European Added Value Assessment
The EU Arrest Warrant

ANNEX II

Assessing the need for intervention at EU level to revise the European Arrest Warrant Framework Decision

Research paper
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Abstract

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Abbreviations

CJEU	Court of Justice of European Union
EAW	European Arrest Warrant/s
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FD	Framework Decision
MLA	Mutual Legal Assistance
SIS	Schengen Information System

Executive summary

1. Introduction

This report will consider some of the issues which lead to the conclusion that intervention is needed at an EU level to revise the European Arrest Warrant Framework ("EAW") Decision. There are a large number of issues which have been suggested as meriting action at an EU level. Therefore, this report deals only with what are, in the author's opinion, the most significant or widespread issues.

In order to understand the European Arrest Warrant it is necessary to consider its history and to analyse which issues arise from the EAW Scheme or its implementation and which are due to deficiencies in the criminal justice systems of the Member States.

1.1 Mutual recognition

The genesis of the mutual recognition programme lies in a meeting of the European Council in Cardiff in 1998. One of the conclusions of this meeting was:

> "*39. The European Council underlines the importance of effective judicial cooperation in the fight against cross-border crime. It recognises the need to enhance the ability of national legal systems to work closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each other's courts.*"[1]

Following on from this, at the meeting of the European Council at Tampere in Finland on 15 and 16 October 1999, the Council stated that:

> "*It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial.*"[2]

Even at this early stage the importance of ensuring that any scheme should be compliant with Article 6 of the Treaty on European Union was recognised.

The Council and the Commission were invited to adopt a programme of measures to implement the principle of mutual recognition and the Council stressed that:

> "*Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union.*"

However, there were a number of challenges in arriving at an acceptable proposal given the contentious issues which had to be dealt with such as double criminality and the surrender of nationals. The events of 11 September 2001 acted as a spur to provide the

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1 Cardiff European Council, 15 and 16 JUNE 1998, Presidency Conclusions SN 150/1/98 REV 1

2 European Council Document 200/1/99 of 16 October 1999, paragraphs 33 and 35.

political will to resolve these issues and on 25 September 2001[3] the Commission made a detailed proposal for a Council Framework Decision on a European arrest warrant. This was considered by the European Parliament. It was adopted by the European Council on 13 June 2002.[4]

The EAW Framework Decision was the first instrument to implement the principle of mutual recognition of judicial decisions in criminal matters.

This principle, which assumes a high level of confidence and trust[5] between Member States, has been explained by the Commission in the following way:

> "*… once … a decision taken by a judge in exercising his or her official powers has been taken, that measure – in so far as it has extranational implications – would automatically be accepted in all other Member States and have the same or at least similar effects there.*"[6]

The principle of mutual recognition has now been given effect by the TFEU.[7]

1.2 The EAW Framework Decision

The Framework Decision was to abolish the formal extradition procedure provided for under the various Conventions[8] to which Member States were parties and to replace it with a system of mutual recognition.

> "*(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.*" (Recitals of the preamble)

Article 6(1) provided (at the time the Framework Decision was adopted):[9]

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3 Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (COM (2001) 522-C5-0453/2002-2001/0215 (CWS), 25 September 2001).

4 European Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA; OJ 2002 L 190, pI).

5 See the programme of measures to implement the principle of mutual recognition of decisions in criminal matters: OJ C 12 15 January 2001, pages 10-22.

6 *Mutual Recognition of Final Decisions in Criminal Matters:* Com (2000) 495 final, 26 July 2000. See also the *Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States*: Com (2005) 195 final, 19 May 2005.

7 Article 82(1): "*Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments …*"

8 The various Conventions are listed in Article 31 of the Framework Decision. They include the European Convention on Extradition 1957 and the Conventions of 1995 and 1996 between Member States of the European Union.

> "*The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.*"

Article 6(3) provides that:

> "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*"[10]

Article 7 sets out the procedure to be followed by the European Council where it determines the existence of a serious and persistent breach by a Member State of principles then mentioned in Article 6(1).[11] Under Article 7(3) the Council may decide to suspend certain of the rights deriving from the Treaty to the Member State in question.[12]

Thus, the effect of recital 10 is that the implementation of the European arrest warrant may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles of liberty, democracy, respect for human rights and the rule of law. This has not happened since the EAW scheme was implemented.

1.3 The Framework Decision and Fundamental Human Rights

Recitals (12) and (13) of the Preamble to the Framework Decision provide as follows:

> "*(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union*

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9 In the Consolidated Version of the TEU Article 6(1) provides: "*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2007, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties.*" Article 6(2) now provides: "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined the Treaties.*" The previous Article 6(1) is now to be found in an amended form in Article 2 of the TEU.

10 Even before the Treaty of European Union, the Court of Justice had held that respect for human rights was a condition of the lawfulness of European Union acts and that the European Convention on Human Rights had special significance: Case 4/73 *Nold v. Commission*; Case C-299/95 [1974] ECR 491, *Kremzor v. Austria* [1997] ECRI-2629. Each of the Member States is, of course, a party to the European Convention on Human Rights: being a signatory to the Convention is a condition of accession to the European Union.

11 The procedure under Article 7 now applies to the values identified to in Article 2 of the TEU (as amended). Article 2 provides: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*"

12 These various provisions (in an amended form) are now to be found in Articles 2, 6 and 7 of the Consolidated Version of The Treaty on European Union.

in particular Chapter VI thereof.[13] *Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation or that person's position may be prejudiced for any of those reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.*

(13) No person should be removed expelled or extradited to a State where there is a risk that he or she would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment."[14]

1.4 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union ('the Charter') was signed by the then 15 Member States[15] at the Nice Summit on 7 December 2000 in order to provide in a single document the rights already recognised within the European Union which apply to the European Union and Member States when applying European Union law.[16] The Charter has now been given legal recognition by the Treaty of Lisbon which amends Article 6(1) of the Treaty on European Union so that it now reads:

> *"The Union recognises the rights, freedoms and principles set out in the Charter …"*

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13 Chapter VI of the Charter of the European Union comprises: Article 47, the right to an effective remedy and to a fair trial; Article 48, the presumption of innocence and rights to defence; Article 49, the principles of legality and proportionality of criminal offences and penalties and Article 50, the right not to be tried or punished twice in criminal proceedings for the same offence.

14 Recital 13 reflects the case law concerning Article 3 of the European Convention on Human Rights (prohibition on torture and inhuman and degrading treatment). The European Court of Human Rights has held that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment: *Soering v. United Kingdom* (1989) 11 EHRR 439; *Chahal v. United Kingdom* (1997) 23 EHRR 413; *Mamatkulov v. Turkey* (2005) 41 EHRR 25; *Saadi v. Italy* (2009) 49 EHRR 30. Article 19 of the Charter of Fundamental Rights provides a similar protection.

15 France, Germany, Italy, Belgium, The Netherlands, Luxembourg, Denmark, Ireland, United Kingdom, Greece, Portugal, Spain, Austria, Finland, Sweden.

16 The founding treaties of the European Communities made no reference to fundamental rights forming part of the Communities' legal order. However, the European Court of Justice began to incorporate notions of fundamental rights into its decision-making and there are cases decided by the Court of Justice holding that Community legislation was either invalid because it breached fundamental rights or had to be interpreted to ensure its compatibility with such rights.

1.5 Constitutional Challenges

The EAW Framework Decision was challenged in four Member States on constitutional grounds as it allowed the surrender of nationals of these Member States. [17] The three challenges that were successful resulted in constitutional changes or a change to the domestic implementing legislation.

1.6 Commission Reports

Since 1 January 2004 when the EAW came into effect there have been three reports prepared by the Commission on the operation of the Framework Decision.

The first of these three reports, dated 24 January 2006,[18] stated that in the first nine months of the operation of the EAW (January 2004 to September 2004) the figures available to the Commission showed 2,603 warrants were issued, 653 persons arrested and 104 surrendered. The Commission calculated that the average time taken to execute a warrant had fallen from more than nine months to 43 days. It is undoubtedly true that the EAW scheme has made the system of surrender quicker. The Commission concluded that the overall impact of the European arrest warrant had been positive in that surrender between Member States was now taking place expeditiously, subject to judicial control and in accordance with the fundamental rights of the individual.

The second Commission report, dated 11 July 2007, followed the entry of Romania and Bulgaria into the European Union on 1 January 2007. The report noted that the use of the European arrest warrant had grown year by year, with 6,900 warrants issued by 23 Member States in 2005 with 1,770 arrests (figures from Belgium and Germany were not available). Of those arrested some 1,532 were surrendered to the issuing Member States, with an average surrender time of 43 days.

The third Commission report, dated 13 April 2011, noted that between 2005 and 2009, some 54,689 arrest warrants had been issued and 11,630 executed. The average surrender time (for those who did not consent) was 48 days. The Commission stated that the European arrest warrant was *"far from perfect"* noting that Member States, European and national parliamentarians, groups from civil society and individual citizens had all expressed concerns in relation to the operation of the European arrest warrant and in particular its effect on fundamental rights.

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[17] Poland; Decision of the Constitutional Court, P 1/05 of 27 April 2005. Germany; Decision of the Constitutional Court, 18 July 2005, BvR 2236/04. Cyprus; *Attorney General v. Konstantinou*: Decision of the Supreme Court 7 November 2005, Ap. No. 294/2005. Czech Republic; Decision 3 May 2006, 434/2006 Sb.

[18] Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), European Commission, 24 January 2006, COM (2006) 8 and SEC (2006) 79. (The first evaluation report was actually produced in 2005 but revised to include findings in relation to Italy, which implemented the Framework Decision on 14 May 2005.)

> "*From the issues raised in relation to the operation of the EAW it would seem that, despite the fact that the law and criminal procedures of all Member States are subject to the standards of the European Court of Human Rights, there are often some doubts about standards being similar across the EU. While an individual can have recourse to the European Court of Human Rights to assert rights arising from the European Convention on Human Rights, this can only be done after an alleged breach has occurred and all domestic legal avenues have been exhausted. This has not proved to be an effective means of ensuring that signatories comply with the Convention's standards.*"

These concerns had led to the Commission's Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings.

