Sounding Board remarks on Common Practical Guidelines, recommendations and report

1- Tuuli Eerolainen, Finland, State Prosecutor at the Office of the State Prosecutor

1. Proportionality:

• the victim's right to have an ending for the case needs to be assessed as well. In some sexual crimes the punishment might be conditional prison sentence (e.g. in Finland first prison sentence up to 2 years is conditional as a rule), but for the victim a proper closure is needed.

• as ESO is rarely used, this could be elaborated.

• not all ms have implemented 1972 convention

2. Issuing:

• I don¨t agree with this: *If the EAW is issued by a public prosecutor, it must be explained under section (f) whether the national warrant is issued by a court/judge.* It is customary to write under section b the authority to issue national arrest warrant and the date and number of the decision. This is also where you look for it.

• *The judgment should be enforceable. If it is enforceable and no ordinary remedies are possible anymore, then the EAW can be issued as an execution-EAW. If it is enforceable, but an ordinary remedy is still possible (e.g. an enforceable court decision where an ordinary appeal is pending), then the EAW can be issued only as a prosecution-EAW.* Also, you could mention the situation if the person to be surrendered has the possibility to have the in absentia case reopened after being surrendered. This in my opinion should be handled in the executing state as prosecution-eaw even though the eaw has not been issued as such.

• section C: would be more clear to the executing authority if only either c1 or c2 is filled in.

• **section D is missing**. Advice about this section is badly needed! This is also one of the sections that are usually very badly filled in and where the EU autonomous concept of e,g, serving a summons in person is not respected. Very often you need to ask for additional information about this (but also for other parts of section D),

• section E: there are ways to describe offences in the indictment or national arrest warrant that can vary a lot between member states. Some states seem to put a lot of such information that is not relevant for the executing state thus making it very difficult to understand. It could be pointed out here, that such additional information that is not needed for understanding the content of the offence or making double criminality or ne bis in idem consideration should not be put in the form. Also: short sentences and simple terms should be used.

3. Miscellaneous:

• *Execution of judgments – Art. 4 (6) of FD 2002/584/JHA* This chapter is very good and also needed.

• *supplementary information*: one should use the language used in the form or the FD instead of any self-made translations.

• *Set a deadline;* EJN could also be mentioned here

• *The authority answering the requests and providing the supplementary information should be, if possible, a judicial authorit (p 12)y:* I would delete "if possible" as this is cooperation between judicial authorities. Rather I would add the issuing authority here, as they are responsible for requesting the surrender and would absolutely need to on top of the case.

• *Alternatives to physical presence (p 50):* the problem with video conference is that many states do not allow the accused to be present in other parts than their own hearing. This is, as we see it, infringement against fair trial, as the person is not allowed to hear what is presented against him in the trial. If the presence through video was possible through the court session, the need to issue EAWs would be much lower.

• Recommendation 2.2.; I don't see the agree with this recommendation if the court would first issued a national arrest warrant with the purpose to allow prosecutor to issue EAW

• Recommendation 2.4.: this can be a bit tricky as long as the concept "resident" varies from MS to MS.

• Rec 2.7.: as there is now discussion about creating an EU instrument of transfer, wonder about this rec.

• Rec 2.10: the last sentence seems to indicate that EAW may be issued for investigation alone

- Rule of speciality; advice how to ask for the executing state's consent should be added here.

2- Jorge Espina, Spain, Deputy National Member for Spain at Eurojust

It is a pleasure for me to have the opportunity to share some comments about the work carried out by the project ImprovEAW. It is even more rewarding when the quality of the report is, as in this case, outstanding. I doubt any of my comments can improve the excellent work presented but at least I hope to contribute to bringing additional perspectives (some from a national viewpoint, others built on my international experience as a prosecutor devoted to international cooperation for more than two decades). I will therefore follow the structure of the final draft of April 2022 of the "*Common Practical Guidelines – ImprovEAW*" (to which I will refer in the following pages as "the Guidelines") to add some remarks, hoping some interest will be found in them.

The topic of proportionality (page 1) is adequately addressed and a very valid and important point is made precisely at the beginning of the chapter: the assessment about the proportionality needs to be made by the issuing authority (in my view, any other solution would be in detriment of the core principles governing the principle of mutual recognition) but it is also equally important to emphasize that this assessment is not necessarily the same as the one used at domestic level for a domestic warrant. Obviously, this will vary depending on the MS in question, but the circumstances surrounding an international arrest warrant are not the same than those existing at national level and this needs a specific and differentiated treatment. Failing to do so has brought many problems in practice, because it is not rare to see that the same protocols designed for domestic cases (issuing arrest orders when the purpose is solely to notify documents or make summons) have been used at European level, thus resulting in inadequate use of the EAW and in breaching of rights of the suspect (EAWs issued for the purpose of notification or for hearings that could have been carried out by an EIO). At national level, the competent authority has a level of control that is lacking when we are in the supranational scenario, so a different assessment is required.

I do agree with the fact that all concurring circumstances need to be carefully assessed before issuing an EAW. Above all, the issuing authority needs to have in mind the question of whether the EAW is the right instrument to be used, if there are other compatible instruments which might render the same or very similar results (for instance there might be other options for early stages of the investigation such as hearing via EIO as

recital 26 of the Directive EIO specifically mentions; or supervision of measures instead of provisional detention as per FD 2009 should be assessed), or if it is the right time to use the EAW.

The EAW is a very (arguably the most) powerful tool among all mutual recognition instruments, with a very high impact on fundamental rights; and a wise use within a wider investigative strategy should allow the judicial authority in charge to plan ahead and be ready to manage all the options present. In my view, managing the options should also include managing expectations connected to the EAW, because it is an instrument (as any other in the mutual recognition field) where results are not 100% guaranteed, as the executing authority needs to review carefully all grounds for non-recognition and execution. A wrong or non-timely use of the EAW will very likely result in a lack of surrender, but this can hardly be deemed a failure of the instrument as such, because it can also mean the checks and balances have worked. A successful EAW –from this wider perspective- is not only the one that delivers a person, but also that in which surrender is rejected because the requisites and legal conditions are not there to make it happen.

As briefly mentioned above, it is important at the issuing stage to consider the possibilities to use other instruments instead of an EAW, like the EIO for prosecution EAWs or FD909 when it comes to EAWs for execution. However, the mention to transfer of proceedings (page 2) as it reads in the Guidelines needs to be further clarified because transfer of proceedings is hardly an alternative to EAW because even in cases of transfers, EAWs will be necessary whenever these transfers consist in sending the case to the jurisdiction that does not have the requested person at its disposal. Therefore, in parallel to the transfer of proceedings, the use of the necessary complementary instruments (EAWs, freezing orders, etc.) need to be considered (and this is done in practice at Eurojust whenever recommendations about the jurisdiction best placed to prosecute are issued) so that not only the judicial file but also all the elements for a successful prosecution cab be put at the disposal of the authority taking over the case.

Also, as a side comment, the fact that the Guidelines mention the 1972 CoE Convention as the only example for transfer of proceedings could give the wrong impression that this is the most widely used instrument, when in practice transfers are hardly done under 1972 CoE Convention (not ratified by a significant number of MS) but rather through the use of Art. 21 of the 1959 Convention (which has the additional advantage of allowing the direct communication between competent judicial authorities thanks to Art. 6 of

Convention 2000). An additional interesting point on this topic is that the European Commission seems to be considering a new instrument (it remains to be seen whether the instrument would fall in the category of mutual recognition or not) devoted to transfer of proceedings, so it will be very interesting to see the details of this initiative.

When it comes to the various bullet points highlighted under "*preparations to fill in the form*" (page 3), I can think of an additional exercise connected with the proportionality principle which might seem obvious but that, unfortunately, still brings some problems in practice: it is important for the issuing authority to have a clear understanding on what the real purpose of a EAW is: to get someone surrendered for prosecution or execution. I am mentioning this because we can still find in practice EAWs issued for simple notifications or service of procedural documents. These cases are not numerous but can still be found every now and then. To mention the example of Spain, legal amendments were passed into the transposition legislation in order to make sure the issuance of an EAW responded to the correct purposes under the Framework Decision (the investigative judge cannot issue *ex officio* but only upon request of the prosecutor or other private accusation; it is only feasible when the requisites to put the surrendered person in custody are met; and- as per Bob-Dogy doctrine- a prison warrant needs to be issued beforehand).

As mentioned above, this attention to proportionality is also related to the possibility to use other less intrusive mutual recognition instruments which might serve the procedural needs at the concrete moment (like hearings under EIO Directive, as specifically mentioned by its recital 25). At the same time, the proportionality should be taken into account in cases where confits of jurisdiction might exist and where solutions might involve a transfer of proceedings (to the executing State). In these cases, it would be better to try to solve it first to avoid situations in which an EAW is issued only to find that the resolution of the conflict consists in transferring the case to the executing State, thus rendering the EAW unnecessary. I understand it is not always easy to make these considerations because not all the information is available to the concrete judicial authority, but this is a field in which timely involvement of EU cooperation mechanisms like Eurojust can result in a more efficient handling of the case.

Under the topic of "*Issuing EAW*" (page 3), I am not sure I would support a standard translation into English, as it is not clear this would have an added value, as this would depend on the level of English among executing authorities of a given MS. Besides, this is already regulated under Art. 8(2) of the FDEAW and depends on the declarations made by

MS. *De lege ferend*a it could be envisaged some amendments along the lines already shown by Directive EIO (its Art. 5(2) demands from MS to accept an additional language to their official one to process EIOs received). However and given the lack of success achieved even under a mandatory regime for the EIO, I am afraid nothing suggests the outcome would be better for the EAW.

However, I am fully supportive of any amendment to the Annex making a much clearer distinction between the two types of EAW (for prosecution and for execution) as the current format leaves much to be desired when it comes to clarity and visibility of this crucial distinction (page 4).

As regards Section (e) (page 6), and I admit this comment might be motivated by my wrong understanding of the English expression used, I wonder if it would not be more correct instead of "*the executing authority might want to raise refusal grounds*", to say that "*the executing authority might have to raise*" them (due to lack of clarity) and therefore a proper filling in of Section (e) would be very helpful. As it reads now, some might have the impression a certain predisposition of the executing authority against the execution of the EAW might be in place (by wanting to raise refusal grounds).

On Section (f) (pages 6-7), I would suggest something which is related to the executing authority, but where proper information from the issuing authority could be crucial. I am referring to the practical difficulties for surrender stemming from situations where the person is not in custody and simply does not comply when being summoned for being handed over to the police officers of the issuing MS. This is a delicate situation with no easy solution, as the *favor libertatis* principle makes impossible to expect from the executing authority that any person would be held in custody to avoid the mentioned risk. However, on the other hand, it is understandable that complaints are made by the issuing authority when after sending officials to pick up a person, they have returned empty-handed because he or she did not show up. There are of course a number of less harsh measures than custody to ensure a person is under control and can be located quickly if the above situation happens but, unfortunately, these seem not to be in place, or not used in practice.

From a legal viewpoint it could perhaps be stressed that the executing authorities are expected to carefully consider the merits of the case, not also drawing a distinction between EAW for prosecution (where a higher threshold might be necessary to rule provisional custody) or for execution (affecting by definition already convicted persons); but also considering all factual relevant elements in particular those connected to precedents of

absconding from justice in the file of the issuing authority on which the EAW is based (hence the connection to Section (f) and to the importance of having the issuing authority properly and thoroughly filling it).

When it comes to the "*Power to assess the EAW*" (page 7), I cannot agree more to the remarks concerning the inability of the executing authority to assess the merits of the case. Unfortunately, in some cases we have seen in practice almost a pre-trial conducted by the executing authority, assessing evidence intended only for the main trial in the issuing State, thus subverting the purpose of the instruments, as well as the basic underlying principles of mutual recognition. This is why it is very positive the Guidelines return to this as regards the supplementary information to be requested by the executing authority (page 10): it should not include issues which are minor or non-related to the surrender, but also exclude any topics aimed at allowing the executing authority to make assessments beyond its competence (like those related to the available evidence, for instance).

As regards the optional ground of refusal of lack of double criminality in non-listed offences (pages 8-9), it is important to highlight that due to the EAW being enacted as a Framework Decision, it cannot be excluded that by means of (incorrect) transposition, the applicable legal norms of the executing State might reflect this ground (or any other optional ground) as mandatory. This creates a difficult situation for the executing authority but the only way forward, as stated by the ECJ in C-579/15 and C-573/17, is to act according to the FD and not to the transposition legislation as it is incompatible with EU law to limit through national rules the discretion of the executing authority as defined by the EU law (a FD in this case).

This is why perhaps the wording as regards prosecution for the same acts, connected to Art. 4(2) FDEAW (page 9) should be changed, as it seems to accept that the optional ground should be such only "*if the national framework currently gives to the executing judicial authority such discretion*". Such discretion is granted by the FD and therefore it should be available for the executing authority to use, regardless of the option taken by the national framework.

It is also of particular importance from the angle of ensuring a smooth relationship among all relevant mutual recognition instruments the advice given as regards refusal based on Art. 4(6) in relation with FD909 (page 9). Too often, the automatic use of return clauses (not only in execution EAWs but also in prosecution EAWs under Art. 5(3)) results in unnecessary work being carried out, only to come in the end to the application of FD909,

thus returning to the executing MS someone who had been previously subject to these return or non-surrender clauses. Having this is in mind is so much more important because authorities involved in issuing and executing both instruments are usually not the same and are not coordinated among themselves, as well as due to the fact that the prevalent criteria for transfers under FD909 are based on social rehabilitation, while return clauses under EAW are based only on residence and nationality, thus resulting in possible contradictory or inconsistent outcomes.

The report rightly highlights the importance of the Eurojust Guidelines for deciding which jurisdiction should prosecute (page 10). Some MS like Spain have even incorporated them into national legislation when transposing the FD on conflicts of jurisdiction (curiously enough, adding a criterion such as the possible penalty to be imposed, but without indicating whether its severity should be considered in favour or against a given jurisdiction) but, in any case and from a practical viewpoint, it is worth noting these guidelines are always vague and are not ordered by priority, giving only a general framework for the authorities to take a decision which, in any case, will have to be assessed on a case by case basis, considering the specific circumstances of each file.

As regards the request of supplementary information by the executing authority (page 12), it is particularly positive the Guidelines insist in making them meaningful, not only as regards content but also from the perspective of offering reasonable deadlines (which take into account the status of liberty of the requested person), as well as mentioning the channel of Eurojust, which can be instrumental to ensuring a fast exchange of information, if only by avoiding the translation problems and ensuring competent authorities received directly the information. All this is also valid when we see the problem from the issuing authority's perspective (timely replies, use of Eurojust, targeted answers, etc.). In addition, of course, it will be in the best interest of the issuing authority to be proactive and make use of the *ex officio* possibility to send any relevant information that might pave the way for surrender, as per Art. 15(3).

An additional topic that could be highlighted in connection with the need for a fast and reliable consultation process is language, and it might be good to clarify that –unless any other particular arrangements are viable in the concrete case- the basic principle of putting the burden of translation on the interested requesting authority should apply, thus leading to the use of the language of the executing authority (*incumbit translatio qui quaerit*

non qui rogatus est), unless a different understating might have been achieved between the concerned authorities.

