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The European Arrest Warrant

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LEVEL 1: SUBJECT

SUMMARY

1. Mutual recognition and fundamental rights

Any surrender of accused or sentenced persons entails more than just the relationship between the states involved. It presupposes a prior relationship between the requesting state and the requested person (resulting from the criminal proceedings brought against the latter) and creates a relationship between the executing state and the person to be surrendered (what was previously the extradition procedure is now the surrender procedure). Three fields of law converge on this point: international, criminal and procedural. Criminal law is an expression of the sovereignty of states and as such operates as a limit to the prosecution of crimes requiring international collaboration mechanisms. Meanwhile, the law of criminal procedure regulates the exercise of the *ius puniendi* by means of a web of complex checks and balances between the protection of the vulnerable and vital fundamental rights and the need to grant the state the necessary powers to protect its citizens by efficiently fighting crime - a kind of "applied constitutional law" or seismograph that reflects the basic values set out in the constitution of a state[1]. This sovereignty obviously creates conflicts when it crosses borders and meets "applied constitutions". The surrender of a subject by the state in which he/she as taken refuge, to another state that wants to criminally prosecute him/her, in order to be able to exercise the *ius puniendi*, represents the maximum expression of criminal cooperation. It is for this reason that extradition, liable to cause irreparable harm to the freedom of the person as well as affecting other values, constitutes one of the clearest examples of the collision between systems that are not obliged to resolve the difficult balancing act of fundamental rights – protection of citizens, in the same way. As a result, it has traditionally been regulated by agreements containing special guarantees and been subject to strict principles consolidated down through the 19th and 20th centuries, distinguishing it from the rest of the tools of international judicial assistance.

Nevertheless, it is a fact that crime today, as well as being organised, crosses borders and has benefitted from technological advances and the bewildering development of communications occurring in recent decades. The globalisation of the economy has led to the exploitation of countries with weak institutions and deficient criminal laws. In Europe, the elimination of borders has not discriminated against the free movement of criminals and the proceeds of crime. In this context, the straitjacket consisting of state sovereignty in criminal matters provides for a significant degree of impunity and makes both the investigation and the suppression of crime more difficult. This is why it is

[1] See ORMAZABAL using terminology coined by ROXIN (text cited in the bibliography).

necessary to step up judicial cooperation. In a Europe without internal borders, the structures on which this stepping-up has been designed have copied the system of Community freedoms. In addition to the free movement of persons, services, goods and assets we now have what is known as the fifth freedom, the free movement of judicial decisions[2].

The idea of the execution in one state of the judicial decisions handed down by criminal judges in another is not new in the context of the cooperation regulated by the EU[3]. There are precedents in the context of the Council of Europe, such as the European Convention on the International Validity of Criminal Judgments, which belongs to the classic idea of collaboration. However, in the European Union it was not until the Treaty of Amsterdam of 1997, which prepared the ground for the creation of a "European Judicial Space", that Europe started working on a new idea: the principle of mutual trust providing legitimacy for decisions. Of the two options considered by the Cardiff European Council (*15 and 16 June 1998)* in preparing the "Council Action Plan" on the best way to apply the provisions of the Treaty of Amsterdam, horizontal judicial cooperation or the imposition of obligatory recognition, the EU opted for the latter as of the Tampere European Council (*15 and 16 October 1999*), in the special session devoted to the creation of this area of freedom, security and justice[4], coming up with the idea that has been repeated *ad nauseam*: the principle of mutual recognition should be the "cornerstone" of judicial cooperation. In general, it calls for the adoption of a programme of measures to implement this principle of mutual recognition, ultimately adopted in 12-2000[5].

In developing this Programme, several Framework Decisions have been adopted in relation to the subject matter involved. The first and most significant was promoted as a result of the terrorist attacks committed on 11-9-2001, following which the Commission proposed the creation of a European arrest warrant that would replace the extradition procedures[6]. Finally, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States was passed[7], the first of the Framework Decisions that have sought to develop the Community's fifth freedom. Meanwhile, the CJEC has supported the validity of this instrument for implementing the principle of mutual recognition in

[2] This principle is analyzed and assessed by DELGADO. This development provided the title for a 1986 article by IGLESIAS and DESANTES (texts cited in the bibliography at the end).
[3] See IRURZUN, trust principle...
[4] Tampere http://www.europarl.europa.eu/summits/tam_en.htm
[5] OJ C 12, 15-1-2001) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:012:0010:0022:EN:PDF
[6] OJ C 332, 27-11-2001, COM (2001) 522 final.
[7] OJ L 190, 18-7-2002, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF

resolving the request for a preliminary ruling posed by the Belgian Constitutional Court in relation to the same[8]. The aim of this principle is to ensure that a decision rendered by a judicial authority in one member state, with transnational implications, is automatically recognised by the rest of the Member States and has the same legal consequences as it would have in the country in which it was rendered. It is based on mutual trust, despite the divergence between the national legislative and judicial systems; all the Member States trust that the other legal systems respect the fundamental rights and freedoms, procedural guarantees and the values of a democratic state under the rule of law, as the basic principles for coexistence in the EU.

However, the improvement of the mechanisms of international cooperation, including the replacement of extradition with the EAW, cannot be implemented at the expense of the rights of the requested person[9]. For this reason, the debate is ongoing as to whether there are sufficient grounds in the Framework Decision to enable the intervention of the executing authority to include invoking these rights and guarantees, without forgetting that the object of the execution procedure of the EAW is not criminal sanctioning, but rather to enable criminal proceedings to be held in another state. This question was raised in a request for a preliminary ruling[10].

Art. 6 of the consolidated version of the TEU[11] refers us to the Charter of Fundamental Rights on this point, which it recognises as part of the law of the EU, to be interpreted in line with the Explanations to the same published in the OJEU[12] and it has legally binding force as acknowledged in Declaration 1 of the Treaty of Lisbon. These explanations rely on ECHR case law, with which Declaration 2 of this Treaty recognises regular dialogue. Both art. 6 of the TEU and Protocol no. 8 of this Treaty envisage the accession of the EU to the European Convention on Human Rights, and the fundamental rights it safeguards are declared general principles of EU law. Thus the protection of fundamental rights and the invocations of the same within the EU are clearly enhanced.

2. Underlying principles and interpretation

[8] CJEC Judgment of 3-5-2007, c. 303/2005, *Advocaten voor de Wereld,*
[9] See Judgment of 9-6-1998, no. 25829/1994, Texeira v. Portugal.
[10] Request of 31-7-09, c.306/09, IB, although the Judgment of 21-10-2010 fails to address this issue. Finland withdrew the one submitted on the 25-2-.2010, c.105/10, Gataev and Gataeva (Ruling 3-4-2010). CJEC case law can be consulted at: http://curia.europa.eu/jcms/jcms/j_6/
[11] http://eur-lex.europa.eu/JOHtml.do?uri=OJ%3AC%3A2008%3A115%3ASOM%3AEN%3AHTML
[12] Article 52 of the Charter http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:303:SOM:EN:HTML

In using the EAW, a jurist has to deal with several national legislations that have not always implemented the Framework Decision in a homogenous fashion. In fact, the current relations between issuing and executing states are a new development; they were previously governed by international law but now represent a convergence of different rules, all national, that implement or apply a common EU legal instrument, but not Community law. As such, we could talk of different relations depending on the Member States involved. The Judgment in the *María Pupino* case[13] is often cited as recognising the "indirect" effect of the Framework Decisions, which means that domestic law must be interpreted in line with the purposes of the former. This is the parameter of interpretation that also applies to the different transposition laws. Likewise, while a more recent development and one that has grown in importance as more power is attributed to it, the CJEU is beginning to issue decisions on different precepts of the Framework Decision, as well as on aspects that may be relevant for the surrender of persons. And as we will be able to observe by examining its case law, the interpretation is performed on the basis of the principles and aims of the Framework Decision.

The first aim that the EAW develops is that of the mutual recognition of judicial decisions referred to in the Preamble of the Framework Decision that regulates it. Nevertheless, and despite the emphasis with which it is referred to, the minimum regulation imposed by the Framework Decision does not eliminate the procedure of verification of the requirements and guarantees of the decision whose enforcement is sought, finally requiring a decision of the enforcing authority regarding whether or not it should go ahead. There is no automatic surrender. For that reason, both doctrine and the Courts debate whether the EAW is still an extradition procedure in view of its aim, the surrender of a person accused or convicted of a crime, and the same limited rights for implementing it, maintaining the decisions rendered in the case of extradition for EAWs.

The second, enjoying the same degree of importance in the Framework Decision as the former, is the protection of fundamental rights. Indeed, the best way to strengthen mutual trust is by increasing this requirement. For this reason it is fundamental for the comprehension and interpretation of the regulation of the EAW that it be scrupulously respected. In fact, the CJEC itself takes compliance with the same for granted by considering that the rights of art. 6 of the TEU are not infringed. Respect for fundamental rights is one of the pillars on which the EU is based. As such, insofar as mutual recognition relies on trust in the legal systems of the rest of the Member

[13] CJEC Judgment 16-6-2005, C-105/03.

States being respectful of the absolute content of these rights, the Courts must interpret the rule requiring that such respect be effective. In this way, even based on the trust in foreign legal systems, the allegation of a specific infringement containing even an element of truth may be examined by some Courts entrusted with ensuring everyone has enjoys proper judicial protection, a power defended by some authors[14]. For this reason it is not strange for any possible infringement to be investigated prior to a surrender. The decision adopted after such an investigation and what is considered as a possible indirect infringement in the event the surrender goes ahead is another matter.

3. Concept, nature and characteristics of the EAW

The EAW is defined in art. 1.1 of the Framework Decision as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of:

- conducting a criminal prosecution (surrender for prosecution), or
- executing a custodial sentence or detention order (surrender for execution).

However, there are more facets to it that just those indicated above. First of all, and as its name indicates, it is a "warrant" issued by a Judicial Authority for the immediate arrest of an individual within the EU, equivalent to an international summons that requires a prior decision ordering deprivation of liberty. If the purpose is execution, a judgment. If it is for trial, the decision that the legal system in question envisages for adopting it. For that reason section b) of the form requires that express reference be made to the judgment or decision on the basis of which arrest is being ordered, the only aspect of the EAW that, as we will see, is mandatory and for which reason it is an "arrest warrant".

Secondly, as well as a warrant, this instrument contains a "request for surrender". This is stated in the heading of the form, which means that it is an instrument of international judicial cooperation. Whether the situation of deprivation of liberty is maintained while it is being decided whether or not to surrender the person and well as the final decision on surrender itself, will depend on the corresponding judicial decision of the executing authority and it does not necessarily have to agree to both measures.

[14] See in this regard the interesting reflection by VOGEL prior to the Framework Decision and his theory of "European reservation in relation to fundamental rights and human rights", a thesis also maintained by CUERDA under the title *non refoulement* and GONZÁLEZ-CUÉLLAR (texts cited in the bibliography).

Thirdly, the EAW is issued by means of a "common form" that all Judicial Authorities of the Member States should have. This commonality serves to counteract the language difficulties derived from the multi-lingual environment of the EU, meaning that it is immediately recognised. Despite of the absence of a common European criminal vocabulary, it makes it possible to use a common tool with a single criminal language.

As for the characteristics of this regulation, they are largely common to those of the rest of the Framework Decision that implements the principle of mutual recognition and make it possible to identify traits that set it apart from the old extradition system and develop three basic ideas: judicial monopoly, harmonisation and the simplification of the procedure.

a. Judicialisation. It is an exclusively judicial mechanism, ruling out any governmental intervention and the principle of opportunity[15], allowing direct judicial cooperation between judicial authorities. This new vision of the EAW means that the competent authority assumes a merely ancillary role.

b. Homogenisation. The Framework Decision sets the basis for a common procedure that all Member States have implemented with a degree of discretionality.

c. Harmonisation. A common form is supplied. It is single, simple, brief form, which entails a reduction of formalities and documentation to be sent; it consists of seven pages, is identical for all judicial authorities of the EU and in theory the mere sending of it with a translation is sufficient for surrender to be granted.

d. Simplification. Detention prior to extradition disappears as an independent stage. The fact that an EAW has been issued is sufficient to arrest the person, activate the decision procedure and go ahead with surrender.

e. Speed. This is a result of the disappearance of the governmental formality[16], direct communication[17] between judicial authorities and the establishment of very short processing times. The final decision must be adopted within 90 days, which allows the proceedings to continue in the issuing state in a relatively short time.

f. Procedural flexibility. It contemplates the possibility of the requested person consenting to surrender[18] with a drastic reduction of the terms and includes alternative

[15] For MORENO, with the elimination of the intervention of the executive, the three main obstacles to extradition: dual criminality, the principle of speciality and the protection of one's nationals, would have been removed (in text cited in the bibliography at the end).
[16] Descriptively, CUERDA terms passive extradition "sandwich" when it comes to distributing the roles of executive and judiciary in the decision (text cited in the bibliography).
[17] CASTILLEJO cites the 2000 CMACM as background. Urged in Recommendation R(82)1 of the Committee of Ministers of 15-1-1982, it represents a new development in the surrender of persons for trial (text cited in the bibliography).
[18] This consent-based simplification was already envisaged in the Conventions of Schengen, Brussels and Dublin.

mechanisms, such as temporary surrender, that make it possible to speed up cooperation.

g. Favouring surrender. The requirement of dual criminality is eliminated for 32 categories of offence, grounds for non-execution are reduced, it is possible to surrender one's nationals and the reference to political and military offences disappears[19].

i. Guaranteeism. Respect for the fundamental rights of the requested person is enhanced as of the moment of arrest and throughout processing, with the deprivation of liberty suffered because of the surrender being applied to the sentence.

4. Scope

4.1 Spatial scope

Being the product of a Framework Decision issued in the context of the EU, this is the territory in which the EAW is designed to operate[20]. In fact, art. 31.1 of the Framework Decision solemnly states that, as of 1-1-2004, the EAW was to replace the provisions of the main Extradition conventions applicable to the Member States up to that point[21]. However, the Framework Decision was not implemented immediately. It required the adaptation of the internal systems. Even though the term for incorporation ended on 31-12-2003[22], not all the Member States fulfilled this obligation on time. Despite the initial delay in transposition (up to 16 months in the case of Italy), and the initial constitutional differences, it now applies to all the members of the EU and can be classed as a success whose use is increasing progressively[23].

The first practical effect is the simplification of the regulatory chaos governing extradition within the EU. This is a convergence of different levels of legal regulation, with new ones being imposed on top of previous ones. None of them annulled the previous ones, but "supplemented" them instead. The EAW makes the identification of

[19] As LÓPEZ (2003) indicates, the Framework Decision does not contemplate the possibility of asylum between the Member States as the principle of mutual trust means that they are attributed "safe country" status, and are obliged to adopt a contrary position to execution in relation to nationals of such states.
[20] On 28-6-2006 an agreement was signed between the EU and Norway and Iceland in order to extend the surrender mechanism to these countries with some modifications; the agreement is not in force yet.
[21] The European Convention on Extradition, of 13-12-1957 and its two additional protocols; the parts of the European Convention on the Suppression of Terrorism of 27-1-1977 dealing with extradition; agreement of 26 May 1989 between 12 Member States on simplifying the transmission of extradition requests, of 26-5-1989; the Convention on simplified extradition procedure between the Member States of the European Union of 10-3-1995; the Convention relating to extradition between the Member States of the European Union of 27-9-1996; and Chapter IV of Title III of the Convention implementing the Schengen Agreement of 19-6-1990.
[22] Obligation that the 15 original EU countries were to fulfil, pursuant to Article 34.1 of the Framework Decision and that was deferred for the 10 new Member States until 1-5-2004. In the case of Bulgaria and Romania, who joined subsequently posterior, it was deferred until 1-1-2007.
[23] Update of the report from the Commission on the implementation of the Framework Decision since 2005 [SEC(2007) 979] http://register.consilium.europa.eu/pdf/en/07/st11/st11788.en07.pdf

the applicable text far easier. At present, in the EU the arrest and surrender of an accused or sentenced person is governed by the EAW alone.

However this substitution must be qualified on two points. First, it only applies to the Member States of the EU and not to other third countries. Second, the substitution is not complete because, as the Framework Decision itself notes in art. 31, Member States may continue to apply or conclude new agreements that make it possible to extend or enlarge the objectives of the same or simplify or facilitate surrender procedures[24]. Indeed, subsequent events such as the annulment of the German regulations that adapted the Framework Decision to its domestic system had the primary effect of reactivating the extradition system rendered extinct until 2-8-2006[25].

4.2 Temporal scope

In principle, the EAW was designed to be applied to requests submitted from 1-1-2004 onwards. Apart from the delay in transposition, pursuant to art. 32 of the Framework Decision 3 Member States limited its application to after a particular date before which acts committed would be processed in accordance with the previous regime. The states were France, Italy and Austria: France, prior to 1-11-1993, Italy and Austria, prior to 7-8-2002. After the Framework Decision, other countries have followed this system, going against the provisions of the Framework Decision. Even Italy went further than its initial declaration and limited application to EAWs issued or received after the entry into force of its law[26]. At present, it is operational in all Member States since the dates referred to in the table contained in Level II.

4.3 Material scope

The object of the EAW is the arrest and surrender of a person involved in criminal proceedings. This can be seen from art. 1.1 of the Framework Decision, indicating that the requested person should be claimed for the purposes of conducting

[24] This is what Denmark, Finland and Sweden have done by considering that in the majority of spheres the uniform legislation in force in the Nordic states makes it possible to simplify and facilitate surrender procedures. OJ L 246 29-9-2003, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:246:0001:0001:EN:PDF. The Czech Republic also maintains Treaties with Slovakia and Austria. An example of undertakings assumed subsequently can be found in the approval of what is termed the "Nordic Arrest Warrant". http://register.consilium.europa.eu/pdf/en/06/st05/st05573.en06.pdf

[25] By means of the Judgment of 18-7-2005 from the German Constitutional Court, in the *Darkanzali* case.

[26] Luxembourg, which made no representation at the time of adoption, did so when transposing the Framework Decision and although the new Member States joining the EU did not have the option of doing so, the Czech Republic and Slovenia both included limits. In the case of the Czech Republic it was even done without respecting the absolute limit set out in the Framework Decision of 7-8-2002, although it modified its legislation on 19-4-2006 to moderate this declaration for its nationals. Slovenia eventually withdrew its declaration regarding deeds committed after 7-8-2002, Council document no. 13636/08, 3-10-08, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/EN/EJN747.pdf.

a criminal prosecution (EAW for prosecution) or executing a custodial sentence or detention order as a result of having been tried (EAW for enforcement).

