



European Arrest Warrant

European Implementation Assessment

STUDY

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On 6 November 2019, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested authorisation to draw up an own-initiative implementation report on the Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (FD EAW, 2002/584/JHA) (rapporteur: Javier Zarzalejos, EPP, Spain). The Conference of Committee Chairs gave its authorisation on 26 November. This triggered the automatic production of a European implementation assessment by the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, Directorate-General for Parliamentary Research Services (EPRS).

This study provides an assessment and conclusions on the implementation of the FD EAW. It also contains recommendations on how to address the shortcomings identified, as per the request of the rapporteur. It is intended to contribute to the Parliament's discussions on this topic, improving understanding of the subject, and ultimately feeding into the implementation report. The study concludes that the FD EAW has simplified and sped up handover procedures, including for some high-profile cases of serious crime and terrorism. A number of outstanding challenges relate back to core debates concerning judicial independence, the nature of mutual recognition and its relationship with international and EU law and values, constitutional principles and additional harmonisation measures. Furthermore, there are gaps in effectiveness, efficiency and coherence with other measures and the application of digital tools. The study recommends targeted infringement proceedings, support to judicial authorities and hearing suspects via video-link where appropriate to avoid surrender whilst ensuring the effective exercise of defence rights, as well as a range of measures aimed at achieving humane treatment of prisoners. In the medium term, for reasons of legitimacy, legal certainty and coherence, it recommends a review of the FD EAW as part of an EU judicial cooperation code in criminal matters.

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This paper has been drawn up by the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament.

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Executive summary

EU Member States have been extraditing suspects and sentenced persons to each other for many decades, on the basis of bilateral and multilateral conventions. Those arrangements were, however, slow and thwarted by exceptions based on national sovereignty. As EU integration has progressed, the Member States have agreed to base their cooperation on the principle of **mutual recognition of judicial decisions**, moving away from a system in which decisions on extradition were ultimately taken at government level. This principle was implemented by the Council framework decision on the European Arrest Warrant and the surrender procedures between Member States (FD EAW) adopted in 2002, on the basis of rapid negotiations following the 9/11 terrorist attacks. This study is the second of two publications envisaged to support an own-initiative implementation report on the FD EAW by the European Parliament. In February 2020, a framework for analysis as well as preliminary findings on the implementation of the aforementioned legislation in practice was presented. This study presents conclusions on the implementation of the framework decision and recommendations as to how to address the shortcomings identified, as per the request of the rapporteur.

Key issues and challenges in the implementation of the FD EAW

Surrender procedures based on the FD EAW, implemented since 2004, **generally run smoothly**. Available data, discussed in chapter 1, show that it has led to a considerable simplification and speeding up of handover procedures. This includes some high-profile cases of serious crime and terrorism. In 2017, the average time between the arrest and surrender of people who did not consent to surrender was 40 days, a remarkable reduction compared to the one-year average under the pre-existing extradition regime. Notwithstanding these achievements, **a number of challenges remain**. More specifically, reports by international organisations, EU institutions, case law and contributions by practitioners, academics and non-governmental organisations point to a number of challenges in the issuance and execution of EAWs. Those challenges relate back to core debates concerning judicial independence, the nature of mutual recognition and its relationship with international norms, primary EU law and values, including fundamental rights, constitutional principles and (the need for) additional harmonisation measures. These issues are discussed in chapter 2. They concern the following matters:

- the definition of issuing judicial authorities and their independence from government, which excludes police officers and organs of the executive, but can include public prosecutors in accordance with certain conditions (Section 2.1.1.)
- the proportionality of a number of EAWs issued for 'minor crimes' and before the case was 'trial ready', also in view of other possible judicial cooperation measures, where the European Parliament's call for legislative reform has been answered through guidelines in a Commission Handbook (Section 2.1.2);
- the situation pending the hearing by the executing judicial authority, such as possibilities offered for hearing by the issuing judicial authorities prior to surrender and the time limits to be respected, including in the situation when appeals are lodged (Section 2.2.1);
- the verification of double criminality by executing judicial authorities, leading to a lively academic debate on the compatibility of this requirement with the principle of mutual recognition and potential further questions to be raised with the CJEU; and the lack of approximation of certain offences for which verification is no longer allowed (Section 2.2.2);

- EAWs for nationals and residents of the executing Member State and their interplay with the framework decision on the transfer of prisoners with the dual aim of social rehabilitation and the prevention of impunity (Section 2.2.3);
- EAWs issued in cases concerning final judgments for the same acts, where the sentence has been served, or is currently being served, or can no longer be executed (*ne bis in idem*) and the larger issue of the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (Section 2.2.4);
- EAWs based on decisions following proceedings at which the person concerned was not present (*in absentia*) raising practical problems caused by non-implementation, differences concerning implementation, or incorrect implementation or application of the legislation when implementing the framework decision on *in absentia* (Section 2.2.5);
- the role of the executing judicial authority in safeguarding the fundamental rights of the requested person as developed in the CJEU's case law, both regarding EAWs where there are concerns relating to poor detention conditions and broader concerns relating to the right to a fair trial, including an independent and impartial tribunal (Section 2.2.6); and
- the relationship with third states, generally on the basis of CJEU case law, in accordance with treaties between the EU and the third states concerned (Norway, Iceland) and those that might result from negotiations with the UK (Section 2.2.7)

Finally, requested persons have also faced difficulties in effectively exercising their procedural rights in the issuing and executing Member State, based on the specific provisions relating to the EAW in the various directives approximating the rights of suspected and accused persons within the EU.

Assessment and conclusions regarding the implementation of the FD EAW

In chapter 3, conclusions are drawn regarding the implementation of the FD EAW. This has been done by applying the following evaluation criteria: effectiveness, efficiency, coherence, relevance, EU added value and compliance with EU values including fundamental rights (Commission's better regulation evaluation criteria). On this basis, semi-structured interviews were held with a wide range of stakeholders. **In terms of effectiveness**, as discussed, the FD EAW has achieved the objective of speeding up handover procedures. The FD EAW also led to a considerable simplification of handover procedures. However, in practice the executive is still called in to assist judicial authorities, practical cooperation on the basis of the EAW form does not always run smoothly and Court of Justice of the European Union (CJEU) case law, through offering more clarity on a number of aspects left open by the generic drafting of the FD EAW, has also led to further practical questions. Finally, the rights of the defence may have been compromised due to the shortening of appeal possibilities. The objective of limiting the grounds for refusal based on the verification of double criminality seems to have been achieved overall. However, there are remaining uncertainties as regards the scope of the test to be applied in situations where such verification is still allowed. The limitation of the nationality exception has also been successful. Still, in cases relating to nationals and residents of the executing Member State, it is found that issuing judicial authorities do not sufficiently focus on the perspectives of social rehabilitation, before issuing an EAW. The decision of certain Member States to no longer surrender their nationals to the UK during the transition period testifies to the enduring sensitivities. CJEU case law has reinforced control by (independent) judicial authorities in

the issuing and executing Member State. At the same time, there are concerns regarding the degree in which this case law results in effective judicial protection of requested persons.

EU action to monitor and uphold **EU values** has not led to a swift and effective resolution of threats to the rule of law in certain Member States. CJEU case law which requires the executing judicial authorities to assess potential violations of fair trial rights in the issuing Member State on a case-by-case basis has led to different outcomes regarding EAWs issued by the same Member State, also revealing a different appreciation of the relationship between (constitutional) values and mutual recognition. Furthermore, CJEU case law puts the spotlight on the need to provide national courts with proper human and financial resources. They also need access to (centralised) knowledge on the criminal justice systems (including EAW decisions) and safeguards for compliance with EU values in the other Member States. **Detention conditions** may be easier to assess than compliance with EU values more generally, especially if the resources of the Fundamental Rights Agency (FRA, criminal detention database) and Eurojust and other relevant information from the ground are relied upon in the process. Nevertheless, there is no mechanism in place to ensure a proper follow-up to assurances provided by issuing judicial authorities after surrender. Much is to be gained through further intensifying cooperation and funding to international prison monitoring bodies and making sure their reports are properly followed up by EU Member States. Furthermore, a lot is expected of EU funding to modernise detention facilities in the Member States and to support them in addressing the problem of deficient detention conditions. However, this should go hand-in-hand with domestic criminal justice reform. EU legislation in the area of detention conditions could have added value. However, the impact would depend on the scope of such legislation (only addressing procedural requirements in terms of reasoning for pre-trial detention and regular reviews, or also material detention conditions), the level of harmonisation chosen and its ultimate implementation.

In terms of efficiency, it is reported that the majority of Member States have put mechanisms in place in their domestic systems for ensuring that EAWs are not issued for minor offences. This has resulted in the impression that there is a decrease of EAWs issued for 'minor crimes'. At the same time, there are still some cases where a suspect appears to be wanted for questioning, rather than prosecution. Here another cooperation mechanism (the European investigation order, EIO) should be used. The option provided by the FD EAW for the issuing judicial authorities to hear the requested person by video-link could also be further stimulated. It is also important for a requested person to have access to a lawyer in the issuing Member State. In some cases (where surrender would be disproportionate) this lawyer could encourage the withdrawal of the EAW. However, certain Member States still do not provide and/or facilitate such access. Furthermore, the inability of a lawyer to access information on the case in the issuing state can make it impossible for them to provide effective assistance.

As regards coherence it should be pointed out that the EAW should be seen as a tool for surrender to be used within the criminal proceedings of the Member States as a subsidiary measure to other, less intrusive options, in the spirit of a common EU Criminal Justice Area. However, too often judicial authorities see it as a tool to obtain the person for the benefit of *their* criminal proceedings, or to obtain execution of *their* sentence. In part, this is due to inconsistencies between various EU measures. Other EU measures either have different objectives (social rehabilitation versus free movement of judicial decisions for instance), intervene at a different point (a supervision measure should be considered *before* issuing an EAW) or do not contain mandatory language in their operational provisions regarding the need to consider them as an alternative to issuing an EAW (EIO). Finally, a number of Member States have so far not made sufficient efforts to transpose and

implement EU procedural rights directives on time and correctly. In the absence of the Commission launching infringement proceedings, it is to be feared that practitioners will only see EU legislation in this area as guidance.

In terms of relevance, it is noted that the FD EAW was adopted in 2002. This was prior to the accession of 13 new Member States and the recent departure of the UK. Since 2002, the European Parliament has achieved and exercised equal legislative powers with the Council as regards the field at stake. As long as the FD EAW is not adapted to the Lisbon Treaty framework, it lacks the democratic legitimacy provided by the involvement of the European Parliament on the basis of the ordinary legislative procedure in its adoption. In terms of the serious crimes addressed, on the basis of Europol reports it is noted that terrorism continues to constitute a major threat to security in EU Member States. At the same time globalisation and digitalisation have led to forms of cybercriminality that one could have not imagined in 2002. Cooperation between judicial authorities can be improved through the use of modern techniques. Technological advancement could also improve the efficiency and fundamental rights compliance of the EAW procedure. The Covid-19 crisis has forced Member States to enhance the use of modern technologies in the criminal justice area. The aforementioned option of hearing a requested person by video-link should therefore be more accessible. Trial by video-link is much more controversial and difficult to organise at the moment, however it cannot be disregarded altogether, particularly in minor and simple cases in terms of evidence, where the defendant consents to this modality. At the same time, the Covid-19 crisis has highlighted the need to ensure the effective exercise of defence rights, notably access to a lawyer and their guaranteed physical presence (with appropriate safety measures) during questioning and trial.

The European Commission's indications for assessing the added value of EU criminal law do not offer sufficient guidance for assessing the **added value of the FD EAW**. However, it is clearly a founding stone for the establishment of an area of freedom, security and justice. Its level of cooperation could not have been achieved without having this objective in mind. This may be illustrated by the relationship with non-EU Schengen States and the negotiations with the UK after Brexit.

Recommendations

Chapter 4 offers a number of **recommendations** on how to overcome the shortcomings identified. The **effective implementation** of the FD EAW could be further improved. In this regard, the study recommends the initiation of infringement proceedings against those Member States which have incorrectly or deficiently transposed the FD EAW and the related provisions of the procedural rights directives. Furthermore, the assistance and coordination of Eurojust to the judicial authorities in the Member States could be further promoted and funded through the EU budget. The same is recommended for training and exchanges between judicial authorities. The Commission (in cooperation with Eurojust, the European judicial (training) network and the Fundamental Rights Agency (FRA) could also develop and regularly update a 'handbook on judicial cooperation in criminal matters within the EU'. Finally, judicial authorities would benefit from a centralised database containing the national jurisprudence on the EAW (as is the case in other areas of EU law).

Compliance with **EU values and fundamental rights** could be enhanced by systematically involving judicial authorities in the development of EU mechanisms monitoring compliance with EU values in the Member States. More generally, Member States could be reminded of the need to comply with

international obligations by properly executing European Court of Human Rights judgments and Council of Europe recommendations. In this regard, all EU Member States could be encouraged to ratify the relevant international conventions. At the same time, the area of freedom, security and justice (AFSJ) requires a specific level of protection for Member States to comply with. The FRA could be requested to conduct a comparative study on the follow-up in the issuing Member States, to offer assurances as regards detention conditions in the context of EAW procedure. EU funding to modernise detention facilities in the Member States could be further exploited. And finally, as discussed, the Commission could propose EU legislation in the area of detention conditions.

In terms of **efficiency**, beyond further stimulating the use of alternatives to an EAW, the proportionality test to be conducted by judicial authorities could be revised and further clarified in the light of CJEU case law and comparable provisions in the EIO. The Commission could be called upon to take enforcement action against those Member States that have not (properly) implemented the relevant provisions of the Access to a Lawyer Directive. Such enforcement action should also be taken against Member States that do not grant lawyers access to the case file prior to the surrender. To enhance **coherence**, beyond the points mentioned, the Commission could also adopt a communication discussing the list of 32 ‘serious crimes’ referred to in Article 2(2) FD EAW, relevant EU harmonisation measures and their national transposition. This communication could also assess the need for adopting or revising the definitions and sanctions of these offences at EU level to ensure mutual trust. Where deemed appropriate, the Commission should suggest updates to the list. As discussed, in terms of relevance, technological advancement could be used to improve the efficiency and fundamental rights compliance of the EAW procedure.

In the **medium term**, for reasons of democratic legitimacy, legal certainty and coherence with other judicial cooperation and procedural rights measures, a ‘Lisbonisation’ of the FD EAW is recommended. This process could be part of a proposed **EU judicial cooperation code in criminal matters**. Such an initiative could also contain legislative proposals on the prevention and resolution of conflicts of competence and the transfer of proceedings. The final decision on embarking on such a comprehensive review should take into account the compliance assessment that will shortly be presented by the European Commission and the mutual evaluations that the Member States are currently conducting in the Council. In addition, the European Parliament could also consider requesting the Commission to conduct a ‘fitness check’ evaluating and identifying gaps and inconsistencies, and considering possible ways of simplifying and streamlining the current EU framework in the area of judicial cooperation in criminal matters. Another compatible option would be for it to launch a legislative own-initiative report in accordance with Article 225 TFEU, which would result in concrete recommendations for the Commission on how to review the FD EAW. Finally, the European Parliament could conduct further implementation reports on related judicial cooperation instruments, notably EIO, the FD on *in absentia* decisions, the FD on transfer of prisoners, the FD on prohibition and alternative sentences (PAS) and the European supervision order (ESO) as well as the various measures discussed in section 2.3 concerning the rights of suspects, including requested persons.

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Acronyms and abbreviations

AFSJ	Area of Freedom, Security and Justice
CCBE	Council of Bars and Law Societies of Europe
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	Council of Europe Committee for the Prevention of Torture
EAW	European Arrest Warrant
ECBA	European Criminal Bar Association
ECE	1957 European Convention on Extradition
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIA	European Implementation Assessment
EIO	European Investigation Order
EJN	European Judicial Network
EJtN	European Judicial Training Network
EPPO	European Public Prosecutor's Office
EPRS	European Parliamentary Research Service
ESO	European Supervision Order
EU Charter	Charter of Fundamental Rights of the European Union
FD EAW	Framework Decision on the European Arrest Warrant
FD PAS	Framework Decision on Probation and Alternative Sentences
LIBE	European Parliament's Committee for Civil Liberties, Justice and Home Affairs
EP	European Parliament
FRA	EU Fundamental Rights Agency
NPM	National Preventive Mechanism
UN	United Nations
SCIA	Schengen Convention Implementation Agreement
SIS	Schengen Information System
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1. European Arrest Warrant in context

1.1.1. Situation before the adoption of the Framework Decision on the European Arrest Warrant (FD EAW)

Before the adoption of the FD EAW, EU action and cooperation in the area of extradition took place within the wider framework at United Nations (UN) and Council of Europe (CoE) level, including the European Convention on Extradition (ECE).¹ Extradition procedures were however traditionally slow and thwarted by conditions and exceptions based on national sovereignty, including the non-extradition of own nationals (nationality exception), in cases where the criminal acts would not be punishable under the country's own jurisdiction (double criminality requirement) or in cases where the criminal acts could be perceived as political offences. Other grounds for refusal, developed in the case law of the European Court of Human Rights (ECtHR) existed in cases where extradition might have resulted in a flagrant breach of the European Convention on Human Rights,² without an effective remedy in the requesting State.³ Attempts to constrain the grounds for refusal⁴ had limited success. A number of Member States did agree to simplify extradition procedures between them in the 1990 Schengen Convention Implementation Agreement.⁵ Following the entry into force of the Maastricht Treaty, in 1995 a convention on simplified extradition procedures was agreed upon among Member States,⁶ followed by an EU extradition convention in 1996,⁷ which however still maintained options for reservations.

Since the entry into force of the Treaty of Amsterdam in 1999, the EU has been aiming to develop into an area of freedom, security and justice (AFSJ) without internal frontiers. The European Council, in its conclusions adopted that same year, agreed to found Member States' cooperation on the principle of mutual recognition of judicial decisions (since codified in Articles 67(3) and 82(1) TFEU), together with the necessary approximation of legislation and based on the presumption that Member States comply with fundamental rights. This would imply a simple transfer of sentenced people and fast track extradition procedures for people wanted for prosecution in another Member State.⁸ However, throughout this study it should be kept in mind that there were at least four different (and to a certain extent competing) approaches towards the concept of mutual recognition among the Commission and the 12 Member States and that endorsed it at the time:⁹

¹ European Convention on Extradition, Paris, 13 December 1957, ETS No 073.

² [Convention for the Protection of Human Rights and Fundamental Freedoms](#), Rome, 4 November 1950, consolidated.

³ ECtHR, Case No 1/1889/161/217, *Soering v UK*, 26 June 1989.

⁴ e.g. First Additional Protocol to the ECE, ET No 86; CoE Convention on the Suppression of Terrorism, ETS No 90.

⁵ The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22 September 2000, pp. 19-62.

⁶ Council Act of 10 March 1995, adopted on the basis of Article K.3 of the Treaty on European Union, drawing up the Convention on simplified extradition procedure between the Member States of the European Union, OJ (C78)1 of 10 March 1995.

⁷ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, OJ C 313/12 of 23 October 1996.

⁸ Presidency Conclusions-Tampere European Council, 15-16 October 1999, Bul. 10/1999, points 33-35.

⁹ More extensively, see W. van Ballegooij, *The nature of mutual recognition in European Law, re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Intersentia, Antwerpen, 2015, chapter 3.2. (historical development of judicial cooperation in criminal matters in the EU)

- The UK's idea which, although officially inspired by the operation of mutual recognition in the internal market,¹⁰ mostly tried to avoid the 'vertical solution of a common set of rules administered centrally but a new European prosecuting agency'.¹¹ In other words, the establishment of a European public prosecutor, together with a harmonisation or even unification of parts of substantive and procedural criminal law, to tackle fraud with EU finances in the Member States, as proposed by the *Corpus Juris* study,¹² and on which a regulation has since been adopted;¹³
- The Nordic Member States' which backed the UK's position based on the close cooperation and high levels of mutual trust among them;¹⁴
- The Commission's ambition to achieve automatic recognition and execution of judicial decisions in criminal matters, based on the perceived success of mutual recognition as a means of establishing the internal market,¹⁵ strongly supported in this endeavour by France¹⁶ and Spain;¹⁷
- Germany, which endorsed mutual recognition as a further simplification of extradition and mutual legal assistance procedures, but which soon would be faced with a backlash from domestic scholars strongly rejecting the analogy with the single market given the fundamental rights at stake in the area of criminal law,¹⁸ as well as its own Constitutional

¹⁰ *L'Espace Judiciaire Européen*, Actes du Colloque d'Avignon, Ministère de la justice, Paris, 1999, p. 89; V. Mitsellegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', 43 *Common Market Law Review*, 2006, p. 1277-1311, at p. 1279

¹¹ J.R. Spencer, 'The European Arrest Warrant', 7 *Cambridge Yearbook of European Legal Studies*, 2004, p. 201-2017, citing a statement by Kate Hoey MP, Parliamentary Under-Secretary of State, 29 May 1999 proposing to 'work towards abolition of extradition between Member States so that arrest warrants are directly enforceable'.

¹² M. Delmas-Marty and J. Vervaele (Eds.), *The implementation of the Corpus Juris in the Member States (Vol. I-III)*, Intersentia, 2000.

¹³ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1-71

¹⁴ H. Nilsson, 'Mutual trust and mutual recognition of our differences, a personal view, in: G. de Kerchove & A. Weyembergh (Eds.), *La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne* (Editions de l'université de Bruxelles), Bruxelles: Institut d'études européennes 2001, p. 155-160; A. Suominen, *The principle of mutual recognition in cooperation in criminal matters, a study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States*, Intersentia 2011.

¹⁵ Communication from the Commission to the Council and the European Parliament-Mutual recognition of Final Decision in criminal matters, COM (2000) 495, p. 2: 'Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition, which, simply states, means that once a certain measures, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extranational implications- would automatically be accepted in all other Member States, and have the same or at least similar effects there.'

¹⁶ M. Poelmans, 'Bilan et perspectives du principe de reconnaissance mutuelle en matière pénale en France' in: G. Vernimmen-van Tiggelen, L. Surano and A. Weyembergh(Eds.), *The future of mutual recognition in criminal matters/ L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne*, Editions de l'université de Bruxelles, 2009, p. 239-257, at p. 240: 'le principe de reconnaissance mutuelle est unanimement connu et reconnu par les acteurs judiciaires français' (the principle of mutual recognition is unanimously known and recognized by French judicial actors).

¹⁷ A. G. Zarza, 'Mutual recognition in criminal matters in Spain' in: G. Vernimmen-van Tiggelen, L. Surano and A. Weyembergh(2009), p. 189-217, at p. 189 'The principle of mutual recognition in criminal matters was greeted by Spain with the same anticipation as when a long-awaited friend is welcomed home.'

¹⁸ T. Wahl, 'The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany', in: G. Vernimmen-van Tiggelen, L. Surano and A. Weyembergh (2009), p. 115-146, at p. 115-116; B. Schünemann(Ed.), *A Programme for European Criminal Justice*, Carl Heymanns Verlag, 2006.

Court, which reframed mutual recognition as a way of preserving national identity and statehood in a single European judicial area,¹⁹ a stance which it has maintained in recent decades.²⁰

1.1.2. Origin of the FD EAW

The 9/11 attacks fundamentally reshaped the policy agenda when it came to implementing the AFSJ, placing a stronger emphasis on the security aspect. This resulted in the introduction of fast track transfer and extradition (now renamed 'surrender') procedures to meet the immediate need to fight terrorism more effectively (the FDEAW, which is reproduced in Annex I to this study).²¹

A European Arrest Warrant is a judicial decision issued, in the form laid down in Annex 1 to the FD EAW, by a Member State, with a view to the arrest and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.²² The surrender procedure has to be completed within 60 days, with an optional extension of 30 days.²³ Applying mutual recognition to extradition procedures also implies limiting grounds for refusal (or non-execution) based on national sovereignty, such as the above-mentioned double criminality²⁴ and nationality exception.²⁵ Finally, Member States included a number of provisions on the rights of the requested person during EAW procedures, including the right to be assisted by a legal counsel and by an interpreter in accordance with national law.²⁶

The FD EAW has been in use since 1 January 2004, i.e. for over 16 years. It is pertinent to note here that several important changes have been made during this period. The FD EAW was amended in 2009 as regards decisions following proceedings *in absentia* (at which the person concerned was not present) by a framework decision that added specific grounds for non-execution.²⁷ Since 2009, several directives have also been adopted that approximate the rights of suspects and accused persons more generally.²⁸ Those directives also cover the rights of individuals subject to EAW procedures.²⁹ Finally, in the meantime, a number of other mutual recognition instruments have been adopted that both complement the EAW system and in some instances provide useful and less intrusive alternatives to it.³⁰

¹⁹ German Constitutional Court, Judgment of 18 July 2005-on the Law implementing the European Arrest Warrant, 2 BVR 2236/04; F. Geyer, 'The European Arrest Warrant in Germany-Constitutional Mistrust towards the Concept of Mutual Trust', in: E. Guild (Ed.) *Constitutional challenges to the European Arrest Warrant*, Wolf Legal Publishers, 2006

²⁰ German Federal Constitutional Court, judgment of 30 June 2009 – 2 BvE 2/08 ("Lisbon Treaty"), paras. 252 ff.; German Federal Constitutional Court, decision of 15 December 2015 – 2 BvR 2735/14 ("Identity Control"), paras. 67 ff.; R. Niblock, A. Oehmichen, 'Local law repercussions on EU extradition law: Perspectives from Continental Europe and England and Wales', *New Journal of European Criminal Law* 2017, Vol 8(2), p. 116-127, at p. 119-120.

²¹ OJ L 190 p. 1, 2002.

²² FD EAW, Article 1(1), Annex 1.

²³ FD EAW, Articles 14 to 17.

²⁴ FD EAW Articles 2, 4(1).

²⁵ FD EAW, Article 4(6).

²⁶ FD EAW, Articles 11, 12 and 14.

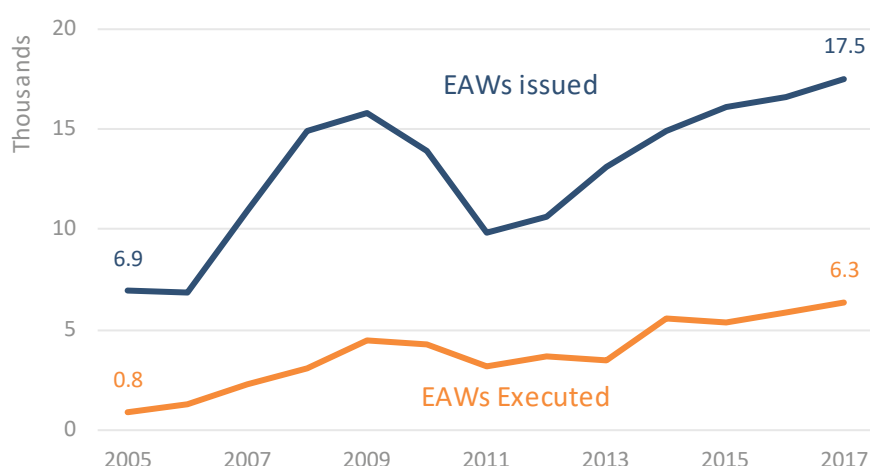
²⁷ FD EAW, Article 4a; Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, 2009 OJ (L 81) 24 of 27 March 2009.

²⁸ In accordance with a road map contained in Council document 14552/1/09 of 21 October 2009.

²⁹ See Section 2.3.

³⁰ See Section 2.1.

Figure 1: Number of EAWs issued and executed, aggregate 2005-2017



Source: Authors' graph based on European Commission data from SWD (2019) 318.

1.1.3. An overview of the state of play regarding the EAW

A lot of information is available pertaining to the implementation of the EAW. Quantitative information regarding the number of EAWs issued and executed is available for the 2005-2017 period, initially collected by the Council and more recently based on Commission questionnaires. It should be noted that this is a voluntary exercise, as the FD EAW does not impose a legal obligation on Member States to provide this information. In addition, collecting the appropriate data may be very cumbersome in Member States that have very decentralised systems, where judicial authorities at local level can issue and execute EAWs. However, digitalisation should make it easier to retrieve quantitative data in the future.³¹ Therefore, despite the long implementation period, it should be noted that the data currently available is far from perfect and complete. Thus, the findings based solely on (imperfect and incomplete) quantitative data need to be triangulated with information from other sources and interpreted with care. The most recent quantitative data relating to the practical operation of the FD EAW is from 2017, during which year 17 491 EAWs were issued and 6 317 were executed.³² As can be seen from Figure 1, the number of EAWs issued and executed is on an upward trend. During the first exchange of views on the own-initiative implementation report in LIBE, the Commission explained that the fact that roughly 60 % of EAWs are not executed is not to be interpreted as implying that the instrument is not working properly, since 'first, it happens often that an EAW is issued, but that the person cannot be located, because he or she has absconded. Second, the number of executed EAWs represented may include EAWs issued the year before, but which are executed one or more years later depending on when the person is found: And, quite often different EAWs are issued for the same person, which then explains that the number of executed EAWs is lower once the person is already surrendered.'³³

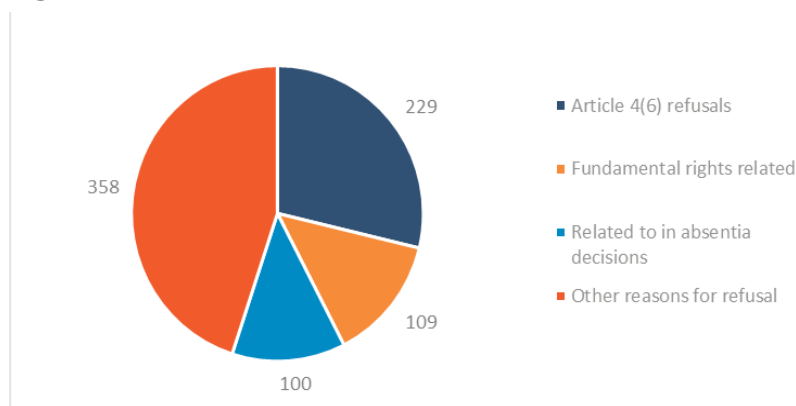
³¹ e-Evidence Digital Exchange System: state of play, Council document 6429/1/20 of 4 March 2020.

³² Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD (2019) 318 final of 28.8.2019.

³³ European Parliament, meeting of the LIBE Committee, Exchange of views on the own initiative implementation report on the FD EAW, Intervention by Jesca Beneder, European Commission, DG JUST, 20 February, 2020 at 9h34 <https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200220-0900-COMMITTEE-LIBE>

As to the reasons for issuing EAWs, in 2017, roughly one third of EAWs (2 960 out of 9 005) were issued for prosecution, although the proportion varied significantly among Member States³⁴ (18 Member States provided figures on this point). The most commonly identified categories of offences, based on the data provided by 21 Member States, were theft and criminal damage (2 649 EAWs), fraud and corruption (1 535 EAWs) and drugs (1 535 EAWs). In 2017, 241 EAWs were issued for terrorism-related offences, the great majority of which from France³⁵ On the basis of the data of

Figure 2: Reasons for refusal to execute EAW, 2017 data



Source: Authors' chart based on European Commission data SWD(2019)318.

23 Member States it can be concluded that two-thirds of wanted persons consented to their surrender. On average they were surrendered within 15 days. For the remaining one-third that did not consent the procedure lasted on average 40 days.³⁶ This is well below the time-limits enshrined in the FDEAW.³⁷

The execution of an EAW was refused in 796 cases (by 24 Member States that provided figures). The most common reason for

refusal was Article 4(6), execution of a sentence regarding a national or resident (229 cases). However, it should be noted that those cases do not lead to impunity as the sentence or detention order should still be executed. The second main grounds for non-execution covers various fundamental rights issues, including poor detention conditions (109). The third main grounds relates to *in absentia* decisions (100).³⁸

1.1.4. Institutional positions

In a 2014 resolution based on a legislative own-initiative report,³⁹ the European Parliament called on the Commission to propose a proportionality test, to be performed by the issuing of judicial authority, and fundamental rights-based grounds for non-execution. The European Commission response⁴⁰ to Parliament's legislative own-initiative argued that proposing legislative change would be premature in light of the ability of the Commission to start infringement procedures. It also

³⁴ *Ibidem*, p. 3.

³⁵ *Ibidem*, p. 4.

³⁶ *Ibidem*, p. 5.