Turning the attention now to the guarantee of return under Art. 5(3) (pages 13-14), I have already expressed above the need to ensure a smooth relationship with other instruments, especially with FD909. I could not agree more to the need to exclude automatisms in the use of this clause, because nationality in particular does not necessarily mean social rehabilitation purposes are better achieved in the MS of origin, and other circumstances need to be looked at. Proper anticipation or early assessment on this can save a lot of time and efforts if FD909 needs to be triggered towards the issuing MS later on.

This is why I suggest a slight amendment of the proposed texts, as long as both seem to fully rely on FD909 that, precisely because of the lack of social rehabilitation purposes, might not be applicable. I understand this is not the intention of the authors of the Guidelines as they are perfectly aware of Art. 25 FD909, but I think it would be better to mention it explicitly. Obviously, the return agreed under 5(3) is essentially different from the one that might be decided under FD909 and the possibility to use the procedural means contained in FD909 does not mean all of it is applicable (in particular the social rehabilitation principle). Therefore, if we simply mention the application of the FD909 then it can lead to the wrong conclusion that everything is under the perspective of social rehabilitation. So perhaps it would be better to stress more the *mutatis mutandis* applicability of the FD909 as well as the subordination to the FDEAW rules as per Art. 25 of FD909, where it is made clear FD909 provisions are applicable only to the extent they are compatible with FDEAW. The expressions used "*in accordance with*", "*according to the dispositions of*" could be somehow clarified in the sense expressed above, to avoid misunderstandings.

As regards prison conditions and systemic deficiencies (pages 16-21), the Guidelines are very complete and thorough (correctly stressing the double step tests and the need for *in concreto* risks) and little can be added to the text. If anything, I would make a comment as regards the attention note highlighted on page 20, as regards the guarantee given by a judicial authority as to in which specific prison a person will be held. This is not always possible under the domestic legislation of the MS, because Penitentiary Administration might have the competence over this and it might simply not be possible to keep someone at a given prison even if this is the decision of a judicial authority, because it would not be

the competent authority to do so. In these cases, a distinction might have to be made between a EAW for prosecution, where the competence of the judicial authority may be wider, and EAW for execution, where the Prison Administration might be the one taking the decision.

But, as it is connected to this topic, I would like to use this opportunity to highlight a point I have had the chance to make in some fora and publications: the unintended negative consequences that these issues (refusals based on prison conditions or systemic deficiencies) can bring to practical situations (not only from the perspective of the extended time limits to carry out surrender according to the FDEAW), as well as some suggestion to correct it.

Whenever risks for fundamental rights are concerned (and this could happen as regards prison conditions, as regards systemic deficiencies or for any other causes), time limits for preliminary custody in the executing MS might not be flexible enough to absorb the delay provoked by the postponement of surrender until it becomes feasible, thus creating situations which are very worrying from the perspective of possible impunity areas, as well as of the adequate protection to European citizens. Therefore, a solution should be found for all those cases where, despite the attempts made by the involved authorities in reaching a satisfactory solution that respects fundamental rights, decisions need to be taken by the executing authority as regards the person affected by the EAW (be it about custody or other measures).

The ECJ has made clear (C-404/15 and C-659/15) that until these aspects have been dealt with, execution must be postponed but not abandoned and that new provisional measures might be imposed to prevent the person from absconding and ensuring effective surrender could take place in due time. This obviously does not mean the suspension of the surrender procedure can be prolonged forever and it could also be the case that, if the right conditions are not met, surrender procedure must be brought to an end. Whether this bringing the surrender procedure to an end equals a formal refusal of the surrender or not, the practical consequences will be very similar and, after a certain time has passed, the person will have to be released from prison (or precautionary measures imposed on him ceased), as no enforceable surrender order will remain in place.

This does not seem particularly grave in EAWs for prosecution (in which the person sought is presumed innocent), but in cases of EAWs for execution a convicted person (perhaps for extremely serious crimes) might have to be released by the executing

authority, due to the impossibility to extend provisional measures any further. For such cases, resorting to FD909 or to the principle *aut dedere aut iudicare* will not always be possible and therefore additional solutions need to be found. For instance, it could be envisaged an amendment of the FDEAW to include under Art. 4(6) an additional optional ground for refusal when the executing authority finds that the requested person, if surrendered to the requested Member State, will be exposed to a real risk of inhuman or degrading treatment, within the meaning of Art. 4 of the Charter, or whenever surrender is not possible due to reasons stated under Art. 23(3) or (4). Nevertheless, until a solution is found, it would be good to raise awareness in the executing authority about the potential consequences of denying execution in cases where real *in concreto* risks are not present.

Finally, as regards the principle of Speciality (page 21), only a suggestion to be added to the bullet points indicating aspects to be taken into account by the executing authority: it is important to keep other relevant Administrations informed about the applicability of this principle, because it can happen in practice that the Prisons Administration might decide that, having a person as an inmate with pending files against him, there are no reasons not to execute everything pending. There are of course mechanisms to prevent this from happening ex post (complaints from the inmate, supervision from judicial or administrative authorities) but it would be so much better to prevent this from happening in the first place.

It would also be important to keep in mind that the principle of Speciality is also applied to cases of temporary surrender, so that it is not possible for any authority (not only the executing authority) in the executing MS to act upon the subject other than for the specific case for which temporary surrender has been granted. Of course, this would also apply not only to temporary surrender under Art. 24 FDEAW but also to the temporary transfer under Art. 18 (which is carried out before a decision on the substance has been taken).

To conclude, as I already said at the beginning of this small contribution, the text is of an outstanding quality and therefore I can only label my remarks as minor, as the overall quality of the Guidelines make this document an extremely interesting and useful document for practitioners and will undoubtedly contribute to improve the use of the EAW, until our European legislators decide (if they do so) to open the Pandora box and consider (as the European Parliament has been advocating for since some time ago) an amendment of the

instrument to correct the loopholes and further boost the mutual recognition principle in this extremely important field. Time will tell.

3- Jan Ginter, Estonia, Professor at the University of Tartu

Comments are not published.

4- Juliette Lelieur, France, Professor at the University of Strasbourg

As the author of a comprehensive study about the implementation of the European Arrest Warrant in France, published five years ago[1], I was very interested in reading the final report of the ambitious research project ImprovEAW. It was not only the chance for me to widen my knowledge about the most successful cooperation instrument in criminal matters in the European Union and to see whether the possibilities of improving the implementation of the EAW I had thought of while working on French Law are shared in other EU-Member States. It was especially the great opportunity to discover new and deeply considered proposals that were elaborated in the course of a fruitful collective work.

As an overall remark, I observe that the report offers an adequate balance between legal and practical considerations. It situates each difficulty in implementing the EAW at the relevant level: Legal framework or enforcement of legislation by the judicial authorities; if legal framework, European or national Law; if judicial authorities, judicial authorities of the issuing or executing Member State; last but not least, either prosecuting authorities or courts of the relevant Member State. Because of this rigorous structure, the analysis is clear and efficient, and each recommendation precisely addresses the right recipient. Consequently, the authors of the report rightly avoid the academic temptation to change the law rather than to help national authorities to adapt their practices.

The report gives a concrete idea of the debates that have taken place beyond experts as it often quotes examples found in national practice and it develops the various arguments on how to overcome problems before it comes to the formulation of a recommendation. Finally the recommendations are formulated in perfectly clear and concise manner, which make them very good understandable. It was easy to test their feasibility in French law.

In short, I was delighted to read the research report. I found the findings very instructive and some conclusions highly worth thinking about – like for instance the proposal that only judges should issue and execute EAWs.

For the purpose of evaluating the feasibility of the recommendation, I will focus my analysis on the French situation. Unfortunately, I am not able to comment the immense

[1] Le mandat d'arrêt européen, Répertoire de droit pénal et procédure pénale, Encyclopédie Dalloz, 2017.

work realised in the report on how to fill up the EAW form at best because I have no practical experience in concretely implementing EAWs.

I will first explain that several recommendations concerning the national legal framework have recently found a concrete application in France, which proves that they are well feasible (1). Then I will discuss three sensitive points: The opportunity to reserve the power to issue and execute the EAW to judges (2) and to consider proportionality while issuing an EAW (3) as well as the proposal to formulate a non-execution ground with regard to the protection of human rights (4). Finally I will address diverse recommendations of lower relevance – or easier enforcement – from a French perspective (5).

1) RECENT IMPROVEMENT OF THE FRENCH LEGAL FRAMEWORK

a) Recommendation 2.1. : Grounds for refusal

Until recently, France was one of the Member State concerned by Recommendation 2.1 because the French legislator transposed two optional non-execution grounds according to the FD 2002/584/JHA as mandatory non-execution into French Law.

The structure of the French legislation is the following:

- Art. 695-22 CPP[2] entails the mandatory grounds for refusal
- Art. 695-23 CPP is a specific provision concerning the double criminality requirement
- Art. 695-24 CPP entails the optional grounds for refusal

French legislation was modified in December 2021. Thereby two mandatory non-execution grounds provided by Art. 695-22 and Art. 695-23 CPP were changed into optional non-execution grounds.

- *Statute of limitation according to French Law*

[2] Code of penal procedure

Until 2021, Article 695-22, 4°) CPP prohibited the execution of an EAW when French courts had jurisdiction upon the case under French criminal law, but prosecution or punishment was statute-barred according to French law (Art. 4.4. of FD 2002/584/JHA).

Law Nb. 2021-1729 of 22 December 2021 changed the mandatory ground for refusal into an optional ground for refusal. It is now for Art. 695-24, 6°) CPP to make it possible for French courts to refuse to execute the EAW because the acts fall within French jurisdiction under French criminal law and the French statute of limitation bars prosecution or punishment.

- *Double criminality requirement*

Until 2021, Article 695-23, 1°) CPP provided for a mandatory ground for refusal in case the act on which the EAW was based did not constitute an offence under French law and did not fall under the list of Article 2(2) of FD 2002/584/JHA.

Law Nb. 2021-1729 of 22 December 2021 changed the wording of Article 695-23, 1°) CPP. Today the ground for refusal is an optional one.

b) Recommendation 2.4.

This recommendation rings a bell to French lawyers because Art. 695-24, °2) CPP used to provide for a restrictive transposition of Art. 4(6) of FD 2002/584/JHA. Only French nationals could benefit from the optional non-execution ground until Law Nb. 2013-711 of 5.8.2013 widened the application field of Art. 695-24, 2°) CPP to persons who "have regularly been residing for five years, without interruption, in France"[3]. This new legislation substantially improves the legal situation of non-nationals but it is questionable whether the temporal condition, five years of residence without interruption, meets the requirements of Art. 4(6) of FD 2002/584/JHA. Furthermore Art. 695-42, 2°) CPP requires that the execution of the sentence is possible according to Art. 728-31 CPP, which results from the transposition of FD 2008/909/JHA.

[3] See an application of the new legislation in Cass. Crim. 5 November 2014, Request Nb. 14-86.533

2) RESERVING THE POWER TO ISSUE AND EXECUTE A PROSECUTION-EAW FOR JUDGES

Recommendation 2.2 enjoins Member States that still assign the power to issue EAWs for prosecution to a public prosecutor to change this and assign this power to a judge/court instead. France is fully concerned by this recommendation. Additionally recommendation 5.2. invites the EU legislator to make only judges competent to issue/execute EAWs, independently whether it deals with prosecution or execution EAWs. As we will see, the two recommendations do not have the same incidence on French law.

Whereas the decision on executing EAWs resides in the power of a court (the chamber of instruction, *chambre de l'instruction*), it is in France for the public prosecutor to issue an EAW, according to Article 695-16 CPP. This provision does not distinguish between prosecution and execution EAWs.

It reads that the national arrest warrant on which the EAW is based may be issued by three kinds of judicial authorities (judges/court), under different conditions in each case:

- the investigating judge (*juridiction d'instruction*, Art. 122 and 131 CPP),
- the trial court (*juridiction de jugement*, Art. 397-4 and 465 CPP)
- the sentence enforcement judge (*juridiction d'application des peines*, Art. 712-17 CPP).

The wording of Art. 695-16 § 1 CPP is interesting. It states that the public prosecutor "enforces" (*"met à execution"*) the national warrant "in the form of an EAW" (*"sous la forme d'un mandat d'arrêt européen"*). In other words, the public prosecutor seems to be a mere executing authority. However, the end of the phrasing of this provision gives a different information. It reads that an EAW may be issued by the public prosecutor either on request of one of the three judges/court mentioned or at her/his own initiative. In the last option, the public prosecutor has an important margin of appreciation.

Additionally, Art. 695-16 § 3 CPP allows the public prosecutor to issue an executing-EAW for the purpose of assuring the execution of a prison sentence pronounced by a court if the length of the sentence is at least 4 months.

Looking at these rules, it appears that French law does not comply with recommendation 2.2.

Considering recommendation 2.2.

Recommendation 2.2. focusses on EAWs for prosecution. EAWs for the enforcement of a prison sentence are not concerned. The reason of that restriction may be that in some Member States, a public prosecutor may issue a "national prosecution arrest warrant". It means that such a judicial decision is taken without a jurisdiction deciding on the opportunity (and proportionality) to arrest the person. This substantially differs from the "national execution arrest warrant" which is issued by a judge or a court who decides whether to deprive the person of her/his liberty through sentencing. This latter case gives rise to execution-EAWs.

In France, a public prosecutor cannot issue a "national prosecution arrest warrant". Such an arrest warrant must be issued by a judge, the investigating judge (Art. 122 CPP). French law considers the investigating judge as a "juridiction" for itself. Most of the time, the investigating judge works as a single person, but in complicated cases, a pool of judges (*pôle d'instruction*) may be designated for investigating collegially.

An arrest warrant according to French law is an order given by the investigating judge to the police to find the person, then to bring and present her/him to the investigating judge. If the investigating judge is not able to meet her/him immediately, the person may be brought to jail (*maison d'arrêt*) for no longer than 24 hours.

In case the detention must be longer (pre-trial custody, *détention provisoire*), another judge has to consider the case upon request of the investigating judge and to decide upon detention. This judge is called judge of liberties and detention (*juge des libertés et de la détention*). However the legal basis of such a deprivation of liberty is not the *mandat d'arrêt*, but the *mandat de dépôt*. The leading principle for issuing a *mandat de dépôt* is the so-called "4 eyes principle" (*double regard*): At least two judges must agree

with the pre-trial detention. Drawing a comparison with the prosecution-EAW, one can say that the judge of liberties and detention plays the role of the executing judicial authority, that is to say the judge deciding upon detention in the executing Member State.

Turning to prosecution-EAWs, it is decisive to guarantee the **dual level of protection** according to which the judicial authorities taking the decision to issue the national arrest warrant and to issue the prosecution-EAW must evaluate the opportunity to deprive the person from her/his liberty. One important consideration is the independence from the executive of the judicial authority taking the decision. However, it is questionable whether the guarantee of independence must exist at the two levels of decision or whether it is enough that one of these levels presents the guarantee of independence. In France, the investigating judge is without doubt an independent authority whereas there were still discussions whether the public prosecutor is entirely independent from the executive until the famous 2019 ECJ-Judgement[4], which confirmed the legality of French issues EAW with regard to the independence of the issuing authority.