The Commission report also noted that confidence in the application of the European arrest warrant had been undermined by the systematic use of European arrest warrants for the surrender of persons sought in respect of minor offences. It noted a general agreement among Member States that a proportionality requirement is necessary to prevent European arrest warrants from being issued for offences which are not serious enough to justify the cooperation which the European arrest warrant requires.[19] In order to address this problem, the Commission recommended that judicial authorities should use the European arrest warrant system only when a surrender request is proportionate in all the circumstances of the case. The Commission recommended that uniformity would be achieved by use of the Council's Handbook on how to issue a European arrest warrant[20] which sets out the factors to be taken into account when issuing a European arrest warrant and the possible alternative measures to be considered before taking such a step.[21]

1.7 The European Council's Evaluation

In 1997 the European Council established a mechanism for evaluating the application and implementation at national level of international measures designed to deal with organised crime. The fourth round of mutual evaluations, 18 May 2009, addressed the application in practice of the European arrest warrant.[22]

The Council noted: "*In general terms, the practitioners who were interviewed in the different Member States had a very positive view of the EAW and its application … National authorities have assumed the innovative nature of the EAW and are aware of the need to introduce a new*

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19 A similar conclusion had been reached by the Council in its Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European arrest warrant and by a Commission experts' meeting: Implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrants: The issue of proportionality (Brussels 5 November 2009).

20 Amended in June 2010

21 Council 8436/2/10 COPEN p.3

22 Final Report of the fourth round of mutual evaluations – The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States, 8302/2/09, Brussels 18 May 2009.

judicial culture based on mutual trust … Their willingness to see that the EAW system is effectively enforced is remarkable. No small number, however, stressed the need to take further steps to approximate legislation and identify common procedural standards as a means of enhancing mutual trust."

1.8 The Roadmap and Procedural Safeguards

In 2003 the European Commission produced a Green Paper on Minimum Standards in Procedural Safeguards in Criminal Proceedings.[23] This was followed in 2004 by a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.[24] However, the negotiations that followed did not result in a Framework Decision. On 30 November 2009, the Council adopted what was known as '*The Roadmap*' for strengthening the procedural rights of suspected or accused persons in criminal proceedings.[25]

The Roadmap identified six priority measures:

(i) the right to interpretation and translation;

(ii) the right to information about rights (known as the Letter of Rights);

(iii) the right to pre-trial legal advice and at-trial legal aid;

(iv) the right of a detainee to communicate with family members, employers and consular authorities;

(v) greater protection for vulnerable suspects;

(vi) the publication of a green paper on pre-trial detention.

1.8.1 Interpretation and Translation

In relation to the first measure (interpretation and translation), a Directive on the right to interpretation and translation in criminal proceedings was adopted by the European Parliament and Council in October 2010.[26] The recitals make clear how it is hoped it will have a positive effect on the principle of mutual recognition.

> "*(3) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.*
>
> *…*

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[23] Com (2003) 75 final, 19 February 2003

[24] Com (2004) 328 final, 28 April 2004

[25] Resolution of the Council of 30 November 2009 OJ C 295, 4 December 2009, p.1

[26] Directive 2010/64/EU- OJ L 2890 26 October 2010. The United Kingdom Government has decided to examine each Road map proposal on a case by case basis. It has agreed to participate in the interpretation and translation Directive which is scheduled to come into force in October 2013.

(6) Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(7) Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter."

The Directive provides that a person subject to criminal proceedings who does not speak or understand the language of those proceedings, shall be provided with interpretation during the proceedings, including during police questioning, all court hearings and any necessary interim hearings. Interpretation should be of sufficient quality to safeguard the fairness of the proceedings by ensuring the person has knowledge of the case against them. The Directive also includes a requirement for the written translation of "*essential documents*" which includes a decision depriving the defendant of his liberty, any charge or indictment, any written judgment and other documents which the Member State concerned deems essential in order to safeguard the fairness of the proceedings.

1.8.2 Right to information in criminal proceedings

The Directive on the right to information in criminal proceedings must be implemented by June 2014.[27] It requires that a person suspected of committing criminal offence is informed in writing and in a language they understand that they have certain rights including the right of access to a lawyer, the right to be informed about the accusation, the right to interpretation and translation and the right to remain silent. If a person has been arrested, and is in custody, the letter of rights must also contain additional information. There is also a right to information concerning the criminal proceedings which must be made available without any charge.

1.8.3 Access to a Lawyer

The Directive on the right of access to a lawyer in criminal proceedings was formally adopted by the Council of Ministers on 7 October.[28] This Directive sets minimum standards to ensure that individuals are able to have access to a lawyer from the time that they are made aware that they are suspected, or when they are accused, of committing a criminal offence. In addition, it will ensure that the arrested person is allowed to communicate with their family and, in cases where the suspect is arrested abroad, to contact and receive visits from their home consulate. The Directive will also ensure that individuals subject to an EAW are made aware of their right to appoint a lawyer in the issuing Member State and are provided with the necessary information to facilitate this[29].

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[27] DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2012 on the right to information in criminal proceedings

[28] Once it is published in the Official Journal Member States will have three years to implement it.

[29] The UK and Ireland are not currently participating in the Directive although they can choose to opt in.

1.8.4 Green Paper on Pre-Trial Detention

In June 2011, the Commission published a Green Paper on Pre-Trial Detention ('the Green Paper'), as envisaged by the Roadmap. In the Green Paper, the Commission acknowledged that in a number of Member States the system of pre-trial detention fell far below acceptable standards. In particular, the use of pre-trial detention was capable of breaching the Convention rights of suspected or accused people in the following ways.

- By offending against the presumption in favour of bail. This problem is particularly acute for suspected or accused persons who are foreign nationals. In one case, *Tariq v the Czech Republic*[30], the applicant was held in custody for some four years between charge and trial, principally on the grounds that he had no links to the Czech Republic and was facing a substantial sentence of imprisonment if found guilty.
- By virtue of the conditions in which the applicant was kept. In *Orchowski v Poland*[31], the applicants complained that they had been subjected to a breach of article 3 of the ECHR, on account of being kept in conditions where they enjoyed less than 3m² of living space, with the lack of space made worse by aggravating factors, such as lack of exercise, lack of privacy and frequent transfers.
- The length of detention. In *Jablonski v Poland*[32], the applicant had been held in some form of custody for five years prior to his being tried for what, the European Court of Human Rights noted, was not an unusually or exceptionally complex allegation.

At the same time, the significant divergence between Member States regarding the use of and procedural safeguards attached to pre-trial detention had the potential to significantly undermine reciprocal trust between judicial authorities across the Union. As the Commission has noted,

> "*Without mutual confidence in the area of detention, European Union mutual recognition instruments that have a bearing on detention will not work properly, because a Member State might be reluctant to recognise and enforce the decision taken by another Member State's authorities. It could be difficult to develop closer judicial cooperation between Member States unless further efforts are made to improve detention conditions and to promote alternatives to custody.*"

The Green Paper invited responses as to how to ensure that pre-trial detention was the exception rather than the norm and where it was necessary that it was in humane conditions which did not violate the European Convention on Human Rights. It is understood that the Commission is continuing to consider the issue of pre-trial detention.

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[30] Application no 75455/01

[31] Application no 17885/04

[32] Application no 33985/05, [2008] ECHR 33985/05

1.8.5 Further work on the roadmap on procedural rights

The Commission has in November 2013 issued a Communication outlining its five proposals to make progress procedural safeguards for suspects or accused persons and to "strengthen the foundation of the European area of criminal justice".[33] It has proposed three Directives dealing with:

(1) Presumption of innocence and right to be present at trial in criminal proceedings[34]

(2) Special safeguards for children suspected or accused in criminal proceedings[35]. Article 17 specifies that some of the rights in this directive would apply in the executing Member State to a requested child undergoing EAW proceedings. Article 17(2) requires the executing Member State to take all measures to limit the period that any child is held in detention during EAW proceedings.

(3) Provisional legal aid for suspects or accused persons deprived of liberty and legal aid in EAW proceedings in both the issuing and executing Member States.[36] This will give practical effect to the right to dual representation in EAW proceedings provided by the Directive on access to a lawyer. However, Article 5(3) provides that legal aid may be subject to a means and / or merits assessment according to the eligibility criteria operating in each Member State.

The Commission has also issued two recommendations dealing with:

(4) Procedural safeguards for vulnerable persons suspected or accused in criminal proceedings[37] Article 16 suggests that executing Member States should ensure that a vulnerable person subject to EAW proceedings has the procedural rights set out in the recommendation.

(5) The right to legal aid for suspects or accused persons in criminal proceedings.[38]

1.8.6 Defence Rights in the EU

A report by Fair Trials International published in 2012[39] looked at defence rights across the European Union considering both responses to a survey of defence practitioners and also an analysis of the case law of the European Court of Human Rights. The keys conclusions were:

- EU Member States are responsible for a growing number of violations of the European Convention on Human Rights: liberty and fair trial rights are those most commonly breached;

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[33] COM (2013) 820/2

[34] COM (2013) 821/2

[35] COM (2013) 822/2

[36] Article 5, COM (2013) 824

[37] C (2013) 8178/2

[38] C (2013) 8179/2

[39] http://www.fairtrials.org/wp-content/uploads/2012/10/ADR-Report_FINAL.pdf

- In many states, legal advice is not always provided, confidential access to clients is not guaranteed, and legal aid provision is inadequate;
- Standards of interpreting are often poor, as is access to prosecution information;
- Police misconduct against suspects in custody is going unpunished;
- Equality of arms and the presumption of innocence are not respected;
- There is insufficient protection for vulnerable suspects and defendants such as children and mentally or physically disabled people; and
- Unnecessary and excessive detention before trial blights many states' systems and causes prison overcrowding; detainees often have no way to challenge their detention and alternatives are not available or not used.

1.9 The United Kingdom

Article 10 of Protocol 36 to the EU Treaties enables the UK Government to decide by 31 May 2014 whether the UK should continue to be bound by the police and criminal justice measures which were adopted before the Treaty of Lisbon entered into force. This includes the EAW Framework Decision:

> *"The European Arrest Warrant has been successful in streamlining extradition processes and returning serious criminals. However, the government has been clear that there have been some problems with its operation. Particular concerns have been raised about the disproportionate use of the EAW for trivial offences, the lengthy pre-trial detention of some British citizens overseas and the use of the EAW for actions that are not considered to be crimes in the UK. The Government has undertaken to consider what changes can be made to improve the EAW's operation."*[40]

The UK Government has now made its position clear

> *"…I would like to make a statement on the decision whether the UK should opt out of those EU police and criminal justice measures adopted before the Lisbon Treaty came into force…this is a stand-alone decision which the Government is required to make under the terms of the Lisbon Treaty by 31 May 2014, with that decision taking effect on 1 December of that year. It covers around 130 measures, some of which it is clearly in our national interest to remain part of. But if we wish to remain bound by only some of the measures, we must exercise our opt-out from them all en masse and seek to rejoin those that we judge to be in our national interest…..*
>
> *We believe the UK should opt out of the measures in question for reasons of principle, policy, and pragmatism. And we should only seek to rejoin those measures that help us co-operate with our European neighbours to combat cross-border crime and keep our country safe…."*[41]

The UK Government has indicated that it would wish to re-join the EAW scheme. If it is allowed to re-join then it will be subject to the full jurisdiction of the CJEU and the

[40] Paragraph 80, page 95 of Cm 8671 July 2013 (Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union). This was prepared to assist with consideration of whether or not the UK should continue to be bound by the police and criminal justice measures, which includes the EAW, which were adopted before the Treaty of Lisbon entered into force.

