



HOUSE OF LORDS

European Union Committee

30th Report of Session 2005–06

European Arrest Warrant—Recent Developments

Report with Evidence

Ordered to be printed 28 March and published 4 April 2006

Published by the Authority of the House of Lords

London: The Stationery Office Limited
£10.00

HL Paper 156

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ORAL EVIDENCE

Mr Andy Burnham MP, Parliamentary Under Secretary of State, Mr Andrew Miller, Legal Adviser, and Ms Karen Townsend, Crime Reduction and Community Safety Group, Home Office

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(p) refers to a page of the Report or Appendices, or to a page of evidence

ABSTRACT

The European Arrest Warrant (EAW) is now widely used to secure the arrest and surrender of suspected criminals across the Union. The EAW has a key role to play in the fight against terrorism and in bringing those accused of serious crime to justice.

This Report draws to the attention of the House two recent developments relating to the EAW:

1. EC Commission's recent report on the implementation of the EAW, criticising Member States for inadequate or faulty implementation; and
2. The reactions of certain Member States' constitutional courts to the EAW, finding incompatibility with safeguards provided for their nationals.

Some legal uncertainty now surrounds the EAW. Until this is resolved the EAW may not be fully effective between Member States. Further, the adoption of other measures based on mutual recognition, such as the European Evidence Warrant, may be delayed.

The Report also makes available the written and oral evidence on these matters given by Mr Andy Burnham MP, Parliamentary Under Secretary of State in the Home Office.

European Arrest Warrant— Recent Developments

Introduction

1. The European Arrest Warrant (EAW) has been available to police and prosecutors in the European Union for more than two years. The adoption of the Framework Decision¹ establishing the EAW by the Council in 2002, accelerated by the events of 9/11, attracted considerable comment. Its implementation and application since have also attracted attention. Use of an EAW in a number of high profile cases² has been reported in the media. It was, for example, the means by which Hussain Osman³, a suspect in the London bombings, was sent back from Italy to the UK.
2. The purpose of this Report is to draw the attention of the House to two major developments:
 - (1) the Commission's recent report on the implementation of the EAW, criticising Member States for inadequate or faulty implementation;⁴ and
 - (2) the reactions of certain Member States' constitutional courts to the EAW, finding incompatibility with safeguards provided for their nationals.
3. The Commission's report was subject to scrutiny by Sub-Committee E (Law and Institutions) and on January 18 2006 the Committee met Andy Burnham MP, Parliamentary Under Secretary of State in the Home Office, to discuss these developments. The meeting also provided the opportunity to look at how the EAW was working in relation to the UK and what the effect of the above developments has been on the viability of the principle of mutual trust and recognition.
4. A transcript of the oral evidence given by the Minister, together with a subsequent note provided by him for the Committee, is printed with this Report.

¹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L 190/1. The Committee reported twice during the negotiations on the Framework Decision: *Counter Terrorism: the European Arrest Warrant*, 6th Report, 2001–02, HL Paper 34, and *The European Arrest Warrant*, 16th Report, 2001–02, HL Paper 89.

² For example, in June 2005 Viktor Dembovskis, suspected of the rape and murder of Wembley teenager Jeshma Raithatha, was extradited to the UK within weeks of fleeing to his home country of Latvia during the investigation of the case.

³ Also known as Hamdi Issac.

⁴ Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version) Brussels, 24.1.2006 COM(2006)8 final. The Report was first issued in February 2005 (COM(2005) 63 final) but at that time Italy had not given effect to the EAW. Italy's implementation of the EAW was not completed until April 2005.

The European Arrest Warrant

5. The Framework Decision to establish the EAW entered into force on 1 January 2004.⁵ It is aimed at replacing extradition proceedings between Member States and is designed to speed up and remove any political dimension affecting the transfer of suspected criminals and fugitives. The EAW can be used to secure the arrest and surrender of an individual for the purpose of conducting a criminal prosecution or of executing a custodial sentence or detention order. The EAW applies in relation to any offence punishable under the law of the requesting State by at least 12 months' imprisonment or, where there has already been a conviction, a sentence of at least four months has been imposed.⁶
6. The EAW, in a standard form, is sent direct from one judicial authority to another without the involvement of any diplomatic channel or other intermediary. The requesting State does not have to show that there is a case to answer. The merits of the request are taken on trust and there are limited grounds for refusing enforcement. Traditional exceptions for political, military and revenue offences have gone. Tight time-limits apply.
7. Further, for a long list of (32) offences, the Framework Decision removes the principle of double criminality, i.e. that the act in respect of which extradition is sought is recognised as criminal in both the requesting and extraditing State. It is sufficient that the act be *criminal* in the State issuing the EAW and is punishable under the law of that State by imprisonment for a maximum period of not less than three years. The listed offences include participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in arms, corruption, fraud including fraud pertaining to the financial interests of the European Union, money laundering and counterfeiting of money including the euro.

The Commission's Report

8. Article 34(4) of the Framework Decision requires the Council to conduct a review of the application of the EAW. To that end the Commission produced a report in February 2005 evaluating the operation of the EAW. The Commission's report was primarily based on their analysis of national laws giving effect to the EAW and the response to questionnaires addressed to the Member States. In January 2006 the Commission published a revised report to take account of the Italian legislation adopted since the presentation of the original report.⁷

⁵ Though at that time it only took effect between 8 (including the UK) of the (then) 15 Member States of the Union. The EAW was implemented in the UK by the Extradition Act 2003, which also entered into force on 1 January 2004.

⁶ Examples of the latter use can be seen in the cases of *Office of the King's Prosecutor, Brussels v Armas and others* [2005] UKHL 67, and *Enander v The Governor of Her Majesty's Prison Brixton and Another* [2006] 1 C.M.L.R. 37. In the first case, the Kingdom of Belgium sought the surrender of an Ecuadorian citizen who had been convicted in Brussels in his absence of three charges, including people trafficking. In the second an EAW issued by the Swedish National Police Board sought the surrender of the applicant to serve his sentence for offences for which he had been sentenced to imprisonment for one year and three months by a court at Svea in Sweden.

⁷ Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ("the Report")

9. The Commission's report concludes that despite an initial delay (many Member States were late in implementing the Framework Decision) the EAW is now operational across the Union. EAWs have been used in over 2,000 cases and 653 persons have been arrested and 104 persons surrendered in the period up to September 2004.
10. However, the Commission is critical of Member States' implementation of the Framework Decision. In an annex to its Report the Commission has set out a detailed, article by article, analysis of how the Decision has been implemented in the law of the Member States. For each article, Member States are identified according to whether they have, in the Commission's view, fully, partially or wrongly transposed the Framework Decision in their national laws.
11. In some instances the Commission's view is clearly controversial. For example, criticism is levelled by the Commission at Belgium for its exclusion of abortion and euthanasia from the offence of "murder or grievous bodily harm" in the (32) listed offences. But there are circumstances where abortion and euthanasia may not be unlawful and their categorisation raises difficult questions of fundamental rights and morality. In fairness, the Commission notes that some Member States have indicated a wish to review the double criminality list because of concerns in relation to abortion, euthanasia and possession of drugs.⁸
12. The Government are content with the list as it stands (Q 4). However, it is clear from the Commission's report that not all Member States construe the list in the same way and that it is capable of causing problems. We also note that there has been difficulty in agreeing reproduction of the list in the context of the proposed European Evidence Warrant (EEW).⁹ **We believe a review would be helpful.**

Member States' reactions

13. Doubts have been raised as to the accuracy of the Commission's analysis, not least as regards the position in the UK. In his Explanatory Memorandum (EM) dealing with the Commission's Report, the Minister provided us with a very full and detailed rebuttal of the Commission's statement as to that position.¹⁰
14. We asked the Minister whether the Government had received a response from the Commission. The Minister told us that the Commission had not yet responded (Q 1). We were also interested to learn that the UK was not the only Member State taking issue with some of the report's findings.
15. As already mentioned, the Commission has recently issued a revised version of its report in order to take account of the Italian implementing legislation. The revision does not take into account the comments made by Member

COM(2006)8 final. Annexed to the Report is a Commission Staff Working Document analysing Member States' implementation of the Framework Decision article by article. SEC(2006) 79 ("Staff Working Document").

⁸ Staff Working Document, p 6.

⁹ Written Statement. Justice and Home Affairs Council. Hansard House of Lords 3 March Vol 679 No 113. WS 43.

¹⁰ A copy of the relevant section of the Minister's Explanatory Memorandum is published with this Report.

States, including the UK, in response to the criticisms made in the original report. But in the opening paragraph of the annex to the revised report the Commission states that “Further information transmitted by Member States since the adoption of the previous version will be taken into account in a second report of the Commission, as requested by the Justice and Home Affairs Council on 2 June 2005”.¹¹ We understand this to mean that the Commission will reconsider its assessment of Member States’ implementation in the light of the comments made by them following publication of the first report. **It is regrettable that the Commission did not show Member States the report in draft. We have asked the Minister to keep us informed of developments.**

The EAW and terrorism

16. The EAW was adopted following the 9/11 attacks to try and address the problem of terrorism. As mentioned, the recent case of Hussain Osman, in which the EAW procedure was used to extradite a suspect in the London bombings from Italy to the UK, demonstrates the effectiveness of the procedure. The Minister said that the Hussain Osman case “very well illustrated the potential benefits to the UK of the smooth functioning of this system”. However, in other terrorist cases the process had not been as swift (QQ 8–9).
17. Given the context in which the Framework Decision establishing the EAW was adopted it is important that it should work, and be seen to be working, well. **The EAW has a key role to play in the fight against terrorism and in bringing those accused of serious crime to justice.**

EAW statistics

18. We sought factual information on the operation of the EAW in and as between all Member States. Some statistics can be found in document EUROJUST 15,¹² which sets out data collected by the Secretariat of the Council of Ministers. The information is not perfect, for several reasons. Some Member States have not collected data in all fields. In other areas the data provided suggest that different Member States have interpreted the questions in different ways. There are obvious discrepancies in the figures¹³ but because the Council merely collected the data, it is unable to explain why these have occurred.
19. There is an ongoing project in the Council to collect and analyse EAW data.¹⁴ It is envisaged that this will lead to an annual evaluation by the Council. Member States are also to undertake a mutual evaluation of the practical application of the EAW (Q 2). We look forward to seeing the results

¹¹ Report, p 2.

¹² Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant. COPEN 49.

¹³ One glaring discrepancy is in the case of figures for France: the document states that 195 EAWs were issued in 2004, and then explains that 500 EAWs were transmitted via Interpol and 1291 via the SIS (Schengen Information System).

¹⁴ At a meeting of the Working Party on Cooperation in Criminal Matters on 5 April 2005, delegations agreed the terms of a standard questionnaire for the purpose of collecting quantitative information on the operation of the European arrest warrant. COPEN 75.

of this work. The preparation and publication of such data are important not only to governments and national parliaments in monitoring the application and effectiveness of EU law but also to citizens in informing them of the action being taken to secure their safety.

