Table of Contents

Chapter 1. Introduction

1.1 The *ImprovEAW* project

With the introduction of FD 2002/584/JHA on the European arrest warrant (EAW)[1] as the tool for surrendering accused and convicted persons, the EU took a revolutionary step. It led to much speedier procedures and more safeguards for the individuals concerned and contributed to closing the gap of impunity. However, EAW practice also brings to light new problems and hick-ups that demand to be dealt with. It is on these problems and hick-ups that the research project *Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines* (*ImprovEAW*) project focuses its attention.

This project concerns the application of FD 2002/584/JHA in seven Member States (Belgium, Greece, Hungary, Ireland, the Netherlands, Poland and Romania) and it is a follow up of an earlier project that led to the publication of *The European Arrest Warrant and In Absentia Judgments*, Maastricht Law Series No. 12.[2] In that publication the focus was on EAW-practice with regard to *in absentia* judgments only. In comparison with the previous project the current project is broader in the sense that it looks at various other aspects of the EAW surrender procedure that are problematic in practice. It also goes more into detail as it aims to present an alternative to the European Commission's outdated *Handbook on how to issue and execute a European arrest warrant*.[3] Apart from the present research report, the research project resulted in, *inter alia*, Common Practical Guidelines on issuing and executing EAWs.

FD 2002/584/JHA aims at simplifying and accelerating judicial cooperation in criminal matters, by replacing extradition between the Member States on the basis of a request by surrender between judicial authorities on the basis of an EAW. Compared with the previous extradition regime, the EAW has to a large extent achieved these objectives.

[1] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (*OJ* 2002, L 190, p. 1).
[2] Also accessible at https://www.inabsentieaw.eu.
[3] *OJ* 2017, C 335, p. 1.

One of the means of achieving FD 2002/584/JHA's objectives, is the mandatory use of the EAW-form contained in the annex to that framework decision. The issuing judicial authority must use the form to convey information about the request for surrender to the executing judicial authority. Art. 8(1) of FD 2002/584/JHA determines what information the EAW must contain, *i.e.* the 'minimum official information required to enable the executing judicial authorities to give effect to the European arrest warrant swiftly by adopting their decision on the surrender as a matter of urgency'.[4] According to the Court of Justice, Art. 15(2) of FD 2002/584/JHA, which provides for requesting supplementary information from the issuing judicial authority, may only be applied 'as a last resort in exceptional cases in which the executing judicial authority considers that it does not have the official evidence necessary to adopt a decision on surrender as a matter of urgency'.[5]

That is the theory. However, in practice an EAW does not always contain the necessary information or is perceived to be lacking the necessary information. From the perspective of the executing judicial authority, the EAW does not always contain the 'minimum official information' necessary to validly decide on its execution, triggering a request for supplementary information on the basis of Art. 15(2) of FD 2002/584/JHA. From the perspective of the issuing judicial authority, a request for supplementary information does not always seem relevant to the issue.

Lack of clarity about what kind of information is needed for issuing and executing EAWs certainly is problematic.

After all, requesting supplementary information on the basis of Art. 15(2) FD 2002/584/JHA:

- leads to delays and extra costs in the issuing and executing Member States;

- can result in non-compliance of the 60 and 90 days' time limits;

[4] ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, para. 59.
[5] ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, para. 59.

- can result in a decision to refrain from giving effect to the EAW, if the request is not honoured (completely) or not honoured within the fixed time limit, and thus result in impunity of the person concerned.

At the same time not requesting necessary supplementary information and not receiving this information can result in unjustified surrender or refusal of surrender.

If the defect giving rise to a request for supplementary information is merely perceived to be a defect, then the decision to refrain from giving effect to the EAW on that account is incorrect in hindsight. In such a case, the resulting impunity of the person concerned is all the more undesirable.

Clearly, such consequences can have a negative impact on the objectives of simplifying and accelerating judicial cooperation.

Moreover, such consequences can have a negative effect on the high level of mutual trust that should exist between the (judicial authorities of the) Member States. From the executing perspective, having to request supplementary information because the EAW does not contain all the information which is required does not inspire confidence in the issuing judicial authority's ability to complete the EAW-form correctly. From the issuing perspective, by issuing the EAW the issuing judicial authority signals that the EAW contains all the information needed for the decision on the execution of the EAW; in such circumstances, a request for supplementary information affects the confidence in the executing judicial authority's ability to decide on the execution of the EAW in accordance with FD 2002/584/JHA. FD 2002/584/JHA can only fully achieve its objectives, when both the issuing and the executing judicial authorities have sufficient confidence in each other.

The problems identified here may be caused by:

- differences concerning the implementation;[6]

[6] In this report, the word 'implementation' either means transposition of Union law into national law or application of national law that transposes Union law. The context in which the word is used will make it clear in what meaning it is used.

- differences concerning the application of the implementing legislation by issuing and executing judicial authorities of the Member States;

- differences concerning the legal systems of the issuing and executing judicial authorities. If the issuing Member State has a legal system based on civil law and the executing Member State a legal system based on common law, it is not unreasonable to presuppose that the latter Member State will have need of more information just to make sense of an EAW emanating from a wholly unfamiliar legal system.

- incorrect implementation by the Member States and/or incorrect application by issuing and executing judicial authorities of the Member States;

Such causes, in turn, may affect:

- which information is supplied by the issuing judicial authority and/or which information is requested by the executing authority;

- the way in which the issuing judicial authority interprets a request for information by the executing judicial authority and

- the way in which the executing judicial authority interprets the information provided by the issuing judicial authority.

The *ImprovEAW* project intends to identify the causes of the (perceived) need for supplementary information, to prevent, as far as possible, that (perceived) need from arising and to fill, as far as possible, that (perceived) need, once arisen.

1.2 Genesis of the report

Experts from seven Member States (Belgium, Greece, Hungary, Ireland, the Netherlands, Poland and Romania) participated in the project. For the most part, the experts are

practitioners which deal with EAWs almost on a daily basis. Some of the participants are also legal scholars. The experts participating in the research project are:

- Mr. László Angyal-Szűrös, judge of the Central District Court of Pest (Hungary);
- Mr John Edwards, justice of the Court of Appeal of Ireland and Adjunct Professor of Law at the University of Limerick (Ireland);
- Mr Jan Van Gaever, Advocate General at the Court of Appeal of Brussels (Belgium);
- Prof. Vincent Glerum, senior legal advisor at the District Court of Amsterdam and professor of International and European Criminal Law at the University of Groningen (the Netherlands);
- Mr Hans Kijlstra, judge of the District Court of Amsterdam (the Netherlands);
- Prof. André Klip, professor of Criminal Law, Criminal Procedure and the Transnational Aspects of Criminal Law at Maastricht University and judge of the Court of Appeal of 's-Hertogenbosch (the Netherlands);
- Dr Christina Peristeridou, assistant professor of criminal law at Maastricht University (Greece);
- Dr Mariana Radu, Ministry of Justice, Central Authority for EAWs (Romania);
- Prof. Małgorzata Wąsek-Wiaderek, professor of Criminal Procedure at the John Paul II Catholic University of Lublin and judge of the Supreme Court (Poland); in conducting the research she cooperated with Dr Adrian Zbiciak, assistant at the John Paul II Catholic University of Lublin and judge of the District Court in Chełm.

The research project was led by a Management Team, consisting of Ms Renata da Silva Athayde Barbosa (Maastricht University, project manager), Prof. Vincent Glerum (District Court of Amsterdam and University of Groningen, principal researcher), Prof. André Klip (Maastricht University, project leader) Dr Christina Peristeridou (Maastricht University, researcher) and Mr. Hans Kijlstra (District Court of Amsterdam, advisor).

On the basis of a questionnaire, the experts reported on the practical application of the EAW in their respective Member States. The questionnaire is intended as a tool to:

- identify any practical problems issuing judicial authorities and executing judicial authorities may experience when deciding on the issuing or on the execution of EAWs, and

- identify the roots of these problems.

The questionnaire consists of five parts: (1) preliminary matters, (2) transposition of FD 2002/584/JHA, (3) problems regarding the individual sections of the EAW-form, (4) problems not directly related to the EAW-form and (5) conclusions, opinions *et cetera*.

Part 1 concerns the personal details of the expert who completed the questionnaire, his or her capacity and his or her years of experience in dealing with EAW cases. Part 2 addresses various aspects of transposition of FD 2002/584/JHA by the Member States involved in the project. The questions of Part 2 aim to establish how the Member States have transposed the relevant provisions and whether they have transposed them correctly. Part 3 runs through all of the individual sections of the EAW-form in order to establish whether they pose any problems when issuing or executing an EAW. Part 4 addresses possible problems not directly related to the EAW-form (supplementary information; time limits; the guarantee of return; detention conditions/deficiencies in the system of justice; the EPPO; surrender to and from Iceland, Norway and the United Kingdom; (analogous) application of the *Petruhhin*-judgment; the speciality rule). Part 5 invites the expert to state his or her opinion on the adequacy of, *inter alia*, the existing legal and organisational framework and the Handbook.

Both the questionnaire and the country reports are available on the website of the *ImprovEAW* project.[7] The manuscripts of the country reports were closed on 1 November 2021. The country reports for Greece, the Netherlands and Poland were published separately as Maastricht Law Series No. 23 (*European Arrest Warrant: Practice in Greece, the Netherlands and Poland*).

This report is based on the country reports produced by the experts participating in the project. However, the analyses, conclusions and recommendations contained in the report are the work of the five authors. The authors would like to thank the experts for all their hard work in preparing the country reports and in discussing the report with the authors.

[7] https://improveaw.eu/our-publications.

The manuscript of the report was closed on 1 March 2022.[8]

The report, including the recommendations to the European Union, the Member States and their judicial authorities, and the Common Practical Guidelines for issuing an executing EAWs, were submitted to a Sounding Board, composed of academics and practitioners from nine Member States not represented in the project and from one third State. The members of the Sounding Board are:

1- Tuuli Eerolainen, Finland, State Prosecutor at the Office of the State Prosecutor;
2- Jorge Espina, Spain, Deputy National Member for Spain at Eurojust;
3- Jan Ginter, Estonia, Professor at the University of Tartu;
4- Juliette Lelieur, France, Professor at the University of Strasbourg;
5- Monique Lundh, Denmark, PhD Candidate at Maastricht University;
6- Teresa Magno, Italy, Italian Desk at Eurojust;
7- Anna Ondrejová, Slovakia, General Prosecutor's Office of the Slovak Republic;
8- Aneta Petrova, Bulgaria, Federal University for Applied Administrative Sciences;
9- Vânia Costa Ramos, Portugal, Lawyer;
10- Annika Suominen, Norway, Associate Professor at Stockholm University;[9]
11- Gintaras Švedas, Lithuania, Professor at Vilnius University.

The Sounding Board members commented on the relevance of the recommendations and, in particular, on the usability of the Common Practical Guidelines. In finalising the report, the recommendations and the Common Practical Guidelines their comments were taken into account. The authors would like to extend their thanks to the members of the Sounding Board for their incisive and useful comments.

1.3 Brief outline of the report

Chapters 2-5 follow the structure of the Parts 2-5 of the questionnaire. Chapter 2 is dedicated to issues concerning the transposition of FD 2002/584/JHA by the Member States represented

[8] However, occasionally, the report will refer to an opinion of an advocate general of the Court of Justice of the European Union that was rendered after that date.
[9] Although Dr Suominen teaches at a Swedish university, she acts as Sounding Board member for Norway.

in the project. Chapter 3 discusses each of the individual sections of the EAW-form. Chapter 4 addresses issues not directly related to the EAW-form. Chapter 5 presents a synthesis of the experts' opinion on four subjects: the need to amend the existing legal and organisational framework; issuing and providing supplementary information and its impact on mutual trust; the adequacy and usability of the Handbook; and the consequences of the COVID pandemic.

Because Chapters 2-5 are based on the structure of the questionnaire, it is inevitable that some topics are dealt with in more than one chapter, albeit under different angles. Chapter 2, *e.g.*, deals with the topic of the dual level of protection and the requirement of effective judicial protection from a general angle: how do the Member States guarantee a dual level of protection. The same topic is dealt with in Chapter 3 from the angle of the requirements of the EAW form: which information should the issuing judicial authority mention in the EAW form. Recommendations are put forward and explained in the chapter that relates to their subject matter, even though the grounds on which a recommendation is based might also be dealt with in another chapter. Of course, for the reader's ease the explanation of those recommendations will also refer to the relevant sections of other chapters. Chapter 3, *e.g.*, contains all recommendations concerning the EAW form, but some of those recommendations are partly based on the findings in Chapter 4 concerning requests for supplementary information; the explanation of those recommendations also refers to that chapter.

The character of Chapter 6 differs from the preceding chapters. Whereas those chapters, taking the existing legal framework and its application in practice as their basis, formulate short term and intermediate recommendations to amend that framework in parts and to adopt best practices, chapter 6 takes a more long term approach. Extending various strands that emerge from Chapters 2-5 and tying them together, that chapter describes a vision of mutual recognition 2.0.

Chapter 2 Transposition and implementation of the Framework Decision

2.1 Introduction

This second chapter deals with issues related to the implementation of Framework Decision 2002/584 into the national legal order. In terms of the questionnaire that was answered by the country experts it deals with Questions 2-13. This means that the Chapter focuses on whether and if so how the Member State has implemented the Framework Decision correctly. It further looks at the requirements concerning the issuing judicial authority, as well as the criteria the issuing judicial authority may apply when taking the decision to issue an EAW. Will alternatives be taken into account? What role does the requested person himself play in taking the best decision for this particular case?

The position of the issuing and executing judicial authorities is analysed in light of the most recent case law of the Court of Justice. Special attention is given to the character of grounds for refusal (mandatory or optional) and whether Member States have implemented these correctly and apply those without any discrimination. At the end this Chapter also points ahead to the last Chapter in which an attempt is made to fill in the concept of dual level of protection in a more hands-on-manner. What conditions need to be in place to give the requested person a real protection as required under EU law? Where necessary, recommendations have been drafted that aim to contribute to reducing or solving the problems that were identified in the practice of the Member States involved.

All Member States transposed the Framework Decision into their national law. However, Greece transposed Art. 4a of FD 2002/584/JHA eight years late. Ireland initially gave the FD direct effect, which was later reversed.[10] Ireland and Belgium stand out as these countries apply the national legislation for surrender on the basis of the EAW also to the surrender with third states with which the EU has a special agreement: Norway and Iceland, as well as the United Kingdom.

[10] This might have looked rather EU-friendly initially but led to a situation in which two norms were equally applicable to a particular matter, see further IE, report, question 2 b).

An uncertainty as to whether Article 8(1)(f) of the Framework Decision was accurately transposed into Irish legislation by section 11(1A) of the Act of 2003 was resolved by the Court of Appeal. It held that it was required, if possible, to give s.11(1A)(g)(iii) of the Act of 2003 a conforming interpretation that aligned with the provision it was intended to transpose.[11]

In the Netherlands, Art. 2(2) of the Law on Surrender uses the term 'uitvaardigende justitiële autoriteit' instead of the term 'uitvaardigende rechterlijke autoriteit' (Art. 8(1) of the Dutch language version of FD 2002/584/JHA). However, in substance, Dutch law complies with the Framework Decision on this point.[12]

There is also a slight difference when it comes to terminology in Greece. The term τελεσίδικη/telesidiki judgment is used in the Greek version of Article 8(1) of the FD. These are judgments against which there is no remedy anymore on the merits but there is still the possibility to appeal to the Supreme Court on points of law. However, in the national law the term used is that of an αμετάκλητη/ametakliti judgment: these are judgments against which there is no remedy at all (law or merits), thus judgments of the Supreme Court or judgments for which all deadlines for remedies have lapsed. In addition, in the Greek EAW form there are two additional fields requesting the first names of the father and mother of the requested person under a) of the form.[13] The background of this is that (also in the context of the EAW) Greece is confronted with many refugees who have combinations of very common and interchangeable names. Whilst there might be reasons for requesting further details concerning the identity of the requested person in relation to very common names, this does not justify requiring information on the father and mother of all requested persons for all EAWs send to Greece. A general requirement of this size will hold up all cases. It is advisable to ask for these further details only where the circumstances of the case demand so.

[11] IE, report, question 2 a).
[12] NL, report, question 2.
[13] EL, report, question 2.

All Member States apply the EAW-form. Some have not transposed it into the body of the national law, but as an annex to the national act.[14] For Poland, it is reported that while in substance the EAW-form of the Annex to the FD was implemented correctly into the Ordinance, some wording was changed, as well as the order. The result was that EAWs produced the relevant information sometimes in Section F and not in Section E.2.[15] All Member States report that their national law obliges the issuing judicial authorities of their Member State to use the EAW-form as amended by FD 2009/299/JHA. However, Greece only does do so since 2019 after the form has been amended when it implemented FD 2009/299.

Hungary, Poland and Romania report no debates on whether the transposition of the EAW form was correct.

2.2 Infringement procedures

Several experts reported that infringement procedures have been started against their Member State (Netherlands, Greece, Poland, Belgium and Ireland).[16] No procedures were launched against Hungary and Romania yet. In relation to Greece it concerns the grounds of refusal, as well as the fact the Greek practice refuses to execute EAWs for offences that are infractions under Greek law (less than misdemeanours).[17] For the Netherlands it is expected that the infringement procedures may relate to adding an additional ground for mandatory refusal: refusing surrender on account of 'proven innocence' of the requested person.

In the case of Poland, the Commission alleges failure to implement the Framework Decision properly, "for example by treating their nationals favourably in comparison to EU citizens from other Member States or providing additional grounds for refusal of warrants not provided for in the Framework Decision".[18]

[14] For instance Belgium, see BE, report, question 2.
[15] PL, report, question 2.
[16] Ireland received a Formal Notice from the Commission to comply with EAW mandatory time limits.
[17] EL, report, question 4 and 18.
[18] PL, report, question 2bis.

The Commission has various objections against the Belgian legislation.[19] Among other issues, the Commission holds that Belgium:

- did not transpose or did not transpose correctly Article 28(3) as executing State;
- may not perform a check on double criminality when a listed offence is ticked (this applies to the pending cases regarding the Catalan ex-ministers, see Case C-158/21);
- did not transpose correctly the grounds for refusal: Article 4(1), (3) and (4).

2.3 Grounds for refusal and guarantees

Grounds for refusal are the exception to the general obligation of recognition on the basis of mutual recognition. The Court has signaled that Member States should interpret grounds for refusal restrictively and exhaustively.[20] One could even say that the grounds for refusal are a closed list. *Framework Decision 2002/584 on the European Arrest Warrant* formulates three grounds for the mandatory non-execution of the warrant (Article 3). Apart from these grounds for mandatory refusal, the Framework Decision provides grounds for optional refusal.[21] This means that the Member States should, when transposing these grounds into national law, confer on the executing judicial authority some discretion whether to apply the ground or not.[22] Article 4 provides grounds for optional non-execution.

Four Member States (Poland, Romania, Belgium and Greece) have implemented all refusal grounds in one way or another.

2.3.1 Mandatory grounds

All Member States transposed the **mandatory grounds** of Article 3.[23] Except for the Netherlands, that did not implement Article 3(1) as amnesties are not provided under Dutch law.[24] As this ground for refusal in the Framework Decision refers to national law that does not provide it, there does not seem to be a reason to transpose it.

[19] See BE, report, question 2.
[20] ECJ, judgment of 26 February 2013, *Melloni*, Case C-399/11, ECLI:EU:C:2013:107, para. 44 and 46.
[21] We shall use terms ‘ground for mandatory/optional refusal’ and ‘mandatory/optional ground for refusal’ interchangeably.
[22] ECJ, judgment of 29 June 2017, *Popławski*, Case C-579/15, ECLI:EU:C:2017:503, paras. 20–21.
[23] And they transposed these grounds as grounds for mandatory refusal.
[24] NL, report, question 3.

2.3.2 Optional grounds

Ireland initially implemented the first clause of Article 4(3), which relates to refusing the EAW because a decision had been made not to prosecute the offence. It later reversed this implementation.[25]

Ireland did not implement 4(4), which relates to statute-barred offences.

Ireland did not implement 4(6), which allows to refuse surrender of nationals, residents and persons staying in the country for the purpose of enforcing a custodial sentence. Hungary implemented 4(6) for Hungarian nationals who are resident in Hungary only. For the application of 4(6), Polish law distinguishes between Polish nationals and persons granted asylum on the one hand and other residents on the other. Mandatory refusal is provided in a case of lack of consent concerning the former group.

Ireland did not implement 4(7)(a).

Hungary did not implement 4(7)(b).

Ireland and Hungary decided not to transpose several optional grounds for refusal. Does this comply with their obligations under Union law? The idea behind the surrender proceedings on the basis of the EAW is that surrender takes place as widely as possible and grounds for refusal are applied with restraint. In that context, not providing for certain grounds for refusal increases the chance that the EAW will be executed and thus facilitates mutual recognition. On the basis of that evaluation, not providing for certain grounds for optional refusal may not be regarded as a violation of Union law. The case law of the Court of Justice endorses this conclusion: it refers to the grounds for refusal in Article 4 as 'the options afforded' a national legislature.[26] This is however different in a situation in which a prohibited distinction is made

[25] Initially Ireland's 2003 Act provided for refusal on this ground. However, in 2005 this was amended so that Irish legislation no longer provides that a decision not to prosecute the respondent in Ireland can be a ground for refusal. See IE, report, question 3.
[26] ECJ, judgment 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, para. 58.

in the sphere of application of the ground. This is the case for the Hungarian implementation of Article 4(6), which applies to Hungarian nationals who are resident in Hungary only. This rules out Hungarian residents with other Member States' nationality and forms a discrimination based on nationality. Poland makes a distinction based on nationality as lack of consent for nationals leads mandatory to refusal, whereas refusal is optional for residents. Recommendation **2.4** invites both states to repeal these distinctions.

2.3.3 Guarantees

Several Member States (Belgium, the Netherlands, Ireland and Hungary) did not transpose the guarantee provided in Article 5(2) that allows Member States to make surrender conditional on the guarantee that in cases of life sentences there is a possibility for review at least after 20 years imprisonment. However, as an issuing Member State, the Netherlands may give the guarantee as meant in Article 5(2).

Ireland did not implement 5(3).

The absence of the possibility to ask for any of the guarantees of Article 5 for some Member States cannot be regarded as a violation of their obligations under Union law, as this takes away potential impediments to further cooperation and mutual recognition. Again, the case law of the Court of Justice confirms this conclusion. It referred to Art. 5(3) of FD 2002/584/JHA as making it 'possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State'.[27]

2.3.4 Incorrect transposition of optional grounds to mandatory ones and vice versa

Romania is the only Member State that never changed any of the optional grounds for refusal to mandatory ones. Initially, The Netherlands had implemented all grounds for refusal as mandatory. There is no documentation stating reasons to do so available to the experts. After a change of legislation in 2021 most grounds for optional refusal of the Framework Decision

[27] ECJ, judgment of 21 October 2010, *I.B.*, C-306/09, ECLI:EU:C:2010:626, para. 51.

are now also optional under Dutch law. The ground for refusal concerning double criminality, which is still a ground for mandatory refusal, has been given a conforming interpretation by the executing judicial authority. The Ministry of Justice and Security is preparing legislation which will turn that ground for refusal into an optional one as well.

Several Member States have transposed optional grounds as mandatory grounds and continue to maintain these. Also the guarantee of return was transposed by some Member States as a ground for mandatory refusal. This concerns the following optional grounds/ guarantees of Article 4, 4a and 5:

4(1) double criminality requirement (Belgium, Hungary, Greece, the Netherlands);[28]
4(2) ongoing prosecution in the executing Member State (Greece);[29]
4(3) decision not to prosecute the case (Ireland, Hungary);
4(4) statute-barred prosecution (Greece, Belgium);[30]
4(5) final judgment (Belgium, Ireland, Poland);
4(6) refusal of the execution of an EAW and execution of the sentence at the same time (Hungary and Greece apply this to nationals. Poland when there is a lack of consent);[31]
4(7) territorial jurisdiction of the executing Member State (Ireland and Greece);[32]
4a *in absentia* (Hungary, Ireland);
5(3) condition of return to sender (Hungary and Greece apply this for nationals only).[33]

Most Member States simply implemented the grounds as mandatory grounds without discussing the matter at all.[34] It seems as if this was self-evident. Only in Greece the *travaux préparatoires* gave reasons to do so. The choices made were motivated by the desire to

[28] Note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this ground has been made optional.
[29] Note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this ground has been made optional.
[30] Note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this ground has been made optional.
[31] Note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this ground has been made optional.
[32] Note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this ground has been made optional.
[33] Note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this ground has been made optional.
[34] HU, report, question 4; PL, report, question 4; BE, report, question 4; NL, report, question 4.

maintain national sovereignty, *i.e.* to minimize the surrender of Greek nationals.[35] This sovereignty aspect can also be found in the mandatory character of the grounds for refusal relating to double criminality, jurisdiction and statute of limitations. There was quite some reluctance towards mutual recognition on the side of the Greek legislator. However, it is also reported that practice was more positive towards mutual recognition.

In Ireland most of the optional grounds enumerated in the Framework Decision are incorporated as mandatory provisions which prohibit surrender in the Irish legislation. The fact that they were implemented as mandatory was not debated. Much of the parliamentary debate at the time related to the surrender of nationals, trials *in absentia* and curtailment of dual criminality requirements for offences listed in Article 2(2) of the Framework Decision, which represented a departure from the law and practice of the Irish State at the time.[36]

Recommendation **2.1** calls upon the five Member States that maintain optional grounds as mandatory to change that. Recommendation **2.4** invites Greece, Poland and Hungary to end favourable treatment for nationals when applying grounds for refusal.

Greek literature acknowledges that transposing optional grounds as mandatory is incorrect. One of the consequences of having so many mandatory grounds for refusal is that the Greek courts as executing judicial authority must address each of these individually in their decision.[37] In addition, the distinction made between Greek nationals and residents for the purposes of Articles 4 (6) and 5 (3) is incorrect. Double criminality has also been transposed as a mandatory ground to apply concerning all non-listed offences. In practice, there are also cases of listed offences in which double criminality is checked. Many refusals take place on the ground that the offence has been partly committed in Greece. As this ground is also mandatory, it must be applied, even when Greece has neither evidence nor interest to do so.[38] The defence has discovered invoking potential remote claims for jurisdiction as this effectively leads to impunity. In addition, the executing judicial authority in Greece will check whether the statute of limitations according to the law of the issuing Member State

[35] EL, report, question 4.
[36] See further IE, report, question 4.
[37] Due to the 'formalistic style of the Greek legal system': EL, report, question 6 a).
[38] See examples EL, report, question 6 a). Note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this ground has been made optional.

applies. This can only lead to serious delays, as it may be difficult for the Greek authorities to assess this. Apparently, the Greek authorities do not read in the fact that an EAW has been issued a presumption that the statute of limitations in the issuing Member State cannot possibly stand in the way of an arrest warrant.

Under Polish law the situation of Polish citizens and persons granted the right of asylum on the one hand and residents and persons permanently staying in Poland on the other hand is treated differently for the purposes of Article 4(6).[39] The first group, *i.e.*, Polish citizens,[40] and persons granted the right to asylum, shall not be surrendered unless they consent to surrender. With reference to residents and persons staying permanently in Poland, the executing judicial authority may refuse to execute the EAW. Concerning Article 4(7b) it is reported that this ground is not reflected *expressis verbis* in the Polish CCP. However, in such cases execution of the EAW could be refused relying on lack of double criminality.

The situation for the Netherlands is quite complex. Initially, the country did not correctly transpose the following grounds for refusal in Art. 7(1) of the Law on Surrender:
a. the ground for refusal concerning double incrimination of non-listed offences (Article 4(1) of FD 2002/584/JHA) was a ground for mandatory refusal and, therefore, did not confer a "margin of discretion as to whether or not it is appropriate to refuse to execute the EAW" on the executing judicial authority.
b. an execution-EAW concerning a non-listed offence had to meet two conditions cumulatively (the sentence imposed had to be for at least four months and the non-listed offence for which the sentence was imposed had to carry a maximum penalty of at least twelve months in the issuing Member State), whereas Art. 2(1) of FD 2002/584/JHA clearly sets alternative conditions for prosecution- and execution-EAWs.
c. both execution- and prosecution-EAWs had to meet the conditions that the non-listed offence is an offence under Dutch law and that this offence carries a penalty under Dutch law of at least twelve months, whereas Art. 2(4) in combination with Art. 4(1) of FD 2002/584/JHA only allows for the first of those two conditions.

[39] PL, report, question 3.
[40] Concerning Polish citizens additional prerequisites of surrender must be fulfilled: double criminality in every case and extraterritoriality. See PL, report, question 6 a).

In this situation, the District Court of Amsterdam gave a conforming interpretation to Art. 7(1) of the Law on Surrender, which remedied the defects identified under b and c.

The bill for transposing FD 2002/584/JHA anew, which was passed by Parliament and entered into force on 1 April 2021,[41] deleted the condition that the non-listed offence carries a penalty under Dutch law of at least twelve months, but left the other two defects (i.e. a and b) as they were. However, the District Court of Amsterdam interprets the new provision in conformity with FD 2002/584/JHA: the ground for refusal is optional and the condition concerning the maximum sentence in the issuing Member State and the condition concerning the duration of the sentence imposed are alternatives.

With effect of new legislation applicable since 1 April 2021 the Netherlands have turned some grounds for mandatory refusal as meant in Article 3(2) into optional by accident. This concerns prosecutorial decisions such as a penal order (strafbeschikking) and a decision to discontinue proceedings.[42] The Netherlands ought to make the ground for refusal of Article 3(2) mandatory again. Recommendation **2.5** is drafted with that purpose.

The report for the Netherlands refers to the inconsistency that the legislator in 2021 made a decision on Article 4(6) optional, but kept Article 5(3)[43] without a margin of discretion for the court making the decision.[44] As both paragraphs cover the same needs and rationales, it would have been more logical to apply the same standards for the refusal of surrender by taking over the execution, as for the guarantee of the requested person to be send back for execution. Since 1 April 2021 the executing judicial authority applies the transposition of Article 5(3) as if it had an optional character.

2.3.5 Additional grounds for refusal

[41] NL, report, question 6 a).
[42] NL, report, question 6 a)..
[43] In the Netherlands an unfortunate practice existed in cases in which Article 5(3) was applied. If the surrender of a Dutch national or resident was sought for the purposes of prosecuting him for a listed offence, the executing judicial authority would nevertheless examine whether that listed offence constituted an offence under Dutch law. This practice came to an end only in June 2021. See extensively NL, report, question 6 a).
[44] NL, report, question 6a).

Three Member States reported that no additional grounds were added: Belgium, Hungary and Romania. Ireland added a ground for refusal that an EAW will be refused if it is for mere investigation. A decision must have been taken to both charge and try a person sought for surrender, otherwise Ireland will refuse. One may question whether this is a ground for refusal or whether this could also be regarded as reiterating a requirement that defines the scope of application of the Framework Decision. Article 1(1) defines the scope to arrest and surrender "for the purposes of conducting a criminal prosecution". This does not immediately indicate that the person has to be charged already, but allows for some investigatory activities preceding that. Assistance that can be given under the European Investigation Order must be requested on that basis. What no longer can be done under that less infringing legal instrument and for which the presence of the suspect is necessary may qualify for an EAW. However, the Irish exemption seems to be not in line with the Framework Decision.

Greece added an additional ground for refusal that intends to protect a requested person against a discriminatory prosecution based on grounds of gender, race, ethnicity, religion, origin, nationality, language, political believes, or sexual orientation or for their action for freedom. However, not a single case of refusal on this ground has been reported.

This is certainly not the case for the "innocence exception" provided under Dutch law. If the executing judicial authority in the Netherlands finds that the requested person cannot be guilty of the offences for which surrender is sought – *i.e.* that it is impossible that he committed those offences –, pursuant to Art. 28(2) of the Law on Surrender the executing judicial authority must refuse to execute the EAW. This is an unacceptable assessment of the facts, which is a prerogative of the issuing authorities. Therefore, in 2021 the executing judicial authority gave a conforming interpretation to the provision mentioned that effectively excludes a refusal on that basis. Recommendation **2.6** urges the Member State nevertheless to repeal the legal provision in the Law on Surrender.

Poland added no less than four grounds for refusal. The first three were introduced due to constitutional requirements.

1. Pursuant to Article 607p § 1 (5) of the CCP the execution of the EAW shall be denied if "it would violate human and citizens' rights".

2. Pursuant to Article 607p § 1 (6) of the CCP the execution of the EAW shall be denied if the EAW was issued in connection with a political offence committed without the use of violence.
3. Pursuant to Article 607p § 2 of the CCP,[45] in case of the EAW concerning a Polish citizen and issued for the purpose of prosecution, surrender may take place if the offence was committed outside the territory of Poland, whilst the condition of double criminality is fulfilled.
4. Article 607p § 1 (4) of the CCP provides that the execution of the EAW will be denied if a final and binding decision on surrender to a different Member State of the EU was issued against a requested person.

The human rights clause under Polish law may find its justification in the two-step test. The reintroduction of the political offence (under 2) must be regarded as contrary to the closed list of grounds for refusal. The application of ground 3 to Polish nationals only violates the discrimination prohibition. Concerning the double criminality aspect of this ground for refusal see section 3.6.1.6. Recommendation **2.6** asks Poland to repeal the political offence of Article 607p § 1 (6). Recommendation **2.6** also asks Poland to delete Article 607p § 2 of the CCP, or apply it all persons without discrimination (between nationals and residents).

2.3.6 Distinction based on nationality

This issue came to the fore already when dealing with the mandatory and optional grounds. For three Member States: Belgium, the Netherlands and Romania, it is clear that no distinctions are made (anymore). Ireland did not transpose Article 4(6). For the other three, Poland, Hungary and Greece, some distinctions are made of which it was established that these amount to a prohibited discrimination on the basis of nationality. The reader is referred to section 2.3.4.

Belgian law has been adapted following the *Kozłowski*, *Wolzenburg* and *Lopes Da Silva Jorge* rulings of the Court of Justice on the terms “resident” and “staying in” as autonomous

[45] The wording of Article 607p § 2 of the CCP directly reflects the text of Article 55 of the Constitution. See further PL, report, question 6 a).

concepts of EU law. Originally, the Netherlands made a distinction. However, with effect of 1 April 2021 this is no longer the case. To come within the ambit of the ground for refusal a foreign national now must meet only two conditions: (1) that he shows having lawfully resided for a continuous period of five years in the Netherlands and (2) that he "can be expected not to forfeit his right of residence in the Netherlands as a result of any sentence or measure which may be imposed on him after surrender" (Art. 6a(9) of the Law on Surrender). There is no requirement anymore that the Netherlands has jurisdiction over the offence.

2.4 Human rights concerns and detention conditions: the two-step test

In the *Minister for Justice and Equality (Deficiencies in the system of justice)* case the Court instructs the executing authority on how to make an assessment of whether there is a real risk of a violation of Art. 4 and of Art. 47 of the Charter.[46] It must as a first step assess the existence of a risk connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. In the second step, it must assess whether this risk materialises for the requested person: does he personally run the risk?[47] A similar two-step test has to be applied in case of concerns with regard to detention conditions in the issuing state.

All Member States report that there is no legal provision for a two-step test. Despite this, Member States report cases of application or facilitation of the two-step test in practice. In doing so, they often refer to a national legal provision relating to human rights protection that allows the executing judicial authority to perform a test. This is the case for the Netherlands, that refers to Art. 11 of the Law on Surrender that may be used as a basis to refrain from executing the EAW if there is a real risk of a violation of the Charter of Fundamental Rights of the EU. Ireland refers to S 37 of the Irish act that allows for refusal for reasons relating to

[46] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, Case C-216/18 PPU, ECLI:EU:C:2018:586. This judgment further elaborated in ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

[47] See ECJ, judgment of 22 February 2022, *Openbaar Ministerie (Right to a tribunal previously established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100. The Amsterdam District Court referred the matter because it stated to be unable to know in advance whether the requested person's case will be judged by judges whose nomination does or does not guarantee their independence. A similar reference was made by the Irish Supreme Court on 3 August 2021, ECJ, Reference for a preliminary ruling, *W O, J L v Minister for Justice and Equality*, Case C-480/21.

human rights violations.[48] Poland points at Article 607p § 1 (5) of the Polish CCP that may have a similar effect. In Hungary, Art. 5(1)f) of the Act CLXXX of 2012 is a ground for mandatory refusal, if the execution of the EAW would mean a serious violation of a fundamental right as they are enshrined in an international treaty or in a law of the EU. Article 11 para e) of the Greek implementing law, which states that the EAW must not be executed if it was issued to prosecute or sentence someone on discriminatory grounds, could be potentially used in the future in this way. Article 4.5 of the Belgian Law of 19 December 2003 prohibits surrender if there is a real risk of a violation of the fundamental rights of the person concerned. Romania reports that the national law must be applied in accordance with the Court's case law, but does not point out a provision for applying the two step test.

2.5 Issuing an EAW

2.5.1 Issuing judicial authorities

For all Member States, except Greece and to a certain extent Belgium, judges are designated as issuing judicial authorities. Some Member States have assigned the competence to issue EAWs to different courts/ judges, depending on the stage of the proceedings.

In practice, only in Ireland a centralisation to one issuing authority took place. It is the High Court alone that issues EAWs. Other Member States have not centralised issuing the EAW.

Of the two Member States that have assigned the competence to issue EAWs to public prosecutors, Greece applies the principle of mandatory prosecution. This implies an obligation under Greek law to initiate prosecution if there is sufficient evidence. It does not oblige to issue an EAW. Proportionality considerations for some listed situations may lead to making an exception and then no prosecution takes place. Belgium applies the principle of discretionary prosecution.

The Belgian report states that this Member State's prosecutors comply with the requirements for being sufficiently autonomous and independent issuing judicial authorities. For Belgium, the independence of the Belgian public prosecutor is embedded in the Constitution. The Belgian report states that in none of the situations in which the prosecutor may issue an EAW

[48] See IE, report, question 7.

recourse to a court – in order to check the decision to issue an EAW and, *inter alia*, the proportionality of such a decision –[49] is needed. The most important category concerns execution-EAWs. After all, at the basis of such an EAW is a decision to convict which can be taken by a court only.[50] There is also no recourse to a court needed where it concerns the issuing of an EAW in the trial phase with the consent of the person requested in order to have the requested person, detained abroad for other reasons, transferred to Belgium to be present at his own trial. There is no specific recourse provided for EAW's issued for the prosecution of minors.

The picture for Greece is different. The report clearly states that the Greek prosecutors cannot be regarded as complying with the requirements imposed in the Court's case law on issuing authorities. On the basis of Article 29 CCP, the Minister of Justice has the power to suspend or postpone the prosecution of an offence, in cases where the international relations might be affected or in political crimes. However, it is stated that the Ministerial instructions are never used.

2.5.2 Preparation of the EAW

Three Member States (Hungary, Romania and Poland) report that judges will prepare the EAW. They may be assisted by administrative staff. For these states, the prosecutor does not play a role. This is different for another group of three states (Belgium, Ireland and the Netherlands). Whereas the final EAW is issued by the judge/ court, a prosecutor may have prepared it. In Greece, the prosecutor (or his staff) continues to fill in the EAW.

It is interesting to see in the Netherlands what information is provided to the examining judge who finally issues the EAW. In prosecution-cases, the public prosecutor provides:

- an unsubstantiated request to issue an EAW ;
- the completed EAW-form itself;

[49] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 75.
[50] ECJ, judgment of 12 December 20-19, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU, EU:C:2019:1079, para. 35.

- (sometimes) an affidavit (*proces-verbaal*) explaining why the requested person is suspected of having committed the offences mentioned in the EAW;

- (sometimes) a national arrest warrant.

The case-file of the criminal case is not handed over to the examining judge.

In execution-cases, the examining judge is provided with:

- an unsubstantiated request to issue an EAW;

- the completed EAW-form itself.

In execution-cases, the examining judge is never provided with the final judgment of conviction. This practice in which in essence the examining judge issues an EAW on the basis of a non-substantiated formal request and the completed EAW-form, raises the question whether the examining judge is in a position to assess whether to issue an EAW, in particular with regard to the proportionality thereof. Recommendation **2.3** asks the Netherlands to provide the examining magistrate with the full file in order to assess proportionality himself and to prevent that this judge will merely rubber stamp the EAW prepared by the prosecutor.

All Member States use the word format template provided by EJN.[51]

2.5.3 National judicial decision (proportionality)

Before an EAW can be issued there must first be a *national* judicial decision, either an arrest warrant or a judgment. The requirements concerning national judicial decisions are dealt with in section 3.3.1. In this section, the focus is on the *assessment of proportionality* when issuing a national *arrest warrant*.

The legislation of all Member States already provides for elements that relate to proportionality of the national arrest warrant: the degree of suspicion, the seriousness of the offence, the risk of absconding, the existence of alternatives. For Hungary, the prosecutor must intend to request a prison sentence in the indictment before an European arrest warrant

[51] In Poland the EAW-form was published as attachment to the Ordinance of the Ministry of Justice. See PL, report, question 9b).

may be issued. Romanian law requires that an accused must be summoned according to the CCP before an arrest warrant can be issued.

In Greece national arrest warrants are issued by judges. It is either the investigative judge (with approval of the prosecutor) or the judicial council.[52] The regular national rules apply to such a decision. These relate to the nature of the offence, the degree of suspicion and the question of whether there is recidivism. Fear that the accused might abscond may qualify as a reason to issue an arrest warrant. There is no legal remedy provided against issuing a national arrest warrant. However, (upon approval of the prosecutor) the investigative judge may withdraw it. Prosecutors issue EAWs on the basis of a national arrest warrant issued by a judge.

Romanian law provides two concepts for arrest warrants in its criminal justice system. The warrant for preventive arrest as a preventive measure issued within the context of prosecution and trial and secondly a warrant for enforcement of a custodial sentence once the judgment of conviction is final and enforceable. Slightly different rules and authorities apply to the two situations. Any preventive measure has to be proportional to the seriousness of the charges brought against the person such measure is taken for, and necessary for the attainment of the purpose sought when ordering it. According to Article 223(1) of the Romanian Criminal Procedure Code preventive arrest may be ordered by the Judge for Rights and Liberties, during the criminal investigation, by the Preliminary Chamber Judge, in preliminary chamber procedure, or by the Court before which the case is pending, during the trial. Article 555 of the Romanian Criminal Procedure Code stipulates that imprisonment and life detention penalties are enforced by issuing a warrant for enforcement of a custodial sentence. Such warrant shall be issued by the delegated judge in charge of enforcement on the date when the judgment of conviction remains final. Thus, the court is under an obligation to issue such a warrant and there is no room for proportionality to be considered.

Member States do not report that the fact that a requested person is a Union citizen who exercised his right to free movement plays a role at all. Except for Greece, the fact that the requested person is a Union citizen exercising his right to free movement does not play a role in the legal provisions assessing the proportionality of the national arrest warrant. However,

[52] EL, report, question 9 c). However, it is not undisputed that the issuing judge needs the approval of the public prosecutor, since the wording of the law seems to imply that mere ‘consulting’ suffices.

in practice it could actually be considered as a sign of the existence of a risk of absconding and, therefore, as a ground for issuing a national arrest warrant.[53]

The Member States also do not report that the possibility of issuing an European supervision order is expressly addressed when examining the proportionality of issuing a national arrest warrant. This may relate to the fact that there is very little practice on FD 2008/829 in general. In addition, Ireland implemented FD 2008/829 only with effect from 5 February 2021.[54]

The Irish report states that 'in principle, the possibility of bail supervision measures as an alternative to provisional detention could potentially impact a District Judge's decision on whether "good grounds" exist for issuance of a warrant'.[55] However, given the short period since the Framework Decision was implemented, no application has been reported.

Hungary does not require the issuing judicial authority to mention whether it assessed the ESO as an alternative. Romania considers the supervision order as an alternative to a national arrest warrant.[56] Poland and Greece do not regard an ESO as viable and practical option. Belgium mentions that this is the case because the authority competent to issue an ESO is the prosecutor and the authority competent to issue the national arrest warrant a judge.

In the Netherlands the majority of EAW's is based on a national arrest warrant issued by a public prosecutor. This is probably not in line with the FD in as far as the national arrest warrant is issued for the purpose of bringing the requested person before the public prosecutor, not of bringing him before the court.[57]

2.5.4 Proportionality of issuing an EAW

Most Member States report that the proportionality assessment for issuing a (prosecution) EAW is the same as for issuing a national arrest warrant (Romania, Ireland, Greece and Belgium).[58]

[53] This must be considered as contrary to EU law, as it relates to a discrimination based on nationality and which could lead to non-Greeks being detained more often in Greece than Greeks nationals.
[54] Concerning the relationship between the ESO and the EAW see section 5.2.2.2.
[55] IE, report, question 9 c).
[56] RO, report, question 9c).
[57] NL, report, question 5bis. See also there for solutions to this problem.
[58] This section focusses on prosecution-EAWs for the same reasons as the previous section (2.5.4).

This means for instance from the perspective of the Romanian system, that the Code of Criminal Procedure establishes the obligation for the judicial body, when choosing a preventive measure, in this case the EAW, to cumulatively analyse the following general conditions: 1) to have solid evidence or indications from which results the reasonable suspicion that a person committed a crime, 2) the measure is proportionate to the gravity of the accusation, 3) the preventive measure is necessary to achieve the purpose pursued by its disposition - the condition of necessity of measures depriving or restricting liberty being expressed under the condition of their exceptional character, and 4) there should not be, at the time of order, confirmation, extension or maintenance of the preventive measure, any cause that prevents the initiation or exercise of the criminal action. Romanian law requires that an accused must be summoned according to the CCP before a national arrest warrant can be issued. This creates problems at a later stage when it leads to an *in absentia* judgment.

For Belgium also the same conditions as those to issue a national arrest warrant apply. There is no additional proportionality test to be performed. Regarding non-nationals, it is stated that preference will be given, if possible and proportionate given the circumstances of the case and the seriousness of the facts, to issuing EIO's over EAW's.[59] Belgium may issue EAWs when the investigations are not yet fully concluded. It is stated in the Belgian report that a "trial readiness" is not required.

Where the Netherlands, Poland and Hungary all three report that the issuing authority will specifically look at the need for an EAW in addition to a national arrest warrant, it only becomes clear for Poland how that additional test is performed.

Poland does make an assessment of whether an EAW is in the "interest of justice." The Polish report refers to considerations by courts that apply a proportionality assessment: weighing the EAW against the severity of the alleged offences or against the remainder of the sentence to be served, or against the infringement of his right to privacy, or against the old age of the sentencing judgment.[60] *In absentia* remains a major problem for the Polish practice. It is often unclear whether there is a fugitive as the law requires. The presumption that because he cannot be reached he must be a fugitive, creates problems with the EAW for *in absentia*

[59] BE, report, question 9 c).
[60] See in detail PL, report, question 9 c).

judgments. In this context it is reported that many EAWs were not issued concerning *in absentia* judgment as the chance of success was small.

The cases referred to in the report demonstrate that Polish practice did act upon the criticism it received in the past concerning EAWs for minor offences. In Poland, the regular rules apply also for EAWs. However, before the prosecutor can file an indictment, the accused must be heard. This is a complicating factor in EAW cases, as the issuing court will require proof that efforts to find the whereabouts of the accused/summon him to appear to be heard or otherwise get in touch with him were undertaken without success. In this context Poland occasionally makes use of the EIO.

Both Greece and Belgium appear to apply proportionality criteria without characterising these as such. In Greece, where the prosecutor issues the EAW, a first assessment is made on the question whether the national arrest warrant issued by the investigative judge requires an EAW. If so, he will first make an entry in SIRENE. After arrest of the requested person, the formal EAW is issued. In the end, Greek prosecutors are obliged to comply with a legal obligation to execute judicial decisions (Art. 549 GCCP for the execution of court judgments and Art. 277 GCCP for executing the national warrant).[61] Prosecutors must take all measures available to them to execute judicial decisions and thus, if the legal requirements for an EAW are met, they will issue an EAW, as the measure is available to them. There is uncertainty in practice as to whether the prosecutor would be entitled to refuse issuing EAWs. However, not all national arrest warrants lead to issuing an EAW, so in practice a certain assessment is made. The criteria for this seem to be vague, but a practice concerning more serious offences can be noticed. Managing the prosecutor's workload plays a role in the decision to issue an EAW.

Belgium is unique for its practice concerning EAWs for execution. Such EAWs will be issued only for one or more prison sentences as principal sentences totalling at least three years and where at least two years remain to be executed. That is an entirely different approach than in The Netherlands, where all remainders of four months and more are put on notice for surrender.

[61] EL, report, question 10 c).

Looking closer at potential alternatives to an EAW: the European Investigation Order, the ESO or the transfer of sentences, some experts agree that issuing an EIO is no alternative for an EAW.[62] Other experts (Belgium, Poland and the Netherlands) do consider an EIO as a possible alternative, as it enables authorities to give instructions once the person is found. Belgium and Hungary state that a SIS-alert is the better alternative to an EIO.[63] None of the Member States give a (concrete) account of the role the ESO can play in issuing/executing EAW's. The Dutch experts point out that issuing an ESO is not an alternative to issuing a prosecution-EAW, because issuing an ESO presupposes a decision on supervision measures meaning that the requested person will not be detained, which is incompatible with the existence of a national arrest warrant which is required for issuing a prosecution-EAW.[64] None of the Member States mentions the potential alternative to surrender in the form of a transfer of proceedings. However, this may relate to the fact that the authorities that are competent on the various alternatives are different.

Only Hungarian law requires that before issuing the EAW an assessment is made whether on grounds of proportionality or applicability of FD 2008/909 the EAW is necessary.[65]

Member States should make use of the European Supervision Order as a supportive legal instrument, or as an alternative to issuing an EAW for realising the presence of the accused at trial. This could prevent that EAWs are issued to secure the presence of the accused at trial. However, the supervision order is only an alternative for an EAW and release from pre-trial detention at the same time. In other words, without a (suspended) detention order there is no place for an supervision order.

When issuing an EAW, the issuing judicial authority should make an assessment of whether surrender instead of transfer of proceedings or transfer of the execution of the sentence is the best alternative in the concrete circumstances of the case (see Recommendation **2.9**). This also corresponds to meeting the demands of the dual level of protection-rule which will be dealt with later. In this context inspiration might be drawn from Article 597 of the Trade and

[62] Please note that Directive 2014/41 is not applicable to Ireland.
[63] Ireland joined the SIS in March 2021.
[64] Concerning the role of the ESO when executing a prosecution-EAW see section 5.2.2.2.
[65] HU, report, question 9 c).

Cooperation Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland, stipulating the principle of proportionality as follows: "Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention".

None of the Member States reports that the fact that a requested person is a Union citizen who exercised his right to free movement plays any role in the assessment whether issuing an EAW is proportional.

2.5.5 Execution-EAWs: coherence between legal instruments

In the previous sections, the focus was on (the proportionality of) issuing prosecution-EAWs. This section is devoted to issuing execution-EAWs.

There is little evidence that the different legal instruments (FD 2002/584/JHA (execution-EAWs) and FD 2008/909) are applied in a coherent way. Article 4(6) of FD 2002/584/JHA allows the executing authority to refuse to execute an EAW if the executing Member State undertakes to execute the sentence pronounced in the issuing Member State. Ireland did not transpose Article 4(6) and did not implement FD 2008/909. Recommendation **2.8** asks Ireland to do the latter.

It appears that there is a divide between Member States of the European Union when it comes to the question of whether refusal of the EAW and ordering the execution can be given in one decision by the executing judicial authority, or whether the refusal must be followed by a request from the issuing Member State based on FD 2008/909, followed by an enforcement decision by the executing authority. Although we do know that 4(6) is the ground of refusal

that is most often applied in the entire European Union, with no less than 44% almost half of all refusals,[66] we do not know whether there is a causal link with enforcement.

For some Member States giving the undertaking of execution means that the state can actually execute the sentence and further steps from the issuing Member State are not required (Poland, Romania, Belgium and since 2021 also the Netherlands). So all conditions for taking over execution must be checked. Romanian law provides for several options.[67] If all the documents relevant for the execution are there already, this may lead to one decision refusing the EAW and ordering the execution of the sentence. It may also be that information is lacking and that only the EAW is refused and the issuing Member State is asked to submit a new request for transfer. Romania reports problems with Italy and Sweden because of residents, as well as cases in which there is nothing to execute and the case is de facto absolved. Also in Polish law the decision to refuse the EAW on the basis of 4(6) should contain the order to execute the sentence. This is how it has been formulated in the law and the expert states that most courts apply the law in such a way that the refusal of the EAW and the order to execute the sentence are one decision.[68]

The Belgian position is that this ground for refusal should only be applied after a thorough verification that all conditions for the transfer of execution are also fulfilled.[69] Only then it can it be guaranteed by the executing Member State that the foreign sentence will actually be executed. Belgian law provides for these decisions (refusal EAW + enforcement foreign sentence) in one single judicial decision. Execution then starts immediately. Belgium states that some Member States are not willing to accept the consequences of automatic transition from an EAW to a transfer of execution of Framework Decision 2008/909, which has led to a case in which two Member States were trying to execute the sentence at the same time. The Belgian report refers to a continuing problem with Germany.

It is Belgian practice that the requested person must ask for the application of Article 4(6) and that an *ex officio* application by the court is not possible. It also means that the requested

[66] COMMISSION STAFF WORKING DOCUMENT, Statistics on the practical operation of the European arrest warrant – 2019, Brussels, 6.8.2021, SWD(2021) 227 final, p. 16.
[67] RO, report, question 6 b).
[68] PL, report, question 6 b).
[69] BE, report, question 6 b).

person consents to sending a certificate for transfer of the execution of the judgment. This could amount to, in the Belgian view, of changing a custodial sentence imposed in the sentencing Member State to a community service executed in Belgium if the latter's legislation does not provide for imprisonment in the given circumstances.

In the Netherlands, a refusal by the Amsterdam District Court to execute an EAW, cannot be separated from ordering the execution of the foreign sentence in the Netherlands. On the basis of Art. 6a(1) of the Law on Surrender, the Minister of Justice and Security must ensure that the sentence is actually carried out according to Dutch law with due observance of the District Court's judgment (Art. 6a(8) of the Law on Surrender). The Minister of Justice and Security cannot require that the issuing Member States forwards a certificate as meant in FD 2008/909/JHA to the Netherlands. The decision to execute the foreign sentence has already been taken by the District Court and its judgment is final.

Greece also seems to be able to work without an additional certificate for FD 2008/909. However, difficulties with Germany and Bulgaria that do require this are reported. Until 2012, Greece required the Ministry of Justice to give a declaration that the country would execute the sentence. Since then, it is within the discretion of the executing court only to invoke the ground for refusal. It is reported that other Member States are not satisfied with the rather lenient way in which Greece executes penalties, providing for early release at moments far too early for the sentencing Member State.

The opposite view, supported by the European Commission, is taken by Hungary. Hungary requires an additional request for the application of 2008/909, which also allows the issuing Member State to withdraw the initial EAW.

Recommendation **2.11** invites the Member States when considering a refusal based on 4(6) that the executing judicial authority must explore whether it has all the information it needs to order the execution of the foreign sentence on the basis of FD 2008/909. If that is so, it will stipulate so in one single decision. If there is insufficient information to order execution, the executing authority will ask for further information that will enable it to refuse the EAW and order the execution.

2.5.6 Proportionality revisited

2.5.6.1 Introduction

This section tries to bring the findings of the previous sub-sections together and attempts to present a more holistic view on whether it is proportional to issue an EAW. It often seems as if choosing for an EAW is like the choice for a specific tunnel to reach the other side of the mountain. Once you are in the tunnel, you can no longer choose to climb over the top, you cannot turn, and must hope that at the other side of the tunnel you are at the right destination. In more legal terms, we will look at which conditions must be in place to make use of the combined strength and cohesion of the legal instruments and regard these as mutually enforcing instead of excluding each other.

2.5.6.2 Proportionality of the EAW is more than proportionality of a NAW

As pointed out before, proportionality at the national level is an issue only with regard to issuing a national arrest warrant (as the basis for a prosecution-EAW), since decisions by courts to impose a sentence (as the basis for an execution-EAW) are proportional in itself. In many Member States assessing the proportionality of the EAW is regarded as the same exercise as judging whether it is proportional to issue a national arrest warrant. The Court has made clear that there must be more. In addition, there are several factors that play out on the proportionality of a prosecution EAW that do not form part of assessing a national arrest warrant. Also, there are factors that relate to the proportionality of issuing an execution-EAW. Which are these factors that need to be taken into consideration? This is the theme of the next sub-section. In analysing this, we make use of the notion that has been expressed in the Polish criminal justice system, to whit the requirement that an EAW must be “in the interests of justice”. Recommendation **2.10** requires issuing judicial authorities to establish that issuing an EAW is proportional in the given circumstances of the case.

2.5.6.3 Factors determining proportionality and the interests of justice

Several factors may be identified that contribute to determining the proportionality of the surrender of a requested person from one Member State to another. These factors, that ought to be read in combination and not in a ranking order, are:

- stage of the proceedings
- authorities competent

- circumstances of the case
- alternatives to surrender
- impact on free movement rights

With the relevance of the *stage of the proceedings* it is meant that in each stage of the proceedings different choices can be made. For instance in the early stage of an investigation the very fact that a potential suspect is out of the country might not immediately lead to issuing an EAW as it might also be possible to clarify the role of the suspect via an EIO. When the proceedings have reached the trial stage and the suspect is still not there, there may not be an alternative to an EAW in order to secure his presence. When it concerns a convicted person, the issuing Member State may assess whether it is better to enforce the sentence itself and thus issue an EAW, or that enforcement of the sentence could better be done by the executing Member State, in which case it will transfer the execution of that sentence.

Determined by the stage in which the proceedings find themselves, it also becomes clear which are the *authorities competent* to take decisions. Following the example given above, national legislation will stipulate which authority is competent for which legal measure. This may result in a situation that for instance an examining magistrate is competent to issue an EAW, a prosecutor is competent to issue an EIO and the Ministry for Justice may issue a certificate based on FD 2008/909. This means that when in charge, the competent authority may not be able to take any other decision than for which it is competent, because national law or the EU legal instrument has limited its competences. This could block taking into account a less intrusive alternative.

As always, the *circumstances of the case* are highly important. It may be so that the facts of the case clearly indicate that the prosecution must take place in the issuing Member State, because not only the offence happened there, but also victims and perpetrator are at home in that state. Under those circumstances, an EAW to obtain the presence of the suspect at trial is the logical step. However, if the offence only happened in the issuing Member State, and accused and victims reside in the executing Member State, it might be much more appropriate to have the trial there. This would mean no EAW, but a transfer of proceedings. Transfer of proceedings is still not regulated by an EU legal instrument, but by the 1972 Council of European Convention on the Transfer of Proceedings in Criminal Matters. Framework

Decision 2009/948 on Conflicts of Jurisdiction encourages the transfer of proceedings, by obliging Member States' authorities to contact each other in cases of overlapping jurisdiction, but does not actually provide mandatory rules on the transfer of proceedings.

A very specific circumstance of the case is the *impact on free movement rights* that a decision to issue an EAW or take another measure may have. All citizens of the European Union enjoy free movement rights. They may freely go from one Member State to another to find a job, to sell goods, to deliver services and so on.[70] By definition, criminal investigations, trials and imprisonment have an impact on how freely an EU national can make use of his freedoms. Whilst combating crime is a justification accepted in the case law of the Court as an exception to the prohibition to infringe free movement rights, it is accompanied by the obligation that the infringement must be proportional to the interests pursued. In essence, it requires that the less infringing alternative is chosen, wherever possible.

The degree of infringement upon free movement rights differs from measure to measure.[71] A duty to appear as a witness in court or a house search is certainly far less infringing than the coercive physical surrender of a person to another Member State. The latter could mean that the requested person may lose his job or see the enterprise he built up falling apart due to his absence. In such a case, where there is an impressive impact on free movement, there is a stronger need to look for alternatives, as reintegration will be better served, if the person will not lose his job or his business. In such a case, it might be possible to transfer the proceedings to the Member State in which he is residing. Also this factor should not be assessed in isolation only.[72] If the crime is so outrageous that the requested person will lose his right to reside in the executing Member State, he has forfeited his right to free movement and this can no longer influence the outcome. Directive 2004/38 on the right of citizens of the Union and

[70] See André Klip, European Criminal Law. An Integrative Approach, Intersentia Cambridge 4th ed. 2021, p. 93-148.
[71] ECJ, Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 22 February 2021 – Criminal proceedings against IR, Case C-105/21, ECLI:EU:C:2022:511, paras. 46-53.
[72] None of the factors must be assessed in isolation. The Eurojust Guidelines for deciding 'Which jurisdiction should prosecute?' are very helpful in this respect. See https://www.eurojust.europa.eu/guidelines-deciding-which-jurisdiction-should-prosecute

their family members to move and reside freely within the territory of the Member States provides for limited possibilities in this respect.[73]

Last but not least are the *alternatives to surrender* that may exist in the given circumstances of the case. In several cases the Court underlined the need to see the existing legal instruments and alternatives in context.[74] The Court reminds us of the fact that the EAW should not be seen in isolation: "It should also be observed that, as stated in recital 6 thereof, Framework Decision 2002/584 is the first concrete measure in the field of criminal law implementing the principle of mutual recognition of judgments and judicial decisions enshrined in Article 82(1) TFEU, which replaced Article 31 EU, on the basis of which that framework decision was adopted. Since then, the field of judicial cooperation in criminal matters has gradually acquired legal instruments whose *coordinated application* is intended to strengthen the confidence of Member States in their respective national legal orders with a view to ensuring that judgments in criminal matters are recognised and enforced within the European Union in order to ensure that persons who have committed offences do not go unpunished. In addition, (…) Framework Decision 2002/584 forms part of a comprehensive system of safeguards relating to effective judicial protection provided for by other EU rules, adopted in the field of judicial cooperation in criminal matters, which contribute to helping a person requested on the basis of a European arrest warrant to exercise his rights, even before his surrender to the issuing Member State. In particular, Article 10 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in

[73] See further André Klip, European Criminal Law. An Integrative Approach, Intersentia Cambridge 4th ed. 2021, p. 425-426.

[74] The Court stated in ECJ, judgment of 27 May 2014, *Spasic*, C-129/14 PPU, ECLI:EU:C:2014:586, paras. 65-67: "As regards whether the execution condition is necessary to meet the objective of general interest of preventing, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in one EU Member State, it must be noted that, as the Commission pointed out in its written observations and at the hearing, there are numerous instruments at the EU level intended to facilitate cooperation between the Member States in criminal law matters. In that respect, regard must be had to Framework Decision 2009/948, Article 5 of which requires the authorities of different Member States claiming concurrent jurisdiction to bring criminal proceedings in relation to the same acts to initiate direct consultations in order to reach a consensus on effective solutions aimed at avoiding the adverse consequences arising from such parallel proceedings. Where appropriate, such direct consultations may lead, on the basis of Framework Decision 2002/584, to the issue of a European Arrest Warrant by the authorities of the Member State in which the court which delivered a final decision on sentencing is located, for the purpose of execution of the penalties imposed. Alternatively, those consultations may lead, on the basis of the Framework Decisions 2005/214 and 2008/909, to the penalties imposed by a criminal court of one Member State being executed in another Member State (see, on the interpretation of the Framework Decision 2005/214, ECJ, judgment of 14 November 2013, *Baláž*, Case C-60/12, EU:C:2013:733)."

criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1) requires the competent authority of the executing Member State to inform the persons whose surrender is sought without undue delay after they have been deprived of their liberty that they have the right to appoint a lawyer in the issuing Member State".[75]

The alternatives described below may be used instead of an EAW. However, it may also be so that an EAW and another modality of international cooperation can be taken consecutively, or parallel at the same time. Which alternatives are applicable? This is determined by what the authorities want to achieve. There are basically four categories of alternatives that may be considered.

1. *Alternative ways to obtain the presence of the requested person in the issuing state*

   One of the major goals and functions of an EAW is that it leads to the requested person being physically present in the issuing Member State for a specific purpose. It does so, by making use of the coercive means of the surrender which involves the authorities of the executing Member State. In some situations it may not be necessary to use coercion, which would have less impact and lead to less stigmatisation of the person involved. A *SIS-alert* may enable authorities in another Member State to find the person and may lead to the opportunity to hand out a *summons* to the requested person.[76] This could be useful in a context in which the investigations have not been concluded yet and there is no reason for detention on remand. In such a situation, the voluntary presence of the suspect might also be stimulated by a *safe conduct*,[77] which protects him against detention while being available for interrogation in the issuing Member State. Another incentive to realise

[75] ECJ, judgment of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, Joined Cases C-566/19 PPU and C-626/19, ECLI:EU:C:2019:1077, paras. 43, 72 and 73.

[76] The practice both in Poland and Romania favour an attempt to such a procedure as a precondition for being allowed to conduct proceedings *in absentia* at a later stage.

[77] Whereas Article 12(2) European Convention on Mutual Assistance in Criminal Matters (ETS No. 030) provides a certain protection on the basis of the convention already: "A person, whatever his nationality, summoned before the judicial authorities of the requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions anterior to his departure from the territory of the requested Party and not specified in the summons. A Member State may choose to give an additional safe conduct protecting him against detention exactly for the "acts forming the subject of proceedings against him".

voluntary appearance is the issuing of an *European Supervision Order* on the basis of FD 2009/829. By ordering this, the issuing Member State does not detain the suspect and allows him to return or to stay in another Member State. That Member State will supervise that the suspect will live up to the conditions imposed (such as report to the police on a regular basis and not commit new offences). He will remain out of prison if he complies with that and travels on time to be present at the proceedings conducted against him in the issuing Member State. Should he not do so, FD 2009/829 provides for issuing an EAW with a lower threshold (Article 21 Framework Decision 2009/829 on Supervision Measures). The alternatives mentioned in this category are alternatives that value the presumption of innocence highly and contribute to reducing pre-trial detention.

2. Alternatives to physical presence

The stage of the proceedings may require the presence of the suspect for interrogation but not for a prolonged pre-trial detention. In such a case an *EIO* for a videoconference as provided in Article 24 Directive 2014/41 in the European Investigation Order might form a good alternative to an EAW, especially if the only reason for the latter would be that the suspect is no longer in the country. If the proceedings have progressed to the trial stage already and the national criminal procedural rules allow that the suspect can participate via a *video-link* and wishes to do so, it may be a far less cumbersome method than surrendering him. The last alternative is to conduct the proceedings without the accused being present (*in absentia*). As a matter of principle, it should not be stimulated. However, it must be noticed that there is a right to be present at one's trial, not an obligation. Depending on the circumstances of the case, the trial may proceed without him being there, if he is represented by chosen or nominated defence counsel whom he has mandated to do so. This may often not have the preference, but there are circumstances in which it might outweigh the interests of surrender. These measures pay due respect to the presumption of innocence and may limit detention to those that are convicted to a custodial sentence. That is even the case for *in absentia* proceedings, but that alternative has a serious impact on exercising procedural rights.

3. Another Member State prosecuting the suspect

In many criminal cases more than one Member State has jurisdiction. When that applies there is an alternative for the state taking the initiative in the prosecution. Some cases can

be more effectively prosecuted by another Member State or may offer better possibilities for participation (*e.g.* in the language of the suspect) and/ or reintegration (*e.g.* in the country of origin). The case mentioned above, in which the only element linking the case to the issuing Member State is that the offence was committed there, could easily be transferred if all victims, witness and accused come from another state, which presumably will have jurisdiction on active (and/ or passive) nationality. Framework Decision 2009/948 on Conflicts of Jurisdiction obliges Member States' authorities to contact each other in cases of parallel proceedings. Parallel proceedings inherently presuppose overlapping jurisdiction. Multiple jurisdiction as such does not oblige to transfer the proceedings. However, a transfer is not only possible for those Member States that are a party to the 1972 Council of European Convention on the Transfer of Proceedings in Criminal Matters,[78] but may (depending on national law) also take place without a basis in treaty or Union legal instrument. A Member State not being able to transfer of proceedings seriously limits its possibilities for alternatives. Recommendation **2.7** therefore urges Member States who have not done so yet, to ratify the 1972 Council of European Convention on the Transfer of Proceedings in Criminal Matters.[79]

4. Another Member State executing the sentence

Despite the fact that the proceedings have been concluded in the issuing Member State with a sentence that imposes imprisonment, not under all circumstances this must lead to the execution of the sentence in the same state. Again, especially in situations in which the convicted person has few ties with the issuing Member State, which makes reintegration more difficult, there may be hardly any benefit from executing the sentence there. In such a situation transferring the sentence on the basis of FD 2008/909 is a viable option. These possibilities to transfer the execution also exist concerning conditional sentences. The Member State where the person is sentenced to a conditional sentence may forward the judgment to the Member State where the sentenced person is lawfully and ordinarily resident if this is in the interest of social rehabilitation. Forwarding a judgment should take place when the sentenced person has returned, or wants to return to that State

[78] The Convention has been ratified by 13 Member States, 8 other Member States have signed it.
[79] By lack of a general legally applicable instrument, Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters is often used as a basis for transfer of proceedings. In addition, some Member States apply bilateral conventions that provide transfer of proceedings.

(Article 5 *Framework Decision 2008/947 on Supervision of Probation Measures*). The sentenced person may request it to be forwarded to the issuing Member State (Article 5, paragraph 2).

The factors mentioned above play a different role in each individual case. Not all factors will be present in each case and if they are, they have different weight. In other words, looking at the factors will not lead to the same answer for all cases. Many cases could even be decided either way. Whereas in one case the assessment may clearly lead to conclude that an EAW is the best option, in another the transfer of the proceedings may be much better for both suspect and victims.

One of the challenges is that the authorities competent in a certain stage of the proceedings, may not have the competence to go for an alternative, as this belongs to competence of another authority. This requires that Member States develop a mechanism that can overcome this. It would certainly not be in the interest of justice to see that the better alternative is not used, because the authority competent over the case cannot initiate it.

2.5.6.4 Formal requirement: judicial review

The Court requires judicial review over the issuing of a national arrest warrant or of an EAW, because it wants a judicial protection of the procedural rights and fundamental rights of the person concerned, which necessarily implies a judicial review of the proportionality of measures infringing personal liberty: is this a case that should give rise to an EAW or not? It seems logical that the review of the national arrest warrant is limited to be in full compliance with the national rules of criminal procedure. This is different for the EAW, that requires more. In the previous section we discussed the factors that can be applied to reach a balanced decision. Even if these factors have been taken into consideration by the issuing judicial authority as stipulated in section 2.5.6.3, there is a fair chance that the suspect was not able to participate in this evaluation and to make his views known as he could not be reached. We do not yet know for sure whether the Court will regard representation by defence counsel (nominated or chosen) as compliant with *effective judicial protection*,[80] although the judgment

[80] The reference by the Court to Article 10(5) Directive 2013/48 on the Right of Access to a Lawyer might indicate that the Court regards the presence of a lawyer in the issuing Member State as complying with the effective judicial protection requirement. See ECJ, judgment of 12 December 2019, *Parquet général du Grand-Duché*

in the *Svishtov Regional Prosecutor's Office* case seems to indicate that the mere involvement of a court in issuing either the national arrest warrant or the EAW, without any participation by the suspect or representation by defence counsel in those proceedings, is sufficient.[81] This leads us to the requirements of the dual level of protection of the requested person's procedural and fundamental rights in the issuing Member State, which is the subject of the next section.

2.5.7 Dual level of protection

The concept of a 'dual level of protection' for procedural rights and fundamental rights which must be enjoyed by the requested person in the issuing Member State relates to a requirement imposed by the Court in its case law.[82] Pursuant to this case-law, a judge in the issuing Member State must have assessed the lawfulness of an arrest of the person concerned either when deciding on the issue of a national arrest warrant or on the issue of a prosecution-EAW, or must be able to perform that assessment on request or *ex officio* before surrender. In its case-law on the meaning of the concept 'issuing judicial authority', the Court of Justice ruled that, at least at one of those two levels of protection, a decision meeting the requirements inherent in effective judicial protection should be adopted[83] before the surrender of the requested person.[84] For a more detailed exposé see section 3.1.2.

Two facts stands out when looking at the answers given by the experts for the Member States. The first is that they seem to focus at whether they comply with the requirement as issuing

de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours), Joined Cases C-566/19 PPU and C-626/19, ECLI:EU:C:2019:1077, para. 73; ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, C-625/19 PPU, ECLI:EU:C:2019:1078, para. 55.

[81] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, para. 51.

[82] See ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EUC:2016:385, para. 56: the system of the EAW 'entails (…) a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which [an EAW] is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision'.

[83] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 68; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 47.

[84] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, para. 51.

Member State. In itself, this is not surprising, because the requirements of the dual level of protection concern judicial protection in the issuing Member State. However, since the requirements of the dual level of protection relate to the validity of the EAW (see section 3.1.2), the executing judicial authority has a role in assessing whether a specific EAW meets those requirements. And second, maybe even less surprising, the Member States' assessment is that their own system complies with what the Court wants.

The experts for the Netherlands regard the 'dual level of protection' in the issuing Member State as required by the Court of Justice's case-law as an issue with regard to the position of public prosecutors. After all, that case-law requires judicial review, *i.e.* review by a court, before surrender either at the level of the national arrest warrant or at the level of the EAW. In practice, Dutch public prosecutors, when preparing an application to the examining judge to issue a prosecution-EAW, usually order the arrest of the suspect themselves on the basis of Art. 54(1) of the Code of Criminal Procedure. Therefore, in practice a Dutch prosecution-EAW is only rarely based on a national arrest warrant issued by a court or by a judge.[85] The experts for the Netherlands are of the opinion that an order to arrest the suspect on the basis of Art. 54(1) of the Code of Criminal Procedure does not meet the definition of a '[national] arrest warrant or any other enforceable judicial decision having the same effect' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA,[86] because such an order is not 'intended to enable, by a coercive judicial measure, the arrest of that person with a view to his or her appearance before a court for the purpose of conducting the stages of the criminal proceedings',[87] instead of bringing that person before the public prosecutor. Although both prosecution and execution-EAWs are always issued by a judge, the examining judge, the experts doubt whether a prosecution-EAW that is based on an order to arrest issued by a public prosecutor meets the requirement of the dual level of protection. After all, the first level of the dual level of protection requires the existence of a national judicial decision within the meaning of Art. 8(1)(c) of FD 002/584/JHA. Execution-EAWs are always based on a final and enforceable judgment of a court or a judge.

[85] NL, report, question 5bis. See further Jannemieke Ouwerkerk et al., De rol en positie van het openbaar ministerie als justitiële autoriteit in Europees strafrecht. Een verkennende studie naar een toekomstbestendige vormgeving van de rol en de positie van het openbaar ministerie in de EU-brede justitiële samenwerking in strafzaken, https://repository.wodc.nl/handle/20.500.12832/3120
[86] NL, report, question 5bis.
[87] ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, para. 53.

As an issuing Member State, Poland provides for a judge as the issuing judicial authority and thus complies with the required level of protection. In Belgium, national arrest warrants are issued by the investigative judge or by the court (in the trial phase when certain conditions are met). Prosecution EAW's will be issued by the investigative judge. The expert mentions two rare examples in which a prosecution-EAW may be issued by the prosecutor. In both cases this can only be done with *previous* judicial review. The assessment for Greece is that as an issuing Member State it complies with the dual level of protection as the investigative judge issues the national arrest warrant and may assess proportionality when issuing an EAW. It is interesting that Greece gives the requested person a judicial remedy after surrender in Greece. This could lead to a decision that there were not sufficient grounds to issue an arrest warrant.

When deciding on the execution of EAW, the competent Polish court shall examine whether it was issued by "the judicial organ" of the MS, i.e., an organ notified by the Member State pursuant to Article 6 (3) of the FD EAW as "the competent judicial authority". When interpreting the notion of "the competent judicial organ" Polish courts shall consider the jurisprudence of the CJEU on this issue.[88] Also Greece, Hungary, Ireland, the Netherlands, Romania and Belgium report that their executing judicial authorities do assess the status of the issuing judicial authority and, by consequence, whether the decision to issue the EAW was taken by a judge (or is subject to judicial review). The Netherlands also checks whether the requirements at the first of the two levels, the level of the national decision, were met.

In section 6 an attempt will be made to sketch an approach integrating the dual level of protection in the issuing Member State and the level of protection in the executing Member State into an all-encompassing tri-level of protection of the requested person's procedural and fundamental rights, in which an effective judicial review of proportionality of issuing and executing an EAW is merged with an affective and coherent application of the various legal instruments concerning judicial cooperation.

2.6 Executing an EAW

[88] PL, report, question 5bis.

2.6.1 Executing judicial authorities

No centralisation is provided for executing judicial authorities in Belgium, Greece, Poland and Romania. Greek law provides two phases of execution, spread over two different executing judicial authorities: The first phase is the arrest of the individual, and the executing judicial authority is the Prosecutor of the Appeal Court (art 9 para 1 national law). At the second phase, the person is brought to a court. The competent authorities in Belgium are the court's investigating chambers (first/ second instance). These are also competent concerning additional surrender and subsequent surrender.

The three other Member States (Hungary, Ireland and the Netherlands) centralised the executing authority. In the Netherlands, the Amsterdam prosecutor was originally designated as the single contact point for all execution matters. However, some of his powers have been transferred to the District Court.[89]

Consent to surrender

Only Belgium reports that differentiation with regard to the competent authority takes place based on whether there is consent or there is no consent. For Belgium, the consent must be given in the presence of the requested person's lawyer before the prosecutor.

In cases of consent, both Greece and the Netherlands provide for an EAW-procedure before a single judge instead of a panel of judges, although in the Netherlands the scope for review of the EAW is much reduced when compared to EAW proceedings concerning requested persons who do not consent to surrender. Additionally, in Greece the requested person not consenting must have a lawyer. This is optional for requested persons who consent.

Decision on consent as referred to in Art. 27(3)(g) and (4) and in Art. 28(2)-(3) of FD 2002/584/JHA and decisions regarding (postponed or conditional) surrender of the requested person (Art. 23(3)-(4) and Art. 24 of FD 2002/584/JHA)

The situation in the Member States in the project is exactly the same concerning consent within the meaning of Art. 27(3)(g) and (4) and Art. 28(2)-(3) and concerning postponed or

[89] Such as issues relating to consent of the requested person. See NL, report, question 10 a).

conditional surrender of the requested person within the meaning of Art. 23(3)-(4) and Art. 24, except for the Netherlands. In the Netherlands, the District Court of Amsterdam takes the decision on the execution of the EAW and on additional consent, whereas only the Amsterdam public prosecutor is competent with regard to the decision concerning postponed surrender and only the Minister for Justice and Security is competent with regard to decisions concerning conditional surrender, although, confronted with infringement proceedings, the Ministry of Justice of Security is preparing legislation which will confer the power to decide on conditional surrender on the District Court of Amsterdam.

2.6.2 Prosecutors as executing judicial authority

Two Member States designated public prosecutors as executing judicial authorities. Consistent with their position as issuing Member State, Belgium regards its prosecutors as complying with the requirements of the case law of the Court, whereas Greece does not.

For Belgium the decision on surrender is taken by the public prosecutor instead of the court if the requested person consents to surrender. In such a decision on surrender the proportionality is not examined. Consent to surrender cannot be revoked.

Prosecutors play a role in Greece as executing Member State in the context of hearing the requested person on whether s/he consents to surrender. Because of the split in Greek procedure between a first part before the prosecutor and a second before the Court of Appeal, issues may come up relating to consent, in particular its revocation.

Recommendation **2.2** asks Greece and Belgium to end the situation in which authorities other than judges can issue an EAW.

2.6.3 Proportionality of executing an EAW

An important question is whether executing judicial authorities when deciding on the execution of an EAW, examine whether, in the light of the particular circumstances of each case, it is proportionate to execute that EAW. For most states there is clearly no such assessment: the presumption is that if the request falls within the terms of the EAW, it must

be regarded as proportional to surrender the individual.[90] Alternatives to surrender or an assessment of the infringement upon the free movement rights of an individual do not play a role.

In Ireland such a proportionality assessment may take place to a limited extent. Superior courts have taken a nuanced approach. Because the right to liberty and the right to a private and family life may be adversely affected by surrender, the courts may be entitled to engage in an assessment of whether it is proportionate to execute an EAW. However, no case was successful yet. On the other hand the Irish report refers to a judgment in which the Irish Court held: "In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State's obligations under the Convention".[91]

In the Greek view mutual recognition and mutual trust stand in the way of making an assessment of the proportionality of an EAW. Whereas in the past Greek practice was very strict and rejected any proportionality claim, this seems to be changing recently.[92] The report mentions two cases in which the executing judicial authority did assess the proportionality.

Member States do not report that the fact that a requested person is a Union citizen who exercised his right to free movement is taken into consideration.

2.7 Central authorities

Most Member States designated the Ministry for Justice as the central authority responsible for transmission of the EAW and all other official correspondence thereto.[93]

[90] See for instance NL, report, question 10 c).
[91] IE, report, question 10 c).
[92] EL, report, question 10 c).
[93] Hungary takes an intermediate position. The EAW is sent to the Ministry of Justice and the International Law Enforcement Cooperation Centre by the court. HU, report, question 9 d).

Concerning the question of whether the Member States designated a central authority responsible for reception of the EAW and all other official correspondence thereto, experts for Belgium, Greece and the Netherlands reported that no centralisation took place. The other four Member States report centralisation. In Romania, the Ministry of Justice and the prosecution offices of the court of appeal in which jurisdiction the requested person was located are to receive EAWs. If the location of the requested person is not known, EAWs are sent to the Prosecutor's Office of the Bucharest Court of Appeal. The Ministry of Justice has no competence to request/ answer additional information and leaves this to the prosecution office.[94]

2.8 Language requirements

Belgium, Hungary, Romania and the Netherlands report to have made a declaration as provided for in Art. 8(2) FD 2002/584/JHA on the language to be used. Greece and Poland stated that they did not make a declaration. If a state does not make a declaration, Article 8(2) stipulates that the EAW be translated in the official language(s) of the executing Member State.

Of the Member States in the project that made a declaration it entails that the following languages may be used:
For Belgium:[95] Dutch, French, German or English;
For the Netherlands: Dutch and English;
For Hungary: Hungarian or for Member States that do not exclusively require their own language themselves: also English, French, German;
For Romania: Romanian or translations into English or French.

None of the declarations was published in the Official Journal, as required in the FD (Art. 8(2)). However, all declarations reported, except the Belgian one, can be found on the EJN-website. On the basis of this practice as well as the international position of English in

[94] RO, report, question 10 e).
[95] The Belgian declaration was published only in the Belgian Official Gazette and cannot be found at the EJN-website.

international situations, trade and tourism, it is therefore recommended to include English as the general default language in which EAWs can be issued.

Article 8, paragraph 2 reads: "The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities." The last part of the last sentence does not seem to give room for *conditional clauses* as to the use of languages other than the national language(s) of the executing Member State. What the Framework Decision states is an unconditional use of other languages, not a conditional one and not one limited to certain Member States. On the basis of that evaluation, the conditional declarations of several Member States should be interpreted as unconditional.

Most Member States do not report any problems with the quality of the translations of the incoming EAWs. Belgium and Greece state that the main problem is translation speed. The translation office of the Greek Ministry of Foreign Affairs is buried under workload. Despite this, there is commitment to translate all EAWs within 72 hours. The problem is even more excessive when the translation request concerns supplementary information within the meaning of Article 15(2). In this case, the translation service does not commit to a 72 hours deadline which means that these cases are bound to have unnecessary delays. Some reporters state that google translate is used as well as non-qualified translators, either by the Ministry of Foreign Affairs or the courts bypassing the ministry.

If the translation of the EAW deviates from the official EAW-form in the language of the executing Member State various options are on the table depending on the circumstances. In Belgium, the court will consider the standard part only. For Belgium, Hungary and Poland a new translation may be required. In other situations more information will asked (Belgium and Greece). For the Netherlands, a distinction between form and substance ought to be

made.[96] Deviation in form should not have consequences. However, deviation in substance may lead to asking additional information.

Romania considers that a deviation of the translation from the available form does not have a direct implication in the execution of the EAW. What is essential is that the translation of the information included in the form is intelligible. From the perspective of Romania as the issuing state, the translators are provided with the existing word form on the EJN website in the language in which they are to perform the translation.

2.9 Conditional surrender

Conditional surrender within the meaning of Article 24(2) of FD 2002/584/JHA is regulated by the Member States in different ways. The Netherlands have provided for a legal basis for detention both as an issuing Member State and as an executing Member State. Reasons for postponing surrender under Dutch law are that a prosecution against the person concerned is ongoing in the Netherlands, or that a Dutch judgment of conviction remains to be enforced. Conditional transfer is regarded as a way to circumvent the consequences of postponement of surrender for a trial in the issuing Member State. The Minister for Justice and Security determines the conditions which must, at least include, the conditions mentioned in the applicable provision.[97]

Hungary surrenders conditionally on the basis of a bilateral agreement between issuing and executing judicial authorities. The Budapest-Capital Regional Court's is the competent authority and will include in the agreement at least these following statements:

a) stating for what type of procedural activity it is needed to conditionally surrender the defendant;

b) the estimated/ planned deadline for the execution of the conditional surrender and the deadline for the conditional surrender;

[96] See NL, report, question 13 b). The examples given relates to section (d). Where the term 'the trial resulting in the decision' is rendered as 'the trial during which the judgment was pronounced' the substance of section (d) is affected. The latter term is more narrow than the former. Using the latter term, therefore, could have a negative impact on the rights of the defence.

[97] NL, report, question 10bis. The Minister cannot be regarded as an executing judicial authority under Union law.

c) an undertaking to return the conditionally surrendered defendant to Hungary within the requested or permitted time limit after the specified procedural step;
d) an undertaking that the conditionally surrendered person will remain in restraint/ detention in the Member State during his or her stay until his or her return to Hungary;
e) a declaration that the requesting Member State will bear all the costs incurred in connection with the conditional surrender and return of the person charged;
f) the determination of whether the time spent by the defendant in restraint/ detention in the issuing Member State during the conditional transfer will be counted in the issuing Member State or in Hungary in the sentence imposed on the defendant.

A decision on conditional surrender is taken by a court having a general competence to decide on execution of the EAW. Furthermore, a decision on conditional surrender is always optional and is subject to appeal under the same conditions as "ordinary" decision on surrender.

For Ireland, the position is governed by s.19 of the European Arrest Warrant Act 2003. Undertakings are usually required from the issuing Member State to keep the respondent in custody at all times and to return him to the State to serve the remainder of the existing prison sentence.

In Greece, conditional surrender is decided by the court and is based on the written judgment of the court, that mentions that the execution is subjected to the condition that the person will return to Greece immediately after proceedings end.

Under Belgian law "A [conditional] surrender is a coercive measure with a restriction to the freedom of movement of the requested person and entails as such that the requested person is in detention in the executing state, either for prosecution purposes or for the execution of a sentence (a detention of the requested person in the surrender proceedings serves only the purpose of being able to execute the positive decision on surrender and that situation of detention cannot as such be used as a basis for postponing a surrender – the period of detention in the surrender proceedings must also be attributed in the issuing state and in case of conviction be deducted from the sentence to be served – neither can the decision to postpone a surrender be used as a title to warrant a detention) ". Conditions must be set by agreement between Belgium and the other Member State concerned. In Belgium the

conditionally surrendered person will be incarcerated in the prison on the basis of "een bevel tot bewaring" (*i.e.* an order to remand the person into custody).

Concerning Romania the matter of the conditional surrender is regulated by specific regulations in Law no.302/2004, namely Art. 114 in conjunction with Art. 58 paragraphs (1)-(5) and 7, for those situations when Romania is executing Member State, and Art. 94 for those situations when Romania is issuing Member State.[98]

2.10 Recommendations

Recommendations to Member States:

> **Recommendation 2.1**. Member States who transposed optional grounds for refusal and guarantees as mandatory are recommended to change the mandatory character into an optional one (where applicable).

Five of the project Member States transposed several optional grounds for refusal/ guarantees of Articles 4, 4a and 5 as a mandatory ground for refusal/ guarantees. Member States which transposed grounds of Articles 4-4a and guarantees of Article 5 as a mandatory ground for refusal/ guarantees deny their executing judicial authorities the possibility of taking into account all relevant circumstances of the case with a view to refraining from refusing to execute the EAW. These Member States are recommended to change these grounds for refusal/ guarantees into optional grounds for refusal/ guarantees.

> **Recommendation 2.2**. Member States that still assign the power to issue EAWs for prosecution to a public prosecutor are recommended to change this and assign this power to a judge/court instead.

Regardless of whether the Member States concerned are right that their prosecutors comply with the requirements posed by the Court on the independence of the prosecutor, it may lead to an assessment by the executing judicial authority whether this is the case indeed. As a consequence of that it may lead to delay as well as to unjustified refusals.

[98] RO, report, question 10bis.

Recommendation 2.3. The Netherlands are recommended to provide the examining judge (*rechter-commissaris*) with the full file and not just with an EAW-form filled in by the prosecutor before issuing the EAW.

Judicial oversight can only be carried out when having access to all materials and should be something else than just rubberstamp a decision prepared by somebody else.

Recommendation 2.4. Hungary, Poland and Greece are recommended to treat their residents, regardless of their nationality, without distinction when applying the grounds of refusal of Art. 4(2) and Art. 4(6), as well as the guarantee of Art. 5(3).

Not providing for certain grounds for refusal increases the chance that the EAW will be executed and thus facilitates mutual recognition. On the basis of that evaluation, it may not be regarded as a violation of Union law, as the case law of the Court of Justice confirms. This is however different in a situation in which a prohibited distinction is made in the sphere of the scope of application of the ground. This is the case for the Polish implementation of Article 4(6), as well as the Hungarian and Greek implementation of Article 4(6) and 5(3). The Hungarian ground for refusal only applies to Hungarian nationals who are resident in Hungary. This rules out its application to Hungarian residents with another Member States' nationality and forms a discrimination based on nationality. Greek legislation makes the ground for refusal mandatory for nationals and optional for residents. This is a distinction based on nationality. National law may not give a better protection or more favourable treatment to nationals than to other EU nationals. The Greek implementation of Article 4(2) applies to nationals only. This rules out its application to nationals of other Member States and forms a discrimination based on nationality.

Recommendation 2.5. The Netherlands is recommended to make all aspects of the ground for refusal of 3(2) mandatory again, as this relates to a fundamental right guaranteed in Article 50 Charter and 54 CISA.

The Framework Decision prescribes this ground as a mandatory ground. The Netherlands is not at liberty to grant its executing judicial authority a margin of discretion with respect to (aspects of) the application of that ground.

> **Recommendation 2.6**. The Netherlands, Greece and Poland are recommended to repeal the grounds for refusal that were added to the closed list of grounds for refusal of the FD.

For Poland this relates to the political offence exception of Article 607p § 1 (6) and to Article 607p § 2 of the CCP, that should either be deleted or made applicable to all (nationals and residents), as it is a discrimination on the basis of nationality. These grounds are outside the scope of the exhaustive list provided in the Framework Decision. The fact that these grounds are an implementation of constitutional obligations does not alter these conclusions. For the Netherlands it concerns the alibi/ innocence ground for refusal that is not permitted under the Framework Decision. All these three grounds should be removed.

> **Recommendation 2.7**. The European Union is called to develop an instrument on transfer of proceedings of its own. In the meantime Member States who have not done so yet are recommended to ratify the 1972 Council of European Convention on the Transfer of Proceedings in Criminal Matters.

> **Recommendation 2.8**. Ireland is recommended to implement Framework Decision 2008/909.

Recommendations to issuing judicial authorities

> **Recommendation 2.9.** All issuing judicial authorities are recommended to assess the proportionality of an EAW before issuing it.

> **Recommendation 2.10**. When assessing the proportionality of issuing an EAW for prosecution issuing judicial authorities are recommended to take into consideration 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. There is no place for an EAW if the needs for the investigation can also be met by issuing an EIO.

It is important to note that the assessment of proportionality is more than a mere assessment of whether the criteria for the national arrest warrant apply. This is justified by the fact that the circumstances are different, the most important being that the requested person will be forcefully brought to another Member State. Several other factors follow from that: impact on free movement rights and the existence of alternatives. However, they may differ in weight, depending on the circumstances of the case. For an EU national who has built up a company of his own in another Member State in a decade or two, the infringement upon free movement rights is quite different than an EU national who went to look for a job elsewhere recently. For the first, there may also be alternatives to an EAW (transfer of proceedings/ transfer of execution) that may not exist for the second example.

Recommendations to executing judicial authorities

Recommendation 2.11. Executing authorities are recommended when considering a refusal based on Article 4(6) to order the execution of the foreign sentence on the basis of FD 2008/909 in one single decision. If there is insufficient information to order execution, the executing judicial authority will ask for further information that will enable it to refuse the EAW and order the execution of the foreign sentence at the same time.

This contributes to speeding up cooperation and enforcement, prevents impunity and contributes to social re-integration.

Chapter 3 The EAW

3.1 Introduction

3.1.1 EAW-form

When compared to the regime governing extradition, one of the major improvements of the regime governing surrender is the introduction of a *uniform* instrument, the EAW form. The annex to FD 2002/584/JHA, as amended by FD 2009/299/JHA, contains the EAW form. The form is the main 'tool' for providing information the executing judicial authority needs to decide whether the requested person will be surrendered or not.

Issuing judicial authorities 'are required to complete' the EAW form by 'furnishing the specific information requested' in the form.[99] Pursuant to Article 8(1) of FD 2002/584/JHA, an EAW 'shall contain' the information set out in Article 8(1)(a-g) 'in accordance with the form contained in the Annex'. Because FD 2002/584/JHA does not have direct effect[100] and must be transposed by the Member States into their national laws, it follows that the information must be conveyed by using the EAW form *as transposed into the national law of the issuing Member State*. Of course, the EAW form as contained in national legislation must be in conformity with the form as contained in the Annex to FD 2002/584/JHA.