[41] Statement of Home Secretary on 9 July 2013 to the UK Parliament

enforcement powers of the European Commission. The UK has also indicated that it will introduce amendments to its domestic legislation and work at an EU level to try and deal with concerns it has about the operation of the EAW scheme.

1.10 Croatia

Croatia became a member of the European Union on 1 July 2013 and now operates the EAW scheme as it has implemented the EAW Framework decision through domestic legislation.[42]

1.11 Conclusion

The concept of mutual recognition has its origins in common market law. In the context of surrender procedures it was adopted as an alternative to the more politically controversial notion of harmonisation. However, it is difficult to equate the surrender of convicted or accused persons within the EU to the free movement of goods, services, persons and capital. In many cases surrender takes place against the will of the requested person and brings with it the personal and financial cost in moving someone to another country to face trial or to serve a sentence. It cannot be assumed that this is their country of nationality and so in some cases it may even be a country they have never visited previously where a language is spoken they do not understand and with an unfamiliar legal system. This movement may affect the requested person, their family and their employment. The EAW scheme suggests that it heralds the abolition of extradition replacing it with a simplified system of surrender between judicial authorities[43]. However, if the movement of a requested person is carried out without proper consideration then it cannot take any account of a change in their circumstances since they were accused of the offence or sentenced (or any information which was unknown to the court which carried this process).

The mutual recognition programme and, therefore the EAW Scheme, is founded on a supposed high degree of mutual trust: "*The important underlying assumption of the Framework Decision is that member states, sharing common values and recognising common rights, can and should trust the integrity and fairness of each others' judicial institutions.*" One of the enduring problems has been that this starting assumption is not universally held which is not surprising given that every Member State is regularly found to violate the European Convention on Human Rights.

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[42] An amendment made to this legislation so that Croatia would not have to surrender to other Member States persons accused or convicted of crimes committed before 7 August 2002 provoked a strong response from the Commission which felt this was in violation of EU law- see http://europa.eu/rapid/press-release_MEMO-13-793_en.htm .

[43] Recital 5, Preamble, EAW Framework Decision. However, not every Member State has adopted the terminology of surrender and the UK, for example, continues to use extradition to refer to the EAW scheme. Given this, this report will refer interchangeably to surrender and extradition when referring to the execution of an EAW.

The problems which exist in terms of human rights in some Member States, such as over long pre-trial detention and the conditions of detention, are not caused by the EAW. However, they demonstrate that the conditions in each Member State are not equivalent. It must be hoped that the need to have equivalent criminal justice systems will lead to improvements in all Member States and this will hopefully be the outcome of the Roadmap on Procedural Rights. There is a danger that it may lead to unequal treatment in favour of those who are surrendered under the EAW scheme as assurances given as part of this process might lead to better treatment than those who are not surrendered.

The EU has recognised that as increasingly citizens of European Member States travel within the Union there will be ever greater instances where they come into contact with the criminal justice system of another Member State.

2. Is the European Arrest Warrant Framework Decision effective, complete and consistent in its application among Member States?

It is clear that the EAW Framework Decision has not been implemented consistently by Member States. The Commission has monitored the implementation and its reports, and in particular the Staff Working Documents annexed to the reports, amply illustrate the lack of consistency in the implementation of the Framework Decision[44]. It is less clear if the Commission is correct in its assessment of whether Member States have incorrectly transposed the Framework Decision. Member States mount robust defences of their domestic implementation of the EAW Framework Decision in their comments on the Commission Reports[45]. For example there is a clear disagreement as to the relationship between the EAW Framework Decision and fundamental rights:

> *"Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights an explicit ground for refusal in event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States: in a system based on mutual trust, such a situation should remain exceptional."*[46]

It is instructive to look, for example, at Ireland's response as it does not agree with the Commission that its domestic provision dealing with ECHR rights goes beyond the EAW Framework Decision[47]- this issue is addressed further in Chapter 3 of this report. It is also clear that some Member States have introduced provisions not explicitly envisaged in the Framework Decision to maintain concepts or protections which they had in their extradition legislation in place before the EAW scheme. Member States may try to justify these differences by referring to fundamental rights or concepts of EU law. Member States also try to deal with perceived deficiencies in the EAW scheme by including provisions in their domestic law which have no exact parallel in the EAW Framework Decision. This report looks at two examples of this; the first is made to deal with the problem of EAWs issued for cases that are not ready to proceed to trial (discussed later in this Chapter) and the second deals with the issue of proportionality (and is discussed in Chapter 4).

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[44] The most recent analysis is in the Staff Working Document annexed to the 2011 Commission Report SEC (2011) 430 Final.

[45] See for example the Members States' comments on the Commission Report of 2005. 11528/05 COPEN 118 EJN 40 EUROJUST 44

[46] Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), European Commission, 24 January 2006, COM (2006) 8 and SEC (2006) 79 at page 6. (The first evaluation report was actually produced in 2005 but revised to include findings in relation to Italy, which implemented the Framework Decision on 14th May 2005.)

[47] Ireland's comments on the 2007 Commission Report 14308/07 COPEN 146 EJN 32 EUROJUST 60 at page 3

It is possible that some of these issues may be settled once the enforcement powers of the Commission and the jurisdiction of the Court of Justice apply in 2014.[48] The Commission realises what a seismic change will occur in 2014:

> "*The new regime introduced by the Lisbon Treaty will become fully effective soon. The Treaty's transitional regime for justice and home affairs - covered by the former so-called 'third pillar' - expires on 30 November 2014. From that date, the Commission will have enforcement powers over the whole justice and home affairs acquis and the European Court of Justice will have full jurisdiction for pre-Lisbon mutual recognition instruments. This, together with the establishment of an EU-wide prosecution system to tackle fraud against the EU's financial interests, will change the landscape of the European area of criminal justice.*"[49]

It is striking that even the courts of those Member States which have the ability to make preliminary references to the Court of Justice of the European Union ("CJUE") have not used this much. It is also clear from the limited number of decision made by the CJEU that it is often reluctant to deal with the wider issues that affect the EAW and instead focuses very narrowly on the questions referred to it even on occasion rephrasing the questions to avoid addressing wider points. This is discussed further in the context of fundamental rights in Chapter 3.

Therefore, it seems essential that the problems which affect the EAW scheme should be addressed at an EU level. Otherwise the domestic legislation with Member States have in place to try and deal with these problems may be found to violate the Framework Decision and this could cause conflict with the Commission. It also seems likely that courts in Member States are not making referrals to the CJEU as they prefer to develop their own approaches to try and deal with these problems. The CJEU seems reticent to deal with some of these wider issues as it is obviously reluctant to do anything which would undermine the efficiency of the EAW scheme.

This chapter consider two specific issues that have arisen and these are:

- the meaning of "judicial authority" and why it may be necessary for this to be defined in the EAW Framework Decision; and
- EAWs which are issued for cases which are not immediately ready to proceed to trial and how this issue could be dealt with.

2.1 Judicial Authority

The Commission considered the issue of the bodies designated as judicial authorities by the Member States in the 2007 Staff Working Document.

"*The Framework Decision does not define what a judicial authority is, this question being left to the national law of Member States. Whilst it is understood that the Minister of Justice is designated by national Danish law as being a judicial authority, it is difficult to view such a*

[48] See Article 9 of Protocol 36 (Transitional Provisions) annexed to the Treaty of Lisbon.

[49] Part 4, page 12 COM (2013) 820/2

designation as being in the spirit of the Framework Decision. Similarly, DE has designated the Federal Ministry of Justice and the Ministries of Justice in the Länder as the competent judicial authority. The latter have very often transferred the exercising of their powers to submit outgoing requests to public prosecutor's offices in the Länder as well as the regional Courts while their powers to allow incoming requests have generally been transferred to regional public prosecution authorities in the Länder. One of the main advances of the European Arrest Warrant system is the removal of the possibility of political involvement from the surrender proceedings. The Commission therefore considers that the designation of an organ of the Executive as a judicial body will adversely impact on fundamental principles upon which mutual recognition and mutual trust are based.

The competent judicial authority when EE stands as the issuing Member State is the prosecutor when the EAW is delivered in order to conduct criminal prosecutions and the Ministry of Justice when the EAW is delivered in order to execute a custodial sentence.

Moreover as the national legislation is currently drafted, there is no competent issuing judicial authority designated to deal with instances where a suspect might abscond during the preliminary stages of the criminal proceedings. This is not in line with the Framework decision. However, when EE is acting as the executing Member State, its judicial authorities are district or appeal judges.

In addition, LT has indicated that an EAW for enforcement of a sentence is issued by the Ministry of Justice but only at the request of the judicial authority or the authority executing the sentence, that is the relevant prison department which is, however, under the under the control of the Ministry of Justice . The Ministry of Justice is not a judicial authority, but rather part of the executive. In particular, in the case the issuing of a EAW is asked by the prison department, there is no involvement at all of the judiciary. As to the Office of the Prosecutor General, it is considered as judicial authority in LT because the related provision is inserted in Chapter 9 of its Constitution entitled "The Court" of the judicial Procedure. Hence, there is no strong support to the argument that the Office of the Prosecutor General is a judicial authority in LT. Again, the Framework Decision states that an EAW must be issued or executed by a judicial authority and as a consequence LT's implementation of Article 6 is contrary to the Framework Decision.

For FI, the Criminal Sanctions Agency shall issue the warrant for the enforcement of a custodial sentence.

Last but not least, whilst CY has indicated that the Office of the Attorney General is neither a political, judicial nor an administrative authority, the Commission is concerned by the role it plays in the issuing of an EAW. Indeed, for a EAW to be issued in a prosecution case, the consent of the Attorney General must be given in writing prior to the EAW being produced before the competent judicial authority. The Commission has not been informed of what would happen to a EAW if the consent by the Attorney General is refused and as a consequence the Commission fears that the Attorney General, in practice, will endorse the role of a judicial authority."[50] [emphasis added]

The concept of a "judicial authority" is critical to the EAW process as "*the issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.*"[51] The failure

[50] Commission staff working document : Annex to the report from the Commission, SEC(2007)979 (as published in Council Document No. 11788/07 Add 1)

[51] Article 6(1) EAW Framework Decision

of the EAW Framework Decision to define this important term and the differences between the criminal justice systems in different member states had led a large variation in practice between Member States as is illustrated by the extract from the Staff Working Document above. It has also led to confusion as a previous draft of the Framework Decision provided specificity referring to judges and prosecutors. It is for each Member State to designate its judicial authority and then it must "*inform the General Secretariat of the Council of the competent judicial authority under its law*".[52] However, as the Staff Working Document makes clear one of the key changes brought about by the EAW Framework Decision is the removal of any political involvement in the process and this is why the Commission is critical of those Member States which have designated Ministries of Justice as they are considered to be part of the executive and not the judiciary. The Commission also suggests that this may "*adversely impact on fundamental principles upon which mutual recognition and mutual trust are based*". Taking the UK as an example this certainly seems to be what has happened.