The Framework Decision does not exclude any offence from its scope. However, and this is one of the most noteworthy new developments of the EAW, the determination of the material scope on the basis of the offence is done according to a dual system. It will establish different requirements depending on whether or not the offence is one of those included in a list of 32 categories of offence[27], with the common requirement in all cases of a minimum penalty or sentence duration threshold in the issuing state.

- Offences included in the list in art. 2.2 of the Framework Decision[28].
  - Minimum penalty. For these offences the requirement is a custodial sentence or a detention order of at least 3 years in the issuing state, without distinguishing between prosecution and enforcement.
  - No dual criminality requirement.
- Offences not included in the list (art. 2.1 of the Framework Decision).

[27] - participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage..

[28] A list which, as CASTILLEJO indicates (text cited in the bibliography), are offences for which Europol has jurisdiction, or offences included in the Treaties to which the Member States are party. As MORENO states, the dual criminality requirement is not eliminated in this case either as it is taken for granted that all countries have Criminal Codes with crimes that correspond to these categories, meaning that the dual criminality test would *a priori* have been performed in the Community instrument (text cited in the bibliography). See regulations in Level II.

- Minimum penalty. For EAWs for trial, the custodial sentence or a detention order envisaged in the law of the issuing state will be at least 1 year. For EAWs for enforcement of a sentence or detention order, it must be for at least 4 months. In both cases, unlike with the traditional system[29] it is no longer necessary for the executing state to meet any minimum[30].
- Dual criminality test (art. 2.4 and 4.1 of the Framework Decision): all that is required is that the deeds also constitute an offence in the executing state, whatever the constituent elements or however it is described, with the task of interpretation in such cases corresponding to the executing authority, meaning that some authors consider that this test is not as broad as in the case of extradition.

The biggest problem raised by the list when issuing an EAW will be interpreting whether or not the deeds to which the proceedings refer belong to one of the categories, which must be stated in the form by marking the corresponding box. In principle, this is the exclusive competence of the issuing body. But the need to provide a brief description of the facts will mean that, if the classification is abused, problems may arise for the execution of the EAW and be highlighted by the Commission in its reports[31].

Finally, and in view of the fact that the principle of speciality remains in the EAW, pursuant to which the surrendered person may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered, with the exception of those cases set out in the instrument (27.2 of the Framework Decision), it is advisable for the person to be claimed for all offences pending in the issuing state. This represents a problem in countries like Spain, where the issuing judicial authority is not centralised. But the form contains the possibility for the surrender to be based on several offences. In principle and in view of the minimum penalties, it is necessary that the crime be reasonably serious, as no provision is made for *ancillary surrender,* for minor offences that do not reach the sentence threshold[32]. Some authors reject this possibility, due to its omission. By virtue of art. 31.2 of the Framework Decision, it could be interpreted that the precept set out in the European Convention on Extradition, as a

[29] Article 2.1 of the European Convention on Extradition.
[30] The Dublin Convention (Article 2) already replaced the traditional system with a dual penalty one.
[31] The executing judicial authority maintains a minimum degree of control, as it decides on the version of events according to MORENO (text cited in the bibliography).
[32] Unlike in the case of Article 2.2 of the European Convention on Extradition.

multilateral convention subscribed by the Member States, facilitates the surrender procedure on this point and the Commission shares this view.

5. Issuing an EAW

5.1 Competent authority

This will be the judicial authority designated by each state in accordance with art. 6 of the Framework Decision, available for consultation on the page of the Council of the EU in the respective declarations, and is a matter for the internal law of the issuing state. The question arises as to whether it covers other jurisdictions with authority to issue sentences or detention orders. First of all, and as there is no exception for military offences like in art. 4 of the European Convention on Extradition, in the event there is a jurisdiction apart from the ordinary one, there is nothing preventing it using the EAW. The same question arises with the possible jurisdiction of minors. It is true that the Framework Decision establishes the fact that the requested person cannot be considered criminally responsible for the deeds as grounds for mandatory non-execution. Each country has a different age of criminal responsibility and for ages below the threshold terms of deprivation of liberty tend to be imposed. It is a question that remains open and the solution adopted depends on each country, including the interpreting one.

5.2 The request

The content of the same can be found in art. 8 of the Framework Decision and is developed in the form. When preparing a request, parties are advised to follow the European handbook on how to issue a European Arrest Warrant available on the website of the Council of the EU[33], the main purpose of which is to harmonise the different practices used in the different Member States. The EAW, as a measure that restricts rights, has to be adopted in line with the principle of proportionality, bearing in mind that it is a measure that restricts individual freedom and the high financial cost of surrender[34]. This requisite has been specified to a greater degree in the latest version

[33] The Handbook warns that the observations it contains are not binding, while pointing out the obligation of conforming interpretation derived from the *María Pupino* Judgment.
http://register.consilium.europa.eu/pdf/en/08/st08/st08216-re02.en08.pdf

[34] La Corte di Cassazione, Sección VI, 17-19-4-07, nº 15970, Piras e Stori, cancelled an EAW decision issued simply in order to obtain a testimony.

of the Handbook, which encourages the use of alternative measures that place fewer restrictions on rights.[35]

5.2.1 Procedural stage

The Framework Decision does not establish any provisions on the moment of the proceedings at which it should be issued, merely stating that the surrender must be for the purpose of bringing criminal proceedings or for enforcing a custodial sentence or detention order already imposed. It seems the EAW is not designed for investigations of suspects without a minimum evidentiary basis, but for *prima facie* evidence that makes it possible to bring criminal action. In this regard, the European Handbook cites the CJEC in the *Advocaten* case (which, due to its importance, is included, together with the *María Pupino* judgment*),* as well as the content of art. 49 of the Charter of Fundamental Rights on the validity of this principle[36].

5.2.2 Form and content

The content of the EAW established by the form, meaning that it has to include all the requirements set out in art. 8 of the Framework Decision and does not specify that it should initially be accompanied by any other document. The European Handbook recommends downloading it onto a computer. That is, it is not necessary to attach the decision (ruling or judgment) on which it is based. However in section b) of the form a reference must be included to facilitate identification of the decision: number, proceedings, date and, if applicable, a decision other than a judgment, meaning detention or imprisonment[37]. The form can be obtained by all Member States in any of the Community languages on the website of the EJN, which includes a section called "*EAW Wizard*" which makes it possible to draft the EAW online using an interactive tool[38]. This page also includes the different forms in the section of the same name[39]. They are also available on the website of the Council of the EU[40]. This form must necessarily be used, and no abridged versions or omission of sections are permitted; it must be typed, not handwritten. One form must be used for each person, but several offences may be included in a single EAW.

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[35] The seriousness of the offence, the sanction, the possibilities of arrest, the need to protect the general public and the interests of the victims are to be weighed up. With regards the need to comply with the requisite limiting rights and the possibility of refusing surrender on these grounds, a request for a preliminary ruling has been issued: c. 396/11, 27-7-2011, *Radu*.

[36] The United Kingdom conditions surrender on the investigation having concluded.

[37] However, we should not be surprised if an executing authority asks for supplementary information despite the fact that, according to the Commission's Report, it is not necessary.

[38] http://www.ejn-crimjust.europa.eu/eawwizard.aspx

[39] http://www.ejn-crimjust.europa.eu/forms.aspx

[40] http://www.consilium.europa.eu/App/PolJu/Default.aspx?Detailid=134&cmsid=720&lang=EN

The form must be filled in by the judicial authority, regardless of the means of transmission used and of whether or not the whereabouts of the subject are known. This is specified in letter i), requiring the official signature and stamp at the end of the EAW. As such, it is not possible to send a judicial request to SIRENE or INTERPOL asking them to perform the task on our behalf. As for complementary material, the document itself will ask for the necessary, essential information for the purposes of the surrender[41].

Section a) consists of the description of the requested person[42], with the data we have in the case. The whereabouts are usually not known, and this must be made clear if applicable. Some countries require additional information consisting of the language that the requested person understands. If this is not known, it should also be mentioned in this section.

If we have photographs, fingerprints, distinctive marks (tattoos, deformities, special characteristics, etc.) or a DNA analysis, the form indicates where they should be attached, as the identity of the requested person tends to be one of the most conflictive parts of the surrender procedure. If such data is not available, which would probably be the case most of the time, it is worth making a reference to the number of the statement and the group that took it, if it exists, so that the police channel used takes the necessary steps to prepare a dactyloscopic file and the identification material. It is also worth referring to how dangerous the person is considered and the possibility he/she may be armed[43]. If he/she uses a false name, it is advisable to include it in brackets and include fraudulently used data in all fields related to their identity.

The decision on which the warrant is based (the ruling or judgment) is identified in **section b)**, which makes it possible to distinguish the purpose of the EAW (for prosecution or to serve a custodial sentence or detention order, including the date on which it became final)[44]. Any box that is not relevant may be marked “not applicable” or crossed out. Judgments rendered *in absentia* raise problems as many Member States do not consider them “enforceable”[45] and the Handbook opts to recommend that they be included in section b) 1 and not in b) 2.

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[41] SIS I only allows a single EAW to be submitted per person in each Member State, as it only allows one alert or “A” form (the form of the initial description, flag or alert, which allows a single, simultaneous query in the different Member States). Once included in the system, SIRENE conserves the information of the rest of the EAWs issued for the same person in that Member State using several “M” forms (miscellaneous information on the same flag).

[42] One EAW per person, regardless of the fact that several may have participated in the same criminal act.

[43] Ireland sends a “risk assessment” on persons requested in an EAW.

[44] If the procedure advances and the requested person is, for example, tried *in absentia*, the Handbook recommends issuing a new EAW.

[45] This aspect, due to the affect on the application of the guarantee of return of nationals in relation to Articles 4.6 or 5.3 of the Framework Decision, was raised in a request for a preliminary ruling IB 31-7-09 (C-306/09), with the conclusions of 6-7-2010 considering that the EAW may mutate depending on the circumstances. The judgment of the CJEU issued

Section c) requires, for the purpose of verifying that the penalty thresholds have been met, that the maximum length of the custodial sentence or detention order which may be imposed, has already been imposed or period of which that remains to be served be indicated, depending on the aim of the EAW. Once again, the corresponding section may be marked "not applicable" or crossed out as with section b)[46]. If the penalty imposed is indefinite (e.g. life or internment in a mental institution) it should be specified that at least 4 months remain to be served.

With respect to **section d)** when the decision has been rendered *in absentia*, the first thing to remember is that Framework Decision 2009/299/JHA[47], whose transposition deadline was the 28-3-2011 (exceptionally 1-1-2014 in the event of difficulties) amends this section. This is the part where it must be specified whether the requested person was summoned personally or informed by other means or, alternatively, was not, but has guarantees that can be offered in advance using section f) if applicable. This avoids us being asked for additional information, as it is the executing judicial authority that is responsible for assessing whether or not the trial can be described as "fair" as well as the degree of "sufficiency" of the guarantees offered. The European Handbook recommends that section b).1 (a decision that is not final) be used and box f) be taken advantage of to explain the situation. This is primarily when the person has not been summoned in person but "by other means" permitted by the legislation of the issuing state, explaining what they are and the degree of certainty that the requested person is actually aware of the date and venue of the trial; the conditions of the new hearing or possible appeal if judged *in absentia*, the term for filing it, and whether the notification of the EAW is the same as the notification of the judgment in terms of the timeframe for appealing[48]. Otherwise, the requested person, once arrested as a result of the EAW, can be considered to have formal knowledge of the procedure followed in relation to him/her because he/she must necessarily be informed of its existence and of the reason for the EAW[49]. New Framework Decision 2009/299 states

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on the 21-10-2010 determines that where the executing Member State has incorporated article 5.1 and 3 into its national law, the enforcement of an EAW rendered in absentia may be made conditional on the individual, a national or resident in the State of execution, being returned to serve the sanction imposed following a new trial held in his or her presence in the issuing Member State.

[46] Except for judgments *in absentia* where it has been opted to consider it a "non-executive" decision.

[47] From 26-2-2009, which amends Framework Decisions DM 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81 of 27-3-2009) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:EN:PDF

[48] Due to translation difficulties, the Ghent Court has translated the rules on trials *in absentia* into all Community languages.

[49] With regard to respect for the fundamental rights of the requested person, to date it can be interpreted that the Second Protocol to the European Convention on Extradition continues to apply and the notification of the EAW is not equivalent to the notification of the judgment rendered *in absentia*, by application of Article 31.2 of the Framework Decision, for the purposes of calculating the term for filing the appeal.

that the information on the judgment supplied in executing the EAW will not count as a notification for the purposes of the term for appealing.

The most complicated part may be **section e)** regarding the description of the offence. The first thing we are asked for is the number of crimes for which it is issued, always referring to the same person. The numbering must be followed in relation to all the information to be included in the section. Following this, a description of the facts is required. This should be drafted as simply and concisely as possible. First of all, as the forms have to be translated. Secondly, and as SIRENE and the European Handbook stipulate, if they are not concise they represent a problem that makes it necessary to use other ancillary forms, as the technical limit in SIS for each of the boxes is 1024 characters, which is equivalent to approximately 15 lines. Taking functional aspects into account and that the SIRENE Offices cannot alter the wording of the EAW issued by a judicial body (one thing is technical remedy but the modification of a “warrant” is something else entirely), it is advisable to make an effort to provide a comprehensive yet concise text in the description. Otherwise, there is a danger of collapse in these offices, which also have to prepare a “support translation” in order to introduce it into the SIS. This concision is not required by INTERPOL to the same degree. When describing the facts it is best not to copy them from the writ of complaint or the facts proven *in absentia*, and unnecessary data should also be omitted. Art. 8 of the Framework Decision specifies what circumstances must be described: when they were committed (the day, in order to determine the application of the EAW in time, the possible time-barring or, in the event of multiple requests, for taking this point into account), the place (for the purposes of international jurisdiction and to confirm the territory in which they took place, meaning that the description should take this purpose into account, simply naming the town where the events occurred), the degree of consummation and participation of the requested person. Unnecessary or non-essential details that are not required for the purposes of understanding the offence they constitute from the point of view of a foreign authority should be avoided, such as a lengthy description of injuries.

The second part of this section, by stating the nature and legal classification of the offence and the applicable legal provision, deals with the specification in legal terms of the offence or offences to which the EAW refers and highlights the legal text in which they are described. It is not necessary, however, to supply a copy of the legislation. This specification is not required for offences on the list contained in section e) of the EAW form and that do not require the dual criminality test. In such cases, it

will be sufficient to indicate the corresponding one by ticking the box on the left, keeping in mind that the custodial sentence or detention order must be at least 3 years deprivation of liberty. The form itself reminds us of this, albeit the wording is somewhat confused. It is necessary, however, for the offence to be described when it is not on the list (section e) II), and here the precept that regulates it can perfectly well be transcribed. It is worth keeping in mind that this description is for a foreign authority who is not familiar with our criminal justice system and for that reason we are supplying the information. The European Handbook recommends including the accessory offences committed by the person that do not reach the deprivation of liberty threshold. The executing judicial authority can decide whether or not to also grant the EAW for these deeds.

In **section f)** the EAW inserts a box enabling us to include what is termed optional information. The examples mentioned in the form include the interruption of periods of time limitation, as this is a question examined by some Member States and tends to be the subject of supplementary information[50]. This is the space in which we can propose the adoption of measures such as temporary surrender or taking a statement (with or without a transfer to the territory in question) set out in art. 18 and 24 of the Framework Decision, as well as the use of videoconferencing[51]. This option can also be used to inform of any urgent circumstances that may exist or, if appropriate, make a reference to the requested person already having been deprived of liberty in our country, as well as any other circumstance that we consider may be of interest when adopting the decision, either regarding the procedural situation pending a judicial decision or on the surrender itself[52]. What we must not include in this section are details of the property that constitutes evidence or the proceeds of the offence, as this is dealt with in the following section, unless they are being claimed urgently in advance[53].

Section g) is devoted to the objects that may be used as evidence or constitute the proceeds of the offence and that are in the possession of the requested person. They should be described and data on their location should be provided in order to

[50] The *"passage of time"* constitutes grounds for opposition when more than a year passes between the commission of the offence and the EAW.
[51] The Convention on judicial assistance in criminal matters between Member States of the European Union, 29-5-2000 governs this. OJ C 197, of 12-7.
[52] It is worth remembering that the EAW, as a request, does not necessarily mean that the requested person will remain deprived of liberty until the moment of the decision and, if applicable, the surrender (this decision is for the executing authority alone once the requested person has appeared before it (Article 17 of the Framework Decision).
[53] The seizure of these objects can also be requested and they can be claimed prior to surrender by means of a letter rogatory (which will be regulated by the conventional instruments existing between the countries involved).

facilitate confiscation, when such details are known. It does not include the personal effects of the requested person.

Section h), deals with the life sentence, a box that specifically covers the information that may be used as a guarantee for those states who apply this sentence, also indicating any clemency or review measures, an explanation of which can be included in the optional information of section f). If this type of sentence does not exist, it will be marked "not applicable". The European Handbook also recommends including the possible indefinite duration of the measure or sentence in section c).

Finally, the third-last box, **section i)**, is for the purpose of identifying the issuing authority, the name of the body or its representative (file reference, telephone number, fax, email, etc...) and it is obligatory to include the necessary data to allow direct communication (this data is very important when arrest takes place). It may be a good idea to specify what languages can be used in communication or provide the details of another person who can act as a contact at this point[54]. The final box is for the stamp and signature of the issuing judicial authority, as specified in the EAW, and should include the name and function of the authority as well as the date of issue.

By filling in the form the European arrest warrant is considered prepared, without the need for further complements, annexes or information other than that which the executing authority may ask us for.

5.3 Transmission

Transmission and the procedure for performing it are regulated in art. 9 and 10 of the Framework Decision and covers both the possibility of the location of the requested person being known and unknown, the latter being the usual state of affairs.

- **Location of the requested person known**

If the location of the person is known, direct communication "may" take place between judicial authorities. Once the authority who has responsibility in the executing state has been identified, the EAW can be sent directly to it[55]. This task is facilitated by the EJN as envisaged by art. 10.1 of the Framework Decision by means of the Atlas on its website[56], which also provides advice on what the requirements of the national rules are.