³⁷ *Infra* Section 2.2.

³⁸ *Ibidem*, p. 6.

³⁹ European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European Arrest Warrant(2013/2109(INL)), [P7_TA\(2014\)0174](#); M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament; Annex I: A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#); Annex II: A. Doobay, [Assessing the need for intervention at EU level to revise the European Arrest Warrant Framework Decision](#).

⁴⁰ Commission response to text adopted in plenary [SP \(2014\) 447](#).

preferred to use soft law tools to ensure proper implementation of the FD EAW, such as the handbook on how to issue and execute a European Arrest Warrant.⁴¹ In its reply, the Commission also referred to the development of other mutual recognition instruments 'that both complement the European Arrest Warrant system and in some instances provide useful and less intrusive alternatives to it' and to the ongoing work on 'common minimum standards of procedural rights for suspects and accused persons across the European Union'.

The European Parliament was not satisfied with this reply. In 2016, it reiterated its call for legislative intervention.⁴² During the negotiations on the Directive on the European Investigation Order (EIO),⁴³ the Parliament did successfully insist on a mandatory proportionality test to be performed by the issuing judicial authority,⁴⁴ a consultation procedure should the executing judicial authority have doubts concerning the proportionality of the investigative measure and a fundamental rights basis for non-execution.⁴⁵ It should be noted that, at the time of writing, no information is publicly available as regards the implementation of these requirements, as the Commission has not yet complied with its obligation to present a report on the application of the EIO.⁴⁶

More recently, before being appointed Justice Commissioner, Didier Reynders made the following commitment at his hearing before the European Parliament: 'Concerning the European Arrest Warrant, I will continue to monitor its application and work closely with you and with the Member States to continue to improve it. We will consider whether infringement proceedings are necessary in light of the compliance assessment. I will also seriously consider whether to bring forward a proposal to revise the European Arrest Warrant.'⁴⁷ The compliance assessment referred to by the Commissioner is due to be published before the summer.⁴⁸

From the side of the Council there have been no calls for a reform of the FD EAW. However, issues relating to proportionality and fundamental rights have been discussed as part of the mutual evaluation exercises⁴⁹ that have been conducted on the practical application of the EAW and corresponding procedures in the Member States.⁵⁰ In this respect, two recent Council conclusions on 'promoting mutual recognition by enhancing mutual trust'⁵¹ and 'alternative measures to

⁴¹ Commission Notice, [Handbook on how to issue and execute a European Arrest Warrant](#), C(2017) 6389 final of 28 September 2017.

⁴² European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015, [P8_TA-PROV\(2016\)0485](#), para 43: 'Reiterates the recommendations to the Commission on the review of the European Arrest Warrant, notably as regards the introduction of a proportionality test and a fundamental rights exception.

⁴³ Directive 2014/41/EU of 3 April 2014 regarding the [European investigation order in criminal matters](#), OJ L30 p.1 of 1 May 2014.

⁴⁴ EIO, Article 6.

⁴⁵ EIO, Article 11 (f).

⁴⁶ EIO, Article 37.

⁴⁷ O. Marzocchi, U. Bux, [Commitments made at the hearing of Didier Reynders, Commissioner-designate for Justice](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, October 2019.

⁴⁸ European Parliament, meeting of the LIBE Committee, Exchange of views on the own initiative implementation report on the FD EAW, Intervention by Jesca Beneder, European Commission, DG JUST, 20 February, 2020 at 9h38 <https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200220-0900-COMMITTEE-LIBE>

⁴⁹ Final report on the fourth round of mutual evaluations- the practical application of the European arrest warrant and corresponding surrender procedures between Member States, [Council doc. 8302/4/09](#) of 28 May 2009, p. 15 (proportionality check); Issues of proportionality and fundamental rights in the context of the operation of the European Arrest Warrant, [Council doc. 9968/14](#).

⁵⁰ [EJN website](#).

⁵¹ [Council conclusions on mutual recognition in criminal matters-'Promoting mutual recognition by enhancing mutual trust'](#), OJC 449 of 13 December 2018, pp. 6-9.

detention: the use of non-custodial sanctions and measures in the field of criminal justice⁵² should also be mentioned.

1.2. Scope and objectives, methodology and structure

1.2.1. Scope and objectives

On 6 November 2019, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested authorisation to draw up an own-initiative implementation report on the Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) (rapporteur: Javier Zarzalejos, EPP, Spain). The Conference of Committee Chairs gave its authorisation on 26 November. This triggered the automatic production of a European implementation assessment by the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value of the Directorate-General for Parliamentary Research Services (EPRS).

This publication is the second of two publications produced in this context.

- 1 European Arrest Warrant: Framework for analysis and preliminary findings on its implementation (February 2020)
- 2 European Arrest Warrant: European implementation assessment (May 2020)

Both publications are designed to contribute to the Parliament's discussions on this topic, improving understanding of the subject, and ultimately feeding into the implementation report.

Framework for analysis and preliminary findings

The first publication was presented in the form of an in-depth analysis and provided a framework for analysis as well as preliminary findings on the implementation of the FD EAW in practice. It did not cover a full spectrum of the FD EAW implementation, but rather explored in some detail those aspects of the FDEAW implementation that appear to be the most problematic. The selection of the most pertinent topics explored in this first publication was made on the basis of:

- the European Parliament's demands in the 2014 legislative INI (proportionality and fundamental rights);
- the provisions of the FD EAW that were reasons for most refusals to execute EAWs (EAWs for the execution of sentences against nationals and residents; execution of EAW on the basis of *in absentia* decisions); and
- the issues that have been the subject of academic (and public) debate (double criminality).

European implementation assessment

This final study – European Arrest Warrant: European implementation assessment – builds on the February publication and further explores the implementation of the FDEAW as a whole. In view of the interconnectedness of the FD EAW with other relevant criminal justice cooperation mechanisms, it analyses the coherence of the FD EAW with relevant international and EU laws. Its findings are based on an analysis of the information publicly available (desk research) as well as on the findings of a series of interviews that have been conducted with relevant stakeholders. Finally, it presents

⁵² [Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice](#), OJ C 422 of 16 December 2019, pp. 9-13.

conclusions on the implementation of the framework decision and tentative recommendations on how to address shortcomings identified, as per the request of the rapporteur.

1.2.2. Methodology and structure

Methodology

This publication is based on desk research, relying primarily on international and EU institutional sources as well as contributions from practitioners, academics and NGOs.

The Commission has issued reports on the implementation of the FDEAW in [2005](#), [2006](#), [2007](#) and [2011](#). It is currently preparing its next report. On the Council side, a number of mutual evaluation exercises have been conducted and will continue on the practical application of the EAW and corresponding procedures in the Member States. Reports on each Member State are available via the website of the European judicial network.⁵³ This website also contains links to national legislation, national case law and the case law of the Court of Justice of the European Union (CJEU), and factsheets regarding the case law of the European Court of Human Rights (ECtHR). Eurojust provides analyses of CJEU case law on a regular basis.⁵⁴ As it is not the purpose of this study to provide a comprehensive overview of CJEU case law related to the EAW, it will refer to this and other resources analysing this case law where appropriate. Furthermore, the Fundamental Rights Agency (FRA) has produced a number of relevant studies regarding judicial cooperation,⁵⁵ procedural rights⁵⁶ and detention conditions.⁵⁷ It also operates the Criminal detention database, providing information on detention conditions in all 27 EU Member States.⁵⁸

Professional organisations, including the Council of Bars and Law Societies of Europe (CCBE)⁵⁹ and European Criminal Bar Association (ECBA)⁶⁰ have produced their own reports providing a defence rights perspective. The FDEAW has been the subject of a lively academic debate *inter alia* facilitated by the European criminal law academic network⁶¹ and the Max Planck Institute for Foreign and International Criminal Law.⁶² Finally, a number of NGOs, including Fair Trials International,⁶³ have been very active on the EAW. As noted in the previous chapter, in the second phase, desk research has been complemented with semi-structured interviews and written contributions received in reply to questions to be found in Annex II. Contributions were received from the main EU institutional actors (Commission, Council secretariat, Eurojust, Fundamental Rights Agency), experts working for international organisations (Council of Europe, CPT), professional associations (ECBA, CCBE, European Network of Councils for the Judiciary (ENCJ)), individual practitioners (judges,

⁵³ [EJN website](#).

⁵⁴ Eurojust, [Case law by the Court of Justice of the European Union on the European Arrest Warrant](#), 15 March 2020

⁵⁵ [Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), European Union Agency for Fundamental Rights, 2016.

⁵⁶ [Rights in practice: access to a lawyer and procedural rights in criminal proceedings and European Arrest Warrant proceedings](#), FRA, 2019.

⁵⁷ [Criminal detention in the EU, rules and reality](#), FRA, 2019.

⁵⁸ FRA, [criminal detention in the EU](#).

⁵⁹ [EAW-Rights, Analysis of the implementation and operation of the European Arrest Warrant from the view of defence practitioners](#), Council of Bars and Law Societies of Europe/ European Lawyers Foundation, 2016.

⁶⁰ [How to defend a European Arrest Warrant case, ECBA Handbook on the EAW for defence lawyers](#), ECBA, 2017.

⁶¹ [ECLAN website](#).

⁶² [Max Planck Institute for Foreign and International Criminal Law](#).

⁶³ [Fair Trials International](#).

prosecutors, defence lawyers), academics and NGO representatives (Fair Trials International). Further details on the methodology is provided at the beginning of chapter 3.

Structure

This study is divided into four sections: the introductory section presents the EAW in context (Section 1.1) and gives a brief overview of the FD EAW state of play (Section 1.1.3), followed by overview of the institutional positions (Section 1.1.4). The scope, objectives, methodology and structure are covered in Section 1.2. Following this introduction, the second chapter of the publication covers selected aspects of the implementation of the FD EAW from the perspectives of the issuance of EAWs in Member States (Section 2.1), challenges faced in the execution of EAWs in the Member States (Section 2.2) and the impact of EAWs on the rights of individuals in the Member States (Section 2.3). Building on the second chapter, the third chapter then draws conclusions as regards to the implementation of the EAW in the Member States following the evaluation criteria: effectiveness (Section 3.1), compliance with EU values including fundamental rights (Section 3.2) efficiency (Section 3.3.), coherence (Section 3.4), relevance (Section 3.5.) and EU added value (Section 3.6.). Finally, the fourth chapter presents a number of recommendations as to how to address the shortcomings identified.

2. Key issues and challenges in the implementation of the FD EAW

2.1. Challenges faced in the issuance of EAWs in Member State

In Article 1(1) of the Framework Decision an EAW is described as 'a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order'. In accordance with Article 1(2) FD EAW, judicial authorities need to 'execute any European arrest warrant on the basis of the principle of mutual recognition' and 'in accordance with the provisions of this Framework Decision'. Finally, Article 1(3) declares that 'this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.

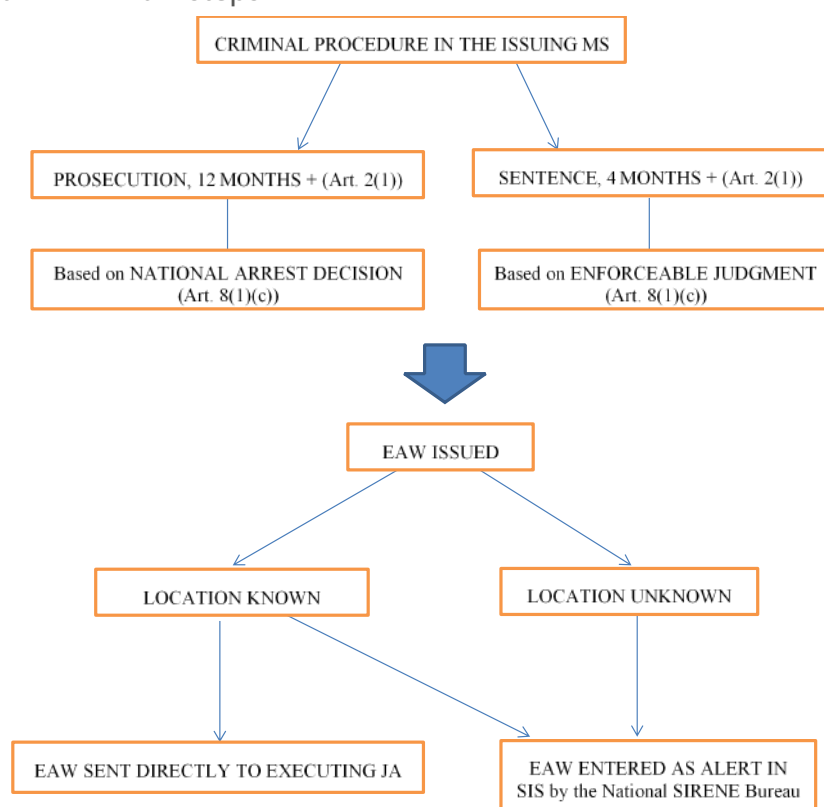
More specifically, in accordance with Article 2(1) FD EAW an EAW *may* be issued for:

- [criminal prosecution of] acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months; or
- for [the execution of] sentences of at least four months.

In accordance with article 8 (1) of the FDEAW, the EAW form shall contain the information regarding the identity and nationality of the requested person; contact details of the issuing judicial authority; evidence of an enforceable judgment (in case the EAW is issued for the execution of a sentence) and an arrest warrant or any other enforceable judicial decision having the same effect (in case the EAW is issued for prosecution). Furthermore, the nature and legal classification of the offence should be indicated as well as a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person; the penalty imposed, if there is a final judgment or the prescribed scale of penalties for the offence under the law of the issuing Member State; and if possible, other consequences of the offence.

When the location of the requested person is known, the issuing judicial authority may transmit the European Arrest Warrant directly to the executing judicial authority.⁶⁴ In most cases however, the person's location is unknown or uncertain and the EAW should be transmitted to all Member States via the Schengen information system. Even when the person's location is known, the issuing judicial authority may decide to issue an alert.⁶⁵ The SIS alert enables the police authorities in the Member States to be aware that the person is wanted for arrest. The rules and procedures for Member States' cooperation concerning alerts for arrest based on EAWs are set out in the SIS II Decision⁶⁶ and SIRENE (Supplementary Information Request at the National Entries) manual.⁶⁷ The steps for issuing an EAW are outlined in figure 3 below.

Figure 3: Issuing an EAW-main steps



Source: European Commission, [Handbook on how to issue and execute a European Arrest Warrant](#).

As will be discussed below, 18 years after the text of the FD EAW was drafted, the CJEU is still providing guidance on how to interpret the key notion of an independent 'judicial authority' and under which conditions prosecutors can be considered as such. Furthermore, there is no common definition of the notion of 'criminal prosecution', leading to concerns that surrender is requested prematurely. The CJEU has interpreted the principle of mutual recognition as meaning that 'the

⁶⁴ Article 9(1) FD EAW.

⁶⁵ Article 9(2) FD EAW ; European Commission, [Handbook on how to issue and execute a European Arrest Warrant](#), section 3.3.

⁶⁶ OJ L 205, 7.8.2007, p. 63, article 24-31.

⁶⁷ Commission Implementing Decision (EU) 2016/1209 of 12 July 2016 replacing the Annex to Commission Implementing Decision 2013/115/EU on the SIRENE Manual and other implementing measures for the second-generation Schengen Information System (SIS II), OJ L 203, 28.7.2016, p. 35.

Member States are in principle obliged to give effect to a European Arrest Warrant'.⁶⁸ However, the second part of Article 1(2) and 'in accordance with the provisions of this Framework decision' already indicates that this instrument contains exceptions and conditions to be met before a person may be surrendered. One of the exceptions that *may* be imposed is double criminality (which will be discussed in section 2.2.2).

In any event, reflecting the different positions by the Member States at the time of the adoption of the Tampere conclusions in 1999,⁶⁹ academic views diverge widely on the question of the degree to which the application of mutual recognition is appropriate in the area of criminal law (as opposed to the internal market) given the implications for national sovereignty and fundamental rights and the extent to which it needs to be balanced by harmonisation of procedural standards and substantive criminal law.⁷⁰ The dilemma has been described as a need to avoid as far as possible double checks and controls, but also blind trust and the 'deresponsibilisation' of competent executing authorities.⁷¹ This is particularly relevant for cases in which there are concerns regarding the fundamental rights situation in the issuing Member State, which will be discussed in section 2.2.6, as CJEU case law has now established *de facto* grounds for non-execution based on primary EU law. The issues highlighted below will be further discussed in the section below.

2.1.1. The definition of issuing judicial authorities

In Article 1(1) of the Framework Decision an EAW is described as 'a judicial decision' for the purposes of conducting a 'criminal prosecution'. However, the lack of clarity offered by the FDEAW as regards the interpretation of these concepts has led to various problems in national implementation and practice, particularly when surrender was requested by a prosecutor.⁷²

The CJEU has since clarified that the concept of 'judicial authority' (Article 6(1) FDEAW) may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned, but it excludes the police⁷³ or an organ of the executive⁷⁴ of the Member State. In a number of more recent cases the CJEU explored the conditions for prosecutors to be able to issue EAWs, notably the need for their independence from the executive.⁷⁵ This entails the existence of 'statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, *inter alia*, to an instruction in a specific case from the executive. Moreover, the framework must enable prosecutors to assess the necessity and proportionality of issuing an EAW'.⁷⁶ In this context, the CJEU has clarified that in order to afford effective judicial protection, the EAW system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person. In addition to the judicial protection provided at the first level, at

⁶⁸ CJEU of 16 July 2015, Case C-237/15, PPU, [Lanigan](#), para. 36.

⁶⁹ Supra section 1.1.2.

⁷⁰ For a discussion see W. van Ballegooij, *The Nature of Mutual recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Intersentia, 2015, Chapter 3, Section 3.

⁷¹ A. Weyembergh, 'Transverse Report on Judicial Control in Cooperation in Criminal Matters. The Evolution from Traditional Judicial Cooperation to Mutual Recognition', in K. Ligeti (Ed.), *Toward a Prosecutor for the European Union, A Comparative Analysis (Volume 1)*, Hart Publishing, 2013, pp. 945-985 at p. 972.

⁷² UK Supreme Court judgment of 30 May 2012 in *Assange v Swedish Prosecution Authority*, UKSC 22.

⁷³ CJEU judgment of 10 November 2016, Case C-452/16 PPU, [Poltorak](#), paras 34-52.

⁷⁴ CJEU judgment of 10 November 2016, Case C-477/16 PPU, [Kovalkovas](#), paras 28-48.

⁷⁵ CJEU judgment of 27 May 2019, Joined cases [C-508/18 OG](#) and [C-82/19 PI PPU](#).

⁷⁶ Ibidem, paras 51 and 74. CJEU of 12 December 2019, [Case C-625/19 PPU, XD](#), para. 40; CJEU judgment of 12 December 2019, Joined cases [C-566/19 PPU YR](#) and [C-626/19 PPU YC](#), para. 52.

which a national decision is adopted, there should be the protection afforded at the second level, at which the EAW is issued.⁷⁷ If, in the issuing Member State, the competence to issue an EAW does not lie with a court but with another authority participating in the administration of justice, the decision to issue the EAW and the proportionality of such a decision must be capable of being the subject, in the issuing Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.⁷⁸ This case law led to a questionnaire by Eurojust on the impact of the relevant CJEU judgments and notably the question of whether prosecutors are authorised to issue an EAW in the Member States.⁷⁹ From this document (as revised on 26 November 2019) it becomes clear that the CJEU case law resulted in changes in certain Member States aimed at ensuring that only independent prosecutors or (investigating) judges can issue EAWs.⁸⁰

The CJEU has been criticised by civil society for taking a formalistic approach towards the concept of independence in not seeking to enquire into the practice or other potential forms of influence of the executive over prosecutors.⁸¹ Its case law has also received mixed responses in academia, notably because it raises wider questions regarding the position of public prosecutors within the criminal justice systems of the Member States. On the one hand, *Heimrich* has emphasized the need for public prosecutors' independence in the context of assessing whether the issuance of an EAW is proportionate.⁸² On the other hand, *Ambos* has expressed the concern that making public prosecutors structurally independent of both the judiciary and executive would lead to problems regarding political and parliamentary control and lead to a shift in the equality of arms between prosecution and defence, to the detriment of the latter. There he submits that from a rule of law and fair trial perspective, EAWs should be issued by (investigative) judges only in future.⁸³ *Carrera and Stefan* cite the CoE Commission for Democracy through Law (the Venice Commission) in emphasizing that there is no common standard for the independence of prosecutors. However, 'guarantees must be provided at the level of the individual case to ensure that there is transparency concerning instructions that may be given.'⁸⁴

⁷⁷ Ibidem, para. 67.

⁷⁸ Ibidem, para. 75.

⁷⁹ [Impact of the CJEU judgments of 27 May 2019 in joined cases OG \(C508/18\) and PI \(C-82/19 PPU\) and Case PF \(C-509/18\) – Questionnaire by Eurojust and compilation of replies](#), Council doc. 10016/19 of 11 June 2019.

⁸⁰ Ibidem.

⁸¹ L. Baudrihaye-Gérard, 'Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent public prosecutors' [EU Law analysis blog](#), 2 January, 2020.

⁸² C. Heimrich, 'European arrest warrants and the independence of the issuing judicial authority – How much independence is required?' (Case note on joined cases C-508/18 and C-82/19 PPU OG and PI), *New Journal of European Criminal Law*, 2019 Vol. (4), pp. 389-398, p. 397.

⁸³ K. Ambos, 'The German Public Prosecutor as (no) judicial authority within the meaning of the European Arrest Warrant: A case note on the CJEU's judgment in OG (C-508/18) and PI (C-82/19 PPU)', *New Journal of European Criminal Law*, 2019, Vol. (4), pp. 399-407, pp. 405-406.

⁸⁴ S. Carrera, M. Stefan, '[Access to Electronic Data for Criminal Investigations Purposes](#)' in the EU, *CEPS paper in Liberty and Security in Europe*, No 20-01, February 2020, p. 39, 40 citing Venice Commission, 'Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, [CDL-AD\(2014\)042](#) of 12,13 December 2014, § 16: The Report further states that the major reference texts allow for systems where the prosecution service is not independent from the executive. Nonetheless, where such systems are in place, guarantees must be provided at the level of the individual case to ensure that there is transparency concerning instructions that may be given.'

2.1.2. Proportionality

The growing number of EAWs issued (at 17 491 in 2017)⁸⁵ has been a cause for concern amongst Member States⁸⁶ and the Commission⁸⁷ with regards to proportionality. This has particularly been the case when EAWs related to 'minor' or 'trivial offences', such as the theft of a chicken,⁸⁸ and for cases that were not 'trial ready', also taking into account the (pre-trial) detention conditions in certain issuing Member States.⁸⁹ Beyond the detrimental impact on the individuals concerned, these practices undermine mutual trust and potentially lead to refusals to execute EAWs, even if proportionality is not formally cited as the reason for doing so.⁹⁰

When looking at the seriousness of the offence, it is pointed out that in 2017 the most commonly identified category for which EAWs were issued was theft and criminal damage (2 649 EAWs)⁹¹ For some of these cases, which may include shoplifting,⁹² one might wonder whether issuing an EAW was the most proportionate measure even if the formal conditions for issuing it were met. In reply to a European parliamentary question⁹³ the Commission referred to a 2013 study indicating that at that point the majority of Member States had mechanisms for ensuring that EAWs were not issued for minor offences.⁹⁴ The Commission was however not in a position to provide a comprehensive list of cases where EAWs had been issued for 'trivial offences', as there was no common EU definition of trivial offences. As will be discussed further in Section 2.2.2, the use of the FD EAW is undisputed in the case of serious offences, but there is also a lack of a common definition.

Again referring back to the 2017 data, roughly one third of EAWs (2 960 out of 9 005) were issued for prosecution.⁹⁵ However, as discussed in the section above, in absence of a common definition of the notion of a 'criminal prosecution' referred to in Article 1(1) FD EAW, it is not possible to establish how many of these EAWs related to cases that were 'trial-ready', a notion that is in any case difficult

⁸⁵ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD (2019) 318 final of 28.8.2019.

⁸⁶ Final report on the fourth round of mutual evaluations – the practical application of the European arrest warrant and corresponding surrender procedures between Member States, [Council doc. 8302/4/09](#) of 28 May 2009, p. 15 (proportionality check); Issues of proportionality and fundamental rights in the context of the operation of the European arrest warrant, [Council doc. 9968/14](#).

⁸⁷ Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [COM\(2011\) 175](#) final of 11 April 2011, p. 7, 8.

⁸⁸ *The Economist*, 'Wanted, for chicken rustling', 30 December 2009.

⁸⁹ For background see S. Carrera, E. Guild and N. Hernanz, 'Europe's most wanted? Recalibrating trust in the European Arrest Warrant system', CEPS, 2013.

⁹⁰ For a more detailed discussion see A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#), Annex I to M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament, pp. 32-38.

⁹¹ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD (2019) 318 final of 28.8.2019, p. 4.

⁹² E. Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice, A Role for Proportionality?*, Bloomsbury, 2020, p. 117

⁹³ European Parliamentary Question [E-007089-17](#) (European Arrest Warrant), 17 November 2017.

⁹⁴ [Final report](#) towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters, March 2013. According to the survey, the vast majority of Member States have indicated that they apply a standard proportionality check when a national arrest warrant is issued, as well as for issuing a EAW.

⁹⁵ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD (2019) 318 final of 28.8.2019, p. 3.

to define given the differences between Member States' criminal procedures and practices.⁹⁶ On the other hand, there are recent indications of number of examples of EAWs that were issued prematurely, resulting in the requested person remaining in pre-trial detention for a lengthy period after having been surrendered by the judicial authorities of another Member State.⁹⁷ In a 2014 resolution based on a legislative own-initiative report,⁹⁸ the European Parliament called on the Commission to propose a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances, such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate, less intrusive alternative measure.⁹⁹

As regards the cost implications, the European Added Value Assessment accompanying Parliament's legislative own-initiative report provided a conservative estimate of the average costs of enforcing an EAW at €20 000 per case. In terms of direct costs to the Member States alone it can include: the costs of enforcement (wages of police officers escorting the surrendered person, cost of flights for both the surrendered person and the police officers, cost of hotel accommodation for the police officers, etc.); operating detention facilities (costs relating to prison guards and administrators) and warehousing detainees (food, clothing, beds and healthcare, assuming these are provided); and investigation and judicial fees linked to the EAW.¹⁰⁰ The cost implications for the individual concerned were not included. However, the 'cost of non-Europe' report in the area of procedural rights and detention conditions, produced by EPRS in December 2017, does provide some additional data on the cost of pre-trial detention, estimated at €115 per day, with significant cost variation across Member States,¹⁰¹ as well as the detrimental effects of detention on employment, education, private and family life, mental and psychological health.

Instead of seeking to amend the FDEAW, the Commission has preferred to continue with a soft-law approach. Its handbook on how to issue and execute a European Arrest Warrant¹⁰² provides guidelines aimed at ensuring that issuing an EAW is justified in a particular case. Those guidelines focus more narrowly than the European Parliament on the seriousness of the offence and the

⁹⁶ For a more detailed discussion see A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#), Annex I to M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament, pp. 38-42.

⁹⁷ [Beyond surrender Putting human rights at the heart of the European arrest warrant](#), Fair Trials International, 2018.

⁹⁸ European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European arrest warrant (2013/2109(INL)), [P7_TA\(2014\)0174](#); M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament; Annex I: A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#); Annex II: A. Doobay, [Assessing the need for intervention at EU level to revise the European Arrest Warrant Framework Decision](#).

⁹⁹ European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), [P7_TA\(2014\)0174](#), paragraph 7 (b).

¹⁰⁰ M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament, p. 29.

¹⁰¹ For a more detailed discussion see W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017, p 134.

¹⁰² Commission Notice, [Handbook on how to issue and execute a European Arrest Warrant](#), C(2017) 6389 final of 28 September 2017.

likelihood of detention of the person in the issuing Member State. At the same time, they consider the perspective of the interests of the victims of the offence.¹⁰³

Considering the severe consequences that the execution of an EAW has on the requested person's liberty and the restrictions of free movement, the issuing judicial authorities should consider assessing a number of factors in order to determine whether issuing an EAW is justified.

In particular, the following factors could be taken into account:

- (a) the seriousness of the offence (for example, the harm or danger it has caused);
- (b) the likely penalty if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence);
- (c) the likelihood of detention of the person in the issuing Member State after surrender;
- (d) the interests of the victims of the offence.¹⁰⁴

Furthermore, the handbook calls on issuing judicial authorities to consider whether 'other judicial cooperation measures could be used instead of issuing an EAW. Measures that complement the FD EAW are:

- the European investigation order (EIO),¹⁰⁵ a standard form that allows one or more specific investigative measures in another Member State with a view to obtaining evidence.¹⁰⁶ Recital 26 calls on judicial authorities to consider issuing an EIO instead of an EAW if they would like to hear a person;¹⁰⁷
- the European supervision order (ESO),¹⁰⁸ which should reduce the impact on the life of defendants who are subject to prosecution in another Member State by offering the possibility to await trial in the Member State of residence, subject to supervision measures (such as regular reporting to the police).
- the Council of Europe Convention on the Transfer of Proceedings in Criminal Matters,¹⁰⁹ in accordance with which in relevant cases the criminal proceedings could be transferred to the Member State where the suspect is residing;
- the FD on Financial Penalties,¹¹⁰ which enables a judicial or administrative authority to transmit a financial penalty directly to an authority in another Member State and to have

¹⁰³ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315, 14 November 2012, p. 57–73; A. Scherrer, I. Kiendl Krišto, [The Victims' Rights Directive 2012/29/EU, European Implementation Assessment](#), EPRS, December 2017.

¹⁰⁴ Commission Notice, [Handbook on how to issue and execute a European arrest warrant](#), C(2017) 6389 final of 28 September 2017, p. 19.

¹⁰⁵ Directive 2014/41/EU of 3 April 2014 regarding the European investigation order in criminal matters, OJ (L30)1 of 1 May 2014.

¹⁰⁶ EIO, Article 1(1).

¹⁰⁷ EIO, Recital 26: With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative.

¹⁰⁸ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11 November 2009.

¹⁰⁹ European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15 May 1972, ETS No 073.

¹¹⁰ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22 March 2005, pp. 16–30.

that penalty recognised and executed without any further formality. The FD on Financial Penalties may be considered as one of the methods for enforcing payment before converting the financial penalty into a custodial sentence, thus avoiding the need to issue an EAW;

- the FD on Transfer of Prisoners,¹¹¹ which complements the FD EAW by providing a system in accordance with which a judgment may be forwarded directly to another Member State for the purpose of recognition of the judgment and execution of the sentence there 'with a view to facilitating the social rehabilitation of the sentenced person'¹¹²
- the FD on Probation and Alternative Sanctions (PAS),¹¹³ which enables the transfer of a convicted person to a different Member State (typically, but not necessarily, the country of their nationality) in order to serve a probation order or other alternative sanction imposed by the original issuing state.

The Commission has not yet complied with its obligation to present a report on the application of the EIO by 21 May 2019,¹¹⁴ therefore it is not clear at this stage to what extent this instrument has been used as an alternative to the European Arrest Warrant. In 2014 the Commission produced a report¹¹⁵ on the implementation of the FD on Transfer of Prisoners, the FD on PAS and the ESO. At that point only 18 Member States had implemented the FD on Transfer of Prisoners, 14 the FD on PAS and 12 the ESO. Although in the meantime most Member States have implemented the three measures,¹¹⁶ at least for the FD on PAS and ESO a 2016 FRA study on criminal detention and alternatives signalled a lack of their use in practice.¹¹⁷

In June 2019, the Council held a policy debate on the basis of a Presidency report on 'the way forward in the field of mutual recognition in criminal matters'.¹¹⁸ This report indicates that the reasons for the infrequent use of the FD on PAS and ESO will be explored in the ninth round of mutual evaluations by the Council, together with the issue of proportionality in relation to the use of the EAW more generally.¹¹⁹ In December 2019 the Council also adopted conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of

¹¹¹ Framework Decision 2008/909 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union (FD Transfer of Prisoners) OJ L 327 of 5 December 2008 p. 27.

¹¹² FD Transfer of Prisoners, Article 3(1).

¹¹³ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16 December 2008, pp. 102–122.

¹¹⁴ Directive 2014/41/EU of 3 April 2014 regarding the European investigation order in criminal matters, OJ (L30)1 of 1 May 2014, Article 37; European Parliamentary Question [E-004099/2019](#) (European Investigation Order (EIO) – report on application of the Directive).