In the UK an EAW is valid only if issued by a judicial authority for another Member State and the UK's judicial authority must certify that the foreign judicial authority has the function of issuing EAWs in that Member State[53]. However, it is for judge in the UK to determine whether the person or body that has issued the EAW has the quality of being a 'judicial authority'[54]. A judicial authority must be sufficiently independent of the executive for the purpose of carrying out the function of making the judicial decision when issuing the EAW[55].

It had been held that this could apply to a Ministry of Justice for conviction warrants but the judge would have to decide whether in fact there is sufficient independence for the particular Ministry of Justice which has issued the EAW. However this position has now changed as the Supreme Court has recently delivered its judgement in three joined cases.[56] The Supreme Court has confirmed that "judicial authority" has an autonomous meaning and does not simply mean that each Member State can choose to define it in whichever way they choose. A Ministry of Justice can in principle constitute a "judicial authority" but only if it issues the EAW under the national law of the issuing Member State at the request of and by way of endorsement of a decision that the issue of the EAW is appropriate. This decision must be made by the court responsible for the sentence or some other body or person properly regarded as a judicial authority (for example, a prosecutor) responsible for its execution. The Supreme Court found that the Ministry of Justice of Lithuania when it issued an EAW on the request of the prison service was not a "judicial authority".

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[52] Article 6(3)EAW Framework Decision

[53] Section 2(7) and (8) Extradition Act 2003

[54] *Ministry of Justice, Republic of Lithuania v Bucnys* [2013] 1 All ER 1220 at [85].

[55] Ibid at paragraph 97. However, the Supreme Court has cast doubt on whether this is relevant without resolving the issue. [2013] UKSC 71

[56] *Bucnys v Ministry of Justice, Republic of Lithuania; Sakalis v Ministry of Justice, Republic of Lithuania; Lavrov v Ministry of Justice, Estonia* [2013] UKSC 71

The current position in the UK is that a public prosecutor[57] or a police authority[58] can be a "judicial authority. However, police and prosecutors[59] are not seen in the UK as exercising judicial functions and this issue continues to provoke litigation. It is entirely unclear as to whether there is consensus between the Member States and the Commission as to what was intended by the phrase "judicial authority" and this is particularly problematic given the differences between the roles of the prosecutor, judge and police officer in the adversarial and inquisitorial systems. Even leaving this aside some Member States have designated Ministries of Justice as "judicial authorities" which the Commission does not believe is appropriate. The EAW Framework Decision speaks of the EAW being "a judicial decision"[60] and the implication must be that there are safeguards which flow from it being a judicial decision (and also presumably subject to the protections of Articles 5 and 6 ECHR). If this is not correct then it may undermine the premise that mutual recognition should lead to the recognition and execution of this decision.

2.2 When should an EAW be issued?

The EAW Framework Decision leaves it for the issuing judicial authority to decide when to issue a European arrest warrant. However, it is undesirable in any system of criminal justice for an accused person to be kept in custody awaiting trial for an unnecessary period of time. The problem of lengthy periods of pre-trial detention can be addressed in a number of ways:

(i) Member States can be encouraged to ensure that proceedings are brought to trial without unreasonable delay, as is required by Article 6 of the Human Rights Convention in any event.

(ii) Member States can issue European arrest warrants so as to limit the period of time an accused person spends in custody. EAWs could only be issued when the case is ready for trial or almost ready for trial unless there is an exceptional requirement for the presence of the defendant (see (v) below).

(iii) Greater use can be made of the European Supervision Order to avoid unnecessary pre-trial detention.

(iv) The EAW Framework Decision can be amended to include a system of postponed surrender with the requested person remanded on bail in the executing State until his or her appearance is required in the issuing State.

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[57] *Assange v Swedish Prosecution Authority* [2012] 2 AC 471

[58] *Ziri v Head of the International Police Cooperation Division National Police Board* [2012] EWHC 3329 (Admin)

[59] The difference between the role of a prosecutor in the common and civil law systems is discussed in *Assange v Swedish Prosecution Authority* [2012] 2 AC 471, for example, at [36]-[38].

[60] Article 1(1), EAW Framework Decision

(v) EU level action can be taken to ensure that Member States do not unnecessarily require the presence of the accused in order to start the criminal process or at any intermediate stage before trial. This would avoid the issue of an EAW before a case is actually ready for trial which otherwise may lead to lengthy pre-trial detention. If a person needs to take part in a pre-trial procedure then this can take place by video link unless there is an exceptional reason why this is not appropriate. If the Member State does require a person's physical presence for a pre-trial procedure then they can be required to issue a summons to try to secure this appearance before issuing an EAW.

2.2.1 "for the purposes of conducting a criminal prosecution"

Article 1(1) the EAW Framework Decision makes clear that an EAW must be issued "for the purposes of conducting a criminal prosecution". There is no definition of this term in the Framework Decision and it is being interpreted variably in different Member States.

In the UK, section 2(3) Extradition Act 2003, which implements the EAW Framework Decision, requires an EAW to contain a statement that (i) the person is accused of an offence and (ii) it is issued with a view to the person's arrest and surrender for the purpose of being prosecuted for the offence. The UK case law considers that:

> *"…In the 2003 Act the requirement in s2(3)(a) that the person is "accused" of the offence specified in the warrant and the requirement in s2(3)(b) that the warrant is issued for the purpose of prosecution, when read together, emphasise that it is not enough that the criminal investigation has reached a stage where the person concerned merely faces suspicion of having committed an office and that the authorities in the requesting state wish to be able to question him with a view to determining whether there is a sufficient case to put him on trial. The investigation must have reached the stage at which the requesting judicial authority is satisfied that he faces a case such that he ought to be tried for the specified offence or offences, and the purpose of the request for extradition must be to place him on trial. This has to be made clear by the language of the EAW, however it is expressed…"*[61]

This might be thought to suggest that the EAW Framework Decision and the Act therefore required a decision to charge to have been taken. The difficulty arises with interpreting "for the purpose of". The courts in the UK have held that they are capable of referring to a future event that has not yet occurred (i.e. a prosecution that may commence in the future). This means that the EAW Framework Decision is capable of being read in a way that elides the concepts of pre-charge investigation and post charge prosecution. Using this interpretation, an EAW could be issued under the Framework Decision prior to the point at which a criminal prosecution had actually commenced.

Therefore the position in the UK is that the courts have recognised that the domestic legislation went further than the EAW Framework Decision in introducing the common law concept of "accused". However, the courts have held that neither "accusation" nor

[61] *The Judicial Authority of the Court of First Instance, Hasselt, Belgium v Bartlett* [2010] EWHC 1390 (Admin) at paragraph 50

(because of the words "for the purpose of") "conducting a criminal prosecution" requires a decision to charge (much less a decision to try) to actually have been made.[62]

This is not the construction that other Member States have given to Article 1(1). In Ireland section 21A of the Irish European Arrest Warrants Act 2003 was inserted by the Criminal Justice (Terrorist Offences) Act 2005.

> *"21A. – (1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.*
> *(2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."*

This provision was examined in detail in *Bailey v Minister of Justice, Equality & Law Reform*[63]. The Irish scheme requires a decision to charge and to try to have been made (with a rebuttable presumption that this has happened). Section 21A was considered by the European Council's 2007 Mutual Evaluation report on Ireland and attracted no adverse comment. [64]

There may be cases where, in reality, a decision to charge has been taken, but cannot be formally notified (under the procedural law of the Member State) other than in the presence of the defendant (i.e. after surrender).[65] However, the terms of the Irish legislation have been shown to be capable of catering for such cases.[66]

The UK has now proposed an amendment to its domestic legislation to include a similar provision to that found in Ireland. The draft legislation which is currently being considered by the UK's legislature includes the following[67]:

"12A Absence of prosecution decision

(1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if) –

(a) it appears to the appropriate judge that there are reasonable grounds for believing that –

> *(i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and*

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[62] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) at paragraphs 128-154; *Neave, O'Connor, Dines & Dines v Court of Rome, Italy* [2012] EWHC 358 (Admin)

[63] [2012] IESC 16

[64] Doc. 11843/2/06 REV 2 at 4.9

[65] See, for example, the UK case of *Meizoso-Gonzalez v Juzgado de Instruccion Cinco de Palma de Mallorca, Spain* [2010] EWHC 3655 (Admin))

[66] *Olsson v Minister for Justice, Equality & Law Reform* [2011] IESC 1 discussed in *Bailey*. See also the discussion at (v) above.

[67] Clause 137, Anti-social Behaviour, Crime and Policing Bill

(ii) the person's absence from the category 1 territory is not the sole reason for that failure,

and

(b) those representing the category 1 territory do not prove that –

(i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or

(ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.

(2) In this section "to charge" and "to try", in relation to a person and an extradition offence, mean –

(a) to charge the person with the offence in the category 1 territory, and

(b) to try the person for the offence in the category 1 territory."

Therefore, Member States are taking action at a domestic level to try and address issues which have arisen with the use of EAWs too early in the prosecution process. Chapter 4 which considers proportionality also provides some possible solutions at an EU level for this issue.

3. Respect for Fundamental Rights

3.1 The Treaties

The Treaties of the European Union make clear their commitment, and thus the Member States' joint commitment, to the upholding of individuals' fundamental rights.

3.1.1 The Treaty on European Union[68]

> *"Article 2*
> *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*
>
> *"Article 6*
> *(ex Article 6 TEU)*
>
> *1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*
>
> *The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*
>
> *The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*
>
> *2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*
>
> *3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States,* ***shall constitute general principles of the Union's law."*** (emphasis added)

3.1.2 Treaty on the Functioning of the European Union[69]

The TFEU has also reiterated the Union's position in relation to the status and importance of fundamental rights and freedoms:

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[68] OJ C 83/13, 30 March 2010

[69] OJ C 83/47, 30 March 2010

"Article 67
(ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

…

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

3.1.3 The EAW Framework Decision

The Framework Decision itself also refers to fundamental rights and freedoms.

