



European arrest warrant

Framework for
analysis and
preliminary
findings on its
implementation

IN-DEPTH ANALYSIS

EPRS | European Parliamentary Research Service

Authors: Wouter van Ballegooij and Ivana Kiendl Krišto

Ex-Post Evaluation Unit

PE 642.814 – February 2020

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

This publication is the first of two publications envisaged in this context. It is presented in the form of an in-depth analysis and provides a framework for analysis as well as preliminary findings on the implementation of the above-mentioned legislation in practice. This in-depth analysis (February 2020) will be followed by a study (April 2020) that will present conclusions on the implementation of the framework decision and tentative recommendations as to how to address the shortcomings identified, as per the request of the rapporteur.

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

AUTHORS

Dr Wouter van Ballegooij, European Added Value Unit, and Ivana Kiendl Krišto, Ex-Post Evaluation Unit

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

To contact the authors, please email: EPRS-ExPostEvaluation@ep.europa.eu

LINGUISTIC VERSIONS

Original: EN

Manuscript completed in February 2020.

DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

Brussels © European Union, 2020.

PE 642.814
ISBN: 978-92-846-6338-5
DOI: 10.2861/01860
CAT: QA-03-20-101-EN-N

epers@ep.europa.eu

<http://www.eprs.ep.parl.union.eu> (intranet)

<http://www.europarl.europa.eu/thinktank> (internet)

<http://epthinktank.eu> (blog)

Executive summary

EU Member States have been extraditing suspects and sentenced persons to each other for many decades on the basis of bilateral and multilateral conventions. Those arrangements were, however, slow and thwarted by exceptions based on national sovereignty. As EU integration has progressed, the Member States have agreed to base their cooperation on the principle of mutual recognition of judicial decisions, moving away from a system in which decisions on extradition were ultimately taken at government level. This principle was implemented in the Framework Decision on the European Arrest Warrant and Surrender Procedures (FD EAW), adopted in 2002 on the basis of rapid negotiations following the 9/11 terrorist attacks.

This paper is the first of two publications on the implementation of the European arrest warrant that EPRS will prepare for the LIBE committee. It provides a framework for analysis as well as preliminary findings on the implementation of the above-mentioned legislation in practice. This paper will be followed by a study (due in April 2020) that will present a comprehensive assessment of the implementation of the FD EAW and tentative recommendations on how to address shortcomings identified.

The FD EAW, adopted in 2002 and implemented since 2004, is generally recognised as a successful instrument. The data available show that it has led to a considerable simplification and speeding up of handover procedures, including for some high-profile cases of serious crime and terrorism. In 2017, the average time between the arrest and surrender of people who did not consent to surrender was 40 days, a remarkable reduction compared to the one year average under the pre-existing extradition regime.

Notwithstanding these achievements a number of challenges remain. More specifically, reports by EU institutions, case law and contributions by practitioners, academics and non-governmental organisations (NGOs) point to a number of challenges in the issuance and execution of EAWs. Those challenges relate back to core debates concerning judicial independence, the nature of mutual recognition and its relationship with international norms, primary EU law and values, including fundamental rights, and (the need for) additional harmonisation measures. In particular, they concern the following matters:

- the definition of issuing judicial authorities and their independence from government, which excludes police officers and organs of the executive, but can include public prosecutors in accordance with certain conditions (Section 2.1.1);
- the proportionality of a number of EAWs issued for 'minor crimes' and before the case was 'trial ready', also in view of other possible judicial cooperation measures, where the European Parliament's call for legislative reform has been answered through guidelines in a Commission Handbook (Section 2.1.2)
- the verification of double criminality by executing judicial authorities, leading to a lively academic debate on the compatibility of this requirement with the principle of mutual recognition and potential further questions to be raised with the CJEU; and the lack of approximation of certain offences for which verification is no longer allowed (Section 2.2.1);
- EAWs for nationals and residents of the executing Member State and their interplay with the Framework Decision on the Transfer of Prisoners with the dual aim of social rehabilitation and the prevention of impunity (Section 2.2.2);
- EAWs based on decisions following proceedings at which the person concerned was not present (*in absentia*) raising practical problems caused by non-implementation,

- ▶ differences concerning implementation, or incorrect implementation or application of the legislation implementing the Framework Decision on *in absentia* (Section 2.2.3); and
- ▶ the role of the executing judicial authority in safeguarding the fundamental rights of the requested person as developed in the CJEU's case law both as regards EAWs where there are concerns relating to poor detention conditions and broader concerns relating to the right to a fair trial, including an independent and impartial tribunal (Section 2.2.4).

Finally, requested persons have also faced difficulties in effectively exercising their procedural rights in the issuing as well as the executing Member State based on the specific provisions relating to the EAW in the various directives approximating the rights of suspected and accused persons within the EU (Section 2.3).

Table of contents

1. Introduction	1
1.1. European arrest warrant in context	1
1.1.1. Situation before the adoption of the Framework Decision on the European arrest warrant (FD EAW)	1
1.1.2. Origin of the FD EAW	1
1.1.3. A brief overview of the state of play regarding the EAW	2
1.1.4. Institutional positions	4
1.2. Scope and objectives, methodology and structure	5
1.2.1. Scope and objectives	5
1.2.2. Methodology and structure	6
2. Implementation of the FD EAW	7
2.1. The issuance of EAWs in Member State	7
2.1.1. The definition of issuing judicial authorities	8
2.1.2. Proportionality	9
2.2. Challenges faced in the execution of EAWs in the Member States	13
2.2.1. Double criminality	14
2.2.2. Nationals and residents	17
2.2.3. <i>In absentia</i> decisions	18
2.2.4. Relationship with fundamental rights and EU values	18
2.3. The impact of EAWs on the rights of individuals in the Member States	22

Table of figures

Figure 2 – Reasons for refusal to execute EAW, 2017 data	3
Figure 1 – Number of EAWs issued and executed, aggregate 2005-2017	3

1. Introduction

1.1. European arrest warrant in context

1.1.1. Situation before the adoption of the Framework Decision on the European arrest warrant (FD EAW)

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

Since the entry into force of the Treaty of Amsterdam in 1999, the EU has been aiming to develop into an area of freedom, security and justice (AFSJ) without internal frontiers. The European Council, in its conclusions adopted that same year, agreed to found Member States' cooperation on the principle of mutual recognition of judicial decisions (since codified in Articles 67(3) and 82(1) TFEU), together with the necessary approximation of legislation and based on the presumption that Member States comply with fundamental rights. This would imply a simple transfer of sentenced people and fast track extradition procedures for people wanted for prosecution in another Member State.⁸

1.1.2. Origin of the FD EAW

The 9/11 attacks fundamentally reshaped the policy agenda when it came to implementing the AFSJ, placing a stronger emphasis on the mutual recognition aspect. This resulted in the

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

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

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

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

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

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

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

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

introduction of fast track transfer and extradition (now renamed 'surrender') procedures to meet the immediate need to fight terrorism more effectively (the FD EAW).⁹

A European arrest warrant is a judicial decision issued, in the form laid down in Annex 1 to the FD EAW, by a Member State, with a view to the arrest and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.¹⁰ The surrender procedure has to be completed within 60 days, with an optional extension of 30 days.¹¹ Applying mutual recognition to extradition procedures also implies limiting grounds for refusal (or non-execution) based on national sovereignty, such as the above-mentioned double criminality¹² and nationality exception.¹³ Finally, Member States included a number of provisions on the rights of the requested person during EAW procedures, including the right to be assisted by a legal counsel and by an interpreter in accordance with national law.¹⁴

The FD EAW has been in use since 1 January 2004, i.e. for over 16 years. It is pertinent to note here that several important changes have been made during this period. The FD EAW was amended in 2009 as regards decisions following proceedings *in absentia* (at which the person concerned was not present) by a framework decision that added specific grounds for non-execution.¹⁵ Since 2009, several directives have also been adopted that approximate the rights of suspects and accused persons more generally.¹⁶ Those directives also cover the rights of individuals subject to EAW procedures.¹⁷ Finally, in the meantime, a number of other mutual recognition instruments have been adopted that both complement the EAW system and in some instances provide useful and less intrusive alternatives to it.¹⁸

1.1.3. A brief overview of the state of play regarding the EAW

A lot of information is available pertaining to the implementation of the EAW. Quantitative information regarding the number of EAWs issued and executed is available for the 2005-2017 period, initially collected by the Council and more recently based on Commission questionnaires. It should be noted that this is a voluntary exercise, as the FD EAW does not impose a legal obligation on Member States to provide this information. Despite the long implementation period, it should be noted that the data is far from perfect and complete. Thus, the findings based solely on (imperfect and incomplete) quantitative data need to be triangulated with information from other sources and interpreted with care. The most recent quantitative data relating to the practical operation of the

⁹ OJ L 190 p. 1, 2002.

¹⁰ FD EAW, Article 1(1), Annex 1.

¹¹ FD EAW, Articles 14 to 17.

¹² FD EAW Articles 2, 4(1).

¹³ FD EAW, Article 4(6).

¹⁴ FD EAW, Articles 11, 12 and 14.

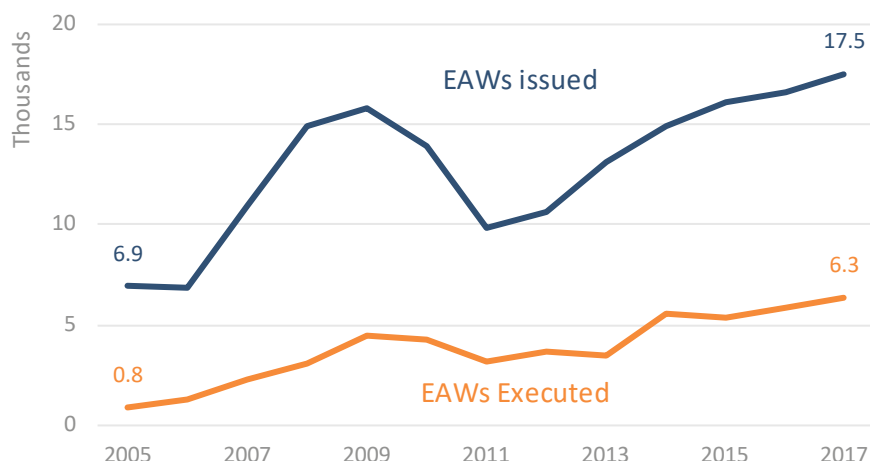
¹⁵ FD EAW, Article 4a; Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, 2009 OJ (L 81) 24 of 27 March 2009.