In practice, issuing judicial authorities sometimes seem to 'adapt' the official EAW form to the circumstances of the case, *e.g.* by striking out passages that are not applicable (see section 5.2.2.1.2). This is allowed only insofar as the official EAW form itself allows for striking out non-applicable parts. Otherwise, this practice results in deviations from the official EAW form (see recommendation **3.1**). Another source of deviations is the practice of some issuing judicial authorities of having the entire EAW – *i.e.* the pre-written standard texts and the information inserted by the issuing judicial authority – translated in the language of the executing Member State or in the language indicated by that Member State, instead of using

[99] ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/17, ECLI:EU:C:2018:27, para. 57.
[100] ECJ, judgment of 24 June 2019, *Popławski II*, C-573/17, ECLI:EU:C:2019:530, para. 71; ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, ECLI:EU:C:2021:339, para. 62.

the official EAW form in that language version and having only the information added by the issuing judicial authority translated (see section 5.2.2.1.2 and recommendation **3.2**).

Art. 8(1) of FD 2002/584/JHA lists the information which an EAW must – at least – contain, *viz.* information relating to:

- 'the identity and nationality of the requested person' (Art. 8(1)(a));
- 'the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority' (Art. 8(1)(b));
- 'evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2' (Art. 8(1)(c));
- 'the nature and legal classification of the offence, particularly in respect of Article 2' (Art. 8(1)(d));
- 'a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person' (Art. 8(1)(e));
- 'the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State' (Art. 8(1)(f));
- 'if possible, other consequences of the offence' (Art. 8(1)(g)).

The EAW form is divided into nine sections which are preceded by two pre-printed statements indicating that the EAW is issued 'by a competent authority' and that this authority requests 'that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'. Each of the nine sections consists of pre-printed texts which must be completed by filling in the required information (*e.g.* the date of a judgment and the penalty imposed) and pre-printed texts whose applicability to the case at hand can be indicated by ticking the box that pertains to those texts (*e.g.* a box that pertains to one of the 32 listed offences of Art. 2(2) of FD 2002/584/JHA). Most sections of the EAW-form cover one or more of the requirements set out in Art. 8(1):

- section (a) ('Information regarding the identity of the requested person') covers the requirement of Art. 8(1)(a) ('the identity and nationality of the requested person');

- section (b) ('Decision on which the warrant is based') covers the requirement of Art. 8(1)(c) ('evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2');
- section (c) ('Indications on the length of the sentence') covers the requirement of Art. 8(1)(f) ('the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State');
- section (d) ('Indicate if the person appeared in person at the trial resulting in the decision') has no counterpart in Art. 8(1) but, obviously, is inextricably linked to the requirements of Art. 4a;
- section (e) ('Offences') covers the requirements of Art. 8(1)(d) and (e) ('the nature and legal classification of the offence, particularly in respect of Article 2'; 'a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person');
- section (f) ('Other circumstances relevant to the case (optional information)' covers the requirement of Art. 8(1)(g) ('if possible, other consequences of the offence').
- section (g) ('This warrant pertains also to the seizure and handing over of property which may be required as evidence') has no counterpart in Art. 8(1), but, obviously, relates to Art. 29 ('Handing over of property');
- section (h) ('The offence(s) on the basis of which this warrant has been issued is(are) punishable by/has(have) led to a custodial life sentence or lifetime detention order') has no counterpart in Art. 8(1) but, clearly, refers to Art. 5(2) ('Guarantees to be given by the issuing Member State in particular cases');
- section (i) ('The judicial authority which issued the warrant') covers the requirement of Art. 8(1)(b) ('the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority').

The purpose of that information is 'to provide the minimum official information required to enable the executing judicial authorities to give effect to the [EAW] swiftly by adopting their decision on the surrender as a matter of urgency'.[101]

[101] ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/17, ECLI:EU:C:2018:27, para. 59.

3.1.2 Validity of the EAW

Art. 8(1) of FD 2002/584/JHA lays down requirements concerning the information to be provided in the EAW. According to the Court of Justice these requirements are *requirements as to lawfulness*. They 'must be obeyed if the [EAW] is to be valid'.[102] Although the grounds for refusal and guarantees are *exhaustively* listed in Art. 3-5 of FD 2002/584/JHA, a failure to comply with one of those requirements as to lawfulness 'must, in principle, result in the executing judicial authority refusing to give effect to that [EAW]'.[103] This is so, because Art. 3-5 are based on the premiss that 'the [EAW] concerned will satisfy the requirements as to the lawfulness of that warrant laid down in Article 8(1) of the Framework Decision'.[104] However, before refusing to give effect to an EAW on account of non-compliance with the requirements of Art. 8(1), the executing judicial authority must first apply Art. 15(2) of FD 2002/584/JHA and 'request the judicial authority of the issuing Member State to furnish all necessary supplementary information as a matter of urgency'.[105]

The minimum requirements necessary for an EAW to be valid are *not limited* to the requirements of Article 8(1) of FD 2002/584/JHA. In a judgment concerning the status of 'issuing judicial authority', the Court of Justice stated that the principle of mutual recognition 'is based on the premiss that the [EAW] concerned was issued in accordance with the minimum requirements on which its validity depends, *including* those laid down in Article 8 of Framework Decision 2002/584 (…)'.[106] The word 'including' indicates that the minimum requirements on which the validity of an EAW depends do not entirely coincide with the requirements laid down in Art. 8(1).

One of those minimum requirements *not* mentioned in Art. 8(1) of FD 2002/584/JHA is the requirement that an EAW is issued by a 'judicial authority' within the meaning of Article 6(1) of FD 2002/584/JHA. Even though the grounds for refusal and guarantees are exhaustively

[102] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 64; ECJ, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)*, C-551/18 PPU, ECLI:EU:C:2018:991, para. 43.
[103] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 64; ECJ, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)*, C-551/18 PPU, ECLI:EU:C:2018:991, para. 43.
[104] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 63.
[105] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 65.
[106] ECJ, judgment of 9 October 2019, *NJ (Public Prosecutor's Office, Vienna)*, para. 29. See also ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 53.

listed, the principle of mutual recognition 'proceeds from the assumption that only [EAWs], within the meaning of Article 1(1) of [FD 2002/584/JHA], must be executed in accordance with the provisions of that decision'. After all, Art. 1(1) defines the EAW as a 'judicial decision (…)', which requires that it is issued by a 'judicial authority' within the meaning of Art. 6(1).[107]

Arguably, another minimum requirement as to the validity of an EAW which is not mentioned in Art. 8(1) of FD 2002/584/JHA is the requirement of effective judicial protection in the issuing Member State. This requirement follows from the Court of Justice's case-law on the dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person in the issuing Member State, as introduced in the *Bob-Dogi* judgment. In that judgment, the Court of Justice held that the system of the EAW 'entails (…) a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which [an EAW] is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision' (see also section 2.5.7).[108]

In its case-law on the meaning of the concept 'issuing judicial authority', which, for the most part, was developed in the context of EAWs issued by public prosecutors, the Court of Justice ruled that, at least at one of those two levels of protection, a decision meeting the requirements inherent in effective judicial protection should be adopted.[109] This is so, because issuing an EAW is a measure capable of impinging on the right to liberty of the requested person (Art. 6 of the Charter).[110] From all of this, the Court of Justice deduced that, where the issuing Member State confers the competence to issue an EAW on an authority which, whilst

[107] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 46; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 25.
[108] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EUC:2016:385, para. 56.
[109] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 68; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 47.
[110] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 68; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 46.

participating in the administration of justice in that Member State, is not a judge or a court – such as a Public Prosecutor's Office –, the national judicial decision on which the EAW is based, must, itself, meet the requirements inherent in judicial protection,[111] *i.e.* must be taken by or be amenable to review by a judge or a court.[112] Moreover, even if the national judicial decision is issued by a court, where a decision to issue a prosecution-EAW is taken by an authority which participates in the administration of criminal justice but is not a judge or a court – such as a Public Prosecutor's Office – that decision and, *inter alia*, the proportionality of that decision must be 'capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection'.[113] This requirement seems to be somewhat at odds with the Court of Justice's earlier observation that, *at least* at one of the two levels of protection, a decision must be adopted that meets the requirements inherent in effective judicial protection. Apparently, the requirement of the possibility of effective judicial protection against a decision to issue an EAW taken by a Public Prosecutor's Office expresses that, although such an authority can be an issuing judicial authority, it is still not a judge or a court and, in itself, does not provide effective judicial protection. Member States have considerable latitude in providing effective judicial protection. A right to appeal the decision to issue an EAW is only one of the possibilities.[114] National procedural rules, *e.g.*, according to which a court, when issuing a *national* arrest warrant on which a later EAW is based makes an assessment of the conditions to be met when issuing an EAW and, in particular, of the proportionality of that EAW meet the requirements of effective judicial protection.[115] However, if an authority which participates in the administration of criminal justice but is not a judge or a court issues an *execution*-EAW, the need to ensure effective judicial protection for the requested person is already satisfied by the judgment of conviction, which was rendered by a judge or a court. In such cases, the judicial

[111] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 69; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 48.
[112] In this vein advocate general M. Richard de la Tour, opinion of 9 December 2020, *MM*, C-414/20 PPU, ECLI:EU:C:2020:1009, paras. 100-102 and opinion of 11 February 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:115, para. 47.
[113] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 75; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 52.
[114] [114] ECJ, judgment of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:2019:1077, para. 65.
[115] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, paras. 52-53.

review required by the principle of effective judicial protection is incorporated in that judgment.[116]

In a recent judgment, the Court of Justice added another strand to the intricate tapestry of its case-law on the dual level of protection and the requirements of effective judicial protection, by specifying when that judicial protection must be available in order to be effective. According to the Court of Justice, from the case-law discussed above it follows that, at least at one of the two levels, effective judicial protection must be available *before* the surrender of the requested person.[117] In a nutshell, review by a court of the national judicial decision or of the EAW must be possible before surrender.[118] This means that, in order to comply with the requirements of effective judicial protection, the decision to issue either a national judicial decision or an EAW must be taken by a court – in which case the requested person is inherently afforded judicial protection before surrender – or must be amenable to review by a court before surrender. If this requirement is met, the executing judicial authority can be satisfied that the EAW 'has been issued following a national procedure that is subject to judicial review in the context of which the requested person has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584'.[119] In execution-cases, that judicial review was, *ipso facto*, carried out before the surrender of the requested person, because the judgment of conviction on which an execution-EAW is based logically predates the EAW and, therefore, surrender. The subject of the required judicial review is the 'lawfulness' of the national judicial decision or of the EAW.[120] If the national judicial decision is not lawful, an EAW cannot be issued or, when already issued, must be withdrawn.[121] If the EAW is not lawful, it must be withdrawn.

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[116] ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU, ECLI:EU:C:2019:1079, para. 35.
[117] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, para. 47.
[118] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, para. 48.
[119] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, para. 49.
[120] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, para. 57. It remains to be seen whether the review of the 'lawfulness' of the *national* judicial decision must comprise an assessment of the conditions to issue an *EAW* and its proportionality. The judgment is silent on this issue.
[121] Cf. ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, C-625/19 PPU, ECLI:EU:C:2019:1078, para. 50: 'Furthermore, the Swedish Government stated in its written

Either way, judicial review of the lawfulness of the national judicial decision or of the EAW before surrender can block surrender. It has the potential of preventing the requested person's arrest and/or (continued) detention in the executing Member State and his forced transfer to the issuing Member State. Evidently, judicial protection which is only afforded *after* surrender is not considered to be fully effective.[122]

Four different situations with regard to the issuing of a prosecution-EAW are possible: (1) a prosecution-EAW was issued by a court based on a national judicial decision issued by a public prosecutor; (2) a prosecution-EAW was issued by a court based on a national judicial decision issued by a court; (3) a prosecution-EAW was issued by a public prosecutor based on a national judicial decision issued by a court; (4) a prosecution-EAW was issued by a public prosecutor based on a national judicial decision issued by a public prosecutor. It should be recalled that the Court of Justice's case-law was developed mostly in cases in which an authority that is not a judge or a court but that participates in the administration of justice issued the EAW. Therefore, under the requirement of effective judicial protection, which as we have seen must be afforded at least at one of the two levels before surrender, only one situation presents any particular difficulties. In situation (4) one of the decisions must be amenable to judicial review before surrender. For execution-EAWs it is not necessary to distinguish different situations along these lines, since inherent in issuing an execution-EAW is that it is based on a national judicial decision that is issued by a court following a procedure that meets the requirements of effective judicial protection (see above).

The requirement of effective protection concerns the procedure for *issuing* an EAW.[123] As yet, the Court of Justice has not explained what consequences, from the perspective of the *executive* judicial authority, a failure to comply with the requirement of effective judicial

observations and at the hearing before the Court that a person requested on the basis of a European arrest warrant has the right to appeal against the decision ordering his or her provisional detention, without any temporal limitation, even after the European arrest warrant has been issued and after he or she has been arrested in the executing Member State. If the decision ordering the contested provisional detention is annulled, the European arrest warrant is automatically invalid, since it was issued on the basis of that decision'.

[122] In this vein advocate general J. Richard de la Tour, opinion of 11 February 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:115, paras. 60-61.

[123] ECJ, judgment of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:2019:1077, para. 48; ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, C-625/19 PPU, ECLI:EU:C:2019:1078, para. 30.

protection should have. Focussing on the *issuing* side, Advocate General M. Campos Sánchez-Bordona seems to suggests that an issuing judicial authority is *not empowered* to issue an EAW if its decision to issue is not amenable to judicial review.[124] Viewed from the perspective of the *executing* judicial authority, an EAW issued by an authority that was not empowered to issue it on account of a failure to comply with the requirement of effective judicial protection would be an invalid EAW.[125]

3.1.3 EAW form and the decision on the execution of an EAW

As we saw earlier, the purpose of the information that the issuing judicial authority is required to convey to the executing judicial authority through the medium of the EAW form is to enable the latter authority to give effect to the EAW swiftly by adopting a decision on the surrender of the requested person as a matter of urgency (section 3.1.1). In order to achieve that purpose the information that the EAW form requires should match the information the executing judicial authority needs. This leads us to the scope of the executing judicial authority's assessment when deciding on the surrender of the requested person. In deciding on the executing of the EAW the executing judicial authority must:
(1) establish that the EAW meets to the minimum requirements for it to be valid;
(2) establish that the person who was arrested on the basis of that EAW is actually the person sought by the issuing judicial authority;
(3) determine whether it must or may refuse surrender on the basis of one or more of the grounds for refusal mentioned in Art. 3-4a of FD 2002/584/JHA, insofar as the executing Member State transposed them, and/or whether to make surrender conditional on one or more of the guarantees mentioned in Article 5 of FD 2002/584/JHA, insofar as the executing Member State transposed them;
(4) in exceptional cases, determine whether it should bring the procedure to an end

[124] Opinion of Advocate General M. Campos Sánchez-Bordona of 25 June 2020, *Openbaar Ministerie (Independence of the executing judicial authority)*, C-510/19, ECLI:EU:C:2020:494, para. 53.
[125] On the consequences for the issuing Member State of a surrender on the basis of an invalid EAW see ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4.

on account of a real risk of a violation of Art. 4[126] or refrain from executing the EAW on account of a real risk of a violation of Art. 47 of the Charter of Fundamental Rights of the European Union (Charter) in the issuing Member State.[127]

If the EAW form is completed correctly, the executing judicial authority can easily establish that the EAW complies with the requirements as to its validity that are set out in Article 8(1). However, compliance with *other* necessary minimum requirements concerning the validity of an EAW may not as easily be deduced from the information provided in the EAW. Those requirements are not explicitly mentioned in FD 2002/584/JHA but were introduced by the Court of Justice in its case-law on the interpretation of that framework decision. As a result, those requirements are not represented in Art. 8(1) of FD 2002/584/JHA or in the EAW form (see recommendation **3.3**).

The issue of the judicial character of an issuing Public Prosecutor's Office, *e.g.*, usually cannot be decided based solely on the information provided in the EAW. Of course, the EAW must contain information on the judicial authority which issued the EAW (section (i) of the EAW-form), but the information required by that section does not cover the 'statutory rules and institutional framework of that authority' that should guarantee its independence vis-à-vis the executive branch of the issuing Member State.[128] Where appropriate, such information will have to be requested on the basis of Article 15(2) of FD 2002/584/JHA.

Equally, where a prosecution-EAW is issued by a Public Prosecutor's Office based on a national judicial decision issued by that same authority, the information provided in sections (b) and (i) is usually insufficient to determine whether the requirements of effective judicial protection are met, *i.e.* whether the EAW or the national decision is amenable to judicial review before surrender. Sections (b) and (i) simply do not require providing information

[126] Cf. ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 104.
[127] Cf. ECJ, judgment of 22 February 2022, *Openbaar Ministerie (Right to a tribunal previously established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100, para. 101.
[128] Cf. *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 74; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 52.

about the availability of judicial review before surrender. To obtain such information, Art. 15(2) of FD 2002/584/JHA will have to be applied.

The information provided in section (a) of the EAW form ('Information regarding the identity of the requested person') should enable the executing judicial authority to establish that the person who was arrested on the basis of an EAW actually is the person whose surrender is sought by the issuing judicial authority. However, the structure of that section already provides an indication that, in some cases, that information might not be enough: the issuing judicial authority is required to mention 'Photo and fingerprints of the requested person, if they are available and can be transmitted, or contact details of the person to be contacted in order to obtain such information or a DNA profile (where this evidence can be supplied but has not been included)'. It is evident that photo-, fingerprint- and DNA-evidence can be relevant where the person who was arrested puts up a defence of mistaken identity. In such cases, that evidence can be requested on the basis of Art. 15(2) of FD 2002/584/JHA.

The information provided in the EAW form constitutes the factual and legal foundation for invoking a ground for refusal. However, here again, it is clear that this foundation may not be enough. Consider, *e.g.*, the ground for mandatory refusal concerning *ne bis in idem* in a Member State (Art. 3(2) of FD 2002/584/JHA). Of course, the EAW must contain information about the 'acts' committed by the requested person (section (e) of the EAW form), but it will be a very rare case indeed if the EAW *also* provides sufficient information about a 'final judgment' in a Member State in respect of 'the same acts' within the meaning of Article 3(2) of FD 2002/584/JHA. After all, even if the issuing judicial authority were aware of such information, none of the sections of the EAW form requires providing that information. In most cases, such information is provided by the requested person and/or is obtained on the basis of Article 15(2) of FD 2002/584/JHA. In those cases, the EAW merely provides a basis for comparing the 'acts' for which surrender is sought with the 'acts' on which the 'final judgment' is based and determining whether both sets of 'acts' are 'inextricably linked'.[129]

[129] See ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, paras. 39-41.

Equally, as regards the guarantees of Art. 5 of FD 2002/584/JHA the information provided in the EAW may not be sufficient either. Consider, *e.g.*, the guarantee of return of a national or of resident of the executing Member State to serve his custodial sentence in that Member State (Art. 5(3) of FD 2002/584/JHA). It is true that the issuing judicial authority must mention the nationality of the requested person in section (a) of the EAW-form. A person who is *not* a *national* of the executing Member State may well be a *resident* of the executing Member State, but this is a circumstance of which the issuing judicial authority usually is not aware (even if it were inclined to mention such a circumstance in the EAW). Consequently, a decision to make surrender of a resident of the executing Member State conditional on a guarantee of return will, as a rule, be based on information provided by the requested person himself or on *ex officio* knowledge of the executing judicial authority.

The minimum information as set out in Article 8(1) of FD 2002/584/JHA is of little or no use for determining whether the requested person, if surrendered, would run a real risk of being subjected to inhuman or degrading conditions of detention in the issuing Member State or a real risk of a violation of the right to an independent tribunal. None of the requirements of Art. 8(1) and none of the sections of the EAW form relate to such matters. Once the executing judicial authority has established a real risk of a Charter violation *in abstracto*, it must engage in a 'dialogue'[130] with the issuing judicial authority – *i.e.* request supplementary information on the basis of Art. 15(2) of FD 2002/584/JHA – if the information at its disposal is insufficient to determine whether there is a real risk of a violation *in concreto*.[131]

Therefore, one can conclude that, although the EAW form certainly is the main source of information needed by the executing judicial authority to decide on the execution of an EAW, it is not and, of necessity, cannot be the only source of information.

Although the EAW form is intended to convey the minimum official information needed to take a decision on the execution on an EAW and, as such, is the main source of information,

[130] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, ECLI:EU:C:2018:589, para. 104; ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, ECLI:EU:C:2018:586, para. 77.
[131] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, ECLI:EU:C:2018:589, para. 63; ECJ, judgment of 22 February 2022, *Openbaar Ministerie (Right to a tribunal previously established by law in the issuing Member State)*, ECLI:EU:C:2022:100, para. 54.

the EAW form does not always seem to provide sufficient guidance to issuing judicial authorities on completing the form and, therefore, on providing the necessary minimum official information (see recommendation **3.3**). As discussed above, to some extent this is the result of the fact that the form no longer fully reflects the evolving case-law of the Court of Justice on the EAW. However, the structure and wording of the EAW form itself are also an important cause. This chapter will pinpoint a number of failings in the structure and wording of the form (see, *e.g.*, section 3.6.1.3.1 on the structure of section (e) of the EAW form).[132]

3.1.4 Recommendations regarding the EAW form in general

As we saw in section 3.1.1, although issuing judicial authorities must use the EAW form when issuing an EAW, they sometimes take liberties with the form by deviating from it. Moreover, translations sometimes deviate from the issued EAW because the translator also translate the pre-written standard texts of the EAW instead of using the EAW form in the language version of the executing Member State.

These conclusions lead to the following recommendations.

Recommendation 3.1 The issuing judicial authorities are recommended to only use the official EAW form without any deviations.

Recommendation 3.2 When having the EAW translated in the official language of the executing Member State or in the language indicated by that Member State pursuant to Art. 8(2) of FD 2002/584/JHA, the issuing judicial authorities are recommended to only use the EAW form in that official language version, in order that only the parts that were completed by the issuing judicial authority are translated.

As discussed before (see section 3.1.3), the sections of the EAW form do not fully reflect the requirements as they follow from the Court of Justice's case-law on the EAW. The EAW form is lagging behind the ever evolving case-law of the Court of Justice on the EAW. To

[132] On section (d) of the EAW form see H. Brodersen, V. Glerum & A. Klip, *The European Arrest Warrant and In Absentia Judgments*, The Hague: Eleven International Publishers 2020, *passim*.

same extent this is inevitable. However, this does not relieve the EU of trying to find a way to update the EAW form regularly in a quick and less cumbersome way than amending the FD 2002/584/JHA.

In practice, the EAW form does not always seem to give the issuing judicial authorities sufficient guidance on completing it correctly (see section 3.1.3). Therefore, a regular update of the EAW form should be combined with the development of a digital and smart EAW form in order that completing the form becomes more intuitive and user-friendly. Such a digital and interactive EAW form could contain digital instructions (and a link to the *Handbook* or other instructions) to elucidate the meaning of the separate sections and to list do's and don'ts.

These conclusions result in the following recommendation.

Recommendation 3.3 The EU is recommended to:

- find a way to regularly update the EAW form in order that it reflects the requirements of the constantly evolving case-law of the Court of Justice; and
- provide the regularly updated EAW form in a digital and interactive format.

3.2 Section (a) of the EAW form

3.2.1 Legal framework

Obviously, section (a) of the EAW form (entitled 'Information regarding the identity of the requested person') is intended to list the minimum information which is necessary for the identification of the requested person. Section (a) of the EAW form is the corollary of Art. 8(1)(a) of FD 2002/584/JHA, which requires mentioning 'the identity and nationality of the requested person'.

As to the identity of the requested person, section (a) of the EAW form requires mentioning the name (including, where applicable, the maiden name and any aliases) and address (if known) of the requested person, his sex, his date and place of birth and 'Distinctive marks/description of the requested person'. Also photo and fingerprints of the requested person 'if they are available and can be transmitted' must be included or, 'where this evidence can be supplied but has not been included', contact details of the person to be contacted in order to obtain such information or a DNA profile. Obviously, photo, fingerprints and a DNA profile are highly useful tools for establishing the identity of the requested person, especially where the person concerned disputes that he is the requested person.

Mentioning the requested person's nationality is relevant for the possible application of Art. 4(6) of FD 2002/584/JHA and of Art. 5(3) of FD 2002/584/JHA.

Section (a) also requires mentioning the 'Language(s) which the requested person understands (if known)'. Although this not information about the identity of the requested person *stricto sensu*, such information is nonetheless is very useful once the requested person is arrested in the executing Member State.

3.2.2 Section (a) in practice

3.2.2.1 Difficulties on the issuing side

None of the country experts mentions any serious difficulties on the issuing side.

According to the Hungarian country expert, issuing judicial authorities from that Member State, when entering information in SIS, do not always have a photo or fingerprints of the person concerned. For example, non-Hungarian citizens who have never entered into the record before may not have their photo in the system. In Hungarian law and practice, the name of the mother is also used in identifying requested persons.[133]

Most experts stress the need for sufficient information to properly identify the person concerned. Absent such information, an EAW should not be issued.[134]

3.2.2.2 Difficulties on the executing side

The country experts mention varying degrees of difficulties on the executing side: no difficulties;[135] difficulties are rather seldom[136] or not very common;[137] difficulties occur from time to time[138] or in some cases;[139] difficulties are often.[140]

Although difficulties are reported to be not very common in Romania, when they do occur they are of a serious nature. *E.g.*, the country expert for that Member State refers to cases in which the enforceable judgment of conviction was based on the wrong identity or on a false identity.[141]

The country expert for Greece mentions that EAWs often contain insufficient information to identify the requested person, which can have serious repercussions. Greece has many refugees and immigrants whose true or full personal details are unknown to the police. This can result in frequent and unjustified arrests of the same person, or of different persons, with the same first and last names. The Greek expert calls on issuing judicial authorities to be more diligent in completing section (a). In particular, the first names of the father and the mother of the requested person should be included in EAW form.[142]

[133] HU, report, question 14.
[134] BE, report, question 14; EL, report, question 14 ; IE, report, question 14; NL, report, question 14.
[135] HU, report, question 15; PL, report, question 15.
[136] BE, report, question 15.
[137] RO, report, question 15.
[138] IE, report, question 15.
[139] NL, report, question 15.
[140] EL, report, question 15.
[141] RO, report, question 15.
[142] EL, report, question 15.

The experts from Belgium and Ireland remark that, if the available information is insufficient to dispel doubts about the identity of the person who was arrested on the basis of an EAW, supplementary information may be requested.[143] In Dutch practice, errors or omissions in the information provided in section (a) have no consequences, as long as the executing judicial authority is able to establish that the person who was arrested is the requested person. When examining a defence of mistaken identity, the executing judicial authority will have regard to, *e.g.*, fingerprints or photographs provided by the issuing judicial authority.[144]

3.2.3 Recommendations regarding section (a)

Although it is evident that there are some difficulties on the executing side, it is not necessary to put forward recommendations regarding section (a).

Amending section (a) in order to require mentioning the first names of the father and the mother of the requested person to solve a problem which seems to be particular to Greece is problematic. For Member States which do not register the father's and mother's first names of suspected and convicted persons this would probably mean that they would be forced to amend not only the legislation adopted to transpose FD 2002/584/JHA but also their national legislation on criminal procedure and on data protection. After all, in order to be able to comply with a requirement to mention data concerning the parents of the requested person in the event of issuing an EAW, the national authorities would not only have to ask (almost) every suspect and convicted person[145] to supply that information but would also have to register that information. That, in turn, would probably require modifying existing IT systems. Simply recommending that issuing judicial authorities mention the father's and mother's first names, without any basis in national law for asking, registering and providing such information and without any modifications to IT systems, would be equally problematic.

[143] BE, report, question 15; IE, report, question 15.
[144] NL, report, question 15.
[145] Except where the threshold of Art. 2(1) of FD 2002/584/JHA is not met.

3.3 Section (b) of the EAW form

3.3.1 Legal framework

3.3.1.1 Introduction

Section (b) of the EAW form concerns the national decision on which the EAW is based. This section is the corollary of Art. 8(1)(c) of FD 2002/584/JHA which requires mentioning, in the EAW, 'evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2'.

As a preliminary observation, it should be pointed out that Art. 8(1)(c) of FD 2002/584/JHA does not require the issuing judicial authority to provide the original national decision or an authenticated copy thereof. What is required is that the issuing judicial authority describes the national decision on which the EAW is based, by giving particulars of that decision – such as the type of decision, the date and the case reference – under one of the two headings of section (b) of the EAW form ('Arrest warrant or judicial decision having the same effect'; 'Enforceable judgment'). In this respect, the regime of Art. 8(1)(c) differs from the regime of Art. 12(2)(a) of the European Convention on Extradition, which states that a request for extradition must be accompanied by 'the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party'. By doing away with that requirement, Art. 8(1)(c) gives expression to the objective of FD 2002/584/JHA of simplifying and accelerating judicial cooperation.

3.3.1.2 Judicial decision

As the wording of Art. 8(1)(c) of FD 2002/584/JHA makes perfectly clear, the national decision on which the EAW is based must be a 'judicial' decision. That requirement is expressly reflected in the wording of section (b)1 ('Arrest warrant or judicial decision having the same effect') and, more implicitly, in the wording of section (b)2 ('Enforceable judgment').

The autonomous term of Union law 'judicial decision' is not limited to decisions of courts and judges but covers all decisions of national authorities that administer criminal justice –

such as Public Prosecutor's Offices –, but not the police services.[146] Since the executive does not administer criminal justice, that interpretation also excludes decisions of the executive from being judicial decisions.[147] In the *Özçelik* judgment, the Court of Justice gives two reasons for this interpretation.[148] First, the need to ensure consistency between the interpretation of the term 'judicial authority' within the meaning of Art. 6(1) of FD 2002/584/JHA and the interpretation of the term 'judicial decision' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA. The interpretation given to the latter term – authorities that administer criminal justice but not the police – is in line with the interpretation given to the former term in the *Kovalkovas*[149] and *Poltorak*[150] judgments. Second, that interpretation 'justifies' the high level of confidence between the Member States and, therefore, contributes to the attainment of the objective set for the EU to become an area of freedom, security and justice, founded on a high level of confidence.

In a later development, the interpretation of the term 'judicial authority' within the meaning of Art. 6(1) of FD 2002/584/JHA came to include the requirement that an authority that administrates criminal justice but that is not a judge or a court – such as a Public Prosecutor's Office – 'must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to issue [an EAW] lies with that authority and not, ultimately, with the executive'.[151] In the *OG and PI* and *PF* judgments, the Court of Justice held that independence from the executive in the execution of responsibilities that are inherent in the issuing of an EAW requires 'that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not

[146] ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860, para. 33; ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLU:EU:C:2021:4, para. 52.
[147] Compare ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, para. 35.
[148] ECJ, judgment of 10 November 2016, Özçelik, C-453/16 PPU, ECLI:EU:C:2016:860, paras. 33-36.
[149] ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paras. 34-35.
[150] ECJ, judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, ECLI:EU:C:2016:858, paras. 33-34.
[151] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 73; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 51.

exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive'.[152]

Concerning national judicial decisions, the case-law of the Court of Justice does not (expressly) require that authorities that administrate criminal justice but are not judges or courts are not exposed to the risk that their decision making power vis-à-vis national decisions is subject to directions of instructions from the executive. After the *OG and PI* and *PF* judgments, the Court of Justice, when referring to the definition of a 'judicial decision' within the meaning of Art. 8(1)(c), simply repeated that this term covers all the decisions of national authorities that administer criminal justice, but not the police.[153] Consequently, it seems possible that the interpretations of the terms 'judicial authority' and 'judicial decision' no longer are entirely consistent with one another.[154]

3.3.1.3 Enforceable judicial decision

The wording of Art. 8(1)(c) also clearly requires that the national judicial decision on which the EAW is based is 'enforceable'. Section (b) of the EAW form only uses the word 'enforceable' with regard to judgments, but Art. 8(1)(c) refers to 'an enforceable judgment, an arrest warrant or *any other enforceable* judicial decision',[155] thus signifying that a national arrest warrant equally should be 'enforceable'. Enforceability of a national judicial decision is

[152] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 74; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 52.
The requirement concerning statutory rules and an institutional framework capable of guaranteeing independence in decision making does not concern issuing judges or courts. According to the Court of Justice, judges and courts 'by their nature' act 'entirely independently of the executive'. Moreover, the Union law requirement that courts be independent 'precludes the possibility that they may be subject to a hierarchical constraint or subordinated to any other body and that they may take orders or instructions from any source whatsoever': ECJ, judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU & C-412/20 PPU, ECLI:EU:C:2020:1033, paras. 41 and 49.
[153] ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, para. 52.
[154] It should be pointed out that in the *MM* judgment the status of the Bulgarian Public Prosecutor's Office as an 'issuing judicial authority' and thus its independence from the executive was not at issue: ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, para. 43. In a later judgment, the Court of Justice actually held that another Bulgarian Public Prosecutor's Office met the conditions for being classified as an 'issuing judicial authority': ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, para. 37. See also ECJ, order of 22 June 2021, *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria***,** C-206/20, ECLI:EU:C:2021:509, para. 41.
[155] Emphasis added.

'decisive in determining the time from which [an EAW] may be issued':[156] a judicial decision that is not 'enforceable' cannot constitute the basis for issuing an EAW.

When is a judicial decision an 'enforceable' decision? The most obvious answer is that a judicial decision is 'enforceable' where there is no legal impediment to carrying it out. However, in establishing the meaning of the concept of 'enforceability' regard must be had to the fact that some provisions of FD 2002/584/JHA refer to a 'final judgment', *e.g.* Art. 8(1)(f), which requires mentioning 'the penalty imposed, if there is a final judgment' in section (c)2 of the EAW form.

The Court of Justice has not had the opportunity to define the concept 'final judgment' of Art. 8(1)(f) of FD 2002/584/JHA. As a working hypothesis, this report will use the definition of a 'final decision' within the meaning of Art. 4 of Protocol No. 7 to the ECHR. Under that provision a judgment is 'final', when no further 'ordinary' remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them.[157] Although not all Member States have ratified Protocol No. 7 to the ECHR, this does not seem preclude using the definition of Art. 4. After all, the Court of Justice adopted that definition under Art. 50 of the Charter and Art. 54 of the CISA.[158] Lack of a time limit, unlimited discretion of one of the parties to make use of a remedy or subjecting a remedy to conditions disclosing a major imbalance between the parties in their ability to avail themselves of it, indicates that the remedy is not an 'ordinary' one.[159]

According to the European Commission's *Handbook*, the legal systems of some Member States allow issuing an EAW for the execution of a custodial sentence 'even if the sentence is not final and still subject to judicial review'. In the legal systems of other Member States an EAW for the execution of a custodial sentence is possible only when the sentence is final.[160] The Handbook advises the executing judicial authority to recognise 'the issuing judicial authority's classification for the purpose of execution of the EAW, even if it does not

[156] ECJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 71.
[157] See ECtHR, judgment of 10 February 2009 [GC], *Sergey Zolotukhin v.Russia*, ECLI:CE:ECHR:2009:0210JUD001493903, § 107.
[158] ECJ, judgment of 5 June 2014, *M.*, C-398/12, ECLI:EU:C:2014:1057, paras. 37-39.
[159] ECtHR, judgment of 8 July 2019, *Mihalache v. Romania*, ECLI:CE:ECHR:2019:0708JUD005401210, § 115.
[160] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/12.

correspond to its own legal system in this regard'. This seems to suggest that an 'enforceable judgment' is not necessarily a 'final judgment', depending on the legal system of the issuing Member State.

However, in the *Guidelines how to fill in the EAW form* (Annex III to the Handbook) – which are addressed to *issuing* judicial authorities – the 'finality' of a judgment seems to be regarded as a condition for 'enforceability' of that judgment. According to those *Guidelines*, the issuing judicial authority should 'Refer to the relevant judgment or ruling, which became final on dd/mm/yyyy (…)' in section (b)2. Further, it states that sentences that are not yet enforceable 'while appeal is possible, while they are not final, are grounds for filling in box (b) 1 and NOT box (b) 2'. Box (b)2 concerns *enforceable* judgments. The Guidelines add that where section (b)2 is filled in section (c)2 should also be filled in. Section (c)2 concerns the length of the custodial sentence or detention order imposed, 'if there is a final judgment' (Art. 8(1)(f) of FD 2002/584/JHA). The *Guidelines* seem to be in line with the Court of Justice's judgment in the *B.* case. In that judgment, the Court of Justice held that, if a sentence – in this particular case, a sentence imposed *in absentia* - is not yet enforceable because it is still open to the person concerned to apply for a retrial, surrender would serve the purpose of 'enabling a criminal prosecution to be conducted or the case to be retried'.[161]

Nevertheless, although 'finality' seems to be a condition for 'enforceability', both concepts are not entirely coterminous. Consider, *e.g.*, a final judgment convicting a person to a custodial sentence, where the enforcement of that sentence is statute-barred or where the offence for which that sentence was imposed is covered by an amnesty in the issuing Member State. In those circumstances the final judgment is not enforceable anymore.[162] Or consider a final judgment convicting a person to a suspended custodial sentence. As long as the suspension of that sentence is not revoked, that final judgment is not enforceable within the meaning of Art. 8(1)(c) of FD 2002/584/JHA yet.[163]

[161] ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paras. 56-57.
[162] Compare advocate-general J. Kokott, opinion of 17 June 2021, *AB and Others (Revocation of an amnesty)*, C-203/20, ECLI:EU:C:2021:498, para. 33.
[163] Of course, in the context of the principle of *ne bis in idem* a suspended sentence is 'actually in the process of being enforced' within the meaning of Art. 54 of the CISA during the probation period and must be regarded as 'having been enforced' once the probation period has ended: ECJ, judgment of 18 July 2007, *Kretzinger*, C-288/05, ECLI:EU:C:2007:441, para. 42.

In the *Tupikas* judgment, the Court of Justice confirmed that – in the context of Art. 4a of FD 2002/584/JHA – 'finality' and 'enforceability' do not necessarily coincide. It defined the concept 'decision' – part of the concept of 'trial resulting in the decision' – as a 'judicial decision which finally sentenced' the requested person or as a 'final sentencing decision' for short.[164] It added that 'although the final sentencing decision may, in certain cases, be indissociable from the enforceable criminal decision, that aspect is still governed by the various national procedural rules, in particular where several decisions have been taken at the end of successive proceedings'.[165]

In doing so, the Court of Justice apparently followed advocate general Bobek. He had concluded that the 'enforceable judgment' is 'the judgment which allows the competent authorities, under the applicable national law, to ensure execution of the custodial sentence which was imposed on the person concerned. What constitutes such a judgment in a particular case will depend on the procedural framework in the Member State and the manner in which the person concerned has used it (or in which it has been used in relation to him)'.[166] According to the advocate general, to identify, in a given case, what constitutes an 'enforceable judgment', there are two variables. The first variable concerns the 'possibility of an appeal in which the merits of the case are fully examined, including an examination of guilt or of the penalty imposed' and the second variable 'whether the appeal was actually brought and what effect it had on the judgment given at first instance'.[167] He added that 'the applicable national law determines whether it is the judgment at first instance or the judgment given on appeal which is the enforceable instrument'.[168]

3.3.1.4 Judicial decision 'coming with the scope of Articles 1 and 2'

Art. 8(1)(c) requires that the national judicial decision on which the EAW is based comes 'within the scope of Articles 1 and 2'.

[164] ECJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paras. 74 and 76.
[165] ECJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 76.
[166] Opinion of advocate general M. Bobek of 26 July 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:609, para. 54.
[167] Opinion of advocate general M. Bobek of 26 July 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:609, para. 51-53.
[168] Opinion of advocate general M. Bobek of 26 July 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:609, para. 54.

The purpose of the first part of this sentence, the reference to Art. 1, is not immediately clear.

Art. 1 of FD 2002/584/JHA has three sections. Section (1) contains the definition of an EAW ('a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'). Section (2) formulates the duty of the Member States to execute any EAW on the basis of the principle of mutual recognition. Section (3) reminds us of the 'obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.

None of these three sections contain a 'scope' within which national judicial decisions should come. The most likely reading of the reference to Art. 1 is that it concerns the distinction between conducting a criminal prosecution and executing a custodial sentence or detention order. In this reading, the national judicial decision must either be related to a criminal prosecution or to the enforcement of a sentence.

This reading is confirmed by the *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)* judgment. Referring to Art. 1 and 2, the Court of Justice held that it follows 'from the purpose and subject matter' of a judicial decision allowing the enforcement of a (foreign) custodial sentence, 'namely the execution of a sentence', that it falls 'within the scope of Articles 1 and 2, provided that the sentence in question is a custodial sentence of at least four months'.[169] The 'purpose' of the judicial decision refers to the purpose of the EAW, as described in Art. 1: either conducting a prosecution or executing a custodial sentence. The 'subject matter' of a judicial decision refers to the distinction between 'acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months' and 'sentences of at least four months' as laid down by Art. 2.[170]

This brings us to the reference to Art. 2. According to its rubric, that provision defines the scope of the EAW. Consequently, for a national judicial decision to come within the scope of

[169] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 50.
[170] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 51.

Art. 2, it must concern either 'acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months' (Art. 2(1)). Implicitly, the reference to Art. 2 also concerns the distinction between EAWs for the purposes of conducting a prosecution and EAWs for the purposes of executing a custodial sentence.

3.3.1.5 Objectives of Art. 8(1)(c) of FD 2002/584/JHA

Compliance with the first level of the dual level of protection

The main objective of the requirement of mentioning the existence of a national judicial decision in section (b) of the EAW follows from the Court of Justice's case-law on the dual level of protection for procedural rights and fundamental rights of the requested person. That concept was introduced in the *Bob-Dogi* judgment. In the Court of Justice's reasoning, mentioning the existence of a national arrest warrant on which the EAW is based, signifies to the executing judicial authority that the person concerned already had the benefit, at the first stage of the proceedings in the issuing Member State, of *judicial* protection of procedural safeguards and fundamental rights.[171]

It follows that the 'arrest warrant' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA is *distinct* from and does not *coincide* with the EAW. Otherwise, the first level of judicial protection for the requested person's procedural and fundamental rights would be absent. Therefore, in prosecution-cases, the EAW must be based on - and must mention the existence of - a separate national arrest warrant.[172] Even though the 'arrest warrant' and the EAW cannot coincide, the Court of Justice evidently does not exclude that both the national judicial decision and the EAW are issued by one and the same authority close after each other. According to the Court of Justice, the protection that must be afforded at the second level, *i.e.* the level of the adoption of the EAW, 'may occur, depending on the circumstances, *shortly after the adoption of the national judicial decision*'.[173]

[171] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLU:EU:C:2016:385, paras. 54-55.
[172] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLU:EU:C:2016:385, paras. 56-58.
[173] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 56 (emphasis added).

In *execution*-cases, the need for judicial protection for procedural safeguards and fundamental rights at the level of the adoption of the national judicial decision is met by judicial proceedings ruling on the guilt of the requested person. Mentioning the existence of an enforceable judgment allows 'the executing judicial authority to presume that the decision to issue a European arrest warrant for the purposes of executing a sentence is the result of a national procedure in which the person in respect of whom an enforceable judgment has been delivered has had the benefit of all safeguards appropriate to the adoption of that type of decision, including those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584'.[174]

In the *OG and PI* and *PF* judgments, the Court of Justice attached the requirement of effective judicial protection to the concept 'dual level of protection'. It did so in the context of defining the concept 'issuing judicial authority' within the meaning of Art. 6(1) of FD 2002/584/JHA. Under certain conditions a Public Prosecutor's Office qualifies as an 'issuing judicial authority' and can issue EAWs.[175] An EAW is capable of 'impinging on the right to liberty' (Art. 6 of the Charter) of the requested person. Therefore, the protection for procedural rights and fundamental rights entails that 'a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection'. Accordingly, where an authority that is not a judge or a court is competent to issue a prosecution-EAW, such as Public Prosecutor's Office, the *national* judicial decision must meet the requirements inherent in effective judicial protection. Those requirements are met where a prosecution-EAW is based on the result of a 'national procedure that is subject to review by a court'. Because the Court of Justice had held earlier, in the *Özçelik* judgment, that a decision of a Public Prosecutor's Office is a 'judicial decision' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA,[176] a national arrest warrant issued by a Public Prosecutor's Office on which a prosecution-EAW is based must be capable of review by a court.

[174] ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU, ECLI:EU:C:2019:1079, para. 36.
[175] See ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457.
[176] ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860, para. 37.

It follows that - from the *OG and PI* and *PF* judgments on - mentioning the existence of national arrest warrant issued by a public prosecutor in an EAW that was also issued by a public prosecutor admittedly demonstrates that the EAW meets the requirement of Art. 8(1)(c) of FD 2002/584/JHA, but does not *ipso facto* demonstrate that the requirements of effective judicial protection are met with regard to that decision. Neither Art. 8(1)(c) nor the Court of Justice's case-law require the issuing judicial authority to include in the EAW information showing that a national arrest warrant issued by a public prosecutor is capable of judicial review. In the absence of such information, the executing judicial authority, in order to establish whether the EAW meets the minimum requirements for it to be valid, which requirements include the requirements inherent in effective judicial protection, must apply Art. 15(2) of FD 2002/584/JHA and request supplementary information from the issuing judicial authority.

Of course, the *Updated Questionnaire and Compilation on the Requirements for Issuing and Executing Judicial Authorities in EAW Proceedings pursuant to the CJEU's Case-Law*, compiled by Eurojust and the European Judicial Network,[177] contains information which could be used to determine whether those requirements are met. However, in the context of direct communications between judicial authorities, it is the issuing judicial authority that should provide information that is necessary for the decision on the execution of the EAW. Moreover, the information contained in the *Updated Questionnaire* is sometimes disputed and incomplete. In the opinion of the expert from Greece, *e.g.*, Greek public prosecutors are not independent from the executive,[178] whereas the *Updated Questionnaire* states that they are.[179] In addition, the *Updated Questionnaire* does not give any information about the right to effective judicial protection concerning the decision to issue a prosecution EAW taken by a Greek public prosecutor.[180]

Distinction between prosecution-EAWs and execution-EAWs

[177] *Updated Questionnaire and Compilation on the Requirements for Issuing and Executing Judicial Authorities in EAW Proceedings pursuant to the CJEU's Case-Law*, last updated: 19 April 2021 (https://www.ejn-crimjust.europa.eu/ejnupload/DynamicPages/Updated_Compilation_judicial_authorities_EAW.pdf, last accessed on 21 November 2021).
[178] EL, report, question 8 b)(ii).
[179] *Updated Questionnaire and Compilation on the Requirements for Issuing and Executing Judicial Authorities in EAW Proceedings pursuant to the CJEU's Case-Law*, last updated: 19 April 2021, p. 43.
[180] Ibid., p. 44.

As a corollary of the requirement of Art. 8(1)(c) of FD 2002/584/JHA, mentioning the existence of a national judicial decision in section (b), together with the information provided in section (c), enables the executing judicial authority to determine whether surrender is sought for the purposes of conducting a prosecution or for the purposes of executing a custodial sentence. An EAW can apply those two *distinct* situations.[181]

As we saw earlier, the sections of the EAW form are preceded by a general pre-printed statement that surrender is requested 'for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'. The distinction between prosecution- and execution-EAWs is relevant for the decision on the execution of the EAW. Art. 2(1) of FD 2002/584/JHA sets different conditions for issuing an EAW depending on whether its purpose is to conduct a prosecution or to execute a custodial sentence. Moreover, some grounds for refusal and guarantees are applicable only to execution-EAWs (Art. 4(6) and 4a), and others only to prosecution-EAWs (Art. 5(3)). However, the EAW form does not require the issuing judicial authority to strike out that part of the statement that is not applicable to the EAW at hand.

The binary purposes of surrender are reflected in the 'binary structure' of sections (b) and (c). If the purpose of an EAW is to conduct a criminal prosecution, section (b)1 and c(1) ('Maximum length of the custodial sentence or detention order which may be imposed for the offence(s)') should be filled in. If, on the other hand, the purpose of an EAW is to execute a custodial sentence, sections (b)2 and (c)2 ('Length of the custodial sentence or detention order imposed') should be filled in.

3.3.1.6 Arrest warrant or enforceable judicial decision having the same effect

An 'arrest warrant or (…) enforceable judicial decision having the same effect' is a national measure that is distinct from the EAW and that is issued by a national authority that administers criminal justice but is not the police. It is not required that the national measure is referred to as an 'arrest warrant' in the legislation of the issuing Member State but it must produce equivalents effects, *i.e.* 'the legal effects of an order to search for and arrest the

[181] ECJ, judgment of 21 October 2010, B., C-306/09, ECLI:EU:C:2010:626, para. 49; ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 58.

person who is the subject of a criminal prosecution'. Therefore, the autonomous concept 'arrest warrant or (…) enforceable judicial decision having the same effect' does not cover 'all the measures which initiate the opening of criminal proceedings against a person, but only those intended to enable, by a coercive judicial measure, the arrest of that person with a view to his or her appearance before a court for the purpose of conducting the stages of the criminal proceedings'.[182]

Accordingly, an order adopted by a public prosecutor putting a person under investigation, the sole purpose of which is to notify the person concerned of the charges against him and to afford him the possibility to defend himself by providing explanations or presenting offers of evidence, is not an 'arrest warrant' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA.[183] By contrast, a decision adopted by a public prosecutor ordering the detention of the requested person for a maximum of 72 hours – with a view to allowing that person to be brought before a court with jurisdiction to make a provisional detention order – does come within the definition of an 'arrest warrant'.[184]

3.3.1.7 Enforceable judgment

If a final suspended custodial sentence was imposed and that suspension was finally revoked by a later decision, the question arises which judicial decision is the 'enforceable judgment' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA and section (b) of the EAW form. The same goes for (the revocation of) parole. On the one hand, one can argue that the final judgment imposing the suspended custodial sentence or granting parole became enforceable once the decision to revoke the suspension or parole became final and that, therefore, the judgment is the 'enforceable judgment'. On the other hand, one can argue that the revocation decision is the 'enforceable judgment' – or, at least, is an 'enforceable judgment' as well – because this decision 'allows a judgment to be enforced'.[185] It may even be that one treats both the judgment imposing the suspended sentence or granting parole and the revocation decision as the 'enforceable judgment'. However, the law of the issuing Member State

[182] ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, para. 53.
[183] ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, paras. 54 and 56.
[184] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, para. 39; ECJ, order of 22 June 2021, *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria*, C-206/20, ECLI:EU:C:2021:509, para. 42.
[185] Cf. ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 44.

decides which final judgment or decision constitutes an 'enforceable judgment' (see section 3.3.1.3). As a result, the answer to question which of those two is the 'enforceable judgment' can vary from Member State to Member State. On this issue, section (b) of the EAW form is silent. That section nor any of the other sections contains any reference to (the revocation of) a suspended sentence/parole.

The wording of Art. 8(1)(c) of FD 2002/584/JHA, insofar as it contains a reference to an 'enforceable judgment', does not exclude from its scope a judgment rendered *in absentia*, *i.e.* a judgment rendered after a trial at which the person concerned did not appear in person. Art. 4a of FD 2002/584/JHA confirms that an EAW can be issued for the purposes of executing a custodial sentence imposed by a judgment *in absentia*. That provision contains a ground for optional refusal for just such a situation ('The executing judicial authority may also refuse to execute the [EAW] issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision (…)'). An *in absentia* judgment can be a 'final' judgment within the meaning of FD 2002/584/JHA. The Court of Justice defined the 'decision' to which Art. 4a of FD 2002/584/JHA refers as the 'judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of [an EAW]' or the 'final sentencing decision' for short.[186] Moreover, as the Court of Justice held in the *Bourquain* case, the sole fact that *in absentia* proceedings, under national law, would necessitate the reopening of the case does not, in itself, mean that in such circumstances the *in absentia* judgment cannot be regarded as a final decision (within the meaning of Art. 54 of the CISA).[187] If an *in absentia* judgment can be a 'final' judgment, there is no reason to suppose that it cannot also be an 'enforceable' judgment.

Therefore, it is surprising that the *Guidelines on how to fill in the EAW FORM* (Annex III of the Commission's *Handbook*) seem to allow for an interpretation that *in absentia* judgments can only be at the basis of an EAW for the purposes of conducting a criminal prosecution. According to the *Guidelines*, when an EAW 'is issued in cases rendered in absentia' section (b)1 should be filled in. The *Guidelines* also remark that 'where box (b) 1 is filled in box (c) 1

[186] ECJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paras. 74 and 76.
[187] ECJ, judgment of 11 December 2008, *Bourquain*, C-297/07, ECLI:EU:C:2008:708, paras. 40 and 45.

should also be filled in'.[188] On this issue, the *Guidelines* could lead issuing judicial authorities astray.

By its nature, an 'enforceable judgment' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA must be an enforceable judicial decision coming from a court or another judicial authority of a *Member State*. After all, FD 2002/584/JHA only applies to Member States of the EU.[189]

However, a judgment rendered in a *third* State that was recognised and rendered enforceable by the issuing Member State can – indirectly – constitute the basis for issuing an execution-EAW. FD 2002/584/JHA does not require that that the custodial sentence to be executed in the issuing Member State stems from a judgment delivered by the courts of that Member State or of another Member State.[190] National measures that allow such a judgment to be enforced in the issuing Member State and that are adopted by a court or other judicial authority of that Member State qualify as an 'enforceable judicial decision'. Since an EAW based on such a judicial decision would have the purpose of executing a custodial sentence, that judicial decision would come 'within the meaning of Articles 1 and 2', provided that the sentence imposed is a custodial sentence of at least four months.[191] In short, in these circumstances such a judicial decision would meet the requirements of Art. 8(1)(c) of FD 2002/584/JHA.

Surrender for the purpose of executing a custodial sentence imposed in a *third* State raises the question whether the fundamental rights of the requested person were respected in the proceedings resulting in the imposition of that sentence. Between Member States of the EU mutual trust, in particular in their respective criminal justice systems, is implied and justified by the fundamental premiss 'that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union

[188] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/66.
[189] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, paras. 43-44.
[190] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 52.
[191] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, paras. 47-50.

is founded, as stated in Article 2 TEU'.[192] The principle of mutual recognition requires a Member State to consider all the other Member States to be complying, in particular, the fundamental rights recognised by EU law, save in exceptional circumstances.[193] However, with regard to third States which are not party to the Convention on the implementation of the Schengen Agreement or do not have other privileged relations with the EU such a presumption does not apply.[194]

Therefore, the dual level of protection must be applied in such a manner that 'compliance with the requirements inherent in the European arrest warrant system in relation to procedure and fundamental rights' is ensured.[195] To that end, either at the level of the national judicial decision or at the level of the decision on issuing the EAW, the issuing Member State should provide for 'judicial review to verify that, in the procedure leading to the adoption in the third State of the judgment subsequently recognised in the issuing State, the fundamental rights of the sentenced person and, in particular, the obligations arising from Articles 47 and 48 of the Charter have been complied with'.[196] Neither Art. 8(1)(c) of FD 2002/584/JHA nor section (b) requires the issuing judicial authority to indicate in the EAW that such a judicial review was carried out. However, it is open to the issuing judicial authority to mention this, *e.g.* in section (f) of the EAW. If there is doubt whether these requirements are met, the executing judicial authority must apply Art. 15(2) of FD 2002/584/JHA and request the 'necessary information to allow it to decide on surrender'.[197]

In holding that the 'judicial decision' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA 'must necessarily come from a court or other judicial authority of *a Member State*',[198] the Court of Justice seems to say that it is possible to base an execution- EAW directly on a

[192] ECJ, opinion of 24 December 2014, *Accession of the European Union to the ECHR*, 2/13, ECLI:EU:C:2014:2454, para. 168.
[193] ECJ, opinion of 24 December 2014, *Accession of the European Union to the ECHR*, 2/13, ECLI:EU:C:2014:2454, para. 191.
[194] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 55.
[195] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, paras. 55-57.
[196] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 58.
[197] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 58.
[198] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 43 (emphasis added).

judgment of conviction rendered by a court in *another Member State than the issuing Member State*.

However, it should be stressed that the 'judicial decision' on which the EAW is based must be enforceable. A judgment of conviction from a court in Member State A is not automatically enforceable in Member State B. Member State B can only enforce a custodial sentence imposed in Member State A – and therefore can only issue an EAW for the purposes of executing that sentence –, once it has *recognised* that sentence pursuant to the procedure under FD 2008/909/JHA. It then depends on the law of Member State B whether the judgment of conviction or the judicial decision recognising that judgment is the 'enforceable judgment' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA.

If an EAW is issued for the purposes of executing a custodial sentence that was imposed in a Member State and subsequently was recognised by the issuing Member State, it seems likely that a judicial review, in the issuing Member State, of fundamental rights compliance in the proceedings leading to the judgment of conviction - such as the judicial review required vis-à-vis a judgment of conviction from a third State - is not necessary. Unlike a judgment emanating from a third State, a judgment emanating from a Member State 'meets the needs to ensure effective judicial protection' for the person concerned[199] and allows the executing judicial authority 'to presume that the decision to issue [an EAW] for the purposes of executing a sentence is the result of a national procedure in which the person in respect of whom an enforceable judgment has been delivered has had the benefit of all safeguards appropriate to the adoption of that type of decision, including those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584'.[200]

3.3.2 Section (b) in practice

[199] ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU, ECLI:EU:C:2019:1079, para. 35.
[200] ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU, ECLI:EU:C:2019:1079, para. 36.

3.3.2.1 Difficulties on the issuing side

Judging from the country reports, issuing judicial authorities do not seem to regard completing section (b) of the EAW as particularly problematic. The issuing judicial authorities from three Member States did not report difficulties with regard to section (b).[201] The issuing judicial authorities from the other Member States report some difficulties.

The expert from Romania mentions that Romanian issuing judicial authorities receive numerous requests for supplementary information regarding final convictions concerning multiple offences, the sanctioning regime, revocation of conditional suspension and presence at the trial.[202] Concerning the revocation of conditional suspension, Chapter 4 demonstrates that suspended sentences and their revocation – whether a suspended sentence was revoked and, if so, at which date – are often the subject of requests for supplementary information (see section 4.2.2.4 and recommendation **3.4**). The expert from Hungary mentions an instance in which questions were asked about the execution of a suspended sentence.[203] All of this concerns difficulties after the EAW was issued, in cases in which the executing judicial authority apparently was of the opinion that the information provided was not clear or incomplete.

Some difficulties reported concern completing section (b).

In Poland, it is possible to issue a so-called 'cumulative judgment'. In proceedings resulting in a 'cumulative judgment' one or more sentences handed down previously in respect of the person concerned are commuted into one single sentence.[204] This raises the question whether all judgments covered by a cumulative judgment must be indicated in section (b). Usually only the cumulative judgment is indicated in section (b) and only the cumulative sentence is mentioned in section (c). However, in section (e)1 the number of offences is provided corresponding to all sentences commuted into the single sentence.[205]

[201] HU, report, question 16; IE, report, question 16; NL, report, question 16.
[202] RO, report, question 16.
[203] HU, report, question 16.
[204] ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 86. These proceedings necessarily result in a more favourable result for the person concerned.
[205] PL, report, question 16.

If the 'cumulative judgment' is final and if, according to the law of Poland, it is the sentence imposed by that judgment that will be executed after surrender, only mentioning the 'cumulative judgment' in section (b) seems perfectly in accordance with Art. 8(1)(c) of FD 2002/584/JHA. Indeed, in such circumstances it would be advisable to only mention that judgment in section (b), in order to avoid confusion. However, it should be remembered that both the 'cumulative judgment' and the judgments covered by it could be relevant under Art. 4a of FD 2002/584/JHA and, where appropriate, both should be mentioned in section (d) of the EAW.[206]

An issue mentioned by the expert from Belgium concerns whether the national arrest warrant should cover all of the offences described in section (e) of the EAW. In proceedings concerning a request for consent to an extension of the offences pursuant to Art. 27(3)(g) and (4) of FD 2002/584/JHA, the Belgian Court of Cassation answered this question in the negative. The Court of Cassation held that the rule of speciality is defined by what is mentioned in the EAW, not by what is mentioned in the national arrest warrant. Moreover, there is no legal rule that prohibits adding in section (e) of the EAW offences that are not mentioned in the national arrest warrant on which the EAW is based, *e.g.*, acts that will not lead to deprivation of liberty or that are complementary to those already mentioned in the national arrest warrant.[207] By contrast, the District Court of Amsterdam (the Netherlands) held that the national arrest warrant should cover all of the offences described in section (e) of the EAW, without, however, giving reasons for that ruling.[208]

The issue is not so much an issue concerning the rule of speciality as it is an issue concerning the dual level of protection for the rights of the requested person. A decision to issue a prosecution-EAW is liable to affect the right to liberty of the person concerned.[209] Against that background, it could be argued that the dual level of protection for the requested person requires that the national arrest warrant covers all of the offences described in section (e). Otherwise, the executing judicial authority cannot be 'satisfied' that the decision to issue an EAW is based *fully* 'on a national procedure that is subject to review by a court' nor that the

[206] ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 93.
[207] BE, report, question 16.
[208] NL, report, question 16.
[209] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 68.

requested person 'has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584' (see recommendation **3.5**).[210] If one accepts that the national arrest warrant should cover all the offences described in section (e) of the EAW, perhaps one should make an exception for those offences that cannot lead to deprivation of liberty and, therefore, cannot be covered by a national arrest warrant. On the other hand, one can remark that it is not necessary to include such offences in the EAW, because, once the requested person is surrendered, the authorities of the issuing Member State can prosecute him for such offences anyway (see Art. 27(3)(b) and (c) of FD 2002/584/JHA).

The main issue for Greek issuing judicial authorities is the issue of 'enforceability' of judgments: when may an execution-EAW be issued? According to Greek law, a first instance judgment may be enforceable under some conditions, even though ordinary legal remedies are still open. The Greek expert points out that the Greek version of Art. 8(1)(c) of FD 2002/584/JHA uses a term that in Greek law means that a Supreme Court remedy – an ordinary remedy – is still possible, whereas the national legislation uses a term which in Greek law means that no remedy remains open (see above section 2.1). The Greek Supreme Court ruled that an execution-EAW can be based on a judgment even though not all remedies have been exhausted, as long as it is enforceable. However, practice varies. The majority of public prosecutors will only issue an EAW if no remedy remains open, whereas some issue an EAW when remedies still remain open. The Greek expert opines that the Court of Justice should clarify what constitutes a 'enforceable judgment' in view of possible legal remedies against a judgment.[211]

As the Greek expert correctly supposes, the concept 'enforceable judgment' in Art. 8(1)(c) of FD 2002/584/JHA is an autonomous concept of Union law that should not be interpreted according to the meaning of that concept under domestic law. However, one should not lose sight of another autonomous concept of Union law, the concept of a 'final judgment'. The issue raised by the Greek expert is one that, properly, relates to the definition of that concept.

[210] Compare ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 70.
[211] EL, report, question 16.

The Court of Justice has not given a definition of that concept yet. If we apply the working hypothesis that a judgment is 'final' when no ordinary legal remedy remains open against it (see section 3.3.1.3), it would not be possible to issue an execution-EAW on the basis of a judgment against which a remedy with the Supreme Court remains open. This does not mean, however, that in such circumstances no EAW can be issued. Provided that there is an enforceable judicial decision having the same effect as an arrest warrant, the issuing judicial authority can issue an EAW for the purposes of conducting a prosecution. If, after surrender, all legal remedies against the judgment are exhausted and the judgment is enforceable *and final*, the issuing Member State may execute that judgment (see recommendation **3.6**).

3.3.2.2 Difficulties on the executing side

On the executing side, the judicial authorities of four Member States reported difficulties with the information provided in section (b).

No copy of the judicial decision needed

The legal experts of two Member States report that their executing judicial authorities do not require that a copy of the judicial decision is attached to the EAW.[212] This is in line with Art. 8(1) and the EAW form.

Arrest warrants or judicial decisions having the same effect

The common thread of these difficulties is that information about that national judicial decision is lacking, is incorrect or is contradictory.

Sometimes section (b) of a prosecution-EAW does not mention the existence of a national judicial decision at all,[213] a situation addressed in the *Bob-Dogi* judgment. Pursuant to that judgment, in such circumstances the executing judicial authority is required to request supplementary information 'to enable it to examine whether the fact that the European arrest warrant does not state whether there is a national arrest warrant may be explained either by the fact that no separate national warrant was issued prior to the issue of the European arrest warrant or that such a warrant exists but was not mentioned'.[214]

[212] EL, report, question 16; NL, report, question 16.
[213] BE, report, question 16; EL, report, question 16; IE, report, question 17.
[214] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 65.

The date at which the national arrest warrant was issued[215] and even the authority that issued it are not always mentioned.[216] To be sure, neither Art. 8(1)(c) of FD 2002/584/JHA nor section (b)1 explicitly requires mentioning the date at which the national arrest warrant was rendered. However, the Commission's *Handbook* recommends to specify the date and the reference of the national arrest warrant.[217] It is difficult to see how one could meet the requirement of mentioning the existence of a national arrest warrant without at least giving some particulars of that judicial decision. In this respect, the date and the reference of that decision are obvious data to identify a national judicial decision. Of more importance, however, is the authority that issued the national arrest warrant. The arrest warrant should be issued by a judicial authority, otherwise it could not qualify as a 'judicial decision' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA and the EAW would not be valid. Therefore, the issuing judicial authority should, at least, specify in section (b)1 which authority issued the arrest warrant. If the EAW does not specify which authority issued the arrest warrant on which the EAW is based and if the executing judicial authority cannot otherwise establish the issuing authority, it should apply the *Bob-Dogi* judgment by analogy and request supplementary information on that topic.

In respect of 'plugging' such informational 'holes' in the EAW, a practice has developed in the Netherlands which seems to commend itself to judicial authorities of other Member States. The Dutch executing judicial authority 'reads' the EAW in combination with Form A, if available. That form contains the information that must be provided when entering an alert in the Schengen Information System that a person is wanted for arrest for surrender purposes (see Art. 95 of the Convention implementing the Schengen Agreement (CISA)). Pursuant to Art. 95(2) of the CISA, that information relates to, *inter alia*, 'whether there is an arrest warrant or other document having the same legal effect, or an enforceable judgment'. If, *e.g.*, Form A refers to the *same* arrest warrant as the EAW *and* mentions the authority that issued it, the Dutch judicial authority will hold that the arrest warrant referred to in the EAW was issued by that authority.[218] Nevertheless, it must be remembered that the judicial authority

[215] BE, report, question 16; NL, report, question 16.
[216] NL, report, question 16.
[217] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/66.
[218] NL, report, question 16.

that requested issuing the Schengen alert is not necessarily the same authority that issued the EAW. Moreover, in practice Form A is sometimes incomplete or contains incorrect information. Therefore, although Form A is a potential source of information, it must be treated with some caution.

The executing judicial authorities of two Member States report instances of information provided in section b)1 that is incorrect,[219] *e.g.*, a reference to an arrest warrant that relates to a completely different person than the EAW,[220] or contradictory, *e.g.*, a reference to both an arrest warrant and an enforceable judgment.[221]

Regarding the first example, providing incorrect information will usually trigger a request for supplementary information ex Art. 15(2) of FD 2002/584/JHA.

Regarding the second example, an EAW can be issued both for the purposes of conducting a criminal prosecution and for the purposes of executing a custodial sentence. However, in such a case the criminal prosecution must, by its nature, concern *other* offences than the custodial sentence and *vice versa*. Mentioning both an arrest warrant and an enforceable judgment of conviction concerning the *same* offences is confusing and, moreover, is not necessary. If the judgment is final and enforceable, that judgment, in itself, constitutes a sufficient basis for issuing an execution-EAW. Usually, it is possible to determine whether the EAW is issued for the purposes of conducting a prosecution or for the purposes of executing a custodial sentence on the basis of information provided elsewhere in the EAW, *e.g.* on the basis of the information provided in section (c). However, it must be stated that neither section (b) nor section (c) spells out that the first part of those sections only relates to prosecution-EAWs and the second part only to execution-EAWs. Apparently, the present structure of those sections is not clear enough to guide issuing judicial authorities.

Enforceable judgments

Pursuant to the case-law of the Greek Supreme Court, an foreign execution-EAW can be based on a judgment against which legal remedies are still open, as long as it is

[219] BE, report, question 16.
[220] IE, report, question 17.
[221] PL, report, question 16.

'enforceable'.[222] This does not seem to be in line with the *Guidelines how to fill in the EAW form* and the – scant – case-law of the Court of Justice on the concept 'enforceability' (see section 3.3.1.3). In such circumstances, surrender in effect serves the purposes of continuing a criminal prosecution.

In the Netherlands, the executing judicial authority has encountered a number of execution-EAWs that were based on judgments whose execution the issuing Member State had taken over from a third State. It held that an EAW could be based on a sentence imposed in a third State whose execution was taken over by the issuing Member State.[223] These cases pre-dated the judgment in *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*. Consequently, the Dutch executing judicial authority did not examine whether a judicial review, either at the level of the national judicial decision or at the level of the decision to issue the EAW, of fundamental rights compliance in the proceedings leading to the judgment in the third State had taken place.

3.3.3 Recommendations regarding section (b)

3.3.3.1 Revocation of a suspended sentence/parole

In practice, the issue of the revocation of a suspended sentence/parole creates difficulties: such decisions result in frequent requests for supplementary information (see sections 3.3.2.1 and 4.2.2.4), in particular information whether the suspended sentence/the parole was revoked and, if so, when. Without a decision to revoke the suspension or the parole, the custodial sentence is not 'enforceable' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA and section (b)2 of the EAW form. Explicitly mentioning the revocation decision in section (b) would obviate requests for supplementary information. However, at present, section (b) does not explicitly require the issuing judicial authority to include information about a revocation decision.

This conclusion leads to the following recommendation.

[222] EL, report, question 17.
[223] NL, report, question 17.

Recommendation 3.4 The EU is recommended to amend section (b) of the EAW form in order to include a separate field concerning the revocation of a suspended sentence/parole, in the following way:

(b) Decision on which the warrant is based:
1. Arrest warrant or judicial decision having the same effect: . . . . . .
. . . . . .
Type: . . . . . .
. . . .
2. Enforceable judgment: . . . . . .
Reference: . . . . . .
. . . .
In case of a suspended sentence/parole, indicate the decision revoking the suspension/parole: ….
Date of revocation decision: ….

3.3.3.2 Offences not covered by the national arrest warrant

In case of a prosecution-EAW, the national arrest warrant should cover all offences described in section (e) of the EAW. Otherwise the EAW would not meet the requirements of the dual level of protection (see section 3.3.2.1)

This conclusion results in the following recommendation. It is recommended that:

Recommendation 3.5 Issuing judicial authorities are recommended to only base a prosecution-EAW on a national arrest warrant or national arrest warrants which cover(s) all of the offences for which surrender is sought.

3.3.3.3 ‘Finality’ and ‘enforceability’

Where the EAW is issued for the purpose of executing a custodial sentence, Art. 8(1)(f) of FD 2002/5844/JHA and section (c)2 of the EAW form require mentioning a judgment that is both ‘final’ and ‘enforceable’.

This conclusion results in the following recommendation.

Recommendation 3.6 Issuing judicial authorities are recommended not to issue an execution-EAW but a prosecution-EAW where the judgment is ‘enforceable’ but not ‘final’ yet.

3.4 Section (c) of the EAW form

3.4.1 Legal framework

3.4.1.1 Introduction

Section (c) of the EAW form, entitled 'Indications on the length or the sentence', concerns either the penalty that the person concerned is liable to incur or the penalty he actually has incurred, for the offence(s) for which surrender is sought. Section (c) is divided into two subsections: (c)1, entitled 'Maximum length of the custodial sentence or detention order which may be imposed for the offence(s)', and (c)2, entitled 'Length of the custodial sentence or detention order imposed'. Section (c) is the corollary of Art. 8(1)(f) of FD 2002/584/JHA, which requires mentioning in the EAW 'the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State'.

The dichotomy between the sentence that may be imposed and the sentence that was imposed corresponds to the dichotomy between surrender for the purposes of conducting a criminal prosecution and surrender for the purposes of executing a custodial sentence.

The purpose of the information that the issuing judicial authority is required to mention in section (c) is to enable the executing judicial authority 'to satisfy itself that the [EAW] falls within the scope of that framework decision (…)'.[224] That scope is defined in Art. 1(1) and 2(1) of FD 2002/584/JHA. According to the former provision an EAW is issued with a view to surrender of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. According to the latter provision, an EAW can be issued either 'for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months' or 'where a sentence has been passed or a detention order has been made, for sentences of at least four months'.

[224] ECJ, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)*, C-551/18 PPU, ECLI:EU:C:2018:991, para. 51.

The objective of the alternative thresholds mentioned in Art. 2(1) of FD is to ensure that, *in general*, surrender complies with the principle of proportionality by excluding surrender (exclusively) for minor offences and sentences.[225]

FD 2002/584/JHA focuses on 'the level of punishment applicable in the issuing Member State' because the criminal prosecution or the execution of a custodial sentence is carried out 'in accordance with the rules of that Member State'.[226] In the context of a case in which the law of the issuing Member State was amended between the date of the acts and the date at which the executing judicial authority had to decide whether to execute the EAW, the Court of Justice deduced from the wording of section (c) – 'sentence (…) which may be imposed' and 'sentence (…) imposed' – that the sentence must be mentioned that results 'from the version of the law of the issuing Member State which is applicable to the facts in question'.[227] In support of this interpretation, it remarked that otherwise the difficulties for the executing judicial authority in identifying the relevant version of the law would run counter to the objective of facilitating and accelerating judicial cooperation.[228] Moreover, according to the Court of Justice, a different interpretation would be a source of uncertainty and would be contrary to the principle of legal certainty.[229]

Of course, when the issuing judicial authority mentions in section (c) the sentence that results 'from the version of the law of the issuing Member State which is applicable to the facts in question', it must have regard to the principle of legality of criminal offences and penalties (Art. 49(1) of the Charter; Art. 7(1) of the ECHR). The issuing Member State must respect fundamental rights and, consequently, must respect that principle.[230] The principle of non-retroactivity of the criminal law prohibits that a court, in criminal proceedings, *aggravates* the criminal liability of those against whom such proceedings are brought,[231] *e.g.* by applying a

[225] Compare ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU, ECLI:EU:C:2019:1079, para. 38, with regard to an execution-EAW.
[226] ECJ, order of 25 September 2015, *A.*, C-463/15 PPU, ECLI:EU:C:2015:634, para. 29.
[227] ECJ, judgment of 3 March 2020, *X (European arrest warrant – double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 31.
[228] ECJ, judgment of 3 March 2020, *X (European arrest warrant – double criminality)*, C-717/18, ECLI:EU:C:2020:142, paras. 36-37.
[229] ECJ, judgment of 3 March 2020, *X (European arrest warrant – double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 38.
[230] ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, para. 53.
[231] ECJ, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936, para. 57.

penalty which, at the time of the acts, was not laid down by national law.[232] The principle of retroactive application of the more lenient criminal law, enshrined in Art. 49(1) of the Charter and 7(1) of the ECHR, dictates that the more lenient criminal law (*lex mitior*) and, therefore, the more lenient penalty must be applied retroactively.

Where the issuing Member State reduces the maximum sentence for the offence on which a prosecution-EAW is based below the threshold of Art. 2(1) of FD 2002/584/JHA *after* the EAW was issued but *before* surrender was effected, the principle of the application of the *lex mitior* requires that the issuing judicial authority withdraws that EAW.

Concerning execution-EAWs the situation is more nuanced. According to the case-law of the ECtHR, the principle of the retroactive application of the more lenient criminal law ceases to apply once a final judgment is rendered.[233] The Court of Justice seems to be of the same opinion.[234] Under Art. 15(1) of the International Covenant on Civil and Political Rights (CCPR), which expressly guarantees the right to retro-active application of the more lenient penalty, the applicability to final sentences has not been addressed yet.[235] The *traveaux préparatoires* of the CCPR contain an indication that this provision is intended to be applicable irrespective whether the person concerned was already finally sentenced: a proposal to explicitly limit the scope of the provision to situations where a sentence has not been passed was rejected.[236] In light of the far-reaching consequences of such a broad scope –

[232] Compare ECJ, judgment of 8 September 2015, *Taricco and Others*, C-105/14, ECLI:EU:C:2015:555, para. 56.
[233] ECtHR, judgment of 19 September 2009 [GC], *Scoppola (no. 2) v. Italy*, ECLI:CE:ECHR:2009:0917JUD001024903, § 109; ECtHR, decision of 30 November 2021, *Artsruni v. Armenia*, ECLI:CE:ECHR:2021:1130DEC004112613, § 55.
[234] ECJ, judgment of 6 October 2015, *Delvigne*, C-650/13, ECLI:EU:C:2015:648, para. 56: 'Suffice it to note in that regard that the rule of retroactive effect of the more lenient criminal law, contained in the last sentence of Article 49(1) of the Charter, does not preclude national legislation such as that at issue in the main proceedings since (…) that legislation is limited to maintaining the deprivation of the right to vote resulting, by operation of law, from a criminal conviction *only in respect of final convictions by judgment delivered at last instance under the old Criminal Code*' (emphasis added). However, in the next paragraph the Court of Justice also observed that, 'in any event', French legislation expressly provides for the possibility of persons subject to such a ban applying for, and obtaining, the lifting of that ban, irrespective whether the deprivation of the right to result followed from a final conviction under the old Criminal Code.
[235] HRC, views adopted on 5 July 2015, *V.M. v. The Russian Federation*, communication No. 2043/2011, para. 8: '(…) The Committee notes that, even assuming for the purposes of argument that article 15 (1) of the Covenant applies to the period after the final conviction (…)'.
[236] See opinion of 8 March 2001 of G. Knigge, Advocate General at the Supreme Court of the Netherlands, ECLI:NL:PHR:2011:BP6878, para. 5.8, with reference to Marc J. Bossuyt, *Guide to the 'traveaux préparatoires' of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff Publishers 1987, p. 328.

to name but one consequence: all final sentences, even those that have been enforced in full, would have to be reviewed – doctrine distinguishes between reversible penalties (*e.g.* a custodial sentence for a fixed period) and irreversible penalties (*e.g.* a life sentence or the death penalty). Only for the latter category of penalties should the right to retroactive application of the more lenient penalty apply also where the sentence is final.[237]
If *national* law expressly provides for a possibility of retrospective revision of a final sentence where a subsequent law has reduced the penalty applicable to an offence, the ECtHR will extend the guarantees of Art. 7 of the ECHR to that retrospective revision,[238] even though that provision would not have applied on its own. In the *Gouarré Patte v. Andorra* case, when requested to apply the provision on retrospective revision to a final lifetime ban on exercising a certain profession, imposed under the old Criminal Code, because under the new Criminal Code it was only possible to impose a temporary ban, the national courts had refused to do so. In holding that Andorra had violated Art. 7 of the ECHR by maintaining the lifetime ban, the ECtHR held that State to its own legislative choice in introducing retrospectiveness of more lenient penalties even to final judgments.[239]

3.4.1.2 Accessory surrender

3.4.1.2.1 Accessory extradition

Before discussing whether FD 2002/584/JHA allows for accessory surrender and, if so, to what extent, it is useful to devote some attention to the legal concept of "accessory extradition" as an introduction to that discussion.

Under the European Convention on Extradition[240] (ECE), offences are extraditable when they meet the requirement of qualified double criminality: the offences must be punishable in the

[237] Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 2nd revised edition, Kehl am Rhein: Engel 2005, p. 366; W. Gollwitzer, *Menschenrechte im Strafverfahren, MRK und IPBPR Kommentar*, Berlin: De Gruyter 2005, p. 438 RN 7; F. Tulkens & S. Van Drooghenbroeck, avec D. Caccamisi, 'Article 15', dans: E. Decaux (dir.), *Le Pacte international relative aux droits civils et politiques, commentaire article par article*, Paris: Economica 2011, p. 372.
[238] ECtHR, judgment of 12 January 2016, *Gouarré Patte v. Andorra*, ECLI:CE:ECHR:2016:0112JUD003342710, § 32-36; ECtHR, judgment of 24 January 2017, *Koprivnikar v. Slovenia*, ECLI:CE:ECHR:2017:0124JUD006750313, § 49; ECtHR, decision of 30 November 2021, *Artsruni v. Armenia*, ECLI:CE:ECHR:2021:1130DEC004112613, § 56.
[239] Cf. ECtHR, judgment of 12 July 2016, *Ruban v. Ukraine*, ECLI:CE:ECHR:2016:0712JUD000892711, § 39.
[240] Paris, 13 December 1957 (ETS No 24).

requesting State and in the requested State by a custodial sentence or a detention order for a maximum period of at least one year or by a more severe penalty. (Art. 2(1) of the ECE). In addition: if extradition is sought for the purposes of executing a custodial sentence, that sentence must be for a period of at least four months.

However, Art. 2(2) of the ECE allows granting extradition for offences that meet the requirement of double criminality but are punishable with a custodial sentence or a detention order with a *lower* threshold than that of Art. 2(1). Although the English version of that provision seems to exclude custodial sentences for less than four months that were already imposed ('(…) do not fulfil the condition with regard to the amount of punishment *which may be awarded* (…)'), the equally authentic French version uses a term that is capable of including such sentences ('(…) ne remplissent pas la condition relative au *taux de la peine* (…)'). The main view is that accessory extradition can also be granted for custodial sentences for less than four months. In conclusion, under the ECE accessory extradition can be granted for all offences that are punishable in both the requesting State and the requested State with a custodial sentence or a detention order and, in case of execution-extradition, for which a custodial sentence or detention order was imposed.

Accessory extradition is only possible together with extradition for one or more offences that fully meet the requirement of qualified double criminality of Art. 2(1) of the ECE. That is why such extradition is 'accessory', *i.e.* additional, to extradition for offences that fully meet the requirement of qualified double criminality.

Although offences that are punishable with a custodial sentence or detention order of less than one year could be described as minor offences and although extradition for minor offences could cause excessive hardship for the requested person and would not be cost effective for the requesting and requested States, such negative consequences cannot occur when the requested person has to be extradited anyway for an offence that meets the requirement of qualified double criminality. Accessory extradition is in the interest of the requesting State, as it allows the courts of the requesting State to deal with all the charges against the requested person in one go. Accessory extradition could also be said to be in the interest of the requested person because it enables the courts of the requesting State to take into account all offences of which he is accused in imposing a sentence on him, which may well have a

mitigating effect. Moreover, in case of accessory extradition the requested person is spared multiple successive prosecutions and sentences.

3.4.1.2.2 Potential scope of accessory surrender

Leaving aside, for the moment, the question whether FD 2002/584/JHA regulates or allows for accessory surrender, it should first be pointed out that the potential scope of accessory surrender is much more limited than the scope of accessory extradition under the ECE. Unlike the ECE, FD 2002/584/JHA does not require qualified *double* criminality, but rather qualified *single* criminality. Pursuant to Art. 2(1) of FD 2002/584/JHA, an EAW can be issued either for acts that are punishable in the *issuing* Member State with a custodial sentence or detention order or, when a sentence has already been imposed in the *issuing* Member State, for sentences at least 4 months. Requiring *double* criminality - with regard to offences not covered by Art. 2(2) of FD 2002/584/JHA – is *optional* (Art. 2(4) of FD 2002/584/JHA). When a Member State chooses to avail itself of that option, it may not require that acts are *punishable with a custodial sentence* in the executing Member State but only that the acts constitute an offence in the executing Member State.[241] In other words, a Member State cannot require *qualified* double criminality. Moreover, a Member State cannot oblige its executing judicial authorities to refuse surrender in cases not covered by Art. 2(2) of FD 2002/584/JHA if the acts do not constitute an offence in the executing Member State. After all, Art. 4(1) of FD 2002/584/JHA contains a ground for *optional* refusal.

In conclusion, the possibility of surrender for accessory offences would only seem to be relevant for offences that are punishable in the issuing Member State with a custodial sentence of less than 12 months or for already imposed sentences of less than four months. Given the *optional* nature of Art. 4(1) of FD 2002/584/JHA, it does not seem logical to exclude, *a priori*, acts that do not constitute an offence in the executing Member State.

The exceptions to the rule of speciality do not render accessory surrender superfluous. Admittedly, under Art. 27(3)(c) of FD 2002/584/JHA the authorities of the issuing Member State may prosecute the surrendered person for another offence, where the ‘criminal

[241] ECJ, order of 25 September 2015, *A.*, C-463/15 PPU, ECLI:EU:C:2015:634, para. 27.

proceedings do not give rise', by law or in the assessment of the judicial authority,[242] 'to the application of a measure restricting personal liberty'. This exception also applies if the offence is punishable in the issuing Member State with a custodial sentence of less than 12 months, 'provided that no measure restricting liberty is applied during the criminal proceedings'. However, if the surrendered person is sentenced to a penalty or a measure restricting liberty, that penalty cannot be executed without the consent of the executing judicial authority.[243]

This leads us to another exception to the speciality rule. That rule does not apply, if the executing judicial authority which surrendered the person concerned gives its consent for extension of the offences set out in the EAW (Art. 27(3)(g) and (4) of FD 2002/584/JHA). Pursuant to Art. 27(4) of FD 2002/584/JHA, that consent 'shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision'. However, that consent 'shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4'. Moreover, for 'the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein'.

The reference to offences 'subject to surrender in accordance with the provisions of this Framework Decision' obviously means that, barring the application of a ground for mandatory or optional refusal, the executing judicial authority must give consent where the request concerns an offence or a sentence that meets the requirements of Art. 2(1) of FD 2002/584/JHA. One could construe Art. 27(4) of FD 2002/584/JHA to mean that, although there is a duty to give consent in those circumstances, there is no duty to refuse consent if the request concerns an offence or a sentence that does not meet the requirements of Art. 2(1). In this reading, it depends on the law of the executing Member State whether consent can be given for such an offence or such a sentence. However, if the request is submitted for the purpose of conducting a criminal prosecution and even if the law of the executing Member State provides for giving consent for such an offence, the request must be accompanied by

[242] ECJ, judgment of 1 December 2018, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:669, para. 70.
[243] ECJ, judgment of 1 December 2018, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:669, para. 73.

information indicating the existence of a national arrest warrant or another judicial decision having the same effect within the meaning of Art. 8(1)(b) of FD 2002/584/JHA. After all, a 'request for consent shall be (…) accompanied by the information mentioned in Article 8(1)'. It may well be that, under the law of the issuing Member State, it is not possible to issue a national arrest warrant for an offence that is punishable with a custodial sentence of less than 12 months. If that is so, then it is not possible to request consent with regard to that offence.[244]

In conclusion: the potential scope of accessory surrender is limited to offences which do not meet the condition with regard to the duration of the sentence which, according to the law of the issuing Member State, *may be imposed* and to sentences which do not meet the condition with regard to the duration of the sentence which *was imposed*. In light of the optional character of refusal on the basis of Art. 4(1) of FD 2002/584/JHA, it does not seem logical to *require* that the acts for which surrender is sought, constitute an offence according to the law of the executing Member State. The exceptions to the rule of speciality do not constitute a full-fledged alternative to accessory surrender.

3.4.1.2.3 Accessory surrender allowed?

Now that we have defined the potential scope for accessory surrender, it remains to be seen whether accessory surrender is allowed.

FD 2002/584/JHA does not contain any provisions on accessory surrender. However, this does not rule out the possibility of issuing and executing an EAW with regard to accessory offences and sentences. Art. 2(1) of FD 2002/584/JA does not stipulate that an EAW may *only* be issued for the acts and sentences described in that provision. In light of its wording, it seems possible to conclude that Art. 2(1) of FD 2002/584/JHA only effects a *minimum* harmonisation of the scope of an EAW. Pursuant to that interpretation, provided that an EAW pertains to at least one offence or one sentence that meets the requirement of that provision, Member States would be free to allow their issuing judicial authorities to also include offences that are punishable in the issuing Member State with a custodial sentence of less than 12 months or sentences imposed of less than four months. Equally, provided that surrender

[244] Of course, if the request is submitted for the purpose of executing a custodial sentence this problem does not arise. Such a sentence, by its very nature, presupposes the existence of a national judicial decision.

will be granted for at least one offence or one sentence which meets the requirement of Art. 2(1) of FD 2002/584/JHA, Member States would be free to allow their executing judicial authorities to also grant surrender for accessory offences and sentences.

The interpretation that Art. 2(1) of FD 2002/584/JHA aims at *minimum* harmonisation is perfectly in accord with the objective of FD 2002/584/JHA of simplifying and accelerating judicial cooperation by replacing extradition with surrender. An interpretation that accessory surrender is not allowed under FD 2002/584/JHA would not contribute to achieving that aim. Moreover, the interpretation that Art. 2(1) of FD 202/584/JHA effects minimum harmonisation is supported by Art. 31(2) of FD 2002/584/JHA. Pursuant to that provision, Member States may conclude 'bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the prescriptions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants, *in particular by (…) lowering the threshold provided for in Article 2(1)* or (2)'.[245] There is no reason to suppose that lowering that threshold could not also include providing for accessory surrender. The fact that this provision only refers to bi- or multilateral instruments does not, *a contrario*, lead to the conclusion that *unilateral* measures are excluded.

Of course, unilateral measures have an obvious drawback. If the issuing Member State allows its issuing judicial authorities to include accessory offences or sentences in an EAW, surrender for those offences or sentences depends on whether the executing Member State allows its executing judicial authorities to grant surrender for such offences or sentences.

The Court of Justice has not had the opportunity to rule on the admissibility of unilateral measures on accessory surrender yet. The *Handbook* assumes that such measures are allowed. It remarks that FD 2002/584/JHA itself 'does not explicitly provide for a way to deal with the issue of accessory surrender' and that '[s]ome Member States have decided to allow it, whereas others do not'.[246] Annex VII to the *Handbook* contains a list of 12 Member States

[245] Emphasis added.
[246] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/28.

whose legal system may allow for accessory surrender.[247] According to the *Handbook*, the issuing judicial authority may include accessory offences or sentences in the EAW, provided that the EAW is issued for at least one offence or sentence that meets the requirement of FD 2002/584/JHA.[248] Equally, the executing judicial authority may grant surrender for accessory offences or sentences, under the same proviso.[249] With regard to accessory surrender from the perspective of the executing judicial authority, the *Handbook* is somewhat imprecise. Strictly speaking, the proviso that 'the EAW must be issued for at least one offence that meets the threshold set out in Article 2(1) of the Framework Decision on EAW' is incorrect. The proviso should read that *surrender* must be *granted* for at least one offence or one sentence that meets that threshold. Otherwise, it would not be excluded that an executing judicial authority grants surrender *solely* for the accessory offence or sentence. By its very nature, accessory surrender can only be granted *in addition to* at least one offence or sentence that meets the requirement of Art. 2(1) of FD 2002/584/JHA.

3.4.1.3 Sentence which may be imposed

3.4.1.3.1 Length of the sentence

In accordance with the *minimum* character of the harmonisation of the scope of the EAW, Member States must make sure that a prosecution-EAW, *at least*, can be issued for offences that carry a maximum sentence of, *at least*, twelve months in the issuing Member State. That minimum character allows the Member States to *lower* the threshold of twelve months and, thus, to *broaden* the scope of the EAW (although that might run counter to the principle of proportionality), but it does not allow them, unilaterally, to set *higher* thresholds and, thus to *narrow* the scope of the EAW.

3.4.1.3.2 Inchoate offences and participation

In case of an EAW for the purpose of conducting a criminal prosecution, the issuing judicial authority must mention the 'Maximum length of the custodial sentence or detention order for

[247] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/82: Austria, Czech Republic, Denmark, Finland, Germany, France, Hungary, Latvia, Lithuania, Slovenia Slovakia, Sweden.
[248] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/14.
[249] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/28.

the offence(s)' for which surrender is sought (section (c)1). As we saw earlier, the issuing judicial authority must mention the sentence according to the law that is applicable to the acts.

In some Member States, an inchoate offence – *e.g.*, an attempt to commit an offence – carries a lower maximum custodial sentence than the completed offence.[250] The same goes for some forms of participation in an offence, *e.g.* aiding and abetting.[251] This raises the question which maximum sentence the issuing judicial authority should mention in section (c)1.

According to the Court of Justice, the information which must be provided in the EAW form 'relates to *concrete elements of the case* in which the [EAW] has been issued'.[252] From this, it can be deduced that, where the law is amended after the date of the acts but before the decision on the execution of the EAW, the maximum sentence must be mentioned that is *actually* applicable to those acts. The same principle should apply to the sentence for inchoate offences and for aiding and abetting. The issuing judicial authority should mention the maximum sentence that is actually applicable to the case at hand – *i.e.* the maximum sentence for the inchoate offence or for aiding or abetting –, not the maximum sentence for an offence for which surrender is not sought.

3.4.1.3.3 Multiple offences

In some Member States, the rules on concurrence of offences require that their courts, in case of a conviction for multiple separate offences, impose a single custodial sentence.[253] If an issuing judicial authority of such a Member State wants to issue a prosecution-EAW for multiple offences, can it content itself with mentioning the maximum single sentence which could be imposed for all of these offences in case of a conviction or should it mention the maximum sentences which each of those offences carries?

Neither FD 2002/584/JHA nor the EAW form answers this question.

[250] See, *e.g.*, for the Netherlands Art. 45(2) of the Criminal Code.
[251] See, *e.g.*, for the Netherlands Art. 49(1) of the Criminal Code.
[252] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 32 (emphasis added).
[253] See, *e.g.*, for the Netherlands Art. 57 of the Criminal Code, with regard to crimes ('misdrijven').

On the basis of the Court of Justice's case-law one could argue that the issuing judicial authority could and should mention the maximum single sentence that may be imposed in case of conviction if its Member State's legal system provides for imposing a single sentence for multiple offences. After all, the issuing judicial authority must provide information that 'relates to concrete elements of the case' (see section 3.4.1.3.2).[254] Consequently, it should mention the sentence which is 'liable to be imposed'.

However, in answering the question one should also take into account the objective of the thresholds of Art. 2(1) of FD 2002/584/JHA, that is ensuring, in general, that the execution of an EAW is proportional. The information provided in section (c) should enable the executing judicial authority to verify whether the relevant threshold is met. An EAW issued with respect to two or more offences may result in a decision to partially refuse surrender for one of those offences. In such a case, the mention of a single maximum sentence does not, in and of itself, demonstrate that the threshold is met with respect to the remaining offence(s), (unless, of course, all of the offences are covered by the same legal provision). Therefore, the rationale of the threshold of Art. 2(1) of FD 2002/584/JBZ would seem to require mentioning a separate maximum sentence for each of the offences for which surrender is sought, *i.e.* the maximum sentence for each separate offence which is liable to be imposed if the offence were prosecuted separately.