As to the question of the feasibility of recommendation 2.2., I am very cautious in my opinion because I have no enforcement experience. Legally speaking, the logical change to proceed would be to give the power to issue prosecution-EAWs to the judge of liberties and detention instead of the public prosecutor. In this sense, implementing the recommendation seems to be feasible. Giving the power to issue the prosecution EAW to the investigating judge would make no sense because this judge would probably transpose her/his national decision to arrest the person into a prosecution-EAW in a systematic manner.

However, it is an important change to empower the judge of liberties and detention with issuing EAW because there is a wide experience with dealing with EAW at public prosecution offices, whereas judges of liberties and detention are completely unexperienced with international cooperation up to date. One should also consider a former experience of changing French law concerning the competent authority to decide on pre-trial detention. Until 2000, the *mandat de dépôt* (pre-trial custody order) was totally in the hands of the

[4] ECJ C-566/19 PPU and C-626/19 PPU, 12 December 2019. Baptiste Nicaud, "Conformité au droit de l'Union de l'émission des mandats d'arrêt européens par le parquet français », AJ Pénal 2020, p. 102.

investigating judge. The judge of liberties and detention did not exist. This authority was created in 2000 and one of its major role is to double check whether pre-trial detention is needed. However, in the beginning of the new system, it was noticed that judges of liberties and detention were following the request of the investigating judge in almost all cases. The request for *mandats de dépôt* were almost systematically granted.

If I may, I would suggest an alternative change of French law. In Article 695-16 CPP offers the possibility to the public prosecutor to issue a prosecution-EAW if even if the investigating judge has not required her/his national arrest warrant to be enforced in the other members states of the European Union. I think that this possibility should be suppressed and that a prosecution-EAW should only come into consideration when the investigating judge has formulated an explicit request for it (what I am not able to say is whether it is usual that public prosecutors decide on their own initiative to issue a prosecution-EAW on the basis of a national arrest warrant). Furthermore, it is important to my eyes to introduce the proportionality check, which for now is totally absent of the French legislation concerning the issuing a prosecution-EAW. I will address this point later under 3.

Considering recommendation 5.2.

In contrast to recommendation 2.2., recommendation 5.2. does not distinguish between prosecution and execution EAWs. This is a substantive difference because it implies that even if the national judicial decision has been issued by a judge or a court (case of an execution-EAW), the power to issue an EAW on the basis of the national decision is reserved to a judge or a court. In short, two judges or courts must agree for issuing an EAW.

As in France the public prosecutor is the competent authority to issue all kinds of EAW, following recommendation 5.2. would imply to totally change the rule of Art. 695-16 CPP. I have said before that this change seems to be feasible concerning prosecution-EAW. Concerning execution-EAWs, there is a long tradition in France according to which prosecution offices are responsible for the enforcement of sentences. Furthermore, there is no current example in which the judge of liberties and detention intervenes in matters or sentence executions (in contrast to pre-trial detention as I have explained above). The competent authority to implement sentences on a jurisdictional level is the sentence enforcement judge (*juge d'application des peines*). Therefore, if recommendation 5.2. was to be followed by the EU legislator, it would mean that French law had to be adapted and

the chances are big that the French legislator would give the power to issue execution-EAWs to the sentence enforcement judge.

I see two risks in this possibility. Not only that sentence enforcement judges are very unexperienced with international cooperation matters, but also that in some cases, the sentence enforcement judge would be the authority to issue the national arrest warrant as well as the execution-EAW. This is the case in Art. 712-17 CPP, according to which the sentence enforcement judge may revoke a probation measure and order the detention of the person who has not complied with the probation measure through an arrest warrant. If the sentence enforcement judge is also the competent authority to issue the EAW, she/he will probably decide to prolong her/his national arrest warrant through an execution-EAW in a systematic manner. This will probably not be satisfactory in terms of protection of the person.

In sum, I think that **it is crucial that the judicial authority deciding on issuing the EAW is a different authority from the one who decides on the national arrest decision**. Withdrawing the power to issue an EAW from the public prosecutor may be a "wrong good idea" if the consequences are that a judge, but twice the same judge, decides on the national judicial decision to arrest the person and on the issuing of an EAW on the basis of the first decision.

I personally tend to an improvement of the conditions of issuing the EAW, not on the competent authority. In this regard, the proportionality check while issuing an EAW is extremely important. This should explicitly be introduced in French legislation and practices.

3) CONSIDERING PROPORTIONALITY WHILE ISSUING AN EAW

Recommendations 2.9. and 2.10. relate to the assessment of proportionality of an EAW before the competent judicial authority issues it. The judicial authority should consider other options as alternatives to surrender, including the European investigation order.

In France, there is no long tradition of judicial authorities assessing the proportionality of a pre-trial investigative measure, to which an arrest warrant belongs. In the French judicial culture, it is generally considered that the legal conditions set up for the

admissibility of an investigative measure are precisely the requirements ensuring that proportionality is met.

However, things are – slowly – changing. Following the indications of a 2015 decision by the Constitutional Council[5], the criminal Chamber of the Court of cassation quashed, in a 2017 judgement, the decision of an appeal court that upheld an arrest warrant delivered by an investigating judge against a person living abroad (in the United States). The court of cassation reproached the chamber of instruction for not having assessed the necessity and proportionality of the measure[6]. In 2020, the same court renewed this position: It quashed again the judgement of a chamber of instruction that did not respond to the argument of lack of necessity and disproportion of an arrest warrant delivered by the investigating judge against a person residing abroad (in Israel)[7].

However, this evolution has not reach the issuing of an EAW by the public prosecutor. Legally speaking, Article 695-16 CPP does not refer to any necessity or proportionality check. It simply indicates that the legal conditions of Articles 695-12 to -15 CPP must be met for the public prosecutor to issue an EAW for prosecution or the execution of a sentence. Worst, the wording of Article 695-16 CPP theoretically excludes any proportionality check as it reads that the public prosecutor "enforces" (*met à execution*) the national arrest warrant – it does not read "may enforce". In other words, according to a textual reading of the law, the public prosecutor is not allowed not to enforce the national decision; that means not to issue an EAW on the basis of existing national arrest warrants. This interpretation is confirmed by the ministerial circular of 11 March 2004[8], stating that the public prosecutor only has a power of appreciation on whether to issue an EAW or not in case of executing a sentence according to Article 695-16 § 3 CPP. It is interesting to note that this provision allows this arrest of a person relating to the execution of sentences of at least 4 months, which follows the EAW Framework Decision. In national law, an arrest warrant for the execution of a sentence is possible under regular cases for prison sentences of at least one year (Article 465 CPP).

Finally, there is no judicial review against the decision to issue an EAW in France. Therefore, it is hopeless that an evolution will come from the courts like in the 2017 and

[5] Décision n° 2014-452 QPC du 27 février 2015.
[6] Cass. Crim. 11 January 2017, request Nb. 16-80.619.
[7] Cass. Crim. 16 December 2020, request Nb. 20-85.289.
[8] CRIM 4-02 of 11 March 2004.

2020 cases mentioned above. On the contrary, the criminal Chamber of the Court of cassation has recently reproached a Chamber of instruction for having reviewed the assessment of proportionality of an EAW by the German issuing authority. It recalled that controlling proportionality of an EAW is strictly reserved to the executing judicial authority[9].

Given these legal conditions, recommendation 2.9. and 2.10 are indeed hardly feasible in the French judicial system. In its actual wording, Article 695-16 CPP simply leaves no room for a proportionality check. Although the European Commission already recommended in 2011 that national judicial authority fulfil an assessment of proportionality before issuing an EAW[10], this has not taken place in France since then. For such a recommendation to be applied, first the wording of Art. 695-16 CPP should be changed. It should read that the public prosecutor may issue an EAW on the basis of the national arrest warrant. Additionally, as I explained before, this possibility should not be open without an explicit request by the authority that rendered the national decision. Moreover, an obligation for the issuing authority to verify the proportionality of the EAW should be enshrined in the law. Even better, a judicial review of the issuing of an EAW should be possible. It would be important to submit this review to strict conditions in order to avoid delaying tactics.

As there is almost no chance that the French legislator spontaneously modifies the law in order to provide for a necessity and proportionality check, I most welcome recommendation 5.2. that invites the EU legislator to "adopt a provision concerning proportionality including an explicit relationship with Directive EIO". Only with this incentive of a new European legal framework the French practice may evolve in favour of a proportionality assessment when issuing an EAW.

4) ADOPTING A GROUND FOR REFUSAL WITH REGARD TO HUMAN RIGHTS

Recommendation 5.2. invites the EU legislator to "adopt a ground for refusal with regard to human rights".

[9] Cass. Crim. 20 October 2021, request Nb. 21-85.583.
[10] COM(2011) 175 final, p. 9.

As a preliminary remark, I would like to comment briefly recommendation 2.6., which concerns the spontaneous addition of grounds for refusal by some Members States. Recommendation 2.6. only addresses specific Member States. It was a wise decision of the experts not to extend the recommendation to all Member States, as France has spontaneously introduced a mandatory non-execution ground referring to human rights, at least partially, into its legislation when transposing the FD 2022/584/JHA.

Article 695-22, 5°) CPP provides for a mandatory ground for refusal that is directly inspired by consideration 12 of the Preamble of FD 2002/584/JHA[11]. In fact, Article 695-22, 5°) CPP is more or less a transposition of the second sentence of consideration (12). It prohibits the execution of an EAW if it is proved that the EAW was issued in the purpose of prosecuting or punishing a person for a discriminative reason (sex, race, religion, ethnic origin, nationality, language, political opinions, sexual orientation or gender identity). The mandatory ground for refusal also applies when the execution of the EAW would harm the person for the same discriminative reasons. In practice, lawyers have invoked Article 695-22, 5° CPP in the context of Basque terrorism but this legal argumentation did not succeed in courts[12].

Very early, the French Court of cassation resisted to the absence of a ground for refusal based on human rights in the EAW Framework Decision – and consequently in the CPP[13]. This is particularly visible concerning the right of private and family life, protected by Article 8 ECHR. Although this is not the only field of resistance by the Court of cassation[14], I

[11] (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(7), 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**.

[12] Olivier Cahn, « La Chambre criminelle de la Cour de cassation a-t-elle sacrifié la confiance mutuelle aux droits de l'homme ? Réflexions sur la jurisprudence afférente à l'article 695-22, 5°, du code de procédure pénale », in *Droit répressif au pluriel : interne, international, européen, des droits de l'homme, Liber Amicorum Renée Koering-Joulin*, Anthemis 2014.

[13] Bernadette Aubert, « De quelques évolutions en matière de mandat d'arrêt européen », AJ Pénal 2017, p. 111.

[14] Concerning for instance the **right to a remedy**, see the famous Jeremy F. case, which was finally brought by the French Constitutional Council – itself being seized by the Court of cassation – to the ECJ (Cass. Crim. 19 February 2013, request Nb. 13-80.491; Const. Council 4 April 2013, Nb. 2013-314 QPC ; ECJ C-168/13, 30 May 2013). **Concerning the rights derived from Article 3 ECHR, see Cass. crim, 7 August 2013, Request Nb. 13-85076 ; Cass. crim. 20 May 2014, Request Nb. 14-83138** ; Cass. crim 12 July 2016, request Nb. **16-84.000.**

will focus the following development on this matter. Maybe I am wrong, but I think that this may be a French originality as most of the debates in the European Union concern the rights of defence and the detention conditions.

Already in 2010, the criminal Chamber of the Court of cassation quashed several decisions of chambers of instruction because they validated the execution of EAWs without having checked the necessity and proportionality of surrendering a person with regard to her/his personal situation[15]. As I have said before, the Court of cassation is frankly against controlling necessity and proportionality when issuing an EAW. Yet it does firmly require these controls to be proceeded before executing an EAW in certain cases. In one of the 2010 cases, a person was wanted by Germany for executing a 7 months prison sentence because she had stolen a wallet with 40€ inside. The person had five children, growing up in France under her care. The Court of cassation expects in such a case that first instance courts duly assess the necessity and proportionality of an attempt to the right to family life through executing the EAW. It bases this requirement directly on Article 8 ECHR. In a 2015 case, the Court of cassation approved the lower courts (chambers of instruction) to have refused to execute an EAW issued by a Portuguese authority for executing a prison sentence pronounced for the offence of driving without a valid licence. The person was living in France where he had a (French) wife and two children[16]. In 2016, the Court of cassation confirmed its family life friendly case-law in a case where the defendant had omitted to plead explicitly Article 8 ECHR before the lower courts. In other words, the Court of cassation asks the chambers of instruction to invoke Article 8 ECHR on their own motion when the optional ground for refusal of 695-24, 2°) CPP (the person is a French national or resides in France since at least 5 years and the foreign sentence may be executed on French territory) is put into question[17].

Considering this case-law (and other judgements relating among other matters to the rights of refugees and to detention conditions), there is no doubt that an new ground for refusal based on human rights would be more than welcome in France.

[15] Cass. crim. 12 May 2010, request Nb. 10-82.746 ; Cass. crim. 22 September 2010, request Nb. 10-86.237 ; Cass. crim. 10 November 2010, request Nb. 10-87.282).
[16] Crim. 5 mai 2015, request Nb. 15-82.108.
[17] Cass. Crim. 12 April 2016, Request Nb. 16-82.175.

5) OTHER OBSERVATIONS

Finally, I would like to comment three more recommendations from a French perspective.

a) Recommendation 2.7. : 1972 Council of Europe Convention on the Transfer of Proceedings in Criminal matters

France belongs to the countries that have not signed and ratify the European Convention on the Transfer of Proceedings in Criminal matters. Recommendation 2.7. therefore directly concerns the French Government. I personally support that France signs and ratifies this Convention. However, time has passed since 1972 and there is today more hope to put in a new cooperation instrument of the European Union.

b) Recommendation 4.6. ; abusive request or supply for supplementary information regarding the appreciation of the merits of the case

The transposition of Art. 15(2) FD 2002/584/JHA stands in Art. 695-33 CPP. Initially chambers of instruction were either reluctant to apply this provision. The Court of cassation used it, however, in matters where human rights were at stake.

The criminal chamber of the Court of cassation imposed the chambers of instruction to supply the issuing authority for supplementary information before deciding on the execution of the EAW in several cases. It did so with regard to the French additional non-execution ground concerning discrimination, enshrined in Art. 695-22, 5°) CPP[18], as well as in cases where the wanted person is a refugee in France, and there is a risk that the issuing Member State later extradites her/him to a third country where her/his fundamental rights may be in danger[19]. It finally asked chambers of instruction to make use of Art. 695-33 CPP in cases where the conditions of detention in the issuing Member State were possibly

[18] **Cass. Crim. 26 septembre 2007, Request Nb. 07-86.099 ; Cass. Crim. 21 novembre 2007, Request Nb. 07-87.499 ;** Cass. Crim. 9 juin 2015, **Request Nb. 15-82.750.**
[19] **Cass. Crim. 7 février 2007, Request Nb. 07-80.162** ; **Cass. Crim. 21 novembre 2007, Request Nb. 07-87499 ; Cass. Crim. 9 juin 2015, Request Nb. 15-82.750.**

infringing Article 3 ECHR, either with regard to an execution-EAW[20] or even with regard to a prosecution-EAW[21].

c) Recommendation 5.2 : non-execution for grounds of territoriality

Under recommendation 5.2 the EU legislator is invited to restrict the possibility to refuse execution of an EAW on grounds of territoriality (Art. 4(7) FD 2002/584/JHA).