¹⁶ In accordance with a road map contained in Council document 14552/1/09 of 21 October 2009.

¹⁷ See Section 2.3.

¹⁸ See Section 2.1.

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

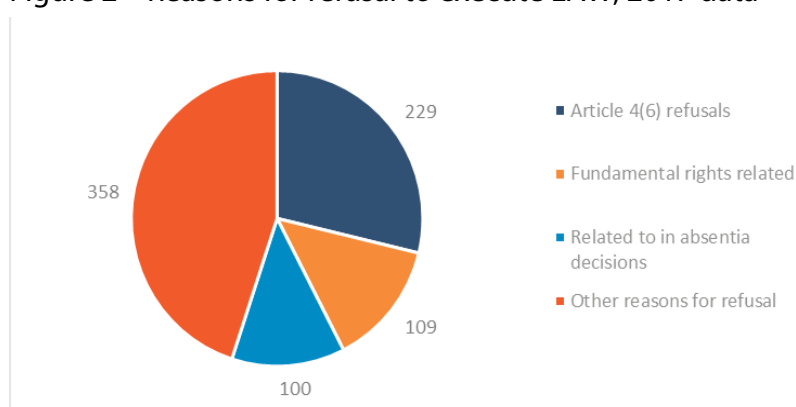


Source: Authors' graph based on European Commission data from (SWD (2019)318).

FD EAW is from 2017, during which year 17 491 EAWs were issued and 6 317 were executed.¹⁹ As can be seen from Figure 1, the number of EAWs issued and executed is on an upward trend.

As to the reasons for issuing EAWs, in 2017, roughly one third of EAWs (2960 out of 9005) were issued for prosecution, although the proportion varied significantly among Member States²⁰ (18 Member States provided figures on this point). The most commonly identified categories of offences, based on the data provided by 21 Member States, were theft and criminal damage (2649 EAWs), fraud and corruption (1535 EAWs) and drugs (1535 EAWs). In 2017, 241 EAWs were issued for terrorism-related offences, the great majority of which from France.²¹ On the basis of the data of 23 Member States it

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



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

can be concluded that two-thirds of wanted persons consented to their surrender. On average they were surrendered within 15 days. For the remaining one-third that did not consent the procedure lasted on average 40 days.²²

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

¹⁹ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD (2019) 318 final of 28.8.2019.

²⁰ *Ibidem*, p. 3.

²¹ *Ibidem*, p. 4.

²² *Ibidem*, p. 5.

refusal was Article 4(6), execution of a sentence regarding a national or resident (229 cases), followed by fundamental rights issues (109) and *in absentia* decisions (100).²³

1.1.4. Institutional positions

In a 2014 resolution based on a legislative own-initiative report,²⁴ the European Parliament called on the Commission to propose a proportionality test, to be performed by the issuing judicial authority, and fundamental rights-based grounds for non-execution. The European Commission response²⁵ to Parliament's legislative own-initiative argued that proposing legislative change would be premature in light of the ability of the Commission to start infringement procedures. It also preferred to use soft law tools to ensure proper implementation of the FD EAW, such as the handbook on how to issue and execute a European arrest warrant.²⁶ In its reply, the Commission also referred to the development of other mutual recognition instruments 'that both complement the European arrest warrant system and in some instances provide useful and less intrusive alternatives to it' and to the ongoing work on 'common minimum standards of procedural rights for suspects and accused persons across the European Union'.

The European Parliament was not satisfied with this reply. In 2016, it reiterated its call for legislative intervention.²⁷ During the negotiations on the Directive on the European Investigation Order (EIO),²⁸ the Parliament did successfully insist on a mandatory proportionality test to be performed by the issuing judicial authority,²⁹ a consultation procedure should the executing judicial authority have doubts concerning the proportionality of the investigative measure and a fundamental rights basis for non-execution.³⁰ It should be noted that, at the time of writing, no information is publically available as regards the implementation of these requirements as the Commission has not yet complied with its obligation to present a report on the application of the EIO.³¹

More recently, before being appointed Justice Commissioner, Didier Reynders made the following commitment at his hearing before the European Parliament: 'Concerning the European arrest warrant, I will continue to monitor its application and work closely with you and with the Member States to continue to improve it. We will consider whether infringement proceedings are necessary in light of the compliance assessment. I will also seriously consider whether to bring forward a

²³ *Ibidem*, p. 6.

²⁴ European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European Arrest Warrant(2013/2109(INL)), [P7_TA\(2014\)0174](#); M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament; Annex I: A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#); Annex II: A. Doobay, [Assessing the need for intervention at EU level to revise the European Arrest Warrant Framework Decision](#).

²⁵ Commission response to text adopted in plenary [SP\(2014\) 447](#).

²⁶ Commission Notice, [Handbook on how to issue and execute a European Arrest Warrant](#), C(2017) 6389 final of 28 September 2017.

²⁷ European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015, [P8_TA-PROV\(2016\)0485](#), para 43: 'Reiterates the recommendations to the Commission on the review of the European Arrest Warrant, notably as regards the introduction of a proportionality test and a fundamental rights exception.

²⁸ Directive 2014/41/EU of 3 April 2014 regarding the [European investigation order in criminal matters](#), OJ L30 p.1 of 1 May 2014.

²⁹ EIO, Article 6.

³⁰ EIO, Article 11 (f).

³¹ EIO, Article 37.

proposal to revise the European arrest warrant.¹³² From the side of the Council there have been no calls for a reform of the FD EAW. However, issues relating to proportionality and fundamental rights have been discussed as part of the mutual evaluation exercises³³ that have been conducted on the practical application of the EAW and corresponding procedures in the Member States.³⁴ In this respect, two recent Council conclusions on 'promoting mutual recognition by enhancing mutual trust'³⁵ and 'alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice'³⁶ should also be mentioned.

1.2. Scope and objectives, methodology and structure

1.2.1. Scope and objectives

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

This publication is the first of two publications envisaged in this context.

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

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

Framework for analysis and preliminary findings (current publication)

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

- the European Parliament's demands in the 2014 legislative INI (proportionality and fundamental rights);

³² O. Marzocchi, U. Bux, [Commitments made at the hearing of Didier Reynders, Commissioner-designate for Justice](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, October 2019.

³³ Final report on the fourth round of mutual evaluations- the practical application of the European arrest warrant and corresponding surrender procedures between Member States, [Council doc. 8302/4/09](#) of 28 May 2009, p. 15 (proportionality check); Issues of proportionality and fundamental rights in the context of the operation of the European Arrest Warrant, [Council doc. 9968/14](#).

³⁴ [EJN website](#).

³⁵ [Council conclusions on mutual recognition in criminal matters-'Promoting mutual recognition by enhancing mutual trust'](#), OJ C 449 of 13 December 2018, pp. 6-9.

³⁶ [Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice](#), OJ C 422 of 16 December 2019, pp. 9-13.

- the provisions of the FD EAW that were reasons for most refusals to execute EAWs (EAWs for the execution of sentences against nationals and residents; execution of EAW on the basis of *in absentia* decisions); and
- the issues that have been the subject of academic (and public) debate (double criminality).

These are only some of the issues that are relevant in the implementation of the FD EAW. Other issues identified will be further explored in the final study, not least those pertaining to practical cooperation between judicial authorities. It is important to say that any findings are preliminary and subject to revision based on further research.

European implementation assessment (April 2020)

The final study – European Arrest Warrant: European implementation assessment, planned for April 2020, will build on the current publication and will further explore the implementation of the FD EAW as a whole. In view of the interconnectedness of the FD EAW with other relevant criminal justice cooperation mechanisms, it will analyse the coherence of the FD EAW with relevant international and EU laws. Its findings will be based on an analysis of the information publicly available (desk research) as well as on the findings of a series of interviews that will be conducted with relevant stakeholders. Finally, it will present conclusions on the implementation of the Framework decision and tentative recommendations on how to address shortcomings identified, as per the request of the rapporteur.

1.2.2. Methodology and structure

Methodology

This publication was carried out by means of desk research, relying primarily on international and EU institutional sources as well as contributions from practitioners, academics and NGOs.

The Commission has issued reports on the implementation of the FD EAW in [2005](#), [2006](#), [2007](#) and [2011](#). It is currently preparing its next report. On the Council side, a number of mutual evaluation exercises have been conducted and will continue on the practical application of the EAW and corresponding procedures in the Member States. Reports on each Member State are available via the website of the European Judicial Network.³⁷ This website also contains links to national legislation, national case law and the case law of the Court of Justice of the European Union (CJEU), and factsheets regarding the case law of the European Court of Human Rights (ECtHR). Eurojust provides analyses of CJEU case law on a regular basis.³⁸ Furthermore, the Fundamental Rights Agency (FRA) has produced a number of relevant studies regarding judicial cooperation,³⁹ procedural rights⁴⁰ and detention conditions.⁴¹ It also operates the Criminal Detention Database providing information on detention conditions in all 28 EU Member States.⁴²

³⁷ [EJN website](#).

³⁸ Eurojust 2018 edition of Eurojust's [Overview on Case Law of the Court of Justice of the European Union \(CJEU\) on the European Arrest Warrant \(EAW\)](#).