Moreover, the doctrine of concurrence relates to sentencing and thus presupposes a conviction for two or more offences. However, when issuing a prosecution-EAW for two or more offences there is no final and enforceable conviction yet.

The wording and structure of section (c) offer little or no guidance in this regard. The same goes for the *Handbook*, which does not refer to the possibility of multiple offences.

3.4.1.4 Sentence which was imposed

[254] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 32.

3.4.1.4.1 Length of the sentence

Art. 8(1)(f) of FD 2002/584/JHA ('penalty imposed (…)'), when read in combination with section (c)2 ('Length of the custodial sentence or detention order imposed'), requires mentioning the length of the sentence as it was imposed on the person concerned, not that part of the sentence that the person concerned will actually serve. The fact that the issuing judicial authority is required to mention *separately* the 'Remaining sentence to be served' confirms that the threshold of four months of Art. 2(1) of FD 2002/584/JHA concerns the length of the sentence as it was imposed. Consequently, for determining whether the requirement of Art. 2(1) of FD 2002/584/JHA is met, it is immaterial whether the time remaining to be served is less than four months. The *Handbook* rightly remarks that national 'rules on early or conditional release, probation or other similar rules resulting in shorter effective imprisonment' are irrelevant for determining whether the sentence reaches the four month's threshold.[255]

In its judgment in the *IK (Enforcement of an additional sentence)* case, the Court of Justice seems to suggest that the sentence must be *more than* four months. After all, it held that the objective of the requirement of Art. 8(1)(f) of FD 2002/584/JHA is to enable the executing judicial authority 'to ascertain whether it has been issued for the execution of a custodial sentence or detention order the length of which *exceeds* the threshold of four months set out in Article 2(1) of the framework decision'.[256] However, this must be a *lapsus calami*. Art. 2(1) of FD 2002/584/JHA explicitly refers to sentences of *at least* four months, in other words sentences of *four months or more*.

In accordance with the *minimum* character of the harmonisation of the scope of the EAW, Member States must make sure that, *at least*, an execution-EAW can be issued for sentences of, *at least*, four months. As explained in section 3.4.1.3.1, that minimum character allows the Member States to lower the threshold of four months and, thus, to broaden the scope of the EAW (although that might run counter to the principle of proportionality), but it does not allow them to set higher thresholds and, thus to narrow the scope of the EAW.

[255] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/12.
[256] ECJ, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)*, C-551/18 PPU, ECLI:EU:C:2018:991, para. 51 (emphasis added).

Although the length of the sentence as it was imposed is determinative for meeting the requirement of Art. 2(1) of FD 2002/584/JHA, the 'Remaining sentence to be served' is also relevant. First, the requirement to include information about the period of the sentence that remains to be served confirms that the sentence must not have been served in full yet. Surrender for the purposes of executing a sentence which was already fully enforced would be pointless. Moreover, if the sentence was served in full the judicial decision on which the EAW is based would no longer be 'enforceable' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA. Second, the requirement to mention the remaining sentence has a strong link with the principle of proportionality. According to the Court of Justice, an execution-EAW is proportional just because the sentence imposed must consist of a custodial sentence or detention order of at least four months.[257] However, the four months' threshold only ensures proportionality in an abstract way. Particularly where the remaining sentence is less than four months that threshold may not be enough to ensure proportionality in a specific case. In this regard, it is important to note that FD 2008/909/JHA employs a higher (optional) threshold: recognition and enforcement of a judgment from another Member imposing a custodial sentence may be refused if, at the time the judgment was received by the executing Member State, 'less than six months of the sentence remain to be served' (Art. 9(1)(d) of FD 2008/909/JHA).

Where the EAW mentions a custodial sentence of at least four months, a failure to indicate an *additional* custodial sentence, imposed for the same offence(s) and pronounced by the same judicial decision as the main custodial sentence, does not fall foul of the requirements of Art. 8(1)(f) of FD 2002/584/JHA. An indication of a main sentence of at least four months is 'sufficient for the purposes of ensuring that the European arrest warrant [satisfies] the requirement as to lawfulness referred to in Article 8(1)(f) of the framework decision'.[258] In such circumstances, the executing judicial authority is 'required to surrender the person identified by the European arrest warrant so that the offence committed [does] not go unpunished and that the sentence imposed on that person [is] served'.[259] Nevertheless, in the

[257] ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU, ECLI:EU:C:2019:1079, para. 38. See also advocate general A. Rantos, opinion of 31 March 2022, *Procureur général près la cour d'appel d'Angers*, C-168/21, ECLI:EU:C:2022:246, para. 62.
[258] ECJ, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)*, C-551/18 PPU, ECLI:EU:C:2018:991, para. 52.
[259] ECJ, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)*, C-551/18 PPU, ECLI:EU:C:2018:991, para. 53.

interest of transparency it is advisable to mention any additional custodial sentences in section (c)2 of the EAW form.

3.4.1.4.2 Adding up sentences to reach the threshold

As a prosecution-EAW can be issued for more than one offence, so can an execution-EAW be issued for more than one sentence. This raises the question whether an issuing judicial authority can issue an EAW for the purpose of executing two or more separate sentences that, individually, do not reach the threshold of four months, but whose total amount of punishment awarded does meet that threshold.

Before answering that question, however, we must distinguish the situation of separate sentences that, individually, do not meet the requirement of Art. 2(1) of FD 2002/584/JHA but when 'added up' do, from the situation where separate sentences which were handed previously in respect of the requested person are commuted into one overall total sentence, a so-called cumulative sentence, by a judicial authority of the issuing Member State.[260] In case of the imposition of a cumulative sentence, as a matter of law there is only one sentence left. Therefore, the length of the cumulative sentence is determinative under Art. 2(1) of FD 2002/584/JHA, even if one or more of the sentences that were merged did not, individually, reach the threshold of that provision.

The wording of Art. 2(1) ('where a sentence has been passed (…) for sentences of at least four months'), Art. 8(1)(f) ('the penalty imposed (…)') and section (c)2 ('Length of the custodial sentence or detention order imposed') strongly suggest that each sentence for which an EAW is issued must be a sentence of at least four months.

If FD 2002/584/JHA were to allow adding up sentences that, individually, do not meet the requirement of Art. 2(1) of FD 2002/584/JHA in order to reach the threshold of four months, it would, in effect, provide for a far-reaching variant of accessory surrender. As discussed before, accessory surrender by its very nature requires the existence of at least one offence or one sentence that meets the requirement of Art. 2(1) of FD 2002/584/JHA. That requirement, however, would be sidestepped if adding up of individual sentences were allowed.

[260] ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 86.

As discussed before, the objective of the threshold of four months is to ensure proportionality in general by excluding 'minor' sentences. Adding up sentences that, individually, do not meet the requirement of four months would be contrary to that objective. Four individual sentences of each one month are still four 'minor' sentences. The total of those four 'minor' sentences was not imposed in respect of each of the offences for which the individual sentences were imposed (in contrast to a so-called cumulative sentence).

In conclusion, adding up separate sentences of less than four months to reach the threshold of four months would not seem to be allowed under FD 2002/584/JHA.

3.4.1.4.3 Single sentence for multiple offences: partial refusal

What would be the consequence for the decision on the execution of an EAW where a single sentence was imposed for multiple offences and one of those offences does not meet the requirements for surrender?

In practice, broadly speaking three approaches can be identified:

1. Partial refusal

The length of the single sentence is determinative. Provided that this sentence meets the requirement of Art. 2(1) of FD 2002/584/JHA, the executing judicial authority must or may refuse to execute the EAW for the offence that does not meet the requirements for surrender and must order surrender for the remaining offence(s).

2. Full refusal

If the requested person were to be surrendered only for the offence(s) for which surrender is allowed, he would serve a sentence in the issuing Member State which was, in part, imposed for an offence for which he could not be surrendered. That would be fundamentally objectionable.

However, if the single sentence could be disaggregated, *i.e.* is if the offence for which surrender is not possible could be 'severed' from the other offences, in such a way that the

person concerned would only serve a sentence for the offences for which surrender is allowed, surrender is possible.

3. Full surrender

Surrender will be ordered for all of the offences.

As a preliminary observation to assessing those approaches, it should be pointed out that FD 2002/584/JHA does not harmonise the sanctioning regimes of the Member States. Therefore, it is logical to interpret FD 2002/584/JHA as allowing judicial authorities to issue and to execute EAWs concerning a single sentence for two or more offences. It follows, that for those EAWs the length of the single sentence is determinative. All of the three approaches identified above explicitly or implicitly recognise that the length of the single sentence is determinative for the purpose of determining whether the requirement of Art. 2(1) of FD 2002/584/JHA is met.

It should also be pointed out that section (e) of the EAW form requires the issuing judicial authority to mention the total number of offences to which the EAW relates. Moreover, some of the grounds for mandatory or optional refusal use either the singular or the plural and refer to the 'act' or 'acts' on which the EAW is based or to the 'offence' or 'offences' on which the EAW is based. In addition, those grounds for refusal are not limited to prosecution-EAWs. Consequently, it would seem that, where an execution-EAW is issued for the purpose of executing a single sentence imposed for multiple offences, *partial* execution of that EAW is possible and, in case of a ground for mandatory refusal, even required.

The first approach seeks to avoid impunity: the requested person is surrendered to serve the sentence imposed on him. When coupled with the application of the rule of speciality, this approach also protects the rights of the person concerned. Although the person concerned will not know beforehand which part of the sentence he is to serve, the authorities of the issuing Member State are obliged to limit the enforcement of that sentence to the period that is attributable to the offence(s) for which surrender was allowed.

The second approach stresses the right of the person concerned not to serve a sentence for an offence for which he could not have been surrendered. In doing so, it creates a risk of

impunity. If the single sentence cannot be disaggregated before the decision on the execution of the EAW, surrender is not possible at all. Actual disaggregation of a single sentence before the decision on the execution of the EAW, if at all possible according to the law of the issuing Member State, will mean that the single sentence is no longer 'enforceable' within the meaning of Art. 8(1)(c) of FD 2002/584/JHA and section (c)2 of the EAW form. Therefore, the EAW which is based on that single sentence can no longer be executed. Moreover, the second approach raises serious questions regarding the role of the executing judicial authority and the rule of speciality, which is a consequence of surrender – see the rubric of Chapter 3 of FD 2002/584/JHA ('Effects of surrender') – and, therefore, imposes obligations on the issuing Member State only in the event of surrender. One such question is whether the executing judicial authority may oblige the issuing judicial authority to disaggregate the sentence before surrender.

Like the first approach, the third approach avoids impunity. However, this approach goes too far in avoiding impunity. This approach does not take into account the rights of the requested person in that surrender is not limited to the offences which (fully) meet the requirements for surrender. Consequently, the person concerned will probably serve the full sentence even though one of the offences for which that sentence was imposed did not meet the requirements for surrender.

On balance, the first approach, combined with the rule of speciality, seems to be the only approach that more or less reconciles the need to avoid impunity, the system of grounds for mandatory and optional refusal and the duty to protect the rights of the person concerned. However, that approach could result in a situation in which, after surrender and disaggregation of the single sentence, the surrender person will serve a sentence of less than four months. In hindsight, such a result would be at odds with the principle of proportionality.

3.4.2 Section (c) in practice

3.4.2.1 Accessory surrender in practice

Accessory surrender not possible at all

In four Member States, it is not possible at all to issue and execute EAWs for accessory offences and sentences: Belgium,[261] Greece (according to the main view),[262] Ireland,[263] and Poland (see recommendation **3.8**).[264] The expert for Poland remarks that, because of the quite high level of punitiveness of Polish criminal law, the issue of accessory surrender does not seem to be a problem for Polish issuing judicial authorities.[265]

In Poland, a cumulative sentence of at least four months could include individual sentences of less than four months.[266] However, such cases do not fall within the definition of accessory surrender, as the duration of the cumulative sentence is determinative (see section 3.4.1.4.2).

Accessory surrender: issuing EAWs

In Hungary, it is possible to issue an EAW for accessory offences and sentences.[267]

By contrast, in the Netherlands, it is not possible to issue EAWs for accessory offences and sentences. The relevant national provision, in substance, replicates Art. 2(1) of FD 2002/584/JHA with one important addition. Pursuant to Art. 2(1) of the Law on Surrender, an EAW can *only* be issued for an offence or a sentence that meets the threshold.[268]

In Romania, the law does not contain any provision on accessory surrender.[269] The expert from Romania remarks that it is not possible to issue a *prosecution*-EAW for accessory offences. Concerning *execution*-EAWs, she points out that the law does not distinguish between the offences for which the sentence was imposed. What is of importance is the duration of the sentence imposed. Consequently, it is possible that an EAW, issued for the enforcement of a sentence of at least four months, includes minor offences that, if they had

[261] BE, report, question 18.
[262] EL, report, question 18.
[263] IE, report, question 18.
[264] PL, report, question 18.
[265] PL, report, question 18.
[266] PL, report, question 18.
[267] HU, report, question 18. Evidently the law was changed since 2007, because the 2007 evaluation report states that accessory offences cannot be included in an EAW: *Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between Member States – report in Hungary*, Council Document 15317/17, 14 December 2007, p. 25.
[268] NL, report, question 18.
[269] *Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between Member States – report on Romania*, Council Document 8267/1/09, 27 April 2009, p. 14.

been tried separately, could not have led to the issuing of an EAW.[270] In the opinion of the authors of this report, such an EAW could not be said to be issued for the purpose of accessory surrender. As the expert from Romania rightly points out, in execution-cases only the duration of the sentence which was actually imposed is determinative for the possibility to issue an EAW, not the sentence that may be imposed for each of the offences. After all, the thresholds that Art. 2(1) sets for prosecution- and execution-EAWs are each other's alternatives.[271]

Accessory surrender: executing EAWs

In Hungary, the Netherlands (since 1 April 2021) and Romania accessory surrender is possible, provided that the condition of double criminality is met.[272] In the Netherlands, the executing judicial authority is under no duty to grant accessory surrender even if the conditions for accessory surrender are met.[273] These conditions are twofold: the condition of double criminality and the condition that the sentence which may be imposed or was imposed is a *custodial* sentence.

[270] RO, report, question 18.
[271] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 22.
[272] HU, report, question 18; NL, report, question 18; RO, report, question 18.
[273] NL, report, question 18.

Table: accessory allowed?

	Issuing side (execution-EAWs)	Issuing side (prosecution-EAWs)	Executing side (execution-EAWs)	Executing side (prosecution-EAWs)
Belgium	No	No	No	No
Greece	No	No	No	No
Hungary	Yes	Yes	Yes	Yes
Ireland	No	No	No	No
Netherlands	No	No	Yes	Yes
Poland	No	No	No	No
Romania	No	No	Yes	Yes

3.4.2.2 Sentence which may be imposed

3.4.2.2.1 Length of the sentence

In transposing Art. 2(1) of FD 2002/584/JHA some Member States introduced a higher threshold than 12 months. In Poland, a prosecution-EAW can only be issued if the offence carries a sentence of *more* than a year.[274] In Romania, a prosecution-EAW can only be issued for offences which carry a life sentence or a sentence of *two years or more*.[275] Such higher thresholds are not in conformity with FD 2002/584/JHA (see section 3.4.1.3.1 and recommendation **3.9**).[276]

[274] PL, report, question 18.
[275] RO, report, question 18.
[276] Belgium correctly transposed Art. 2(1) of FD 2002/584/JHA in Art. 3 of the Law on the European arrest warrant (*Wet betreffende het Europees aanhoudingbevel*), which sets the threshold for issuing a prosecution-EAW at a maximum custodial sentence of at least twelve months. Nevertheless, Belgian issuing judicial

3.4.2.2.2 Inchoate offences and participation

As Art. 8(1)(f) of FD 2002/584/JHA and section (c)1 refer to the penalty according to the law of the issuing Member State which is actually applicable, it follows that, where the law of that Member State provides for a specific maximum sentence for inchoate offences or for participation in an offence, that specific maximum sentence should be mentioned, not the (non-applicable) maximum sentence for the completed offence or for the predicate offence.

The executing judicial authority of one Member State (the Netherlands) is of the opinion that the sentence for the completed offence or the sentence for the predicate offence is determinative.[277]

3.4.2.2.3 Multiple offences

The issuing judicial authorities of almost all Member States mention the maximum sentence applicable to each separate offence. One exception mentioned by the experts from Ireland and the Netherlands is self-explanatory: where it is clear that the offences are all covered by one and the same legal provision and, therefore, carry one and the same maximum sentence, it is not necessary to mention that maximum sentence with regard to each offence separately.

The second exception is mentioned by the expert from Poland and relates to a so-called 'cumulative qualification'. According to Polish law, where a criminal act meets the definition of two or more distinct offences only the heaviest applicable maximum sentence is applicable and, therefore, only that sentence is mentioned.

The third exception is mentioned by the expert from Belgium. Belgian law is silent on the subject. In practice, either a single maximum sentence (the heaviest maximum sentence) or the applicable maximum sentences for each offence are mentioned. The first practice is the most likely to happen.

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authorities can only issue a national arrest warrant and, therefore, only issue a prosecution -EAW for an offence which carries a maximum custodial sentence of at least *one year* (Art. 16 §1 of the Law on pre-trial detention (*Wet betreffende de voorlopige hechtenis*). One year is more than 12 months (360 days). However, this does not amount to an incorrect transposition of Art. 2(1) of FD 2002/584/JHA because that provision only seeks to harmonise the conditions for issuing a *European* arrest warrant, not the conditions for issuing a *national* arrest warrant.

[277] NL, report, question 26.

The country experts for two Member States (EL, NL) remark that (often) the maximum sentence for each of the offences is not mentioned in section (c).[278] The country expert for Greece adds that, generally, section (c) often does not correlate the maximum sentences to the offences described in section (e).[279] The information collated in Chapter 4 confirms that the sentences applicable to each of two or more offences is often a topic of request for supplementary information. The same goes for so-called 'cumulative sentences' (see section 4.2.2.4). It seems that section (c) does not offer sufficient guidance to issuing judicial authorities in this regard (see recommendation **3.7**).

3.4.2.3 Sentence which was imposed

3.4.2.3.1 Length of the sentence

In five of the Member States involved in the project the threshold of four months is interpreted as referring to the length of the sentence as it was imposed.[280] However, the expert for Poland remarks that, although the legislation is clear on this issue, in practice three different approaches are followed:

- 1. if the remaining sentence does not exceed four months, the EAW cannot be issued;
- 2. if the sentence as it was imposed exceeds four months but the remaining sentence does not exceed four months, the threshold of the Polish transposition of Art. 2(1) of FD 2002/584/JHA is met. However, issuing an EAW in such circumstances would not be 'in the interest of the administration of justice', *i.e.* not proportionate. No instances of EAWs issued for such sentences were found in the research. Motions to issue an EAW in such circumstances were simply refused on the basis of Art. 607b of the Code of Criminal Procedure ('It is not permissible to issue a warrant if it is not in the interest of the administration of justice (…)').
- 3. If the sentence as it was imposed exceeds four months but the remaining sentence does not, an EAW is issued only if it relates also to the execution of another judgment imposing a custodial sentence exceeding 4 months.[281]

[278] EL, report, question 24; NL, report, question 24.
[279] EL, report, question 24.
[280] BE, report, question 21; EL, report, question 21; HU, report, question 21; IE, report, question 21 ; PL, report, question 21.
[281] PL, report, question 21.

In essence, the third approach identified in the research carried out by the Polish expert corresponds to issuing an EAW for an accessory sentence (see section 3.4.1.2.3).

Comparable to the second approach identified in that research, in two other Member States proportionality is mentioned as an issue where the remaining sentence is less than four months. In Greece, many issuing judicial authorities will not issue an execution-EAW where the remaining sentence is less than four months.[282] In the Netherlands, it is policy not to request the issuing judicial authority to issue an EAW for a remaining sentence of less than 120 days.[283] However, as the country report for that Member State shows, from time to time surrender is ordered by the executing judicial authority for the purposes of executing a remaining sentence of less than four months.[284]

Two Member States have introduced a higher legal threshold than the threshold of four months. In Poland, it is prohibited to issue an EAW for a sentence not exceeding four months, thus requiring that the sentence is for *more* than four months.[285] In Romania, the sentence or remaining sentence should be one for life imprisonment of for *one year or more* (see recommendation **3.9**).[286] In Belgium, the *legal* threshold is four months but – in the interests of legal certainty and of uniformity of practice – *policy guidelines* were issued by the Board of Prosecutors General for issuing execution-EAWs. In principle, an execution-EAW can only be issued for one or more (principal) custodial sentences of a total of *at least three years* of which *at least two years* remain to be served. There are three categories of exceptions, concerning the nature of the offence, special circumstances and specific circumstances relating to the person concerned.[287]

3.4.2.3.2 Adding up sentences to reach the threshold

In five Member States (BE, HU, IE, PL and RO) it is not allowed to add up individual sentences of less than four months to reach the threshold of Art. 2(1) of FD 2002/584/JHA. In

[282] EL, report, question 21.
[283] NL, report, question 21.
[284] NL, report, question 21.
[285] PL, report, question 18.
[286] RO, report, question 18.
[287] BE, report, questions 9 c) and 20.

those Member States each separate sentence must be of at least four months.[288] The expert from Belgium adds that, in Belgium, it is allowed to add up sentences that, individually, meet the *legal* requirement of four months to reach the *policy* threshold of three years for issuing an execution-EAW (see section 3.4.2.3.1).

In the Netherlands, the executing judicial authority will order surrender for the purpose of executing separate sentences that, individually, do not meet the requirement of Art. 2(1) of FD 2002/584 but that, when added up, reach the threshold of Art. 2(1) of FD 2002/584/JHA. In reaching the conclusion that this is allowed, it gave an *historical* interpretation of the *national* provisions that transpose Art. 2(1) of FD 2002/584/JHA and, in essence, held that what was allowed under the regime of extradition should also be allowed under the regime of surrender (see recommendation **3.11**). A Dutch issuing judicial authority applied the reasoning of the executing judicial authority to an execution-EAW. However, a Belgian executing judicial authority refused to execute that EAW because the sentences, individually, did not meet the requirement of Art. 2(1) of FD 2002/584/JHA.[289]

3.4.2.3.3 Single sentence for multiple offences: partial refusal

The first of the three approaches identified in section 3.4.1.4.3 ('partial refusal') is the approach of the executing judicial authorities in Belgium, the Netherlands, and Romania.[290] In Greece, this approach applies in case of 'quasi concurrence' and 'true concurrence'.[291]

Within this approach, there are differing opinions on the consequences of a partial refusal. In two Member States (NL, RO) a partial refusal is covered by the rule of speciality: after surrender, the issuing Member State is under a duty not to execute that part of the sentence that relates to the offence for which surrender was refused.[292] According to the expert from Belgium it is up to the authorities of the issuing Member State to determine the consequences, *if any*, of a partial refusal.[293] As an *issuing* Member State, Belgium addresses that determination on the basis of the Court of Cassation's doctrine of 'the lawful sentence': 'the

[288] BE, report, question 20; EL, report, question 20; HU, report, question 20; IE, report, question 20; PL, report, question 20; RO, report, question 20.
[289] NL, report, question 18.
[290] BE, report, question 22; NL, report, question 22; RO, report, question 22.
[291] EL, report, question 22.
[292] NL, report, question 22; RO, report, question 22.
[293] BE, report, question 22.

sentence imposed is legitimated by an (other) offence that has been legally proven (meaning that the maximum penalty for the other offence allowed for the penalty imposed', which means that that penalty is higher than the penalty imposed). 'If the penalty for the offence for which surrender was not allowed exceeds the maximum penalty for the offence(s) for which surrender was allowed, the execution of the sentence should accordingly be limited'.[294]

The second approach ('full refusal') is followed in Ireland, unless the single sentence can be disaggregated.[295] In Greece, this approach is applied to 'continuous' offences (this term refers to committing the same offence in different instances with common intent and within a short period of time): surrender for the purpose of executing a single sentence for multiple offences will be refused where one of the 'continuous' offences does not meet the requirements for surrender.[296]

The third approach is the one adopted by the Hungarian executing judicial authority. As long as all offences meet the requirement of double criminality, surrender will be ordered in full.[297]

3.4.3 Recommendations regarding section (c)

3.4.3.1 Correlating offences with sentences; cumulative sentences

In practice, requests for supplementary information frequently concern the sentence(s) which may be or have been imposed (see sections 3.2.2.1, 3.4.2.2.3 and 4.2.2.4), especially where a prosecution-EAW is issued for multiple offences or where an execution-EAW is issued for a 'cumulative judgment'. Apparently, the structure and wording of section (b) does not offer sufficient guidance to issuing judicial authorities in order to connect each offence for which surrender for the purposes of prosecution is sought to the maximum sentence which may be imposed for that offence. Section (b) does not offer any guidance on the subject of 'cumulative judgments'.

These conclusions lead to the following recommendation.

[294] BE, report, question 23.
[295] IE, report, question 22.
[296] EL, report, question 22.
[297] HU, report, question 22.

Recommendation 3.7 The EU is recommended to amend section (c) of the EAW form in order to correlate the offence(s) with the sentence(s) and to provide a separate part for so-called 'cumulative sentences', in the following way:

> **(c) Indications on the length of the sentence:**
> 1. Maximum length of the custodial sentence or detention order which may be imposed for the offence(s):
>
> Offence [number; see section (e)] : … Sentence: ….
> (possibility to add more offences)
>
> 2. Length of the custodial sentence or detention order imposed:
>
> Offence [number; see section (e)]: … Sentence: ….
> (possibility to add more offences)
>
> Overall sentence if a cumulative sentence is provided in the national system: …
>
> Remaining sentence to be served:

3.4.3.2 Accessory surrender

The legislation of Belgium, Greece, Ireland and Poland does not provide for issuing and executing EAWs concerning accessory offences and sentences.

Recommendation 3.8 Belgium, Greece, Ireland and Poland are recommended to introduce the possibility of executing EAWs concerning accessory offences and sentences.

3.4.3.3 Thresholds of Art. 2(1) of FD 2002/584/JHA

Poland and Romania have introduced *higher* (legislative) thresholds for issuing EAWs than the thresholds provided in Art. 2(1) of FD 2002/584/JHA. which is not in accordance with Art. 2(1) of FD 2002/584/JHA (see section 3.4.1.3.1).

Recommendation 3.9 Poland and Romania are recommended to amend their legislation in order to conform to the thresholds of Art. 2(1) of FD 2002/584/JHA.

3.4.3.4 Sentence which was imposed

3.4.3.4.1 Length of the sentence

Although the length of the remaining sentence is, in itself, not determinative for issuing an executing an execution-EAW, mentioning the remaining sentence in section (c)2 is required and important. Surrender for the purpose of executing a remaining sentence of less than four months raises serious issues of proportionality (see sections 3.4.1.4.1 and 3.4.2.3.1).

Recommendation 3.10 Judicial authorities are recommended not to issue and execute EAWs for the purposes of enforcing a sentence or sentences where the (total) remainder to be served is less than four months, accessory sentences not included.

3.4.3.4.2 Adding up individual sentences of less than four months

In the Netherlands, issuing and executing judicial authorities add up sentences that, individually, are for less than four months but, together, reach the threshold of four months (see section 3.4.2.3.2). The practice of adding up such sentences is not in accordance with the principle of proportionality (see section 3.4.1.4.2).

Recommendation 3.11 The issuing and executing judicial authorities from the Netherlands are recommended to desist from the practice of adding up custodial sentences that, individually, are for less than four months but, together, reach the threshold of four months mentioned in Art. 2(1) of FD 2002/584/JHA.

3.5 Section (d) of the EAW

3.5.1 Legal framework[298]

Section (d) of the EAW form is intended to correspond to the requirements of Art. 4a(1) of FD 2002/584/JHA, which provision contains a ground for optional refusal concerning *in absentia* decisions.

Pursuant to Article 4a(1), the executing judicial authority 'may' refuse to execute an EAW issued for the purpose of executing a custodial sentence or a detention order if the requested person 'did not appear in person at the trial resulting in the decision', unless one of the four exceptions covered by Article 4a(1)(a-d) applies.

The – exhaustive –[299] exceptions listed in Article 4a cover situations in which the requested person must be deemed to have waived his right to be present at the trial (Article 4(1)(a-b)), and situations in which the requested person has the right to a retrial, or an appeal (Article 4a(1)(c-d)).[300] In other words, the exceptions cover situations in which surrender 'must be regarded as not infringing the rights of the defence'.[301] Consequently, if one or more of these exceptions apply, the executing judicial authorities may not make the execution of an EAW dependent on additional guarantees concerning the rights of the defence[302] and may not refuse the execution of the EAW on the ground that the requested person did not appear in person at the trial resulting in the decision.[303]

The exhaustive list of exceptions does not represent a full codification of situations in which surrender would not infringe the rights of the defence notwithstanding the requested person's absence at the trial. Because of the optional nature of the ground for refusal, even if the executing judicial authority concludes that none of the exceptions of Art. 4(1)(a)-(d) applies it may still 'take into account other circumstances that enable it to satisfy itself that the

[298] For a detailed exposé see H., V. Glerum & A. Klip, *The European Arrest Warrant and In Absentia Judgments*, The Hague: Eleven International Publishers 2020.
[299] ECJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para. 44.
[300] ECJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para. 52.
[301] ECJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para. 44.
[302] ECJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para. 44.
[303] See, *e.g.*, ECJ judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 55.

surrender of the person concerned does not entail a breach of his rights of defence, and surrender that person to the issuing Member State'.[304]

When issuing an EAW for the purposes of executing a custodial sentence or a detention order, the issuing judicial authority is required to state, in section (d) of the EAW form, whether the requested person appeared in person at the trial resulting in the decision or not (points 1-2). If the requested person did not appear at that trial, the issuing judicial authority should tick the box corresponding to one or more of the exceptions that is applicable to the case at hand (points 3.1-3.4).

3.5.2 Section (d) in practice

The application of Art. 4a(1) and section (d) in practice were dealt with *in extenso* in the *InAbsentiEAW* project.[305] Therefore, the experts were invited only to report on new developments in this regard.

The expert from Belgium reports recurrent problems with Italian EAWs concerning proceedings in which the requested person was represented by a legal counsellor directly appointed by the State. In such cases, the requirement that the requested person 'had given a mandate to a legal counsellor' (Art. 4a(1)(b) of FD 2002/584/JHA) is usually not met. In the absence of a mandate, Belgian executing judicial authorities have already refused the execution of Italian EAWs.[306] The expert from Belgium also draws attention to a judgment of the Court of Cassation in an EAW-case. In this judgment, the Court of Cassation held that serving the summons to a legal counsellor at whose address the defendant elected domicile does not, in and of itself, unequivocally establish that the defendant 'actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' (Art. 4a(1)(a) of FD 2002/584/JHA).[307]

[304] See, *e,g.*, ECJ, judgment of 17 December 2020, *Generalstaatsanwaltschaft Hamburg*, C-416/20 PPU, ECLI:EU:C:2020:1042, para. 51.
[305] See Kei Hannah Brodersen, Vincent Glerum & André Klip, The European Arrest Warrant and In Absentia Judgments, Eleven International Publishing: Maastricht 2020.
[306] BE, report, question 24 d).
[307] BE, report, question 24 d).

Both the expert from Greece and the expert from the Netherlands report legislative changes.

Greece finally transposed FD 2009/299/JHA on 1 July 2019, more than eight years after the due date.[308] The previous regime of summoning was particularly liberal in its presumptions. It was not required that the individual had *actual* knowledge of the summons. Knowledge of the summons was presumed, if it was delivered to third persons, without the need for proof that the individual was actually informed. It was even possible to serve the summons on the secretariat of the local court. Moreover, under the previous regime Greece could not guarantee the right to a retrial within the meaning of Art. 4a(1)(d) of FD 2002/584/JHA, because it was not possible to serve the judgment on the person concerned *after* surrender. As a result, the execution of many Greek EAWs was rightfully refused. After transposition of FD 2009/299/JHA, the methods of summoning discussed above were retained. However, the judgment will be served on the surrendered person in person after surrender, if it is not proven that he was aware of the scheduled trial. In line with *Dworzecki*,[309] the Greek legislator added that notification 'by other means' than a summons in person (Art. 4a(1)(a) of FD 2009/299/JHA) requires proof of knowledge of the day and time of the trial.[310] Nevertheless, the Greek expert points out that the present regime of summoning still operates under many presumptions, which is problematic.[311]

The Dutch experts report that most problems identified in the *InAbsentiEAW* project still are a live issue in Dutch practice. However, one important cause of those problems is now solved. The Netherlands originally had transposed Art. 4a(1) of FD 2002/584/JHA as a ground for mandatory refusal, which resulted in a high number of refusals. On 1 April 2021, the ground for refusal was turned into an optional ground for refusal. As a result, the executing judicial authority can now take into account other circumstances that enable it to ensure that the surrender of the requested person does not entail a breach of his rights of defence. Where the executing judicial authority is able to establish that surrendering the requested person would

[308] Pursuant to Art. 8(1) of FD 2002/584/JHA, the Member States had to transpose that framework decision on 28 March 2011 at the latest.
[309] ECJ, judgment of 24 May 2017, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346.
[310] EL, report, question 24.
[311] EL, report, question 24.

not entail such a breach, it will refrain from refusing surrender.[312] Under the new regime, the number of refusals based on Art. 4a(1) has dropped significantly.[313]

3.5.3 Recommendations regarding section (d)

The *InabsentiEAW* project resulted in a number of recommendations to the EU, to Member States and to judicial authorities.[314] The findings of the present project do not give rise to any additional recommendations regarding section (d). If anything, these findings confirm those recommendations. One of the recommendations, *e.g.*, called on Member States to turn a transposition of Art. 4a(1) as a mandatory ground for refusal into a ground for optional refusal.[315] Another recommendation called on Member States to amend their legislation on summoning so as to meet the requirements of the judgment in the *Dworzecki* case.[316]

[312] NL, report, question 24.
[313] For some of the first ruling under the new regime see NL, report, question 24.
[314] Kei Hannah Brodersen, Vincent Glerum & André Klip, The European Arrest Warrant and In Absentia Judgments, Eleven International Publishing: Maastricht 2020, p. 199-212.
[315] Kei Hannah Brodersen, Vincent Glerum & André Klip, The European Arrest Warrant and In Absentia Judgments, Eleven International Publishing: Maastricht 2020, p. 205 (recommendation 18).
[316] Kei Hannah Brodersen, Vincent Glerum & André Klip, The European Arrest Warrant and In Absentia Judgments, Eleven International Publishing: Maastricht 2020, p. 205-206 (recommendation 19).

3.6 Section (e)

3.6.1 Legal framework

3.6.1.1 Introduction

Section (e) of the EAW form, entitled 'Offence', concerns the description of the offence(s) for which surrender is sought. It is the corollary of Art. 8(1)(e) of FD 2002/584/JHA, which requires the EAW to contain 'a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person'.

Section (e) is a most important part of the EAW form. The description of the 'offence' is the basis for the application of a whole host of grounds for refusal. Some grounds for mandatory or optional refusal refer to the 'offence' or 'offences' on which the EAW is based (Art. 3(1); Art. 4(3); Art. 4(7)), others to the 'act', 'acts', 'same act' or 'same acts' (Art. 3(2); Art. 4(1); Art. 4(2); Art. 4(4); Art. 4(5)).

The description of the 'offence' in section (e) is also relevant from a fundamental rights perspective. Anyone who is arrested on the basis of an EAW has the right 'to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him' (Art. 5(2) of the ECHR). Art. 6 of the Charter corresponds to Art. 5 of the ECHR.[317] Therefore, its meaning and scope are the same as those of Art. 5 of the ECHR (Art. 52(3) of the Charter). That is why Art. 11(2) of FD 2002/584/JHA obliges the executing judicial authority to 'inform' the requested person who is arrested 'of the [EAW] and of its contents' (Art. 11(1) of FD 2002/584/JHA).

In fact, that obligation goes much further than the obligation arising from Art. 6 of the Charter. Pursuant to the case-law of the ECtHR on Art. 5(2) of the ECHR, when a person is arrested on suspicion of having committed a crime, that provision 'neither requires that the necessary information be given in a particular form, nor that it consists of a complete list of

[317] ECJ, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474, paras. 56-57; ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, para. 57.

the charges held against the arrested person (…). *When a person is arrested with a view to extradition, the information given may be even less complete*'.[318] It suffices that, in the course of the arrest, the person concerned was told that he is wanted for extradition by the requesting State.[319]

Finally, when the executing judicial authority decides to execute the EAW, the description of the 'offence' in section (e) constitutes the basis for compliance with the rule of speciality. Under Art. 27(2) of FD 2002/584/JHA, the authorities of the issuing Member State may not prosecute, sentence or deprive the surrendered person of his or her liberty 'for an offence committed prior to his or her surrender other than that for which he or she was surrendered', unless the executing judicial authority gave consent (or another exception of Art. 27(3) of FD 2002/584/JHA applies).[320] In order to assess whether such consent is required, *i.e.* whether there is an 'other offence', the authorities of the issuing Member State must compare the description of the offence in the EAW with later procedural documents.[321]

The description of the 'offence' must be such that it enables the executing judicial authority to decide whether to execute the EAW, in particular whether to apply one of those grounds for refusal mentioned above. If it does not, a requirement as to the validity of the EAW is not met and, applying the judgment in *Bob-Dogi* case by analogy, the executing judicial authority must request all necessary supplementary information on the basis of Art. 15(2) of FD 2002/584/JHA.[322]

3.6.1.2 The concept 'offence'

The concept 'offence' refers to specific conduct – a specific act or a specific omission – which meets the definition of a specific offence under the law of the issuing Member State.

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[318] ECtHR, judgment of 8 February 2005, *Bordovskiy v. Russia*, ECLI:CE:ECHR:2005:0208JUD004949199, § 56 (emphasis added).
[319] ECtHR, judgment of 8 February 2005, *Bordovskiy v. Russia*, ECLI:CE:ECHR:2005:0208JUD004949199, § 57.
[320] Member States have the possibility to notify that they renounce the rule of speciality on the basis of reciprocity (Art. 27(1) of FD 2002/584/JHA). According to the *Handbook*, only Austria, Estonia and Romania have sent such notifications: *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/18.
[321] ECJ, judgment of 1 December 2008, *Leymann & Pustovarov*, C-308/08 PPU, ECLI:EU:C:2008:669, para. 55.
[322] Compare ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paras. 64-65.

As reflected in the structure of section (e), the (description of an) 'offence' has two components: a factual one and a legal one.

That structure is as follows. First, section (e) requires the issuing judicial authority to state the total number of offences for which surrender is sought. Then section (e) requires it to give a 'Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person' and to mention the 'Nature and legal classification of the offence(s) and the applicable statutory provision/code'. Subsequently, the issuing judicial authority must either declare that the offence is a so-called listed offence (*i.e.* an offence within the meaning of Art. 2(2) of FD 2002/584/JHA) and designate the applicable listed offence by ticking its box (section (e)I) or declare that it is not a listed offence by giving 'Full descriptions of offence(s) not covered by section I above' (section (e)II).

The 'Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person' and the 'Full descriptions of offence(s) not covered by section I above' both concern the factual component of the offence. The 'Nature and legal classification of the offence(s) and the applicable statutory provision/code' and section (e)I both concern the legal component of the offence.

3.6.1.3 The structure of section (e)

3.6.1.3.1 The structure in general

The structure of section (e) is somewhat muddled. Where the 'offence' is *not* a listed offence, section (e) seems to require a description of the 'offence' *twice*: both at the head of section (e) and in section (e)II.

However, in contrast to the description at the head of section (e), section (e)II requires '*Full* descriptions of the offence(s) not covered by section I above'.[323] That distinction could be explained by the fact that the executing judicial authority is not allowed to verify the double

[323] Emphasis added.

criminality of a listed offence (Art. 2(2) of FD 2002/584/JA), whereas, depending on the choice made by its Member State (see Art. 2(4) of FD 2002/584/JHA), it may refuse the execution of the EAW with respect to an act that does not constitute an offence under the law of the executing Member State (Art. 4(1) of FD 2002/584/JHA). From that perspective, the description of a listed offence need not be as detailed as the description of a non-listed offence.

Be that as it may, the description of the offence is *also* needed when the executing judicial authority must assess whether to refuse to execute the EAW on the basis of Art. 3(2) or Art. 4(2)(3)(4)(5) or (7) of FD 2002/584/JHA. These grounds for refusal refer to the 'act', 'acts', 'same acts', 'offence' or offences' on which the EAW is based and are all applicable regardless of whether the issuing judicial authority designated the act(s) or the offence(s) as listed offences. The level of detail required when assessing whether to apply one of those grounds for refusal is comparable to the level of detail required when assessing double criminality. Two examples to illustrate this point. Where an EAW is issued for a listed offence and the requested person argues that he has already been finally judged in a Member State 'in respect of the same acts' (Art. 3(2) of FD 2002/584/JHA), the executing judicial authority must 'consider the specific unlawful conduct which gave rise to the criminal proceedings before the courts of the two [Member States] as a whole'.[324] To do so, the description, in the EAW, of that conduct needs to be specific. Where an EAW is issued for a listed offence and the requested person argues that the right to prosecute him has expired under the law of the executing Member State (Art. 4(4) of FD 2002/584/JHA), the executing judicial authority will have to determine whether that listed offence constitutes an offence under the law of the executing Member State. Otherwise, it cannot establish whether the condition that 'the acts fall within the jurisdiction of that Member State under its own criminal law' is met. In conclusion, the distinction between listed and non-listed offences, as far as their description is concerned, does not seem justified.

A logical structure of section (e) – that would avoid confusion about where to describe the offence – would be as follows:

[324] ECJ, judgment 18 July 2007, *Kraaijenbrink*, C-367/05, ECLI:EU:C:2007:444, para. 28, with regard to Art. 54 of the Convention Implementing the Schengen Agreement.

I. Number of offences

II. Description of the offences

III. Designation of one or more of the offences as listed offences

In this order, the description of the offence would always *precede* a potential designation as a listed offence, thus precluding the possibility that a specific offence is – inadvertently – classified both as a listed offence and as a non-listed offence. If section (e)III is completed, the offence is a listed offence. If that section is not completed, the offence is a non-listed offence.

3.6.1.3.2 Description of the offence

Giving the binary purpose of the EAW – conducting a prosecution or executing a sentence – the offence described in section (e) must either be the offence which the person concerned is suspected of having committed or the offence for which he was sentenced. In execution-cases, the task of describing the offence should be easy, because a court already has established the facts. In prosecution-cases, a court has not determined the charge against the person concerned yet. It may even be that in prosecution-cases the investigation against the person concerned has not been concluded yet. After all, in the words of the Court of Justice, 'the surrender request is based on information which reflects the state of investigations at the time of issue of the [EAW]'.[325] It follows that in prosecution-cases the issuing judicial authority may not be able to describe the offence for which surrender is sought with the same degree of clarity and precision as in execution-cases.

Where surrender is sought for the purpose of conducting a prosecution, neither Art. 8(1)(e) of FD 2002/584/JHA nor section (e) of the EAW form requires that the issuing judicial authority refers to evidence demonstrating a reasonable suspicion of having committed the offence for which surrender is sought. In other words, it is not necessary that the issuing judicial authority describes *why* the person concerned is suspected of an offence. Rather, the issuing judicial authority is required to describe *which offence* the requested person is suspected of having

[325] ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:669, para. 52.

committed. Of course, once surrendered to the issuing Member State the arrest and detention of the surrendered person must conform to Art. 5(1)(c) of the ECHR. Pursuant to that provision, the arrest and detention of the surrendered person must be based on a 'reasonable suspicion of having committed an offence'. However, his arrest and detention on the basis of the EAW in the executing Member State is not covered by that provision but by Art. 6 of the Charter, which in the context of EAW-cases, corresponds to Art. 5(1)(f) of the ECHR. Consequently, the requirement of a 'reasonable suspicion' does not apply to arrest and detention on the basis of an EAW and the authorities of the executing Member State are not required to check whether there is a 'reasonable suspicion'.[326] Nor is it required that there is evidence of '*prima facie* case' against the requested person.[327]

3.6.1.4 Listed offences

3.6.1.4.1 Introduction

Compared to the regime of extradition, FD 2002/584/JHA introduced an important innovation. Whereas under extradition law double criminality usually is required (see *e.g.* Art. 2(1) of the ECE) and, therefore, usually must be verified, Art. 2(2) of FD 2002/584/JHA abolishes verification of double criminality for a list of 32 categories of offences – the so-called listed offences – 'if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State'.

The original idea behind abolishing the verification of double criminality for listed offences was that all of the listed offences are criminalised in all Member States. Therefore, verification of double criminality would be redundant and, because of its often time-consuming nature, would run counter to the objective of simplifying and accelerating judicial cooperation. However, that is not what the Court of Justice sees as the justification for abolishing verification of double criminality. Against the background of the principle of

[326] See, *e.g.*, ECtHR, decision of 16 November 2004, *Mc Donald and others v. Slovakia*, ECLI:CE:ECHR:2004:1116DEC007281201; ECtHR, decision of 3 May 2005, *Gordyeyev v. Poland*, ECLI:CE:ECHR:2005:0503DEC004336998; ECtHR, decision of 26 May 2005, *Parlanti v. Germany*, ECLI:CE:ECHR:2005:0526DEC004509704; ECtHR, judgment of 24 July 2014, *Čalovskis v. Latvia,* ECLI:CE:ECHR:2014:0724JUD002220513, § 180.
[327] ECtHR, judgment of 6 July 2010, *Babar Ahmad and others v. United Kingdom*, ECLI:CE:ECHR:2010:0706DEC002402707, § 180.

mutual trust and the high level of mutual trust and solidarity, the Court of Justice in essence held that the 'seriousness' of the listed offences 'in terms of adversely affecting public order and public safety' justified dispensing with verification of double criminality. The 'seriousness' of those offences follows either from their 'inherent nature' or from 'the punishment incurred of a maximum of at least three years'.[328] Implicit in this reasoning is that Member States are bound to cooperate with another in respect of such serious offences, in other words are bound to trust and to solidarize with one another in respect of such offences, irrespective of whether they constitute an offence according to their own criminal laws.

According to the Court of Justice dispensing with the verification of double criminality in respect of the listed offences is not contrary to the principle of legality of offences and penalties. Its reasoning is based on the observation that FD 2002/584/JHA does not seek to harmonise the categories of offences of Art. 2(2) of FD 2002/584/JHA 'in respect of their constituent elements or of the penalties which they attract'.[329] As a result, the definition of those offences and of the applicable penalties remains to be governed by the law of the issuing Member State and that Member State must respect the principle of legality of offences and penalties enshrined in Art. 49(1) of the Charter.[330]

Although some minimum harmonisation has taken place at EU level concerning some of the 32 categories of offences mentioned in Art. 2(2) of FD 2002/584/JHA, the categories of offences cannot be considered to be autonomous concepts of Union law. Normally, the terms of a provision of EU law must be given an autonomous and uniform interpretation throughout the Union, unless that provision refers to the law of the Member States for the purpose of determining the meaning and scope of those terms.[331] This exception is applicable here. After all, Art. 2(2) of FD 2002/584/JHA explicitly refers to the law of the issuing Member State concerning the definition of the listed offences ('(…) as they are defined by the law of the issuing Member State'). This means that the law of the issuing Member State alone determines whether an offence according to the law of that Member State constitutes a listed

[328] ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, para. 57.
[329] ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, para. 52.
[330] ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:339, para. 53.
[331] See, *e.g.*, ECJ, judgment of 17 July 2008, *Kozłowski*, C-66/08, ECI:EU:C:2008:437, para. 41; ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, para. 38; ECJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 65.

offence. Where the offence for which surrender is sought carries a maximum custodial sentence of at least three years, it is up to issuing judicial authority to determine, on the basis of the law of its Member State, whether that offence is a listed offence and, if so, to tick the box of the appropriate category in section e)I. If not, the issuing judicial must describe the offence in section (e)II.

When the Council of the European Union adopted FD 2002/584/JHA, it made a statement on the meaning of some of the categories of listed offences. That statement was entered into the minutes and reads as follows:

'The Council states that in particular for the following offences, listed in Article 2(2), there is no completely harmonised definition at Union level. For the purposes of applying the European arrest warrant, the act as defined by the law governing issue prevails. Without prejudice to the decisions which might be taken by the Council in the context of implementing Article 31(e) TEU, Member States are requested to be guided by the following definitions of acts in order to make the arrest warrant operational throughout the Union for offences involving racism and xenophobia, sabotage and racketeering and extortion.

Racism and xenophobia as defined in the Joint Action of 15 July 1996 (96/443/JAI)

Sabotage:
"Any person who unlawfully and intentionally causes large-scale damage to a government installation, another public installation, a public transport system or other infrastructure which entails or is likely to entail considerable economic loss."

Racketeering and extortion:
"Demanding by threats, use of force or by any other form of intimidation goods, promises, receipts or the signing of any document containing or resulting in an obligation, alienation or discharge."'[332]

[332] *Revised addendum to the draft minutes, 2436th meeting of the Council (Justice and Home Affairs and Civil Protection)*, held in Luxembourg on 13 June 2002, Council document 9985/02 ADD 1 REV 1, p. 6.

The Council also made a statement about the constituent elements of the concept of 'swindling':

'The Council states that the concept of swindling referred to in Article 2(2) encompasses the following constituent elements inter alia: using false names or claiming a false position or using fraudulent means to abuse people's confidence or credulity with the aim of appropriating something belonging to another person'.[333]

Such statements, whose content is not reflected in the provisions of FD 2002/584/JHA, are not binding and not significant for the interpretation of Art. 2(2) of FD 2002/584/JHA or its implementation. After all, it is settled case-law that 'declarations made in the course of preparatory work leading to the adoption of a [legal act] cannot be used for the purpose of interpreting that [legal act] where no reference is made to the content of the declaration in the wording of the provision in question, and, moreover, such declarations have no legal significance'.[334] Moreover, whether or not a category of offences is harmonised at EU level it is still the law of the issuing Member State that determines whether an offence according to the law of the issuing Member State is covered by one of the categories of Art. 2(2) of FD 2002/584/JHA. Therefore, the definitions and the constituent elements mentioned in the Council statement could not detract from that, even if the Council's statements were binding and had legal significance.

The designation of an offence as a listed offence is a two-part operation. First, the issuing judicial authority must determine whether the specific conduct of the person concerned – the specific act or the specific omission – meets the definition of a specific offence according to the law of the issuing Member State and, if so, which specific offence. This determination already took place when the competent authority issued the *national* judicial decision. Second, having determined which specific offence according to the law of the issuing Member State is applicable, it must then determine – on the basis of the law of the issuing Member State – whether that specific offence is covered by one or more of the categories of

[333] *Revised addendum to the draft minutes, 2436th meeting of the Council (Justice and Home Affairs and Civil Protection)*, held in Luxembourg on 13 June 2002, Council document 9985/02 ADD 1 REV 1, p. 6.
[334] See, *e.g.*, ECJ, judgment of 17 December 2020, *WEG Tevesstraße*, C-449/19, ECLI:EU:C:1038, para. 44, with regard to a directive.

offences of Art. 2(2) of FD 2002/584/JHA and, if so, whether it carries a maximum sentence of at least three years.

Because the law of the issuing Member State determines whether an offence constitutes a listed offence, it is not up to the *executing* judicial authority to *determine* that an offence is a listed offence where the issuing judicial has not ticked the box of any listed offence. Of course, if the executing judicial authority has good reason to believe that a failure to tick a box of a listed offence was unintentional, it could apply Art. 15(2) of FD 2002/584/JHA and ask the issuing judicial authority to confirm that it did intend to tick that box. However, the executing judicial authority should only embark on such a course of action if, in the event of an affirmative answer, it is willing to treat the EAW as having been issued with regard to a listed offence.

3.6.1.4.2 Custodial sentence of three years

An absolute condition for being designated as a listed offence is that it carries a maximum custodial sentence of at least three years in the issuing Member State. If an issuing judicial authority ticks the box of a listed offence in section (e)I of the EAW, it automatically declares that the offence is 'punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years'. That declaration is part of the pre-printed head of that section ('If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State (…)').

In this respect, neither Art. 2(2) of FD 2002/584/JHA nor section (e)I distinguishes between execution- and prosecution-EAWs. However, where an EAW is issued for the purpose of conducting a prosecution concerning a listed offence, the issuing judicial authority must still mention the *specific* maximum sentence applicable in section (c)1. Where an EAW is issued for the purpose of executing a custodial sentence imposed for a listed offence, apparently the pre-printed declaration in section (e)I suffices.[335] In that case, of course, the issuing judicial authority must mention the penalty that was actually imposed in section (c)2.

[335] In the same vein advocate general M. Bobek, opinion of 26 November 2019, *X (European arrest warrant-Double criminality)*, C-717/18, ECLI:EU:C:2019:1011, para. 64.

As we saw earlier (see section 3.4.1.3.2), the information to be provided in the EAW-form relates to 'concrete elements of the case'.[336] Section (c) of the EAW requires mentioning either the penalty that is liable to be imposed or the penalty that was actually imposed.[337] Consequently, the penalty threshold of Art. 2(2) of FD 2002/584/JHA relates to the penalty according to the law of the issuing Member State that is 'applicable to the facts giving rise to the case in which [an EAW] is issued'.[338] It follows that, if the maximum penalty does not meet the threshold of Art. 2(2) of FD 2002/574/JHA at the date of the acts but is aggravated to the level of that threshold at a later date, the issuing judicial authority cannot designate the offence as a listed offence.

Because the information about the penalty must relate to the *specifics* of the case at hand, in case of, *e.g.*, inchoate offences (an attempt to commit an offence) the penalty threshold of Art. 2(2) of FD 2002/584/JHA relates to the penalty for those offences, not to the penalty that is liable to be imposed for the completed offence (see section 3.4.1.3.2).

If the executing judicial authority establishes that the listed offence does not carry, in the issuing Member State, a maximum custodial sentence of at least three years, it cannot automatically refuse the EAW for that reason. It simply means that the offence cannot give rise to surrender without verification of double criminality. Consequently, the executing judicial authority must examine the double criminality of the act on which the EAW is based[339] (provided, of course, that the executing Member State availed itself of the option of setting the condition of double criminality for non-listed offences, pursuant to Art. 2(4) of FD 2002/584/JHA).

[336] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 32.
[337] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 31.
[338] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 33.
[339] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 42.

3.6.1.4.3 Description

As discussed in section 3.6.1.2, the factual side of a listed offence should be described at the head of section (e). A listed offence should not be described in section (e)II as well. That section exclusively relates to non-listed offences.

3.6.1.4.4 Review

As discussed before, the issuing judicial authority determines, on the basis of the law of the issuing Member State, whether an offence according to the law of the issuing Member State is a listed offence and, if so, which listed offence. This raises the question whether the *executing* judicial authority may review that determination.

As discussed before, designating a listed offence involves a two-part operation (see section 3.5.4.1). It should be noted at the outset that the *first* part of that step - the determination that the act is an offence according to the law of the issuing Member State - is not subject to any review by the executing judicial authority. As Art. 2(4) and Art. 4(1) of FD 2002/574/JHA make clear, that authority may only assess whether the act is an offence according to the law of the *executing* Member State. In accordance with the principles of mutual trust and mutual recognition the executing judicial authority is bound by the determination that the act constitutes an offence according to the law of the executing Member State.

With regard to the second part of the two-part operation, one should distinguish between reviewing whether the penalty threshold is met and reviewing whether the offence is covered by one of the categories of offences of Art. 2(2) of FD 2002/584/JHA.

Concerning the penalty threshold, the information required by Art. 8(1)(f) of FD 2002/584/JHA and by section (c) of the EAW form affords the executing judicial authority a – limited – possibility of reviewing whether the offence carries a maximum penalty of at least three years. A *prosecution*-EAW must contain, in section (c)1, information about the specific maximum sentence for that offence. The executing judicial authority must carry out the – limited – review of the penalty threshold ‘on the basis of the information available in the

[EAW] itself'.[340] After all, in light of the principle of mutual trust and of the requirement of diligence, as expressed by the time limits of Art. 17 of FD 2002/584/JHA, the executing judicial authority 'must be able to rely, in the application of Article 2(2) of Framework Decision 2002/584, on the information on the length of the sentence set out in the [EAW]'.[341]

Concerning the designation of an offence as belonging to one or more of the 32 categories of Art. 2(2) of FD 2002/584/JHA, it seems logical to presume that the executing judicial authority may review that designation only to a very limited extent, if at all. The law of the issuing Member States determines whether an offence is a listed offence. The executing judicial authority does not know that law. Moreover, FD 2002/584/JHA does not require the issuing judicial authority to justify its decision to designate an offence as a listed offence.

The case-law of the Court of Justice on FD 2005/214/JHA on the application of the principle of mutual recognition to financial penalties[342] confirms that, in principle, the executing judicial authority is bound by the designation as a listed offence. That framework decision contains a provision on listed offences that is comparable to Art. 2(2) of FD 2002/584/JHA (Art. 5(1) of FD 2005/214/JHA). In its judgment in the *LU (Recouvrement de d'amendes de circulation routière)* case, the Court of Justice noted that the competent authority of the executing State, in principle, is under a duty to recognise and execute a decision requiring a financial penalty to be paid and that, by way of derogation of that general rule, it can only refuse to recognise and execute such a decision on the basis of the grounds for refusal that are explicitly established in FD 2005/214/JHA.[343] The Court of Justice further observed that, pursuant to Art. 5(1) of FD 2005/214/JHA the offences mentioned in the list shall give rise to recognition and execution 'as they are defined by the law of the issuing State'.[344] From that, the Court of Justice concluded that the competent authority of the executing State, in principle, is bound by the assessment carried out by the authority of the issuing State

[340] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 39.
[341] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 39.
[342] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ* 2005, 76/16.
[343] ECJ, judgment of 6 October 2021, *LU (Recouvrement de d'amendes de circulation routière)*, C-136/20, ECLI:EU:C:2021:804, para. 40.
[344] ECJ, judgment of 6 October 2021, *LU (Recouvrement de d'amendes de circulation routière)*, C-136/20, ECLI:EU:C:2021:804, para. 41.

concerning the classification of the offence as a listed offence.[345] In the case at hand, a financial penalty was imposed on the owner of a motor vehicle that was involved in a traffic accident for failing to identify the person who had driven that motor vehicle at the time of the accident. The authority of the issuing Member State had designated this offence as the listed offence 'conduct which infringes road traffic regulations (…)'. The referring court was of the opinion that, in doing so, the authority of the issuing State had given too broad an interpretation to that category because that category does not cover offences that relate to traffic safety in an indirect way only. The Court of Justice held that the authority of the issuing State had designated that offence – which, in the issuing State, was covered by the Federal Law on Motor Vehicles (*Kraftfahrgesetz*) – as a listed offence.[346] In addition, the reference for a preliminary ruling did not contain any information on the basis of which it could be concluded that the certificate sent by the authority of the issuing State manifestly did not correspond to the financial penalty decision and only indicated that the authority of the issuing State had given to broad an interpretation to the category in question. As a result, the situation in the case at hand did not seem to relate to one of the situations laid down in Art. 7(1) of FD 2005/214/JHA in which the authorities of the executing State may refuse to recognise and execute the financial penalty decision.[347] According to the Court of Justice, in those circumstances the competent authority of the executing State cannot refuse to recognise and execute the financial penalty decision.[348] Nevertheless, the Court of Justice pointed out that, in accordance with Art. 20(3) of FD 2002/214/JHA, the competent authority of the executing State can oppose the recognition and execution if the certificate gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union may have been infringed.[349] Consequently, where an authority of the issuing State designated an offence as belonging to one of the categories of offences mentioned in the list of Art. 5(1) of FD 2002/214/JHA the competent authority of the executing State, in principle, cannot refuse to recognise and execute the financial penalty

[345] ECJ, judgment of 6 October 2021, *LU (Recouvrement de d'amendes de circulation routière)*, C-136/20, ECLI:EU:C:2021:804, para. 42.
[346] ECJ, judgment of 6 October 2021, *LU (Recouvrement de d'amendes de circulation routière)*, C-136/20, ECLI:EU:C:2021:804, para. 47.
[347] ECJ, judgment of 6 October 2021, *LU (Recouvrement de d'amendes de circulation routière)*, C-136/20, ECLI:EU:C:2021:804, para. 48.
[348] ECJ, judgment of 6 October 2021, *LU (Recouvrement de d'amendes de circulation routière)*, C-136/20, ECLI:EU:C:2021:804, para. 49.
[349] ECJ, judgment of 6 October 2021, *LU (Recouvrement de d'amendes de circulation routière)*, C-136/20, ECLI:EU:C:2021:804, para. 50.

decision outside of the grounds for refusal explicitly established by FD 2005/214/JHA.[350] The words 'in principle' obviously refer to the possibility of applying Art. 20(3) of FD 2005/214/JHA, which is not a ground for refusal.

By referring to the ground for optional refusal of Art. 7(1) of FD 2005/214/JHA – concerning situations in which the certificate 'manifestly does not correspond to the [financial penalty] decision' –, the Court of Justice seems to afford the competent authority some room to review the classification as a listed offence. In this respect, advocate general Richard de la Tour pointed out that the ground for optional refusal of Art. 7(1) covers situations in which the offence mentioned in the financial penalty decision *manifestly* is not covered by the designated listed offence. Against this background, the fact that the Court of Justice observed that the issuing State had classified the offence, *on the basis of the Federal Law on Motor Vehicles*, as the listed offence 'conduct which infringes road traffic regulations', is indicative. Apparently, the Court of Justice saw an - obvious - link between offences defined in a law dedicated to motor vehicles and road traffic regulations. Or, put negatively, apparently the Court of Justice did not see a manifest mismatch between an offence that is defined in such a law and the listed offence.

Returning to FD 2002/584/JHA, can one apply the *LU (Recouvrement de d'amendes de circulation routière)* judgment by analogy to the designation of listed offences by the issuing judicial authority? FD 2002/584/JHA does not contain a ground for refusal comparable to Art. 7(1) of FD 2005/214/JHA. However, the validity requirements of Art. 8(1) of FD 2002/584/JHA explicitly refer to Art. 2 of FD 2002/584/JHA. The EAW must contain information about the existence of a national judicial decision 'coming within the scope of Articles 1 and 2' (Art. 8(1)(c)) and information about the nature and legal classification of the offence 'particularly in respect of Article 2' (Art. 8(1)(e)). One could argue that these requirements are not met where there is a *manifest* mismatch between the offence as described in section (e) and the listed offence ticked in section (e)I.

[350] ECJ, judgment of 6 October 2021, *LU (Recouvrement de d'amendes de circulation routière)*, C-136/20, ECLI:EU:C:2021:804, para. 51.

If one accepts that the executing judicial authority has the power to review whether the designated listed offence *manifestly* does not correspond to the offence as described in the EAW, one must also accept that it has the power to decide that the designated listed offence is *manifestly* not applicable on account of manifest non-correspondence.

Unlike other requirements as to the validity of the EAW, a failure to meet the requirements of Art. 8(1)(c) and (e) of FD 2002/584/JHA on account of a manifest mismatch between the offence as described in the EAW and the designated listed offence would not, in itself, lead to a refusal to give effect to that EAW.[351] The fact that the offence at issue cannot give rise to surrender without verification of the double criminality of the act, pursuant to Article 2(2) of FD 2002/584, does not automatically mean that surrender has to be refused. It is up to the executing judicial authority to assess whether the condition of double criminality is met (insofar as its Member State has transposed Art. 2(4) and 4(1) of FD 2002/584/JHA).[352] Of course, that assessment could result in the conclusion that the act on which the EAW is based does not constitute an offence according to the law of the executing Member State and, consequently, could lead to a refusal of surrender.

It is precisely for that reason that the executing judicial authority should only exercise the power to decide that the designated listed offence is manifestly not applicable, after having given the issuing judicial authority the opportunity – on the basis of Art. 15(2) of FD 2002/584/JHA – to clarify its decision to designate the offence as a listed offence and, thus, to prevent a possible refusal for failure to meet the condition of double criminality. In this respect, the situation would similar be to the other validity requirements of Art. 8(1) of FD 2002/584/JHA.[353]

3.6.1.5 *Ne bis in idem*

[351] Compare ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 64, with regard to the requirement of Art. 8(1)(b) of FD 2002/584/JHA.
[352] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 42.
[353] Compare ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 65, with regard to the requirement of Art. 8(1)(b) of FD 2002/584/JHA.

3.6.1.5.1 Introduction

FD 2002/584/JHA contains two grounds for refusal relating to *ne bis in idem*. The ground for *mandatory* refusal of Art. 3(2) of FD 2002/584/JHA concerns the situation that the requested person was 'finally judged' in respect of the 'same acts' by a *Member State*. The ground for *optional* refusal of Art. 4(5) of FD 2002/584/JHA concerns the situation that the requested person was 'finally judged' in respect of the 'same acts' by a *third State*.

According to the Court of Justice, both grounds for refusal intend 'to enable the executing judicial authority to ensure legal certainty for the requested person by taking into account, within the margin of discretion it has, the fact that the requested person has been finally judged in another State in respect of the same acts'.[354]

Art. 3(2) of FD 2002/584/JHA 'reflects' the *ne bis in idem* principle enshrined in Art. 50 of the Charter.[355] Pursuant to the latter provision, no one may be tried or punished twice within the EU in criminal proceedings for the same criminal offence. The *ne bis in idem principle* requires Member States to refrain from prosecuting a person for certain acts themselves and, by extension, from assisting another Member State in the prosecution of that person by surrendering him, if that person has already been finally judged by a Member State.[356] In surrendering a requested person, the executing Member State acts 'as a *longa manus* of the prosecuting State', *i.e.* 'effectively acts for and on behalf of the prosecution of another State'.[357]

The requirement to respect the *ne bis in idem* principle enshrined in Art. 50 of the Charter explains why the executing judicial authority does not have a margin of discretion when applying Art. 3(2) of FD 2002/584/JHA.[358] Art. 50 of the Charter only applies 'within the Union'. Therefore, under that provision there is no *duty* to refuse the execution of an EAW if

[354] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 89.
[355] ECJ, judgment of 25 July 2018, *AY (Arrest warrant – Witness)*, C-268/17, ECLI:EU:C:2018:602, para. 39.
[356] Compare ECJ, judgment of 12 May 2021, *Bundesrepublik Deutschland (Red notice of Interpol)*, C-505/19, ECLI:EU:C:2021:376, para. 82, with regard to provisional arrest with a view to extradition to a third State.
[357] Advocate general M. Bobek, opinion of 19 November 2020, *Bundesrepublik Deutschland (Red notice of Interpol)*, C-505/19, ECLI:EU:C:2020:939, para. 63, with regard to provisional arrest with a view to extradition to a third State.
[358] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 50.

the requested person was 'finally judged' in a *third* State. When a Member State chooses to transpose the ground for optional refusal of Art. 4(5) of FD 2002/584/JHA, it cannot turn that ground for refusal into a ground for mandatory refusal.[359]

Since framework decisions that, from the entry into force of the Treaty of Lisbon, have not been subject to repeal, annulment or amendment – such as FD 2002/584/JHA – do not have direct effect under the EU Treaty itself, a court of the executing Member State 'is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to those framework decisions'.[360] However, pursuant to the duty of conforming interpretation *all* authorities of the executing Member State – not just its judicial authorities – are bound to interpret their national law 'to the greatest extent possible' in the light of the text and the purpose of FD 2002/584/JHA.[361] In its case-law, the Court of Justice almost seems to direct the executing judicial authority to interpret a ground for refusal that was incorrectly transposed as a mandatory ground for refusal as having an optional character.[362] Nevertheless, the principle of conforming interpretation 'cannot serve as the basis for an interpretation of national law *contra legem*'.[363] In other words, the 'obligation for national law to be interpreted in conformity with EU law ceases when national law cannot be interpreted so as to achieve a result which is compatible with that sought by the directive concerned'.[364] In the end, it is up to the national authorities to determine whether a conforming interpretation is possible.[365]

3.6.1.5.2 The 'same acts'

In the *Mantello* case, the Court of Justice held that the autonomous concept 'same acts' of Art. 3(2) of FD 2002/584/JHA should be interpreted in accordance with its case-law on Art.

[359] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 44.
[360] ECJ, judgment of 24 June 2019, *Popławski II*, C-573/17, ECLI:EU:C:2019:530, para. 71.
[361] ECJ, judgment of 24 June 2019, *Popławski II*, C-573/17, ECLI:EU:C:2019:530, para. 94. The Court of Justice, therefore, does not seem to exclude that *national* law requires disapplying a national provision which is incompatible with a provision of a framework decision.
[362] See, *e.g.*, ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, paras. 63-66. In this judgment, the Court of Justice more or less directs the referring court to give an anticipatory interpretation to a national provision that incorrectly transposed an optional ground for refusal as a mandatory ground for refusal.
[363] See, *e.g.*, ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 63.
[364] See, *e.g.*, ECJ, judgment of 17 October 2018, *Klohn*, C-167/17, ECLI:EU:C:2018:833, para. 65.
[365] ECJ, judgment of 24 June 2019, *Popławski II*, C-573/17, ECLI:EU:C:2019:530, para. 85.

54 of the CISA.[366] For reasons of consistency and legal certainty, the same holds true for the concept 'same acts' within the meaning of Art. 4(5) of FD 2002/584/JHA, even though the high level of trust that exists between the Member States cannot be presumed as regards third States.[367] That is the reason why a 'final judgment' from a third State in respect of the 'same acts' only constitutes a ground for *optional* refusal.[368] Moreover, giving a different – more narrow – scope to the concept of 'same acts' in Art. 4(5) of FD 2002/584 than the scope accorded to that concept in Art. 3(2) of FD 2002/584/JHA and in Art. 54 of the CISA would be difficult to reconcile with the CISA because that convention also applies to some third States.[369]

Consequently, the concept 'same acts' in both provisions refers 'only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected'.[370]

3.6.1.5.3 *Ex officio* application?

Both Art. 3(2) and Art. 4(5) contains an interesting passage that does not occur in the wording of any of the other grounds for mandatory or optional refusal. The executing judicial authority shall or may refuse to execute the EAW 'if the executing judicial authority is informed' that a *ne bis in idem* situation exists. One could read this passage as indicating that the executing judicial authority is not required to examine *ex officio* whether to refuse surrender on the basis of these grounds for refusal. And one could defend this reading with reference to the fact that the EAW, usually, will not contain any indication that the requested person was already 'finally judged' by a Member State or by a third State in respect of the 'same acts'. Particularly if the final judgment occurred in another Member State than the issuing or executing Member States or even in a third State, an *ex officio* examination could be burdensome and time-consuming, and, therefore, could run counter to the duty to respect the time limits of Art. 17 of FD 2002/584/JHA. On the other hand, the requested person will,

[366] ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, para. 40.
[367] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, paras. 75-77.
[368] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 78.
[369] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 81.
[370] ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, para. 39.

usually, be aware of a 'final judgment' in respect of the 'same acts'. Moreover, even in the absence of an *ex officio* duty to examine whether the grounds for refusal apply it is still open to the person concerned, after his surrender, to invoke the *ne bis in idem* principle before the authorities of the issuing Member State. After all, as stated in Art. 1(3) of the Framework Decision, that Member State must respect fundamental rights and fundamental legal principles, and, consequently, the *ne bis in idem* principle.[371]

3.6.1.6 Double criminality

3.6.1.6.1 Introduction

For other offences than those mentioned in Art. 2(2) of FD 2002/584/JHA Member States have the *option* of making surrender subject to the condition 'that the acts for which the [EAW] has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described' (Art. 2(4) of FD 2002/584/JHA). The scope of Art. 2(4) of FD 2002/584/JHA encompasses offences which do not come within the ambit of at least one of the 32 categories of criminal behaviour and offences, whether or not within the ambit of one of those categories, which do not carry a custodial sentence in the issuing Member State of at least three years.

The possibility afforded by Art. 2(4) of FD 2002/548/JHA enables Member States to refuse the execution of an EAW 'in respect of conduct which they do not consider to be morally wrong and which does not, therefore, constitute an offence'.[372] When a Member State avails itself of this option, its executing judicial authorities may examine whether the condition of double criminality is met regarding a non-listed offence. In this respect, another provision of FD 2002/584/JHA is of particular importance. Inextricably connected to the option of making surrender for a non-listed offence subject to the condition of double criminality is the ground for optional refusal of Art. 4(1) of FD 2002/584/JHA. Pursuant to that provision, the executing judicial authority 'may' refuse to execute the EAW 'if, in one of the cases referred to in Article 2(4), the act on which the [EAW] is based does not constitute an offence under

[371] Compare ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, para. 53, with regard to the principle of legality of criminal offences and penalties.
[372] Cf. ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 45, with regard to Art. 7(3) of FD 2008/909/JHA.

the law of the executing Member State' (Art. 4(1) of FD 2002/584/JHA). In other words, this ground for optional refusal affords the possibility of a refusal of surrender 'if the condition of double criminality is not met'.[373] The words 'in one of the cases referred to in Article 2(4)' make clear that the ground for optional refusal has no existence independent of Art. 2(4). The ground for optional refusal is only applicable where the executing Member State availed itself of the option afforded in Art. 2(4). Conversely, making surrender for non-listed offences subject to the condition of double criminality without transposing Art. 4(2) would be pointless. Although the executing judicial authorities would be allowed to examine whether the condition of double criminality is met, they would not be allowed to refuse surrender in cases in which that condition is not met.

When Member States choose to transpose Art. 2(4) and 4(1) of FD 2002/584/JHA, they cannot set a condition with regard to the *level of punishment* applicable in the *executing* Member State.[374] In contrast to the extradition regime, FD 2002/584/JHA 'focusses' on the level of punishment in the *issuing* Member State, as the criminal prosecution or the execution of a custodial sentence for which surrender is sought is conducted in accordance with the rules of that Member State.[375] This is in line with FD 2002/584/JHA's objective of free movement of judicial decisions in an area of freedom, justice and security.[376]

When Member States choose to transpose the ground for optional refusal of Art. 4(1), they 'cannot provide that judicial authorities are required to refuse to execute any [EAW] formally falling within the scope of [that ground], without those authorities having the opportunity to take into account the circumstances specific to each case'.[377] In other words, they cannot turn that ground for optional refusal into a ground for mandatory refusal.

The legal systems of Member States divide offences into two or three legal categories according to their severity, such as 'crimes' and 'misdemeanours'. Art. 2(4) and Art. 4(1) do not contain any distinction in this regard. The only condition is that the act constitutes an

[373] Cf. ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 29.
[374] ECJ, order of 25 September 2015, *A.*, C-463/15 PPU, ECLI:EU:C:2015:634, paras. 24-27.
[375] ECJ, order of 25 September 2015, *A.*, C-463/15 PPU, ECLI:EU:C:2015:634, para. 29.
[376] ECJ, order of 25 September 2015, *A.*, C-463/15 PPU, ECLI:EU:C:2015:634, para. 30.
[377] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 44.

offence according to the law of the executing Member State, 'whatever the constituent elements or however it is described'. Requiring not only that the act constitutes an offence but also that this offence is a 'crime' would exclude offences under the law of the executing Member State that belong to a legal category of less severe offences. By doing so, the executing Member State would make the ground for refusal applicable to situations in which the act *is* an offence in the executing Member State (but not of the required gravity) and, thereby, would *broaden* the scope of that ground for refusal. This is not allowed. Broadening the scope of a ground for refusal would lead to more refusals and, therefore, would hamper surrender, which is not in accordance with the principle of mutual recognition.[378]

The principle of the retroactive application of the more lenient criminal law (see section 3.4.1.1) is not limited to legislative changes concerning the applicable penalty. In its *Scoppola (no. 2)* judgment, the ECtHR described the principle of the retro-activeness of the more lenient criminal law as 'the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant'.[379] The term 'criminal law(s)', in itself, is not limited to penalties. Later case-law of the ECtHR confirms that this rule also applies to legislative changes in the definition of an offence.[380] Under Art. 15(1) of the CCPR, the UN Human Rights Committee held that the right to retro-active application of the more lenient penalty refers '*a fortiori* to a law abolishing a penalty for an act that no longer constitutes an offence'.[381] The Court of Justice seems to endorse an equally broad interpretation of the principle of retro-active application of the more lenient criminal law. In the *Paoletti* case it observed that this principle 'is based on the conclusion that the legislature changed its position either on *the criminal classification of the act* or the penalty to be applied to an offence'.[382] It appears, therefore, that favourable changes in the definition of an offence and, *a*

[378] By contrast, *limiting* the scope of a ground for optional refusal of Art. 4 of FD 2002/584/JHA is allowed, as this would facilitate surrender in according with the principle of mutual recognition: ECJ, judgment of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, paras. 58-59.
[379] ECtHR, judgment of 19 September 2009 [GC], *Scoppola (no. 2) v. Italy*, ECLI:CE:ECHR:2009:0917JUD001024903, § 109.
[380] ECtHR, judgment of 3 December 2019, *Parmak and Bakir v. Turkey*, ECLI:CE:ECHR:2019:1203JUD002242907, § 64.
[381] HRC, views of 21 October 2010, *Cochet v. France*, Communication No. 1760/2008.
[382] ECJ, judgment of 6 October 2016, *Paoletti and Others*, C-218/15, ECLI:EU:C:2016:748, para. 27 (emphasis added).

fortiori, the abolition of an offence have retro-active effect on acts committed before the entry into force of those changes or that abolition.

It follows that a prosecution-EAW should not be issued with respect to an act which was subsequently decriminalised and that a prosecution-EAW should be withdrawn where the act on which it is based is decriminalised after the issue of that EAW but before the decision on its execution. With regard to execution-EAWs, the situation is more nuanced (see section 3.4.1.1).

3.6.1.6.2 Assessment of double criminality

In its judgment in the *Grundza* case, the Court of Justice explained how to assess double criminality under FD 2008/909/JHA. Art. 7(3) of FD 2008/909/JHA limits the scope of the assessment of double criminality, because it requires that the competent authority of the executing State verifies whether the acts in question constitute an offence under the law of that State, 'whatever its constituent elements or however it is described'.[383] Consequently, for meeting the condition of double criminality it is both necessary and sufficient that the acts constitute an offence in the executing State.[384] The offences in the issuing and executing States do not need to be identical.[385] Against this background, the Court of Justice stated that 'the factual elements underlying the offence, as reflected in the judgment handed down in the issuing State' and 'how the offence is defined under the law of the executing State' should be 'congruent'.[386] Therefore, when assessing double criminality, the competent authority of the executing State must 'verify whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the executing State if they were present in that State'.[387]

Art. 2(4) and 4(1) of FD 2002/584/JHA are almost identical to Art. 7(3) and 9(1)(d) of FD 2008/909/JHA. The legislative context of both sets of provisions is comparable: both framework decisions are based on the principle of mutual recognition. Consequently, both

[383] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 33.
[384] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 34.
[385] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 34.
[386] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 37.
[387] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 38.

grounds for optional refusal concerning double criminality should be interpreted strictly.[388] Moreover, a strict interpretation of both grounds for optional refusal contributes to the objectives of their respective framework decisions. A strict interpretation of Art. 7(3) and 9(1)(d) of FD 2008/909/JHA contributes to the attainment of the objective of social rehabilitation of nationals of the executing State. A strict interpretation limits the scope of the ground for refusal and, therefore, facilitates recognition by and execution of a judgment in the executing Member State. A strict interpretation of Art. 2(4) and 4(1) of FD 2002/584/JHA contributes to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice. A strict interpretation limits the scope of the ground for refusal and, therefore, prevents impunity.

Therefore, it seems highly likely that Art. 2(4) and 4(1) of FD 2002/584/JHA require an assessment of double criminality that is comparable to the assessment described in the *Grundza* judgment.[389] That assessment would consist of verifying whether the factual elements underlying the offence, as described in section (e) of the EAW, would also, *per se*, be subject to a criminal penalty in the executing Member State if they were present in that State. Apparently, the *Handbook* is of the same opinion. As to the assessment of double criminality it refers to *Grundza* without any reservation.[390]

Art. 4(1) of FD 2002/584/JHA contains specific instructions on the assessment of double criminality concerning a specific category of offences, *viz.* fiscal offences, which is also present in Art. 9(1)(d) of FD 2008/909/JHA: 'in relation to taxes or duties, customs and

[388] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 46. For the EAW see, *e.g.*, ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, paras. 38-39.
[389] In the same vein: A. Falkiewicz, 'The Double Criminality Requirement in the Area of Freedom, Security and Justice – Reflections in Light of the European Court of Justice Judgment of 11 January 2017, C-289/15, Criminal Proceedings against Jozef Grundza', *EuCLR* 2017, p. 267; V.H. Glerum, 'Het EAB en politiek gevoelige zaken: beschouwingen over de EAB-beslissingen in de zaak Puigdemont', *SEW* 2019, p. 56-57; M. Heger, 'Einige Anmerkungen zum Auslieferungshaftbefehl in der causa "Puigdemont"', *ZIS* 2018, p. 188. Without arguing for direct application of the Grundza judgment, L. Bachmaier is of the opinion that 'some flexibility could be warranted in assessing the double criminality requirement' in EAW-cases: 'European Arrest Warrant, Double Criminality and Mutual Recognition: A Much Debated Case', *EuCLR* 2018, p. 156. According to Advocate general Y. Bot, the Court of Justice's analyses in the *Grundza* judgment seems 'perfectly applicable in the context of the European arrest warrant mechanism': opinion of 6 September 2018, *Sut*, C-514/17, ECLI:EU:C:2018:672, para. 69. Recently, advocate general A. Rantos has advised the Court of Justice to adopt apply its interpretation in de *Grundza* judgment to Art. 2(4) and 4(1): opinion of 31 March 2022, *Procureur général près la cour d'appel d'Angers*, C-168/21, ECLI:EU:C:2022:246, paras. 34-40.
[390] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/11, 28 and 30.

exchange, execution of the [EAW] shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State'. Obviously, this rule is derived from Art. 6(2) of the EU Convention on extradition.[391] It recognises that the definitions of the various offences connected with taxes, duties, customs and exchange will vary from Member State to Member State, perhaps even more so than non-fiscal offences. After all, those offences are closely linked to particular national interests and Member States will usually not protect those interests in an identical way.[392] In essence, the rule replicates the principle espoused in the *Grundza* judgment: to meet the condition of double criminality it is not necessary that the definition of the offences in the issuing and executing Member States are identical.[393]

3.6.1.6.3 Temporal point of reference

Neither Art. 2(4) nor Art. 4(1) of FD 2002/584/JHA contains any indication of the time at which the 'act' described in section (e) of the EAW should constitute an offence in the executing Member State. This raises the question what temporal point of reference the executing judicial authority should take when assessing whether the act constitutes an offence under the law of the executing Member State.

The possible answers to that question cover a broad spectrum ranging from the date at which the act was committed (assessment *ex tunc*) to the date of the decision on the execution of the EAW (assessment *ex nunc*).

As a preliminary point, one can exclude at least one possible answer. It is highly unlikely that FD 2002/584/JHA can be interpreted as *requiring* that the act constitutes an offence under the law of the executing Member State *at the time at which the act was committed*. Art. 49(1) of the Charter enshrines the principle of legality of criminal offences and penalties and

[391] 'Extradition may not be refused on the ground that the law of the requested Member State does not impose the same type of taxes or duties or does not have the same type of provisions in connection with taxes, duties, customs and exchange as the law of the requesting Member State'.
[392] Cf. advocate general M. Bobek, opinion of 28 July 2016, *Grundza*, C-289/15, ECLI:EU:C:2016:622, paras. 74-75.
[393] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 34.

corresponds to Art. 7(1) of the ECHR.[394] Of course, when proceeding in a criminal case the authorities of the *issuing* Member State must respect that principle. However, when deciding on the execution of an EAW the authorities of the *executing* Member State are *not* bound by that principle. With regard to *listed* offences, *i.e.* offences whose double criminality may not be verified by the executing judicial authority, the Court of Justice held in the *Advocaten voor de Wereld* case that the *issuing* Member States must respect the principle of legality of criminal offences and penalties.[395] It follows that surrender in the absence of verification of double criminality and, *a fortiori*, surrender in the absence of double criminality, is not an issue under that principle. This is confirmed by the case-law of the European Commission on Human Rights and of the ECtHR on extradition and surrender under Art. 7(1) of the ECtHR. A decision to extradite or to surrender a requested person is not a penalty imposed on him for committing an offence within the meaning of that provision, but a procedure intended to permit a criminal prosecution or the execution of a judgment in another State. Consequently, that provision does not apply to a decision to extradite or to surrender a requested person, regardless of whether the act was committed before it was criminalised in the requested State/executing Member State.[396]

An assessment *ex tunc* would give a broad scope to the ground for refusal of Art. 4(1) of FD 2002/584/JHA, because such an assessment would exclude cases in which the executing Member State criminalised acts such as the act on which the EAW is based at a later date. The ground for refusal is an exception to the rule, which is that EAWs must be executed. As an exception, it must interpreted strictly.

Against this background, an interpretation of Art. 2(4) and 4(1) FD 2002/584/JHA that the act must constitute an offence under the law of the executing Member State at the time of the decision on the execution of the EAW seems more appropriate. In such an interpretation, acts

[394] ECJ, judgment of 8 September 2015, *Taricco and Others*, C-105/14, ECLI:EU:C:2015:555, para. 57; ECJ, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936, para. 52.
[395] ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, para. 53.
[396] Extradition: ECRM, decision of 6 July 1976, *X. v. the Netherlands*, ECLI:CE:ECHR:1976:0706DEC000751276; ECRM, decision of 6 March 1991, *Polley v. Belgium*, ECLI:CE:ECHR:1991:0306DEC001219286; ECRM, decision of 18 January 1996, *Bakhtiar v. Switzerland*, ECLI:CE:ECHR:1996:0118DEC002729295.
Surrender: ECtHR, decision of 7 October 2008, *Monedero Angora v. Spain*, ECLI:CE:ECHR:2008:1007DEC004113805.

that did not constitute an offence at the time of their commission but that do constitute an offence when the executing judicial authority decides on surrender could not give rise to a refusal on the basis of Art. 4(1) of FD 2002/584/JHA.

Such an interpretation is in line with the *ratio legis*, as described by the Court of Justice in *Grundza*. The option of setting the condition of double criminality enables the Member States to refuse to execute an EAW 'in respect of conduct which they do not consider to be morally wrong and which does not, therefore, constitute an offence'. Two things are of note. First, the Court of Justice uses the *present* tense. Second, what is at stake is the duty to *cooperate* with the issuing Member State, not whether to conduct criminal proceedings. In the words of Advocate General M. Bobek, 'the issue of the relevant law in the executing Member State pertains to the logic of the assessment of criteria for *recognition* from the point of view of the executing Member State. (…) In other words, the assessment of the legal framework relevant for Article 2(4) relates to the rules of the executing Member State which are by definition *not applicable* to the case, but that are used as a yardstick for dual criminality as a condition of recognition'.[397] Member States do not want to be forced to cooperate in respect of conduct that they do not consider to be morally wrong and that, therefore, does not constitute an offence under their laws. The best way to ensure this is to make cooperation dependent on their *current* views on immorality and criminality, *i.e.* their views at the time when they decide whether to cooperate with the issuing Member State. Otherwise, they could find themselves in the situation that they are obliged to cooperate in respect of conduct they once considered to be morally wrong, but have since decriminalised. Advocate General M. Bobek seems to endorse this interpretation in his opinion in the *X (European arrest warrant — Double criminality)* case.[398]

All of this militates for the interpretation of FD 2002/584/JHA that it requires an assessment *ex nunc*: does the act described in the EAW constitute an offence under the law of the executing Member State at the time of the decision on the execution of the EAW?

[397] Opinion of 26 November 2019, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2019:1011, para. 46.
[398] Opinion of 26 November 2019, *X (European arrest warrant — Double criminality)*, C-717/18, ECLI:EU:C:2019:1011, para. 45: 'That argument [*i.e.* that Article 2(4) of FD 2002/584/JHA leads the executing Member State to carry out the examination of the requirement of double criminality according to what is provided for in its legal order at the time of execution of the EAW] is certainly valid in the framework of the assessment required *under Article 2(4)* with regard to the *executing* Member State. (…)'.

However, it has to be recognised that the rules on verifying double criminality in FD 2002/584/JHA are non-committal on the issue of the temporal point of reference for the assessment of double criminality.[399] One can argue, therefore, that these rules do not seek to *exhaustively* harmonise *every* aspect of verifying double criminality.

Pursuant to Art. 53 of the Charter, 'where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'.[400] In the *Melloni* judgment, the Court of Justice made it clear that the exhaustive harmonisation, in Art. 4a of FD 2002/584/JHA, of the situations in which *in absentia* proceedings are regarded as not infringing the rights of the defence precludes the executing Member State from applying its *higher national* standards of fundamental rights protection. Applying the higher national standard would compromise the primacy, unity and effectiveness of Art. 4a of FD 2002/584/JHA. In the absence of exhaustive or full harmonisation, Member States remain free to apply their *national* standards of fundamental rights protection, under the proviso that this does not compromise the level of protection provided for by the Charter, and the primacy, unity and effectiveness of Union law.[401] Applying a *higher* national fundamental rights standard will not compromise the level of protection of the Charter. In the absence of full harmonisation, the actual degree of harmonisation will determine whether applying such a standard will compromise the primacy, unity and effectiveness of Union law. The more harmonisation has taken place, the less probable it is that applying such standards do not have that effect. In the *JZ* judgment, *e.g.*, the Court of Justice held that Art. 26(1) of FD 2002/584/JHA – concerning the deduction of the period of detention served in the executing Member State – 'merely imposes a *minimum* level of protection of the fundamental rights' of the requested person and that his provision, therefore, does not prevent the issuing Member State 'on the basis of domestic law alone, to

[399] Compare advocate general M. Bobek, opinion of 26 November 2019, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2019:1011, para. 105.
[400] ECJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para. 60.
[401] See ECJ, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 29; ECJ, judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, para. 60; ECJ, judgment of 5 December 2017, *M.A.S. and M.B.*, ECLI:EU:C:2017:936, paras. 44-45; ECJ, judgment of 29 July 2019, *Spiegel Online*, C-516/17, ECLI:EU:C:2019:625, paras. 21-22.

deduct from the total period of detention which the person concerned would have to serve in that Member State all or part of the period during which that person was subject, in the executing Member State, to measures involving not a deprivation of liberty but a restriction of it'.[402] Evidently, applying a higher national fundamental rights standard in such circumstances does not compromise the primacy and unity of Union law: in case of minimum harmonisation, Member States are allowed to go beyond the minimum result required and, for that reason, unity is, at best, minimal. In addition, applying a higher national fundamental rights standard in such circumstances does not impair the effectiveness of Union law as it would not hamper cooperation between issuing and executing judicial authorities.[403]

Against this background one can argue that, if a Member State's *national* principle of legality of offences and penalties *also* covers the assessment of double criminality in the context of a decision on the execution of an EAW, its authorities would be allowed to require that the act already constitutes an offence under the law of that Member State at the time it was committed. Given the low degree of harmonisation of the assessment of double criminality one could contend that this would not compromise the primacy and unity of Union law. As to its effectiveness, admittedly an assessment *ex tunc* would broaden the scope of the ground for refusal but cases in which the act on which the EAW is based was not an offence according to the law of the executing Member State at the time of the act but is at the time of the decision on the execution of the EAW are few and far between, *i.e.* such cases are scarce.

3.6.1.6.4 Refusal on account of lack of double criminality

Even though Union law adopts a 'flexible approach' to assessing double criminality 'both as regards the constituent elements of the offence and its description'[404] (see section 3.5.6.2), it is still possible that the assessment of double criminality results in the conclusion that the 'act' does not constitute an offence according to the law of the executing Member State. Although some *minimum* harmonisation of some offences has taken place – in particular in respect of some of the listed offences –, large swathes of criminal law remain within the competence of the Member States. It follows that, since the criminal laws of the Member

[402] ECJ, judgment of 28 July 2016, *JZ*, C-294/16, ECLI:EU:C:2016:610, para. 55 (emphasis added).
[403] See Hannah Brodersen, Vincent Glerum & André Klip, *The European Arrest Warrant and In Absentia Judgments*, The Hague: Boom juridisch 2020, p. 60-61.
[404] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, para. 36.

States are largely unharmonized, they 'by nature diverge in the various Member States'.[405] Divergences between the criminal laws of the issuing and executing Member States can lead to the conclusion that an 'act' which is an offence according to the law of the issuing Member State is not an offence according to the law of the executing Member State.

Broadly speaking, such a conclusion presents itself in two categories of cases:

1. Certain conduct is not criminalised at all in the executing Member State.

2. Certain conduct is – to some extent – criminalised in both Member States but the scope of the offence in the executing Member State is *narrower* than the scope of the offence in the issuing Member State. Such a situation occurs where the definition of the offence in the executing Member State contains constituent elements that are absent in the definition of the offence in the issuing Member State.