The preamble includes:

"(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.
This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

"Article 1

Definition of the European arrest warrant and obligation to execute it

…

> *3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."*

Article 1(3) confirms the pre-existing obligations to respect fundamental rights. The Framework Decision is in reality adding nothing new.[70]

3.2 CJEU Case law

3.2.1 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [71]

The first case requiring the Court of Justice to consider the Framework Decision was *Advocaten voor de Wereld VZW.* In this case, the Belgian Arbitragehof asked the European Court:

> *"…*
>
> *(2) Is Article 2(2) of Framework Decision 2002/584 … insofar as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Article 6(2) EU and, more specifically, with the principle of legality in criminal proceedings guaranteed by that provision and with the principle of equality and non-discrimination?"*[72]

The then Advocate General Colomer in outlining his approach to dealing with the reference said:

> *"AG6 In order to answer that question, it will be necessary to conduct a full examination of the role of fundamental rights in the sensitive sector of police and judicial co-operation in criminal matters, following the proclamation of the Charter of Fundamental Rights of the European Union."*

In its judgment, the Court of Justice confirmed that the institutions of the EU also had to act so as to respect fundamental rights.

> *"45 It must be noted at the outset that, by virtue of Art.6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950 , and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union (see, inter alia, Gestoras Pro Amnistía v Council (C-354/04 P) [2007] 2 C.M.L.R. 22 at [51]; and Segi v Council (C-355/04 P) [2007] 2 C.M.L.R. 23 at [51])."*

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[70] This was also the position of Advocate General Sharpston in *Radu* discussed later in this chapter (see paragraph 51 of her Opinion).

[71] Case C-303/05

[72] AG Colomer's Opinion at [28]

The Court found that the limited removal of the double criminality requirement by the Framework Decision did not infringe the principle of the legality of criminal offences and penalties or the principle of equality and non-discrimination.

3.2.2 *João Pedro Lopes Da Silva Jorge*[73]

Mr Lopes Da Silva Jorge was the subject of an EAW issued in Portugal on 14 September 2006 for the purpose of enforcing a penalty of five years' imprisonment for drug trafficking. Whilst Mr Lopes Da Silva Jorge was a Portuguese national, he had moved to France, married a French woman in July 2009 and had been employed since February 2008 as a long-distance lorry driver in France under a contract of indefinite duration.

Before the French domestic Court, Mr Lopes Da Silva Jorge resisted extradition:

> *"24 Mr Lopes Da Silva Jorge asks the cour d'appel d'Amiens not to execute the European arrest warrant and to order his sentence of imprisonment to be served in France. In that connection, Mr Lopes Da Silva Jorge submits, in particular, that his surrender to the Portuguese judicial authorities would be contrary to Article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950. It would disproportionately undermine his right to respect for private and family life, since he lives in France at the home of his wife, a French national, and he is employed in that Member State as a long-distance lorry driver under a contract of indefinite duration by a French company. Mr Lopes Da Silva Jorge also submits, relying on Wolzenburg, that, inasmuch as it limits to French nationals alone the optional ground for refusing execution under Article 4(6) of Framework Decision 2002/584, Article 695-24 of the Code of Criminal Procedure incorrectly transposes that provision, since Article 4(6) allows that ground also to be used in relation to the residents of the executing Member State. This gives rise, moreover, to discrimination on grounds of nationality within the meaning of Article 18 TFEU, in so far as the difference in treatment introduced by that national provision between the nationals of the Member State in question and the nationals of other Member States is not objectively justified."*

This led the French court to make the following reference to the CJEU for a preliminary ruling:

> *"(1) Does the principle of non-discrimination laid down by Article [18 TFEU] preclude national legislation such as Article 695-24 of the [French] Code of Criminal Procedure which restricts the power to refuse to execute a European arrest warrant issued for the purposes of enforcing a penalty involving deprivation of liberty to cases where the person whose extradition is sought is of French nationality and the competent French authorities undertake to proceed with such enforcement?*
>
> *(2) Is the principle of the implementation in domestic law of the grounds for non-enforcement provided for in Article 4(6) of [Framework Decision 2002/584]*

[73] Case C-42/11

> *a matter for the discretion of the Member States or is it compulsory, and in particular may a Member State adopt a measure involving discrimination based on nationality?'"*

Advocate General Mengozzi's Opinion considered the inter-relationship between fundamental rights and the EAW Framework.

> *"27.First of all, however, I should like to make a number of observations which appear to me to be essential for a better understanding of the present case and the issues involved. To that end, it is important to bear in mind that Article 1(3) of Framework Decision 2002/584 states that that framework decision 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles' as enshrined in European Union law.*
>
> *28 […] Thus, as Article 1(3) of Framework Decision 2002/584 is at pains to remind us, in the context of applying the principle of mutual recognition within the meaning of that framework decision, the protection of fundamental rights, the foremost among which is the dignity of the sentenced person, must be the overriding concern of the national legislature when it transposes acts of the European Union, of the national judicial authorities when they avail themselves of the powers devolved to them by European Union law, but also of the Court when it receives questions on the interpretation of the provisions of Framework Decision 2002/584. It is in the light of the higher principle represented by the protection of human dignity, the cornerstone of the protection of fundamental rights within the European Union legal order, that the free movement of judgments in criminal matters must not only be guaranteed but also, where appropriate, limited.*

The Court held that a Member State could not, without undermining the principle that there should be no discrimination on the grounds of nationality, limit the non-execution of a warrant (on the basis of allowing the requested person to serve the custodial sentence in the requested Member State) solely to their own nationals, by automatically and absolutely excluding nationals of other Member States who were staying or resident in the territory of the Member State of execution, irrespective of their connections with that Member State.

The Court noted that it had already held in *Wolzenburg*[74] that, by way of derogation from the principle of mutual recognition, a Member State could limit the benefit of this ground for non-execution to its own nationals or the nationals of other Member States who had lawfully resided within the national territory for a continuous period of five years, thereby ensuring sufficient integration by the requested person in the extraditing Member State[75].

[74] Case C-123/08

[75] Reintegration into society following the custodial sentence having consistently been held by the CJEU as the particular objective of this ground for optional refusal to extradite.

The Court's decision does not however mean that a Member State must necessarily refuse to execute an EAW issued against a person residing or staying in its territory, simply that in so far as that person demonstrates a degree of integration in the society of that Member State, comparable to that of a national, the executing judicial authority must be able to assess whether there is a legitimate interest which would justify the sentence being enforced within the executing Member State. The French domestic law in that case could not justify the difference in treatment between a non-French national and a French national.

3.2.3 *Ministerul Public - Parchetul de pe lângă Curtea de Apel Constanța V Ciprian Vasile Radu*[76]

The Facts

The case of *Radu* presented the CJEU with an opportunity to provide clear guidance on the interaction between fundamental rights and the EAW Framework Decision.

Mr Radu, a Romanian national, was the subject of four EAWs issued by German authorities seeking his extradition to face charges of aggravated robbery. The Romanian Curte de Apel (Court of Appeal) ordered the execution of three of the EAWs (one request being refused on the grounds that Mr Radu was already being prosecuted before the Romanian courts for the same alleged criminal acts).

At a hearing on 22 February 2011 before the Curte de Apel, Mr Radu opposed the execution of the EAWs issued against him arguing:

(i) Despite the fact that on the date the Framework Decision 2002/584 was adopted neither the fundamental rights laid down by the ECHR nor those contained within the Charter had been specifically incorporated into the EU's founding treaties, pursuant to Article 6 TEU, the provisions of the ECHR and the Charter had subsequently become provisions of primary EU Law and therefore the Framework Decision had to be interpreted and applied in accordance with these rights;

(ii) The Framework Decision had not been implemented consistently by Member States and the execution of an EAW was subject to a requirement of reciprocity (he made reference to the fact that German legislation transposing the Framework Decision had been declared unconstitutional in 2005 prior to the adoption of a new law by the German legislature); and

(iii) The judicial authorities of the executing state were obliged to ascertain whether the fundamental rights guaranteed by the ECHR and the Charter were being observed in the issuing Member State and if they were not, this would provide a justification for refusing to execute the EAW even if such a ground was not expressly provided for in the Framework Decision itself.

[76] Case C-396/11

The Questions to the CJEU

These objections by Mr Radu led the Romanian court to refer the following six questions for a preliminary ruling (the Court ruled that questions 1-4 and 6 were admissible but that question 5 was not):

> *"(1) Are Article 5(1) of [the Convention], and Article 6, read in conjunction with Articles 48 and 52 of [the Charter], with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], provisions of primary [EU] law, contained in the founding Treaties?*
>
> *(2) Does the action of the competent judicial authority of the State of execution of a European arrest warrant, entailing deprivation of liberty and forcible surrender, without the consent of the person in respect of whom the European arrest warrant has been issued (the person whose arrest and surrender is requested) constitute interference, on the part of the State executing the warrant, with the right to individual liberty of the person whose arrest and surrender is requested, which is authorised by EU law, pursuant to Article 6 TEU, read in conjunction with Article 5(1) of [the Convention], and pursuant to Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention]?*
>
> *(3) Must the interference on the part of the State executing a European arrest warrant with the rights and guarantees laid down in Article 5(1) of [the Convention] and in Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], satisfy the requirements of necessity in a democratic society and of proportionality in relation to the objective actually pursued?*
>
> *(4) Can the competent judicial authority of the State executing a European arrest warrant refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of [EU] law, by reason of a failure to observe all the cumulative conditions under Article 5(1) of [the Convention] and Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention]?*
>
> *(5) Can the competent judicial authority of the State executing a European arrest warrant refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of [EU] law, on the ground that the State issuing the European arrest warrant has failed to transpose or fully to transpose or has incorrectly transposed (in the sense that the condition of reciprocity has not been satisfied) [the Framework Decision]?*
>
> *(6) Is the domestic law of Romania, a Member State of the European Union – in particular Title III of Law No 302/2004 – incompatible with Article 5(1) of [the Convention] and Article 6 of [the Charter], read in conjunction with Articles 48*

and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], to which Article 6 TEU refers, and have the above provisions properly transposed into national law [the Framework Decision]?'"

These were potentially very important questions, the answers to which would seemingly have laid down a clear and consistent approach to be followed by Member States in the application of fundamental rights when dealing with EAWs.

The Advocate General's Opinion

Advocate General Sharpston delivered her Opinion on 18 October 2012 and provided a very thorough and detailed examination of the interaction between fundamental rights and the EAW Framework Decision. The Advocate General adopted a broad approach to her exploration of the issues.

She dealt briefly with the relationship between the [EU] Charter and the Convention (ECHR):

"14. Article 52(3) of the Charter makes it plain that there is, and is intended to be, overlap between the provisions of the Charter and those of the Convention. In so far as material to this Opinion, Article 6 of the Charter corresponds to Article 5 of the Convention. The second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the Convention and Article 48 of the Charter corresponds to Article 6(1) and (2) of the Convention."