The French legislator used the exact wording of Art. 4(7) of the EAW Framework Decision to transpose it into the CPP. Article 695-24, 3°) CPP is the transposition of Art. 4(7) a) while Article 695-24, 4°) CPP phrases Art. 4(7) b) almost word by word.

To my opinion, Art. 4(7) b) EAW FD should be totally removed. It follows a complicated reasoning and has no benefit, as it does not protect any fundamental interest.

Concerning Art. 4(7) a) EAW FD, the question is more sensitive. Territoriality remains an important element of sovereignty although it is probably declining[22]. It will be politically hard to support that the territoriality exception should completely disappear. I suggest two requirements for this optional non-execution ground:

- The offences on which the EAW is based have been committed totally or mainly in the executing Member State
- The executing Member State has started to investigate on the facts.

[20] Cass. crim., 12 July 2016, Request Nb. 16-84.000.
[21] Cass. Crim. 26 March 2019, Request Nb. 19-81.731.
[22] See the XXIIIème journée d'étude de l'Institut de sciences criminelles de Poitiers, *Questions contemporaines sur la territorialité du droit pénal*, 19 et 20 novembre 2021, will be published.

5- Monique Lundh, Denmark, PhD Candidate at Maastricht University.]

The EAW in Denmark

While Denmark has opted out of (i.a.) the European Union's Area of Freedom, Security and Justice from when the Lisbon Treaty entered into force in 2009, this opt-out does not concern older, intergovernmental EU-rules on this area, which were in force before the Lisbon Treaty. These rules, which includes Framework Decision 2002/584 on the European Arrest Warrant (in the following: the *EAW FD*), will keep applying to and in Denmark, unless they are replaced by new, supranational rules.

That means that the EAW FD applies to Denmark.

The Danish Extradition Act implementing the EAW FD was suggested amended in November 2019. The background for the amendment was an effort to comply with EAW FD as this has been interpreted by the CJEU in judgments rendered 27 May 2019. Additionally, the purpose was to change the structure of the Extradition Act and harmonise provisions to avoid having different rules for extradition to different countries, where there is no special reason for this differentiation.[23]

It should be noted, before delving into the specific structure and content of the rules on extradition from Denmark, that there are exemptions made from the rules regarding two EU countries: Sweden and Finland. This is due to a prior extradition agreement between the Nordic countries (also including Norway and Iceland), which is either broader in scope or similar to the content of the EAW FD rules.[24] Thus, this is in conformity with the general EU rule that Member States can go further than EU rules prescribe, as long as they do not infringe other EU rules or rights, and Art 31(2) of the EAW FD, which allows Member States to conclude bi- or multilateral agreements to the extent that they are broader than the rules contained in the EAW FD, and contributes to further simplify or ease the procedures for surrender of persons covered by an EU arrest warrant.[25]

[23] Folketinget, *L 78 Forslag til lov om udlevering til og fra Danmark*, 27 November 2019, found at: https://www.ft.dk/samling/20191/lovforslag/l78/index.htm, last visited 11 May 2022.
[24] Folketinget, Folketingstidende, Tillæg A, *L 78 Forslag til lov om udlevering til og fra Danmark (udleveringsloven)*, published 27 November 2019, p. 40.
[25] Ibid.

The Extradition Act also concerns extradition to countries outside the North and EU Member States, but they are not relevant for this report, and will not be discussed further.

The primary background for the amendment in 2019 was, as mentioned, CJEU decisions regarding the interpretation of Art 6(1) of the EAW FD, namely in the Cases C-508/18, C-82/19 PPU, and C-509/18. The cases regarded whether, and to what extent, the public prosecution service can be appointed to issue a European arrest warrant; and whether the public prosecution service is sufficiently independent from the executive power (in relation to the *trias politica*). The core of the cases primarily relates to the condition of independence.[26]

In Denmark, until this point, it was the Attorney General that had the competence to issue and execute arrest warrants under the EAW FD. However, according to the Danish Code of Judicial Procedure § 98(3), the Minister of Justice can instruct the prosecution service regarding the treatment of concrete cases – also cases covered by the EAW FD. Consequently, the Danish Ministry of Justice was of the opinion that a system as the Danish, where the Minister of Justice in principle had the possibility of instructing or ordering the prosecution service in cases regarding a European arrest warrant is contrary to the EAW FD as interpreted by the CJEU; regardless that the prosecution service in practice functions independently and is subject to a principle of objectivity when handling cases under the EAW FD.[27]

The Danish Extradition Act did, until the drafting of the Bill, not include rules on request on extraditions *to* Denmark. These rules were to be found in the, for the request relevant, international acts.[28] The Ministry of Justice found it appropriate, since the Extradition Act were to be amended regardless, to include a chapter on Danish extradition requests.[29]

The primary consequence of the amendment, which entered into force in 2020, is that the competence to issue and execute extradition requests was moved from the public prosecution service to the Danish courts.[30]

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26 Ibid, p. 33.
27 Ibid, p. 34.
28 Ibid, p. 39.
29 Ibid, p. 39f.
30 Ibid, p. 40.

In the following, the (relevant) rules currently in force in the Danish Extradition Act are presented and discussed.

Denmark as executing state

Formal requirements for extradition

A European arrest warrant must, to form the basis for an arrest and extradition to an EU Member State, include the following information:

1) Identity and nationality of the requested person,
2) Time and place of the criminal act,
3) Description of the type of act and the applicable criminal provisions, and
4) Information on whether a decision is made on arrest or imprisonment, or if a judgment has been rendered.

This follows from the § 30 of the Extradition Act and is in accordance with the EAW FD.

The Danish authorities cannot require that the decision on arrest, imprisonment, or the judgment that is the basis for the EAW is delivered at the same time as the EAW. Instead, a representative for the issuing judicial authority will have to confirm the information in the EAW, and the EAW will include the same information that usually appears directly from the decision on arrest or imprisonment, or of the judgment.[31]

The EAW must also include information on the potential penalty that can be rendered for the criminal act, cf. § 30(2), or, if the request regards execution of an already rendered penalty, information on that penalty, cf. § 30(3).

According to § 32 of the Extradition Act, a European arrest warrant is sent to the prosecution services in the jurisdiction where the requested person lives or stays. The police must, hereafter, initiate the necessary investigations, without any delay, to decide whether the conditions for extradition are fulfilled, cf. sub-paragraph 1. If the prosecution service finds, based on the information of the EAW, that the extradition should be rejected, the case is to be submitted to the courts without further police investigation, cf. sub-paragraph 4.

[31] Ibid, p. 71.

Regarding the judicial authority that finally decides whether the EAW can be accepted or should be rejected, the Ministry of Justice has indicated that the courts, the public prosecution services, i.e. the Ministry of Justice, the Attorney General, the public prosecutors, and the police chiefs, are judicial authorities.[32] However, because the Ministry of Justice has the possibility to instruct (formally) the public prosecutors in cases regarding EAWs, this is not in conformity with the CJEU judgments in cases C-508/18, C-82/19 PPU, and C-509/18. Therefore, the competence to decide in cases regarding EAWs is transferred from the Attorney General to the Danish courts. This follows from § 35 of the Extradition Act. The court must also decide on potential conditions to the extradition.[33]

Regarding time limits, the court must decide on the extradition within 60 days from the day of arrest of the requested person, cf. § 37(2)(2) of the Extradition Act.

Condition for extradition to the Nordic countries

A relevant condition for extradition to the Nordic countries (i.e. also Sweden and Finland) is that extradition only takes place if the extradited person is not further surrendered to a(nother) Member State of the EU for other criminal acts committed before the extradition, besides the one that the extradition is based on, cf. § 12. Exemptions to this condition are, cf. § 12 nos. 1-3:

1) If the requested/extradited person has consented to further extradition in accordance with § 36 of the Extradition Act, or

2) The person has had the possibility of leaving the country, to which that person has been extradited, but s/he has omitted doing so for 30 days after final release, or has returned to the country after having left it, or

3) The Danish court allows for further extradition in accordance with § 41 of the Extradition Act.

Conditions for extradition to EU Member States (except Finland and Sweden)

§ 13(1) of the Extradition Act contains rules on when extradition *must* take place. This provision reflects Art 2(2) of the EAW FD. No differentiation is made between Danish citizens and foreigners, and it is irrelevant whether the act (if it is included in nos. 1-32) is criminalised in Denmark.

[32] Ibid, p. 80.
[33] Ibid, p. 81.

For acts that are not included in the list, extradition to an EU Member State can take place on the basis of an EAW, if a similar act is punishable according to Danish legislation, and if the criminal act in the issuing Member State warrants imprisonment of minimum 1 year, or if the person has already been sentenced to imprisonment (or a similar measures depriving the person of liberty) of a minimum duration of 4 months, cf. § 13(2) and (3) of the Extradition Act. If the requested person is indicted or convicted for several criminal acts, the conditions only need to be fulfilled for one of them before extradition can take place, cf. § 13(4).

If the statute of limitation of the crime has expired according to Danish legislation, extradition *can* be rejected, cf. § 14.

Extradition can also be rejected if the act in question has been committed outside the territory of the issuing Member state, and a similar act conducted outside Danish territory would not be covered by the Danish authority to prosecute, cf. § 15 of the Extradition Act. This means that e.g. if *Member State A* requests Denmark to extradite a person for a sex crime committed in the *state B*, even though the requested person is not a citizen of or has residence in *Member State A* (i.e. prosecution takes place on the basis of universal jurisdiction), Denmark can refuse extradition. Similarly, if *Member State A* requests extradition of its own citizen for the purpose of prosecution for an act committed in *state B*, but in *state B*, this act is not punishable, Denmark can refuse extradition.[34]

Extradition *cannot* take place for the purpose of execution of a sentence if the requested person has not been present during the court case, where s/he was sentenced to imprisonment (or a similar measures depriving the person of liberty), *unless* it appears from the EAW either that the requested person was summoned correctly, was familiar with the scheduled case and authorised a legal advisor to act in his/her place, has been made familiar with the judgment and possibilities of appeal, or will be familiarised with the judgment immediately upon the extradition, including possibilities of appeal, cf. § 16 of the Extradition Act.

Similar to the condition on extradition to the Nordic countries, also for the EU Member States, extradition cannot take place, if the extradited person will be held responsible or further extradited to a third country, unless the Danish court allows for it, s/he has been able to leave for at least 30 days, or s/he has left but voluntarily returned, cf.

[34] Ibid, p. 57.

§ 17(1). Further extradition to a third Member State can also take place without the Danish courts' approval, if the requested person agrees in accordance with § 36 of the Extradition Act, *or* if the prosecution or execution that the third state seeks extradition for does not include imprisonment, cf. § 17(2) and (3).

Reasons to reject extradition

Criminal minimum age

One of the common grounds to refuse extradition is if the person that is subject to the extradition request at the time of committing the crime was below the criminal minimum age. In Denmark, this age limit is out in the Danish Criminal Code § 15 and is currently 15 years. This is inserted as a regular condition for extradition from Denmark, saying that extradition *cannot* take place, if the person in question at the time of committing the crime was below this criminal minimum age, cf. § 2 of the Extradition Act.

Ne bis in idem

Three different scenarios fall under the prohibition on *ne bis in idem*. Consequently, extradition *cannot* take place, cf. § 3 of the Extradition Act:

1. When the requested person in Denmark, a Nordic country, or in a(nother) Member State of the EU already has been convicted or acquitted for the same criminal act, or
2. If the requested person has been pardoned in Denmark for the act.

Extradition *can* be rejected if the requested person has been convicted or acquitted for the act in a country outside the Nordic countries or the European Union.

A prerequisite for refusing extradition based on that the person is already convicted or acquitted is that the judgment has been executed, is being executed, or no longer can be executed in accordance with the legislation in the relevant state.

Consequently, the two first rules prohibit extradition as such. The latter, regarding third states, provides a possibility to refuse extradition.

The provision also covers situations where it is the issuing state that already convicted or acquitted the requested person in a prior, already executed etc. judgment.[35]

[35] Ibid, p. 43.

It is *not* the intention that the Danish extradition authorities on their own accord initiate investigations whether a prior judgment has been rendered in another state. If the authorities are informed that this is the case, but this information is insufficient, and can the necessary information not be acquired within the time limits, the extradition request should normally be granted if the conditions under the Extradition Act otherwise are fulfilled.[36]

Acts committed wholly or partly in Denmark

An act falls i.a. within the Danish jurisdiction, and can be prosecuted here, when it has been committed on Danish territory, is committed by a Danish citizen in another State *if* the act is also punishable in that state *when* the act has influences in Denmark, *or* if the act is covered by an interpersonal agreement, according to which Denmark is obligated to prosecute.[37]

According to § 5 of the Extradition Act, extradition *cannot* take place if the act in question wholly or partly is committed in Denmark, and the act is not punishable here. Further, extradition *can* be refused if Denmark has initiated criminal proceedings for the act in question, and the proceedings in general should be concluded in Denmark, because of the character of the act, the requested person's affiliation to Denmark, and the circumstances in general, cf. § 4(2) of the Act.

Fear of persecution based on race, political ideologies etc.

Extradition *cannot* take place if there are grounds to fear that the requested person, upon the extradition, because of his/her race, belonging to a particular population group, religious or political ideologies, or moreover because of political relations will be subjected to persecution directed at his/her life or freedom or that is of another serious nature, cf. § 6(1) of the Extradition Act. The same prohibition exists if there are grounds to fear that the person, upon the extradition, will be subject to torture or other inhumane or degrading treatment, or if the extradition would be contrary to Denmark's international obligations, cf. § 6(2) and (3) of the Act.

The latter rule ('contrary to Denmark's international obligations') was inserted with the amendment in 2020. The Ministry of Justice found that this is a particular relevant point, and it means that, when assessing whether extradition requests can be granted, it will *not*

36 Ibid, p. 45.
37 Ibid.

rarely be necessary to conduct a concrete assessment of whether extradition is in accordance with e.g. Art 6 ECHR on a right to a fair trial.[38]

Extradition of Danish citizens and permanent residents

According to the EAW FD, no difference should be made between the obligation to extradite Danish citizens in comparison to foreigners. However, extradition of Danish citizens or persons with permanent residence in Denmark *can* be refused, if Denmark obligates itself to execute the sanction, cf. Art 4(6) of the EAW FD and § 7(2) of the Extradition Act.

Additionally, Denmark *can* require that a person that is requested extradited for the purpose of criminal prosecution in another state is transferred back to Denmark for the purpose of executing the (potential) sanction, i.e. upon finalisation and rendering of a judgment in the case against that person. This is, however, only possible if the person is a Danish citizen or has permanent residence in Denmark, cf. § 7(1) of the Extradition Act.