[54] It is normal for the executing authority to send a fax or email acknowledging receipt of the EAW.
[55] According to the Commission's Report and in relation to contact between executing and issuing authorities, such contact is usually via the SIRENE office, through which the majority of warrants are channelled as well as requests for additional information. Where they exist, Liaison Magistrates are also used, as are the EJN contact points. The exchange of information can be intensified in order to organise the practical surrender of the person, once the decision has been adopted.
[56] http://www.ejn-crimjust.europa.eu/EAW_atlas.aspx

If we send the request to the wrong authority, the recipient is obliged to transmit it *ex officio* to the competent authority and inform the issuing judicial authority accordingly[57]. Finally, it should be remembered that some countries have established different authorities for transmission and receipt, on the one hand, and execution, on the other, taking advantage of the option offered in art. 7 of the Framework Decision. The main practical problem is the translation requirement due to the lack of sufficient means and the number of EU languages. Of the 27 Member States, 13 accept English, but many require their own language (see table of languages accepted by countries in Level II). But in this case, as the transmission is not the result of a prior arrest and we know the country to which it is to be sent, the translation can be carried out without the celerity required by the short timeframes established by the different legislations for sending the EAW after the arrest of the individual.

- **Location of the requested person unknown**

The whereabouts of the accused or sentenced person are usually not known, and even whether or not he/she is in a particular Member State. The EAW form also serves as an international arrest warrant for all the countries in the world; this aspect is highlighted not only in the title of the EAW (adding "and international"), but also in section f), offering to send an extradition request. In such cases a copy will have to be sent to INTERPOL and, in those countries where it is not centralised and exists, to the SIRENE office so that it can be included in the SIS[58]. It will then be valid for extradition as well, being an EAW. These offices will make the necessary changes in order to introduce the EAW into their respective dissemination systems. It should be remembered that only the EAW is sent, without any attached documentation or decision[59].

Discovery of the person. If the requested person is discovered in a Member State in which the EAW applies, and if the executing judicial authority so requests (see tables in Level II on the specific requirements of each country), the EAW will be sent together with a translated copy in a language said country accepts[60]. As such, we will have to act on the communication sent by the executing authority and the deadlines established therein, with the risk of the person being released if we fail to meet them[61]. If the discovery takes place in a third country or a Member State in which the EAW is

[57] Article 10.6 of the Framework Decision.
[58] An SIS alert is equivalent to an EAW accompanied by the information requested by the latter pursuant to the provisions of Article 95 of the CISA.
[59] In some Member States the Interpol alert is not sufficient to carry out an arrest and it is important to expressly indicate that the EAW exists.
[60] Some countries, like France, require the translation to be signed and stamped also.
[61] This power corresponds to the executing judicial authority at all times by virtue of Article 12 of the Framework Decision.

not applicable due to the date on which the events took place, the EAW will act as a request for provisional arrest for the purposes of extradition, which will have to be processed pursuant to the corresponding conventions[62].

This is the case where the **translation** becomes a problem due to the short timeframes for sending the translated EAW as of such time as the requested person is arrested. It is possible to have an English translation prepared due to the high number of Member States who accept it. But the diversity in this regard means that no other measures can be adopted.

With regard to the **means of transmission**, the Framework Decision states that it can be sent using any reliable means capable of producing a written record and that allows the executing authority to establish its authenticity. They are usually sent by fax, but some countries do not accept this form of transmission, in which case the original may be sent by international courier (once again, see the table in Level II).

The question of whether or not extradition requests refused under the previous regime prevent a new surrender request being sent in the form of an EAW is another important question. That is, whether or not the former decision has *res judicata* effect, which has caused doctrinal debate but which the Framework Decision does not rule out.

5.4 Actions pending the decision

5.4.1 Additional information

Art. 15.2 of the Framework Decision, and from the point of view of the executing authority, contemplates the scenario in which the information supplied by the EAW is insufficient, in which case it must be furnished as a matter of urgency and a time limit may be set for the receipt thereof. The authorities involved will decide on the means for doing so and both fax and email can be used. Complementary information may be requested at any stage of the procedure and in some countries the failure to supply it may entail the release of the requested person. It will mainly be used to clarify aspects related to the grounds for the refusal or provision of guarantees and will be invoked in the executing state if the requested person challenges his/her surrender, although in practice it can be for the purpose of clarifying any aspect. The issuing judicial authority may also forward such information without being asked to do so (15.3 of the Framework Decision).

[62] Pursuant to Article 64 of the CISA, a alert introduced into the SIS will have the same effect as a request for provisional arrest.

5.4.2 Authorisations

If the requested person enjoys a privilege or immunity, this does not mean the EAW cannot be issued, as envisaged in art. 20 of the Framework Decision. The majority of Member States contemplate this scenario as executing authority, who will request the withdrawal of the immunity or privilege held in the executing state and notify the issuing authority when protected by another state or organisation. In such cases it will be the issuing authority who must ask for the withdrawal so that the person can be surrendered, subsequently informing the executing judicial authority once the immunity or privilege has been withdrawn so that the term for complying with the EAW can begin to run. This situation is considered grounds for an optional challenge to the recognition of a criminal judgment for the purposes of enforcement of the same in another state in Framework Decision 2008/909/JHA[63], which is to be transposed shortly.

5.4.3 Hearing and temporary transfer

This is regulated in art. 18 and 19 of the Framework Decision and represents the possibility of requesting, while the procedure is underway in the executing state, that action be taken, and the Framework Decision limits it to EAWs for trial. The most frequent requests are for a hearing or participation in a confrontation, in order to interrupt the term of expiry, or when other participants are being tried.

The European Handbook recommends using section f) of the form, regardless of the result of the decision, setting out the reasons of urgency. These two forms of international judicial cooperation, together with that of the surrender of property that constitutes evidence or the proceeds of crime, even when the surrender cannot ultimately take place, are legally covered by the EAW, meaning that it is not necessary to issue a complementary Letter Rogatory under other instruments of international judicial cooperation. Either using the same EAW form, or via a subsequent communication using any means that provides a written record that makes it possible to establish its authenticity[64].

Temporary transfer. It would be advisable for the agreement reached by the authorities to state the deadline by which surrender will take place and the guarantee of

[63] Article 9.1.f) of this Framework Decision, of 27-11- 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 of 5-12-2008), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0027:0046:EN:PDF

[64] The possibility for the EAW to include other judicial assistance procedures not regulated in the Framework Decision, but admissible under the conventions in force between the countries involved, such as requesting an immediate expert analysis of an instrument of the crime (e.g. traces of blood in a vehicle in which it a murder is believed to have been committed) is more doubtful; in such cases it seems an additional Letter Rogatory would have to be issued.

return assumed. The surrender takes place in the same way as the definitive surrender, but with the obligation to return the person surrendered, who must be able to return to the executing state in any event in order to attend the oral hearings that concern him/her in the context of the EAW (art. 18.3 of the Framework Decision).

Hearing. The issuing judicial authority may ask that the requested person appear at a hearing. The hearing will be held in accordance with the legislation of the executing state, subject to the rules on questioning according to the capacity in which the person is appearing (witness, accused,...) regardless of the attendance of a representative of the issuing authority as expressly envisaged in art. 19 of the Framework Decision. It is possible to request that the hearing be held via videoconference if the legislation of the executing state so permits or if it is party to one of the European conventions that regulate it, which represents less cost than the transfer of the issuing judicial authority. This is envisaged in the European Handbook.

5.5 Situation after the decision

The executing judicial authority will inform the issuing judicial authority of the reasoned decision ultimately adopted, both if the request for surrender is accepted or rejected (art. 22 of the Framework Decision), and it will be for the issuing judicial authority to ensure the EAW ceases to be effective, meaning that it will send this information to the SIS and INTERPOL when appropriate.[65]

5.5.1 Refusal

If the executing authority concludes that surrender cannot be granted, this decision does not necessarily entail the shelving of the proceedings. There is nothing preventing the requested person returning voluntarily or a change of circumstances occurring. Another alternative would be that of transferring the proceedings to the state that refused surrender under the European Convention that governs these matters and where the necessary conditions are met, or filing a complaint under art. 21 of the European Convention on Mutual Assistance in Criminal Matters so that he/she can be tried in said country. If the EAW was for enforcement, apply the European Convention on the International Validity of Criminal Judgments, taking into account Framework Decision 2008/909/JHA on the recognition of judgments and Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of

[65] A standardised form has been added to adopt surrender decisions, which does not substitute the decision that is to be notified in accordance with article 22 of the Framework Decision concerning the EAW, nor the full text of the judicial ruling, when requested by the issuing judicial authority.

exercise of jurisdiction in criminal proceedings[66]. If the proceedings are maintained in the issuing state, there is nothing preventing other acts of international cooperation being used.

5.5.2 Surrender

If the decision is positive, the physical surrender is carried out by INTERPOL or SIRENE (in those states in which it operates) unless the decision is conditioned or suspended. The Framework Decision regulates this in art. 23 and envisages that it will be performed a maximum of 10 days after the final decision, a term that can be extended due to circumstances beyond the control of any of the Member States involved, with a new 10-day term being set as of the new date agreed by the judicial authorities. On an exceptional basis and for serious humanitarian reasons, but not technical ones, which include danger to life or health, surrender may be suspended until they cease to exist. The term will be 10 days as of that point.

Together with the requested person, property that may be used as evidence or have been acquired as a result of the offence and are in the possession of the requested person (not including personal belongings) may be surrendered, even if we have not requested them (art. 29 of the Framework Decision), preserving third-party rights and those of the executing state, who may temporarily retain or hand over such property. The return of the items in these cases will not entail expense for the executing state. They must be surrendered even if the EAW cannot be executed due to the death or escape of the requested person.

5.5.3 Transit

The Framework Decision contemplates the possibility of the surrender involving passing through the territory of another Member State, who must authorise it, unless the person is a national or resident of that territory. In this case, the option of challenging applies when the EAW is for enforcement of a judgment, or conditioning it in the same terms as established in art. 5.3 of the Framework Decision. In the event of transit, information on the identity and nationality of the requested person must be supplied, as well as notification of the existence of an EAW, the character and classification of the offence and a description of the circumstances, including the date and place committed, transmitted by any means that produces a written record and will not apply when the transit is by air without a stopover, unless there is an unscheduled

[66] OJ L 328 15-12-2009 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:328:0042:0047:EN:PDF, which must be incorporated into internal law prior to 15-6-2012.

landing. An authority responsible for communicating and receiving the documentation must be designated (see table in Level II).

5.6 Effects of surrender

5.6.1 Deduction of the deprivation of liberty

Once the requested person has been placed at the disposal of the issuing judicial authority, upon surrender the executing judicial authority must inform of the time during which he/she was deprived of liberty, which will be deducted from any sentence (art. 26). If it fails to do so, the details must be requested; the Eurojust and Commission reports show how often this obligation is not fulfilled, with the procedural dysfunctions that this entails. On the other hand, "conversion" difficulties may arise in relation to other alternative measures that may have been adopted for the surrender when deducting the deprivation of liberty. If the person is absolved, he/she may also seek indemnification on the basis of administrative liability.

5.6.2 Principle of Speciality

According to art. 27 of the Framework Decision, a surrendered person cannot be tried, sentenced or deprived of liberty for an offence committed prior to surrender different to the one on which the surrender was based. This is a sovereign leftover from extradition and exists not only in art. 27 of the Framework Decision but also in any subsequent surrender of the person, either by virtue of extradition (art. 21 of the Framework Decision) or an EAW (art. 28 of the Framework Decision). Doctrine has highlighted the paradox that the maintenance of this principle represents when the dual criminality test is being devalued. Given its continued existence, the EAW must be issued for all outstanding offences, which causes problems of coordination, as highlighted by the Commission's Assessment Report, because the need to issue an EAW arises in the course of each criminal proceedings. To that end, it would be useful to devise a method of notification of the issue of an EAW for a person wanted for other offences in the issuing state[67].

This principle will not apply in the following cases:

- When the executing state authorises it. Unless it has been declared that this principle has been assumed *iuris tantum* to have been waived, the consent of the state requires an EAW request, with the same content, transmission and translation requirements, subject to the same mandatory and optional reasons

[67] Whereas 23 of the Framework Decision. For the purposes of the recognition of judgments involving the deprivation of liberty, this only applies when the person is surrendered by force, not when he/she takes refuge in a state according to Framework Decision 2008/909.

for non-execution and the same guarantees maybe imposed. All that varies is the term for deciding, which is reduced to 30 days. But before authorisation is obtained, the person may be accused and tried in the issuing state if no detention order is issued, according to the CJEC[68].

- When the person consents to it:
    - Tacitly: not leaving the territory for 45 days or returning
    - Expressly, voluntary and informed waiver, with the assistance of a lawyer[69]
        - before the Executing judicial authority in the handover procedure
        - before the issuing judicial authority after surrender
- Because the sentence or measure does not involve deprivation of liberty: the offence does not envisage such sentences, they are ultimately not imposed or the person is subject to other measures, even if they may restrict his/her individual freedom.

5.6.3 Subsequent surrender

Art. 21 and 28 of the Framework Decision contain two cases covered by the principle of speciality where the existence of two surrenders is introduced as a distinguishing feature. In the first, as a result of a prior extradition, the person enjoys this protection in the executing state. In this case, the latter will seek the consent of the state that granted extradition, with the calculation of the term for decision suspended in the meantime and with the necessary guarantees being adopted for maintaining the material conditions of the surrender.

Art. 28 of the Framework Decision contemplates the opposite situation. The application of the principle of speciality after the surrender as the result of an EAW, not in the issuing state but in relation to any subsequent surrenders that the latter may order. If it is for the purposes of a new EAW, the new surrender prevents the application of said principle, basically with the same conditions and processing as with the principle of speciality, except for its non-application due to the sentence. In the case of subsequent surrender by virtue of extradition, it refers the matter to the corresponding conventions.

[68] CJEC Judgment 1-12-2008, c.388/08, Leymann v Pustovarov.
[69] There is no mention here of the interpreter, which is one of the rights of the arrested person in Article 11 of the Framework Decision.

5.7 Expenses

They are assumed by the issuing state, with the exception of those incurred in the territory of the executing state (art. 30 of the Framework Decision).

6. Execution of an EAW

One of the new developments of the Framework Decision is that of establishing common minimum procedural standards that all Member States are, in principle, obliged to observe. However, it is precisely the enforcement procedure that has been implemented in each country taking into account the peculiarities of each legal system, meaning that apart from the minimum guarantees required and the timeframes (which are not always respected), each state will provide protection to the requested person and adopt the corresponding decision pursuant to its procedural rules.

6.1 Competent authority

The competent authority is designated by each Member State in the declarations made to the Secretariat of the Council in accordance with art. 6 of the Framework Decision, which are contained in the table in Level II. However, the safest way of determining what the competent authority is for enforcement in a particular country is via the Atlas on the EJN website[70].

6.2 Initial actions

6.2.1 Arrest and appearance at court

The Framework Decision introduces a judicial system of surrender that could be described as a double judicial protection regime. In addition to that derived from the criminal proceedings in the issuing state, the Framework Decision imposes a series of rights and guarantees in the extradition procedure meaning that there is no question of it being described as automatic surrender.

What is termed the statute of the requested person includes the right of information, to a lawyer, an interpreter (art. 11 of the Framework Decision), to freely provide his/her consent (art. 13 of the Framework Decision), apart from the guarantees of the internal legislation of the executing state that apply to him/her as a detainee[71]. The information covers the existence of the EAW, its content and the possibility of

[70] http://www.ejn-crimjust.europa.eu/EAW_atlas.aspx

[71] This statute is in stark contrast to the difficulties in approving the proposed Framework Decision on procedural guarantees in criminal proceedings, which was eventually aborted and split up into different instruments dealing with each one of the basic rights.

consenting. It is advisable to provide a copy in a language that the appellant understands.

6.2.2 Hearing of the requested person

Art. 14 of the Framework Decision contains the right to a hearing before the executing judicial authority. However, this does not have to be a mandatory formality in the surrender procedure, but merely a right that depends on the wishes of the requested person, as is the case in some Member States.

6.3 Procedure

The subsequent procedure must be urgent. That of the Framework Decision merely differentiates in art. 13 and 17 of the Framework Decision between a rapid processing, if consent for surrender is granted and/or the principle of speciality is waived (before the judicial authority, who ensures that it is granted freely and in full knowledge of the consequences, in the presence of a lawyer and with a record being taken)[72] and the normal one. In the first case the period for decision is drastically reduced to just 10 days.

If consent is not granted, the period for decision is 60 days, which can be extended by a further 30 days after informing the issuing judicial authority, and the necessary guarantees must be adopted in order to maintain the material conditions and facilitate the effective surrender. If the deadline cannot be met due to exceptional circumstances, Eurojust must be informed. If a state suffers repeated delays, it will inform the Council[73].

6.4 Action pending decision

6.4.1 Complementary information

Provided that national legislation establishes that data not transmitted with the EAW is relevant, the executing judicial authority is entitled to request it, within the term and with the conditions established in its legislation and the issuing judicial authority will be obliged to comply[74].

6.4.2 Authorisations

The executing judicial authority will request the lifting of any immunity or privilege enjoyed by the requested person in the executing state and the timeframes of the procedure will not begin to run until it is informed of the lifting of the same; in the

[72] Article 13 of the Framework Decision.
[73] Article 17 of the Framework Decision.
[74] Article 15.2 of the Framework Decision.

meantime it will adopt the guarantees to ensure the material conditions for effective surrender (art. 20 of the Framework Decision).

6.4.3 Hearing and temporary transfer

The executing judicial authority has an alternative pursuant to art. 18 of the Framework Decision: it either agrees to a temporary surrender of the requested person or grants him/her a hearing, with the conditions of surrender or the hearing usually agreed by the judicial authorities. It seems it is not possible to refuse one of the options. Neither does the Framework Decision limit the possibility for this request to be made more than once if the decision is delayed. If it is decided to opt for a hearing, it will be held pursuant to its internal law, notwithstanding what the judicial authorities may agree, regarding the presence of the person designated by the issuing judicial authority or of the presence of another judicial authority designated in this case by the Executing judicial authority (art. 19 of the Framework Decision).

6.5 Decision

It must be adopted within the timeframe established in art. 17 of the Framework Decision. It will be refused if mandatory grounds (those set out in Art. 3 of the Framework Decision) or optional ones (art. 4 of the Framework Decision) for non-execution exist. If there are several requests for surrender where such grounds do not apply, it must first be decided which has priority.

6.5.1 Grounds for mandatory non-execution

- **Protection of fundamental rights**

In addition to the grounds expressly contained in art. 3 and 4 of the Framework Decision, some countries have included a reference to these rights as grounds for refusal. In such cases, they must go no further than the intangible core of “international public order” as inherent to the human condition.

- **Amnesty**

The first mandatory ground for non-execution (art. 3.1 of the Framework Decision) is where the offence on which the arrest warrant is based is covered by amnesty in the executing Member State. A lax interpretation would include any pardon measures or remission of sentences, including reprieves (characterised by the individual nature of the same, as opposed to other grace measures applied to a group of persons). Other opinions restrict amnesty to decisions of a general nature issued by Parliament, adopted according to the internal law-making procedure. But the differences that exist in Europe regarding these forms of clemency do not distort their

power to annul the *ius puniendi* in all states, or the undeniable reality that non-judicial abrogate, in this way, the effects of a criminal judgment, for which reason doctrine considers it to be a leftover or state sovereignty[75].