The Advocate General considered the operation of the Framework Decision and its background and aims:

35. A major objective of the new arrangements introduced by the Framework Decision is the removal of delays inherent in the previous extradition system. That aim has, it appears, been achieved in practice. In its 2011 report into the implementation of the decision, the Commission notes that the average time taken for extradition was of the order of one year. Under the European arrest warrant system, the average period for implementation has been reduced to between 14 and 17 days, where the requested person consents to his surrender. Where he does not so consent, the period is 48 days.

36. While the obligations imposed on the Member States by the Framework Decision relate to matters that are essentially procedural, that does not mean that the legislature failed to take fundamental and human rights into account when enacting the Framework Decision. On the contrary: it did so in a number of ways.

37. First, it incorporated express references to those rights in the decision. That is clear, for example, from recitals 10, 12 and 13 in the preamble. More fundamentally, Article 1(3) specifically provides that the decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in what is now Article 6 TEU. I shall return to that point below.

38. Second, the high level of mutual confidence between Member States referred to in recital 10 is predicated on the observance by each of the Member States both of the rights enshrined in the Convention and of the fundamental rights which form part of the constitutional traditions common to the Member States. With effect from the coming into force of the Treaty of Lisbon on 1 December 2009, it is now necessary to add – to the extent that it did not previously already have a role to play – the Charter.

39. Third, the Framework Decision incorporates a number of provisions designed to protect the fundamental rights of the requested person. I have summarised these in point 11 above and shall not repeat them here, save to note the rights to a hearing expressly provided for where the requested person does not consent to his surrender (Article 14) and where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution (Article 18).

40. As regards the Framework Decision's objectives, it would be wrong to see the system it introduces as being purely intended to benefit the administrative authorities of the Member States. By introducing a form of procedure which is designed to be more efficient and effective than its predecessor, the legislature also intended to improve the protection afforded to victims of criminal offences by seeing their perpetrators brought to justice more rapidly and more efficaciously.

41. While the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice."

In moving on to deal substantively with the questions posed by the national court, Advocate General Sharpston said:

"Question 1

42. By its first question, the national court asks whether the provisions of the Charter and the Convention form part of the primary law of the Union.

43. I shall start with the position since the coming into force of the Treaty of Lisbon.

44. By virtue of Article 6(1) TEU, the Charter has the same legal value as the Treaties and accordingly now forms part of the primary law of the Union.

45. The provisions of the Convention have also been enshrined by the Lisbon Treaty. Article 6(3) TEU provides that fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, constitute general principles of Union law.

46. It follows that not only the Union and its institutions, but also the Member States when interpreting and applying EU law, will be bound by the Charter and the Convention.

47. That, of itself, is sufficient to answer the letter of the national court's first question. However, it is plain from the order for reference that the dispute before it is somewhat wider, inasmuch as Mr Radu appears to claim that the coming into force of the Treaty of Lisbon brought with it a fundamental change in the manner in which fundamental rights and principles fell to be applied in the Union. In order to give a useful answer to the national court, it is therefore necessary to look to the position prior to 1 December 2009.

48. While the Charter was solemnly proclaimed in Nice on 7 December 2000, the decision as to the precise legal status to be given to it was, however, postponed. As a result, it was not incorporated into any of the Treaties and its provisions were not given the force of law in any other way. None the less, the Charter quickly came to be regarded as an authoritative catalogue of fundamental rights, confirming as it did the general principles inherent in the rule of law which are common to the constitutional traditions of the Member States. This Court frequently drew guidance from the provisions of the Charter in delivering its judgments. As a result, the Charter acquired the status of 'soft' law; that is to say, although its provisions were not directly applicable as part of EU law, they none the less were capable of producing legal effects – in many cases, far-reaching effects – within the Union.

49. The role of the Convention in Union law is far more deeply rooted. As long ago as 1969, the Court held in Stauder that 'fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court'. That case-law, initially embryonic, has been applied and developed through leading judgments such as Internationale Handelsgesellschaft and Nold through to the present day. In Kadi and Al Barakaat, the Court roundly stated that 'measures incompatible with respect for human rights are not acceptable in the Community'. With specific reference to the Convention, the Court in Der Grüne Punkt described the right to a fair trial given by Article 6(1) of the Convention 'as a general principle of Community law'.

50. Given that, can it be said that the coming into force of the Treaty of Lisbon altered Union law to a material degree?

51. I do not believe so. It seems to me that Article 6(1) and (3) TEU merely represents what the United Kingdom terms in its observations a 'codification' of the pre-existing position. They encapsulate, to put it another way, a political desire that the provisions they seek to enshrine and to protect should be more visible in their expression. They do not represent a sea change of any kind. For that reason, I see any argument that the provisions of the Framework Decision must be given a different interpretation with their coming into force as being bound to fail.

52. In the light of the above, the answer to Question 1 should be that the provisions of the Charter, including Articles 6, 48 and 52 thereof, form part of the primary law of the Union. Fundamental rights, as guaranteed by the

Convention, including the rights set out in Articles 5(1), (3) and (4) and 6(2) and (3) of the Convention, constitute general principles of Union law."

In relation to Questions 2 and 3, which she dealt with together, the Advocate General again tackled head on the issues raised on the reference in relation to the application of fundamental rights:

"53. By these questions, which are best addressed together, the national court essentially asks whether the deprivation of liberty and forcible surrender of the requested person that the European arrest warrant procedure entails constitute an interference with that person's right to liberty and whether, for that interference to be authorised by Article 5(1) of the Convention and Article 6 of the Charter, it must satisfy the requirements of necessity and proportionality.

…

57. It would be wrong, however, to interpret that part of the case-law concerning the Convention as meaning that any detention under Article 5(1)(f) will always be lawful, provided that it is done with a view to deportation or extradition. The Court of Human Rights has also held that 'any deprivation of liberty under the second limb of Article 5(1)(f) will be justified … only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f) ... The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5(1) requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5(1) and the notion of "arbitrariness" in Article 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention ... To avoid being branded as arbitrary, detention under Article 5(1)(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the [national authorities]; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued ...'

…

60. I would, however, add this point. As the Commission notes in its 2011 Report, one of the criticisms levelled at the manner in which the Framework Decision has been implemented by the Member States is that confidence in its application has been undermined by the systematic issuing of European arrest warrants for the surrender of persons sought in respect of often very minor offences which are not serious enough to justify the measures and cooperation which the execution of such warrants requires. The Commission observes that there is a disproportionate effect on the liberty and freedom of requested persons

when European arrest warrants are issued concerning cases in which (pre-trial) detention would otherwise be felt inappropriate.

61. I agree.

62 … the answer to Questions 2 and 3 should be that the deprivation of liberty and forcible surrender of the requested person that the European arrest warrant procedure entails constitutes an interference with that person's right to liberty for the purposes of Article 5 of the Convention and Article 6 of the Charter. That interference will normally be justified as 'necessary in a democratic society' by virtue of Article 5(1)(f) of the Convention. Nevertheless, detention under that provision must not be arbitrary. To avoid being arbitrary, such detention must be carried out in good faith; it must be closely connected to the ground of detention relied on by the executing judicial authority; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (thus satisfying the proportionality test). Article 6 of the Charter falls to be construed in the same way as Article 5(1) of the Convention."

The Advocate General summarised question 4 as asking:

"64. By contrast to the second and third questions, where the Court was asked to look at the circumstances surrounding the requested person's detention in the period between the service of a European arrest warrant and that person's transfer to the issuing Member State, here the issues are wider. Can the competent judicial authority in the executing Member State refuse altogether to execute a warrant where infringements of the requested person's human rights are in issue?"

She then proceeded to answer the question:

"65. The question raises that point by reference to the enumerated provisions of Articles 5 and 6 of the Convention and Article 6 of the Charter. Mr Radu's counsel stated at the hearing that his client had 'not been notified in respect of the charges against him, not been subpoenaed in respect of them and found himself in a situation where it was completely impossible to defend himself'. Since the impossibility of maintaining a proper defence also gives rise, at least potentially, to issues concerning Article 6(1) of the Convention, and Article 47 of the Charter, I shall include them in my analysis for the sake of completeness.

66. A cursory reading of the Framework Decision might lead one to conclude that such infringements (whatever their temporal effects) do not fall to be taken into consideration. Articles 3 and 4 list the circumstances in which the judicial authority of the executing Member State either must (Article 3) or may (Article 4) refuse to execute a European arrest warrant. In neither case do they refer to human rights issues as a ground for doing so. The Court has held that the list of grounds set out in those articles is exhaustive.

67. Such a conclusion might also be reached on the basis of the objectives of the decision. The system of surrender it introduces is founded on the principles of mutual recognition and a high level of mutual confidence between Member

States, and is intended to reduce the delays inherent in the former extradition procedure.

68. The Court has, no doubt having regard to this consideration, held that 'the principle of mutual recognition, which underpins the Framework Decision, means that, in accordance with Article 1(2) of the Framework Decision, the Member States are in principle obliged to act upon a European arrest warrant'. That must plainly be correct, since, if the position were otherwise, the objectives underlying the decision would risk being seriously undermined.

69. However, I do not believe that a narrow approach – which would exclude human rights considerations altogether – is supported either by the wording of the Framework Decision or by the case-law.

70. Article 1(3) of the Framework Decision makes it clear that the decision does not affect the obligation to respect fundamental rights and fundamental principles as enshrined in Article 6 EU (now, after amendment, Article 6 TEU). It follows, in my view, that the duty to respect those rights and principles permeates the Framework Decision. It is implicit that those rights may be taken into account in founding a decision not to execute a warrant. To interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude.

…

73. In my view, it is clear that the judicial authorities of an executing Member State are bound to have regard to the fundamental rights set out in the Convention and the Charter when considering whether to execute a European arrest warrant."

After considering the relevant case law she stated:

"77. To summarise, both Courts [77] accept that fundamental rights may affect the legislative obligation of a Member State to transfer a person to another State. As regards Article 3 of the Convention and the equivalent provisions in Article 4 of the Charter, they consider that the test should be whether there are 'substantial grounds for believing' that there is a 'real risk' that the provision in question will be infringed in the State to which the person in question would otherwise fall to be transferred. In the context of Article 6, the Court of Human Rights has held that the obligation to transfer will be affected only 'exceptionally' and where the person in question 'has suffered or risks suffering a flagrant denial' of his rights under the Convention. This Court has yet to give a ruling in relation to Articles 47 and 48 of the Charter."