¹¹⁵ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, [COM \(2014\) 57](#) final of 5 February 2014.

¹¹⁶ The tables of implementation referring to the national legislation concerned are available in the [judicial library](#) of the European Judicial Network.

¹¹⁷ [Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), European Union Agency for Fundamental Rights, 2016.

¹¹⁸ The way forward in the field of mutual recognition in criminal matters - Policy debate, Annex to Council doc. 9317/19 of 27 May 2019.

¹¹⁹ Ninth round of mutual evaluations – Scope of the evaluation and contributions to the questionnaire, Council doc. 6333/19 of 13 February 2019.

criminal justice.¹²⁰ In these conclusions Member States are encouraged to develop or improve training on the content and the use of the FD PAS and the ESO.¹²¹ They are also encouraged to improve the collection of data on the application of the FD on PAS and ESO.¹²² Furthermore, the Commission is invited to continue to enhance the implementation of both the FD on PAS and ESO, taking into account the information gathered during the ninth round of mutual evaluations.¹²³

2.2. Challenges faced in the execution of EAWs in the Member States

In accordance with article 11 FD EAW, upon arrest the requested person has a right to be informed of the EAW and its contents, as well as a right to be assisted by a legal counsel. Article 12 FD EAW contains a right to provisional release in accordance with the domestic law of the executing Member State.¹²⁴ These and other procedural rights of the requested person will be further discussed in section 2.3. below. The arrested person may consent to surrender, however that consent and, if appropriate, expression of renunciation of entitlement to the 'speciality rule', referred to in Article 27(2) FD EAW, shall be given before the executing judicial authority. Renunciation of the speciality rule implies possible prosecution for other offences. In case he or she consents in accordance with Article 13 FD EAW, a decision on execution of the EAW must be taken within 10 days in accordance with Article 17(2) FD EAW. In situations where the wanted person objects to its surrender, Member States must foresee a surrender procedure for EAWs to be completed within 60 days, with an optional extension of 30 days.¹²⁵ This surrender procedure will be discussed in more detail in Section 2.2.1. below.

The surrender procedure contains possibilities for the executing judicial authority to refuse surrender or to make it subject to certain conditions. The FD EAW introduces mandatory and optional grounds for non-execution. Article 3 mentions the following mandatory grounds for non-execution: amnesty (Article 3(1)); the person has been finally judged by a Member State and the sentence has been served or is currently being served (Article 3(2) and); the person is below the age of criminal responsibility (Article 3(3)). Article 4 mentions the following optional grounds for non-execution: a lack of double criminality (Article 4(1)); prosecution pending in the executing Member State (Article 4(2)); prosecution for the same offence is precluded in the executing Member State (Article 4(3)); prosecution or punishment is statute-barred; final judgment was rendered in a third State (Article 4(5)); the executing Member State 'undertakes' the execution of the sentence (Article 4(6)); extraterritoriality (offences committed outside the territory of the issuing Member State) (Article 4(7)); and *in absentia decisions* in accordance with the conditions set out in Article 4a.¹²⁶ Article 5 provides for a number of guarantees that may be requested from the issuing judicial authorities in particular cases where life sentences may be imposed and when the EAW concerns the prosecution of a national or resident of the executing Member State (on condition that they be

¹²⁰ OJC 422 of 16 December 2019, pp. 9-13.

¹²¹ OJC 422 of 16 December 2019, pp. 9-13, para. I. 8.

¹²² OJC 422 of 16 December 2019, pp. 9-13, para. I.10.

¹²³ OJC 422 of 16 December 2019, pp. 9-13, para. II.3.

¹²⁴ European Commission, [Handbook on how to issue and execute a European Arrest Warrant](#), section 4.6.

¹²⁵ FD EAW, Article 17(3) and (4).

¹²⁶ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, [thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial](#), 2009 OJ (L 81) 24 of 27 March 2009.

returned to the executing Member State to serve the sentence imposed by the issuing Member State there).

As discussed in Section 1.3., according to the Commission statistics in 2017 the most common reason for refusal was a situation in which the executing Member State undertook to execute the custodial sentence (229 out of 796 cases). Of a total of 796 refusals, 100 related to in absentia decisions. Fundamental rights issues led to refusals in 109 cases. In the sections 2.2.2.-2.2.7 below, these grounds will be discussed further, together with a lack of double criminality, *ne bis in idem* and the relationship with third countries.

If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to the grounds for application and information, is provided in the EAW form.¹²⁷ Here, the assistance of Eurojust may also be requested. Similarly this EU agency may assist in deciding which EAW to execute in situations when multiple requests have been made regarding the same person.¹²⁸ It should also be informed in cases where the time limits for the decision to execute an EAW cannot be observed.¹²⁹ The executing judicial authority shall notify the issuing judicial authority immediately of the decision on the action to be taken on the EAW.¹³⁰ In case the EAW is executed, surrender should take place within 10 days. The main steps of the procedure in the executing Member States are outlined in figure 4 below.

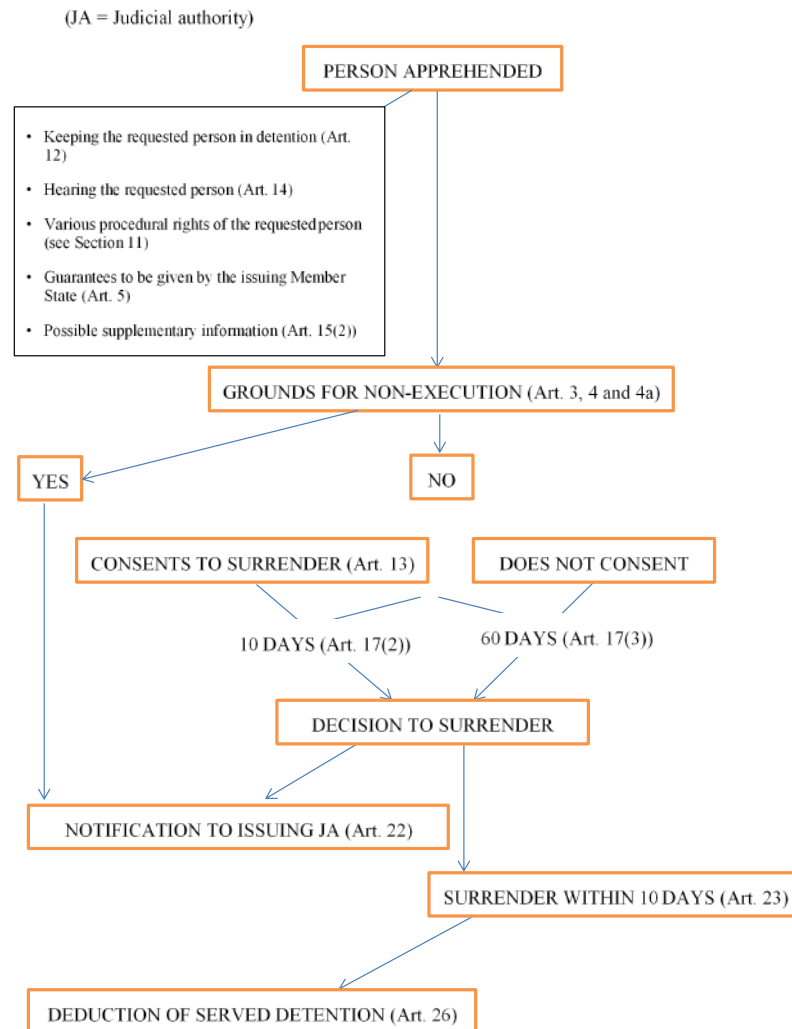
¹²⁷ FD EAW, Article 15(2)

¹²⁸ FD EAW, Article 16; [Eurojust Guidelines for deciding on competing requests for surrender and extradition](#).

¹²⁹ FD EAW, Article 17(6).

¹³⁰ FD EAW, Article 22.

Figure 4: Executing an EAW-main steps



Source: European Commission, [Handbook on how to issue and execute a European Arrest Warrant](#)

2.2.1. Hearing and time limits

During the first exchange of views on the own-initiative implementation report in LIBE, the Commission pointed to problems with mandatory time limits, in particular through lengthy appeal proceedings.¹³¹ One of the problems here is that the FD EAW is silent on the possibility of appeals and not all Member States foresee this possibility.¹³² In *Jeremy F*¹³³ the CJEU clarified that national appeal procedures would have to respect the time limits laid down in the FDEAW.¹³⁴ The question remains however, whether these time limits are always sufficient to provide an effective remedy for

¹³¹ European Parliament, meeting of the LIBE Committee, Exchange of views on the own initiative implementation report on the FD EAW, Intervention by Jesca Beneder, European Commission, DG JUST, 20 February, 2020 at 9h40 <https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200220-0900-COMMITTEE-LIBE>

¹³² Netherlands Act of 29 April 2004 implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States of the European Union ([the Surrender Act](#)), article 29.

¹³³ CJEU of 30 May 2013, Case C-168/13 PPU, *Jeremy F. v Premier ministre* [ECLI:EU:C:2013:358](#)

¹³⁴ *Ibidem*, para. 59.

the defence, particularly in more complicated cases. As will be discussed in section 2.6., some of these cases concern allegations of a lack of respect for EU values, the undermining of fair trial rights and of poor detention conditions amounting to inhumane treatment. In those cases, the executing judicial authority will need to request supplementary information and assurances as regards the prison conditions.

At the same time, in *Lanigan* the CJEU held that a failure to observe the time limits of Article 17 FD EAW does not preclude the executing court from taking a decision on the execution of an EAW.¹³⁵ This however raises the question of how long the requested person may be kept in custody. Here the CJEU clarified that Article 12 FD EAW was not to be interpreted as implying a right for the person to be released upon expiry of the time limits stipulated in Article 17 FD EAW.¹³⁶ At the same time, in the light of the right to liberty (Article 6 EU Charter), the duration of custody should not be not excessive in the light of the characteristics of the procedure followed in the case in the main proceedings, which is a matter to be ascertained by the national court.¹³⁷

2.2.2. Double criminality

In its proposal for the FD EAW, the Commission proposed total abolition of the double criminality requirement, allowing Member States to establish only an exhaustive list of conduct for which they would refuse surrender ('negative list').¹³⁸ In its opinion, the European Parliament disagreed slightly with the Commission in the sense that it did not want to allow exceptions for crimes referred to in Article 29 TEU (currently 83 TFEU).¹³⁹ However, during their negotiations on the FD EAW, Member States were not ready to apply the principle of mutual recognition to their entire body of criminal law. Consequently, as a general rule, Article 2 (1) FD EAW requires that the act in relation to which arrest and surrender is requested be punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum of at least 12 months or, if surrender is requested for the execution of a prison sentence or detention order, that the imposed sentence is for at least four months. On the basis of Article 2(4) FD EAW surrender may, however, 'be subject to the condition that the acts for which the EAW has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described'. Article 2(4) relates to an optional grounds for non-execution contained in Article 4(1) FD EAW in cases where 'the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State'.¹⁴⁰ Based on the statistical data discussed in section 1.1.3. it may be assumed that a large part of the EAWs issued will still be subject to verification of double criminality.

So far, the CJEU has not provided further interpretation of Article 4(1) FD EAW. However, its judgment in Case C-289/15, *Grundza*,¹⁴¹ regarding the application of the double criminality principle

¹³⁵ CJEU of 16 July 2015, Case C-237/15, PPU, *Minister for Justice and Equality v Francis Lanigan* [ECLI:EU:C:2015:474](#), para. 37-42.

¹³⁶ *Ibidem*, para. 52.

¹³⁷ *Ibidem*, para. 64.

¹³⁸ Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States, [COM \(2001\) 522](#) final of 19 September 2001, p.16.

¹³⁹ European Parliament resolution of 29 November 2001 on the Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States (COM(2001) 522 - C5-0453/2001 - 2001/0215(CNS)), [A5-0397/2001](#), amendment 68.

¹⁴⁰ FD EAW, Article 4(1) FD EAW.

¹⁴¹ CJEU judgment of 11 January 2017, Case C-289/15, *Grundza*; A. Falkiewicz, 'The Double Criminality Requirement in the Area of Freedom, Security and Justice-Reflections in Light of the European Court of Justice Judgment of

in the context of Article 7(3) of the FD on Transfer of Prisoners¹⁴² is of relevance. In this case the Court held that 'when assessing double criminality, the competent authority of the executing State is required to verify whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the executing State if they were present in that State'.¹⁴³ Furthermore, 'in assessing double criminality, the competent authority of the executing State must ascertain, not whether an interest protected by the issuing State has been infringed, but whether, in the event that the offence at issue were committed in the territory of the executing State, it would be found that a *similar interest* [our emphasis] protected under the national law of that State, had been infringed'.¹⁴⁴

Even with this clarification, there has been much academic debate regarding the mandate of the executing judicial authority to verify double criminality and whether its application is compatible with the principle of mutual recognition more generally. On this point *Bachmaier* submits that 'A too strict application of the double criminality test in the realm of the EAW is contrary to the objectives set out in Articles 67 and 82 TFEU, while it is not necessarily justified on grounds of protection of human rights'.¹⁴⁵ *Muñoz de Morales Romero* submits limiting it in such a way that 'only a difference leading to a problem of 'public order' or 'national identity' could take precedence over cooperation'.¹⁴⁶ *Satzger* also argues in favour of a public order clause. At the same time he points to the difficulty in crafting it while simultaneously respecting the supremacy of EU law.¹⁴⁷ In the absence of a revision of the FD EAW, *Ruiz Yamuza* suggests raising further questions with the CJEU on the interpretation of Article 4(1) FD EAW regarding 'the degree of similarity needed between the offence for which extradition was requested and other similar crimes under which the acts could be entirely or partially classified according to the law of the executing Member State'.¹⁴⁸

Exception to the double criminality requirement (list of 32 offences)

The exception to the double criminality requirement is laid down in Article 2(2) FD EAW. For 32 offences (a 'positive list')¹⁴⁹ there is only a *single qualified criminality requirement* (the acts should be

11 January 2017, Criminal Proceedings against Jozef Grundza', *European Criminal Law Review*, Vol. 7(3), 2017, pp. 258-274.

¹⁴² Framework Decision 2008/909 the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union (FD Transfer of Prisoners) OJ (L 327) 27 of 5 December 2008.

¹⁴³ CJEU judgment of 11 January 2017, Case C-289/15, *Grundza*, para. 38.

¹⁴⁴ CJEU judgment of 11 January 2017, Case C-289/15, *Grundza*, para. 49.

¹⁴⁵ L. Bachmaier, European Arrest Warrant, 'Double criminality and Mutual recognition: A much debated case', *European Criminal Law Review*, Vol. 8(2), 2018, pp. 152-159, at p. 159.

¹⁴⁶ M. Muñoz de Morales Romero, 'Dual criminality under review: On the Puigdemont case', *European Criminal Law Review*, Vol. 8(2), 2018, pp. 167-175, at p. 173.

¹⁴⁷ H. Satzger, 'Mutual recognition in Times of Crisis-Mutual recognition in crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant', *European Criminal Law Review*, Vol. 8(3), 2018, pp. 317-331; European Criminal Policy Initiative, *A Manifesto on European Criminal Procedure Law*, Stockholm University Press, 2014, p. 15.

¹⁴⁸ R. Ruiz Yamuza, 'CJEU case law on double criminality. The Grundza-Piotrowski paradox? Some notes regarding the Puigdemont case', *ERA Forum* (2019) 19, pp. 465-484 at p. 481, 482.

¹⁴⁹ FD EAW, Article 2(2) refers to participation in a criminal organisation, terrorism, trafficking in human beings, child abuse, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions, and explosives, corruption, fraud, including that affecting the financial interests of the Union, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking

punishable by deprivation of liberties of at least three years in the issuing Member State). If this condition is fulfilled the warrant gives rise to surrender 'without verification of the double criminality of the act'. *Advocaten voor de Wereld*, one of the earliest CJEU cases on the EAW, concerned questions from the Belgian Constitutional Court regarding the compatibility of the non-verification of double criminality in accordance with Article 6(2) TEU and more specifically with the principle of legality in criminal proceedings and the principle of equality and non-discrimination.¹⁵⁰ *Advocaten voor de Wereld* claimed a violation of this principle as Article 2(2) FD EAW does not provide precise legal definitions of the offences for which verification of double criminality is renounced.¹⁵¹ The CJEU, however, held this principle not to be violated since it is the crime as defined in the substantive criminal law of the issuing Member State that should be taken as the point of reference.¹⁵²

Furthermore, without going into the question as to whether there was a risk of differentiated treatment, the CJEU replied that the seriousness of the 32 categories of crime in terms of adversely affecting public order and public safety warranted dispensing with the verification of double criminality, particularly in the light of the high degree of trust and solidarity between the Member States.¹⁵³ The distinct vagueness of the list of 'serious crimes' referred to in Article 2(2) FD EAW has led to questions regarding the proportionality of letting go of the dual criminality requirement in these cases, particularly given that in accordance with Article 83(1) TFEU, the EU can establish only 'minimum rules' concerning the definition of criminal offences and sanctions. And it is not those minimum definitions that matter; but the national definitions.¹⁵⁴ One example concerns the 2008 framework decision on the fight against organised crime,¹⁵⁵ which retains the 'double model' of criminalising either participation in a criminal organisation or conspiracy, taking into account the underlying differences between civil law and common law jurisdictions. All Member States except Denmark and Sweden have introduced the key elements of the framework decision. Denmark and Sweden have other alternative legal instruments to tackle criminal organisations (also known as the Scandinavian approach).¹⁵⁶ Even within the civil law jurisdictions there are important differences, notably regarding the incrimination of mafia-type associations.¹⁵⁷ Despite the fact that the Commission itself 'questions the added value of the instrument from the point of view of achieving the necessary minimum degree of approximation',¹⁵⁸ it has so far not come up with a proposal to revise the framework decision on organised crime.

in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships and sabotage.

¹⁵⁰ CJEU judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633.

¹⁵¹ *Ibidem*, para. 13.

¹⁵² *Ibidem*, para. 53.

¹⁵³ *Ibidem*, para. 57.

¹⁵⁴ Cf. A. Klip, *European Criminal Law – An integrative approach*, 3rd Edition, Intersentia, 2016, pp. 403-407.

¹⁵⁵ Council [framework decision 2008/841/JHA of 24 October 2008 on the fight against organised crime](#), O.J. L 300/42 of 11.11.2008.

¹⁵⁶ W. van Ballegooij and T. Zandstra, [The cost of non-Europe in the area of organised crime and corruption](#), EPRS, 2016, p. 17; A. di Nicola et al., 'Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime', Study written for the European Commission, DG HOME, February 2015, http://ec.europa.eu/dgs/home-affairs/e-library/docs/20150312_1_amoc_report_020315_0_220_part_1_en.pdf and http://ec.europa.eu/dgs/home-affairs/e-library/docs/20150312_1_amoc_report_020315_0_220_part_2_en.pdf.

¹⁵⁷ See Europol threat assessment, [Italian Organised Crime](#), 2013.

¹⁵⁸ Report from the Commission to the European Parliament and the Council based on Article 10 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime; [COM \(2016\)0448](#) final of 7.7.2016, p. 1.

Even if criminal definitions and sanctions have recently been harmonised by the Directive on Terrorism,¹⁵⁹ this Directive does not prevent Member States adopting or maintaining criminal definitions which cover other (intentional) acts. It also explicitly refers to a number of fundamental rights principles based on which Member States may limit criminal liability. This means that certain differences between Member States' legal systems will also remain regarding this aspect, which might lead to obstacles in cooperation and fundamental rights concerns.¹⁶⁰ The recent CJEU case of *X*¹⁶¹ concerned the interpretation of the threshold of a custodial sentence for a maximum period of at least 3 years under Article 2(2) FD EAW. Should the executing judicial authority consider the criminal legislation on glorification of terrorism and humiliation of the victims of terrorism applicable to the facts in the main proceedings leading to the conviction, or the version applicable at the date of issue of the EAW? In the latter case, the 3-year threshold would be met, in the prior case it would not have been. The CJEU pointed to the relevance of article 2(1) FD EAW, which refers to the sentence passed and for there to be consistency between this article and Article 2(2) FD EAW.¹⁶² Furthermore it held that it follows from the wording of Section (c) of the EAW form and the term 'imposed' that the sentence is the one resulting from the version of the law of the issuing Member State which is applicable to the facts in question.¹⁶³ Also, if the law of the issuing Member State, which the executing authority must take into account pursuant to Article 2(2) EAW FD, was not the one applicable to the facts giving rise to the case in which the EAW was issued, the executing authority would be required to verify whether that law had not been amended subsequently to the date of those facts.¹⁶⁴ This interpretation would run counter the purpose of EAW FD and, in view of the difficulties the executing authority might encounter in identifying the relevant versions of the law, it would be a source of uncertainty and be contrary to the principle of legal certainty.¹⁶⁵ Finally, the fact that the offence at issue cannot give rise to surrender without verification of double criminality pursuant to Article 2(2) EAW FD does not necessarily mean that the execution of the EAW has to be refused. The executing authority is obliged to examine the criterion of double criminality in the light of that offence.¹⁶⁶ The case shows the enduring importance of the 3 year punishment threshold as applicable at the time of the conviction, and thereby the need for harmonisation of definitions and sanctions at EU level to provide a basis for smooth cooperation.

2.2.3. Nationals and residents

In its proposal for a FDEAW, the Commission argued that since the European Arrest Warrant is based on the idea of citizenship of the Union, the exception provided for a country's national, which existed under traditional extradition arrangements, should no longer apply.¹⁶⁷ However, during their negotiations for the FD EAW, Member States opposed this idea, particularly regarding the

¹⁵⁹ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88/6 of, 31 March 2017.

¹⁶⁰ Cf. W. van Ballegooij, P. Bakowski, [The cost of non-Europe in the Fight against Terrorism](#), EPRS, European Parliament, 2018, p. 28, 29.

¹⁶¹ CJEU of 3 March 2020 in Case C-717/18 [ECLI:EU:C:2020:142](#)

¹⁶² Ibidem, para. 22-26.

¹⁶³ Ibidem, para. 30, 31.

¹⁶⁴ Ibidem, para. 36, "è

¹⁶⁵ Ibidem, para. 38

¹⁶⁶ Ibidem, para. 41, 42.

¹⁶⁷ Proposal for a Council framework decision on the European Arrest Warrant and the surrender procedures between the Member States, [COM\(2001\) 522](#) final of 19 September 2001, p.5.

execution of sentences.¹⁶⁸ As a result, in accordance with Article 4 (6) FD EAW, the executing judicial authority may refuse to execute an arrest warrant in cases where the EAW has been issued for the purpose of execution of a custodial sentence or detention order where the requested person is staying in or is a national or resident of the executing Member State, and that state undertakes to execute the sentence or detention order in accordance with its domestic law. CJEU case law has since defined the notions of 'resident' and 'staying in'.¹⁶⁹ It has also accepted domestic rules providing for the non-execution of a EAW in the case of migrant Union citizens with a view to the enforcement of a custodial sentence, only if they had been lawfully resident within the national territory for a continuous period of five years.¹⁷⁰ Furthermore, in accordance with Article 5(3) FD EAW, where a person who is the subject of an EAW or the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

As discussed, the FD on Transfer of Prisoners¹⁷¹ complements the FD EAW by providing a system in accordance with which a judgment may be forwarded directly to another Member State for the purpose of the recognition of the judgment and execution of the sentence.¹⁷² It also applies in the situation where an EAW for the execution of a sentence has been refused and the executing Member State has agreed to execute the sentence itself.¹⁷³ At the same time practical problems have arisen as regards the interaction between the two instruments, notably with regards to the need for the certificate contained in Annex I to the FD on Transfer of Prisoners to be forwarded.¹⁷⁴ The CJEU has provided certain guidance in the *Popławski* cases.¹⁷⁵ In particular it has underlined that the executing authority may only refuse surrender on the basis of Article 4 (6) FDEAW if assurance is given that the custodial sentence passed in the issuing State against the person concerned can actually be enforced in the executing Member State.¹⁷⁶ In this context, the CJEU emphasises the paramount importance of avoiding all risk of impunity for the requested person.¹⁷⁷ Furthermore, the CJEU has

¹⁶⁸ As regards to EAWs for prosecution, the following guarantee has been included in Article 5 FD EAW: 'where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

¹⁶⁹ CJEU judgment of 17 July 2008, Case C-66/08 [Kozłowski](#).

¹⁷⁰ CJEU judgment of 6 October 2009, Case C-123/08, [Wolzenburg](#).

¹⁷¹ Framework Decision 2008/909 the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union (FD Transfer of Prisoners) OJ (L 327) 27 of 5 December 2008.

¹⁷² FD Transfer of Prisoners, Article 3(1): 'The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.'

¹⁷³ FD Transfer of Prisoners, Article 25: 'Without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, mutatis mutandis to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.'

¹⁷⁴ Interview with a representative of the Council Secretariat; Article 4, 5 FD Transfer of Prisoners.

¹⁷⁵ CJEU judgment of 29 June 2017, Case C-579/15, [Popławski I](#); CJEU judgment of 24 June 2019, Case C-573/17, [Popławski II](#).

¹⁷⁶ CJEU judgment of 24 June 2019, Case C-573/17, [Popławski II](#), para. 22.

¹⁷⁷ CJEU judgment of 24 June 2019, Case C-573/17, [Popławski II](#), para. 86; CJEU judgment of 29 June 2017, Case C-579/15, [Popławski I](#), para. 23; Commission notice, [Handbook on the transfer of sentenced persons and custodial sentences in the European Union](#), OJ C 403/2 of 29 November 2019, p. 34.

recently clarified that when the execution of a EAW issued for the purposes of criminal proceedings is subject to the return guarantee, the executing Member State can, in order to enforce the execution of a custodial sentence or a detention order imposed in the issuing Member State on the person concerned, adapt the duration of that sentence or detention only within the strict conditions set out in Article 8(2) of FD on Transfer of Prisoners.¹⁷⁸

2.2.4. *Ne bis in idem*

The principle of '*ne bis in idem*' has been codified in Article 50 of the EU Charter on 'the right not to be tried or punished twice in criminal proceedings for the same offence'.¹⁷⁹ The explanations to the Charter clarify that Article 50 applies not only within the jurisdiction of one State, but also between the jurisdictions of several Member States. That corresponds to Articles 54-58¹⁸⁰ of the Schengen Convention Implementation Agreement (SCIA)¹⁸¹ as incorporated in the EU Treaties by a protocol to the Treaty of Amsterdam.¹⁸² Article 54 of the SCIA stipulates:

A person whose trial has been finally disposed of in a Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

Ne bis in idem serves as grounds for mandatory non-execution in Article 3(2) FD EAW: 'The person has finally been judged by a Member State and the sentence has been served or is currently being served (Article 3(2) FD EAW)'. It also features as an optional grounds for non-execution in accordance with Article 4(3): 'a decision to halt proceedings or where a final judgment had been passed upon the requested person'.

The *ne bis in idem* principle was mentioned as a subject for harmonisation under the 'programme of measures to implement the principle of mutual recognition of decisions in criminal matters'¹⁸³ adopted by the Justice and Home Affairs Council in November 2000. This harmonisation initiative was placed in the more general context of preventing conflicts of jurisdiction from appearing in the first place. A Commission green paper on conflicts of jurisdiction and the principle of *ne bis in idem* was produced in 2005, but it did not lead to comprehensive harmonisation.¹⁸⁴ In 2009, a framework decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings was adopted,¹⁸⁵ aimed at preventing parallel prosecutions covering the same acts and the same person. This framework decision however lacks binding rules preventing conflicts of

¹⁷⁸ CJEU judgment of 11 March 2020, Case C-314/18, SF, [ECLI:EU:C:2020:191](#), paras. 63-68.

¹⁷⁹ Article 50 EU Charter: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

¹⁸⁰ European Criminal Bar Association Initiative 2017/2018 "[Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards](#)", measure E, conflicts of jurisdiction and *ne bis in idem*.

¹⁸¹ The Schengen acquis as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999 OJ L 239/1 of 22 September 2000.

¹⁸² Council decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, OJ L 176, p. 17 of 10 July 1999.

¹⁸³ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/ 10 of 15 January 2001.

¹⁸⁴ Cf. Commission green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM (2005) 696 of 23 December 2005.

¹⁸⁵ Framework decision 2009/948 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328, p. 42 of 15 December 2009.

jurisdiction and mechanisms to solve conflicts of jurisdiction when parallel proceedings already exist in two or more Member States. It also fails to provide an effective remedy for the defendant.¹⁸⁶

Harmonisation attempts were, however, overshadowed by the development of the *ne bis in idem* principle in the case law of the CJEU. In this case law the Court has provided guidance on the notions of 'final decision', 'same acts' and the enforcement condition of Article 54 SCIA.¹⁸⁷ A number of these cases arose in the context of surrender proceedings. The *Mantello* case,¹⁸⁸ for example, concerned an individual who had been convicted in Italy in 2005 for possession of drugs. In 2008 he was arrested in Germany based on an EAW based on charges of drug trafficking, an act the Italian prosecutors were aware of but had not prosecuted him for in 2005. In this case the CJEU first recalled its case law in which the concept of 'same acts' had been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.¹⁸⁹ The CJEU furthermore held that in view of the shared objective Article 54 of the SCIA and Article 3(2) of the FD EAW, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, it must be accepted that an interpretation of that concept given in the context of the SCIA is equally valid for the purposes of the framework decision.¹⁹⁰ The CJEU then focused on the question of whether Mr Mantello had been 'finally judged', which would have resulted in non-execution in accordance with Article 3(2) FD EAW.¹⁹¹ The Court, however held this not to be the case as the decision of the public prosecutor not to prosecute for certain offences, even though the material evidence was already available, did not bar further prosecution for those offences.¹⁹² In this regard the Court stressed that the question of whether a person has been 'finally judged' for the purposes of Article 3(2) of the FD EAW is determined by the law of the Member State in which the judgment was delivered.¹⁹³ In *AY*¹⁹⁴ the CJEU furthermore held that Articles 3(2) and 4(3) EAW FD cannot be relied on for the purpose of refusing to execute an EAW in cases where a public prosecutor's office terminated an investigation opened against an unknown person during which the person who is the subject of the EAW (AY) was interviewed as a witness only.¹⁹⁵

Practitioners¹⁹⁶ and academics¹⁹⁷ have called for EU harmonisation initiatives in the area of conflicts of jurisdiction and *ne bis in idem* to be revived. In 2017, the European Law Institute proposed three

¹⁸⁶ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, COM (2014) 313, p. 11; A. Klip, *European Criminal Law, An integrative approach, 3rd edition*, Intersentia, 2016, pp. 450-456; The status of implementation of this framework decision is accessibly through the [EJN website](#).

¹⁸⁷ Eurojust, [Case Law by the Court of Justice of the European Union on the European Arrest Warrant](#), October 2018, section 7.3.; W. van Ballegooij, *The nature of mutual recognition in European Law, re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Intersentia, Antwerpen, 2015, chapter 3.6.

¹⁸⁸ CJEU of 16 November 2010 in case C-261/09, *Mantello* [ECLI:EU:C:2010:683](#)

¹⁸⁹ CJEU of 16 November 2010 in case C-261/09, *Mantello* [ECLI:EU:C:2010:683](#), para. 39.

¹⁹⁰ CJEU of 16 November 2010 in case C-261/09, *Mantello* [ECLI:EU:C:2010:683](#), para. 40.

¹⁹¹ CJEU of 16 November 2010 in case C-261/09, *Mantello* [ECLI:EU:C:2010:683](#), para. 43.

¹⁹² CJEU of 16 November 2010 in case C-261/09, *Mantello* [ECLI:EU:C:2010:683](#), para. 51.

¹⁹³ CJEU of 16 November 2010 in case C-261/09, *Mantello* [ECLI:EU:C:2010:683](#), para. 46..

¹⁹⁴ CJEU of 25 July 2018 in Case 268/17 *AY* [ECLI:EU:C:2018:602](#)

¹⁹⁵ *Ibidem*, para. 63.

¹⁹⁶ European Criminal Bar Association Initiative 2017/2018 "[Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards](#)", measure E, conflicts of jurisdiction and *ne bis in idem*.