- ***Non bis in idem***

Art. 3.2 of the Framework Decision, on the grounds for mandatory non-execution of a EAW, and art. 4, the grounds for optional non-execution, both contain the *non bis in idem* principle*,* setting the limits of its effectiveness in relation to decisions adopted by the judicial authorities of another Member State. However, subsequent CJEC case law on the implementation and interpretation of art. 54 *et seq* of the CISA (see Level II) has made it necessary to reconsider the scope of this rule. Basically, considering that if the decision, by going into the merits, creates *res judicata* effects, it can be invoked to prevent a new trial[76]. The Commission itself considers that, despite the wording of 4.2 of the Framework Decision, if the judicial authorities had decided to conclude the criminal proceedings due to the offence to which the EAW refers, the grounds for non-execution should not be optional, but mandatory[77].

- **Minors**

Art. 3.3 of the Framework Decision states that if the requested person may not, owing to his age, be held criminally responsible for the acts under the law of the executing State, said state may refuse execution. The precept does not establish being underage as a ground for refusal, but the absence of "criminal responsibility", which may be invoked by specialist youth courts, provided a custodial sentence or a detention order has been issued.

6.5.2 Grounds for optional non-execution

The grounds for optional non-execution are in some cases an expression of the traces of state sovereignty that still remain in punitive matters and it is the area where we find greatest disparity between the different legal systems (see table in Level II).

- **Grounds related to *non bis in idem***

Dual criminality for offences not on the list (art. 4.1 of the Framework Decision).

The posing of the Belgian request for a preliminary ruling in the *Advocaten* case addressed this prickly question of the non-existence of the dual criminality test for

[75] The CJEC has not dealt with this directly, but in the conclusions of the Advocate General RUIZ-JARABO presented on 8-4-2008 in case C-297/07, *Bourquain*, a series of comments are made on the divergent nature of the amnesty and *ne bis in idem*, with a view to reflecting on the implications of the former given "the various guises taken by this exceptional mechanism of mercy in the different legal systems".

[76] CJEC Judgment of 11-2-2003, cases C-187/01 and 385/01, *Gözütok and Brügge;* 10-3-2005, C-469/03, *Miraglia;* 22-12-2008, C-491/07, *Turansky;* 28-9-2006, c-150/05, *Van Straaten;* 28-9-06, c-467/04, *Gasparini;* 17-7-2007, c-288/05, *Kretzinger;* 11-12-2008, C-297/07, *Bourquain,* 9-3-2006, C-436/04, *Van Esbroeck;* 18-7-2007, C-367/05, *Kraaijenbrink;* 1-12-2008, c.388/08, *Leymann and Pustovarov* and preliminary decision 14-7-09, c.261/09, *Mantello.*

[77] SEC(2006)79, of 24.01.2006, p. 11.

the offences on the list, operating simply as optional grounds for the rest of crimes, and was ultimately rejected[78].

Preventing judgment (art. 4.3 of the Framework Decision)

CJEC doctrine seems to grant such decisions preventive effect as grounds for mandatory non-execution and comprises the decision not to bring charges, the conclusion of proceedings or any other final decision that prevents subsequent criminal proceedings being brought for the same acts to which the EAW refers.

Bis in idem of a third country (art. 4.5 of the Framework Decision)

The difference of considering this ground optional as opposed to the *bis in idem* of a Member State resides precisely in the mutual trust between the criminal justice systems of the EU, based on the principle of mutual recognition.

Lis pendens (art. 4.2 of the Framework Decision)

If the requested person has been finally judged by a third State in respect of the same acts where the final decision could have *res judicata* effect. With a view to addressing jurisdictional conflicts, Framework Decision 2009/948/JHA of 30-11 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings was passed.

Statute of limitations in the executing state (art. 4.4 of the Framework Decision)

The acts must fall within the jurisdiction of the executing state under its own criminal law in order to avoid possible abuse. If this occurs in the issuing state the proceedings should have been shelved.

- **Territoriality** (art. 4.7 of the Framework Decision)
  - When the acts are committed in whole or in part in the territory of the executing Member State.
  - When the acts are 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.
- **Requested person staying in, a national or a resident of the executing Member State regarding EAWs for enforcement** (art. 4.6 of the Framework Decision)

[78] The Conclusions of the Spanish Advocate General ultimately followed in the judgment opted to consider that none of the fundamental rights of legality and equality invoked had been infringed. This was on the basis that in such behaviour, the verification was "superfluous because the acts concerned are punished throughout the Member States". Nevertheless, he concluded by recommending that in case of doubt regarding this point, that sections 1 and 4 of Article 2 of the Framework Decision be regarded, as they offer a solution that makes it possible to dispel any doubt regarding the elimination of this principle.

With regard to the general extradition rule of not surrendering nationals (which can be extended to residents), the Framework Decision only envisages one ground for optional non-execution of EAWs aimed at enforcing a sentence under the *aut dedere aut punire* principle. At the same time, art. 5.3 of the Framework Decision imposes the guarantee of return in the case of EAWs for trial. The mere possibility of surrendering nationals has been questioned by the national courts of some countries at a constitutional level (Germany, Poland and Cyprus) and it was one of the biggest obstacles to the implementation of the EAW (see Level II). The aim of this ground was to ensure these persons are returned to an environment which is as close as possible to their usual one –family, friends–, as well as ensuring a quick, easy reinsertion, once they have served their sentence[79].

On the concept of permanent residence, the CJEC[80] affirms that it strengthens the sense of EU citizenship and confirms that these provisions tend to guarantee social reintegration after serving a sentence. It states that a requirement of 5 years' residence can be established in order to consider an EU citizen to have continued residence, but it does not allow the imposition of additional administrative requirements, such as an indefinite residence permit. If the person resides legally in another Member State, he/she may invoke the right to non-discrimination vis-à-vis nationals of that state. As for the residents and inhabitants, it states that these are concepts that are separate from EU law and require a uniform definition[81]. The aim is to allow the judicial authority to grant a particular importance to the possibility of increasing the opportunities for social reinsertion. A requested person is a "resident" of the executing Member State if he/she has established his/her actual residence there and "lives" there when, as a result of a stable period of a certain duration in that Member State, he/she has created links similar in strength to those resulting from residence. In this regard, the authority must perform a global assessment of several elements, in particular the duration, nature and conditions of permanence and family and economic links with the executing state. The failure to stay uninterruptedly or illegal entry may be assessed negatively, but not so the commission of offences or having been in prison. The object of Framework Decision 2008/909 is to establish the rules pursuant to which a Member State, in order to facilitate the reinsertion of a sentenced person, will recognise a judgment and enforce the sentence[82].

[79] Framework Decision 2008/909 expressly sets this as an aim of the mutual recognition of criminal judgments, Article 3.
[80] CJEC Judgment 6-10-2009 (C-123/08), *Wolzenburg.*
[81] CJEC Judgment 17-7-2008 (C-66/08), *Kozłowski.*
[82] The conclusions of the *Rottmann* case of 30-9-09, C-135/08 on the optional power of states to determine who their nationals are in relation to the concept of EU citizenship are interesting. Determining the way in which nationality and

6.5.3 Multiple requests

This situation is regulated by art. 16 of the Framework Decision. It arises when a person is requested by more than one state, either because the offence is subject to the criminal jurisdiction of all of them[83], because the person has committed different offences in different states and as no grounds for non-execution arise in several of them, a conflict or priority in surrender exists. The existence of multiple requests is possible both between EU Member States (multiple EAWs) and between an EAW and an extradition request. What the Framework Decision does not contain are specific instructions as to which should have priority. It is a problem for the executing authority to assess in line with some general guidelines offered: the seriousness and place of the offences, the dates of the requests, and the objective for which surrender is requested (for trial or the enforcement of a sentence already imposed). If there is an extradition request, the applicable treaties will obviously have to be taken into account. There are other circumstances (not cited) that also have an influence, such as the nationality of the person and the probabilities of the state of which he/she is a national agreeing to a future surrender. The same thing happens with the place where the damaging effects were felt or where the majority of the evidence exists. Annex II of the 2004 Eurojust report[84] analyses four situations where multiple EAWs exist and the criteria with greatest weight adopted in each case at the strategic meeting called in Prague.

It is precisely the assistance of Eurojust that is envisaged for resolving conflicts between EAWs. But only in the case of multiple EAWs and not between an EAW and an extradition request, as only EU Member States are members of Eurojust. The different annual reports summarise the cases in which it intervenes and the solution reached.

The European Handbook estimates that if the same country has issued several EAWs regarding the same person, they should not be considered multiple. But there are authorities that do not accept more than one EAW per person from an issuing state.

6.5.4 Grounds for imposing conditions

In this case, the protection of the rights of the requested person acts as a conditioning factor for surrender, not for the decision. Together with the grounds for

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citizenship of the EU is the exclusive competence of States, although it must be exercised while respecting EU law (CJEC Judgment 7-7-1992, c.369/90, *Micheletti*).

[83] Framework Decision 2009/948 envisages greater cooperation the prevention of *non bis in idem*, seeking efficient solutions via direct contacts and the exchange of information as well as the possibility to take recourse to Eurojust if it is competent.

[84] The Eurojust reports are accessible in all languages: http://www.eurojust.europa.eu/press_annual.htm

non-execution due to a possible infringement of these rights, the Framework Decision envisages the possibility of conditioning surrender of the requested person upon the provision of certain guarantees to ensure his/her protection, a well-known mechanism in traditional extradition procedures.

The difference is that, in order to save time in requesting and obtaining them, the same EAW form contains boxes that, in view of art. 5 of the Framework Decision, are common to all Member States and, making clear the circumstances in which the decision was handed down and the type of penalty imposed or envisaged, we can anticipate matters and offer them, explaining what they will consist of. If the guarantee is not provided upon issue, the executing authority may request them subsequently.

- **Absentia** (art. 5.1 of the Framework Decision)

The Framework Decision states unequivocally that said guarantee applies in the event the person has not been informed of the proceedings brought against him/her and has not participated therein, a requirement that belongs to the right to a fair trial, which implies having been summoned in person or notified of the existence of criminal charges, where it cannot be presumed that he/she was probably aware of the proceedings. This conclusion fits in with ECHR case law. Taking into account the different regulations in this area and the problems in demanding and implementing guarantees considered "sufficient" by the executing judicial authority, Framework Decision 2009/299 has been approved with a view to unifying criteria, the Spanish Constitutional Court having raised a question for a preliminary ruling in this regard[85] (see Level II). The guarantee supplied will be sufficient when the executing judicial authority is convinced that the requested person has a right to review in the issuing state. This guarantee may be envisaged in the legislation of said state or be granted on an individual basis by the issuing judicial authority in the EAW and is compatible with the nationality or residence of the person[86]. France has queried before the CJEU whether this provision undermines the principle of non-discrimination.[87]

- **Custodial life sentence or equivalent measures** (art. 5.2 of the Framework Decision).

The life sentence, if envisaged as a penalty, is not uniformly regulated in Member States either. Portugal and Spain, for example, consider it an inhuman

[85] Request for preliminary ruling 28-7-11, c.399, *Melloni*.
[86] Judgment 21-10-2010, c.306/09, IB (Belgian constitutional court).
[87] Referral for a preliminary ruling (31-1-2011, c-42/11, *Lopes Da Silva Jorge*). Queries are raised with regards a national regulation that reserves the faculty to refuse to enforce a EAW where the individual sought is a national in the State of execution, whether the grounds for non-execution outlined in art. 4.6 of the Framework Decision are left to the discretion of the Member States or are compulsory in nature or whether it is a measure that implies discrimination on the basis of nationality.

punishment. In others, an obligatory review is envisaged after a certain period of time. It can also be obligatory for the most serious offences. The ECHR, however, does not establish the possible revision of the same as a requirement for validity. The majority of states envisage the possibility of reprieving a person sentenced to life imprisonment. Among the “equivalent measures” we have those imposed on persons with a mental disorder, the term of duration of which is impossible to determine and depends on the seriousness of the disorder and the threat that it represents for society. The diversity of rules entails a sufficiently broad regulation of the guarantee.

- **Nationality or residence in EAWs for enforcement** (art. 5.3 of the Framework Decision)

EAWs for enforcement do not allow the invocation of nationality or residence as grounds for non-execution. All states can do is condition it and demand the guarantee of return to the executing state where the sentence imposed in the issuing state can be served. The guarantee of return to the executing state is provided after the requested person has been heard in this regard.

In this case, there is no specific box on the EAW form for offering guarantees of return to the executing state for the person surrendered, as it is for the executing authority to decide whether the possible serving of the sentence in its country will help the social reinsertion of the requested person. Section a) however, contains the nationality and residence of the requested person. Even if the European Handbook does not mention it, there is nothing preventing the possible guarantee for the purposes of art. 5.3 of the Framework Decision being transmitted directly to the state of which the person is a national in section f) of the EAW. The concept of residence currently differs from one country to the next. It is the executing state that is in the best position to determine whether or not the requested person resides in its country and has to determine whether demanding a guarantee of return is worthwhile. Moreover, in the majority of cases residence will emerge at the time of arrest and be alleged in the surrender procedure for the first time. According to the Commission’s date, over 1/5 of surrenders are nationals or residents of the executing state. It is precisely in order to resolve problems of return that Framework Decision 2008/909 has been passed (see Level II).

6.6 Surrender

6.6.1 Ordinary surrender

From the point of view of the executing state, the surrender is also coordinated by SIRENE-INTERPOL. If it is finally decided to surrender the requested person, the

surrender must take place within a maximum of 10 days as of the date of the judicial surrender decision, which can be extended for a further 10 days as of the new agreement, but only for causes beyond the control of one of the (issuing or executing) states and following a decision of the judicial authority, explaining the reasons that make it impossible to meet the deadline. On serious humanitarian grounds, the executing judicial authority may suspend surrender, which is postponed until such time as the situation ceases to exist. Together with the requested person, the objects found in his/her possession that constituted evidence or the proceeds of the crime, will also be surrendered.

6.6.2 Conditioned or postponed surrender

This is the case envisaged in art. 24 of the Framework Decision. There is the possibility for the requested person to be the object of criminal charges in the executing state for a different offence or offences to that described in the EAW. In this case, the procedural possibility exists to either make the surrender on a conditional basis, postpone it, guaranteeing respect for the national sovereignty of the executing state and the possibility of giving priority to its competence for criminal matters in relation to the requested person. These hypotheses are only applicable after the decision to enforce the EAW and not while it is pending. If the issuing authority is informed of the intention to postpone surrender, it is possible for it to apply for temporary surrender before the final decision is adopted, although the postponement is usually notified after the decision.

Postponed surrender. The criminal proceedings pending the executing state until the conclusion of which surrender is postponed, must be indicated. But the measures of deprivation of liberty adopted by the EAW cannot be extended for the entire period of postponement and in any event provisional imprisonment is subject to certain maximum limits, which will require a coordinated effort on the part of the authorities involved. What may happen in the executing state itself is that the judicial authority that postpones surrender and the one competent for the pending proceedings are different. If, during the postponement period, the executing state verifies the existence of other criminal proceedings or convictions that were not considered when issuing the decision or if new offences have been committed in the meantime, they will not be included in the postponement, although the proceedings may be brought until surrender is effective. There will be cases in which, after the conditioned surrender has been made, the need for subsequent surrender disappears (e.g. after having appeared at court and been acquitted).

Conditioned surrender. Similar to temporary surrender, it is carried out after a decision agreeing to execute the EAW, with the obligation to return the person to the executing state. It is usually ordered when the case pending in the state looks like being lengthy. It is different from temporary transfer both due to the time at which it is adopted, before or after the decision, and due to the alternative envisaged: the hearing of the person in temporary surrender and postponement in the second. However, there is also the possibility of requesting a Letter Rogatory while surrender has been postponed so that the requested person is heard under other international instruments, even by videoconference. It would represent lower costs than temporary transfer and could lead to the disappearance of the grounds for requesting the surrender of the requested person.

7. Assessment of implementation

In the last quarter of 2009 Eurojust carried out a thorough assessment of all cases closed[88], the majority referred to EAWs, with the Framework Decision being one of the most frequently invoked legal instruments in judicial cooperation. The assessment highlighted that the obstacles to cooperation include insufficient national resources, which affects the poor quality of translations leading internal requests to take priority over foreign ones. The insufficient information sent is also a problem. Among the cultural obstacles, there is ignorance of foreign criminal justice systems (e.g. a formal questioning of the suspect is not necessary for charges to be laid in all countries). The obstacles of a legal nature are clearly related to differences in criminal proceedings and procedural regulations[89]. Nevertheless, the overall assessment of its use was positive and we have witnessed an exponential increase in its use[90].

[88] Eurojust Report of 2009, http://www.eurojust.europa.eu/press_releases/annual_reports/2009/Annual_Report_2009_EN.pdf

[89] In 2009, Eurojust identified the following problems in the practical application of EAWs:
• The nationality of the requested person was considered in a number of cases to be an underlying reason for refusing the execution of an EAW.
• Problems related to proportionality. EAWs were issued for offences that were regarded by the executing Member State as being disproportionate given the minor nature of the offence.
• If the executing Member State considered that the higher sentences likely to be imposed in the issuing Member State were disproportionate, this fostered reluctance to execute EAWs.
• Practical problems related to the speciality rule were identified when the requested person was additionally charged with other crimes after the surrender.
• Obstacles to surrender were also identified when the requested person was serving a sentence in the executing Member State for which he had been convicted in a different Member State.
• Trials *in absentia*. Difficulties arose where a suspect need not be personally aware of the proceedings if legally represented or where it was considered unlikely that the requested person could apply for a retrial.
• Differences in legal systems with respect to life imprisonment.
• Difficulties were encountered in the return of nationals in application of article 5(3) of the EAW FD, not considering the EAW FD as the appropriate legal basis for the return of nationals, and seeking to apply the 1983 Council of Europe Convention on the Transfer of Sentenced Persons.
• Missing information in issued EAWs and requests to supply additional information caused delays in many proceedings.

Yet the improvement in cooperation cannot be achieved at the expense of the rights of the requested person. While there is room for a review of those classic principles of extradition if they are only an expression of the sovereignty of the states and, as such, disposable, those that are related to protecting the requested person's rights cannot be touched. But the increase in use of this instrument by Member States seems unstoppable and as such an effort should be made to ensure application of the same does not infringe citizen's rights.

