SYMPOSIUM PRESENTATION
-IRELAND

At the outset I would like to thank the project co-ordinators, Andrè Klip, Vincent Glerum and Hannah Brodersen, for inviting an Irish judge to be a partner in this important and valuable project; and for affording me as the judge concerned a unique opportunity to deepen my personal understanding of the kinds of problems that can arise with both the issuing and execution of EAWS in the case of persons who have been tried *in absentia.* Participation has allowed me to gain valuable insights and to appreciate the sometimes differing perspectives of judges and prosecutors from other EU member states on various issues that we have identified, as well as offering the perspective of a member of the Irish judiciary on those issues.

In that regard I would also like to thank my co-partners from Belgium, the Netherlands, Poland, Hungary and Romania, who all provided very valuable information concerning their own legal systems and on how prosecutors and the judiciary in their respective countries approach different aspects of the EAW system. One highlight of my involvement in the project was the ability during visits to both Hungary and Romania to meet and have a meaningful discussion with judges in those countries who deal exclusively or predominantly with EAW cases, to attend EAW hearings in both of those countries, and in the case of Hungary for our group to have a discussion with the judge concerned after the case. These engagements provided invaluable insights.

My hope is that the report that we have produced, and the other project deliverables, will prove highly useful to judges, prosecutors and lawyers involved in EAW work across the EU, particularly with respect to requests for the surrender of persons tried *in absentia*, and that it will serve to enhance mutual recognition and strengthen mutual trust and confidence.

I believe that the opportunity for Ireland to participate was to be particularly welcomed in circumstances where our situation is unique or nearly unique in a number of respects. Very soon, assuming Brexit proceeds and the United Kingdom leaves the EU, Ireland will be the sole remaining predominantly common law jurisdiction within the EU. That is not to deny that the legal systems of Cyprus and Malta have also been somewhat influenced by the common law, but they are not as predominantly and overwhelmingly orientated towards the common law as Ireland's legal system is. A major feature of Ireland's common law heritage is that our criminal proceedings are adversarial, unlike those of the 26 other EU member states who will remain after the UK's departure which are inquisitorial. Also, the role of the prosecutor in our system is very substantially different to that in other EU member states. Further, our criminal law is not codified, whereas that in the other member states is. Moreover, our criminal law, both substantive and procedural, has developed, at least in part, through the doctrine of stare decisis and the issuing of binding precedents by our superior courts, a feature largely unknown in civil law systems.

Accordingly, post Brexit, our criminal legal system will stand out as being radically different from that of every other member state in the European Union, and a fortiori from that of every other participant in the European arrest warrant system. While it is to be expected that no two legal systems will be exactly the same, those participants that come from the civil law tradition have far more in common with each other than they do with any state that has a common law legal tradition and which operates an adversarial criminal justice system.

The differences between the civil and common law legal traditions have always been an issue in the operation of the European arrest warrant system. Even while the UK was a fully participating member of that system, such differences occasionally gave rise to particular challenges in affording mutual recognition and for reliance on mutual trust and confidence. Sometimes the common law judge concerned could not simply understand a position being taken by her opposite number in a civil law country, or vice versa. However, the size of the UK in terms of its population and its economic weight, the fact that it embraced three predominantly common law jurisdictions, i.e., England and Wales, Northern Ireland and to a lesser extent Scotland (the latter having a mixed legal system which has features of both the common law and civil law traditions) and the fact that it was not the only member state with a common law heritage in the EU (although by far the largest one), prompted a willingness on both sides to recognise and if at all possible to accommodate the differences and diversity in legal traditions giving rise to the problem, whatever they might be. The concern in Ireland is that, with the departure of the UK from the EU, Ireland will be the odd man out, isolated by its difference, and exceptional in operating different criminal procedures to those to in operation elsewhere across the EU; and that there is a risk that over time there may be less tolerance and willingness by other member states to show understanding of our unique position. It is vital therefore that Irish judges become pro-active in engaging with their civil law colleagues towards developing deeper mutual trust and confidence, notwithstanding the differences that exist. The opportunity to participate in this project, and to share the results of it, has been valuable in that respect and represents an important step along that road.