The Advocate General then went on to consider whether the CJEU should adopt the same tests as the European Court of Human Rights, concluding it should not as the test and the standard of proof was too high and proposing different tests (see paragraphs 79 – 96) which she summarised in her conclusion:

[77] Both the UK Supreme Court in *Soering v United Kingdom* (No 14038/88) and the CJEU in *N.S. and Others* (Joined Cases C-411/10 and C-493/10 [2011] ECR I-0000)

> *"97. In the light of the above, the answer to Question 4 should be that the competent judicial authority of the State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of Community law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection."*[78]

The CJEU took a very narrow approach to the questions referred by the National Court. On the basis of its analysis that Mr Radu had argued that his surrender should not take place because the EAWs had been issued without his having been heard beforehand in the issuing State, the CJEU interpreted the Romanian Court's questions as:

> *"essentially asking whether Framework Decision 2002/584, read in the light of Articles 47 and 48 of the Charter and of Article 6 of the ECHR, must be interpreted as meaning that the executing judicial authorities can refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the issuing judicial authorities did not hear the requested person before that arrest warrant was issued"*[79].

The Court found that Articles 47 and 48 of the Charter and Article 6 of the ECHR did not allow refusal of an EAW for this reason as according to the Court, a requirement that the person against whom extradition was sought be entitled to be heard in the proposed issuing state, prior to the EAW being issued, would *"inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584"* as the EAW system's effectiveness depended upon *"surprise"* and furthermore because a right to be heard was available in the executing Member State.[80]

The wording of the Court's judgment in paragraphs 36 and 37 suggests a narrow approach to the issue of fundamental rights.[81]

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[78] The Advocate General addressed question 5 (which the CJEU ruled was inadmissible) at paragraphs 98 – 104 and thought question 6 was not admissible.

[79] Paragraph 31

[80] Paragraphs 39-41

[81] *"36 As the Court has already held, according to the provisions of Framework Decision 2002/584, the Member States may refuse to execute such a warrant* ***only*** *in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a."* [emphasis added]

3.2.4 *Stefano Melloni v Ministerio Fiscal*[82]

Questions to CJEU

The Court was presented with a further opportunity to provide guidance on the application of fundamental rights in the context of the Framework Decision and specifically in relation to Article 4a[83] dealing with the issue of convictions *in absentia*.

The national Court referred the following three questions for a preliminary ruling:

> *"'1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?*
>
> *2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter …, and from the rights of defence guaranteed under Article 48(2) of the Charter?*
>
> *3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?'"*[84]

Judgment of the CJEU

The Court then gave its brief judgment on 26 February 2013. The Court set out its methodology:

> *"39 In order to determine the scope of Article 4a(1) of Framework Decision 2002/584, which is the subject-matter of the present question, it is necessary to examine its wording, scheme and purpose."*

It considered the first question:

> *"35 By its first question, the Tribunal Constitucional asks, in essence, whether Article 4a(1) of Framework Decision 2002/584 must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued*

[82] Case C-399/11

[83] As inserted by Regulation 2009/299/JHA and repealing Article 5(1) of Regulation 2002/584/JHA

[84] At [26]

for the purposes of executing a sentence conditional upon the conviction rendered in absentia being open to review in the issuing Member State."

The interpretative approach which the Court adopted throughout is foreshadowed by the use of the words *"wording, scheme and purpose"*:

> *"40 It is apparent from the wording of Article 4a(1) of Framework Decision 2002/584 that it provides for an optional ground for non-execution of a European arrest warrant issued for the purpose of executing a custodial sentence or a detention order, where the person concerned has not appeared in person at the trial which resulted in the conviction. That option is nevertheless accompanied by four exceptions in which the executing judicial authority may not refuse to execute the European arrest warrant in question. Article 4a(1) thus precludes, in the four situations set out therein, the executing judicial authority from making the surrender of a person convicted in absentia conditional upon the conviction being open to review in his presence.*
>
> *41 This literal interpretation of Article 4a(1) of Framework Decision 2002/584 is confirmed by an analysis of the purpose of the provision. The object of Framework Decision 2009/299 is, firstly, to repeal Article 5(1) of Framework Decision 2002/584, which, subject to certain conditions, allowed for the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia to be made conditional on there being a guarantee of a retrial of the case in the presence of the person concerned in the issuing Member State and, secondly, to replace that provision by Article 4a. That provision henceforth restricts the opportunities for refusing to execute such a warrant by setting out, as indicated in recital 6 of Framework Decision 2009/299, 'conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused'."*
>
> *42 In particular, Article 4a(1)(a) and (b) of Framework Decision 2002/584 provides in essence, that, once the person convicted in absentia was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial, gave a mandate to a legal counsellor to defend him at the trial, the executing judicial authority is required to surrender that person, with the result that it cannot make that surrender subject to there being an opportunity for a retrial of the case at which he is present in the issuing Member State.*
>
> *43 This interpretation of Article 4a is also confirmed by the objectives pursued by the EU legislature. It is apparent from recitals 2 to 4 and also Article 1 of Framework Decision 2009/299 that the European Union, in adopting that decision, intended to facilitate judicial cooperation in criminal matters by improving mutual recognition of judicial decisions between Member States through harmonisation of the grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person. As is apparent in particular from recital 4, the EU legislature, in defining those common grounds, wished to allow 'the executing authority to execute the*

decision despite the absence of the person at the trial, while fully respecting the person's right of defence'.

In dealing with the second question from the National Court the CJEU held:

> *"47 By its second question, the national court asks the Court, in essence, whether Article 4a(1) of Framework Decision 2002/584 is compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter and from the rights of the defence guaranteed under Article 48(2) of the Charter.*
>
> *48 It must be borne in mind that, under Article 6(1) TEU, the Union recognises the rights, freedoms and principles set out in the Charter, 'which shall have the same legal value as the Treaties'.*
>
> *49 Regarding the scope of the right to an effective judicial remedy and to a fair trial provided for in Article 47 of the Charter, and the rights of the defence guaranteed by Article 48(2) thereof, it should be observed that, although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute (see, inter alia, Case C-619/10 Trade Agency [2012] ECR I-0000, paragraphs 52 and 55). The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.*
>
> *50 This interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the European Court of Human Rights (see, inter alia, ECtHR, Medenica v. Switzerland, no. 20491/92, § 56 to 59, ECHR 2001-VI; Sejdovic v. Italy [GC], no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and Haralampiev v. Bulgaria, no. 29648/03, § 32 and 33, 24 April 2012).*
>
> *51 Furthermore, as indicated by Article 1 of Framework Decision 2009/299, the objective of the harmonisation of the conditions of execution of European arrest warrants issued for the purposes of executing decisions rendered at the end of trials at which the person concerned has not appeared in person, effected by that framework decision, is to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States.*
>
> *52 Accordingly, Article 4a(1)(a) and (b) of Framework Decision 2002/584 lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial, with the result that the execution of a European arrest warrant issued for the purposes of executing the sentence of a person convicted in absentia cannot be made subject to the condition that that person may claim the benefit of a retrial at which he is present in the issuing Member State. This is so either where, as*

referred to in Article 4a(1)(a), the person did not appear in person at the trial despite having been summoned in person or officially informed of the scheduled date and place of the trial or, as referred to in Article 4a(1)(b), the person, being aware of the scheduled trial, deliberately chose to be represented by a legal counsellor instead of appearing in person. Article 4a(1)(c) and (d) refers to circumstances where the executing judicial authority is required to execute the European arrest warrant, even though the person concerned is entitled to a retrial, because the arrest warrant states that the person concerned either did not ask for a retrial or that he will be expressly informed of his right to a retrial.

53 In the light of the foregoing, Article 4a(1) of Framework Decision 2002/584 does not disregard either the right to an effective judicial remedy and to a fair trial or the rights of the defence guaranteed by Articles 47 and 48(2) of the Charter respectively."

The CJEU then went onto deal with the third question.

"55 By its third question, the national court asks, in essence, whether Article 53 of the Charter[85] must be interpreted as allowing the executing Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

56 The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584.

57 Such an interpretation of Article 53 of the Charter cannot be accepted.

58 That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

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[85] *"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."*

59 It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/09 [2011] ECR I-1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, paragraph 3, and Case C-409/06 Winner Wetten [2010] ECR I-8015, paragraph 61).

60 It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

61 However, as is apparent from paragraph 40 of this judgment, Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.

62 It should also be borne in mind that the adoption of Framework Decision 2009/299, which inserted that provision into Framework Decision 2002/584, is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights. That framework decision effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered in absentia, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant.

63 Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.

64 In the light of the foregoing considerations, the answer to the third question is that Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution." [emphasis added]

It is clear that the CJEU places a high premium on ensuring the efficacy of the EAW scheme.

3.3 Conclusion

There is a presumption that Member States will fulfil their obligations under the ECHR which may be rebutted by evidence.

Diplomatic assurances may be given by the issuing Member State to try and establish that there is no risk of a violation of a Convention Right.[86] However, some argue that this should not be required within the EU as all Member States should be able to show that they will not violate the European Convention on Human Rights. In addition the regular use of diplomatic assurances to deal with concerns about whether prisons conditions in an issuing Member State breach Article 3 could act as an incentive for a defendant to become a fugitive if they are guaranteed better prison conditions if surrendered pursuant to an EAW[87]. In order to avoid this it would be necessary to take action to ensure that the criminal justice systems in all Member States do not violate the ECHR and in particular to ensure that prison conditions do not violate Article 3. In June 2011, as part of the procedural rights project, the Commission published Green Paper on the action necessary for resolving problems of both pre and post-trial detention including sub-standard conditions of detention. The Green Paper does not make any recommendations for legislation or any other course of action. Instead, it seeks information from Member States about domestic practices and invites suggestions about what measures could be taken at Union level to assist concerns about pre and post trial detention.

The current case law of the European Court of Human Rights confirms that the ECHR can be engaged in the extradition process. If the loss of the requested person's life is shown to be a near certainty (or a real risk) then Article 2 (the right to life) will stop extradition[88]. Extradition will also be prohibited on because of Article 3 if there are substantial grounds for believing that there is a real risk that the requested person will receive treatment which would breach Article 3 if extradited[89] but a minimum level of severity is necessary to bar extradition.[90] Article 5 will prevent extradition if there is a real risk of a flagrant violation which might involve, for example, arbitrary detention for many years without any intention to bring a person to trial.[91] Extradition will violate Article 6 if the requested person has suffered or there is a real risk they will suffer a flagrant denial of justice. A flagrant denial of justice means a trial which is manifestly contrary to the provisions of Article 6 or the principles it embodies. This must be more

[86] see *Abu Qatada v United Kingdom* [2012] ECHR 8139/09 for the process to assess the quality of any diplomatic assurances-at paragraphs 188-189.