In the second category of situations, the description of the offence in section (e) of the EAW is not necessarily determinative for double criminality. When describing the offence for which surrender is sought, the issuing judicial authority, naturally, will have the applicable national definition in mind and, naturally, will present only the circumstances that, in its opinion, fulfil that definition. However, it may be that the circumstances in which the act was committed also include circumstances that are not relevant under the national definition but are relevant under the definition in the executing Member State. An example. In Poland a persistent failure to pay child maintenance ordered by a court is an offence if it exposes the child to a situation where it cannot satisfy its essential needs.[406] In the Netherlands, it is not. However, in the Netherlands intentionally putting a person for whose maintenance, care or nursing one is legally responsible in a helpless condition is an offence.[407] If the requested person was legally responsible for the maintenance of the child and, by failing to pay child maintenance, intentionally put the child in a helpless condition, *i.e.* in concrete danger for its

[405] ECJ, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1027, para. 63.
[406] Art. 209 §1 of the Polish Penal Code.
[407] Art. 255 of the Dutch Penal Code.

life or health, the act would constitute an offence under Dutch law.[408] Therefore, with regard to the second category of situations, on the basis of FD 15(2) of FD 2002/584/JHA, it is advisable to request supplementary information with regard to the circumstances that are needed to conclude that the act is an offence according to the law of the executing Member State before deciding to apply the ground for refusal. After all, executing the EAW constitutes the rule, whereas refusal is intended to be the exception.[409]

Whatever category is applicable when the executing judicial authority concludes that the act does not constitute an offence in the executing Member State, it is not bound to refuse to execute the EAW on that account. After all, Art. 4(1) of FD 2002/584/JHA contains a ground for *optional* refusal. Given that execution of the EAW is the rule and, consequently, refusal to execute is intended to be an exception which must be interpreted strictly, the executing judicial authority should consider whether there are compelling reasons for refraining from a refusal. The executing judicial authority could examine, *e.g.*, whether the executing Member State has any interest in actually refusing to execute the EAW. In the course of such an examination the executing judicial authority could determine whether the act has any meaningful link with the legal order of its Member State. In principle, a meaningful link and, therefore, a legal interest in refusing to execute the EAW would be absent where the act was committed in the territory of the issuing Member State by a national of that Member State against a national of that Member State. Even if there is a meaningful link and, consequently, a legal interest in refusing to execute the EAW, the executing judicial authority may wonder whether the interest of its Member State outweighs the interest of the executing Member State in conducting a prosecution or executing a custodial sentence. In that case, it could consult with its counterpart in the issuing Member State on the basis of Art. 15(2) of FD 2002/584/JHA. Finally, considerations of a practical nature could also play a role. In situations in which the requested person would have to be surrendered anyway – *e.g.*, because the other offence for which surrender is sought meets the requirements for surrender – considerations that are comparable to the rationale of accessory surrender (see section 3.4.1.2.1) might bring the executing judicial authority to refrain from a partial refusal.

[408] See, *e.g.*, District Court of Amsterdam, judgment of 11 December 2018, ECLI:NL:RBAMS:2018:9095. In this case, even after having requested supplementary information the court found that the constituent element 'helpless situation' was not present.
[409] See, *e.g.*, ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 39.

3.6.1.7 Prosecution in the executing Member State for the same acts

3.6.1.7.1 Introduction

Art. 4(2) of FD 2002/584/JHA contains a ground for optional refusal concerning a situation in which the requested person 'is being prosecuted in the executing Member State for the same act as that on which the [EAW] is based'.

That provision is *not* a corollary of the *ne bis in idem* principle enshrined in Art. 50 of the Charter and in Art. 54 of the CISA. That principle and those provisions are 'not intended to protect the suspect from having to submit to possible subsequent investigations, in respect of the same acts, in several [Member] States'.[410] Art. 50 of the Charter 'specifically targets the repetition of proceedings concerning the same material act which have been concluded by a final decision'.[411] This explains why the ground for refusal has an optional character in contrast to the ground for refusal of Art. 3(2) of FD 2002/584/JHA.[412]

When Member States choose to transpose the ground for optional refusal of Art. 4(2), they cannot turn that ground for optional refusal into a ground for mandatory refusal.[413]

3.6.1.7.2 The 'same act'

The Court of Justice has not interpreted the definition of the concept 'same act' in Art. 4(2) of FD 2002/584/JHA yet. Although Art. 4(2) of FD 2002/584/JHA does not pursue the same objective as Art. 3(2) and 4(5) of FD 2002/584/JHA, the use of the word 'act' seems to suggest that – comparable to the definition of the concept 'same acts' in Art. 3(2) and 4(5) of FD 2002/584/JHA – the definition of the concept 'same act' focusses only on the nature of the act and disregards its legal classification or the legal interest protected. Therefore, for reasons

[410] ECJ, judgment of 22 December 2008, *Turanský*, C-491/07, ECLI:EU:C:2008:768, para. 44, with regard to Art. 54 of the CISA.
[411] ECJ, judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, ECLI:EU:C:2019:283, para. 32, concerning the application of national competition law and Union competition law in *parallel*.
[412] Compare ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 50, concerning Art. 3(2) of FD 2002/584/JHA.
[413] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 44.

of consistency[414] and legal certainty,[415] it seems logical to assume that the concept 'same act' has the same definition as the concept 'same acts' of Art. 3(2) and 4(5) of FD 2002/584/JHA.

3.6.1.8 Statute-barred criminal prosecution or punishment

3.6.1.8.1 Introduction

A statute-bar is also called limitation. According to the ECtHR, 'Limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed. Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time'.[416]

The view of the ECtHR is that rules on limitation are of a procedural nature: they do not define offences and penalties and, therefore, can be considered as simply laying down a precondition for the assessment of the case.[417] Consequently, the principle of legality of offences and penalties enshrined in Art. 7(1) of the ECHR does not prohibit an extension of a period of limitation and its immediate application where the relevant offence has never become subject to limitation.[418] The Court of Justice has held the same under Art. 49(1) of the Charter, which provision corresponds to Art. 7(1) of the ECHR.[419]

Statute-barred prosecution or punishment according to the law of the *issuing* Member State does not constitute a ground for refusal: Art. 4(4) of FD 2002/584/JHA only refers to statute-

[414] ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860, para. 33, with regard to the concept 'judicial authority'.
[415] Compare, ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 75, with regard to the concept 'same acts' in Art. 4(5) of FD 2002/584/JHA.
[416] ECtHR, judgment of 22 June 2000, *Coëme and others v. Belgium*, ECLI:CE:ECHR:2000:0622JUD003249296, § 146.
[417] ECtHR, decision of 12 February 2013, *Previti v. Italy*, ECLI:CE:ECHR:2013:0212DEC000184508, § 80; ECJ, decision of 22 September 2015, *Borcea v. Romania*, ECLI:CE:ECHR:2015:0922DEC005595914, para. 64; ECJ, judgment of 29 January 2019, *Orlen Lietuva Ltd. v. Lithuania*, ECLI:CE:ECHR:2019:0129JUD004584913, para. 97.
[418] ECtHR, judgment of 22 June 2000, *Coëme and others v. Belgium*, ECLI:CE:ECHR:2000:0622JUD003249296, § 146.
[419] ECJ, judgment of 8 September 2015, *Taricco and Others*, C-105/14, ECLI:EU:C:2015:555, paras. 54-57.

barred prosecution or punishment according to the law of the *executing* Member State. Consequently, pursuant to the principle of mutual trust there is a presumption that the issuing judicial authority will not issue an EAW where prosecution or punishment of a penalty in the issuing Member State is no longer possible.

However, it cannot be excluded that prosecution or punishment in the issuing Member State becomes statute-barred *after* the EAW was issued but before the executing judicial authority decides on the execution of that EAW, *e.g.* in cases in which there is a long delay between issuing the EAW and arresting the requested person or between the arrest of the requested person and the decision on the execution of the EAW.

The mention of the existence of an 'enforceable' national judicial decision in the sense of Art. 8(1)(c) of FD 2002/584/JHA in section (b) of the EAW confirms the presumption that prosecution or punishment was not statute-barred according to the law of the *issuing* Member State *at the time of issuing the EAW*.[420] If, *afterwards*, the right to prosecute or to punish expires, the national judicial decision on which the EAW is based cannot be said to be 'enforceable' in the sense of Art. 8(1)(c) of FD 2002/584/JHA any longer.[421] An EAW which is not based on an enforceable national judicial decision is not a valid EAW.[422]

As stated above, Art. 4(4) of FD 2002/584/JHA contains a ground for - optional - refusal concerning statute-barred criminal prosecution or punishment of the requested person according to the law of the *executing* Member State. This ground for refusal is applicable only 'if the acts fall within the jurisdiction of that Member State under its own criminal law'. That condition was derived from Art. 8 of the EU Convention on extradition.[423] Art. 8(1) of that convention forbade refusing extradition on the ground that the prosecution or punishment of the person would be statute-barred according to the law of the requested Member State.

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[420] Vincent Glerum, *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (PhD thesis Amsterdam VU), Nijmegen: Wolf Legal Publishers 2013, p. 600-601.
[421] In the same vein, with regard to an amnesty in the issuing Member State, advocate general J. Kokott, opinion of 17 June 2021, *AB and Others (Revocation of an amnesty)*, ECLI:EU:C:2021:498, para. 33.
[422] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2015:385, para. 64; ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:56.
[423] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, *OJ* 1996, C-312/12.

However, Art. 8(2) gave the requested Member State 'the option of not applying paragraph 1 where the request for extradition is based on offences for which that Member State has jurisdiction under its own criminal law'. Evidently, the condition of jurisdiction is intended to limit the scope of the ground for refusal to cases to which the criminal law of the executing Member State actually applies. In such cases, the executing Member State has a legal interest By contrast, Art. 10 of the ECE obliges to refuse extradition on account of statute-barred prosecution or punishment in the requested State, irrespective of whether it has jurisdiction to prosecute or to punish.

When a Member State chooses to transpose Art. 4(4) of FD 2002/584/JHA, it cannot turn it into a ground for mandatory refusal.[424]

During the negotiations on FD 2002/584/JHA, it was proposed to limit the scope of the ground for refusal concerning a statute-bar in the executing Member State to offences for which the principle of double criminality could still be invoked, *i.e.* for non-listed offences.[425] This proposal was not adopted. As a result, Art. 4(4) does not distinguish between listed and non-listed offences. Therefore, listed offences also come within the scope of that ground for refusal. The very concept of a 'statute-bar' or 'limitation' according to the law of the executing Member State inherently presupposes the existence of an *offence* according to the law of that Member State. Moreover, the condition set by that provision that 'the acts fall within the jurisdiction of that Member State under its own criminal law' also presumes that these 'acts' constitute an offence under that criminal law (see section 3.6.1.8.1). It follows that, in determining whether to apply the ground for refusal, the executing judicial authority will have to verify double criminality of the 'act', even if the issuing judicial authority designated that 'act' as a listed offence.

To exercise the power to refuse the execution of an EAW pursuant to Art. 4(4) of FD 2002/584/JHA, it is not necessary that a prior judgment 'whose basis is that a prosecution is time-barred' exists.[426] However, where the requested person is acquitted finally in a Member

[424] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 44.
[425] *Council document* 14867/01, 4 December 2001, p. 4.
[426] ECJ, judgment of 28 September 2006, *Gasparini*, C-467/04, ECLI:EU:C:2006:610, para. 31.

State because prosecution of the same acts on which the EAW is based is time-barred, the ground for mandatory refusal of Art. 3(2) of FD 2002/584/JHA will apply.[427]

3.6.1.8.2 Temporal point of reference

Art. 4(4) of FD 2002/584/JHA does not contain any firm indication of the time at which the 'act' described in section (e) of the EAW should be statute-barred according to the law of the executing Member State. This raises the question what temporal point of reference the executing judicial authority should take when assessing whether this ground for refusal applies.

The case-law of both the ECtHR and the Court of Justice shows that limitation is of a procedural nature and, therefore, is not covered by the principle of legality of offences and penalties enshrined in Art. 7(1) of the ECHR and Art. 49(1) of the Charter. That case-law does not concern extradition and surrender, because extradition and surrender do not constitute a conviction for an offence within the meaning of those provisions (see section 3.5.6.3). From a fundamental rights perspective, therefore, it seems improbable that FD 2002/584/JHA would prohibit an assessment *ex nunc*.

Comparable to an assessment *ex nunc* of double criminality (see section 3.5.6.3), an assessment *ex nunc* of limitation would comply with the requirement to interpret grounds for refusal – as exceptions to the rule of executing the EAW – in a strict way. An assessment *ex nunc* of limitation would *narrow* the scope of the ground for refusal as, *e.g.*, it would allow to take into account an extension of the period of limitation that was introduced *after* the act was committed.

However, the laws of the member States on limitation periods have not been harmonised[428] or, for some offences, have been harmonised only partially.[429] Moreover, comparable to Art. 4(1) (see section 3.6.1.6.3) Art. 4(4) of FD 2002/584/JHA could be considered as a measure

[427] Compare ECJ, judgment of 28 September 2006, *Gasparini*, C-467/04, ECLI:EU:C:2006:610, para. 33, with regard to Art. 54 of the CISA.
[428] ECJ, judgment of 28 September 2006, *Gasparini*, C-467/04, ECLI:EU:C:2006:610, para. 29.
[429] ECJ, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936, para. 44, with reference to Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *OJ* 2017, L 198/29.

that does not exhaustively harmonise the matter at hand. In the absence of full harmonisation, Member States would remain free to apply national standards of fundamental rights protection, provided that this does not compromise the level of protection of the Charter and the primacy, unity and effectiveness of Union law. If, in the legal order of the executing Member State, limitation is not of a procedural nature but forms part of substantive criminal law and, consequently, is covered by the *national* principle of legality of offences and penalties, the authorities of that Member State would be allowed to assess limitation *ex tunc*, *i.e.* assess limitation according to the law that was in force at the time of the act (cf. section 3.6.1.6.3).

3.6.2 Section (e) in practice

3.6.2.1 The structure of section (e)

3.6.2.1.1 The structure in general

As discussed previously, the structure of section (e) is misleading (see section 3.6.1.3.1). In practice, the distinction between the description of listed offences and non-listed offences seems to cause misunderstandings: sometimes an offence is described at the head of section (e), is designated as a listed offence in section (e)I and is also described in section (e)II;[430] and sometimes a non-listed offence is not described in section (e)II nor anywhere else in the EAW (see recommendation **3.12**).[431]

3.6.2.1.2 Description of the offence

The executing judicial authority of one Member State (NL) explicitly takes into account that surrender is sought for the purpose of conducting a prosecution when assessing whether the description of the offence is sufficient to decide on the execution of the EAW.[432]

In several Member States, the executing judicial authorities encounter problems with the description of the offences.

[430] IE, report, question 26; NL, report, question 26.
[431] IE, report, question 26; NL, report, question 26.
[432] NL, report, question 26.

Often, the description is too limited, *e.g.*, to check whether the act constitutes an offence according to the law of the executing Member State. Frequently, the time, place and degree of participation in the offence by the requested person are not mentioned (see recommendation **3.12**).[433]

On the other hand, sometimes the description of the offence is too extensive. *E.g.*, sometimes the course of the investigation in detail is given, rather than the offence for which is surrender is sought.[434]

Where an EAW is issued for a number of separate offences, those offences are not always described as separate offences. This makes it difficult to apply the ground for refusal concerning double criminality. Moreover, often the legal provisions or legal classifications are missing or do not correspond to the acts described, in that the acts described in section (e) only relate to some of the legal classifications.[435] Evidently, section (e) of the EAW form fails to give proper guidance to issuing judicial authorities where the EAW is issued for separate offences (see recommendation **3.12**).

The executing judicial authorities of one Member State (Greece) report that, because that Member State has transposed a large number of grounds for refusals as grounds for mandatory refusal – even grounds for optional refusal mentioned in Art. 4 of FD 2002/584/JHA – their need for information to decide on the application of those grounds for refusal is often not satisfied by the information provided in section (e) of the EAW. In particular, the executing judicial authorities report that the statute of limitations according to the law of the issuing Member State often is not mentioned, causing them to request supplementary information on this subject.

These observations give rise to two remarks. First, the need for the executing judicial authorities for supplementary information would most probably be greatly reduced if their Member State were to amend the legislation adopted to transpose the provisions of Art. 4(1) of FD 2002/584/JHA in such a way that these provision contain grounds for *optional* refusal.

[433] BE, report, question 26; EL, report, question 26; HU, report, question 26.
[434] BE, report, question 26; HU, report, question 26; NL, report, question 26.
[435] EL, report, question 26; IE, report, question 26; NL, report, question 26.

Second, a statute-bar according to the law of the issuing Member State does not constitute a ground for refusal (see section 3.5.8.1). Consequently, there is no need for information on that topic and executing judicial authorities should not request supplementary information on that topic (unless they have good reason to believe that the right to prosecute or to execute a sentence has expired since issuing the EAW).

3.6.2.2 Listed offences

3.6.2.2.1 Introduction

The experts of two Member States (BE, PL) report that issuing judicial authorities have some difficulty with determining whether an offence is a listed offence. In Belgium, offences committed while being part of an association of criminals do not necessarily constitute the listed offence of 'participation in a criminal association'.[436] In Poland, an issuing judicial authority voiced doubts about how to interpret the listed offence 'armed robbery'. Under Polish law, robbery with the use of a firearm or a knife is classified as 'armed' robbery. The same applies to 'robbery with the use of another similarly dangerous item'. This raises the question whether the listed offence of 'armed robbery' may be applied to 'robbery with the use of another similarly dangerous item'.[437]

Two other Member States (HU, IE) have adopted legislative measures to guide their issuing judicial authorities in that respect. In Hungary, an annex to the national law that transposes FD 2002/584/JHA contains all listed offences and their proper counterparts in the Hungarian Criminal Code.[438] Thus, most of the offences mentioned in the Criminal Code can be matched to a listed offence. In Ireland, a statutory measure was prepared but is not yet enacted that specifies certain offences under Irish law as automatically coming under the heading of particular listed offences.[439]

In transposing Art. 2(2) of FD 2002/584/JHA, some Member States deviated from that provision (see recommendation **3.13**).

[436] BE, report, question 27a a).
[437] PL, report, question 27a a).
[438] HU, report, question 27a a).
[439] IE, report, question 27a a).

In Belgium, *e.g.*, national law explicitly states that the offences of abortion and euthanasia, as described in Belgian law, cannot be considered to be covered by the listed offence 'murder' (Art. 5(4) of the Law on the European arrest warrant (*Wet betreffende het Europees aanhoudingsbevel*)). Although issues concerning the criminality of abortion and euthanasia may be sensitive for some Member States, nevertheless insofar as this provision pertains to the *execution* of an EAW issued by a judicial authority from another Member State this would not seem to be in accordance with Art. 2(2) of FD 2002/584/JHA, as the national law of the *issuing* Member State determines whether a certain offence is a listed offence.

Other Member States deviated from Art. 2(2) of FD 2002/584/JHA with regard to the number and/or the designations of listed offences (see recommendation **3.13**).

In the Netherlands, Annex 1 to the Law on Surrender (*Overleveringswet*) contains a list of 31 categories of offences. The separate categories 'forgery of administrative documents and trafficking therein' and 'forgery of means of payment' were merged into one category. In Poland as well, the legislator deviated from the number of categories of listed offences. Art. 607w of the Code of Criminal Procedure lists 33 categories of offences.

In Greece and Poland, the legislator provided for some listed offences that do not correspond to their designation in FD 2002/584/JHA.

Greek law presents some very minor differences compared with the Greek language version of Art. 2(2) of FD 2002/584/JHA. The Greek language version, in its turn, deviates from the English language version. Two examples. The listed offence 'swindling', is called 'fraud' in both the Greek version of FD 2002/584/JHA and in national law. On the other hand, the listed offence 'fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests', is called 'defrauding creditors and crimes against the Euro' in the Greek version of FD 2002/584/JHA, whereas it is called 'crimes against the financial interests of the EU' in national law. The expert from Greece points out that these divergences

might lead to confusion between what is called 'swindling' and what is called 'fraud, including [etc.]' in the English language version.[440]

Polish law also affords examples of deviation from the designation in Art. 2(2) of FD 2002/584/JHA. Two examples. The listed offence 'fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests' (*nadużycia finansowe, w tym mające negatywny wpływ na interesy finansowe Wspólnot Europejskich w rozumieniu Konwencji z dnia 26 lipca 1995 r. w sprawie ochrony interesów finansowych Wspólnot Europejskich*) simply is transposed as 'fraud' (*oszustwo*). The listed offence 'sexual exploitation of children and child pornography' (*seksualne wykorzystywanie dzieci i pornografia dziecięca*) is transposed as 'offences against sexual freedom and morality of minors' (*przeciwko wolności seksualnej lub obyczajności na szkodę małoletniego*). The issue of deviations from Art. 2(2) of FD 2002/584/JHA was already addressed in the 2007 evaluation report. It was recommended to amend the legislation in this regard.[441] The country report for Ireland shows that such diverging designations can result in difficulties in the execution of Polish EAWs.[442]

Moreover, the Polish version of the EAW-form as established by the Ordinance of the Ministry of Justice of 24 February 2012[443] arranges the listed offences in section E.1 of that form in a different order than the (Polish language version of the) Annex to FD 2002/584/JHA and Art. 2(2) of FD 2002/584/JHA. The country reports for Ireland and for the Netherlands demonstrate that divergence can result in difficulties on the executing side (see recommendation **3.13**).[444]

3.6.2.2.2 Custodial sentence of three years

In one Member State (NL), the executing judicial authority is frequently confronted with the situation that an offence designated as a listed offence does not meet the penalty threshold of

[440] EL, report, question 27a a).
[441] *Evaluation report on the fourth round of mutual evaluations "The practical application of the European arrest warrant and corresponding surrender procedures between member states": Report on Poland*, Council Document 14240/2/07, 7 February 2008, p. 57 and p. 63.
[442] IE, report, question 27a b).
[443] *Journal of Laws* 2012, item 266: D20120266.pdf (sejm.gov.pl).
[444] IE, report, question 27a b); NL, report, question 26.

Art. 2(2) of FD 200/584/JHA according to information provided in section (c)1 of the EAW. In those situations, usually the EAW is issued for a group of offences that, in the opinion of the issuing judicial authority, are linked together and as a group are covered by one or more listed offences. Whatever the link between the offences, the Dutch executing judicial authority will treat an offence that does not carry a maximum custodial sentence of at least three years as a non-listed offence.[445]

3.6.2.2.3 Description

The structure of section (e) is confusing. The executing judicial authorities of two Member States (IE, NL) report difficulties in this respect: sometimes non-listed offences are not described in section (e)II nor in any other section of the EAW. Sometimes offences are described both as listed and non-listed offences (see recommendation **3.12**).[446]

3.6.2.2.4 Review

The executing judicial authorities of almost all Member States involved in the project carry out some sort of check, the degree of automaticity of which varies from Member State to Member State.

As to the automaticity of checking the designation of a listed offence the practices of the judicial authorities from the Member States involved in the project present a broad spectrum with on opposite ends checking the designation of listed offences automatically (BE, EL)[447] and relying on the designation except in cases of manifest error (IE)[448] or of manifest discrepancy between the description of the offence and the designated listed offence (NL) (see recommendation **3.14**).[449]

On the intensity of the check, the common thread seems to be that it is a *marginal* check. In Belgium, *e.g.*, although the check is systematically carried out, it is limited to assessing whether the acts correspond *prima facie* to the designated listed offence.[450] The checks carried

[445] NL, report, questions 26 and 27a a).
[446] IE, report, question 26; NL, report, question 26.
[447] BE, report, question 27a b); EL, report, question 27a b).
[448] IE, report, question 27a b).
[449] NL, report, question 27a b).
[450] BE, report, question 27a b).

out in Ireland and the Netherlands have a similar marginal character: *manifest* error[451] and *manifest* discrepancy.[452] Greek courts check whether, *in abstracto*, there is a *logical* match between the acts and the designated listed offence consistent with criminal law in general, *i.e.* whether the designation of the listed offence makes sense in a general way or whether there is an error. However, the expert from Greece points out that the Greek Supreme Court rejects all objections to designation as a listed offence. Its reasons for doing so are twofold: the law of the issuing Member State is determinative for the designation as a listed offence and listed offences are offences according to Greek law anyway.[453] Romanian courts check for discrepancies between the description of the act and the designated listed offence.[454] Without further research, it is not possible to determine whether the various tests differ in their intensity.

3.6.2.3 *Ne bis in idem*

3.6.2.3.1. Transposition

In two of the seven Member States involved in the project (IE, PL) the ground for refusal of Art. 4(5) of FD 2002/584/JHA is a ground for mandatory refusal (see recommendation **2.1**).[455]

3.6.2.3.2 The 'same acts"

The experts from four Member States (BE, IE, NL, PL) report that the executing judicial authorities apply the case-law of the Court of Justice when assessing whether the requested person was 'finally judged' in respect of the 'same acts'.[456] In two other Member States (HU, RO), the executing judicial authorities focus on the factual description of the offence in section (e), which is in line with that case-law.[457] In the remaining Member State (EL), both doctrine and practice presents divergent opinions on the definition of the concept 'same acts'. As a consequence, courts in Greece avoid dealing with *ne bis in idem* issues as much as possible. Moreover, the Greek Supreme Court's approach of the concept of 'same acts' is quite different than the Court of Justice's approach. In addition to the requirement that the facts are identical, the Supreme Court requires that the material and immaterial consequences

[451] IE, report, question 27a b).
[452] NL, report, question 27a b).
[453] EL, report, question 27a b).
[454] RO, report, question 27a b).
[455] IE, report, question 4; PL, report, question 3.
[456] BE, report, question 27 a); IE, report, question 27 a); NL, report, question 27 a); PL, report, question 27 a).
[457] HU, report, question 27 a); RO, report, question 27 a).

of the facts are identical. That additional requirement creates a link between the facts and the protected legal interests that are at issue, introduces a legal element into the definition of the 'same acts' and, thereby, narrows the definition of the concept of 'same acts' when compared to the Court of Justice's definition (see recommendation **3.15**).[458]

3.6.2.3.3 *Ex officio* application?

In two Member States (HU, RO), in order to prepare for the decision on the execution of an EAW the authorities seems to check *ex officio* for *national* final judgments in respect of the same acts.[459] In Poland, the executing judicial authorities may consult the National Criminal Register.[460] The expert from Belgium stresses the role of the requested person in supplying information about a potential *ne bis in idem* situation.[461] The expert from Romania does the same but with regard to final judgments from *other* Member States than the executing Member State or from *third* States.[462] (As stated above, in Romania the authorities seem to check *ex officio* for *national* final judgments in respect of the same acts.)

3.6.2.4 Double criminality

3.6.2.4.1 Transposition

In transposing Art. 4(1) of FD 2002/584/JHA, one of the seven Member States involved in the project originally set a condition with regard to the level of punishment in the executing Member State (NL). This condition was repealed in 2021.[463]

In four Member States (BE, EL, HU and IE) Art. 4(1) was transposed as a ground for mandatory refusal (see recommendation **2.1**),[464] in two other Member State as a ground for optional refusal (PL, RO).[465]

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[458] EL, report, question 27 a).
[459] HU, report, question 27 a); RO, report, question 27 a).
[460] PL, report, question 27 a).
[461] BE, report, question 27 a).
[462] RO, report, question 27 a).
[463] NL, report, question 6 a).
[464] EL, report, question 4; HU, report, question 4; IE, report, question 4; RO, report, question 4.
[465] BE, report, question 4; PL, report, question 3; RO: Art. 98(2)(a) of Law no. 302/2004 on international judicial cooperation in criminal matters, as amended and supplemented by Laws no. 224/2006, no. 222/2008 and 300/2013 no. 302/2004 on international judicial cooperation in criminal matters no. 302/2004 on international judicial cooperation in criminal matters no. 302/2004 on international judicial cooperation in criminal matters, as amended and supplemented by Laws no. 224/2006, no. 222/2008 and 300/2013.

However, one of those three Member States (PL) introduced a specific provision concerning double criminality where the requested person is a Polish national (Art. 607p(2) of the Code of Criminal Procedure). According to that provision, which reflects the requirements of Art. 55 of the Polish Constitution concerning extradition of Polish nationals, surrender of a Polish national for an *extra*territorial offence is only allowed if the condition of double criminality is fulfilled, both at the time when the act was committed and at the time when the EAW was issued.[466] It follows that refusal is *mandatory* where the condition of double criminality is not met. Because Art. 607p(2) of the Code of Criminal Procedure does not distinguish between listed offences and non-listed offences and, therefore, requires the executing judicial authorities to verify double criminality systematically where an EAW is issued against a Polish national for an extraterritorial offence, it seems that this provision runs counter to the prohibition of verification of double criminality of listed offences (Art. 2(2)). Moreover, the special position of Austria under FD 2002/584/JHA would seem to confirm that the Polish provision is not in accordance with that framework decision. FD 2002/584/JHA only allowed Austria to refuse the execution of an EAW 'if the requested person is an Austrian citizen and if the act for which the [EAW] has been issued is not punishable under Austrian law', irrespective of whether a listed offence was designated or not. Moreover, Austria was only allowed to do so until December 2008 at the latest (Art. 32 of FD 2002/584/JHA). In Polish legal doctrine as well, the common view is that Art. 607p(2) of the Code of Criminal Procedure is contrary to FD 2002/584/JHA (see recommendation **2.1**).[467]

In one Member State (NL), Art. 4(1) of FD 2002/584/JHA the provision was transposed as a ground for mandatory refusal but, as a result of a conforming interpretation by the executing judicial authority, it is now applied as a ground for optional refusal.[468]

The experts from two Member States (HU, PL) report decisions in which surrender was refused because, admittedly, the act constituted an offence according to the law of the executing Member State but only as a misdemeanour or as a so-called 'minor offence' (PL: *wykroczenie*).[469] Even where the national provisions of those Member States do not explicitly

[466] PL, report, questions 6 a) and 27 b). Surrender of a Polish national for an offence committed in the territory of Poland is prohibited *tout court*.
[467] PL, report, question 6 a).
[468] NL, report, questions 4 and 6 a).
[469] HU, report, question 27 b); PL, report, question 27 b).

require that the offence is not a misdemeanour or a 'minor offence' in the executing Member State, an interpretation by the authorities of those Member States that these provisions do contain that requirement would not be in accordance Art. 2(4) and Art. 4(1) of FD 2002/584/JHA (see section 3.6.1.6.1).

3.6.2.4.2 Assessment of double criminality

In two of the seven Member States involved in the project the executing judicial authorities apply the *Grundza* judgment by analogy, when assessing double criminality (EL, NL).[470] In the other five Member States the common thread of the approaches taken by the executing judicial authorities is that, when assessing double criminality, the focus is on the factual side of the offence described in section (e) of the EAW – the act or omission –, not on the legal side – the constituent elements or the legal classification – of that offence.[471] In substance, those approaches are in accordance with a *Grundza* based assessment.

3.6.2.4.3 Temporal point of reference

The expert from Hungary reports that, in theory, double criminality should be assessed in accordance with the principle of legality.[472] Evidently, this means an assessment *ex tunc*, *i.e.* an assessment whether the act constitutes an offence under Hungarian law at the time of the act. However, the expert has not found any specific guidelines in decisions of the executing judicial authority concerning this issue.[473] In Romania, double criminality is assessed *ex tunc*, according to the law of the executing Member State at the time the acts were committed. Retroactive application of a more punitive law is prohibited, but a *lex mitior* adopted after the commission of the acts will be applied.[474]

In one Member State (IE) double criminality is assessed with reference to the date at which the EAW was issued.[475]

[470] EL, report, question 27 b); NL, report, question 27 b).
[471] BE, report, question 27 b); HU, report, question 27 b); IE, report, question 27 b); PL, report, question 27 b); RO, report, question 27 b).
[472] HU, report, question 27 b).
[473] HU, report, question 27 b).
[474] RO, report, question 27 b).
[475] IE, report, question 27 b).

In three Member States (BE, EL, NL) double criminality is assessed *ex nunc*: the act must constitute an offence under the law of the executing Member State at the time of the decision on the EAW.[476] This means that an act could give rise to surrender which was not an offence under the law of the executing Member State at the time it was committed but is an offence at the time of the decision on surrender. In Greece, the prevailing opinion of practitioners is that double criminality should be assessed *ex nunc*, although in legal doctrine it is argued that, because of the principle of legality of offences and penalties, the act should already constitute an offence *tempore delicti* and that, moreover, a later *lex mitior* should be applied.[477]

In the remaining Member State (PL), in legal doctrine it is argued that the assessment should be *ex nunc*. Practice, however, varies. Those judges that participated in the research mention different points or reference:

- the time of the act;
- the time of the decision on the execution of the EAW;
- the time of the act, the date at which the EAW was issued and the time of the decision on the execution of the EAW; and
- the time of the act and the time of the decision on the execution of the EAW.

The majority opinion (the time of the decision on the execution of the EAW) is consistent with the view expressed in legal doctrine. Concerning the "qualified" assessment of double criminality where the requested person is a Polish national (see section 3.6.2.4.1), national law dictates the applicable points of reference: the time of the act and the time of issuing the EAW. Although the country expert for Poland remarks that the case-law analysed in the course of this project did not establish whether the choice of the temporal point of reference for assessing double criminality relates to the principle of legality of offences and penalties, the temporal points of reference for the "qualified" assessment of double criminality relate to the national constitutional principle *nullum crimen sine lege*.[478]

In four of the seven Member State (HU, NL, PL, RO) the temporal points of reference of EAW law and of extradition law are the same.[479] In two of those four Member States (HU,

[476] BE, report, question 27 b); EL, report, question 27 b); NL, report, question 27 b).
[477] EL, report, question 27 b).
[478] PL, report, question 27 b).
[479] HU, report, question 27 b); NL, report, question 27 b); PL, report, question 27 b); RO, report, question 27 b).

RO) the assessment of double criminality both in extradition matters and in EAW matters is *ex tunc*. This is an interesting finding because FD 2002/584/JHA is supposed to simplify and accelerate cooperation in comparison with the traditional extradition regime.[480] In three other Member States (BE, EL, IE), the temporal points of reference of EAW law and extradition law are not (exactly) the same. In Belgium, assessment of double criminality under extradition law is *ex tunc*, whereas under EAW law it is *ex nunc*.[481] In Greece, in extradition law the temporal points of reference are the time of commission of the offence and the time the request for extradition is sent, examined and decided on,[482] whereas in EAW law double criminality is assessed *ex nunc* (according to the prevailing opinion amongst practitioners).[483] In Ireland, in extradition law the day on which the request for extradition is made is the point of reference – as it is in EAW law – except where the offence for which surrender is sought consists of one or more acts including any act committed in Ireland. In that case, the day on which the latter act was committed is the applicable point of reference. [484]

Table: temporal point of reference for assessing double criminality

	Ex tunc	Issuing EAW	*Ex nunc*	Principle of legality	Same as extradition
Belgium			X	No	No
Greece			X[485]	No	No
Hungary	X			Yes	Yes
Ireland		X		No	No
Netherlands			X	No	Yes
Poland			X[486]	Could not be established[487]	Yes
Romania	X			Yes	Yes

[480] Recital (5) of the preamble to FD 2002/584/JHA.
[481] BE, report, question 27 b).
[482] *Compilation of Replies to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition requests*, PC-OC(2013)12Bil.Rev3, European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters, Strasbourg, 25 November 2014, p. 19.
[483] EL, report, question 27 b).
[484] IE, report, question 27 b).
[485] Prevailing opinion amongst practitioners.
[486] According to legal doctrine and the prevailing opinion amongst practitioners. With regard to Polish nationals the points of reference are: the time of the act and the time of issuing the EAW.
[487] With regard to Polish nationals: yes.

3.6.2.4.4 Refusal on account of lack of double criminality

In five of the seven Member States involved in the project (BE, HU, IE, NL, PL) there have been instances of a refusal to execute an EAW because the act did not constitute an offence according to the law of the executing Member State.[488]

The examples mentioned by the experts illustrate the two categories of situations in which double criminality can be absent (see section 3.6.1.6.4):

1. Certain conduct is not criminalised at all in the executing Member State. In Belgium, *e.g.*, 'skipping bail' and leaving the country without authorisation do not constitute an offence at all.[489] In Netherlands, *e.g.*, escaping from prison, in itself, is not an offence.[490]

2. Certain conduct is criminalised – to a certain extent – both in the issuing Member State and in the executing Member State. Both in the Netherlands and Poland, *e.g.*, 'parental abduction' is an offence. However, the definition of 'parental obduction' in Poland is *narrower* than the definition of that offence in the Netherlands.[491] In the former Member State, 'parental abduction' is possible only where the parent does not exercise full parental rights, as a result of which double criminality is absent where the Netherlands seeks surrender for 'parental abduction' and the requested person's parental rights were not limited by a Dutch court.[492]

It is not clear whether, in cases belonging to the second category, executing judicial authorities of the five Member States mentioned above requested supplementary information to ascertain whether the required element(s) that were missing in the description of the offence were in fact present (see recommendation **3.16**).

However, it is clear that the executing judicial authorities of three of those five Member States (BE, HU, IE) cannot refrain from a refusal once they have established that the requirement of double criminality is not met. Their Member States transposed Art. 4(1) of FD 2002/584/JHA

[488] BE, report, question 27 b); HU, report, question 27 b); IE, report, question 27 b); NL, report, 27 b; PL, report, question 27 b).
[489] BE, report, question 27 b).
[490] Of course, where the person concerned, in escaping, uses violence against prison guards or threatens them or intentionally damages property belonging to another (*e.g.*, the State) he can be prosecuted for those offences.
[491] NL, report, question 27 b).
[492] PL, report, question 27 b).

as a ground for mandatory refusal. In addition, in the absence of double criminality the executing judicial authorities of Poland must refuse to execute an EAW issued against a Polish national for an extraterritorial offence.[493] In two other Member States (NL, RO), refusal is optional. In Poland, refusal is optional for non-nationals.

The executing judicial authority of the Netherlands will examine, on a case by case basis, whether there are good reasons not to refuse to execute the EAW. Considerations such as those described in section 3.6.1.6.4 are relevant for a decision to refrain from a refusal (see recommendation **3.17**).[494]

3.6.2.5 Prosecution in the executing Member State for the 'same acts'

3.6.2.5.1 Transposition

Two of the Member States involved in the project (EL, IE) transposed the ground for refusal as a ground for mandatory refusal (see recommendation **2.1**).[495] In this respect, Greece distinguishes between Greek nationals and residents of Greece. For the former category, the ground for refusal is mandatory, for the latter it is optional. It is highly doubtful whether this distinction is in accordance with the prohibition of discrimination on grounds of nationality (Art. 18 of the Treaty on the Functioning of the European Union). After all, the category of 'residents' of Greece can include nationals of other Member States (see recommendation **2.4**).

3.6.2.5.2 The 'same act'

In four Member States involved in the project (BE, EL, NL, PL), the executing judicial authorities apply the case-law of the Court of Justice by analogy when assessing whether the requested person is being prosecuted for the 'same act'.[496] In Ireland, the issue has not arisen yet but the expert from Ireland opines that Irish courts would apply that case-law.[497] The approach in the two remaining Member States focusses on the conduct described in the EAW

[493] Pursuant to Article 607p(2) of the Polish Penal Code surrender of Polish national is not allowed if: (1) the act was committed in the territory of Poland; (2) if the act is extraterritorial and the condition of double criminality is not met, both at the time the act was committed and at the time, when the EAW was issued.
[494] NL, report, question 27 b).
[495] EL, report, question 4; IE, report, question 4.
[496] BE, report, question 27 c); EL, report, question 27 c); NL, report, question 27 c); PL, report, question 27 c).
[497] IE, report, question 27 c).

and comparing it to the object of prosecution in the executing Member State, which seems to be in line with the Court of Justice's case-law on the definition of the concept 'same acts'.[498]

3.6.2.6 Statute-barred criminal prosecution or punishment

3.6.2.6.1 Transposition

In one Member State involved in the project (EL), the executing judicial authorities systematically check whether the prosecution or punishment of the requested person is statute-barred according to the law of the *issuing* Member State. If the issuing judicial authority does not provide any information on this topic in the EAW – as it is not bound to do –, the executing judicial authorities will request supplementary information.[499] Obviously, this practice is not in accordance with FD 2002/584/JHA (see recommendation **3.18**).

Two of the seven Member States involved in the project (BE, EL) transposed Art. 4(4) of FD 2002/584/JHA – concerning statute-barred prosecution or punishment according to the law of the *executing* Member State – as a ground for mandatory refusal (see recommendation **2.1**).[500] One of the Member States (IE) has not transposed that provision because there is no statute of limitations applicable to the prosecution of offences in Irish law.[501]

The experts from the Netherlands and Romania point out that the ground for refusal only is applicable where the 'acts' on which the EAW is based constitute an offence under the law of the executing Member State.[502] Therefore, determining whether the ground for refusal is applicable requires verifying double criminality even where the issuing judicial authority designated he offence as a listed offence.

3.6.2.5.2 Temporal point of reference

In two of the six Member States whose legal systems recognise limitation (NL, RO) limitation is assessed *ex nunc*.[503] In Poland, practice is divergent but the prevailing opinion is that the

[498] HU, report, question 27 c); RO, report, question 27 c).
[499] EL, report, question 27 d).
[500] BE, report, question 27 d); EL, report, question 27 d). Note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this ground has been made optional.
[501] IE, report, question 27 d).
[502] NL, report, question 27 d); RO, report, question 27 d).
[503] NL, report, question 27 d); RO, report, question 27 d).

assessment should be *ex nunc*.[504] In Belgium, the assessment of limitation also is an assessment *ex nunc*. However, in that Member State the *condition of jurisdiction* is assessed *ex tunc*.[505] The position with regard to limitation suggests that in those four out of six Member States the principle of legality of offences and penalties does not apply to the assessment of limitation in the context of the decision on the EAW.

In Greece, limitation is assessed *ex tunc* on account of the principle of legality of offences and penalties. However, a later *lex mitior* will be applied.[506]

Only three experts addressed the question whether the temporal point of reference was the same in extradition law and EAW law. A comparison with extradition may reveal whether the national rules adopted to transpose FD 2002/584/JHA 'remove the complexity and potential for delay inherent in the present extradition procedures' or not.[507] In the Netherlands and Poland, both in extradition law and in surrender law the temporal point of reference is the time of the decision on the execution of the EAW (*ex nunc*).[508] Under the regime of extradition, those Member States already employed a temporal point of reference that favoured cooperation in criminal matters. In Belgium, the temporal points of reference in extradition law and in EAW law are not the same: in classical extradition law, the temporal point of reference is the time of the acts (*ex tunc*), whereas in EAW law it is the time of the decision on the execution of the EAW (*ex nunc*).[509] In this respect, the transition from extradition to surrender has changed the Belgian position to an approach that favours

[504] PL, report, question 27 d).
[505] BE, report, question 27 d).
[506] EL, report, question 27 d).
[507] Recital (5) of the preamble to FD 2002/584/JHA.
[508] NL, report, question 27 d); PL, report, question d).
[509] BE, report, question 27 d).

cooperation.

Table: temporal point of reference for assessing limitation

	Ex tunc	*Ex nunc*	Principle of legality	Same as extradition
Belgium	x[1]	x[2]	x[3]	No
Greece	x[4]		x	?
Hungary	?	?	?	?
Ireland	---	---	---	---
Netherlands		x	No	Yes
Poland		x[5]	No	Yes
Romania		x	No	?

[1] As regards jurisdiction.
[2] As regards limitation.
[3] As regards jurisdiction.
[4] *Lex mitior* will be applied.
[5] Divergent practice, but *ex nunc* is the prevailing opinion.

3.6.3 Recommendations regarding section (e)

3.6.3.1 Structure of section (e)

The structure of section (e) is unclear and misleading in that it:

- unjustifiably distinguishes between the description of listed offences and non-listed offences (see section 3.6.1.3.1);
- seems to require a description of a non-listed offence twice: once at the head of section (e) and again in section (e)II (see section 3.6.1.3.1);
- in case of two or more separate offences does not force the issuing judicial authority to number each separate offence and to describe the factual and legal side of each separate offence separately (see section 3.6.2.1.2).

Recommendation 3.12 The EU is recommended to amend section (e) of the EAW form, *e.g.*, as follows:

> **Section(e) Offences**
>
> **I. Number of offences**
>
> This warrant relates to in total: …. offences.
>
> **II. Description of the offences**
>
> Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person, and specification of the legal classification of the offence(s) and the applicable statutory provision:
>
> <u>Offence 1</u>
> (i) Circumstances in which the offence was committed
>
> (ii) time of the offence

(iii) place of the offence

(iv) degree of participation in the offence by the requested person

(v) legal classification of the offence

(vi) applicable statutory provision

Offence 2

(i) Circumstances [and so on]

III. Designation of one or more of the offences as 'listed offences'

If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State:

[] participation in a criminal organisation: offence(s) described as offence(s) [insert: 1, 2, 3, 4 or ….] in section (e)II
[] terrorism: offence(s) [insert 1, 2, 3 4 or ….] as described in section (e)II
[and so on]

3.6.3.2 Listed offences

Divergences between FD 2002/584/JHA and national law

In transposing Art. 2(2), some Member States (Greece, the Netherlands, Poland) deviated from the number of categories of listed offences and/or from the official designations mentioned in that provision or, as *executing* Member State, gave a narrow scope to those designations (Belgium). One Member State re-arranged the order of the listed offences in the EAW form in its official language (Poland). Both categories of deviations can lead to confusion (see section 3.6.2.2.1).

These conclusions lead to the following recommendation.

Recommendation 3.13 Belgium, Greece, the Netherlands and Poland are recommended to simply copy the list with offences of Art. 2(2) of FD 2002/584/JHA, as it appears in their respective language versions of FD 2002/584/JHA, into their respective national legislation.

Review of the designation as a listed offence

In some Member States (Belgium and Greece), the designation of an offence as a listed offence is automatically reviewed by the executing judicial authorities. Moreover, the review – whether automatic or not – does not always seem to be limited to a *prima facie* check or to a check for manifest error/manifest discrepancy (Greece, Hungary, Romania) (see section 3.6.2.2.4).

This conclusion result in the following recommendation.

Recommendation 3.14 Member States are recommended not to provide for and their executing judicial authorities are recommended not to carry out an automatic review of the designation of an offence as a listed offence.

3.6.3.3 *Ne bis in idem*

The courts of one Member State (Greece) apply a more narrow definition of the concept of 'same acts' than the Court of Justice's definition when applying Art. 3(2) and Art. 4(5) of FD 2002/584/JHA.

This conclusion leads to the following recommendation.

Recommendation 3.15 Greek courts are recommended to apply the Court of Justice's definition of the concept 'same acts' when applying Art. 3(2) or Art. 4(5) of FD 2002/584/JHA.

3.6.3.4 Double criminality

Assessment of double criminality

Where the definition of the offence is more narrow in the executing Member State than in the issuing Member State, the description of the offence in the EAW is, in itself, not determinative for double criminality. It may well be that the elements needed under the definition according to the law of the executing Member State and which are missing in the description of the offence, did occur but were not mentioned in the EAW because they are irrelevant according to the law of the issuing Member State (see sections 3.6.1.6.2 and 3.6.2.4.4).

This conclusion leads to the following recommendation.

Recommendation 3.16 Executing judicial authorities are recommended to request supplementary information about any factual element(s) not expressed in the description of the offence but which are required for the act to constitute an offence according to the law of the executing Member State, before deciding that the condition of double criminality is not met.

Determination whether to apply the ground for refusal

Where the executing judicial authority has determined that the condition of double criminality is not met, it is under no duty to refuse to execute the EAW. After all, surrender is the rule and refusal is the exception, which must be interpreted and applied strictly. Accordingly, the determination that the condition of double criminality is not met should move the executing judicial authority to consider seriously the possibility of refraining from a refusal (see sections 3.6.1.6.4 and 3.6.3.4.4).

This conclusion results in the following recommendation.

Recommendation 3.17 Executing judicial authorities are recommended only to decide on the application of the ground for refusal of Art. 4(1) of FD 2002/584/JHA after having considered, in each case, whether there is a compelling reason for refraining from a refusal to execute the EAW on account of a lack of double criminality.

3.6.3.5 Statute-barred criminal prosecution or punishment

Transposition

The issuing judicial authorities of one Member State (Greece) systematically check whether the right to prosecute or to punish is statute-bared according to the law of the *issuing* Member State, although a statute-bar in the issuing Member State does not constitute one of the exhaustively listed grounds for refusal of Art. 3-4a of FD 2002/584/JHA (see section 3.6.2.6.1).

This conclusion leads to the following recommendation.

Recommendation 3.18 Greek executing judicial authorities are recommended not to check systematically whether the right to prosecute or to punish is statute-bared according to the law of the issuing Member State.

3.7 Section (f) of the EAW form

3.7.1 Legal framework

3.7.1.1 Introduction

Section (f) of the EAW form, entitled 'Other circumstances relevant to the case (optional information)', is dedicated to information which might be useful to the executing judicial authority, but which the issuing judicial authority is not obliged to provide *proprio motu*. Consequently, section (f) has no corollary in Art. 8(1) of FD 2002/584/JHA. After all, Art. 8(1) of FD 'indicates the information intended to provide the minimum official information *required* to enable the executing judicial authorities to give effect to the [EAW] swiftly by adopting their decision on the surrender as a matter of urgency'.[510]

Section (f) itself gives an indication of which information might be useful to mention in that section: '(NB: This could cover remarks on extraterritoriality, interruption of periods of time limitation and other consequences of the offence)'.

3.7.1.2 Information about extraterritoriality

The reference in section (f) to remarks on extraterritoriality concerns the ground for optional refusal of Art. 4(7)(b) of FD 2002/584/JHA. Pursuant to that provision, the executing judicial authority may refuse to execute the EAW where it 'relates to offences which (…) (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory'.

When they chose to transpose this provision, Member States are not allowed to turn this ground for optional refusal into a ground for mandatory.[511]

[510] See, *e.g.*, ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, para. 28 (emphasis added).
[511] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 44.

The ground for refusal applies to prosecution- and execution-EAWs alike.[512] Its objective is 'to ensure that the judicial authority of the executing State is not obliged to grant [an EAW] for an offence prosecuted under an international criminal jurisdiction that is broader than that recognised by the law of that State'.[513]

Art. 4(7)(b) of FD 2002/584/JHA sets two cumulative conditions to a refusal of surrender: (1) the offence giving rise to the issuing of the EAW was committed outside the territory of the issuing Member State and (2) the law of the executing Member State would not allow prosecution for such an offence when committed outside the territory of that Member State.[514]

As to the first condition, a comparison with Art. 4(7)(a) of FD 2002/584/JHA – which allows for a refusal for offences 'which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State (…)' – demonstrates that Art. 4(7)(b) of FD 2002/584/JHA is only applicable to offences committed *entirely* outside the territory of the issuing Member State.[515]

According to Advocate General J. Kokott, in order to determine whether an offence was committed entirely outside the territory of the issuing Member States the focus must be on the 'actual act': the specific circumstances which are inextricably linked together are decisive.[516]

The wording of Art. 4(7)(b) of FD 2002/584/JHA does not exclude its application to cases in which the offence was committed, in whole or in part, in the territory of the *executing* Member State. On the one hand one could argue that, since grounds for refusal should be interpreted strictly[517] and since the ground for refusal of Art. 4(7)(a) already applies to

[512] Cf. ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206.
[513] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 68.
[514] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 65.
[515] In the same vein Advocate General J. Kokott, opinion of 17 September 2020, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2020, para. 78.
[516] Opinion of 17 September 2020, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2020, para. 82.
[517] See, *e.g.*, ECJ, judgment of 22 February 2022, *Openbaar Ministerie (Right to a tribunal previously established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100, para. 44.

offences committed, in whole or in part, in the territory of the executing Member State, Art. 4(7)(b) should be interpreted as not covering such offences. On the other hand, one could argue Art. 4(7)(b) does cover such offences, because the grounds for refusal of Art. 4(7)(a) and Art. 4(7)(b) pursue objectives that, albeit different, complement each other. While both grounds for refusal protect the interests of the executing Member State, the ground for refusal of Art. 4(7)(a) aims at protecting territorial sovereignty, whereas the ground for refusal of Art. 4(7)(b) aims at protecting against the exercise of overly broad extraterritorial jurisdiction.

However, even if the Court of Justice were to adopt the latter interpretation, the Member States would still be allowed to limit the scope of Art. 4(7)(b) to offences committed outside both the issuing Member State and the executing Member State. When transposing a ground for refusal mentioned in Art. 4, Member States are free to limit the situations in which their executing judicial authorities may refuse to surrender a requested person. Such a limitation 'facilitates the surrender of requested persons, in accordance with the principle of mutual recognition set out in Article 1(2) of Framework Decision 2002/584, which constitutes the essential rule introduced by that decision'.[518]

Art. 4(7)(b) of FD 2002/584/JHA does not distinguish between listed offences (Art. 2(2) of FD 2002/584/JHA) and other offences.

As to the second condition, establishing whether 'the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory' requires, first of all, assessing whether the act on which the EAW is based constitutes an offence according to the law of the executing Member State, irrespective of whether the issuing judicial authority designated a listed offence or not. After all, criminal jurisdiction, by its very nature, presupposes that the act with respect to which an Member State wishes to exercise criminal jurisdiction is an offence under the law of that Member State. It would be meaningless to say that a Member State has criminal jurisdiction over an act which is not an offence according to the law of that Member State.

[518] ECJ, judgment of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, paras. 58-62.

Where the act on which the EAW is based constitutes an offence according to the law of the executing Member State, the executing judicial authority must subsequently assess whether, in *analogous* circumstances, the executing Member State would have criminal jurisdiction. This calls for a thought experiment comparable to assessing double criminality: the executing judicial authority must examine whether its Member State would have criminal jurisdiction if the offence were committed outside the territory of the executing Member State. If so, the ground for refusal is not applicable. If not, the executing judicial authority may refuse to execute the EAW.

It is clear that a finding the executing Member State would not have *any* criminal jurisdiction in an analogous case means that the second condition for a refusal is met (see above). What if the executing Member State would have criminal jurisdiction, but not on an *similar* basis to the issuing Member State? The wording or Art. 4(7)(b) of FD 2002/584/JHA does not explicitly require, as a condition for refusal, that 'the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory' on a similar basis as the law of the issuing Member State. As an exception to the rule, that provision should be interpreted strictly.[519] Moreover, the objective of that provision is 'to ensure that the judicial authority of the executing State is not obliged to grant [an EAW] (…) for an offence prosecuted under an international criminal jurisdiction that is broader than that recognised by the law of that State'.[520] One could argue that if the executing Member State would have extraterritorial jurisdiction to prosecute the offence, albeit on the basis of a *different* principle of extraterritorial jurisdiction than the issuing Member State, the jurisdiction exercised by the issuing Member State is not broader than that recognised by the executing Member State. However, if the Court of Justice were to interpret Art. 4(7)(b) as requiring, as a condition for refusal, that the executing Member State could not prosecute on the basis of a *similar* principle of extraterritorial jurisdiction, the Member States would be free to limit the scope of that provision when transposing it into national law.[521] Limiting the scope of the second condition for refusal to situations in which the executing Member State would not have

[519] See, *e.g.*, ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 39.
[520] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para. 68.
[521] Cf. ECJ, judgment of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, paras. 58-61.

criminal jurisdiction in an analogous case *on any basis* would result in fewer refusals and, therefore, would facilitate surrender in accordance with the principle of mutual recognition.

3.7.1.3 Information about (interruption of periods of) time limitation

The reference in section (f) to remarks on interruption of periods of time limitation concerns statute-bars according to the law of the issuing Member State. Statute-barred prosecution or sentence enforcement according to the law of the issuing Member State does not, in itself, constitute a ground for refusal (see section 3.6.1.8.1). Consequently, the executing judicial authority, in principle, should not examine whether a period of time limitation was interrupted according to the law of the issuing Member State. Nevertheless, as the *Handbook* rightly states, if the offence was committed a long time ago an indication of the interruption of the period of time limitation may be useful.[522] Such an indication might prevent a request for supplementary information.

3.7.1.4 Other information

According to the *Handbook*, section (f) could also be used 'where there are special circumstances relating to the execution of the EAW and providing further information could facilitate the execution of the EAW, in spite of the possibilities of direct communication'. It lists the following examples of such special circumstances:

- a. remarks on restrictions regarding contacts with third parties after arrest, indications that there is a risk of destruction of evidence or a risk of re-offending;
- b. an indication of circumstances which, under Framework Decision 2008/909/JHA, make it likely that the requested person could be in a position to be transferred afterwards to serve the possible custodial sentence in the executing Member State under Article 5(3) of FD 2002/584/JHA (such as having residence, job, family links, etc. in the executing Member State);
- c. a request for consent under Article 27(4) of FD 2002/584/JHA. This example is somewhat puzzling. Logically, such a request can only pertain to 'an offence committed prior to [the person's] surrender other than that for which he or she was

[522] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/70.

surrendered' (see Art. 27(2) of FD 2002/584/JHA. However, the person concerned has not been surrendered yet and that is the reason for issuing an EAW.

- d. other requests for judicial cooperation, *e.g.* an EIO, to be executed simultaneously;
- e. agreements relating to concurrent EAWs reached between issuing judicial authorities, so that the executing judicial authority is immediately aware of them and is in a position to take them into consideration, especially those agreements reached at coordination meetings at Eurojust. This example relates to situations in which the issuing judicial authorities of two or more Member States have issued EAWs for the same person (Art. 16(1) of FD 2002/584/JHA);
- f. in accordance with Directive 2013/48/EU, information on the lawyer within the issuing Member State who can assist the lawyer in the executing Member State. Pursuant to Art. 10(4) of that directive, the authorities of the executing Member State must inform requested persons that they have the right to appoint a lawyer in the issuing Member State, whose role it is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under FD 2002/584/JHA;
- g. in accordance with Article 22 of FD 2009/829/JHA, information on any previous supervision measure (breach of the supervision measures).[523] This example relates to situations in which a decision on supervision measures taken by the authorities of the issuing Member State was recognised by another Member State and the person concerned was found to be in breach of those measures.

3.7.2 Section (f) in practice

3.7.2.1 Information provided by the issuing side

The country experts for Belgium and the Netherlands mention that issuing judicial authorities of those Member States usually do not provide information in section (f), other than information about time limitation and/or extraterritoriality.[524]

[523] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/70-71.
[524] BE, report, question 28; NL, report, question 28.

Issuing judicial authorities from Greece, Hungary and Romania provide information about time limitation, about suspended sentences (Greece and Romania) and about the existence and relation to an EIO or a previous (or an additional) EAW (Belgium).[525]

Issuing judicial authorities from Poland use section (f) to convey information on a wide range of topics:

- the description of the offence on which the EAW is based;
- information about Polish law;
- information about the examination of the case;
- information about issuing the wanted notice;
- information concerning suspension of execution of the sentence;
- information about time limitation;
- detailed information about the period of deprivation of liberty (for example provisional detention) deducted from the final sentence;
- a warning that the requested person may be aggressive or armed.[526]

Some of these topics are already covered or partially covered by other sections of the EAW form. The offence on which the EAW is based should be described in section (e) of the EAW form. If the EAW is based on an execution-EAW concerning an *in absentia* judgment, information about the trial should be provided in section (d) of the EAW form. Information about periods of deprivation of liberty deducted from the final sentence correlates to section (c)2, which requires providing information about the 'Remaining sentence to be served'.

In Ireland, the issuing judicial authority includes in section (f) a standard text alerting the executing judicial authority that Ireland has not fully transposed Art. 5(3) of FD 2002/584/JHA.[527]

Although Belgian issuing judicial authorities normally do not provide information in section (f) other than information about time limitation and extraterritoriality (see above), the country expert for Belgium lists a number of possible topics which could be addressed in section (f), some of which are also covered by the *Handbook* (see section 3.7.1):

[525] EL, report, questions 28-29; HU, report, question 28; RO, report, question 28.
[526] PL. report, question 28.
[527] IE, report, question 28.

- the reasons for the delay between the imposition of the sentence and the issuing of the EAW;
- the circumstance that the convicted person did not return to prison after a period of prison leave;
- the fact that the EAW will be used as basis for a temporary surrender;
- a request for a hearing by videoconference;
- information about the possible whereabouts of the requested person or other information that could be helpful in finding the requested person (*e.g.* whereabouts of his girlfriend).[528]

3.7.2.2 Information encountered by and wished for by the executing side

Information encountered by executing judicial authorities

As to the information provided to executing judicial authorities in section (f) of the EAW, the country experts confirm that this section is used to convey information about a wide range of topics, which, for the most part, overlap with the topics identified in section 3.7.2.1.

The country expert for Ireland, *e.g.*, remarks that information provided in section (f) ranges from clarification of national criminal codes and statutes relating to the EAW to providing clarity whether the EAWs are for prosecution or conviction purposes. A sample of topics:

- information about other EAWs against the requested person;
- information about previous offences/convictions;
- particulars of a claim of extraterritorial jurisdiction;
- an explanation for delay.[529]

In addition to what is mentioned in section 3.7.2.1, the country expert for Belgium states that section (f) sometimes contains a request to send proof of formal notification of the EAW or proof that the requested person was informed of the content of the EAW.[530]

[528] BE, report, question 28.
[529] IE, report, question 29.
[530] BE, report, question 29.

A number of country reports show that information about time limitation is a constant (HU, IE, NL, RO).[531]

The Dutch and Irish experts, in essence, remark that unsolicited information can be both a blessing and a curse. Additional information about the proceedings in the issuing MS provided in section (f) might indicate that, even though none of the exceptions of Art. 4(1)(a-d) of FD 2002/584/JHA applies, surrender would not constitute a breach of the requested person's rights of defence, as the Dutch country expert points out.[532] On the other hand, as the Irish country expert points, information provided in section (f) occasionally has the opposite effect of providing clarification.[533] Moreover, such information can elicit unfruitful discussions about irrelevant subjects.[534] Information about previous offences or convictions, *e.g.*, can elicit arguments about non-compliance with the rule of speciality.[535]

Information wished for by executing judicial authorities

Against this background, the expert for Ireland observes that section (f) should only provide relevant rather than superfluous information, *i.e.* information which is potentially relevant to the issue of surrender not provided under other headings. Moreover, any information in section (f) should not be contradictory or misleading and should be clear, concise, and accurate in order to prevent any need for clarification.[536]

As to specific information executing judicial authorities would like to see provided in section (f) of the EAW, the country experts for Greece and Poland both mention information about time limitation.[537]

The expert for Ireland remarks that it is unfortunate that there is no obligation on an issuing judicial authority to set out in definitive terms that an offence is indeed one in which extraterritorial jurisdiction is being claimed.[538]

[531] HU, report, question 29; IE, report, question 29; NL, question 29; RO, question 29.
[532] NL, report, question 29.
[533] IE, report, question 29.
[534] NL, report, question 29.
[535] IE, report, question 29.
[536] IE, report, question 29.
[537] EL, report, question 29; PL, report, question 29.
[538] IE, report, question 29.

3.7.2.3 Difficulties with Art. 4(7)(b) of FD 2002/584/JHA

The country expert for Belgium mentions frequent difficulties on the *issuing* side with some Member States. Italian executing judicial authorities, *e.g.*, refuse surrender for the purposes of prosecution on the basis of Art. 4(7)(b) of FD 2002/584/JHA and also surrender for the purposes of execution of a sentence while at the same time refusing to take over the execution of the sentence on the same ground of (extra)territorial competence, thus creating a situation of impunity as long as the person concerned remains in Italy.[539]

The country expertsfor the other Member States do not indicate any problems on the issuing side.

On the *executing* side it is noteworthy that Hungary has not explicitly transposed Art. 4(7)(b) of FD 2002/584/JHA as a ground for refusal.[540] The other Member States involved in the project have transposed the ground for refusal of Art. 4(7)(b).

Most of the country expertsfor those Member States do not mention any difficulties on the executing side.[541]

The country expertfor Belgium remarks that, to the Belgian expert's knowledge, no surrender for the purposes of prosecution has been refused by Belgian executing judicial authorities based solely on Art. 4(7)(b). This ground for refusal will not be applied in execution-EAWs unless it coincides with the application of Art. 4(6) of FD 2002/584/JHA (in which the execution of the sentence is taken over).[542]

The country expert for Greece states that the ground for refusal of Art. 4(7)(b) of FD 2002/584/JHA is not a ground with much practical application, but it is criticised in literature as incomprehensible in many ways. The test applied by Greek executing judicial authorities is *ex nunc*, *i.e.* according to Greek law at the time of the decision on the execution of the EAW.

[539] BE, report, question 29a.
[540] HU, report, question 29a.
[541] PL, report, question 29a; RO, report, question 29a.
[542] BE, report, question 29a.

The condition that Greek law 'does not allow prosecution for the same offences when committed outside its territory' is met where the criminal jurisdiction of the issuing Member State has a different scope than the criminal jurisdiction of the executing Member State, *e.g.* where the prosecution in the issuing Member State is based on the principle of universal jurisdiction whereas the executing Member State does not provide for universal jurisdiction for the offence or sets an additional condition that does not apply in the case. Assessing whether that condition is met, requires answering the question 'what would have happened if the situation had occurred in relation to Greece?'. Academic literature identifies two problems: (1) which Member State's legislation defines whether the offence was committed outside the territory of the issuing Member State and (2) what does 'does not allow prosecution' mean? As to the second problem: some read this phrase in terms of territoriality, others propose a broader reading which includes a double criminality check.[543]

The country expert for the Netherlands remarks that the information contained in the EAW (in combination with the information in 'Form A') is usually sufficient to determine whether the ground for refusal is applicable, *i.e* whether the offence was committed outside the territory of the issuing Member State and, if so, whether the Netherlands could exercise extraterritorial jurisdiction in an analogous case. In most cases in which the requested person invoked the Dutch transposition of Art. 4(7)(b) of FD 2002/584/JHA the provision was held not to be applicable because the offence was committed, at least partially, in the territory of the issuing Member State. And even if the offence was committed entirely outside the territory of the issuing Member State, cases in which the Netherlands would not have jurisdiction are rare. There are only a few cases in which surrender was refused on the basis of this ground for refusal. These cases concerned crimes committed on a foreign ship on the high seas and they predate 1 April 2021, the date at which the ground for refusal was turned into a ground for optional refusal. In order to assess whether the Netherlands could exercise extraterritorial jurisdiction in an analogous case, the executing judicial authority carries out a hypothetical test. In this test, the Netherlands takes the place of the issuing Member State: those aspects of the offence which, from the viewpoint of the *issuing* Member State, have an exclusively 'national' character – such as the fact that the requested person is a national of that Member State –, are 'converted' into their *Dutch* equivalents. This means that, *e.g.*, if Slovakia seeks

[543] EL, report, question 29a.

surrender of a *Slovakian* national who has committed offences *in the Czech Republic*, the executing judicial authority will examine whether the Netherlands would have jurisdiction to prosecute a *Dutch* national for those offences when committed *outside the Netherlands*. If the answer is in the affirmative, the applicable principle of jurisdiction does not have to be similar to the principle on which the exercise of extraterritorial jurisdiction by the issuing Member State is based.[544]

The country expert for Ireland observes that it is unfortunate that completion of section (f) is only optional and, therefore, that there is no obligation on the issuing judicial authority to state that its Member State is exercising or has exercised extraterritorial jurisdiction in respect of an offence on which the EAW is based. It details the problems encountered by Irish courts in construing the ground for refusal over time up to and including the preliminary reference by the High Court in the *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)* case. The Irish transposition of Art. 4(7)(b) of FD 2002/584/JHA, as interpreted by the Irish courts, prohibits the surrender of a person where the act on which the EAW is based does not constitute an offence in Ireland because it was committed in a place other than Ireland. This interpretation requires engaging in a hypothetical test whereby Ireland takes the position of the issuing Member State in relation the offence on which the EAW is based. The basis for exercising hypothetical extraterritorial jurisdiction needs to be similar to the basis upon which the issuing Member State exercises extraterritorial jurisdiction. The hypothetical test is carried out with reference to the law in force in Ireland at the time of the hearing by the executing judicial authority.[545]

3.7.3 Recommendations regarding section (f)

The findings do not give rise to any recommendation.

[544] NL, report, question 29a.
[545] IE, report, question 29a.

3.8 Section (g) of the EAW form

3.8.1 Legal framework

Section (g) affords the issuing judicial authority the opportunity to request seizing and handing over of property and to describe that property and its location (if known). This section does not correspond to any of the requirements of Art. 8(1) of FD 2002/584/JHA but is the obvious corollary of Art. 29 of FD 2002/584/JHA. Pursuant to that provision, '[a]t the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which: (a) may be required as evidence, or (b) has been acquired by the requested person as a result of the offence'. Obviously, this provision is intended to facilitate judicial cooperation in that it obviates the need for issuing a separate EIO.

Compared to the English, French and German language versions, the Dutch language version contains a deviation with respect to the second category of property amenable to seizure (Art. 29(1)(b) of FD 2002/584/JHA). In the Dutch language version that category pertains to property accruing from the offence *which is in the possession of the requested person* ('voorwerpen (…) die (…) van het strafbaar feit afkomstig zijn en zich in het bezit van de gezochte persoon bevinden') (see recommendation **3.19**).

3.8.2 Section (g) in practice

3.8.2.1 Difficulties on the issuing side

Six country experts mention no difficulties with section (g) on the issuing side.[546] The Greek expert states that issuing judicial authorities hardly ever use section (g), except for seizing passports,[547] the Irish country expert states that section (g) is predominantly marked as 'not applicable'[548] and the Polish expert that the judges who were interviewed had not used that instrument.[549]

[546] The Belgian country expert states that no information was available.
[547] EL, report, question 31.
[548] IE, report, question 31.
[549] PL, report, question 31.

3.8.2.2 Difficulties on the executing side

Most country experts do not mention any difficulties with section (g) on the executing side. It seems that section (g) is not widely used. The Polish country expert states that the judges who were interviewed had not encountered requests for seizure pursuant to section (g).[550] The Greek country expert states that section (g) is mainly used for passports and other identification documents. As the EIO was transposed by Greece, the Greek expert supposes that foreign judicial authorities might well prefer issuing an EIO over using section (g) of the EAW form.[551] According to the Irish report, requests for seizure are rare, because issuing judicial authorities tend to avail themselves of instruments concerning mutual legal assistance.[552] This preference for other instruments over section (g) of the EAW form is evidenced by the country expert for Romania: EAWs are often accompanied by an EIO; moreover, under the regime of the EIO the handing over of seized property takes place immediately, whereas under the regime of the EAW seized property is handed over only once the EAW proceedings are concluded.[553]

In the Netherlands, national law does not allow the executing judicial to carry out a search in places of residence or in places of business in order to comply with a request for seizure, because national law restricts both categories of property which are amenable to seizure. Only property found in the requested person's possession, *i.e.* property which, at the time of arrest, was found on his person or which, at the time of arrest, he carried with him, may be seized and handed over (see recommendation **3.20**).

None of the other Member States involved in the project have introduced a restriction to property found in the possession of the requested person.

3.8.3 Recommendations regarding section (g)

[550] PL, report, question 32.
[551] EL, report, question 32.
[552] IE, report, question 32.
[553] RO, report, question 32.

Art. 29(1)(b) of the Dutch language version of FD 2002/584/JHA deviates from other language versions of FD 2002/584/JHA in that, in describing the two categories of property which may seized and handed over, it limits the scope of the second category - 'property (…) which (…) (b) has been acquired by the requested person as a result of the offence' – to property which came from the offence and is in the possession of the requested person ('voorwerpen (…) die (…) van het strafbaar feit afkomstig zijn en zich in het bezit van de gezochte persoon bevinden').

Moreover, the Netherlands has not transposed Art. 29(1) of FD 2002/584/JHA correctly: seizing and handing of whatever kind of property is subject to the condition that it is found in the possession of the requested person ('Voorwerpen, aangetroffen in het bezit van de opgeëiste persoon, kunnen (…) in beslag worden genomen'). This restriction prevents carrying out searches in a place of residence or in a place of business and only allows seizure of property which the arrested requested person carries with him at the time of his arrest.

These conclusions lead to the following recommendations.

Recommendation 3.19 The EU is recommended to bring the Dutch language version of Art. 29(1)(b) of FD 2002/584/JHA, which requires, *inter alia*, that the property is 'in the possession of the requested person', in line with other language versions.

Recommendation 3.20 The Netherlands is recommended to amend Art. 49(1) of the Law on Surrender by deleting the restriction to property found in the possession of the requested person and to make the national provisions on carrying out a search and seizure at the request of a foreign authority applicable.

3.9 Section (h) of the EAW form

3.9.1 Legal framework

Section (h) of the EAW form concerns offences which are punishable by custodial life sentence or life-time detention order in the issuing Member State. It corresponds to Art. 5(2) of FD 2002/584/JHA. Pursuant to that provision, if the offence on which the EAW is based carries a custodial life sentence or life-time detention order 'the execution of the said [EAW] may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure'.

Section (h) of the EAW form reflects that binary condition. The first indent refers to a system for review of the penalty of measures imposed, the second indent to measures of clemency.

Pursuant to some language versions of FD 2002/584/JHA, the 'review' must be carried out on request or 'at least after 20 years',[554] whereas other language versions use an equivalent of 'at the latest'.[555] Given the nature of Art. 5(2), which is obviously inspired by concerns about the duration of life sentences, only the latter language versions seem correct.

It is reported that Art. 5(2) of FD 2002/584/JHA was included in the framework decision on the insistence of Portugal, because the Portuguese constitution prohibits the imposition and execution of a life sentence.[556]

[554] ES: 'al meno; NL: 'ten minste'.
[555] DA: 'senest'; DE: 'spätestens'; EN: 'at the latest'; FR: 'au plus tard'; IT: 'al più tardi'; PL: 'najpóźniej po upływie 20 lat'; PT: 'o mais tardar'; SV: 'senast'.
[556] Compare the Portuguese declaration under the EU Convention on extradition: '(…) Portugal states that where extradition is sought for an offence punishable by a life sentence or detention order, it will grant extradition, in compliance with the relevant provisions of the Constitution of the Portuguese Republic, as interpreted by its Constitutional Court, only if it regards as sufficient the assurances given by the requesting Member State that it will encourage, in accordance with its law and practice regarding the carrying out of sentences, the application of any measures of clemency to which the person whose extradition is requested might be entitled' (*OJ* 1996, C 313/23).

One could argue that there also is a link between Art. 5(2) of FD 2002/584/JHA and the ECtHR's case-law on life sentences. The imposition of a life sentence which is not reducible *de facto* and *de jure* is contrary to Art. 3 of the ECHR.[557] Extradition runs afoul of that provision in the event of a real risk of the imposition of an irreducible life sentence in the requesting State.[558] Art. 3 of the ECHR corresponds to Art. 4 of the Charter.[559] Therefore, pursuant to Art. 52(3) of the Charter surrender would be prohibited by Art. 4 of the Charter where the requested person runs a real risk of imposition of an irreducible life sentence in the issuing Member State.

However, there are some notable discrepancies between Art. 5(3) of FD 2002/584/JHA and the requirements of the ECtHR's case-law on life sentences.

First of all, under Art. 5(3) of FD 2002/584/JHA the mere fact that the offence on which the EAW is based carries a life sentence is enough to make surrender conditional on a system of review or on the application of measures of clemency. The mere fact that the offence carries a life sentence does not, in and of itself, entail a real risk of the imposition of that sentence. After all, it may well be that a life sentence is not the only sentence allowed for the offence or that a life sentence is only the *maximum* sentence allowed for the offence.[560] Equally, the mere fact that the offence carries a life sentence does not entail, in and of itself, a real risk of the imposition of an *irreducible* life sentence. In other words, the scope of Art. 5(2) of FD 2002/584/JHA is broader than the scope of the case-law of the ECtHR: it encompasses situations in which there is no real risk of the imposition of a irreducible life sentence.

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[557] See, *e.g.*, ECtHR, judgment of 26 April 2016 [GC], *Murray v. the Netherlands*, ECLI:CE:ECHR:2016:0426JUD001051110, § 99.
[558] see, *e.g.*, ECtHR, judgment of 4 September 2014, *Trabelsi v. Belgium*, ECLI:CE:ECHR:2014:0904JUD000014010, § 131.
[559] ECJ, judgment of 15 October 2019, *Dorobantu*, C-128/18, ECLI:EU:C:2019:857, para. 58.
[560] See, *e.g.*, ECtHR, judgment of 24 July 2014, *Čalovskis v. Latvia*, ECLI:CE:ECHR:2014:0724JUD002220513, § 146 ('However, the applicant has not demonstrated that he complained before the domestic authorities – nor has he complained before this Court – that the maximum penalties could be imposed by a court in the United States without due consideration of all relevant mitigating and aggravating factors (…)'); ECtHR, decision of 7 June 2016, *Findikoglu v. Germany*, ECLI:CE:ECHR:2016:0607DEC002067215, § 37 ("However, in the present case, the applicant has not demonstrated that the maximum penalty would be imposed by a court in the United States without due consideration of all the relevant mitigating and aggravating factors (…)'); ECtHR, decision of 12 December 2017, *López Elorza v. Spain*, ECLI:CE:ECHR:2017:1212JUD003061415, § 117 ('In sum, the applicant has not demonstrated that the maximum penalty would be imposed by a US court without due consideration of all the relevant mitigating and aggravating factors (…)').

Second, the binary conditions of Art. 5(2) of FD 2002/584/JHA do not fully reflect the requirements of the case-law of the ECtHR. The imposition of a life sentence already is incompatible with Art. 3 of the ECHR where at the moment of imposition of that life sentence national law 'does not provide any mechanism or possibility for review of a whole life sentence'.[561] The right to a review of a person sentenced to a life sentence 'entails an actual assessment of the relevant information whether his or her continued imprisonment is justified on legitimate penological grounds (…), and the review must also be surrounded by sufficient procedural guarantees (…). To the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions, it may be required that reasons be provided (…)'.[562] A person sentenced to a life sentence must have access to that review mechanism no later than 25 years after the imposition of the life sentence.[563] The wording of Art. 5(2) of FD 2002/584/JHA and of section (h) does not require the availability of a mechanism of review at the time of the imposition of a life sentence and does not attach any conditions to the scope and quality of the review. This is not surprising, because the adoption of FD 2002/584/JHA predates key judgments in the ECtHR's case-law on life sentences.[564]

In light of the Court of Justice's case-law on a real risk of violation of Art. 4 of the Charter, one could argue that Art. 5(2) of FD 2002/584/JHA is redundant. In the absence of that provision, where there is evidence that, in general, persons who are convicted to a life sentence in the issuing Member run a real risk of a violation of Art. 4 of the Charter on account of the imposition of an irreducible life sentence, the executing judicial authority would have to examine whether the requested person, if surrendered, would run that real risk (see recommendation **3.21**).

3.9.2 Section (h) in practice

[561] ECtHR, judgment of 9 July 2013 [GC], *Vinter and Others v. the United Kingdom*, ECLI:CE:ECHR:2013:0709JUD006606909, § 122.
[562] See, *e.g.*, ECtHR, judgment of 23 May 2017, *Matiošaitis v. Lithuania*, ECLI:CE:ECHR:2017:0523JUD002266213, § 174.
[563] See, *e.g.*, ECtHR, judgment of 26 April 2016 [GC], *Murray v. the Netherlands*, ECLI:CE:ECHR:2016:0426JUD001051110, § 99.
[564] The judgment in the *Vinter* case, *e.g.*, was rendered in 2013: ECtHR, judgment of 9 July 2013 [GC], *Vinter and Others v. the United Kingdom*, ECLI:CE:ECHR:2013:0709JUD006606909.

3.9.2.1 Difficulties on the issuing side

Except for the Belgian country expert, the country experts do not mention any difficulties on the issuing side. Some of the country experts give details on the possibilities of reducing a life sentence which may explain why the issuing judicial authorities of those Member States did not report any difficulties in this regard. In Greece, a life sentence never means life: 20 years is the maximum of actual prison time.[565] In Ireland, there is a possibility of review of a life sentence after twelve years and an application for review may lead to an order to release a prisoner. This is mentioned in EAWs concerning an offence that carries a life sentence.[566] In the Netherlands, Since 1 March 2017 there is a mechanism for review which, according to the Supreme Court, ensures that a Dutch life sentence is reducible *de jure* and *de facto*.[567] To date, under that mechanism two 'lifers' were given an early release.[568]

The Belgian country expert mentions that no information is available on difficulties with section (h). Belgian issuing judicial authorities are advised to circle the second indent of section (h) (concerning measures of clemency), but, according to the report, this is not completely accurate, as the sentence implementation courts are competent for measures of provisional and definite release.[569]

3.9.2.2 Difficulties on the executing side

The country experts concerning four Member States report no difficulties with section (h) on the executing side.[570]

The Dutch country expert states that the Netherlands did not transpose Art. 5(2) of FD 2002/584/JHA with regard to *executing* EAWs from other Member States. However, the executing judicial authority will carry out, by analogy, the two-step examination introduced in the *Aranyosi and Căldăraru* case to a real risk of the imposition of an irreducible life sentence in the issuing Member State. In this respect, a recent finding by the ECtHR of a violation of Art. 3 of the ECHR on account of the imposition of an irreducible life sentence is sufficient to

[565] EL, report, question 33.
[566] IE, report, question 33.
[567] NL, report, question 35.
[568] P.A.M. Mevis, 'Levenslang; een tussenstand', *DD* 2022, p. 117.
[569] BE, report, question 33.
[570] According to the Belgian country expert, no information is available on this topic.

establish a real risk *in abstracto* of a violation of Art. 4 of the Charter (the first step of that two-step examination). *E.g.*, following the *T.P. and A.T. v. Hungary* judgment,[571] the Dutch executing judicial authority requested supplementary information about the possibilities of reducing a life sentence under Hungarian law. Surrender was allowed, because the answer of the Hungarian issuing judicial authority excluded the imposition of a life sentence. If a prosecution-EAW is issued for an offence carrying a life sentence and if the issuing Member State has given a guarantee of return to the Netherlands (cf. Art. 5(3) of FD 2002/584/JHA), the possible imposition of a life sentence is not considered to be an issue. After all, at the time of the imposition of such a sentence the person concerned is aware that he will be returned to the Netherlands for the enforcement of that sentence in accordance with Dutch law (under Dutch law a life sentence is *de jure* and *de facto* reducible; see section 3.9.2.1).

The Irish country expert refers to cases concerning life sentences imposed in the United Kingdom. In one case, referring to *James, Wells and Lee v. The United Kingdom*[572] surrender to the United Kingdom for the execution of an 'indeterminate sentence for the protection of the public' was held to be in breach of Ireland's obligation under the ECHR. Consequently, the execution of the EAW was refused.[573]

3.9.3 Recommendations regarding section (h)

Art. 5(2) of FD 2002/584/JHA, in its present wording, does not conform to the case-law of the ECtHR on irreducible life sentences under Art. 3 of the ECHR. Moreover, it can be argued that the provision is redundant in light of the Court of Justice's case-law on a real risk of a violation of Art. 4 of the Charter. Moreover, in some language versions that provision deviates from other language versions in that it refers to the possibility of revision of a life sentence 'on request or *at least* after 20 years' instead of 'on request or *at the latest* after 20 year'.

[571] ECtHR, judgment of 4 October 2016, *T.P. and A.T. v. Hungary*, ECLI:CE:ECHR:2016:1004JUD003787114. See also ECtHR, judgment of 17 June 2021, *Sándor Varga and Others v. Hungary*, ECLI:CE:ECHR:2021:0617JUD003973415; ECtHR, judgment of 28 October 2021, *Bancsók and Lázló Magyar (No. 2) v. Hungary*, ECLI:CE:ECHR:2021:1028JUD005237415.
[572] ECtHR, judgment of 18 September 2012, *James, Wells and Lee v. The United Kingdom*, ECLI:CE:ECHR:2012:0918JUD002511909,
[573] IE, report, question 34.

These conclusions lead to the following recommendation.

Recommendation 3.21 The EU is recommended:

- either to repeal Art. 5(2) of FD 2002/584/JHA, because this provision is redundant in light of the Court of Justice's case-law on a real risk of a violation of Art. 4 of the Charter as an obstacle to execution of the EAW;
- or, at least, to amend Art. 5(2) of FD 2002/584/JHA in such a way that it is in line with the case-law of the ECtHR on the incompatibility of irreducible life sentences with Art. 3 of the ECHR, *viz.* that:
    - it is only applicable where there is a real risk of the imposition of a life sentence or where such a sentence has already been imposed;
    - it provides for a guarantee concerning a mechanism or possibility for review of that sentence:
        - which already is available at the time of the imposition of the life sentence;
        - which entails an actual assessment of the relevant information whether the requested person's continued imprisonment is justified on legitimate penological grounds and is surrounded by sufficient procedural guarantees; and
        - to which the person sentenced to a life sentence must have access no later than 25 years after the imposition of the life sentence.

This general recommendation makes a specific recommendation with regard to diverging language versions redundant.

3.10 Section (i) of the EAW form

3.10.1 Legal framework

3.10.1.1 Introduction

Section (i) of the EAW form, entitled 'The judicial authority which issued the warrant', concerns information about the authority that issued the EAW and contact information. This section is the corollary of Art. 8(1)(b) of FD 2002/584/JHA, which requires mentioning 'the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority'.

Section (i) is divided into three parts.

The first part concerns information:

- about the issuing judicial authority: 'Official name';
- about the representative of the issuing judicial authority: 'Name of its representative', 'Post held (title/grade)'
- that intends to facilitate contact between the issuing and executing authorities: 'File reference', 'Address', 'Tel: (country code) (area/city code) (…)', 'Fax: (country code) (area/city code) (…)', 'E-mail', 'Contact details of the person to contact to make necessary practical arrangements for the surrender'.

The second part is applicable only where the issuing Member State designated a 'central authority'. Pursuant to Art. 7 of FD 2002/584/JHA, Member States may have recourse to a non-judicial authority concerning the transmission and reception of EAWs as well as for all other official correspondence relating thereto 'if necessary as a result of the organisation of their internal judicial systems'.[574] A ministry of a Member State may be covered by the term 'central authority'.[575] The function of a 'central authority is 'limited to practical and administrative assistance for the competent judicial authorities'. Accordingly, Member States

[574] ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, para. 38.
[575] ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, para. 39.

cannot substitute a 'central authority' for the competent judicial authority for the decisions to issue and to execute EAWs.[576]

The second part of section (i) concerns information:

- about the 'central authority': 'Name of the central authority';
- the contact person for that authority: 'Contact person, if applicable (title/grade and name)';
- intended to facilitate contact between the executing judicial authority and the 'central authority': 'Address', 'Tel: (country code) (area/city code) (…)', 'Fax: (country code) (area/city code) (…)', 'E-mail'.

The third part of section (i) concerns the signature of the issuing judicial authority and the date at which the EAW was issued. By signing and dating the EAW, the issuing judicial authority certifies that the EAW is authentic and that it has been issued by a competent judicial authority either for the purposes of conducting a criminal prosecution or for the purposes of executing a custodial sentence (see the statement preceding section (a) of the EAW form). Moreover, by signing and dating the EAW, the issuing judicial authority in effect vouches for the correctness of the factual and legal information contained in the EAW.

In section 3.1.3 it was concluded that the information required by Art. 8(1)(b) of FD 2002/584/JHA and by section (i) of the EAW form is not enough to establish that the requirements of the dual level of protection are met (see section 3.1.2), where the EAW was issued by a public prosecutor.

3.10.2 Section (i) in practice

3.10.2.1 Difficulties on the issuing side

None of the country experts mentions any difficulties encountered by issuing judicial authorities.

[576] ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, para. 39.

3.10.2.2 Difficulties on the executing side

Most country experts mention no difficulties on the executing side or state that occasional mistakes were clarified by requesting supplementary information.

The country experts for Ireland, the Netherlands and Poland mention some difficulties encountered by executing judicial authorities.

In an Irish case, concerning an EAW which was not signed by the Prosecutor General but by the Acting Prosecutor General, the court ruled that the Acting Prosecutor General was entitled to do so on behalf of the issuing judicial authority (the Prosecutor General's Office).[577]

Similarly, in the Netherlands defence counsel sometimes argue that a 'deputy' or 'substitute' public prosecutor is a mere administrative assistant and, therefore, cannot issue an EAW. However, the executing judicial authority held that a 'deputy' or 'substitute' public prosecutor undoubtedly is a prosecutor and represents the issuing judicial authority (the Public Prosecutor's Office). In German EAWs, the public prosecutor is sometimes referred to as the representative of the issuing court. This does not have any consequences, as long as the EAW was issued and signed by a judge. German EAWs are sometimes issued by a functionary called the 'manager of the Local Court'. In one of such cases, the executing judicial authority requested supplementary information on the judicial nature of that position. It turned out, that managers of a Local Court are always judges in that court.[578]

In the same vein, the Polish country expert mentions that section (i) does not always state whether the person who issued the EAW is a judge.[579]

3.10.3 Recommendations regarding section (i)

The findings do not give rise to any recommendation, except recommendations in the context of the Court of Justice's case-law on the dual level of protection in the issuing Member State. Those recommendations are dealt with in section 3.3.3.1.

[577] IE, report, question 36.
[578] NL, report, question 36.
[579] PL, report, question 36.

Chapter 4 Problems not related directly to the EAW-form

4.1 Introduction

This part concerns problems not directly related to the EAW-form. The following topics have been selected to be addressed with this research: supplementary information Art. 15(2)-(3) of FD 2002/584/JHA; the recent line of case law regarding detention conditions and deficiencies in the system of justice; the guarantee of return of Art. 5(3) of FD 2002/584/JHA; the time limits of Art. 17 of FD 2002/584/JHA; the time limits of Art. 17 of FD 2002/584/JHA; new structures of cooperation in criminal matters with and in the EU (namely the surrender from and to Iceland and Norway, the analogous application of the *Petruhhin* and *Ruska Federacija* cases, the surrender to and from the United Kingdom and aspects of the EAW and the European Public Prosecutor`s Office); and finally, the speciality rule.

All these topics refer to aspects of surrender procedure that go beyond the current EAW-form or even the current EAW procedure itself. The legal practice surrounding these aspects can result to useful recommendations for their improvement or for improvement of the EAW-form itself.

For some of these subjects, providing additional information is central. The recent line of case law regarding detention conditions and deficiencies for example involves the request of supplementary information. Looking into the practice surrounding supplementary information might show whether and when the EAW-form is insufficient or used incorrectly. If, for example, additional information regarding the facts or the nature of offences is frequently requested, then perhaps the EAW-form is not sufficiently detailed.

For some procedures the executing Member State *must* request supplementary information, such as the procedure created by the ECJ jurisprudential line regarding detention conditions and deficiencies of the system of justice in the issuing Member State.[580] The national practice is relatively new and diverse. How do authorities in the executing Member State apply the

[580] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198; ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice*), C-216/18 PPU, ECLI:EU:C:2018:586.

Aranyosi and *Minister for Justice and Equality (Deficiencies in the system of justice)* tests and what type of information and procedures are used in the issuing Member State to provide the required supplementary information? These procedures are organically developed in each system. Understanding the practice in that procedure may lead to recommendations for improvement of the EAW-form or even improvement beyond the EAW-form.

The guarantee of return of Art. 5(3) of FD 2002/584/JHA is also a topic which might generate requests for supplementary information in the form of the assurances required by that provision. It is a frequent aspect of EAW procedures and several practical issues arise. The legal framework of the EAW practically stops with Art. 5(3), *i.e.* giving the assurance; there is no uniform follow-up procedure set in this instrument. How to execute the guarantee and return the person depends on the national systems; apparently, this procedure presents an intersection between FD 2002/584/JHA and FD 2008/909/JHA on custodial sentences. There are several questions raised, *e.g.* what if the requested person who consented to the return does not consent anymore at the time of the return?

Another topic is the impact of supplementary information on the time limits of Art. 17 of FD 2002/584/JHA to discover how systems ensure the respect of time limits where more information is required. All of the procedures mentioned could impact on the timely execution of EAWs.

In this part, we also address new structures of cooperation that go beyond the EAW-form or the EAW procedure itself. Under this, we investigate the special regime regarding surrender to and from Iceland and Norway and the recently established regime for the surrender to and from the United Kingdom. The purpose is to identify how these procedures, which are similar to the EAW procedure, evolve in practice and what challenges they create for the authorities. Similarly, we investigate the newly created meeting point between the European Public Prosecutor's Office (EPPO) and EAWs. Following Art. 33(2) of the EPPO Regulation, an EAW may be issued under some conditions. We strive to identify how this procedure is outlined in the countries of this research and what problems are to be found. As this is a new practice, it will be seen that most difficulties are located with the national legal framework and how this accommodates the EPPO and its powers.

A new structure of cooperation was also established with the *Petruhhin* and *Ruska Federacija* cases. When third countries request the extradition of EU nationals and the requested EU Member State does not extradite its own nationals to third countries, this protection must be extended to other EU nationals as well. To avoid impunity, the requested Member State must engage into a dialogue with the Member State of the persons' nationality. How does this complex procedure unfold in practice?

A final topic is the speciality rule. As it will be seen, the speciality rule is rarely waived by requested persons, yet the lack of transparency regarding the status of the speciality rule in the EAW procedure creates problems to the issuing state – which is the state to comply with it.

4.2 Supplementary information – Art. 15(2)-(3) of FD 2002/584/JHA

The EAW-form is the main means of communication between the authorities regarding what is requested. Its purpose is to regulate that communication. Yet, often, there is a need for more communication or clarification after the form has been sent. Art. 15(2) of FD 2002/584/JHA gives the opportunity to the executing judicial authority to reach out to the issuing Member State and request additional information. This could include clarification of information already included in the form, or of possible mistakes or of information missing from the form, or it could concern information not required in the form *per se* but still useful. In Art. 15(3) of FD 2002/584/JHA, the issuing judicial authority is given the power to send information to the executing judicial authority *proprio motu*. These two paragraphs open the channels of communication between authorities beyond the EAW-form.

We will first provide an overview of the legal framework provided by the ECJ regarding this topic and then proceed with presenting the practice in the systems examined in this project.

4.2.1 Legal framework

Art. 15(2) of FD 2002/584/JHA concerns providing supplementary information ('in particular with respect to Articles 3 to 5 and Article 8') at the request of the executing judicial authority, whereas Art. 15(3) of FD 2002/584/JHA concerns forwarding 'additional useful information' by the issuing judicial authority *proprio motu*.

4.2.1.1 When to use Art. 15 (2) and (3) of FD 2002/584/JHA

Member States are generally encouraged by the ECJ to make use of the possibility of Art. 15 of FD 2002/584/JHA to "foster mutual trust".[581] Yet this should only be used when strictly necessary. According to the court, 'recourse may be had to that option only as a last resort in exceptional cases in which the executing judicial authority considers that it does not have the official evidence necessary to adopt a decision on surrender as a matter of urgency'.[582] The request for supplementary information shall be furnished as a matter of urgency (and especially so when it relates to Art. 3, 5 and 8 of FD 2002/584/JHA) and the executing judicial authority 'may' fix a time limit for the receipt of that information, given the need to observe the time limits for deciding on the EAW set out in Art. 17 of FD 2002/584/JHA. National legal frameworks that force the executing judicial authority to request as a matter of course supplementary information are incompatible with Art. 15 (see the facts in *Piotrowski*).[583] Conclusively, the use of Art. 15(2) of FD 2002/584/JHA is intended to be as limited as possible whereas the expectation is that the EAW-form should contain all necessary information in most cases.