Use of EAW—UK experience

20. The Minister believed that the system was working well and that the figures demonstrated this.¹⁵

(a) Inward

21. In the period 1 January 2004 to 22 February 2006, the UK received 5,732 EAWs. 175 have resulted in an arrest in the UK, with 88 persons being surrendered. The large discrepancy between the number received and the number of arrests is due to the fact that a large number of EAWs are posted as “alerts” on the SIS (Schengen Information System)¹⁶ or via Interpol and are therefore not directed at one Member State. As the Minister told us, very few have turned out to have a connection with the UK (QQ 17–21).
22. Not all requests for EAWs have been accepted by our courts. In 34 cases (of which 29 occurred in 2005) the EAW was discharged by the court, in a substantial number of those cases because of lack of information in the warrant. Other cases have been discharged on the grounds, for example, that the offence in question was not an extraditable offence or because, as a result of the passage of time, the judge considered that it would be unfair and unjust to order extradition. In no instance has the issuing State challenged the decision to refuse the EAW.¹⁷

(b) Outward

23. Since 1 January 2004 the UK has issued 201 warrants, which have resulted in 90 arrests with 69 persons returned to the UK (Q 16). Of the 96 warrants issued in 2004, 47 resulted in arrest, of which 41 were surrendered to the UK. The Minister informed us that action was continuing in respect of five of the remaining six. The other request had failed following the judgment of the Supreme Court of Cyprus declaring it unconstitutional to extradite Cypriot nationals (see paragraph 27 below). The remaining 49 requests had failed because the person concerned had not been located in the territory of the requested Member State.¹⁸

¹⁵ Letter of 22 February 2006 from Mr Andy Burnham MP, Parliamentary Under Secretary of State, Home Office, printed with this Report.

¹⁶ The Framework Decision envisages the SIS being used to transmit EAWs. Article 9(3) provides: “For a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending receipt of the original in due and proper form by the executing judicial authority”.

¹⁷ Letter of 22 February 2006 from Mr Andy Burnham MP, Parliamentary Under Secretary of State, Home Office, printed with this Report.

¹⁸ *Ibid.*

Surrender of own nationals—national constitutions

24. A particular problem concerns Member States surrendering their own nationals. A number of them have provisions in their constitutions restricting the extradition of their own nationals. The issue is not new to the EAW and has been addressed in international discussions of extradition procedures on a number of occasions; for example, in the context of the European Convention on Extradition 1957 and, more recently, the Convention relating to extradition between the Member States of the European Union 1996.
25. The issue was certainly considered in the negotiations leading to the EAW. The position appears clear. The Framework Decision does not permit Member States to refuse to surrender their own nationals. The EAW is based on the principle that EU citizens are responsible for their acts before national courts across the EU. However, the Framework Decision contains three provisions expressly directed at the issue. Article 4(6) enables the surrender of a sentenced individual to be made conditional on the requested Member State itself undertaking to execute the sentence. Under Article 5(3), surrender for the purpose of trial may be made subject to the condition that the individual concerned will, if convicted, be returned for the execution of his sentence. Finally, one of the (then) 15 Member States, Austria, sought and obtained a temporary exception (until 31 December 2008) from surrendering its own nationals (Article 33(1)).
26. The Commission's report notes that several Member States (for example, Portugal and Slovenia) have had to amend their constitutions in order to give effect to the EAW.¹⁹ Others have implemented the Framework Decision in a way which gives priority to their national constitutions or which appears to favour their own nationals (for example, Italy has provided that execution of an EAW may be refused where the requested person is an Italian citizen who did not know that the conduct was prohibited). It should be noted that the Commission is critical of this approach as going further than the Framework Decision allows.²⁰

National Constitutional Courts

27. The EAW has come under attack in a number of national courts. In April 2005 the Polish Constitutional Tribunal found that the EAW offended the Polish Constitution's ban on extraditing Polish nationals.²¹ In July 2005 the German Constitutional Court annulled Germany's law transposing the Framework Decision because it did not adequately protect German citizens' fundamental rights.²² The Supreme Court of Cyprus has found the EAW to fall foul of a clause in the Constitution of Cyprus prohibiting their citizens from being transferred abroad for prosecution.²³ On the other hand, the EAW has survived challenge in the Greek Constitutional Court.

¹⁹ Report, p 2.

²⁰ Staff Working Document pp 5, 9.

²¹ An unofficial translation, provided by the Polish Constitutional Tribunal, has been published by Common Market Law Reports: *Re Enforcement of a European Arrest Warrant*, [2006] 1 C.M.L.R. 36.

²² Decision of 18 July 2005, upon an application by a German national, Mamoun Darkazanli, whose extradition was sought by the Spanish authorities on alleged al-Qaida terrorist charges.

²³ Decision of 7 November 2005.

28. The Minister recognised that such challenges were a matter of some concern and he could not say that similar problems might not arise in other Member States (Q 53). But he also drew attention to the fact that remedial action was in hand. In Germany steps were being taken to introduce amending legislation, though the Minister could not say by when that would be accomplished. In the case of Cyprus and Poland the problem may be difficult to solve because amendment of their constitutions seems to be needed. It looks unlikely that the 18 month deadline set by the Polish Constitutional Tribunal will be met (QQ 43–48).

Mutual recognition—the principle

29. In its report the Commission describes the EAW as “the first, and most symbolic, measure applying the principle of mutual recognition”.²⁴ This principle is built on the trust and confidence of one Member State in the criminal justice arrangements of other Member States. If one Member State refuses to execute an EAW on grounds which are not permitted under the Framework Decision then other Member States might well feel justified in doing likewise. Were such practice to become widespread then the whole regime could break down and its benefits would be lost. Mutual recognition and reciprocity would seem to go hand in hand.
30. In response to the German Constitutional Court’s ruling, the Spanish authorities rejected several EAW requests from Germany because under Spanish Constitutional law extradition is permitted only on the basis of reciprocity. We therefore asked the Minister whether the challenges to the EAW raised in the courts of Member States could have long-term implications for the operation of the EAW, and in particular for the approach of the UK to the EAW. Would the UK recognise and execute EAW requests originating from Member States that could not reciprocate?
31. The Minister believed mutual recognition to be important and that it would be unsatisfactory to have an imperfect relationship. He thought that there would be “a breakdown of the system if it was tit-for-tat”. He added: “I think it is right that we should say to our partners we would want them to make the changes as quickly as possible and we will give them ample time to do that but there would have to come a point where if there was no movement we would have to review the position”. The Minister hoped to avoid the situation where some Member States might have to be treated, for the purposes of our Extradition Act, differently from others (QQ 51, 56, 59).

ECJ Challenge

32. In July 2005 the Belgian Court of Arbitration made a reference to the European Court of Justice in a case challenging the *vires* of the Framework Decision and the legality of the partial abolition of dual criminality.

²⁴ Report, p 2, para 1.

Reference for a preliminary ruling of 13 July 2005 from the Arbitragehof (Belgium) in the proceedings between Advocaten voor de wereld, a non-profit-making association, and the Council of Ministers

(Case C-303/05)

Reference has been made to the Court of Justice of the European Communities by judgment of the Arbitragehof (Court of Arbitration) (Belgium) of 13 July 2005, received at the Court Registry on 29 July 2005, for a preliminary ruling in the proceedings between Advocaten voor de wereld, a non-profit-making association, and the Council of Ministers on the following questions:

Is Framework Decision 2002/584/JHA 1 of the Council of the European Union of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States compatible with Article 34(2)(b) of the Treaty on European Union, under which framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States?

Is Article 2(2) of Framework Decision 2002/584/JHA of the Council of the European Union of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, in so far as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Article 6(2) of the Treaty on European Union and, more specifically, with the principle of legality in criminal proceedings guaranteed by that provision and with the principle of equality and non-discrimination?

33. **This challenge is potentially far more serious than the German, Polish and Cypriot cases because the very use of a Framework Decision, instead of a Convention, to adopt the EAW is at issue.** The Minister told us that the Government have submitted observations in the case. The case is likely to be heard by the ECJ towards the end of 2006. In the meantime Belgium would, the Minister said, continue to issue and execute EAWs (QQ 68–71).

Conclusion

34. The EAW is now widely used to secure the arrest and surrender of persons across the Union and, as the Commission's report indicates, has largely overtaken traditional extradition procedures as between Member States. Problems have, however, arisen in some Member States where their constitutions provide protection against extradition of own nationals. Questions relating to the legality of the EAW are also pending before the European Court of Justice. **Until the legal uncertainty raised by this litigation is resolved it is inevitable that the effects and benefits of the EAW will not be fully felt across the whole Union and there may be caution and delays in moving forward on other EU legislative proposals based on mutual recognition; for example, the proposed European Evidence Warrant (EEW) currently under negotiation in the Council of Ministers.**
35. This Report is made for the information of the House.

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee were:

Lord Borrie
Lord Brown of Eaton-under-Heywood (Chairman)
Lord Clinton-Davis
Lord Goodhart
Lord Grabiner
Lord Henley
Lord Lester of Herne Hill
Lord Lucas of Crudwell and Dingwall
Lord Neill of Bladen
Lord Norton of Louth

Declaration of Interests

Lord Lester of Herne Hill
Member, Council of JUSTICE

APPENDIX 2: REPORTS

Recent Reports from the Select Committee

Annual Report 2005 (25th Report, Session 2005–06, HL Paper 123)

The Work of the European Ombudsman (22nd Report, Session 2005–06, HL Paper 117)

Scrutiny of Subsidiarity: Follow up Report (15th Report, Session 2005–06, HL Paper 66)

Evidence from the Minister for Europe—the European Council and the United Kingdom Presidency (10th Report, Session 2005–06, HL Paper 34)

Ensuring Effective Regulation in the EU (9th Report, Session 2005–06, HL Paper 33)

Recent Reports from Sub-Committee E

Human rights protection in Europe: the Fundamental Rights Agency (29th Report, Session 2005–06, HL Paper 155)

European Small Claims Procedure (23rd Report, Session 2005–06, HL Paper 118)

Human Rights Proofing EU Legislation (16th Report, Session 2005–06, HL Paper 67)

Evidence from the EP Legal Affairs Committee on European Contract Law, Rome II and Better Regulation (8th Report, Session 2005–06, HL Paper 25)

The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence (3rd Report, Session 2005–06, HL Paper 15)

European Contract Law—the way forward? (12th Report, Session 2004–05, HL Paper 95)

The Hague Programme: a five year agenda for EU Justice and Home Affairs (10th Report, Session 2004–05, HL Paper 84)—*Joint Report with Sub-Committee F (Home Affairs)*

Procedural Rights in Criminal Proceedings (1st Report, Session 2004–05, HL Paper 28)

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE E)

WEDNESDAY 18 JANUARY 2006

Present	Brown of Eaton-under-Heywood, L (Chairman) Clinton-Davis, L Goodhart, L	Grabiner, L Lester of Herne Hill, L Neill of Bladen, L
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COMMISSION REPORT ON THE IMPLEMENTATION OF THE FRAMEWORK DECISION ON
THE EUROPEAN ARREST WARRANT, UNDER EACH MEMBER STATE'S LAW

Explanatory memorandum submitted by the Home Office on 20 February 2006

SUBJECT MATTER

1. This Explanatory Memorandum relates to a report prepared by the Commission of the European Union on the operation of the Framework Decision on the European Arrest Warrant (EAW) by Member States.

SCRUTINY HISTORY

2. The Framework Decision on the European arrest warrant was adopted by the Council of Ministers on 13 June 2002, having been cleared after a debate in European Standing Committee B (House of Commons) on 10 December 2001 and on the Floor of the House of Lords on 23 April 2002.