¹⁹⁷ M. Wasmeier, 'Ne bis in idem and the enforcement conditions, balancing freedom, security and justice?' *New Journal of European Criminal Law*, 2014, vol. 4, p. 534-555.

legislative policy options¹⁹⁸ for filling the gaps in the current EU legislative framework. The proposals' added value is discussed both from the perspective of strengthening the fundamental right of those living in the AFSJ and ensuring the good administration of justice.

2.2.5. *In absentia* decisions

As regards *in absentia* decisions, Member States agreed on a framework decision in 2009, adding an optional ground for non-execution (Article 4a).¹⁹⁹ According to this article, if the requested person did not appear in person at the trial resulting in the decision, the executing judicial authority can refuse to execute the EAW unless certain conditions are fulfilled, such as: being handed a summons for the trial in person and being informed that a decision may be handed down if the requested person does not appear for trial (Article 4a(1) FDEAW):

Decisions rendered following a trial at which the person did not appear in person

1. The executing judicial authority may also refuse to execute the European Arrest Warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European Arrest Warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time: (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and (ii) was informed that a decision may be handed down if he or she does not appear for the trial; or

being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; or

after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: (i) expressly stated that he or she does not contest the decision; or (ii) did not request a retrial or appeal within the applicable timeframe; or

was not personally served with the decision but: (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European Arrest Warrant.

As testified by the relatively large number of 100 refusals relating to *in absentia* decisions in 2017,²⁰⁰ the interpretation and application of this ground for refusal has led to many practical and legal problems. During the first exchange of views on the own-initiative implementation report in LIBE,

¹⁹⁸ European Law Institute, [Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union](#), 2017.

¹⁹⁹ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, 2009 OJ (L 81) 24 of 27 March 2009.

²⁰⁰ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD(2019) 318 final of 28.8.2019, p. 6.

the Commission indicated that the ground for refusal on *in absentia* has quite often not been properly implemented by the Member States.²⁰¹ This was corroborated in an interview with a representative of the Council Secretariat who also pointed out that some Member States have transposed Article 4a FD EAW as a mandatory ground for non-execution. Many Member States do not allow for judgments *in absentia*, or only in limited cases. Their judicial authorities are also very hesitant to cooperate in the execution such judgments originating from another EU Member State. The CJEU *Melloni* case²⁰² revolved around a conflict between Article 24 of the Spanish constitution, interpreted as allowing for a review of a conviction in absentia in the requesting Member State, and Article 4(a) (1) FD EAW, which if its conditions are met does not foresee in such a right. The CJEU held the latter article to be compatible with the right to an effective remedy and the rights of defence in accordance with Articles 47 and 48 of the EU Charter and the ECHR.²⁰³ Allowing national authorities to apply the (higher) domestic standard in this case would compromise the primacy, unity and effectiveness of EU law.²⁰⁴

Moreover, there are differences as regards the criteria for a judgment in absentia²⁰⁵ and summoning the person. Furthermore, the lack of knowledge of each other's legal systems complicated judicial cooperation. At the same time the relevant section of the EAW form is not always completed extensively and precisely (Section D).²⁰⁶ This leads to uncertainty in the executing Member States, requests for additional information and delays.

A very good starting point for obtaining a deeper understanding of the problems concerned is the outcome of the Commission funded research project on 'Improving mutual recognition of European arrest warrants for the purpose of executing *in absentia* judgments'.²⁰⁷ Its main authors, *Brodersen*, *Glerum* and *Klip*, further highlight the practical problems caused by the lack of (proper) information provided by issuing judicial authorities, leading to requests for supplementary information, delays, and extra costs, as well as leading to unjustified refusals to execute the EAW or, inversely, to decisions to surrender that in hindsight were incorrect.²⁰⁸ They discuss how the practical problems may be caused by non-implementation, differences concerning implementation, incorrect implementation or application of the legislation implementing the FD on *in absentia*.²⁰⁹ The research project has resulted in a number of conclusions and recommendations for the issuing and executing judicial authorities, Member States and the European Union, including a number of proposals for additional EU legislation.²¹⁰

²⁰¹ European Parliament, meeting of the LIBE Committee, Exchange of views on the own initiative implementation report on the FD EAW, Intervention by Jesca Beder, European Commission, DG JUST, 20 February, 2020 at 9h40 <https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200220-0900-COMMITTEE-LIBE>

²⁰² CJEU of 26 February 2013 in Case C-399/11 *Melloni* [ECLI:EU:C:2013:107](https://eur-lex.europa.eu/eli/jl/2013/107/oj)

²⁰³ *Ibidem*, para. 49, 50.

²⁰⁴ *Ibidem*, para. 60.

²⁰⁵ Cf. CJEU of 10 August 2017 in case C-270/17 PPU, *Tadas Tupikas* [ECLI:EU:C:2017:628](https://eur-lex.europa.eu/eli/jl/2017/628/oj)

²⁰⁶ For a consolidated version of the FD EAW see Annex I to this study.

²⁰⁷ [InAbsentiaEAW](#), Research project on European arrest warrants issued for the enforcement of sentences after *in absentia* trials.

²⁰⁸ Brodersen, Glerum, Klip, [Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person](#), p. 7, 8.

²⁰⁹ *Ibidem*, p. 13.

²¹⁰ *Ibidem*, Chapter 9.

2.2.6. Relationship with fundamental rights and EU values

The application of the principle of mutual recognition to intra-EU extradition procedures resulted in a deviation from the traditional allocation of Member States' responsibilities in protecting the fundamental rights of the individual concerned. Article 1(3) FDEAW mandates that trust be placed in the decisions of the issuing judicial authority, vindicated by reference to the joint obligation of Member States to comply with fundamental rights obligations referred to under Article 6 TEU. Even so, a number of Member States explicitly implemented Article 1(3) as grounds for non-execution.²¹¹ In its 2014 legislative own-initiative resolution, the European Parliament called for 'a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligation in accordance with Article 6 of the TEU and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality'.²¹² In the meantime there have been significant developments in the case law of the CJEU regarding the interpretation of Article 1(3) FD EAW, *de facto* allowing executing judicial authorities to refuse surrender on grounds of fundamental rights in 'exceptional cases'.²¹³ This case law commenced in the area of prison conditions, but has since expanded to other alleged violations of fundamental rights and the rule of law.

Detention conditions

EU action and cooperation in the area of detention conditions have taken place in a wider framework, at United Nations and Council of Europe level.²¹⁴ However, EU Member States regularly fail to comply with those standards. European Court of Human Rights judgments are not properly executed and recommendations by specialised bodies established in accordance with UN and CoE treaties are not implemented by Member States. At a certain point, judicial cooperation within the EU had to be adapted to this reality. In its April 2016 judgment on the joined cases of *Aranyosi* and *Căldăraru*,²¹⁵ the CJEU recalled that Article 51(1) of the Charter demands that Member States respect the Charter when implementing EU law, including Article 4 regarding the prohibition of inhuman or degrading treatment or punishment.²¹⁶

The Court established a two-pronged test for the executing judicial authority. Firstly, to consider evidence with respect to deficient detention conditions in the issuing Member State generally, and secondly, to consider the real risk of inhuman or degrading treatment of the requested person in the event of his surrender to that Member State. If, following consultation with the issuing judicial authority, the risk of such fundamental rights violation cannot be discounted within a reasonable

²¹¹ This was originally condemned by the Commission (see COM(2005)63, p. 5). However, its third implementation report strikes a different tone. See COM(2011) 175, p. 7: 'It is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that surrender would result in a breach of the requested person's fundamental rights arising from unacceptable detention conditions'.

²¹² European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), [P7_TA\(2014\)0174](#), para. 7 (d).

²¹³ CJEU judgment of 5 April 2016 joined Cases C-404/15 *Aranyosi* and C-659/15 PPU, [Căldăraru](#), para. 78.

²¹⁴ R. Raffaelli, [Prison conditions in the Member States: selected European standards and best practices](#), Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament, 2017; W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017, Chapter 1.1; Cf. European Parliament resolution of 5 October 2017 on prison systems and conditions, [P8_TA\(2017\)0385](#).

²¹⁵ CJEU judgment of 5 April 2016, joined Cases C-404/15 *Aranyosi* and C-659/15 PPU, [Căldăraru](#); W. van Ballegooij and P. Bárd, 'Mutual recognition and individual rights; did the Court get it right?', in *New Journal of European Criminal Law*, Vol. 4, 2016, pp. 439-464.

²¹⁶ *Ibid*, para. 84.

time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.²¹⁷

This case law was further refined in *ML*,²¹⁸ in the sense that the assessment should be limited to the prisons in which the person that is subject to the EAW will be held.²¹⁹ When the issuing authority provides information and assurance, the executing Member State has to rely on that assurance, unless there are specific indications of inhuman or degrading treatment.²²⁰ *Caeiro* criticises the use of assurances as ‘hardly sufficient to provide an effective protection against ill-treatment, especially in cases which presuppose, by definition, systemic or generalised deficiencies of such protection.’²²¹ In particular, he raises the question of whether the ECtHR would find such assurances acceptable if they came from a non-EU state:

*If the ECtHR faced a case where a non-EU State had provided reliable guarantees that the rights of the detainee would be respected (no torture, no ill-treatment) in some prisons, but not necessarily in other prisons to which he or she might be transferred in the course of the execution of the sentence, would the decision to extradite comply with the Convention? Arguably it would not, because the guarantees would not have effectively averted the risk of ill-treatment.*²²²

Caeiro therefore submits that ‘convergence with the criteria set by the ECtHR can only be ensured if the CJEU allows the executing Member State to request from the issuing Member State comprehensive assurances that bind the latter to always comply with Article 4 of the Charter while dealing with that particular individual.’²²³ In *Dorobantu*²²⁴ the CJEU addressed further questions regarding the minimum standards for detention conditions required under Article 4 of the Charter, in particular the issue of personal space (in this case in a multi-occupancy cell). The Court held that regarding the personal space available to each detainee, the executing judicial authority must, *in the absence, currently, of minimum standards in that respect under EU law*, take account of the minimum requirements under Article 3 of the ECHR, as interpreted by the ECHR.²²⁵ With regard to such potential minimum EU standards concerning detention conditions, the EPRS report on the cost of non-Europe in the area of procedural rights and detention conditions assessed a number of options for taking further action at EU level. It found that with regards to pre-trial detention, there was sufficient evidence of the added value of potential EU action. Furthermore, it concluded that common action was also justified in the area of post-trial detention, as judicial cooperation measures, especially those involving the transfer of suspected and convicted persons, presumed adequate detention conditions.²²⁶ The debate regarding the scope of the EU to legislate under

²¹⁷ *Ibid*, paras 85-104.

²¹⁸ CJEU judgment of 25 July 2018, Case C-220/18 PPU, *ML*; TP Marguery, ‘Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions’, *Maastricht Journal of European and Comparative Law*, 25(6), 2019, pp. 704-717.

²¹⁹ *Ibid*, para 87.

²²⁰ *Ibid*, para 112.

²²¹ P.Caeiro, ‘Scenes from a Marriage’: Trust, Distrust and (Re)Assurances in the execution of a European Arrest Warrant, in S. Carrera, D. Curtin and A. Geddes (Eds.), *20 years anniversary of the Tampere Programme, Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, European University Institute, 2020, p. 231-240, at p. 239.

²²² P.Caeiro, ‘Scenes from a Marriage’: Trust, Distrust and (Re)Assurances in the execution of a European Arrest Warrant, in S. Carrera, D. Curtin and A. Geddes (Eds.), *20 years anniversary of the Tampere Programme, Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, European University Institute, 2020, p. 231-240, at p. 239.

²²³ *Ibidem*, p. 240

²²⁴ CJEU judgment of 15 October 2019, Case C-128/18, *Dorobantu*.

²²⁵ *Ibid*, paras 70-79, 85.

²²⁶ W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017, p. 42.

Article 82(2)(b) TFEU (what may be covered by the notion of ‘criminal procedure’?) and its added value in terms of improvement of material detention conditions continues, as illustrated by the opposing stances taken by *Coventry*²²⁷ and *Soo*²²⁸ on the matter. *Martufi* and *Peristeridou*, further cautioning that ‘if the EU were to improve the rational use of pre-trial detention, ECHR standards should not be considered adequate to ensure that pre-trial detention remains a measure of last resort.’ They also offer specific guidance on the standard that prospective EU legislation should reach.²²⁹

Despite launching a green paper on detention in 2011,²³⁰ the Commission has so far not proposed any EU legislation in the area of (pre-trial) detention. It has undertaken various other initiatives to improve detention conditions in the Member States. Under the justice programme, the Commission has arranged various operating grants for organisations active in the field of prison management. Since 2016, the Commission has provided a direct grant to the Council of Europe aimed at the operation of a European forum of independent prison monitoring bodies, referred to as national preventive mechanisms (NPMs).²³¹ The Commission is also working closely with the FRA on the criminal detention database,²³² providing information on detention conditions in all 27 EU Member States.²³³ In December 2018 the Council adopted conclusions on ‘Promoting mutual recognition by enhancing mutual trust.’²³⁴ Paragraph 5 of these conclusions encourages Member States to have legislation in place that, where appropriate, allows for the utilisation of measures alternative to detention in order to reduce the population in their detention facilities. In December 2019 the Council adopted the aforementioned conclusions on alternatives to detention.²³⁵ In these conclusions the Member States are encouraged to continue their efforts to improve prison conditions and to counter prison overcrowding.²³⁶ Furthermore, they express support for continued Commission funding for organisations active in the field of prison management and the European forum of NPMs.²³⁷

Fair trial, independent and impartial tribunals

The Commission has indicated that judicial cooperation in criminal matters, where individual rights are directly at stake, cannot function when there are serious concerns regarding the independence

²²⁷ T. Coventry, ‘Pretrial detention: Assessing European Union Competence under Article 82(2) TFEU’ 8 *New Journal of European Criminal Law*, vol 8, 2017, p. 43–63.

²²⁸ A. Soo, ‘Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures’, *ERA Forum* 20, (2020), p. 327–341.

²²⁹ A. Martufi A., Peristeridou C. The purposes of pre-trial detention and the quest for alternatives’ in *European Journal of Crime, Criminal Law and Criminal Justice*, 28(2), 2020, to be published, at. p 15

²³⁰ European Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327 of 14 June 2011.

²³¹ Council of Europe, [human rights national implementation](#).

²³² FRA, [Criminal detention in the EU](#).

²³³ Answer to European Parliamentary question [E-003096/2019](#) (Prison conditions in the EU and follow-up to the own-initiative report on prison systems and conditions).

²³⁴ Council conclusions on mutual recognition in criminal matters – ‘Promoting mutual recognition by enhancing mutual trust’, OJC 449, 13.12.2018, pp. 6-9.

²³⁵ Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, OJC 422 of 16 December 2019, pp. 9-13.

²³⁶ Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, OJC 422 of 16 December 2019, pp. 9-13, actions to be taken at national level, point 13.

²³⁷ *Ibid*, actions to be taken at EU level, point 7; actions to be taken to enhance cooperation with the Council of Europe and other relevant organisations, point 2.

of judicial authorities.²³⁸ In *LM*²³⁹ such serious concerns were the subject of preliminary questions raised by an Irish executing judicial authority in the context of an EAW issued by a Polish judicial authority. In its judgment, the CJEU subsequently extended its two-pronged 'Aranyosi test' to possible violations of the right to a fair trial, the essence of which includes the requirement that tribunals be independent and impartial.²⁴⁰ In accordance with this judgment, even if the Member State concerned is subject to the Article 7(1) TEU procedure due to 'a clear risk of a serious breach of EU values' – currently the case for both Poland²⁴¹ and Hungary²⁴² – or the Article 7(2) TEU procedure to 'determine the existence of a serious and persistent breach of EU values' by a Member State,²⁴³ the executing judicial authority will still need to assess whether in the case at hand there are substantial grounds for believing that the requested suspect will run the real risk of being subject to a breach of the essence of the right to a fair trial.²⁴⁴ In the national follow-up to *LM*, the Supreme Court of Ireland, after underlining the difficulty of applying the second prong of the test laid down by the CJEU,²⁴⁵ held that the threshold of evidence pointing to such a real risk had not been reached.²⁴⁶ Hence the appeal against surrender was dismissed.²⁴⁷ However, as reported by *Wahl*,²⁴⁸ more recently, the Higher Regional Court of Karlsruhe set aside an EAW against a Polish national who was to be surrendered to Poland for the purpose of criminal prosecution. The court argued that a fair trial for the requested person was not guaranteed in Poland following recent reforms that had an impact on the disciplinary regime of the judiciary in Poland.²⁴⁹ The Karlsruhe approach was also picked up in a series of interim rulings by the District Court of Amsterdam.²⁵⁰

²³⁸ Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, COM (2014) 158 of 19 March 2014, p. 2.

²³⁹ CJEU judgment of 25 July 2018 in Case C-216/18 PPU *Minister for Justice and Equality v LM* [ECLI:EU:C:2018:586](#)

²⁴⁰ *Ibid*, paras 47, 48.

²⁴¹ Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, [COM\(2017\) 835](#) of 20 December 2017.

²⁴² European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, [P8_TA\(2018\)0340](#).

²⁴³ *Ibid*, paras 71, 72; criticized by P. Bárd and W. van Ballegooij, 'Judicial independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v LM*', in: *New Journal of European Criminal Law*, 2018/3, p. 353–365, at p. 361: 'making suspension of mutual trust dependent on the sanctioning prong of Article 7 TEU is a reading of the FD EAW that can easily be contested. It disregards the historical evolution of Article 7 TEU. The reason Recital (10) to the FD EAW is silent about current Article 7(1) TEU is that it did not exist at the time this framework decision had been drafted. Since a preventive arm has been added in the meantime, one could argue that the drafters of the FD EAW intended to refer to Article 7 as such and the preventive arm should also be read into Recital (10). Such an interpretation would have been preferable in the light of the inherent asymmetry between the individual and the state, especially in the area of criminal law.'

²⁴⁴ *Ibid*, para 68.

²⁴⁵ Supreme Court of Ireland of 12 November 2019, *Minister for Justice & Equality v Celmer* [\[2019\] IESC 80](#), paras 81–83.

²⁴⁶ *Ibid*, paras 84–87.

²⁴⁷ *Ibid*, *Minister for Justice & Equality v Celmer* [\[2019\] IESC 80](#), para. 88.

²⁴⁸ T. Wahl, [Fair Trial Concerns: German Court Suspends Execution of Polish EAW](#), EUCRIM, 2 April 2020.

²⁴⁹ Higher Regional Court of Karlsruhe, decision of 17 February 2020, https://oberlandesgericht-karlsruhe.justiz-bw.de/pb/_Lde/6096769/;

²⁵⁰ District Court of Amsterdam in [ECLI:NL:RBAMS:2020:1896](#), 24 March 2020; [ECLI:NL:RBAMS:2020:1931](#), 24 March 2020 and [ECLI:NL:RBAMS:2020:2008](#), 26 March 2020 P. Bárd, J. Morijn, 'Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part II)', *Verfassungsblog*, April 19, 2020.

This line of CJEU case law is related to EU efforts in the area of the enforcement of EU values, which cover fundamental rights, including the right to independent and impartial tribunals.²⁵¹ The European Parliament has called for an interinstitutional agreement on an EU monitoring and enforcement mechanism on democracy, the rule of law and fundamental rights.²⁵² The Commission is now willing to engage in a 'rule of law review cycle',²⁵³ culminating in an 'Annual Rule of Law Report'²⁵⁴ covering all Member States. Commission President Ursula von der Leyen has tasked Věra Jourová, Vice-President for Values, Transparency, and Didier Reynders, Commissioner for Justice, with the development of a 'comprehensive European rule of law mechanism', including an annual report monitoring the situation in every Member State. The first annual report is expected in September 2020.²⁵⁵ The Commission has made a significant step towards Parliament's position. However, four key differences in their approach remain. These notably relate to what is assessed, by whom and which follow-up is to be provided.²⁵⁶

2.2.7. Relationship with third states, notably Schengen countries and the UK

As discussed below, the interaction between the EAW and extradition relations with third states demonstrates the advanced nature of the mechanism. The relationship with third states has been shaped by CJEU case law,²⁵⁷ notably in the *Petruhhin* case,²⁵⁸ discussing what a Member State must do when it receives an extradition request from a third country related to the prosecution of a Union citizen who is a national of another Member State. In the absence of rules of EU law governing extradition between the Member States and that third state, it is necessary, in order to safeguard EU nationals from measures liable to deprive them of the rights of free movement and residence provided for in Article 21 TFEU, while combatting impunity in respect of criminal offences, to apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law.²⁵⁹ The requested Member State must exchange information with the EU Member State of which the person is a national. It must give that other EU Member State the opportunity to exercise its jurisdiction to prosecute offences of its own nationals. Finally, it must give priority to a potential EAW of that Member State over the extradition request of the third country.²⁶⁰ In *Raugevicius*²⁶¹ similar logic was applied as regards an extradition request by a third country for the execution of a sentence of an EU citizen that had exercised their right to free movement. In this case the requested

²⁵¹ Article 2 TEU.

²⁵² [European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights](#) (2015/2254(INL)); W van Ballegooij and T Evas, [An EU mechanism on democracy, the rule of law and fundamental rights: European Added Value Assessment accompanying the Parliament's Legislative Initiative Report](#), EPRS, European Parliament, 2016; Annex I, [The establishment of an EU mechanism on democracy the rule of law and fundamental rights](#) by L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo and H. Spanikova; Annex II, [Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights](#) by P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe.

²⁵³ [COM \(2019\) 343](#), p. 9.

²⁵⁴ [COM \(2019\) 343](#), p. 11.

²⁵⁵ Commission work programme, [COM \(2020\) 37](#) final, p. 8.

²⁵⁶ W. van Ballegooij, [European added value of an EU mechanism on democracy, the rule of law and fundamental rights - Preliminary assessment](#), EPRS, European Parliament, 2020.

²⁵⁷ For a wider discussion of CJEU case law in this area see M.J. Costa, *Extradition Law, Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, European Criminal Justice series, Vol. 2, Brill Nijhoff, 2019, chapter 4.

²⁵⁸ CJEU of 6 September 2016 in Case C-182/15, *Petruhhin* [ECLI:EU:C:2016:630](#)

²⁵⁹ *Ibidem*, para. 47

²⁶⁰ *Ibidem*, para. 48, 49.

²⁶¹ CJEU of 13 November 2018 in Case C-247/17, *Raugevicius* [ECLI:EU:C:2018:898](#)

Member State, whose national law prohibits the extradition of its own nationals out of the European Union for the purpose of enforcing a sentence, and makes provision for the possibility that such a sentence pronounced abroad may be served on its territory, is required to ensure that that EU citizen, provided that he resides permanently in its territory, receives the same treatment as that accorded to its own nationals in relation to extradition.²⁶² This case law underlines the enduring sensitivities that surround the extradition of nationals and resident EU citizens to third states. This is also a sticking point in negotiations for extradition agreements between the EU and third states as illustrated in table 1 below. In particular, in this table a number of important aspects of the FD EAW are compared with the agreement the EU, Norway and Iceland signed on the surrender procedure between them in 2006,²⁶³ as well as a potential EU-UK agreement, on the basis of the relevant sections of the draft text of the agreement on the new partnership with the UK published by the European Commission on 18 March 2020, taking into account that this represents the EU's current negotiation position.²⁶⁴ The UK's draft text, published more recently, has significant differences to that of the Commission. Whilst public comment on the negotiations to date has largely focused on trade issues, it is apparent that work is still needed to bring the two sides together in the area of judicial cooperation in criminal matters.²⁶⁵

Table 1: EU extradition agreements with third states compared with the FD EAW

Regimes	FD EAW	EU-Norway/Iceland Agreement	Potential EU-UK Partnership Agreement
Basis for cooperation	AFSJ, compliance with EU values and fundamental rights	Schengen cooperation ECHR+ CoE data protection standards	Security Partnership, Democracy, rule of law, human rights, ECHR+ procedural rights and data protection standards
Recourse to Schengen Information System	Yes	Yes	No (recourse to Interpol)
Between judicial authorities	Yes	Depends on declarations	Yes
Time limits for taking the decision	Yes	Depends on declarations	Will depend on declarations

²⁶² Ibidem, para. 50.

²⁶³ [Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway](#), OJ L 292/2 of 21 October 2006.

²⁶⁴ European Commission, [Draft text of the Agreement on the New Partnership with the United Kingdom](#), 18 March 2020, parts III (Security Partnership), chapter 1 & 7, in particular; For a comparison with the ECE and EU-US extradition agreement see S. Carrera, V. Mitselegas, M. Stefan, F. Giuffrida, [Towards a principled and trust-based partnership. Criminal justice and Police cooperation between the EU and the UK after Brexit](#), CEPS, 2018, p. 148.

²⁶⁵ [UK draft working text for an agreement on law enforcement and judicial cooperation in criminal matters](#), 18 May 2020.

No verification double criminality serious crimes	Yes	Depends on declarations	Will depend on declarations
No ban on extradition of own nationals	Yes	Depends on declarations	Will depend on declarations
Interpretation application	CJEU	Dispute settlement+ mutual transmission case law	Partnership council, Arbitration Tribunal

Source: author's own elaboration

Basis for cooperation

As discussed in Section 1.1.1. and 1.1.2., the basis for the FDEAW was the establishment of the AFSJ and the decision to develop it by means of mutual recognition of judicial decisions. As discussed in Section 2.6., this method was deemed appropriate in view of the trust in Member States' compliance with EU values and fundamental rights. Norway and Iceland are both part of the Schengen Area.²⁶⁶ The preamble²⁶⁷ to the EU Norway/Iceland agreement furthermore expresses confidence in the ability and willingness of all contracting parties to guarantee the right to a fair trial and to respect the ECHR and the CoE Convention for the protection of individuals with regards to automatic processing of personal data.²⁶⁸ Moreover, since 2012 Denmark, Sweden, Norway, Finland and Iceland operate their own Nordic Arrest Warrant system between them that further simplifies and facilitates surrender procedures in accordance with article 31(2) FDEAW.²⁶⁹

The UK left the European Union on 31 January 2020. At the time of writing we are in a 'transitional period' until the end of 2020. During this period the UK and EU Member States can continue to use the EAW, provided that the process is initiated before the end of the transitional period. However, Article 185 of the Withdrawal agreement²⁷⁰ allows EU Member States to declare that, during the transition period, their executing judicial authorities may refuse to surrender nationals of that Member State to the UK. In this case the UK is allowed to take reciprocal action. Germany, Austria and Slovenia have availed themselves of this possibility.²⁷¹ This testifies to the sensitivity of the matter from a constitutional and political perspective. The EU and the UK are currently negotiating a new relationship.²⁷² This includes criminal justice cooperation, under the heading of a 'security

²⁶⁶ European Commission, [Schengen Area](#).

²⁶⁷ EU-Norway-Iceland Surrender Agreement preamble.

²⁶⁸ Convention for the Protection of Individuals with regards to Automatic Processing of Personal Data, E.T.S. No 108, Strasbourg, 28 January 1981

²⁶⁹ Convention of 15.12.2005 on surrender on the basis of an offence between the Nordic States (The Nordic Arrest Warrant); A. Suominen, 'The Nordic European Arrest Warrant Finally in Force', *European Criminal Law Review*, 2014, p. 41-45; [Trust issues, the Arrest Warrant system from a Nordic perspective](#), EJTN, 2018

²⁷⁰ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ L 29/7 of 31 January 2020*, article 185.

²⁷¹ Declaration by the European Union made in accordance with the third paragraph of Article 185 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Council doc. XT 21011/20 of 28 January 2020.

²⁷² For a general background see C. Cirlig, [The future partnership between the European Union and the United Kingdom, Negotiating a framework for relations after Brexit](#), EPRS, 2018.

partnership'.²⁷³ The EU's draft negotiating mandate specifies that 'the security partnership should ensure reciprocity, preserve the autonomy of the Union's decision-making and the integrity of its legal order and take account of the fact that a third country cannot enjoy the same rights and benefits as a Member State.'²⁷⁴ Furthermore, 'the envisaged partnership should be underpinned by commitments to respect fundamental rights. In this context, the envisaged partnership should provide for automatic termination of the law enforcement cooperation and judicial cooperation in criminal matters if the United Kingdom were to denounce the ECHR. It should also provide for automatic suspension if the United Kingdom were to abrogate domestic law giving effect to the ECHR, thus making it impossible for individuals to invoke the rights under the ECHR before the United Kingdom's courts.'²⁷⁵ Moreover, 'The security partnership should also provide for judicial guarantees for a fair trial, including procedural rights, e.g. effective access to a lawyer. It should also lay down appropriate grounds for refusal of a request for cooperation, including where such request concerns a person who has been finally convicted or acquitted for the same facts in a Member State or the United Kingdom.'²⁷⁶ Also, the draft text of the agreement on the new partnership with the UK published by the European Commission on 18 March 2020 clarifies that cooperation depends on adequate data protection standards in the area of policing and criminal justice.²⁷⁷ Finally, the draft text of the agreement on the new partnership with the UK published by the European Commission on 18 March 2020 also contains an article expressing a commitment to democracy, the rule of law and human rights as a basis for cooperation.²⁷⁸

Recourse to the Schengen Information System

As discussed in Section 2.1., SIS may be used to issue alerts and transmit EAWs. The only third countries that have thus far been provided access to SIS, namely Iceland, Liechtenstein, Norway and Switzerland, are members of the Schengen area.²⁷⁹ Consequently, the EU- Norway/Iceland agreement allows these countries to make use of SIS as well.²⁸⁰ The UK currently operates SIS but, as it has chosen not to join the Schengen area, it cannot issue or access Schengen-wide alerts for refusing entry and stay into the Schengen area.²⁸¹ However, in accordance with the draft text of the

²⁷³ *Ibidem*, section 5.3.2.; S. Carrera, V. Mitselegas, M. Stefan, F. Giuffrida, [Towards a principled and trust-based partnership, Criminal justice and Police cooperation between the EU and the UK after Brexit](#), CEPS, 2018, in particular chapter 3 on UK participation in EU mutual recognition instruments and future options.

²⁷⁴ Recommendation for a Council decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, COM(2020) 35 final of 3 February 2020, para. 112.

²⁷⁵ *Ibidem*, para. 113.

²⁷⁶ *Ibidem*, para. 113.

²⁷⁷ European Commission, [Draft text of the Agreement on the New Partnership with the United Kingdom](#), 18 March 2020, Article LAW.OTHER.136: Suspension and disapplication: 6. In case the Decision taken in accordance with Article 36 of Directive (EU) 2016/680 is either repealed or suspended by the Commission or declared invalid by the Court of Justice of the EU, all provisions of this Title shall be suspended; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119/89 of 4 May 2016, Article 36 (Transfers on the basis of an adequacy decision).

²⁷⁸ Draft text of the Agreement on the New Partnership with the United Kingdom, part one (common provisions), title II (basis for cooperation), Article COMPROV.4: Democracy, rule of law and human rights.

²⁷⁹ S. Carrera, V. Mitselegas, M. Stefan, F. Giuffrida, [Towards a principled and trust-based partnership, Criminal justice and Police cooperation between the EU and the UK after Brexit](#), CEPS, 2018, p. 123.

²⁸⁰ EU-Norway-Iceland Surrender Agreement, articles 12, 13.

²⁸¹ European Commission, [Schengen Information System](#).

agreement on the new partnership with the UK, such access would no longer be offered, and the UK would have to rely on the International Criminal Police Organisation (“Interpol”) instead.²⁸²

Between judicial authorities

As discussed in Section 2.1.1., one of the main innovations of the FD EAW has been that surrender procedures exclusively take place between judicial authorities. Article 9 of the EU-Norway/Iceland agreement follows that logic as far as issuing judicial authorities are concerned. However, it offers the option for state parties to notify that the Ministry of Justice is their executing judicial authority.²⁸³ The draft text of the agreement on the new partnership with the UK defines a “judicial authority” as a judge, a court or a prosecutor.²⁸⁴

Time limits

As discussed in Section 2.2. and 2.2.1. the FD EAW contains a number of time limits, the main one being that in situations where the wanted person objects to their surrender, Member States have to foresee a surrender procedure for EAWs to be completed within 60 days, with an optional extension of 30 days.²⁸⁵ These time limits are replicated in Article 20 of the EU-Norway-Iceland Agreement. However, Article 20(3) allows the EU (on behalf of any of its Member States) to issue a declaration indicating in which cases paragraphs 3 and 4 will not apply. Norway and Iceland may apply reciprocity in relation to the Member States concerned. The draft text of the agreement on the new partnership with the UK contains a similar provision.²⁸⁶

No verification double criminality serious crimes

As discussed in Section 2.2.2 the FD EAW contains an exception to the double criminality requirement, which is laid down in Article 2(2) FD EAW. For 32 offences (a 'positive list') there is only a *single qualified criminality requirement* (the acts should be punishable by deprivation of liberties of at least three years in the issuing Member State). If this condition is fulfilled the warrant gives rise to surrender 'without verification of the double criminality of the act'. In the EU-Norway/Iceland agreement, dual criminality is required as a condition of extradition, unless Norway or Iceland on the one hand, or the EU on behalf of the Member States on the other, make a declaration that it does not require dual criminality if the offence is a 'serious offence' listed in Article 3(4) and carries a penalty of at least three years' imprisonment in the requesting state. The agreement provides that such declaration may lead to reciprocal measures by the other party. The draft text of the agreement on the new partnership with the UK contains a similar provision.²⁸⁷

No ban on extradition of own nationals

As discussed in Section 2.2.3. another major innovation of the FDEAW is that it enables the surrender of nationals for prosecution purposes with a return guarantee. Article 5(3) FDEAW, as well as the surrender for the execution of a sentence, which, however, may be refused in accordance with article 4(6) FD EAW in view of the alternative option to execute the sentence in the Member State of nationality. Article 7(1) of the EU-Norway/Iceland agreement also enables the surrender of nationals.