The procedure for requesting supplementary information can neither breach Art. 17 of FD 2002/584/JHA, nor create an obligation to the executing judicial authority to request such information more than once.[584]

Nevertheless, in some situations, executing judicial authorities *are obligated* to request supplementary information, meaning that they cannot reject execution of an EAW on the following grounds without making use of Art. 15 (2) of FD 2002/584/JHA. In particular:

- when examining whether the EAW meets the requirements of lawfulness set out in Art. 8(1) of FD 2002/584/JHA;[585]

[581] ECJ, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, para. 91.
[582] ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, paras. 60-61.
[583] ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, para. 61.
[584] ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 105.
[585] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 65.

- when examining whether the requirements of Art. 4a(1)(a)-(d) of FD 2002/584/JHA are met;[586]
- when examining whether there is a real risk for the requested person of a violation of Art. 4 of the Charter or of a violation of the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter.[587] However, this obligation is more relative when it concerns deficiencies of the judicial system.[588]

The issuing judicial authority *must* respond with the information required.[589] That obligation derives from the duty of sincere cooperation (Art. 4(3) TEU), which 'informs' the 'dialogue' between the issuing and executing judicial authorities when applying Art. 15(2)-(3) of FD 2002/584/JHA.[590]

Art. 15(3) of FD 2002/584/JHA establishes the possibility of providing *proprio motu* information to the executing Member State by the issuing Member State and functions at the discretion of the issuing judicial authority: if there is something that the issuing judicial authority wishes to communicate that it believes might assist the executing Member State, or when it can predict it could be of use. But *must* the issuing judicial authority relay some information *proprio motu*? Can there be an obligation? That was the question in *IK*, where the issuing judicial authority neglected to include an additional custodial sentence to the EAW. The Court held that there is no such obligation:

> 'Therefore, in circumstances such as those at issue in the main proceedings, Article 15(3) of Framework Decision 2002/584 cannot be interpreted as requiring the issuing judicial authority to inform the executing judicial authority, after that authority has acceded to the request for surrender, of the existence of an additional sentence so that executing judicial authority may adopt a decision regarding the possibility of enforcing that sentence in the issuing Member State'.[591]

[586] ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras. 101-103.
[587] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 95; ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system*), C-216/18 PPU, ECLI:EU:C:2018:586, para. 77.
[588] ECJ, judgment of 22 February 2022, *X&Y*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100, para. 84.
[589] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para.h 97, with regard to information about detention conditions.
[590] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Detention conditions in Hungary*), C-220/18, ECLI:EU:C:2018:589, para. 104.
[591] ECJ, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)*, C-551/18 PPU, ECLI:EU:C:2018:991, para. 68.

However, this ruling was based on the observations that the EAW did mention the main sentence of three year's imprisonment, that the indication of that sentence was sufficient for the purpose of ensuring that the EAW satisfied the requirement of Art. 8(1)(f) of FD 2002/584/JHA and that, therefore, the executing judicial authority was required to execute the EAW anyway.[592]

4.2.1.2 Type of information

Arguably, only information that the executing judicial authority considers indispensable to decide on the EAW can be asked. In *Piotrowski,* the ECJ restricted the use of Art. 15 (2) of FD 2002/584/JHA to a lack of 'official evidence' to adopt a decision.[593] It is for the executing judicial authority to make the assessment on when to use Art. 15 (2) of FD 2002/584/JHA and for which information.[594] However, the executing judicial authority might not be entirely free to make that decision, as it has limited powers in controlling the merits of the EAW. In that respect, information that alludes to the merits of the case (*e.g.* the level of suspicion, or evidence or proportionality) – which are matters for the issuing Member State – should not, in principle, be the subject of supplementary information. Concomitantly, even when supplementary information *must* be requested, *e.g.* on detention conditions, its use is limited to clarify the *in concreto* risk and not to receive general information or to survey all prisons in the issuing Member State.[595] Information asked should not be irrelevant, too general or impossible to answer within the time limits of Art. 17 of FD 2002/584/JHA; this was for example the case with requesting information on every prison or questions irrelevant to detention conditions, *e.g.* opportunities for religious worship, whether it is possible to smoke, the arrangements for the washing of clothing and whether there are bars or slatted shutters on cell windows.[596]

Art. 15 (2) of FD 2002/584/JHA has been interpreted by the ECJ as a means to address issues not addressed sufficiently in the EAW-form. One example is detention conditions. Another – and very recent – example relates to the consent given by the executing judicial authority

[592] ECJ, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)*, C-551/18 PPU, ECLI:EU:C:2018:991, para. 52-53.
[593] ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, paras. 60-61.
[594] ECJ, judgment of 21 October 2010, *I.B,*. C-306/09, ECLI:EU:C:2010:626, para. 47.
[595] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, ECLI:EU:C:2018:589, paras. 79-80.
[596] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, ECLI:EU:C:2018:589, para. 103.

regarding the speciality rule for other offences pursuant to Art. 27(3)(g) and (4) of FD 2002/584/JHA and the procedure of subsequent surrender of Art. 28 of FD 2002/584/JHA. In *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)*, the Court held that the executing judicial authority should ensure that it possesses all necessary information to make that decision (of giving consent) and for that matter ask, if necessary, supplementary information.[597]

4.2.1.3 Which authority should provide the information?

A recent preliminary reference questioned whether the authority of the issuing state providing the requested information should also meet the requirements of Art. 6(1) of FD 2002/584/JHA for being an 'issuing judicial authority'. The case concerned supplementary information provided by another authority than the one issuing the EAW and information substantially supplementing, or possibly even changing the content of the EAW.[598] Sadly, the preliminary question was retracted in September 2021.[599] If the ECJ were to answer this question in the affirmative this would lead to somewhat of a pickle. When can it be said that this additional information "substantially supplements or changes the content of the arrest warrant"? One would need to define that, which will not be easy. Essentially it would inquire a test of when the supplementary information equals a new EAW request.

Nevertheless, this is a valid problem. It should be avoided that the issuing judicial authority issues a very basic EAW and relies on other authorities to fill this up with the necessary information later. Then the requirement of independent and impartial judicial authority would be only illusionary.

4.2.2 Legal practice

In the following part, the legal practice on Art. 15(2) of FD 2002/584/JHA will be presented.

[597] ECJ, judgment of 26 October 2021, *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)*, C-428/21 PPU and C-429/21 PPU, ECLI:EU:C:2021:876.
[598] ECJ, Request for a preliminary ruling of 14 February 2020, *Criminal proceedings against M.B*,. C-78/20, ECLI:EU:C:2021:738.
[599] ECJ, Order of 1 September 202, *Generálna prokuratura Slovenskej republiky, Criminal proceedings against M.B*, C-78/20, ECLI:EU:C:2021:738.

4.2.2.1 Authority that requests or provides supplementary information

Which authority of the issuing Member State provides the requested information to the executing Member State? In most systems, this is the issuing judicial authority, as the latter is defined by the national legal framework. Since in most systems the issuing judicial authority is a court or a judge, this authority is also responsible for providing the requested information. That goes for Hungary,[600] the Netherlands (mainly in theory),[601] Poland,[602] Romania,[603] and Ireland.[604] In Belgium the prosecutor will usually provide the supplementary information, but especially concerning prosecution-EAWs the investigative judge might also step in and supply the information requested.[605] Greece also confers this responsibility on the issuing judicial authority, which is not a judge or a court, but the Prosecutor of the Appeals Court.[606] In several Member States, the issuing judicial authority might receive help from other authorities to gather the necessary information, *e.g.*, prison directors.[607] In Poland with reference to EAWs issued at the pre-trial stage of the proceedings additional information may also be submitted by a public prosecutor.[608]

Importantly, in some Member States where the judges/courts are the competent authority, practice works differently, as it is essentially the prosecutor who takes up this task. This is for example the case in the Netherlands, where according to the Dutch experts, the prosecutor will often supply that information even without the knowledge of the issuing judicial authority, as a matter of expediency.[609] This also appears to be the practice in Belgium (for some cases) and Ireland. One must wonder whether this is in line with EU law. Shouldn't a judicial authority with the guarantees of judicial independence supply such information? For now, as explained above, the ECJ has not yet ruled on this issue.

[600] HU, report, question 37.
[601] NL, report, question 37.
[602] PL, report, question 37.
[603] RO, report, questions 37 and 9 a).
[604] IE, report, question 8 a.
[605] BE, report, question 37.
[606] EL, report, question 37.
[607] E.g. EL, report, question 50.
[608] PL, report, question 37.
[609] NL, report, question 37.

Yet, this has been a problem at a national level: should the executing judicial authority accept as legitimate supplementary information supplied by an authority which is not a court? The High Court in Ireland dealt with this question, when the requested person argued that the Irish court should not rely on the supplementary information because it was provided by a prosecutorial and not judicial authority and that the information should have been included already in the initial EAW-form. The Irish court decided that there was no such requirement set out in Art. 15 of FD 2002/584/JHA given the wording of that provision, the lack of guidance by the ECJ and also the fact that this procedure is meant to be swift. Part of the argumentation was the comparison of a grammatical reading of Art. 15(2) and (3) of FD 2002/584/JHA: whereas in the latter the EU legislator refers to the issuing judicial authority, Art. 15(2) of FD 2002/584/JHA does not.[610]

One must highlight that the existence of such practices – namely to delegate that task to prosecutors – perhaps betrays the fact that supplementary information is a more practical part of the procedure, habitually closer to the tasks of prosecutors. Such statement might be truer for some type of information than others; in the end, who gets to respond to requests for supplementary information might depend on the nature of the request. But if supplementary information leads to a substantial change of the EAW, this could raise questions.

4.2.2.2 Authority requesting the supplementary information

This aspect was not part of the questionnaire however two Member States, namely Ireland and Greece, provided information in this regard that deserves to be mentioned. One may assume that it is the executing judicial authority, making the decision of whether and if so, which supplementary information is in order. In some situations, in Greece and Belgium, the prosecutor, who receives the EAW at first, might request from the issuing judicial authority additional information, even before the case goes to the executing judicial authority. This might happen as a pre-emptive check when manifest defects are detected. Another reason relates to the extensive mandatory grounds in national legislation which might require extra information: *e.g.* the guarantee of Art 5(3) of FD 2002/584/JHA will be requested already before the case reaches the judicial authority, as this is mandatory.[611]

[610] IE, report, question37.
[611] EL, report, question 37.

An interesting case is that of Ireland, where the Central Authority was authorised until 2019 to take the decision of whether supplementary information was necessary. The intention was that there should be a preliminary screening by the Central Authority to detect manifest defects. After 2019, Irish law provides that the court will take that decision, and the power of the Central Authority to send requests on its own volition was removed. But in practice the Central Authority retains its power to make a first draft of the letter (giving the Central Authority room to identify the problems at an early stage) which will be submitted to the High Court for endorsement and approval.[612]

Both these countries reveal practices that support the efficiency and expediency of proceedings: practically if the authority receiving the EAWs discovers obvious lacunas in the form or knows that certain information will be requested by the court anyhow, it might be prudent to request supplementary information as soon as possible. On the other hand, receiving a request from supplementary information from another authority than expected could confuse the authorities in the issuing Member State. One could avoid any confusion by clarifying in the request that the prosecutor asks for additional information, either on behalf of the court, or in preparation of bringing the case to court.

4.2.2.3 *Proprio motu* – Art. 15(3) of FD 2002/584/JHA

All experts from our research have reported that Art. 15(3) of FD 2002/584/JHA has been used, with the exception of Poland.[613] No problems are reported with this aspect, however it is interesting to observe that Art. 15(3) of FD 2002/584/JHA allows the issuing Member State to take the perspective of the executing Member State and foresee possible hurdles due to some particular aspects of the issuing Member State's system.

Examples of information given this way are: summoning procedure, service of the custodial sentence, lapse of time (Romania);[614] *in absentia* procedure and statute of limitation

[612] IE,report, question 37.
[613] PL, report, question 41 b).
[614] RO, report, question 39.

(Greece);[615] in execution-EAWs information about the proceedings resulting in the judicial decision which finally sentenced the requested person and to explain that escaping from prison is not an offence under Dutch law (the Netherlands);[616] in one case that the requested person is represented by lawyer (Hungary),[617] the relation with an European Investigation Order, other EAW's or ongoing investigations in the executing Member State or other Member States (Belgium).[618]

Issuing Member States send information *proprio motu* for a variety of topics that usually relate to particularities of their system that could be misunderstood or lead to issues. A vivid example is Ireland: because of the common law tradition which inspires its system, Irish authorities frequently use this option especially with continental law systems to ensure that aspects of the Irish legal system will not be misunderstood. The Irish expert reports that this requires an attentive attitude of anticipation and perspective-taking of what could raise questions at the executing Member State.[619] Such practice might mean that Ireland uses this option frequently, as the authorities would rather err on the side of caution and send too much than too little.[620]

4.2.2.4 Type of information requested with Art. 15(2) of FD 2002/584/JHA

What type of information is usually the subject of Art. 15(2) of FD 2002/584/JHA? There is a plethora of topics in the country reports, which we have tried to group together into larger categories.[621]

Section e) description of offences and circumstances

The most common topic that popped up in most national reports relates to part e) of the form, namely the description of the offences. Both the description of the circumstances and the nature of the legal classification of offences are frequently the subject of supplementary information.

[615] EL, report, question 39.
[616] NL, report, question 39.
[617] HU, report, question 39.
[618] BE, report, question 39.
[619] IE, report, question 39.
[620] IE, report, question39.
[621] For a more elaborate list, please consult each national report.

A selection of examples from the national reports:

- Poland was requested to provide information on the kind of fraud that was committed, or the exact words used by a defendant in order to insult a police officer (question stemming from the Dutch executing judicial authority);[622]
- Hungary was requested to provide information regarding the facts of the offence so that the executing judicial authority could establish double criminality;[623]
- Greece and Poland request information regarding time and place of offences;[624]
- Greece, Belgium and the Netherlands request information regarding a better description of the facts and clarification of the participation of the requested person which is often too vaguely described;[625]
- The lack of compatibility and correlation between the offences (when more than one), the punishment of each offence, the description of facts and the role of the suspect are also topics for more information.[626]

The Irish expert has gathered a variety of examples showing what type of questions regarding section e) are requested by the Irish authorities:

- A more comprehensive account of each offence. Details as to circumstances in which the offences were committed including time, place and degree of participation.
- Clarity as to what convictions had resulted from the description of the offending conduct provided.
- To confirm whether the legal classifications of the crimes in the warrant were correctly stated (in circumstances where there was some ambiguity).
- Which of the offences the issuing judicial authority claimed fell within Art. 2(2) of FD 2002/584/JHA. The clarification was sought in light of contradictory statements in the EAW.[627]

It is crucial to understand better the factual and legal basis for the EAW as this helps the executing judicial authority to assess whether grounds for refusal apply, *e.g.* double criminality,

[622] PL, report, question 38.
[623] HU, report, question 38.
[624] PL, report, question 40; EL, report, question 40.
[625] NL, report, question 40; EL, report, question 40; BE, report, question 40.
[626] EL, report, question 40.
[627] IE, report, question40.

or territorial jurisdiction. When the information is not adequate this could lead either to delays for clarification, or to unnecessary refusals. The mechanism of Art. 15 of FD 2002/584/JHA is not meant to be used on a standardised basis, otherwise this would imply that the EAW-form operates inefficiently. Additionally, when the EAW is issued for more offences, there must be a clear reference of each offence and the facts and sanctions that correspond to it. While some guidance is now given in the instruction of the question: "Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person", it would be best if this is required as a separate field within the form, so that it becomes necessary to fill in for the issuing authority. To address the frequent use of supplementary information to clarify aspects of the EAW-form regarding section e), we make Recommendation **3.12**.

Section c), indication on the length of the sentence

The indication of the length of sentence is also frequently subject to supplementary information. The Belgian, Irish, Greek, Dutch and Polish reports reported questions relating to that issue: the questions asked might relate to the period of limitation of the execution of the sentence, the period of detention already served in the issuing Member State or how much is left to be served, questions regarding the suspended effect of a sentence, to explain cumulative penalty provision, discrepancies between the indication of the remaining time to serve and the time for which the EAW was requested, and whether an aggregate sentence can be disaggregated if one of the offences is not an offence under the law of the executing Member State.[628] To address the frequent use of supplementary information to clarify aspects of the EAW-form regarding section c), we make Recommendation **3.7**.

Other types of information

Next to those two topics, there are other types of information mentioned in the country reports, which are frequently the subject of Art. 15(2) of FD 2002/584/JHA.

Sometimes, this might relate to the specifics of each system. Ireland for example requests information regarding the purpose of the EAW, namely whether it is for standing trial or for

[628] BE, report, question 40; IE, report, question 40; EL, report, question 40; NL, report, question 40; PL, report, question 41.

investigation purposes. This is because in transposing the EAW Ireland made the declaration that it will not surrender persons solely for investigative purposes.[629]

Information was also requested about, *inter alia*: the identity of the person,[630] life sentences,[631] the proceedings resulting in the judicial decision which finally sentenced the requested person,[632] which authority issued the national arrest warrant;[633] the rule of speciality and a guarantee that it will be respected, [634] whether the offences were criminalised at the time they were committed,[635] statute of limitation,[636] various procedural rights: presence of lawyer, defence rights,[637] *locus delicti* (place of commission),[638] the existence of a national warrant,[639] the return guarantee of Art. 5(3) of FD 2002/584/JHA.[640] Information regarding *in absentia* trials is furthermore also mentioned in most reports.[641] This was part of the previous project of our team, and we will not elaborate further at this point.

Please note that detention conditions and questions regarding the deficiencies in the system of justice (rule of law, independence of courts) form a major part of the application of Art. 15(2) of FD 2002/584/JHA for several of the countries in our project, as seen in the reports. Yet this will be discussed below and for reasons of expedience, we will not mention those types of supplementary information in this section.

Finally, the issue of suspended sentences was mentioned as frequently being the subject of supplementary information.[642] Apparently information is often required regarding whether the suspension has been revoked. Executing judicial authorities require moreover the date on which the suspension was revoked. It remains unclear what type of information the EAW-form should

[629] IE, report, question 40.
[630] RO, report, question 40 and EL, report, question40.
[631] NL, report, question 40.
[632] NL, report, question 40.
[633] NL, report, question 40.
[634] IE, report, question 40.
[635] IE, report, question 40.
[636] HU, report, question 38; RO, report, question 39 and EL, report, question 39.
[637] RO, report, question 38; HU, report, question 40.
[638] PO, report, question 40; EL, report, question 40.
[639] EL, report, question 40.
[640] BE, report, question 40.
[641] For example look: NL, report, question 40; BE, report, question 40; RO, rReport, question 40; PO, report, question 40.
[642] See for example, PL, report, question 40; EL, report, question 40.

include as from the reports, it appears that at least a reference to the decision revoking the sentence is crucial – as this is the bases for issuing the EAW. Poland follows a good practice as according to the Polish expert both decisions are indicated in the EAW, *i.e.* the decision suspending the sentence and the decision of the revocation. In that regard, we propose Recommendation **3.4** to address the clarification required when the EAW is based on a revoked suspended sentence.

Requests for irrelevant information

Part of the national reports raised the issue of irrelevant information. What type of requests are deemed irrelevant by issuing judicial authorities and what information sent to the executing Member State is considered irrelevant?

As smartly pointed out by the Irish, Romanian and Belgian experts,[643] the definition of irrelevance lies in the eyes of the beholder: a request for supplementary information that the issuing judicial authority considers irrelevant might not be as such for the executing judicial authority making the request. Additionally, often imprecise or vague questions and/or answers might make a request or its answer seem irrelevant. There could also be misunderstandings due to diverse terminology or faulty translation: the executing Member State might ask A, but the issuing judicial authority understands and answers B. The phrase "it is better to have too much information than too little" can summarise the approach mentioned by some country experts.[644] But more generally, there appears to be a justifiable reluctance to consider (a request for) information received in good faith by another system as irrelevant, given that the systems differ tremendously in the fine points of criminal procedure. This is an approach that we adopt and embrace in this report.

However, there are, sometimes, some types of information that are irrelevant, no matter the background of each system. One is to request information contained already in the EAW; when there is no added value to this request, it is unnecessary.[645] This was reported to be the case for example with Hungarian requests to the Netherlands regarding aspects of the Dutch

[643] IE, report, question 41 b; RO, report, question 41 a); BE, report, question 41 b).
[644] IE, report, question 41 b); RO, report, question 41 a).
[645] IE, report, question 41 a).

proceedings already mentioned in the form (see also below about the United Kingdom).[646] Another example concerns topics that the executing judicial authority is not supposed to be reviewing. For instance, the Greek expert described a standard practice in Greece to request supplementary information regarding the statute of limitation of the offence for which the EAW is issued.[647] The Greek executing judicial authority is not supposed to control whether the offence is statute-barred according to the laws of the issuing Member State – this is a task for the issuing judicial authority. Another example is requests regarding the number of witnesses at the trial upon which the conviction is based,[648] the quality and amount of evidence, the stages of investigations and grounds for reasonable suspicion.[649] Additionally, a question regarding the grounds that led to the revocation of the suspended sentence is irrelevant.[650] To address this issue, we make Recommendation **4.6**.

Finally, a clearly problematic case is how the United Kingdom approached Art. 15(2) of FD 2002/584/JHA according to the reports, before Brexit. As explained above, the use of Art. 15(2) is meant to be exceptional and only when strictly necessary. Many of our experts reported that the United Kingdom used to send by default a standardised list of questions regardless of whether the information was already in the EAW.[651] The Irish expert provides an example of these standard queries by the United Kingdom:

- The date of direction to prosecute.
- Details of any interviews with the requested person including any admissions.
- When did the requested person first become aware of the pending prosecution?
- Was the requested person under an obligation to remain in Ireland?
- What, if any bail conditions, did the requested person breach?
- Did the requested person seek to evade prosecution?
- Reasons for any delay?
- Is the prosecution in a position to proceed? Are all prosecution witnesses still available?[652]

[646] NL, report, question 41 a).
[647] EL, report, question 40.
[648] EL, report, question 41 a).
[649] NL, report, question 41 b).
[650] PL, report, question 41 a).
[651] NL, report, question 41 a); EL, report, question 41 b); PL, report, question 41 a); IE, report, question 41 a).
[652] IE, report, question 38.

To address the standardised use of Art. 15(2) of FD 2002/584/JHA we make Recommendation **4.6**.

4.3 Detention conditions and deficiencies in the system of justice

In recent years, the ECJ jurisprudential line regarding detention conditions and deficiencies in the system of justice of the issuing Member State created exceptions to mutual recognition. Accordingly, the executing judicial authority is entitled to postpone surrender if an individual real risk is established of inhuman or degrading detention conditions or of a violation of the right to an independent tribunal. However, the proof of the pudding is in the eating. There is unequal use: some Member States are keener on asking questions about these topics, others are usually at the receiving end. Also, the actual procedure followed to carry out those tests (whether as issuing or executing judicial authority) is diversified. In this part, we will try to delve deeper into this practice, highlight the problematic areas and make suggestions for improvement.

4.3.1 Legal framework

Before delving into practice, a summary of the current legal framework regarding these issues is in order, which is developing rapidly, as more and more jurisprudence sees the light of day. All recommendations are presented at the end, as the issues are interrelated.

4.3.1.1 Detention conditions

As reminder, FD 2002/584/JHA does not include a (general) ground for refusal concerning human rights violations, detention conditions or aspects of the Rule of Law. Art. 1(3) of FD 2002/584/JHA contains a general obligation to respect fundamental rights, an aspect also addressed in recital 12 of the Preamble (which also refers to the Charter of Fundamental Rights).

However, in *Aranyosi and Căldăraru*, the ECJ held that under certain conditions, the procedure of executing an EAW could end (be discontinued), when there is a real risk of a breach of Art. 4 of the Charter by reason of inhuman or degrading detention conditions in the issuing Member

State. In the post-*Aranyosi* jurisprudence, the ECJ clarified the two-step test to be followed in order to assess whether such risk exists.

(i) *In abstracto* risk

The first step of the test aims at establishing whether detainees in the issuing Member State in general run a real risk of being subjected to inhuman or degrading detention conditions. Such a risk can relate to structural issues such as 'deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'. To prove an abstract risk, the national court cannot use just any information but may only 'rely on information that is objective, reliable, specific and properly updated'.[653] Once such a risk is established, then the national court must proceed to the second part of the test. A finding of an *in abstracto* risk does not suffice to refuse execution of the EAW.[654]

(ii) *In concreto* risk

If the executing judicial authority finds that there is a real *in abstracto* risk, it must then assess, specifically and precisely, 'whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State'. The *in concreto* test concerns the actual risk that the requested person might face. To that end, the executing judicial authority must open the dialogue with the issuing judicial authority to investigate whether such risk can be excluded.[655] Supplementary information - Art. 15(2) FD 2002/584/JHA - must be requested to inquire into 'the conditions in which it is envisaged that the individual concerned will be detained in that Member State'. The issuing judicial authority is obliged to carry out such a request, if need be, with assistance of the central authority (Art. 7 of FD 2002/584/JHA). Requesting supplementary information is an obligation for the executing judicial authority in this case, as it is for the issuing state to

[653] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 89.
[654] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 92.
[655] Martufi A. & Gigengack D. (2020), Exploring mutual trust through the lens of an executing judicial authority. The practice of the Court of Amsterdam in EAW proceedings, New Journal of European criminal law 11(3), p. 283.

respond to such a request. The executing judicial authority will rely on the information acquired from the issuing Member State, but it may also rely on any other information available.[656]

If that assessment results in finding a real *in concreto* risk for the requested person if surrendered, the executing judicial authority must postpone the execution of the EAW 'until it obtains the supplementary information that allows it to discount the existence of such a risk'. The EAW procedure cannot be yet abandoned. But 'if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end'.[657]

Content of information requested

Some guidance regarding what type of information to take into account can be found in *Dorobantu*, where the ECJ held that:

- There is an absence of EU minimum standards on prison conditions (esp. regarding personal space available) and thus, Art. 3 ECHR and the ECtHR jurisprudence define the minimum standards for detention conditions for the time being;[658]
- The executing Member State, when having higher than the ECHR standards in its own prisons, *may not* use those higher national standards as a benchmark but must use the ones derived from Art. 3 ECHR and the ECtHR case law; this is to sustain uniform application of the EU law.[659]
- The executing judicial authority may not request supplementary information on all prisons of the issuing Member State, but request information only on the actual and precise facilities where the requested person will likely be detained, including on a temporary basis;[660]
- To establish a real risk *in concreto*, the review must be comprehensive and not limited to only manifest inadequacies;

[656] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 98.
[657] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 104.
[658] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 71.
[659] ECJ, judgment 15 October 2019, *Dorobantu*, C-128/18, ECLI:EU:C:2019, para. 79.
[660] Also in ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, para. 78.

- All relevant physical aspects should be taken into account (*e.g.* personal space, sanitary conditions, freedom to move within prison) and thus follow the ECtHR case law (*e.g.* 3m^2 minimum with certain exemptions, duration plays a role but is not decisive, other aspects of inappropriate conditions);[661]
- In calculating that available space, the area occupied by sanitary facilities should not be taken into account, but the calculation should include space occupied by furniture. Detainees should still have the possibility of moving around normally within the cell;
- A legal remedy in the issuing Member State to challenge detention conditions does not suffice to exclude a real risk of violation;[662]
- Balancing detention conditions against considerations relating to impunity or to the efficacy of judicial cooperation and principles of mutual trust and mutual recognition cannot be accepted.[663]

Importantly, the content of supplementary information may not only be information regarding the actual detention facilities, but also a reassurance/guarantee that the person will be held in facilities complying with human rights standards.[664] In the case of such assurances, the question arises as to what type of promise/assurance suffices to dispel doubts regarding the treatment of the requested person. The ECJ has held that such reassurance should be taken into account by the executing judicial authority. However, its gravity depends on whether it was given, or endorsed at least, by the issuing judicial authority; if not (*e.g.* if given by the Ministry of the issuing Member State, but not explicitly endorsed by the issuing judicial authority) then it may be taken into account together with the other information regarding detention conditions.[665] *Mutandis mutatis*, one may carefully deduce that if such assurance is given by the issuing judicial authority, it would have more gravity in light of mutual trust; meaning that this assurance should be enough to dispel any doubts regarding the fate of the requested person, 'at

[661] The ECJ cites diverse ECtHR case law such as ECtHR, judgment of 20 October 2016, *Muršić v. Croatia*, CE:ECHR:2016:1020JUD000733413, § 139. For a collection of the ECtHR case law that instructs the ECJ see ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paras. 97 and 98 and the case-law cited.
[662] Also in ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589.
[663] ECJ, judgment of 15 October 2019, *Dorobantu*, C-128/18, ECLI:EU:C:2019.
[664] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589.
[665] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paras. 113-114.

least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter'.[666]

As this is an evolving area of law in a field without harmonisation (detention conditions), the jurisprudence is growing. For example, a request for preliminary reference is pending, lodged by the Constitutional Court of Italy, raising the issue of serious and irreversible illness of the requested person and whether this too can be the subject of supplementary information to dispel the suspicion that the person concerned would suffer a serious risk of violation of Art. 3, 4 and 35 of the Charter, if surrendered.[667]

4.3.1.2 Deficiencies in the system of justice

Similar to the *Aranyosi* test is the test to establish a real risk of a breach of the right to an independent tribunal and the right to be tried by a tribunal previously established by law.[668] In *Minister for Justice and Equality (Deficiencies in the system of justice)*, the ECJ essentially adapted the two-step *Aranyosi* test to assessing a risk of a breach of the right to an independent tribunal, a right which belongs to the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter.[669]

Steps 1 and 2 look generally similar to the *Aranyosi* test. The executing judicial authority must: 'assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State (…), whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached'.[670] A finding of the existence of such a risk, necessitates a further assessment

[666] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, para. 112.
[667] ECJ, Request for a preliminary ruling of 22 November 2021, *E.D.L.*, C-699/21.
[668] See the recent ECJ, judgment of 22 February 2022, *X&Y*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100, para. 103.
[669] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586.
[670] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, para. 61.

– step 2 – namely, whether there are substantial grounds to believe that the requested person will be exposed to that risk if surrendered.

Yet, step 2 of the *in concreto risk* is more nuanced, consisting of two further sub-steps:

Sub-step 2a): The executing judicial authority must, in particular, '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'.[671] Here the focus is on whether the deficiencies affect the relevant courts of the *ad hoc* case.

Sub-step 2b): 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 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]'.[672] Here the executing judicial authority is expected to zoom into the procedure of the requested person and see whether the pending case will be affected by the alleged deficiencies affecting the said courts with jurisdiction over these proceedings.

The test appears to be demanding and setting a high threshold for finding an *in concreto* risk. When making that *in concreto* assessment the executing judicial authority must look into various specific factors: for example, in execution-EAWs, information regarding the composition of the panel of judges that heard the requested person's criminal case and whether there was a real breach of fair trial rights.[673] In prosecution-EAWs, the factors to be taken into account could be the personal situation of the requested person, the nature of the offence, the factual context surrounding that European arrest warrant or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called

[671] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, para. 74.
[672] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, para. 75.
[673] ECJ, judgment of 22 February 2022, *X&Y*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100, para. 102.

upon to hear the proceedings in respect of that person, the latter, if surrendered, runs a real risk of breach of that fundamental right.[674]

As with the *Aranyosi* test, the executing judicial authority must engage in a dialogue with the issuing judicial authority pursuant to Art. 15(2) of FD 2002/584/JHA to acquire information and/or assurances to dispel any doubts. As with requests about detention conditions, the executing judicial authority is obliged to make such a request and the issuing judicial authority must respond. If the executing judicial authority cannot discount the existence of a real risk, it must 'refrain from giving effect' to the EAW.[675] However, the obligation to request supplementary information is not, in the case of deficiencies of the judicial system, as strict as with *Aranyosi.* In the recent *X&Y,* the ECJ held that the obligation to employ Art. 15(2) of FD 2002/584/JHA exists only when "…the evidence put forward by the person concerned, although suggesting that those systemic and generalised deficiencies have had, or are liable to have, a tangible influence in that person's particular case, is not sufficient to demonstrate the existence, in such a case, of a real risk of breach of the fundamental right to a tribunal previously established by law, and thus to refuse to execute the European arrest warrant in question…".[676]

The relationship between the two steps is similar to *Aranyosi*, namely a finding of a *in abstracto* risk does not end the test.[677] This is even if the Member State in question has been the subject of a reasoned proposal adopted by the Commission pursuant to Art. 7(1) TEU (in this case Poland).[678] Yet if the Council were to adopt a decision based on Art. 7(2) TEU with respect to a Member State *and* the Council were to suspend FD 2002/584/JHA for that Member State, then and only then, executing judicial authorities of other Member States would be entitled to refuse surrender automatically (and thus forgo the *Minister for Justice and Equality* two-step test) to that Member State.[679]

[674] ECJ, judgment of 22 February 2022, *X&Y*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100, para. 102.
[675] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, paras. 60-61 and 68-78.
[676] ECJ, judgment of 22 February 2022, *X&Y*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100, para. 84.
[677] ECJ, judgment of 17 December 2020, *L* (C-354/20 PPU), *P* (C-412/20 PPU), ECLI:EU:C:2020:1033.
[678] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, para. 69.
[679] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, para. 72.

Importantly, a difference between the *Aranyosi* and the *Minister for Justice* tests is that while in *Aranyosi* the burden of proof lies with the issuing judicial authority, in *Minister for Justice and Equality (Deficiencies in the system of justice)* the burden is on the requested person: "Thus, where, as in the main proceedings, the person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his surrender to the issuing judicial authority, that there are systemic deficiencies,…".[680]

Content of information requested

As with *Aranyosi* test the type of information requested from the issuing judicial authority is tailored to the stage of the test. For step 1, the executing judicial authority may rely on objective information; in *Minister for Justice and Equality (Deficiencies in the system of justice)*, documents produced by EU bodies regarding the Art. 7(1) TEU hearings were mentioned as possible sources.

In that regard, the ECJ has outlined the aspects of Art. 47(2) Charter – which help define and demarcate the type of questions addressed to the issuing judicial authority within the request of supplementary information. The requirement of judicial independence has two dimensions: first, courts are not hierarchically constrained or subordinated to any other body, they do not receive any instructions or are not liable to pressure and intervention from any source whatsoever.[681] To support this aspect some guarantees need be in place, such as remuneration appropriate for their tasks and guarantees against removal from office. Second, independence is linked to impartiality which means that judges should keep objective, equal distance from each party and have no interest in the case apart from the application of the law. To ensure all of this, any regime of disciplinary proceedings should protect judges from political or external control, namely disciplinary procedures should not be used as tool to exert political control over judges.[682]

[680] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, para. 60 and see, by analogy, ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, para. 88.
[681] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, para. 63.
[682] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, para. 67.

As the jurisprudence develops, the scope of *Minister for Justice and Equality (Deficiencies in the system of justice)* might be growing as well. For example, two almost identical pending preliminary reference requests (Supreme Court of Ireland and District Court of Amsterdam) raise the questions whether (and if so how) the test applies when in doubt of the tribunal being established previously by law, when the composition of the court is not at this time known, and where there is no remedy to challenge the appointment of judges.[683]

4.3.2 Legal practice

The legal practice concerning these two issues is quite diverse and depends – as it will be shown – on the judicial culture of each system.

4.3.2.1 Uneven trigger – uneven effect

One does not have to read closely the national reports to already see that this topic concerns the countries in our project unevenly. The Netherlands and Ireland are countries that mainly raise questions regarding these topics as executing Member States in the cases explored by national experts,[684] while Greece, Poland, Hungary and Romania are at the receiver's end as issuing Member States (very few or no cases reported as executing judicial authorities raising concerns regarding detention conditions or impartiality of courts).[685] Given that the research is not exhaustive it cannot be said these countries have never questioned the detention conditions in other Member States as executing Member States, but one notices a clear polarity between the countries of this research. In fact, in Greece most requests received for supplementary information are reportedly about detention conditions;[686] the same impression is given when reading the Polish report since most topics of the requests of supplementary information relate to impartiality of courts.[687] The Belgian expert has reported that Belgian authorities have raised this issue as executing judicial authorities and they received requests to explain their detention conditions as issuing judicial authorities.[688]

[683] ECJ, Request for a preliminary ruling of 14 September 2021, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission*), C-563/21 and the same questions pending in ECJ, Request for preliminary ruling of 3 August 2021, *Minister for Justice and Equality*, C-480/2.
[684] IE, report, question 50; NL, report, question 50.
[685] RO, report, question 52; PO, report, question 52; HU, report, question 48; EL, report, question48.
[686] EL, report, question 48.
[687] PL, report, question 41 a).
[688] BE, report, question 50.

The issue of independence of courts seems to concern mainly Poland for the time being. However, Greece reported one case where two joined EAWs issued from Malta were refused, due to concerns regarding the impartiality of the judicial system as a whole (risk of corruption), a case that involved the witness testimonies of members of the European Parliament who drew parallels between the situation in Poland with that of Malta.[689] This is a highly political issue and it remains to be seen whether the ECJ's jurisprudence on deficiencies in the system of justice can affect other Member States beyond Poland and in which way. However, it is to be regretted that the Greek court did not raise the issue in a preliminary reference procedure to the ECJ.

A clear observation is that not all countries in our research, as executing Member States, raise questions regarding detention conditions or deficiencies of in the system of justice. Why?[690] One assumption is that the case law, being relatively new, has not yet taken root in all systems. It could be that executing judicial authorities might not know about the case law of the ECJ in this matter. One example that supports the view is that in the only case discovered by the Greek expert where deficiencies in the Maltese system were discussed, the Greek court followed a test almost similar to *Minister for Justice and Equality (Deficiencies in the system of justice)* but did not refer to the ECJ case law at all.[691] Another explanation supported by the Greek expert is that the states with known problematic detention conditions cannot sensibly complain about the detention conditions elsewhere.[692] Additionally, the attitude might be leaning more on the side of mutual trust, or even a bit towards managerialism: execute as many requests as possible and without delays.

In our view, the fact that these ECJ judgments might be used unevenly by Member States is rather problematic. Detention conditions relate to the prohibition of torture and deficiencies in the system of justice to aspects of the Rule of Law, the impartiality of courts and fair trial. Are these topics that can be left to the discretion and sensitivity of the executing Member State or

[689] EL, report, question 53.
[690] Which is a question also posed by the Dutch expert, see NL, report, question 49.
[691] EL, report, question 53.
[692] EL, report, question 50.

is this a matter of violation of EU law where action must be taken once adequate information is there? We address this problem in our Recommendation **5.8**.

Additionally, the Greek expert reported that there is the view, amongst some Greek practitioners, that the case law on detention conditions is predominately used by executing judicial authorities for execution-EAWs and not for prosecution-EAWs. This is interpreted by some Greek prosecutors as not being the right approach, because problematic detention condition will affect possibly also persons requested for a prosecution-EAW.[693] The view that *Aranyosi and Căldăraru* is raised only for execution-EAWs by executing judicial authorities of Member States might not be confirmed though, if looking at the Belgian report, where it is stated that detention conditions are challenged both in prosecution and execution-EAWs.[694]

Moreover, this uneven legal practice leads to a natural divide between Member States that usually invoke *Aranyosi and Căldăraru* and Member States who are usually the receivers of these requests. This divide does not help mutual recognition, as the receivers of the requests reportedly feel not trusted and interpret some requests as exaggerated or showing a lack of mutual trust or asking simply too many questions (see Greece,[695] Poland,[696] Romania[697]). In two notable cases, Poland even refused to execute EAWs from the Netherlands citing a lack of impartiality of the Dutch authorities, in the sense of impartiality towards Polish cases, given the numerous requests for supplementary information that Poland receives from the Netherlands on this issue – this was an expression of lack of reciprocity.[698] This divide is naturally so, as the *Aranyosi* and *Minister for Justice and Equality (Deficiencies in the system of justice)* mechanisms are meant as pressure points for some countries to improve problematic aspects of their judicial system. However, our project shows that it does impact mutual trust in a negative way.

[693] EL, report, question 50.
[694] BE, report, question 49 a).
[695] EL, report, question 50.
[696] PL, report, question 73 b.
[697] RO, report, question 67.
[698] PO, report, question 54.

The Dutch and Irish experts have mentioned a plethora of cases where *Aranyosi and Căldăraru* and *Minister for Justice and Equality (Deficiencies in the system of justice)* were considered.[699] For example, the Netherlands have applied the *Aranyosi and Căldăraru* test with respect to: Belgium, Bulgaria, France, Greece, Hungary, Italy, Lithuania, Sweden, Poland, Portugal, Romania and the United Kingdom.[700] To get an idea regarding the numbers in the Netherlands, from 2016 to September 2019, the Dutch court established an *in abstracto* real risk in 94 cases concerning Bulgaria, France, Hungary, Portugal, Romania and the United Kingdom. And in 56 of these decisions, the Court surrendered the requested person since no *in concreto* risk was established. In the same period, in 38 cases a concrete risk was established which led to postponement of the procedure, and in the end in 8 cases the person concerned was surrendered after sufficient guarantees were given. Finally in the same period, in 30 cases the risk could not be excluded within a reasonable time.[701]

4.3.2.2 *Aranyosi* and *Căldăraru* test

Regarding the function of the test and its comprehensibility little difficulty arises in legal practice. The Dutch court at a certain point took issue with the triggering of the test: when there are grave concerns regarding the situation in a Member State but there is not enough information or evidence. That was called step 0 and the Dutch courts in some cases did request additional information to see whether there was enough evidence to trigger step 1 of *Aranyosi and Căldăraru*. Later this was abandoned, with the view that lack of information means that there is not enough evidence to substantiate step 1.[702]

The Irish practice is interesting. There were cases preceding *Aranyosi and Căldărau* and the Irish courts used a similar reasoning to the test adopted later by the ECJ.[703] Judicial practice has developed a list of principles for judicial assessment of whether a person would run the risk of being subjected to inhuman and degrading treatment:

[699] NL, report, question 48; IE, report, question 48.
[700] NL, report, question 48.
[701] NL, report, question. 49.
[702] NL, report, question 51.
[703] IE, report, question48.

(a) The cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and mutual trust;

(b) A refusal to execute a European arrest warrant is intended to be an exception;

(c) One of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to article 3 ECHR or article 4 of the Charter of Fundamental Rights of the European Union;

(d) The prohibition of surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objective of the Framework Decision cannot defeat an established risk of ill-treatment;

(e) The burden rests upon a respondent to adduce evidence of proving that there are substantial/reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;

(f) The threshold which a respondent must meet in order to prevent extradition is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights. Whilst the presumption can be rebutted, such a conclusion will not be reached lightly;

(g) In examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;

(h) The Court may attach importance to reports of independent international human rights organisations or reports from government sources;

(i) The relevant time to consider the conditions in the requesting state is at the time of the hearing;

(j) When the personal space available to a detainee falls below $3m^2$ of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of article 3 ECHR arises. The burden of proof is then on the issuing state to rebut the presumption by demonstrating that there are factors capable of adequately compensating for the scarce allocation of personal space, and this presumption will normally be capable of being rebutted only if the following factors are cumulatively met:

1.The reductions in the required minimum personal space of $3m^2$ are short, occasional and minor,

2. such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities and

3. the detainee is confined to what is, when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention.

(k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether

there are substantial grounds to believe that the individual concerned will be exposed to that risk. The executing judicial authority should request of the issuing member state all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained.

(l) an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhuman or degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member states on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter;

(m) it is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member state. [704]

What stands out from these principles – which seem in line with *Aranyosi and Căldăraru* – are the threshold and the burden of proof. First, apparently, the threshold to prove inhuman detention conditions is rather high, since there is a presumption that Member States act in good faith and with respect for human rights. Second, once the defence proves that the available space is below $3m^2$ (which is one of the benchmarks used by the ECtHR and the ECJ), then the burden of proof shifts to the issuing judicial authority to prove that, despite the lack of space, there are still adequate conditions in that facility. This later shift comes as an addition to the current standards followed by the European courts.

4.3.2.3 *Minister for Justice and Equality (Deficiencies in the system of justice)* test

As far as the *Minister for Justice and Equality (Deficiencies in the system of justice)* goes, its application created some problems in the Dutch practice regarding the function of the test. In particular, especially for step 2a of the test, namely whether the deficiencies established affect the relevant courts of the *ad hoc* case, the Dutch court developed certain standardised questions submitted to all cases regarding prosecution-EAWs from Poland (and for execution-EAWs based on a judgment of conviction that was rendered as of August 2017 where it was plausible

[704] IE, report, question48.

that, after surrender, proceedings on sentencing would be conducted).[705] After a while the Dutch court stopped asking those questions, as in the meantime it was made clear that deficiencies impacted all Polish courts. Other than this issue, there seems to be no particular legal problem with the function of the test, other than the difficulties in mutual trust generated by its use.

4.3.2.4 Sources to establish *in abstracto* risk

To establish an *in abstracto* risk, a variety of sources are used, but their diversity depends on the national system and the position taken by the defence counsel in *ad hoc* cases. According to the Belgian expert, Belgian courts consult all types of information including ECtHR case law, but it is mainly based on that case law that risks are established.[706] Looking at the Dutch report we see a plethora of sources mentioned: European Committee for the Prevention of Torture (CPT), ECtHR, NGO's, information from the issuing Member State, reports from the Ombudsman, information from the prosecution office of *another* Member State, media coverage etc.[707] In Greece, for one case in which deficiencies of the Maltese system were discussed, the court also heard as witnesses members of the European Parliament, *inter alia*.[708]

The database of the Fundamental Rights Agency was not used in applying the test in the cases reported by the national experts.[709] The Dutch executing judicial authority has used the database only when preparing some cases but has not referred in its judgments per se.[710] It is no wonder how this database is underused, as it does not contain sufficient and updated information.

The Dutch experts point out the difficulty of finding updated and reliable information regarding the detention conditions.[711] In a notable 2019 case from Hungary, the Amsterdam court was asked to draw conclusions regarding the *in abstracto* risk based on information from ECtHR case law dated from 2016 based on conditions in Hungary of 2012, with no cases adjudicated by the ECtHR since then (declared inadmissible) and with CPT reports dating from 2014 concerning a visit in 2013. This example illustrates the more generalise lacuna of updated and

[705] NL, report, question 53.
[706] BE, report, question 48.
[707] NL, report, question 48.
[708] EL, report, question 53.
[709] BE, report, question 48.
[710] NL, report, question 48.
[711] NL, report, question 51.

current information regarding European prisons. To address this problem, we have developed Recommendation **4.2**.

Regarding *Minister for Justice and Equality (Deficiencies in the system of justice),* the information to establish an *in abstracto* risk of a violation of the right to an independent tribunal was based, *e.g.* in Irish cases on the Proposal of the European Commission in accordance with Art. 7(1) TEU, the affidavit of the requested person and Opinions of the Venice Commission, an advisory body of the Council of Europe on the situation in Poland.[712] Given the topic, it might be easier to find updated information.

4.3.2.5 Supplementary information

The second part of both tests is to request supplementary information from the issuing Member State, which in this case is obligatory. No problems regarding the obligation were reported, apart from one case in Greece were the national court refused to request supplementary information on the grounds that it was not necessary; it is unclear whether the national court was aware of the ECJ case law.[713]

The purpose of that requested information is to exclude any *in concreto* risks that should the requested person be surrendered, he would be subjected to the established *in abstracto* risk.

Procedure

The Greek expert noticed – since Greece has been frequently on the receiving ends of these requests – that the procedure is often inefficient: there are multiple requests arriving for the same case, *i.e.* questions are sent one after another and not altogether. That can cause delays.[714]

Some systems reported that the supplementary information is not always supplied by the issuing judicial authority. Please note that there is no ECJ ruling yet according to which the supplementary information *must be* supplied by a judicial authority. Nevertheless, if the supplementary information is given by another than the issuing judicial authority and it is

[712] IE, report, question 52.
[713] EL, report, question 53.
[714] EL, report, question 50.

accompanied by a guarantee endorsed or approved by the issuing judicial authority then, according to the ECJ, it should carry more weight in the assessment.[715]

Accordingly, it was mentioned in the Dutch report, that, sometimes, information or a guarantee provided by the issuing Member State is not endorsed by its judicial authority, which then presents additional difficulties in assessing/accepting it.[716] This is because when the assurance given is not endorsed by the issuing judicial authority then, according to the ECJ, such assurance 'must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority'.[717] Naturally, receiving an assurance that can be immediately relied upon is a far more efficient option, than conducting an overall assessment of all information. It is unknown whether all Member States are aware that guarantees not endorsed by judicial authorities might not be as effective.

Additionally, there is great diversity with what is requested. Some executing judicial authorities will request a guarantee that a specific prison will not be used, some will indicate which prison they wish, some will request general information regarding the prison conditions, and some information regarding the specific detention center to which the requested person would end up; often there is a mixture of guarantees and information requested.[718] According to the Greek expert, legal practice would benefit from a more standardised way to apply Art. 15(2) of FD 2002/584/JHA in this context.[719] Looking at the Polish report, we see a similar trend to streamline the procedure: because the questions that Poland receives are all pertinent to the same systemic issues, Polish authorities use often standardised answers since the answers are similar.[720] At the same time, the Dutch authorities who often pose these questions have also developed over time a list of standardised questions concerning deficiencies in the system of justice – although this practice seems by now to have been abandoned.[721]

[715] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paras. 113-114.
[716] NL, report, question 51.
[717] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paras. 113-114.
[718] EL, report, question 50.
[719] EL, report, question 50.
[720] PL, report, question 54.
[721] NL, report, question53.

Furthermore, the communication might go amiss, as in some cases responses are not sent or properly sent, as was the case mentioned by the Belgian expert where the Italian judge had ordered the request of supplementary information from Belgium, but the other Italian authorities never forwarded the request.[722] The conclusion that we can draw is that applying Art. 15(2) of FD 2002/584/JHA in the context of these topics requires some streamlining.

Interestingly, according to the Belgian expert, the European Commission is preparing a draft template for the supplementary information procedure regarding detention conditions, which can guide national authorities on what to ask/answer.[723] Such a draft template could improve communication and the clarity of the requests, as this is also suggested in our Recommendation **4.3**:[724]

[722] BE, report, question 51.
[723] BE, report, question 49 a).
[724] The draft template has been provided by the Belgian expert, Jan van Gaever, and it is reportedly a template in the making by EU institutions, not yet published.

"Please provide supplementary information on the conditions in which it is envisaged that the requested person will be detained in relation to the ticked boxes below:

1. Prison cells:
   - o Minimum personal space for single-occupancy and multi-occupancy cells (in m2)
   - o Cell's measurements (height and width)
   - o Equipment (heating, ventilation) and facilities (lighting, windows, washbasin, toilet, shower, furniture) in cell
   - o Cleanliness and hygienic conditions in cell
   - o Video-surveillance of cells

2. Sanitary conditions:
   - o Access to sanitary facilities (frequency)
   - o Structural separation requirements for in-cell sanitary facilities
   - o Hygienic conditions (disinfection and cleaning, provision of sanitary products to detainees)
   - o Access to shower/bathing facilities and hot water

3. Time out of cell
   - o Time per day/week spent by detainees outdoors in open air
   - o Sport facilities outdoors and indoors
   - o Time per day/week spent by detainees in common areas
   - o Activities/programmes available to detainees outside of their cells (education and recreational activities)

4. Solitary confinement
   - o Standards for the application of solitary confinement
   - o Monitoring of detainees while in solitary confinement

5. Access to healthcare
   - o Access to medical services and emergency care in prison
   - o Timing on medical intervention
   - o Availability of qualified medical and nursing personnel in prison facilities
   - o Availability of specialist care (e.g. for long-term diseases, for sick and elderly detainees, mental illnesses, drug addictions)
   - o Medical examination upon arrival in detention facilities
   - o Medical treatment of own choosing

6. Vulnerable prisoners
   - o Special measures for young detainees
   - o Special measures for women in detention
   - o Special measures for pregnant women
   - o Special measures for LGBTI prisoners

7. Special measures in place to protect detainees from violence
   - o Staff supervision
   - o Facility arrangements to prevent inter-prisoner violence (emergency button in cells, video-monitoring,…)
   - o Guards trainings

8. Nutrition
   - o Frequency of provision of meals
   - o General nutrition standards

9. Legal remedies
   - o Legal remedies available to the detainee in case of violation of national standards on detention conditions

Please also provide additional information on the above-mentioned topics: …"

Type of information requested

When supplementary information is requested for the context of *Aranyosi and Căldăraru* the purpose is to exclude a *in concreto* risk and as such it can be a simple request for information regarding the detention facility and the conditions in which the person will be held, or a guarantee that he will not be held in a specific place, or a guarantee that he will be held in an appropriate facility, sometimes even named, or a combination of the above.[725]

Some questions that the Dutch court asks are: square meters of living space; duration of the detention; duration of stay inside and outside the prison cell; state of the sanitation facilities; recreational and educational and work facilities; information in which prison the requested person will be detained after his/her surrender; information about the duration of the stay in a specific prison.[726] Belgium for example had requested in a case what actions Romania had taken

[725] Also see HU, report, question 50.
[726] NL, report, question 49.

to remedy deficiencies mentioned in ECtHR case law and in which prison facilities would the requested person reside.[727]

Examples from Ireland are the following questions: whether he will be kept in a prison with 4m^2 of living space in shared cells; kept in a prison with adequate sanitary conditions; have access to natural light and artificial lighting and ventilation; would be provided with a clean mattress and bedding; would be provided with adequate and partitioned toilet facilities; would have access to basic hygiene products; would have outdoor exercise of at least one hour a day; would be provided with satisfactory food.[728]

Type of responses given

The responses are not always convincing, or the information received is not always specific enough to dispel doubts.[729] A vague guarantee that the detention conditions will be sufficient and not violate the Charter and the ECHR is not sufficient.[730] It is unclear which guarantees might be good enough by looking at the reports. Laconic answers are not received well, *e.g.* that "conditions are fine", without explanation.[731]

From the point of view of the issuing Member States, the same problem is seen from their angle: a lack of clarity is reported regarding which information will be considered sufficient. The Greek expert gave an overview of how the Greek authorities have experienced this procedure as an issuing Member State that receives frequent requests to explain its detention conditions. It has been reported that the same information and the same guarantee (regarding the same prison) might be sufficient for one executing judicial authority but not another. For example, it has happened with multiple EAWs pending with German executing judicial authorities that the information about the same prison facility is accepted as sufficient for one German court, but not for the other. Some Greek prisons are considered *Aranyosi-proof* and some executing judicial authorities will request that the person is kept in those, and if there is space the Greek prosecutor will comply with such request. Though when the executing judicial authority has sent an open request for information, then Greek prosecutors often work in the blind: they are

[727] BE, report, question 49.
[728] IE, report, question 49.
[729] See the case between Ireland and Romania, in IE, report, question 49 iii) a).
[730] NL, report, question 49.
[731] BE, report, question 51ss.

unsure as to whether the suggested prison facility will be accepted given the lack of harmonised rules at EU level. Moreover, executing authorities apply their own standards and may be lenient to a different degree. This has promoted a two-speed responsiveness to requests. In some cases, the Greek prosecutors will go the extra mile to secure a prison facility that will most likely please the executing judicial authority *e.g.* in cases of great interest and when there is space. In other cases, (*e.g.* where there is no space in a particular prison facility), the Greek prosecutor has to take a gamble and outline prison conditions of which he cannot be sure in advance that the executing judicial authority will accept. This situation creates a climate of great uncertainty for issuing Member States like Greece that receive frequent these requests.[732] In our view, it does also not promote the improvement of standards of prison conditions. The lack of harmonized standards on prison conditions that was also discussed above under the legal framework is addressed with our Recommendation **4.1**.

To conclude it seems that the following elements make a response to a request for supplementary information in the context of *Aranyosi and Căldăraru* more likely to be effective, as this is also expressed in Recommendation **4.7**:

- It contains information about the prison facilities in which the person concerned will likely be detained after surrender, including on a temporary or transitional basis.[733]
- Guarantees in the form of a concrete promise to detain the requested person at a specific facility that complies with the relevant standards (and explains how this complies) or for which no *in abstracto risk* was established in step 1.

Other guarantees might be sufficient as well, but it will depend on the situation and the type of guarantee given. For example, the Dutch courts have accepted guarantees where it was stated that the requested person would not be detained in a facility that does not comply with Art. 4 of the Charter or a more general guarantee for unspecified requested persons who are in the same situation (*e.g.* the guarantee that all requested persons would (not) be detained in a specific facility).[734]

[732] EL, report, question 50.
[733] To be in line with ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Detention conditions in Hungary*), C-220/18, ECLI:EU:C:2018:589, para. 117, see as well NL, report, questionp. 51.
[734] NL, report, question 49.

Problems might arise as it is not always possible to know in advance in which facility the person will be detained, depending on how execution of penalties is organised in the legal system of the issuing Member State. Some responses might be more tentative. Let us take a look at this response from Romania supplied to Ireland which was deemed sufficient:

> "In answer to the said request, the issuing judicial authority sent two separate replies dated 16th June, 2020 and 17th June, 2020, respectively. The reply of 16th June, 2020 dealt with the issue of prison conditions. It indicated that if surrendered, the respondent would initially spend a period in quarantine of 21 days in the Bucharest Rahova penitentiary where he would have a minimum space of $3m^2$. Further, it indicated that subsequent to the quarantine period, the respondent would most probably be detained[735] under a semi-open regime at the Bistriţa penitentiary where rooms had appropriate natural ventilation and lighting, heating and permanent access to water and sanitary items, while inmates had an individual bed comprising a mattress and bedding, as well as furniture for storing personal items and eating. Details were provided of regular disinfection, pest control and lighting conditions. Under the semi-open regime, inmates are able to walk unaccompanied in areas within the detention area and manage their own leisure time under supervision, while the doors of the rooms remain open during the entire day. Details were given in relation to access to telephone calls and information points in relation to prisoners' detention status. Inmates could perform work and attend educational and cultural events and therapeutic and psychological counselling, as well as social support and moral /religious activities in schools or professional training outside of the penitentiary under supervision. It was stated:- 'Hence, the prisoners executing the sentences under the semi-open regime have the possibility to spend their leisure time outside of their detention room during the entire day. They are put in their rooms only for having their meals and half an hour before making the evening call. In conclusion, apart from the time assigned for attending activities and programmes, as well as for enforcing their rights, this category of prisoners can spend leisure time outside of their detention room, in open air, practically using their detention room only to rest or for various administrative and individual hygiene activities".[736]

4.3.2.6 Miscellaneous issues

Currently there is no mechanism for follow-up whether the guarantee will actually be complied with. Apparently, the Dutch could pinpoint one case where the guarantee was not respected; after the defence's complaint the issuing Member State complied.[737] It is not known whether there is even a relevant remedy in national laws, since the guarantee given within the context

[735] Emphasis added by the author.
[736] IE, report, question 49 i).
[737] NL, report, question 49.

of *Aranyosi and Căldăraru* is not based on a legal basis in FD 2002/584/JHA, as is, by contrast, the guarantee of return of Art. 5(3).

A significant issue raised both by the Irish and Dutch experts relates to the burden of proof that leans heavy on the defence to provide evidence and to support its case, mainly for the *in concreto risk* but also for the *in abstracto*.[738] It is unclear how feasible and reasonable is this expectation from the requested person given the difficulty in acquiring updated reliable information. For this reason, in the Netherlands, the courts often will gather information *ex officio* once the problem is raised both for the *in abstracto* and the *in concreto risk*.[739] Given the lack of reliable and updated information, the Dutch courts often seem to ponder on their role in this procedure and how far should they go to apply the two tests. This is another point showing the need for more assistance to national judicial authorities. Pursuant to *Aranyosi and Căldăraru*, the burden of proof shifts to the issuing Member State once step one is taken (see above). A good practice is seen in Ireland where the burden of proof shifts to the issuing Member State to prove that detention conditions are adequate when the physical space is less than $3m^2$ (see above).

If, in the end, the procedure reaches its end and surrender is essentially refused, the question is what happens to prevent impunity. Belgium and Romania for example might ask for a certificate of FD 2008/909/JHA or, concerning prosecution-EAWs, it might propose the use of Art. 5(3) of FD 2002/584/JHA, or of FD 2009/829/JHA.[740] Yet, even when using Art. 5(3) of FD 2002/584/JHA, the requested person will be potentially exposed to problematic detention facilities during pre-trial detention. Other Member States do not take measures to prevent impunity in a systematic way, *e.g.* in the Netherlands, there is the idea (which is however not shared by many) that the execution of the sentence in the Netherlands would not help improve the detention conditions in the issuing Member State.[741]

4.4 Guarantee of return – Art. 5(3) of FD 2002/584/JHA

[738] NL, report, questions. 51 and 53; IE, report, question 49 i).
[739] NL, report, questions 51 and 53.
[740] RO, report, question 49 a); BE, report, question 49 a).
[741] NL, report, questionp. 49 a).

A frequent part of EAW-practice is the application the guarantee of return of Art. 5(3) of FD 2002/584/JHA. However, as we shall see, FD 2002/584/JHA provides very little guidance on how to actually execute this guarantee. Member States resort to other instruments, mainly FD 2008/909/JHA, which however may not have a legal framework that is compatible with FD 2002/584/JHA. At the same time, as the guarantee becomes operational after the end of the proceedings in the issuing Member State, it often is forgotten to carry it out with no follow up either from the issuing or the executing Member State.

4.4.1 Legal framework

The system of FD 2002/584/JHA, as evidenced, *inter alia*, by Art. 5(3) of FD 2002/584/JHA, 'makes it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State'.[742] That provision refers to a guarantee, to be given by the issuing Member State, that a national or resident of the executing Member State who is the subject of a prosecution-EAW, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order to be imposed on him in the issuing Member State.

The object of that provision is also to benefit the requested person, namely to increase 'the chances of social reintegration of the national or resident of the executing Member State'.[743] In that sense, Art. 5(3) of FD 2002/584/JHA is the sister of Art. 4(6) of FD 2002/584/JHA as both instil into the EAW process aspects of social rehabilitation, which in the light of freedom of movement is even more so important. Unlike Art. 4(6) of FD 2002/584/JHA, the guarantee of return is only available for residents and nationals of the executing Member State and not for those "staying" in that state.

The legal framework of FD 2002/584/JHA does not regulate how the transfer is to be conducted; however, Art. 25 of FD 2008/909/JHA provides that FD 2008/909 will apply, to the extent that is compatible with FD 2002/584/JHA, to the return of Art. 5(3) of FD 2002/584/JHA. The ECJ has furthermore confirmed that there must be a coordination between the two

[742] ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, para. 51.
[743] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, para. 48.

instruments and such coordination should facilitate social rehabilitation.[744] A product of that coordination was seen in *SF*, where the question arose when the return should take place. Since FD 2008/909/JHA applies only to final judgments, Art. 5(3) of FD 2002/584/JHA should also be triggered once the judgment in the issuing Member State becomes final.[745] Such return should take place as soon as possible, according to the ECJ, which is in line with the objective of both instruments.[746] However, when other procedural steps pertinent to the criminal procedure must be taken, such as a determination of the sentence, then the return of Art. 5(3) of FD 2002/584/JHA takes place right after those additional procedural steps.[747] The same applies when there are concrete grounds making the presence of the requested person essential in the issuing Member State, relating to the safeguarding of the rights of defence of the person concerned or the proper administration of justice; this assessment requires a balancing exercise concerning whether delay is necessary.[748] However, the issuing judicial authority may not systematically and automatically postpone the return.[749]

Art. 5(3) of FD 2002/584/JHA does not require – so far – that the guarantee be given by the issuing *judicial authority per se*. This stems from a comparison between Art. 27(4) and Art. 28(3) of FD 2002/584/JHA stating that the issuing Member State must give the guarantees provided for in Art. 5(3) of FD 2002/584/JHA for the situations mentioned in that provision. The ECJ also refers to "(…) a guarantee to be given by the issuing Member State in particular cases (…)*'* - not by the issuing judicial authority.[750]

Another example of the coordination between the two instruments is the discretion of the executing Member State to adapt the sentence imposed in the issuing Member State, after the return of Art. 5(3) of FD 2002/584/JHA: such adaptation may only be allowed within the strict limits of Art. 8(2) of FD 2008/909/JHA. Any reduction of the sentence may only be tolerated as long as it is not less than the maximum of the sentence that is applicable in the executing Member State to similar offences.[751]

[744] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, para. 51.
[745] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, para. 53.
[746] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, paras. 54-55.
[747] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, para. 56.
[748] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, para. 59.
[749] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, para. 60.
[750] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, para. 41 (emphasis added).
[751] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, para. 60.

The extent of coordination between the two instruments is yet to be fully explored. For example, a lingering question relates to consent to the return. What if after surrender and the end of proceedings, the person changes his mind and does not wish to be transferred back to the executing Member State? Art. 6(2) of FD 2008/909/JHA outlines the cases where consent for the transfer is not required (*e.g.* when the person is a national of the executing Member State and resides there) but in all other occasions consent must be given. But is this compatible with Art. 5(3) of FD 2002/584/JHA which creates (also following *SF*) an obligation to return the person as soon as possible? Please note that the ECJ has commented on Art. 5(3) of FD 2002/584/JHA as a condition that the person *has to be returned*.[752] Whether this means that the lack of consent may block that return remains open.

Interestingly, the ECJ has already received the question whether the guarantee should be executed even in the absence of consent after the end of proceedings at the issuing state. In *Kita,* a Romanian national was sentenced to imprisonment by an Austrian court, after an EAW that was executed by Romania with the guarantee of return. The Romanian court ordered the return of the person to Romania and during the appeal of that decision a request for a preliminary reference was lodged. The Romanian court was wondering whether the transfer should depend on consent as it is with the European Convention on the Transfer of Sentenced Persons or take place automatically, since the guarantee was already given during the EAW procedure, and the Austrian proceedings had ended. The ECJ turned down the request to apply the urgent procedure as the requirements were not met, given the fact that the preliminary ruling would not alter the detention length or validity. Indeed, questions regarding the execution of the transfer under Art. 5(3) of FD 2002/584/JHA do not, in principle, alter the type or length of the sentence.

Importantly, the ECJ did comment on the lack of clarity of the place of detention in this case: according to the ECJ, since the applicant was actually serving his sentence in Austria and did not wish to return to Romania but to remain in Austria due to the proximity with his family, there was no reason to accept a request to apply the urgent procedure. In those circumstances the uncertainty about where he would eventually have to undergo his sentence and the

[752] ECJ, judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191, para. 41.

repercussions of an eventual return to Romania for his family life could not justify applying the urgent procedure.[753] All this was reasoned under the heading of whether the urgent procedure was warranted – not under the heading of the interpretation of Art 5(3) of FD 2002/584/JHA or Art. 6(2) of FD 2008/909/JHA. Therefore, there can be no safe conclusions drawn regarding consent to the execution of the return guarantee of Art. 5(3) of FD 2002/584/JHA.

4.4.2 Legal practice

Now, we will turn our attention to the legal practice at the Member States. We will address a variety of issues that stood out from the country reports. To a great extent, the practice confirms that the lacunae identified in the legal framework do cause trouble.

4.4.2.1 Implementation

Art. 5(3) of FD 2002/584/JHA has not been implemented properly in all Member States. Important to highlight is that Art. 5(3) of FD 2002/584/JHA is not transposed completely in Ireland. According to Irish legislation, Ireland will respond to requests as an issuing Member State to return requested persons to the executing Member State after the finalisation of the procedures in Ireland. But Ireland as executing Member State cannot request such guarantee when executing EAWs. Also, Ireland has not, to date, implemented FD 2008/909/JHA.[754] Yet, as of late a legislation draft is pending to transpose FD 2008/909/JHA.[755] The current procedure for the return is based on a national warrant with the aim to surrender the person to the authorities of the other Member State.[756]

Also as already stated, Greece has implemented Art. 5(3) of FD 2002/584/JHA as a mandatory ground for refusal which means that the guarantee must always be given for Greece to execute the EAW when it concerns nationals (and not non-Greeks for which the guarantee is an optional ground for refusal).[757] Dutch legislation is similar, however luckily the District Court of Amsterdam has adopted an interpretation of the law where the application of Art. 5(3) of FD

[753] ECJ, Order of the Court of 19 October 2010, *Kita*, C-264/10, ECLI:EU:C:2010:618 (in French/Romanian).
[754] IE, report, question 46.
[755] IE, report, question 46.
[756] IE,s report, question 46.
[757] EL, report, question 44.

2002/584/JHA is optional.[758] Poland has also limited the application of Art. 5(3) of FD 2002/584/JHA to Polish citizens only or those granted asylum but not to residents.[759] Hungary has transposed Art. 5(3) of FD 2002/584/JHA as a mandatory ground as well and its scope is limited to Hungarian nationals who are also residents.[760]

4.4.2.2 Which instrument covers the return?

As explained, Art. 25 of FD 2008/909/JHA indicates that this instrument should be used as long as it is compatible with FD 2002/584/JHA. Indeed, most Member States involved in our research use this regime to execute the return.[761] However, not all Member States do that consistently. One example is Ireland, as aforementioned, where a national warrant is used. In Greece, some prosecutors argue that the use of FD 2008/909/JHA is unnecessary and superfluous as it leads to a similar check of requirements with the EAW (leading to double work) and that the return should take place without acquiring the certificate of Art. 6 of FD 2008/909/JHA; accordingly there have been attempts to complete the transfer without applying FD 2008/909/JHA, which are usually not successful as other countries require this procedure.[762] Similarly, the Polish expert refers to a case where Poland received a request based on the Convention on the Transfer of Sentenced Persons in order to execute the guarantee.[763] Please note that in Poland there is discussion amongst academics as to whether FD 2008/909/JHA is indeed the procedure for these transfers (the legislation is not clear), with the mainstream opinion pointing out that this should be the case.[764]

4.4.2.3 Consent and distinction between nationals/non-nationals

The consent by the surrendered person in executing the guarantee of return appears quite problematic. When we talk about consent, please note that there are actually two moments where consent might become relevant: consent before the executing judicial authority to trigger Art. 5(3) of FD 2002/584/JHA and consent after surrender and the proceedings in the issuing

[758] NL, report, question 43.
[759] PL, report, question 43.
[760] HU, report, question 4.
[761] PL, report, question 47; BE, report, question 45 c); RO, report, question 45 c).
[762] EL, report, question 43.
[763] PL, report, question 47.
[764] PL, report, question 43).

Member State to actually perform the return to the executing Member State. The complexity is amplified by the fact that some Member States distinguish between nationals and non-nationals or residents.

Consent I: Is Art. 5(3) of FD 2002/584/JHA triggered by the executing Member State after the person concerned invokes it?

In all systems but Greece and the Netherlands,[765] Art. 5(3) of FD 2002/584/JHA is applied optionally, when the requested person invokes it (in the Netherlands, the court applies it as an optional guarantee, but legislatively this is still a mandatory guarantee). As it was explained by the Greek expert, this mandatory guarantee irrespective of consent is very problematic, not only because rehabilitation is not achieved, but also because there have been cases in Greece where the requested person objected to triggering Art. 5(3) of FD 2002/584/JHA – in at least one case the national court had no choice but to decide, exceptionally, not to trigger the guarantee.[766] In Poland, consent was added in the legislation explicitly in 2015.[767]

Due to incorrect implementation, some countries discriminate between nationals/non-nationals. This is the case for Hungary; only nationals who are also residents fall within the scope of the provision.[768] In Poland only nationals and persons granted asylum (but not residents) may make use of Art. 5(3) of FD 2002/584/JHA, in Greece the ground is mandatory for nationals, but optional for residents. This means that residents can still benefit from Art. 5(3) of FD 2002/584/JHA but they must convince Greek courts. The Greek expert has explained that convincing the court to invoke the optional guarantee of Art. 5(3) of FD 2002/584/JHA for residents required many administrative hurdles and that while nowadays these additional burdens are erased by recent case law, many Greek courts are not aware of the change.[769]

[765] RO, report, question 43; HU, report, question 43, BE, report, question 43; Ireland has legislation regarding these issues only when it is the issuing Member State, given the partial implementation, as explained.
[766] EL, report, question 43.
[767] PL, report, question 43.
[768] HU, report, question 43.
[769] EL, report, question 47.

Consent II: Is an additional consent required for the issuing Member State to execute the return?

This is an even more complex matter because it connects with Art. 6(2) of FD 2008/909/JHA. That provision requires the consent of the person concerned except when the person is returned to the Member State of his nationality where he also lives, when he is deported to a Member State on the basis of a expulsion or deportation order included in or consequential to the judgment of conviction, or where he has fled or returned to a Member State in view of the criminal proceedings pending against him in the issuing Member State or following a conviction in the issuing Member State. Nevertheless, if the person is still at the issuing state, his opinion will be heard – Art. 6(3) of FD 2008/909/JHA – even if consent is not a requirement according to Art. 6(2) of FD 2008/909/JHA. Please note that according to this regime of FD 2008/909/JHA there is a *de facto* discrimination of nationals who reside in the state of nationality as they have may be transferred against their will.

The question is whether these provisions are compatible with Art. 5(3) of FD 2002/584/JHA. The Belgian expert argued that the provisions of FD 2008/909/JHA regarding consent are not applicable to the return of Art. 5(3) of FD 2002/584/JHA. Consent I is therefore valid throughout the process up to and including the return and there is no Consent II required. This is supported by the fact that Art. 25 of FD 2008/909/JHA allows the application of that instrument to EAWs only as far as it is compatible. Art. 5(3) of FD 2002/584/JHA is a guarantee that binds the issuing judicial authority under that instrument and cannot be blocked by the provisions on consent in FD 2008/909/JHA. The issuing Member State must execute that guarantee and a later renunciation of consent cannot be considered, according to the opinion of the Belgian expert.[770] Yet, this does not mean that there is no way out of this, as, in Belgium, there are still remedies to challenge the transfer.[771]

An oppositive view is found in the Dutch report, where it is stated that the two instruments are compatible, at least in the opinion of the Dutch legislator, since the national provisions adopted to transpose FD 2008/909/JHA do not distinguish between consent in 'pure' FD 2008/909/JHA cases and in cases where FD 2008/909/JHA applies *mutatis mutandis* to a guarantee of return

[770] BE, report, question 45 c) ii).
[771] BE, report, question 45 c) ii).

within the meaning of Art. 5(3) of FD 2002/584/JHA. Consequently, in the Netherlands, if none of the exceptions to the consent rule found in Art. 6(3) of FD 2008/909/JHA applies, consent is required for the return of the surrendered person.[772] Some practitioners in the Netherlands have even indicated that there would be reluctance to execute the transfer if the requested person opposed to it, even in case where the consent is not required.[773] However, the experts from the Netherlands point to the wording of Art. 5(3) of FD 2002/584/JHA and to the ECJ's case law, which seem to support the interpretation that return to the executing Member State is mandatory, irrespective of consent, and that, therefore, the rules on consent of FD 2008/909/JHA might be incompatible with Art. 5(3) FD 2002/584/JHA.[774]

In Poland, the consent of the person is not required according to the legislation and after the end of the proceedings the Polish court will order the surrender to the executing Member State. The surrendered person has the right to participate at the hearing, but he is not notified of it, and his opinion might be taken into account in some cases.[775] Similarly in Romania, consent of the surrendered person is not relevant if the Art. 5(3) of FD 2002/584/JHA guarantee was already given. However, if the guarantee given includes a condition that the person must consent, then a judge will hear the surrendered person in the presence of a lawyer.[776] Greece also does not require a second consent either.[777]

Other countries might execute the transfer only if the person consents. This is the case for example in Ireland, where, at the time of writing, the Irish legal framework functions outside FD 2008/909/JHA, a situation that is expected to change once legislation to transpose FD 2008/909/JHA which is currently pending, and at an advanced stage of the legislative process, is enacted.[778] This appears to be the case also in Hungary, namely that consent is decisive.[779]

We therefore see that there is some diversity and, most importantly, there is lack of clarity regarding the compatibility of the two instruments and the procedure of return per se.

[772] NL, report, question 45 c) i).
[773] NL, report, question 45 c) i).
[774] NL, report, question 45 c) i).
[775] PL, report, question 45 c) i).
[776] RO, report, question 45 c).
[777] EL, report, question 45 c).
[778] IE, report, question 45 c).
[779] HU, report, question 45.

Accordingly, we have developed Recommendations **5.3** and **4.5** to address the lack of clarity on this matter.

4.4.2.4 Authority

The authorities of the issuing Member State that issue the guarantee are also diverse, *e.g.* the Ministry in Romania,[780] the court in Poland (different possibilities concerning which court),[781] the investigative judge in the Netherlands (as issuing judicial authority),[782] the High Court in Ireland,[783] Ministry of Justice in Hungary,[784] the prosecutor in Greece[785] and also in Belgium.[786] When national laws are not clear on the authority competent to issue the guarantee, this might lead to delays. For example, the Polish expert mentions that the guarantee issued by the Polish court acting as the issuing judicial authority was on some occasions not accepted by the executing judicial authority, due to the lack of an official text and clear rules.[787]

The Dutch experts mentioned a case where the guarantee was given by a Norwegian police officer. While the authority issuing the guarantee need not be the issuing judicial authority, this case was disputed in court because it seemed less binding, but as the Norwegian police officer was acting upon the orders of the Norwegian issuing judicial authority (a prosecutor), the Dutch court accepted this.[788]

4.4.2.5 Uniform text for the guarantee

A specific text used to give the guarantee is mentioned by the Romanian expert: "in case of surrender to Romania, if convicted, the person in case is going to be returned to the executing state in accordance with the applicable instruments".[789] The Dutch experts also mentioned a specific text used by the investigative judges in the District Court of Amsterdam but it is unclear

[780] RO, report, question 44.
[781] PL, report, question 44.
[782] NL, report, question 44.
[783] IE, report, question 44.
[784] HU, report, question 44.
[785] EL, report, question 6 b).
[786] BE, report, question 44.
[787] PL, report, question 46.
[788] NL, report, question 47.
[789] RO, report, question 45 a).

whether this is used by all courts, namely: "The Office of the Investigating Judge at /// hereby gives the guarantee that the (nationality) national (///), if he is sentenced to a custodial sentence or detention order by final judgment, will be returned to (Member State) to serve his custodial sentence or detention order there.]"[790] The Hungarian expert reported a standard text as well but is was not possible to retrieve it.[791] And finally the Belgian expert also included in the report a standard text: "A guarantee is given in accordance with article 5, § 3 of the framework decision 2002/584/JHA for the return to (fill in the country) of (fill in the identity of the person concerned) who will be surrendered to Belgium. This guarantee entails that the person concerned, after a final decision imposing a custodial sentence or measure involving deprivation of liberty has been given, will be returned to (fill in the country) in order to serve there the custodial sentence or detention order passed against him according to the dispositions of framework decision 2008/909/JHA."[792]

In Ireland the text of the legislation is used as a form of uniform text.[793] Most interestingly, the Irish authority routinely communicates when issuing the EAW that such guarantee is available for the taking. This is done *proprio motu* and is added as a standard text to section (f) of the EAW.[794] This is to expedite procedure and it has been suggested as a good practice by the Dutch

[790] NL, report, question 45 a).
[791] HU, report, question 45.
[792] BE, report, question 45 a).
[793] IE, report, question 45 a).
[794] IE, report, question 44: "*In the context of Article 5(3) of the Framework Decision, Ireland has enacted the following legislation. Section 45B of the European Arrest Warrant Act 2003 as inserted by Section 20 of the Criminal Justice (Miscellaneous Provisions) Act 2009 provides that: In the circumstances of an extradition order or consent in the Member State relating to this warrant the following legislation will apply accordingly: S45B (1): Where a national or resident of another state from which he or she is surrendered- (a). is surrendered to the State pursuant to a European Arrest Warrant with a view to being prosecuted in the State and; (b). whose surrender is subject to the condition that he or she, after being so prosecuted, is returned if he or she so consents to that other state in order to serve any custodial sentence or detention order imposed upon him or her in the State, the Minister shall, following the final determination of the proceedings and if the person consents, issue a warrant for the transfer of the person from the State to that other state in order to serve there any custodial sentence or detention order so imposed. (2) A warrant issued under subsection (1) shall authorise— (a) the taking of the person to a place in any part of the State and his or her delivery at a place of departure from the State into the custody of a person authorized by the other state to receive the person, for conveyance to the other state concerned, and the keeping of the person in custody until the delivery is effected, and (b) the removal of the person concerned, by the person to whom he or she is delivered, from the State. The issuing Judicial authority confirms that in the circumstances of an extradition order or consent relating to this Warrant, the ten day period for the surrender of the requested person will begin subject to the agreement of the executing Judicial authority, once the requested person's sentence/criminal matter(s) in the executing Member State have been completed (if applicable). Pursuant to Article 24 (1) of the Framework Decision."*

experts as well and it is also suggested in the Handbook.[795] Accordingly, we have adopted a similar approach in our Recommendation **4.8**.

The content of the guarantee is rather crucial as not all guarantees are accepted in practice. The Dutch experts mention quite a few cases where the guarantee given was either too vague or too conditional to be accepted. The Dutch courts have accepted guarantees that contain conditions such as: "the person… expresses his will not to serve his sentence in France and to benefit from the return guarantee", a guarantee that referred in the text to the European Convention on the Transfer of Sentenced Persons (but Germany, the issuing Member State, had already transposed FD 2008/909/JHA which replaced that instrument), a guarantee where it was stated that it was not final but could be appealed (upon inquiry by the Amsterdam Court it was established that appeal was no longer possible), a monosyllabic "yes" to a request for a guarantee of Art. 5(3) of FD 2002/584/JHA, a statement that the issuing judicial authority will comply with a condition of return set by the executing judicial authority (this is an example from Poland mentioned in the Dutch report).[796] Nevertheless, the guarantee given should not be conditional: for example the guarantee cannot be made depended on the finding by the court of the issuing sate that this would indeed help social rehabilitation or other objectives.[797] To address this issue we have developed Recommendation **4.4**.

4.4.2.6 Other procedural steps and procedure of return

As seen, the ECJ held that the return should happen as soon as possible after the final judgment in the issuing Member State unless there are other procedural steps (see above for definition). This is indeed the case apparently in Romania,[798] Poland,[799] Hungary,[800] Belgium,[801] Greece (although the expert does not make clear whether the decision must be final),[802] Ireland (in the way that this is limited as explained before).[803] The Dutch experts mention that while the

[795] NL, report, question 45 d) and *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/12, section 3.2.2.
[796] NL, report, question 47.
[797] NL, report, question 47.
[798] RO, report, question 47.
[799] PL, report, question 47.
[800] HU, report, question 45.
[801] BE, report, question 45 d).
[802] EL, report, question 45 d).
[803] IE, report, question 45 d).

execution of the transfer should happen after the final judgment in the Netherlands, some practitioners are of the opinion that it is the surrendered person who should trigger the return, so the timing depends on his wish.[804] Polish literature indicates that there are some cases that the return might be delayed, when for example there are other criminal proceedings against the same person pending in Poland.[805] Please note that no expert in our research mentions that there are other procedural steps in their legal systems.

The procedure of return is opaque. Not much information could be retrieved on the authority competent to take the initiative to execute the guarantee and the ensuing procedure. Contrariwise, the national experts report a lack of follow-up: the guarantee gets forgotten both by the executing and the issuing Member States! This pathology was mentioned *inter alia* by the experts of Romania,[806] Greece[807] and Belgium.[808] The Greek expert further elaborates that this delay prevents the execution of conditional release from a social-rehabilitation point of view, as the sentenced person still wishes to return to his country but if the sentence is suspended with conditions, he is trapped in the issuing Member State, especially since FD 2008/947/JHA is not popular.[809] One good practice comes from Romania where the condition of return is marked in a Registry (National Administration of Penitentiary) and accordingly, it becomes someone's job to execute it.[810]

Examples of some procedures mentioned by the experts: in Ireland, the Minister will issue a warrant once the proceedings end and the person consents and there is an agreement on the handover with the executing judicial authority;[811] the Greek prosecutor will initiate the surrender after agreement with the executing judicial authority and the finalisation of proceedings;[812] in the Netherlands, the procedure is probably triggered by the prosecutor, although the Dutch experts point out that, pursuant to the ECJ's case law, the issuing judicial authority (the investigative judge) should take decisions concerning carrying out a guarantee of

[804] NL, report, question 45 d).
[805] PL, report, question 47.
[806] RO, report, question 47.
[807] EL, report, question 47.
[808] BE, report, question 47.
[809] EL, report, question 47.
[810] RO, report, question 45 d).
[811] IE, report, question 45 d).
[812] EL, report, question 45 d).

return.[813] Notably there is less detail in most reports regarding the actual procedure, as if such procedure is unclear or not standardised.

4.5 Time limits – Art. 17 of FD 2002/584/JHA

A key element of the EAW procedure is its speed. Art. 17 of FD 2002/584/JHA sets strict and short deadlines for deciding on the execution of an EAW. If the deadlines are (habitually) not observed, the integrity and value of the EAW procedure is compromised as this is supposed to be a swift and efficient system due to the underlying mutual trust between the Member States.[814]

4.5.1 Legal framework

Pursuant to Art. 17(2) and (3) of FD 2002/584/JHA, EAWs should be executed within 10 days if the person consents to his surrender and in 60 days if not. These time limits can be extended by 30 days in specific cases, (Art. 17 (4) of FD 2002/584/JHA), but in those cases the issuing judicial authority must be notified immediately including the reasons for the delay. The final decision on the execution of the EAW must, in principle, be taken within these time limits.[815] Pursuant to Art. 17(7) of FD 2002/584/JHA, when the executing judicial authority cannot observe those time limits in exceptional circumstances, Eurojust must be informed with explanation on the reasons.

Such exceptional circumstances to extend the deadline are for example:

- the executing judicial authority assesses whether there is a real risk that the requested person will, if surrendered, suffer inhuman or degrading treatment, within the meaning of Art. 4 of the Charter, or a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by Art. 47(2) of the Charter, or,

[813] NL, report, question 45 d).
[814] ECJ, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474, paras. 29 and 32.
[815] ECJ, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474, para. 32.

- proceedings are stayed pending a decision of the ECJ in response to a request for a preliminary ruling made by an executing judicial authority, on the basis of Art. 267 TFEU.[816]

When the time limits cannot be observed, the executing judicial authority is not forced to release the suspect and national legislation should not mandate that.[817] If the executing judicial authority decides to release the person provisionally, measures should be taken "to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the European arrest warrant has been taken".[818] This may include bail or other measures alternative to detention. Yet, when those measures are not sufficient to decrease to an acceptable degree a very serious risk of absconding, the executing judicial authority may not simply release the person only because the time limits have expired.[819] In other words, the validity and legality of the detention pending an EAW does not depend *decisively* on compliance with the time limits.

Furthermore, the national and EU rules regarding detention should be clear and predictable, which flows from Art. 6 of the Charter and Art. 5 ECHR – the legal framework of detention pending surrender should protect individuals from arbitrariness, including protection from unforeseeable and unclear decisions regarding detention.[820] In *TC*, the contradiction between the EU and Dutch rules and the divergence in the interpretation of those rules by different Dutch courts led to the finding that the legal framework was unpredictable and lacked clarity; in that case the contradiction concerned whether the national court ought to release automatically the person upon expiration of the time limits of Art. 17 of FD 2002/584/JHA. When those time limits are extended (resulting in further deprivation of liberty), national law must be clear in that respect and must be interpreted in conformity with EU law.[821] Accordingly, detention beyond those time limits is not against the FD 2002/584/JHA but it must be based on a national legal basis which is in conformity with the FD 2002/584/JHA and interpreted in a consistent way by national courts.

[816] ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, para. 43.
[817] ECJ, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474, para. 44.
[818] ECJ, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474, para. 61.
[819] ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, para. 63.
[820] ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, para. 63 which cites ECJ, judgment of 15 March 2017, *Al Chodor*, C-528/15, ECLI:EU:C:2017:213, para. 39.
[821] ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108.

Importantly, requesting and providing supplementary information on the basis of Art. 15(2) of FD 2002/584/JHA should be carried within the time limits (save in the situations mentioned above). Neither the wording of that provision nor the ECJ obliges strictly speaking the executing judicial authority to fix a deadline when requesting supplementary information.[822] When fixing such a time limit though, this must be adjusted to the particular case, taking into account the time required to collect the information. Yet, the executing judicial authority when imposing such deadline *must* take into account the need to respect the time limits of Art. 17 of FD 2002/584/JHA.[823]

4.5.2 Legal Practice

4.5.2.1 Availability of data

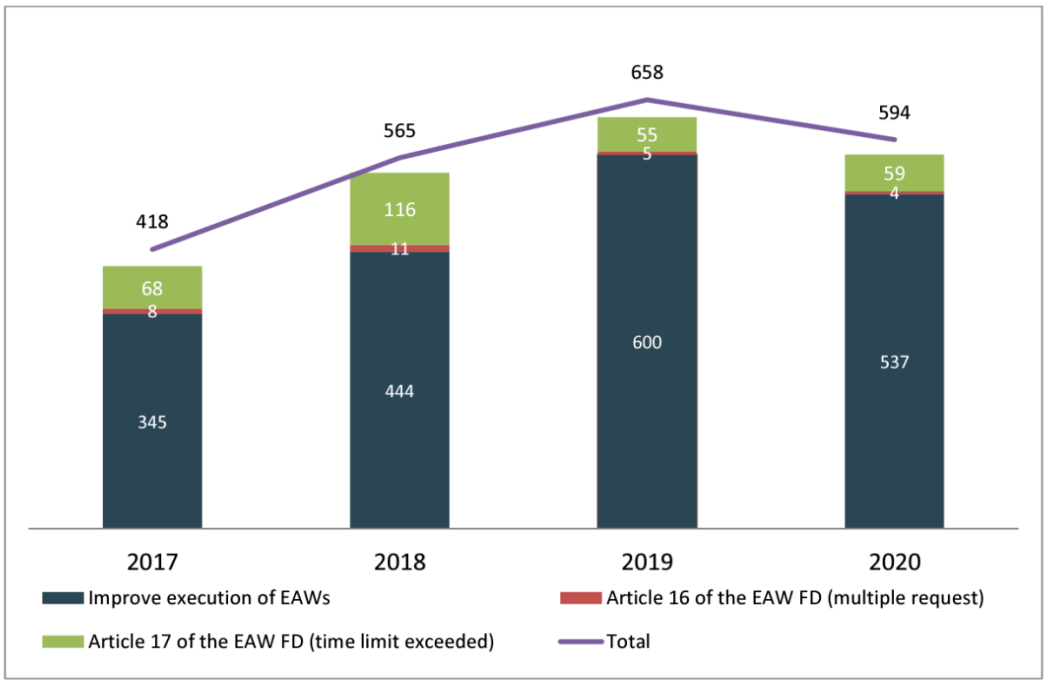
It was surprising to observe that availability of statistics regarding EAWs, the time limits and the outcome of EAW proceedings are scarce. In several countries national statistics were simply unavailable to the experts and most data were taken from existing EU resources.[824] The Irish and Dutch experts were able to procure some national data.[825] It is worth mentioning that the Irish Ministry of Justice and Equality draws up yearly reports on EAW practice which contain much insight to the whole EAW practice in Ireland – a good practice.[826] The lack of statistics is worrying in an such a digital age.

Overall, from the data that could be obtained also in conjunction with the EU material, it can be observed that most countries do relatively well in respecting the time limits. This is even the case where a national remedy exists against the decision of the court, as it is in Greece where the requested person may file an appeal to the Supreme Court within 24 hours against the decision to execute the EAW; the Supreme Court decides within 8 days.[827]

[822] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 97.
[823] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 97.
[824] PL, report, question 42; RO, report, question 42; BE, report, question 42 HU, report, question 42; EL, report, question 42.
[825] IE, report, question 42 b); NL, report, question 42 b).
[826] IE, report, question 42 b).
[827] EL, report, question 42 a).

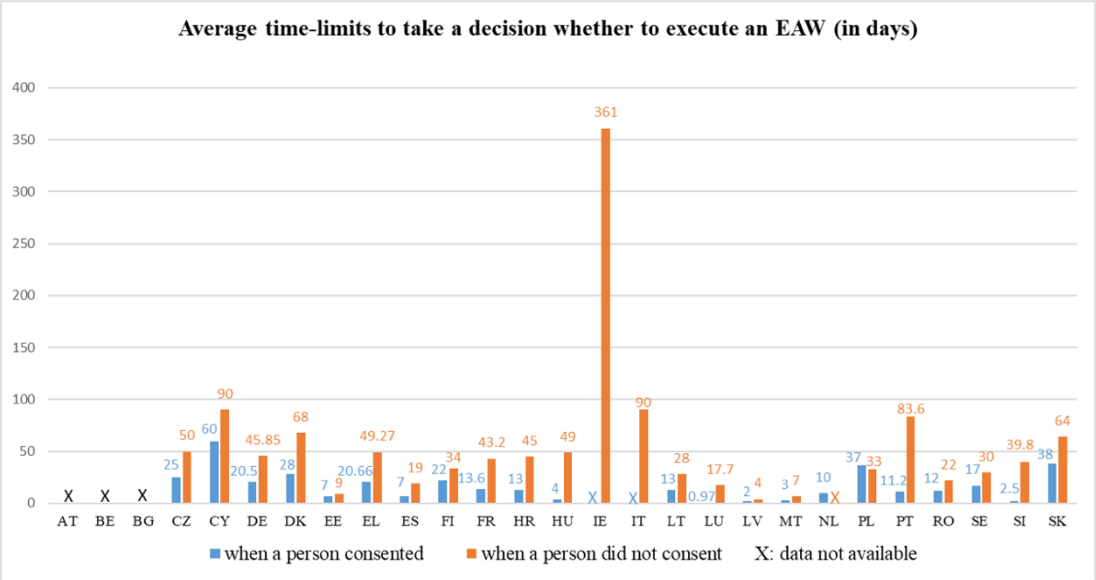
There does not seem to be a need to alter the time limits, or to attach any consequences to non-observance, taking into account the growing complexity of the procedures as well. Looking at the reports, we see that delays are usually due to supplementary information being requested, *e.g.* in Belgium and Greece.[828] The following table comes from the Report on Eurojust's Casework in the Field of the European Arrest Warrant, 07 July 2021, p. 9:[829]

Number of EAW cases registered at Eurojust (2017–2020)



It does appear to be the case that some countries, *e.g.* Ireland, do take longer to reach a decision on the execution of an EAW, looking at the following table from the Commission statistics of 2019 p. 15, published recently. However, as is explained both by the Irish expert and in the Commission document, this is because of the pending preliminary reference proceedings of that year:[830]

[828] BE, report, question 42 a; EL, report, question 42 b.
[829] See here https://www.eurojust.europa.eu/publication/report-eurojusts-casework-field-european-arrest-warrant-july-2021
[830] COMMISSION STAFF WORKING DOCUMENT. Statistics on the practical operation of the European arrest warrant – 2019, Brussels, 6.8.2021. SWD(2021) 227 final, p. 15; see for explanations on the delays in p. 32 in the footnotes.