³⁹ [Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), European Union Agency for Fundamental Rights, 2016.

⁴⁰ [Rights in practice: access to a lawyer and procedural rights in criminal proceedings and European Arrest Warrant proceedings](#), FRA, 2019.

⁴¹ [Criminal detention in the EU, rules and reality](#), FRA, 2019.

⁴² FRA, [criminal detention in the EU](#).

Professional organisations, including the Council of Bars and Law Societies of Europe (CCBE)⁴³ and European Criminal Bar Association (ECBA)⁴⁴ have produced their own reports providing a defence rights perspective. The FD EAW has been the subject of a lively academic debate *inter alia* facilitated by the European Criminal Law Academic Network⁴⁵ and the Max Planck Institute for Foreign and International Criminal Law.⁴⁶ Finally, a number of NGOs, including Fair Trials International,⁴⁷ have been very active on the EAW. As noted in previous chapter, in the second phase, desk research will be complemented with semi-structured interviews with the main EU institutional actors, international organisations, professional associations and NGOs.

Structure

This in-depth analysis is divided into three sections: the introductory section presents the EAW in context (Section 1.1) and gives a brief overview of the FD EAW state of play (Section 1.1.3), followed by a short overview of the institutional positions (Section 1.1.4). The scope, objectives, methodology and structure are covered in Section 1.2.

Following this introduction, the core chapter of the publication covers selected aspects of the implementation of the FD EAW from the perspectives of the issuance of EAWs in Member States (Section 2.1), challenges faced in the execution of EAWs in the Member States (Section 2.2) and the impact of EAWs on the rights of individuals in the Member States (Section 2.3).

2. Implementation of the FD EAW

2.1. The issuance of EAWs in Member State

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

As will be discussed below, 18 years after the text of the FD EAW was drafted, the CJEU is still providing guidance on how to interpret the key notion of an (independent) 'judicial authority' and under which conditions prosecutors can be considered as such. Furthermore, there is no common definition of the notion of 'criminal prosecution', leading to concerns that surrender is requested prematurely. The CJEU has interpreted the principle of mutual recognition as meaning that 'the Member States are in principle obliged to give effect to a European arrest warrant'.⁴⁸ However, the

⁴³ [EAW-Rights, Analysis of the implementation and operation of the European Arrest Warrant from the view of defence practitioners](#), Council of Bars and Law Societies of Europe/ European Lawyers Foundation, 2016.

⁴⁴ [How to defend a European Arrest Warrant case, ECBA Handbook on the EAW for defence lawyers](#), ECBA, 2017.

^{45, 45} [ECLAN website](#).

⁴⁶ [Max Planck Institute for Foreign and International Criminal Law](#).

⁴⁷ [Fair Trials International](#).

⁴⁸ CJEU of 16 July 2015, Case C-237/15, PPU, [Lanigan](#), para. 36.

second part of article 1(2) and 'in accordance with the provisions of this Framework decision' already indicates that this instrument contains exceptions and conditions to be met before a person may be surrendered. One of those exceptions that *may* be imposed is double criminality (which will be discussed in section 2.2.).

In any event, academic views diverge widely on the question of the degree to which the application of mutual recognition is appropriate in the area of criminal law (as opposed to the internal market) given the implications for national sovereignty and fundamental rights and the extent to which it needs to be balanced by harmonisation of procedural standards and substantive criminal law⁴⁹ The dilemma has been described as a need to avoid as far as possible double checks and controls, but also blind trust and the 'deresponsibilisation' of competent executing authorities.⁵⁰ This is particularly relevant for cases in which there are concerns regarding the fundamental rights situation in the issuing Member State, which will be discussed in section 2.2., as CJEU case law has now established a *de facto* ground for non-execution based on primary EU law. The issues highlighted below will be further discussed in the section below. Other aspects related to the issuance of EAWs in the Member States, including practical issues related to the EAW form and its transmission⁵¹ will be discussed in the second publication due in April.

2.1.1. The definition of issuing judicial authorities

In Article 1(1) of the Framework Decision an EAW is described as 'a judicial decision' for the purposes of conducting a 'criminal prosecution'. However, the lack of clarity offered by the FD EAW as regards the interpretation of these concepts has led to various problems in national implementation and practice, particularly when surrender was requested by a prosecutor.⁵²

The CJEU has since clarified that the concept of 'judicial authority' (Article 6(1) FD EAW) may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned, but it excludes the police⁵³ or an organ of the executive⁵⁴ of the Member State. In a number of more recent cases the CJEU explored the conditions for prosecutors to be able to issue EAWs, notably the need for their independence from the executive.⁵⁵ This entails the existence of 'statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, *inter alia*, to an instruction in a specific case from the executive. Moreover, the framework must enable prosecutors to assess the necessity and proportionality of issuing an EAW'.⁵⁶

⁴⁹ For a discussion see W. van Ballegooij, *The Nature of Mutual recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Intersentia, 2015, Chapter 3, Section 3.

⁵⁰ A. Weyembergh, 'Transverse Report on Judicial Control in Cooperation in Criminal Matters. The Evolution from Traditional Judicial Cooperation to Mutual Recognition', in K. Ligeti (Ed.), *Toward a Prosecutor for the European Union, A Comparative Analysis (Volume 1)*, Hart Publishing, 2013, pp. 945-985 at p. 972.

⁵¹ FD EAW, Articles 8 to 10.

⁵² UK Supreme Court judgment of 30 May 2012 in *Assange v Swedish Prosecution Authority*, UKSC 22.

⁵³ CJEU judgment of 10 November 2016, Case C-452/16 PPU, *Poltorak*, paras 34-52.

⁵⁴ CJEU judgment of 10 November 2016, Case C-477/16 PPU, *Kovalkovas*, paras 28-48.

⁵⁵ CJEU judgment of 27 May 2019, Joined cases [C-508/18 OG and C-82/19 PI PPU](#).

⁵⁶ CJEU judgment of 27 May 2019, Joined cases [C-508/18 OG and C-82/19 PI PPU](#), paras 51 and 74; CJEU of 12 December 2019, [Case C-625/19 PPU, XD](#), para. 40; CJEU judgment of 12 December 2019, Case C-27/19 PPU, [Openbaar Ministerie v ZB](#), para. 31; CJEU judgment of 12 December 2019, Joined cases [C-566/19 PPU YR and C-626/19 PPU YC](#), para. 52.

This case law led to a questionnaire by Eurojust on the impact of the relevant CJEU judgments and notably the question of whether prosecutors are authorised to issue an EAW in the Member States.⁵⁷ From this document (as revised on 26 November 2019) it becomes clear that the CJEU case law resulted in changes in certain Member States aimed at ensuring that only independent prosecutors or (investigating) judges can issue EAWs.⁵⁸ The academic debate has highlighted the need for such independence in the context of assessing whether the issuance of an EAW is proportionate.⁵⁹ On the other hand, Ambos has expressed the concern that making public prosecutors structurally independent of both the judiciary and executive would lead to problems regarding political and parliamentary control and lead to a shift in the equality of arms between prosecution and defence to the detriment of the latter. Therefore he submits that from a rule of law and fair trial perspective EAWs should be issued by (investigative) judges only in future.⁶⁰ At the same time the CJEU has been criticised by civil society for taking a formalistic approach towards the concept of independence in not seeking to enquire into the practice or other potential forms of influence of the executive over prosecutors.⁶¹

2.1.2. Proportionality

In accordance with Article 2(1) FD EAW an EAW *may* [our emphasis] be issued for:

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

However, the growing number of EAWs issued (at 17 491 in 2017)⁶² has been a cause for concern, among Member States,⁶³ and the Commission,⁶⁴ with regard to proportionality. This has particularly been the case when EAWs related to 'minor' or 'trivial offences', such as the theft of a chicken,⁶⁵ and for cases that were not 'trial ready', also taking into account the (pre-trial) detention conditions in certain issuing Member States.⁶⁶ Beyond the detrimental effect on the individuals concerned these

⁵⁷ [Impact of the CJEU judgments of 27 May 2019 in joined cases OG \(C508/18\) and PI \(C-82/19 PPU\) and Case PF \(C-509/18\) – Questionnaire by Eurojust and compilation of replies](#), Council doc. 10016/19 of 11 June 2019.

⁵⁸ Ibidem.

⁵⁹ C. Heimrich, 'European arrest warrants and the independence of the issuing judicial authority – How much independence is required?' (Case note on joined cases C-508/18 and C-82/19 PPU OG and PI), *New Journal of European Criminal Law*, 2019 Vol. (4), pp. 389-398, p. 397.

⁶⁰ K. Ambos, 'The German Public Prosecutor as (no) judicial authority within the meaning of the European Arrest Warrant: A case note on the CJEU's judgment in OG (C-508/18) and PI (C-82/19 PPU)', *New Journal of European Criminal Law*, 2019, Vol. (4), pp. 399-407, pp. 405-406.

⁶¹ L. Baudrihay-Gérard, 'Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent public prosecutors' [EU Law analysis blog](#), 2 January, 2020.

⁶² Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD (2019) 318 final of 28.8.2019.

⁶³ Final report on the fourth round of mutual evaluations – the practical application of the European arrest warrant and corresponding surrender procedures between Member States, [Council doc. 8302/4/09](#) of 28 May 2009, p. 15 (proportionality check); Issues of proportionality and fundamental rights in the context of the operation of the European arrest warrant, [Council doc. 9968/14](#).

⁶⁴ Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [COM\(2011\) 175](#) final of 11 April 2011, p. 7, 8.

⁶⁵ *The Economist*, 'Wanted, for chicken rustling', 30 December 2009.