²⁸² Draft text of the Agreement on the New Partnership with the UK, Article LAW.SURR.88: Detailed procedures for transmitting an arrest warrant, para 2: The issuing judicial authority may call on the International Criminal Police Organisation (“[Interpol](#)”) to transmit an arrest warrant.

²⁸³ Article 9 (2).

²⁸⁴ Draft text of the Agreement on the New Partnership with the UK, Article LAW.SURR.77: Definitions

²⁸⁵ FD EAW, Article 17(3) and (4).

²⁸⁶ Draft text of the Agreement on the New Partnership with the UK, Article LAW.SURR.96: Time limits and procedures for the decision to execute the arrest warrant.

²⁸⁷ Draft text of the Agreement on the New Partnership with the UK, Article LAW.SURR.78: Scope

However, again in accordance with Article 7(2), a declaration may be made that nationals will not be surrendered or that surrender will be authorised only under certain specified conditions. The draft text of the agreement on the new partnership with the UK follows the same logic.²⁸⁸ As discussed above, a number of EU Member States have already declared they will no longer surrender their nationals to the UK during the transitional period.

Interpretation application

Since the end of the 5-year transitional period after the entry into force of the Lisbon Treaty, the CJEU has had full jurisdiction over the area of police and judicial cooperation in criminal matters.²⁸⁹ This includes the FD EAW. The EU-Norway/Iceland agreement contains a political dispute settlement clause regarding the interpretation and application of the agreement²⁹⁰ as well as a mechanism allowing for the mutual transmission of CJEU and Icelandic and Norwegian EAW case law.²⁹¹ The draft text of the agreement on the new partnership with the UK contains a political dispute settlement procedure in the context of a 'Partnership council',²⁹² followed in case of a persisting disagreement by a procedure in front of an 'Arbitration Tribunal'.²⁹³ Questions of interpretation or application of a concept of Union law contained in the agreement should however be referred to the CJEU. Its ruling shall be binding on the arbitration tribunal.²⁹⁴

Conclusion

As shown by the EU-Norway/Iceland agreement and the draft text of the partnership agreement, whatever the outcome the negotiations between the EU and the UK,²⁹⁵ the resulting extradition arrangements will be less ambitious than the EAW. Generally, international agreements allow the contracting parties to enter declarations and notifications. The list related to the EU-Norway/Iceland agreement²⁹⁶ shows how this can lead to a complicated web of relations between the individual states concerned. Furthermore, the EU and the UK no longer share a common legal area (the AFSJ) in which there may be mutual recognition on the basis of mutual trust reinforced by the jurisdiction of the CJEU. Instead, there will have to be *verifiable* trust on the basis of compliance with international fundamental rights obligations (the ECHR) and equivalent protection to that offered

²⁸⁸ Draft text of the Agreement on the New Partnership with the UK, Article LAW.SURR.82: Nationality exception

²⁸⁹ Consolidated version of the Treaty on European Union, Protocol (No 36) on transitional provisions, OJ 115 / 322 of 09 May 2008.

²⁹⁰ EU, Iceland and Norway Surrender Agreement, Article 36.

²⁹¹ Ibidem, Article 37.

²⁹² Draft text of the Agreement on the New Partnership with the UK, Article INST.13: Consultations in the framework of the Partnership Council

²⁹³ Draft text of the Agreement on the New Partnership with the UK, Article INST.13: Consultations in the framework of the Partnership Council, Article INST.15: Arbitration procedure.

²⁹⁴ Draft text of the Agreement on the New Partnership with the UK, Article INST.16: Disputes raising questions of Union law: '1. Where a dispute submitted to arbitration raises a question of interpretation or application of a concept of Union law contained in this Agreement or any supplementing agreement, or of a provision of Union law referred to in this Agreement or any supplementing agreement, the arbitration tribunal shall not decide on any such question. In such case, it shall request the Court of Justice of the European Union to give a ruling on the question. The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration tribunal

²⁹⁵ Cf. J. Dawson, [Brexit, next steps: the European Arrest Warrant](#), House of Commons Library, February 20, 2020.

²⁹⁶ Notifications and declarations concerning Agreement of 28 June 2006 between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure, [Council doc. 5638/1/20 REV 1](#) of 12 March 2020.

by the EU Directives approximating suspects' rights (see *infra* section 2.3).²⁹⁷ With regards to the latter, it is interesting to notice how the draft text of the agreement published in March 2020 contains a number of provisions on suspects' rights²⁹⁸ that the UK had not opted in to²⁹⁹ prior to Brexit, notably deriving from the Directive on Access to a Lawyer³⁰⁰ and the Directive on the Rights of Children.³⁰¹ As *Carrera, Mitselegas et al* already pointed out, 'the UK's willingness to continue to reap the security benefits of EU cooperation may be contingent on the UK complying with the EU *acquis*, including the *acquis* on the protection of fundamental rights, part of which it is currently [written before Brexit] at liberty to disregard under its opt-outs'³⁰² At the same time, this raises questions regarding the position of Ireland and Denmark, which still do not participate in (all) procedural rights measures due to the application of their respective protocols to the Lisbon Treaty.³⁰³

2.3. The impact of EAWs on the rights of individuals in the Member States

On the basis of the FD EAW

The Commission proposal for a FD EAW already recognised the need 'to improve the overall context' by at least partially harmonising the procedural rights of wanted persons, particularly regarding access to a lawyer and an interpreter, conditional release of the surrendered person in the executing Member State and conditions for the execution of sentences following a trial in which the suspect was not present (*in absentia*).³⁰⁴ The European Parliament's opinion even called for legal assistance to be free of charge in cases where the requested person had insufficient means.³⁰⁵ In the end, Article 11 of the FD states that the requested person has a right to be informed of the EAW and its contents, as well as a right to be assisted by a legal counsel and an interpreter in accordance with the national law of the executing Member State. Article 12 FD EAW contains a right to provisional release in accordance with the domestic law of the executing Member State. In accordance with Articles 14 and 19 FD EAW, where the arrested person does not consent to his or her surrender, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.

²⁹⁷ Cf. P. Bárd, 'The effect of Brexit on European Arrest Warrants', [CEPS Paper in Liberty and Security in Europe 2018/2](#), April 2018, p. 5: 'In order to maintain trust between the two entities, the Charter and procedural guarantees should be binding also on the UK.'

²⁹⁸ Draft text of the Agreement on the New Partnership with the UK, Article INST.13: Consultations in the framework of the Partnership Council Article LAW.SURR.89: Rights of a requested person, Article LAW.SURR.90 Rights of a requested person who is a child.

²⁹⁹ Consolidated version of the Treaty on the Functioning of the European Union, Protocol No. 21 OJ C 202/295 of 7 June 2016.

³⁰⁰ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 10 (1), (2) and (3).

³⁰¹ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).

³⁰² S. Carrera, V. Mitselegas, M. Stefan, F. Giuffrida, [Towards a principled and trust-based partnership, Criminal justice and Police cooperation between the EU and the UK after Brexit](#), CEPS, 2018, p. v.

³⁰³ Consolidated version of the Treaty on the Functioning of the European Union, Protocol No. 21 OJ C 202/295 of 7 June 2016; Protocol No. 22, OJ C 202/ 298 of 7 June 2016

³⁰⁴ Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States, COM (2001) 522 final of 19 September 2001.

³⁰⁵ European Parliament legislative resolution of 29 November 2001 on the proposal for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States, 2002 OJ (C 153E) 276 of 27 June 2002.

On the basis of other secondary EU legislation

In its policy documents the European Commission has always stressed the relationship between mutual recognition and the necessary approximation.³⁰⁶ In this vein, the 2004 Commission proposal was aimed at setting common minimum standards at EU level regarding the basic fair trial rights of suspects or accused persons.³⁰⁷ This initiative however failed in the Council, owing to cost and subsidiarity considerations. The Commission and Member States then agreed to an alternative approach. This consisted of a 'roadmap',³⁰⁸ in accordance with which the rights of suspects would be harmonised in several individual instruments. Since 2009, directives have been adopted on the rights to interpretation and translation, information, access to a lawyer and on the rights to communicate upon arrest, the presumption of innocence, special safeguards for children suspected or accused of crime, and the right to legal aid.³⁰⁹ These directives also apply to wanted persons in European Arrest Warrant procedures, thereby strengthening the rights contained in the FD EAW:

- The Interpretation and Translation Directive provides for interpretation during the surrender procedure in the executing Member State and translation of the EAW.³¹⁰
- The Directive on Information in criminal proceedings requires that any person who is arrested for the purpose of the execution of a European Arrest Warrant should promptly receive an appropriate letter of rights containing information on her or his rights according to the national law implementing the FD EAW in the executing Member State.³¹¹
- The Directive on Access to a Lawyer provides that a requested person has a right of access to a lawyer in the executing Member State upon arrest pursuant to an EAW.³¹² The requested person also has the right to appoint a lawyer in the issuing Member States to provide the lawyer in the executing Member States with information and advice with a view to the effective exercise of the rights of requested persons laid down in the FD EAW.³¹³ The person also has the right to have a third person informed of the deprivation of liberty,³¹⁴ the right to communicate with third persons³¹⁵ and the right to communicate with consular authorities.³¹⁶

³⁰⁶ Communication from the Commission to the Council and the European Parliament, Mutual recognition of final decisions in criminal matters, COM (2000) 495 final of 26 July 2000, p. 16.

³⁰⁷ Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final of 28 April 2004.

³⁰⁸ Council document 14552/1/09 of 21 October 2009.

^{309, 309} For a more detailed discussion see W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017, Chapter 1.2.2.

³¹⁰ Directive 2010/64/EU on the Right to Interpretation and Translation (OJ L 280, 26 October 2010, p. 1-7), Article 2(7), 3(6).

³¹¹ Directive 2012/13/EU on the Right to Information in criminal proceedings (OJ L 142, 1 June 2012, p. 1-10), Article 5.

³¹² Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 10 (1), (2) and (3).

³¹³ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 10 (4) (5) (6).

³¹⁴ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 5.

³¹⁵ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 6.

³¹⁶ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 7.

- The Directive on the Rights of Children³¹⁷ provides specific safeguards for children (= those under the age of 18) that are over the age of criminal responsibility who are subject to EAW procedures, such as (a) the right to information; (b) the right to have the holder of parental responsibility informed; (c) the right to be assisted by a lawyer; (d) the right to a medical examination; (e) the right to specific treatment in case of deprivation of liberty; (f) the right to protection of privacy; and (g) the right to be accompanied by the holder of parental responsibility during the proceedings.
- The Directive on Legal Aid³¹⁸ also covers legal aid in European arrest warrant proceedings, both in the issuing and executing Member State.³¹⁹ The directive furthermore contains provisions related to the quality of legal aid and professional training of staff involved in the decision-making, and of the lawyers providing legal aid services.³²⁰

Transposition and implementation concerning several directives

Based on prior EPRS research³²¹ and Commission reports on the application of the directives on interpretation and translation,³²² the right to information³²³ and access to a lawyer³²⁴ together with the FRA studies regarding procedural rights³²⁵ and detention conditions,³²⁶ the tentative conclusion may be drawn that the transposition and implementation of the relevant provisions concerning the EAW in the above-mentioned first three 'roadmap' directives has been inadequate to date. Some elements of the relevant data are reproduced below.

Almost all Member States have correctly transposed the requirements for interpretation in proceedings for the execution of an EAW and ensure that a translation of the EAW is provided.³²⁷ Furthermore, a majority of Member States ensure that the requested person promptly receives an appropriate letter of rights containing information on her or his rights, with most Member States having letters drafted in simple and accessible language. The Commission report expresses the concern however that several Member States lack a separate provision regulating the obligation to

³¹⁷ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).

³¹⁸ Directive 2016/1919 (OJ L 297, 4 November 2016, p. 1).

³¹⁹ *Ibid*, Article 5.

³²⁰ *Ibid*, Article 7.

³²¹ W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017.

³²² Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, COM(2018) 857 final of 18 December 2018.

³²³ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, COM (2018)858 final of 18 December 2018.

³²⁴ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [COM\(2019\) 560 final](#) of 26 September 2019.

³²⁵ [Rights in practice: access to a lawyer and procedural rights in criminal proceedings and European Arrest Warrant proceedings](#), FRA, September 2019.

³²⁶ [Criminal detention in the EU, rules and reality](#), FRA, December 2019.

³²⁷ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, COM(2018) 857 final of 18 December 2018, p. 7, 9.

provide information on the rights of suspects and accused persons in EAW proceedings.³²⁸ The FRA study regarding procedural rights³²⁹ finds that in EAW cases, language barriers frequently impede individuals' ability to benefit from their right to information and that requested persons often misunderstand such information, resulting in them making decisions that are contrary to their interests.³³⁰

In the context of the implementation of the Directive on Access to a Lawyer, 21 Member States provide the requested person with a right of access to a lawyer upon arrest pursuant to an EAW.³³¹ The Commission furthermore finds that the 'legislation in four Member States does not all reflect the right of requested persons to appoint a lawyer in the issuing Member State'³³² and in its conclusions mention it as a key provision with which there are still difficulties.³³³ Finally, most Member States also cross-refer in their legislation on EAW proceedings to rules on criminal proceedings governing the rights of suspects and accused persons.³³⁴ The FRA study regarding procedural rights equally finds that Member States do not effectively provide requested persons with information about their rights to access a lawyer in the issuing Member State.³³⁵

³²⁸ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, COM (2018)858 final of 18 December 2018, p. 10, 11.

³²⁹ [Rights in practice: access to a lawyer and procedural rights in criminal proceedings and European Arrest Warrant proceedings](#), FRA, September 2019.

³³⁰ *Ibidem*, p. 14.

³³¹ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [COM\(2019\) 560 final](#) of 26 September 2019, p. 20.

³³² *Ibidem*, p. 17.

³³³ *Ibidem*, p. 20.

³³⁴ *Ibidem*, p. 17.

³³⁵ [Rights in practice: access to a lawyer and procedural rights in criminal proceedings and European Arrest Warrant proceedings](#), FRA, September 2019.

3. Assessment and conclusions as regards the implementation of the EAW in the Member States

The Commission's better regulation guidelines establish a set of evaluation criteria against which EU interventions are to be assessed.³³⁶ The following criteria set out in the accompanying better regulation toolbox will provide the basis for the assessment undertaken here: effectiveness, efficiency, coherence, relevance and EU added value.³³⁷ Effectiveness refers to the degree to which an action achieves or progresses towards its objectives. Efficiency considers the relationship between the resources used by an intervention and the changes generated by the intervention. Coherence involves looking at how well or not different actions work together. It may highlight areas where there are synergies which improve overall performance, or which were perhaps not possible if introduced at national level; or it may point to tensions such as objectives which are potentially contradictory or approaches which are causing inefficiencies. Relevance looks at the relationship between the needs and problems in society and the objectives of the intervention and hence touches on aspects of design. Relevance analysis also requires a consideration of how the objectives of an EU intervention (legislative or spending measure) correspond to wider EU policy goals and priorities. EU-added value looks for changes which it can reasonably be argued are due to the EU intervention, over and above what could reasonably have been expected from national actions by the Member States. In many ways, the evaluation of EU added value brings together the findings of the other criteria, presenting the arguments on causality and drawing conclusions, based on the evidence to hand, about the performance of the EU intervention.³³⁸

It should be pointed out that a comprehensive evaluation of the EU's security policies is lacking,³³⁹ and there has been no separate evaluation of EU criminal justice policies. The Commission did, however, conduct a comprehensive assessment on EU security policies in 2017, which may be viewed as a positive first step.³⁴⁰ Figure 5 below illustrates the five key evaluation criteria and how they interrelate. One should however take into account the specific nature of European implementation assessments produced by EPRS. As opposed to the Commission evaluations, they are produced over a shorter period of time and tailored to meet parliamentarians' needs, notably by focusing on the practical application of the EU measure.³⁴¹

The temporal and substantive scope and methodology of this European implementation assessment were discussed in section 1.2. In this regard, and given the particular impact arrest, detention and surrender has on fundamental rights, a special question on fundamental rights was added to the questions posed to interviewees reproduced in Annex II.³⁴² Furthermore, a question was included on compliance with EU values in the light of CJEU case law on the interaction between

³³⁶ European Commission, [Better Regulation guidelines and toolbox](#);

³³⁷ *Ibidem*, [Toolbox nr. 47 evaluation criteria and questions](#)

³³⁸ European Commission, Better Regulation Tool #47 Evaluation criteria and questions.

³³⁹ Cf. W. van Ballegooij, P. Bakowski, [The cost of non-Europe in the Fight against Terrorism](#), EPRS, European Parliament, 2018, p. 19.

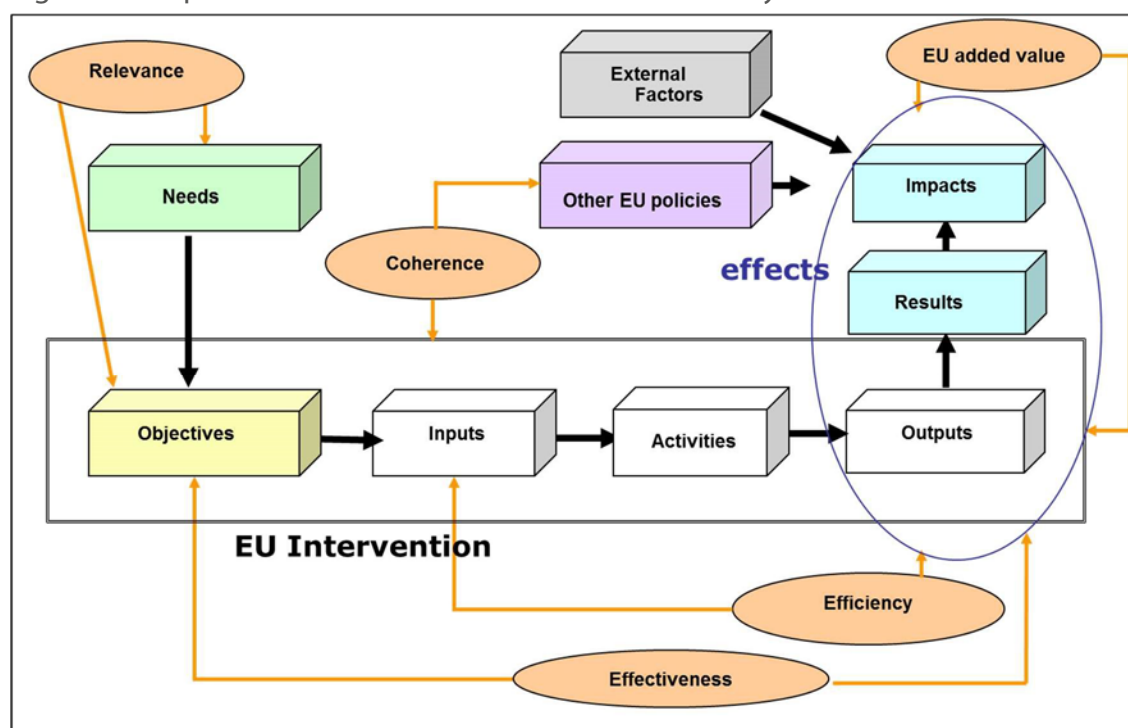
³⁴⁰ European Commission, 'Ninth Progress Report towards an Effective and Genuine Security Union' COM (2017) 407 final; European Commission Staff Working Document, 'Comprehensive Assessment of EU Security Policy' SWD (2017) 278 final.

³⁴¹ I. Anglmayer, [Evaluation and ex-post impact assessment at EU level](#), EPRS, 2016

³⁴² Fundamental rights have been recognized by the European Commission as a criterion for impact assessment, but not yet (explicitly) as a criterion for evaluation; European Commission, Better regulation guidelines and toolbox, Toolbox nr. 28 [fundamental rights & human rights](#).

the principle of mutual recognition and mutual trust and upholding these values.³⁴³ They are discussed between the questions of effectiveness and efficiency given the close connection they have with the objectives of the FD EAW and its efficient/proportionate use.

Figure 5: Simplified view of the intervention and the 5 key evaluation criteria



Source: European Commission, Better Regulation [Tool #47 Evaluation criteria and questions](#).

In line with the methodology presented in section 1.2., this chapter builds on the quantitative and qualitative data presented in chapter 1 and the desk research reflected in the overview of the main implementation challenges provided in chapter 2. This information is combined with the outcome of the written and oral replies provided to the questionnaire contained in Annex II. The replies, received during the months of March and April 2020, have been categorised in terms of the international organisation (Council of Europe, Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)), EU institution (Commission, Council), agency (Eurojust and FRA), affiliation or profession of the interviewee concerned. Interviewees replied in their personal capacity, where relevant referring to official documents and statements of

³⁴³ CJEU judgment of 25 July 2018 in Case C-216/18 PPU *Minister for Justice and Equality v LM* ECLI:EU:C:2018:586

their organisation. Where necessary, further context to their answers is provided, by specifying the national background of the interviewee concerned and through references to scholarly debates.

Key findings

The FD EAW has achieved the objective of speeding up handover procedures. The FD EAW also led to a considerable simplification of those procedures by moving away from a system in which decisions on extradition were ultimately taken at government level, introducing a standard EAW form, strict and short time limits and removing (political offence) or reducing (double criminality, nationality) refusal grounds. However, in practice the executive is still called in to assist judicial authorities, whilst practical cooperation on the basis of the form is not always running smoothly, with CJEU case law leading to further complexity. Eurojust has seen an uptick in assistance requests indicating its added value for practitioners. Finally, the rights of the defence might have been compromised due to the shortening of appeal possibilities.

Despite the different agendas of certain Member States and the European Commission leading to the choice for mutual recognition to be the 'cornerstone' of judicial cooperation, the objective of limiting the grounds for refusal based on the verification of double criminality seems to have been achieved overall. However, there are remaining uncertainties regarding the scope of the test to be applied in situations where such verification is still allowed. The vague description of certain list offences has led to calls for further harmonisation of substantive criminal law, though the practical need for doing so should be further supported with evidence.

The limitation of the nationality exception has been successful where prosecution is concerned. Regarding the execution of sentences, a number of Member States have made the optional grounds for execution contained in Article 4(6) FD EAW mandatory. In case of nationals and residents of the executing Member States, issuing judicial authorities should have social rehabilitation perspectives in mind before issuing an EAW. CJEU case law on the surrender of EU nationals to third states and the decision of certain Member States to no longer surrender their nationals to the UK during the transitional period testify to the enduring sensitivities.

CJEU case law has reinforced control by (independent) judicial authorities in the issuing and executing Member State, notably by excluding the police and the executive from issuing EAWs. At the same time there are concerns regarding the degree in which this case law results in effective judicial protection of requested persons.

3.1. Effectiveness

Effectiveness in this case this concerns the extent to which the objectives of the FDEAW have been achieved. The main objectives; speeding up procedures, removing the complexity and potential for delay inherent in extradition procedures, implementing the principle of mutual recognition and ensuring that an EAW is subject to sufficient controls by a judicial authority will be discussed in the following paragraphs.

3.1.1. Speeding up procedures (recital 1)

Recital 1 to the FD EAW refers back to the 1999 Council conclusions³⁴⁴ discussed in section 1.1. in accordance with which 'the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and

³⁴⁴ Presidency Conclusions-Tampere European Council, 15-16 October 1999, Bul. 10/1999, points 33-35.

extradition procedures should be speeded up in respect of persons suspected of having committed an offence.' As mentioned in section 1.1.3., in accordance with the Commission's statistics in 2017, requested persons who consented were surrendered within 15 days. For those that did not consent the procedure lasted on average 40 days,³⁴⁵ a remarkable reduction compared to the respective average under the pre-existing extradition regime. In 2018 a slight increase in the average length of the surrender procedure was reported.³⁴⁶ In general most respondents welcome this increase in speed as it provides certainty for law enforcement, the victim and the requested person. The exact reason for the slight increase in average length of the surrender procedure in 2018 cannot be determined with great certainty. Both a respondent from the Council secretariat and an academic expert indicated that the delay might be caused by the application of the CJEU case law, notably as regards the definition of judicial authorities (discussed in Section 2.1.1.) and detention conditions in the issuing Member State (discussed in Section 2.2.6). Finally, the rights of the defence might have been compromised due to the shortening of appeal possibilities. A representative of the ECBA pointed out that Member States have put different procedures in place, with different deadlines for lodging a defence application or an appeal.

3.1.2. Removing the complexity and potential for delay inherent in extradition procedures (recital 5)

In accordance with recital 5 to the FD EAW 'the objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities.' Furthermore, it states that 'the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.'

On this point, a representative of the European Commission listed the main achievements of the FD EAW as moving away from a system in which decisions on extradition were ultimately taken at government level, the introduction of a standard EAW form, strict and short time limits and a removal (political offence) or reduction (double criminality, nationality) of grounds for refusal. However, they also indicated room for improvement for instance as regard the form taking into account findings of the report on 'improving mutual recognition of European Arrest Warrants for the purpose of executing *in absentia* judgments'³⁴⁷ discussed in Section 2.2.5. A respondent from the Council secretariat shared the general assessment that the FD EAW has led to a reduction in complexity, although they also indicated that application of the CJEU case-law in recent years had made the procedure in some situations (much) more cumbersome. In this regard, a representative of Eurojust indicated that it had seen a significant increase of the number of cases where its assistance was sought to facilitate and improve the execution of the EAW (from 442 cases in 2018 to 599 cases in 2019).³⁴⁸ Interviewees from the FRA confirmed the impression that there is a lack of knowledge amongst judicial authorities of each other's legislation and practice. The FRA operates a

³⁴⁵ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD (2019) 318 final of 28.8.2019, p. 5.

³⁴⁶ Commission staff working document, replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018, not yet published.

³⁴⁷ [InAbsentiaEAW](#), Research project on European arrest warrants issued for the enforcement of sentences after *in absentia* trials.

³⁴⁸ Written response by Eurojust.

number of databases containing national jurisprudence.³⁴⁹ This does not include the EAW (so far). A judge interviewed submitted that in their experience, the aim of enhancing the direct contacts amongst the judicial authorities has not been fully achieved. There were still many requests for clarification, including cases in which the assistance of the executive was requested. In addition, in their opinion judges were less connected than public prosecutors. Furthermore, a lack of linguistic skills continues to be an obstacle to cooperation. Another judge interviewed expressed the opinion that the FD EAW, with its limited grounds of non-execution, did not allow for practical solutions to real life issues, for instance a single mother that would be separated from her young children if surrendered. Even if the executing judicial authority refused to execute the EAW, the SIS signal would stay in place, meaning the individual could be picked up again in another EU Member State (See Section 2.1.).

3.1.3. Implementing the principle of mutual recognition (recital 6)

In recital 6 to the FD EAW it is underlined that ‘the European Arrest Warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.’ As discussed in Section 1.1. and Section 2.1., there are different strands of thought amongst Member States and academia as regards to the interpretation and consequences of the principle of mutual recognition. These differences of approach have also filtered through in the interviews with stakeholders. For instance, a German judge interviewed stated that they agreed with the basic idea of mutual recognition, but that essential constitutional requirements, notably human dignity, would need to be respected, referring thereby to article 1 of the German Basic Law.³⁵⁰ Or as a CPT member interviewed put it: ‘In Germany it is dignity first, in France it is trust first’.

As regards limiting the application of the double criminality requirement

As discussed in Section 2.2.2., Article 4(1) FD EAW still maintains an optional grounds for non-execution for cases in which the act on which the European Arrest Warrant is based does not constitute an offence under the law of the executing Member State. The exception to the double criminality requirement is laid down in Article 2(2) FD EAW. For 32 offences (a ‘positive list’) there is only a single qualified criminality requirement (the acts should be punishable by deprivation of liberties of at least three years in the issuing Member State).

On this point a Commission representative indicated that a number of Member States have made the optional grounds for non-execution contained in Article 4(1) FD EAW mandatory. Furthermore, a number of Member States require double criminality outside the scope of the instrument. The Commission representative also recalled that the question has come up as to whether the list of offences for which there is no double criminality check in accordance with Article 2(2) FD EAW needs to be enlarged. However, when they discussed this issue with legal practitioners, judges and prosecutors, the problem did not seem so much related to the fact that some offences were not included in this list, but more the fact that several offences listed in Article 2(2) of the FD EAW are described in rather vague terms. Examples include ‘fraud’ and ‘sabotage’. This has given rise to a variety of interpretations, and quite often EAWs are issued for facts that do not even qualify as criminal offences in other Member States, such as fraud involving a small amount of damage. In any case, the Commission representative indicated that the list can be expanded under the FD EAW, at any time, by the Council acting unanimously. But there has never been a request to that effect. A representative from the Council secretariat echoed the comments of the Commission in the sense

³⁴⁹ e.g. the [FRA database on anti-Muslim hatred](#)

³⁵⁰ [Basic Law for the Federal Republic of Germany](#), Article 1(1): ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.’

that in their view the double criminality requirement had not played a major role (with some exceptions). At the same time, Member States continued to insist on its inclusion in other mutual recognition instruments. In their view, the European Union needed to proceed with the harmonisation of substantive criminal law, notably as regards the 32 list offences. An academic interviewee however pointed out that they did not observe practical cases where there were concerns that would substantiate the need for harmonisation.

A representative from Eurojust equally pointed out that in a few but quite relevant cases, Eurojust faced the difficulty of the application of the dual criminality ground, including on how this test should be properly applied. The main question was whether the factual elements underlying the offence would be criminalised in the executing Member State and whether a similar interest was protected in the law of the executing Member State. This is a task for the executing authority, but it must do this always in light of the guidance provided by the CJEU's case law and not only be guided by a pure national law approach. They added that from an operational point of view, it is clear that a full abolition or further restriction of the dual criminality test (or any other grounds for non-recognition), would facilitate the execution of EAWs. With reference to the CJEU's *Advocaten voor de Wereld*³⁵¹ case, discussed in Section 2.2.2., they submitted that there is no need for prior harmonization of the underlying offences. A prosecutor interviewed equally pointed out that the verification of double criminality in accordance with Article 2(1), 2(4) and 4(1) FD EAW hardly ever posed a problem in practice. From the side of defence lawyers, it was pointed out that the non-necessity of establishing a double criminality has in the 'tick box offences' greatly simplified the process and has resulted in surrenders which might never otherwise have taken place under the old extradition arrangements.

As regards limiting the nationality exception

As discussed in Section 2.2.3, in accordance with Article 4(6) FD EAW, the executing judicial authority may refuse to execute an arrest warrant in cases where the EAW has been issued for the purpose of execution of a custodial sentence or detention order where the requested person is staying in, or is a national or resident of the executing Member State, and that state undertakes to execute the sentence or detention order in accordance with its domestic law. On this point the Commission representative indicated that some Member States have added additional grounds for refusal containing prohibitions to surrender nationals.