4.5.2.2 The special case of the Netherlands

As of 1 April 2021, Dutch legislation provides that extending the time limit is only possible in three exhaustively enumerated cases: (i) When the court is expecting a ECJ response to a preliminary reference request which is relevant for the case at hand (in that case repeated extensions of a maximum of 30 days each time are possible until the ECJ has rendered judgment and the court has taken its decision on the execution of the EAW); (ii) when the court is in the process of assessing a real *in abstracto* risk of a violation of the Charter (repeated extensions of a maximum of 30 days each time are possible) (iii) when the court examines an *in concreto* real risk (repeated extensions of a maximum of 60 days each time).[831]

This legislation significantly limits the powers of the Dutch executing judicial authority to extend the time limits and to request supplementary information. This situation may force the Dutch court to render a decision without the necessary information, as it has happened in some cases. This legal framework, according to the Dutch experts, has led to refusals that could have been avoided. Additionally, the Dutch executing judicial authority is, following this legislation, precluded from making preliminary references to the ECJ after the 90 days have passed as all references must have been made within the 90 days-limit. This does not appear to be in line

[831] See for more explanation and examples of the problematic situation in NL, report, question 42 a).

with EU law.[832] Accordingly, the Netherlands is recommended to amend this practice (see Recommendation **4.9**).

4.5.2.3 Informing Eurojust

In most countries informing Eurojust is mandated in the legislation as this is included in the text of FD 2002/584/JHA.[833] In the Netherlands, this obligation was only transposed into national law on 1 April 2021.[834] Nevertheless, Member States apparently do not always comply with the duty to inform Eurojust, see *e.g.* Belgium.[835] It is unclear to which extent this obligation is enforced as such. One exception is clearly Ireland who is the best student in the class when it comes to this issue. Some countries have a stronger supervisory mechanism in case of delays, for example in Poland, apart from the obligations stemming from the FD 2002/584/JHA, the regional courts must inform the Ministry of Justice, supply documentation and give reasons for the delay.[836]

The following table comes from the Report on Eurojust's Casework in the Field of the European Arrest Warrant, 07 July 2021, p. 47:[837]

[832] NL, report, question 42 a).
[833] For example see, IE, report, question 42 b; PL, report, question 42 b.
[834] NL, report, question 42 a).
[835] BE, report, question 42 a).
[836] PL, report, question 42 c).
[837] See here https://www.eurojust.europa.eu/publication/report-eurojusts-casework-field-european-arrest-warrant-july-2021

Overview of the number of formal Article 17 EAW FD notifications to Eurojust, per country (2017–2020)

Country (*)	2017	2018	2019	2020	Total
BG	0	3	1	0	4
CY	0	0	0	3	3
CZ	24	6	2	4	36
EL	1	0	0	1	2
ES	0	0	0	1	1
HR	1	1	0	0	2
HU	0	1	0	1	2
IE	42	79	0	43	164
LV	0	2	0	0	2
PT	0	1	0	0	1
SE	0	0	0	3	3
SI	0	1	0	0	1
SK	0	0	0	2	2
UK	0	22	52	1	75

(*) The countries not included in this table have zero notifications.

When comparing the number of cases, the Member States reported in which the time limits were exceeded to the number of cases reported to Eurojust, we see some significant differences for some Member States, which confirms that the obligation of Art. 17(7) of FD 2002/584/JHA is not respected in many cases.

The following table comes from the Commission statistics of 2019, p. 35-36:[838]

8.1. In how many cases this year were the judicial authorities of your Member State not able to respect the 90-day time limit for the decision on the execution of the EAW according to Article 17(4) of the Framework Decision?

AT	BE	BG	CZ	CY	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK
X	X	X	7	1	70	7	0	2	18	0	5	4	0	83	X	0	X[73]	0	0	165[74]	3	0[75]	1	0	2	7

8.2. In how many of the cases in 8.1 above was Eurojust informed (Framework Decision, Article 17(7))?

AT	BE	BG	CZ	CY	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK
X	X	X	7[76]	1	0	0	0	2	0	0	1	0	0	83	X	0	X	0	0	X[77]	2	X	1	0	0	1

[838] COMMISSION STAFF WORKING DOCUMENT. Statistics on the practical operation of the European arrest warrant – 2019, Brussels, 6.8.2021. SWD(2021) 227 final, p. 36-37.

4.5.2.4 Fixing a time limit for complying with the request of Art. 15(2) of FD 2002/584/JHA

While fixing a time limit is not an obligation per se under EU law as explained, complying with the deadlines of Art. 17 of FD 2002/584/JHA becomes far too difficult if a time limit is not fixed. Not all experts reported that time limits were habitually fixed when requesting supplementary information. For example, the Hungarian expert mentioned that no example could be given of a fixed time limit; instead, the term 'as soon as possible' is used.[839]

The rest of the experts in our research do indicate some form of time limit for the issuing judicial authority to respond. There are different types of time limits not always dealt with in the same way within the legal systems of the Member States. More specifically:

- A *legislative imperative*: in Poland, legislation obliges courts to fix a time limit when requesting supplementary information, but the courts determine how long this will be. This is a good practice, as it pushes courts to comply with Art. 17 of FD 2002/584/JHA.
- At *the discretion of courts*: most other systems leave it to the discretion of the executing judicial authority. It is observed that usually judges do set a deadline one way or another and are mindful of Art. 17 of FD 2002/584/JHA (with the exception of Hungary where this was not seen in the research of the Hungarian expert, as explained). The Irish expert mentions that setting time limits for the Art. 15(2) of FD 2002/584/JHA request is a recent phenomenon, but it is being done.[840]

How long are the deadlines and how to decide which deadline to fix? Again, a diversity of approaches were observed:

- Some Member States, according to their experts, use the next hearing of the court as an indicator, which is then scheduled within the Art. 17 of FD 2002/584/JHA time-limit and by then the information must be made available to the executing judicial authority. The Dutch expert reported this method;[841] this is also the method followed by some Polish judges, *e.g.* a deadline of 3 days before the hearing of the court.[842] This is a method that puts pressure to the issuing authority (presuming that they are aware what

[839] HU, report, question 41.
[840] IE, report, question 41.
[841] NL, report, question 41.
[842] PL, report, question 41.

the deadline alludes to) because if they do not comply the execution of the EAW might be refused and it helps expediency of proceedings in the executing Member State as everything is ready before the hearing.

- There is also the possibility for fixed deadlines. The Romanian expert mentioned such an example where a time limit is always set due to the procedural constraints, with an initial period 10 or 15 days which can be extended for another 10 or 15 days. Accordingly, if the issuing Member State remains unresponsive, the Romanian authorities will request assistance from the EJN or Eurojust to ensure the proper respect of those limits.[843] This is also a practice that puts pressure not only to the issuing judicial authority to reply, but also to the executing judicial authority to mobilise external help available.
- Other countries set deadlines on a case-by-case basis. For example, Belgian authorities, according to the Belgian expert, will factor in the following characteristics in setting a time limit: the circumstances of the case, whether or not the person concerned is at liberty, the possibilities of the court's agenda, the nature and the complexity of the requested information and the time limits of Art. 17 of FD 2002/584/JHA. Some examples are: 2-3 days to 1 week for detention conditions, 5 days to confirm that the EAW was withdrawn, 1 month to answer several questions relating to the national proceedings. [844] Please note that in Belgium additional information may be asked before the person is located, and in that case no deadline will be set.[845] This is also an approach followed in Greece where courts also decide on a case-by-case basis.[846] Such a context-sensitive approach presents the advantage of balancing the needs of both issuing and executing Member States including the rights of the requested person and Art. 17 of FD 2002/584/JHA. It also appears to be closer to the ECJ case law that requires those factors to be considered when deciding on the deadline (see above). However, this approach might lead to violations of Art. 17 of FD 2002/584/JHA, if other interests are weightier. For example, the Greek expert noted cases where the court set a deadline of 2 months because the suspect was not in custody and the information required was bulky – although this would lead to an Art. 17 of FD 2002/584/JHA violation.[847]

[843] RO, report, question 41.
[844] BE, report, question 41.
[845] BE, report, question 41.
[846] EL, report, question 41.
[847] EL, report, question 41.

To include some examples of deadlines presented in the national reports:

- In Belgium, 5 days to provide an answer to the defence lawyer's statement that the national arrest warrant and the EAW were withdrawn; 1 month to give an answer to several questions related to the proceedings; 2-3 days to 1 week to give a guarantee regarding detention conditions (in cases where the requested person is detained); 1-3 days in case where the intervention of Eurojust was asked.[848]
- In Greece, 30 days or more if the suspect is not in custody.[849]
- In Poland, usually anywhere between 2 and 4 weeks, or a shorter deadline *e.g.* 3 days.[850]

In our view, there is no single best way to regulate the imposition of deadlines for supplementary information. Each approach has its benefits and possible shortcomings and depicts a different attitude towards discretion of courts and procedural aspects that differ in each system.

4.6 Recommendations

Recommendations to the EU authorities and institutions

Recommendation 4.1 The EU is recommended to provide legislation on harmonised standards of prison conditions, including not only the physical space but also other living conditions that play a role in assessing prison conditions (*e.g.* access to education, religious space). These should also include how detainees with health or other special issues are treated in prison facilities.

> This recommendation aims to address the lacuna of EU harmonised standards on detention conditions which has created unclarity amongst the authorities of Member States regarding the standards that would satisfy the Charter.

Recommendation 4.2 The Fundamental Rights' Agency is recommended to advance its database to a constantly updated, digital hub of information regarding present detention

[848] BE, report, question 41.
[849] EL, report, question 41.
[850] PL, report, question 41.

conditions in Europe that should include recent ECtHR case law and the accumulation of other resources from NGOs or other organizations that the Agency itself deems reliable and updated.

> This is aimed at addressing the lack of up to date or objective and concrete information regarding the detention conditions or the deficiencies of judicial systems. National judicial authorities require assistance to apply the ECJ case law in this field when executing EAWs.

Recommendation 4.3 The EU is recommended to amend the Handbook on the EAW to include a template on what type of supplementary information in the context of *Aranyosi and Căldăraru* and *Minister for Justice and Equality (Deficiencies in the system of justice)* could be requested, incorporating the EU requirements of prisons standards and independence of the judiciary; such template(s) should be made available to all judicial authorities. Such templates should include space to request additionally a guarantee (thus, not only request for information).

Recommendation 4.4 The EU is recommended to develop a unified text for providing the guarantee of Art. 5(3) of FD 2002/584/JHA.

Recommendation 4.5 The EU is recommended to clearly regulate whether the return guarantee of Art. 5(3) of FD 2002/584/JHA can be triggered by the executing judicial authority only after the requested person invokes it. The EU is also recommended to clearly regulate whether a consent at the issuing Member State is required for the return guarantee to be executed after the proceedings in that Member State end.

Recommendations to the Member States

Recommendation 4.6 Member States are recommended *not* to request or supply supplementary information regarding the appreciation of the merits of the case at the issuing Member State (*e.g.* statute of limitation in the issuing Member State, evidence supporting the case). Member States should not send standardised lists with questions/questionnaires automatically when requesting information in the context of Art. 15 (2) of FD 2002/584/JHA. The use of Art. 15(2) must be limited to cases in which supplementary information is strictly

necessary for the executing judicial authority to take its decision and must be limited only to questions that are relevant for the *ad hoc* case.

Recommendation 4.7 The issuing authorities of Member States when responding to a request for supplementary information regarding detention conditions of their prisons are recommended to give information in their response regarding the two following aspects, if possible: i) information about the prison facilities in which the person concerned will likely be detained after surrender, including on a temporary or transitional basis; ii) if possible and desirable, a guarantee in the form of a concrete promise to detain the requested person at a specific facility that complies with the relevant standards (and explain how this complies) or for which no *in abstracto risk* is established.

Recommendation 4.8 Issuing judicial authorities are recommended to include the guarantee of return of Art. 5(3) of FD 2002/584/JHA in the initial EAW in *section (f)* (if the requested person is their national or resident), in order to avoid the delay caused when executing judicial authorities have to request for it.

Recommendation 4.9 The Netherlands is recommended to amend its legislation that restricts the extension of the time limits of Art. 17 of FD 2002/584/JHA to only specific and exhaustively described in that legislation cases.

4.7 New structures of cooperation in criminal matters with and within the EU

As the European Union develops a network to enable cooperation in criminal matters with third countries and with Member States, new questions arise. This subsection enumerates new cooperation mechanisms between the EU and its partners, dealing with the consequences and the difficulties created by these same mechanisms for effective cooperation. The first mechanism is the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ* 2006, L 292/2, (hereafter, EU Agreement with Iceland and Norway) which entered into force on 1 November 2019 (*OJ* 2019, L 230/1). The second mechanism of analysis is the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the

United Kingdom of Great Britain and Northern Ireland, of the other part, OJ 2021, L 149/10[851] (hereafter, EU-UK Trade and Cooperation Agreement) which was applied provisionally from 1 January 2021 and entered into force on 1 May 2021. The third mechanism, Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ* 2017, L 283/1 (thereafter, EPPO Regulation) which enabled EPPO to start its activities on 1 June 2021. Finally, this subsection presents and analyses the impact on cooperation in criminal matters of the *Ruska Federacija* case, as a consequence of and in comparison to the *Petruhhin* case.[852]

On 8 June 2022, the European Commission released the new Guidelines on Extradition to Third States[854] which summarizes the case law that affected the topic and suggested standard procedures to be adopted by Member States in such cases.

4.7.1 Surrender to and from Iceland and Norway

4.7.1.1 The legal framework

The EU Agreement with Iceland and Norway 'seeks to improve judicial cooperation in criminal matters between, on the one hand, the Member States of the European Union and, on the other hand, the Republic of Iceland and the Kingdom of Norway, in so far as the current relationships among the contracting parties, characterised in particular by the fact that the Republic of Iceland and the Kingdom of Norway are part of the EEA[855], require close cooperation in the fight against crime'.[856] The Agreement translates the traditional 'proximity, long-standing common values and European identity'[857] of Norway and Iceland into close judicial cooperation in criminal matters, bringing in a parallel with the Union concept of

[851] Brussels and London, 30 December 2020, *OJ* 2021, p. 10.
[852] See André Klip, European Criminal Law. An Integrative Approach, Intersentia Cambridge 4th ed. 2021, p. 640-641. Leandro Mancano. Trust Thy Neighbour? Compliance and Proximity to the EU through the Lens of Extradition Yearbook of European Law, Vol. 40, No. 1 (2021), pp. 475–514; The Agreement on Extradition between the European Union and the United States of America, OJ 2003, L181/28 is not object of this research project. Agreement on Extradition between the European Union and the United States of America, 19 July 2003, OJ 2003, L 181/28.
[854] Commission Notice – Guidelines on Extradition to Third States (20220/C22/ 01).
[855] The European Economic Area is composed by the EU Member States, Iceland, Norway and Liechtenstein.
[856] ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, para. 72.
[857] ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, para. 3.

mutual trust and mutual confidence.[859] A concrete example of this is found in the similarities between the Agreement and FD 2002/584/JHA,[861] as well as between the EAW-form and the Arrest Warrant Form in the Annex of the Agreement.[864]

4.7.1.2 The Agreement in practice

Difficulties on the issuing side

Possibly due to the relative short period that the Agreement has been in force, Member States` experts have not reported cases or difficulties in issuing Arrest Warrants to Iceland or Norway. The reports for Belgium, Hungary and the Netherlands have indicated that, among the cases verified by experts, none of these Member States issued Arrest Warrants under the EU Agreement with Iceland and Norway.[865] Differently, the country experts of Greece, Ireland, Poland and Romania stated one or a few number of cases, mostly related to Norway, where Arrest Warrants have been issued, however, no difficulties were encountered.[866]

Difficulties on the executing side

Most of the experts have reported that no cases were found where their Member States functioned as executing authorities of Arrest Warrants sent by Iceland or Norway.[867] The Greek and Romanian experts informed that a few cases from Norway were identified, however, no difficulties were found.[868]

Only the Dutch executing judicial authority has encountered difficulties with the four Norwegian Arrest Warrants[869] it has dealt with.[870] In this regard, two issues were specified by the experts. The first concerned the concept of 'issuing judicial authority' under FD

[859] In the preamble of the EU Agreement with Iceland and Norway, the contracting parties 'have expressed their mutual confidence in the structure and functioning of their legal systems and their capacity to guarantee a fair trial'. Vienna, 28 June 2006, *OJ* 2006.
[861] ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, para. 74; The prevalence of similarities does not eliminate the eventual differences. Three relevant differences are present in article 3(4) reintroducing double criminality, article 6 addressing the political offence exception and article 7(2) which refers to nationality, all provisions of the Agreement.
[864] ImprovEAW Questionnaire. Available in: www.improveaw.eu. Accessed on: 1 January 2022,
[865] NL, report, question 56; BE, report, question 56; HU, report, question 56.
[866] EL, report, question 56; IE, report, question 56; PL, report, question 56; RO, report, question 56.
[867] BE, report, question 57; HU, report, question 57; IE, report, question 57; PL, report, question 57.
[868] EL, report, question 57; RO, report, question 57.
[869] District Court of Amsterdam, judgment of 4 August 2020, ECLI:NL:RBAMS:2020:3894; District Court of Amsterdam, judgment of 30 November 2020, ECLI:NL:RBAMS:2020:5327; District Court of Amsterdam, judgment of 25 February 2021, ECLI:NL:RBAMS:2021:1895.
[870] NL, report, question 57.

2002/584/JHA and whether the case-law of the Court of Justice[871] also applies to the EU Agreement with Iceland and Norway,[873] which the Amsterdam District Court answered positively. The second issue regarded whether a guarantee of return[874] issued by a police officer is valid, which the Amsterdam District Court also confirmed. The Court`s reasoning was that the police officer was acting on behalf of the public prosecutor, who had confirmed that the guarantee was still valid, as stated in the Arrest Warrant and the form. Furthermore, the Court attested having no reason to doubt that the public prosecutor had mandated the police officer to issue the guarantee.[876] By doing so, the Court reaffirmed the mutual confidence in the Norwegian system.

4.7.1.3 Recommendations

No recommendations are needed.

4.7.2 The application of the Petruhhin case and Ruska Federacija case

4.7.2.1 The legal framework

The *Petruhhin* case

The *Petruhhin* case[877] concerns Member States that do not extradite or apply specific conditions to the extradition of their own nationals, but do extradite nationals of other Member States.[878] According to the judgment, an extradition request from a third country to a Member State other than that of the requested EU citizen`s nationality – when the EU citizen has moved exercising their right to free movement[879] – creates the duty for the Member State to inform the Member State of nationality about the extradition request. Should the Member

[871] See specifically ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, Joined Cases C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, para. 75; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, para. 53.
[873] The District Court of Amsterdam understood that the decision to issue an Arrest Warrant and, inter alia, the assessment of proportionality of such a decision are capable of being subject, in Norway, of court proceedings. As a consequence, the decision to issue an Arrest Warrant meets in full the requirements inherent in effective judicial protection. See District Court of Amsterdam, judgment of 4 August 2020, ECLI:NL:RBAMS:2020:3894.
[874] Art. 8(3) of the EU Agreement with Iceland and Norway.
[876] Judgment of 16 March 2021, parketnummer 13/751026-20 (not published).
[877] ECJ, judgment of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630.
[878] André Klip, Europeans First!: Petruhhin, an Unexpected Revolution in Extradition Law. European Journal of Crime, Criminal Law and Criminal Justice, No. 25 (2017) pp. 195 - 204.
[879] On the basis of Article 21 TFEU.

State of nationality so request, the Member States that acts as requested state in extradition must surrender the requested person under the terms of FD 2002/584/JHA to the Member State of nationality. The conditions for the surrender under FD 2002/584/JHA are that the Member State of nationality 'has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory';[881] and, to safeguard the objective of preventing the risk of impunity, that the EAW must, at least, relate to the same offences as the extradition request.[883] This report will refer to this chain of obligations as the *Petruhhin* mechanism.

Extradition of nationals v. Extradition of nationals of other Member States

Petruhhin impacts only Member States that do not extradite their own nationals or do so only under certain conditions, but do extradite nationals of other Member States. In order to analyse the practical consequences of the judgment, it is necessary to understand Member States` considerations of the impact of nationality of EU citizens on extradition.

[881] ECJ, judgment of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630, para. 48.
[883] ECJ, judgment of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630, para. 50; ECJ, judgment of 10 April 2018, *Pisciotti*, C-191/16, ECLI:EU:C:2018:222, para. 54.

Under Dutch[884], Irish[885], Polish[886], and Romanian[887] laws, extradition of their own nationals is only allowed under certain conditions; yet, they allow extradition of nationals of other Member States in general. For the Member States analysed in this report, most of the conditions for extradition of their own nationals relate to differences between extradition for the purposes of prosecution or of execution of a sentence.[889] Belgian law does not allow the extradition of their own nationals, despite allowing it for nationals of other Member States.[891] Greek[892] law prohibits the extradition of nationals to third countries, but allows that of other Member State nationals. Hungarian Law, in Act XXXVIII of 1996, establishes distinctions setting aside Hungarian nationals that reside in Hungary from Hungarian nationals that do not

[884] Under Dutch extradition law, Art. 4 of the Extradition Act (*Uitleveringswet*), that enables extradition of Dutch nationals to not be granted only under certain circumstances, can only be applied insofar as the applicable extradition treaty allows for that application. Hence, some of the old bilateral extradition treaties totally exclude the extradition of nationals of the requested State, either for the purpose of executing a sentence or for the purpose of conducting a prosecution. Under those treaties, a Dutch national cannot be extradited at all. The circumstances provided for in Art. 4 are "a Dutch national will not be extradited for the purpose of executing a custodial sentence or a detention order, but he may be extradited for the purpose of conducting a prosecution, provided that the requesting State guarantees that the person concerned may be returned to the Netherlands to serve his sentence there if, following his extradition, a custodial sentence other than a suspended sentence or a measure depriving him of his liberty is imposed upon him. According to case-law [Supreme Court, judgment of 31 March 1995, NJ 1996/382, para. 3.3.4], the requesting State must also guarantee that the sentence imposed in the requesting State may be converted into a Dutch sentence (unless that guarantee is incompatible with the applicable treaty provisions) ". NL, report, question 58.

[885] S.14 of the Extradition Act 1965 provides that: "14. Extradition shall not be granted where a person claimed is a citizen of Ireland, unless— (a) the relevant extradition provisions or this Act otherwise provide, or (b) the law of the requesting country does not prohibit the surrender by the requesting country of a citizen of that country to the State for prosecution or punishment for an offence. IE, report, question 58.

[886] Under art 55(2) of the Polish constitution "Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: 1) was committed outside the territory of the Republic of Poland, and 2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request".

[887]Art. 20 of Law 302/2004 sets the conditions for the extradition of Romanian nationals. '(1) Romanian citizens may be extradited from Romania based on the international multilateral conventions to which Romania is a party and based on reciprocity, only if at least one of the following conditions is met: a) the extraditable person resides on the territory of the requesting State at the date when the request for extradition is filed; b) the extraditable person has also the citizenship of the requesting State; c) the extraditable person has committed the act on the territory or against a citizen of a Member State of the European Union, if the requesting State is a Member State of the European Union. (2) In the case provided in paragraph (1) a) and c), when extradition is requested in order to conduct the criminal prosecution or the trial, an additional condition is that the requesting State provide assurances considered as sufficient that, in case a conviction to a custodial sentence by a final judgment, the extradited person shall be transferred in order to execute the punishment in Romania. (3) The Romanian citizens can be extradited based on the provisions of the bilateral treaties and based on reciprocity'. RO, report, question 58.

[889] See also ECJ, judgment of 13 November 2018, *Denis Raugevicius*, C-247/17, ECLI:EU:C:2018:898.

[891] Not even the extradition of a national for prosecutions subject to the condition of their return after final condition (the so-called Dutch clause) is possible in Belgium. BE, report, question 59.

[892] Art 438 GCCP; EL, report, question 58.

reside in Hungary and have another nationality than the Hungarian nationality. While the former cannot generally be extradited,[894] the latter can be extradited. However, the legislation clearly treats non-Hungarian EU nationals differently assuring that, if the extradition request concerns the execution of a sentence, a non-Hungarian EU national who is also a resident of Hungary can only be extradited, if he agree to it. In contrast, if the extradition request concerns criminal prosecution, the national of an EU Member State, whether or not a Hungarian resident, can be extradited. Hence, in the case of Hungary, only in this final hypothesis or if the national of a Member State would consent to the request for execution of a sentence, *Petruhhin* would be applicable *ab initio*.[895]

The *Ruska Federacija* case

The *Ruska Federacija* case[896] dealt with two questions. First, whether the extradition request by a non-EU State of a national of an European Free Trade Association (EFTA) State[897] which state is also a member of the EEA obliges the EU Member State that receives the request to inform the State of nationality, under Article 18 TFEU.[899] Second, in case such obligation exists, and the EFTA/EEA State of nationality requests the surrender of the person of which extradition was requested, whether the *Petruhhin* mechanism applies by analogy. The person concerned was a national of Iceland, an EFTA/EEA State that is also bound by EU Agreement with Iceland and Norway, therefore the question was whether he should be surrendered to the EFTA/EEA State of nationality.[900] Hence, it is an extension of the *Petruhhin* case, in preserving citizenship at the same time as not overlooking the fight against impunity. The ECJ reinforced the 'special relationship'[901] between Iceland as an EEA Member and the EU, establishing that there is such an obligation.[902] Furthermore, the opposite would also be valid, Iceland and Norway could also figure as requested state in extradition request, when EU citizens are involved, in which case they should notify the EU Member

[894] Only "if the chief prosecutor decides that the takeover of the criminal process itself is not possible in the specific case, the Hungarian national and resident can be extradited, if the concerned crime is punishable in both of the countries at least by 1 year imprisonment, and the 'issuing' country provides a guarantee, that the defendant can return to Hungary to undergo his sentence". HU, report, question 58.
[895] HU, report, question 58.
[896] ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262.
[897] The EFTA is an intergovernmental organisation consisting of Iceland, Liechtenstein, Norway and Switzerland.
[899] ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, para. 30(1).
[900] ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, para. 30(2).
[901] ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, para. 44.
[902] ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paras. 75-77.

State of nationality.[904] In essence, the *Ruska Federacija* judgment, in combination with the *Petruhhin* judgment, created an area consisting of the EU Member States, Norway and Iceland, in which EU citizens and EFTA/EEA nationals are protected against (unequal treatment concerning) extradition to third States.

Extradition of nationals v. Extradition of EFTA/EEA State nationals

The Irish EAW legislation does not allow discrimination based on nationality.[905] In contrast, the Hungarian[906] and Polish legislations do allow for such differential treatment.[908] Romanian nationals can be extradited under certain circumstances.[910] There are no special conditions for nationals of EFTA/EEA States, in contrary to what the reports inform about nationals of EU Member States.

4.7.2.2 The consequences of the judgments in practice

The *Petruhhin* case

Difficulties in applying the judgment

The majority of the consulted Member States apply the *Petruhhin* mechanism. However, this does not result in prosecution by the notified Member State of the person which extradition was sought by the third state. The Belgian expert points out that the *Petruhhin* mechanism is applied by the Central Authority (Ministry of Justice) and has never materialised in an EAW.[911] The Dutch report states that the mechanism is applied in 10-15 cases per year and in none of them it resulted in the notified Member State issuing an EAW.[912] The Romanian report affirms that the mechanism is indeed applied, however, none of the cases have resulted in a prosecution.[913] The Greek report points out that in only one case the *Petruhhin*

[904] Leandro Mancano, Trust Thy Neighbour? Compliance and Proximity to the EU through the Lens of Extradition Yearbook of European Law, Vol. 40, No. 1 (2021), pp. 504-505; Vincent Glerum, Het Hof van Justitie breidt de bescherming tegen ongelijke behandeling bij uitlevering uit: *Petruhhin* is naar analogie van toepassing op EVA-/EER-onderdanen, No. 12 (2020) SEW, p. 700-701.
[905] IE, report, question 57.
[906] According to Act LXIX of 2014 that implemented the Agreement in Hungary, if the arrest warrant concerns conducting a criminal prosecution and the involved person is a Hungarian citizen and also a resident, the arrest warrant can only be executed if the issuing State guarantees that the person involved can return to Hungary to undergo his sentence. HU, report, question 57.
[908] HU, report, question 60; PL, report, question 60.
[910] RO, report, question 60.
[911] BE, report, question 58.
[912] NL, report, question 58.
[913] RO, report, question 58.

mechanism has been applied in Greece, in which case the notified authority did not follow up.[914] The Hungarian report states that it did not find any examples of the application of the *Petruhhin* mechanism, even though it is possible that it is being applied.[915] In Poland,[917] the Regional Public Prosecution Offices would be competent to implement the *Petruhhin* mechanism,[919] being the public prosecutor responsible for informing the judicial authority in another Member State in case of extradition request.[921] The fact that – even in cases where Member States apply *Petruhhin* – the mechanism does not lead to prosecution, leads to the conclusion that sending the notification seems a formality to avoid allegations by the defence to oppose to the extradition procedure.

By contrast, the Irish report points out that the *Petruhhin* case has never been applied in Ireland, since there is no provision in Irish EAW law for discrimination based on nationality concerning extradition to third States. Moreover, no case requiring consideration of the *Petruhhin* case in any context has yet arisen.[922]

- *The information contained in the notification*

A possible cause for non-issuance of an EAW by the notified Member State could be the information contained in the notification. Hence, the analysis of the content of such notification by Member States is necessary.[923] The information contained in notifications sent by the Netherlands are: name and address details of the requested person; a statement of the offences for which extradition is sought; a copy of the Interpol 'red notice' and the extradition request.[924] The information provided by the Belgian authorities is a one or two page letter summarizing the essential elements of the extradition request. Which has been sufficient, according to the Belgian report, since there are no requests for supplement information.[925]

[914] EL, report, question 58.
[915] HU, report, question 58.
[917] PL, report, question 58.
[919] The Minister of Justice, while taking a decision mentioned in Article 607y § 2 of the CCP, shall respect the judgment of the Court of Justice delivered in the *Petruhhin* case. PL, report, question 58.
[921] As it happened in case III KO 112/16 of the Supreme Court in 05 April 2017.
[922] IE, report, question 58.
[923] According to the *Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)* judgment, the requested Member State must inform the authorities of the Member State of which the requested person is a national 'not only of the existence of an extradition request concerning that person, but also of all the matters of fact and law communicated by the third State requesting extradition in the context of that extradition request' and keep those authorities informed 'of any changes in the situation of the requested person that might be relevant to the possibility of a European arrest warrant being issued with respect to that person'. *Generalstaatsanwaltschaft (Extradition to Ukraine)*, para. 48. See Vincent Glerum, Beter ten halve gekeerd, dan ten hele gedwaald? Het Hof van Justitie houdt vast aan – en verduidelijkt – het arrest Petruhhin Vol. 40, No. 12 (2021), pp. 682.
[924] NL, report, question 59.
[925] BE, report, question 59.

The information offered by Romanian authorities is limited to a description of facts and the person in question.[926] The information provided by the Polish authority in the cases referenced by the report were limited to notifying the authority about the facts and providing a copy of the arrest warrant.[927] Hence, despite the existence of ECJ case law on the topic, Member States do not seem to commit to the application thereof.

Another relevant aspect is whether the application of the *Petruhhin* mechanism and a possible lack of information may result delays. The Dutch report asserts that usually there is a deadline of four weeks that, however, is not crucial, since the mechanism is applied in parallel with the extradition proceedings.[928] The time limit in Belgium is set for 10 days, which is usually sufficient.[929] Romania also sets a deadline which is determined by the Romanian competent court.[930]

By comparing the duty to inform derived from *Petruhhin* and the number of EAWs that were actually issued to allow prosecution inside EU Member States – rather than allowing extradition to third countries – might demonstrate that the concern that the European Court of Justice has with EU-citizens rights and protections outside Europe is not shared by Member States about their own citizens.

Difficulties in receiving the notification

There is a clear trend that when Member States receive few notifications it does not result in issuing an EAW. The Belgian report describes that very few *Petruhhin* notifications regarding Belgian nationals were received by the Federal Prosecutor's Office, and in none of these cases Belgium has decided to prosecute the person sought for the alleged offences.[931] The Irish report informs that the Irish Central Authority has been notified about two cases over the last two years of requests for extradition concerning an Irish national, in both cases the information provided (only the extradition request from the third country) was a limitation only to a certain extent - as they had some information available from the previous Guard investigation - and the EAW was not issued in the end.[933] The Romanian report states that

[926] RO, report, question 58.
[927] PL, report, question 58.
[928] NL, report, question 59.
[929] BE, report, question 58.
[930] RO, report, question 59.
[931] BE, report, question 59.
[933] IE, report, question 59.

between 2017 and July 2020, Romania was notified of 36 cases of requests for extradition addressed to other EU Member States by third countries, however, no EAW was issued.[934] The Dutch report attests that a handful of cases occur every year, yet, none of them resulted in issuing an EAW.[936]

- *The information given in the notification*

The Romanian report points out that the information provided by the Member State who sent the notification is hardly ever enough, and it highlights that even if the full extradition package was offered, this would not be sufficient for prosecution.[937] The Irish report points out that the information is usually limited to the extradition request from the third country, a difficulty that can be overcome with the information offered by a previous *Guardaí* investigation.[938] Both reports leave the impression that the outcome would be different if the information was sufficient. By contrast, the Belgian and the Dutch reports reveal that the issue of the lack of information is real, however, it might not be central. In fact, for the experts, the main issue could be a matter of capacity or even interest in prosecuting such an offence.[939] That is, even when having extraterritorial jurisdiction and upon receiving the notification, the authorities of the Member State of nationality may not wish to pursue the prosecution or execution of their national, due to the limits on human resources or due to the fragile link with the crime or the perpetrator.

The Greek, Hungarian and Polish reports inform that no notifications were found in the examined cases.[940]

When comparing the information offered and received by Member States, it can be noted that while the Member States' approach seems to indicate that the information offered is enough, some of them also point out that the information received is insufficient. Thus, this gap – between what national authorities consider sufficient to provide in comparison with what they would expect to receive – is one of the factors that contributes to leaving a loose end in the *Petruhhin* application. The difficulty could originate from two factors. The first is that in cooperation the amount of information necessary to enable surrender is smaller than that to

[934] RO, report, question 59.
[936] NL, report, question 59.
[937] RO, report, question 59.
[938] IE, report, question 59.
[939] BE, report, question 59; NL, report, question 59.
[940] EL, report, question 59; HU, report, question 59; PL, report, question 59.

enable prosecution. The second is that Member States might not have an interest, even when having jurisdiction, in the prosecution of the requested person, since they have no relationship with the crime. In the binomial *impunity-rights of a citizen of a Member State*, perhaps the focus should be on the latter. In this case, the Member State of nationality could analyse the interest to preserve the rights, focusing on the human rights aspect of the potential extradition.

The *Ruska Federacija* case

Difficulties in applying the judgment

The Belgian, Dutch, Greek, Hungarian, Irish, and Polish reports do not identify any cases where the respective Member States applied the *Petruhhin* mechanism by analogy as a consequence of the *Ruska Federacija* case.[941]

4.7.2.3 Recommendations

No recommendation.

4.7.3. Surrender to and from the United Kingdom

4.7.3.1 The legal framework

The EU-UK Trade and Cooperation Agreement, in Part III, deals with 'Law Enforcement and Judicial Cooperation in Criminal Matters' aiming to ensure that extradition 'is based on a mechanism of surrender pursuant to an arrest warrant in accordance with the terms'.[942] Despite the many similarities with the FD 2002/584/JHA,[943] it is noteworthy that the Agreement does not contain any references to or mentions mutual trust or mutual confidence, as it is the case with Norway and Iceland.[944] By contrast, it reintroduces double criminality,[945]

[941] BE, report, question 60; EL, report, question 60; HU, report, question 60; IE, report, question 60; PL, report, question 60.
[942] Article 596.
[943] Leandro Mancano, Trust Thy Neighbour? Compliance and Proximity to the EU through the Lens of Extradition Yearbook of European Law, Vol. 40, No. 1 (2021), pp. 507.
[944] In the preamble it says `expressing their mutual confidence in the structure and functioning of their legal systems and in the ability of all Contracting Parties to guarantee a fair trial`. Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, Brussels and London, 30 December 2020, *OJ* 2021.
[945] According to Art. 599, 4 of the EU-UK Trade and Cooperation Agreement, the UK and the EU may each notify the Specialised Committee on Law Enforcement and Judicial Cooperation that, on the basis of reciprocity,

the abolition of the verification of which is one of the most symbolic expressions of mutual trust.[946] Hence, the new design of the cooperation in criminal matters between the EU and the UK could be one that occurs from further distance when compared to other neighbour countries *vis-á-vis* Norway and Iceland, potentially resulting in less close cooperation.

Concerning extradition and surrender, this report deals with two issues. The first is the impact of the Agreement as it was applied provisionally from 1 January 2021 and entered into force on 1 May 2021. The second is the period after Art. 50 TEU was triggered, as an indicator of potential issues after the notification of the UK intention to withdraw from the European Union.

Referring to the period following the withdrawal notification but before actual Brexit, the ECJ case law expresses that the withdrawal notification did not modify the status of cooperation between EU and UK.[947] Concerning compliance by the UK, now as a third state, with the rights of the requested person, from the withdrawal notification on it is possible to see a presumption that those rights still apply. Two factors are relevant: the first is the fact that the UK still participates in the ECHR, and the second is that, *inter alia*, by being a Party to the convention the rights of the requested person are incorporated into UK national law and the CoE Extradition Convention.[948] This is a remarkable difference to other third states, e.g. Russia, in the case of *Petruhhin*.

4.7.3.2 The Agreement in practice

Difficulties on the issuing side

the condition of double criminality will not be applied. However, such notification has not occurred until the date of 01 March 2022.

[946] Leandro Mancano, Trust Thy Neighbour? Compliance and Proximity to the EU through the Lens of Extradition Yearbook of European Law, Vol. 40, No. 1 (2021), pp. 509.

[947] See Case C-327/18, where the question was still whether the notification of the UK of the intention to withdraw from the European Union did have as consequence that EAWs issued by it could not be executed or should be postponed. The Court understood that it was not the case, Union Law was still in force. ECJ, judgment of 19 September 2018, *RO*, C-327/18 PPU, ECLI:EU:C:2018:733. However, this precedent was not followed by every Member State's courts, revealing already that trust has been affected. See Supreme Court, Judgment 120/17.2YREVR.S1, 14 February 2019.

[948] ECJ, judgment of 19 September 2018, *RO*, C-327/18 PPU, ECLI:EU:C:2018:733, para. 20; Article 629, EU-UK Trade and Cooperation Agreement; Leandro Mancano, Trust Thy Neighbour? Compliance and Proximity to the EU through the Lens of Extradition Yearbook of European Law, Vol. 40, No. 1 (2021), pp. 507.

The reports for Belgium, Greece, Hungary, and the Netherlands, point out that, as far as could be verified, they have not experienced issuing Arrest Warrants under the EU-UK Trade and Cooperation Agreement.[950] The Dutch experts highlight that the law that implements the EU-UK Trade and cooperation Agreement (*Uitvoeringswet Handels- en Samenwerkingsovereenkomst EU – VK Justitie en Veiligheid)* only entered into force on 17 July 2021. The reports for Ireland and Romania state that, despite the existence of cases, no difficulties were to be found.[951] The Polish expert identifies one case where the Polish court acted as issuing authority, using the Arrest Warrant form annexed to the Agreement, and reported that no issues arose from it.[952]

Difficulties on the executing side

At the time of concluding their reports, Greek, Hungarian, and Dutch experts pointed out that, based on the cases examined, none of them have executed Arrest Warrants under the EU-UK Trade and Cooperation Agreement.[953] The reports for Ireland[954] and Romania[955] state that, despite the existence of cases, no difficulties were encountered.[956] The Belgian expert describes two proceedings that led to decisions on surrender without incurring any issues.[957] The Polish expert informs about the existence of a draft Act on the EU-UK Trade and Cooperation Agreement, and highlights that the rules governing surrender of a Polish citizen to an EU Member State are the same for surrender to the United Kingdom.[958]

The issues that are pointed out by experts concern the transition period, during which period the UK already was a third country, and the actual application of the EU-UK Trade and cooperation Agreement. The Dutch experts point out that the approach adopted by the District

[950] BE, report, question 57bis; EL, report, question 57bis; HU, report, question 57bis; NL, report, question 57bis.
[951] IE, report, question 57bis; RO, report, question 57bis.
[952] PL, report, question57bis.
[953] EL, report, question 57bis; HU, report, question 57bis; NL, report, question 57bis.
[954] The Irish report highlights that the CJEU decided that the provisions in the EU-UK Withdrawal Agreement concerning the European arrest warrant regime with respect to the United Kingdom, as well as the provision in the Trade and Cooperation Agreement between the EU and the United Kingdom concerning the new surrender mechanism, are binding on Ireland. ECJ, judgment of 16 November 2019, *Governor of Cloverhill Prison and Others*, C-479/21 PPU, ECLI:EU:C:2021:929. IE, report, question 57bis.
[955] RO, report, question 57bis.
[956] IE, report, question 57bis ; RO, report, question 57bis.
[957] BE, report, question 57bis.
[958] PL, report, question 57bis.

Court of Amsterdam[959] under Art. 62(1)(b) of the Withdrawal Agreement is to continue to apply FD 2002/584/JHA up to and including the moment of the actual surrender, when the requested person was arrested based on an EAW issued by a UK authority before 1 January 2021.[960] This practice facilitated court decisions in various cases,[962] and was ultimately endorsed by the Court of Justice in an Irish case.[963] Under the EU-UK Trade and cooperation Agreement two issues arose. The first is that double criminality still applies even if the offence at stake in the arrest warrant is included in the list in Art. 599(5) of the Agreement, since the UK did not notify the Specialised Committee on Law Enforcement and Judicial Cooperation that, on the basis of reciprocity, the condition of double criminality referred to in Art. 599(2) will not be applied with respect to offences listed in Art. 599(5) which are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years. The second is the question of which test should be used to verify compliance with Art. 4 of the Charter by the issuing state: the *Aranyosi and Căldăraru* test or the test carried out by the European Court of Human Rights.[964] The Irish[965] report also points out as an issue systemic challenges, as was the case in *Gallagher v Minister for Foreign Affairs & Ors* where the appellant challenged the implementation of secondary legislation in the transition period. The Court decided that the secondary legislation adopted 'during the transition period, by virtue of the withdrawal Agreement, continue to have validity and implications for ongoing proceedings and events that extend beyond the expiry of the transition period`.[966]

4.7.3.3 Recommendations

No recommendations are needed.

[959] Based on Art. 62(1)(b) of the EU-UK Trade and Cooperation Agreement.
[960] NL, report, question 57bis.
[962] See District Court of Amsterdam, judgment of 22 January 2021, ECLI:NL:RBAMS:2021:225; District Court of Amsterdam, judgment of 16 February 2021, ECLI:NL:RBAMS:2021:667; District Court of Amsterdam, judgment of 18 February 2021, ECLI:NL:RBAMS:2021:1403; District Court of Amsterdam, judgment of 5 March 2021, ECLI:NL:RBAMS:2021:1115 (not published); District Court of Amsterdam, judgment of 26 March 2021, ECLI:NL:RBAMS:2021:1885; District Court of Amsterdam, judgment of 25 May 2021, ECLI:NL:RBAMS:2021:2736.
[963] ECJ, judgment of 16 November 2019, *Governor of Cloverhill Prison and Others*, C-479/21 PPU, ECLI:EU:C:2021:929, para. 41.
[964] District Court of Amsterdam, judgment of 2 November 2021, parketnummer 13/751024-21.
[965] IE, report, question 57bis.
[966] *Gallagher v Minister for Foreign Affairs & Ors Rec n. 2021/93 [2021] ICA 173*.

4.7.4 The investigations by the European Public Prosecutor`s Office

4.7.4.1 The legal framework

Established by Regulation 2017/1939 the EPPO is a body responsible for investigating, prosecuting and bringing to judgment criminal offences affecting the financial interests of the Union.[968] Starting its activities on 1 June 2021, EPPO is one of the forms of direct enforcement of Union law, entailing a mandate developed according to and by the Union. As a result, national authorities 'work in a subordinate position'[969] while cooperating with EPPO.

The Regulation also provides for centralised and decentralised levels to enable EPPO`s mandate to be fulfilled. Of special interest for this project on the decentralised level are the European Delegated Prosecutors, who among other tasks act 'on behalf of the EPPO in their respective Member States and shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment, in addition and subject to the specific powers and status conferred on them'.[971]

Whenever investigations acquire a cross-border character, it is the European Delegated Prosecutor in the Member State conducting the investigation who will ask for assistance by the European Delegated Prosecutor in the other Member State where assistance is needed, named the handling EDP and the assisting EDP respectively.[972] As Article 33(2) of the EPPO Regulation adds, where it is necessary to arrest and surrender a person who is not present in the Member State where the handling EDP is located, he shall *issue* or *request* the competent authority to issue a EAW in accordance with FD 2002/584/JHA.

[968] Articles 3 and 4 of the Regulation. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ* 2017, L 283/1.
[969] André Klip, European Criminal Law. An Integrative Approach, Intersentia Cambridge 4th ed. 2021, p. 582.
[971] See Article 13 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ* 2017, L 283/1.
[972] Article 31(2) and (4) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ* 2017, L 283/1.

Following the premise that EDPs shall have the same powers as national prosecutors,[974] an implication of this is that depending on the Member State`s approach to the power to issue an EAW, the EDPs may not have the power to issue an EAW. In cases where the national public prosecutor does not have the power to issue EAWs according to domestic law, the public prosecutor shall have to request the court to do so. The EAW would thus be issued on behalf of EPPO and executed by the Member State.

4.7.4.2 The consequences of the Regulation in practice

Difficulties on the issuing side

The reports of the Dutch and Romanian experts indicate that their domestic legislations have not given EDPs competence to issue EAWs on behalf of EPPO.[975] In the cases of Belgium,[976] the Netherlands[977] and Romania[978] this is because national legislation grants EDPs the same power granted to national public prosecutors, which does not consider public prosecutors as issuing judicial authorities. In these cases, the European Delegated Prosecutors need to ask the national court to issue the EAW.

Difficulties on the executing side

The other side of the question is whether national legislations have been amended to accommodate Member States' execution of EAWs issued by or on behalf of EPPO, since, originally, surrender takes place on the behalf of the Member State, not the EPPO. The Dutch[979] legislation, for instance, made room for the execution of EAWs by broadening the

[974] Art. 13(1) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ* 2017, L 283/1.
[975] BE, report, question 57ter; NL, report, question 57ter; RO, report, question 57ter.
[976] Article 156/1 of the Belgian Judicial Code and Article 47quaterdecies of the Code of Criminal Procedure. Belgian legislation has not given competence to the EPPO magistrates to issue an execution-EAW, which as a result will be issued by Belgian prosecutors.
[977] *Kamerstukken II* 2019/20, 35429, nr. 6, p. 22.
[978] RO, report, question 57ter.
[979] '[T]he Law on Surrender was amended to accommodate the *execution* by the Netherlands of EAWs issued by or on behalf of an EDP. By broadening the definitions of 'European arrest warrant', 'issuing judicial authority' and 'issuing Member State' to include the EPPO, the rules that apply to the execution of an EAW issued on behalf of a Member State now also apply to an EAW issued on behalf of EPPO (Art. 1a of the Law on Surrender)'; NL, report, question 57ter.

definition of 'issuing Member State' to include the EPPO. In Romanian legislation, by adapting the Romanian legislation to the EPPO Regulation it was expressly mentioned that any reference in Romanian law to the prosecutor will be understood as referring to the European Delegated Prosecutor and European Prosecutor as well.[980]
Greece has no specific regulation on the EPPO at this moment. The Greek expert explains that there is no explicit provision that addresses the EPPO in the Greek legislation for EAWs. Some aspects of the EPPO are addressed by Law 4786 of 2021, however, it does not cover issuing EAWs or executing EAWs issued by or on the behalf of EDPs.[981]
Poland, Ireland, and Hungary are not included in the 22 Member States that participate in the EPPO. However, it is relevant to note that there was an initiative in Poland to draft a document that would enable cooperation between Polish procedural organs and EPPO, but the draft Act amending the Code of Criminal Procedure was withdrawn from legislative procedure.[982] Similar procedures have not occurred in Ireland or Hungary.

4.7.4.3 Recommendations

Recommendation 4.10 Greece is recommended to implement in its national legislation amendments to accommodate issuing EAWs by or on behalf of European Delegated Prosecutors and to accommodate execution of EAWs issued by or on behalf of European Delegated Prosecutors from other Member States.
Recommendation 4.11 Ireland, Hungary and Poland do not participate in the EPPO, these Member States are recommended to find a way enable sincere cooperation with EPPO.

4.8 Speciality rule

4.8.1 The legal framework

The Speciality rule is a consequence of surrender according to which rule one cannot be prosecuted, sentenced or deprived from his or her liberty for an 'an offence committed prior to his or her surrender other than that for which he or she was surrendered' (Art. 27(2)),

[980] Law 6/2021; RO, report, question 57ter.
[981] EL, report, question 57ter.
[982] PL, report, question 57ter.

except when both issuing and executing Member States chose to not apply it on reciprocal basis (Art. 27 (1)).[984] The other exceptions to this rule are determined by Art. 27(3) of FD 2002/584/JHA. Of particular practical relevance to this project due to its link with the EAW-form is the exception related to the explicit consent by the person to be surrendered (Art. 13(1) in combination with Art. 27(3)(e)). For the assessment of whether the person was surrendered for the same offence or another offence, the description of the offence is determinative. As such, the description contained in section (e) of the EAW-form plays a central role, together with the decision to execute the EAW – which may contain for instance the exclusion of one or more offences from the surrender.

In order to establish whether an offence is an 'other offence' the ECJ has decided that it must be ascertained whether 'the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision'.[985] On a practical level, to enable such an assessment both the EAW-form and the decision of the execution of the EAW are central, not only to determine for which offence the person was surrendered, but also to verify whether he or she has renounced their entitlement to the speciality rule.

4.8.2 Speciality rule in practice

4.8.2.1 The content of the decision to execute an EAW

The description of offences

All the country reports show that the decision to execute an EAW will contain the offence(s) for which the surrender is being granted as well as the offences for which it is being

[984] Only Austria, Estonia, and Romania are prepared to renounce the speciality rule on a reciprocal basis. *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/18.
[985] ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:661, paras. 55 and 57.

refused.[987] The distinctions are related to whether the preponderant element of the 'constituent element' of the offences are referred to their factual description or legal qualification. The Hungarian, Polish and Romanian reports point out that offences would be referred to by both in the decision.[989] The Greek report stated that offences are defined in detail in the decision.[990] The Belgian report affirms that the decision refers to the facts described as constituting the offence contained in the EAW.[992] The Dutch report states that the offences are described by the conduct which constitutes the offence, entailing both facts and legal description – since section (e) contains information also about the legal side of conduct.[993] The Irish report asserts that whatever form of description and numbering has been used in section (e) will most likely be replicated in the court's judgment and formal order, being cross referable.[995]

The renouncement to the speciality rule

Art. 13(1) of FD 2002/584/JHA refers to 'express renunciation of entitlement to the "speciality rule", referred to in Article 27(2)' and, thus, makes it clear that renunciation is a distinct event, not an automatic consequence of consent to surrender, and that renunciation must be explicit. Hence, whether the renouncement appears or not in the decision on the execution of an EAW is central to its application, since the EAW form contains no reference to it.[996]

The Handbook in Annex VII contains a standard form concerning EAW decisions, which should be used by executing judicial authorities to communicate their decisions on the action taken on the EAW to issuing judicial authorities, but which does not replace the decision on the execution of the EAW. This form requires indicating whether the requested person consented to surrender and whether speciality was renounced.[997] FD 2002/584/JHA establishes a procedure for renouncing the rule of speciality by consent of the executing

[987] BE, report, question 61 a); EL, report, question 61 a); HU, report, question 61 a); IE, report, question 61 a); NL, report, question 61 a); PL, report, question 61 a); RO, report, question 61 a).
[989] HU, report, question 61; PL, report, question 61 a); RO, report, question 61 a).
[990] EL, report, question 61 a).
[992] BE, report, question 61 a).
[993] NL, report, question 61 a).
[995] IE, report, question 61 a).
[996] The Italian member of the Sounding Board highlighted the need for clarity on whether or not the surrender was granted under the speciality rule.
[997] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/80.

judicial authority (Art. 27(3)(g)-(4) of FD 2002/574/JHA). A request for consent shall be submitted by the same procedure and must contain the same information as an EAW.[999]

The reports of the Greek, Hungarian, Irish, and Romanian experts clarify that renouncement of the entitlement to the speciality rule is mentioned in the decision to execute the EAW.[1000] In practice, during the court session the judges warn the requested person, who is assisted by a lawyer,[1001] about the consequences of the renunciation.[1002] The Irish report highlights that the 'waiver of consent in relation to the rule of speciality' has no special form, differently from the requested person's choice to consent.[1003] The Polish report states that the declaration concerning the speciality rule would always be present in the minutes of the hearing, however, while some judges also include it in the decision on the surrender, others do it in the letter informing the issuing judicial authorities about the execution of the EAW. Hence, decisions on surrender sometimes do not contain the relevant information on the speciality rule, but rather, it is included in other documents relevant for the surrender.[1004]

The reports of Belgian and Dutch experts discuss the different treatment given to the speciality rule when the requested person consents and does not consent to surrender. The Dutch report points to a central deficiency in national legislation: where the requested person consents to surrender, the existing national legislation does not allow the requested person to renounce the speciality rule prior to surrender. Because consent to surrender is closely but not inextricably linked to renunciation of entitlement to the speciality rule, in order to avoid any confusion the court's decision on surrender will explicitly mention that, although the requested person consented to surrender, he did not lose his entitlement to the speciality rule. By contrast, if the requested person does not consent to surrender, the court's assessment of the EAW will result in a judgment on the execution, and these judgments do not state whether the requested person is entitled to the speciality rule.[1005] The District Court of

[999] See item 2.6. *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C-335/19.
[1000] EL, report, question 61 b); HU, report, question 61; IE, report, question 61 b); RO, report, question 61 b.
[1001] HU, report, question 61; IE, report, question 61 b); RO, report, question 61 b).
[1002] Polish and Hungarian reposts added that this will appear in the minutes of the hearing, question 61 a) and 61, respectively.
[1003] IE, report, question 61 b).
[1004] PL, report, question 61 b).
[1005] Art. 14 of the Law on Surrender requires the District Court of Amsterdam to stipulate that the issuing Member State complies with the speciality rule. This provision is part of Section 1 ('Voorwaarden voor overlevering'; Conditions for surrender) of Chapter 1 ('Overlevering door Nederland'; Surrender by the Netherlands). NL, report, question 61 b).

Amsterdam's[1006] interpretation of the current legislation against the background of the Framework Decision is that in such cases mutual trust dictates that the court must trust that the authorities of the issuing Member State will comply with the speciality rule and that the requested person will be able to invoke it.[1007] Whenever surrender is allowed, the public prosecutor will proceed to the actual surrender, providing the issuing judicial authority with the necessary documents, which does not cover the renunciation to the entitlement of the speciality rule. Such practice is *per se* in contradiction to the Handbook on how to issue and execute a European Arrest Warrant, Annex VII, which explicitly requires indicating whether the speciality rule was renounced.[1008]

The Belgian report is aligned with this approach: a specific reference to the renouncement or not their entitlement to the speciality rule only appears in cases where the requested person consented to the surrender. Whenever the case is of non-consent, there will be a formal mention of the need to respect the speciality rule.[1009]

4.8.2.2 The formalities of the decision to execute an EAW

From the reports presented, it appears that it is common for Member States to provide a copy of the decision to execute the EAW to the issuing judicial authority and the requested person.[1010] Though, practice varies when it comes to whether the copy of the judgment is translated. In Greece, Hungary and Poland the tendency is to offer translated copies of the decision to execute the EAW to both the requested person and the issuing authority. In Romania, translation is only offered to the requested person if they do not speak Romanian. Differently, Belgium, Ireland, and the Netherlands, tend to offer copies of the decision to execute the EAW without translations. Both the Dutch and Irish reports assert that, if the requested person is present at the judgment, an interpreter may be provided by the court. See

[1006] District Court of Amsterdam, judgment of 30 March 2012, ECLI:NL:RBAMS:2012:BW8970.
[1007] NL, report, question 61 b).
[1008] NL, report, question 61 b).
[1009] BE, report, question 61 b).
[1010] BE, report, question 62; EL, report, question 62; HU, report, question 62; IE, report, question 62; PL, report, question 62; NL, report, question 62; RO, report, question 62.

Directive on the Right to Information 2012/13 and Directive on the Right to Translation 2010/64.[1011]

4.8.2.3 Ensuring the compliance with the speciality rule

The mechanisms for ensuring that the speciality rule is complied with are various across Member States. The Belgian, Greek, and Irish[1012] reports call attention to the fact that the defence counsel usually is responsible for signalling and gathering evidence whenever there is an issue with the speciality rule.[1013] Three country experts mention general remedies to such issues, Greek, Hungarian, and Romanian. In Greece, violation of the speciality rule is not only considered unlawful when related to a prosecution, but also is a ground for appeal to the Supreme Court.[1014] In Hungary, all the legal remedies are applicable in case of violation of the speciality rule, including the possibility to appeal decisions made by the relevant national court.[1015] In Romania, the requested person is entitled to any legal remedy available in the Criminal Procedure Code; however, the most common is that the requested person raises the speciality rule during the court hearing.[1016] In the Netherlands, the consequence of a violation of the speciality rule, a rule which is binding on courts, prosecutors and the police,[1017] is that the prosecution is considered inadmissible, which is examined *ex officio* by first and second instance courts. A violation of the speciality rule constitutes a ground for quashing a conviction.[1018] In Ireland, cases of breach of the speciality rule may lead to judicial review (in a form analogous to habeas corpus proceedings) of the proceedings[1019] or allow the requested person to seek an order of *certiorari*, aiming at quashing the decision of the executing

[1011] See Directive on the Right to Information 2012/13/EU and Directive on the Right to interpretation and translation 2010/64/EU.
[1012] According to Art. 40.4.2 proceedings in *Corcoran v Governor of Castlerea Prison.*
[1013] BE, report, question 63; EL, report, question 63.
[1014] Art. 510(1) GCCP; EL, report, question 63.
[1015] HU, report, question 63.
[1016] RO, report, question. 63.
[1017] The speciality rule is deemed as a condition for surrender set by the executing judicial authority within the meaning of Art. 48 of the Law on Surrender. It binds, in the terms of the article, any person or authority in the Netherlands charged with a public duty. NL, report, question 63.
[1018] NL, report, question 63.
[1019] See Article 40.4.2 of the Constitution of Ireland.

authority.[1021] In Poland, if a court violates the duties concerning the application of the speciality rule it would be classified as an "absolute ground" for quashing a judgment.[1023]

In order to provide protection of the rights of the person concerned, while simultaneously honouring the decision of the executing judicial authority, one could make a speciality rule check an *ex officio* obligation for the judicial authorities of the issuing Member State. In such a way, it would trigger a formal mandatory analysis of the speciality rule in the court cases of the issuing Member State. In fact, the possibility of prosecution or execution of a sentence derived from the surrender only exists due to the issuing Member State right to prosecute or punish. Hence, it is expected that limitations to this right create duties. This does not affect mutual trust, as the decision to surrender has already been given and the assessment is made by the issuing Member State itself. Indeed, such an *ex officio* check could even strengthen mutual trust, as it would show that the issuing Member State takes its obligations arising from FD 2002/584/JHA seriously.

Despite the existence of various national mechanisms, available mostly to the defence, to ensure the compliance of speciality rule, there are no follow up mechanisms between executing and issuing judicial authorities.

The Polish report points to two issues commonly related to the speciality rule. The first is derived from cumulative penalties, issued in separate procedures concerning cumulative judgments (*wyrok łaczny*). The difficulty is whether the speciality rule (as determined by Article 607e §1 CCP) constitutes a procedural obstacle to issuing a cumulative penalty for offences other than those which formed the basis of surrender. To this issue, the Supreme Court responded affirmatively.[1024] The Supreme Court also stated that it seems justified to request the executing authority for consent to execution of another penalty than this covered by the EAW prior to issuing the cumulative judgment. The reason behind is that only "enforceable" penalties may form a basis for cumulative judgment while penalties which did

[1021] See *Adams v. DDP and Others* [2001] IESC 27; IE, report, question 63.
[1023] Art. 439 § 1 (9) of the CCP in conjunction with Article 17 § 1 (11) of the CCP. Another relevant rule expressed by Polish courts was that the waiver of the speciality rule shall be unequivocal, voluntary and expressed with full awareness of the consequences. Plea bargaining (*i.e.* consent to sentencing) is not equal to a waiver of the speciality rule (judgment of the Supreme Court of 19 August 2009, II KK 181/09); PL, report, question 63.

[1024] PL, report, question63; Supreme Court of 6 February 2020, II KK 2/20.

not form a basis for surrender are not "enforceable".[1025] The second issue is related to the execution of an imprisonment penalty which was conditionally suspended and whether the procedure of article 607e §3(8) CCP shall be initiated prior or after issuing an order execute the suspended sentence of imprisonment.[1026]

4.8.2.4 Difficulties in the issuing state

The Belgian, Greek and Dutch reports point out a struggle in defining what are the 'same acts'/'offence other' than the one(s) contained in the EAW.[1027] The Greek report demonstrates that the abstractness of the definition of the offence, which is not a violation of speciality rule *per se*, can lead to a violation of the speciality rule.[1029] The Belgian expert addresses the issue of the aggravating circumstances of crimes –whose qualification differs between Member States – existing in the issuing Member State and not existing in the executing Member State, and whether this falls under the scope of 'same acts'.[1031] The Dutch experts point to the difficulties with using legal designations derived from the law of the executing Member State in the decision on a request for consent within the meaning of Art. 27(3)(g) of FD 2002/584/JHA, which leads to difficulties in understanding for which offence(s) the consent is given.[1033]

The Greek and Irish reports mention that the speciality rule is, to say the least, rarely waived.[1034]

The Belgian, Dutch, Polish and Romanian reports address the difficulty in knowing whether the EAW was executed or not under the speciality rule.[1035] The Belgian and the Dutch reports elaborate on the topic, warning that the decision on surrender of the executing judicial authority frequently is not included in the criminal files, and even the EAW is rarely included in the Dutch criminal cases.[1037] The Polish expert reports that there is often a certain

[1025] PL, report, question63; Supreme Court of 20 January 2015, III KK 369/14.
[1026] PL, report, question63.
[1027] BE report, question 64; EL, report, question 64.
[1029] ΑΠ 1261/2013 and ΣυμβΕφΔωδεκ 78/2019.
[1031] BE, report, question 64.
[1033] NL, report, question 64.
[1034] EL, report, question 64; IE, report, question 64.
[1035] BE, report, question 64; NL, report, question 64; PL, report, question 64; RO, report, question 64.
[1037] BE, report, question 64; NL, report, question 64.

discrepancy between the declaration of the requested person, and the conclusion derived from documents obtained via executing judicial authorities. All this leads to difficulties in ensuring that the speciality rule is complied with.

The Romanian and the Dutch reports consider as a recurring issue the long time it takes to receive the consent, or to having decisions made.[1038]

The Hungarian report explains that no difficulties were found in the examined cases.[1040]

The Spanish member of the Sounding Board raised the question whether there is the need to ensure that the notification and communication of the executing judicial authorities on the speciality rule should also reach administrative authorities in charge of the sentence execution. This is due to the possibilities where an inmate has pending files and, if not aware from the speciality rule application, the prison administration might not see any reason to no execute the remaining sanction. Regardless of the existence of remedies in such situations, the ideal scenario would propose ways to present this in the bulk of speciality rule application.

The issue of additional surrender

The relevant issue about additional surrender (Art. 27 (4) FD 2002/584/JHA is whether it should be based on a specific national arrest warrant or not necessarily, under the condition that the issuing authority states that additional surrender will not result in additional deprivation of liberty.[1041]

In the Netherlands, a request for consent to additional surrender must be accompanied by information about the existence of a national judicial decision (cf. Art 8(1)(c) of FD 2002/584/JHA), pursuant to Art. 27(4) of FD 2002/584/JHA and in line with the 'dual level' of protection, since it is liable to prejudice the individual's liberty.[1042] In Greece, practice is that an EAW is required, however in some cases only the national arrest warrant was needed.[1043] In Hungary, the request for additional surrender should be handled as an EAW, thus, the same prerequisites apply as to the latter.[1044] In Ireland, the prerequisites for Art. 27

[1038] RO, report, question 64; NL, report, question 64.
[1040] HU, report, question 64.
[1041] The Finnish member of the Sounding Board pointed in her contribution the need for more clarification in regarding on how to ask the executing state for their consent.
[1042] NL, report, question 64bis; ECJ, judgment of 24 November 2020, *Openbaar Ministerie (Forgery in documents)*, C-510/19, ECLI:EU:C:2020:953, para. 62.
[1043] ΣυμβΕφΑθ 24/2019 and ΣυμβΕφΑθ 150/2020. EL, report, question 102.
[1044] HU, report, question 64bis.

(4) application are the same as for the EAW, which means that the request for consent to additional surrender should be based on a national arrest warrant or judicial decision having the same effect, or an enforceable judgment. The Irish expert believes it would not be possible to deal with an additional surrender without a national arrest warrant or an enforceable judgment, regardless of the impact on the deprivation of liberty.[1045] In Poland,[1047] the request for additional surrender should contain the same information as that of an EAW, including a 'final and binding or enforceable judicial decision in connection with which the warrant was issued'.[1048]

Differently, in Belgium, there is a distinction between additional surrender for prosecuting and for executing EAWs, and the question refers only to the first. The report raises the question of whether the fact that the Handbook determined that additional surrender should be submitted by the 'same procedure' is enough to make the additional surrender be based on a national arrest warrant. The Belgian Court of Cassation distinguishes between surrender and additional surrender,[1050] as only the additional surrender can be granted by the public prosecutor without the need to issue an EAW. In the case at stake, it was not based on a specific national arrest warrant.[1051]

Belgian,[1052] Dutch[1053] and Polish[1054] experts highlighted the issue of accessory offences, that do not meet the threshold of article 2 of FD 2002/584/JHA, cases in which the criminal proceedings would not result in their detention. The challenge they pose is whether such offences would lead to issue a national arrest warrant and as consequence qualify for additional surrender. In Poland, for instance, it is not necessary to submit a motion for additional surrender, or to have consent,[1055] if the proceedings do not result in detention of the requested person or if the penalty finally imposed in such proceedings does not result in deprivation of liberty. Polish authorities apply exceptions to the rule of speciality specifically provided for in Art. 27(3)(c)-(d) of FD 2002/584/JHA. The Dutch experts conclude that it is

[1045] IE, report, question 64bis.
[1047] Article 607e(4) of the CCP.
[1048] PL, report, question 64bis.
[1050] Case number P.14.0054.N.
[1051] The Belgian expert criticizes this decision, asserting that an EAW is needed for the additional surrender, requiring a national arrest warrant. BE, report, question 64bis.
[1052] BE, report, question 64bis.
[1053] NL, report, questions 17bis and 64bis.
[1054] PL, report, question 64bis.
[1055] The Supreme Court relied on the judgment of the CJEU of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:669. PL, report, question 64bis.

not possible to issue an EAW with respect to an offence for which it is not possible to apply measures restricting personal liberty, such as an arrest or pre-trial detention,[1056] but, like the Polish report, they refer to exceptions to the rule of speciality (Art. 27(3)(b)-(c) of FD 2002/584/JHA).[1057] Belgium, differently, does not allow surrender for accessory offences.[1059] For the Belgian expert, granting additional surrender without an EAW and underlying national arrest warrant could constitute an issue, as the EAW was not set up to facilitate the prosecution.[1060]

4.8.2.5 Difficulties in the executing Member State

The Hungarian, Polish and Romanian reports show no difficulties on the executing side.[1061] The Dutch report indicates that, sporadically, there are complaints by surrendered persons about non-compliance with the speciality rule, and that it is difficult to assess whether these complaints are well founded due to the number of exceptions in Art. 27 (3) of FD 2002/584/JHA.[1062] The Belgian expert states that the difficulty in figuring out whether the issuing judicial authority respects the speciality rule also appears when Belgium is the executing authority, since it is not possible to check it. It is noteworthy that, in case of non-compliance, there is no remedy.[1063] The Greek report shows that the same issues that appear when Greece is the issuing Member State, reflect on it as executing Member State, such as defining `same acts` and the vagueness of the offences description.[1064] The Irish report states that the provision that regulates the procedure adopted for dealing with requests for consent does not provide detail, only setting out that it be in writing.[1065] Because such proceedings

[1056] NL, report, question 17bis.
[1057] NL, report, question 64bis.
[1059] BE, report, question 64bis.
[1060] "Article 1(1) FD establishes that the EAW is aimed solely at the arrest of the requested person in a member state other than the issuing member state with a view to his surrender to the latter state (see also AG Bot, opinion in C-241/15, Bob-Dogi, para. 45). The EAW was therefore not set up nor intended to facilitate the prosecution. If an additional surrender is not possible without an EAW and an underlying national arrest warrant, one could however argue that this is a major weakness of the EAW FD and only leads to more creativity in assessing that the benefice of the rule of speciality does not apply." BE, report, question 64bis.
[1061] HU, report, question 65; PL, report, question 65; RO, report, question 65.
[1062] NL, report, question 65.
[1063] BE, report, question 65.
[1064] EL, report, question 65.
[1065] Section 22 of the Act of 2003 as amended by s. 80 Criminal Justice (Terrorist Offences) Act 2005, s. 15 European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 and S.I. No. 150/2021. IE, report, question 65.

usually arise only after surrender, practical difficulties can arise for the legal representatives of surrendered persons, 'particularly where the respondent is in custody and there is also a language barrier'.[1066] As to difficulties encountered by the executing judicial authority, the Irish report gives a number of examples. The first example is of multiple EAWs where the Supreme Court decided to allow 'the respondent may be ordered to be surrendered on two warrants. Such an approach preserves the rule of specialty and is consistent with the terms of section 22 and with the purpose of the Framework Decision'.[1067] The second example is a case where the respondent had his acquittal quashed and the re-trial reordered in the issuing Member State due to the re-examination of forensic samples. In the case, the Court gave consent for prosecuting him for the offence.[1068] The final example is one where the respondent objected to the consent being sought in respect of his further prosecution on the basis that special rules in the Irish EAW legislation which applied to a person awaiting surrender (contained in s. 22(2) of the Irish EAW Act 2003) should also apply to his situation which was instead governed by a different provision of the same Act, i.e., s. 22(7) of that Act. The Irish Court of Appeal upheld the decision of the High Court to grant the consent sought, stating that there was 'simply no basis as a matter of statutory interpretation in seeking to apply the special rules in s. 22(2) to one situation (i.e., the person awaiting surrender) to another (i.e., the person who has already been surrendered)'. Hence, a request for consent to further prosecution was not to be treated in all respects as if it was a request for surrender.[1069]

4.8.3 Recommendations

Recommendation 4.12 Executing judicial authorities shall include in the decision on the execution of the EAW the person's decision concerning the renunciation of the speciality rule.

Recommendation 4.13 The executing judicial authorities shall send the decision on the execution of the EAW, and it is recommended to add its translation to the issuing judicial authority.

Recommendation 4.14 The issuing authority shall include both the EAW and the decision on the execution thereof in the case file of the national proceedings.

[1066] IE, report, question 65.
[1067] *Minister for Justice, Equality and Law Reform v. Gotszlik* [2009] 3 IR 390.
[1068] *Minister for Justice, Equality and Law Reform v Renner-Dillon* [2011] IESC 5.
[1069] *Minister for Justice and Equality v. Sliwa* [2016] IECA 130.

Chapter 5 Synthesis

5.1 Introduction

In this chapter we will start with dealing with issues related to amending/improving the legal and organisational framework within which the competent authorities have to operate. We will continue with the issue of requesting/supplying supplementary information and its impact on mutual trust and mutual recognition. The chapter will end up with dealing with the Handbook on how to issue and execute a European Arrest Warrant[1070] (Handbook) and with the COVID-pandemic.

In general one could say that the responses of the experts with regard to the legal and organisational framework can be divided in two categories:

i. keeping the legal and organisational framework as it is, but improving its application;
ii. amending the legal and organisational framework.

The project aims at identifying problems in daily practice and providing practical solutions. Some of the problems that issuing and executing judicial authorities encounter in everyday practice are caused by deficiencies in the, legal and organisational, framework within which these authorities have to operate. Other problems do not result from deficiencies in the framework, but from the way in which the framework is applied by the competent authorities.

In this chapter we will address both levels and come up with corresponding recommendations, since deficiencies on both levels can result in practical problems that the competent authorities have to deal with in their daily work.

In section 2 we will first deal with the legal framework itself and in section 3 with issues of organisation and communication. In section 4 we will treat the issue of requesting and supplying supplementary information on the basis of Art. 15(2) of FD 2002/584/JHA. The Handbook is the subject of section 5. Finally, in section 6 the inescapable issue of the COVID-19-pandemic will be dealt with.

[1070] *Handbook on how to issue and execute a European arrest warrant*, COM(2017) 6389 final.

We will begin the analysis of each issue with observations based on the country-reports of the experts and our own knowledge and experience. Then, some general overall-conclusions will be drawn. Finally, we will make more specific recommendations.

5.2 The legal framework

5.2.1 Introduction

The legal framework with regard to the EAW is, in a narrow sense, of course FD 2002/584/JHA.[1072] In a broader sense, other instruments interfere with the application of this Framework Decision. First we will deal with the Framework Decision itself. Then the relationship with other legal instruments will be addressed.

5.2.2 Observations

5.2.2.1 FD 2002/584/JHA

The responses of the experts to the question which suggestions they have for improving the FD[1073] show a huge variety. They range from 'none'[1074] to replacing the FD by a Regulation[1075] (or creating a 'new instrument'[1076]).

Keeping the two levels mentioned in section 1. in mind, the suggestions of the experts fall into two categories:

i. amending (or replacing) the FD;
ii. improving the way in which the FD is applied while keeping it as it is.

5.2.2.1.1 Amending/replacing the FD

[1072] FD 2002/584/JHA.
[1073] Question 72 of the questionnaire.
[1074] RO, report, question 72.
[1075] EL, report, question 72.
[1076] BE, report, question 72.

Amending the FD

The experts make many proposals to amend the existing FD. Common thread in this regard is drafting a more elaborate EAW-form taking in parts of the Handbook and other guidance on filling in the form. The experts from Ireland and Poland flag the lack of a substantive provision on human rights (as a ground for refusal) in the FD.[1078] Several experts suggest incorporating a proportionality assessment in the FD and in the EAW-form.[1080] The Irish expert suggests creating a basis in the FD for the Irish exemption with regard to surrender solely for investigative purposes (*i.e.* as long as the case is not 'trial-ready'). Amending the time-limits has also been put forward (just one time-limit of 60 days beginning at the moment when the EAW is complete (Ireland)). Section (d) of the form should give more guidance and should clarify to what extent and in what way this section also concerns appeal-judgments, cumulative sentences and judgments converting suspended sentences into enforceable sentences, according to the Polish expert. Related to the EAW-form some kind of digitalisation of the form has been suggested by several experts.

The expert for Poland is of the opinion that only judges should be competent to issue/execute EAW's. With regard to the issue of 'dual level protection' we already pointed out that the situation would be far less complex if only judges would be competent to issue EAW's.[1082] Taking this point one step further, simplifying the system by designating only judges as issuing and executing judicial authorities could also contribute to mutual trust.[1084] After all, no additional requirements as formulated by the Court of Justice with regard to prosecutors are necessary to support mutual trust between judges of the Member States. Furthermore, prosecutors do not have the option of referring cases to the Court of Justice in order to get answers to preliminary questions about the interpretation of EU-law. The French member of the Sounding Board describes the implications for French national law if the competence to issue and execute a EAW were to be allocated to judges only. The explanation, although very clear and convincing in its arguments, underlines the observation that the complexity we have to deal with stems from the variety of national arrangements of competences involved. She also makes a valid argument by stating that improvement should be achieved by better

[1078] In the eyes of the Polish expert there is no need for amending the FD, since this gap is filled in by the ECJ.
[1080] EL, report, question 72; IE, report, question 72.
[1082] See chapter 2 and 3.
[1084] Not through distrusting prosecutors, but for reasons relating to simplifying the system.

regulating the issuing of EAW's instead of changing authorities. While this could contribute to more adequate issuing decisions, especially with regard to assessing the proportionality of issuing a EAW, it does not simplify the system as much as implementing the recommendation would do. She furthermore points out validly that, if only judges were to be competent as judicial authorities, the national arrest warrant and the European arrest warrant should not be issued by the same judge. This would contribute to the protection of the rights of the requested person.

Specifically with regard to the grounds for refusal in the FD, the Dutch experts state that the FD should only contain mandatory refusal grounds that are directly based on the obligation to respect fundamental rights. All other grounds should be optional both for the Member States and, in case of transposition, for their executing judicial authorities. No expert reflected the need to introduce new grounds for refusal (other than the aforementioned ground for refusal based on human rights) or to abolish existing grounds for refusal, with the exception of the Greek expert. This expert is of the opinion that a clear prohibition to differentiate between nationals and non-nationals when applying grounds for refusal should be added to the FD. We would, however, like to point out that this issue is also, or primarily, an issue of correctly transposing and applying the grounds for refusal of this FD.

Regarding the specialty rule, the Polish and Belgian expert are of the opinion that this rule should be abolished or, according to the Polish expert, at least be limited and, according to the Belgian expert, at least be redefined. It complicates the execution of sentences and causes a lot of additional procedural activity (requests for additional surrender).[1085] The Hungarian expert thinks it should be maintained since it has an important role in the protection of the rights of the defendant. The experts for the Netherlands thinks the specialty rule is not redundant as long as grounds for refusal and guarantees exist. The country-report of Greece presents an interesting angle. Prosecutors are in favour of abolishing this rule because this would be in line with the principle of mutual trust and judges are in favour of keeping it because the rule protects the rights of the requested person. The Irish expert refers to a long standing debate concerning whether the rule of specialty operates solely to protect the sovereignty and extradition process of the executing state or, alternatively, confers rights upon

[1085] PO, report, question 72.

the requested person or operates both to protect the process of the executing state and to confer rights upon the requested person. In his view the specialty rule is a right of States and not of individuals. Also the Polish expert is of the opinion that this rule is more rooted in State sovereignty than in the idea of protection of human rights. Although, according to the Irish expert, within the EAW-system, which operates between judicial authorities and is based on mutual trust and mutual recognition, the need for this rule might be less pressing, nevertheless with the present challenges to the rule of law within the EU there might be, according to this expert, a 'residual need' for this rule. One can observe that there is not much common ground on the issue of the specialty rule. The case-law of the Court of Justice, by the way, is very clear with regard to the ratio of the speciality rule: it is linked to the sovereignty of the executing Member State and also confers a right on the requested person.[1086]

In the view of the Greek expert the 'territoriality exception' of Art. 4(7) FD 2002/584/JHA should be limited by prescribing that prosecution has to take place in the Member State that is affected the most. She refers in this regard to FD 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. Extensive use of this ground for refusal breaks cases apart and creates obstacles for prosecution. This is even more pressing in a situation in which this optional ground is transposed as mandatory ground (as in Greece).[1087] In this regard, we may refer to the debate on the specialty rule mentioned before where the question was raised whether this rule protects State-interests (sovereignty) or the rights of the requested person. We point out that this 'territoriality exception' is not a right conferred upon the requested person but it is linked to the protection of the interest of the State.

Replacing the FD

Most far reaching is, of course, replacing the FD by a Regulation. Greece points out that this would circumvent faulty implementations and Belgium states that this would make applying the legal framework more easy. Without wanting to contradict these points, even with a Regulation in place national judges will have to interpret this Regulation. Also, some

[1086] ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:669, para. 44; ECJ, judgment of 24 September 2020, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)*, C-195/20 PPU, ECLI:EU:C:2020:749, para. 39.
[1087] Note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this ground has been made optional.

transposing in national legislation has to be done on certain organisational and procedural issues. So, putting a Regulation in place is no guarantee that divergences between Member States will not occur. On the contrary, one could argue that a lack of guidance by a national transposing law, which by its nature has a unifying effect, will give room to divergences in interpreting the Regulation on a national level. This is the more pressing in a situation in which the power to issue and/or execute EAW's is not centralised. Therefore, even apart from considerations with regard to the political feasibility of putting in place a Regulation and the long and burdensome legislative procedures to go through, it remains to be seen whether this option will have the desired effect. Nevertheless, it is worthwhile to explore replacing the FD EAW by a Regulation and even to consider incorporating in this Regulation other instruments like the EIO (see section 5.2.2.2).

5.2.2.1.2 Improving the application of the FD

The FD and national law (taking away discrepancies)

The most obvious way to improve the application of the existing FD is to remove any discrepancies between the FD and the national transpositions. These discrepancies are addressed in the previous chapters. From an overall-perspective one discrepancy is worth mentioning here, since there seems to be a fundamental flaw in transposing the FD.[1089] Grounds for refusal that are optional in the FD should not be transposed as mandatory grounds.[1091]

The Greek report flags that in Greece, besides transposing optional refusal grounds as mandatory, some grounds for refusal are transposed as mandatory for nationals whereas they are optional for non-nationals.[1093] More or less in line with this, the guarantee of return is transposed as a guarantee for residents and as a mandatory ground for refusal for nationals. In the view of the expert this should be prohibited. In the Dutch country-report several instances

[1089] See especially country reports EL, report, question 72; NL, report, question 72.
[1091] EL, report, question 73 a); NL, report, question 73 a).
[1093] See EL, report, questions 4 and 73 a). This is the case with regard to Art. 4(2) and 4(6) of the FD. However, note that according to new Greek legislation (N 4947/2022) enacted on 23 June 2022, this discrimination was repaired.

of incorrect transposition of optional grounds for refusal are mentioned too. See also the report on Belgium, Hungary, Poland and Ireland.[1094]

In so far as these and other transpositions are not in conformity with the FD, they should, as mentioned before, be amended. However, as long as the necessary amendments to national laws are not in place, the courts and prosecutors of the Member States, as masters of the national practice, should do the utmost to find workarounds by giving a conforming interpretation to these national provisions.[1096]

The FD and national practice

Some practical suggestions are made to improve the way in which the existing FD is applied.[1098] With regard to issuing an EAW the following is mentioned. Only the official EAW-form should be used (without deviations) and only in the official language versions.[1100] In the decision to execute the EAW, the acts for which surrender is allowed should be designated according to the offences mentioned in section (e) of the EAW-form (instead of designated according to the legal classification of the executing Member State). The decision should state whether the requested person renounced his entitlement to the specialty rule. Issuing judicial authorities should always include the guarantee of return (Art. 5(3) FD 2002/584/JHA) in the initial EAW in order to prevent the executing judicial authority from having to ask for it should that authority decide to make surrender dependent on that guarantee.[1101]

In relation to decisions to execute an EAW suggestions are made to ensure the specialty rule, to provide the requested person and the issuing judicial authority with a translation of the

[1094] In this regard, it is not clear how Romania transposed the grounds for refusal.
[1096] It is too tempting not to cite EL, report, question 4: "Importantly, I must emphasize that contrary to the legislator, Greek legal practice depicts a positive stance towards mutual recognition. As it will be demonstrated throughout the report, Greek practitioners show a loyal attitude towards mutual trust and the execution of EAWs. While the legal framework might not leave wiggling room, one observes a gap between law and practice, with the legislator maintaining a conservative regime, and courts and prosecutors attempting to minimize obstacles in mutual cooperation. " This is in line with the 'Dutch experience'.
[1098] See NL, report, question 72.
[1100] Of course it could be that in some Member States this requires amending the national transposing law
[1101] See **recommendation** 4.8. With regard to this last suggestion the Dutch report clarifies that it is (of course) up to the executing judicial authority whether it will make surrender dependent on that guarantee. The object of providing this guarantee beforehand is improving efficiency and, in and of itself, creates no obligations for issuing and executing judicial authorities.

decision on surrender[1102] and to include a copy of the decision in the case file of the criminal case in the issuing Member State.

5.2.2.2 FD 2002/584/JHA and other instruments

The country-reports address the following legal instruments of criminal cooperation within the EU that could be relevant in assessing the proportionality of issuing/executing an EAW:

- the European Investigation Order (EIO) (Directive 2014/41/EU);
- the European Supervision Order (ESO) (FD 2009/829.JHA);
- taking over the execution of a sentence (FD 2008/909/JHA);
- summoning a person in another Member State.[1104]

These instruments are mainly analysed in the context of the requirement to assess the proportionality of issuing an EAW,[1106] that is as alternatives to or requirements for issuing an EAW that could be relevant in deciding whether to issue an EAW. This is the angle which is dealt with in this chapter. Other angles are treated in previous chapters.

With regard to the EIO, it is noteworthy at the outset that the Directive EIO refers in its preamble to FD 2002/584/JHA, but not *vice versa*. The preamble of the Directive EIO refers in the Preamble to the EAW[1107] stating that the issuing (EAW-)authority should consider whether issuing an EIO could serve as an effective alternative with a view to a proportionate use of the EAW, where it would be more logical if FD 2002/584/JHA refers to the Directive EIO in addressing the issue of the proportionality of issuing an EAW. After all, one would expect that FD 2002/584/JHA gives guidance to competent (EAW-)authorities on when to refrain from issuing an EAW because a more proportionate alternative is available.

[1102] See **recommendation** 4.14. See also Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings with regard to the right of the requested person to a translation of the EAW and other documents. This Directive entails a right of the requested person to a translation of the EAW and other documents. It does not seem to confer on him a right to a translation of the decision on the execution of the EAW. Neither does it entail provisions with regard to translations for issuing judicial authorities.
[1104] See especially PL, report, question 76 a).
[1106] See especially question 9 of the questionnaire.
[1107] "With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative." This is, of course, due to the fact that the FD EAW preceded the Directive EIO. Nevertheless, the observation stands.

The Greek expert states that a prosecution-EAW should only be issued when a case is ready for trial. This would be in line with the exemption of Ireland not to surrender for the purpose of an investigation in the pre-trial phase.[1109]

The Hungarian expert thinks that summoning abroad can be an alternative to issuing an EAW, while the Romanian expert has the view that, since summoning a person is a prerequisite for issuing a national arrest warrant, which is a prerequisite for issuing an EAW, it is not an alternative to issuing an EAW. However, one could argue in general, that it would be better first to try to have the requested person available on a (more) voluntary basis before issuing a coercive measure like an EAW, as the Greek expert notes as well. When this turns out to be successful there is no need for an EAW and in this sense summoning abroad could be viewed as an alternative.

The expert of Belgium points out that the different means (EAW, EIO, ESO and summoning abroad) serve different purposes. They can be used together, according to this expert, but not necessarily as alternatives to or prerequisites for issuing an EAW. The interaction between the different instruments is nicely illustrated in the country-report of Poland. The expert of Poland mentions that Polish law contains a provision on summoning a person at an address in another Member State. She then gives examples of refusals by Polish courts to issue an EAW considering that no adequate attempt was made to summon the requested person at an (known) address abroad. A request for issuing a prosecution-EAW was refused because the place of residence of the requested person abroad was known and it would be not proportionate to issue an EAW in a situation in which no adequate attempt was made to reach him at this address and try to conduct procedures on the basis of an EIO. Another example refers to a refusal to issue an execution-EAW. In this case the court, referring to the judgment of the Court of Justice in *Dworzecki*,[1111] ruled that an attempt should be made to find out the address of the requested person. The court reasoned that the execution of an EAW in order to have the requested person undergo his sentence in Poland, might be refused because the EAW is not in conformity with Art. 4a of FD 2002/584/JHA. Although the court did not explicitly refer to the requirement of proportionality, one could argue that issuing an EAW knowing that its execution will be (or should be) refused is not proportionate (since it cannot be

[1109] N.B. Ireland did not opt in with regard to the EIO and the ESO.
[1111] ECJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346.

effective).[1112] In these cases, we see an interplay between issuing an EAW, summoning a person in another Member State and issuing an EIO. The Dutch experts are of the opinion that issuing an EIO could be a viable alternative to issuing a prosecution-EAW. In order though to make the EIO more effective, the requirement of consent to videoconferences should be deleted. Furthermore a legal basis should be put in place in FD 2002/584/JHA and the EAW form for a proportionality-assessment.

The ESO does not seem to resonate with the experts. Only the Romanian expert mentions some experience in executing an ESO. One is tempted to call it a 'failed instrument' (see also the Greek report). Besides hardly being used at all, experts give no (concrete) account of the role the ESO can play in issuing/executing EAW's. Only the Dutch country-report makes an attempt to construe a relationship between the ESO and the EAW. The fact that a prosecution-EAW presupposes the existence of an enforceable national arrest warrant makes it hard to conceive, according to the Dutch experts, how issuing an ESO could be an alternative to *issuing* a prosecution-EAW. After all, issuing an ESO presupposes a decision on supervision measures meaning that the requested person will not be detained, which is incompatible with the existence of a national arrest warrant. Issuing an ESO will therefore require that the national arrest warrant is withdrawn as a result of which there is no basis anymore for issuing an EAW. With regard to *executing* a prosecution-EAW the Dutch country-report takes a different stance. During the proceedings in the executing Member State the requested person, or even the executing judicial authority, might request or suggest to the issuing judicial authority to replace the national arrest warrant (*i.e.* the pre-trial detention order) by a decision on supervision measures which could be recognised and enforced in the executing Member State. This would amount to withdrawing the EAW and would enable the requested person to go on with his life in the executing Member State, while that Member State carries out the supervision. When the issuing Member State then starts/continues the trial the requested person may attend the trial on his own accord or waive his right to be present.[1114] In the meantime necessary (further) investigation could take place using an EIO or making arrangements with the requested person on the basis of the supervision measures.

[1112] Moreover, issuing an EAW in such circumstances would be contrary to the principles of mutual trust and sincere cooperation. Cf. ECJ, judgment of 11 November 2021, *Gavanozov II*, C-852/19, ECLI:EU:C:2021:902, para. 60.
[1114] If the competent authorities deem it necessary that the requested person is present at his trial this could be achieved by incorporating in the supervision order an obligation to appear at the trial.

We take this idea of the role of the ESO, after issuing a prosecution-EAW, in the proceedings before the executing judicial authority one step further to a dual level protection 2.0. One could envisage a possibility for the requested person to challenge the national arrest warrant during the proceedings before the executing judicial authority. This could be achieved by letting the issuing judicial authority participate in the hearing in the executing Member State[1115] and giving the requested person the possibility to file a request with the issuing judicial authority before or during the hearing. This request could be a request to replace the national arrest warrant by an ESO as suggested before. But also, the request could be to withdraw the national arrest warrant, for example, because of a lack of sufficient evidence, which falls outside the competence of the executing judicial authority. Creating the possibility to file both kinds of requests would then amount to a proportionality assessment not before but after issuing the EAW and before taking a decision on executing the EAW. It could very well be that the authority that is competent to issue the prosecution-EAW is not the competent authority with regard to issuing an ESO or withdrawing the national arrest warrant. In that case, the authority that is competent should attend the hearing. This last point, by the way, illustrates that there is room to improve the coherence between the different applicable instruments. Of course, this idea might look revolutionary, but in our eyes it would be worthwhile further exploring this idea even if it is 'out of the box'.[1117] Even one more step further, the proceedings in the executing Member State could offer the requested person also an opportunity to challenge the EAW on grounds of proportionality as described in more detail in the next Chapter. The result of combining these two steps will be that after issuing the EAW and before taking a decision on the execution of the EAW the issuing judicial authority will be able to reconsider issuing the national arrest warrant (and withdrawing it or replacing it by an ESO) and to reconsider issuing the EAW. It should be pointed out in this regard that it is, of course, up to the issuing judicial authority to reconsider issuing the national and/or European arrest warrant and not up to the executing judicial authority. In case

[1115] The participation of the issuing authority could by the way also speed up the proceedings, since this might prevent having to ask for supplementary information on the basis of 15(2) FD EAW.
[1117] See also Glerum, inaugural lecture on the right of the requested person to be heard in the executing Member State by the competent authority of the issuing Member State who issued the national arrest warrant (V.H. Glerum, *Tussen vrijheid en gebondenheid: het Europees aanhoudingsbevel 2.0. Gedachten over een nieuw evenwicht tussen rechtsbescherming en doeltreffende justitiële samenwerking in strafzaken* (inaugural lecture Groningen), Deventer: Wolters Kluwer 2022).

the outcome is that the EAW is upheld, the executing judicial authority will continue the proceedings and take a decision in the usual way.