⁶⁶ For background see S. Carrera, E. Guild and N. Hernanz, 'Europe's most wanted? Recalibrating trust in the European Arrest Warrant system', CEPS, 2013.

practices undermine mutual trust and potentially lead to refusals to execute EAWs, even if proportionality is not formally cited as the reason for doing so.⁶⁷

When looking at the seriousness of the offence it is pointed out that in 2017 the most commonly identified category for which EAWs were issued was theft and criminal damage (2649 EAWs).⁶⁸ For some of these cases one might wonder whether issuing an EAW was the most proportionate measure even if the formal conditions for issuing it were met. In reply to a European parliamentary question⁶⁹ the Commission referred to a 2013 study indicating that at that point the majority of Member States had mechanisms for ensuring that EAWs were not issued for minor offences.⁷⁰ The Commission was however not in a position to provide a comprehensive list of cases where EAWs had been issued for 'trivial offences', as there was no common EU definition of trivial offences.

Again referring back to the 2017 data, roughly one third of EAWs (2960 out of 9005) were issued for prosecution.⁷¹ However, as discussed in the section above, in absence of a common definition of the notion of a 'criminal prosecution' referred to in Article 1(1) FD EAW, it is not possible to establish how many of these EAWs related to cases that were 'trial-ready', a notion that is in any case difficult to define given the differences between Member States' criminal procedures and practices.⁷² On the other hand there are recent indications of number of examples of EAWs that were issued prematurely, resulting in the requested person remaining in pre-trial detention for a lengthy period after having been surrendered by the judicial authorities of another Member State.⁷³ In a 2014 resolution based on a legislative own-initiative report,⁷⁴ the European Parliament called on the Commission to propose a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances, such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate less intrusive alternative measure.⁷⁵

⁶⁷ For a more detailed discussion see A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#), Annex I to M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament, pp. 32-38.

⁶⁸ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD (2019) 318 final of 28.8.2019, p. 4.

⁶⁹ European Parliamentary Question [E-007089-17](#) (European Arrest Warrant), 17 November 2017.

⁷⁰ [Final report](#) towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters, March 2013. According to the survey, the vast majority of Member States have indicated they apply a standard proportionality check when a national arrest warrant is issued, as well as for issuing a EAW.

⁷¹ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD (2019) 318 final of 28.8.2019, p. 3.

⁷² For a more detailed discussion see A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#), Annex I to M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament, pp. 38-42.

⁷³ [Beyond surrender Putting human rights at the heart of the European arrest warrant](#), Fair Trials International, 2018.

⁷⁴ European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European arrest warrant(2013/2109(INL)), [P7_TA\(2014\)0174](#); M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament; Annex I: A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#); Annex II: A. Doobay, [Assessing the need for intervention at EU level to revise the European Arrest Warrant Framework Decision](#).

⁷⁵ European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), [P7_TA\(2014\)0174](#), paragraph 7 (b).

As regards the cost implications, the European Added Value Assessment accompanying Parliament's legislative own-initiative report provided a conservative estimate of the average costs of enforcing an EAW at €20 000 per case. In terms of direct costs to the Member States alone it can include: the costs of enforcement (wages of police officers escorting the surrendered person, cost of flights for both the surrendered person and the police officers, cost of hotel accommodation for the police officers, etc.); operating detention facilities (costs relating to prison guards and administrators) and warehousing detainees (food, clothing, beds and healthcare, assuming these are provided); investigation and judicial fees linked to the EAW.⁷⁶ The cost implications for the individual concerned were not included. However, the cost of non-Europe report in the area of procedural rights and detention conditions, produced by EPRS in December 2017, does provide some additional data on the cost of pre-trial detention, estimated at €115 per day, with significant cost variation across Member States,⁷⁷ as well as the detrimental effects of detention on employment, education, private and family life, mental and psychological health.

Instead of seeking to amend the FD EAW, the Commission has preferred to continue with a soft-law approach. Its handbook on how to issue and execute a European arrest warrant⁷⁸ provides guidelines aimed at ensuring that issuing an EAW is justified in a particular case. Those guidelines focus more narrowly than the European Parliament on the seriousness of the offence and the likelihood of detention of the person in the issuing Member State. At the same time they consider the perspective of the interests of the victims of the offence.⁷⁹

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

In particular the following factors could be taken into account:

- (a) the seriousness of the offence (for example, the harm or danger it has caused);
- (b) the likely penalty if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence);
- (c) the likelihood of detention of the person in the issuing Member State after surrender;
- (d) the interests of the victims of the offence.⁸⁰

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

⁷⁶ M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#), EPRS, European Parliament, p. 29.

⁷⁷ For a more detailed discussion see W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017, p 134.

⁷⁸ Commission Notice, [Handbook on how to issue and execute a European Arrest Warrant](#), C(2017) 6389 final of 28 September 2017.

⁷⁹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315, 14 November 2012, p. 57–73; A. Scherrer, I. Kiendl Krišto, [The Victims' Rights Directive 2012/29/EU, European Implementation Assessment](#), EPRS, December 2017.

⁸⁰ Commission Notice, [Handbook on how to issue and execute a European arrest warrant](#), C(2017) 6389 final of 28 September 2017, p. 19.

- the European investigation order (EIO),⁸¹ a standard form that allows one or more specific investigative measures in another Member State with a view to obtaining evidence.⁸² Recital 26 calls on judicial authorities to consider issuing an EIO instead of an EAW if they would like to hear a person;⁸³
- the European supervision order (ESO),⁸⁴ which should reduce the impact on the life of defendants who are subject to prosecution in another Member State by offering the possibility to await trial in the Member State of residence, subject to supervision measures (such as regular reporting to the police).
- the Council of Europe Convention on the Transfer of Proceedings in Criminal Matters,⁸⁵ in accordance with which in relevant cases the criminal proceedings could be transferred to the Member State where the suspect is residing;
- the FD on financial penalties,⁸⁶ which enables a judicial or administrative authority to transmit a financial penalty directly to an authority in another Member State and to have that penalty recognised and executed without any further formality. The FD on financial penalties may be considered as one of the methods for enforcing payment before converting the financial penalty into a custodial sentence, thus avoiding the need to issue an EAW;
- the FD on Transfer of Prisoners,⁸⁷ which complements the FD EAW by providing a system in accordance with which a judgment may be forwarded directly to another Member State for the purpose of recognition of the judgment and execution of the sentence there' with a view to facilitating the social rehabilitation of the sentenced person';⁸⁸ and
- the FD on Probation and Alternative Sanctions (PAS),⁸⁹ which enables transfer of a convicted person to a different Member State (typically, but not necessarily, the country of their nationality) and in that state to serve a probation order or other alternative sanction imposed by the original issuing state.

The Commission has not yet complied with its obligation to present a report on the application of the EIO by 21 May 2019,⁹⁰ therefore it is not clear at this stage to what extent this instrument has

⁸¹ Directive 2014/41/EU of 3 April 2014 regarding the European investigation order in criminal matters, OJ (L30)1 of 1 May 2014.

⁸² EIO, Article 1(1).

⁸³ EIO, Recital 26: With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative.

⁸⁴ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11 November 2009.

⁸⁵ European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15 May 1972, ETS No 073.

⁸⁶ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22 March 2005, pp. 16-30.

⁸⁷ Framework Decision 2008/909 the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union (FD Transfer of Prisoners) OJ L 327 of 5 December 2008 p. 27.

⁸⁸ FD Transfer of Prisoners, Article 3(1).

⁸⁹ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16 December 2008, pp. 102-122.

⁹⁰ Directive 2014/41/EU of 3 April 2014 regarding the European investigation order in criminal matters, OJ (L30)1 of 1 May 2014, Article 37; European Parliamentary Question [E-004099/2019](#) (European Investigation Order (EIO) – report on application of the Directive).

been used as an alternative to the European arrest warrant. In 2014 the Commission produced a report⁹¹ on the implementation of the FD on Transfer of Prisoners, the FD on PAS and the ESO. At that point only 18 Member States had implemented the FD on Transfer of Prisoners, 14 the FD on PAS and 12 the ESO. Although in the meantime most Member States have implemented the three measures,⁹² at least for the FD on PAS and ESO a 2016 FRA study on criminal detention and alternatives signalled a lack of their use in practice.⁹³

In June 2019, the Council held a policy debate on the basis of a Presidency report on 'the way forward in the field of mutual recognition in criminal matters'.⁹⁴ This report indicates that the reasons for the infrequent use of the FD on PAS and ESO will be explored in the ninth round of mutual evaluations by the Council, together with the issue of proportionality in relation to the use of the EAW more generally.⁹⁵ In December 2019 the Council also adopted conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice.⁹⁶ In these conclusions Member States are encouraged to develop or improve training on the content and the use of the FD PAS and the ESO.⁹⁷ They are also encouraged to improve the collection of data on the application of the FD on PAS and ESO.⁹⁸ Furthermore, the Commission is invited to continue to enhance the implementation of both the FD on PAS and ESO, taking into account the information gathered during the ninth round of mutual evaluations.⁹⁹

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

The surrender procedure contains possibilities for the executing judicial authority to refuse surrender or to make it subject to certain conditions. The FD EAW introduces mandatory and optional grounds for non-execution. Article 3 mentions the following mandatory grounds for non-execution: amnesty (Article 3(1)); the person has been finally judged by a Member State and the sentence has been served or is currently being served (Article 3(2) and; the person is below the age of criminal responsibility (Article 3(3).

Article 4 mentions the following optional grounds for non-execution: a lack of double criminality (Article 4(1)); prosecution pending in the executing Member State (Article 4(2)); prosecution for the same offence is precluded in the executing Member State (Article 4(3)); prosecution or punishment

⁹¹ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, [COM \(2014\) 57](#) final of 5 February 2014.

⁹² The tables of implementation referring to the national legislation concerned are available in the [judicial library](#) of the European Judicial Network.

⁹³ [Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), European Union Agency for Fundamental Rights, 2016.

