the consent of the MS which surrendered the person was obtained. The person would not, however, be tried until the consent was given.

## 7.2.2. Good practice: Guidance for the completion of the EAW form.

The MoJLE has edited written guidance that includes specific information on how the EAW form should be filled in. That guidance is also available on the Internet in Hungarian.

In an annex the implementing law has a chart providing mandatory guidance for issuing judicial authorities indicating which of the offences specified in the Hungarian Criminal Code corresponds to each of the offences listed in Article 32 of the FD.

## 7.3 CONCLUSIONS IN RESPECT OF HUNGARY'S ACTIVITIES AS AN EXECUTING STATE

### 7.3.1. Issues

7.3.1.1. An EAW is not needed for a court to order surrender in the simplified surrender procedure (with the consent of the requested person).

The simplified surrender procedure allows for a decision on surrender within the seventy-two hours following the arrest of the requested person on the basis of an Interpol alert. It covers not only cases in which the EAW has not been forwarded to the Hungarian authorities but also cases in which the EAW has not actually been issued even though there is an arrest warrant that serves as a basis for the Interpol notice.

## RESTREINT UE

According to the answers given by the officials of the MoJLE, judges, prosecutors and the private attorney who were interviewed during the visit, no problems were associated with that system, and the simplified procedure only took place when the available data were enough to establish all the important questions for the decision on surrender. The evaluation team, however, questioned whether such a system (however quick and effective) was the best possible. That surrender system operates outwith the EAW framework and might create difficulties for Member States which apply the FD strictly. The main issue is related to the level of the individual's knowledge of the content of the EAW (Article 11(1) of the FD) when giving his/her consent to surrender and to the revocation of the rule of speciality.

7.3.1.2. Bail is not possible in EAW proceedings under the Hungarian implementing legislation. It must be noted that the FD does not require that the requested person remains in detention throughout the EAW procedure. In principle such a measure, intended to prevent that the requested person evades the execution of the surrender order, is not necessary in situations where other measures not that constraining suffice to prevent his absconding or where the risk of absconding does not concur. The views of the Member States on this issue are however divergent, as is their reading of the FD. In this context, consideration has to be given to the argument of the Hungarian authorities to justify such legislative option that the FD obliges Member States to take all the necessary measures to ensure the execution of the EAW.

7.3.1.3. It is unclear whether grounds for refusal other than those listed in the implementing law can be applied.

During the meeting with the judges of the Metropolitan Court it appeared that there was no common view on the question whether additional grounds for refusal might be applied on the basis of national legislation or pursuant to the general principles of the Hungarian judicial system. That means that refusal could be based, for example, on humanitarian considerations, fundamental rights or insufficient mental capacity even if that were not expressly provided for in the implementing legislation.

## RESTREINT UE

7.3.1.4. The implementing legislation extends the grounds for refusal laid down in Article 4(4) of the FD (lapse of time).

The evaluation team found that Section 4(c) of the implementing law stipulates a mandatory ground for refusal based on the lapse of time but omitting the condition imposed in Article 4(4) of the FD that the acts must fall within the jurisdiction of the Hungarian authorities under their criminal law. The judges of the Metropolitan Court confirmed the view that an EAW is to be refused on the basis of the lapse of time even when the crime does not fall within the jurisdiction of the Hungarian authorities. That is an extension of the grounds for refusal and therefore restricts cooperation between Hungary and other Member States. That provision of the law should clearly be changed.

7.3.1.5. The wording of the implementing legislation (Section 4(g) of the implementing law) on the scope of the ground for refusal laid down in Article 4(3) of the FD (previous decision not to prosecute for the offence on which an EAW is based or to halt proceedings) does not correspond literally to Article 4(3) of the FD, since it attributes the decision to dismiss charges relating to the offence on which an EAW is based or to halt the investigation or the criminal proceedings not only to the judicial authorities, as laid down in the FD, but also to "the investigating authority".