Finally, the country-reports address also FD 2008/909/JHA as a possible alternative to issuing or executing an execution-EAW. This FD is dealt with from the perspective of a refusal to execute an execution-EAW on the basis of Art. 4(6) FD EAW in previous chapters of the report. In this chapter we deal with FD 2008/909/JHA from the perspective of proportionality, that is as a possible alternative to issuing an execution-EAW. According to the Romanian expert, this FD should be (more often) applied '*ab initio*', *i.e.* before issuing an execution-EAW an attempt should be made to have the sentence enforced in the Member State where the requested person resides. In this regard it should be pointed out that, as the Dutch experts mention, Art. 4(6) already provides for the option of enforcing the sentence in the executing Member State. Therefore, the question would be which procedure is more effective and/or less burdensome for the Member States involved and the requested person. The Belgian expert points out that there is no legal basis for establishing a preference of applying one of the FD's over the other.[1119] However, given the lack of a legal basis for establishing a preference in general, one could argue that the proportionality requirement in relation to issuing an EAW could be a basis for establishing a preference in an individual case.

With regard to the relevance of the FD 2002/584/JHA for other instruments of mutual recognition of decisions in criminal matters,[1121] Greece mentions FD 2008/947/JHA (on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions). The Greek expert also points out that Directive 2013/48 and, generally, the 'procedural rights directives' may have an impact on the application of FD 2002/584/JHA, since the EAW system has become more and more complicated and expert defense counsels seem to become a scarce commodity. The Netherlands mentions the Agreement Iceland/Norway, the Trade and Cooperation agreement with the UK and other FD's/Directives with grounds for refusal similar to those of FD 2002/584/JHA, like FD 2005/214/JHA (on the application of the

[1119] The Belgian expert points out several legal and practical issues that are intertwined and involved in applying Art. 4(6) FD 2002/584/JHA and FD 2008/909. See the answers to BE, report, questions 6 b) and 45 c). See also the NL, report, questions 6 b) and 45 c). These issues are not dealt with in this chapter.
[1121] Question 77 of the questionnaire.

principle of mutual recognition to financial penalties) and FD 2008/909/JHA. It would be desirable that these grounds are interpreted and applied in a uniform way.

With regard to the different instruments mentioned, a final general observation is that there is no adequate cross-referencing between the different instruments, that different authorities are competent and that the goals are partly overlapping.

5.2.3 Conclusions

Looking at the country-reports, the general feeling is that the legal framework, and especially FD 2002/584/JHA, does not live up to today's requirements of the practice of issuing/executing EAW's and of the cooperation between competent authorities in surrender-procedures. One senses dissatisfaction, not to say sometimes frustration, with the suitability of this framework in the present form and with the present content. To respond to this dissatisfaction a total make-over of the legal set-up could be considered, but also several possible specific improvements with regard to several aspects of the legal framework are worth considering, some of them limited to amending only the EAW-form.

There are also a number of 'easy' ways to improve the practice of issuing/executing EAW's and, especially, to contribute to mutual trust and mutual recognition, without having to amend the legal framework at the EU-level. The most obvious is that the issuing judicial authorities should only use the official EAW form without any deviations (recommendation **3.1**).

With regard to the legal framework, putting in place amendments will be more challenging. These amendments would take place on three levels: national law, FD 2002/584/JHA and other EU-instruments with a connection with the FD. By the way, the extent to which amending the national laws of Member States is really necessary depends on the 'creativity' of courts and prosecutors in the Member States to find ways around deficiencies and to adapt the national provisions to the needs of daily practice of issuing/executing EAW's (as far as possible).[1123]

[1123] See NL, report, question 73 b).

With regard to the relationship between FD 2002/584/JHA and EIO, ESO, and summoning a requested person abroad no uniform picture arises. The different experts have different opinions on how to relate the instrument of an EIO and summoning abroad to issuing an EAW. The ESO does not seem to be relevant at all because this option is scarcely used, but could be relevant when adequately linked to EAW-proceedings. The overall-conclusion is that further clarification by the EU-legislator is needed and that, at the same time, there are opportunities in daily practice to apply these instruments more coherently in order to comply with the requirement of proportionality. Especially the relationship between the EAW and the EIO needs attention.

The relationship between applying FD 2002/584/JHA by issuing an execution-EAW and applying FD 2008/909/JHA without issuing an EAW from the perspective of proportionality also deserves further exploration. It remains to be seen which approach would be preferable in terms of efficiency and effectiveness, including the burden on the requested person and the Member States involved.

A general conclusion from what can be observed in the country-reports is that an integral and coherent approach in applying the several applicable instruments is missing. In order to achieve this approach the interdependence and interconnections between these instruments should be fine-tuned and made transparent. The EU-legislator is recommended to create a procedure in which an integrative and coherent application of the several instruments of criminal cooperation within the EU is guaranteed (see chapter 6).

5.2.4 Recommendations

Issuing and executing judicial authorities

See the recommendations of Chapter 3 with regard to the EAW-form. In a sense these recommendations are ‘quick wins’, since there is no need to amend the legal framework.

5.1 Executing judicial authorities are recommended to specify the offence(es) for which surrender is allowed in a decision to execute the EAW only partially by referring to the offence(s) as mentioned in section (e) of the EAW (not by referring to their national legislation).

The EU legislator

Since amendments to the FD (incl. the EAW-form) do not fall under the category 'quick wins', we choose not to make direct recommendations for specific amendments. We prefer to recommend in general to reconsider the setup of the legal framework along the following lines, since we are not in a position to balance the effort needed for these amendments and the profit gained by these amendments.

5.2 Reconsider the setup of the FD EAW along the following lines.

- *Replacing* the framework decision by a Regulation.
- *Amending* the framework decision.
    - Adopt a provision concerning proportionality including an explicit relationship with Directive EIO.
    - Adopt a ground for refusal with regard to human rights.
    - Amend the time-limits by setting a time-limit of 60 days after completing the EAW in cases that supplementary information is needed.
    - Create a basis in the FD for the Irish exemption by introducing a corresponding optional refusal ground.[1125]
    - Restrict the possibility to refuse execution of an EAW on grounds of territoriality (Art. 4(7) FD 2002/584/JHA).[1127]
    - Make only judges competent to issue/execute EAW's.
    - Amend the EAW-form (see recommendations of chapter 3).

5.3 Consider evaluating the coherence of the several instruments of criminal cooperation along the following lines.

- Integrating EAW and EIO in a Directive or Regulation
- Limiting the use of the EAW for prosecution to cases that are trial ready (as a consequence of which the EIO will probably be used more often for cases that are not yet trial ready).

[1125] There is no need for incorporating a basis *in* the FD for the Irish exemption if the use of prosecution-EAW's would be limited to cases which are 'trial-ready' (see the recommendation below).
[1127] The French member of the Sounding Board propagates, in line with the recommendation, to abolish Art. 4(7) b) EAW FD. Also in line with the recommendation, she suggests two requirements for the optional non-execution ground of Art. 4(7)a) EAW FD: 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.

- Aligning FD 2002/584/JHA with FD 2008/909.
- Amend the FD 2009/829/JHA on the ESO to facilitate the role the ESO can play in executing a prosecution-EAW.
- Reconsider the ways in which Member States can summon requested persons residing in other Member States, including giving to Member States access to the national registry of other Member States and providing for a guarantee of safe conduct.[1128]

5.3 Organisation and communication

5.3.1 Introduction

In this section we address the way in which the exercise of powers to issue and execute EAW's is organised, *i.e.* who decides on what. Also, we look at the way in which communication between the competent judicial authorities is organised.[1129]

5.3.2 Observations

Exercise of powers (jurisdiction to issue/execute)

The experts of Ireland and the Netherlands are in favour of centralising the power to issue and execute EAW's. This would contribute to the quality of communications and to developing the knowledge/expertise and experience needed. The expert for Belgium reports that although centralising the execution or even the issuing of EAW's on a national level appears not to be an option in Belgium, in some judicial districts there is, however, already a centralisation within the public prosecutor's office for the issuing and, within the courts, for the execution of EAW's.

Some experts point out that practice shows that specialisation takes place.[1131] This can be seen as a kind of 'centralisation', *i.e.* centralisation of knowledge and experience instead of formal competence to issue/execute EAW's.

[1128] One should examine whether such a safe conduct should be broader than the safe conduct within the meaning of Art. 12(2) of the ECMACM.
[1129] See especially questions 70 and 72 of the Questionnaire.
[1131] PL, report, question 70; BE, report, question 70.

As already pointed out in section 5.2.2.1.1., in the eyes of Poland only judges should be designated as issuing/executing judicial authorities. This could simplify things and could contribute to mutual trust and, furthermore, allows for preliminary references in cases in which this is at the moment not possible.

Organisation of communication

With regard to the way in which the communication between the competent judicial authorities is organised, some experts are in favour of establishing focal points.[1133] Direct contact between focal points could contribute to a more swift and adequate communication, since these focal points know the way around their organisation and their Member State. Other experts do not see sufficient added value.[1135] In this regard the experts from Romania, Poland and Belgium refer to Eurojust and EJN as organisations that can be engaged to facilitate communications between judicial authorities.[1137]

In the eyes of the Irish expert, focal points would be useful as a second best option to centralising the competence to issue/execute EAW's. The Dutch experts also think that centralising competences would contribute more to the quality of communications than designating focal points. Furthermore, in their view centralised focal points,[1139] in a setting of decentralised competences, would be a better option than designating focal points within each issuing and executing judicial authority.

It seems that there is no direct cooperation and communication between competent judicial authorities, besides sending/receiving an EAW and requesting/supplying information (on the basis of Art. 15(2) FD EAW). The Dutch country-report states that direct communication between judicial authorities is problematic for reasons of transparency vis-à-vis the requested person and his defense counsel and for practical reasons, e.g. language problems. Nevertheless the country-report also mentions the option of a (digital) platform for all judicial authorities for informal non-case related discussions and debate.

[1133] EL, report, question 70; HU, report, question 70.
[1135] PL, report, question 70.
[1137] RO, report, question 70; BE, report, question 70; PL, report, question 70.
[1139] As 'central authority' (Art. 7 FD EAW).

5.3.3 Conclusions

Like changing the legal framework, changing the way things are organised can be challenging for several reasons. At the same time, organisational restraints can have a heavy impact on the work of the competent authorities. Amendments can relate to the way powers are attributed to authorities (*e.g.* centralised or not), but also to the way the communication between authorities is organised. Of course, it is obvious that, for example, centralising the competence to issue and execute EAW's in Member States where there is no centralisation in place might not seem feasible or at least not easy to realise ('a bridge too far'). Nevertheless, in our view it is also obvious that centralising would contribute to streamlining the process and to developing the knowledge/expertise and experience needed and, therefore, would contribute to the quality of decisions taken by the competent authorities.

Regarding communication between authorities, centralising competences would also enhance the quality and efficiency thereof. Providing for centralised focal points for communication in a setting in which the issuing and execution of EAW's takes is decentralised could be a second best option to centralising the competence to issue/execute EAW's. Finally, setting up decentralised focal points in a decentralised setting has, in our opinion, an even more limited effect than the second best option. An alternative approach is specialisation within the competent authorities. Furthermore, it seems advisable to look at Eurojust and EJN when it comes to speeding up communications.

A different kind of communication, non-case related debate and discussion, is worthwhile exploring. A platform for all judicial authorities within the Union could contribute to mutual understanding and could offer an opportunity to unify approaches and could make (some) judgments of issuing/executing judicial authorities available to judicial authorities of other Member States.

5.3.4 Recommendations

<u>EU Commission</u>

5.4 Facilitate direct communication between judicial authorities on case-related and general issues. Put in place a digital platform for information exchange and debate and discussion between judicial authorities of different Member States and to support e-learning possibilities and provide for facilitation of the use of the platform by the EU Commission.

Member States legislators

5.5 Centralize competences and communication
- Consider making only judges competent to issue and execute EAW's.
- Centralize the competence to issue and execute EAW's.
- Put in place centralised focal points to facilitate communication between judicial authorities of different Member States.

Issuing and executing judicial authorities

5.6 Use Eurojust and EJN in communicating with judicial authorities of other Member States. For example in order to facilitate an adequate simultaneous execution of EAW's from two or more different Member States with regard to the same required person.

5.4 Supplementary information and mutual trust

5.4.1 Introduction

The issue of requesting and supplying supplementary information[1140] is dealt with primarily from the perspective of its impact on mutual trust.[1142] We will also look at the angle of efficiency. Without any doubt, efficiency in requesting and supplying supplementary information can have an impact on mutual trust, in a positive or a negative way.

5.4.2 Observations

When looking at the country-reports, identifying missing information, deciding on whether to ask for supplementary information, formulating the request and, last but not least, waiting for the issuing authority's reply, emerges as important issues in the daily practice of executing

[1140] See Art. 15(2) of FD 2002/584/JHA.
[1142] See questions 66 – 69 of the Questionnaire.

judicial authorities. As it is for the issuing judicial authorities to interpret requests for supplementary information, gather this information and formulate the reply.

This issue is important in a quantitative way and in a qualitative way. Quantitively, because it takes time to request and supply supplementary information and it also takes 'lead time' (waiting for the information) which can put pressure on keeping the time-limits. Qualitatively, because the decision whether to surrender or not may depend on the (availability of the) supplementary information. As a matter of fact the decision *should* depend on this information, that is it should be a matter of "to surrender or not to surrender"[1143] and asking for necessary supplementary information is mandatory[1144] (at least once). Also, requesting supplementary information can put stress on the cooperation between executing and issuing judicial authorities, as can be seen in the country-reports.

The answers to the question whether asking supplementary information has an impact on mutual trust vary from yes ('absolutely'[1145] and 'a lot'[1146]) to no ('not per se'[1147]). The Irish expert puts this question in a different perspective by stating that mutual trust at a *political level* might be impacted, whereas he believes that there is no impact on mutual trust at the *judicial* level, though this trust between judicial authorities requires continuous maintenance.

Some country-reports contain indications that the content of the question, being irrelevant (e.g. questions about available evidence) or delicate (*e.g.* about the independence of Polish judges, detention conditions, the status of a prosecutor as judicial authority), the way the question is put ("if we don't get the right answer we will refuse surrender…"), short time-limits, repetitive questions (same questions in each individual case), asking questions about issues that are not under the control of the issuing judicial authority and using standard-questionnaires etc., play a role in the way requesting supplementary information impacts on mutual trust.

Examples of irrelevant questions mentioned.[1149]

[1143] ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27.
[1144] ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629.
[1145] EL, report, question 66.
[1146] BE, report, question 66.
[1147] IE, report, question 66; NL, report, question 66.
[1149] For a more complete list see the *Common Practical Guidelines*.

- Questions about the presence of the requested person at the proceedings concerning the enforcement of a suspended sentence or the revocation of a conditional release.
- Questions about the reason for revoking conditional sentence.
- Questions about the reasons for issuing the EAW.
- Questions about the availability of proof and/or witnesses.
- The question whether the requested person left the country with permission of the court.
- Questions about summoning other than with regard to *in absentia* verdicts.
- Requests for documents confirming information given in section (d) of the EAW-form.

The Irish country-report gives an interesting example of how the relevance of requested information might depend on the way the FD is implemented in national law. 'Normally', in case of a prosecution-EAW, it would seem to be irrelevant whether the criminal investigation already led to a decision to place the requested person on trial. In the case of Ireland this information is relevant since Irish law prohibits surrender 'solely for the purpose of investigation'.[1151]

Some experts indicate that questions should be accompanied by an explanation of the reasons for asking the question. This would help in general and in particular it could ease feelings of discomfort caused by having to ask or to answer questions about delicate issues (*e.g.* deficiencies in the system of justice).

A somewhat different angle to this issue is given by two experts,[1153] indicating that requests for supplementary information should relate to existing objections to allow surrender (that is possible grounds for refusal). This angle reflects the general axioma of the FD 2002/584 that surrender should be the norm and refusal the exception and the judgment in *Piotrowski* that asking questions on the basis of 15(2) FD 2002/584 should be the *ultimum remedium*.[1155]

With regard to the issue of detention conditions and deficiencies in the system of justice, the Greek expert flags that it is unclear whether *assurances* (*e.g.* a guarantee that the requested person will not be detained in a problematic prison or a guarantee that the prison where the

[1151] IE, report, question 67.
[1153] BE, report, question 67; IE, report, question 67.
[1155] ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27.

requested person will be detained is not problematic) should be given or *information about facts* (size of the prison cell, time spent outside the cell, etc.). Indeed, the question arises how an assurance/guarantee, which by its nature is based on trust, relates to available factual information on the basis of which this trust is not (fully) operational? Is a general assurance/guarantee aiming at preventing the establishment of a general risk or taking away this conclusion (step 1 of the *Aranyosi and Căldăraru*[1156] and *Minister for Justice and Equality (Deficiencies in the system of justice*-test[1157]) acceptable? Or is an assurance/guarantee only acceptable in step 2 of the *Aranyosi and Căldăraru* and *Minister for Justice and Equality (Deficiencies in the system of justice* -test as a basis to take away the individual risk? Which information should an assurance contain?

Two experts[1158] refer to 'repetitive questions'. Information that is relevant for and applicable to several cases is requested in each and every individual case. For example, in each case the Dutch authorities are asked by the British authorities whether escaping from prison is punishable under Dutch law.[1159] Another example: the Court in Amsterdam verified whether a guarantee of the Italian authorities concerning detention conditions was given in each case, but later on switched to the approach that this guarantee applied to every case so there was no need for asking whether this guarantee would apply to the case at hand. One expert makes the suggestion of creating a database of information/guarantees already supplied on certain issues.[1161]

With regard to the do's (as opposed to the don'ts as mentioned above) the answers indicate that information should be asked about *facts.* On the one hand, this concerns information about 'empirical' facts (*e.g.* place of committing the crime, whether the requested person actually received information about the date and place of the trial). On the other hand, the information can relate to 'legal' facts, *i.e.* specific provisions of the law of the issuing Member State (that is whether a decision of a prosecutor to issue an EAW can be subjected to court proceedings or the possibility of a review of a life sentence).

[1156] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.
[1157] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice*, C-216/18 PPU, ECLI:EU:C:2018:586.
[1158] BE, report, question 68; NL, report, question 68.
[1159] This is possibly due to the fact that in the UK the competence to issue an EAW was not centralised. NL, report, question 68.
[1161] BE, report, question 67.

Even more on the positive side, one could argue that, besides being the duty of the executing judicial authority when supplementary information is needed, asking relevant and clear questions in a respectful way has a positive impact on mutual trust. The dialogue between executing and issuing judicial authorities is part of a sincere cooperation (Art. 4(3) TEU), asking questions makes it clear to the issuing judicial authority that the EAW is treated in a serious way and flagging deficiencies/gaps in EAW's issued can also be regarded as feedback that can be helpful for the future.[1163]

5.4.3 Conclusions

Requesting and supplying supplementary information is an important issue in the daily practice of executing and issuing EAW's. It should be done in a way that is efficient and respectful in order to respect the time-limits and to contribute to mutual trust and sincere cooperation. Several suggestions have been made in the country-reports to develop practical guidelines for requestion/supplying supplementary information and, in line with this, for amending the EAW-form in order to further smooth this process. See the Common Practical Guidelines for guidelines on how to request and supply supplementary information.

5.4.4 Recommendations

<u>EU Commission</u>

5.7 Implement the common practical guidelines for requesting/supplying supplementary information, including:

- templates/formats for questions that frequently occur;
- a list of examples of irrelevant questions, *e.g.* about available evidence and witnesses about summoning (other than related to *in absentia* judgments);
- a list of do's, *e.g.*:
  - explain why the information is needed/necessary;
  - refer to legal provisions and decision of the Court of Justice of the EU;

[1163] EL, report, question 73 b); NL, report, question 73 b).

- ask and supply information about empirical and legal facts;
- ask and answer all questions at the same time;
- set a realistic deadline;

- a list of don'ts, *e.g.*:
  - avoid repetitive questions as far as possible;
  - do not ask for or supply information about legal issues/provisions in general or for opinions;
  - do not use automatically standard-questionnaires, but only ask questions relevant in the case at hand.

5.5 The Handbook (a window of opportunity)

5.5.1 Introduction

The current Handbook (2017)[1164] 'is a revised version of the European handbook on how to issue a European Arrest Warrant issued by the Council in 2008 and revised in 2010'. This handbook 'takes into account the experience gained over the past 13 years of application of the European Arrest Warrant in the Union'. These two citations already show that there can be serious doubts whether the Handbook is sufficiently up to date. Not only because since 2017 five years have passed, but also because there seems to have been an acceleration of developments in the last years with regard to the EAW, for a great part due to an increase in preliminary references by national courts and a corresponding increase in judgments of the Court of Justice.

At the moment the Handbook is undergoing a revision again. It is obvious that there is a relationship between the Handbook and the Practical Guidelines that will be delivered by this project. What this relationship will look like remains to be seen. It could be that the Practical Guidelines are taken on board in the (current revision of the) Handbook or that the Guidelines are (the basis of) the new Handbook. It could also be that the Guidelines and the Handbook remain two different instruments, but then the two should be coordinated.

[1164] (*Handbook on how to issue and execute a European arrest warrant*,).

5.5.2 Observations

The general picture is that the Handbook is not widely used and that its usability is limited. Even the experts who are positive about the Handbook give answers that could be interpreted in that light. The Greek expert thinks that 'everything about the EAW can be useful' indicating its limited usability. This expert adds to this that many use the Handbook especially in larger courts with more expertise in EU-matters. The Romanian expert values the Handbook as 'very good', but adds to this that 'it should be used' which might also be interpreted as indicating that the Handbook is not used widely. Other experts state explicitly that it is not (widely) used.

Further remarks on the usability refer to the Handbook not being up to date, not detailed enough and not addressing practical problems.

Ireland thinks that is more of use for unexperienced practitioners and not widely used by experienced practitioners. In line with this, the expert for Hungary thinks that the Handbook is useful to get familiar with the EAW. Also the expert for Poland mentions the Handbook in connection with unexperienced judges. This is somewhat contrary to the answer in the Greek country-report that especially in larger courts with more expertise many use the Handbook.

Some answers suggest to make a digital version of the Handbook and make and keep it up to date and incorporate in it lists of 'don'ts' and 'common mistakes'.

5.5.3 Conclusions

There seems to be a lack of awareness that the Handbook can be useful. This seems to be related to the circumstance that there is room for improvement here by updating and upgrading the Handbook and taking care to keep it updated and upgraded. Like the judgments of the Court of Justice, one Handbook for all Member States could contribute to a better and more uniform application of EU-legislation in place if the Handbook is actually used in practice.

5.5.4 Recommendations

With regard to the Handbook we make the following recommendations.

Issuing and executing judicial authorities and others[1165]

5.8 Update training of staff and others involved.

- Put in place adequate training in introducing new staff and others who are new to the job (f.e. legal counsellors) and keeping knowledge and skills of existing staff on the required level.
- Raise awareness of the existence and usability of the Handbook, especially when introducing new staff and others involved.

EU Commission

5.9 Update the Handbook

- Make it more detailed
- Address practical problems to a greater extent
- Make it digital and interactive
- Incorporate a list of 'do's and don'ts' en 'common mistakes'
- Put in place a procedure to keep the Handbook up to date

5.6 COVID-19

5.6.1 Introduction

We pay attention to the impact of the COVID-19-pandemic on the practice of issuing and executing EAW's for three reasons. Even in case this pandemic turns out to be a temporary episode, the impact of the pandemic is huge and for this reason should be taken account of when taking a snap-shot of the current situation. Also, there could be lessons learned which have relevance apart from the pandemic. When and, at least, as long as COVID stays, then we have to keep on dealing with it.

[1165] The Lithuanian member of the Sounding Board rightfully points out that not only staff of judicial authorities (like judges/prosecutors and assistants) should be well trained but also other persons involved, f.e. legal counselors.

5.6.2 Observations

COVID-19 led to postponements and delays in actually surrendering requested persons, but not to refusals. Belgium mentions one withdrawal of an EAW by the issuing judicial authority relating to the pandemic.

With regard to the issuing side, Greece mentions a significant reduction of incoming EAW's. In line with this observation, the Belgian expert reports that for a few months (March 2020 – June 2020) the issuing of EAW's was put on hold (partly).

With regard to alternatives for the physical presence of the requested person during EAW hearings we can observe the following. Only Greece did not use video-conferencing or hearing by phone as an alternative, because it looks like these ways of hearing are not used at all (also not before the pandemic, that is). In Hungary the use of video-conferencing has increased with the pandemic and is highly accepted among judges, while hearing by phone has no legal basis. Also in Romania legislation on videoconferencing was introduced because of the pandemic, but hearing by phone lacks a legal basis. Poland introduced legislation with regard to videoconference and phone conversation in hearings.

The Netherlands refers to the restriction on the right to be present at the court hearing by using videoconference. While there is a special COVID-law in place, it is doubtful whether this law applies to EAW-proceedings. Nevertheless, the court in Amsterdam did use and still uses videoconferences in the majority of cases on the basis of balancing this right against other interests.

Ireland mentions as a possible consequence in the long run that the COVID-situation might have an impact on the proportionality assessment.

5.6.3 Conclusions

The impact of the COVID-19-pandemic seems to be mainly of a logistical nature. EAW hearings are conducted in a different way using more technology (video-conferencing and hearing by phone). Furthermore, the logistics of actually getting the requested person to the territory of the issuing Member State is impacted. Overall one can observe delays but not, or

at least not significantly, instances of abstaining from issuing an EAW or refusing its execution as far as we can see.[1167]

An interesting element is that not all Member States seem to have a sufficient legal basis for video-conferencing or hearing by phone in place. The COVID-19-pandemic could be an incentive for putting legislation in place in order to be able to use technology on a bigger scale also for reasons not related to the pandemic, that is for reasons of efficiency. This could be relevant also for communications between the competent authorities of different Member States, including the participation of the issuing Member State in hearings before the executive judicial authority.[1169]

5.6.4 Recommendations

EU-legislator

5.38 Facilitate the use of video and audio technology in interstate communications especially in conducting hearings. Put in place necessary legislation..

Member State legislators

5.10 Facilitate the use of video and audio technology in conducting EAW-proceedings (apart from the pandemic) especially in conducting hearings. Put in place the necessary legislation.

Issuing and executing judicial authorities

5.11 Consider to what extent the use of video and audio technology is possible (legally and logistically) and desirable especially in conducting hearings.

[1167] On this point we should be careful when drawing conclusions. Where we might have some insight into the impact on the execution of EAW's already issued, to what extent authorities abstain from issuing EAW's because of COVID eludes our perception to a high degree. Also, we have no clear view as to what extent the competent authorities abstain for COVID-reasons from arresting requested persons against whom an EAW is issued.
[1169] See section 2.2.2.

Chapter 6 An Integrative Approach to Decisions and a Coordinated Application of Legal Instruments

6.1 Introduction

Since 2016, the Court repeats that in (prosecution-) EAW-proceedings[1170] in the issuing Member State a *dual level of protection* must be provided and that the executing judicial authority must assess whether the requirements of that dual level of protection were complied with when issuing the EAW. Initially, this seemed to relate to the status of the issuing judicial authority only. However, the case law gradually developed into a more encompassing quality assessment of the procedure on issuing an EAW. What exactly is meant by a *dual level of protection* and what are the possibilities of such a procedure? Does it give a standing to the requested person himself? Would it be possible to assess and where necessary apply in such a procedure the potential of alternatives to the surrender? In this chapter it will be explored what conditions must be in place for such a procedure.[1171] It will culminate in a proposal. But first back to what the Court demands from the Member States.

The requirements imposed by the Court

In the *Bob-Dogi* case the question was put to the Court whether an executing judicial authority had to recognise a EAW directly, without a distinct national arrest warrant at the basis of that EAW.[1172] Unexpectedly, the Court used this case to raise the thresholds for issuing EAWs. It held that the EAW must be based on a national arrest warrant separate from the EAW, because this will protect the rights of the individual. With the requirement that a distinct national arrest warrant be at the basis of a prosecution-EAW, the Court underlines that deprivation of liberty must be based on a judicial decision. The Court believes that this:

"is of particular importance since it means that, where the European arrest warrant has been issued with a view to the arrest and surrender by another Member State of a requested person

[1170] In execution-EAW-proceedings, the required level of protection already is incorporated in the judgment of conviction: ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Public prosecutor Brussels)*, C-627/19 PPU, ECLI:EU:C:2019:1079, paras. 34-36.

[1171] This Chapter forms an elaborated version of A Next Level Model for the European Arrest Warrant, 30 European Journal of Crime, Criminal Law and Criminal Justice 2022, p. 107–126.

[1172] The case law forces the executing judicial authority to verify whether the issue of the EAW provides a review by a court or judge of both the national warrant as well as the EAW. See ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187.

for the purposes of conducting a criminal prosecution, that person should have already had the benefit, at the first stage of the proceedings, of procedural safeguards and fundamental rights, the protection of which it is the task of the judicial authority of the issuing Member State to ensure, in accordance with the applicable provisions of national law, for the purpose, inter alia, of adopting a national arrest warrant. The European arrest warrant system therefore entails, in view of the requirement laid down in Article 8(1)(c) of the Framework Decision, *a dual level of protection for procedural rights and fundamental rights* which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision."[1173]

In other words, the Court wishes to see that the requested person's procedural and fundamental rights are already protected at the first stage of the proceedings when it is decided whether a national arrest warrant must be issued. Subsequently, the Court wants an EAW based on a national warrant, in other words: there must be two warrants.[1174] If there is only one warrant, a refusal of the EAW must follow. An EAW issued without a national warrant or any other judicial decision having equivalent effect, is invalid.[1175] Also at the second level, when the EAW is adopted, there must be protection for procedural rights and fundamental rights. In the first *IR* case the Court held that: "where the person who is the subject of a European arrest warrant issued for the purposes of criminal prosecution is surrendered to the authorities of the Member State that issued that warrant, he or she acquires the status of '*accused person*' within the meaning of Directive 2012/13 and enjoys all the rights associated with that status."[1176] Although this clearly recognizes the requested person as a person with rights as an accused person from the moment of surrender, it also raises the question how his rights may be exercised before surrender as the fact that the requested person is not in the country anymore or cannot be found, is the main reason to issue a national

[1173] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paras. 55 and 56 (emphasis added, references omitted).
[1174] ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860.
[1175] See also ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, para. 56.
[1176] ECJ, judgment of 28 January 2021, *Spetsializirana prokuratura (Déclaration des droits)*, C-649/19, ECLI:EU:C:2021:75, para. 61 (emphasis added).

arrest warrant and an EAW. His absence makes it impossible for him to participate in the proceedings of adopting the arrest warrants.

Whilst the *dual level of protection* very much relates to what happens in the issuing Member State, other elements of the case law on EAW matters draw attention to the role of the executing judicial authority in *reviewing* whether the dual level of protection requirements were complied with.[1177] Such a review could, eventually, end with a refusal. The possibility of refusing recognition of each other's decisions has been significantly reduced by Union legal instruments. The legal instruments on international co-operation in criminal matters assign the task to assess whether there is an infringement of the Charter to the executing judicial authority.

In EAW matters the dual level of protection concerns a review of the national arrest warrant and the EAW in *one* Member State. This takes place in the *issuing* Member State, but the executing judicial authority must monitor that the issuing Member State lives up to the requirements.

These steps raise the question whether dual level of protection, as introduced by the Court, is accompanied by a separate requirement that a procedure in two stages will be necessary, one stage in the issuing Member State, before the EAW is issued, and another stage in the executing Member State, when it must be executed. The requirement of Art. 8(1)(c) of FD 2002/584/JHA concerns the validity of an EAW, which must be reviewed by the executing judicial authority.[1178] The requirement of review, in the executing Member State, of compliance with the dual level of protection results from Article 47 Charter, as Article 8(1)(c) of Framework Decision 2002/584 is read in the light of Article 47 of the Charter.[1179] This effectively leads to a system of mutual monitoring, because the question whether the issuing Member State met the requirements will be assessed by the executing Member State.

[1177] ECJ, judgment of 27 May 2019, , *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, paras. 44-47.
[1178] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:386, paras. 53 and 64.
[1179] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, paras. 58 and 60; ECJ, judgment of 22 June 2021, *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria*, Case C-206/20, ECLI:EU:C:2021:509, para. 38.

The Court "held that it is apparent (…) that a person who is the subject of a European arrest warrant for the purposes of criminal prosecution must be afforded effective judicial protection before being surrendered to the issuing Member State, at least at one of the two levels of protection required by that case-law. Such protection presupposes, therefore, that judicial review of either the European arrest warrant or the judicial decision on which it is based is possible before that warrant is executed".[1180] Two elements can be recognised in this statement. One is a temporal element in that the judicial protection must be there before the EAW is executed, *i.e.* before surrender. The Court has now repeatedly stated that a review after arrest in the issuing Member State, *i.e.* after surrender, is not enough, even if this can be done within 72 hours. The second is a more qualitative element that the judicial protection must be "effective". There is yet no clear indication as to what exactly amounts to *effective*, except that where judicial protection is only afforded after surrender it is not effective judicial protection.

Can there be such a thing as effective protection for procedural rights if the requested person is not present by definition and may often neither know of the proceedings nor have counsel representing him? In a recent referral the question has been put to the Court what exactly the issuing Member State must do and which normative standard is applicable to it: "Would it be in conformity with Article 6 of the Charter – read in conjunction with Article 5(4), (2) and (1)(c) ECHR – and with Article 47 of the Charter, the right to freedom of movement, the principle of equality and the principle of mutual trust if the issuing judicial authority, according to Article 6(1) of Framework Decision 2002/584, were to make no effort whatsoever to inform the requested person, while he or she is in the territory of the executing Member State, of the factual and legal bases for his or her arrest and of the right to challenge the arrest warrant? If so: Does the principle of the primacy of EU law over national law require the issuing judicial authority not to provide that information and, moreover, if the requested person requests the withdrawal of the national arrest warrant despite that failure to provide information, does that principle require the issuing judicial authority to assess that

[1180] ECJ, judgment of 22 June 2021, *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria*, Case C-206/20, ECLI:EU:C:2021:509, para. 49.

request on the merits only after the requested person has been surrendered"?[1181] The procedure in which these highly relevant questions were raised is pending.

However, in an earlier judgment concerning the same national criminal proceedings, the Court held: "the right to effective judicial protection does not require that the right, provided for in the legislation of the issuing Member State, to challenge the decision to issue a European arrest warrant for the purposes of criminal prosecution can be exercised before the surrender of the person concerned to the competent authorities of that Member State (see, to that effect, ECJ, judgment of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077, paragraphs 69 to 71). Therefore, the mere fact that the person who is the subject of a European arrest warrant issued for the purposes of criminal prosecution is not informed about the remedies available in the issuing Member State and is not given access to the materials of the case until after he or she is surrendered to the competent authorities of the issuing Member State cannot result in any infringement of the right to effective judicial protection".[1182]

This quotation from the Court demonstrates that EAWs are only issued concerning persons who are *not there*. At first sight it is strange that the Court appears to accept that the challenge to surrender may take place *after* the surrender. Advocate General Richard de la Tour formulated a way to solve that problem as follows: "I consider that since – as a result of the very mechanism of cooperation between judicial authorities embodied by the European arrest warrant, which requires some time in order for the procedure for executing the warrant to be completed – the requested person cannot be brought promptly before a court in the issuing Member State, and since the procedure for executing a European arrest warrant may result, in the circumstances set out in Article 12 of Framework Decision 2002/584, in the detention of that person in the executing Member State for a potentially long period, it is necessary to ensure, as a minimum requirement, that the national decision ordering the search for and

[1181] ECJ, Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 22 February 2021 – Criminal proceedings against IR, Case C-105/21, ECLI:EU:C:2022:511. . This case is a follow up of ECJ, judgment of 28 January 2021, *Spetsializirana prokuratura (Déclaration des droits)*, C-649/19, ECLI:EU:C:2021:75.
[1182] ECJ, judgment of 28 January 2021, *Spetsializirana prokuratura (Déclaration des droits)*, C-649/19, ECLI :EU:C:2021:75, paras. 79-80.

arrest of a person, or his detention as in the present case, and which forms the basis for the issue by a public prosecutor of a European arrest warrant, is subject to judicial review when that decision is adopted, or, at the very least, to ensure that that decision may be challenged by way of proceedings brought by the person concerned before a court in the issuing Member State immediately upon his arrest in the executing Member State".[1183] This interesting idea of the Advocate General seems to call for bringing the two procedures (reviewing the EAW by the issuing judicial authority and assessing the execution by the executing judicial authority) together. That idea was put forward in the context of an EAW issued by a public prosecutor that was based on a national arrest warrant issued by a public prosecutor. The Court followed the Advocate General in holding that effective judicial protection must be afforded *before surrender* at least at one of the two levels of protection. Therefore, judicial review, *i.e.* review by a court, of the lawfulness of either the EAW or the national arrest warrant on which it is based must be possible before surrender.[1184] In essence, either the EAW or the national arrest warrant must be issued by a court, in which case judicial protection is *ipso facto* afforded before surrender, or must be subject to review by a court before surrender.

There are good reasons for extending the Advocate General's idea and the Court's ruling to situations in which the EAW and/or the national judicial decision were issued by a judge. In these situations the requested person was not able to participate in the proceedings resulting in the issue of the EAW as well. If this could be done, it might give the requested person a *locus standi* in all EAW-cases and thus a possibility to participate in the procedure and invoke his rights himself. If it would be possible when the requested person is arrested in the executing Member State to challenge the need for and proportionality of the EAW in the context of the existence of alternatives to surrender that might be less infringing on the freedoms and rights of the requested person, it would be possible to find the best measure in the given circumstances. However, this requires participation of both Member States involved and the requested person. The participants would then form something similar to a "multidisciplinary team", known from health care, that is not only able to see things in context as well as from all angles, but is also capable to act upon it. Such an overall assessment of the legal position

[1183] See Opinion of Advocate General Richard de la Tour of 11 February 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, para. 94.
[1184] ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, paras. 47-48 and 57.

of the requested person would require a single joint level of protection, involving both Member States and the requested person in one procedure in order to safeguard that all interests at stake are considered, to make sure that impunity is prevented and thus a fair administration of justice is ensured. Whereas the right of the requested person to be heard in EAW proceedings is explicitly recognised in FD 2002/584/JHA (Article 14), it was already there for many years in the transfer of proceedings (Article 17 1972 Council of European Convention on the Transfer of Proceedings in Criminal Matters) and the transfer of judgments (Article 6 Framework Decision 2008/909 on Custodial Sentences). The transfer of execution of probation sentences can even take place on request of the convicted person (Article 5(2) *Framework Decision 2008/947 on Supervision of Probation Measures*).

In a referral for a preliminary ruling that predates the *Svishtov Regional Prosecutor's Office* judgment, the Bulgarian *Spetsializiran nakazatelen sad*, hit the nail on the head. It stated: "What the two levels of protection have in common is the lack of involvement of the accused person. He or she is not given any opportunity to express his or her opinion. In order to achieve genuinely effective protection, it is necessary to recognise the need for a third level of protection existing after the first two levels, namely protection before the issuing authority in the course of the execution of the European arrest warrant while the requested person is in the executing State (to that effect, see ECJ, judgment of 10 November 2016, *Poltorak*, Case C-452/16, EU:C:2016:858, paragraphs 39 and 44)".[1185] The Bulgarian court continues: "Were the requested person to have an effective remedy for challenging the national arrest warrant while in the executing State, this would lead to a reduction in the number of disproportionate European arrest warrants or an increase in the number of cases where such disproportionate European arrest warrants are withdrawn before the person is surrendered".[1186] As we have seen, the judgment in *Svishtov Regional Prosecutor's Office,* to a limited extent, addresses the need for protection in the issuing Member State where the requested person is still in the executing Member State. The third level of protection desired by the referring court is incorporated in the dual level of protection only in some EAW-cases.[1187] A true third level of

[1185] ECJ, Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 22 February 2021 – Criminal proceedings against IR, Case C-105/21, ECLI:EU:C:2022:511, paras. 40-41.
[1186] ECJ, Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 22 February 2021 – Criminal proceedings against IR, Case C-105/21, ECLI:EU:C:2022:511,, para. 43.
[1187] On the third level of protection, the referring court refers to ECJ, judgment of 10 November 2016, *Poltorak*,, Case C-477/16 PPU, EU:C:2016:858; ECJ, judgment of 10 November, *Kovalkovas*,, C-477/16 PPU,

protection would entail that the requested person could challenge the issue of the EAW in all EAW-cases while he is still in the executing Member State.

How could such a third level of protection look like? The remainder of this text will deal with this question.

6.2 Starting point

The starting point for the whole procedure is that the requested person did not participate in the procedure that led to the adoption of the national arrest warrant and the EAW. The very fact that a request for mutual recognition was needed and issued was the result of an evaluation of the issuing Member State only. This has been characterised as a system with narcissistic elements.[1188] Proportionality cannot be adequately assessed if the viewpoint of the accused person, including any information indicating whether there has been an attempt to evade justice, is not taken into account.[1189] This means that once arrested in the executing Member State the requested person must have the possibility of challenging the issue of an EAW that complies with the normative criteria of offering effective judicial protection. This is one of the red lines of the procedure that must follow. Another is that it must lead to a decision that can be regarded as the most appropriate in the interest of justice. It is therefore also important that the executing judicial authority is available to give information and, finally, that the outcome will not contribute to impunity.

6.3 Debating the need for a national arrest warrant and the need for an EAW

ECLI:EU:C:2016:861; ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456.

[1188] See André Klip, European Criminal Law. An Integrative Approach, Intersentia Cambridge 4th ed. 2021, p. 638: "The understanding of mutual recognition as a mechanism by which the Member State taking the first initiative in a matter determines the conditions pertinent to the matter, is not based on an objective evaluation of all the interests involved. It has been characterised as a system with narcissistic elements, lacking a European Union approach towards combating crime. Such a European approach only becomes possible when nationally defined interests are not the only ones to be taken into consideration. However, the mechanisms adopted by the European Union in criminal law implicitly assume that the state taking the first initiative has exclusive jurisdiction".

[1189] ECJ, Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 22 February 2021 – Criminal proceedings against IR, Case C-105/21, ECLI:EU:C:2022:511, para. 42.

The combination of these key notions as well as the technical (video-link presence) and legal possibilities of our times leads us to consider whether the dual level of protection can be realised by creating a procedure once the requested person has been arrested in the executing Member State. The hearing will be pending before the issuing judicial authority and all input must relate to enabling that authority to take a decision on the proportionality of both the national arrest warrant as well as the EAW, or to take a decision that an alternative is more appropriate. The requested person must have all opportunities to challenge the arrest warrants and to put forward (an argumentation supportive of) an alternative solution.[1190] The executing judicial authority may provide information to the issuing judicial authority. The normative framework on the basis of which decisions will be made has been sketched above in Chapter 2, section 2.5.6. The goal of this hearing is to allow the issuing judicial authority to take the decision that is the best for this individual case in a procedure in which the requested person is able to make use of his procedural and fundamental rights with the input of the executing judicial authority. If the requested person indicates that he does not want to challenge the EAW, there is no reason for this and the procedure to be followed is the regular one (Art. 13(1) FD).

6.4 Where to hear the requested person and by whom?

Whereas in EAW surrender proceedings the requested person is arrested in the executing Member State and wishes to participate in a proceeding in the issuing Member State, for the opposite situation (the surrendered person is in the issuing Member State and wishes to participate in a proceeding in the executing Member State), the Court's case law already offers some guidance. In a judgment rendered on 26 October 2021,[1191] the Court dealt with questions referred by the District Court of Amsterdam concerning the procedures applicable to requests for additional consent to prosecute for other offences or to surrender the requested

[1190] ECJ, Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 22 February 2021 – Criminal proceedings against IR, Case C-105/21, ECLI:EU:C:2022:511, para. 31: "The question arises as to the existence of effective remedies in cases where there is an international element, namely where a judicial authority issues a national arrest warrant and subsequently issues, on the basis of that warrant, a European arrest warrant, and then another national judicial authority arrests the requested person in execution of the European arrest warrant. In such a case, the ability to challenge the national arrest warrant (which forms the basis of the entire procedure) constitutes a remedy providing protection against the execution of the European arrest warrant".

[1191] ECJ, judgment of 26 October 2021, *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)*, C-428/21 PPU and C-429/21 PPU, ECLI:EU:C:2021:876.

person subsequently to another Member State as meant in Article 27(3)(g)-(4) and Article 28(3), which are procedures that are carried out after surrender. The key question was whether the person concerned (the surrendered person), now already present in the Member State that originally issued the EAW, has the right to be heard in the executing Member State. The Court first establishes that the right to be heard is part of the concept of effective judicial protection. This is especially relevant in light of the fact that the outcome of a decision on consent has consequences for the right to liberty of the surrendered person. The Court held that the requested person therefore must be heard by the executing judicial authority, although this does not mean that he personally must appear before that authority.[1192] The Court subsequently identifies that the Framework Decision does not stipulate a specific logistic procedure for this and draws the conclusion that the issuing judicial authority and executing judicial authority must set up a procedure in agreement. The Court states that the right to be heard by the executing judicial authority can be exercised before the issuing judicial authority. The latter will then report the views of the surrendered person to the executing judicial authority.

Although the Court refers to the opinion of Advocate General Rantos, it does not follow his concrete suggestion of making use of modern video-link techniques for the practical implementation of the right to be heard. Rantos suggested: "With regard, more specifically, to the specific arrangements for exercising a surrendered person's right to be heard in respect of a request for additional consent, in the first place, I take the view that the competent national authorities can find support, to the extent permitted by the national legislation, in other instruments that make up the legal framework for judicial cooperation in criminal matters in the Union. That framework could provide a point of reference for those authorities and prevent the diversity of the applicable rules or the – inappropriate and time-consuming – duplication of the safeguards enjoyed by the surrendered person in the two Member States concerned by a request for additional consent from jeopardising the effectiveness of the EAW mechanism. Amongst those instruments, I would draw attention, first of all, to the temporary transfer of the surrendered person, as provided for inter alia in Articles 22 and 23 of Directive 2014/41 for the purpose of carrying out a European investigative measure in criminal matters,

[1192] ECJ, judgment of 26 October 2021, *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution*, C-428/21 PPU and C-429/21 PPU, ECLI:EU:C:2021:876, paras. 56 and 63.

even though this is a particularly onerous measure for the authorities concerned. The same is true, in my view, as regards the possibility of representatives of the executing judicial authority going to the issuing Member State in order to hear the surrendered person. Next, I would raise the option of audiovisual transmission methods, and in particular videoconferencing. The use of such methods is provided for inter alia in Article 24 of Directive 2014/41, which allows a judicial authority to issue a European investigation order in order to hear, as a suspect or accused person, a person located in the territory of another Member State. Without wishing to encroach upon the prerogatives of the national authorities, that method appears to me to be particularly appropriate to enable a surrendered person located in the issuing Member State to exercise his or her right to be heard by the executing judicial authority before the latter rules on the request for additional consent, thus precluding the need to transfer him or her to the executing Member State. Finally, it is my view that, in situations such as those at issue here, nor does EU law preclude the surrendered person's right to be heard from being exercised through the use of a written procedure. Provision is made for that procedure inter alia in Article 8 of Directive (EU) 2016/343 which, whilst establishing, in paragraph 1 thereof, that Member States are to ensure that suspects and accused persons have the right to be present at their trial, states, in paragraph 6 thereof, that that article is to be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial. In my opinion, such a procedure could enable the person concerned to express his or her views and the executing authority to give an informed ruling on the request for additional consent, without prejudice to the possibility that is available to that authority of requesting additional information from the competent judicial authority of the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584".[1193]

What these considerations on *post surrender* proceedings show is equally applicable to combined proceedings *prior to surrender*. Given the technical possibilities this does not require physical presence of all involved at the same location. There are various options on the table. One is a temporary surrender of the requested person, another is a hearing by the issuing judicial authority in the executing Member State, which means that this authority must

[1193] ECJ, Opinion of Advocate General Rantos of 14 October 2021, *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution*, C-428/21 PPU and C-429/21 PPU, ECLI:EU:C:2021:851, paras. 65-69.

travel. Another is the hearing by the executing judicial authority, who subsequently sends a report to the issuing Member State. The fact that the debate is about arrest warrants issued by the issuing Member State demands that authority to be in charge of the proceeding. The more practical option seems to be a video-conference which does not require any travel. This has the advantage of easy and cheap organisation. Article 19(4) Framework Decision 2009/829 on Supervision Measures provides an example of such a procedure.[1194]
It will then be up to the issuing judicial authority after the hearing to take a decision to maintain the EAW or to withdraw it in exchange for any of the other alternatives. Impunity will not be the outcome. If it is the decision of the issuing judicial authority to go on with the EAW, it is our assessment that there has been sufficient input of both judicial authorities and the requested person.

6.5 Final stage: the executing authority assessing the EAW

In the cases in which the decision of the issuing judicial authority is to maintain the EAW, the executing judicial authority must answer the EAW in the usual way. In the executing Member State, the requested person may challenge the proportionality of the *execution of the EAW*, as well as the applicability of grounds for refusal. In this respect, it is important to note that, pursuant to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter, such as the right to liberty (Article 6), and the right to respect for private and family life (Article 7), is subject to the principle of proportionality. The proportionality of *issuing* the EAW can no longer be debated.[1195]

[1194] It reads: "With a view to hearing the person concerned, the procedure and conditions contained in instruments of international and European Union law that provide for the possibility of using telephone- and videoconferences for hearing persons may be used mutatis mutandis, in particular where the legislation of the issuing State provides that a judicial hearing must be held before a decision referred to in Article 18(1) is taken". See also Article 17(4) Framework Decision 2008/947 on Supervision of Probation Measures.
[1195] Situations in which the executing judicial authority might otherwise be inclined to refuse demonstrate the need for bringing the procedures together. This can be shown by referring to the Puigdemont case, in which one of the questions raised by the Spanish Tribunal Supremo is: "Are the answers to the previous questions affected if the person whose surrender is sought has been able to put forward before the courts of the issuing Member State, including at a second level of jurisdiction, arguments concerning the lack of competence of the issuing judicial authority, the arrest warrant issued against him and the guarantee of his fundamental rights"? (ECJ, Request for a preliminary ruling from the Tribunal Supremo (Spain) lodged on 11 March 2021, *Puig Gordi and Others*, Case C-158/21, ECLI:EU:C:2022:573. The questions of the Spanish Supreme Court relate to the fact that the Belgian executing court refused the surrender as it found that the requested person will not get a fair trial in Spain.

If there are new circumstances, this could lead to a reconsideration of which is the most appropriate step. Also here the presence of the issuing judicial authority via video-conference at the hearing before the executing judicial authority allows it to give information. For instance on issues regarding the surrender and subsequent treatment of the requested person in the issuing state. The requested person may have the assistance of a lawyer in the issuing Member State. This may be regarded as a direct communication (Article 15(2) FD) in real time. After the hearing in this second stage, it is the executing judicial authority taking the decision on the execution of the EAW.

6.6 Recommendations to the European Union

Recommendation 6.1. The EU is recommended to create a procedure that complies with the demands of a *dual level of protection*, which takes place after arrest of the requested person in the executing Member State. This procedure will take place on demand of the requested person and will have *two stages* in which the issuing judicial authority, the executing judicial authority and the requested person and his counsel are present, either physically or on-line. The law applicable to the hearing in the first stage is the law of issuing Member State. The law applicable to the hearing in the second stage is the law of executing Member State. The *first stage* consists of a hearing before the issuing judicial authority at which the requested person may bring forward all the arguments that are in favour of one form of cooperation over another (surrender, transfer of proceedings/ transfer of execution/ voluntary appearance at the trial). At the hearing, the issuing judicial authority may ask information from the executing judicial authority. The latter may also give information spontaneously. After closure of the hearing, the issuing judicial authority will assess whether it will maintain the EAW. It may also lead to a decision to withdraw the EAW in exchange for any of the other alternatives. Impunity will not be the outcome.
When the issuing Member State's procedure on the EAW is concluded the *second stage* starts before the executing judicial authority. At the hearing before the executing judicial authority in the executing Member State, the requested person may challenge the proportionality of the execution of the EAW and/ or the applicability of grounds for refusal. At this hearing before the executing judicial authority, the issuing judicial authority may be present and give information to the executing judicial authority. This hearing in the executing Member State

could lead to a reconsideration of which is the most appropriate step. After the hearing, the executing judicial authority will take a decision on the execution of the EAW.

ANNEX I

Recommendations per chapter

Chapter 2 - Recommendations

Recommendations to Member States

Recommendation 2.1. Member States who transposed optional grounds for refusal and guarantees as mandatory are recommended to change the mandatory character into an optional one (where applicable).

Recommendation 2.2. Member States that still assign the power to issue EAWs for prosecution to a public prosecutor are recommended to change this and assign this power to a judge/court instead.

Recommendation 2.3. The Netherlands are recommended to provide the examining judge (*rechter-commissaris*) with the full file and not just with an EAW-form filled in by the prosecutor before issuing the EAW.

Recommendation 2.4. Hungary, Poland and Greece are recommended to treat their residents, regardless of their nationality, without distinction when applying the grounds of refusal of Art. 4(2) and Art. 4(6), as well as the guarantee of Art. 5(3).

Recommendation 2.5. The Netherlands are recommended to make all aspects of the ground for refusal of Art. 3(2) mandatory again.

Recommendation 2.6. The Netherlands, Greece and Poland are recommended to repeal the grounds for refusal that were added to the closed list of grounds for refusal of the FD.

Recommendation 2.7. The European Union is called to develop an instrument on transfer of proceedings of its own. In the meantime Member States who have not done so yet are recommended to ratify the 1972 Council of European Convention on the Transfer of Proceedings in Criminal Matters.

Recommendation 2.8. Ireland is recommended to implement Framework Decision 2008/909.

Recommendations to issuing judicial authorities

Recommendation 2.9

All issuing judicial authorities are recommended to assess the proportionality of an EAW before issuing it.

Recommendation 2.10. When assessing the proportionality of issuing an EAW for prosecution issuing judicial authorities are recommended to take into consideration 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. There is no place for an EAW if the needs for the investigation can also be met by issuing an EIO.

Recommendations to executing judicial authorities

Recommendation 2.11. Executing authorities are recommended when considering a refusal based on Article 4(6) to order the execution of the foreign sentence on the basis of FD 2008/909 in one single decision. If there is insufficient information to order execution, the executing judicial authority will ask for further information that will enable it to refuse the EAW and order the execution of the foreign sentence at the same time.

Chapter 3 – Recommendations

Recommendation to issuing judicial authorities

Recommendation 3.1 The issuing judicial authorities are recommended to only use the official EAW form without any deviations.

Recommendation 3.2 When having the EAW translated in the official language of the executing Member State or in the language indicated by that Member State pursuant to Art. 8(2) of FD 2002/584/JHA, the issuing judicial authorities are recommended to only use the EAW form in that official language version, in order that only the parts that were completed by the issuing judicial authority are translated.

Recommendation to EU authorities and institutions

Recommendation 3.3 The EU is recommended to:

- find a way to regularly update the EAW form in order that it reflects the requirements of the constantly evolving case-law of the Court of Justice; and
- provide the regularly updated EAW form in a digital and interactive format.

Recommendation 3.4 The EU is recommended to amend section (b) of the EAW form in order to include a separate field concerning the revocation of a suspended sentence/a parole, in the following way:

(b) Decision on which the warrant is based:

1. Arrest warrant or judicial decision having the same effect: . . . . . .

Type: . . . . . .

2. Enforceable judgment: . . . . . Reference: . . . . . .

In case of a suspended sentence/parole, indicate the decision revoking the suspension/parole: ….

Date of revocation decision: ….

Recommendation to issuing judicial authorities

Recommendation 3.5 Issuing judicial authorities are recommended to only base a prosecution-EAW on a national arrest warrant or national arrest warrants which cover(s) all of the offences for which surrender is sought.

Recommendation 3.6 Issuing judicial authorities are recommended not to issue an execution-EAW but a prosecution-EAW where the judgment is ‘enforceable’ but not ‘final’ yet.

Recommendation to EU authorities and institutions

Recommendation 3.7 The EU is recommended to amend section (c) of the EAW form in order to correlate the offence(s) with the sentence(s) and to provide a separate part for so-called ‘cumulative sentences’, in the following way:

(c) Indications on the length of the sentence:

1. Maximum length of the custodial sentence or detention order which may be imposed for the offence(s):

Offence [number; see section (e)] : … Sentence: ….
(possibility to add more offences)

2. Length of the custodial sentence or detention order imposed:

Offence [number; see section (e)]: … Sentence: ….
(possibility to add more offences)

Overall sentence if a cumulative sentence is provided in the national system: …
Remaining sentence to be served:
…

Recommendation to Member States

Recommendation 3.8 Belgium, Greece, Ireland and Poland are recommended to introduce the possibility of executing EAWs concerning accessory offences and sentences.
Recommendation 3.9 Poland and Romania are recommended to amend their legislation in order to conform to the thresholds of Art. 2(1) of FD 2002/584/JHA.
Recommendation 3.10 Judicial authorities are recommended not to issue and execute EAWs for the purpose of enforcing a sentence or sentences where the (total) remainder to be served is less than four months, any accessory sentences not included.

Recommendation to issuing and executing authorities

Recommendation 3.11 The issuing and executing judicial authorities from the Netherlands are recommended to desist from the practice of adding up custodial sentences that, individually, are for less than four months but, together, reach the threshold of four months mentioned in Art. 2(1) of FD 2002/584/JHA.

Recommendation to EU authorities and institutions

Recommendation 3.12 The EU is recommended to amend section (e) of the EAW form, *e.g.*, as follows:

Section(e) Offences

I. Number of offences

This warrant relates to in total: …. offences.

II. Description of the offences

Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person, and specification of the legal classification of the offence(s) and the applicable statutory provision:

Offence 1

(i) Circumstances in which the offence was committed

(ii) time of the offence

(iii) place of the offence

(iv) degree of participation in the offence by the requested person

(v) legal classification of the offence

(vi) applicable statutory provision

…..

Offence 2

(i) Circumstances [and so on]

III. Designation of one or more of the offences as 'listed offences'

If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State:

[] participation in a criminal organisation: offence(s) described as offence(s) [insert: 1, 2, 3, 4 or ….] in section (e)II
[] terrorism: offence(s) [insert 1, 2, 3 4 or ….] as described in section (e)II
[and so on]

Recommendation to Member States

Recommendation 3.13 Belgium, Greece, the Netherlands and Poland are recommended to simply copy the list with offences of Art. 2(2) of FD 2002/584/JHA, as it appears in their respective language versions of FD 2002/584/JHA, into their respective national legislation.

Recommendation 3.14 Member States are recommended not to provide for and their executing judicial authorities are recommended not to carry out an automatic review of the designation of an offence as a listed offence.

Recommendation 3.15 Greek courts are recommended to apply the Court of Justice's definition of the concept 'same acts' when applying Art. 3(2) or Art. 4(5) of FD 2002/584/JHA.

Recommendation to executing judicial authorities

Recommendation 3.16 Executing judicial authorities are recommended to request supplementary information about any factual element(s) not expressed in the description of the offence but which are required for the act to constitute an offence according to the law of the executing Member State, before deciding that the condition of double criminality is not met.

Recommendation 3.17 Executing judicial authorities are recommended only to decide on the application of the ground for refusal of Art. 4(1) of FD 2002/584/JHA after having considered, in each case, whether there is a compelling reason for refraining from a refusal to execute the EAW on account of a lack of double criminality.

Recommendation to Member States

Recommendation 3.18 Greek executing judicial authorities are recommended not to check systematically whether the right to prosecute or to punish is statute-bared according to the law of the issuing Member State.

Recommendation to EU authorities and institutions

Recommendation 3.19 The EU is recommended to bring the Dutch language version of Art. 29(1)(b) of FD 2002/584/JHA, which requires, *inter alia*, that the property is 'in the possession of the requested person', in line with other language versions.

Recommendation to Member States

Recommendation 3.20 The Netherlands is recommended to amend Art. 49(1) of the Law on Surrender by deleting the restriction to property found in the possession of the requested person and to make the national provisions on carrying out a search and seizure at the request of a foreign authority applicable.

Recommendation to EU authorities and institutions

Recommendation 3.21 The EU is recommended:

- either to repeal Art. 5(2) of FD 2002/584/JHA, because this provision is redundant in light of the Court of Justice's case-law on a real risk of a violation of Art. 4 of the Charter as an obstacle to execution of the EAW;
- or, at least, to amend Art. 5(2) of FD 2002/584/JHA in such a way that it is in line with the case-law of the ECtHR on the incompatibility of irreducible life sentences with Art. 3 of the ECHR, *viz.* that:

- it is only applicable where there is a real risk of the imposition of a life sentence or where such a sentence has already been imposed;
- it provides for a guarantee concerning a mechanism or possibility for review of that sentence:
  - which already is available at the time of the imposition of the life sentence;
  - which entails an actual assessment of the relevant information whether the requested person's continued imprisonment is justified on legitimate penological grounds and is surrounded by sufficient procedural guarantees; and
  - to which the person sentenced to a life sentence must have access no later than 25 years after the imposition of the life sentence.

Chapter 4 - Recommendations

Recommendations to the EU authorities and institutions

Recommendation 4.1 The EU is recommended to provide legislation on harmonised standards of prison conditions, including not only the physical space but also other living conditions that play a role in assessing prison conditions (*e.g.* access to education, religious space). These should also include how detainees with health or other special issues are treated in prison facilities.

Recommendation 4.2 The Fundamental Rights' Agency is recommended to advance its database to a constantly updated, digital hub of information regarding present detention conditions in Europe that should include recent ECtHR case law and the accumulation of other resources from NGOs or other organizations that the Agency itself deems reliable and updated.

Recommendation 4.3 The EU is recommended to amend the Handbook on the EAW to include a template on what type of supplementary information in the context of *Aranyosi and Căldăraru* and *Minister for Justice and Equality (Deficiencies in the system of justice)* could be requested, incorporating the EU requirements of prisons standards and independence of the judiciary; such template(s) should be made available to all judicial authorities. Such templates should include space to request additionally a guarantee (thus, not only request for information).

Recommendation 4.4 The EU is recommended to develop a unified text for providing the guarantee of Art. 5(3) of FD 2002/584/JHA.

Recommendation 4.5 The EU is recommended to clearly regulate whether the return guarantee of Art. 5(3) of FD 2002/584/JHA can be triggered by the executing judicial authority only after the requested person invokes it. The EU is also recommended to clearly regulate whether a consent at the issuing Member State is required for the return guarantee to be executed after the proceedings in that Member State end.

Recommendations to the Member States

Recommendation 4.6 Member States are recommended *not* to request or supply supplementary information regarding the appreciation of the merits of the case at the issuing Member State (*e.g.* statute of limitation in the issuing Member State, evidence supporting the case). Member States should not send standardised lists with questions/questionnaires automatically when requesting information in the context of Art. 15 (2) of FD 2002/584/JHA. The use of Art. 15(2) must be limited to cases in which supplementary information is strictly necessary for the executing judicial authority to take its decision and must be limited only to questions that are relevant for the *ad hoc* case.

Recommendation 4.7 The issuing authorities of Member States when responding to a request for supplementary information regarding detention conditions of their prisons are recommended to give information in their response regarding the two following aspects, if possible: i) information about the prison facilities in which the person concerned will likely be detained after surrender, including on a temporary or transitional basis; ii) if possible and desirable, a guarantee in the form of a concrete promise to detain the requested person at a specific facility that complies with the relevant standards (and explain how this complies) or for which no *in abstracto risk* is established.

Recommendation 4.8 Issuing judicial authorities are recommended to include the guarantee of return of Art. 5(3) of FD 2002/584/JHA in the initial EAW in *section (f)* (if the requested person is their national or resident), in order to avoid the delay caused when executing judicial authorities have to request for it.

Recommendation 4.9 The Netherlands is recommended to amend its legislation that restricts the extension of the time limits of Art. 17 of FD 2002/584/JHA to only specific and exhaustively described in that legislation cases.

Recommendations to Member States

Recommendation 4.10 Greece is recommended to implement in its national legislation amendments to accommodate issuing EAWs by or on behalf of European Delegated Prosecutors and to accommodate execution of EAWs issued by or on behalf of European Delegated Prosecutors from other Member States.
Recommendation 4.11 Ireland, Hungary and Poland do not participate in the EPPO, these Member States are recommended to find a way enable sincere cooperation with EPPO.

Recommendation to executing authorities

Recommendation 4.12 Executing judicial authorities shall include in the decision on the execution of the EAW the person's decision concerning the renunciation of the speciality rule.
Recommendation 4.13 The Executing judicial authorities shall send the decision on the execution of the EAW, and is recommended to add its translation to the issuing judicial authority.

Recommendation to issuing authorities
Recommendation 4.14 The issuing authority shall include both the EAW and the decision on the Execution thereof in the case file of the national proceedings.

Chapter 5 - Recommendations

Recommendation to executing judicial authorities

Recommendation 5.1 Executing judicial authorities are recommended to specify the offence(es) for which surrender is allowed in a decision to execute the EAW only partially by referring to the offence(s) as mentioned in section (e) of the EAW (not by referring to their national legislation).

Recommendation to the EU legislator

Recommendation 5.2 Reconsider the setup of the FD EAW along the following lines.

- *Replacing* the framework decision by a Regulation.
- *Amending* the framework decision.
    - Adopt a provision concerning proportionality including an explicit relationship with Directive EIO.
    - Adopt a ground for refusal with regard to human rights.
    - Amend the time-limits by setting a time-limit of 60 days after completing the EAW in cases that supplementary information is needed.
    - Create a basis in the FD for the Irish exemption by introducing a corresponding optional refusal ground.[1196]
    - Restrict the possibility to refuse execution of an EAW on grounds of territoriality (Art. 4(7) FD 2002/584/JHA)
    - Make only judges competent to issue/execute EAW's.
    - Amend the EAW-form (see recommendations of chapter 3).

Recommendation 5.3 Consider evaluating the coherence of the several instruments of criminal cooperation along the following lines.

- Integrating EAW and EIO in a Directive or Regulation.
- Limiting the use of the EAW for prosecution to cases that are trial ready (as a consequence of which the EIO will probably be used more often for cases that are not yet trial ready).
- Aligning FD 2002/584/JHA with FD 2008/909.
- Amending the FD 2009/829/JHA on the ESO to facilitate the role the ESO can play in executing a prosecution-EAW.
- Reconsider the ways in which Member States can summon requested persons residing in other Member States, including giving to Member States access to the national registry of other Member States and providing for a guarantee of safe conduct.[1197]

Recommendation to European Commission

Recommendation 5.4 Facilitate direct communication between judicial authorities on case-related and general issues. Put in place a digital platform for information exchange and debate and discussion between judicial authorities of different Member States and to support e-

[1196] There is no need for incorporating a basis *in* the FD for the Irish exemption if the use of prosecution-EAW's would be limited to cases which are 'trial-ready' (see the recommendation below).
[1197] Such a safe conduct should be broader than the safe conduct within the meaning of Art. 12(2) of the ECMACM.

learning possibilities and provide for facilitation of the use of the platform by the EU Commission

Recommendation to Member States

Recommendation 5.5 Centralize competences and communication

- Consider making only judges competent to issue and execute EAW's.
- Centralize the competence to issue and execute EAW's.
- Put in place centralised focal points to facilitate communication between judicial authorities of different Member States.

Recommendation to issuing and executing judicial authorities

Recommendation 5.6 Use Eurojust and EJN in communicating with judicial authorities of other Member States. For example, in order to facilitate an adequate simultaneous execution of EAW's from two or more different Member States with regard to the same required person.

Recommendation to the European Commission

Recommendation 5.7 Implement the common practical guidelines for requesting/supplying supplementary information, including:

- templates/formats for questions that frequently occur;
- a list of examples of irrelevant questions, *e.g.* about available evidence and witnesses about summoning (other than related to *in absentia* judgments);
- a list of do's, *e.g.*:
  - explain why the information is needed/necessary;
  - refer to legal provisions and decision of the Court of Justice of the EU;
  - ask and supply information about empirical and legal facts;
  - ask and answer all questions at the same time;
  - set a realistic deadline;

- a list of don’ts, *e.g.*:
  - avoid repetitive questions as far as possible;
  - do not ask for or supply information about legal issues/provisions in general or for opinions;
  - do not automatically use standard-questionnaires, but only ask questions relevant in the case at hand.

Recommendation to issuing and executing judicial authorities

Recommendation 5.8 Update training of staff and others.

- Put in place adequate training in introducing new staff and others who are new to the job (f.e. legal counsellors) and keeping knowledge and skills of existing staff on the required level.

Raise awareness of the existence and usability of the Handbook, especially when introducing new staff and others involved.

Recommendation to European Commission

Recommendation 5.9 Update the Handbook.

- Update the Handbook and consider to merge it with the Common Practical Guidelines.
- Make it more detailed.
- Address practical problems to a greater extent.
- Make it digital and interactive.
- Incorporate a list of ‘do’s and don’ts’ and ‘common mistakes’.
- Put in place a procedure to keep the Handbook up to date.

Recommendation to EU-legislator

Recommendation 5.10 Facilitate the use of video and audio technology in interstate communications especially in conducting hearings. Put in place necessary legislation.

Recommendation to Member States

Recommendation 5.11 Facilitate the use of video and audio technology in conducting EAW-proceedings (apart from the pandemic) especially in conducting hearings. Put in place the necessary legislation.

Recommendation to issuing and executing judicial authorities

Recommendation 5.12 Consider to what extent the use of video and audio technology is possible (legally and logistically) and desirable especially in conducting hearings.

Chapter 6 - Recommendations

Recommendations to the European Union

Recommendation 6.1. The EU is recommended to create a procedure that complies with the demands of a *dual level of protection*, which takes place after arrest of the requested person in the executing Member State. This procedure will take place on demand of the requested person and will have *two stages* in which the issuing judicial authority, the executing judicial authority and the requested person and his counsel are present, either physically or on-line. The law applicable to the hearing in the first stage is the law of issuing Member State. The law applicable to the hearing in the second stage is the law of executing Member State. The *first stage* consists of a hearing before the issuing judicial authority at which the requested person may bring forward all the arguments that are in favour of one form of cooperation over another (surrender, transfer of proceedings/transfer of execution/voluntary appearance at the trial). At the hearing, the issuing judicial authority may ask information from the executing judicial authority. The latter may also give information spontaneously. After closure of the hearing, the issuing judicial authority will assess whether it will maintain the EAW. It may also lead to a decision to withdraw the EAW in exchange for any of the other alternatives. Impunity will not be the outcome.

When the issuing Member State's procedure on the EAW is concluded the *second stage* starts before the executing judicial authority. At the hearing before the executing judicial authority in the executing Member State, the requested person may challenge the proportionality of the execution of the EAW and/ or the applicability of grounds for refusal. At this hearing before the executing judicial authority, the issuing judicial authority may be present and give information to the executing judicial authority. This hearing in the executing Member State could lead to a reconsideration of which is the most appropriate step. After the hearing, the executing judicial authority will take a decision on the execution of the EAW.

ANNEX II

Common Practical Guidelines

June 2022

By Christina Peristeridou, Małgorzata Wąsek-Wiaderek & Jan van Gaever

This document contains the Common Practical Guidelines for filling in and assessing the EAW form. The following guidelines are addressed *inter alia* to the issuing and executing authorities of Member States when they issue but also when they receive/execute EAWs. The aim is to aid authorities in filling in and assessing the EAW form and to avoid mistakes or lacunae that could lead to pitfalls and delays. We have separated the guidelines into separate parts representing roughly the steps of dealing with the EAW form. Often there are suggestions of Do's and Don'ts to help national authorities develop good practices and keep the information practice-friendly.

In our project we make several suggestions for amending the EAW form to reflect the newest ECJ jurisprudence and address current problems of the practice.[1198] But **the following guidelines concern the current EAW form in its present state to facilitate the current and actual practice**.

Issuing EAWs

1. Before issuing an EAW

Proportionality

Before the authorities issue an EAW, a decision must be made whether it is necessary and appropriate to issue an EAW. As far as prosecution-EAWs go, and whereas most national laws might imbue aspects of proportionality for issuing the national warrant, the issuing of an EAW requires an additional test of proportionality to the proportionality test for the national warrant, with more substantial grounds (see below). Before issuing a prosecution or execution-EAW, the issuing judicial authorities must establish its proportionality by looking at the case at hand. The issuing judicial authority should be able to refuse issuing an EAW despite the existence of a national warrant or a national judicial judgment, if it would be disproportional, even if the other formal requirements are met. The aspects to be taken into account and weighed against each other are the following:

- Especially for *prosecution-EAWs*, the degree of infringement on the free movement rights of the requested person. For this, the issuing judicial authority must consider the personal situation of the requested person, *e.g.* family, economic and social ties, place of residence when known but also the impact of the execution of the EAW on the life of the requested person. This should be weighed against the purpose of the EAW in the

[1198] See Report ImprovEAW.

case at hand. That the requested person has the nationality of or resides in another Member State can be but should not in itself be a ground to issue an EAW.[1199]

- The seriousness of the offences and, in execution-EAWs, of the length of the sentence to be executed: cases regarding offences barely falling within the scope of the EAW and sanctions too close to the 4-month limit, *e.g.* 6 months, should be treated with special caution, especially since this is a ground of refusal for the execution of sentences in another instrument, see Art. 9(1)(h) of FD 2008/909/JHA. Similarly, regarding the remainder of the sentence: it is recommended that judicial authorities, in principle, do not issue (and execute) EAWs for the purpose of enforcing a sentence where the (total) remainder to be served is less than four months (see as well Art. 9(1)(h) of FD 2008/909/JHA where a remainder of less than 6 months could be a ground of refusal).

- In prosecution-EAWs, the state and progress of investigations (*e.g.* degree of suspicion);

- The existence of alternatives to surrender: issuing judicial authorities are strongly advised to assess the interest/goal in acquiring the requested person and whether this could be fulfilled with less infringing instruments of cooperation. The stage of proceedings might be crucial for that assessment. See for more in the section right below.

Purpose(s) of the EAW, stage of proceedings and alternatives
Issuing judicial authorities should keep in mind that the EAW is not the only way to acquire requested persons for criminal proceedings or to execute sentences. There are other instruments that are less intrusive and perhaps even more efficient than the EAW. These should be explored first as part of the proportionality test but also as part of efficiency of administration of justice.[1200]

In a **prosecution-EAW,** if the requested person has a known address in another Member State and the purpose is to obtain or facilitate the presence of the person then *summoning the person* or the *European Supervision Order* based on FD 2009/829/JHA (ESO) could be options. If the purpose of the EAW is to interrogate the requested person, there are alternatives to the physical presence: the European Investigation Order (EIO) could be used for *video conferencing*. In **execution-EAWs**, FD 2008/909/JHA on custodial sentences should be considered instead. Given that many EAWs end up triggering FD 2008/909/JHA because of the application of the refusal ground of Art. 4(6) of FD 2002/584/JHA, it is prudent to directly use this option from the start, when possible. This would lead to less trouble for the requested person and less time and resources used by the authorities of the executing Member State.

Finally, transfer of proceedings might be an attractive option for some cases. This could be regulated, for example, with the use of the 1959 European Convention on Mutual Assistance in Criminal Matters or the 1972 Convention on the Transfer of Proceedings in Criminal Matters.

[1199] See also Commission Notice – Handbook on how to issue and execute a European Arrest Warrant, OJ 2017/C-335/01, 6.10.2017 (thereafter Handbook), para. 2.4.
[1200] See furthermore Handbook, para. 2.5.

An important factor in considering alternatives to the EAW is the administrative implications for operationalising them. If the competent authority that makes the decision for the EIO, for example, is another than the authority that issues the EAW, then the EAW issuing judicial authority should explore the possibility of coordination with that authority. If different authorities are competent for different instruments within a legal system, cooperation and coordination should be sought so that alternatives to the EAW can be employed.

Preparation to fill in the form

In preparing for issuing an EAW, the judicial authority must collect all information necessary to assess whether the requirements are met. The issuing judicial authority must have acquired in preparation for an EAW at least:

- The official EAW form.[1201]
- A valid national warrant (within the meaning of Art. 8(1)(c) of FD 2002/584/JHA) for **prosecution-EAWs** issued in accordance with the national legislation.[1202] Please note that without a national warrant, an EAW cannot be issued, and the issuing judicial authority should be able to verify the existence and content of such warrant. It is strongly advised that the issuing judicial authority receives a copy of the national warrant.
- The court judgment for **execution-EAWs.** Should the EAW be for the execution of a suspended sentence/parole that has been revoked, also the judgment on revoking the suspended sentence/parole should be gathered and it is recommended to refer to it as well in the EAW form.
- The national judicial authority issuing the EAW should have in its possession the appropriate information to assess whether the conditions for issuing the EAW are fulfilled but also whether issuing an EAW would be proportional (see above). While this information may be contained within the national warrant or court judgment, the whereabouts of the person might not be known when the national warrant/judgment is issued. Additionally, sometimes, national warrants are not detailed in this manner. It is recommended that the issuing judicial authority be provided with full access to the case file in order to properly assess the prerequisites for issuing the EAW, fill in the form and assess proportionality. In this regard, additional information regarding the personal circumstances of the requested person must be acquired – if possible and available – in advance (see above).

2. Issuing the EAW

Given the prevalence of the English language as the common denominator/language amongst most professionals and the difficulties that translations create (contextual inaccuracies, delay but also resources), when issuing EAWs an English translation should be added if possible.

Section (a)

Authorities should fill in all information required in this section, including where photos and fingerprints can be collected, if available and not already added in the SIS alert. Photos

[1201] Handbook, para. 1.3.
[1202] Also see Handbook, para. 2.1.3.

(especially when recent) and fingerprints are quite useful to avoid wrongful arrests and to solve problems of identification since the requested person may challenge the identity before the authorities of the executing Member State.[1203] Mentioning the time when the photo was taken could prevent doubts regarding the identity of the person. Mentioning the nationality is needed to examine grounds for refusal, while the language of the requested person can assist the authorities to organise the arrest and the ensuing procedure.

Section (b)

Prosecution or execution-EAW?

When filling out *section (b)* mentioning the existence of a national judicial decision in *section (b)*, together with the information provided in *section (c)*, enables the executing judicial authority to determine whether surrender is sought for the purposes of conducting a prosecution or for the purposes of executing a custodial sentence.

Currently, the form does not allow for a clear indication of whether the EAW is a prosecution or execution EAW. Therefore, mentioning in a precise manner, the nature of the national instrument is vital for the executing judicial authority to understand this.

This should also be reflected on the following parts of the form:

For *prosecution-EAWs* and execution-EAWs in cases where an ordinary remedy is still possible (before or after surrender, for example for *in absentia* proceedings), *section b(1)* and *section c(1)* must be filled out and also *section (c)2* if a penalty was already imposed.

For *execution-EAWs* where no ordinary remedy is available, *sections (b)2 and (c)2* must be filled out.

It is not required to include a copy of the national judgment or arrest warrant, either authenticated or not.

The national legal basis

Following the need to comply with the dual-level of protection, the national judicial decision must be a distinct, separate decision even if issued by the same authority that issues the EAW.[1204] In prosecution-EAWs, the national basis does not have to be called 'arrest warrant'. It must have though a same effect to a national arrest warrant, namely "to enable, by a coercive judicial measure, the arrest of that person with a view to his or her appearance before a court for the purpose of conducting the stages of the criminal proceedings".[1205]

The national warrant(s) must cover all offences for which an EAW is sought.

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 and how the dual level of protection is fulfilled in

[1203] Also, Handbook, para. 3.2.1.
[1204] See Handbook, para. 2.1.3.
[1205] ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, para. 53.

this case. This is because the current EAW form does not include all new features of validity of EAWs following the ECJ case law. To avoid a request for supplementary information, when the EAW is issued by a prosecutor, explaining how dual protection is fulfilled avoids delays and possible refusals.

In case of a convicting judgment (execution-EAWs), the judgment must originate from a judicial authority from the Member State and not a third state outside the EU unless it was recognised and rendered as enforceable by the issuing Member State. However, when the EAW concerns the execution of a sentence that has been taken over by the issuing Member State from a third State, the issuing judicial authority should mention in the EAW whether a judicial review was carried out in the issuing Member State to verify whether the fundamental rights of the person concerned were respected in the proceedings resulting in the judgment in the third State. If the judgment is of another EU Member State, it can also be the basis for an EAW as long as it has been recognised under the law of the issuing Member State.

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.[1206]

Attention is needed in the case of the so-called 'cumulative judgments', when one or more sentences handed down previously in respect of the person concerned are cumulated into one single sentence in a process leading to one cumulative judgment. To avoid confusion only the cumulative judgment should be filled in under s*ection (b)2* and the cumulative sentence under *section (c)2*. To avoid requests for supplementary information and clarification, the issuing judicial authority should explain aspects of the separate judgments that could lead to applying refusal grounds: the offences, facts (*e.g. locus delicti*), and other aspects that are pertinent for refusal grounds.

From practice, it appears that the date of the decision, the authority and the reference (numbering or identification number) of the decision (warrant or court judgment) are data desired by executing judicial authorities. The issuing judicial authority should therefore mention those three elements even if they are not explicitly required by the form.

Section (c)

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 (before or after surrender, for example for *in absentia* proceedings). In other cases, filling out both the *fields (c)1 and (c)2*, might confuse the executing judicial authority regarding the character of the EAW – see for more above under *section (b)*.

[1206] In this regard, this is a more nuanced approach than the Handbook, para. 2.1, check also the *Guidelines how to fill in the EAW form* (Annex III to the Handbook).

Mentioning the remaining sentence to be served in *section (c)2* is required and important and it should always be filled out. If no part of the sentence has been served yet, the amount of the full sentence should be repeated there.

When filling in the sentences you may add accessory offences. However, be aware that not all Member States accept accessory offences as part of the EAW and the EAW would as a result only partly be executed in that case.

Multiple offences - sentences
Where a *prosecution-EAW* is issued for multiple offences, the maximum sentence for each separate offence must be mentioned in *section (c)*, unless the offences are all covered by the same legal provision, and must clearly link that maximum sentence to the relevant offence.

Currently, the EAW form does not guide the issuing judicial authority to link offences with sentences – *i.e.* which offence corresponds to which sentence. This leads often to supplementary information requests. To avoid this, it is advisable to clearly outline the offences and their sentences in the EAW so that it is clear which maximum sentence corresponds to which offence.

Section (e)
Section (e) is the gist of the EAW. The executing judicial authority might have to raise refusal grounds and diligently filling in *section (e)* is vital for avoiding supplementary information requests, refusals and delays.

The description of the circumstances includes:

- A description of the facts as accurately as possible that gives a clear impression of the factual circumstances.
- Time and place must be included as precisely as possible. This is important to address issues relating to *ne bis in idem*, territoriality and other topics that relate to possible ground of refusals.
- The degree of participation of the requested person must be mentioned. This is often omitted and yet it is vital to comprehend the factual basis for the EAW.

In the current form, the non-listed offences must essentially be mentioned twice: once under the description of offences and a second time below the list of offences under *section (e)II*. This can be confusing. If the offence is a non-listed offence, you can repeat the same description under (e)II and try to keep the same text in the section above to describe the offences. Alternatively, you may explain that this concerns a non-listed offence and refer to the description above.

Please be aware when describing non-listed offences that if the executing judicial authority doubts whether the requirement of double criminality is met, additional information might be requested; being as precise and descriptive as possible might be beneficial.

More offences

If there are more offences, the current form does not guide the issuing judicial authority to outline them separately. It is advised that the issuing judicial authority describes them separately and numbers (1, 2, 3…) each offence so it is clear which description corresponds to which offence. This also applies to the facts that support each offence separately. It must be clear to the executing judicial authority: how many offences there are, the legal classification for each offence, the description of the facts supporting each offence, and the sanction for each offence.

Section (f)

A plethora of aspects can be communicated to the executing judicial authority under this section and there can be no exhaustive suggestions. This section is meant to be used at the discretion of the issuing judicial authority to communicate to the executing judicial authority anything that might assist the positive evaluation of the request.

The executing judicial authority should not assess the merits of the case (*e.g.* level of suspicion, quality, adequacy of evidence) and information pertinent for such an assessment is superfluous.

Unsolicited information could be both a blessing and a curse, as it could confuse and lead to unnecessary discussions at the executing judicial authority.

Having said that, below is a non-exhaustive collection of information that could be useful to include under *section (f)*, when relevant, as it could facilitate the process:

- Guarantee of Art. 5 (3) of FD 2002/584/JHA: if the issuing judicial authority is ready to commit to such a guarantee, giving it in advance *proprio motu* will facilitate proceedings. Please consider it especially when the requested person is a resident or national of the executing Member State. If so, please include under *section (f)* a guarantee that can be relied upon (see below under Guarantee of Art. 5 (3) of FD 2002/584/JHA) for more).
- Information about the possible whereabouts of the requested person or other information that could be helpful in finding the requested person. This could also be included under *section (a);*
- Warnings that the person might be aggressive or armed;
- The fact that the EAW will be used as the basis for a conditional surrender of Art. 24 of FD 2002/584/JHA (see below for more);
- Statute of limitation: if there is a large time-lapse leaving the impression that the EAW might be based on a national prosecution or enforcement which is statute-barred, you may mention that the statute of limitations is not expired yet, to alleviate any concerns regarding Art. 8 (1) (c) of FD 2002/584/JHA (that the EAW is not based on an enforceable decision).
- If the statute of limitation is close to expiration and this is a particularly urgent request: please mention this under *section (f)*. Alternatively, you may use the option of the conditional transfer of Art. 24 of FD 2002/584/JHA.
- Explain if an accumulated sentence for more offences can be disaggregated, or to address issues relating to cumulative judgments, aggregated offences and their sanctions.

- Detention conditions: you may give a guarantee that the person will (not) be held in a particular prison facility, to accelerate surrender. Please read below under the section on detention conditions on how to maximise the efficiency of such guarantee. Respectively the same can be done as well for deficiencies in the system of justice.
- Issuing judicial authority and dual protection: if the EAW is issued by a prosecutor, it will help to explain how the dual-level protection is fulfilled.
- The reasons for the delay between the imposition of the sentence and the issuing of the EAW.
- Information about other EAWs against the requested person.
- Other information *proprio motu* about special aspects of the judicial system of the issuing Member State or the case at hand, in anticipation of any questions that may arise.

Executing EAWs

Power to assess the EAW

When assessing the form, the executing judicial authority has a specific limit to its powers: *e.g.* to check the conditions of Art. 8 of FD 2002/584/JHA, grounds of refusal. The executing judicial authority does not have the power to assess the merits of the case pending in the issuing Member State, *e.g.* level of suspicion, maturity and adequacy of the evidence. 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.

An example is the statute of limitation in the issuing Member State which cannot be checked by the executing judicial authority, this is not a type of assessment that falls within the powers of the executing judicial authority. However, if after the issuing of the EAW and due to lapse of time the act is statute-barred in the issuing Member State, then the national judicial decision on which the EAW is based cannot be said to be 'enforceable' any longer in the sense of Art. 8(1)(c) of FD 2002/584/JHA; based on this provision, the executing judicial authority may control the validity of the EAW (and not based on statute of limitations). Preferably those issues should be clarified before the requested person is exposed to detention.

Listed-offences

Executing judicial authorities in principle cannot assess whether the described offence would fall under the listed-offence ticked in the EAW under the law of the executing judicial authority or even make that assessment based on the information of the EAW themselves. This is for the issuing Member State to decide.

Double criminality cannot be checked for listed-offences even if it concerns one's own nationals.

Ne bis in idem

Please note that for raising the ground of *ne bis in idem*, the ECJ has developed jurisprudence on the definition of when the acts are the same ("same acts"), where the same facts are connected only with the factual circumstances and not the legal classification of the offences or the protected legal interests *per se*. This means that there could be "same acts" triggering *ne bis in idem* even if the legal classification and protected interests differ.[1207]

Double criminality

The ground for refusal of double criminality for non-listed offences is meant to be optional, in that the executing judicial authority may choose to go ahead and execute the EAW even if the offence (which is not a listed-offence) is not criminalised under the law of the executing Member State. The executing judicial authority should make use of this discretion where required[1208] and where possible under national law.[1209] For example, if there are compelling reasons for executing the EAW, the conclusion could be that the ground will not be applied.

When assessing double criminality, the constituent elements of the offence of the two legal systems do not necessarily have to match. What is important is whether the factual elements underlying the offence, *as these are described in the EAW*, would also be criminalised, even if criminalised as a different offence (see the ECJ jurisprudence in this regard).[1210]

Supplementary information may be requested if factual data important to assess the existence of double criminality are missing from the EAW.

The double criminality ground does not include any check of proportionality.

Prosecution in the executing Member State for the same 'act'

Note that the ground of refusal in Art. 4(2) of FD 2002/584/JHA is not a corollary of *ne bis in idem*. This ground can be raised when there are multiple prosecutions and is meant to be raised as optional ground. Accordingly, the executing judicial authority should make use of this discretion where required[1211] and where possible under national law.[1212] One guideline could be that the prosecution that should 'prevail' is the one that makes sense from the point of view of the best jurisdiction to prosecute. The executing judicial authority should be able to take into account the availability of evidence, where the damage was the greatest or, even, whether the case in the executing Member State is as progressed as the one pending before the issuing judicial authority.

[1207] ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, para. 39; ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para. 81.
[1208] Cf. the duty of conforming interpretation.
[1209] Under EU law there is no duty to interpret national law *contra legem*.
[1210] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4.
[1211] Cf. the duty of conforming interpretation.
[1212] Under EU law there is no duty to interpret national law *contra legem*.

Execution of judgments – Art. 4 (6) of FD 2002/584/JHA

When considering a refusal based on Art. 4(6) of FD 2002/584/JHA, the executing judicial authority must explore whether it has all the information it needs to be able to actually execute the foreign sentence on the basis of FD 2008/909/JHA, *while examining this ground*. In this way, if there is a need for supplementary information for applying FD 2008/909/JHA it can be asked upfront.

This smart practice is to avoid that the ground is applied by the national court with insufficient information to proceed immediately with FD 2008/909/JHA and delays occur accordingly to acquire the certificate of Art. 6 of FD 2008/909/JHA. If that is so, it will stipulate so in one single decision. If there is insufficient information to order execution, the executing judicial authority will ask for further information that will enable it to refuse the EAW and order the execution.

Territorial jurisdiction

This ground is meant to be optional and the executing judicial authority must have discretion on when to raise it.

Cross-border cases are often complex to prosecute, and the executing judicial authority should think twice when considering this ground. The practice to raise this ground in an automatic way once the requirements of territoriality are fulfilled does not serve the purposes of the EAW. One example is if only minor acts, or even some of the acts, took place within the territory of the executing judicial authority; in those cases, the executing judicial authority should only raise the ground after careful consideration of whether claiming jurisdiction is sensible in the case: *e.g.* whether it can prosecute all the acts, availability of evidence and prospects of prosecution, interest in prosecuting, the effect of applying this ground (the outcome may not lead to impunity), the fact that no prosecution was launched in the executing Member State, that the facts were only partially committed in the executing Member State.

The *Guidelines for deciding 'Which jurisdiction should prosecute?'* by Eurojust provide for good practices in assessing jurisdiction. The executing judicial authority should take these aspects into account before applying this ground.

Conditional surrender Art. 24(2) of FD 2002/584/JHA

Conditional surrender on the basis of Art. 24(2) of FD 2002/584/JHA should be arranged based on a bilateral agreement between the competent authorities. The following aspects could be included in the bilateral agreement to achieve clarity of what is agreed upon:

- stating for what type of procedural activity (*e.g.* for the duration of proceedings or for other activity) the conditional surrender is required;
- the estimated/ planned deadline for the execution of the conditional surrender and the deadline for the conditional surrender;

- an undertaking to return the conditionally surrendered defendant within the requested or permitted time limit after the specified procedural step;
- an undertaking that the conditionally surrendered person will remain in restraint/ detention in the Member State during his or her stay until his or her return;
- a declaration that the requesting Member State will bear the costs incurred in connection with the conditional surrender and return of the person charged (or another type of agreement regarding the costs).

Supplementary information Art. 15(2)-(3) of FD 2002/584/JHA

Requesting supplementary information

Supplementary information may only be requested when necessary to take the decision on surrender.[1213] Supplementary information may only be requested in exceptional cases and not when it concerns minor issues that are not decisive for the decision, or issues that are clearly within the EAW-form already. The practice of requesting supplementary information in an automatic and structural way, with, *inter alia*, standardised lists of questions/requests is not in line with EU law and should not be done.

The executing judicial authority has discretion to decide when supplementary information is necessary. If necessary, it must be requested. See, *e.g.*,:

(i) when examining whether the EAW meets the requirements of lawfulness set out in Art. 8(1) of FD 2002/584/JHA;[1214]
(ii) when examining whether the requirements of Art. 4a(1)(a)-(d) of FD 2002/584/JHA are met;[1215]
(iii) when examining whether there is a real risk for the requested person of a violation of Art. 4 of the Charter or of a violation of the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter.[1216]

Supplementary information is requested, usually, on account of a judicial authority's decision in the executing Member State. In some countries, also non-judicial authorities might take the initiative to send such a request. To avoid misunderstandings, such requests from non-judicial authorities should be kept to a minimum and only if they concern obvious mishaps in the interest of procedural economy, *e.g.* signature missing.

When requesting supplementary information, it is advised to include the following information in the request as clearly as possible:

[1213] See for an outline of examples where supplementary information might be necessary in Handbook, para. 4.4.1.
[1214] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, para. 65.
[1215] ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras. 101-103.
[1216] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 95; ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system*), C-216/18 PPU, ECLI:EU:C:2018:586, para. 77.

- Exactly what information is requested; it has to be clear to the issuing judicial authority what it must provide. If for example what is missing is the role of the requested person in the criminal offence, then the question should be "what was the role..." and not "describe the facts better". It is advisable to request what is missing and be as specific as possible. Vague requests *e.g.* "better explanation of *section (e)"* may lead to vague answers. Make sure generic language is used, avoiding national terminology which might confuse the issuing judicial authority.

- Reasons for requesting such information, especially when it concerns possible grounds for refusal or guarantees. By explaining the context of the request, the executing judicial authority can enable the issuing judicial authority to provide the appropriate context in the answer. Often additional documents might be needed which the issuing judicial authority can provide once the context is clear. For example, if the information is requested in the context of *ne bis in idem*, the issuing judicial authority might have an interest to provide more information than the executing judicial authority requests, *e.g.* the copies of judgments – which would not have been sent had it not known the context of the request for supplementary information.