The assessment of whether extradition should be refused in return for an obligation to conduct the execution of the penalty should be based on a concrete assessment in each individual case. The assessment is based on i.a. the gravity of the crime, and the person's affiliation with the Member State where the crime has been committed. If a person e.g. is convicted for acts of terrorism, there will not be a basis for requiring this person transferred back to Denmark for execution, or if the person has a close affiliation with the state where the crime has been committed.[39]

It was considered, already with the first Extradition Act from 2002-03, whether this provision should be made mandatory (so that extradition of Danish citizens or permanent residents *always* would be rejected under condition of that Denmark overtakes the execution, or, when it regards prosecution, make the surrender conditional of return). However, because there can be instances where the crime is so serious that the consideration of the Member State where the crime has been committed dictates that the person should be prosecuted and serve the sentence in that State, it should be assessed on a case-by-case basis whether this exemption should be used.[40]

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38 Ibid, p. 48.
39 Ibid, p. 49.
40 Ibid, pp. 49f.

Persons that are serving prior sentence(s) in Denmark

According to § 8 of the Extradition Act, a person that is serving a sentence in Denmark can be *temporarily* extradited for the purpose of prosecution in the issuing State under the conditions that, 1) that person is returned to Denmark when prosecution is final, and 2) that person is deprived of liberty during the extradition. It is still (logically) required that the other conditions for extradition are fulfilled.

According to the same provision's sub-paragraph 3, the time that the person concerned is deprived of liberty during the extradition is subtracted from the time that that person must serve in prison in Denmark. I.e., the penalty is continuously executed during the extradition.[41]

If there are ongoing criminal cases against the requested person in Denmark, that person will, as a starting point, *not* be extradited before the criminal prosecution is final. There can, however, be exemptions to this; e.g. if the finalisation of the prosecution in Denmark is expected to be delayed for reasons that is not to blame on the Danish system.[42]

Denmark as issuing state

Until the amendment of the Extradition Act that entered into force in 2020, the question of requesting a person extradited *to* Denmark was not separately regulated in the Danish legislation. Until 2020, thus, the conditions and procedures for extradition to Denmark depended on the international legal basis that regulated the extradition case between Denmark and the relevant state, and the extradition act in the country, from which extradition was sought.[43]

Consequently, the Danish authorities followed the EAW FD when requesting extradition of persons from other EU Member States.

With reference to the CJEU cases as referred to above, the Danish Ministry of Justice found it necessary to also establish which is the competent judicial authority that can decide on EAWs when Denmark is the issuing state; namely, the courts.[44]

According to §§ 45 and 47 of the Extradition Act, if the public prosecution wants a person to be sought internationally for the purpose of deprivation of liberty and extradition

41 Ibid, p. 51.
42 Ibid, p. 52.
43 Ibid, p. 95.
44 Ibid, pp. 95f.

for prosecution in Denmark, or for the purpose of execution of a penalty, the public prosecution must request the Danish court to order that person detained on remand and issue a European Arrest Warrant.

Before the court decides on detention on remand, the wanted person's defence attorney must have the possibility to speak. If the wanted person has not chosen a defence attorney, or if that attorney is not present, the court appoints an attorney for the wanted person.[45]

It is the court that observes whether the conditions for issuing the EAW are fulfilled. An EAW can be issued for acts punishable by imprisonment or other measures for deprivation of liberty with a maximum duration of at least 12 months, cf. Art 2(1) of the EAW FD. The court also checks whether the EAW includes the information that is required, cf. Art 9(1) of the EAW FD, i.e. information on:[46]

1. The wanted person's identity and nationality,
2. Indication of whether there is an order for arrest or other executable decision with similar enforceability,
3. The character of the crime and the legal description,
4. A description of under which circumstances the crime has been committed, including time, place, and extent of the wanted person's participation herein,
5. The penalty frame for the crime in question, and
6. Potential other consequences of the crime.

When a person is requested for the purpose of execution of a penalty in Denmark, it is also the court that decides on issuing the EAW. The deprivation of liberty that the wanted person risks abroad, because of the issuance of the EAW and, consequently, potential detention on remand in the executing Member State, is based on a judgment that that person is escaping the execution of in Denmark. The time that the wanted person is deprived of liberty abroad is subtracted from the penalty that s/he has received and is (going) to serve in Denmark.[47]

45 Ibid, p. 96.
46 Ibid, pp. 96f.
47 Ibid, p. 97.

An EAW for the purpose of execution of a sentence can be issued for penalties of a duration of at least 4 months, cf. Art 2 of the EAW FD. The court also observes whether the EAW contains the information required in Art 8 of the EAW FD, i.e. indication of whether there is an executable judgment, the character of the crime and the legal description hereof, a description of the circumstances that the crime has been committed under, including time, place, and extent of the requested person's participation herein, and potential other consequences of the crime.[48]

Relevant case law

UfR 2020.3876 H

Judgment by the Danish Supreme Court of 10 September 2020. The case regarded an extradition request for the purpose of execution of a sentence from Romania, of a Romanian citizen in Denmark. The Romanian wanted to serve the sentence in Denmark, but seeing that the conditions for extradition were fulfilled, the Supreme Court stated that the starting point is that an EU Member State shall execute any EAW. A rejection of execution because the requested person *can* serve the sentence in Denmark is an exemption to this. Based on an overall assessment of the Romanian's personal relations, the character of the crime and the gravity hereof, the Supreme Court found that there were no reasons to refuse extradition. Consequently, the Romanian could be extradited.[49]

UfR 2021.2624 V

Judgment by the Danish High Court, Western Division, of 14 April 2021. The case regarded an Iranian citizen, who had been convicted in Greece for i.a. human trafficking, and received a sentence of 5 years, 3 months, and 10 days, of which he still had to serve 4 years, 5 months, and 20 days. Greece had requested the Danish authorities to extradite the Iranian, guaranteeing that he would be serving in a specific prison, where the conditions are in conformity with European standards. However, the District Court, on 17 March 2021, found that the Iranian could not be extradited, because the conditions in the prison were not in conformity with European standards; despite the guarantee from the Greek authorities.[50]

In its judgment, the High Court refers to recent CJEU cases regarding the meaning and significance of guarantees from Member States, according to which only in special cases

48 Ibid, p. 97.
49 Højesteret, judgment of 10 September 2020, UfR 2020.3876 H.
50 Vestre Landsret, judgment of 14 April 2021, UfR 2021.2624 V.

and due to specific reasons, the executing judicial authority can conclude that there, despite a guarantee, is a real risk for submission to inhumane or degrading treatment. The Court found, conclusively, that there the necessary grounds to override the Greek authorities' guarantee regarding the imprisonment conditions, and, therefore, the Iranian could be extradited for the purpose of execution of the penalty in Greece.[51]

UfR 2021.4225 H

Judgment by the Danish Supreme Court of 15 June 2021. The case regarded an extradition request for the purpose of execution of a prison sentence of a Danish citizen. The Dane objected against extradition, claiming, first, that the sentence did not fulfil the double criminality requirement, because the 'crimes' for which he had been sentenced in Germany did not constitute crimes according to Danish legislation. Second, he claimed that *if* he should serve the sentence, it should be in Denmark.

The Supreme Court stated that the requirement of double criminality only must be fulfilled for *one* of the crimes that the requested person has been sentenced or is being persecuted for. It is therefore irrelevant that some of the crimes, in this case, does not constitute crimes under Danish law. However, the Court also found that the conditions for rejecting the extradition request on the basis of the sentence being executed in Denmark were fulfilled. Consequently, the extradition request was rejected, and the requested person should serve his sentence in Denmark.[52]

UfR 2021.4101 Ø

Judgment by the Danish High Court, Eastern Division, of 6 July 2021. The case regarded an extradition request from Poland of a Danish citizen, for the purpose of prosecution in Poland. The question in the case was whether extradition would be contradictory to the Art 47(2) of the Charter and Art 6 of the ECHR, due to the (known) issues with the Polish judiciary.[53]

The High Court refers to cases of the CJEU, where it has been concluded that the executing judicial authority cannot refuse extradition when it is aware of issues with the (in)dependency of the judicial powers of another Member State without conducting a concrete and exact assessment, taking into account the requested person's personal

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51 Ibid.

52 Højesteret, judgment of 15 June 2021, UfR 2021.4225 H.

53 Østre Landsret, judgment of 6 July 2021, UfR 2021.4101 Ø.

situation, the kind of crime in question, the sort of crime in question, and the factual circumstances under which the issuance of the EAW had taken place.

The High Court stated that because the Danish citizen was not being persecuted due to ethnical, religious, political, or other relations, and considering the character of the crime that he was requested extradited for, there were no actual risk for violation of his fundamental right to a fair trial before an independent and impartial court. Consequently, the Danish citizen could be extradited for prosecution in Poland.

ImprovEAW: Comments on recommendations

In this section, the recommendations relevant to comment on from a Danish perspective, taking into consideration the previous section, are selected.

Comment on Recommendation 2.1

In Denmark, extradition *cannot* take place, cf. § 5 of the Extradition Act, if the act in question wholly or partly is committed in Denmark, and the act is not punishable here. This provision is a transposition of the optional non-execution ground in Art 4(7)(a) of the EAW FD. As such, it constitutes a mandatory version of an optional ground. Seeing that Denmark just updated the Extradition Act (entering into force in February 2020), it is highly doubtful that the legislator would be willing to change this condition from a mandatory to an optional non-execution ground. Note, however, the difference between Art 4(7)(a) and § 5; the latter has the additional requirement, for the non-execution ground to be activated, that the act is not punishable in Denmark.

Comment on Recommendation 2.2

Denmark amended this with the new Extradition Act, cf. § 35, which says, '*Decision on extradition and any terms is made by the court upon the prosecution services' request*'. It is still the prosecution services which must decide to bring the question of extradition to the courts, but the courts now have the final say in the matter of issuing or executing an EAW.

Comment on Recommendation 2.3

Denmark has the same procedure as the Netherlands. It is assumed that if the EAW form is filled in correctly, it fulfils the relevant criteria. It is for the prosecution to fill in 'as much available information as possible before the court hearing'. If necessary, the court fills in the remainder of the form, e.g. the court's case number and the name of the judge. The

form must be signed by the judge. The original arrest warrant is handed over to the prosecution for further measures.[54]

Comment on Recommendation 2.9

There is no requirement of assessment of proportionality in the Danish Extradition Act. However, the *travaux préparatoires* of the Extradition Act mention that an EAW must, in accordance with Art 9(1) of the FD, specific information as indicated in the form, and according to the practice of the CJEU, the principle of proportionality must be considered by the issuing judicial authorities, before the issuance.[55]

Comment on Recommendation 2.10

As mentioned, there is no explicit requirement in the Danish legislation that the proportionality of issuing the EAW is assessed. Note, however, that the fact that the rules on issuing EAWs is collected in one chapter in the Extradition Act is fairly new; until the update of the Act, which came into force in 2020, Denmark would, when issuing EAWs, take into consideration the applicable international legislation. This would mean that proportionality, seeing that it is a requirement that follows from the EAW FD, also would be assessed.

Comment on Recommendation 3.5

Denmark does not require that all the acts, for which extradition is sought, be it for prosecution or execution of a sanction, fulfils the criteria for extradition. It is only necessary that *one* act fulfills the criteria, cf. § 13(4) of the Extradition Act.

Comment on Recommendation 3.13

The list of Art 2(2) of the EAW FD is copy/pasted into § 13 of the Extradition Act.

Comment on Recommendation 3.14

In the notes to § 13(1) of the Extradition Act, it is stated that the listed offences as a starting point are criminal offences in all Member States, and as such, the added value of the Framework Decision on this point is primarily that *it should not be checked whether the crime also is punishable in the executing Member State*.[56] Consequently, it can be assumed

[54] Karnov, *Notes on the Danish Extradition Act*, nos. 94 and 144.
[55] Folketinget, Folketingstidende, Tillæg A, *L 78 Forslag til lov om udlevering til og fra Danmark (udleveringsloven)*, published 27 November 2019, p. 95.
[56] Karnov, *Notes on the Danish Extradition Act*, no. 40.

that Denmark does not, as executing state, automatically carry out a review of the designation of an offence as a listed offence.

Comment on Recommendation 3.16

The Danish legislation does not mention anything in regard to this, but the remarks say that the requirement of double criminality should be administered flexibly, so that the requirement is considered fulfilled, if the acts that are described in the EAW wholly or partly match a crime in the executing country (Denmark). The requirement in § 13(2) is assumed to be administered this way. That means that it is sufficient to consider the requirement of double criminality fulfilled if the indictment, accusation, or judgment, regardless of the legal description, concerns an act that would also be punishable according to Danish legislation, if it had taken place in Denmark. It is *not* a requirement that the act is punishable with imprisonment in Denmark.[57]

Comment on Recommendation 3.17

There is no explicit information on this but seeing that it is the intention that § 13(2) is administered flexibly, cf. previous comment, it seems to be the less in the more that the courts are deciding this based on a concrete assessment in each individual case.

Comment on Recommendation 4.6

The Danish courts request the necessary, additional information within a time limit set out by the court, cf. § 35(5) of the Extradition Act. It is assumed, cf. the remarks, that the court requests the prosecution services to provide the necessary information.[58] It is not indicated that a standardised list can/cannot be sent.

Comment on Recommendation 4.8

Denmark can, according to § 7 of the Extradition Act, set as a term that a Danish citizen or permanent resident is transferred back to Denmark for the purpose of completion of a potential prison sentence. This term is decided upon a concrete assessment in each individual case.[59] Consequently, it is not always necessary for Denmark – and perhaps Denmark also does not always want to obligate itself – to have the Danish citizen/permanent resident serve his/her sentence in Denmark. Because the court has the option of setting this term for extradition, it seems an irrelevant recommendation.

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57 Karnov, *Notes on the Danish Extradition Act*, no. 42.
58 Karnov, *Notes on the Danish Extradition Act*, no. 117.
59 Karnov, *Notes on the Danish Extradition Act*, no. 19.

Comment on Recommendation 4.11

Denmark is also not participating in the EPPO. Hence, this recommendation will be applicable to Denmark as well.

Comment on Recommendation 4.12

Art 13(4) of the EAW FD states that, in principle, consent (to surrender) may not be revoked. However, 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 Art 17.

According to the section 'Statements made by certain Member States on the adoption of the Framework Decision', it is indicated, under 'Statements provided for in Article 13(4)', that in Denmark, '*consent to surrender and express renunciation of entitlement to the speciality rule may be revoked in accordance with the relevant rules applicable at any time under Danish law*'.

It is assumed that the Danish courts are already including in their decision on the execution of the EAW the requested person's decision concerning the renunciation of the specialty rule, because, irrespective of the requested person's renunciation, the courts will still need to assess whether the conditions for extradition are fulfilled. The difference is that an actual court hearing does not need to be held, if the requested person has agreed to the extradition, cf. § 35(4) of the Extradition Act. Interestingly, because the Danish courts still need to assess whether the criteria for extradition are fulfilled, irrespective of consent/renunciation, the fact that the requested person followingly retracts his/her consent to extradition does not result in that the question of extradition must be reconsidered by the courts.[60]

Comment on Recommendation 5.1

This recommendation is not relevant for Denmark, since Denmark allows for extradition for the purpose of prosecution or execution of a sanction for several criminal acts, even though the conditions (in § 13(1)-(3) of the Extradition Act, similar to Art 2(1)-(3) of the EAW FD) are only fulfilled for one of the acts.

[60] Karnov, *Notes on the Danish Extradition Act*, no. 121.