⁹⁴ The way forward in the field of mutual recognition in criminal matters - Policy debate, Annex to Council doc. 9317/19 of 27 May 2019.

⁹⁵ Ninth round of mutual evaluations – Scope of the evaluation and contributions to the questionnaire, Council doc. 6333/19 of 13 February 2019.

⁹⁶ OJ C 422 of 16 December 2019, pp. 9-13.

⁹⁷ OJ C 422 of 16 December 2019, pp. 9-13, para. I. 8.

⁹⁸ OJ C 422 of 16 December 2019, pp. 9-13, para. I.10.

⁹⁹ OJ C 422 of 16 December 2019, pp. 9-13, para. II.3.

statute-barred; final judgment in a third State (Article 4(5)); the executing Member State 'undertakes' the execution of the sentence (Article 4(6)); extraterritoriality (offences committed outside the territory of the issuing Member State) (Article 4(7)); *in absentia* decisions in accordance with the conditions set out in Article 4a;¹⁰⁰

As discussed in Section 1, according to the Commission statistics in 2017 the most common reason for refusal was a situation in which the executing Member State undertook to execute the custodial sentence (229 out of 796 cases). Of a total of 796 refusals, 100 related to *in absentia* decisions. Fundamental rights issues led to refusals in 109 cases.¹⁰¹ In the sections below these grounds will be discussed further, together with a lack of double criminality. The other grounds for non-execution, guarantees to be given by the issuing Member State in particular cases,¹⁰² time limits¹⁰³ and other aspects relating to the execution of EAWs in Member States will be discussed in the second publication due in April.

2.2.1. Double criminality

In its proposal for the FD EAW, the Commission proposed total abolition of the double criminality requirement, allowing Member States to establish only an exhaustive list of conduct for which they would refuse surrender ('negative list').¹⁰⁴ In its opinion the European Parliament disagreed slightly with the Commission in the sense that it did not want to allow exceptions for crimes referred to in Article 29 TEU (currently 83 TFEU).¹⁰⁵ However, during their negotiations on the FD EAW, Member States were not ready to apply the principle of mutual recognition to their entire body of criminal law. Consequently, as a general rule, Article 2 (1) FD EAW requires that the act in relation to which arrest and surrender is requested be punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum of a least 12 months or, if surrender is requested for the execution of a prison sentence or detention order that the imposed sentence is for at least four months. On the basis of Article 2(4) FD EAW surrender may, however 'be subject to the condition that the acts for which the EAW has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described'. Article 2(4) relates to an optional ground for non-execution contained in Article 4(1) FD EAW in cases where 'the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State'.¹⁰⁶

¹⁰⁰ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, [thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial](#), 2009 OJ (L 81) 24 of 27 March 2009.

¹⁰¹ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD(2019) 318 final of 28.8.2019, p. 6.

¹⁰² Article 5 FD EAW.

¹⁰³ Article 17, 23 FD EAW.

¹⁰⁴ Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States, [COM \(2001\) 522](#) final of 19 September 2001, p.16.

¹⁰⁵ European Parliament resolution of 29 November 2001 on the Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States (COM(2001) 522 - C5-0453/2001 - 2001/0215(CNS), [A5-0397/2001](#), amendment 68.

¹⁰⁶ FD EAW, Article 4(1) FD EAW.

So far the CJEU has not provided further interpretation of Article 4(1) FD EAW. However, its judgment in Case C-289/15, *Grundza*,¹⁰⁷ regarding the application of the double criminality principle in the context of Article 7(3) of the FD on Transfer of Prisoners¹⁰⁸ is of relevance. In this case the Court held that 'when assessing double criminality, the competent authority of the executing State is required to verify whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the executing State if they were present in that State'.¹⁰⁹ Furthermore, 'in assessing double criminality, the competent authority of the executing State must ascertain, not whether an interest protected by the issuing State has been infringed, but whether, in the event that the offence at issue were committed in the territory of the executing State, it would be found that a *similar interest* [our emphasis] protected under the national law of that State, had been infringed'.¹¹⁰

Even with this clarification there has been much academic debate regarding the mandate of the executing judicial authority to verify double criminality and whether its application is compatible with the principle of mutual recognition more generally. On this point *Bachmaier* submits that 'A too strict application of the double criminality test in the realm of the EAW is contrary to the objectives set out in Articles 67 and 82 TFEU, while it is not necessarily justified on grounds of protection of human rights'.¹¹¹ *Muñoz de Morales Romero* submits limiting it in such a way that 'only a difference leading to a problem of 'public order' or 'national identity' could take precedence over cooperation'.¹¹² *Satzger* also argues in favour of a public order clause. At the same time he points to the difficulty in crafting it while simultaneously respecting the supremacy of EU law.¹¹³ In the absence of a revision of the FD EAW, *Ruiz Yamuza* suggests raising further questions with the CJEU on the interpretation of Article 4(1) FD EAW regarding 'the degree of similarity needed between the offence for which extradition was requested and other similar crimes under which the acts could be entirely or partially classified according to the law of the executing Member State'.¹¹⁴

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

The exception to the double criminality requirement is laid down in Article 2(2) FD EAW. For 32 offences (a 'positive list')¹¹⁵ there is only a *single qualified criminality requirement* (the acts should be

¹⁰⁷ CJEU judgment of 11 January 2017, Case C-289/15, *Grundza*; A. Falkiewicz, 'The Double Criminality Requirement in the Area of Freedom, Security and Justice-Reflections in Light of the European Court of Justice Judgment of 11 January 2017, Criminal Proceedings against Jozef Grundza', *European Criminal Law Review*, Vol. 7(3), 2017, pp. 258-274.

¹⁰⁸ Framework Decision 2008/909 the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union (FD Transfer of Prisoners) OJ (L 327) 27 of 5 December 2008.

¹⁰⁹ CJEU judgment of 11 January 2017, Case C-289/15, *Grundza*, para. 38.

¹¹⁰ CJEU judgment of 11 January 2017, Case C-289/15, *Grundza*, para. 49.

¹¹¹ L. Bachmaier, European Arrest Warrant, 'Double criminality and Mutual recognition: A much debated case', *European Criminal Law Review*, Vol. 8(2), 2018, pp. 152-159, at p. 159.

¹¹² M. Muñoz de Morales Romero, 'Dual criminality under review: On the Puigdemont case', *European Criminal Law Review*, Vol. 8(2), 2018, pp. 167-175, at p. 173.

¹¹³ H. Satzger, 'Mutual recognition in Times of Crisis-Mutual recognition in crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant', *European Criminal Law Review*, Vol. 8(3), 2018, pp. 317-331; European Criminal Policy Initiative, *A Manifesto on European Criminal Procedure Law*, Stockholm University Press, 2014, p. 15.

¹¹⁴ R. Ruiz Yamuza, 'CJEU case law on double criminality. The Grundza-Piotrowskiparadox? Some notes regarding the Puigdemont case', *ERA Forum* (2019) 19, pp. 465-484 at p. 481, 482.

¹¹⁵ FD EAW, Article 2(2) refers to participation in a criminal organisation, terrorism, trafficking in human beings, child abuse, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions, and explosives, corruption, fraud, including that affecting the financial interests of the Union, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, facilitation of

punishable by deprivation of liberties of at least three years in the issuing Member State). If this condition is fulfilled the warrant gives rise to surrender 'without verification of the double criminality of the act'. *Advocaten voor de Wereld*, one of the earliest CJEU cases on the EAW concerned questions from the Belgian Constitutional Court regarding the compatibility of the non-verification of double criminality in accordance with Article 6(2) TEU and more specifically with the principle of legality in criminal proceedings and the principle of equality and non-discrimination.¹¹⁶ *Advocaten voor de Wereld* claimed a violation of this principle as Article 2(2) FD EAW does not provide precise legal definitions of the offences for which verification of double criminality is renounced.¹¹⁷ The CJEU, however, held this principle not to be violated since it is the crime as defined in the substantive criminal law of the issuing Member State that should be taken as the point of reference.¹¹⁸

Furthermore, without going into the question as to whether there was a risk of differentiated treatment, the CJEU replied that the seriousness of the 32 categories of crime in terms of adversely affecting public order and public safety warranted dispensing with the verification of double criminality, particularly in the light of the high degree of trust and solidarity between the Member States.¹¹⁹ The distinct vagueness of the list of 'serious crimes' referred to in Article 2(2) FD EAW has led to questions regarding the proportionality of letting go of the dual criminality requirement in these cases, particularly given that in accordance with Article 83(1) TFEU the EU can establish only 'minimum rules' concerning the definition of criminal offences and sanctions. And it is not those minimum definitions that matter; but the national definitions.¹²⁰ One example concerns the 2008 framework decision on the fight against organised crime,¹²¹ which retains the 'double model' of criminalising either participation in a criminal organisation or conspiracy, taking into account the underlying differences between civil law and common law jurisdictions. All Member States except Denmark and Sweden have introduced the key elements of the framework decision. Denmark and Sweden have other alternative legal instruments to tackle criminal organisations (also known as the Scandinavian approach).¹²² Even within the civil law jurisdictions there are important differences, notably as regards the incrimination of mafia-type associations.¹²³ Despite the fact that the Commission itself 'questions the added value of the instrument from the point of view of achieving

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 and sabotage.

¹¹⁶ CJEU judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633.

¹¹⁷ *Ibidem*, para. 13.

¹¹⁸ *Ibidem*, para. 53.

¹¹⁹ *Ibidem*, para. 57.

¹²⁰ Cf. A. Klip, *European Criminal Law – An integrative approach*, 3rd Edition, Intersentia, 2016, pp. 403-407.

¹²¹ Council [framework decision 2008/841/JHA of 24 October 2008 on the fight against organised crime](#), O.J. L 300/42 of 11.11.2008.