MINISTERIAL RESPONSIBILITY

3. The Home Secretary has responsibility for extradition policy.

LEGAL AND PROCEDURAL ISSUES

4. *Legal base*

Article 34(3) of the Framework Decision required the Commission to conduct a review of the operation of the Framework Decision.

5. *European Parliament procedure*

The report was forwarded to the EP for information.

6. *Council voting procedure*

Not applicable.

7. *Impact on UK law*

No impact on UK Law. The Extradition Act 2003 ("the Act") contains the provisions to implement the Framework Decision in the United Kingdom and we believe that the report reflects these provisions. The Extradition Act 2003 came into force on 1 January 2004, in line with the Framework Decision.

18 January 2006

8. *Application to Gibraltar*

Gibraltar will separately apply the Framework Decision.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

9. The Framework Decision does not apply to the non-EU EEA states.

SUBSIDIARITY

10. Not applicable.

CONSULTATION WITH OUTSIDE BODIES

11. The report is not subject to consultation with outside bodies.

POLICY IMPLICATIONS

12. As required by Article 34(3) of the Framework Decision on the European Arrest Warrant the Commission has prepared a report on the operation of the European Arrest Warrant (EAW). At the time the report was published Italy had not implemented the Framework Decision. They implemented this on 14 May 2005 and the Commission has re-issued the report asking for Member States' revised comments.

Article 1 and Recitals 12 and 13—Definition of an EAW and obligation to execute it

The Commission Report correctly identifies that the UK and Malta cannot operate the EAW with Member States until they have been listed by Decree or Order and that they have not been informed whether these lists have been updated in line with the pace of transposition in the EU. In addition to the three statutory instruments passed by Parliament designating countries as Part 1 territories who have implemented the FD, a further statutory instrument was passed by Parliament on 21 July 2005 which designated Italy. The Extradition Act 2003 (Amendment to Designations) (No 2) Order 2005 came into force on 28 July 2005.

It was necessary to pass a number of designation orders as many Member States missed their implementation deadlines (1 January 2004 and for the new Member States 1 May 2004). There is no requirement within the FD for us to notify the Commission of any secondary domestic legislation, however we did inform Member States and the Commission of each order and explained its function and the date that it would come into force.

Article 2—Scope of the EAW

The Report points out that the UK has reduced the time period in conviction cases for conduct that falls under the FD list of offences and thereby removes dual criminality for all conduct covered by the list that has received a custodial sentence of 12 months or more as opposed to the three years listed in the FD. We consider that 12 months is sufficient—it seems odd to abolish dual criminality in accusation cases where someone may be punishable by a custodial sentence of 12 months or more then raise that threshold in conviction cases to three years. Our decision to go further than the FD cannot be considered to be in breach of our obligations as we would clearly not apply the dual criminality for conduct in the list that has led to a custodial sentence of three years or more.

Article 3—Grounds for mandatory non-execution of the EAW

The Commission correctly identifies that we have not transposed Article 3(1) into our national law as we do not have a possibility of an amnesty under UK law. In addition, the Report states that our implementation of Article 3(2) is contrary to the Framework Decision because we require the dual criminality test to be met for double jeopardy to apply. We do not agree with this assessment of the Commission and believe that they have misunderstood Section 12 of the Act which states that the District Judge must be satisfied that had the conduct occurred in the UK then the double jeopardy would apply. Section 12 does not require that the conduct has to satisfy the dual criminality test. We therefore consider that we have transposed the provisions of Article 3(2) correctly.

18 January 2006

In addition, the Report criticises the UK for introducing an additional ground for refusal (Section 208 of the Act) that allows a judge to refuse a request if he believes that the requesting person was acting in the interests of the UK by carrying out the actions conferred or imposed by or under an enactment, or is not liable as a result of an authorisation given by the Secretary of State for his action. We consider that this merely introduces another category of what is envisaged in Article 20 of the Framework Decision that allows an EAW not to be acted on if the subject of the warrant enjoys certain privileges or immunities. We have very limited immunities in our domestic law and Section 208 of the Act is necessary in order to protect these.

The Commission Report also notes that the UK (as well as the Netherlands) has introduced additional grounds for refusal arising from the application of Treaties or Conventions which have not been set aside by the Framework Decision. It is correct that Section 16 of the Act allows for a request to be refused for reasons of hostage taking considerations in specific situations where the International Convention against the Taking of Hostages of 18 December 1979 applies. We believe that this ground for refusal is necessary in order to ensure that we meet our international obligations under the Hostage Taking Convention and would welcome the Commission's further views on this matter, in particular whether this International Convention should have been set aside by the Framework Decision in order to ensure that Member States can meet both their obligations under the Framework Decision and that particular Convention.

Article 4—Grounds for optional non-execution of the EAW

The Report states that the UK implementation of Article 4(7)(b) is contrary to the FD as the UK is required to refuse surrender for extra-territorial offences if the conduct is punishable by less than 12 months under UK law. It is true that the UK has imposed a threshold of 12 months when considering EAW requests from Member States who are exercising extra-territorial jurisdiction. However, it should be noted that in comparison to other Member States the UK's application of extra-territorial jurisdiction is limited and we would only normally assume extra-territorial jurisdiction for serious offences. We therefore consider that there would not be many, if any, cases where we would refuse an EAW request for conduct that occurred outside of the Category 1 Territory because it failed to meet the 12 month threshold as it is unlikely that the UK would be able to exercise jurisdiction for the same conduct had it occurred outside of our territory. We therefore believe that whilst the Commission has made a valid point, that there is no need for them to be concerned at how we have implemented this provision in our national law.

Article 5—Guarantees to be given by issuing state in particular cases

This article deals with the guarantees that may be required by the executing State in relation to particular cases before the judicial authority agrees to execute the EAW. Only the guarantees envisaged under Article 5(1) apply to the UK as we do not require assurances in respect of life sentences and we have no restrictions on surrendering our own nationals. The Commission report states that the UK has gone further than the terms of the FD by not restricting our assurance to guarantee that a person who has been convicted *in absentia* has a right to apply for a retrial and be present at the judgment but that we also request additional assurances. Section 20 of the Extradition Act 2003 requires the District Judge to discharge a requested person where they have been convicted in their absence and it is clear that they did not deliberately absent themselves from the trial and he is not satisfied that they have a right to a retrial or (on appeal) a review amounting to a retrial (Section 420(5)). If a person is entitled to a retrial or a review then they must have "the right to defend himself in person or through legal assistance of his own choosing, or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required" in addition to having the "the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

Article 8—Content and form of EAW

Both the UK and Malta are criticised for not transposing the requirement for all information listed in Article 8(1) of the FD or indicating whether we use the correct form. It is possible for a non-EU Member State to be designated under Part One of the Act providing that they do not operate the death penalty. This explains why the Act does not specifically detail everything contained within the Framework Decision to allow it to cater for any other agreements that may occur in the future to introduce a similar simplified extradition procedure with other states. There are no plans at present to extend Part One to any non-Schengen states. This explains why Section 2 of the Act which lists the information that must be contained in a Part One request does not

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include, for example, the nationality of the subject of the warrant or the full contact details of the issuing judicial authority. Our legislation merely cites the minimum information requirements for a request to be processed under Part One of the Act and this does not prevent us from going beyond the legislation by providing more detailed information than listed in Section 2 of the Act. In practice, the UK judicial authority uses the template EAW which can be found attached as an annex to the Framework Decision. Any UK EAW request to another Member State contains all the information required by the Framework Decision and we are therefore fully compliant with the provisions contained within Article 8.

Article 9—Transmission of an EAW

The Report states that “in spite of the general philosophy of Article 5 of the Framework Decision” the UK does not allow for the direct transmission of an EAW where the exact location of the person is known. The UK, along with a number of other Member States, have decided to have a designated central authority to handle EAW requests. Article 7(2) of the Framework Decision states:

“A Member State may, if it is necessary as a result of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.”

In the UK, the National Criminal Intelligence Service acts as a central authority for all EAW requests (except for where the subject of the warrant is known to be in Scotland in which case it is the Scottish Crown Office) including the transmission of any official correspondence relating to a request. We therefore do not consider that the manner in which the UK handles EAW requests is not in the spirit of the FD. Experience, has proven that the majority of EAWs received are general circulations which require research in order to establish whether the person is in the UK or not. NCIS are best placed to conduct such research as they have all the necessary resources to hand and the Fugitives Unit is staffed 24 hours a day. Even if the location of the person is known it is useful to have a central authority to coordinate and advise local police forces who frequently have no experience of EAW cases and need to be guided through the arrest process.

Article 10—Detailed procedures for transmitting an EAW

The Report states that UK national law has failed to transpose the provisions of Article 10(6) which require the re-transmission of an EAW if it is received by an authority that is not competent to act upon it. Whilst the Extradition Act 2003 does not have explicit provisions to allow for the re-transmission of an EAW if it is sent to the wrong authority it does not prevent this from taking place. For example, there have been a few occasions where EAWs were sent to the Home Office in error who subsequently forwarded the request to NCIS for action. We therefore consider that it is not necessary to transpose this provision in primary legislation as we are able to comply with the terms of Article 10(6) and are doing so when necessary.

Article 13—Consent to surrender

Although the Report does not consider that the UK’s transposition of Article 13(1) is contrary to the FD, concerns are expressed that the practice of not allowing an individual to withdraw consent once it has been made may lead to there being a risk that consented surrender is likely to be less common in Member States who adopt this approach. We have noted the Commission comments but to date do not believe there has been a noticeable reduction in consent cases for requests dealt with under Part One of the Act.

Article 15—Surrender decision

The Report states that the UK has not explicitly transposed the provision within the FD that allows for the request of additional information, in terms of imposing a time-limit for the provision of any such information. Section 9 of the Extradition Act 2003 clearly sets out the District Judge’s powers which includes the power to adjourn the extradition hearing. Therefore, if the District Judge decides that he or she requires additional information from the Issuing State then they would adjourn the hearing to another date in order to allow the additional information to be provided. NCIS, as Central Authority, then forward the request for information to the Issuing State stating that the information has to be available before the date of the next hearing or else there is a very high likelihood that the person will be discharged. Requests for additional information have

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not occurred very often and, to date, no fugitive has been discharged because the Issuing State has failed to provide the requested information. We therefore consider that despite there being no explicit provision in the Act we are fully compliant with the Framework decision in this area.

Article 17—Time-limits and procedures for the decision to execute the EAW

The Report states that the UK has only partially transposed the provisions that relate to time-limits in cases where there has been no consent in terms of there not being a time-limit imposed on any appeal to the House of Lords. Section 114(7) of the Act states:

“If leave to appeal under this section is granted, the appeal must be brought before the end of the permitted period, which is 28 days starting with the day on which leave is granted.”

We therefore disagree with the comments of the Commission on this point.

The UK is also criticised for not including the requirement to provide a reasoned decision to the issuing state if there is a decision not to execute the EAW in our domestic law. We consider this to be an administrative point and not one that needs to be contained in primary legislation. In practice, the UK always provides a reasoned decision to the issuing State, including copies of any relevant judgment if a person is discharged.