It is particularly important because Ireland does not, save in very exceptional and rare circumstances, try persons *in absentia*; preferring instead to stay proceedings and issue a warrant to procure the attendance at some point in the future of an accused who has deliberately absented herself. This is possible in circumstances where there is no statute of limitations on the prosecution of indictable crime in Ireland. In those circumstances no Irish judge has ever had to issue a European arrest warrant seeking the surrender of a person tried in absentia, nor is it likely to happen.

That having been said, the Irish authorities regularly receive incoming European arrest warrants issued by judicial authorities in other EU member states, seeking that Ireland would surrender a person now resident in Ireland to the issuing member state on the basis that that person was tried *in absentia* in the issuing state and is wanted to serve an outstanding sentence.

An EAW seeking the surrender of a person tried *in absentia* may raise complex legal issues in all member states but is particularly prone to do so where trial *in absentia* is an alien procedure that is unknown in the executing member state, and where the basic criminal procedure of the issuing state is radically different from that in the executing member state. For this reason, the reforms to Framework Decision 2002/584/JHA effected by Framework

Decision 2009/299/JHA were particularly welcomed in Ireland. It is fair to say that, in general, the experience of executing judicial authorities in Ireland was that the system of judicial certification introduced by Article 4a(1) as substituted by the 2009 amending Framework Decision rendered it considerably easier for an executing judicial authority in Ireland to deal with an EAW seeking the surrender of a person tried *in absentia*.

What the present project has revealed, however, is that the current system as reformed in 2009 is still far from perfect and that it is capable of further improvement. The report indicates that some of the difficulties still being experienced arise from the way the required judicial certification is approached by the issuing state, e.g., the use of poor translations, the failure to use the consolidated language versions of section (d) of the model EAW; the failure to fully complete section (d) of the model EAW form; and the provision of contradictory information, necessitating the seeking of clarification or supplementary information by the executing member state. I very much commend to you our suggestions for the further amendment of section (d) of the model EAW form, which is one of the deliverables of this project, if only to stimulate a heightened awareness of and sensitivity to the need for issuing judicial authorities to be as comprehensive and as clear as possible in offering judicial certification for the purposes of Article 4a(1), bearing in mind that the executing judicial authority may not intuitively understand the procedural steps taken in the issuing state.

However, other more systemic problems, were also identified. These included different national rules on notification and service of documents, and the need for a common understanding of what is required. Some clarification in that regard has been supplied by the CJEU in *Dworzecki* C108/16 PPU, with that court insisting that the means employed, whatever it be, must allow it to be unequivocally established that the accused person was aware of the scheduled trial. However, the report also identifies the need for the development of autonomous concepts in EU law concerning what it means to be tried *in absentia,* and concerning what constitutes "the trial resulting in the decision" for the purposes of Article 4a(1) of the amended Framework Decision (and the decisions of the CJEU in *Tupiskas*, C270/17 PPU; *Zdziaszek* C271/17 PPU and *Ardic* C571/17 PPU have all contributed in that regard). It has also emerged that there are different interpretations between participating member states concerning whether Article 4a(1) is required to be transposed as a mandatory or optional ground of refusal.

Apart from these issues, the report highlights that difficulties have arisen with the concepts of an enforceable decision versus a final decision, with proceedings at several instances, with the concept of a non-conclusive conviction, with warrants specifying multiple decisions, with decisions altering, amending and consolidating penalties, and with decisions lifting suspended sentences, amongst others. While some of the procedures concerned have analogues in Irish criminal procedure, many of them do not and they are often counter intuitive for an Irish judge. The discussions of, and engagement with, such problems in this report, and in the other deliverables arising from this project, can only benefit us as we strive for greater understanding. From the perspective of the Irish judiciary I predict these will become important and regularly consulted additions to the EAW toolbox.