The evaluation team was informed, however, that under Hungarian law police and other investigating authorities are empowered to dismiss a case on their own initiative on the conclusion of an investigation, although always under the supervision of the prosecutor, who may order the investigation to be continued.

7.3.1.6. Hungary will not execute any sentence passed against a Hungarian national resident in Hungary by a court of another MS if the acts do not constitute a criminal offence under Hungarian law.

Regarding the surrender of own nationals, Hungary applies both Article 4(6) and Article 5(3) of the FD mandatorily. It is clear from the information provided during the visit, however, that Hungary will execute a sentence only if the acts constitute a criminal offence under Hungarian law.

The expert team is of the opinion that such a condition, although applied by a number of MSs, leads to situations in which cooperation between them is not balanced and undermines one of the objectives of the common judicial area, namely that no offender should be left unpunished.

## RESTREINT UE

7.3.1.7. Additional restrictions on the surrender of own nationals.

In addition to the restrictions on the surrender of nationals already referred to, a Hungarian national resident in Hungary and sentenced *in absentia* abroad cannot be surrendered, even if a guarantee of a retrial is given. The Hungarian authorities noted that in such a case the EAW would be sent to the Office of the Prosecutor General for consideration of the initiation of criminal proceedings. The evaluation team considers that that practice could be contrary to the FD.

7.3.2. Good practices

7.3.2.1. Defence rights are granted to a wanted person at a very early stage.

The person receives in his or her own language timeous, comprehensive information concerning the reasons for arrest and the procedure, as well as assistance from an interpreter, if needed, immediately after the arrest and throughout the proceedings. According to the information provided, the assistance of the defence lawyer and, where necessary, of the interpreter is free of charge for the requested person.

## 8. RECOMMENDATIONS

### 8.1. RECOMMENDATIONS TO HUNGARY

#### 8.1.1.As issuing Member State

Recommendation 1 - To consider amending its national legislation to require that the issue of an EAW for prosecution purposes is always preceded by a national arrest warrant or another enforceable judicial decision having the same effect (see 7.2.1.1).

## RESTREINT UE

Recommendation 2 - To amend Section 26 of Act No CXXX of 2003 to ensure that in those cases in which an EAW is issued to replace a pre-existing international arrest warrant, the date of issue of the EAW is clearly indicated in the EAW form (see 7.2.1.3).

Recommendation 3 - To set up, in a manner considered appropriate, a 24/7 duty service at the MoJLE and at court level to deal with urgent EAW matters (at weekends and on official holidays) (see 7.2.1.5).

Recommendation 4 - To consider establishing mechanisms that allow the competent authorities initiating criminal proceedings against a person surrendered for an offence committed before the surrender which was not covered by the EAW, to check the conditions of the surrender in good time, with a view to respecting the speciality principle (see 7.2.1.7).

### 8.1.2. As executing Member State

Recommendation 5 - In the context of its practice of executing a simplified surrender on the basis of an Interpol alert issued by another Member State, ensure that the information available is the same as that included in the EAW (see 7.3.1.1).

Recommendation 6 - To reconsider at the appropriate level the possibility of refusing the execution of an EAW on grounds other than those expressly listed in the implementing law (see 7.3.1.3).

Recommendation 7 - To amend Section 4(c) of Act No CXXX of 2003 to bring it into line with Article 4(4) of the FD (see 7.3.1.4).

Recommendation 8 - To amend its national legislation so that, in the event of sentences passed against Hungarian nationals in other Member States for offences not punishable under Hungarian law, it either surrenders the persons or executes the imprisonment sentences imposed by other Member States' courts (see 7.3.1.6).

Recommendation 9 - To amend its national legislation so that the specific arrangements covering Hungarian nationals resident in Hungary against whom sentences have been passed in other MSs by decisions taken *in absentia* are abolished (see 7.3.1.7).