The Report also states that the UK has failed to transpose the provision which requires the executing state to notify Eurojust of any cases where the time-limits have been exceeded. Again, this is an administrative point not one that needs to be covered in primary legislation. In practice we always inform Eurojust of the small number of cases where it has not been possible to adhere to the time-limits set by the Framework Decision.

Article 18 and 19—Situation and hearing the person pending the decision

The Report states that the UK along with Belgium, Ireland, Hungary, Austria and Sweden considers that it is not necessary to transpose the provisions of Article 18 because the existing rules on mutual legal assistance are sufficient. It is somewhat unclear why the UK has been criticised for its implementation of this Article of the Framework Decision, perhaps this is because a limited number of Member States apply the scope of the EAW slightly differently in that they are able to issue EAWs to return persons to act as witnesses in criminal prosecutions. The UK does not make use of the EAW procedure in this manner. If the UK certifies an EAW request from another Member State then we must proceed to an extradition hearing as required by Article 19 of the Framework Decision. In the event that it is clear that an individual cannot be surrendered in the near future (eg they are already serving a lengthy custodial sentence here for other domestic offences) then Section 37 of the Act allows for a person to be temporarily surrendered to the Issuing State to stand trial as described in Article 18(1)(b) and 18(2) of the Framework Decision. We would expect Member States who are seeking the return of an individual to assist in a criminal prosecution (ie they are not accused of the conduct themselves) then we would expect them to go through the usual mutual legal assistance channels. We are of the opinion that our implementation of this Article is satisfactory and is in keeping with the spirit of the Framework Decision.

Article 20—Privileges and immunities

The Commission Report states that the UK has not specifically transposed the provisions contained in Article 20 which allow an EAW not to be acted on where a person enjoys privilege or immunity regarding jurisdiction or execution in the executing Member State. It is correct that there is no specific transposition of this Article in our national law, however, Section 208 of the Act does allow the Secretary of State not to allow extradition on grounds of national security.

Article 21—Competing international obligations

In respect of requests for onward extradition, the Report claims that the UK has only partially implemented the provisions contained in Article 21. We believe that we have satisfactorily transposed the provisions of this Article into our national law. Section 19 of the Act deals with earlier extradition to the United Kingdom from a non-category 1 territory and bars extradition unless the consent of that State has been obtained if there are arrangements with that state that require the consent before onward extradition can take place. That complies with the first part of Article 21 in terms of taking “all necessary measures for requesting forthwith the consent of the State from which the requested person was extradited”. We have not included a specific reference to the time-limits for the EAW process not beginning until consent has been obtained as we do not think that this is necessary. In practice, if consent of another third State is required then we would always try to attempt to

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obtain this before the beginning of the extradition hearing. If for exception reasons it was impossible to achieve this then it is up to the District Judge to decide whether to adjourn the hearing to allow consent to be obtained or to discharge the requested person.

Article 22—Notification of the decision

The Report states that the UK has not transposed this Article. Again, this is an administrative matter and not one that requires primary legislation. The National Criminal Intelligence Service as our Central Authority notifies the Issuing State of a decision in all cases as soon as they are aware of it.

Article 23—Time-limits for the surrender of the person

The Report refers to the UK failing to fully transpose the provisions that allow the postponement of surrender for humanitarian reasons and raises concern that postponement on these grounds may not be specifically foreseen as it is decided at the hearing. In addition, the Report points out how the District Judge can discharge the person under these circumstances but there is no clarity on what the grounds for discharge are. Article 23(4) The Framework Decision states:

“The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person’s life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist . . .”

It is correct that it is the District Judge who must either adjourn or discharge the subject of the warrant if he or she considers that their physical or mental condition “is such that it would be unjust or oppressive to extradite him” (Section 91(2) of the Act). Given that the EAW procedure is generally very short (average time from arrest to surrender in straightforward cases for requests made to the UK is 17 days), any condition so serious to require the adjournment of discharge of the person is likely to be apparent before the end of the extradition hearing. We do, however, accept that there may be an exceptional case where there could have been a lengthy appeal process and reasons and any such condition does not become apparent until after the extradition hearing. Clearly, we would not surrender anyone to another Member State if they were not considered to be medically fit to travel.

In terms of there being no clarity on what the grounds for discharge should be where there are serious mental or physical conditions that prevent surrender, we are of the opinion that the District Judge will be able to assess from the information available (and where appropriate take into consideration any relevant existing case law) whether surrender would be unjust or oppressive under the existing circumstances and there is therefore no need to clarify this in legislation.

Article 24—Postponed or conditional surrender

The Report states that the decision on postponed or temporary surrender is taken by the Ministry of Justice rather than the executing judicial authority. We do not understand the Commission’s comments in relation to transposition of this Article. It is the District Judge who decides whether or not to postpone or temporarily surrender the requested person and it is clear in our official notification to the EU, in respect of our operation of the Framework Decision, that we have declared that the District Judge is the executing judicial authority in the UK.

Article 25—Transit

The UK is criticised for not implementing the provisions that relate to transit in our domestic law. It is correct that there is no reference to transit in our national legislation, however, in practice we do consider transit requests—in accordance with the requirements of the Framework Decision we declared that NCIS would be the responsible authority to decide on transit requests in our official notification to the EU dated 22 December 2003.

The Report also states that the UK is one of 14 Member States that allows transit where the warrant is based on an act that is not an offence under the law of the transit. We can only assume that this is a typographical error as, pointed out in the previous paragraph we have not explicitly transposed this article in our law despite operating it in practice.

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Article 26—Deduction of the period of detention served in the executing Member State

The UK is criticised for not transposing the provisions of Article 26 into our national extradition law. However, this is covered by other legislation. For conduct that occurred prior to 4 April 2005 Section 47 of the Criminal Justice Act 1991 allows any time spent on remand to be credited by the judge. Section 243 of the Criminal Justice Act 2003 covers conduct that occurred on or after 4 April 2005. The UK always provides details of any time spent on remand to the Requesting State when the subject of the request is surrendered.

Article 27—Possible prosecution for other offences

The Report states that the UK has introduced the possibility for a District Judge to refuse surrender if there are no speciality arrangements in place with the issuing State and points out that any such refusal would be in breach of the FD. Section 17(1) of the Act states:

“A person’s extradition to a category 1 territory is barred by reason of speciality if (and only if) there are no specialty arrangements with the category 1 territory.”

We consider that the Framework Decision establishes speciality arrangements in Article 27 and therefore do not envisage that a District Judge would ever refuse extradition to a Category 1 territory on the grounds that there are no speciality arrangements in place.

In addition, the Report states that the UK has failed to transpose Articles 27(3)(d) and “7(3)(f) of the Framework Decision. We disagree with this assessment of our implementation of these provisions as they have been implemented by Section 17(3)(d) and 17(3)(f) of the Act.

The Report also states that the UK has not correctly implemented Article 27(4) which relates to consent to prosecution for other offences, post-surrender. We do not agree with this assessment of our implementation of this provision. Section 55 of the Act sets out the process a District Judge must go through before consent can be given which includes a full consent hearing where the judge must consider the same bars to extradition as he would do in a full extradition hearing. We do not consider that we have failed to implement this article of the Framework Decision.

Article 28—Surrender or subsequent extradition

The Report states that the UK has not correctly implemented Article 28(2)(b) as our national law refers to “consent of the judge” rather than “consent of the requested person”. It is correct that it is the District Judge who decides whether or not to consent to allowing the prosecution of any additional offences post-extradition. This procedure is clearly set out in Sections 54 and 55 of the Act and includes the requirement for the District Judge to serve notice on the person that a request for consent has been received unless he is satisfied that it is not practicable to do so in addition to conducting a hearing where the various bars to extradition must be considered before consent can be agreed to.

It is also stated that the UK has not correctly transposed Article 28(3) as we have not allowed for the 30 day deadline for making the decision on consent. It is correct that we have not transposed the 30 day deadline, however, Section 54(5) of the Act requires that the consent hearing has to begin within 21 days of receipt of the request for consent. We do not anticipate that we would fail to meet the 30 day deadline.

Article 29—Handing over of Property

The Report states that the UK has not specifically transposed Articles 29(2), 29(3) and 29(4) which deals with the handing over of any property which has been seized as evidence. The Commission is not correct in its assessment of our implementation of this provision. Section 172 of the Act which covers the delivery of seized property implements the provisions contained in Article 29 of the Framework Decision.

Article 30—Expenses

The Report states that the UK has failed to implement this article of the FD which clearly sets out who is responsible for costs incurred during the EAW process. We do not consider that there is a need to explicitly transpose this into our national law. In practice we are fully compliant with Article 30 of the Framework decision.

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TIMETABLE

13. Although the Framework Decision does not contain any further requirements for a review of its operation, Member States and the Commission have agreed that it would be useful to conduct a further review the end of this year.

Examination of Witnesses

Witnesses: ANDY BURNHAM, a Member of the House of Commons, Parliamentary Under Secretary of State, MR ANDREW MILLER, Legal Adviser, and Ms KAREN TOWNSEND, Crime Reduction and Community Safety Group, Home Office, examined.

Q1 Chairman: Minister, thank you very much for coming and indeed for bringing your officials with you, Mr Miller and Ms Townsend. As you know, we are live and there will be a transcript of this afternoon's meeting and you will have an opportunity of correcting it. We would find it helpful if you would add anything that you think would assist us. As I think you appreciate, the main purpose of today's meeting is to discuss two major developments with regard to the European arrest warrant: firstly, the reactions of certain Member States' constitutional courts to the scheme; and, secondly, the Commission's report on its implementation, and in particular this country's and indeed other Member States' response to that report. If we can just perhaps in a sentence or two remind ourselves of the chronology here. The Council Framework Decision was adopted on 13 June 2002, so that is nearly four years ago, and this arrest warrant is, as I understand it, the first measure which applies the principle of mutual recognition following the Tampere Council. It came into force on 1 January 2004, two years ago. Then on 23 February last year, nearly a year ago, there was the Commission report which is provided for by Article 34(3) of the Decision on the operation of the Decision, and on 1 September of last year, just three or four months ago, was the Home Office response to it because of course some of the Commission's criticisms were directed at the United Kingdom and you say that those were in some respects factually inaccurate and that we would be responding to them. Against that background can I start on the questions. I think you have had a copy and you know what it is we want your assistance on. First, presuming you responded to the Commission, have you in turn received a response from them to your comments on their criticisms?

Andy Burnham: Firstly, can I say thank you very much for inviting me here today to discuss this with you. You are right in your opening remarks about our concerns about elements of the Commission's report. I think it is true to say that we were not the only Member State to take issue with some of the points made in that report. To answer you directly, to date the Government has not had a response to the points that we have made, although our comments, together with those of other Member States, have

been made available on the Commission's EU web site, so our comments are in the public domain and are now a matter of public record. It is not clear to us whether the Commission will respond but we feel that we have made our position clear. We would welcome it if the Commission wanted to discuss it further with us but we have of course made our position very clear.

Q2 Chairman: Have you in fact discussed their report with other Member States or is it simply that each of you has responded and you have seen each other's responses?

Andy Burnham: I have had bilateral discussions with only a couple of Member States on the general terms of the working of the European arrest warrant. Obviously I cannot answer for all of the conversations that Home Office ministers and the Home Secretary have had. What I can say is that the EU Multi-Disciplinary Group on Organised Crime's fourth round of mutual evaluation will focus on this very subject, on the practical application of the European arrest warrant, so that will allow for scrutiny between Member States of how the procedures are working in practice. That decision has been taken and that will allow for some peer review, if you like, of how things are working in practice. I think that will be a useful process for us all to learn how things are working in practice, although I would say that we believe that the arrangements are working successfully at the moment.