Santander, 5th of March 2012

• Problems of translation, in particular with respect to crime descriptions and factual circumstances, led on a number of occasions to the breach of time limits for the decision to execute the EAW. Eurojust provided support in the issuing of EAWs in an effort to avoid linguistic misunderstandings and anticipate and satisfy requests for additional information.
• Delays in translations and in the delivery of the original version of the EAW (when required by the law of the executing Member State) led in a number of cases to the release of the arrested person.
• The question of the exact period of detention served by the requested person in the executing Member State after a successful surrender.
• Differences in the legal systems of Member States, in particular between common law and civil law systems.

[90] This impression is supported by the replies to the questionnaire sent in 2009, http://register.consilium.europa.eu/pdf/en/10/st07/st07551-re06.en10.pdf

LEVEL II: TO KNOW MORE

SUMMARY

1. Mutual recognition and fundamental rights

In view of the fact that the extradition procedure was slow and complex and that the Treaty of Amsterdam already explicitly highlighted this subject matter as a sphere for joint action of states by using the framework decision, the Tampere European Council called for the elimination of the formal extradition procedure, to be replaced with a simple transfer of persons, "in compliance with Article 6 TEU" and "without prejudice to the principle of fair trial". Meanwhile, the Programme of measures destined to put into practice the principle of mutual recognition of decisions in criminal matters defined the finality of this principle and designed the framework in which the Community institutions would promote it, which was confirmed and completed by the Commission communication of 19-5-2005[91] and the adoption by the Council of the Action Plan of the Hague Programme[92]. At present, the 2007 Treaty of Lisbon "constitutionally" enshrines the principle of mutual recognition as a basis for Judicial Cooperation in Criminal Matters in the EU by giving a new wording to the TEU[93].

The Framework Decision we are analysing was not the only one issued in application of said principle. It was followed by other initiatives approved, which include the following:

- Framework Decision 2003/577/JHA, of 22 July 2003 on the execution in the European Union of orders freezing property or evidence[94].
- Framework Decision 2005/214/JHA, of 24 February 2005 on the application of the principle of mutual recognition to financial penalties[95].
- Framework Decision 2006/783/JHA, of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders[96] and Framework Decision 2005/212/JHA, of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property[97].
- 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 [98].

[91] Document COM (2005) 195 final, of 19 May.
[92] DO C 53 of 3-3-2005.
[93] Articles 67.3 and 82 TEU.
[94] OJ L 196, 2-8-.2003, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:EN:PDF
[95] OJ L 76, 22- 3-2005, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:076:0016:0030:EN:PDF
[96] OJ L 328, 24-11-2006, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:328:0059:0078:EN:PDF
[97] OJ L 68, 15- 3-2005, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:EN:PDF
[98] OJ L 327, 5-12-2008, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0027:0046:EN:PDF

- Framework Decision 2008/947/JHA, of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [99].
- Framework Decision 2008/977/JHA, of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.[100]
- Framework Decision 2008/978/JHA, of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters[101].
- Framework Decision 2009/315/JHA, of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States[102] and Decision 2009/316/JHA, of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA[103].
- Framework Decision 2009/299/JHA, of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial[104].
- 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 [105].
- Framework Decision 2009/948/JHA, of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [106].
- Directive 2011/99/EU, of 13 of December, on the European protection order[107].

By analysing these instruments we can reduce them to the common characteristics around which they are structured and the new principles of European judicial cooperation based on the principle of mutual recognition:

[99] OJ L 337, 16-12-2008, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:337:0102:0122:EN:PDF
[100] OJ L 350, 30-12 2008, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0060:0071:EN:PDF
[101] OJ L 350, 30-12-2008, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0072:0092:EN:PDF
[102] OJ L 93, 7-4-2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0023:0032:EN:PDF
[103] OJ L 93 7-4-2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0033:0048:EN:PDF
[104] OJ L 81, 27-3-2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:EN:PDF
[105] OJ L 294,11-11-2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:294:0020:0040:EN:PDF
[106] OJ L 328,15-12-2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:328:0042:0047:EN:PDF
[107] OJ L 338, 21-12-2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:338:0002:0018:EN:PDF

- Direct cooperation between judicial authorities by means of the suppression of government intervention.
- Elimination of the principle of dual criminality for a significant number of offences and reduction of the grounds for non-execution to a minimum.
- Creation of a single, simple, brief document that entails a reduction of the formalities and documentation to be sent.
- Reduction of the terms for processing and deciding.
- Inclusion of mechanisms that speed up cooperation and the action of justice.

However, national sovereignty continues to act as a limit to criminal prosecution in each state. The pro-European inertia guiding what is today the CJEU would seem to indicate that Community theses will be favoured over national ones in all those cases where there is a minimum regulatory base in primary legislation[108]. But the existence of different criminal justice systems in turn creates problems regarding the different concepts of the protection of fundamental rights in the EU.

The tension between the principle of mutual recognition and due respect for these rights is materialised in the diversity of transpositions of the Framework Decision we are studying, depending on what aims are considered more important and this affects the Community institutions themselves. The Commission is more inclined to accentuate the former principle, while the need for protection of fundamental rights takes centre stage in the decisions of the CJEU[109], who will soon have to respond to the request for a preliminary ruling of 31-7-09, C-306/09, *IB*[110], on the violation of fundamental rights as grounds for non-execution not expressly contained in Articles 3 and 4 of the Framework Decision. In his conclusions of 6-7-2010, Advocate General Mr. Pedro Cruz Villalón ruled out a strict interpretation of the optional grounds for non-execution under Article 4 of the Framework Decision and the guarantees of Article 5 of the Framework Decision. He highlighted the aims of the Framework Decision include not only mutual recognition but also the protection of fundamental rights and freedoms,

[108] A clear example can be seen in the CJEC Judgment of 13-9-2005, c-176/2003, Commission v Council. It repeats the opinion of CJEC Judgment 23-10-07, c-440/05. Faced with the defence of the Council and the Member States in relation to the considerable importance of Criminal Law for the sovereignty of states, the Plenary Session of the CJEC decided to revoke Framework Decision 2003/80JHA, of 27 January 2003 on the protection of the environment through criminal law because it considered that it invaded areas of Community competence and as such should have been regulated by a Directive. In fact, CJEC Judgment of 3-5-2007, c-303/05, *Advocaten voor de Wereld,* supports the use of the Framework Decision as an instrument for harmonising the surrender of persons.

[109] CJEC Judgment of 3-5-2007 rendered in the matter in question, rejects the infringement of the principle of criminal legality precisely due to the duty to respect the fundamental rights of Article 6 TEU.

[110] Sent by the Belgian Constitutional Court in relation to the discrimination that different treatment for nationals and residents may entail for the purposes of Article 5.3 in relation to Article 4.6 of the Framework Decision.

making express reference to ECHR case law and stressing the new significance of the Charter of Fundamental Rights following the Treaty of Lisbon[111].

However, the Commission is not ignorant of this second objective in relation to fundamental rights. Since the first assessment report based on Article 34 of the Framework Decision[112], and despite classing the instruction of grounds not envisaged by the Framework Decision as "disturbing", it considers that grounds for non-execution consisting of applying the *ne bis in idem* in relation to the CPI, fills a "gap" in the Framework Decision and "it is not an issue". And it expressly makes the following statement: "*A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States (sic); in a system based on mutual trust, such a situation should remain exceptional*"[113].

In any event, the absolute content of the fundamental rights cannot be confused with the protection that the executing state grants to these rights, it should instead be the core inherent in the protection of the dignity of the person as it has universal projection, which should be intimately connected with ECHR case law. This connection between ECHR case law and EU law is expressly made clear in the preamble to Framework Decision 2009/299.

2. Scope

2.1 Spatial scope

While applicable throughout the EU, there are some territories in which the Framework Decision does not apply despite the fact that their foreign affairs are assumed by a Member State, as indicated in Article 31.3 of the Framework Decision[114].

[111] The request for a preliminary ruling submitted by Finland on 25-2-2010, c-105/10, *Gataev and Gataeva* was more profuse. First of all, it raised the relationship between the Directive on refugees and the EAW when the requested person seeks asylum in the executing state and both procedures are pending at the same time. Secondly, it went into the interpretation of Article 1.2 of the Framework Decision and whereas 12 *et seq.* in relation to Article 6.1. TEU and the Charter of Fundamental Rights. Specifically, whether new grounds for non-execution under Articles 3 and 4 of the Framework Decision were allowed, the affect of ECHR case law, the possibility of assessing the value of the content of the judgment and whether it was issued in a fair trial. Unfortunately, Finland withdrew its request which was shelved by a Ruling of 3-4-2010.

[112] Council document no. 6815/05, 1-3-05 [SEC (2005) 257] 23-2-05 http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/EN/EJN656.pdf

[113] CASTILLEJO (text cited in the bibliography) seems to share this opinion. German doctrine and authors such as GONZÁLEZ-CUÉLLAR (text cited in the bibliography) have been more categorical. On the relevance of these rights for understanding the EAW, see the Conclusions in Case C-303/05 and subsequent Judgment of 3-05-07 as well as the Conclusions of Case C-306/09, IB. CJEC Judgment of 3-5-2007, (C- 303/05), *Advocaten voor de Wereld*, highlights the link of the EU with the protection of fundamental rights as resulting from the common constitutional traditions of the Member States and as general principles of Community law.

[114] This precept has been explicitly used by the Netherlands on behalf of the Dutch Antilles or Aruba as indicated by the Commission's second assessment report.

Otherwise, some states have included an Order or Decree in their transposition legislation that specifies the countries with which they apply the EAW, even though in practice it is valid in all Member States[115].

2.2. Temporal scope

The following table shows the validity of the EAW in each Member State, with the shaded lines showing the latest countries to implement it[116].

COUNTRIES		VALIDITY
AT	Austria	01-05-2004 for acts later than 7-8-2002
BE	Belgium	01-01-2004
BG	Bulgaria	01-01-2007
CY	Cyprus	01-05-2004
CZ	Czech Republic	01-11-2004 for acts later than 1-11-2004 for Czech nationals
DE	Germany	23-08-2004
DK	Denmark	01-01-2004
EE	Estonia	01-07-2004
EL	Greece	09-07-2004
ES	Spain	01-01-2004
FI	Finland	01-01-2004
FR	France	13-03-2004 for acts later than 1-11-1993
HU	Hungary	01-05-2004
IE	Ireland	01-01-2004
IT	Italy	14-05-2005 for acts later than 7-8-2002 and EAWs issued after 14-5-2005
LT	Lithuania	01-05-2004
LU	Luxembourg	26-03-2004 for acts later than 7-8-2002
LV	Latvia	30-06-2004
MT	Malta	07-06-2004
NL	Netherlands	12-05-2004
PL	Poland	01-05-2004
PT	Portugal	01-01-2004
RO	Romania	01-01-2007
RU	United Kingdom	01-01-2004
SE	Sweden	01-01-2004
SI	Slovenia	01-05-2004
SK	Slovakia	01-08-2004

2.3 Material scope

The preparation of this list and the minimum penalties was the aspect that involved the hardest negotiations and for that reason it has been configured as a basic element of the Framework Decision which relies on the principle of mutual recognition. Some experiences classed as “scandalous” when some Member States exercised the dual criminality test[117] led the EU to do away with this requirement for a list of 32 categories of offences. Nevertheless, what could have represented overcoming a

[115] Ireland, Malta and the United Kingdom to be precise.
[116] The data is taken from the last official report of the EU, the European Handbook, as the annex to the Commission Report does not contain the latest statements by the Member States.
[117] LÓPEZ (2007) cites the offence of criminal association in France, belonging to the mafia in Italy and belonging to an armed gang in Spain, as well as the refusal by the Belgian Council of State to grant extradition to Spain in 2-1996 for this reason, leading to a specific treatment for this figure in the 1996 Extradition Convention.

historical obstacle to extradition, due to the heterogeneous nature of the categories chosen, ended up grouping conducts with very a different scope and seriousness, and is considered by some authors as a significant step backwards.

It should be remembered that many of these do not correspond exactly to the terms used in the criminal justice legislation in each Member State, meaning that the issuing judicial authority has an unenviable task of integration. Keeping the EU rules in mind may be useful in this regard. While Community law differentiates between *hard law* and *soft law* legal acts depending on whether or not they are binding, the CJEC still considers the latter important and states that they must be taken into account[118], as preliminary to the "consistent interpretation"[119] due to Framework Decisions since *Maria Pupino*. As such, the best way of overcoming mistrust between different criminal justice systems is via harmonisation. The following is an example of definitions of the different types of offence in the following instruments:

- Participation in a criminal organisation: Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union[120] and Framework Decision 2008/841/JHA, of 24 October 2008 on the fight against organised crime[121].
- Terrorism: Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism[122].
- Trafficking in human beings: Framework Decision 2002/629/JHA, of 19 July 2002 on combating trafficking in human beings[123].
- Sexual exploitation of children: Framework Decision 2004/68/JHA, of 22 December 2003 on combating the sexual exploitation of children and child pornography[124].
- Illicit drug trafficking: Framework Decision 2004/757/JHA, of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking[125].

[118] See DELGADO (2007) and CJEC Judgment 13-12-1989, c-322/89, *Grimaldi.*
[119] See CJEC Judgment 13-11-1990, c-106/89, *Marleasing.*
[120] OJ L 351 of 29-12-1998 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:351:0001:0002:EN:PDF
[121] OJ L 300 of 11-12-2008 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:300:0042:0045:EN:PDF
[122] OJ L 330 of 9-12-2008 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0021:0023:EN:PDF
[123] OJ L 203 of 01-08-2002 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:203:0001:0004:EN:PDF
[124] OJ L 13 of 20-01-2004 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:013:0044:0048:EN:PDF
[125] OJ L 335 of 11-11-2004 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:335:0008:0011:EN:PDF
Completed with the Decisions on certain psychotropic or hallucinogenic substances (Decision 2003/847,17-11; 2005/387, 10-5; 2008/206, 3-3, etc.).

- Corruption: Framework Decision 2003/568/JHA, of 22 July 2003 on combating corruption in the private sector[126].
- Laundering the proceeds of crime: Framework Decision 2001/500/JHA, of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime[127].
- Counterfeiting: Framework Decision 2000/383/JHA, of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro[128].
- High-tech offences: Framework Decision 2005/222/JHA, of 24 February 2005 on attacks against information systems[129].
- Environmental offences: Directive 2008/99/EC, of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law[130].
- Aiding illegal entry and residence: Framework Decision 2002/946/JHA, of 28 November 2002 on the strengthening of the penal framework of the conduct defined in Directive 2002/90/EC, of 28 November 2009 defining the facilitation of unauthorised entry, transit and residence[131].
- Racism and xenophobia: Framework Decision 2008/913/JHA, of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law[132].
- Counterfeiting of means of payment: Framework Decision 2001/413/JHA, of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment[133].

With regard to the sentence threshold, for some authors this period refers to the sentence imposed while for other it is the minimum period remaining to be served[134]. In any event, it is necessary to take recourse to the principle of

[126] OJ L 192 of 31-07-2003 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:192:0054:0056:EN:PDF
[127] OJ L 182 of 05-07-2001 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:182:0001:0002:EN:PDF Completed by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OJ L 344 of 28-12-2001; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 209 of 25-11-2005; and Directive 2008/20/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, as regards the implementing powers conferred on the Commission, OJ L 76 of 19-3-2008.
[128] OJ L 140 of 14-06-2000 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:140:0001:0003:EN:PDF
[129] OJ L 69 of 16-03-2005 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:069:0067:0071:EN:PDF
[130] OJ L 328 of 06-12-2008 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0028:0037:EN:PDF
[131] OJ L 328 of 05-12-2002 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:328:0001:0003:EN:PDF
[132] OJ L 328, of 6-12-2008 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:EN:PDF
[133] OJ L 149 of 02-06-2001 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:149:0001:0004:EN:PDF
[134] For the former, see PANDO (text cited in the bibliography at the end); for the latter, SÁNCHEZ in *Emisión...*

proportionality and prevent insignificant sentences being the cause of the high costs involved in a surrender[135]. Currently, the Handbook itself encourages the use of alternative measures to the EAW and, given the legislative differences amongst the Member States, this will be studied by the Council and a referral for a preliminary ruling concerning the requisite of necessity as grounds for opposition is pending[136]

It is worth recalling that in the conclusions to preliminary ruling 303/05, Advocate General Ruiz-Jarabo reserved the complaints regarding the derogation of the dual criminality test for those categories of the list that covered offences that gravely affect legal interests that need special protection in Europe, meaning that the issuing state must punish them with sentence of a certain severity. He literally stated "They are offences where the verification of double criminality is regarded as superfluous because the acts concerned are punished throughout the Member States"[137].

3. Issue of an EAW

3.1 Competent authority

All Member States have notified the Secretariat General of the competent authorities whose information is contained in the respective declarations contained on the Council's website. Denmark stands out as, despite the judicialisation of the process, the issuing authority is still the Minister for Justice. The competent authority tends to be the Ministry for Justice.

3.2 The request

All Member States have incorporated the content of Article 8 according to the Annex to the Commission Report once Malta amended its legislation[138]. As far as

[135] The data on the transposition by the different Member States has been obtained from the Annex to the Commission Report on the implementation of the Framework Decision since 2005 [SEC(2007) 979], http://register.consilium.europa.eu/pdf/en/07/st11/st11788-ad01.en07.pdf. The interpretation of the threshold and transposition of the list has varied depending on the Member State. Belgium stands out as it has expressly excluded abortion and euthanasia. Meanwhile and according to the Commission, practice shows that only a perfunctory examination of the legal classification awarded by the issuing Member State exists.

[136] The referral for a preliminary ruling (26-7-2011, c-396-11, Radu) raises the issue of whether art. 5 and 6 of the ECHR in relation to art. 48 and 52 of the Charter are regulations of primary law, whether the EAW is an interference that must fulfil the requisite of necessity and whether non-compliance or defects of implementation provide grounds for opposition.

[137] Doctrine defends that Article 2, section 2, does not contain types of offences, as the list lacks the characteristic elements of the prosecuted behaviour (Flore, D (2002), «Le mandat d'arrêt européen: première mise en oeuvre d'un nouveau paradigme de la Justice pénale européenne», en *Journal des Tribunaux*, p. 276; and Unger, E.M. (2005), *Schutzlos ausgeliefert? – Der Europäische Haftbefehl,* Frankfurt am Main, p. 100).

[138] United Kingdom, although it has not included all the information on this rule, maintains that in practice the form in the annex to the Framework Decision is used. However, as executing state, it requires prima facie evidence that the person deliberately absented him/herself in order for the search to commence, which may cause problems. In fact, Ireland, Cyprus and the United Kingdom add other requirements to the form that distort the EAW system. If acting as issuing state, the Czech Republic envisages the sending of additional documents in the case of convictions *in absentia* or if

languages are concerned, below is a table of those accepted by the different Member States as declared in their notifications[139].