- **Avoid irrelevant questions**: while the relevancy of the request might depend on the legal system and can be judged differently by other systems, there are some topics for which the executing judicial authority should not normally request any information. Questions relating to the merits of the case should not be part of supplementary information. Examples of questions which are irrelevant as they imply a control of the merits of the case outside the scope of the executing judicial authority include *inter alia*: *e.g.* quality or probative value of evidence supporting the case, whether there are witnesses and, if so, how many, communication of the prosecution file to the suspect, bail conditions, readiness of the case for trial, grounds for reasonable suspicion.

- Set a **deadline**: there must always be a deadline set to the request, to ensure that there will be no delays. Such deadline might be provided by legislation or on a case-by-case basis by the executing judicial authority. Regardless of the mechanism used to impose a time limit (*e.g.* legislative deadline, determination based on hearing date, fixed scheme of deadlines or context-sensitive approach in calculating), the executing judicial authority must ensure that: time limits are *sensible* for the issuing judicial authority to procure the requested information in the case at hand, they should *take into account the liberty status* of the requested person and must not lead to a violation of the *time limits of Art. 17 of FD 2002/584/JHA*. For example, if the information requested is quite bulky, a more generous deadline should be provided. The deadline must be communicated clearly to the issuing judicial authorities. It is advisable that the executing judicial authority includes the direct contact information of the executing judicial authority. If there is difficulty in communication, Eurojust should be contacted to assist. The form for informing Eurojust of delays of Art. 17 of FD 2002/584/JHA should also be used in this case https://www.eurojust.europa.eu/electronic-forms-article-177-eaw-framework-decision

- Make sure that all questions are included in the first request to avoid more requests being sent later. The EAW must be assessed thoroughly before the request is made to

ensure that all issues that must be included in the request are there. The attitude with Art. 15(2) of FD 2002/584/JHA is to "get it right the first time".

Answering supplementary information requests

When receiving requests for supplementary information in the context of Art. 15(2) of FD 2002/584/JHA, it is important to deal with the request as a priority matter of urgency. If, after all efforts, deadlines cannot be met, please contact immediately and as soon as possible the executing judicial authority, because often the deadline corresponds to the day of the hearing in the executing Member State. If there is difficulty in communication, Eurojust should be contacted to assist.

If it is not clear what information is requested, communication with the executing judicial authority should be initiated as soon as possible to clarify. In doubt, it is better to send more information than less.

Often the executing judicial authority might be unfamiliar with some aspects of the legal system of the issuing Member State. A fruitful attitude is to anticipate follow-up questions that could arise.

The authority answering the requests and providing the supplementary information should be, if possible, the issuing judicial authority (within the meaning of Art. 6(1) of FD 2002/584/JHA) especially if the content of the information changes substantially the EAW, for example when the more elaborate description of the offences leads to more offences being included in the form. If not, the danger is that the executing judicial authority might question the validity of the EAW and the supplementary information.

How to use Art. 15(3) of FD 2002/584/JHA – *Proprio motu*

The EAW gives the possibility to the issuing judicial authority to anticipate trouble and/or simplify procedures by sending on its own initiative supplementary information. This can be done under *section (f)* of the form.

Issuing judicial authorities are encouraged to use this option when certain particularities in their system might be the source of possible misunderstanding and lead to Art. 15(2) of FD 2002/584/JHA requests or unnecessary refusals; when particularities in the present case might lead to additional questions; or to expedite the procedure. The guarantee of Art. 5(3) of FD 2002/584/JHA for example could be given in advance, as a way of speeding up the process. Another possibility is to mention in advance the prison(s) in which the requested person, after surrender, will likely be detained.

If you make use of Art. 15(3) of FD 2002/584/JHA make sure the information communicated is clear.

DO's

- be precise and formulate clear and specific questions and answers;
- set a deadline;
- respect the deadline;
- include direct communication details (Skype, email address etc) for easier communication between authorities and specify what language you speak/understand;
- communicate with the authorities of the other Member States to streamline the process;
- anticipate possible questions arising and if possible, send this information *proprio motu.*

DON'T's:

- with regard to direct communication: avoid using intermediaries such as administrative personnel to draw up requests or handle incoming answers;
- send standardised lists of questions;
- vague and general requests for clarification of the form's sections;
- irrelevant questions especially when relating to topics for which the executing judicial authority has no competence;
- unnecessary requests for supplementary information.

The guarantee of Art. 5(3) of FD 2002/584/JHA

The guarantee of return aims *inter alia* at social rehabilitation. It should be requested only when the requested person invokes it. Automatic or obligatory triggering of this guarantee is not appropriate, even if it concerns nationals of one's state. This guarantee should be offered to both nationals and residents. Executing judicial authorities should examine carefully whether social rehabilitation is served by triggering the guarantee.

If the issuing judicial authority is prepared to accept such guarantee when issuing the EAW, they should mention it in advance using art Art. 15(3) of FD 2002/584/JHA *proprio motu* in the form of the EAW (*section (f)* – see above).[1217]

The issuing judicial authority should give the guarantee in a clear and unconditional manner. For example, the guarantee cannot be made dependent on the finding by the court of the issuing Member State that this would indeed help social rehabilitation or other objectives. The text of the guarantee should leave no doubts that the issuing Member State commits to return the person to the executing Member State after the end of proceedings.

[1217] As also in Handbook, paras. 3.2.2 and 5.8.2.

Some proposed texts to use (shorter and longer version):

> "*In case of surrender to [insert country], if convicted to a custodial sentence, the requested person will be returned to the executing* Member State *in accordance with Framework Decision 2008/909".*
>
> *"The guarantee is given in accordance with article 5, § 3 of the Framework Decision 2002/584/JHA for the return to (fill in the executing Member State) of (fill in the identity of the person concerned) if surrendered to (insert issuing* Member State*). This guarantee entails that the person concerned, after a final decision imposing a custodial sentence or measure involving deprivation of liberty has been given, will be returned to (fill in the country) in order to serve there the custodial sentence or detention order passed against him according to the dispositions of Framework Decision 2008/909/JHA."*

The return should be executed as soon as possible after the final judgment in the issuing Member State unless there are other procedural steps. Those procedural steps that could delay the execution of the return guarantee to the executing Member State include:

- additional steps/procedures for the determination of the sentence or due to concrete reasons;
- the presence of the requested person is essential in the issuing Member State for safeguarding the rights of defence of the person concerned or the proper administration of justice.

This assessment requires a balancing exercise on whether delay is necessary, and it should be strictly applied by the issuing judicial authority. The issuing judicial authority may not systematically and automatically postpone the return *e.g.* until a certain amount of time has been served in the issuing Member State.

The procedure of the return must follow FD 2008/909/JHA, thus acquiring and sending the certificate to the other Member State. The provisions of FD 2008/909/JHA are applied *mutandis mutatis* to the return guarantee including the provisions regarding an additional consent (see Art. 6 FD 2008/909) but this is insofar as they are compatible with FD 2002/584/JHA.

The authorities in both the executing and issuing Member States must trigger the procedure of return; the execution of the return should not be 'forgotten'. An attentive attitude is recommended so that guarantees given do not remain unexecuted.[1218]

Time Limits - Art. 17 of FD 2002/584/JHA

[1218] In the Handbook, para. 5.8.2. it is suggested that the issuing Member state is responsible to contact the executing Member State to arrange the return.

The executing judicial authority should treat the EAWs with urgency, given the state of affairs and the restriction of the person's liberty.

This also includes the practice of Art. 15(2) of FD 2002/584/JHA, which should be performed within the time limits. Executing judicial authorities must trigger those procedures early and not wait until the last minute. A good practice is to schedule as early as possible hearings for EAWs or that the judge prepares the case in advance to anticipate the triggering of procedures that take more time.

Using the 30-day extension of Art. 17(4) of FD 2002/584/JHA should always be accompanied by an explanation of the reasons, and it should be used only in specific cases.

Exceeding the time limit of 90 days might be acceptable in exceptional cases, *inter alia*:

- the executing judicial authority assesses whether there is a real risk that the requested person will, if surrendered to the issuing judicial authority, suffer inhuman or degrading treatment, within the meaning of Art. 4 of the Charter, or a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Art. 47 of the Charter, or,
- proceedings are stayed pending a decision of the ECJ in response to a request for a preliminary ruling made by an executing judicial authority, on the basis of Art. 267 TFEU.[1219]

If the time limits of Art. 17 of FD 2002/584/JHA cannot be respected, the issuing judicial authority must be informed. Eurojust should also be informed (Art. 17 (7) of FD 2002/584/JHA) in case the time limits cannot be respected and the following form should be used to do so https://www.eurojust.europa.eu/electronic-forms-article-177-eaw-framework-decision.

Failing to inform Eurojust however does not impact the validity of the detention. If there is a delay and the limits of Art. 17 of FD 2002/584/JHA are violated, the requested person must not *per se* be released automatically. The national law in this case must provide a clear and foreseeable legal framework. If the decision to release the person is taken, the executing judicial authority must ensure that absconding will be prevented using alternatives to detention measures. If, however, this risk cannot be minimised to an acceptable degree, a release simply based on the exceeding of time limits is not appropriate.

Detention conditions and deficiencies in the system of justice

Detention conditions

Should there be an argument that the detention conditions in the issuing Member State are not appropriate, the executing judicial authority must perform a test to assess such risk. The so-called *Aranyosi test* includes two steps: an *in abstracto* step (systematic or generalised and

[1219] ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, para. 43.

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).[1220] Only when following this test, the detention conditions can lead to a postponement of the execution in line with the ECJ jurisprudence.[1221]

To prove the *in-abstracto* risk (first step), executing judicial authorities must take into account information which is objective, reliable, specific and properly updated. For example, ECtHR case law, reports from NGOs and international organisations and the information submitted by the defence.

Attention should be paid as to whether that information is updated and is currently representative of the situation at the issuing state. Often there is a lack of properly updated information and the executing judicial authority must combine sources.

A finding of an *in abstracto* risk does not suffice to refuse execution of the EAW. Once such a risk is established, then the national court must proceed to the second part of the test.

The second step of the test (*in-concreto* risk) necessitates a request for supplementary information based on Art. 15(2) of FD 2002/584/JHA. This is an obligation that cannot be avoided and must be complied with. However, this obligation is somewhat nuanced when it concerns the deficiencies in the systems of justice (see below under Deficiencies in the system of justice).

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.[1222] The executing judicial authority should rely on the information received by the issuing judicial authority, but also on other information that it might acquire on its own volition or through the defence.

The request for supplementary information may take three forms depending on what the *in abstracto*-risk test has shown:

- A request whether the person can be kept in a specifically named prison facility that the executing judicial authority has evidence that it complies with the ECHR standards. This option is a form of **guarantee** and can accelerate the procedure significantly. This can be used when the *in-abstracto* test has proven that a specific facility is in line with the conditions of the ECHR.
- A request that the person will *not* be kept in a specifically named prison facility. This is also a form of **guarantee** that can accelerate the procedure. To use this efficiently, it should be employed only when the in *abstracto risk* is proven for a specific prison

[1220] See more analytically Handbook, para. 5.6.
[1221] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198; ECJ, judgment 15 October 2019, *Dorobantu*, C-128/18, ECLI:EU:C:2019; ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589.
[1222] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, para. 116.

facility (or more specific ones). In that case, the executing judicial authority requests the guarantee that the person will not be held in those prison(s). Such a possibility can accelerate proceedings immensely.

- Request for information on which detention facilities the person will likely be detained, including on a temporary or transitional basis and a description of the conditions in those facilities. This extensive information can be requested when the *in-abstracto* test shows that the problems are across the prison facilities or when it is not clear which facilities are problematic. The questions posed in this option should reflect the aspects of ECHR standards on detention conditions (see below).

Please find below a draft template that could be used to request supplementary information regarding the detention conditions of the facilities that the requested person will likely be detained:[1224]

Draft template

"Please provide supplementary information on the conditions in which it is envisaged that the requested person will be detained in relation to the ticked boxes below:

1. Prison cells:
   - o Minimum personal space for single-occupancy and multi-occupancy cells (in m^2)
   - o Cell's measurements (height and width)
   - o Equipment (heating, ventilation) and facilities (lighting, windows, washbasin, toilet, shower, furniture) in cell
   - o Cleanliness and hygienic conditions in cell
   - o Video-surveillance of cells

2. Sanitary conditions:
   - o Access to sanitary facilities (frequency)
   - o Structural separation requirements for in-cell sanitary facilities
   - o Hygienic conditions (disinfection and cleaning, provision of sanitary products to detainees)
   - o Access to shower/bathing facilities and hot water

3. Time out of cell
   - o Time per day/week spent by detainees outdoors in open air
   - o Sport facilities outdoors and indoors
   - o Time per day/week spent by detainees in common areas
   - o Activities/programmes available to detainees outside of their cells (education and recreational activities)

4. Solitary confinement

[1224] The draft template has been provided by the Belgian partner, Jan van Gaever, and it is reportedly a template in the making by EU institutions, not yet published.

- Standards for the application of solitary confinement
- Monitoring of detainees while in solitary confinement

5. Access to healthcare
   - Access to medical services and emergency care in prison
   - Timing on medical intervention
   - Availability of qualified medical and nursing personnel in prison facilities
   - Availability of specialist care (*e.g.* for long-term diseases, for sick and elderly detainees, mental illnesses, drug addictions)
   - Medical examination upon arrival in detention facilities
   - Medical treatment of own choosing

6. Vulnerable prisoners
   - Special measures for young detainees
   - Special measures for women in detention
   - Special measures for pregnant women
   - Special measures for LGBTI prisoners

7. Special measures in place to protect detainees from violence
   - Staff supervision
   - Facility arrangements to prevent inter-prisoner violence (emergency button in cells, video-monitoring,…)
   - Guards trainings

8. Nutrition
   - Frequency of provision of meals
   - General nutrition standards

9. Legal remedies
   - Legal remedies available to the detainee in case of violation of national standards on detention conditions

Please also provide additional information on the above-mentioned topics: …"

Standards of detention conditions

Currently, there are no EU harmonised standards on detention conditions based on EU legislation. The standards of detention conditions within the EU are those followed by the ECtHR. If the executing Member State has higher standards of conditions regarding detention, those cannot be demanded.

All relevant physical aspects should be taken into account (*e.g.* personal space, sanitary conditions, freedom to move within prison) and thus follow the ECtHR case law in all respects (*e.g.* 3m² minimum with certain exemptions, duration plays a role but is not decisive, other

aspects of inappropriate conditions).[1225] In calculating that available space, the area occupied by sanitary facilities should not be taken into account, but the calculation should include space occupied by furniture. Detainees should still have the possibility of moving around normally within the cell.

A legal remedy to challenge detention conditions does not suffice to exclude a real risk of violation.

Weighing detention conditions with considerations relating to the impunity or efficacy of judicial cooperation and principles of mutual trust and recognition cannot be accepted.

Should the application of the test be unclear in any way, a preliminary reference procedure should be considered.

Conclusion of the test
If the *in-concreto risk* cannot be dispelled within reasonable time even after the supplementary information the procedure can be ended.

In that case, the executing judicial authority should look into further steps to assess the impact of impunity and whether alternatives can be used. These could be the use of FD 2008/909/JHA or the FD 2008/947/JHA in execution-EAWs.

Time limits of executing judicial authority
The executing judicial authority must make efforts to stay within the time limits of Art. 17 of FD 2002/584/JHA and ensure that those matters are triggered as early as possible. Please add a realistic deadline to the request of Art. 15 (2) of FD 2002/584/JHA that complies with Art. 17 of FD 2002/584/JHA.

Issuing judicial authority: answering a request for supplementary information on detention conditions
Upon receiving a request for supplementary information on detention conditions, the issuing authority should treat it as a matter of urgency. If the deadline cannot be respected, please contact the executing judicial authority.

If it is possible to suggest specific prison facilities that comply with the ECHR standards, suggesting this to the executing judicial authority can speed up the process of execution, even if this was not requested. This can be done:

- either when answering the supplementary information of Art. 15(2) of FD 2002/584/JHA request;
- or already in advance as *proprio motu* information of Art. 15(3) of FD 2002/584/JHA if this is a known problem in the issuing Member State. In that case, the EAW is issued with additional information under *section (f)* that the requested person will likely be

[1225] ECtHR, 20 October 2016, *Muršić v. Croatia*, CE:ECHR:2016:1020JUD000733413, § 139. For a collection of the ECtHR case law that instructs the ECJ see ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paras 97 and 98 and the case-law cited.

detained in a named specific facility that complies with the ECHR standards. With this option the lengthy process described above (on the basis of Art. 15(2) of FD 2002/584/JHA) can be avoided altogether. To achieve the efficiency of that option, it must be clear or known already that that the proposed facility complies with the ECHR standards. This can be included in the EAW-form.

Attention! When a guarantee for a specific detention facility is given (*e.g.* that the requested person will be likely detained at a specific facility that fulfils the ECHR standards), an endorsement of this guarantee by the issuing judicial authority is important, to give to this guarantee its full effect! If this guarantee is not given by the judicial authority, acquiring an endorsement, or consent or agreement or approval by the judicial authority increases the reliability and strength of that guarantee. Such endorsement should be mentioned in the response.

Deficiencies in the system of justice

Most aspects mentioned above apply also to risks regarding the independence and impartiality of tribunals in the issuing Member State, or a failure to comply with the requirement for a tribunal established by law. Additional attention should be paid to the following particularities:

The second step of *in-concreto risk* requires two subtests: first, the executing judicial authority must, in particular, '*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 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]'*.[1226] Here the executing judicial authority is expected to zoom in on the procedure of the requested person and see whether the pending case will be affected by the alleged deficiencies potentially affecting the said courts with jurisdiction over these proceedings.

The obligation of the executing judicial authority to request supplementary information (on the basis of Art. 15(2) of FD 2002/584/JHA) in order to assess the *in-concreto risk* in the case of deficiencies of in the system of justice exists only after *'…the evidence put forward by the person concerned, although suggesting that those systemic and generalised deficiencies have had, or are liable to have, a tangible influence in that person's particular case, is not sufficient to demonstrate the existence, in such a case, of a real risk of breach of the fundamental right*

[1226] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, paras. 60-61 and 68-78.

to a tribunal previously established by law, and thus to refuse to execute the European arrest warrant in question,…'.[1227]

When making that *in concreto* assessment the executing judicial authority must look into various specific factors: for example, in execution-EAWs, information regarding the composition of the panel of judges that heard the requested person's criminal case and whether there was a real breach of fair trial rights.[1228] In prosecution-EAWs, the factors to be taken into account could be the personal situation of the requested person, the nature of the offence, the factual context surrounding that European arrest warrant or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person, the latter, if surrendered, runs a real risk of breach of that fundamental right.[1229]

This possibility for postponing surrender is currently applicable only as far as Poland is concerned and concerns aspects of the independence of courts. However, developments within Europe are dynamic. Please note, that even if the issuing Member State in question has been the subject of a reasoned proposal adopted by the Commission pursuant to Art. 7(1) TEU (in this case Poland), the complete assessment must be followed. Yet if the Council were to adopt a decision based on Art. 7(2) TEU in respect to a Member State and the Council were to suspend the FD 2002/584/JHA for that Member, then and only then, the executing judicial authorities of other Member States would be entitled to refuse automatically surrender (thus forgo the two-step test) to that Member State.

Rule of speciality

The renunciation of the speciality differs from the consent to the surrender.

It is important that the issuing judicial authorities become aware of (whether) or not the surrender was allowed under the condition of the speciality rule. Additionally, the issuing Member State should be aware of the declaration made by the requested person in this respect. This is because it is the issuing Member State that needs to comply with this rule.

Thus, the executing judicial authority should ensure that:

- The judgment includes specific reference as to whether or not the speciality rule was renounced.
- A copy of the judgment should be sent to the issuing authorities to verify for which facts surrender was allowed.

[1227] ECJ, judgment of 22 February 2022, *X&Y*, (C-562/21 PPU and C-563/21 PPU), ECLI:EU:C:2022:100, para. 84.
[1228] ECJ, judgment of 22 February 2022, *X&Y*, (C-562/21 PPU and C-563/21 PPU), ECLI:EU:C:2022:100, para. 102.
[1229] ECJ, judgment of 22 February 2022, *X&Y*, (C-562/21 PPU and C-563/21 PPU), ECLI:EU:C:2022:100, para. 102.

- It is highly recommended that the authorities in the executing Member State use this template from the Handbook (Annex III) when communicating their decision to the authorities of the issuing Member State, which summarises all key aspects of the surrender.

Conversely, mechanisms should be in place at the issuing Member State to prevent the violation of the speciality rule due to miscommunication amongst the various authorities in charge of the execution of sentences. For instance, when the issuing judicial authority becomes aware that the surrender is allowed under the condition of the speciality rule, this fact should be communicated to the relevant authorities at the issuing Member State in charge of executing sentences.

ANNEX III

Questionnaire Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines

Introduction

This questionnaire is meant as a tool to:

- identify any practical problems issuing judicial authorities and executing judicial authorities may experience when dealing with EAW's which are related – either directly or indirectly – to the EAW-form and
- identify the roots of these problems.

The questionnaire consists of 5 parts.

Part 1 concerns preliminary matters.

Part 2 concerns the transposition of FD 2002/584/JHA.

Part 3 concerns problems regarding the individual sections of the EAW-form.

Part 4 concerns problems concerning providing information which are not directly related to the EAW-form.

Part 5 invites the partners to draw conclusions and offer opinions based on their experiences (or on those of their Member State's authorities). Furthermore, the partners are encouraged to make any comments, put forward any information, pose any questions and make any recommendation they feel are relevant to the project, but which are not directly related to Parts 2-4.

From Part 2 on, each set of questions is preceded by an explanation. The explanation describes the context and the background of the questions, with reference to the relevant legal provisions and the relevant judgments of the Court of Justice. It also mentions (possible) issues in order to give some guidance in answering the questions. In answering the questions, besides flagging your 'own' issues, please indicate whether the issues mentioned in the explanation-part exist in your Member State.

Besides answering the questions in the questionnaire, please submit documents you deem relevant in answering the questions and please refer to relevant (European or national) case-law and legal literature, where available and applicable, otherwise provide your own expert opinion.

Some of the questions are (partly) identical to questions from the *InAbsentiEAW* questionnaire (see, *e.g.*, Part 1 and some questions in Part 2).[1230] In respect of those questions, you may want to duplicate your answers to that questionnaire, unless there is a change of circumstances.

[1230] https://www.inabsentieaw.eu/wp-content/uploads/2018/10/InAbsentiEAW_QUESTIONNAIRE.pdf.

Part 1: preliminary matters

1. Please indicate who completed the questionnaire in which capacity and how much years of experience you have had in dealing with EAW cases, in particular whether you have experience as issuing and/or executing judicial authority.

Part 2: transposition of Framework Decision 2002/584/JHA

Explanation

Part 2 concerns the national transposition of FD 2002/584/JHA. The questions aim to establish how the Member States have transposed the relevant provisions and whether they have transposed them correctly.

[When referring to (provisions of) FD 2002/584/JHA or the EAW-form, please use the consolidated English language version, available at: https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/787.]

A. General questions

Explanation

Part 2A is dedicated to the transposition of provisions regarding the EAW-form and regarding grounds for refusal and guarantees.

Art. 8(1) of FD 2002/584/JHA concerns the content and form of the EAW. In the Annex to FD 2002/584/JHA, the EAW-form is set out. Member States must implement Art. 8(1) and the Annex.

Grounds for refusal/guarantees exhaustively listed

Art. 3-5 of FD 2002/584/JHA contain grounds for refusal and guarantees. Executing judicial authorities may, *in principle*:

- refuse to execute an EAW *only* on the grounds for non-execution *exhaustively* listed by Art. 3-4a of Framework Decision 2002/584/JHA, and

- make the execution of an EAW subject *only* to one of the conditions *exhaustively* laid down in Art. 5 of FD 2002/584/JHA (see, *e.g.*, ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, C-314/18, ECLI:EU:C:2020:191, paragraphs 39-40).

The words ‘in principle’ obviously refer to ‘exceptional circumstances’ in which the principles of mutual trust and mutual recognition can be limited, such as those identified in *Aranyosi en Căldăraru* (ECJ, judgment of 5 April 2016, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198) and in *Minister for Justice and Equality (Deficiencies in the system of justice)* (ECJ, judgment of 25 July 2018, C-216/18 PPU, ECLI:EU:C:2018:586).

Transposition of grounds for refusal/guarantees

Regarding the transposition of Art. 3-5 of FD 2002/584/JHA, Member States are free whether or not to transpose:

- the grounds for mandatory refusal of Art. 3 (ECJ, judgment of 28 June 2012, *West*, C-192/12 PPU, ECLI:EU:C:2012:404, paragraph 64);
- the grounds for optional refusal of Art. 4 (ECJ, judgment of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, paragraph 58), and
- the guarantees of Art. 5 (ECJ, judgment of 28 June 2012, *West*, C-192/12 PPU, ECLI:EU:C:2012:404, paragraph 64).

Margin of discretion

When a Member States chooses to implement the ground for optional refusal of Art. 4(6) of FD 2002/584/JHA, it must provide the executing judicial authority with 'a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW' (ECJ, judgment of 29 June 2017, *Popławski*, C-579/15, ECLI:EU:C:2017:503, paragraph 21). It could be argued that the interpretation of this particular provision applies equally to *all* grounds for optional refusal mentioned in Art. 4 (cf. opinion of A-G M. Szpunar of 16 May 2018, *AY (Arrest warrant – Witness)*, C-268/17, ECLI:EU:C:2018:317, paragraph 60, with regard to Art. 4(3)).

2. Did your Member State transpose Art. 8(1) of FD 2002/584/JHA and the Annex to FD 2002/584/JHA (containing the EAW-form) correctly? If not, please describe in which way your national legislation deviates from FD 2002/584JHA. Was there any debate about the correctness of the transposition in your national law, *e.g.* in academic literature or in court proceedings? If so, please specify.

2BIS. Have infringement procedures been initiated against your Member State by the European Commission for incorrect transposition of the EAW Framework Decision? If so, on which points?

3. Did your Member State transpose *all* the grounds for refusal (Art. 3-4a of FD 2002/584/JHA) and *all* the guarantees (Art. 5 of FD 2002/584/JHA)?

4. Were those grounds for refusal and guarantees transposed as grounds for mandatory or optional refusal/guarantees? Do the *travaux préparatoires* of the transposing legislation and/or the parliamentary debates on that legislation shed any light on the choices made and, if so, what were the reasons for those choices?

5. Does the national law of your Member State, as interpreted by the courts of your Member State, contain a provision for applying the two-step test for assessing a real risk of a violation of Art. 4 and of Art. 47 of the Charter (see Part 4D)?

5BIS. How does your Member State implement the "dual level of protection" to which the requested person is entitled as required in the case law of the Court?

6.

a) Did your Member State transpose the grounds for refusal and guarantees of Art. 3-5 of FD 2002/584/JHA correctly, taking into account the case-law of the Court of Justice? If not, please describe in which way the national legislation deviates from FD 2002/584/JHA. Was there any debate about the correctness of the transposition in your national law, *e.g.* in academic literature or in court proceedings? If so, please specify.

b) If your Member State transposed Art. 4(6) of FD 2002/584/JHA, does your national legislation:

- (i) differentiate in any way between nationals of your Member State and residents, and, if so, in what way? According to which criteria is 'residency in the executing Member State' established?

- (ii) guarantee that, when the surrender of a national or a resident for the purposes of executing a sentence is refused, the foreign sentence is actually executed in your Member State and, if so, how?

7. Did your Member State include in the national transposing legislation grounds for refusal or guarantees not explicitly provided for in Art. 3-5 of FD 2002/584/JHA (apart from the two-step test referred to in question 5)? If so, which grounds for refusal or guarantees?

B. Your Member State as issuing Member State

Explanation

Part 2B concerns the designation of issuing judicial authorities and Central Authorities by the Member States and the competence of those authorities.

Issuing judicial authority
According to Art. 6(1) of FD 2002/584/JHA, the issuing judicial authority 'shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State'. Pursuant to Art. 6(3), each Member State must 'inform the General Secretariat of the Council of the competent judicial authority under its law'.

The term 'issuing judicial authority' is an *autonomous* concept of Union law, the meaning and scope of which 'cannot be left to the assessment of each Member State'. In accordance with the principle of procedural autonomy, the only role of the Member States is to designate national authorities which meet the conditions for being issuing judicial authorities (ECJ,

judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraphs 31-33).

The term 'issuing judicial authority' is 'not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services which are part of the executive' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 50). Therefore, that term is 'is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 51), such as a Public Prosecution Office which participates in the administration of criminal justice in the issuing Member State.

When deciding whether to issue an EAW, the issuing judicial authority 'must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 71, regarding a prosecution-EAW; ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Procureur du Roi de Bruxelles)*, C-627/19 PPU, ECLI:EU:C:2019:1079, paragraph 31, in a case concerning an execution-EAW).

The issuing judicial authority must be capable of exercising its responsibilities objectively and independently. This independence 'requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraphs 73-74).

Effective judicial protection

When a Member State conferred the competence to issue an EAW on an authority which participates in the administration of justice, *but is not itself a court* – such as a Public Prosecutor's Office –, that authority's decision to issue a *prosecution*-EAW and, *inter alia*, the proportionality of such a decision 'must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 75). This requirement is not one of the conditions for being designated as an issuing judicial authority, but concerns the procedure for issuing a prosecution-EAW (ECJ, judgment of 12 December 2019, *JR and YC (Public Prosecutor's Office in Lyon and Tours)*, C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:1077, paragraph 48). Failure to meet this requirement, means that the issuing judicial authority is not competent to issue a prosecution-EAW (according to A-G M. Campos Sánchez-Bordona, opinion of 25 June 2020, *Openbaar Ministerie (Faux en écritures)*, C-510/19, ECLI:EU:C:2020:494, paragraph 59).

Member States are given a lot of leeway as regards the requirement of effective judicial protection. Even if there is no specific remedy against the decision to issue an EAW, that requirement is met if the conditions for issuing an EAW, and its proportionality, are reviewed by a court before or at the same time as the adoption of a national arrest warrant, but also afterwards (ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Parquet Suède)*, C-625/19 PPU, ECLI:EU:C:2019:1078, paragraphs 52-53) and even after surrender (ECJ, order of 21 January 2020, *MN*, C-813/19, ECLI:EU:C:2020:31, paragraph 52).

The requirement of effective judicial protection does not concern *execution*-EAWs, as the judicial review which meets the requirement of effective judicial protection referred to in paragraph 75 of *OG and PI* is incorporated in the proceedings which resulted in the enforceable judgment (ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Procureur du Roi en Bruxelles)*, C-627/19 PPU, ECLI:EU:C:2019:1079, paragraphs 35-36).

Central authority

According to Art. 7(1) of FD 2002/584/JHA, each MS may under certain conditions designate one or more central authorities 'to assist the competent judicial authorities'.

Central authorities are non-judicial authorities, such as a Ministry for Justice (ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraph 38).

The role of central authorities in the execution of EAWs is limited to 'practical and administrative assistance' (recital (9) of the preamble to FD 2002/584/JHA) as regards the transmission and reception of EAWs and 'all other official correspondence relating thereto'. Therefore, Member States are not allowed to 'substitute the central authority for the competent judicial authorities in relation to the decision to issue the [EAW]' (ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraph 39).

Member States must communicate information relating to the designated central authorities to the General Secretariat of the Council. Such 'indications shall be binding upon all the authorities of the issuing Member State" (Art. 7(3) of FD 2002/584/JHA).

Issues concerning designation/competence issuing judicial authority

Assessing effective judicial protection
If a prosecution-EAW was issued by a public prosecutor (who meets the requirements for being an issuing judicial authority), it is not clear whether the executing judicial authority should examine whether the decision to issue that EAW and its proportionality can be subject to court proceedings in the issuing Member State which fully meet the requirements of effective judicial protection. Neither is it clear what the effect should be of a finding that the national law of the issuing Member State does not provide for such court proceedings.

8.
a) Which authorities did your Member State designate as issuing judicial authorities? Did your Member State centralise the competence to issue EAWs?

b) If your Member State conferred the competence to issue EAWs on public prosecutors,

- (i) does the principle of mandatory prosecution apply, according to which a public prosecutor must prosecute each offence of which he has knowledge, and, if so, does that principle extend to the decision whether or not to issue an EAW;

- (ii) do those public prosecutors meet the autonomous requirements for being issuing judicial authorities, and, if so, describe how they meet those requirements and if not, please specify why not;

- (iii) if those public prosecutors meet the autonomous requirements for being issuing judicial authorities, can the decision to issue a prosecution-EAW taken by a public prosecutor, and, *inter alia*, the proportionality of such a decision, be the subject of court proceedings in your Member State – before or at the same time as the adoption of the national arrest warrant or afterwards – which meet in full the requirements inherent in effective judicial protection, and, if so, describe that recourse;

- (iv) is the fact that the public prosecutor meets the autonomous requirements for being designated as an issuing judicial authority and is the availability of a recourse against the decision to issue a prosecution-EAW before a court in the issuing Member State mentioned in the EAW-form?

9.
a) Who prepares the decision to issue an EAW (*e.g.* who fills in the EAW-form), the representative of the issuing judicial authority, an employee of that authority or someone else?

b) What are the formalities for issuing an EAW? Does your Member State have a (digital) template of the EAW-form?[1231] If so, please attach a hardcopy of the template to the questionnaire.

c) When deciding on issuing:

- a *national* arrest warrant,[1232] do the judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that national arrest warrant? If so,

    - (i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;

    - (ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;

[1231] Compare the consolidated EAW-form in word format at: https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/5/-1/0.
[1232] *I.e.* a national judicial decision ordering the arrest and/or detention of a person.

- (iii) is the possibility of issuing a European Supervision Order (ESO) pursuant to Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (*OJ*, L 294/20), [1234] instead of issuing a national arrest warrant, expressly addressed in that examination, both in law[1235] and in practice?

- an EAW, do the issuing judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that EAW? If so,

  - (i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;

  - (ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;

  - (iii) is the possibility of issuing a European Investigation Order (EIO) pursuant to Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters (*OJ*, L 130/1), [1237] in particular the possibility of issuing an EIO for the hearing of a suspected or accused person, by temporary transfer of a person in custody in the executing Member State to the issuing Member State,[1238] by videoconference or other audiovisual transmission,[1239] or otherwise,[1240] instead of issuing a prosecution-EAW, or the possibility of applying Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of 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 (*OJ*, L 327/27), instead of issuing an execution-EAW, expressly addressed in that examination, both in law[1241] and in practice?

d) Did your Member State designate a central authority responsible for transmission of the EAW and all other official correspondence thereto? If so, which authority? Is that authority

[1234] According to the information provided on the website of the European Judicial Network, only Ireland has not transposed FD 2008/829/JHA yet.
[1235] *I.e.*: does your national law expressly oblige the competent authority to take into account such a possibility and to expressly mention in its decision that it has done so?
[1237] This directive does not apply to Ireland.
[1238] See Art. 22(1) of Directive 2014/41/EU and recital (25) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 22(2)(a) of Directive 2014/41/EU).
[1239] See Art. 24(1) of Directive 2014/41/EU and recitals (25) and (26) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 24(2)(a) of Directive 2014/41/EU).
[1240] An EIO can also be issued for hearing an accused or suspected person on the territory of the executing Member State other than by videoconference or other audiovisual transmission (see Art. 10(2)(c) of Directive 2014/41/EU).
[1241] *I.e.*: does your national law expressly oblige the issuing judicial authority to take into account such a possibility and to expressly mention in its decision that it has done so?

competent to answer requests for supplementary information (Art. 15(2) of FD 2002/584/JHA) or to forward additional information (Art. 15(3) of FD 2002/584/JHA) without supervision by the issuing judicial authority?

C. Your Member State as executing Member State

Explanation

Part 2C concerns the designation of executing judicial authorities by the Member States and the competence of those authorities.

According to Art. 6(2) of FD 2002/584/JHA, the executing judicial authority 'shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State'. Pursuant to Art. 6(3), each Member State must 'inform the General Secretariat of the Council of the competent judicial authority under its law'.

The term 'executing judicial authority' is an *autonomous* concept of Union law, the meaning and scope of which 'cannot be left to the assessment of each Member State' (compare part 2B; the Court of Justice has not addressed this issue yet).

10.
a) Which authorities did your Member State designate as executing judicial authorities? Did your Member State centralise the competence to execute EAWs?

b) As regards the competent executing judicial authority, does your national legislation differentiate between:

- cases in which the requested person consents to his surrender and cases in which he does not;

- the decision on the execution of an EAW, the decision on consent as referred to in Art. 27(3)(g) and (4) and in Art. 28(2)-(3) of FD 2002/584/JHA and decisions regarding the (postponed or conditional) surrender of the requested person (Art. 23(3)-(4) and Art. 24 of FD 2002/584/JHA)?

c) When deciding on the execution of an EAW, can the executing judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to execute that EAW? If so:

    - (i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;

- (ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;

- (iii) is the possibility of issuing a EIO pursuant to Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters (*OJ*, L 130/1),[1243] in particular the possibility of issuing an EIO for the hearing of a suspected or accused person, by temporary transfer of a person in custody in the executing Member State to the issuing Member State,[1244] by videoconference or other audiovisual transmission,[1245] or otherwise,[1246] or the possibility of applying Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of 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 (*OJ*, L 327/27), instead of issuing an EAW, expressly addressed in that examination, both in law[1247] and in practice?

d) If your Member State designated public prosecutors as executing judicial authorities,

- (i) do those public prosecutors meet the autonomous requirements for being executing judicial authorities, and, if so, describe how they meet those requirements;

- (ii) if those public prosecutors meet the autonomous requirements for being executing judicial authorities, can a decision taken by a public prosecutor as executing judicial authority, and, *inter alia*, the proportionality of such a decision, be the subject of court proceedings, in your Member State, which meet in full the requirements inherent in effective judicial protection? If so, please describe that recourse.

e) Did your Member State designate a central authority responsible for reception of the EAW and all other official correspondence thereto? If so, which authority? Is that authority competent to request supplementary information (Art. 15(2) of FD 2002/584/JHA) without supervision by the executing judicial authority?

10BIS. How does your country organise a temporary surrender (as meant in Art. 24 (2) of FD 2002/584/JHA), what regime, what conditions? What is the legal basis for detention?

[1243] This directive does not apply to Ireland.
[1244] See Art. 22(1) of Directive 2014/41/EU and recital (25) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 22(2)(a) of Directive 2014/41/EU).
[1245] See Art. 24(1) of Directive 2014/41/EU and recitals (25) and (26) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 24(2)(a) of Directive 2014/41/EU).
[1246] An EIO can also be issued for hearing an accused or suspected person on the territory of the *executing* Member State other than by videoconference or other audio-visual transmission (see Art. 10(2)(c) of Directive 2014/41/EU).
[1247] *I.e.*: does your national law expressly oblige the issuing judicial authority to take into account such a possibility and to expressly mention in its decision that it has done so?

D. EAW-form

Explanation

All Member States implemented FD 2002/584/JHA and FD 2009/299/JHA.

Art. 2 FD 2009/299/JHA inserts Art. 4a in FD 2002/584/JHA and amends section (d) of the EAW-form.

All issuing judicial authorities are obliged to use the EAW-form as amended by FD 2009/299/JHA (Art. 8(1) FD 2002/584/JHA).

[The official EAW-forms in all official languages of the Member States (with the exception of Irish) are available at: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=5.]

11. Does the national law of your Member State, as interpreted by the courts of your Member State, oblige the issuing judicial authorities of your Member State to use the amended EAW-form? If not, please attach the document which is used for issuing an EAW.

E. Language regime

Explanation

According to Art. 8(2) FD 2002/584/JHA the EAW 'must be translated into the official language or one of the official languages of the executing Member State'. However, a Member State may 'state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities'.

The Netherlands have made the following declaration: 'In addition to [EAW's] drawn up in Dutch or English, [EAW's] in another official language of the European Union are accepted provided that an English translation is submitted at the same time'.

Issues concerning the language regime

Using the official form
The issuing judicial authorities do not always use the official English EAW-form as a basis for the English translation of the original EAW, but rather provide for an *integral* English translation of the original EAW. In such cases the text of the English translation sometimes deviates from the official English EAW-form;

[The official EAW-forms in all official languages of the Member States (with the exception of Irish) are available at: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=5.]

Quality of translations

The quality of some English translations is (very) poor.

12. Has your Member State made a declaration as provided for in Art. 8(2) FD 2002/584/JHA? If so,

- what does this declaration entail?

- where was it published? Please provide a copy in English.

13.
a) Have the issuing judicial authorities of your Member State had any difficulties in complying with the language requirements of the executing Member State? If so, please describe those difficulties and how they were resolved.

b) If the translation of the EAW deviates from the official EAW-form in the language of the executing Member State – or from the official EAW-form in the designated language –, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

Part 3: problems regarding the individual sections of the EAW-form

Explanation

Art. 8(1) of FD 2002/584/JHA lists the information which an EAW must contain. The purpose of that information is 'to provide the minimum official information required to enable the executing judicial authorities to give effect to the European arrest warrant swiftly by adopting their decision on the surrender as a matter of urgency'(ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/17, ECLI:EU:C:2018:27, paragraph 59).

Each section of the EAW-form covers one or more of the requirements set out in Art. 8(1).

The issuing judicial authorities 'are required to complete [the EAW-form contained in the Annex to FD 2002/584/JHA], furnishing the specific information requested' (ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/17, ECLI:EU:C:2018:27, paragraph 57).

Art. 8(1) lays down requirements as to lawfulness 'which must be obeyed if the [EAW] is to be valid' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 64; ECJ, judgment of 6 December 2018, *Piotrowski*, C-551/18 PPU, ECLI:EU:C:2018:991, paragraph 43).

Although the grounds for refusal and guarantees are *exhaustively* listed in Art. 3-5 of FD 2002/584/JHA, a failure to comply with one of those requirements 'must, in principle, result in the executing judicial authority refusing to give effect to that [EAW]' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 64). This is so, because Art. 3-5 are based on the premiss that 'that the [EAW] concerned will satisfy the requirements as to the lawfulness of that warrant laid down in Article 8(1) of the Framework Decision' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 63).

However, before refusing to give effect to the EAW, the executing judicial authority must first apply Art. 15(2) of FD 2002/584/JHA and 'request the judicial authority of the issuing Member State to furnish all necessary supplementary information as a matter of urgency' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 65).

A. Information regarding the identity of the requested person

Explanation

Section (a) of the EAW-form is dedicated to information regarding the identity of the requested person. This sections covers the requirements of Art. 8(1)(a) of FD 2002/584/JHA ("the identity and the nationality of the requested person").

This information enables the executing judicial authority to establish whether the person who is brought before it is actually the person who is sought by the issuing judicial authority.

Information regarding the nationality of the requested person is relevant for applying the ground for refusal of Art. 4(6) of FD 2002/584/JHA and for requesting the guarantee of Art. 5(3) of FD 2002/584/JHA.

Issues regarding section (a)

Relationship between SIS-II-Sirene and the EAW
Issuing judicial authorities do not always enter all relevant data into SIS. Often there is no photo or fingerprints. This causes problems in identifying people with common names without proper documentation (*e.g.* refugees/immigrants) and can lead to repeated arrests of people with the same common name. Other Member States do not always respond to requests for complete information in SIRENE.

14. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (a)? If so, please describe those difficulties and how they were resolved.

15. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (a)? If so, please describe those difficulties and how they were resolved.

B. Decision on which the EAW is based

Explanation

Section (b) of the EAW-form covers the requirements of Art. 8(1)(c) of FD 2002/584/JHA ('evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2').

Mentioning the existence of an arrest warrant or a judgment signifies that the requested person already had the benefit of judicial protection of procedural safeguards and fundamental rights at the level of the adoption of the *national* judicial decision (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraphs 55-56).

The term 'arrest warrant', as used in Art. 8(1)(c), refers 'to a national arrest warrant that is distinct from the [EAW]' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 58).

The adoption of the EAW 'may occur, depending on the circumstances, shortly after the adoption of the national judicial decision' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 56). Presumably, this means that it is not contrary to FD 2002/584/JHA if the authority competent to issue the EAW is the authority which also rendered the national judicial decision.

The national decision referred to in Art. 8(1)(c) and section (b) must be a 'judicial decision'. That term 'covers decisions of the Member State authorities that administer criminal justice, but not the police services' (ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860, paragraph 33). Because the Public Prosecutor's Office 'constitutes a Member State authority responsible for administering criminal justice' (ECJ, judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 39), a decision rendered by that authority 'must be regarded as a judicial decision, within the meaning of Article 8(1)(c) of the Framework Decision' (ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860, paragraph 34).

The enforceability of a national judicial decision is 'decisive in determining the time from which [an EAW] warrant may be issued' (ECJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paragraph 71).

The information provided in section (b), in combination with the information in section (c), enables the executing judicial authority to determine whether the EAW is issued for the purposes of conducting a criminal prosecution (section (b)(i) in combination with section (c)(i)) or for the purposes of executing a custodial sentence or detention order (section (b)(ii) in combination section (c)(ii)).

If a judgment is not yet enforceable, 'the surrender would serve the specific purpose of enabling a criminal prosecution to be conducted' (ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 56, regarding an *in absentia* judgment).

If a judgment was rendered *in absentia* and the requested person can still apply for a retrial, his position is 'comparable to that of a person who is the subject of [an EAW] for the purposes of prosecution' (ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 57).

According to Advocate-General J. Kokott:

- FD 2002/584/JHA is applicable 'in a situation where the requested person was convicted and sentenced in [a third State, *i.e.* not a Member State of the EU], but by virtue of an international agreement with [that third State] the judgment is recognised in the issuing Member State and executed according to the laws of the issuing State'; but

- the executing judicial authority must end the EAW-proceedings 'if it has substantial grounds to assume that execution of the [foreign] custodial sentence, which the [issuing Member State] has recognised, would lead to a serious breach of fundamental rights' (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraphs 62-63).

Issues regarding section (b)

Date of issue and issuing authority

The date of issue of the national judicial decision and/or the authority which issued that decision are not always mentioned in section (b).

Distinguishing between prosecution and serving a sentence
An EAW can be issued for the purposes of conducting a criminal prosecution or executing a custodial sentence or for both of those purposes.
If an EAW is issued which does not belong to the latter category (EAWs issued both for conducting an prosecution and for serving a sentence), issuing judicial authorities sometimes complete *both* subsections of section (b) instead of completing only the applicable subsection.
If an EAW is issued for both purposes, issuing judicial authorities do not always clearly distinguish between information pertaining to the prosecution and information pertaining to the sentence, in particular with regard to the offences mentioned in section (e) of the EAW.

Decision to execute a suspended sentence
When the requested person was originally given a suspended sentence and the execution of that sentence was ordered by a subsequent decision, some executing judicial authorities request information about the reasons for deciding to execute the suspended sentence.

16. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (b)? If so, please describe those difficulties and how they were resolved.

17. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (b)? If so, please describe those difficulties and how they were resolved.

17BIS. What is the position of your country on the conformity of the EAW and the national arrest warrant: should there be full conformity between the two documents or can they diverge from each other (can you add in the EAW offences that are not included in the national arrest warrant?) ? Do you as executing authority check on the national arrest warrant or do you ask for a (translated?) copy of the national arrest warrant (in case of doubt of conformity?). (possible issues: *Bob-Dogi* ruling, rule of speciality, deprivation of liberty, …)

C. Indications on the length of the sentence

Explanation

Section (c) of the EAW-form refers to the 'sentence which, depending on the case, is liable to be imposed or has actually been imposed in the conviction decision' (ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 31). Section (c) covers the requirements of Art. 8(1)(f) of FD 2002/584/JHA ('the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State').

Regarding amendments of the national law of the issuing Member State between the commission of the offence and the date of issue, or execution, of the EAW, only the version of that law of the issuing Member State 'which is applicable to the facts in question' is determinative (ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 31).

The information provided in section (c) enables the executing judicial authority to verify compliance with the penalty thresholds of Art. 2(1) and (2) of FD 2002/584/JHA (ECJ, judgment of 6 December 2018, *IK*, C-551/18 PPU, ECLI:EU:C:2018:991, paragraph 51; ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 33).

If the EAW is issued for the purposes of executing a sentence, *i.e.* if there is a final judgment, section (c), read in conjunction with Art. 8(1)(f), 'requires the issuing judicial authority to provide only information on the penalty imposed' (opinion of A-G M. Bobek of 26 November 2019, *X (European arrest warrant – Double criminality)*), C-717/18, ECLI:EU:C:2019:1011, paragraph 64). This suggests that in case of an execution-EAW concerning one or more of the offences of Art. 2(2) the standard statement contained in section (e) of the EAW-form ('If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State') suffices.

Issues concerning section (c)

Accessory surrender
FD 2002/584/JHA does not explicitly provide for *accessory surrender* (*i.e.* surrender for an offence or a sentence which does not meet the threshold of Art. 2(1) of FD 2002/584/JHA together with the surrender for one or more offences or sentences which do meet that threshold). However, some Member State allow for issuing and/or executing an EAW for accessory offences/sentences,[1248] whereas others do not.

Penalty threshold and multiple offences/sentences
If a *prosecution*-EAW is issued for multiple offences, the issuing judicial authorities of some Member States mention the maximum sentence for each offence separately, whereas the issuing judicial authorities of other Member States mention only one maximum sentence for all offences together. The latter course of action may be the result of national rules concerning concurrence of offences and sentences. According to the legal systems of some Member States, in case of conviction for multiple offences the court must impose a single sentence, the maximum of which is usually 'capped': the maximum sentence is not determined by simply adding up the *maximum* sentences which apply to the offences separately. (In the Netherlands,

[1248] For the purposes of this project:
- an 'accessory offence' is an offence which does not meet the threshold of Art. 2(1) of FD 2002/584/JHA and for which surrender is sought together with one or more sentence and/or one or more offences which do meet that threshold; and
- an 'accessory sentence' is a sentence which does not meet the threshold of Art. 2(1) of FD 2002/584/JHA and for which surrender is sought together with one or more sentences and/or one or more offences which do meet that threshold.

e.g., the maximum sentence is equal to the heaviest maximum sentence applicable to the offences plus one third of that maximum sentence.)
If an *execution*-EAW is issued for multiple sentences, must *each* of those sentences meet the four months requirement *separately*? Or is it allowed to surrender for the execution of those sentences if they *add up* to at least four months?

Partial refusal of execution-EAWs: 'aggregate sentences'
Situations in which a single sentence was imposed for two or more offences (a so-called 'aggregate sentence'),[1249] but in which surrender for one of those offences cannot be allowed (*e.g.*, when that offence is not offence under the law of the executing Member State (Art. 2(4) jo. Art. 4(1) of FD 2002/584/JHA) or when that offence is time-barred according to the law of the executing Member State (Art. 4(4) of FD 2002/584/JHA), are problematic. Should surrender:

- be allowed for the execution of the sentence without any restriction;
- be allowed only for those offences which do meet the necessary requirements and, if so, is it necessary to know which part of the sentence relates to those offences (*i.e.* whether that part of the sentence is for four months);
- be refused surrender altogether?

Partial refusal of execution-EAWs: 'cumulative sentences'
In some Member States, two or more individual final sentences imposed on the same person may be replaced with a cumulative sentence in separate proceedings. In cumulative sentence proceedings, the court is bound by the individual judgments. The cumulative sentence cannot exceed and is usually less than the sum total of the individual sentences.
If an offence for which an individual sentence was imposed which is later replaced by a cumulative sentence does not meet the conditions for surrender, problems similar to those concerning aggregate sentences arise.

Penalty threshold for execution-EAWs: 'gross' or 'net'?
Does the four months requirement refer to the sentence as it was imposed or to that part of the imposed sentence which still remains to be executed (*e.g.* after deduction of time already served or of periods of remand)? In other words, does the requirement refer to the 'gross' sentence or the 'net' sentence?

Remaining sentence to be served
The remaining sentence to be served is not always mentioned.

18. Does the national law of your Member State allow for issuing and/or executing an EAW with regard to accessory offences/sentences?

19. Does the national law of your Member State, as interpreted by the courts of your Member State, allow or require mentioning a single maximum sentence when a *prosecution*-EAW is issued for two or more offences?

[1249] An 'aggregate sentence', therefore, is the antonym of an 'individual sentence'. An 'individual sentence' is a sentence imposed for each offence separately.

20. Concerning an *execution*-EAW for separate imposed sentences, does the national law of your Member State, as interpreted by the courts of your Member State, allow or require 'adding up' those sentences in order to cross the threshold of Art. 2(1) of FD 2002/584/JHA when deciding on issuing or executing that EAW?

21. Regarding the requirement of a sentence of at least four months, does the national law of your Member State, as interpreted by the courts of your Member State, refer to the duration of the sentence as it was imposed or to the duration of that part of the sentence which remains to be enforced?

22. If an 'aggregate sentence' or a 'cumulative sentence' was imposed for multiple offences and one of those offences does not meet the requirements for surrender, does the law of your Member State allow or require the executing judicial authority to surrender without any restriction, to surrender for only those offences which meet the necessary requirements and, if so, is it necessary to know which part of the sentence relates to those offences (*i.e.* whether that part of the sentence is for four months) or to refuse surrender altogether?

23. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (c)? If so, please describe those difficulties and how they were resolved.

24. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (c)? If so, please describe those difficulties and how they were resolved.

D. Appearance in person at the trial resulting in the decision

Section (d) of the EAW-form was exhaustively dealt with in the *InAbsentiEAW* project. As far as we are aware, there are no new developments which would justify further questions concerning *in absentia* convictions.

E. Offences

Explanation

Section (e) is intended 'to provide details of the offence for the purposes of applying Article 2' (opinion of A-G M. Bobek of 26 November 2019, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2019:1011, paragraph 59).

Section (e) covers the information referred to in Art. 8(1)(d)-(e) of FD 2002/584/JHA ('the nature and legal classification of the offence, particularly in respect of Article 2' and 'a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person').

Besides providing a basis for checking whether the conditions of Art. 2 are met, the information required by section (e) also serves the purposes of:

- informing the requested person of the offence(s) for which surrender is sought (see Art. 6 of the Charter in conjunction with Art. 5(2) of the ECHR);

- enabling the executing judicial authority to check whether there are grounds for refusal (*e.g. ne bis in idem* (Art. 3(2)), double criminality (Art. 4(1)), prescription (Art. 4(4));

- (together with the decision to execute the EAW) enabling the authorities of the issuing Member State to comply with the speciality rule (Art. 27 and 28 of FD 2002/584/JHA) and enabling the surrendered person to monitor compliance with that rule.

The structure of section (e) leaves something to be desired. Section (e) requires a description of the offences at two different places: at the top of section (e) and under point II. As point II clearly refers to non-listed offences, the implication seems to be that listed offences should be described at the top of section (e) and non-listed offences under point II.

The EAW-form seems to differentiate its requirements as to the description of the offence(s): regarding a non-listed offence a 'full' description is required (point II of section (e)).

With regard to the listed offences of Art. 2(2) of FD 2002/584/JHA, in conjunction with section (e)(I), it should be remembered that 'the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'', as is apparent from the wording of Art. 2(2). After all, FD 2002/584/JHA 'does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract'. Consequently, the vagueness of some of the listed offences does not support the conclusion that Art. 2(2) infringes the principle of legality of criminal offences and penalties (ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, paragraphs 51-54). Concerning the role of the executing judicial authority in checking compliance with Art. 2(2), if any, according to A-G M. Bobek the FD 'relies on a system of self-declaration, where only a minimum and prima facie review by the executing judicial authority is provided for' (opinion of 26 November 2019, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2019:1011, paragraph 70).[1250]

Some grounds for refusal refer to the 'act' or the 'acts' on which the EAW is based. See, *e.g.*, Art. 3(2) ('the same acts'), Art. 4(1) ('the act'), Art. 4(2) ('the same act') and Art. 4(4) ('the acts'). Section (e) identifies the 'act(s)' on which the EAW is based.

Conceivably, the way in which the executing judicial authorities assess whether:

- there was a final judgment for 'the same acts' (Art. 3(2));

[1250] A recent preliminary reference questions whether the executing judicial authority has any discretion in this regard: C-120/20 (*LU*), with regard to Art. 5(1) of FD Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (*OJ*, L 76/16).

- ‘the act’ constitutes an offence under the law of the executing Member State (Art. 4(1));

- the requested person is being prosecuted in the executed Member State for ‘the same act’ (Art. 4(2)); and

- whether the prosecution of the punishment for ‘the acts’ is statute-barred under the law of the executing Member State (Art. 4(4)),

influences the decision whether the information about ‘the act(s)’, provided in section (e), is sufficient to decide on the execution of the EAW.

The Court of Justice has held that the concept of ‘the same acts’ both in Art. 54 CISA and in Art. 3(2) of FD 2002/584/JHA refers ‘only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected’ (ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, paragraphs 39-40).

In the context of FD 2008/909/JHA the Court of Justice has held that assessing double criminality entails verifying whether ‘the factual elements underlying the offence (…), would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State’ (ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, paragraph 38).

Issues concerning section (e)

Meaning of the term “offence”
Neither FD 2002/584/JHA nor the EAW-form contains a definition of the term “offence”.

Incomplete description of the offence
The description of the offence (whether listed or non-listed) does not always mention the time, place and/or the degree of participation of the requested person in the offence.

Description of the investigation instead of description of the offence
In prosecution-cases, section (e) regularly describes the investigation of the offence, detailing *why* the requested person is suspected of having committed an offence instead of simply describing *which offence* he is suspected of having committed.

Detailing the number of offences (and numbering them separately)
In case of multiple offences, the number of offences is not always given and the offences are not always presented and numbered separately.

Divergence between number of offences described and the applicable legal classifications
In case of multiple offences, the offences described in section (e) are not always clearly linked to the applicable legal classifications. The number of offences described does not always correspond to the number of legal classifications mentioned.

Vague designations of listed offences

Some of the designated listed offences are so vague that it is hard to determine what is covered by that designation and to distinguish one listed offence from the other (*e.g.* 'fraud' and 'swindling').

Divergent designations of listed offences
The order of listed offences sometimes deviates from the official order in FD 2002/584/JHA. Designations of listed offences are sometimes used which deviate from the official designations in FD 2002/584/JHA.

Non-listed offence(s) not described under point II
Non-listed offences are not always described under point II of section (e).

Offences described both as listed and as non-listed
Offences are sometimes described both as listed and as non-listed, meaning that one of the categories of point I is ticked regarding a particular offence, while at the same time that offence is described under point II.

25. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (e)? If so, please describe those difficulties and how they were resolved.

26. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (e)? If so, please describe those difficulties and how they were resolved.

27. How do the executing judicial authorities of your Member State assess whether:

a) the requested person is the subject of a final judgment in respect of the same acts on which the EAW is based;

b) the acts on which the EAW is based constitute an offence under the law of the executing Member State? Does such an assessment take place:

- *ex tunc* – *i.e.* according to law at the time the acts were committed –;

- according to the law at the time of issuing the EAW; or

- *ex nunc* – *i.e.* according to law at the time of the decision on the execution of the EAW –?

Have the executing judicial authorities of your Member State actually refused to execute an EAW, because the acts on which the EAW was based did not constitute an offender under the law of your Member State? If so, please give some examples;

c) the act for which the requested person is being prosecuted in the executing Member State are the same acts on which the EAW is based;

d) the prosecution or punishment of the acts on which the EAW is based is statute-barred according to the law of the executing Member State? Does such an assessment take place:

- *ex tunc* – *i.e.* according to law at the time the acts were committed –;
- according to the law at the time of issuing the EAW; or
- *ex nunc* – *i.e.* according to law at the time of the decision on the execution of the EAW –?

27a. Regarding listed offences,

- (a) have the issuing judicial authorities of your Member State had any difficulties in deciding whether a certain offence constitutes a listed offence? If so, please describe those difficulties and how they were resolved;
- (b) do the executing judicial authorities of your Member State assess whether the issuing judicial authority correctly ticked the box of a listed offence? If so,
    - (i) please describe how they assess that;
    - (ii) are there instances in which the executing judicial authorities actually found that a listed offence was not applicable; if so, which listed offence(s) and did those listed offence(s) constitute an offence under the law of your Member State?

F. Other circumstances relevant to the case (optional information)

Explanation

Section (f) covers the information indicated in by Art. 8(1)(g) ('if possible, other consequences of the offence'). By way of example, section (f) refers to 'remarks on extraterritoriality, interruption of periods of time limitation and other consequences of the offence'.

As is clear from the wording of Art. 8(1)(g) and the heading of section (f), the issuing judicial authority is *not* required to provide such information.

Extraterritoriality (Art. 4(7)(b) of FD 2002/584/JHA)

According to Advocate-General J. Kokott:

- the ‘spirit and purpose’ of Art. 4(7)(b) is ‘to enable the executing judicial authority, when executing the European arrest warrant, to take into consideration key decisions of the requested Member State on the scope of its own criminal jurisdiction’ (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 70);

- that ground for refusal ‘applies only if the offence was committed *entirely* outside the requesting State, whereas it is not sufficient if only part of it took place there’ (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 78);

- that ground for refusal ‘applies not only to the enforcement of a prison sentence (…), but also to criminal prosecution’ (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 79);

- ‘when determining the criminal offence committed, focus has to be on the actual act. The specific circumstances which are inextricably linked together are decisive’ (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 82).

Interruption of periods of time limitation

Time limitations according to the law of the *issuing* Member State do not constitute a ground for refusal (cf. Art. 4(4) of FD 2002/584/JHA). The existence of an *enforceable* national judicial decision (section (b)) implies that the prosecution or execution is not statute-barred according to the law of the *issuing* Member State. If the offence was committed or if the judgment was rendered a long time ago, to pre-empt requests for supplementary information (Art. 15(2) of FD 2002/584/JHA) it may be advisable to mention that the period of time limitation was interrupted.

Issues concerning section (f)

Extraterritoriality
Section (f) is only seldom completed. For the executing judicial authorities of Member States which transposed the optional ground for refusal concerning Art. 4(7)(b) of FD 2002/584/JHA, it would be helpful if the EAW contained a statement whether the offence(s) was/were committed wholly outside of the territory of the issuing Member State and, if so, which form of extraterritorial jurisdiction is claimed.

28. What kind of information do the issuing judicial authorities of your Member State usually provide in section (f)?

29. What kind of information do the executing judicial authorities of your Member State usually encounter in section (f)? What kind of information would they like to see in section (f)?

29a. Did the issuing and/or executing judicial authorities of your Member State encounter any problems regarding the exercise of extraterritorial jurisdiction in the sense of Art. 4(7)(b) of FD 2002/584/JHA? If so, please describe those problems and how they were resolved.

G. The seizure and handing over of property

Explanation

Section (g) relates to Art. 29 of FD 2002/584/JHA. According to Art. 29(1), the executing judicial authority must in accordance with national law, either on its own initiative or at the request of the issuing judicial authority, seize and hand over two categories of property:

- property which may be required as evidence, and
- property which has been acquired by the requested person as a result of the offence.

Section (g) of the EAW-form affords the issuing judicial authority to indicate a request for seizure and handing over of property.

Issues concerning section (g)

Divergent language version of Art. 29(1) and section (g)
Regarding category (b) ('property which has been acquired by the requested person as a result of the offence') the Dutch language version of FD 2002/584/JHA contains a restriction which is not in the English, German and French language versions. The Dutch language version restricts category (b) to property acquired as a result of the offence *which is in the possession of the requested person* ('zich in het bezit van de gezochte persoon bevinden'). The Dutch transposition of Art. 29 generally restricts the possibility of seizing and handing over property to property *found in the possession of the requested person* ('aangetroffen in het bezit van de opgeëiste persoon'). This term is to be understood as 'on his person or carrying with him', thereby excluding the possibility of seizing and handing over property which requires a search in a place of residence or in a place of business.

30. Does the national law of your Member State, as interpreted by the courts of your Member State, contain restrictions similar to the restriction contained in Dutch law (see the explanation) or other restrictions? If so, describe the restriction(s).

31. Have the issuing judicial authorities of your Member State experienced any difficulties when requesting the seizure and handing over of property pursuant to section (g)? If so, please describe those difficulties and how they were resolved.

32. Have the executing judicial authorities of your Member State experienced any difficulties when confronted with a request for seizure and handing over of property pursuant to section (g)? If so, please describe those difficulties and how they were resolved.

H. Guarantees concerning life sentences

Explanation

Section (h) covers the guarantees of Art. 5(2) of FD 2002/584/JHA upon which the execution of an EAW may be made dependent, when the EAW concerns an offence which carries a life sentence in the issuing Member State (prosecution-EAW) or when the EAW concerns a life sentence which was imposed in that Member State (execution-EAW).

Issues concerning section (h)

Not clear when applicable and, if so, which guarantee

Because section (g) uses indents instead of boxes, it is not always clear if the issuing judicial authority intended to declare this section applicable and, if so, which of the guarantees. (Compare *Handbook on how to issue and execute a European arrest warrant*, C(2017) 6389 final, p. 108).

Art. 5(2) and section (h) do not fully reflect the case-law of the ECtHR
To be compatible with Article 3 of the ECHR – which corresponds to Art. 4 of the Charter –, a life sentence must be reducible *de jure* and *de facto*, meaning that there must be both a prospect of release for the prisoner and a possibility of review, both of which must exist from the moment of imposition of the sentence (see, *e.g.*, ECtHR, judgment of 26 April 2016 [GC], *Murray v. the Netherlands*, ECLI:CE:ECHR:2016:0426JUD001051110, § 99). This line of case-law also applies to extradition (see, *e.g.*, ECtHR, judgment of 4 September 2014, *Trabelsi v. Belgium*, ECLI:CE:ECHR:2014:0904JUD000014010, § 131) and to surrender.

The imposition of a life sentence already is incompatible with Art. 3 of the ECHR where at the moment of imposition of that life sentence national law 'does not provide any mechanism or possibility for review of a whole life sentence'(ECtHR, judgment of 9 July 2013 [GC], *Vinter v. the United Kingdom*, ECLI:CE:ECHR:2013:0709JUD006606909, § 122).

The right to a review of a person sentenced to a life sentence 'entails an actual assessment of the relevant information whether his or her continued imprisonment is justified on legitimate penological grounds (…), and the review must also be surrounded by sufficient procedural guarantees (…). To the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions, it may be required that reasons be provided (…)' (see, *e.g.*, ECtHR, judgment of 23 May 2017, *Matiošaitis v. Lithuania*, ECLI:CE:ECHR:2017:0523JUD002266213, § 174).

A person sentenced to a life sentence must have access to that review mechanism no later than 25 years after the imposition of the life sentence (see, *e.g.*, ECtHR, judgment of 26 April 2016 [GC], *Murray v. the Netherlands*, ECLI:CE:ECHR:2016:0426JUD001051110, § 99).

It is clear that the wording of Art. 5(2) of FD 2002/584/JHA and of section (h) does not fully reflect this case-law, *e.g.*, the conditions concerning the mechanism of review, which is not surprising because the adoption of the EAW predates this case-law. In the experience of Dutch issuing judicial authorities, section (h) often leads to requests for clarification by the executing judicial authority (the fact that the Dutch language version of Art. 5(2) and section (h) differs from other language versions (see below) could explain this).

Divergent language versions
In some language versions of FD 2002/584/JHA, the review of the life sentence must be possible *at least* after 20 years (ES ('al meno'); NL ('ten minste')), instead of 'at the latest after 20 years'.

33. Have the issuing judicial authorities of your Member State experienced any difficulties when applying section (h)? If so, please describe those difficulties and how they were resolved.

34. Have the executing judicial authorities of your Member State experienced any difficulties when confronted with EAW's in which section (h) was applicable? If so, please describe those difficulties and how they were resolved.

I. Information about the issuing judicial authority and the Central Authority, signature

Explanation

Section (i) partly covers the information required by Art. 8(1)(b) of FD 2002/584/JHA ('the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority'). The information in this part of section (i) enables the executing judicial authority to identify the issuing judicial authority, and to contact it, if need be.

Further, section (i) requires contact information about the Central Authority of the issuing Member State, if that Member State designated such an authority, thus enabling the executing judicial authority to contact the Central Authority, if need be.

Lastly, section (i) requires information about (the 'representative' of) the issuing judicial authority, and a signature by or on behalf of (the 'representative' of) the issuing judicial authority.

Issues concerning section (i)

Distinction between the authority and its representative
Sometimes, under 'official name' the name and surname of the issuing judge or public prosecutor are given, whereas the term 'official name' – obviously – refers to the official name of the *authority* to which the issuing judge or public prosecutor belongs, *e.g.* the Court of X or the Public Prosecutor's Office in X. The name and surname of the issuing judge or public prosecutor should be mentioned under 'Name of its representative'.

Representative not a judge or a public prosecutor?
German EAWs are sometimes issued by a representative of the issuing Local Court (*Amtsgericht*) whose 'title/grade' is that of 'Direktor', which could be translated as 'manager', thus raising the question whether the representative of the issuing judicial authority is actually a judge.

35. Have the issuing judicial authorities of your Member State experienced any problems regarding section (i)? If so, please describe those difficulties and how they were resolved.

36. Have the executing judicial authorities of your Member State experienced any problems regarding section (i)? If so, please describe those difficulties and how they were resolved.

Part 4: problems not directly related to the EAW-form

Explanation

Part 4 concerns problems not directly related to the EAW-form. A common feature of the subjects dealt with in this part of the questionnaire is that they concern or are linked to providing information (either to decide on the execution of an EAW or on the issuing of an EAW or as a basis for measures after surrender).

These subjects are:

- supplementary/additional information necessary or useful for the decision on the execution of the EAW (Art. 15(2)-(3) of FD 2002/584/JHA);
- the time limits for deciding on the execution of the EAW (Art. 17 of FD 2002/584/JHA);
- the guarantee of return (Art. 5(3) of FD 2002/584/JHA);
- information about detention conditions and deficiencies in the judicial system in the issuing Member State;
- surrender to and from Iceland or Norway;
- (analogous) application of the *Petruhhin* judgment; and
- the speciality rule.

A. Supplementary/additional information (Art. 15(2)-(3))

Explanation

Part. 4A concerns information not included in the EAW but necessary or useful for deciding on the execution of that EAW. Art. 15(2) of FD 2002/584/JHA concerns providing supplementary information ('in particular with respect to Articles 3 to 5 and Article 8') at the request of the executing judicial authority, whereas Art. 15(3) of FD 2002/584/JHA concerns forwarding 'additional useful information' by the issuing judicial authority *proprio motu*. When requesting supplementary information, the executing judicial authority 'may' fix a time limit for the receipt of that information, given the need to observe the time limits for deciding on the EAW set out in Art. 17 of FD 2002/584/JHA.

Art. 15(2) affords the executing judicial authority the 'option' to request that the necessary supplementary information be furnished as a matter of urgency, if it finds 'that the information disclosed by the issuing Member State is insufficient to enable [it] to adopt a

decision on surrender'. However, 'recourse may be had to that option only as a last resort in exceptional cases in which the executing judicial authority considers that it does not have the official evidence necessary to adopt a decision on surrender as a matter of urgency' (ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, paragraphs 60-61).

In some situations, the 'option' is actually an *obligation* to request supplementary information (before deciding to refuse to execute the EAW):

- when examining whether the EAW meets the requirements of lawfulness set out in Art. 8(1) (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 65;

- when examining whether the requirements of Art. 4a(1)(a)-(d) of FD 2002/584/JHA are met (ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paragraphs 101-103);

- when examining whether there is a real risk for the requested person of a violation of Art. 4 of the Charter or of a violation of the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter (ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paragraph 95; ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, paragraph 77).

The issuing judicial authority is obliged to provide the requested information (ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paragraph 97, with regard to information about detention conditions). That obligation derives from the duty of sincere cooperation (Art. 4(3) TEU), which 'informs' the 'dialogue' between the issuing and judicial authorities when applying Art. 15(2)-(3) (ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Detention conditions in Hungary)*, C-220/18, ECLI:EU:C:2018:589, paragraph 104).

Issues concerning Art. 15(2)-(3)

Information provided by another authority
Sometimes, requests for supplementary information pursuant to Art. 15(2) of FD 2002/584/JHA are answered by an authority other than the issuing judicial authority. Equally, sometimes such requests are answered by the Central Authority of the issuing Member State, without it being clear who actually provided the answer: the Central Authority itself, the issuing judicial authority or yet another authority.
A recent preliminary reference questions whether, if the EAW was issued by a judicial authority and supplementary information is provided by another authority (in this case a member of the Public Prosecutor's Office) which substantially supplements, or possibly changes the content of the EAW, that other authority should also meet the requirements of Art. 6(1) of FD 2002/584/JHA for being an 'issuing judicial authority' (*Generálna prokuratura Slovenskej republiky*, C-78/20).

Irrelevant information/standard questionnaires

Sometimes executing authorities ask additional specific questions or even submit a standard list of questions with regard to information that is not relevant. Sometimes issuing judicial authorities submit irrelevant information.

37. Did your Member State confer the competence to provide supplementary information – either at the request of the executing judicial authority or on its own initiative (see Art. 15(2)-(3) of FD 2002/584/JHA) – on another authority than the issuing judicial authority? If so, which authority?

38. When the (issuing judicial) authorities of your Member State are asked to provide supplementary information, what kind of information are they usually asked for?[1251]

39. When the (issuing judicial) authorities of your Member State provide supplementary information *proprio motu*, what kind of information do they usually provide?

40. What kind of supplementary information do the executing judicial authorities of your Member State usually ask for?

41. When requesting supplementary information, do the executing judicial authorities of your Member State fix any time limit for the receipt of that information?

41a. Have the issuing judicial authorities of your Member State experienced receiving irrelevant questions and requests for irrelevant information? If so, please specify what questions and information.

41b. Have the executing judicial authorities of your Member State experienced receiving irrelevant information? If so, please specify what information.

B. Time limits (Art. 17)

Explanation

Part 4B concerns observance of the time limits of Art. 17(3) and (4) of FD 2002/584/JHA in cases in which the information in the EAW-form is insufficient to decide on the execution of the EAW.

The final decision on the execution of the EAW must, in principle, be taken with the time limits of Art. 17(3) and (4) FD 2002/584/JHA (ECJ, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474, paragraph 32), *i.e.* within 60 or 90 days.

[1251] With regard to requests for supplementary information concerning *in absentia* decisions you could refer to the *InAbsentiEAW* project, unless there are developments which justify expressly dealing with such requests in this project.

When ‘in exceptional circumstances’ the executing judicial authority cannot observe the time limit of 90 days, its Member State must inform Eurojust thereof and give reasons for the delay (Art. 17(6) of FD 2002/584/JHA).

Such exceptional circumstances may occur when

- the executing judicial authority assesses whether there is a real risk that the requested person will, if surrendered to the issuing judicial authority, suffer inhuman or degrading treatment, within the meaning of Article 4 of the Charter, or a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter or

- proceedings are stayed pending a decision of the Court of Justice in response to a request for a preliminary ruling made by an executing judicial authority, on the basis of Article 267 TFEU (ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, paragraph 43).

42.

a) Have the executing judicial authorities of your Member State had any cases in which the time limits of 60 and/or 90 days could not be observed, because the information contained in the EAW was insufficient to decide on the execution of the EAW? If so, please state the decision taken by the executing judicial authority.

b) Is recent statistical data available concerning compliance with the time limits by the authorities of your Member State?

c) Pursuant to Art. 17(7) of FD 2002/584/JHA, does your Member State inform Eurojust when it cannot observe the time limits and does your Member State give the reasons for the delay?

C. Guarantee of return (Art. 5(3))

Explanation

Part 4C concerns the guarantee of return.

The system of FD 2002/584/JHA, as evidenced, *inter alia*, by Art. 5(3) of FD 2002/584/JHA, ‘makes it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State’ (ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 51).

That provision refers to a guarantee, to be given by the issuing Member State, that a national or resident of the executing Member State who is the subject of a prosecution-EAW, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order to be imposed on him in the issuing Member State.

The object of that provision is to increase 'the chances of social reintegration of the national or resident of the executing Member State by allowing him to serve, in its territory, the custodial sentence or detention order which, after his surrender, under [an EAW], would be imposed in the issuing Member State' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 48).

Art. 5(3) does not require that the guarantee be given by the issuing judicial authority. Compare Art. 27(4) and Art. 28(3) of FD 2002/584/JHA which state that the issuing *Member State* must give the guarantees provided for in Art. 5(3) for the situations mentioned in that provision and ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 41: '(…) a guarantee to be given by the issuing Member State in particular cases (…)'.

If the executing judicial authority so requests, the issuing Member State *must* provide the guarantee. Compare, again, Art. 27(4) and Art. 28(3) and *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 41.

The return of the surrendered person should occur as soon as possible after the sentence in the issuing Member States has become final (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 58).

However, if the surrendered person 'is required to be present in that Member State by reason of other procedural steps forming part of the criminal proceedings relating to the offence underlying the [EAW], such as the determination of a penalty or an additional measure' the issuing judicial authority must balance 'the objective of facilitating the social rehabilitation of the person concerned' against 'both the effectiveness of the criminal prosecution for the purpose of ensuring a complete and effective punishment of the offence underlying the [EAW] and the safeguarding of the procedural rights of the person concerned' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 56). The issuing judicial authority must, therefore, 'assess whether concrete grounds relating to the safeguarding of the rights of defence of the person concerned or the proper administration of justice make his presence essential in the issuing Member State, after the sentencing decision has become final and until such time as a final decision has been taken on any other procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the [EAW]' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 59). It must 'take into account, for the purposes of the balancing exercise that it is required to carry out, the possibility of applying cooperation and mutual assistance mechanisms provided for in the criminal field under EU law' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 61).

Once the sentenced person is returned, 'an adaptation of the sentence by the executing Member State outside of the situations contemplated under Article 8 of [FD 2008/909/JHA]

cannot be accepted' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 66).

43. According to the national law of your Member State, as interpreted by the courts of your Member State, is the decision to subject surrender to the condition that the issuing Member State give a guarantee of return *dependent* on whether the requested person expressly states that he wishes to undergo any sentence in the executing Member State? If so, does your national law distinguish between nationals and residents of your Member State in this regard?

44. Which authority of your Member State is competent to give the guarantee of return?

45.
a) Do the issuing judicial authorities of your Member State use a uniform text for the guarantee of return? If so, what text?

b) Does a guarantee of return given by the competent authority of your Member State refer to 'other procedural steps forming part of the criminal proceedings relating to the offence underlying the [EAW], such as the determination of a penalty or an additional measure'?

c) Does the national law of your Member State, as interpreted by the courts of your Member State:

- (i) either require the consent of the surrendered person with his return to the executing Member State in order to undergo his sentence there, or, at least, allow him to express his views on a such a return;

- (ii) prohibits the return to the executing Member State to undergo the sentence there, if the answer to question (i) is in the affirmative and the surrendered person withholds consent to a return or is opposed to a return;

- (iii) differentiate between nationals of the executing Member State and residents of that Member State in this regard?

d) When is the surrendered person returned to the executing Member State to undergo his sentence there? Which authority of your Member State determines when the surrendered person is to be returned and according to which procedure?

46. Have the (issuing judicial) authorities of your Member State experienced any difficulties when they provided a guarantee of return? If so, please describe those difficulties and how they were resolved.

47. Have the executing judicial authorities of your Member State experienced any difficulties with a guarantee of return? If so, please describe those difficulties and how they were resolved.

D. Detention conditions/deficiencies in the judicial system

Explanation

Part 4D concerns information about detention conditions in the issuing Member State and deficiencies in the judicial system of the issuing Member State.

Detention conditions
In the *Aranyosi and Căldăraru* judgment, the Court of Justice devised a two-step test for assessing a real risk of a breach of Art. 4 of the Charter by reason of inhuman or degrading detention conditions in the issuing Member State.

The first step of the test aims at establishing whether detainees in the issuing Member State in general run a real risk of being subjected to inhuman or degrading detention conditions on account of 'deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'. In doing so, the executing judicial authority must, initially, 'rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State'.

If the executing judicial authority finds that 'there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member', it must then take the second step of the test and assess, specifically and precisely, 'whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State'.

To that end, the executing judicial authority must engage in a dialogue with the issuing judicial authority and request pursuant to Art. 15(2) of FD 2002/584/JHA 'supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State'. The issuing judicial authority is obliged to carry out such a request, if need be, with assistance of the central authority (Art. 7 of FD 2002/584/JHA) of its Member State.

If that assessment results in a funding of a real risk for the requested person if surrendered, the executing judicial authority must postpone the execution of the EAW 'until it obtains the supplementary information that allows it to discount the existence of such a risk', but 'if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end' (ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 & C-659/15 PPU, ECLI:EU:C:2016:198, paragraphs 88-104).

Deficiencies in the judicial system
In the *Minister for Justice and Equality (Deficiencies in the judicial system)* judgment, the Court of Justice essentially adapted the two-step *Aranyosi and Căldăraru* test and turned it into a test for assessing a real risk of a breach of the right to an independent tribunal, a right which belongs to the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter.

Accordingly, the executing judicial authority must 'assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State (…), whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached'.

A finding of the existence of such a risk, necessitates a further assessment, *viz.* whether there are substantial grounds to believe that the requested person will be exposed to that risk if surrendered.

That further assessment consists of two distinct steps. First, the executing judicial authority must, in particular, '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'. Second, if it finds that those deficiencies are indeed 'liable to affect those courts', 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 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]'.

Furthermore, the executing judicial authority engage in a dialogue with the issuing judicial authority and 'must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk'. As with requests about detention conditions, the issuing judicial authority is obliged to carry out such a request, if need be, with assistance of the central authority (Art. 7 of FD 2002/584/JHA) of its Member State.

If the executing judicial authority cannot 'discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial', it must 'refrain from giving effect' to the EAW (ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, paragraphs 60-61 and 68-78).

Issues

Issuing judicial authority not competent
Sometimes, when the issuing judicial authority is not competent under national law to provide information and/or a guarantee, it will content itself with reporting this to the executing judicial authority instead of referring the matter to the competent national authority of engaging the services of its national central authority.

Detention conditions
48. Have the executing judicial authorities of your Member State had any cases in which they established that detainees in general would run a real risk of being subjected to inhuman or

degrading detention conditions in the issuing Member State on account of systemic or generalised deficiencies, deficiencies which may affect certain groups of people, or deficiencies which may affect certain places of detention (the first step of the *Aranyosi and Căldăraru* test)? If so:

- with respect to which Member State(s);
- on the basis of which sources;
- did the executing judicial authorities use the database of the Fundamental Rights Agency[1252] in stablishing that risk;
- what role, if any, did (measures to combat) COVID-19 play in establishing that risk?

49. Having established a real risk as referred to in the previous question:

- what kind of information did the executing judicial authorities of your Member State request from the issuing judicial authorities in order to assess whether the requested person would run such a risk if surrendered (the second step of the *Aranyosi and Căldăraru* test);
- did the executing judicial authorities of your Member State actually conclude that a requested person would run such a real risk, if surrendered;
- if so, was such a real risk excluded within a reasonable delay? If not, what was the decision taken by the executing judicial authorities of your Member State? If a (judicial) authority of the issuing Member State gave a guarantee that the detention conditions would comply with Art. 4 of the Charter, did the executing judicial authorities of your Member State rely on that guarantee? If not, why not?

49a. In case of a refusal to execute an EAW on account of detention conditions, what steps did your Member State take, as issuing or executing Member State, to prevent impunity (*e.g.* in case of an execution-EAW, initiating proceedings to recognise the judgment and enforce the custodial sentence in the executing Member State on the basis of FD 2008/909/JHA)?

50. Have the issuing judicial authorities of your Member State experienced any difficulties when requested to provide additional information in application of the *Aranyosi and Căldăraru* test? If so, please describe those difficulties and how they were resolved.

51. Have the executing judicial authorities of your Member State experienced any difficulties when applying the *Aranyosi and Căldăraru* test? If so, please describe those difficulties and how they were resolved.

Deficiencies in the judicial system

[1252] The 'Criminal Detention Database 2015-2019': https://fra.europa.eu/en/databases/criminal-detention/criminal-detention.

52. Have the executing judicial authorities of your Member State had any cases in which they established that there is a real risk of a violation of the right to an independent tribunal in the issuing Member State on account of systemic or generalised deficiencies liable to affect the independence of the judiciary (the first step of the *Minister for Justice and Equality (Deficiencies in the judicial system)* test)? If so:

- with respect to which Member State(s);

- on the basis of which sources?

53. Having established a real risk as referred to in the previous question:

- what kind of information did the executing judicial authorities of your Member State request from the issuing judicial authorities in order to assess whether the requested person would run such a risk if surrendered (the second step of the *Minister for Justice and Equality (Deficiencies in the judicial system)* test);

- did the executing judicial authorities of your Member State actually conclude that a requested person would run such a real risk, if surrendered;

- if so, was such a real risk excluded within a reasonable delay? If not, what was the decision taken by the executing judicial authorities of your Member State?

54. Have the issuing judicial authorities of your Member State experienced any difficulties when requested to provide additional information in application of the *Minister for Justice and Equality (Deficiencies in the judicial system)* test? If so, please describe those difficulties and how they were resolved.

55. Have the executing judicial authorities of your Member State experienced any difficulties when applying the *Minister for Justice and Equality (Deficiencies in the judicial system)* test? If so, please describe those difficulties and how they were resolved.

55BIS. Did your courts consider to refer questions to the Court of Justice? If so, on which issues? Why did they not do so in the end?

E. Surrender to and from Iceland and Norway

Explanation

Part 4E concerns the application of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ* 2006, L 292/2.

The Agreement entered into force on 1 November 2019 (*OJ* 2019, L 230/1). It 'seeks to improve judicial cooperation in criminal matters between, on the one hand, the Member States of the European Union and, on the other hand, the Republic of Iceland and the Kingdom of Norway, in so far as the current relationships among the contracting parties, characterised in particular by the fact that the Republic of Iceland and the Kingdom of Norway are part of the EEA, require close cooperation in the fight against crime' (ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraph 72).

According to the preamble to the Agreement, the contracting parties 'have expressed their mutual confidence in the structure and functioning of their legal systems and their capacity to guarantee a fair trial'.

The provisions of the Agreement 'are very similar to the corresponding provisions of Framework Decision 2002/584' (ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraph 74). Equally, the Arrest Warrant-form, set out in the Annex to the Agreement, is very similar to the EAW-form.

56. Have the issuing judicial authorities of your Member State issued any Arrest Warrants under the EU Agreement with Iceland and Norway? If so, have they experienced any difficulties? If so, please describe those difficulties and how they were resolved.

57. Have the executing judicial authorities of your Member State been confronted with any Arrest Warrants under the EU Agreement with Iceland and Norway? If so, have they experienced any difficulties? If so, please describe those difficulties and how they were resolved.

57BIS. How would you answer questions 56 and 57 in relation to the United Kingdom?

57TERTIUS. Does your Member State's legislation provide for executing EAWs issued by the EPPO?

F. (Analogous) application of the *Petruhhin* judgment

Explanation

Part 4F concerns the (analogous) application of the *Petruhhin* judgment.

***Petruhhin* judgment**
Some Member States do not extradite their own nationals, but do extradite nationals of other Member States. If such a Member State, to which a national of another Member State has moved (and thus exercised his right of free movement (Art. 21 TFEU)), receives an extradition request from a third State, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Framework Decision 2002/584/JHA, *provided that*:

- that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory, and

- in order to safeguard the objective of preventing the risk of impunity, the EAW must, at least, relate to the same offences as the extradition request (ECJ, judgment of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630, paragraph 50; ECJ, judgment of 10 April 2018, *Pisciotti*, C-191/16, ECLI:EU:C:2018:222, paragraph 54).

***Ruska Federacija* judgment**
In the *Ruska Federacija* judgment, the Court of Justice held that the *Petruhhin* judgment is applicable by analogy to unequal treatment regarding extradition of own nationals and nationals of a European Economic Area (EEA) State who in exercise of their EEA free movement rights have moved to the requested Member State. (The EEA consists of the EU Member States, Iceland, Liechtenstein and Norway.)

Thus, the requested Member State must inform the EEA State of which the requested person is a national and, should that State so request, surrender the requested person to it, in accordance with the provisions of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, under the provisos described above (ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraphs 75-77). (Liechtenstein is not a party to the aforementioned agreement on surrender. Therefore, the *Ruska Federacija* judgment only seems relevant for nationals of Iceland and Norway.)

***Petruhhin* judgment**
58. Does the national law of your Member State, as interpreted by the courts of your Member State, prohibit the extradition of nationals, but allow the extradition of nationals of other Member States? If so:

- have the competent authorities of your Member State applied the *Petruhhin*-mechanism (*i.e.* informed the Member State of which the requested person is a national) and to what effect;

- what kind of information was provided to the competent authorities of the Member State of which the requested person is a national?

59. Have the competent authorities of your Member State been notified by another Member State of requests for extradition concerning nationals of your Member State, pursuant to the *Petruhhin* judgment? If so:

- was the information provided by that Member State sufficient to decide on issuing an EAW? If not, why not;

- did the competent issuing judicial authority of your Member State actually issue an EAW; and

- if so, did the EAW actually result in surrender to your Member State?

***Ruska Federacija* judgment**

60. Does the national law of your Member State prohibit the extradition of nationals, but allow the extradition of nationals of EEA States? If so:

- have the competent authorities of your Member State applied the *Petruhhin*-mechanism by analogy (*i.e.* informed the Member State of which the requested person is a national) and to what effect;

- what kind of information was provided to the competent authorities of the EEA State of which the requested person is a national?

G. Speciality rule

Explanation

Part 4G concerns a subject relating to the *consequences* of surrender: the speciality rule (Art. 27 of FD 2002/584/JHA).

Except when both the issuing Member State and the executing Member State do not apply the speciality rule on a reciprocal basis (Art. 27(1)),[1253] the speciality rule prohibits prosecuting, sentencing or depriving the person concerned of his or her liberty for 'an offence committed prior to his or her surrender other than that for which he or she was surrendered' (Art. 27(2). This rule is subject to a number of exceptions with regard to 'other offences' than those for which surrender took place (Art. 27(3)). Of particular practical importance is the exception relating to an explicit renunciation by the requested person of his or her entitlement to the speciality rule (Art. 13(1) in combination with Art. 27(3)(e)).

This subject has a firm link with the EAW-form. When establishing whether a prosecution, a sentence or a deprivation of liberty concerns the same offence for which the person concerned was surrendered or rather another offence, the description of the offence on which the EAW is based (in section (e) thereof) together, of course, with the decision to execute the EAW – which may contain restrictions, *e.g.*, the exclusion of one or more offences from surrender – is determinative.

The description of the offence in the [EAW] must be compared with the description in a 'later procedural document', such as the charge against the defendant. The competent authority of the issuing Member State must 'ascertain whether the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications

[1253] Only Austria, Estonia, and Romania are prepared to renounce the speciality rule on a reciprocal basis.

concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision' (ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:661, paragraphs 55 and 57).

Issues concerning speciality

Missing EAW/decision on surrender
Sometimes, the case-file concerning a surrendered person does not contain the EAW and/or the decision on the execution of the EAW, thus leaving uncertain for which offence the person concerned was surrendered and whether he renounced his entitlement to the speciality rule.

61. Does a decision to execute the EAW state:

- a) for which offence(s) the surrender of the requested person is allowed and, if so, how;

- b) whether the requested person renounced his entitlement to the speciality rule?

62. Are the issuing judicial authority and the requested person provided with a copy of the (translated) decision to execute the EAW?

63. How does the national law of your Member State, as interpreted by the courts of your Member State, ensure that the speciality rule is complied with after surrender to your Member State?

64. Have the authorities of your Member State as issuing Member State experienced any difficulties with the application of the speciality rule? If so, please describe those difficulties and how they were resolved.

64BIS. What is the position of your country regarding the basis of requests for additional surrender (Art. 27 (4) of FD 2002/584/JHA): should these be based on a specific national arrest warrant or could it be possible that the request is not based on a national arrest warrant if the issuing authority states that the additional surrender will not bring about an additional deprivation of liberty?

65. Have the authorities of your Member State as executing Member State experienced any difficulties with the application of the speciality rule? If so, please describe those difficulties and how they were resolved.

Part 5: conclusions, opinions *et cetera*

66. Do requests for supplementary information by the executing judicial authority have an impact on the trust which should exist between the cooperating judicial authorities?

67. What kind of questions should an executing judicial authority ask when requesting supplementary information?

68. Do executing judicial authorities occasionally ask too much supplementary information? If so, on what issues?

69. In your opinion, do issuing and executing judicial authorities adequately inform each other about the progress in answering a request for additional information in the issuing Member State and the progress in the proceedings in the executing Member State?

70. In your opinion, would designating focal points for swift communications within the organisations of both issuing and executing judicial authorities enhance the quality of communications between issuing and executing judicial authorities?

71. Are there Member States whose EAW's and/or whose decisions on the execution of EAW's are particularly problematic in your experience? if so, what are the problems that emerge?

72. Do you have any suggestions to improve FD 2002/584/JHA. If so, which suggestions?

73. In particular:

- a) in your opinion, should one or more grounds for refusal and/or guarantees:
    - (i) be totally abolished or amended? If so, which ground(s) and/or guarantee(s) and why;
    - (ii) be introduced? If so, which ground(s) and/or guarantee(s) and why?
- b) given that surrender proceedings are increasingly becoming more complex and protracted, what, in your opinion, is the effect on mutual trust?
- c) in your opinion, should the speciality rule be maintained, amended or abolished? Please explain.

74. What is your opinion on the usability of the *HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRANT* (COM(2017) 6389 final) for judicial practitioners? If, in your opinion, the *Handbook* does not live up to expectations, how could it be improved?

75. Do the issuing and/or executing judicial authorities of your Member State use the *Handbook* in the performance of their duties? If not, why not?

76.

a) What is your opinion on the relationship between the EIO and the ESO on the one hand and the EAW on the other, in particular with regard to the proportionality of a decision to issue a prosecution-EAW?

b) What is your opinion on the relationship between FD 2008/909/JHA and the EAW, in particular with regard to the proportionality of a decision to issue an execution-EAW?

c) Should the FD's and/or the directive establishing the instruments concerning the EAW, the transfer of the execution of custodial sentences, the EIO and the ESO be amended in this regard and, if so, in what way?

77. What relevance, if any, do your answers to Parts 2-4 have for other framework decisions or directives concerning mutual recognition of decisions in criminal matters?

78. What consequences, if any, do measures to combat COVID-19 have on the operation of the EAW-system?

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