Q3 Chairman: We will perhaps come to that in a little more detail in a moment. One matter with which the report does identify problems is this question of transposing dual criminality under Article 2(2) and I think Belgium has taken a point about abortion and euthanasia cases taking those out of "murder and grievous bodily harm". What is being done about that? Are there any provisions to review the list? There is reference to this in the annex to the report which is the detailed analysis of the report, page 6. As that points out, Article 2(3) provides the opportunity for the Council to review the double criminality list and some Member States have expressed the intention to do so in particular due to concerns in

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relation to abortion, euthanasia and possession of drugs. Are you able to tell us any more about that?

Andy Burnham: It is for each Member State to determine how they implement the list as it is set out. My interpretation of the list and the way the warrant is working is that the list is comprehensive and it is working successfully and that there is clarity between European partners on what it covers. I personally am not aware of any moves to amend the list. There is no momentum coming from within the Home Office to have the list reviewed. That is not to say that other Member States may not take a different view from us. I know there has been an issue within the Belgian courts as the extent to which the list can be interpreted differently across the EU and that in itself may be a weakness of the system that has been created, but it is not view that I personally would share, and, as I say, we feel that it is working successfully.

Q4 Chairman: You are comfortable with the list as it stands?

Andy Burnham: Yes.

Q5 Lord Lester of Herne Hill: Just on the question about abortion and euthanasia, they are very difficult and sensitive issues but it seems to me looking at the approach of the Commission that it is quite dogmatic. They say, looking at page 6 under Article 2 that the Belgian legislation provides that abortion and euthanasia are not covered by murder or grievous bodily harm and that this is contrary to the Framework Decision and they explain why they say that. I wonder whether you would agree, Minister, that obviously there can be circumstances, can there not, where abortion and euthanasia would not be covered, even under our own law, by murder or grievous bodily harm? It seems to me it is a bit dogmatic to criticise the Belgians as though it was a simple question, especially as it has got to be looked at in the context of fundamental rights, pro-choice, pro-life, and all the other things as well. What is the view of the Government about that kind of dogmatic statement?

Andy Burnham: I do not really wish to comment necessarily on how other Member States have chosen—

Q6 Lord Lester of Herne Hill: I am asking about the attitude of the Commission in their report?

Andy Burnham: To be honest, I have not read the Commission's report relating to Belgium. Are you referring to how they have interpreted—

Q7 Lord Lester of Herne Hill: I was looking at what they say on that issue but if you have not looked at it, it is not a fair question.

Andy Burnham: I will be honest with you, I am aware of the actions of the Belgian Government and what they have done but I have not studied the Commission's report on that.

Lord Lester of Herne Hill: In that case I will not pursue it. That is fair enough.

Q8 Chairman: Can we move on to how it has been working in practice. One very high profile case is that of Hussain Osman, also known as Hamdi Isaac, in which this procedure was used (initiated by us) in order to extradite a suspect in respect of the second failed London bombings from Italy. That seemed to work and it seemed to work quite speedily. I cannot remember exactly the lapse of time but three or four weeks, was it not? Can you give us any other examples where we have issued a European arrest warrant and things have happened as they should have happened?

Andy Burnham: Sure. Would you mind if I said a little bit before going to examples about the Hussein Osman case. I think that was a case which very well illustrated the potential benefits to the UK of the smooth functioning of this system. I have to say, speaking honestly, there was an element of fortune in how that case worked with respect to the legislative system here in that Italy was designated by your Lordships literally on the day or a couple of days before Parliament rose for the summer recess and it was also considered in a Committee in our House on a day when it was suggested that business may be suspended because of the death of Edward Heath. In the end that did not happen and luckily the proceedings went ahead and then it was ratified. This was literally days before it became known that the suspect in relation to the failed bombings on 21 July had escaped to Italy. So in many ways Parliament did put that system in place at the last gasp if you like but that was only because Italy had delayed full implementation of the Framework Decision. Nevertheless, fortune aside, it did allow us to use the procedure and secure a swift return, and it is arguable whether or not that individual would still be fighting extradition. In fact, you would probably suggest that he would be under the system that we had before, and I think that is a very clear and tangible benefit of the system we have which people will understand and will see the merits of. I just wanted to say that because I think that is important. I do not know if Lord Goodhart wanted to come in on that point.

Q9 Lord Goodhart: Could I just ask a follow-up question here which is clearly the system did work very well in that case. Have there been other cases in which the system has not worked well? If so, could you give us an outline of the sort of problems which have arisen?

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Andy Burnham: I can try and give some other examples. There are some examples where we believe it has worked well. There are other terrorist cases, if we are talking about terrorism for a moment, where the process has not been as swift as that and where the cases have gone on much longer than the procedure which I have just alluded to. Whether that means the case has not gone so well is obviously a matter of individual judgment but it does illustrate that people nevertheless have the ability to argue under the system we have put in place and to exercise fundamental rights, as Lord Lester put it, so that they have that protection in law. So there is still variation in the amount of time that the procedure has taken. If I can perhaps refer to some other instances. There was another instance concerning the UK issuing an arrest warrant for a Portuguese national suspected of murdering his pregnant girlfriend in June of last year and who had fled to Portugal. Extensive efforts by the Portuguese and Spanish Police resulted in the person being arrested in Northern Spain on 21 June. The person's extradition was ordered on 23 June and he was returned to the UK by officers of the Metropolitan Police Extradition Unit on 29 June. That is another example of where the procedure worked well. I could probably give you examples where cases have been dismissed. Somewhere within my file there are figures where the warrant has not been executed for various reasons and I could provide you with those figures if they would be helpful, Lord Goodhart.

Q10 Lord Goodhart: I think it would be interesting to have some idea of what those reasons are and which countries have given rise to the problem.

Andy Burnham: Would you mind if I just took a moment to find where they were in my briefing or if someone could help me find them for you. This relates obviously to warrants that we issue and also warrants that we have received, so working both ways. In 2004, five cases were discharged by the court, I think I am right in saying.

Q11 Lord Goodhart: By our courts?

Andy Burnham: I think that was by our courts so that was incoming warrants that were not actioned. Karen will correct me if I am wrong here.

Q12 Chairman: On what grounds were they, do we know?

Andy Burnham: One was lack of information about the conduct contained within the warrant or insufficient information; one was the warrant was cancelled before it could be actioned; another one was not an extradition offence the court decided; another one was on double jeopardy grounds; and in a further one the time limit for prosecution had expired. I do not have more detail than that at this

stage but we would obviously seek to make further information available to you if you wanted that.

Q13 Chairman: Do you happen to know whether any of those grounds of refusal were challenged by the requesting state? Were they dissatisfied? Were they contending that there was any failure on our part to comply with the Directive?

Andy Burnham: Obviously that is an avenue open to them under the system that we have. I am informed that as far as we are aware that was not exercised.

Lord Neill of Bladen: I was interested in the case you mentioned of insufficient evidence. Are you talking there about an incoming warrant, so the warrant comes in and there is then a challenge in an English court saying it is application that is not supported by—

Chairman: I am afraid we are forced into an adjournment at this point because there is a division.

The Committee suspended from 4.35 pm to 4.43 pm for a division in the House.

Q14 Chairman: Minister, we are able to carry on so can we please do that. Perhaps the best thing to do, because it is obviously difficult for you to have the details at your fingertips, is to ask you to let us have a note as to how the practice is in fact operating, both with regard to requests we make and requests we receive. I do not know if you have had a chance to look at a document called EUROJUST 15 which contains certain statistical information which has been collected by the Council Secretariat in respect of 2004. Have you had a chance to look at that? Have you got it in front of you, by any chance?

Andy Burnham: I think it may be somewhere in my brief.

Q15 Chairman: Can we touch on it just so you can see what would be helpful for us because this is a very unsatisfactory collection of figures. It is very difficult to follow and indeed a lot of them do not square and there are obvious discrepancies. On page 2, just pause at France, just under halfway, they say that they have issued 195 warrants, then if you turn the page you see under 4.1 that about 500 of those have been transmitted by Interpol and another 1,290 transmitted by the Schengen Information System, so there is plainly a problem of communication and I think that the Council recognise that. Just looking at our figures, we are at the extreme right-hand end on page 2, we have issued 96 requests apparently in 2004 and we do not need 1.2 and 1.3 because those are the extradition requests in earlier years, but paragraph 2 on page 2 shows that 19 of the 96 have produced a surrender. Does that seem about right?

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Andy Burnham: Yes, I am sure those figures were correct at the time they were given.

Q16 Chairman: It would be very helpful to update what happened to the rest of the 96.

Andy Burnham: We will happily provide that in a note. I can give it to you now because it is quite easy to give you. Since the EWA came into force the UK has issued 201 arrest warrants which have resulted in 90 arrests and the return of 69 individuals to the UK, so that is the outgoing requests that we have issued. We can update those figures.

Q17 Chairman: That would be very helpful indeed. And incoming?

Andy Burnham: Incoming, we have received considerably more. The total number that we have received to date is 5,732.

Q18 Chairman: What!

Andy Burnham: Which is a lot.

Q19 Chairman: Just looking at page 4 of this document that suggests we had received only 186 in 2004.

Andy Burnham: If I could say, my Lord Chairman, in 2004 obviously there were a smaller number of countries in the system.

Q20 Chairman: Undoubtedly.

Andy Burnham: Particularly as some of the big players have come into the system the numbers have increased significantly. Of those 5,732 you will then find that not each and every one of those has resulted in an action. 175 have resulted in an arrest in this country and 88 people have surrendered another way. So there are clearly a lot more incoming requests leading to an action. The reason for that is that there is a practice within the Schengen states of issuing arrest warrants complementary to Interpol alerts so particularly on perhaps Continental Europe it would be common for an arrest warrant to be communicated to all partners in the case of an individual—

Q21 Chairman: Absolutely, so it does not imply that the person is actually in your country?

Andy Burnham: No, it does not, but obviously if there were strong grounds to believe that the person was last known in the UK that, I am led to believe, would normally be very clearly indicated in the text of the warrant and it would probably be backed up with direct contact between the central authorities in both countries. There is a different type of warrant where there is a general request “if arrested this person is found . . .” I think Ms Townsend would like to say something further on the 2005 figures.

Ms Townsend: It might be clearer to explain that when providing the statistics here that cite the 186 figure that it is so starkly different from the over 5,000 Mr Burnham has just mentioned because here we were talking about actual translated European arrest warrants received whereas the number which Mr Burnham referred to is the part one requests issued and, as he has already explained, a number of those have been Interpol diffusion notices. It might also explain a bit more why there were not as many surrenders in 2004 compared to the requests that were made, that again there would have been a number of cases still going through the court systems in the other state if they had appealed, and also I understand that the majority of our requests were to Ireland, and there was a case there that was holding up requests and required a change of their legislation (which has now taken place) which made it impossible to process those requests.

Q22 Chairman: That is very helpful. If you could let us have a note about all of this indicating the average length of time it takes and so forth, that would be extremely helpful.