Comment on Recommendation 5.5

As mentioned, since the entering into force of the updated Extradition Act, it is now only the courts that are competent to issue and execute EAWs. Under § 31 of the Extradition Act, the Danish Minister of Justice has appointed the Attorney General to receive EAWs, and, as such, the Attorney General constitutes a 'centralised focal point' in this regard. It is also the Attorney General that must, if necessary, obtain additional information from the issuing authority if necessary.

Comment on Recommendation 5.6

Since the entry into force of the Eurojust Regulation in 2019, Denmark is no longer a member of Eurojust. However, Denmark still has access to Eurojust's information systems and can share personal data in criminal investigations, and prosecutions via its seconded Representative, Deputy, or Assistant. It seems, then, that Denmark, although not a member of Eurojust, can use it to communicate with other Member States' judicial authorities.

6- Teresa Magno, Italy, Italian Desk at Eurojust

I would like to elaborate on a few points of the Common Practical Guidelines for filling in and assessing the EAW form.

In my opinion, these guidelines are very complete, clear and easy to work with. They focus on the most problematic issues to be dealt with while issuing or executing an EAW.

Since these guidelines concern the current EAW form, they can be of major assistance to the judiciary. In particular, they draw the attention on the aspects that in practice turn out to be the thorniest ones.

I agree with the necessity to address firstly the issue of proportionality especially as far as the prosecution-EAWs are concerned.

The purpose of the EAW in the case at hand is a major element to consider and should be carefully pondered by the issuing authority.

It has to be underlined that in some jurisdictions, a warrant can be issued domestically to summon the suspect and question him or her to get (additional) evidence. When an EAW is issued to achieve this objective, the practical experience shows that the EAW is refused, without the previous existence of a national warrant playing any role.

In my opinion, the issue of these EAWs has to be prevented, since the EAW is not the correct tool to use. Judicial authorities have to be well informed about the refusal they will almost certainly receive. From the point of view of the investigative strategy, such a decision is deemed to very likely backfire.

In addition, the issuing authority has to consider that suspects enjoy the right to remain silent and provide no answers when questioned, which collides even more with the issuance of such an intrusive measure as an the EAW.

Another recurrent and relevant issue is outlined at p.5 of the guidelines and concerns the execution of multiple offences sentences by issuing an execution- EAW. As it is correctly pointed out at p.6, the EAW form does not guide the issuing judicial authority to link offences with sentences and to clarify which offence corresponds to which sentence, which leads in practise to refusal decision or request for supplementary information.

I agree with the need to clearly specify the offences ant the conviction applied for each count in each final decision mentioned. This is particularly relevant when the execution-EAW concerns at the same time crimes falling under the 32 categories of the EAW and crimes for which the requirement of double criminality has to be assessed. I can elaborate further at the symposium based on the Italian experience when issuing execution EAW for accumulated sentences.

I fully agree with the proposed list of information that might be included under section (f) at p.7 of the guidelines, since they allow the executing Court to receive complete outline of the factual and legal state of play. In addition, this timely inclusion allows sparing time in the execution phase and limiting recourse to request for additional information and clarifications.

As far as the executing EAWs issues are concerned, I can immediately comment on those related to territorial jurisdiction. In my national legal order, until very recently this ground for refusal was compulsory, which did not always facilitate cooperation in cross-border cases. The current practise is now showing a careful evaluation of this optional ground for refusal by the courts. Providing the most complete outline of the cross border investigation helps Courts to find a balanced decision and to recognise and apply instruments in line with their purposes. Courts also consider the criteria mentioned in the Guidelines for deciding "Which jurisdiction should prosecute?" since those criteria have to be evaluated when applying the domestic legislation on the settlement and prevention of conflict of jurisdictions. I can elaborate further on this topic, if needed.

Coming to the point of the request for supplementary information, my experience is based on judicial authority's requests. Irrelevant questions are still asked and the merits of the request is still assessed. I welcome the symposium as a venue to discuss how to tackle effectively this persisting issue that is more widespread than we may think of. At this regard, a case by case approach is necessary and detailed guidelines are necessary. Practical examples of what is meant by control of the merits that is outside the scope of the instrument can be beneficial in training.

I would like to underline the role that Eurojust can play to assist national judicial authorities in dealing with EAW procedure. I will elaborate further at the meeting but experience shows that the assistance of the agency in easing communication, avoiding misunderstanding and clarifying issues can be particularly beneficial. Eurojust is very effective in this specific area of judicial cooperation in criminal matters.

Finally, I praise the reference to the speciality principle, because it is relevant that the issuing judicial authority becomes aware of whether or not the surrender has been allowed under the condition of this rule. The issuing MS has to comply with this rule and has to be fully informed about it. As I said, I am available to elaborate on this as well, if requested.

7- Anna Ondrejová, Slovakia, General Prosecutor's Office of the Slovak Republic

The final report is an excellent material that offers an in-depth analysis of key elements of the European Arrest Warrant, including EU and national competences and cover all relevant areas of this instrument

All chapters clearly explain and thoroughly analyze the application of the EAW in the Member States that participated in the research project. It can be emphasized that the basis for this unique work was a well-designed questionnaire, which can be assessed as the basis for success. Not only the questions but also the explanations to the questions were essential for the respondents to understand the intention of the research project and to provide comprehensive information for further work.

Finally, it should be appreciated that the final report does not only analyze the EAW instrument itself, but it also provides solutions for its effective use in the future. The authors of the individual chapters also offer options and starting points for more effective solutions through already existing instruments.

From the expert's point of view, I focused on the chapters dedicated to the EAW - form and all parts of the form, which are analyzed in their entirety and in particular in great detail. I also paid attention to the chapter that are not directly related to EA forms. Taking into account all the factors that follow from the content, the recommendations seem complex and it is difficult to identify specific areas where there is room for improvement. I do not make suggestions for additions or comments.

The synthesis part with its conclusions, with which I fully agree, is particularly interesting. A summary of all the recommendations contained in the final report is clear and very useful. It can already be said that the common practical guidelines will certainly become a key reference tool for practical use in this area.

In conclusion, I would appreciate to have the opportunity to comment on the final report, recommendations and common practical guidelines.

Perhaps I would like to suggest that the visibility of the EuroPris website on the European Judicial Network's website be taken into account, as it is the primary source of information for experts from the Member States.

8- Aneta Petrova, Bulgaria, Federal University for Applied Administrative Sciences

The utility of the recommendations and the common practical guidelines for the Union as a whole is indisputable. They are from high professional quality and underlies the impact and significance of the new European case law practices in the EU Member States. The recommendations are very well formulated and structured in six chapters. This give an excelent opportunity to access the utility for the law enforement bodies, academics and practitioners, and make them a very helpful source for development of best practices. In my comments I would like to discuss some recommendations with impact on the EAW as an legal institute and on the Union as a whole.

In terms of recommendations to Member States: It is necessary to make all aspects of the ground for refusal of 3(2) mandatory again. This would be positive development not only in formal context but especially when it comes to effective exersising of the procedural rights of the the requested person (Recommendation 2.5.). The mandatory character have to be a guiding principle handling this issue for all EU Member States. As the separation of the functions in the criminal procedure is an inheren part of the process as a whole Recommendation 2.2. seems to be reasonable consequence. In addition, it is really important that the examinating judge in The Netherlands is provided with both, an EAW-form filled in by the prosecutor and the full file; this would make possible to understand better the grounds for the concete decision. Recommendation 2.8. is a reasonable step in context of the common EU policy in this area. Each EU Member State have the moral responsibilty to implement Framework Decision 2008/909 in order to facilitate the mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

In terms of recommendations to issuing judicial authorities: As some inquisatorial crimnal systems like Germany do not assess the proportionality in their case-law practice of an EAW before issuing it, especially in terms of the impact a surrender from one Member State to another may have, whether alternatives to surrender exist, and to what extent the free movement rights the requested person may enjoy will be infringed upon, is this recommendation from exceptional significance (OLG Bremen (1. Strafsenat), Beschluss vom

03.09.2021 – 1 Ausl.A 45/20, OLG Karlsruhe (1. Strafsenat), Beschluss vom 04.10.2021 – 301 AR 86/21, OLG München, Beschluss vom 14.12.2015 - 1 AR 392/15).

In terms of recommendation to EU authorities and institutions: The actualisation of EAW institute through incorporation of the ECHR case law into the EAW would bring more consistency and fairness.

In terms of recommendations to the EU authorities and institutions: As the economic situation in the EU Member States very different is, is the implication of Recommendation 4.1 open for further discussions. The update-activities and collaborative initiatives, including tough digital platforms in terms of Recommendation 5.4 are welcome; only actuall and comprehensive information regarding present detention conditions in Europe could be analysed. Recommendation 4.6 implies a very important guiding principle; the necessity of the information is an integral part of the individualisation.

9- Vânia Ramos, Portugal, Lawyer

The views are only of the author, unless they explicitly refer to the ECBA's positions. This list is seeks to outline some of the relevant issues from a defence perspective, but is not exhaustive.

"Issuing EAWs"

- The Common Practical Guidelines have been drafted rather in a perspective of the issuing and executing authorities, and not bearing so much in mind the perspective of the defence of the individuals targeted by an EAW.

- They seem nonetheless to try to introduce more emphasis on certain points that are key to the defence, such as the proper use of proportionality tests.

- In respect of the section "Issuing EAWs" and the aspects to be taken into account before issuing an EAW, the emphasis on the need of an additional proportionality test is to be praised.

- However, this test, in my view, should bear in mind not only the "seriousness of the offence" as considered by looking at the applicable sanctions in abstract, but rather at the expected sentence and whether it would carry periods of deprivation of liberty. In fact, often EAW are issued for offences that do not likely carry the imposing of an actual prison sentence at the end of the case. For example, in Portugal the crime of "robbery" carries a sentence of 1 to 8 years[61] (which is considered serious). However, especially for first offenders, in case of a conviction there is often no actual prison sentence imposed. This is often the case, for example, of "bag snatching" which is considered a "robbery" in Portugal, rather than a theft (normally carrying a sentence only up to 3 years imprisonment or a fine[62])[63].In my view, it is only proportionate to issue an EAW if there is an order determining the imposition of pre-trial detention (which involved the assessment of the existing procedural risks – absconding, reoffending, … *and* the likelihood of the imposing of a sentence carrying deprivation of liberty), or, at the very least, it is highly likely that, once surrendered, the person will remain in detention (which would normally only be proportionate if it is likely that, at the end of the case, a sentence imposing deprivation of liberty will be imposed). Otherwise, the deprivation of liberty during EAW procedures is disproportionate and the existing alternatives should be used.

[61] Art. 210(1) CP.

[62] Art. 203 CP.

[63] See, for example, court of Appeals Lisbon, 18.09.2019, http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/dfb7d7801ec4628e802584ac0052a882?OpenDocument (a case of bag snatching in which suspended sentences were imposed, even where the defendants already had prior convictions).

- The common guidelines use the term "existence of alternatives to surrender" which are "less infringing"[64] (p. 2). This may not necessarily be understood as involving the alternative of requesting the execution of the prison sanction in the Member State where a person in living, which could often be more appropriate and, from the view of the person, less restrictive to their rights to family life and to reside in another Member State. However, since both an EAW for execution of sentence and the transfer of execution of sentence carry a deprivation of liberty, it may be disregarded by practitioners as included in the scope of alternatives. In my practice I have rarely met cases in which there is consideration of an EAW vs a request for execution of the sentence abroad. The default option being rather the issuing of an EAW. This may give rise to difficulties in terms of the sentence being served in the executing state, where the implementation of the relevant Framework Decision was not done, or the decision on whether the executing state accepts the transfer takes too long. When there is information that the person lives in another MS, this option should be considered and the defence lawyer (as the requested person, where possible) should be allowed to comment on this alternative. When there is no information, one could consider to disseminate a whereabouts notice via the SIS in order to locate the person and thereafter to make the assessment of what is more appropriate (EAW vs request for execution of sentence).

- A particular emphasis could be added, on the use of video-conferencing in cross border cases as a means to avoid the issuing of an EAW and thus a less stringent and as such more proportionate measure. In this respect, see para 15 to 17 of the **European Criminal Bar Association Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World**, https://www.ecba.org/extdocserv/20200906_ECBAStatement_videolink.pdf [65]:

> 16. [...] some states require the physical presence of the suspect or accused for certain procedural acts, in particular the first interview carried out during the investigation, presentation of the charges, or when deciding on pre-trial detention, or make the exercise of the rights of the accused dependent on such physical presence, which frequently leads to the issuing of an EAW or IAW.
>
> 17. The potential for the suspect or accused to participate in such procedural acts in the cross-border context by means of video-conference would be beneficial, particularly in those cases in which EAWs or IAWs are ordered disproportionately, simply to secure the physical presence of the suspect or accused, when there is no flight risk or where the flight risk is wrongly assumed based on the mere ground that the suspect or accused lives in another EU Member State. Benefits that would follow are set out below:

[64] In my view the correct phrasing would be "less restrictive". The same applies on p.1 , "degree of infringement" should read perhaps "degree of restriction".

[65] Also available at https://journals.sagepub.com/doi/abs/10.1177/20322844211013541.

a. It would render it unnecessary for states to issue an EAW or IAW in order to bring the person to the state of prosecution where his or her physical presence is not necessary but the law still requires that the person is heard: this could be satisfactorily done by video-conference, thereby offering a solution that is more proportionate than issuing an EAW;

b. It would enable the suspect or accused to be present and to participate in the procedures and exercise his or her rights from the beginning of a criminal investigation;

c. It would offer more immediacy than not hearing the person at all or hearing the person by means of a rogatory letter or an EIO sent to the state of residence or location of the suspect or accused;

d. It would make it easier to comply with the procedural safeguards applicable in both states, when compared to a hearing conducted only in the presence of the authorities of the state of residence;

e. It would also involve a reduction in costs (according to the European Added Value Assessment accompanying the European Parliament's legislative own-initiative report, a conservative estimate of the average costs of enforcing an EAW is around €20,000 per case);

f. It would facilitate the exercise of dual defence in those cases in which the suspect or accused does not have financial means to pay for lawyers in the two Member States to attend the hearing in person and also mean a cost saving to both Member States (since effective legal aid in both states would require covering the travel costs of the lawyer of the issuing state to the executing state, paying for the travel costs of the suspect or accused from the state of residence to the state of the investigation).

17. This is particularly relevant in cases in which imprisonment is unlikely, which is frequently the case in low and medium criminality (the recently published European Parliament Research Service Report states that many EAWs are issued for low level offences), but also in those cases in which pre-trial detention is unlikely to be ordered, and bail measures can be applied and executed without the suspect or accused having to leave his or her state of residence, and finally in such cases in which the case is not trial ready. In these cases, an EAW should not be issued, since it would be disproportionate, and the suspect or accused should be heard by video-conference."