COUNTRIES		LANGUAGES
AT	Austria	German or another language on a reciprocal basis
BE	Belgium	French, Dutch, German
BG	Bulgaria	Bulgarian
CY	Cyprus	Greek, Turkish, English
CZ	Czech Republic	Czech. It accepts EAWs from Slovakia drafted or translated into Slovak and EAWs in German from Austria
DE	Germany	Applies a reciprocity system
DK	Denmark	Danish, English, Swedish[140]
EE	Estonia	Estonian or English
EL	Greece	Greek
ES	Spain	Spanish. When the EAW is issued by introducing an alert into the SIS, the executing judicial authority will translate it when it is not in Spanish
FI	Finland	Finnish, Swedish, English
FR	France	French[141]
HU	Hungary	Hungarian or a translation into Hungarian. For Member States who do not require only their language, it accepts English, French or German
IE	Ireland	Irish or English, or a language that the Minister for Justice may establish in an order, or a translation into Irish or English
IT	Italy	Italian
LT	Lithuania	Lithuanian, English
LU	Luxembourg	French, German, English
LV	Latvia	Latvian, English
MT	Malta	Maltese, English
NL	Netherlands	Dutch, English or any other official EU language with an English translation
PL	Poland	Polish
PT	Portugal	Portuguese
RO	Romania	Romanian, French and English
RU	United Kingdom	English or an English translation
SE	Sweden	Swedish, Danish, Norwegian, English or a translation in any of these languages
SI	Slovenia	Slovenian and English
SK	Slovakia	Slovak or, by virtue of earlier bilateral agreements, German with Austria, Czech with the Czech Republic and Polish with Poland

3.3 Transmission

There is a general acceptance of the use of Interpol[142], which is considered the main alternative to transmission via the SIS[143]. Attached is a table showing the channels and means of transmission allowed. SIS is not operational in the countries that appear as shadowed and they require the original or a certified copy in any event,

more than 3 years have elapsed between the commission of the offence and the issue of the EAW. Malta also requires additional certificates depending on the nature of the offence as issuing judicial authority.

[139] The data consigned is that obtained from the last official report of the EU, the European Handbook. The shadowed countries accept English always, representing more than half of the Member States, which would make it possible for it to be chosen as one of the languages accepted by all Member States.

[140] Except in urgent cases according to the annex to the latest Commission report.

[141] The issuing authority will have to send additional information within 10 days.

[142] Of the states in which SIS is not operational, 7 allow direct transmission between judicial authorities: Czech Republic, Cyprus, Latvia, Lithuania, Poland, Slovenia and Slovakia. Another 5 do not authorise it if the whereabouts of the person is known, namely Estonia, Ireland, Hungary, Malta and the United Kingdom.

[143] The version of the system currently used is called SIS1+. In the last expansion of the SIS, aimed at including all the Member States that joined the EU (except for Cyprus) and Switzerland, respectively, the SISone4ALL application was used as a basis for their respective N.SIS. When the second generation SIS comes on line (SIS II) which will finally include Cyprus, the United Kingdom and Ireland, the original EAW will be scanned and introduced into the system, thus becoming immediately available.

in this case according to the information supplied by the French Minister for Justice in late 2009.

COUNTRIES		TRANSMISSION CHANNEL	MEANS ACCEPTED
AT	Austria	S.I.S.	Original not always required. Fax or email sufficient
BE	Belgium	S.I.S.	Original or certified copy. Fax or email (case-by-case)
BG	Bulgaria	Interpol	Original usually necessary. Fax or email may be sufficient
CY	Cyprus	Interpol	Original or certified copy
CZ	Czech Republic	S.I.S.	The procedure can start with a faxed EAW but the original is required
DE	Germany	S.I.S.	Original not always required. Fax or email sufficient
DK	Denmark	S.I.S.	Original not always required. Fax or email sufficient
EE	Estonia	S.I.S.	Original or certified copy required after arrest
EL	Greece	S.I.S.	Original not always required. Fax or email sufficient
ES	Spain	S.I.S.	Original not always required. Fax or email sufficient
FI	Finland	S.I.S.	Original not always required. Fax or email sufficient
FR	France	S.I.S.	Original or certified copy
HU	Hungary	S.I.S.	Original not always required. Fax or email sufficient
IE	Ireland	Interpol	Original not always required. Fax or email sufficient
IT	Italy	S.I.S.	Not email, but fax with transmission of the EAW is accepted
LT	Lithuania	S.I.S.	Original or certified copy
LU	Luxembourg	S.I.S.	Although it specifies original or certified copy, in practice faxes or email are accepted due to their authenticity
LV	Latvia	S.I.S.	Original not always required. Fax or email sufficient
MT	Malta	S.I.S.	Original not always required. Fax or email sufficient
NL	Netherlands	S.I.S.	Original or certified copy
PL	Poland	S.I.S.	Original or certified copy
PT	Portugal	S.I.S.	Original not always required. Fax or email sufficient
RO	Romania	Interpol	Original not always required. Fax or email sufficient
RU	United Kingdom	Interpol	Original not always required. Fax or email sufficient [144]
SE	Sweden	S.I.S.	Original or certified copy
SI	Slovenia	S.I.S.	Original or certified copy
SK	Slovakia	S.I.S.	Original not always required. Fax or email sufficient

As for the data on the term for sending the EAW after arrest has taken place, the different official sources do not agree[145]. In practice it is advisable to observe the requirement established in the first communication.

COUNTRIES		TERMS[146]
AT	Austria	40 days
BE	Belgium	10 days
BG	Bulgaria	24 hours[147]
CY	Cyprus	3 days, if the EAW was issued prior to arrest
CZ	Czech Republic	40 days
DE	Germany	40 days
DK	Denmark	As soon as possible (the legislation on extradition states, where possible, in the 10 days following the date of arrest or consent to be extradited)[148]

[144] Until the decision of the House of Lords in *Dabas v. High Court of Madrid*, *(2007) 06 UKHL*, the Serious Organised Crime Agency was responsible for the certification of the EAW as an independent document. As of then, the EAW is sufficient and a separate document is not required.

[145] The divergence is due to the failure to supply official data in the different communications made to the Secretariat General of the Council, meaning that the replies depend on the interpretation of the internal rules by the different parties that apply the law, mainly in the case of a gap in the transposition law.

[146] Calendar days unless stated otherwise.

[147] According to the Commission report, the term is 7 days after arrest.

[148] According to the Commission report receipt of the EAW is not necessary if the information of the SIS alert is sufficient.

EE	Estonia	3 working days
EL	Greece	15 days, extendable to 30 days
ES	Spain	Spanish legislation does not establish a term for the receipt of the original of the EAW. Nevertheless, the executing judicial authorities ask that the EAW be received as soon as possible and, in any event, within 10 days of arrest of the person
FI	Finland	As soon as possible or, if requested, within the terms set by the competent Finnish executing authority; nevertheless, it does not make it obligatory to present an EAW when an EAW request has already been included in the SIS alert
FR	France	6 working days
HU	Hungary	40 days
IE	Ireland	The requested person is arrested once the EAW has been received and the High Court has approved it. When the SIS is applicable to Ireland, a term of 7 days will be set
IT	Italy	10 days
LT	Lithuania	48 hours after arrest of the person
LU	Luxembourg	6 working days
LV	Latvia	48 hours[149]
MT	Malta	If there is a description in the SIS, it will be equivalent to an EAW and the judicial authority may set the term for receipt of the form. Otherwise, the arrest may be made on the basis of a preventive arrest warrant with 48 hours for the EAW to be received, only in exceptional circumstances
NL	Netherlands	With regard to the Member States that participate in the SIS: a maximum of 23 days after arrest, when due to an SIS alert. With regard to the Member States who do not participate in the SIS, the ODE must be received as soon as possible
PL	Poland	48 hours
PT	Portugal	At the discretion of the jurisdictional body; generally speaking, 10 days
RO	Romania	48 hours after arrest of the person with the participation of the public prosecutor's office, the arrested person's lawyer and, if necessary, an interpreter, in accordance with the Romanian law of criminal procedure
RU	United Kingdom	48 hours as of provisional arrest; provisional arrest may only be used in exceptional circumstances; the EAW must be presented when requested or the person will be released
SE	Sweden	As soon as possible (a few days, as decided by the prosecutor)
SI	Slovenia	10 days [150]
SK	Slovakia	18 days as of arrest of the person, for receipt of the original EAW and a translation. If not received, the prosecutor may ask the judge to release the person, when appropriate; if the documents are not received within 40 days, release of the person is obligatory[151]

3.4 Action pending the decision

3.4.1 Additional information

We also find diversity here when it comes to setting a term for supplying information and the consequences thereof[152]. The 2008 Eurojust Report[153] states that the main reason cited by the Member States for non-execution of the EAW by the corresponding deadline set out in Article 17 of the Framework Decision, the fact that the issuing authority was asked to supply additional information, and this process (receipt of the request, obtaining the information contained in the files and the corresponding translation) delayed proceedings even more. The provision of guarantees for the purposes of Article 5 of the Framework Decision is one of the main

[149] According to the Commission report the term is 72 hours.
[150] According to the Commission report the term is 20 days. Despite a new declaration sent to the Secretariat General, Council document no. 13636/08, 3-10-08, this aspect is not dealt with.
http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/EN/EJN747.pdf
[151] According to the Commission report, a copy of the EAW, including the fax, should be sent in 48 hours with a translation, even if provisional.
[152] The following do not process the EAW or release the person if the information is not received on time or the EAW is incomplete: Germany, Spain, Italy, Lithuania, Portugal, Slovakia and Sweden. Cyprus and Romania return incomplete EAWs and almost systematically demand a new one.
[153] The Eurojust reports are accessible in all languages: http://www.eurojust.europa.eu/press_annual.htm

causes for requesting the same. For that reason it is advisable to offer as much information as possible in box f) when issuing an EAW.

3.4.2 Authorisations

With regard to immunities and privileges, it is important to recall that the ECHR has considered the possible violation of the victim's right to access via judicial channels if the immunity is not lifted[154]. CJEC Judgment 15-10-2008 (T-3345/05), *Mote*, deals with the theme of the privileges and immunities of a member of the European Parliament affirming that they are exclusively of a functional nature, to prevent obstacles to the functioning and independence of the institutions of the EU, creating a subjective right in favour of the persons to whom it applies. But it does not prevent the suspension of the immunity that removes this protection[155].

3.4.3 Hearing and temporary transfer

Articles 18 and 19 have been incorporated in varying forms, ranging from the absence of any apparent implementation (initially in Malta) to the inclusion via practical use, as in Denmark[156]. Several countries do not consider further transposition necessary, viewing the European Convention on Judicial Assistance in Criminal Matters of 1959 as sufficient, which will entail the intervention of the competent authority and the invocation of other grounds for opposition.

3.5 Decision

The essential elements of Article 23 of the Framework Decision have been included in virtually all Member States, albeit countries such as Ireland are having problems meeting the deadlines.

3.6 Effects of surrender

3.6.1 Principle of speciality

To date, the CJEC Judgment of 1-12-2008 (C-388/08), *Leymann and Pustovaro* issued a decision on this concept allowing the accusation and prosecution if no detention order was adopted[157]. The judgment of the CJEU of the 16-11-2010 (C-

[154] Judgment of the ECHR 3-6-2004, no. 73936/01, *Jorio v. Italy* considered that the claimant was not entitled to defend its right to protect his reputation if whoever slandered him enjoyed parliamentary immunity. This is a safeguard against the prosecution of public representatives on political grounds, a legitimate aim (ECHR Judgment 17-12-2002, no.35373/1997, *A v. United Kingdom*), but not a shield against actions taking place outside of the context of politics and regarding personal relationships (ECHR Judgment 30-1-2003, no. 40877/1998, *Cordova v. Italy*)

[155] Ireland, Italy and Sweden establish it as a ground for obligatory non-execution.

[156] Luxembourg, Austria, Poland and Sweden only envisage the hearing, not temporary transfer.

[157] But it allows deprivation of liberty by virtue of the initial EAW. 'Different offence' is understood as having the same elements constituting the criminal classification.

261/09), *Mantello,* determined that the concept of "same acts", for the purposes of Article 3.2 of the Framework Decision, is an autonomous concept of the EU, with possible influence on this principle of speciality. Only Estonia and Austria have declared that in their mutual relations the waiver of the principle of speciality will be assumed, while Romania applies it with the Member States that have made the same notification[158].

3.6.2 Subsequent surrender

Unlike the previous case, no Member State has appealed the presumption of consent on the basis of Article 28.1 of the Framework Decision[159].

4. Execution of an EAW

4.1 Competent authority

In order to ascertain what the competent authority for execution in a particular country is, the safest way is by using the Atlas on the EJN website[160]. Nevertheless, below is a table illustrating the diversity of authorities involved according to the different declarations. It is worth highlighting that Denmark has designated the Justice Ministry as both issuing and executing judicial authority, giving the executive the power of taking the final decision[161].

COUNTRY		EXECUTING JUDICIAL AUTHORITY	COMPETENT AUTHORITY
AT	Austria	Prosecutors of the District Courts corresponding to domicile or custody; otherwise, the place of arrest. Otherwise, Vienna	Federal Justice (competent for transit) and Home Affairs Ministry: Directorate General for Public Security and Federal Department of Criminal Investigation)
BE	Belgium	Examining magistrate and Council Chamber (*Chambre du Conseil*)	Federal Public Justice Service (Justice Ministry). Receipt in transit
BG	Bulgaria	District courts	Justice Ministry. Receipt in transit
CY	Cyprus	Judge of the District Court. Nicosia, if whereabouts are unknown. Receipt by competent authority	Justice and Public Order Ministry. Receipt in transit
CZ	Czech Republic	Prague regional and municipal prosecutors, Prague Municipal Court. Receipt by Prague regional and municipal prosecutors	Justice Ministry, State Prosecutor's Office and Chief of Police. Receipt in transit by Supreme Court
DE	Germany	Prosecutors of 2nd instance Courts (*Oberlandesgerichte*) in general. Competent for transit	Federal and *Länder* Justice Ministry. Competence depends on the *Land*

[158] Meanwhile, Malta and the United Kingdom maintain a more restrictive legislation than the Framework Decision by allowing refusal of surrender in the absence of agreement with the issuing Member State and doing away with other scenarios where the principle is not applicable. Otherwise, the transposition of each and every one of the exceptions to the principle is not homogenous.

[159] Transposition has also been uneven in this respect. As far as subsequent extradition contemplated in the last paragraph of the precept is concerned, Estonia and Lithuania allow it without the permission of the original executing state.

[160] http://www.ejn-crimjust.europa.eu/ejn/EJN_EAWAtlas.aspx

[161] Nevertheless, while the powers of arrest correspond to the police forces, the requested person is entitled to judicial review of the surrender decision before a court as part of the guarantee function within three days. The Ministry is not bound by the request from the prosecutor's office, which cannot appeal the decision to refuse surrender. The issue is prepared by the prosecutor who attends Court in cases of arrest *in absentia,* and is finally approved by the Ministry.

DK	Denmark	Justice Ministry	Justice Ministry
EE	Estonia	Court of 1st instance of Tallin and Tartu. Receipt competent authority	Justice Ministry. Receipt in transit. Competent for surrender timeframes
EL	Greece	Chief Judge of the Appeal Court, if consent is granted, Judicial Council of the Court of Appeal in the absence of consent. Receipt: Prosecutor of the Appeal Court where arrested (otherwise, Athens, competent for transit)	Justice Ministry
ES	Spain	Central Criminal Courts (receipt) and National Court (*Audiencia Nacional*)	Justice Ministry. Receipt in transit
FI	Finland	District Courts of Helsinki, Kuopio, Oulu and Tampere. Receipt by district prosecutors	Justice Ministry (receipt in transit) or SIRENE Office. Both may also receive the EAW
FR	France	General Prosecutors (*Procureur General*) and examining bodies	Justice Ministry. Receipt in transit transmission of immunities and privileges
HU	Hungary	Court of Budapest. Receipt by competent authority	Justice Ministry. Receipt in transit
IE	Ireland	High Court. Receipt of translation by AC	Department of Justice, Equality and Legislative Reform or designated person. Receipt in transit. Competent for surrender timeframes
IT	Italy	Territorial appeal courts (subsidiary to Rome). Receipt: Justice Ministry or the Court itself	Justice Ministry. Competent for correspondence and transit
LT	Lithuania	Prosecutor General and Court of the province of Vilnius. Office of the Judicial Police in case of urgency	Prosecutor General
LU	Luxembourg	Prosecutor's office, Examining Magistrate and Council Chamber before the Court of 1st instance. Appellable	*Procureur Général d'Etat*. Receipt in transit
LV	Latvia	Office of the Prosecutor General	Office of the Prosecutor General
MT	Malta	Court of Committal	The Office of the Attorney General: granting of consent. Commissioner of Police and Principal Immigration Officer: receipt in transit
NL	Netherlands	District prosecutor, Examining Magistrate and Amsterdam Court (*Officier van justitie, rechter-commissaris and rechtbank d'Amsterdam*). Contact: the prosecutor. SIRENE Office outside office hours	District prosecutor, Examining Magistrate and Amsterdam Court (*Officier van justitie, rechter-commissaris* and *rechtbank d'Amsterdam*). Contact: the prosecutor. SIRENE Office outside office hours
PL	Poland	Circuit Court. Receipt by Circuit prosecutor or the competent authority	Justice Ministry-Fiscal General. Receipt in transit
PT	Portugal	Territorial Courts (*Tribunal de Relaçao*). Receipt: Prosecutor of the Tribunal de Relaçao or Public Prosecutor's Office	Justice Ministry-Fiscal General. Receipt in transit
RO	Romania	Courts of appeal. By default that of Bucharest and the Justice Ministry, of whereabouts are unknown or if sent directly	Justice Ministry. Receipt and transit
RU	United Kingdom	England and Wales: District Judge. Scotland Court of 1st Instance of Lothian y Borders (sheriff). Northern Ireland: County Court Judge	Scotland: Scottish Crown Office. Rest: National Criminal Intelligence Service. Receipt in transit
SE	Sweden	Ordinary Prosecutors and Courts. Receipt: Prosecutor appointed by the Public Prosecutor's Office (assisted by the Police)	Justice Ministry (may help with correspondence). National Police Directorate: receipt in transit
SI	Slovenia	Regional courts	Not designated but the Justice Ministry provides support. Receipt in transit
SK	Slovakia	Prosecutors and regional courts of the place of arrest	Justice Ministry. Receipt in transit

4.2 Initial action: rights of the requested person

All the Member States have incorporated or already regulated the rights of Article 11 of the Framework Decision as well as the possibility of releasing the person under Article 12, although some, such as Poland, do not contemplate measures to prevent escape. The right to a hearing in Article 14 of the Framework Decision does not raise problems either, although Denmark only envisages a hearing in the case of

an appeal filed by the requested person against the decision of the Justice Ministry designated as judicial authority.