Andy Burnham: Certainly. Just before we finish on this point, Lord Neill mentioned a point about lack of evidence, I think it was, you said you wanted more detail on that.

Q23 Lord Neill of Bladen: The division bell stopped me completing the question but you are on to the right point. How did it come about that was an answer to the arrest warrant because it is not immediately clear?

Andy Burnham: I will undertake to provide you with more information in that case. Of course, the warrant does not deal with evidence. Obviously it is information on the nature of the offence so it is not an evidential requirement. I would want to provide you with a full answer as to why in that particular case the information was not considered strong enough because I think the process of doing that would enable me to understand exactly why that one failed, but it was only one. There were more figures for 2005 on Lord Goodhart’s point for warrants not being executed and the number has increased somewhat. I will provide those figures to the Committee if that is okay but there is a considerable increase in warrants not being issued for one or other reason.

Q24 Chairman: Can you give us an indication of what proportion each year were for terrorist applications as opposed to other sorts of criminality?

Andy Burnham: I will. 29 were discharged by the court in 2005.

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Q25 Lord Goodhart: Is that 29 requests to the UK?
Andy Burnham: Yes. 14 of these represent seven linked cases which have individually been discharged twice, so again the reasons are very similar but I can put that in a note to the Committee.

Q26 Lord Lester of Herne Hill: Could I ask about something not amounting to a European arrest warrant but to the alert system to which you have already referred. As I understand the Framework Decision, even if the judicial authority of the requesting state decides not to send the European arrest warrant to the court of the requested state, it may decide to issue an alert for the requested person in the Schengen Information System. As I understand it—and I may be quite wrong—the consequence of that is that the information that “A Lester is a wanted person for a criminal offence” in a requested state goes into the information system across Schengen and will then inform the police services generally. Two questions arise to my mind from that. Firstly, do you have information that you can give us about how many alerts there have been in any convenient way within the European system, and, secondly, what safeguards are there where the alert system does not ripen into a formal application for arrest in a requested state but simply is around in the Schengen Information System jeopardising A Lester potentially when he moves from state to state?
Andy Burnham: I certainly will.

Q27 Lord Lester of Herne Hill: Do you or your advisers have any information about that sensitive area?

Andy Burnham: If any of my colleagues does they can jump in. Speaking a moment ago I was just referring to the fact that I think the common practice on the Continent is that people are running the two complementary to each other.

Q28 Lord Lester of Herne Hill: I know, that is why I asked the question.

Andy Burnham: The arrest warrant provides a means by which action can be taken reasonably swiftly should the person be located. As to how many are issued I have to say I do not have those figures.

Q29 Lord Lester of Herne Hill: And the safeguards?

Andy Burnham: Again obviously the Schengen Information System is not something in which we are participating so I would want to come back to you with as full an answer as I could.

Q30 Lord Lester of Herne Hill: I am entirely in favour of the European arrest warrant. My concern is in narrow British terms. As a citizen I would like to know if I go to a country that is very enthusiastic about it and let’s say it is for an offence punishable by

one year or more and therefore there is no double criminality safeguard—

Andy Burnham: Are you talking about the process by which people are entered onto the SIS system?

Q31 Lord Lester of Herne Hill: I am asking how often this is happening and what are the adverse consequences to the individual and what safeguards remain.

Andy Burnham: What rights they have to challenge that?

Q32 Lord Lester of Herne Hill: Yes.

Andy Burnham: I will be absolutely honest and I will pass over to Ms Townsend but I do not know. I will seek to find out for you.

Q33 Lord Lester of Herne Hill: I know it is not directly on the European arrest warrant but as a consequence of the way the Framework Decision operates.

Andy Burnham: Sure.

Ms Townsend: In terms of alerts that have been issued under Article 95 since the Framework Decision has come into operation, I think all of those in fact (although I would have to check that) are based on existing European arrest warrants even if they are not immediately available, so it could be argued in terms of safeguards that it means that there would be a warrant in existence somewhere and that a domestic warrant would have been issued too.

Lord Lester of Herne Hill: Can I just pursue that. That is not much of a safeguard. Let’s assume—and I repeat I am in favour the system—the court of the requesting state issues the European arrest warrant very easily, perhaps too easily, and also an alert is put into the system but it does not actually lead to the person being arrested and then the warrant being tested in the other state, it leads instead simply to my reputation being at risk within the information system without any safeguard. That is the kind of problem that I would be really interested to know the answer to but I would not expect it to be today.

Q34 Lord Goodhart: Could I just ask a question here simply for information because I am far from being as familiar with the Interpol alert system as Lord Lester. Is it the situation that the alert itself does not give access to a request to arrest someone; it is simply the information that a criminal is thought to be in the country to which it is sent, but it is only if it is backed up by a European arrest warrant then that the country in which this person is found can be arrested?

Andy Burnham: I think that is correct. My understanding of the system—and officials can correct me if I am wrong—is that it is for requesting state to decide whether or not to issue the warrant. If

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a person is arrested on the basis of an alert it is then possible the warrant could be issued at that point.

Q35 Lord Goodhart: They could be arrested on the basis of the alert but then have to be released if it was not followed up by an EAW?

Andy Burnham: That is correct.

Ms Townsend: They can be arrested on the basis of an Article 95 alert in any Member State. I understand this is no different to, for example, the Interpol system whereby there could be a diffusion which would lead to provisional arrest pending receipt of the actual documents.

Q36 Lord Lester of Herne Hill: Would it be relevant to immigration control subject to an alert?

Ms Townsend: No Article 95 is only applied in relation to extradition.

Andy Burnham: The truth of this is that there are different systems in operation that may give Lord Lester cause for concern. There is the system operated by immigration authorities such as the warnings index here, there is the Schengen Information System, there is Interpol. There are different systems which obviously have overlap but on the point about safeguards I think we owe you a fuller answer on that one.

Q37 Lord Neill of Bladen: Can I ask a question on the figures. I am very struck by the figures you gave. When we make requests have I got it right on the latest figures that we have made 201 requests and we have had a pretty high success rate, you might say, which has led to 90 arrests and 69 surrendered. As regards the incoming requests the figures are huge, they are 5,732 and you might say there is a very poor result, 105 arrests and 88 surrendered. That is because of a scatter gun effect, is it not, of Interpol saying these people must be somewhere, there is a fair chance they might be somewhere in the Community? They will tell every Member State about all these cases. I was thinking in terms of the burden on the police force. They have got then to investigate all these individuals to see whether they have got these people. Is a burden arising in that way? It is 100 a week of people who may not be here or have anything to do with this country. On the other hand, it is pretty clear that our requests are targeted to the right country.

Andy Burnham: I think that is a very fair question and actually it was a question I asked for myself when preparing for today when I looked at the figures. I think it reflects co-operation and practice in Continental Europe which we are now being included in, quite rightly in my view. In the past the practice would have been, let's say for instance in the case of Luxembourg where it is possible that somebody could have fled very quickly to any number of

countries—and I think Ms Townsend referred to this—to issue a diffusion notice so that there would be a notice put out widely. Now the use of the arrest warrant is mirroring that process in some ways whereas we are operating as we would continue to do in a traditional way in that we are making specific requests for specific individuals when we have knowledge that they may have gone to a particular country. On your point about police time and resources, which I think is an important one, I did check on that point and I am satisfied that there is no diversion or “crying wolf”, let's say, where there are too many requests or people cannot see the important ones. If a request is incoming with a high priority attached to it or there is specific knowledge that England was the last known address, that is clearly stated on the front of the arrest warrant very close to the top and I think it is true to say NCIS feel that the system is working well and is not unduly burdensome. I think the figures need watching however. I think it would not be right if these requests received were to carry on multiplying and escalating. An issue may arise as to whether the warrant should be used in a more discriminating fashion but I think that is something to watch as the system continues to bed down.

Q38 Chairman: Minister, I take it that the 201 are specifically targeted requests to given countries, is that right, as opposed to general alerts?

Andy Burnham: Yes, that is correct.

Q39 Chairman: Right and the success rate, as Lord Neill points out, is actually quite good but it could get better still because presumably there are still outstanding requests which may yet produce returns within that number?

Andy Burnham: That is absolutely correct. From the figures I have given it would suggest there are 21 cases around Europe where there is an active process underway which may yet lead to a surrender. Obviously it begs the question that there are 111 cases where an individual has not been located.

Q40 Chairman: With respect, I am not sure about the 21 because within that there may have been certain refusals. It would be helpful to know whether there are refusals within that or are they undetermined cases.

Andy Burnham: You are absolutely correct, there may have been. I do not know whether we have got those figures here but we would again provide the Committee with them.

Q41 Chairman: If we can see a pattern developing, that would be helpful. We would like to see how the pattern is developing in general terms, numbers, success rates, whether they are terrorists or not, and

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if there are any specific difficulties that have arisen we might be alerted to what those proved in practice to be.

Andy Burnham: Certainly.

Q42 Chairman: Can we move on to a group of questions which arise because of the problems caused by various constitutional courts in the Community raising difficulties with the Framework Decision and its implementation. The first goes to the judgment of the German Constitutional Court in July. How do you understand that is being resolved?

Andy Burnham: I am led to believe that the problem relates to the way in which the Framework Decision has been implemented in Germany and that the issue is not one of incompatibility with the German constitution or a problem itself with the Framework Decision. My understanding on your specific question as to how it is being rectified, I understand that there is a parliamentary process underway. Obviously there has been a political hiatus for some time and that is now resolved but the German authorities assure us that they are doing everything within their power to ensure that an amended version of the law comes into force as soon as possible.

Q43 Chairman: They can amend not the constitution but the implementing legislation so as to make it harmonious with the constitution. You say that is in train but you have not got any idea as to what the likely amendment date will be?

Andy Burnham: My note says that we have been in touch with the German authorities about this issue and we understand that the German Ministry of Justice are preparing amended legislation which will be submitted to their Parliament as soon as possible. As I say, obviously the general election outcome may have delayed things somewhat. It is unlikely, we believe, that any legislation will come into force by spring this year so there is no immediate prospect of the law being amended but it is obviously a parliamentary process. From our own experience it is not always possible to say exactly when it will be completed and when the necessary time-tabling slots will be found. That is a long-winded way of saying we are in touch with the German authorities. We believe this can be corrected in a fairly straightforward manner. It is simply a case of the German Parliament finding time and dealing with it as soon as possible.

Q44 Chairman: Do you understand that that decision has sparked any similar problems in other Member States? Are there other Member States who are concerned with the general fundamental rights implications of the scheme?

Andy Burnham: There are other problems in other Member States. If I could just finish on Germany, I did hint at this but it is important to say that the

German Constitutional Court decided it was the manner in which the German authorities had implemented certain decisions of the Framework Decision that was contrary to the constitution rather than the system itself. I think that is a very important point. As to other countries, Cyprus has a similar problem, I believe.

Q45 Chairman: I thought that was a rather more fundamental problem with Cyprus as with Poland, namely that under their constitutions they cannot surrender their own nationals to other countries?

Andy Burnham: That is correct.

Q46 Chairman: So they would need not merely to amend implementing legislation but their underlying constitution which forbids full implementation?

Andy Burnham: You are absolutely right. I said similar in that questions arise as to potential conflict between the implementing legislation and the country's constitution so in that sense there is a similar tension. But you are right in that it looks as though the solution to the problem in Cyprus is an amendment to the constitution.