The representative of the Council secretariat pointed out how sensitive the surrender of nationals was, testified by the fact that a number of Member States notified the Council that they will not surrender their nationals to the UK during the transition period after the UK left the EU (as discussed in Section 2.2.7). The respondent from Eurojust explained the practical implications of the *Petruhhin* case law (surrender to a third State).³⁵² The requested Member State must exchange information with the EU Member State of which the person is a national. It must give that other EU Member State the opportunity to exercise its jurisdiction to prosecute offences of its own nationals. Finally, it must give priority to a potential EAW of that Member State over the extradition request of the third country. Eurojust's casework shows that Eurojust can facilitate, speed up and ensure that the information reaches the correct authority in the Member State of nationality. In some Member States, different authorities are involved e.g. a Ministry of Justice (in relation to extradition request), a prosecutor (in relation to decision on jurisdiction) and/or a court (in relation to issuing/executing the EAW) which makes the procedure rather complex and shows that Eurojust's assistance can really be useful.

³⁵¹ CJEU judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633.

³⁵² CJEU of 6 September 2016, case C-182/15, *Petruhhin* [ECLI:EU:C:2016:630](https://eur-lex.europa.eu/eli/eurj:2016:630)

Judges and prosecutors interviewed confirmed the restrictive approach certain Member States have towards the surrender of their nationals for the execution of a sentence. An academic expert interviewed also condemned what they referred to as the 'selfish attitude' of issuing judicial authorities in this regard. The FD on Transfer of Prisoners allows for a possibility to execute the sentence where the individual has the best chances of social rehabilitation. Issuing judicial authorities however do not take this wider, European, perspective into account when issuing an EAW. In this regard they also pointed to an inconsistency between the FDEAW and the FD Transfer of Prisoners. The latter is explicitly aimed at achieving social rehabilitation, whereas the EAW does not mention this objective.

3.1.4. Ensuring that an EAW is subject to sufficient controls by a judicial authority (recital 8)

In accordance with recital 8 to the FD EAW: 'Decisions on the execution of the European Arrest Warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.' On the issuing side, recital 9 to the FDEAW clarifies that 'the role of central authorities in the execution of a European Arrest Warrant must be limited to practical and administrative assistance.' As discussed in Section 2.1.1., CJEU case law on the definition of issuing judicial authorities and their independence from government stipulates that police officers and organs of the executive cannot be defined as issuing judicial authority. This concept can however include public prosecutors in accordance with certain conditions. Furthermore, as discussed in Section 2.2.6, those arrested on the basis of an EAW should be guaranteed the right to a fair trial, including an independent and impartial tribunal in the issuing Member States. The latter point will be further developed when discussing compliance with EU values and fundamental rights in section 3.2 below.

A representative of the Council secretariat concluded that CJEU case law has reinforced the notion of sufficient control by an (independent) judicial authority in the issuing Member State. According to the Commission, most Member States have now taken measures to ensure compliance with CJEU case law on this point. The interviewee from Eurojust indicated that CJEU case law has raised many questions, particularly in relation to those Member States where public prosecutors were or are in charge of issuing EAWs. Were they 'independent' of the executive in the meaning of the CJEU's judgments? And did they meet the requirements of effective judicial protection? Eurojust has played, and is playing, an important role in supporting the national authorities in concrete cases. In the days after the first judgments came out, some persons were released. In other cases, a release was prevented, with the support of Eurojust: EAWs, issued by public prosecutors not meeting the requirements of the CJEU's case law, were re-assessed and confirmed by courts. As discussed in Section 2.2.1 to support the national judicial authorities in such cases, Eurojust published a questionnaire and a compilation of the replies. It includes information, per Member State, in relation to the crucial questions that the judgments triggered. Eurojust is currently preparing an update of that document.

One judge interviewed confirmed that based on their personal experience, the EAW had succeeded in achieving the objective of sufficient controls by a judicial authority in the Member States. A court clerk pointed out that the question of which criteria determine whether an authority is an executing judicial authority is currently before the CJEU.³⁵³ In their opinion, given the far-reaching consequences of the surrender proceedings and of surrender itself, an executing judicial authority should always be a court or a judge. A representative of the ECBA expressed the opinion that the system of judicial control is flawed in its general conception. Every person who is arrested should be

³⁵³ Case C-5/19, [Openbaar Ministerie](#).

brought immediately before a judge who will analyse the lawfulness of detention, including – in pending cases – if there is enough evidence to subject the person to continued detention (pre-trial detention) in accordance with Article 6 EU Charter. This does not happen in EAW proceedings. The judge in the executing state does not perform this control at all. And the judge in the issuing state does not perform this control promptly after detention in the executing state (and often the lawyer in the issuing state is not allowed to have access to the case files before surrender to the issuing state, which is essential to challenge detention). An academic expert expressed their disagreement with CJEU case law on this point, as in their view it only complicates the surrender procedure and is not in line with extradition under the Council of Europe system, in which prosecutors are allowed to request extradition. However, this statement may be rebutted in pointing out that in accordance with article 52(3) of the EU Charter, the EU can and has set higher standards in terms of fundamental rights protection.³⁵⁴

3.2. Compliance with EU values including fundamental rights

Key findings

EU action to monitor and uphold EU values has not led to a swift and effective resolution of threats to the rule of law in certain Member States. CJEU case law which requires executing judicial authorities to assess potential violations of fair trial rights in the issuing Member State on a case-by-case basis has led to different outcomes regarding EAWs issued by the same Member State. Furthermore, CJEU case law puts the spotlight on the need to provide national courts with proper human and financial resources. They also need access to (centralised) knowledge on the criminal justice systems (including EAW decisions) and safeguards for compliance with EU values in the other Member States.

Detention conditions might be easier to assess than compliance with EU values more generally, especially if the resources of the Fundamental Rights Agency (FRA, criminal detention database) and Eurojust and other relevant information from the ground are relied upon in the process. Nevertheless, there is no mechanism in place to ensure a proper follow-up to assurances provided by issuing judicial authorities after surrender. Much is to be gained through further intensifying cooperation and funding to international prison monitoring bodies and making sure that their reports are properly followed up by EU Member States. Furthermore, a lot is expected of EU funding to modernise detention facilities in Member States and to support them in addressing the problem of deficient detention conditions. However, this should go hand-in-hand with domestic criminal justice reform.

EU legislation in the area of detention conditions could have added value. However, the impact would depend on the scope of such legislation (only addressing procedural requirements in terms of reasoning for pre-trial detention and regular reviews, or also material detention conditions) the level of harmonisation chosen and its ultimate implementation. In particular, the Council of Europe standards and ECtHR case law should be taken as a minimum and built upon to accommodate the specific context of transnational cooperation on the basis of mutual recognition within the AFSJ. Given the lack of a separation in practice between pre-trial and sentenced detainees such a measure could have a positive impact on detention conditions overall.

In accordance with recital 10 to the FD EAW, 'The mechanism of the European Arrest Warrant is based on a high level of confidence between Member States. Its implementation may be suspended

³⁵⁴ EU Charter, Article 52(3): 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.' (currently Article 7(2) and 7 (3) as a new Article 7(1) TEU has been introduced to tackle 'a clear risk of a serious breach of EU values').

Recital 12 furthermore stipulates that the FD EAW 'respects fundamental rights and observes the principles recognised by Article 6 TEU and reflected in the EU Charter (Article 6 has since been amended to include a reference to the now binding EU Charter). Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European Arrest Warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.' There is a shorter reference to respect for fundamental rights and fundamental legal principles in Article 1(3) FD EAW: 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

As discussed in Section 2.2.6., by interpreting these provisions in the light of the EU Charter, the CJEU has now created a *de facto* fundamental rights grounds for non-execution. However, many questions remain unanswered regarding the exact role of the executing judicial authority in safeguarding the fundamental rights of the requested person, both regarding EAWs where there are concerns relating to poor detention conditions and broader concerns relating to the right to a fair trial, including an independent and impartial tribunal.

3.2.1. Actions by EU institutions on the enforcement of EU values

In Section 2.2.6., the efforts of EU institutions to monitor and enforce EU values were discussed. The Commission is preparing its first annual rule of law report covering all Member States. On this point the European Parliament has called for an interinstitutional agreement on an EU monitoring and an enforcement mechanism on democracy, the rule of law and fundamental rights. The Commission also triggered the Article 7(1) TEU procedure against Poland,³⁵⁵ whilst the Parliament did the same regarding Hungary.³⁵⁶ Both procedures are now pending in the Council.

Referring to these developments, an interviewee representing the European network of councils for the judiciary (ENCJ) recalled a manifesto³⁵⁷ adopted by its general assembly on 7 June 2019. This manifesto urged EU institutions to endorse the central role that the judiciaries and judicial networks play in promoting and protecting the rule of law and formalise their role in any future rule of law evaluation mechanism. It also called upon EU institution, in particular the European Commission, to encourage further investments by the Member States in their judiciaries and to ensure that Member States involve judiciaries in relation to reform or modernization plans. Furthermore, it called for

³⁵⁵ Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 of 20 December 2017.

³⁵⁶ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA(2018)0340.

³⁵⁷ [The ENCJ Bratislava Manifesto For the European Commission and European Parliament 2019 – 2024 mandate](#), 7 June 2019.

relevant information on national judicial systems, such as any European Commission synthesis of the information gathered in the preparation of the EU justice scoreboard and the European semester, as well as the information collected and the standards developed by the Council of Europe, the ENCJ and other EU judicial networks, to be promoted through raising public awareness and made available in a centralised and easily accessible place. A judge interviewed commented that the lack of progress of the Article 7 proceedings against Poland and Hungary shows that this article does not provide the EU institutions with an effective tool to ensure compliance with the fundamental values of the EU

3.2.2. CJEU case law balancing mutual trust and upholding the rule of law

An interviewee working for the Council secretariat acknowledged that CJEU case law balancing mutual trust and upholding the rule of law required quite a lot from practitioners. However, it was understandable given the current context. At the same time, they pointed to the Commission's mandate to initiate infringement procedures and launch Article 7 TEU procedures where necessary. A court clerk interviewed confirmed that the *LM* case law is challenging to apply in practice. Even where it is accepted that there are systemic rule of law problems, the test on the need to demonstrate their likely impact on individual cases is almost impossible to apply according to them. Furthermore, they pointed out that it is still unclear how CJEU case law requiring structural independence to qualify as a 'judicial authority' applies in the context of Member States with systemic rule of law problems. Finally, legal aid does not fund lawyers in other Member States to provide this type of expertise.

A German judge interviewed stressed that the 17 February 2020 decision of the Higher Regional Court of Karlsruhe, discussed in section 2.2.6. was in conformity with CJEU case law. A German prosecutor interviewed added that the case was well received by other judicial authorities in Germany. The particularities of the case (minor crime, no flight risk as the suspect lives with his family in Germany) made it a good test case. It should be added that the truly decisive factor for immediate suspension of surrender was the alleged involvement of two influential Polish nationals who were said to have bribed witnesses to engage in perjury and to have commissioned others to assault the suspect.³⁵⁸

An Irish defence lawyer expressed the opinion that in Ireland, following *LM*, there was still a disappointing lack of engagement with the realities of fair trial infringements in Poland. This lack of engagement reflected the traditional 'high level of confidence' in other Member States, even though the evidence suggested that such confidence was now unwarranted. In their view, the requirement to demonstrate 'a real risk of flagrant denial of justice' is too exacting a standard and it has resulted in a person being surrendered notwithstanding that there was a statistically not-insignificant chance that they would be subjected to breaches of the essence of their fair trial rights.

An academic expert remarked that the CJEU is moving away from mutual recognition based on mutual trust but places the responsibility in the hands of the executing judicial authority for fixing the practical problems (applies both to rule of law violation as well as poor detention conditions). An NGO representative expressed their disappointment at CJEU extending the two-step approach regarding prison conditions to the rule of law question. They believe that the CJEU should get rid of the second limb of this test, potentially in reply to further preliminary references. At the same they appreciated that individual judges are seeking to defend their independence and a fair trial even when they are under political pressure. Suspending all surrenders might take away an incentive for them to continue to do so.

³⁵⁸ T. Wahl, [Fair Trial Concerns: German Court Suspends Execution of Polish EAW](#), EUCRIM, 2 April 2020.

3.2.3. CJEU case law balancing mutual trust and fundamental rights in the area of detention

One of the main reasons behind the diminution of mutual trust is related to poor detention conditions and the problem of overcrowded prisons in the EU Member States. During the first exchange of views on the own-initiative implementation report in LIBE, the Commission pointed out that EAWs have been put on hold with regards to Poland, Hungary and Romania. Judicial authorities in some of the Member States, in particular Germany, Austria, the Netherlands and Ireland, are more and more reluctant to execute decisions in sensitive criminal matters. Other Member States, like for example France and Spain, are very concerned that the mutual recognition principle is put aside, endangering effective cooperation in criminal matters.³⁵⁹ This reflects these countries' approach towards mutual recognition discussed in Section 1.1.1.

The Commission has looked at the effects of the *Aranyosi* judgment in practice, and what has happened to the EAW after these judgments. It has turned out that prison conditions in the following ten Member States have been scrutinized: Romania, Bulgaria, Greece, France, Poland, Belgium, Croatia, Italia, Latvia, Hungary and Portugal. The Commission however observed a very diverse picture. Some Member States classify specific issuing Member States at risk, whilst others do not and continue executing EAWs originating from those Member States. Also, to assess whether there is a real risk of inhuman and degrading treatment, judges rely on different types of sources. Some take into account reports of the CPT, others of national bodies monitoring detention conditions and some even make use of newspaper articles.³⁶⁰ During the interview, the Commission officials added their impression that judicial authorities from certain Member States that have their own issues with prison conditions will not challenge EAWs from other Member States based on prison conditions. They highlighted that this lack of action relates to the question whether the judge should raise this *ex officio* (as arguably is the case in the *LM* jurisprudence) or only when the defence explicitly raises it.

The Commission has tried over the last year to solve the issue of how to assess detention conditions in other EU Member States by asking the FRA to develop a one-stop shop database which can be consulted by the different judges and prosecutors. This database,³⁶¹ which was launched in December 2019, combines in one place information on the detention situation in all EU Member States. The database does not rank the Member States, but it informs on selected aspects of detention conditions, such as cell space, sanitary conditions, access to healthcare and protection against violence. The Commission expressed the hope that this will improve the situation and also lead to a less divergent assessment of the detention situation in the different Member States.³⁶²

An interviewee from the Council secretariat pointed to the difficulty in applying CJEU case law in the area of detention conditions. In this regard, they would welcome more guidelines. They pointed to the fact that the *Aranyosi* case law had led to more coordination and involvement of the Member States Ministries of Justice in the procedure to help judicial authorities cope. This might be seen as contrary to the aim to judicialize the procedure. In reply to the question of what the judicial authorities in the 23 other Member States are doing with CJEU case law, beyond the four critical

³⁵⁹ European Parliament, meeting of the LIBE Committee, Exchange of views on the own initiative implementation report on the FD EAW, Intervention by Jesca Bener, European Commission, DG JUST, 20 February, 2020 at 9h42-45 <https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200220-0900-COMMITTEE-LIBE>

³⁶⁰ Ibidem

³⁶¹ FRA, [criminal detention in the EU](#).

³⁶² Intervention European Commission (supra n. 358)

ones identified by the Commission, they replied that in those Member States judges continued to rely on the principle of mutual trust.

An Italian judge interviewed equally commented that CJEU case law has led to some problems. They confirmed the Commission's impression that the main issue is whether the assessment of fundamental rights should be done *ex officio* in all cases, only upon request of the defendant or whenever some doubts arise with regard to the prison conditions. This has led to diverging practices among Member States. They pointed out that the FD EAW is based on the mutual trust, which included the mutual trust that all Member States respect human rights, which could be considered as a 'pre-condition' for being part of the EU. In this regard, the judge submitted that an assessment *ex-officio* seems to be in contrast with the concept of mutual trust. They continued in stating that some Member States also take into account that the quality of prison facilities is undoubtedly different throughout the EU and it is a *de facto* situation that depends on different economic resources, different levels of criminality etc. A prosecutor observed that they saw the fact that CJEU aligned its case law with the ECtHR as a positive development. On the contrary, an Irish defence lawyer argued that in their view both the Commission and the CJEU have in practice been overly concerned with protecting the integrity and efficacy of the FD EAW at all costs, at the expense of protecting Article 3, Article 5 and Article 6 ECHR rights in individual cases. In this case mutual trust had been taken too far. Finally, an NGO representative commented that it seems even courts do not want to engage in the politically sensitive act of refusing surrender over detention conditions. This action is sometimes avoided by stopping the case at prosecutorial level or before the final decision on surrender is taken, or by refusing surrender on other, politically less sensitive, grounds. Finally, an academic expert pointed to the discrimination amongst citizens that results from CJEU case law in the area of detention conditions: domestic prisoners languish in poor detention conditions, while surrendered persons get (temporary) better conditions. They expressed the view that the EAW is not the right lever to address detention conditions.

Assurances

A prosecutor interviewed highlighted the importance of following up on assurances provided by the issuing judicial authority post-surrender. How is the person treated in practice? A representative of the ECBA however pointed to doubts on whether the system of assurances, in view of the existence of evidence, in some Member States where there are systemic deficiencies in the Member States in the field of detention conditions, should be considered effective in order to safeguard the fundamental rights of surrendered persons not to be subject to ill-treatment or torture.

Furthermore, in their view:

- i) the assurances are often too general (e.g. not indicating to which prison or prisons the person will be sent);
- ii) there is no set legal consequence for the violation of assurances, i.e. the person might not have any effective remedy to the violation of such assurances;
- iii) there is no follow up by the executing judicial authority on the compliance with the assurance (and legal assistance to that end is also not guaranteed, since the EAW case is closed);
- iv) there is no specialised monitoring of assurances.

They suggested requiring that an inspection of the prison(s) in which the person is likely to be detained be organised in the scope of the EAW proceedings. There would be different methods on how to do this, but it could be done by experts from the issuing judicial authority and the defence, or with the participation also of the issuing courts. General monitoring will normally not avoid the need for these, since up-to-date and prison specific information is needed

3.2.4. The capacity of practitioners to keep track of CJEU case law

The Commission interviewees indicated that they are reflecting on how best to update the Commission handbook on the European Arrest Warrant in view of the speedy developments in CJEU case law. A solution might be to join efforts with Eurojust, which is already producing overviews of CJEU case law. They indicated that training on the EAW is conducted by European judicial training network (EJTN) and the academy of European law (ERA). A representative from the Council secretariat mentioned that the capacity of practitioners to keep track of CJEU case law really depends on the degree of centralisation of the execution of EAWs in the Member State and on the degree of specialisation of judicial authorities concerned. Do they only focus on surrender procedures for criminal cases in general for instance, or on surrender procedures for all kinds of cases?

Eurojust's representative mentioned that in recent years, practitioners have often approached the agency and requested support on how to proceed in a concrete case, raising very practical and pertinent questions related to the CJEU's case law. They opined that this case law confirms how mutual recognition can only be successful if it is applied in full compliance with fundamental rights. The 'specific' assessment developed by the CJEU is a challenging test for judicial authorities. It requires a case-by-case analysis to verify whether in the particular case at hand there is a risk for a breach of the fundamental right at stake. In this regard, the Eurojust representative underlined that national courts must act as EU courts when applying EU law. They are the ones who ensure that fundamental rights, as guaranteed in the EU legal order, are applied correctly. This requires an in-depth knowledge of the relevant CJEU's and ECtHR's case law and requires access to accurate, relevant, up to date information. In Eurojust's casework, they witness on a daily basis how practitioners struggled with this difficult task and how they were asking, repeatedly, for Eurojust's support in such cases. The representative of Eurojust continued that one of the biggest challenges is to find the right balance between requesting 'necessary' information and respecting the time limits. The vast majority of cases at Eurojust relate to requests for additional information. National authorities often contact Eurojust when requests for additional information remain unanswered and when the need for a reply has become extremely urgent.

A French magistrate stressed that judicial cooperation was added to their already heavy domestic workload. A Danish criminal defence lawyer described the knowledge of EAW procedure in their Member State as 'a long way to Tipperary'. There is only so much one can expect from training, especially for judges who only deal with EAW cases occasionally. According to them the Commission handbook is seen as very useful, but it should be updated more regularly (at least once a year).

A representative of the ECBA added that there is no specialisation in terms of legal aid work in EAW cases, which makes it non-effective – not to say impossible – from a financial viewpoint to specialise and get the necessary tools. An academic expert also voiced the opinion that judicial authorities in many Member States are not asking questions (on detention, rule of law etc) simply because they lack the capacity or knowledge. The same opinion was expressed by an NGO representative. They also mentioned that in their experience, there was a lack of awareness amongst judges of the possibility of raising questions with the CJEU in an urgency procedure. They also highlighted that the lack of knowledge amongst judges that had decentralised the execution of EAWs was also reflected in a similar lack of knowledge amongst defence lawyers.

3.2.5. Strengthening the activities of prison monitoring bodies and EU funding for prison reform

A CPT member indicated that in the particular field of detention conditions, the CPT has found and described in its reports³⁶³ situations in EU Member States which could be considered to be in violation of Article 3 ECHR, as well as other situations which, although did not amount to such a violation, raised serious concerns from a preventive perspective in relation to the avoidance of ill-treatment and torture regarding detention conditions. From a CPT practitioners' perspective, in the field of detention conditions, EU institutions have particularly contributed to the monitoring of detention conditions by setting up an NPM-Network, together with the Council of Europe, in which the CPT also participates.³⁶⁴ The member pointed to the extremely important role of NPMs in the monitoring of detention conditions. NPMs are the independent monitoring bodies operating on the ground in Member States on a permanent basis, hence they are best positioned to provide continuous monitoring and also to follow up on the implementation of recommendations by international monitoring bodies, such as the CPT. Setting up an NPM, however, is an obligation deriving from international law (OPCAT). Not all EU Member States have ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).³⁶⁵

In addition to the activities of prison monitoring bodies, the Commission officials interviewed also referred to the use of structural funds to improve prison conditions in the EU as referenced in paragraph 24 of the 2018 Council conclusions on 'promoting mutual recognition by enhancing mutual trust':³⁶⁶

The Commission is invited to promote making optimal use of the funds under the EU financial programmes, in case they are made available, in order to strengthen and promote judicial cooperation between the Member States, including in order to modernise detention facilities in the Member States and support the Member States to address the problem of deficient detention conditions, as this can be detrimental to the application of the mutual recognition instruments.

3.2.6. Potential EU legislation in the area of detention conditions

During the exchange of views in the LIBE Committee the Commission representative mentioned that on average within the EU the proportion of pre-trial detainees amounts to 20 % of the prison population.³⁶⁷ The length of pre-trial detention also varies greatly from one Member State to another. In some countries it is only a few months, whilst in others it might take several years before the actual trial takes place. The Commission highlighted that a few years ago, DG Justice performed a comparative law study on pre-trial detention, which was finalised in 2016.³⁶⁸ The Commission stated that it turned out from their study, that Member States in principle conform to a reasonably high degree with the ECtHR case law and also the Council of Europe recommendations, but that

³⁶³ Available at <https://hudoc.cpt.coe.int/eng>

³⁶⁴ See in this regard the [European NPM Newsletter](#).

³⁶⁵ OPCAT, United Nations Resolution [A/RES/57/199](#) of 18 December 2002.

³⁶⁶ [Council conclusions on mutual recognition in criminal matters-'Promoting mutual recognition by enhancing mutual trust'](#), OJC 449 of 13 December 2018, pp. 6-9.

³⁶⁷ European Parliament, meeting of the LIBE Committee, Exchange of views on the own initiative implementation report on the FD EAW, Intervention by Jesca Bener, European Commission, DG JUST, 20 February, 2020 at 9h45-47 <https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200220-0900-COMMITTEE-LIBE>

³⁶⁸ The study is not publicly available.

there are many shortcomings in practice. The previous Commissioner for Justice had not proposed legislation, given the sensitive and complex nature of the issue of pre-trial detention. The Commission representative concluded by stating that the problem of the overuse of pre-trial detention needs innovative solutions, including through the modernisation of criminal procedural codes and through the strengthening of the judiciary. She mentioned that the current Commissioner for Justice, Mr Reynders, could potentially look more closely into these issues and could propose some measures in this field.³⁶⁹ During their interview, the Commission officials interviewed furthermore indicated that further discussions on the potential scope of a proposal for EU legislation pre-trial detention were needed. Would it entail only procedural requirements in terms of review and reasoning for pre-trial detention or also material detention conditions? Furthermore, the Commission interviewees recalled that during the Romanian presidency, the idea was floated to devise an EU instrument on the Transfer of Proceedings. However, that idea was not picked up, as such an instrument was perceived to shift the burden to the Member State for raising the issue of prison conditions (by having to take over the proceedings as well).

A Council secretariat official furthermore expressed the view that the Commission should present a proposal for a Directive on EU detention standards, both pre- and post-trial. In their view, one could argue that the notion of 'criminal procedure' ex Article 82(2) TFEU covers both aspects (see the discussion in Section 2.2.6 on this). Even if there had been a discussion on the matter during the negotiations leading up to the adoption of the Directive on the Rights of Children,³⁷⁰ an official legal opinion was never adopted. In practice, even if the Directive would be limited to pre-trial detention standards, they considered that a distinction between pre-trial and post-trial prisoners is difficult to make in practice. Therefore, the criteria established for pre-trial prisoners would also benefit the post-trial prisoners.

According to a CPT member, in the case where the EU adopts its own binding law instruments, providing binding normative force under EU law to the obligations stemming from the OPCAT would have added value in the countries in which there is still no NPM operating, and would also allow for improvement in the operation of NPMs. It could also be considered to enact instruments, which would give normative binding force to the standards on detention conditions produced by the CPT in the field of detention conditions.³⁷¹ The CPT representative however cautioned that ECtHR case law is a minimum denominator which even falls behind of the CPT preventive standards in some instances. Unless there are clear and high standards, there will likely always be a need of control of detention conditions in EAW cases. The problem with detention conditions needs in any event a multi-pronged approach, also aiming and addressing the root causes of poor prison conditions, including overcrowding. Another CPT member doubted whether States would be persuaded to improve prison conditions just to get people surrendered. Overall this CPT member was more convinced of peer pressure and targeted funding as a means of getting (Member) States to reform their prison system. They equally issued a warning. Past experience, including the Directive on Access to a Lawyer, had shown that such efforts could also lead to a lowering of standards established at CoE level. For instance, certain Member States have very problematic legislation regarding contact with the outside world and the use of solitary confinement. If these countries were to dictate their standards, that could lead to a race to the bottom. On the other hand, the implementation of the Access to a Lawyer Directive had a positive impact in Member States. In

³⁶⁹ European Parliament, meeting of the LIBE Committee, Exchange of views on the own initiative implementation report on the FD EAW, Intervention by Jesca Bener, European Commission, DG JUST, 20 February, 2020 at 9h45-47 <https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200220-0900-COMMITTEE-LIBE>

³⁷⁰ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).

³⁷¹ Available at: <https://www.coe.int/en/web/cpt/standards>

reply to the question of whether the harmonisation of pre-trial detention standards at EU level could have a positive knock on effect on detention conditions more generally, they said it could. In particular, in many Member States there is no clear separation between prisons holding pre-trial detainees and those holding convicted prisoners, as most are hybrids. Though the mixing of prisoners should be avoided to prevent the negative influence of hardened criminals, it can also have positive implications. Counterintuitively, remand prisoners have much less rights than convicts (in terms of activities, contact with the family, education and training), so a separate regime could discriminate against remand prisoners.

An interviewee of the ECBA pointed to its 'Agenda 2020: A new roadmap on minimum standards of certain procedural safeguards'. In this document it calls for a specific EU measures on pre-trial detention, stating that EU competence according Article 82 TFEU is not in doubt. The document highlights that the very different standards in prison conditions infringe partly on the legal principle of human dignity and have become obstacles to EAW proceedings. In particular, it points out that there are currently no EU standards for time limits for pre-trial detention, nor for less intrusive measures, specific remedies and/or regular judicial control by the responsible authorities.³⁷²

The CJEU is now engaging in questions with regards to the number of square meters a person should have in a multi-person cell. According to an NGO representative, clearly more guidance on this should be provided in EU legislation. They furthermore submitted that the need for EU legislation is clear from the fact that the most important hurdle to the effective operation of the FD EAW is problems regarding detention conditions post-trial. It will be difficult though to translate the CoE standards into EU legislation.

3.3. Efficiency

Key findings

It is reported that the majority of Member States have put mechanisms in place in their domestic systems for ensuring that EAWs are not issued for minor offences. This has resulted in the impression that there has been a decrease in the number of EAWs issued for 'minor crimes'. At the same time, there are still some cases where a suspect appears to be wanted for questioning, rather than prosecution. Here, another cooperation mechanism (the European Investigation Order, EIO) should be used. The option provided by the FD EAW for the issuing judicial authorities to hear the requested person by video-link could also be further stimulated. It is also important for a requested person to have access to a lawyer in the issuing Member State. In some cases (where surrender would be disproportionate) this lawyer could encourage the withdrawal of the EAW. However, certain Member States still do not provide and/or facilitate such access. Furthermore, the inability of a lawyer to access information on the case in the issuing state can make it impossible for them to provide effective assistance.

The efficiency of the FD EAW is to be assessed against the costs incurred in its implementation, covering both the costs to all stakeholders (Member States, victims and requested persons), such as financial costs and others, including immaterial damage. As mentioned in section 2.1.2. there have been concerns relating to the proportionality of a number of EAWs issued for 'minor crimes' and before the case was 'trial ready', as well as in view of other possible judicial cooperation measures, where the European Parliament's call for legislative reform has been answered through guidelines in a Commission handbook.

During the first exchange of views on the own-initiative implementation report in LIBE, the Commission stated that 'the differences in proportionality assessment can be mostly explained by

³⁷² ECBA, Agenda 2020: [A new Roadmap on minimum standards of certain procedural safeguards](#), April 2018.

the choices that Member States have made as regards their prosecution policy. Some have opted for the legality principle (mandatory prosecution), whereas others have opted for the opportunity principle. The majority of Member States actually have mechanisms in place in their domestic systems for ensuring that EAWs are not issued for minor offences. In some Member States, such as Poland, domestic legislative action has also been taken to weaken the legality principle, and also to address the problem. There are also indications, if you look at the statistics, which suggests that the problem is actually hugely decreasing. While we had 4 840 EAWs issued by Poland in 2009, in 2018 only 2 300 were issued. So that is a diminution by half actually. However, when there are serious concerns on proportionality, there are also ways to deal with it in accordance with the framework decision. As we have advised in our revised handbook of 2017, Member States should take into account a certain number of criteria before deciding to issue an EAW. It is also advised that the issuing and executing judicial authority enter into communication with each other. And the executing judicial authority should always contact the issuing judicial authority when it needs more information on the surrender'.³⁷³

An Italian judge replied that they are required to execute an EAW if it meets the requirements established by law. Article 2(2) sets the minimum penalty (one year/four months) for an EAW to be issued. In their view, it is in no way expected that the issuing state will carry out an additional proportionality test at the time of the issuance of the EAW, let alone that the executing state carries out a proportionality check to execute the EAW. The Italian judge pointed out that it cannot be ignored that a different assessment on the proportionality of the EAW by Member States would find its reason in the various criminal policies of the various states, as well as 'unquestionable, socio-cultural differences'. Those differences became apparent through the reply from a German public prosecutor interviewed, who recalled that issuing Member States should test proportionality, not the executing Member State. German courts must check the proportionality of an EAW.³⁷⁴ On the executing side, in case these requests are received, contact will be made with the issuing authorities and solutions may be found (for instance a hearing). An Irish defence lawyer pointed out that Irish judicial authorities will not surrender a person if it is not clear that it is solely for the purpose of trial rather than for investigation. A system of undertakings to that effect has developed and has overcome what otherwise would have been a difficulty with implementation. A French magistrate called for a specific EU instrument to allow for questioning a person (separate from the EIO). Another Irish defence lawyer added that in serious cases of murder, sexual offences, drug trafficking etc the cost of the surrender procedure is clearly proportionate. However, they also pointed out that there are a great number of minor crimes for which an EAW can be issued for which by any standard the cost to the executing state is completely disproportionate. They also pointed to disruption to normal life and the financial costs for the person whose surrender is sought.