¹²² W. van Ballegooij and T. Zandstra, [The cost of non-Europe in the area of organised crime and corruption](#), EPRS, 2016, p. 17; A. di Nicola et al., 'Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime', Study written for the European Commission, DG HOME, February 2015, http://ec.europa.eu/dgs/home-affairs/e-library/docs/20150312_1_amoc_report_020315_0_220_part_1_en.pdf and http://ec.europa.eu/dgs/home-affairs/e-library/docs/20150312_1_amoc_report_020315_0_220_part_2_en.pdf.

¹²³ See Europol threat assessment, [Italian Organised Crime](#), 2013.

the necessary minimum degree of approximation',¹²⁴ it has so far not come up with a proposal to revise the framework decision on organised crime.

2.2.2. Nationals and residents

In its proposal for a FD EAW, the Commission argued that since the European arrest warrant is based on the idea of citizenship of the Union, the exception provided for a country's national, which existed under traditional extradition arrangements, should no longer apply.¹²⁵ However, during their negotiations for the FD EAW, Member States opposed this idea, particularly regarding the execution of sentences. As a result, in accordance with Article 4 (6) FD EAW, the executing judicial authority may refuse to execute an arrest warrant in cases where the EAW has been issued for the purpose of execution of a custodial sentence or detention order where the requested person is staying in, or is a national or resident of the executing Member State and that state undertakes to execute the sentence or detention order in accordance with its domestic law. CJEU case law has since defined the notions of 'resident' and 'staying in'.¹²⁶ It has also accepted domestic rules providing for the non-execution of a EAW in the case of migrant Union citizens with a view to the enforcement of a custodial sentence, only if they had been lawfully resident within the national territory for a continuous period of five years.¹²⁷

As discussed, the FD on Transfer of Prisoners¹²⁸ complements the FD EAW by providing a system in accordance with which a judgment may be forwarded directly to another Member State for the purpose of recognition of the judgment and execution of the sentence.¹²⁹ It also applies in the situation when an EAW for the execution of a sentence has been refused and the executing Member State has agreed to execute the sentence itself. At the same time practical problems have arisen as regards the interaction between the two instruments. On this point the CJEU has provided guidance in the *Popławski* cases.¹³⁰ In particular it has underlined that the executing authority may only refuse surrender on the basis of Article 4 (6) FD EAW if assurance is given that the custodial sentence passed in the issuing State against the person concerned can actually be enforced in the executing Member State.¹³¹ In this context, the CJEU emphasises the paramount importance of avoiding all risk of impunity for the requested person.¹³²

¹²⁴ Report from the Commission to the European Parliament and the Council based on Article 10 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime; [COM \(2016\)0448](#) final of 7.7.2016, p. 1.

¹²⁵ Proposal for a Council framework decision on the European Arrest Warrant and the surrender procedures between the Member States, [COM\(2001\) 522](#) final of 19 September 2001, p.5.

¹²⁶ CJEU judgment of 17 July 2008, Case C-66/08 [Kozłowski](#).

¹²⁷ CJEU judgment of 6 October 2009, Case C-123/08, [Wolzenburg](#).

¹²⁸ Framework Decision 2008/909 the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union (FD Transfer of Prisoners) OJ (L 327) 27 of 5 December 2008.

¹²⁹ FD Transfer of Prisoners, Article 3(1).

¹³⁰ CJEU judgment of 29 June 2017, Case C-579/15, [Popławski I](#); CJEU judgment of 24 June 2019, Case C-573/17, [Popławski II](#).

¹³¹ CJEU judgment of 24 June 2019, Case C-573/17, [Popławski II](#), para. 22.

¹³² CJEU judgment of 24 June 2019, Case C-573/17, [Popławski II](#), para. 86; CJEU judgment of 29 June 2017, Case C-579/15, [Popławski I](#), para. 23; Commission notice, [Handbook on the transfer of sentenced persons and custodial sentences in the European Union](#), OJ C 403/2 of 29 November 2019, p. 34.

2.2.3. *In absentia* decisions

As regards *in absentia* decisions, Member States agreed on a framework decision in 2009, adding an optional ground for non-execution (Article 4a).¹³³ According to this article, if the requested person did not appear in person at the trial resulting in the decision, the executing judicial authority can refuse to execute the EAW unless certain conditions are fulfilled, such as: being handed a summons for the trial in person and being informed that a decision may be handed down if the requested person does not appear for trial (Article 4a(1) FD EAW). As testified by the relatively large number of 100 refusals relating to *in absentia* decisions in 2017,¹³⁴ the interpretation and application of this ground for refusal has led to many practical and legal problems. In this preliminary analysis they will be outlined only briefly. A more detailed discussion will be provided in the European implementation assessment to be published in April.

A very good starting point for obtaining a deeper understanding of the problems concerned is the outcome of the Commission funded research project on 'Improving mutual recognition of European arrest warrants for the purpose of executing *in absentia* judgments'.¹³⁵ Its main authors, *Brodersen, Glerum* and *Klip*, point inter alia to the practical problems caused by the lack of (proper) information provided by issuing judicial authorities, leading to requests for supplementary information, delays, and extra costs, and unjustified refusals to execute the EAW or, inversely, to decisions to surrender that in hindsight were incorrect.¹³⁶ These practical problems may be caused by non-implementation, differences concerning implementation, incorrect implementation or application of the legislation implementing the FD on *in absentia*.¹³⁷ The research project has resulted in a number of conclusions and recommendations for the issuing and executing judicial authorities, Member States and the European Union, including a number of proposals for additional EU legislation.¹³⁸

2.2.4. Relationship with fundamental rights and EU values

The application of the principle of mutual recognition to intra-EU extradition procedures resulted in a deviation from the traditional allocation of Member States' responsibilities in protecting the fundamental rights of the individual concerned. Article 1(3) FD EAW mandates that trust be placed in the decisions of the issuing judicial authority, vindicated by reference to the joint obligation of Member States to comply with fundamental rights obligations referred to under Article 6 TEU. Even so, a number of Member States explicitly implemented Article 1(3) as a ground for non-execution.¹³⁹

¹³³ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, 2009 OJ (L 81) 24 of 27 March 2009.

¹³⁴ Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD(2019) 318 final of 28.8.2019, p. 6.

¹³⁵ [InAbsentiaEAW](#), Research project on European arrest warrants issued for the enforcement of sentences after *in absentia* trials.

¹³⁶ Brodersen, Glerum, Klip, [Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person](#), p. 7, 8.

¹³⁷ *Ibidem*, p. 13.

¹³⁸ *Ibidem*, Chapter 9.

¹³⁹ This was originally condemned by the Commission. However, its third implementation report strikes a different tone. See COM(2011) 175, p. 7: 'It is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights does not mandate surrender where an executing judicial authority is satisfied,

In its 2014 legislative own-initiative resolution the European Parliament called for 'a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligation in accordance with Article 6 of the TEU and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality'.¹⁴⁰

In the meantime there have been significant developments in the case law of the CJEU regarding the interpretation of Article 1(3) FD EAW, *de facto* allowing executing judicial authorities to refuse surrender on grounds of fundamental rights in 'exceptional cases'.¹⁴¹ This case law commenced in the area of prison conditions, but has since expanded to other alleged violations of fundamental rights and the rule of law.

Detention conditions

EU action and cooperation in the area of detention conditions have taken place in a wider framework, at United Nations and Council of Europe level.¹⁴² However, EU Member States regularly fail to comply with those standards. European Court of Human Rights judgments are not properly executed and recommendations by specialised bodies established in accordance with UN and CoE treaties are not implemented by Member States. At a certain point, judicial cooperation within the EU had to be adapted to this reality. In its judgment of April 2016 on the joined cases of *Aranyosi* and *Căldăraru*,¹⁴³ the CJEU recalled that Article 51(1) of the Charter demands that Member States respect the Charter when implementing EU law, including Article 4 regarding the prohibition of inhuman or degrading treatment or punishment.¹⁴⁴

The Court established a two-prong test for the executing judicial authority to consider evidence with respect to deficient detention conditions in the issuing Member State generally and the real risk of inhuman or degrading treatment of the requested person in the event of his surrender to that Member State. If, following consultation with the issuing judicial authority, the risk of such fundamental rights violation cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.¹⁴⁵

This case law was further refined in *ML*,¹⁴⁶ in the sense that the assessment should be limited to the prisons in which the person that is subject to the EAW will be held.¹⁴⁷ When the issuing authority provides information and assurance, the executing Member State has to rely on that assurance,

taking into account all the circumstances of the case, that surrender would result in a breach of the requested person's fundamental rights arising from unacceptable detention conditions'.

¹⁴⁰ European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), [P7_TA\(2014\)0174](#), para. 7 (d).

¹⁴¹ CJEU judgment of 5 April 2016 joined Cases C-404/15 *Aranyosi* and C-659/15 PPU, [Căldăraru](#), para. 78.

¹⁴² R. Raffaelli, [Prison conditions in the Member States: selected European standards and best practices](#), Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament, 2017; W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017, Chapter 1.1; Cf. European Parliament resolution of 5 October 2017 on prison systems and conditions, [P8_TA\(2017\)0385](#).

¹⁴³ CJEU judgment of 5 April 2016, joined Cases C-404/15 *Aranyosi* and C-659/15 PPU, [Căldăraru](#); W. van Ballegooij and P. Bárd, 'Mutual recognition and individual rights; did the Court get it right?', in *New Journal of European Criminal Law*, Vol. 4, 2016, pp. 439-464.

¹⁴⁴ *Ibid*, para. 84.

¹⁴⁵ *Ibid*, paras 85-104.

¹⁴⁶ CJEU judgment of 25 July 2018, Case C-220/18 PPU, [ML](#); TP Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions', *Maastricht Journal of European and Comparative Law*, 25(6), 2019, pp. 704-717.