Q47 Chairman: And Poland too?

Andy Burnham: And Poland too.

Q48 Chairman: Do you know how they are taking forward their attempts to achieve this?

Andy Burnham: Well, obviously we are in contact with them and the Court gave the Polish authorities a deadline, a period of grace by which it postponed the annulment of the provision that was in dispute until 18 months after the publication of its judgment. Its judgment was in April of last year so in Poland there is a deadline of 4 November this year by which they have to have addressed and sorted out this problem. We are led to believe that it is unlikely that that amendment will be made in the deadline that the Court has set. Obviously we would like to see that happen and we have obviously communicated our view, and I am sure other Member States have too, but we would obviously have to take a view as to how we respond at the time that the deadline expires.

Q49 Chairman: I notice that under Article 33 Austria, which also had this problem, is explicitly exempted. Do you happen to know why these other countries whose constitutions are incompatibility were not similarly dealt with? I know you have not had notice of that question but I confess it was one that occurred to me when I was glancing through the Framework Decision, Article 33 of which says in terms that as long as Austria has modified its constitution it may allow its executing judicial authorities to refuse the enforcement of a European

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arrest warrant if the requested person is an Austrian citizen, et cetera, et cetera.

Andy Burnham: My understanding of this issue is not entirely complete. I think it is because two of the countries that have a problem were not Member States at the time that the Framework Decision was agreed in 2002.

Q50 Chairman: I follow. Thank you very much indeed.

Andy Burnham: Poland and Cyprus are the two. Just on the issue of how it might be resolved in the long term, obviously we would have to take a decision whether or not to retain the countries if there was to be a long-term delay in solving the problem. That would be something that would arise at the time when clearly there was no—

Mr Miller: Whether we will continue to honour our obligations towards them if they do not towards us—

Andy Burnham: Absolutely, the basis of these arrangements reciprocity.

Q51 Chairman: Quite, mutual recognition.

Andy Burnham: Yes, and I think more broadly we all have a common interest in seeing that justice is served and seen to be done but, equally, it would be unsatisfactory to have an imperfect relationship and we would have to address those questions at the time. I think however we approach this in a spirit of co-operation and we very much hope that together other Member States will be making the same point and we will get the change.

Q52 Chairman: I know Lord Lester has got a question for you but before that do you know of any other Member States with similar constitutional objections against extraditing their nationals?

Andy Burnham: I do not actually. The examples I have given Cyprus and Poland and Germany obviously—

Q53 Chairman: Their courts have already made that plain but is there a threat elsewhere?

Andy Burnham: There was a challenge in Greece that was heard in November last year and the Greek Supreme Court ruled that the European arrest warrant was constitutional and that the extradition of a Greek citizen to a European country cannot be prevented, so the issue is being tested in the courts of other Member States and obviously I could not say today that I am confident that further issues will not arise, they may do, but as the system beds down I think these challenges need to be worked through.

Q54 Lord Lester of Herne Hill: In the German Constitutional Court decision they said that the Act which gave effect to the Framework Decision was void and that the legislator would have to deal with

the problem, but they also said that meanwhile there was another law on international judicial assistance in criminal matters which would secure extradition in appropriate cases, which leads me to ask in Germany or in those other countries whose constitutional courts have found a problem do we know in practice what difference it makes? Are pre-existing laws like the one mentioned in the judgment of the German Constitutional Court able to secure extradition, albeit not in the accelerated and convenient way in the Framework Decision? How much does the issue pinch as a result of these decisions and how much can we carry on under the old system?

Andy Burnham: It is a good question. Extradition is still possible to and from Germany even with this situation and, as you rightly say, it is the implementing legislation that has been declared void. The position, as I understand it, is that Germany is still able to issue European arrest warrants in the normal way and receiving countries are able to process those arrest warrants. Germany is able to receive incoming arrest warrants that relate to non-German nationals so it can still deal with those arrest warrants. The problem arises of course in terms of warrants for German nationals. As I understand it, until the legislation is in place they are not able to extradite their own nationals to another Member State. I think that is the current position, unless I am corrected on that, but on the whole there is still a functioning system between the two countries. You may be interested because there are figures and we checked the figures on this before coming, and they have surrendered four people back to the UK since the Constitutional Court's decision, so it is working that way. We have surrendered three people to Germany so obviously there is no effect going the other way.

Q55 Lord Lester of Herne Hill: Can I first of all say I have advised the Cyprus Government about European arrest warrants but it was nothing to do with the issues raised today, it was a completely separate issue, but I ought to say that. Presumably—and I am speaking from ignorance on this—in Belgium and Cyprus there are already existing extradition arrangements that can still operate until they manage to sort out their constitutional problems?

Andy Burnham: Yes I think is the answer to that but most if not all of the countries we are talking about here were signatories to the European Convention on Extradition which was signed in 1957, so a longstanding partnership on that basis, so there is the ability to continue to operate under those old-fashioned, and we would say clunky, procedures but obviously it will require a constitutional amendment to make the new system work.

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Q56 Lord Goodhart: If, let's say, the Polish Government failed in an attempt to get the constitution changed and basically gave up on that, what would the consequence be? Would we then demote Poland from being a category one state under the Extradition Act and downgrade it to being a category two state?

Andy Burnham: Exactly that. Obviously I do not think we would want to do that because we want to have a fully functioning system with them, but that is ultimately the unilateral action we can take. The Commission possibly have a role in terms of communicating the importance of resolving this issue, but because this is not a first pillar measure, it means obviously that their role is limited and that it is really one of persuasion perhaps but not necessarily one of direct sanction or something that they can directly influence. So it will be a political decision, I guess, if we decide that there is no movement and no sign of any movement, but according to the legislation—and I think you may have had a hand in this—there is an affirmative procedure to demote them, to relegate them, or whatever the phrase might be, from the Premier League to the Championship, and that would be an affirmative order that would have to go through both Houses. I am looking for legal advice here but I think that is the case. That is obviously a political question for us all.

Q57 Lord Neill of Bladen: Coming back to the mention of reciprocity, the information before us concerning Spain and Germany suggests that Spain is taking the position that so long as the German statute has been struck down there is no play. In other words, the Spanish would refuse to respond to any request whether or not in respect of German nationals coming from Germany into Spain. Is that right and is that unique to Spain or is reciprocity a threat that may raise its head in other countries?

Andy Burnham: I believe that is unique to Spain. I think they have a very firm view of the reciprocal nature of extradition and that that would appear to be their position. I do not have the figures as to whether or not extradition traffic is proceeding while we have this difficulty that is not yet resolved in Germany. I did have a note on it somewhere. As I understand it, the Spanish do take a very firm view that this must be a situation based on reciprocity and I have some considerable sympathy with that actually. I think mutual trust and recognition is the basis of extradition.

Q58 Lord Neill of Bladen: So other states might take a similar position?

Andy Burnham: I do not know. I think the 'in principle' attraction to reciprocity has to be balanced by practicalities and life and making things work and I think it would not be sensible at this stage because,

as with the figures I gave to Lord Lester, clearly there is extradition traffic carrying on between ourselves and Germany and I think that is in the public interest because clearly you would expect, although I have not looked at all those cases, that those individuals have something to answer for.

Q59 Lord Neill of Bladen: I was not really asking about the UK. The system between the Member States would be sabotaged if the reciprocity principle was adopted by other Member States?

Andy Burnham: Sure, I think the danger would be you would have the breakdown of the system if it was tit-for-tat. That would not be a helpful way of looking at it. I think it is right that we should say to our partners we would want them to make the changes as quickly as possible and we will give them ample time to do that but there would have to come a point where if there was no movement we would have to review the position. All I am saying is there is a backstop position that you eventually you have to consider, but my personal preference would be that we carry on and function with what we have got and take people at their word that there is a willingness to change the law.

Q60 Lord Grabiner: Can I take you back to the German law point just so I am sure that I have understood it properly. I am not sure I have. It is my understanding partly from what you have been saying and partly from Lord Lester's question that German legislation has been struck down and declared void but notwithstanding that the mechanisms of the arrest warrant are still operating as between Germany and the UK. Is that correct?

Andy Burnham: That is absolutely correct and the issue that is crucial here is German nationals and how the arrest warrant affects German nationals living in Germany so that they can issue to us (and do) arrest warrants and we can issue arrest warrants to them but it would be in respect of a non-German national.

Q61 Lord Grabiner: I just want to know what the practical consequences of that might be in relation to a request by Germany. Presumably on the assumption that the individual is extradited from here to Germany, he then takes the point in the domestic criminal proceedings that he has been improperly extradited and that provides him with a defence? I do not know if you are able to assist us on that. I am quite interested in the practical operation of the legislation because I can see that what we might end up with is that the mechanics will operate quite satisfactorily as between the Member States but at the ground level it is worthless or might be on that example.

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Andy Burnham: I will pass for a detailed answer to Ms Townsend if that is okay but maybe I should just correct something I said to Lord Lester a moment ago. My understanding is that the German Constitutional Court did not strike down the whole of legislation.

Q62 Chairman: That is the point; they only struck it down if and insofar as it provided for the surrender of their own nationals.

Andy Burnham: That is correct. Maybe I gave the impression that it annulled the whole of the legislation.

Q63 Lord Lester of Herne Hill: It was probably my fault; I put the question very broadly.

Andy Burnham: It is useful to clear that up.

Q64 Chairman: I thought that was probably the answer. That is the answer Ms Townsend was going to give, was it?

Ms Townsend: Perhaps I will go into a little bit more detail. The Constitutional Court declared their implementing domestic legislation void which means that covers all requests made to Germany under the European arrest warrant procedure. They have a separate piece of legislation that covers them making outgoing EAW requests. That is contained in their criminal procedure law which is still very much in force, so they are able to lawfully issue EAWs which is what we have been processing here.

Chairman: Then Lord Grabiner's point is a sound one. Insofar as they are getting back non-nationals, those people are going to be able to complain—

Q65 Lord Grabiner: So the arrest warrant is issued by Germany in respect of a non-German national and that person is entitled to make the complaint because it is that bit of domestic German law which has so far been held to be offensive locally.

Andy Burnham: In respect of one of its own nationals you mean?

Q66 Lord Grabiner: Yes, in respect of one of its own nationals?

Andy Burnham: Again, we need to come back with more clarification on this and we will do. You are talking about a German national living not in Germany but in another Member State and a German request of which they are the subject?

Lord Grabiner: Yes.

Lord Neill of Bladen: I maybe wrong but my understanding is that the German constitution point relates to extradition from Germany so the removal of a German national from their own country to another country, so it would not relate to bringing someone home.

Lord Lester of Herne Hill: Except that if you look at the Belgian reference to the Luxembourg Court, the second question about equality and discrimination, I suppose there could be an argument made in Germany that the German constitution guarantees equal treatment without discrimination and then there has been discrimination since there is no equal treatment and reciprocity so far as nationality is concerned. I suppose that is the kind of argument that in theory could be mounted in Germany and that is as I read the Belgian court reference which they are raising with the Luxembourg Court.

Q67 Chairman: Perhaps we are not in a position to resolve these difficult questions as to what other courts --

Andy Burnham: Mr Miller is the legal adviser in the Home Office.

Mr Miller: I was just going to say that would be an issue for the German courts to resolve.

Chairman: Lord Clinton-Davis?