# **RESTREINT UE**

## **8.2. RECOMMENDATIONS TO CERTAIN OTHER MEMBER STATES**

Recommendation 10 - In the event of a judgment rendered in the absence of the defendant, where the issuing authority has stated in box (d) of the form that the person was otherwise informed of the date of the trial which led to the judgment, Member States should not demand guarantees under Article 5(1) or proof of the fact that the person was informed (see 7.2.1.6).

## **8.3. RECOMMENDATIONS TO THE EUROPEAN UNION**

Recommendation 11 - To consider to amend the Framework Decision on the EAW in order to give sufficient time to the issuing authority to provide a language-compliant EAW, and/or to oblige the executing authority to accept an EAW in the language of the issuing Member State.

Recommendation 12 - To continue the ongoing discussion within the relevant EU institutions of the feasibility of incorporating in the EAW system a proportionality test for the issue of EAWs (see 7.2.1.2).

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ANNEX A

## PROGRAMME OF VISITS

### **Monday, 2 July 2007**

Morning: Arrival of the evaluating team

14.00 – 16.30     Introductory meeting at the Ministry of Justice and Law Enforcement

### **Tuesday, 3 July 2007**

9.30 – 11.30     Visit to the Sirene and Interpol Bureaus

12.15 – 13.15     Lunch

14.00 – 16.00     Visit to the Metropolitan Court of Budapest

19.00             Dinner

### **Thursday, 4 July 2007**

8.30 - 10.30     Visit to the Office of the Chief Prosecutor General

10.30             Depart of the delegation for Ráckeve

12.00 – 13.30     Visit to the Ráckeve City Court

14.00 –             Lunch at Ráckeve

### **Friday, 5 July 2007**

09.00 - 10.00     Meeting with a defence lawyer

10.30 – 12.30     Closing session at the Ministry of Justice and Law Enforcement

13.00 – 14.00     Lunch

## LIST OF PERSONS MET

### **Ministry of Justice and Law Enforcement**

Mr. Lipót Höltzl, Head of the International Criminal Law Department

Ms. Klára Németh-Bokor, Deputy Head of the International Criminal Law Department

Ms. Tünde Forman, Deputy Head of the International Criminal Law Department

Ms. Henriett Nagy, Senior Legal Officer at the International Criminal Law Department

### **NEBEK**

Mr. Zoltán Dani, Colonel Director

Mr. Péter Kővári, Head of Section, Interpol National Central Bureau

Ms. Dóra HAJDUK, Project co-ordinator, Sirene Bureau

### **Metropolitan Court Budapest**

Ms. Erzsébet Mázi-Szepesi, Judge, Deputy Head of the Penal College

Mr. Zsolt Horváth, Judge

Ms. Andrea Kenéz, Judge

### **Office of the Prosecutor General**

Mr. László Láng, Prosecutor, Head of the Department of Supervision of Prosecution

Ms. Éva Kis, Prosecutor, Deputy - Head of the Department of Supervision of Prosecution

Ms. Andrea Répássy, Prosecutor at the Metropolitan Chief Prosecutor's Office

### **Ráckeve County Court**

Mr. László Miszori, Judge, Head of the Penal College at the Pest County Court

Ms. Ágnes Krizsán, Judge, President of the Ráckeve County Court

Mr. János Mohácsi, Judge

Ms. Ágnes Serfőző, Judge

Mr. László Balogh, Judge

### **Defence lawyer**

Mr. Csaba Maráth, private attorney

## LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

| ACRONYM<br>ABBREVIATION<br>TERM | ENGLISH EXPLANATION  |
|---------------------------------|--|
| FD                              | Council Framework Decision of 13 June 2002<br>on the European arrest warrant and the<br>surrender procedures between Member States |
| MoJLE                           | Ministry of Justice and Law Enforcement  |
| NEBEK                           | International Law Enforcement Co-operation<br>Centre   |
| OITH                            | National Council of Justice  |

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