¹⁴⁷ *Ibid*, para 87.

unless there are specific indications of inhuman or degrading treatment.¹⁴⁸ *Dorobantu*¹⁴⁹ addressed further questions regarding the minimum standards for detention conditions required under Article 4 of the Charter, in particular the issue of personal space (in this case in a multi-occupancy cell). The Court held that the personal space available to each detainee, the executing judicial authority must, *in the absence, currently, of minimum standards in that respect under EU law* [our emphasis], take account of the minimum requirements under Article 3 of the ECHR, as interpreted by the European Court of Human Rights.¹⁵⁰ With regard to such potential minimum EU standards concerning detention conditions, the EPRS report on the cost of non-Europe in the area of procedural rights and detention conditions assessed a number of options for taking further action at EU level. It found that as regards pre-trial detention, there was sufficient evidence of the added value of potential EU action. Furthermore it concluded that common action was also justified in the area of post-trial detention, as judicial cooperation measures, especially those involving the transfer of suspected and convicted persons, presumed adequate detention conditions.¹⁵¹

The Commission has so far not proposed any EU legislation in the area of (pre-trial) detention. It has undertaken various other initiatives to improve detention conditions in the Member States. Under the Justice programme, the Commission has arranged various operating grants for organisations active in the field of prison management. Since 2016, the Commission has provided a direct grant to the Council of Europe aimed at the operation of a European Forum of independent prison monitoring bodies, referred to as National Preventive Mechanisms (NPMs).¹⁵² The Commission is also working closely with the FRA on the Criminal Detention Database,¹⁵³ providing information on detention conditions in all 28 EU Member States.¹⁵⁴

In December 2018 the Council adopted conclusions on 'Promoting mutual recognition by enhancing mutual trust'.¹⁵⁵ Paragraph 5 of these conclusions encourages Member States to have legislation in place that, where appropriate, allows use to be made of alternative measures to detention in order to reduce the population in their detention facilities. In December 2019 the Council adopted the above-mentioned conclusions on alternatives to detention.¹⁵⁶ In these conclusions the Member States are encouraged to continue their efforts to improve prison conditions, to counter prison overcrowding.¹⁵⁷ Furthermore they express support for continued Commission funding for organisations active in the field of prison management and the European Forum of NPMs.¹⁵⁸

¹⁴⁸ Ibid, para 112.

¹⁴⁹ CJEU judgment of 15 October 2019, Case C-128/18, [Dorobantu](#).

¹⁵⁰ Ibid, paras 70-79, 85.

¹⁵¹ W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017, p. 42.

¹⁵² Council of Europe, [human rights national implementation](#).

¹⁵³ FRA, [Criminal detention in the EU](#).

¹⁵⁴ Answer to European Parliamentary question [E-003096/2019](#) (Prison conditions in the EU and follow-up to the own-initiative report on prison systems and conditions).

¹⁵⁵ Council conclusions on mutual recognition in criminal matters – 'Promoting mutual recognition by enhancing mutual trust', OJ C 449, 13.12.2018, pp. 6-9.

¹⁵⁶ Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, OJ C 422 of 16 December 2019, pp. 9-13.

¹⁵⁷ Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, OJ C 422 of 16 December 2019, pp. 9-13, actions to be taken at national level, point 13.

¹⁵⁸ Ibid, actions to be taken at EU level, point 7; actions to be taken to enhance cooperation with the Council of Europe and other relevant organisations, point 2.

Fair trial, independent and impartial tribunals

The Commission has indicated that judicial cooperation in criminal matters, where individual rights are directly at stake, cannot function when there are serious concerns regarding the independence of judicial authorities.¹⁵⁹ In *LM*¹⁶⁰ such serious concerns were the subject of preliminary questions raised by an Irish executing judicial authority in the context of an EAW issued by a Polish judicial authority. In its judgment the CJEU subsequently extended its two prong '*Aranyosi* test' to possible violations of the right to a fair trial, the essence of which includes the requirement that tribunals be independent and impartial.¹⁶¹ In accordance with this judgment even if the Member State concerned is subject to the Article 7(1) TEU procedure due to 'a clear risk of a serious breach of EU values' – currently the case for both Poland¹⁶² and Hungary¹⁶³ – or the Article 7(2) TEU procedure to 'determine the existence of a serious and persistent breach of EU values' by a Member State,¹⁶⁴ the executing judicial authority will still need to assess whether in the case at hand there are substantial grounds for believing that the requested suspect will run the real risk of being subject to a breach of the essence of the right to a fair trial.¹⁶⁵ In the national follow-up to *LM*, the Supreme Court of Ireland, after underlining the difficulty of applying the second prong of the test laid down by the CJEU,¹⁶⁶ held that the threshold of evidence pointing to such a real risk had not been reached.¹⁶⁷ Hence the appeal against his surrender was dismissed.¹⁶⁸

This line of CJEU case law is related to EU efforts in the area of the enforcement of EU values, which cover fundamental rights, including the right to independent and impartial tribunals.¹⁶⁹ The European Parliament has called for an interinstitutional agreement on an EU monitoring and an enforcement mechanism on democracy, the rule of law and fundamental rights.¹⁷⁰ In July 2019, the Commission announced 'a blueprint for action',¹⁷¹ which takes an important step towards the position of the European Parliament in the sense that it is now willing to engage in a 'rule of law

¹⁵⁹ Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, COM (2014) 158 of 19 March 2014, p. 2.

¹⁶⁰ CJEU judgment of 25 July 2018 in Case C-216/18 PPU *Minister for Justice and Equality v LM*; P. Bárd and W. van Ballegooij, 'Judicial independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v LM*', in: *New Journal of European Criminal Law*, 2018/3, p. 353–365.

¹⁶¹ *Ibid*, paras 47, 48.

¹⁶² Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, [COM\(2017\) 835](#) of 20 December 2017.

¹⁶³ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, [P8_TA\(2018\)0340](#).

¹⁶⁴ *Ibid*, paras 71, 72.

¹⁶⁵ *Ibid*, para 68.

¹⁶⁶ Supreme Court of Ireland of 12 November 2019, *Minister for Justice & Equality v Celmer* [\[2019\] IESC 80](#), paras 81–83.

¹⁶⁷ *Ibid*, paras 84–87.

¹⁶⁸ *Ibid*, *Minister for Justice & Equality v Celmer* [\[2019\] IESC 80](#), para. 88.

¹⁶⁹ Article 2 TEU.

¹⁷⁰ [European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights](#) (2015/2254(INL)); W van Ballegooij and T Evas, [An EU mechanism on democracy, the rule of law and fundamental rights: European Added Value Assessment accompanying the Parliament's Legislative Initiative Report](#), EPRS, European Parliament, 2016; Annex I, [The establishment of an EU mechanism on democracy the rule of law and fundamental rights](#) by L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo and H. Spanikova; Annex II, [Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights](#) by P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe.

¹⁷¹ Commission communication, Strengthening the rule of law within the Union, A blueprint for action, [COM \(2019\) 343](#) of 17.07.2019.

review cycle',¹⁷² culminating in an 'Annual Rule of Law Report'¹⁷³ covering all Member States. Commission President Ursula von der Leyen has tasked Věra Jourová, Vice-President for Values, Transparency, and Didier Reynders, Commissioner for Justice, with the development of a 'comprehensive European rule of law mechanism', including an annual report monitoring the situation in every Member State. The first annual report may be expected in the second half of 2020.¹⁷⁴

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

On the basis of the FD EAW

The Commission proposal for a FD EAW already recognised the need 'to improve the overall context' by at least partially harmonising the procedural rights of wanted persons, particularly as regards access to a lawyer and an interpreter, conditional release of the surrendered person in the executing Member State and conditions for the execution of sentences following a trial in which the suspect was not present (*in absentia*).¹⁷⁵ The European Parliament's opinion even called for legal assistance to be free of charge in cases where the requested person had insufficient means.¹⁷⁶ In the end, Article 11 of the FD states that the requested person has a right to be informed of the EAW and its contents, as well as a right to be assisted by a legal counsel and an interpreter in accordance with the national law of the executing Member State. Article 12 FD EAW contains a right to provisional release in accordance with the domestic law of the executing Member State. In accordance with Articles 14 and 19 FD EAW, where the arrested person does not consent to his or her surrender, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.

On the basis of other secondary EU legislation

In its policy documents the European Commission has always stressed the relationship between mutual recognition and the necessary approximation.¹⁷⁷ In this vein, the 2004 Commission proposal was aimed at setting common minimum standards at EU level regarding the basic fair trial rights of suspects or accused persons.¹⁷⁸ This initiative however failed in Council owing to cost and subsidiarity considerations. The Commission and Member States then agreed to an alternative approach. This consisted of a 'roadmap',¹⁷⁹ in accordance with which the rights of suspects would be harmonised in several individual instruments. Since 2009, directives have been adopted on the rights to interpretation and translation, information, access to a lawyer and on the rights to communicate upon arrest, the presumption of innocence, special safeguards for children suspected

¹⁷² [COM \(2019\) 343](#), p. 9.

¹⁷³ [COM \(2019\) 343](#), p. 11.

¹⁷⁴ Commission work programme, [COM \(2020\) 37](#) final, p. 8.

¹⁷⁵ Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States, COM (2001) 522 final of 19 September 2001.

¹⁷⁶ European Parliament legislative resolution of 29 November 2001 on the proposal for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States, 2002 OJ (C 153E) 276 of 27 June 2002.

¹⁷⁷ Communication from the Commission to the Council and the European Parliament, Mutual recognition of final decisions in criminal matters, COM (2000) 495 final of 26 July 2000, p. 16.

¹⁷⁸ Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final of 28 April 2004.