- On page 2 of the guidelines there is a reference to summons as an alternative to an EAW to obtain the presence of the person. The cross-border system for summons

needs to be harmonized. The lack of an effective system often gives rise to the use of EAW due to difficulties in summoning persons which could be avoided. As written elsewhere (Costa Ramos/Luchtman/Munteanu):

> "Surprisingly, while in the realm of cooperation in civil matters, there is a directly applicable Regulation on the service of judicial (and extrajudicial) documents in the Member States,[58] there is no mutual recognition instrument whatsoever in the domain of cooperation in criminal matters. Art. 5 of the 2000 MLA Convention between the EU Member States[59] and Arts. 8, 9 and 12 of the CoE Convention on Mutual Assistance in Criminal Matters[60] are applicable. To the contrary of the EU Regulation in civil and commercial matters, these provisions do not establish standard rules for service – or a standard form which would make it easy not only to serve persons abroad but also to effectively inform them of their rights. The lack of such common procedures often leads to the service of documents being made incorrectly, or in a language that the respective person does not understand, thereby hampering the continuation of proceedings, because the service proved irregular or evidence is lacking that the person actually received the document. This scenario also impedes the persons receiving those documents of understanding their rights and duties in relation to the same. Furthermore, there is no deadline for the authorities of the requested state to serve the person. This often results in EAWs being disproportionately used because it was not possible to serve a defendant to appear, or because he failed to appear (although there is no evidence that he had actually received the summons), or simply because using an EAW is much faster than trying to serve the accused or defendant.[61] Moreover, it is often impossible to proceed with a case because the authorities cannot serve the accused at all, or not properly, or not timely. Ultimately, accused persons and defendants facing procedures in another Member State are often confronted with the lack of effective remedies because they are not being informed (or not in a language that they understand) of which remedies they may use in order to react to documents received. Another aggravating factor is that the persons have no extended deadlines to react, which puts them in a worse position than accused persons located in the Member State where the case is pending. Lack of knowledge of the language and rules of the forum Member State makes it even more difficult to be able to find legal assistance within the given deadlines."

- On page 2, the guidelines mention the case where an EAW is issued for the purposes of interrogation. In my view it is not lawful to issue an EAW for such purposes. An interrogation aims at collecting evidence and should be requested by means of an European Investigation Order, unless it is also anticipated that the person will remain in detention in the issuing state. I am aware that the practice of issuing EAW for interrogation purposes is however often used in practice.

- In connection with this topic, there is something essential missing in the common practical guidelines in terms of proportionality, related to the assessment of proportionality not before issuing an EAW bur rather during the process of execution,

once a person has been arrested in the executing state. Where an EAW for prosecution is issued, with the purposes of interrogation or bringing the person to attend (*which in my view as outlined above should only be happening if pre-trial detention is anticipated*), **during the EAW process there are means to enable that a hearing takes place and to avoid surrender and use "less stringent measures", namely by using video-conferencing,** pursuant to Articles 18, para 1, lit. a), and 19 FD 2002/584/JHA ("[w]here the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority **must**[66]: (a) either agree that the requested person should be heard according to Article 19 ["by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court"]). **This is not sufficiently used in practice.** See in this respect para 18 to 26 of the European Criminal Bar Association Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World[67]):

> "18. It is also relevant in cases in which an EAW was issued before trial, since the interview of the suspect or accused by remote means during the EAW proceedings might lead to the conclusion that continued detention is not necessary and hence to the withdrawal of the EAW and the underlying domestic arrest or detention order. Such an interview, conducted by the issuing state authorities by means of a video-link, would also allow the issuing state lawyer to participate.
>
> 19. In particular, the ECBA recalls that according to the Article 5 of the European Convention on Human Rights and Article 6 of the Charter of Fundamental Rights of the European Union the right to liberty is the rule and any measures depriving a person of her liberty, including detention pending trial in cross-border cases, is an exceptional and ultima ratio measure.
>
> 20. The ECBA also recalls that according to those provisions, everyone arrested or detained with a view to being brought before a competent authority on reasonable suspicion of the commission of an offence shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial (if necessary subject to bail measures) and that every person detained is entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 21. The current situation in certain Member States, in which the lawyer in the issuing state cannot consult the case files and effectively challenge detention before the requested person is actually physically removed to the issuing state, even if that person remains in detention throughout the EAW proceedings in the executing state, is particularly concerning and, in the ECBA's view, is not compliant with the above-mentioned fundamental rights.

[66] Not all EU languages say "must"… the Portuguese version states "may" which is not correct (versus the German "muss", English "must", Italian "deve", French "doit", Spanish "deberá").
[67] Also available at https://journals.sagepub.com/doi/abs/10.1177/20322844211013541.

22. The ECBA further recalls that the rights of defence which form an integral part of the right to a fair trial are applicable from the earliest stages of proceedings, including pre-trial stages (in this regard, see Directives 2010/64/EU, 2013/12/EU, 2013/48/EU, 2016/1919/EU, 2016/343/EU). Due to the crucial importance of such stages in modern-day criminal proceedings (in which much of the evidence collected beforehand will be used in court and in which many cases will not even reach the trial stage, due to the use of plea bargaining schemes), it is vital to give the suspect or accused the chance to actively participate in pre-trial proceedings and to present his or her defence at that stage.

23. In the European Union context, there is a legal basis for the participation of the suspect or accused by video-conference in the pre-trial stages in the European Investigation Order (Article 24 and Recitals 24 to 26), in the European Supervision Order (Article 19, para 4, and Recital 10, FD 2009/829/JHA) and in the European Arrest Warrant (Articles 18, para 1, lit. a), and 19 FD 2002/584/JHA). However, video-conferencing is significantly under-used in practice.

24. Hence, in the context of an EAW, the prompt organisation of a hearing by the issuing State authorities per video-conference pursuant to Articles 18, para 1, lit. a), and 19 FD 2002/584/JHA, is essential.

25. The ECBA recalls that Article 18 states that "[w]here 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 ["by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court"]; (b) or agree to the temporary transfer of the requested person".

26. If conducted appropriately, hearing by video-link can serve as a better alternative to a temporary transfer, which should be reserved for serious cases in which physical presence is absolutely necessary, or lengthy times pending the decision on surrender or the actual surrender taking place (often while the person is in detention in the executing Member State): in this context, the EU Council has already recognised the potential of such hearings by video-conference. "[68]

- On page 4, the common practical guidelines mention "[f]or *prosecution-EAWs* and execution-EAWs in cases where an ordinary remedy is still possible (before or after surrender, for example for *in absentia* proceedings), ….". In my view, if this is the case, the EAW should never be considered an execution EAW. For example, Portugal

[68] See also Council Recommendations'Promoting the use of and sharing of best practices on cross-border videoconferencing in the area of justice in the Member States and at EU level' (2015/C 250/01)

authorities often issued (in my view incorrectly) EAW after a trial in absentia and *before* the defendant was served with the judgment. This is unlawful unless Pre-trial detention has been ordered, since the person cannot be put in prison for execution of the sentence before being served with the judgment and until the appeal has been decided, or the deadline for appealing elapses. This should be made clear in the text and is also in line with what the authors refer to further below on page 5, where it is said "The judgment should be *enforceable*. If it is enforceable and no ordinary remedies are possible anymore, then the EAW can be issued as an execution-EAW. If it is enforceable, but an ordinary remedy is still possible (*e.g.* an enforceable court decision where an ordinary appeal is pending), then the EAW can be issued only as a prosecution-EAW." The inconsistency again appears on page 5 ("When filling in *section (c), fields (c)1 and (c)2* should both be filled in only when it concerns *prosecution-EAWs* **and *execution-EAWs* where an ordinary remedy is still possible** […]". There can be no such exection EAW.

- In respect of Section (e), on page 6, the authors may wish to consider adding the age of the suspect at the time of the offence, since this is also a mandatory refusal ground and such information may be needed (see Article 3, para 3, FD EAW).

- In respect of Section (f), on page 6, in my view an explicit recommendation should be made to include in this section:

    - The identification and contact details of any defence lawyer who has been appointed (by the State) or instructed in the issuing state (including name, address, phone number and e-mail).

    - The process to instruct or find a lawyer in the issuing state and to obtain legal aid in that Member State.

  These are very easy and practical steps that will help making the right established in Article 10, para 4, Directive 2013/48 and in Article 5(2) Directive 2016/1919 effective and the procedure established in those Directives, in a way that is speedy enough to safeguard the rights of the person, namely to have a lawyer instructed or appointed in the issuing state promptly, bearing in mind the short times for the decision on execution of an EAW. In fact, although some networks, such as the European Criminal Bar Association, have tools to find lawyers who are acquainted with foreign languages and EAW cases ("ECBA Find a Lawyer: https://www.ecba.org/contactslist/contacts-search-country.php), most requested persons and often even their lawyers are unaware of those tools.

- In respect of Section (f), on page 7: not only the information about other EAWs against the requested person could be relevant, but also generally speaking about any other pending criminal cases or sentences to be enforced, and also as stated above, the indication of the defence lawyers appointed or instructed in such cases.

"Executing EAWs"

- In respect of the "Power to Assess the EAW" (page 8), it is said that "the executing judicial authority cannot assess whether an arrest would have been lawful for similar circumstances under the law of the executing Member State. There can also be no checks regarding the lawfulness of the content of the national warrant and the law of the issuing judicial authority." Doesn't this conflict with the need to assess whether there is a valid national AW underlying? If not, then how? please specify. One may argue that, if there are doubts about such issues, the executing authority should consult the issuing authority. But ignoring the matter that is brought to the attention of the executing authority seems in my view incorrect, as it is a matter connected with the validity of the EAW itself and the underlying national warrant, as there can be no valid EAW without a valid domestic warrant.

- In respect of the "Listed-Offences" (page 8), what is said seems to be in conflict with views from scholars and courts where there is a manifest lack of correspondence of the facts with the boxes ticked – e.g. indicating murder and there is no dead person in the description of facts, or even a completely different case is described. The EAW regime does not prevent that the executing authority performs such a check since it means that it is the IJA itself that is showing that a mistake is made. This is different of assessing whether under IS law a certain fact is a certain offence due to intricated legal aspects. In my view this should be amended.

- The concept of "compelling reasons" used on page 9 is too vague. What does this mean?

- In respect of the "Prosecution in the executing Member State for the same 'act'" (page 9), I respectfully disagree that the refusal ground is not a corollary of ne bis in idem. Ne bis in idem is a *principle* which may be given effect by different types of rules, e.g. by preventing a new case once a decision is final; or already once there are parallel proceedings. Some domestic laws find that there is a violation of the principle where there are parallel proceedings and establish bars on international cooperation for that reason. In my view this is the reason why in the first place the refusal ground exists. See also **HOW TO DEFEND A EUROPEAN ARREST WARRANT CASE - ECBA Handbook on the EAW for Defence Lawyer**s, http://handbook.ecba-eaw.org/j-conflicts-of-jurisdiction-and-using-eurojust/ ("Ultimately it should always be kept in mind that solving conflicts of jurisdiction in parallel proceedings against the same person for the same facts aims primarily at preventing the violation of the *ne bis in idem* principle, which is a fundamental right laid down in Article 50 CFR"). It is true that (to this date) the EU Law does not prohibit parallel proceedings for the same facts, but in my view it should, as precisely a corollary of the ne bis in idem principle. See also in this respect the **Response by ECBA to the green paper and the working paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings presented by the European Commission**, https://www.ecba.org/extdocserv/jurisdictionnebisinidemresponsefinal.PDF (inter alia, "Multiple prosecutions create additional burdens for the defendant including

duplicated costs of representation, and coercive measures to the person and property as well as psychological burdens") .

- Also in respect of the same issue, the "discretion" referred to in the paper should be an assessment that has to be made in connection with an assessment about the transfer of the case to the issuing state. If such transfer will not be made, this gives rise to a violation of *ne bis in idem* principle and also to forum shopping (i.e. the Member State who "gets" the person gets precedence, without any other logical reason). Often the authority that decides the EAW cannot decide on the transfer. There is a need to coordinate and also a need to give the requested person a possibility to make representations on the possible transfer of the case. On page 10 there is reference to the *guidelines for deciding which jurisdiction should prosecute.* Again this reference is insufficient since it does not take into account the need to give persons (namely requested persons in the scope of an EAW case), the possibility to make representations on what jurisdiction is best placed to prosecute (the ECBA also notes this in the **Response by ECBA to the green paper and the working paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings presented by the European Commission**). The existing Council of Europe Convention on Transfer of Proceedings requires such a hearing, but only in certain cases which is still insufficient (see Article 17 and Article 2, European Convention on the Transfer of Proceedings in Criminal Matters Strasbourg, 15.V.1972, ETS 073). The explanatory report states: "The intention behind the requirement that the authorities of the requested State shall inform the suspected person of the request for proceedings against him is that the suspected person shall be entitled to be heard or, in any event, to present such views as he deems to be relevant, before a decision is taken. On the one hand, this provision is prompted by the need to respect the individual's right to defend himself, since the decision – even when within province of an administrative authority – is liable to affect the outcome of the criminal proceedings to a very considerable degree; on the other, it is prompted by the need for the information provided by the requesting State to be supplemented and, where appropriate, disputed by the person actually concerned, so as to preclude so far as possible the danger of decisions based on erroneous evidence, which might possibly give rise at a later stage to a withdrawal of acceptance (see Article 12, (2) (b)). It was considered unnecessary to provide the same requirement where the requested State has original competence."

"Detention conditions and deficiencies in the system of justice"

- In respect of "Detention conditions and deficiencies in the system of justice" (p. 16), the 2-prong test may not be in line with the Case Law of the European Court of Human Rights, since that Court is satisfied with the proof of the risk to the applicant and does not require proof of systemic deficiencies, although they may be important for the individual to meet the burden of proof also for his individual risk (see in this respect the analysis of Callewaert). There should be at least an alert to this, since there may be a violation of the Charter itself, where it required that the respective rights follow the minimum standard of the ECHR (Article 52, para. 3).

- Also in respect of "Detention conditions and deficiencies in the system of justice" (p. 16), in respect of the proof of the risk, one should add as an example of the information submitted by the defence ("including relevant expert reports or witness evidence"). Some Courts are reluctant to accept these which makes the defence extremely difficult and at time impossible where there are no other updated elements. Of course, accepting the reports does not mean that all described therewith is accepted, but at least they should be subject of admission and proper examination. I also suggest specifying in respect of "international organisations", the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), due to its prominence and place in the system of the European Convention on Human Rights.

- Still in this respect, the recommendation (p. 16) that "the executing judicial authority may not request supplementary information on all prisons of the issuing Member State, but may only request information on the actual and precise facility where the requested person will likely be detained, including on a temporary or transitional basis" is problematic since the issuing authority often refuses to indicate where the person will or could be held (except immediately upon arrival), such as is the case with Portugal. The recommendation should be amended to state that it should not refer to all prisons, *unless the IJA refuses or is unable to indicate the specific prison where the person will be held*. In order to reduce this situation, an obligation for the IJA to give the information on where the person will or could be held should be established and recommended.

- In respect of assurances (pp. 16-17), a requirement is missing. the Executing authority should request information about which authorities are competent in the issuing state to make the undertakings that are requested for. Otherwise, any replies given to not bind the issuing state and are insufficient in view of ECtHR case law. This is connected to the para. on page 20 ("Attention!...") where you require endorsement by a "judicial" authority. Often, judicial authorities have no power to give those assurances. A "confirmation" may be possible by a judicial authority (i.e. affirming that what the relevant administrative authority states is correct and that that authority is the competent one) can and should be required. But it cannot replace the assurance given by the competent (often administrative, or even political) authority.