A representative of the ECBA pointed out that in cases of EAWs issued for criminal prosecution, unnecessary costs are often incurred when the judicial authority in the issuing state refuses to interview the requested person/suspect remotely through video link, or by granting them safe passage to travel to the issuing state so they can be heard and present their side of the story. Thereby they also impede them from being granted bail in the issuing state at that point of time. This does not only render the ESO completely useless, it also produces unnecessary delays and judicial costs in the executing state. If the requested person is being granted bail in the executing state, but knows that he or she will face definitely at least one or two months of pre-trial detention in the issuing state, they might oppose surrender and lodge remedies against surrender just in order to 'buy time'

³⁷³ European Parliament, meeting of the LIBE Committee, Exchange of views on the own initiative implementation report on the FD EAW, Intervention by Jesca Bener, European Commission, DG JUST, 20 February, 2020 <https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200220-0900-COMMITTEE-LIBE>

³⁷⁴ Higher Regional Court of Schleswig-Holstein, 2 Ws 13/20 of 6 February 2020.

in relative freedom in order to prepare his or her defence, as preparing defence from within pre-trial detention is almost impossible (no access to one's own computer and documents, restricted access to telephone, restricted time with lawyer etc.). In general, they indicated that EAWs are often not proportionate since the crimes at stake are low or medium crimes and ultimately the person will not be put in pre-trial detention or served any prison sentence in those cases.

It is also often unnecessary to have the person surrendered in order to pursue a criminal case: it is possible to conduct hearings by means of an EIO and trials may even be held in absentia in many cases. The person could then even serve the sentence that results from the trial in the Member State of residence. Furthermore, they held it 'entirely disproportionate' for an EAW to be issued in the investigative stage with the single purpose of questioning or arraigning the person – an act that can be done in most cases using remote means/EIO. They also pointed to disproportionality when the time spent in detention in the executing state is not taken into account in the issuing state for the purpose of calculating maximum pre-trial detention deadlines. The same applies to bail/house arrest being accounted towards pre-trial detention or the final sentence. Finally, an EAW might be entirely disproportionate when there are cases pending in both the issuing and executing Member State for the same facts and the person will be subject to much harsher bail conditions, or to pre-trial detention, in the issuing state, something which had not been imposed in the executing state.

As regards victims, a defence lawyer pointed out that for a near identical offence, one victim might agree that the cost of an EAW is disproportionate and another strongly disagree. Other points to note: it is arguable that for sexual offences, violent offences, hate crime and human trafficking, the balance of cost and proportionality is of small relevance for the Member State, suspect or victim. There is a common European interest in disrupting and prosecuting serious organised crime. The prosecution of an apparently trivial offence can disrupt or deter the commission of more serious offences. The return of a suspect national with established family ties and employment in the requested Member State (which almost certainly would involve pre-trial detention on the grounds of flight risk in the requesting Member State of prosecution) ought to, in the interests of the suspect as well as cost and proportionality, be reserved for serious cases; unless ESOs can be effectively deployed.

An NGO representative pointed out that the problem of EAWs being issued for very minor crimes seems now to be a rare occurrence. However, there are still some cases where a suspect appears to be wanted for investigation, rather than prosecution, when another cooperation mechanism could be used. It is important for a requested person to have access to a lawyer in the issuing Member State and in some cases (where surrender would be disproportionate) it is possible for a lawyer to encourage the withdrawal of the EAW. In practice, however, it is often hard for a requested person to get effective access to a lawyer in the issuing state (due to a lack of funds or a lack of information on available lawyers). Furthermore, the inability of a lawyer to access information on the case in the issuing state can make it impossible for them to provide effective assistance. In the context of mutual recognition, a requested person should be able to challenge the decision to issue an EAW pre-surrender in the issuing Member State, but the CJEU has set a low bar when determining the level of review required to meet the test of effective judicial protection, where the decision to issue the EAW is taken by a prosecutor.

Finally, an academic pointed out that the origin of the proportionality issues lies with the differences amongst Member States' legality principle (prosecute all, EAW for all). Trial readiness is difficult to apply in practice and would put the bar very high. In certain Member States, evidence is collected ahead of the trial, whereas in others it is collected at trial. A minimum evidentiary requirement would be when authorities have enough evidence to arrest a person (which this interviewee deemed a very low standard).

3.4. Coherence

Key findings

The EAW should be seen as a tool for surrender to be used within the criminal proceedings of Member States as a subsidiary measure to other, less intrusive options, in the spirit of a common EU Criminal Justice Area. However, too often judicial authorities see it as a tool to obtain the person for the benefit of their criminal proceedings, or to obtain execution of their sentence. In part this is due to inconsistencies between various EU measures. Other EU measures either have different objectives (social rehabilitation versus free movement of judicial decisions for instance), intervene at a different point (a supervision measure should be considered before issuing an EAW) or do not contain mandatory language in their operational provisions regarding the need to consider them as an alternative to issuing an EAW (EIO). Finally, a number of Member States have so far not made sufficient efforts to transpose and implement EU procedural rights directives timely and correctly. In absence of the Commission starting infringement proceedings, it is to be feared that practitioners will only see EU legislation in this area as guidance.

As discussed in Section 1.1.2., the FD EAW was amended in 2009 regarding decisions following proceedings *in absentia*.³⁷⁵ Since 2009, several directives have also been adopted that approximate the rights of suspects and accused persons more generally.³⁷⁶ Those directives also cover the rights of individuals subject to EAW procedures.³⁷⁷ Finally, in the meantime, a number of other mutual recognition instruments have been adopted that both complement the EAW system and in some instances provide useful and less intrusive alternatives to it.³⁷⁸ At the same time, a number of Council of Europe instruments in the area of extradition and mutual legal assistance remain relevant for relationships with third countries, as well as with respect to types of judicial cooperation that have not yet been harmonised by EU law. Finally, there is a link with EU measures approximating definitions and sanctions in the area of substantive criminal law, especially those that are covered by the list of offences for which the verification of double criminality is no longer allowed in accordance with Article 2(2) FD EAW.

In relation to EU measures, the respondent from the ECBA pointed out that the problem with the EAW is that it is based on an outdated vision of the area of freedom, security and justice (AFSJ). This vision views surrender of persons between Member States as a mere 'horizontal cooperation' issue between 'sovereign states' but is no longer correct. Instead, practice has shown that it should rather be viewed as just a tool within the criminal proceedings of Member States, designed to operate cross-border pre-trial detention in the AFSJ, as well as a tool that may only be used if necessary, proportionate and adequate to safeguard the effectiveness of a criminal case, as the *ultima ratio* of all other measures available to Member States. They furthermore point out that just as with pre-trial detention provisions in a domestic Code of Criminal Procedure, criticism and reform of the EAW cannot be made without looking into the system as a whole. Any reform must address the set of judicial cooperation instruments in criminal matters, in particular mutual recognition instruments, and stress the subsidiary relationship between the EAW (as the more restrictive measure for citizens' right to liberty) and other, less coercive but equally efficient measures (EIO, ESO, service of

³⁷⁵ FD EAW, Article 4a; Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, 2009 OJ (L 81) 24 of 27 March 2009.

³⁷⁶ In accordance with a road map contained in Council document 14552/1/09 of 21 October 2009.

³⁷⁷ See Section 2.3.

³⁷⁸ See Section 2.1.

documents). As long as this is not done, Member State authorities will keep looking at the EAW as 'the' efficient measure to 'proceed' with a case when an accused person is located in another Member State, regardless of the question as to whether the EAW is proportionate in the case at hand.

3.4.1. UN and Council of Europe instruments in the area of extradition and mutual legal assistance

An academic and representative of the Council secretariat pointed out that the EAW is now more cumbersome than the European Convention on Extradition as regards to who may act as the issuing judicial authority, as well as regarding the ability to refuse, with reference to (potential) fundamental rights violations. On the other hand, they had the impression that issuing judicial authorities are not engaging with alternatives to an EAW, such as the transfer of proceedings. A representative of the ECBA expressed the position that the fact that the FD EAW regulates neither the transfer of proceedings nor the resolution of conflicts of jurisdiction is a severe shortcoming both for the prosecution and for the accused. A similar view was expressed by an academic expert. They referred to proposals for EU legislation on the Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law, developed under the guise of the European Law Institute in 2017.³⁷⁹ This would reduce the amount of Member States exercising jurisdiction, because there would be clearer guidelines as to who is competent. Alternatively, they pointed to the option of limiting the exercise of jurisdiction in the measures harmonising substantive definitions and sanctions.

3.4.2. EU measures

EU judicial cooperation measures

Regarding coherence with other judicial cooperation measures, the Commission pointed to the lack of national capacity and practice with the ESO. Some Member States are not used to providing alternatives to pre-trial detention, such as electronic monitoring and bail. In addition, it is acknowledged that it is a highly complicated instrument on the deployment of which judges have to make swift decisions in the pre-trial phase. The ESO also adds the element of having to understand and trust the criminal justice system of the other EU Member State concerned. The Commission pointed out that the origin of the ESO was that the Commission at the time wanted to do something about the high number of prisoners in pre-trial detention. A legal instrument as currently is considered under Article 82 TFEU was not feasible at the time. At the same time, the Commission pointed out that defence lawyers could more actively promote the use of the ESO.

The Commission was more optimistic about the use of the FDPAS as it is to be applied in the post-trial phase, where there is more time to consider its use. A representative of the Council secretariat pointed to the need to consider using the ESO before issuing an EAW. If the person breaches the supervision measures, an EAW can be issued. Beyond the challenges mentioned by the Commission they pointed to the fact that several authorities were involved at national level. Finally, the ESO will probably not be used in more severe cases, as then the judicial authority will want to keep the suspect in detention.

A representative of the Council secretariat pointed out that the problem of a possible lack of consistency between the FD EAW and FD on Transfer of Prisoners is due to a lack of clarity of Article 25 of the latter on enforcement of sentences following an EAW. They deemed the EIO as a real alternative to the use of the EAW in all cases in which the detention of the subject is not actually

³⁷⁹ European Law Institute, [Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union](#), 2017.

necessary to carry out an investigative act. They did not deem the FD PAS and ESO as alternatives to the EAW but rather as additional instruments in all cases where detention in prison has not been imposed. The tools provided by these two framework decisions can constitute an incentive not to impose a penalty or custodial measure. Promoting the knowledge of those instruments could also lead to their increased use. Interviewees from the FRA added that the FD EAW and ESO need to communicate with each other better. An academic was however more pessimistic. Judicial authorities currently do not possess the creativity to make use of alternatives, such as the transfer of proceeding, supervision orders or alternative sentences. In their view, there was still a degree of narcissism on the side of national authorities not wanting to share or transfer 'their' cases. In addition they criticised the CJEU for not putting enough flesh on the bone of the AFSJ in terms of putting the citizen at its heart within a single legal area. The practice still is mostly two jurisdictions fighting over a person. In this context it is worth citing the sobering conclusion by *Joao Costa* on the enduring State-centric approach in the criminal justice area:

Despite the increase in the transnational reach of human conduct, the paradigm of criminal justice remains pointedly State-centric: as in the early days of the Wesphalian paradigm, it is still essentially States that prescribe and enforce criminal offences, and few or no signals exist which allow us to anticipate significant changes in this respect.³⁸⁰

Also, on the side of NGOs scepticism prevailed. In their view the ESO is only mentioned by the Commission as an excuse not to put forward EU legislation in the area of pre-trial detention. Right from the start there have been serious concerns about whether or not it is workable. There is also very limited practical experience. Though prosecutors seem to be open to using the EIO, again no experience of using it as an alternative to the EAW had been reported by them.

EU measures approximating definitions and sanctions in the area of substantive criminal law

The relationship between the FDEAW and EU measures approximating definitions and sanctions in the area of substantive criminal law is established by the 32 categories of crime for which double criminality may no longer be verified in accordance with Article 2(2) of the FD EAW. As discussed, when talking about the effective achievement of the objective of the FD EAW to limit the double criminality principle, several offences listed in Article 2(2) of the FD EAW are described in rather vague terms. A representative of the Council secretariat argued in favour of the EU proceeding with the harmonisation of substantive criminal law, notably with regards to the 32 list offences. With reference to the CJEU's *Advocaten voor de Wereld*³⁸¹ case, discussed in section 2.2.3., a representative of Eurojust submitted that there is no need for prior harmonization of the list offences. An academic interviewee furthermore pointed out that they did not observe practical cases where there were concerns that would substantiate the need for harmonisation.

EU measures approximating the rights of individuals in criminal proceedings

As regards the coherence with EU measures approximating the rights of individuals in criminal proceedings, a representative of the Council secretariat pointed out that Member States could make a greater effort to transpose and implement the relevant directives timely and correctly. Again, they indicated that the Commission should make use of its power to start infringement procedures for incorrect transposition. NGO representatives were of the opinion that the Commission had been too weak on enforcement of the procedural rights directive. They only did so when it was part of a wider

³⁸⁰ M.J. Costa, *Extradition Law, Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, European Criminal Justice series, Vol. 2, Brill Nijhoff, 2019, p. 325

³⁸¹ CJEU judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633.

political objective (for instance enforcing the rule of law). They expressed concern regarding this lack of enforcement action, as it might send the message to practitioners that EU legislation in this area is only to be seen as guidance. They also pointed at a lack of practical support, for example making sure that practical assistance is provided with finding a lawyer in the issuing Member State.

3.5. Relevance

Key findings

The FD EAW was adopted in 2002. This was prior to the accession of 13 new Member States and the recent departure of the UK. Since 2002, the European Parliament has achieved and exercised equal legislative powers with the Council as regards the field at stake. As long as the FD EAW is not 'Lisbonised', it lacks the democratic legitimacy provided by the proper involvement of the European Parliament in its adoption. In terms of the serious crimes addressed, it is noted that terrorism continues to constitute a major threat to security in EU Member States. At the same time globalisation and digitalisation have led to forms of cybercriminality that one could not have imagined in 2002 yet. Cooperation between judicial authorities can be improved through the use of modern techniques. Technological advancement could also improve the efficiency and fundamental rights compliance of the EAW procedure. A small bright spot in the COVID-19 crisis is that it has forced Member States to enhance the use of modern technologies in the criminal justice area. The above-mentioned option of hearing a requested person through video-link should therefore be more accessible. Trial by video-link is much more controversial and difficult to organise at the moment. However, it cannot be disregarded altogether, particularly in minor and simple cases in terms of evidence, where the defendant consents to this modality and the effective exercise of defence rights is guaranteed.

In this context, the question may be raised as to whether the objectives of the FD EAW are still relevant in light of developments that have taken place since its adoption in 2002, notably digitalisation and globalisation? And more generally, do its original objectives still correspond to the (EU) needs in the area of judicial cooperation?

As a preliminary observation, it should be pointed out that the institutional context has changed significantly. The FD EAW was adopted in 2002. This was prior to the accession of 10 new Member States in 2004, Romania and Bulgaria in 2007, Croatia in 2013, and the departure of the UK in 2020. With regards to the UK's central role in promoting the principle of mutual recognition, it might be argued that the balance between mutual recognition and harmonisation might tilt in a different way with the current constellation of Member States than it did in 2002. It should also be reminded that since the entry into force of the Lisbon Treaty in 2009, the European Parliament has equal legislative powers with the Council of Ministers in the area of police and judicial cooperation.³⁸² It has already exercised these powers in key pieces of legislation in the area of judicial cooperation regarding cross-border evidence gathering,³⁸³ freezing and confiscation measures,³⁸⁴ definitions and sanctions, rights of individuals in criminal procedure and the mandates of the relevant EU agencies. This contributes to better law-making, trust and legitimacy in this area.³⁸⁵ As *Mitselegas* writes:

³⁸² S. Carrera, E. Guild (CEPS), [Implementing the Lisbon Treaty Improving the Functioning of the EU on Justice and Home Affairs](#), Study conducted for the European Parliament, DG IPOL Policy Department C, 2015

³⁸³ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1 of 1 May 2014.

³⁸⁴ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303/1 of 28 November 2018.

³⁸⁵ W. van Ballegooij, [Area of freedom, security and justice: cost of non-Europe](#), EPRS, European Parliament, 2019

In terms of institutions, the entry into force of the Lisbon Treaty signified the supranationalisation of European criminal law, with EU institutions assuming their full EU powers in the field. The contribution of two of these institutions, the European Parliament and the CJEU, has been instrumental in the changing landscape of European criminal law and a greater emphasis on the examination of the impact of EU intervention in the field on fundamental rights.³⁸⁶

Inversely, as long as the FDEAW is not ‘Lisbonised’, we continue to live with an instrument that has been adopted without an impact assessment,³⁸⁷ and the democratic legitimacy provided by the proper involvement of the European Parliament. Another factor to be taken into account is the adoption of the EPPO.³⁸⁸ The handling European delegated prosecutor should be entitled to issue or request an EAW within the area of competence of the EPPO.³⁸⁹ Should the FD EAW be reviewed in the light of this development, particularly in case the competence of the EPPO is expanded to the fight against terrorism?³⁹⁰ In this regard, ideas on how to review the FDEAW and EU criminal justice more generally, presented in initiatives such as the ‘manifesto on European criminal procedure law’³⁹¹ should be recalled.

Europol finds that terrorism continues to constitute a major threat to security in EU Member States.³⁹² At the same time, this and other forms of serious and organised crime are an increasingly dynamic and complex phenomenon. Whilst traditional crime areas such as international drug trafficking remain a principal cause of concern, the effects of globalisation in society and business have facilitated the emergence of significant new variations in criminal activity. This includes migrant smuggling and trafficking in human beings, money laundering and ‘cybercrimes’³⁹³ such as the online distribution of child abuse, terrorist, racist and xenophobic content.³⁹⁴ Is the choice made for what are deemed serious crimes in accordance with Article 2(2) FD EAW still accurate in this context?

Responses received from the Council secretariat, Commission and Eurojust confirm that cooperation between judicial authorities can be improved through the use of modern techniques, such as digital transfer of certificates. This is already being addressed, e.g. through the e-evidence digital exchange system (e-EDS).³⁹⁵ The exchange of digital data is also very useful in surrender procedures, for instance to facilitate a proper identification of the person. Again, Eurojust can provide further support to judicial authorities in this process. The ECBA, defence lawyers and NGOs point out that in case the EAW has been issued for a criminal prosecution, electronic tools could be

³⁸⁶ V. Mitsilegas, ‘20 years from Tampere. The Constitutionalisation of Europe’s Area of Criminal Justice’, in S. Carrera, D. Curtin and A. Geddes (Eds.), *20 years anniversary of the Tampere Programme, Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, European University Institute, 2020, p. 211-216, at p. 212.

³⁸⁷ F de Londras, ‘Reviewing the Effectiveness of EU Counterterrorism Policies’ in S. Carrera and V. Mitsilegas (eds), *Constitutionalising the Security Union, Effectiveness, Rule of Law and Rights in Countering Terrorism and Crime*, CEPS, 2017, p. 45–53; W van Ballegooij and P Bakowski, *The Cost of Non-Europe in the Fight against Terrorism*, EPRS, 2018, ch 1.3.1.

³⁸⁸ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), OJ L 283/1 of 31 November 2017.

³⁸⁹ Ibidem, Article 33.

³⁹⁰ Communication from the European Commission to the European Parliament and the European Council, A Europe that protects: an initiative to extend the competences of the European Public Prosecutor’s Office to cross-border terrorist crimes, COM (2018) 641 of 12 September 2018.

³⁹¹ European Criminal Policy Initiative, [A Manifesto on European Criminal Procedure Law](#), Stockholm University Press, 2014.

³⁹² Europol, [Terrorism Situation and Trend Report](#), 2019

³⁹³ Europol, [Internet Organised Crime Threat Assessment \(IOCTA\)](#), 2019

³⁹⁴ Europol, [Serious and Organised Crime Threat Assessment \(SOCTA\)](#), 2017.

³⁹⁵ e-Evidence Digital Exchange System: state of play, Council document 6429/1/20 of 4 March 2020.

used more as an alternative to surrender and to prevent the person from having to spend extensive periods in pre-trial detention in the issuing Member State after surrender. As indicated, the option of the issuing judicial authorities hearing the requested person by video-link in accordance with Article 18 (1) (a) FD EAW is currently underused. A precondition for such a hearing is that the quality of the video-link is ensured. Furthermore, the whole room should be visible, including the prosecutor, judge and defence lawyer in the issuing Member States (which will need to be arranged for). In an interview, arraignment is possible, because it is only the judge who is present. If conducted appropriately, hearing by video-link can serve as a better alternative to a temporary transfer or waiting for a long time to get the arraignment done in the issuing Member State. Trial by video-link is much more difficult at the moment. In any event it would require the consent of the defendant. However, it cannot be disregarded altogether. In many minor cases, like driving under influence, the court does not need the defendant to be physically present, the defendant might be willing to confess.³⁹⁶

3.6. EU-added value

Key findings

The European Commission's indications for assessing the added value of EU criminal law do not offer sufficient guidance for assessing the added value of the FD EAW. However, it is clearly a founding stone for the establishment of an area of freedom, security and justice. Its level of cooperation could not have been achieved by Member States working on a bi- or multilateral level without having this objective in mind. This may be illustrated by the relationship with non-EU Schengen States and the negotiations with the UK after Brexit.

The European Commission measures the added value of EU criminal law based on the extent to which it strengthens the confidence of citizens in exercising their free movement rights, enhances mutual trust among judiciaries and law enforcement, ensures the effective enforcement of EU law in areas such as the protection of the environment or illegal employment and ensures a consistent and coherent system of legislation.³⁹⁷ Under the heading 'EU strategy on criminal justice' the Commission's DG Justice's website furthermore states: 'Serious organised crime is often committed across borders. To prevent "safe havens" for criminals, EU countries' laws should be more aligned.'³⁹⁸

The Council³⁹⁹ and the Parliament⁴⁰⁰ have not developed general guidelines on the added value of EU criminal law, but have so far limited themselves to guidelines for the adoption of substantive criminal law.⁴⁰¹ These elements do not yet add up to a coherent strategy for the development of an EU criminal justice area based on the rule of law, in which all interests, including that of the defence,⁴⁰² are properly represented. There is an inconsistency in thinking about judicial cooperation within the EU, and certainly within the Schengen area, in terms of people 'hiding

³⁹⁶ Interview with a Portuguese defence lawyer.

³⁹⁷ European Commission, 'Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law' (Communication) COM (2011) 573, 5.

³⁹⁸ European Commission DG Justice website, [EU Strategy on Criminal Justice](#).

³⁹⁹ 'Council Conclusions on Model Provisions Guiding Council's Criminal Law Deliberations' (30 November 2009) www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/111543.pdf.

⁴⁰⁰ European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI)), P7_TA (2012)0208.

⁴⁰¹ cf A Klip, *European Criminal Law, An Integrative Approach*, 3rd edn (Cambridge, Intersentia, 2016) 241–43.

⁴⁰² For elements to assess effective criminal defence in a particular jurisdiction, see E Cape, Z Namoradze, R Smits and T Spronken, *Effective Criminal Defence in Europe*, Intersentia, 2010, p. 5, 6.

behind borders'. The whole purpose of the AFSJ is for there to be a *common* criminal justice area based on a genuine EU criminal policy. In the case of suspects, the presumption of innocence should apply. In the case of convicted persons who are nationals or residents of the executing Member State, it is in the interest of their social rehabilitation to stay behind those borders as long as they serve their sentence, so that impunity is avoided. However, the FDEAW is clearly a founding stone for the establishment of an AFSJ. Its level of cooperation could not have been achieved by Member States working on a bi- or multilateral level without having this objective in mind. This may be illustrated by the relationship with non-EU Schengen States and the negotiations with the UK after Brexit discussed in Section 2.7.

4. Recommendations as to how to address the shortcomings identified

Upon the request of the rapporteur, this European implementation assessment also contains a number of recommendations on how to address the shortcomings it has identified. For the sake of consistency, the recommendations are streamlined in accordance with the evaluation criteria: effectiveness, compliance with EU values and fundamental rights, efficiency, relevance, coherence and EU added value. They are joined by short explanations referring back to the findings of the previous chapters. In the medium term, for reasons of democratic legitimacy, legal certainty and coherence with other judicial cooperation and procedural rights measures, a 'Lisbonisation' of the FD EAW is recommended. This process could be part of a proposed EU judicial cooperation code. Such an initiative could also contain legislative proposals on the prevention and resolution of conflicts of competence and the transfer of proceedings.

In line with more general suggestions on how best to evaluate the transposition and application of measures in the area of judicial cooperation in criminal matters,⁴⁰³ the final decision on embarking on such a comprehensive review should take into account the compliance assessment that will shortly be presented by the European Commission and the mutual evaluations the Member States joined in the Council are currently conducting. In addition, the European Parliament could also consider requesting the Commission to conduct a 'fitness check' evaluating and identifying gaps and inconsistencies in order to consider possible ways of simplifying and streamlining the current EU framework in the area of judicial cooperation in criminal matters.⁴⁰⁴ A similar exercise was already conducted in the area of legal migration.⁴⁰⁵ Another, compatible option would be for it to launch a legislative own-initiative report in accordance with Article 225 TFEU, that would result in concrete recommendations towards the Commission on how to review the FD EAW. Finally, the European Parliament could conduct further implementation reports on related judicial cooperation instruments, notably EIO, the FD on in absentia decisions, the FD on Transfer of Prisoners, the FD on PAS and the ESO as well as the various measures discussed in Section 2.3. concerning the rights of suspects, including requested persons.

4.1. Effectiveness

- The Commission could initiate targeted infringement proceedings against those Member States which have incorrectly or deficiently transposed the FD EAW.

Explanation: the 2014 European Commission response⁴⁰⁶ to Parliament's legislative own-initiative argued that proposing legislative changes to the FD EAW would be premature in light of the ability of the Commission to start infringement procedures. No such infringement procedures were

⁴⁰³ P. Albers, P. Beauvais, J.F. Bohnert, M. Böse, P. Langbroek, A. Renier and T. Wahl, [Towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters](#), 2013, short version of the final report at p. 56: By making use of several evaluation methods and sources of data the reliability of the findings of the evaluation will increase, which will also lead to better information that can be used for decision makers to continue with a (European) policy or to adjust the policy directions in the area of judicial cooperation in criminal matters.

⁴⁰⁴ European Commission, Better Regulation Toolbox nr. 43, [What is an evaluation and when is it required?](#)

⁴⁰⁵ European Commission, [Legal Migration Fitness check](#); W. van Ballegooij, E. Thirion, [The Cost of non-Europe in the area of Legal Migration](#), EPRS, European Parliament, 2019.

⁴⁰⁶ Commission response to text adopted in plenary [SP \(2014\) 447](#).

brought over the last six years. The focus could be on deficiencies that have led to practical problems in judicial cooperation.

- The Commission could initiate infringement proceedings against those Member States which have incorrectly or deficiently transposed the provisions of the procedural rights directives, which guarantee the rights of requested persons.

Explanation: the 2014 European Commission response⁴⁰⁷ to Parliament's legislative own-initiative argued that proposing legislative changes to the FD EAW would be premature in light of the adoption of 'common minimum standards of procedural rights for suspects and accused persons across the European Union'. As discussed in Sections 2.3, 3.3 and 3.4, the Member States have so far not made sufficient efforts to transpose and implement EU procedural rights directives timely and correctly. There are notably shortcomings in transposition, in particular with regards to the appointment of a lawyer and access to the case file in the issuing Member State prior to surrender. In absence of the Commission starting infringement proceedings, it is to be feared that practitioners will only see EU legislation in this area as guidance. There is also a lack of practical support with finding a lawyer in the issuing Member State.

- Assistance and coordination by Eurojust to the judicial authorities in the Member States could be further promoted and funded through the EU budget

Explanation: Eurojust plays a crucial role in facilitating judicial cooperation in terms of coordinating prosecutions and resolving conflicts of competence, facilitating the issuance of EAWs, assisting in the process of requests for additional information and guarantees from the issuing Member State, ensuring that the timelines for the surrender procedure are met and by offering practical guidelines and overviews of relevant CJEU case law. There is still untapped potential in terms of making use of this EU agency's services. At the same time, it should continue to receive adequate funding under the EU budget.

- Training and exchanges of judicial authorities could be further promoted and funded under the EU budget

Explanation: Many of the problems related to the practical operation of the EAW relate to a lack of awareness of the procedures, including the proportionality test contained in the Commission's handbook, how to correctly fill out the EAW form, the requirements of CJEU case law and awareness of the judicial systems of the other EU Member States. Training by the EJtN,⁴⁰⁸ ERA⁴⁰⁹ and exchanges⁴¹⁰ help overcome these obstacles.

- The Commission (in cooperation with Eurojust, the EJN/EJtN and the FRA) could develop and regularly update a 'handbook on judicial cooperation in criminal matters within the EU'

Explanation: The Commission handbook on how to issue and execute a European Arrest Warrant⁴¹¹ has been well received by practitioners. However, it cross-refers to many other judicial cooperation instruments, such as the FD on Transfer of Prisoners on which a separate handbook was produced

⁴⁰⁷ *Ibidem*.

⁴⁰⁸ [European Judicial Training Network](#).

⁴⁰⁹ ERA, [events on criminal law](#).

⁴¹⁰ EJtN, [The Exchange Programme for Judicial Authorities](#).

⁴¹¹ Commission Notice, [Handbook on how to issue and execute a European Arrest Warrant](#), C(2017) 6389 final of 28 September 2017.

recently,⁴¹² fundamental rights and procedural rights measures as well as CJEU case law on which other organisations like Eurojust, EJM, EJtN and FRA also report. Furthermore, it quickly runs out of date. A joint effort could be made to produce and regularly update an online handbook on judicial cooperation in criminal matters within the EU.

- A database could be developed containing the national jurisprudence on the EAW

Explanation: As discussed in Section 3.1. there is limited awareness amongst judicial authorities of EAW decisions taken in other Member States. Thereby, it is not clear how EU and national law is interpreted in practice. Opportunities for mutual learning and best practices are lost. National jurisprudence on the EAW is not systematically published (and translated). Databases containing national case law do exist in other domains of EU law, either administered by the EU directly or supported through EU funding. Examples include judicial cooperation in civil matters,⁴¹³ asylum⁴¹⁴ and fundamental rights.⁴¹⁵

4.2. Compliance with EU values including fundamental rights

- Judicial authorities could be systematically involved in the development of EU monitoring mechanisms on democracy, the rule of law and fundamental rights

Explanation: As discussed in Section 2.2.6. and 3.2., the CJEU has tasked the executing judicial authorities with the responsibility to assess whether in the case at hand there are substantial grounds for believing that the requested suspect will run the real risk of being subject to a breach of the essence of the right to a fair trial, in the context of a more general threat to the rule of law in the issuing Member State. For this authority to do so it will need to rely on tailor made and up-to-date information provided by EU monitoring mechanisms.

- EU Member States should comply with their international obligations by properly executing ECtHR decisions and following up on CPT and NPM reports

Explanation: As discussed in Section 2.2.6. and 3.2. the detention conditions in 11 Member States have been questioned in the context of EAW proceedings. These questions reflect a number of ECtHR judgments and critical CPT reports on those countries. The lack of compliance with international obligations undermines mutual trust and therefore the basis for mutual recognition. The European Parliament has made a similar call in its 5 October 2017 resolution on prison systems and conditions.⁴¹⁶

- All EU Member States should ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and set up independent and effective National Preventive Mechanisms (NPMs)

Explanation: As discussed in Section 3.2. NPMs are the independent monitoring bodies operating on the ground in Member States on a permanent basis, hence they are best positioned to provide continuous monitoring as well as to follow up on the implementation of recommendations by international monitoring bodies such as the CPT. Setting up an NPM, however, is an obligation

⁴¹² Commission notice, [Handbook on the transfer of sentenced persons and custodial sentences in the European Union](#), OJ C 403/2 of 29 November 2019, p. 34

⁴¹³ Eur-lex, [JURE database](#).

⁴¹⁴ [European Asylum Database](#).

⁴¹⁵ e.g. the [FRA database on anti-Muslim hatred](#)

⁴¹⁶ European Parliament resolution of 5 October 2017 on prison systems and conditions, [P8_TA\(2017\)0385](#), para. 1.

deriving from the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), but not all EU Member States have ratified OPCAT. The European Parliament has made a similar call in its 5 October 2017 resolution on prison systems and conditions.⁴¹⁷

- The FRA could be requested to conduct a comparative study on the follow-up in the issuing Member States, to offer assurances as regards detention conditions in the context of EAW procedures

Explanation: As discussed in Section 3.2., there is currently no mechanism in place to ensure a proper follow-up of assurances provided by issuing judicial authorities after surrender. An FRA study on the matter would be a logical complement to the criminal detention database⁴¹⁸ it recently launched. On the basis of its results, this study should provide recommendations on how to best guarantee compliance with assurances provided by issuing Member States.