Q68 Lord Clinton-Davis: Excuse me if you have already alluded to this but, as I understand it, the Belgian Court of Arbitration is in the midst of making some decisions about this, and, equally, as I understand it, it is rather more fundamental than the position which has been referred to. Is the British Government doing anything in anticipation of this? I understand that they are able to make certain observations to the court in anticipation of the problem.

Andy Burnham: Thank you, Lord Clinton-Davis. We touched on it previously and I can say a little bit more on it. It is absolutely correct that the Belgian non-governmental organisation *Advocaten voor de Wereld* have made an application to the Belgian Court of Arbitration that seeks the annulment of the Belgian statute on the European arrest warrant. They put forward, I believe, five arguments to that court. They in turn have referred two questions to the European Court of Justice. Is the Framework Decision on the European arrest warrant compatible with Article 34(2)(b) of the Treaty of the European Union under which Framework Decisions may be adopted only for the purpose the of approximation of the laws and regulations of the Member States, which is a big question. The second question is Article 2(2) of the Framework Decision is compatible with Article 6(2) of the Treaty on the European Union and more specifically with the principle of legality in criminal proceedings guaranteed by that position and with the principle of equality and non-discrimination. Those are the two questions that the Belgian Court of Arbitragehof have remitted to the European Court of Justice. We are able to lodge observations, as you alluded to, and we did so in November last year and we believe that Poland,

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France and Lithuania are expected to or have also done the same. We also think observations will be lodged more widely. There will not be a hearing—

Q69 Chairman: Are you supporting the Framework Decision or are you assisting in the challenge? What is the UK Government's stance?

Andy Burnham: Our stance is that we have made observations and we have lodged those with the Court. The document that we have lodged with the Court is not in the public domain so I do not think we want to make our position public at this stage but we have lodged our observations. I am sorry if that is an unsatisfactory answer.

Q70 Chairman: No, I do understand that and although I had not anticipated it I think you are right. I recall that is their practice. When do you expect a hearing?

Andy Burnham: Eight to 12 months' time.

Q71 Chairman: From now?

Andy Burnham: From now and in that time the Belgians will operate the arrest warrant as normal. If at any time we can make more of our position known to your Lordships then we certainly will do that.

Q72 Lord Neill of Bladen: Are you not a little optimistic on timing? We have still got to hear from the Advocate General and he has not yet said anything about this and then a further argument takes place in the court, as you know.

Andy Burnham: I may well be but in the meantime it will not affect the operation of the arrest warrant, so in many ways the timing is important because these are important questions but it is not critical and it will not affect the operation of the arrest warrant.

Q73 Chairman: Can we turn from the original list of questions to two further questions which I think you have had notice of and which arise out last week's informal discussions at the Justice and Home Affairs Council in Vienna. The first one relates to what is said about the role of the Community in criminal law following the perhaps rather controversial ruling in the *Commission v Council* case about protection of the environment. What is the Community's competence with regard to criminal sanctions. Were you at the Council meeting last week?

Andy Burnham: I was not; the Home Secretary was at the meeting.

Q74 Chairman: I see but no doubt you have learned something of what was discussed there?

Andy Burnham: Yes I have. I understand from the Home Secretary that ministers did hold useful discussions on a variety of topics within the European Union including criminal law, civil law matters, asylum and migration management.

Q75 Chairman: There are two matters we are very interested in and the first is the implications of the European Court of Justice decision in that case about the protection of the environment. What is your thinking on that?

Andy Burnham: To read from my brief, because obviously that will give you the technical answer, in relation to the discussion on the role of the Community in criminal law following the ECJ ruling in case 176/03, which is exactly what you are referring to, the majority of Member States, I understand, supported a restrictive interpretation of the ECJ judgment on environmental crime seeking to limit criminal law measures to be agreed under the first pillar and opposing the Commission's proposal to move third pillar measures to first pillar legal basis. The European Parliament also argued where first pillar instruments replaced third pillar ones then full co-decision with the EP was required. The Commission recognised that it needed to be more flexible in its position and agreed to look again at the proposals in its communication.

Q76 Chairman: That is helpful. Can we pass to the second which concerns question procedural rights in the Criminal Proceedings proposal. As I understand it, there may have been agreement last week to shelve that and possibly come back with a new initiative. Are you able to assist us at all as to that?

Andy Burnham: I can and perhaps in a slightly less verbatim way here from my notes. I understand that some Member States have concerns about the proposal, both in terms of its substance and its legal base. The agreement in Vienna was that there needed to be further consideration and I understand that it is likely that it will be slated for discussion at the February JHA Council, so that was the position. As I understand it, at least six Member States have strong concerns—and obviously that is significant—about the competence of the EU to agree procedural law measures under the Treaty on the European Union.

Q77 Chairman: And there are substantial points of substance? Even if there is a legal basis there are questions raised too as to the substance of the proposed agreement?

Andy Burnham: That is correct and I think it is both on the legal base and on the substance of the proposal so we may know more after the February Council.

Chairman: Minister, thank you very much indeed. That has all been most helpful and we are very grateful to you indeed for coming and to your officials, too.

18 January 2006

**Letter from Mr Andy Burnham MP, Parliamentary Under Secretary of State, Home Office,
to Lord Brown of Eaton-under-Heywood, Chairman of Sub-Committee E
of the European Union Committee**

I appeared before you 18 January to give evidence on the European Arrest Warrant (EAW). At that session I undertook to write to the Committee setting out how we think the EAW is working. This letter also seeks to answer specific points raised by the Committee and sets out the United Kingdom's position concerning the Schengen Information System (SIS).

We believe that the EAW arrangements are working successfully at the moment. I mentioned at the evidence session that since the UK began operating the EAW on 1 January 2004 we have received 5,732 EAWs, of which 175 have resulted in an arrest in the UK, with 88 persons being surrendered. This large discrepancy in the number of EAWs received and the number of arrests is because the vast majority of EAWs are circulated to every Member State. Very few EAWs will turn out to have any connection to the UK. Since 1 January 2004, the UK has issued 201 warrants, which have resulted in 90 arrests with 69 people returned to the UK.

Of the 175 cases that have resulted in arrests in the UK, since 1 January 2004, 34 have been discharged by our courts. There were five persons discharged in 2004 for a range of reasons including a lack of information contained in the warrant, the offence for which extradition was sought was not an extradition offence, "double jeopardy", the time limit for prosecution had expired and the warrant being cancelled by the UK domestic prosecuting authority.

In 2005, there were 29 discharges in the UK courts. Fifteen of these discharges were because there was a lack of information contained within the EAW (14 of these relate to a Spanish request for seven people linked in the same incident, who were discharged twice), four were for passage of time considerations, a further four where the warrant was either withdrawn or cancelled by the relevant UK prosecuting authority during the process, three were because the offence(s) contained in the warrants were not extradition offences, one because there was a time delay in producing the subject of the EAW in court, one because the time limit for prosecution had expired and a final one because the EAW did not arrive in time following the person's provisional arrest.

It may help the Committee if I give some background information as to the various reasons for some of the cases being discharged. Information received from the Crown Prosecution Service (CPS) show that one person was discharged due to difficulties (based on complex facts) in establishing that the requested person was deemed to be "unlawfully at large" within the meaning of the Extradition Act 2003. Another person was discharged because the Spanish authorities withdrew their EAW after the person's appeal was dismissed by the Administrative Court. No reason was given by the Spanish authorities for this decision.

In another case, the Swedish authorities withdrew the EAW for a person wanted for allegedly falsifying tax returns, ahead of the extradition hearing. Again, no reason was given by the issuing state, although I understand that the Swedish authorities apparently agreed a financial deal with the defence.

In cases where the person was discharged because of passage of time considerations, one case involved a person who had been convicted *in absentia* in relation to drug offences committed in 1996. The person in question received a 15-year prison sentence in this country in 1997. He was never informed of the proceedings being taken against him in France and, as such, the District Judge at the extradition hearing in the UK decided the person did not deliberately absent himself from the French proceedings. Although a re-trial would be permissible under French law, the District Judge ruled that, as it would be difficult for the requested person to trace any witnesses nine years after the offence, it would be unfair and unjust to order the person's extradition.

Another example where a case was discharge due to passage of time considerations concerned a Polish EAW in respect of a person wanted for a robbery committed 10 years ago. The District Judge ruled that it would be unjust and oppressive to extradite the person.

On the information received, I can find no instances of an issuing state challenging any decision to refuse an EAW.

Lord Neill expressed interest in the case in 2004 that was discharged because of lack of evidence contained in the EAW. We understand that the District Judge hearing the case found that there was nothing to suggest that the alleged conduct had occurred in Belgium, the only reference being in France with the UK being the final destination. The District Judge concluded that he could find no positive statement to say that the type of conduct complained of occurred in Belgium. The lack of evidence was down to the complexities of jurisdictional issues, rather than an inadequately completed EAW.

18 January 2006

I undertook to provide you with information relating to the 96 EAWs that the UK issued in 2004. I have been informed by the National Criminal Intelligence Service (NCIS) that of those 96 EAWs, 47 resulted in an arrest, of which 41 were surrendered back to the UK. Out of the six remaining cases, I understand that there is still outstanding action on five. The other request failed in the Cypriot courts, not because of insufficient evidence or an inadequately completed EAW, but because their Constitutional Court declared that it was unconstitutional to extradite a Cypriot national. Of the other 49 requests that have not so far led to an arrest, the simple answer is that they have not been located in their territory by the executing state.

I further undertook to provide such information on the Schengen Information System (SIS) to the Committee, as Lord Lester asked for details of the number of Article 95 alerts in existence on the SIS and also what safeguards exist to protect individuals where the alert system does not ripen into a formal application for arrest in an executing state.

As we are not yet participating in the Schengen Information System, I regret that I am unable to provide you with the number of Article 95 alerts that are currently on the system.

As for the safeguards point, it may be useful if I offer a more detailed explanation of how Article 95 alerts operate at present. Article 9(3) of the Framework Decision on the European Arrest Warrant states:

“For a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority.”

The above when read in conjunction with Article 95 of the Schengen Implementing Convention makes it clear that an alert entered under Article 95 on the SIS is in fact a “formal application for arrest”. In light of this, a wanted person’s details would not be placed on the SIS under this category if the issuing state had not got sufficient information to issue a domestic arrest warrant and/or EAW for the purpose of requesting the individual’s extradition under the provisions of the Framework Decision. As Ms Townsend already stated, on 18 February, an alert entered under Article 95 can only be used to request a person’s arrest for the purpose of extradition and does not extend to immigration related alerts which the UK has opted out of.

Clearly the rights of individuals must be protected. I understand that before an alert is placed on the system, the national officials wishing to place such an alert must first send the information to their national SIRENE bureau. The information is not forwarded on to the central section of the SIS by the national SIRENE bureau until they are satisfied that the information is relevant to the SIS and that Schengen rules have been applied correctly. It is only when the information is forwarded to the central section of the SIS that the data can be accessed by other SIS partners. In addition an independent Joint Supervisory Authority has been established which is charged with inspecting the central section of the SIS, examines any difficulties of application or interpretation that may arise during the operation of the SIS and ensures that the SIS complies with the various data protection provisions mentioned in the Schengen Convention.

I trust that the Committee will find this note helpful.

22 February 2006