¹⁷⁹ Council document 14552/1/09 of 21 October 2009.

or accused of crime, and the right to legal aid.¹⁸⁰ These directives also apply to wanted persons in European arrest warrant procedures, thereby strengthening the rights contained in the FD EAW:

- The Interpretation and Translation Directive provides for interpretation during the surrender procedure in the executing Member State and translation of the EAW.¹⁸¹
- The Directive on Information in criminal proceedings requires that any person who is arrested for the purpose of the execution of a European arrest warrant should promptly receive an appropriate letter of rights containing information on her or his rights according to the national law implementing the FD EAW in the executing Member State.¹⁸²
- The Directive on Access to a Lawyer provides that a requested person has a right of access to a lawyer in the executing Member State upon arrest pursuant to an EAW.¹⁸³ The requested person also has the right to appoint a lawyer in the issuing Member States to provide the lawyer in the executing Member States with information and advice with a view to the effective exercise of the rights of requested persons laid down in the FD EAW.¹⁸⁴ The person also has the right to have a third person informed of the deprivation of liberty,¹⁸⁵ the right to communicate with third persons¹⁸⁶ and the right to communicate with consular authorities.¹⁸⁷
- The Directive on the Rights of Children¹⁸⁸ provides specific safeguards for children over the age of criminal responsibility who are subject to EAW procedures (a) the right to information; (b) the right to have the holder of parental responsibility informed; (c) the right to be assisted by a lawyer; (d) the right to a medical examination; (e) the right to specific treatment in case of deprivation of liberty; (f) the right to protection of privacy; (g) the right to be accompanied by the holder of parental responsibility during the proceedings.
- The Directive on Legal Aid¹⁸⁹ also covers legal aid in European arrest warrant proceedings, both in the issuing and executing Member State.¹⁹⁰ The directive furthermore contains provisions related to the quality of legal aid and professional training of staff involved in the decision-making, and of lawyers providing legal aid services.¹⁹¹

^{180, 180} For a more detailed discussion see W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017, Chapter 1.2.2.

¹⁸¹ Directive 2010/64/EU on the Right to Interpretation and Translation (OJ L 280, 26 October 2010, p. 1-7), Article 2(7), 3(6).

¹⁸² Directive 2012/13/EU on the Right to Information in criminal proceedings (OJ L 142, 1 June 2012, p. 1-10), Article 5.

¹⁸³ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 10 (1), (2) and (3).

¹⁸⁴ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 10 (4) (5) (6).

¹⁸⁵ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 5.

¹⁸⁶ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 6.

¹⁸⁷ Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, pp. 1-12), Article 7.

¹⁸⁸ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).

¹⁸⁹ Directive 2016/1919 (OJ L 297, 4 November 2016, p. 1).

¹⁹⁰ *Ibid*, Article 5.

¹⁹¹ *Ibid*, Article 7.

Transposition and implementation concerning several directives

Based on prior EPRS research¹⁹² and Commission reports on the application of the directives on interpretation and translation,¹⁹³ the right to information¹⁹⁴ and access to a lawyer¹⁹⁵ together with the FRA studies regarding procedural rights¹⁹⁶ and detention conditions,¹⁹⁷ the tentative conclusion may be drawn that the transposition and implementation of the relevant provisions concerning the EAW in these three first 'roadmap' directives has been inadequate to date. Some elements of the relevant data are reproduced below.

Almost all Member States have correctly transposed the requirements for interpretation in proceedings for the execution of an EAW and ensure that a translation of the EAW is provided.¹⁹⁸ Furthermore, a majority of Member State ensure that the requested person promptly receives an appropriate letter of rights containing information on her or his rights and most Member States have letters drafted in simple and accessible language. The Commission report expresses the concern however that several Member States lack a separate provision regulating the obligation to provide information on the rights of suspects and accused persons in EAW proceedings.¹⁹⁹ The FRA study regarding procedural rights²⁰⁰ finds that in EAW cases language barriers frequently impede individuals' ability to benefit from their right to information and that requested persons often misunderstand such information, resulting in them making decisions that are contrary to their interests.²⁰¹

In the context of the implementation of the Directive on Access to a Lawyer, 21 Member States provide the requested person with a right of access to a lawyer upon arrest pursuant to an EAW.²⁰²

¹⁹² W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, December 2017.

¹⁹³ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, COM(2018) 857 final of 18 December 2018.

¹⁹⁴ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, COM (2018)858 final of 18 December 2018.

¹⁹⁵ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [COM\(2019\) 560 final](#) of 26 September 2019.

¹⁹⁶ [Rights in practice: access to a lawyer and procedural rights in criminal proceedings and European Arrest Warrant proceedings](#), FRA, September 2019.

¹⁹⁷ [Criminal detention in the EU, rules and reality](#), FRA, December 2019.

¹⁹⁸ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, COM(2018) 857 final of 18 December 2018, p. 7, 9.

¹⁹⁹ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, COM (2018)858 final of 18 December 2018, p. 10, 11.

²⁰⁰ [Rights in practice: access to a lawyer and procedural rights in criminal proceedings and European Arrest Warrant proceedings](#), FRA, September 2019.

²⁰¹ *Ibidem*, p. 14.

²⁰² Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [COM\(2019\) 560 final](#) of 26 September 2019, p. 20.

The Commission furthermore finds that the 'legislation in four Member States does not all reflect the right of requested persons to appoint a lawyer in the issuing Member State'²⁰³ and in its conclusions mentions it as a key provision with which there are still difficulties.²⁰⁴ Finally, most Member States also cross-refer in their legislation on EAW proceedings to rules on criminal proceedings governing the rights of suspects and accused persons.²⁰⁵ The FRA study regarding procedural rights equally finds that Member States do not effectively provide requested persons with information about their rights to access a lawyer in the issuing Member State.²⁰⁶

²⁰³ *Ibidem*, p. 17.

²⁰⁴ *Ibidem*, p. 20.

²⁰⁵ *Ibidem*, p. 17.

²⁰⁶ [Rights in practice: access to a lawyer and procedural rights in criminal proceedings and European Arrest Warrant proceedings](#), FRA, September 2019.

References

- K. Ambos, 'The German Public Prosecutor as (no) judicial authority within the meaning of the European Arrest Warrant: A case note on the CJEU's judgment in OG (C-508/18) and PI (C-82/19 PPU)', *New Journal of European Criminal Law*, Vol. 4, 2019, pp. 399-407.
- L. Bachmaier, European Arrest Warrant, 'Double criminality and Mutual recognition: A much debated case', *European Criminal Law Review*, Vol. 8(2), 2018, pp. 152-159.
- W. van Ballegooij, *The nature of mutual recognition in European Law, re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Intersentia, Antwerpen, 2015.
- W. van Ballegooij and P. Bárd, 'Mutual recognition and individual rights; did the Court get it right?', in *New Journal of European Criminal Law*, Vol. 4, 2016, pp. 439-464.
- W. van Ballegooij and T. Zandstra, [The Cost of non-Europe in the area of Organised Crime and Corruption](#), EPRS, 2016.
- W. van Ballegooij and T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights: European Added Value Assessment accompanying the Parliament's Legislative Initiative Report](#), EPRS, European Parliament, 2016.
- W. van Ballegooij, [The Cost of non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, 2017.
- P. Bárd and W. van Ballegooij, 'Judicial independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v LM*', in: *New Journal of European Criminal Law*, Vol. 3, 2018, pp. 353-365.
- R. Blekxtoon and W. van Ballegooij (Eds.), *Handbook on the European Arrest Warrant*, Springer 2005.
- H. Brodersen, V. Glerum and A. Klip, [Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person](#), Maastricht University, 2019.
- S. Carrera, E. Guild and N. Hernanz, [Europe's most wanted? Recalibrating trust in the European Arrest Warrant system](#), CEPS, 2013.
- European Criminal Policy Initiative, *A Manifesto on European Criminal Procedure Law*, Stockholm University Press, 2014.
- A. Falkiewicz, 'The Double Criminality Requirement in the Area of Freedom, Security and Justice- Reflections in Light of the European Court of Justice Judgment of 11 January 2017, Criminal Proceedings against Jozef Grundza', *European Criminal Law Review*, Vol. 7(3), 2017, pp. 258-274.
- C. Heimrich, 'European arrest warrants and the independence of the issuing judicial authority- How much independence is required? (Case note on joined cases C-508/18 and C-82/19 PPU OG and PI)', *New Journal of European Criminal Law*, Vol. 4, 2019, pp. 389-398.
- A. Klip, *European Criminal Law-An integrative approach*, 3rd Edition, Intersentia, 2016.
- TP Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions', *Maastricht Journal of European and Comparative Law*, Vol. 25(6), 2019, pp. 704-717.
- M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report \(rapporteur: Baroness Ludford, PE510.979\)](#),

EPRS, European Parliament; Annex I: A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#); Annex II: A. Doobay, [Assessing the need for intervention at EU level to revise the European Arrest Warrant Framework Decision](#).

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

A. di Nicola et al., Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime, Study written for the European Commission, DG HOME, February 2015.

R. Raffaelli, [Prison conditions in the Member States: selected European standards and best practices](#), Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament, 2017.

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

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

H. Satzger, 'Mutual recognition in times of crisis-mutual recognition in crisis? An analysis of the new jurisprudence on the European Arrest Warrant', *European Criminal Law Review*, Vol. 8(3), 2018, pp. 317-331.

A. Scherrer and I. Kiendl Krišto, [The Victims' Rights Directive 2012/29/EU, European Implementation Assessment](#), EPRS, December 2017.

This publication is the first of two publications providing a European implementation assessment on European arrest warrant and surrender procedures between the Member States. It is presented in the form of an in-depth analysis and provides a framework for analysis as well as preliminary findings on the implementation of the relevant framework decision in practice. This in-depth analysis will be followed by a study (in April 2020) that will present conclusions on the implementation of the framework decision and tentative recommendations on how to address any shortcomings identified.

This is a publication of the Ex-Post Evaluation Unit
EPRS | European Parliamentary Research Service

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

ISBN: 978-92-846-6338-5
DOI: 10.2861/01860
CAT: QA-03-20-101-EN-N