- EU funding to modernise detention facilities in the Member States should be exploited

Explanation: As discussed in Section 3.2, in accordance with paragraph 24 of the 2018 Council conclusions on 'promoting mutual recognition by enhancing mutual trust',⁴¹⁹ the Commission is invited to promote making optimal use of the funds under the EU financial programmes, in order to modernise detention facilities in Member States and support the Member States in addressing the problem of deficient detention conditions. The European Parliament has made a similar call in its 5 October 2017 resolution on prison systems and conditions.⁴²⁰

- The Commission could propose EU legislation in the area of pre-trial detention addressing procedural requirements in terms of reasoning for pre-trial detention and regular reviews, as well as material detention conditions

Explanation: As discussed in Section 2.2.6. and 3.2., adopting EU legislation in the area of pre-trial detention and the detention conditions of sentenced persons has added value, notably in terms of its enforceability. However, the Council of Europe standards and ECtHR case law should be taken as a minimum and built upon to accommodate the specific context of transnational cooperation on the basis of mutual recognition within a common AFSJ. For it to have a real impact, a future instrument on pre-trial detention should not only address procedural requirements in terms of reasoning for pre-trial detention and regular reviews, but also material detention conditions. Given the lack of a separation in practice between pre-trial and sentenced detainees such a measure could have a positive impact on detention conditions overall.

⁴¹⁷ European Parliament resolution of 5 October 2017 on prison systems and conditions, [P8_TA\(2017\)0385](#), para. 1, recital D.

⁴¹⁸ FRA, [criminal detention in the EU](#).

⁴¹⁹ [Council conclusions on mutual recognition in criminal matters-'Promoting mutual recognition by enhancing mutual trust'](#), OJ C 449 of 13 December 2018, pp. 6-9.

⁴²⁰ European Parliament resolution of 5 October 2017 on prison systems and conditions, [P8_TA\(2017\)0385](#), paras 7 and 67.

4.3. Efficiency

- The use of EAWs for low or medium crimes should be reconsidered

Explanation: As discussed in sections 2.1.2., 3.3. and 3.4, for these cases often in practice, usually the person will not be put in pre-trial detention in the issuing Member States nor given a prison sentence. Issuing an ESO will in most cases be a better option.

- The EAW should not be issued for questioning

Explanation: As discussed in sections 2.1.2. and 3.3., there are still some cases where a suspect appears to be wanted for questioning, rather than prosecution. Here another cooperation mechanism (the EIO) could be used.

- The proportionality test to be conducted by judicial authorities could be revised and further clarified in the light of CJEU case law and comparable provisions in the EIO

Explanation: As discussed in sections 2.1.2. and 3.3, practitioners remain divided on the need for and substance of the proportionality test to be conducted by the issuing judicial authorities (with reference to CJEU case law, which would need further clarification on this point, potentially also referring to the EIO in which a proportionality test in the issuing Member State was included). As a first step, this could be done in the relevant section of the 'handbook on judicial cooperation in criminal matters within the EU'.

- Access to a defence lawyer in the issuing Member State should be guaranteed; this defence lawyer should be able to access the case file prior to surrender

Explanation: As discussed in sections 2.1.2., 2.3. and 3.3, it is important for a requested person to have access to a lawyer in the issuing Member State and in some cases (where surrender would be disproportionate) for this lawyer to encourage the withdrawal of the EAW. In practice, however, it is often hard for a requested person to get effective access to a lawyer in the issuing state. Furthermore, the inability of a lawyer to access information on the case in the issuing state can make it impossible for them to provide effective assistance.

4.4. Coherence

- The Commission could adopt a communication discussing the list of 32 'serious crimes' referred to in Article 2(2) FD EAW, relevant EU harmonisation measures and their national transposition. This communication should also assess the necessity and proportionality of adopting or revising the definitions and sanctions of these offences at EU level. Where deemed appropriate, the Commission should suggest updates to the list.

Explanation: As discussed in section 2.2.2. and 3.4., the distinct vagueness of the list of 'serious crimes' referred to in Article 2(2) FD EAW has led to questions regarding the proportionality of letting go of the double criminality requirement in these cases, particularly given that in accordance with Article 83(1) TFEU the EU can establish only 'minimum rules' concerning the definition of criminal offences and sanctions. And it is not those minimum definitions that matter; but the national definitions. Furthermore, as discussed in section 3.5., globalisation and digitalisation have had an influence on this and other crimes, including forms of cybercriminality that one could have not imagined in 2002. Bearing in mind the European Parliament's resolution on an EU approach to

criminal law,⁴²¹ the practical need for harmonising the definitions and sanctions for these offences needs to be discussed further.

- The Commission could propose an EU judicial cooperation code in criminal matters

Explanation: the 2014 European Commission response⁴²² to Parliament's legislative own-initiative argued that proposing legislative changes to the FD EAW would be premature in light of other mutual recognition instruments 'that both complement the European Arrest Warrant system and in some instances provide useful and less intrusive alternatives to it'. As discussed in section 2.1.2. and 3.4, the EAW should be seen as a tool for surrender to be used within the criminal proceedings of the Member States as a subsidiary measure to other, less intrusive options, in the spirit of a common European judicial area guided by the objective of social rehabilitation. However, too often Member States' legislation and practitioners see it as a tool to obtain the person for the benefit of their criminal proceedings, or to obtain execution of their sentence. This is visible through the lack of use of the CoE Convention on Transfer of Proceedings and the limited use of alternatives to issuing an EAW. In a domestic criminal setting, alternative tools would be considered as they are part of the same code of criminal procedure. At EU level such a code is lacking, starting from measures on the prevention and exercise of criminal jurisdiction

- As part of the EU judicial cooperation code, the Commission could put forward a legislative proposal on the prevention and resolution of conflicts of competence

Explanation: As discussed in Section 2.2.4., practitioners⁴²³ and academics⁴²⁴ have called for EU harmonisation initiatives in the area of conflicts of jurisdiction and *ne bis in idem* to be revived. In 2017, the European Law Institute proposed three legislative policy options⁴²⁵ for filling the gaps in the current EU legislative framework. The proposals' added value is discussed both from the perspective of strengthening the fundamental right of those living in the AFSJ and ensuring the good administration of justice

- As part of the EU judicial cooperation code, the Commission could put forward a legislative proposal on transfer of proceedings

Explanation: As discussed in Section 2.1.2., in accordance with such an instrument, in relevant cases the criminal proceedings could be transferred to the Member State where the suspect is residing, thereby offering an alternative to issuing an EAW. As discussed in Section 3.4, the relevant Council of Europe instrument is currently not applied. It should be included in an overall EU toolbox for judicial cooperation

4.5. Relevance

- Technological advancement could be used improve the efficiency and fundamental rights compliance of the EAW procedure

⁴²¹ European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI)), P7_TA (2012)0208.

⁴²² *Ibidem*.

⁴²³ European Criminal Bar Association Initiative 2017/2018 "[Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards](#)", measure E, conflicts of jurisdiction and *ne bis in idem*.

⁴²⁴ M. Wasmeier, 'Ne bis in idem and the enforcement conditions, balancing freedom, security and justice?' *New Journal of European Criminal Law*, 2014, vol. 4, p. 534-555.

⁴²⁵ European Law Institute, [Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union](#), 2017.

Explanation: As discussed in section 3.5., more use could be made of the option of hearing the requested person by video-link. If conducted appropriately, such a hearing can serve as a better alternative to a temporary transfer or a long waiting time to get the arraignment done in the issuing Member State.

4.6. EU added value

- The Commission could adopt a communication presenting a coherent strategy for the development of an EU criminal justice area

Explanation: As discussed in section 3.6, the European Commission measures the added value of EU criminal law based on the extent to which it strengthens the confidence of citizens in exercising their free movement rights, enhances mutual trust among judiciaries and law enforcement, ensures the effective enforcement of EU law in areas such as the protection of the environment or illegal employment and ensures a consistent and coherent system of legislation. Under the heading 'EU strategy on criminal justice' the Commission's DG Justice's website furthermore states that 'serious organised crime is often committed across borders. To prevent "safe havens" for criminals, EU countries' laws should be more aligned.' These elements do not add up to a coherent strategy for the development of an EU criminal justice area based on the rule of law, in which all interests, including that of the defence, are properly represented.

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Annex I: Framework decision on the European Arrest Warrant

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COUNCIL FRAMEWORK DECISION

of 13 June 2002

on the European arrest warrant and the surrender procedures between Member States

(2002/584/JHA)

(OJ L 190, 18.7.2002, p. 1)

Amended by:

		Official Journal		
		No	page	date
► M1	Council Framework Decision 2009/299/JHA of 26 February 2009	L 81	24	27.3.2009

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COUNCIL FRAMEWORK DECISION

of 13 June 2002

**on the European arrest warrant and the surrender procedures
between Member States**

(2002/584/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(a) and (b) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Whereas:

- (1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.
- (2) The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in point 37 of the Tampere European Council Conclusions and adopted by the Council on 30 November 2000 ⁽³⁾, addresses the matter of mutual enforcement of arrest warrants.
- (3) All or some Member States are parties to a number of conventions in the field of extradition, including the European Convention on extradition of 13 December 1957 and the European Convention on the suppression of terrorism of 27 January 1977. The Nordic States have extradition laws with identical wording.
- (4) In addition, the following three Conventions dealing in whole or in part with extradition have been agreed upon among Member States and form part of the Union *acquis*: the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders ⁽⁴⁾ (regarding relations between the Member States which are parties to that Convention), the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union ⁽⁵⁾ and the Convention of 27 September 1996 relating to extradition between the Member States of the European Union ⁽⁶⁾.
- (5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement

⁽¹⁾ OJ C 332 E, 27.11.2001, p. 305.

⁽²⁾ Opinion delivered on 9 January 2002 (not yet published in the Official Journal).

⁽³⁾ OJ C 12 E, 15.1.2001, p. 10.

⁽⁴⁾ OJ L 239, 22.9.2000, p. 19.

⁽⁵⁾ OJ C 78, 30.3.1995, p. 2.

⁽⁶⁾ OJ C 313, 13.10.1996, p. 12.

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of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

- (6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation.
- (7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.
- (8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.
- (9) The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance.
- (10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.
- (11) In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition.
- (12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union⁽¹⁾, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

- (13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to

⁽¹⁾ OJ C 364, 18.12.2000, p. 1.

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the death penalty, torture or other inhuman or degrading treatment or punishment.

- (14) Since all Member States have ratified the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, the personal data processed in the context of the implementation of this Framework Decision should be protected in accordance with the principles of the said Convention,

HAS ADOPTED THIS FRAMEWORK DECISION:

CHAPTER 1

GENERAL PRINCIPLES

Article 1

Definition of the European arrest warrant and obligation to execute it

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.
2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.
3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Scope of the European arrest warrant

1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.
2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:
 - participation in a criminal organisation,
 - terrorism,
 - trafficking in human beings,
 - sexual exploitation of children and child pornography,
 - illicit trafficking in narcotic drugs and psychotropic substances,
 - illicit trafficking in weapons, munitions and explosives,
 - corruption,
 - fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
 - laundering of the proceeds of crime,

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- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

3. The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

4. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.

*Article 3***Grounds for mandatory non-execution of the European arrest warrant**

The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

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2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

*Article 4***Grounds for optional non-execution of the European arrest warrant**

The executing judicial authority may refuse to execute the European arrest warrant:

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;
2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;
3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;
4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;
5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;
6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;
7. where the European arrest warrant relates to offences which:
 - (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
 - (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

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*Article 4a***Decisions rendered following a trial at which the person did not appear in person**

1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

- (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

- (ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

- (i) expressly stated that he or she does not contest the decision;

or

- (ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

- (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

- (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

2. In case the European arrest warrant is issued for the purpose of executing a custodial sentence or detention order under the conditions of paragraph 1(d) and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, request to receive a copy of the judgment before being surrendered. Immediately after having been informed about the request, the issuing authority shall provide the copy of the judgment via the executing authority to the person sought. The request of the person

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sought shall neither delay the surrender procedure nor delay the decision to execute the European arrest warrant. The provision of the judgment to the person concerned is for information purposes only; it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal.

3. In case a person is surrendered under the conditions of paragraph (1)(d) and he or she has requested a retrial or appeal, the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention. The retrial or appeal shall begin within due time after the surrender.

▼ B*Article 5***Guarantees to be given by the issuing Member State in particular cases**

The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

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2. if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;
3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

*Article 6***Determination of the competent judicial authorities**

1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.
2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.
3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

*Article 7***Recourse to the central authority**

1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

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2. A Member State may, if it is necessary as a result of the organisation 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.

Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.

*Article 8***Content and form of the European arrest warrant**

1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

- (a) the identity and nationality of the requested person;
- (b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
- (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;
- (d) the nature and legal classification of the offence, particularly in respect of Article 2;
- (e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
- (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
- (g) if possible, other consequences of the offence.

2. The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities.

CHAPTER 2**SURRENDER PROCEDURE***Article 9***Transmission of a European arrest warrant**

1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.

2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).

3. Such an alert shall be effected in accordance with the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information

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System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1).

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.

*Article 10***Detailed procedures for transmitting a European arrest warrant**

1. If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries, including through the contact points of the European Judicial Network ⁽¹⁾, in order to obtain that information from the executing Member State.
2. If the issuing judicial authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.
3. If it is not possible to call on the services of the SIS, the issuing judicial authority may call on Interpol to transmit a European arrest warrant.
4. The issuing judicial authority may forward the European arrest warrant by any secure means capable of producing written records under conditions allowing the executing Member State to establish its authenticity.
5. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.
6. If the authority which receives a European arrest warrant is not competent to act upon it, it shall automatically forward the European arrest warrant to the competent authority in its Member State and shall inform the issuing judicial authority accordingly.

*Article 11***Rights of a requested person**

1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority.
2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

*Article 12***Keeping the person in detention**

When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the

⁽¹⁾ Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network (OJ L 191, 7.7.1998, p. 4).

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executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.

*Article 13***Consent to surrender**

1. If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express renunciation of entitlement to the 'speciality rule', referred to in Article 27(2), shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State.
2. Each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel.
3. The consent and, where appropriate, renunciation, as referred to in paragraph 1, shall be formally recorded in accordance with the procedure laid down by the domestic law of the executing Member State.
4. In principle, consent may not be revoked. Each Member State may provide that consent and, if appropriate, renunciation may be revoked, in accordance with the rules applicable under its domestic law. In this case, the period between the date of consent and that of its revocation shall not be taken into consideration in establishing the time limits laid down in Article 17. A Member State which wishes to have recourse to this possibility shall inform the General Secretariat of the Council accordingly when this Framework Decision is adopted and shall specify the procedures whereby revocation of consent shall be possible and any amendment to them.

*Article 14***Hearing of the requested person**

Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.

*Article 15***Surrender decision**

1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.
2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.
3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.

*Article 16***Decision in the event of multiple requests**

1. If two or more Member States have issued European arrest warrants for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial

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authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.

2. The executing judicial authority may seek the advice of Eurojust⁽¹⁾ when making the choice referred to in paragraph 1.

3. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances, in particular those referred to in paragraph 1 and those mentioned in the applicable convention.

4. This Article shall be without prejudice to Member States' obligations under the Statute of the International Criminal Court.

*Article 17***Time limits and procedures for the decision to execute the European arrest warrant**

1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

6. Reasons must be given for any refusal to execute a European arrest warrant.

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.

*Article 18***Situation pending the decision**

1. Where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must:

(a) either agree that the requested person should be heard according to Article 19;

⁽¹⁾ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1).

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(b) or agree to the temporary transfer of the requested person.

2. The conditions and the duration of the temporary transfer shall be determined by mutual agreement between the issuing and executing judicial authorities.

3. In the case of temporary transfer, the person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure.

*Article 19***Hearing the person pending the decision**

1. The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court.

2. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities.

3. The competent executing judicial authority may assign another judicial authority of its Member State to take part in the hearing of the requested person in order to ensure the proper application of this Article and of the conditions laid down.

*Article 20***Privileges and immunities**

1. Where the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to in Article 17 shall not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived.

The executing Member State shall ensure that the material conditions necessary for effective surrender are fulfilled when the person no longer enjoys such privilege or immunity.

2. Where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing judicial authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing judicial authority to request it to exercise that power.

*Article 21***Competing international obligations**

This Framework Decision shall not prejudice the obligations of the executing Member State where the requested person has been extradited to that Member State from a third State and where that person is protected by provisions of the arrangement under which he or she was extradited concerning speciality. The executing Member State shall take all necessary measures for requesting forthwith the consent of the State from which the requested person was extradited so that he or she can be surrendered to the Member State which issued the European arrest warrant. The time limits referred to in Article 17 shall not start running until the day on which these speciality rules cease to apply. Pending the decision of the State from which the requested person was extradited, the executing Member State will ensure that the material conditions necessary for effective surrender remain fulfilled.

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*Article 22***Notification of the decision**

The executing judicial authority shall notify the issuing judicial authority immediately of the decision on the action to be taken on the European arrest warrant.

*Article 23***Time limits for surrender of the person**

1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.
2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.
3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
4. 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. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.

*Article 24***Postponed or conditional surrender**

1. The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant.
2. Instead of postponing the surrender, the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State.

*Article 25***Transit**

1. Each Member State shall, except when it avails itself of the possibility of refusal when the transit of a national or a resident is requested for the purpose of the execution of a custodial sentence or detention order, permit the transit through its territory of a requested person who is being surrendered provided that it has been given information on:
 - (a) the identity and nationality of the person subject to the European arrest warrant;
 - (b) the existence of a European arrest warrant;

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- (c) the nature and legal classification of the offence;
- (d) the description of the circumstances of the offence, including the date and place.

Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the Member State of transit, transit may be subject to the condition that the person, after being heard, is returned to the transit Member State to serve the custodial sentence or detention order passed against him in the issuing Member State.

2. Each Member State shall designate an authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests. Member States shall communicate this designation to the General Secretariat of the Council.

3. The transit request and the information set out in paragraph 1 may be addressed to the authority designated pursuant to paragraph 2 by any means capable of producing a written record. The Member State of transit shall notify its decision by the same procedure.

4. This Framework Decision does not apply in the case of transport by air without a scheduled stopover. However, if an unscheduled landing occurs, the issuing Member State shall provide the authority designated pursuant to paragraph 2 with the information provided for in paragraph 1.

5. Where a transit concerns a person who is to be extradited from a third State to a Member State this Article will apply *mutatis mutandis*. In particular the expression 'European arrest warrant' shall be deemed to be replaced by 'extradition request'.

CHAPTER 3

EFFECTS OF THE SURRENDER

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

1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.

2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender.

*Article 27***Possible prosecution for other offences**

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

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2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

- (a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;
- (b) the offence is not punishable by a custodial sentence or detention order;
- (c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;
- (d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;
- (e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;
- (f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;
- (g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein.

*Article 28***Surrender or subsequent extradition**

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States which have given the same notification, the consent for the surrender of a person to a Member State other than the executing Member State pursuant to a European arrest warrant issued for an offence committed prior to his or her surrender is presumed to have been given, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. In any case, a person who has been surrendered to the issuing Member State pursuant to a European arrest warrant may, without the consent of the executing Member State, be surrendered to a Member State other than the executing Member State pursuant to a European

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arrest warrant issued for any offence committed prior to his or her surrender in the following cases:

- (a) where the requested person, having had an opportunity to leave the territory of the Member State to which he or she has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it;
 - (b) where the requested person consents to be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant. Consent shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's national law. It shall be drawn up in such a way as to make clear that the person concerned has given it voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel;
 - (c) where the requested person is not subject to the speciality rule, in accordance with Article 27(3)(a), (e), (f) and (g).
3. The executing judicial authority consents to the surrender to another Member State according to the following rules:
- (a) the request for consent shall be submitted in accordance with Article 9, accompanied by the information mentioned in Article 8 (1) and a translation as stated in Article 8(2);
 - (b) consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision;
 - (c) the decision shall be taken no later than 30 days after receipt of the request;
 - (d) consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4.

For the situations referred to in Article 5, the issuing Member State must give the guarantees provided for therein.

4. Notwithstanding paragraph 1, a person who has been surrendered pursuant to a European arrest warrant shall not be extradited to a third State without the consent of the competent authority of the Member State which surrendered the person. Such consent shall be given in accordance with the Conventions by which that Member State is bound, as well as with its domestic law.

*Article 29***Handing over of property**

1. At the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which:

- (a) may be required as evidence, or
- (b) has been acquired by the requested person as a result of the offence.

2. The property referred to in paragraph 1 shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person.

3. If the property referred to in paragraph 1 is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.

4. Any rights which the executing Member State or third parties may have acquired in the property referred to in paragraph 1 shall be

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preserved. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as the criminal proceedings have been terminated.

*Article 30***Expenses**

1. Expenses incurred in the territory of the executing Member State for the execution of a European arrest warrant shall be borne by that Member State.
2. All other expenses shall be borne by the issuing Member State.

CHAPTER 4

GENERAL AND FINAL PROVISIONS

*Article 31***Relation to other legal instruments**

1. Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States:

- (a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;
- (b) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;
- (c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;
- (d) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union;
- (e) Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants.

Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the prescriptions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants, in particular by fixing time limits shorter than those fixed in Article 17, by extending the list of offences laid down in Article 2(2), by further limiting the grounds for refusal set out in Articles 3 and 4, or by lowering the threshold provided for in Article 2(1) or (2).

The agreements and arrangements referred to in the second subparagraph may in no case affect relations with Member States which are not parties to them.

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Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in the first subparagraph which they wish to continue applying.

Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in the second subparagraph, within three months of signing it.

3. Where the conventions or agreements referred to in paragraph 1 apply to the territories of Member States or to territories for whose external relations a Member State is responsible to which this Framework Decision does not apply, these instruments shall continue to govern the relations existing between those territories and the other Members States.

*Article 32***Transitional provision**

1. Extradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Member State it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. The date in question may not be later than 7 August 2002. The said statement will be published in the *Official Journal of the European Communities*. It may be withdrawn at any time.

*Article 33***Provisions concerning Austria and Gibraltar**

1. As long as Austria has not modified Article 12(1) of the 'Auslieferungs- und Rechtshilfegesetz' and, at the latest, until 31 December 2008, it may allow its executing judicial authorities to refuse the enforcement of a European arrest warrant if the requested person is an Austrian citizen and if the act for which the European arrest warrant has been issued is not punishable under Austrian law.

2. This Framework Decision shall apply to Gibraltar.

*Article 34***Implementation**

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 31 December 2003.

2. Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. When doing so, each Member State may indicate that it will apply immediately this Framework Decision in its relations with those Member States which have given the same notification.

The General Secretariat of the Council shall communicate to the Member States and to the Commission the information received pursuant to Article 7(2), Article 8(2), Article 13(4) and Article 25(2). It shall also have the information published in the *Official Journal of the European Communities*.

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3. On the basis of the information communicated by the General Secretariat of the Council, the Commission shall, by 31 December 2004 at the latest, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals.

4. The Council shall in the second half of 2003 conduct a review, in particular of the practical application, of the provisions of this Framework Decision by the Member States as well as the functioning of the Schengen Information System.

Article 35

Entry into force

This Framework Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

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ANNEX

EUROPEAN ARREST WARRANT ⁽¹⁾

This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

⁽¹⁾ This warrant must be written in, or translated into, one of the official languages of the executing Member State, when that State is known, or any other language accepted by that State.

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(a) Information regarding the identity of the requested person:

Name:

Forename(s):

Maiden name, where applicable:

Aliases, where applicable:

Sex:

Nationality:

Date of birth:

Place of birth:

Residence and/or known address:

Language(s) which the requested person understands (if known):

.....

Distinctive marks/description of the requested person:

.....

Photo and fingerprints of the requested person, if they are available and can be transmitted, or contact details of the person to be contacted in order to obtain such information or a DNA profile (where this evidence can be supplied but has not been included)

(b) Decision on which the warrant is based:

1. Arrest warrant or judicial decision having the same effect:

Type:

2. Enforceable judgement:

.....

Reference:

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(c) Indications on the length of the sentence:

1. Maximum length of the custodial sentence or detention order which may be imposed for the offence(s):

.....

2. Length of the custodial sentence or detention order imposed:

.....

Remaining sentence to be served:

.....

► ⁽¹⁾ (d) Indicate if the person appeared in person at the trial resulting in the decision:

1. ☐ Yes, the person appeared in person at the trial resulting in the decision.

2. ☐ No, the person did not appear in person at the trial resulting in the decision.

3. If you have ticked the box under point 2, please confirm the existence of one of the following:

☐ 3.1a. the person was summoned in person on ... (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

☐ 3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

☐ 3.2. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

OR

☐ 3.3. the person was served with the decision on ... (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

☐ the person expressly stated that he or she does not contest this decision.

OR

☐ the person did not request a retrial or appeal within the applicable time frame;

OR

☐ 3.4. the person was not personally served with the decision, but

— the person will be personally served with this decision without delay after the surrender, and

— when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

— the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be ... days.

4. If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met:

.....

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(e) Offences:

This warrant relates to in total: offences.

Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person:

.....

Nature and legal classification of the offence(s) and the applicable statutory provision/code:

.....

I. If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State:

- ☐ participation in a criminal organisation;
- ☐ terrorism;
- ☐ trafficking in human beings;
- ☐ sexual exploitation of children and child pornography;
- ☐ illicit trafficking in narcotic drugs and psychotropic substances;
- ☐ illicit trafficking in weapons, munitions and explosives;
- ☐ corruption;
- ☐ fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of European Communities' financial interests;
- ☐ laundering of the proceeds of crime;
- ☐ counterfeiting of currency, including the euro;
- ☐ computer-related crime;
- ☐ environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;
- ☐ facilitation of unauthorised entry and residence;
- ☐ murder, grievous bodily injury;
- ☐ illicit trade in human organs and tissue;
- ☐ kidnapping, illegal restraint and hostage-taking;
- ☐ racism and xenophobia;
- ☐ organised or armed robbery;
- ☐ illicit trafficking in cultural goods, including antiques and works of art;
- ☐ swindling;
- ☐ racketeering and extortion;
- ☐ counterfeiting and piracy of products;
- ☐ forgery of administrative documents and trafficking therein;
- ☐ forgery of means of payment;
- ☐ illicit trafficking in hormonal substances and other growth promoters;
- ☐ illicit trafficking in nuclear or radioactive materials;
- ☐ trafficking in stolen vehicles;
- ☐ rape;
- ☐ arson;
- ☐ crimes within the jurisdiction of the International Criminal Court;
- ☐ unlawful seizure of aircraft/ships;
- ☐ sabotage.

II. Full descriptions of offence(s) not covered by section I above:

.....

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(f) Other circumstances relevant to the case (optional information):

(NB: This could cover remarks on extraterritoriality, interruption of periods of time limitation and other consequences of the offence)

.....

(g) This warrant pertains also to the seizure and handing over of property which may be required as evidence:

This warrant pertains also to the seizure and handing over of property acquired by the requested person as a result of the offence:

Description of the property (and location) (if known):

.....

(h) The offence(s) on the basis of which this warrant has been issued is(are) punishable by/has(have) led to a custodial life sentence or lifetime detention order:

— the legal system of the issuing Member State allows for a review of the penalty or measure imposed — on request or at least after 20 years — aiming at a non-execution of such penalty or measure,

and/or

— the legal system of the issuing Member State allows for the application of measures of clemency to which the person is entitled under the law or practice of the issuing Member State, aiming at non-execution of such penalty or measure.

(i) The judicial authority which issued the warrant:

Official name:

Name of its representative ⁽¹⁾:

Post held (title/grade):

File reference:

Address:

Tel: (country code) (area/city code) (...):

Fax: (country code) (area/city code) (...):

E-mail:

Contact details of the person to contact to make necessary practical arrangements for the surrender:

.....

⁽¹⁾ In the different language versions a reference to the 'holder' of the judicial authority will be included.

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Where a central authority has been made responsible for the transmission and administrative reception of European arrest warrants:

Name of the central authority:

.....

Contact person, if applicable (title/grade and name):

.....

Address:

.....

Tel: (country code) (area/city code) (...)

Fax: (country code) (area/city code) (...)

E-mail:

Signature of the issuing judicial authority and/or its representative:

.....

Name:

Post held (title/grade):

Date:

Official stamp (if available)

Annex II: European Implementation Assessment on the European Arrest Warrant – Questions for Interviewees

European Implementation Assessment on the European Arrest Warrant

Questions for interviewees

European Parliamentary Research Service, EVAL unit, March 2020

Transposition problems and their practical implications

Question 1

It appears that there are significant differences in the ways in which Member States have transposed the provisions of the Framework decision on the European Arrest Warrant (FD EAW). Which provisions are mainly concerned? Which differences in transposition cause the most problems in practice?

Relevance

Question 2

Is the FD EAW still relevant in light of developments that took place since its adoption in 2002, notably digitalisation and globalisation? Do its original objectives still correspond to the (EU) needs in the area of judicial cooperation?

Effectiveness

Question 3

When contrasted with pre-existing extradition arrangements between EU Member States.

1. Has the FD EAW succeeded in achieving its stated objectives:
 - a) Speeding up procedures (recital 1, taking into account the relevant [Commission statistics](#))?
 - b) Removing the complexity and potential for delay inherent in extradition procedures (recital 5)?
 - c) Implementing the principle of mutual recognition (recital 6)?
 - As regards limiting the application of the double criminality requirement
 - As regards limiting the nationality exception
 - d) Ensuring that an EAW is subject to sufficient controls by a judicial authority (recital 8)?

Question 4

In accordance with recital 10 to the FDEAW, 'the mechanism of the European arrest warrant is based on a high level of confidence between Member State', notably as regards their compliance with EU values. This is repeated in Article 1(3) FD EAW

In this context, how do you assess:

- a) The actions of EU institutions to monitor and enforce EU values?
- b) The interpretation of Article 1(3) by the Court of Justice of the EU?
- c) The practical application of this case law by judicial authorities?

Question 5

In accordance with recital 12 to the FD EAW, it 'respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union' Furthermore it states that nothing in the FDEAW 'may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.'

In this context, how do you assess:

- a) Compliance of EU Member States with relevant international fundamental rights norms, including European Court of Human Rights case law?
- b) The actions of EU institutions to monitor and enforce fundamental rights?
- c) The interpretation of Article 1(3) by the Court of Justice of the EU, notably as regards detention conditions?
- d) The practical application of this case law by judicial authorities?
- e) The capacity of practitioners to keep track of CJEU case law?

Efficiency**Question 6**

Are the costs for surrender procedures in the Member States based on an EAW justified and proportionate?

- a) From the perspective of the Member State?
- b) From the perspective of the victim?
- c) From the perspective of the requested person?

Coherence**Question 7**

Is the FDEAW coherent with?

- a) UN and Council of Europe instruments in the area of extradition and mutual legal assistance, notably the European Convention on Extradition and the Convention on the Transfer of Proceedings in Criminal Matters?
- b) EU measures in the area of judicial cooperation in criminal matters, notably on the Transfer of Prisoners, the European Investigation Order, Financial Penalties and the European Supervision Order and on Probation and Alternative Sanctions, taking into their transposition and application?
- c) EU measures approximating definitions and sanctions in the area of substantive criminal law, notably for the 32 categories of crime for which double criminality may no longer be verified in accordance with Article 2(2) of the Framework decision on the European Arrest Warrant, taking into their transposition and application?
- d) EU measures approximating the rights of individuals in criminal proceedings, notably the Directives on Interpretation and Translation, the Right to Information in criminal proceedings, Access to a Lawyer, Suspects who are children, and Legal Aid, taking into their transposition and application?

Data availability**Question 8**

Please provide us with the sources from which you get your data on the implementation of the FDEAW in the Member States, and the sources on the basis of which you have replied to the questions posed more generally. Are all of these sources publicly available? For those that are not, could you share those with us/ EPRS?

On 6 November 2019, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested authorisation to draw up an own-initiative implementation report on the Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (FD EAW, 2002/584/JHA) (rapporteur: Javier Zarzalejos, EPP, Spain). The Conference of Committee Chairs gave its authorisation on 26 November. This triggered the automatic production of a European implementation assessment by the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, Directorate-General for Parliamentary Research Services (EPRS). This study is the second of two publications produced in this context. It presents conclusions on the implementation of the FDEAW and recommendations as to how to address the shortcomings identified, as per the request of the rapporteur. Both publications are intended to contribute to the Parliament's discussions on this topic, improving understanding of the subject, and ultimately feeding into the implementation report.

This is a publication of the Ex-Post Evaluation Unit
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