4.3 Procedure

All the legislations contain the dual procedural channels depending on whether or not the surrender is consented to pursuant to Article 13 of the Framework Decision, although some, like France and Slovakia, only allow a waiver of the principle of speciality when the person has consented to surrender. Belgium, Malta, the Netherlands, Austria and the United Kingdom have regulated it in such a way that when the surrender is consented to, the waiver of the principle of speciality is automatic.

Consent is irrevocable in all Member States except Belgium, Denmark, Ireland, Lithuania, Finland and Sweden, while Austria and Poland allow appeals after consent has been given.

4.4 Actions pending the decision

While all Member States permit requests for supplementary information, the annex to the Commission's report highlights how it is automatically requested in the cases of Italy and Ireland.

4.5 Decision

The absence of a sanction for failing to meet the deadline set out in the Framework Decision means that defects in the legislations that incorporated the decision timeframes envisaged in Article 17 of the Framework Decision are difficult to resolve. Difficulties do not arise when the procedure has been followed with the requested person consenting to surrender[162]. The annex updating the Commission Report refers to an average oscillation of between one year and 43 days, when the surrender is ordered without consent, and 11 days if consented to (except for Ireland and the United Kingdom who have longer terms for surrender). Eurojust is not always informed of such non-compliance.

4.5.1 Grounds for mandatory non-execution

Although the majority transpose the different scenarios under Article 3 of the Framework Decision, the noteworthy aspect is the incorporation of new grounds for mandatory non-execution. Some are the result of the mechanism for including the

[162] The Belgian "Conseil d'Etat" has considered that the use of an appeal cannot be considered one of the "specific cases" for the purposes of the extension under Article 17.4 of the Framework Decision.

optional grounds under Article 4 of the Framework Decision or based on fundamental rights. Others are related to the guarantees under Article 5 of the Framework Decision.

- **Protection of fundamental rights**

For some, there is no real danger of rights violations in the EU due to the way they are guaranteed in the different legal systems. But the judgments of the ECHR in the *Soering*, 7-7-1989, no. 14038/88, and *Einhorn*, 16-10-2001 no. 71555/01 cases give rise to this interpretation, meaning that the Member States, as subject to the European Convention on Human Rights, cannot execute surrender when there is a possibility such rights may be violated, with the scope granted to them by this Court and provided there is a genuine possibility of violation, which would represent an exception in the EU. For that reason some Member States have established this as a ground for non-execution[163].

- **Amnesty[164]**

The conclusions of Advocate General RUIZ-JARABO in the *Bourquain* case C-297/07, 8-4-2008 are illustrative. According to these conclusions, the 2nd Protocol of the Geneva Convention likens amnesty to a feeling of pacification and reconciliation, following periods of upheaval involving violent clashes within a community. This "collection of measures for granting clemency, which is inconsistent in the disparity of the ideas it brings together but consistent in respect of the objectives it serves", clearly shows a political will, supported by principles of expediency whose roots lie in the sovereignty of States, as an expression of the management of their own conflicts. "Mutual trust should not shelter, under the Community *ne bis in idem* principle, instances of non-enforcement of a penalty brought about by the exercise of these exorbitant national powers, since mutual recognition then ceases to operate in the sphere of the judicial application of the law and follows a different course, driven by winds with a strong sociological and political component". He recognises that it is not by chance that the Framework Decision on the European arrest warrant gives amnesty as a ground for mandatory non-execution, where that State had jurisdiction to prosecute the offence under its own criminal law. "From the perspective of human rights, amnesty likewise cannot be used to justify non-enforcement of the penalty by application of the *ne bis in idem* principle, since, apart from the fact that it may become

[163] Estonia applies the criteria of proportionality to reach a decision on surrender; Italy introduces grounds that do not even appear in the Framework Decision, similar to an examination based on the merits. It is refused in the case of a threat of violation of fundamental rights by one form or another in Denmark, Lithuania, the Netherlands, Poland, Portugal, the United Kingdom ... The opposition that may be exercised on grounds of national security is more problematic as it represents a *de facto* transfer of the power of decision to the executive.

[164] Even though the majority of Member States contemplate this mandatory ground, the Netherlands and the United Kingdom have not included it, while Ireland refers it to the amnesty or clemency in the issuing Member State at the place of execution, which they have justified on grounds of their procedural peculiarities.

an instrument endangering the implementation of those rights, two different dimensions are again observed: its basic inspiration does not flow from the values enshrined in the fundamental rights and, at the same time, it acts according to parameters which are so broad and random that they transcend the traditional ones of judicial rationality, limiting the opportunity for judicial review"[165].

- ***Non bis in idem***

In Level I we already alluded to the profuse case law of the CJEU in this regard. The CJEC Judgment of 11-2-2003, cases C-187/01 and 385/01, *Gözütok and Brügge*, applies it to discontinuance of criminal proceedings in which the public prosecutor goes into the merits of the case, such as when the shelving of criminal proceedings is ordered after the imposition of obligations, without the intervention of a jurisdictional body, considering in this case that the sanction has been "enforced". On the other hand, if it does not go into the merits, the principle is not applied. This occurs in CJEC Judgment 10-3-2005, C-469/03, *Miraglia,* as the shelving was the result of the decision of the public prosecutor not to continue with the criminal action as criminal proceedings had already commenced in another Member State against the same person and for the same deeds. CJEC Judgment 22-12-2008, C-491/07, *Turansky*, despite examining the merits of the case, orders the shelving, in a stage prior to conviction, without this representing the conclusion of the public prosecution and leaving the door open for new criminal proceedings to be brought. In relation to final judgments, CJEC Judgment 28-9-2006, c-150/05, *Van Straaten* confirms their applicability in the case of acquittal, even if the result of expiry of time limits, as in the case of CJEC Judgment 28-9-06, c-467/04, *Gasparini*. As both the CISA and the Framework Decision exclude enforceable convictions when enforcement has not yet begun, the Court has also issued decisions on the scope of the concept of enforcement. CJEC Judgment 17-7-2007, c-288/05, *Kretzinger* considers that the sanction imposed "has been enforced" or "is being enforced" when the sentence has been suspended; but does not cover provisional detention prior to conviction despite the fact that it counts for the purposes of the sentence ultimately imposed. CJEC Judgment 11-12-2008, C-297/07, *Bourquain* considers that a penalty "can no longer be enforced" even when the non-enforcement is due to the expiry of a limitation period for the same, and the judgment can be

[165] Meanwhile, the conclusions of Advocate General PAOLO MENGOZZI presented on 1-6-2010 in joined cases C-57/09 and C-101/09, case *B,* (on the recognition and status of third country nationals or stateless persons as refugees and the exclusion clauses in relation to Directive 2004/83/EC), recognises *obiter dicta* how the UN Agency for refugees (ACNUR) has stated that in the event the applicant, convicted of a standard serious offence, has been given an amnesty or pardon, it will be assumed that the exclusion clause set out in Article 1.F.b), of the 1951 Convention will not apply, "unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates" due to the danger he represents for society. This applies especially to particularly brutal crimes or acts.

invoked even when the deeds are no longer punishable having been the object of an amnesty and having become final at the time the second proceedings commenced, as the person was already tried *in absentia*. Finally, and for the purposes of invoking this principle, it is sufficient for its regulatory instrument to be in force at the time of the assessment, even if it was not at the time the decision was issued (CJEC Judgment 9-3-2006, C-436/04, *Van Esbroeck*).

The Court of Justice has also issued decisions on the "identity of material acts" for the purposes of the application of the *bis in idem* principle. CJEC Judgment of 9-3-2006, C-436/04, *Van Esbroeck* affirms that this identity consists of a set of facts which are inextricably linked together in time, in space and by their subject-matter, regardless of their legal classification and of the protected legal interests[166]. The punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the Convention are, in principle, to be regarded as 'the same acts', the definitive assessment in that respect being the task of the competent national judge. This doctrine is repeated in subsequent decisions, CJEC Judgments 28-9-2006, c-150/05, *Van Straaten*, 28-9-06, c-467/04, *Gasparini* and 17-7-2007, c-288/05, *Kretzinger* thus extending it to cover sale and transport after importation if this was the intention from the start. But the fact that the deeds are related due to the same criminal intent would not be sufficient according to CJEC Judgment 18-7-2007, C-367/05, *Kraaijenbrink*. The *Van Straaten* Judgment also states that the quantities of the drug that are at issue or the persons alleged to have been party to the acts in the two States are not required to be identical for there to be an identity of acts. But this ground for opposition obviously does not apply to persons other than those that have been the subject of a final decision (*Gasparini).*

Indeed and in relation to the interpretation of the Framework Decision, CJEC Judgment 1-12-2008, c-388/08, *Leymann and Pustovarov* states that it will be a case of "same acts" if the elements that constitute the offence are maintained, even if there has been a change of the circumstances of time and place and of the class of narcotic[167]. A request for a preliminary ruling was made on 14-7-09, c-261/09, *Mantello* regarding the scope of this identity for the purposes of Article 3.2 of the Framework Decision;

[166] In this judgment the content of Article 71 of the CISA comes into play, in relation to Article 36.2.A).i of the Single Convention of the United Nations on Narcotic Drugs of 1961 and Article 22.2.a)i of the Convention on psychotropic substances of 1971. Subject to the constitutional limitations of a Party, its legal system and domestic law, each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence (the former); if a series of related actions constituting offences under paragraph 1 has been committed in different countries, each of them shall be treated as a distinct offence (the latter).

[167] In some legal systems, such as the Spanish one, the criminality of the offence depends on the substance.

whether it should be assessed in the issuing state, the executing one, or whether it is an autonomous concept.

- **Minors**

As far as the Commission is concerned, this aspect has been correctly implemented in all Member States.

4.5.2 Grounds for optional non-execution

Many Member States have interpreted this article as an option for the legislature, others have not transposed it because it is optional and others delegate the power of decision to the judicial authority. For that reason the application of this article becomes quite a mosaic which is demonstrated by the table below.

Due to the problems it has created, it is worth mentioning the ground of optional non-execution envisaged in Article 4.6 of the Framework Decision for EAWs for enforcement and the parallel guarantee of return in Article 5.3, both of which are designed to be fulfilled in the country of origin or residence in order to facilitate reinsertion. We have already mentioned that the possibility of surrendering nationals has been questioned by the national courts of some countries at a constitutional level. Some, like Portugal and Slovenia, have adopted constitutional amendments in order to adapt to the obligation to surrender their nationals by virtue of an EAW. Some complaints, such as those of Greece and the Czech Republic, were ultimately dismissed[168]. However, in three countries, Germany, Cyprus and Poland, the Constitutional Court rendered a negative decision[169].

The Trybunał Konstytucyjny (Polish Constitutional Court), in a judgment of 27-4-2005, concluded that Article 607t § 1 of its Code of Criminal Procedure, amended by a Law of 2004, by allowing the surrender of nationals, was incompatible with Article 55(1) of the Constitution, and granted a term of 18 months for amending the latter. The Constitutional Amendment was directly applicable on 7-11-2006, but only for acts committed outside Poland and that constituted crimes under Polish law.

Barely three months later, on similar grounds, the German Bundesverfassungsgericht (the Federal Constitutional Court) issued a similar judgment in relation to its transposition legislation (Judgment 18-7-2005, Darkanzali) which

[168] Decision no. 591/2005 of the Greek Supreme Court and judgment no. 66/04 of the Ústavní soud (the Czech Constitutional Court), dated 3-5-2006.

[169] Conclusions of 12-9-2006 prior to the CJEC Judgment of 3-5-2007 (C-303/05), Advocaten voor de Wereld. This can also be seen in the Study on the implementation of the EAW and joint investigation teams requested by the Parliament and carried out by the European Centre for Judges and Lawyers of the European Institute of Public Administration. http://www.ecba.org/extdocserv/projects/EAW/Study_EAW_JointInvestigationTeams_EN.pdf and in the Commission reports available on the website of the Council of the EU.

infringed Articles 16.2 and 19.4 of its Basic Law, although on this occasion the declaration of unconstitutionality affected the entire Law[170]. This decision was the result of a request from Spain for surrender of a German citizen for prosecution, providing sufficient guarantees of return, when extradition of this person had already been refused on these grounds and in relation to acts that were only punishable in Germany after they had been committed in Germany. In this case there was a return, once again, to the system of extradition while a new reform was being drafted and this led to a reaction on the part of some countries, such as Spain and Hungary, who applied the principle of reciprocity vis-à-vis Germany, returning to the extradition system between 18-7-2005 and 2-8-2006, the date on which the new law entered into force.

The Cypriot Supreme Court came to an identical conclusion (Supreme Court Judgment 7-11-2005, case 294/2005) in relation to a person with dual British and Cypriot nationality, requested by the United Kingdom, considering that Article 11 of its Constitution ruled out the extradition of nationals and that the Framework Decision did not have direct effect, despite the explicit reference to the *Pupino* case of the CJEC. The amendment of Article 11 entered into force on 28-7-2006 but is only applied to acts omitted after the date it joined the EU (1-5-2004).

Article 4 of the Framework Decision	Optional grounds	Mandatory grounds
4.1 1st point	BG, DK, DE, EL, ES, PL, PT, RO, RU	BE, CZ, FR, IE, IT, LT, LU, HU, MT, NL, AT,SI, SK, FI, SE
4.2	BE, BG, DK, DE, EE, EL (for non-nationals), ES, FR, IE (if prosecution is considered), CY, LV, LT, LU, PL, PT, SI (when not obligatory), FI, RO, RU	CZ, EL (for nationals), IT, HU, MT, NL, AT, SI (offences against nationals or Slovenia), SK, SE
4.3 1st point	BE, BG, DK, DE, EE, EL, ES, FR, CY, LV, LT, LU, PL, PT, RO, SI, FI	IE, HU, NL, AT (with some exceptions for foreigners), SE, SK
4.3 2nd point	BE, BG, DK, DE, EE, EL, ES, FR, CY, LV, LT, LU, PL, PT, RO, SK, FI.	CZ, IE, HU, NL, AT (with some exceptions for foreigners), SI
4.3. 3rd point	BG, DE, EE, EL, ES, CY, LU, PT, SK, FI, RO	BE, CZ, IE, IT, HU, NL, AT (with some exceptions for foreigners), SI (only if the decision is by SI), SK (with exceptions), SE
4.4	BG, DK, DE, EE, ES, CY, LU, PL, PT, RO, FI	BE, CZ, EL, FR, IE, IT, LT, HU, MT, NL, AT, SI, SK, SE, RU
4.5	BE, BG, DK, EE, EL, ES, CY, LU, FI, RO	CZ, FR, IE, LT, HU, MT, NL, AT,PL, SI,

[170] In 5-2002, around 90 prestigious German criminal lawyers signed a manifesto entitled "Stance of German Professors of criminal law in relation to the "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor"". Subsequently, in 6-2003 a larger number signed another document entitled "Thesis on the "Europeanisation of criminal prosecution by means of the principle of mutual recognition"" and that concluded by urging disobedience in relation to the EU bodies. In this regard, see GÓMEZ-JARA (text cited in the bibliography). A reading of the judgment and the individual votes, handed down precisely in an EAW processed by Central Criminal Court no. 5 of the national authority against a German and Syrian citizen, accused of belonging to an armed gang, organisation or terrorist group (Article 516.2 in relation to Article 515.2 of the Criminal Code) when the German judicial authorities had commenced proceedings on suspicion of belonging to a terrorist organisation (§ 129 *a* of the German criminal code *--StGB--)* and money laundering (§ 261 *StGB),* showed how forced the decision avoiding offering any kind of solutions was, recalling the old mistrust of Germany towards the EU institutions and the rest of European legal systems. As RUIZ-JARABO rightly points out in his conclusions, a repeat of past disagreements can perhaps be avoided by granting greater protection to fundamental rights on three different yet coextensive planes: national, Council of Europe and European Union, with identical values.

		SK, SE, RU
4.6	For nationals: ES, FR. For residents: EL, CY, IT, LU, PL. For nationals and residents: BE, DK, PT, SI, FI, BG, RO	For nationals: EE, HU, LT, AT (if surrender is consented), LV, SI (for nationals who consent to enforcement in SI) For nationals and residents: CZ, DE (if surrender is consented), PL (including asylum seekers) Other conditions: NL (with an offer to enforce the judgment), SE (if there are strong ties with the issuing state)
4.7.a	BE, BG, ES, FR, CY, LV, LT, LU, HU, NL, PL, PT, RO, SI, FI	EL, IE (if proceedings have commenced in IE), IT, MT, AT (for nationals), SK, RU, y en parte en DK y SE
4.7.b	BE, BG, EE, ES, FR, CY, LV, LU, NL, PT, RO, SI, FI	DK, EL, IE (in practice), IT, LT, MT, NT, AT (for nationals), SK, RU (if the conduct is punished with 12 months in RU)

4.5.3 Multiple requests

Even though this aspect is not envisaged by all states in the Eurojust report, given the margin of discretion offered by the rule, transposition has not caused problems for adapting to the Framework Decision, although the priority criteria applied have varied.

4.5.4 Grounds for conditioning

- **Absentia**[171]

It is general ECHR doctrine[172] that, despite not being mentioned in Article 6.1 of the European Convention on Human Rights, the object and purpose of a fair trial is that those accused of a crime can participate in their trial. But conviction *in absentia* is not necessarily incompatible with Articles 6.1 and 3 of the Convention[173], which enshrine the right to a fair trial and the right to defence, respectively, or with Article 2 of the 7th Protocol, which acknowledges the right to review of a sentence by another court. The right to be present at the trial may be waived, although it must be done unequivocally and without affecting public interest[174]. This waiver may be implicit when the accused person deliberately evades justice, if it can be accredited that he could reasonably foresee the consequences of his conduct[175]. But unless an accused person is notified in person, he cannot be considered a "fugitive", or be considered to have waived his right to appear in court and defend himself. The legislative provision of trial *in absentia*

[171] This guarantee was already envisaged for the traditional extradition system since the first reservations to Article 1 of the European Convention on Extradition by the Netherlands and Luxembourg provoked the regulation of Article 3 of the Second Protocol. According to the Explanatory Report to the European Convention on Extradition, the guarantee to be provided by the issuing authority may vary depending on the country and even if so agreed in each particular case, allowing it not to be a formal undertaking but a recommendation or mere declaration of intent.
[172] ECHR Judgment 28-2-2008, no. 68020/2001, Demebukov v. Bulgaria.
[173] ECHR Judgments 12-2-1985, no. 9024/1980, Colozza v. Italy; 18-5-2004, no. 67972/2001, Somogyi v. Italy.
[174] ECHR Judgment 21-2-1990, no. 11855/1985 , Håkansson and Sturesson v. Sweden.
[175] ECHR Judgment 9-9-2003, no. 309000/2002, Jones v. United Kingdom.

should be exceptional and for sentences that are not disproportionate to the circumstances of the case.