- The suggested draft template (p. 17-18) should also include in para. 6 (vulnerable prisoners), a request about the availability of transfer to appropriate mental health care facilities where needed due to mental health issues of the person, or their deterioration; and in para. 7 a request for information on the procedure for the assessment of injuries by medical staff and their communication to the relevant authorities and the existence of a system of effective investigations in cases of violence by staff or others; as well as on the procedure in place and the existence of absence of facilities for protecting detainees victims of violence by staff or others.

- In respect of the *standards for detention conditions* (p. 18), there should be reference also the *standards* set up by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) – see https://www.coe.int/en/web/cpt/standards. These are more detailed than the Court's case law and the ECtHR normally relies on the CPT's findings and recommendations.

- From a defence perspective, the "said courts with jurisdiction over these proceedings" referred to on page 20 should include the appellate courts, too, since they also have jurisdiction and their rulings are outcome-determinative.

"Rule of speciality" and other issues to be communicated

- Finally, the common guidelines should state something about the communication of periods of detention, both in cases of a decision to surrender or to refuse surrender. Art. 22 FD EAW requires the executing judicial authority to notify the issuing judicial authority immediately of the decision on the action to be taken on the EAW. Under Art. 26, the issuing Member State shall deduct all periods of detention arising from the execution of an EAW from the total period of detention to be served in the issuing member state as a result of a custodial sentence of detention order being passed. Information concerning the duration of the detention of the requested person on the basis of the EAW shall be transmitted by the executing judicial authority at the time of surrender.

- A specific recommendation to this end should be made since very often this is not the case in practice. Also, even when surrender is refused in the end, such deduction needs to take place (and often it could affect the minimum threshold for the issuing of an EAW for the execution of a sentence, or the assessment of proportionality). The **ECBA has just published a statement on Mutual Recognition of Extradition Decisions**, https://ecba.org/extdocserv/publ/ECBA_STATEMENT_Mutualrecognitionextraditiondecisions_21June2022.pdf which points to this issue (see 3.4, 3.9 and 5.16). The statement will be launched on an on-line event on 13 July 2022, 15h00-15h45 CET (please watch out for the news and link on https://www.linkedin.com/company/european-criminal-bar-association). Therefore, there should be a recommendation to communicate the period of detention in the executing state irrespective of the outcome of the decision in the executing state (the handbook template to which it is referred does not include that request, but it could be integrated into "III - Comments"). In addition to this, the use of other means of deprivation of liberty, such as house arrest with electronic monitoring, equally needs to be indicated (for example, in Portugal this is deducted from the sentence – 1 day house arrest = 1 day sentence; in Spain, the court may deduct also the presentations before a judicial body, in a proportionate manner).

10- Annika Suominen, Norway, Associate Professor at Stockholm University

Introduction

I have been asked to contribute with some comments in relation to the Common Practical Guidelines – ImprovEAW, draft of April 2022. The proposed new guidelines are 22 pages and the final draft research report is a total of 420 pages. Suffice to say, it will not be possible to comment on all the different aspects of the guidelines, and certainly not on the whole research report. My comments will therefore constitute of firstly some general comments, focusing on some main parts of the guidelines and accompanying research report. These will be divided into general comments on issuing an EAW and general comments on executing an EAW. Secondly, some specific comments will thereafter be made, where focus will be on systematic deficiencies and the 'mutual recognition' of decisions refusing surrender, which can both be considered part of the protection of fundamental rights.

As an introductory point, it should be mentioned that the guidelines and the research report are welcome, and there is a demand for updated and functioning guidelines. The guidelines and the accompanying research report are comprehensive and well written, these are clearly based on research, including country reports, and these function as a good starting point for developing the EAW-system further.[69]

General comments on issuing an EAW

Proportionality test

[69] From a Nordic point of view, it would of course have been positive to include at least one of the Nordic Member States in the study, or perhaps have a look at the Nordic Arrest Warrant. This should however not be understood as criticism as such of the project.

My first comment relates to adding a proportionality test to issuing an EAW. This entails that when issuing an EAW, a different and additional test for proportionality is to be made. In addition, this proportionality test should come in addition to the (possible) national proportionality test. This is much welcome and relates to the fact that even when, in some situations, a national arrest warrant is proportionate, an EAW is perhaps not. As is well-known, some national authorities have been overusing the EAW, which in some situations has led to EAWs being issued for petty crimes where the effort to execute the EAW has been clearly disproportionate. That the seriousness of the offence in question as well as the length of the sentence to be executed (for execution-EAWs) is to be part of the proportionality test is a good starting point. The fact that also other instruments can be used in situations where issuing an EAW isn't necessary is promising and should be stressed in cooperation situations. The issue of proportionality should therefore be stressed when issuing an EAW.

Issues relating to filling out the EAW form

My second comment concerns the guidelines relating to how to best fill in the EAW-form when issuing an EAW. The recommendations are detailed,[70] and without going too much into detail here, the logic is that the more information in the correct format the EAW entails, the easier it is for the executing authority to assess the EAW correctly and to execute it within the timeframe. It seems fairly logical, but according to practice it has not always been as easy. It seems that cooperation and being as precise as possible should have an effect on the efficiency of the EAWs. Taking into account the first point, that an EAW should only be issued if it is proportionate, hopefully this correct filling in the form also will have a positive impact on the proportionality-test (and vice versa perhaps). Correctly filling out the EAW-form and including all relevant information should thus be focused on.

General comments on executing an EAW

[70] Guidelines pp. 3-7.

Requests for supplementary information

When it comes to requesting supplementary information, the guidelines are quite detailed when it comes to supplementary information pursuant to articles 15(2)-15(3) of the EAW. There is some case law from the ECJ relating to certain aspects of this,[71] and the main message again is being as clear and concise when requesting supplementary information. If the issuing MS knows what information the executing MS needs, it will be easier to provide it. Judicial authorities should be those primarily requesting supplementary information and the guidelines include a list of do's and don't's (p. 13) which are helpful in the practical application. There is also a section relating to answering to such requests, which hopefully should make cooperation in these matters smoother. The key again seems to be communication and clarity.

Specific comment relating to the systematic deficiencies

When it comes to systematic deficiencies and the possibility to refuse surrender, the *Aranyosi* test includes firstly two steps: an in abstracto step (systematic or generalised and structural deficiencies affecting a group of persons or specific facilities) and an in concreto step (substantial grounds proving that the requested person will be exposed to those detention conditions).[72] In relation to the issue of systematic deficiencies, the second test constitutes of a subtest, constituting firstly of that the executing judicial authority, in particular, '*must examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, (...) are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject'*. Here the focus is on whether the deficiencies can affect the relevant courts of the ad hoc case. Second, if the answer is affirmative, it must also '*assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he*

[71] ECJ cases C-241/15, para 65, C-271/17 PPU paras 101-103 and C-404/15 and C-659/15 PPU para 95 and C-216/18 PPU para 77.
[72] ECJ cases C-404/15 and C-659/15 PPU.

will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the [EAW]'.[73]

This means that the second part of the two-step test contains two subtests where the real risk of the individual running a risk of his fundamental rights to an independent tribunal being breached is assessed. There is a possibility to request supplementary information in order to establish the concrete risk in the actual case.[74] Requesting supplementary information does however not seem always and in all situations to be the best way to gathering information, especially in those situations where the independence of judiciary constitutes part of an on-going politicization of a certain Member State. In such a situation, the supplementary information would not necessarily be reliable. As stated in the research report, if 'the executing judicial authority cannot discount the existence of a real risk, it must 'refrain from giving effect' to the EAW.'[75]

This links additionally to Article 7 TEU and the possibility to a Member State being subjected by a reasoned proposal adopted by the Commission based on article 7(1) TEU. However, in such a case it is necessary for the Council to adopt a decision based on article 7(2) TEU and for the Council to suspend the EAW framework decision for that particular Member State, in order for other Member States to automatically refuse surrender. Only in such cases can the executing Member State automatically refuse surrender, and thus not make the two-step test.[76] Although understandable from a general EU law viewpoint, this raises the question whether this might be fairly late in a situation where systematic deficiencies are present and are of rather serious nature. For the individual involved, the issue is of utter importance, and the question whether the procedure according to article 7 TEU is too time-consuming and that an EAW could and should be refused at an earlier stage (in relation to article 7 TEU) is essential.

[73] ECJ case C-216/18 PPU paras 60-61 and 68-78, the quote and formulation is from the guidelines p. 20.
[74] ECJ cases C-562/21 PPU and C-563/21 PPU para 84. In the research report p. 254 it is commented that this is mandatory.
[75] Research report p. 245.
[76] Research report p. 245.

Especially from a Norwegian point of view, this question is very topical, due to the recently decided case of the Norwegian Supreme Court. This case concerned the surrender of a Norwegian national to Poland. The Polish authorities had issued an EAW for prosecution relating to the suspected importing of a significant amount of drugs from Poland. The Norwegian Supreme Court decided that the person concerned could be surrendered to Poland for prosecution.[77]

The Norwegian Supreme Court did however, when deciding on the surrender, make some specific statements relating to the state of the Polish judicial system. The Supreme Court firstly stated that the Polish judicial system is deeply flawed and based this on the current situation where the Polish courts are no longer independent of legislative and executive power. This creates, according to the Supreme Court, a general risk of endangering the fundamental rights of individuals concerned, and more specifically the fair trial rights.[78] This means that the first step of the test formulated by the ECJ was fulfilled.[79]

The Supreme Court continued by stating that this is not sufficient for refusing the executing of an EAW, but there must also be a real risk that the rights in the particular case must be violated. Considering the current situation in Poland, relatively little concrete evidence is required before the conditions for surrender are not met. However, in this actual case, the evidence was considered too weak. The fact that the defendant was charged in a serious drug case, together with his public criticism of Polish authorities during the hearing of his case in Norway, could not according to the Supreme Court be considered sufficient to refuse the surrender.[80] This means that the second step of the test formulated by the ECJ was not fulfilled.

[77] Case HR-2022-863-A of April 29, 2022, found at: https://lovdata.no/dokument/HRSTR/avgjorelse/hr-2022-863-a (last visited May 30, 2022). For an English summary, please see https://www.domstol.no/en/supremecourt/rulings/rulings-2022/supreme-court-criminal-cases/HR-2022-863-A/ (last visited May 30, 2022) and the order (kjennelse) in English here: https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2022-863-a.pdf (last visited May 30, 2022).
[78] Case HR-2022-863-A section 53.
[79] Case HR-2022-863-A section 54.
[80] Case HR-2022-863-A section 73.

Now taking into account what was stated above in relation to the two-step test, with the subtests included, this case shows that the possibilities for considering the second step to be fulfilled are very limited. This second step should perhaps be formulated, or applied, differently to a certain extent, so that the second step could be considered fulfilled in more cases. In view of the Polish system, where there are currently 'such systemic and generalised deficiencies in the Polish judicial system that there is a real risk of breach of the very core of the fundamental right to a fair trial in Article 6 (1) of the ECHR',[81] it is noteworthy that the second step was not considered fulfilled. The Supreme Court continues by stating that 'Norwegian courts must therefore refuse an arrest warrant for prosecution in Poland if there are substantial grounds for believing that, in case of surrender, there is a real risk of breach of this fundamental right'.[82] In the case, there was insufficient evidence that the individual's fundamental rights would be violated if he was surrendered.

One can ask what kind of evidence would be sufficient for the second step to be fulfilled. In this case the Supreme Court even acknowledges that there are serious doubts related to the guarantees of a fair trial before an independent court in Poland, even in common crime cases.[83] This can be understood that there are serious risks even in ordinary criminal cases. To then still surrender the person seems somewhat contradictory. It seems that the evidence needed is difficult to provide for beforehand. One can ask what kind of evidence would be sufficient for the second step to be fulfilled? If the evidence in this concrete case was not sufficient, even with the information available together with reports from the The Venice Commission (an advisory body of administrative issues under the Council of Europe), it is difficult to foresee what kind of evidence would be sufficient. This therefore leads us to ask whether the human rights protection in relation to the EAW are only illusionary, and not practically applicable.[84]

[81] Case HR-2022-863-A section 72.
[82] Case HR-2022-863-A section 72.
[83] Case HR-2022-863-A section 69.
[84] A (critical) comment on the Norwegian case can be found here (by Prof. Eirik Holmøyvik, in Norwegian): https://juridika.no/innsikt/er-polen-en-rettsstat-hoyesterett-sa-ja?fbclid=IwAR2YkJ1V9oLZcLtcCH6YY5cS1NUeqdpUs_loqVsApAz3rdT1gUj9kJOQWWo (last visited May 30, 2022).

Although one might understand that the Norwegian Supreme Court did not wish to take a political standpoint in one of the first cases before the Supreme Court relating to the EAW, it is nevertheless notable that the case law from other (Member) States indicates a similar approach. The second step is difficult to fulfil. Taking into account that the possibilities related to article 7 TEU are rather time-consuming and cumbersome and that gathering evidence for a real concrete risk for the surrender to endanger the fundamental rights is difficult, the question is whether there is a general danger that the fundamental rights are not respected fully in the EAW-system. This is of course in the ever-changing world and taking the changes in the political climate into account not desirable nor sufficient. From the aspect of mutual trust also, the protection of fundamental rights should be of utter importance for all involved actors.

The guidelines could perhaps have taken a more definitive lead in relation to this issue and taken a clearer stand for the human rights protection in the EAW-system.

Specific comment relating to the mutual recognition of decisions not to execute an EAW

Not perhaps specifically commented on in the recommendations or in the research report, the issue of what happens to the EAW when the execution of it is refused should however not be overlooked. Now in a situation where the execution of an EAW would be based on e.g., ne bis in idem or a similar, unionwide basis such as a human rights infringement (in an execution-EAW), the person subjected to the EAW can find himself in a situation where the EAW is still valid and it is in some situations not removed from the SIS II. In such a situation the EAW therefore keeps actualising, although the matter itself has already been resolved (and the EAW not executed). From the individual's point of view this is not optimal and could be considered rather cumbersome, also taking into account the free movement of persons. It could therefore be an idea to investigate further whether the decision to refuse the execution of an EAW could in fact itself be 'mutually recognised' within the EU. This could on the whole increase the efficiency of EAWs, as there would be no 'redundant' EAWs in the system.

Concluding remarks

Having updated guidelines for the EAW is very important and the proposed guidelines together with the research report are an important step towards having a more functional (and therefore also more efficient) EAW-system. The proposed recommendations are generally well motivated and these have their place in the future application of the EAW-system. One interesting observation is furthermore that there is quite a lot of case law from the ECJ that effects the EAW-system, and it is important that the national actors are up do date with the developments of this case law. The guidelines and the research report highlight this in a functioning manner. The aspect of continuous training for relevant national actors should therefore be kept in mind.

The two last issues commented on above relate to the individual's legal position, or perhaps more in general to the protection of fundamental rights. Although the scope of the guidelines and the research report is as such focused on the efficiency of the EAW-system, this aspect should not be overlooked. Looking at the whole picture, these aspects are as important as those relating to having a well-functioning and efficient EAW-system. In the best of situations, the EAW-system would be both these things, and at the same time safeguarding the fundamental rights.

11- **Gintaras Švedas, Lithuania, Professor at Vilnius University**

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