The ECHR rejects the idea that a violation of the right to a fair trial exists when the person in question knows what he is accused of, has declared as an accused party and voluntarily evades justice by breaching the prohibition on leaving the town where he is resident without authorisation, contributing actively to create a situation that made it impossible to be notified of the judicial summons to participate in the trial[176]. On the other hand, an infringement of Articles 6.1 and 6.3 is considered to exist when, despite being notified to a third party (generally his lawyer) it is not demonstrated that he was aware of the case against him. Otherwise, the notification of criminal proceedings requires certain conditions of content and form that guarantee the effective exercise of the right of the accused person to known what he is accused of. It must be accredited that the person was actually aware of the accusation, indirect knowledge is not sufficient[177]. Formulas such as edicts or public announcements would not meet these requirements. Even with this knowledge, if it is impossible for the person to attend, e.g. because he is serving a sentence in another state, the right to double jurisdiction must apply[178]. The different legislation of the Member States regulate *absentia* proceedings in different ways, meaning that it is difficult for issuing and executing judicial authorities to share the same criteria. This explains the criterion of the Framework Decision regarding whether the person has been summoned in person or informed of the proceedings underway against him. In the event that this is not the case, it is obvious that the person has been unjustly convicted according to the criteria of Article 6 of the ECHR and surrender requires a guarantee on the part of the state that has convicted the requested person that said person will be able to exercise his right to review of the case in the same state with his participation. But it does not impose the obligation for the person to actually exercise his right to review; he may acquiesce to the judgment if he considers it satisfactory. The right to review or appeal is not the same in all Member States either. The diversity of treatment can complicate judicial cooperation[179], and goes from new proceedings to the right to an appeal before a higher court with examination of the facts of the case. According to the ECHR, violation exists when the

[176] ECHR Judgment 28-2-2008, no. 68020/01, Demebukov v. Bulgaria.
[177] ECHR Judgments 8-2-2007, no. 25701/03, Kollcaku v. Italy; 21-12-2006, no. 14405/05, Zunic v. Italy; 9-6-2005, no. 42191/02, R.R. v. Italy; 12-10-1992, no. 14104/1988, T. v. Italy.
[178] ECHR Judgment 31-3-2005, no. 43640/1998, Mariani v. France. The impossibility of attending court for reasons beyond the control of the accused person is contained in Resolution (75) 11, 21-5-1975 of the Committee of Ministers of the Council of Europe, together with the possibility of filing the same appeals as if he had been present and for communication of the judgment in the extradition procedure not be considered equivalent to formal notification.
[179] In the conclusions of 8-4-2008 (C-297/07) Bourquain, the Advocate General identifies the different regulations on trials *in absentia* and Framework Decision 2009/299 (whereas 2) as the cause of impediment of fluid cooperation.

declaration of *absentia* prevents a lawyer being chosen and the right to appeal[180]. Specifically, the guarantee provided by Italy on the possible challenge, which prospered only if the declaration of absentia was considered incorrect, was not sufficient[181].

Framework Decision 2008/909 mentioned earlier, wherein the deadline for transposition of which was the 5-12-2011 (and with a delay for Poland), contains the principle of mutual recognition for criminal judgments involving a deprivation of liberty[182]. Even though it mainly affects the guarantee of return in Article 5.3 of the Framework Decision on EAWs, it also expressly refers to judgments handed down *in absentia*. Specifically, this is established as an optional ground for opposition[183] although it allows consultation between authorities and the additional information in Article 9.3 before refusing transfer. For that reason the uniform certificate that the issuing state must transfer for the enforcement of the judgment will contain a special box for specifying the conditions under which the judgment was rendered, box i), although there is nothing preventing the circumstances in which the judgment *in absentia* was rendered being specified in box l). Both precepts have been amended by Framework Decision 2009/299, Article 5, in order to adapt them to the regulations it contains.

Meanwhile, Framework Decision 2009/299, whose transposition deadline was the 28-3-2011 (exceptionally 1-1-2014 in the case of difficulties) is born of the complication that the diversity of regulations in relation to trials *in absentia* represents, defining clear reasons where refusal is not allowed in this regard. It is based on ECHR case law on this subject matter (whereas 1 and 7), eliminating it as grounds for surrender subject to conditions and adding Article 4a to the Framework Decision on EAWs as a ground for optional non-execution. But it does not apply when one of the following four situations exists: the requested person 1) was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision and that he could be convicted *in absentia*; 2) was aware of the scheduled trial and had given a mandate to a legal counsellor; 3) was expressly informed about the right to a retrial, or an appeal (with the right to appear and have his arguments and new evidence examined) and does not exercise this right; 4) will be personally served with the decision, his right to a retrial, or an appeal and the timeframe for requesting it

[180] ECHR Judgments. 20-3-2001, no. 34989/1997, Goedhart v. Belgium, 20-3-2001 no. 36449/1997 Stroek v. Belgium, 13-2-2001, no. 29731/1996, Krombach v. France.
[181] ECHR Judgment 10-11-2004, no. 56581/2000, Sejdovic v. Italy.
[182] Article 26. It surpasses the Convention on the Transfer of Sentenced Persons and its Protocol, the European Convention on the International Validity of Criminal Judgments and the CISA in the articles that regulate this area.
[183] Article 9.1.i).

without delay. The information on the judgment supplied in the enforcement of the EAW does not count as a notification for the purposes of calculating the timeframe for appealing. As a result, it replaces section d) of the annex to the EAW in order to adapt it to these provisions. In any event, it is the executing judicial authority that decides whether the guarantees offered are satisfactory, which can be extended to all the guarantees envisaged in the Framework Decision[184].

It is worth highlighting the conclusions of Advocate General Mr Pedro Cruz Villalón, of 6-7-2010, in C-306/09, I.B. in the request for a preliminary ruling submitted by Belgium on the classification of judgments *in absentia*. He points out how Belgium and Poland consider that it is an EAW for prosecution, while Sweden, Germany, Austria and the Commission consider it for enforcement. According to the Advocate General, such a warrant could be considered to fall within both categories, depending on the timing and on the conduct of the person concerned. In theory it is issued as an EAW for enforcement. But if the person opts for a new trial, it becomes an EAW for prosecution, which is a mutation that does not entail a loss of guarantees and proposes that in cases falling under Article 5.1 Framework Decision the guarantees of Article 5.3 can also be invoked. CJEC Judgment 11-12-2008, (C-297/07), *Bourquain*, considers a conviction *in absentia* as a final judgment for the purposes of the principle of *non bis in idem* only because in that case enforcement was no longer possible.

- **Life sentence**

In ECHR Judgment 12-2-2008, no. 21906/2004, *Kafkaris v. Cyprus*, the ECHR considers that a life sentence does not in itself represent inhuman and degrading treatment in the sense of Article 3 of the European Convention on Human Rights. A certain degree of seriousness is required before we can argue abuse, particularly due to the duration of the treatment and the psychological and physical effects. In the case of a life sentence, it should be assessed whether the prisoner has any possibility of release, even under certain conditions, or of having his sentence reviewed, commuted or suspended. ECHR Judgment 11-4-2006, no. 19324/2002 *Léger v. France*, recognises that it necessarily entails the anguish and uncertainty related to prison life,

[184] The Spanish Constitutional Court has made a referral for a preliminary ruling (28-7-11, c-399/11, *Melloni*) concerning whether or not the new article 4 bis (1) of the Framework Decision, in the wording afforded in Framework Decision 2009/299, prevents executing judicial authorities from conditioning execution on the possibility or review in order to ensure that the rights of the individual sought are guaranteed, the compatibility of this possibility with the right to effective remedy and a fair trial, outlined in art. 47 and 48.2 of the Charter and whether these precepts, along with art. 53, permit the conditioning of the surrender, affording a greater degree of protection than that derived from EU law in order to avoid an interpretation that proves detrimental to a fundamental right enshrined in the Constitution of this Member State.

but it does not consider that the threshold of seriousness required by Article 3 of the European Convention on Human Rights requires.

- **Nationality and residence**

The Commission's assessment reports highlight how the Netherlands incorporates the dual criminality test and conversion of the sentence for the surrender of nationals pursuant to the 1983 Convention. And in fact, it drafted a statement to Framework Decision 2008/909 so that said Convention would continue to apply to judgments handed down for three years after the entry into force of the Framework Decision. In the latter Framework Decision the recognition of criminal judgments involving deprivation of liberty covers the execution of EAWs for prosecution of nationals or residents in relation to whom the guarantee of return to the executing state has been recognised, thus avoiding impunity[185]. It employs similar concepts to those used by the CJEC and confirms that the aim is the social reinsertion of the requested person[186]. Nationality and the state in which one lives are used as criteria for the transmission of judgments. It envisages the adaptation of the sentence if it is not possible to transfer the one imposed in the issuing state due to its term or nature, and the law that governs the enforcement of the same will be that of the executing state. The guarantee of return is provided even for the purposes of complying with the principle of speciality in surrender[187]. The return of the convicted national, surrendered in response to an EAW for the exercise of criminal action to the state of which he is a national, is automatic or requires his consent, according to the Convention on the Transfer of Sentenced Persons. A request for a preliminary ruling is currently pending having been submitted by Romania on 28-5-2010, C-264/10, *Kita* on Article 5.3 of the Framework Decision.

Santander, 5th of March 2012

[185] Pursuant to Article 25 of this Framework Decision.
[186] See Article 3 of this Framework Decision.
[187] Articles 4, 8, 17 and 18.3 of this Framework Decision.

LEVEL III: REFERENCE DOCUMENTATION

1. Framework decision

1.1. Official texts

1.1.1. Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190 of 18-7-2002, p. 1 to 18)

ES:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:ES:PDF

FR:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:FR:PDF

EN:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF

1.1.2. Statements made by certain Member States on the adoption of the Framework Decision (OJ L 190 of 18-7-2002, p. 19 to 20)

ES:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0019:0020:ES:PDF

FR:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0019:0020:FR:PDF

EN:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0019:0020:EN:PDF

1.2. Information and studies

1.2.1. EU data on different national regulations, assessments and reports on the EAW

ES:http://www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-(jai)/cooperation-judiciaire/european-arrest-warrant?lang=es&detailId=66

FR:http://www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-(jai)/cooperation-judiciaire/european-arrest-warrant?lang=fr&detailId=66

EN:http://www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-(jai)/cooperation-judiciaire/european-arrest-warrant?lang=en&detailId=66

1.2.2. Spanish data on the EAW and essential aspects of the different Member State regulations on the website of the Justice Ministry, section on international judicial cooperation (in Spanish).

http://www.mjusticia.gob.es/cs/Satellite/es/1215197995954/Tematica_C/1215198003700/Detalle.html

1.2.3. Final version of the European handbook on how to issue a European Arrest Warrant

ES: http://register.consilium.europa.eu/pdf/es/10/st17/st17195-re01.es10.pdf
FR: http://register.consilium.europa.eu/pdf/fr/10/st17/st17195-re01.fr10.pdf
EN: http://register.consilium.europa.eu/pdf/en/10/st17/st17195-re01.en10.pdf

1.2.4. Location of competent authorities and wizard for drafting the EAW form (in English and French)

http://www.ejn-crimjust.europa.eu

1.2.5. Eurojust annual reports (in all EU languages)

http://www.eurojust.europa.eu/press_annual.htm

1.2.6. Initial report from the Commission of 23 February 2005 based on Article 34 of the Council Framework Decision 2002/584/JHA [COM(2005) 63 final]

ES:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0063:FIN:ES:PDF
FR:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0063:FIN:FR:PDF
EN:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0063:FIN:EN:PDF

1.2.7. Annex to the initial report from the Commission [SEC (2005) 267] (in English only)

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/EN/EJN657.pdf

1.2.8. Report from the Commission on the implementation of the Framework Decision since 2005 [COM(2007/407 final]

ES: http://register.consilium.europa.eu/pdf/es/07/st11/st11788.es07.pdf

FR: http://register.consilium.europa.eu/pdf/fr/07/st11/st11788.fr07.pdf

EN: http://register.consilium.europa.eu/pdf/en/07/st11/st11788.en07.pdf

1.2.9. Annex to the Report from the Commission on the implementation of the Framework Decision since 2005 [SEC(2007) 979] (in English only)

http://register.consilium.europa.eu/pdf/en/07/st11/st11788-ad01.en07.pdf

1.2.10. Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2009 (in English only)

http://register.consilium.europa.eu/pdf/en/10/st07/st07551-re06.en10.pdf

1.2.11. Study on the implementation of the EAW and joint investigation teams requested by the Parliament and prepared by the European Centre for Judges and Lawyers, European Institute of Public Administration (in English and French)

FR:http://www.europarl.europa.eu/activities/committees/studies/download.do?language=es&file=30129#search=%20european%20Y%20arrest%20%20Y%20warrant%20

EN:http://www.europarl.europa.eu/activities/committees/studies/download.do?language=es&file=30128#search=%20european%20Y%20arrest%20%20Y%20warrant%20

1.2.12. EUR-Lex link to Framework Decision 2002/584/JHA

ES:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:ES:NOT

FR::http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:FR:NOT

EN::http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT

1.2.13. EU summary on Framework Decision 2002/584/JHA

ES:http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33167_es.htm

FR:http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33167_fr.htm

EN:http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33167_en.htm

1.2.14. Original initiative. Proposal for a Council framework Decision on the European arrest warrant and the surrender procedures between the Member States [COM/2001/0522 final]

ES:http://eur-lex.europa.eu/Notice.do?val=256595:cs&lang=es&list=397616:cs,397503:cs,397255:cs,389561:cs,286347:cs,285795:cs,284030:cs,256595:cs,240434:cs,212030:cs,&pos=8&page=4&nbl=41&pgs=10&hwords=&checktexte=checkbox&visu=#texte

FR:http://eur-lex.europa.eu/Notice.do?checktexte=checkbox&val=256595%3Acs&pos=8&page=4&lang=es&pgs=10&nbl=41&list=397616%3Acs%2C397503%3Acs%2C397255%3Acs%2C389561%3Acs%2C286347%3Acs%2C285795%3Acs%2C284030%3Acs%2C256595%3Acs%2C240434%3Acs%2C212030%3Acs%2C&hwords=&action=GO&visu=%23texte

EN:http://eur-lex.europa.eu/Notice.do?checktexte=checkbox&val=256595%3Acs&pos=8&page=4&lang=lt&pgs=10&nbl=41&list=397616%3Acs%2C397503%3Acs%2C397255%3Acs%2C389561%3Acs%2C286347%3Acs%2C285795%3Acs%2C284030%3Acs%2C256595%3Acs%2C240434%3Acs%2C212030%3Acs%2C&hwords=&action=GO&visu=%23texte

1.3. Later instruments

1.3.1. Council 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 of 5-12-2008, p. 27 to 46).

ES:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0027:0046:ES:PDF

FR:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0027:0046:FR:PDF

EN:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0027:0046:EN:PDF

1.3.2. Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81 of 27-3-2009, p. 24 to 36).

ES:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:ES:PDF

FR:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:FR:PDF

EN:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:EN:PDF

1.3.3. Statements by Denmark, Finland and Sweden under Article 31.2 of the Framework Decision (OJ L 246 29-9-2003, p. 1)

ES:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:246:0001:0001:ES:PDF

FR:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:246:0001:0001:FR:PDF

EN:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:246:0001:0001:EN:PDF

1.3.4. The Nordic Arrest Warrant

http://register.consilium.europa.eu/pdf/en/06/st05/st05573.en06.pdf

2. Spanish transposition legislation

2.1. Official texts

2.1.1. Official text. Law 3/2003, of 14 March, on the European arrest warrant and surrender procedures (BOE 17-3-2003, p. 10244-10258)

http://www.boe.es/boe/dias/2003/03/17/pdfs/A10244-10258.pdf

2.1.2. Organic law 2/2003, supplementing law 3/2003, of 14 March, on the European arrest warrant and surrender procedures (BOE 17-3-2003, p. 10244)

http://www.boe.es/boe/dias/2003/03/17/pdfs/A10244-10244.pdf

2.2. Basic information

2.2.1 Information from the Spanish Justice Ministry supplementing the Vademecum

http://www.mjusticia.gob.es/cs/Satellite/es/1215197995954/Tematica_C/1215198003700/Detalle.html

2.1.1. EAW Evaluation report on Spain

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/FR/EJN715.pdf

2.3. Preparatory work

2.3.1. Parliamentary passage of the Bill of the Law on the European Arrest Warrant and Surrender Procedures

http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas/ProydeLey?_piref73_1335538_73_1335535_1335535.next_page=/wc/servidorCGI&CMD=VERLST&BASE=IWI7&PIECE=IWI7&FMT=INITXD1S.fmt&FORM1=INITXLBA.fmt&OJCS=118-118&QUERY=121.cini.

2.3.2. Parliamentary passage of the Bill of the organic law supplementing the Law on the European Arrest Warrant and Surrender Procedures

http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas/ProydeLey?_piref73_1335538_73_1335535_1335535.next_page=/wc/servidorCGI&CMD=VERLST&BASE=IWI7&PIECE=IWI7&FMT=INITXD1S.fmt&FORM1=INITXLBA.fmt&OJCS=119-119&QUERY=121.cini.

2.3.3. Report from the General Council of the Spanish Judiciary on the Draft Bill of the Law on the European Arrest Warrant and Surrender Procedures and the supplementary Organic Law

http://www.poderjudicial.es/eversuite/GetDoc?DBName=dPortal&UniqueKeyValue=152785&Download=false&ShowPath=false

2.3.4. Report from the Council of State on the Draft Bill of the Law on the European Arrest Warrant and Surrender Procedures (despite the title, it deals with the draft bill)

http://www.boe.es/aeboe/consultas/bases_datos_ce/doc.php?coleccion=ce&id=2002-2920

2.3.5. Report from the Council of State on the Draft Bill of the supplementary Organic Law to the Law on the European Arrest Warrant and Surrender Procedures (despite the title, it deals with the draft bill of the Organic Law)

http://www.boe.es/aeboe/consultas/bases_datos_ce/doc.php?coleccion=ce&id=2002-2921