[87] Similar concerns would arise if assurance were used to guarantee treatment relevant to other articles of the ECHR.

[88] *Osman v United Kingdom* (1988) 29 EHRR 245

[89] *Harkins and another v United Kingdom* Application Nos 9146/07 and 32650/07

[90] *Harkins and another v United Kingdom* Application Nos 9146/07 and 32650/07 at paragraphs 129-131

[91] *Abu Qatada v United Kingdom* Application No 8139/09 at paragraphs 232-233

than the mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within a contracting state itself.[92] Article 8 may act to stop extradition if the consequences of the interference with the rights guaranteed are exceptionally serious so as to outweigh the importance of extradition[93]. Article 8 is also relevant when considering proportionality and so this is dealt with in more detail in Chapter 4.

The test of flagrancy required for Articles 5 and 6 is a high one and Advocate General Sharpston has proposed a lower test.[94] When considering this it is necessary to bear in mind that the ECHR sets a floor not a ceiling. In addition the ECHR when it considers extradition is considering cases in which a person may be extradited to a country in which is not a party to the European Convention on Human Rights. It is, therefore, balancing the need to ensure that Parties to the ECHR cannot avoid their obligations by extraditing a person to a non-Party to the ECHR with the desire not to make the Parties to the ECHR responsible for the criminal justice systems in other countries. This is not the case for the EAW as every Member State is a party to the ECHR and should not violate its provisions. Therefore, there is no obvious reason why a less serious violation of the ECHR should be tolerated after surrender pursuant to an EAW.

There is no express ground of refusal to cover cases where the executing Member State is satisfied that execution would result in a breach of the person's human rights in the EAW Framework Decision. Recital (12) stresses that the Framework Decision respects fundamental rights and observes the principles recognised by ex-Article 6 TEU and reflected in the Charter and Article 1(3) makes clear that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles enshrined in ex-Article 6 TEU.

The Commission's position is that:

> "*Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights an explicit ground for refusal in event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States: in a system based on mutual trust, such a situation should remain exceptional.*"[95]

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[92] *Abu Qatada v United Kingdom* Application No 8139/09 at paragraphs 258-261

[93] *Launder v United Kingdom* (1997) 25 EHRR CD 67

[94] Advocate General Sharpston in *Ministerul Public v Radu* [2012] C-396/11 at paragraphs 82-83

[95] Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), European Commission, 24 January 2006, COM (2006) 8 and SEC (2006) 79 at page 6. (The first evaluation report was actually produced in 2005 but revised to include findings in relation to Italy, which implemented the Framework Decision on 14th May 2005.)

However, many Member States do not agree with this and have included an explicit ground for refusal on the basis of fundamental rights which they believe does not go beyond the EAW Framework Decision.[96] There is no consistency on this approach between the Member States and no agreement between Member States and the Commission. It is also not clear if the Commission has changed its position given the comments in its latest report.

"*It is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions.*"[97]

The CJEU has not taken the opportunity offered by *Ministerul Public - Parchetul de pe lângă Curtea de Apel Constanța V Ciprian Vasile Radu*[98] to clarify the relationship between fundamental rights and the EAW and it appears that the court may be reluctant to do this. However, the Court has said that refusal of a warrant should take place "***only** in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a"*[emphasis added][99]. The Court also appears concerned that "*casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.*"[100]

[96] See, for example, Ireland's comments on the 2007 Commission Report 14308/07 COPEN 146 EJN 32 EUROJUST 60 at page 3

[97] COM (2011)175 final at page 7

[98] Case C-396/11

[99] Case C-396/11 at paragraph 36

[100] *Stefano Melloni v Ministerio Fiscal* Case C-399/11 at paragraph 63

4. Is the EAW Framework Decision applied proportionately?

4.1 Alternatives to an EAW

In order to assess whether it is proportionate to issue an EAW it is necessary to understand what alternatives might exist.

4.1.1 Enforcement of Financial Penalties

Council Framework Decision 2005/214/JHA[101] of 24 February 2005 on the application of the principles of mutual recognition of financial penalties makes provision for fines or penalties of €70 or more imposed by the authorities in one Member State to be recognised and enforced in another Member State. The transfer of the financial penalty from one Member State to another is effected by way of a certificate.[102]

4.1.2 The Transfer of Prisoners

Article 5(3) of the Framework Decision on the European arrest warrant enables the execution of a European arrest warrant to take place on condition that the requested person is returned to serve any custodial sentence in the executing Member State. However, the Framework Decision does not contain any mechanism for the return of sentenced persons. The matter of prisoner transfer between Member States is governed by Council Framework Decision 2008/909/JHA of 27 November 2008,[103] on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. This entered into force on 5 December 2008 and had an implementation date of 5 December 2011. [104] The transfer of a sentence under the 2008 Framework Decision does not require the consent of the sentenced person in all circumstances[105]: it does however require the consent of the sentencing Member State. The 2008 Framework Decision[106] contains specific provision for the enforcement of custodial sentences in the executing State in respect of cases falling within Article 4(6) and 5(3)[107] of the EAW Framework Decision.

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101 [2005] OJL L.76/16 22 March 2005

102 The certificate is required to contain details of the penalty, whether the offender appeared personally or was informed of the sentencing hearing. The executing Member State then decides whether to recognise and enforce the penalty having first reviewed whether any of the grounds for refusal apply.

103 OJ L.327 5 December 2008 p.27

104 Poland sought and obtained a three year derogation from the principal clauses of the Framework Decision. Because of the large number of Polish nationals imprisoned throughout the European Union, Poland needed more time to prepare for its implementation. The United Kingdom and Irish governments have agreed that the compulsory transfer arrangements will not be used to transfer prisoners between Ireland and the United Kingdom.

105 See Article 6.

106 OJ L.327, 5 December 2008, p.27

107 Article 4(6) enables the executing Member State to undertake to execute the custodial sentence.

4.1.3 Pre-Trial Supervision (Bail)

Council Framework Decision 2009/829/JHA of 23 October 2009[108] 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. This Framework Decision (known as the European Supervision Order) introduces the possibility of transferring a pre-trial non-custodial supervision measure (such as release on bail) from the Member State where a non-resident is suspected of having committed an offence, to the Member State where he is normally resident. This will allow a suspected person to be subject to a supervision measure (bail) in his home State until the trial takes place in the requesting Member State. It entered into force on 1 December 2009 and had an implementation date of 1 December 2012.[109]

4.1.4 Conflicts of Jurisdiction

Council Framework Decision 2009/948/JHA of 30 November 2009[110] on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. This Framework Decision provides a mechanism for consultation and cooperation between judicial authorities when a person is the subject of parallel criminal proceedings in different Member States in respect of the same conduct. If a Member State has reasonable grounds to believe that parallel proceedings are ongoing in another Member State then it has an obligation to contact the other Member State.[111] It entered into force on 15 December 2009 and had an implementation date of 15 June 2012.

4.1.5 The European Investigation Order

The European Investigation Order ('EIO') is a European legislative proposal aimed at streamlining the process of providing legal assistance in criminal matters between the Member States of the European Union.[112] The EIO is intended to replace the current schemes of mutual legal assistance with a single unified instrument covering all types of evidence and introducing standardised request forms. Article 1 of the draft EIO makes it clear that it is an instrument for '*gathering evidence*' and the objective is to facilitate the fair determination of criminal charges throughout the European Union by ensuring that the trial court has all the relevant available evidence, wherever that evidence might be located.

Article 5(3) enables the executing Member State to surrender the arrested person subject to the condition that he will be returned to the executing Member State to serve his sentence.

[108] OJ L.294 11 November 2009, p.20

[109] The European Supervision Order applies following the surrender of the requested person to the issuing State. In order to provide reassurance to the issuing State that the requested person will return for trial, a person who breaches their bail conditions or is refusing to return to stand trial may be the subject of a further European arrest warrant issued to secure his attendance at the trial.

[110] OJ L.328, 15 December 2009, p.42

[111] Article 5

[112] The United Kingdom opted in to the EIO on 27 July 2010.

4.1.6 Mutual Legal Assistance

There are also mutual legal assistance arrangements in place which can be used for the service of summons or other court documents.

4.2 EAW Framework Decision

The EAW Framework Decision permits the use of a European arrest warrant where, in an accusation case, the offence in question carries a maximum penalty of at least 3 years' imprisonment in the issuing Member State if it falls within the list of 32 "Framework List Offences", or 12 months if it does not and the conduct is a crime in the executing Member State as well. In conviction cases, surrender is available if the custodial sentence to be served is 4 months or more.[113]

Therefore, surrender is not available in respect of every criminal offence: it is only available in respect of offences which satisfy a minimum level of seriousness. Having said that, there is no restriction on the use of the European arrest warrant in cases which satisfy the minimum level of seriousness but which are relatively minor cases of their type. For example, theft, which as a matter of English law carries a maximum penalty of 7 years' imprisonment,[114] is an extradition offence and in principle surrender would be available for a single offence involving the dishonest appropriation of property with a low or nominal value which in reality might be very unlikely to attract a custodial sentence.

The principle of proportionality is a principle of European Union law and is now found in Article 5 of the TEU, which obliges Member States to observe the principle when applying the European Union law.[115]

4.3 The European Arrest Warrant Handbook

The Council of the European Union produced the European handbook on how to issue a European Arrest Warrant in 2008[116] and this was amended in 2010[117]. This includes the following passage dealing with proportionality:

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[113] Article 2.

[114] Theft Act 1968, section 7.

[115] Proportionality is also a familiar concept in the case law in the UK relating to the European Convention on Human Rights: it is used as a vehicle for conducting a balancing exercise. Broadly speaking when considering proportionality under the Human Rights Convention, the domestic courts approach the question by asking a series of questions. First, is the legislative measure in question sufficiently important to justify limiting a fundamental right? Secondly, is the interference with the right rationally connected to the legislative objective no more than necessary to accomplish the objective: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 99; *Huang v Secretary of State for the Home Department* [2009] 2 AC 167.

[116] Council 8216/1/08 REV 1 COPEN 70 EJN 26 EUROJUST 31

[117] Council 17195/1/10 REV 1 COPEN 275 EJN 72 EYROJUST 139

"3. Criteria to apply when issuing an EAW – principle of proportionality

It is clear that the Framework Decision on the EAW does not include any obligation for an issuing Member State to conduct a proportionality check and that the legislation of the Member States plays a key role in that respect. Notwithstanding that, considering the severe consequences of the execution of an EAW with regard to restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant consider proportionality by assessing a number of important factors. In particular these will include an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include ensuring the effective protection of the public and taking into account the interests of the victims of the offence.

The EAW should not be chosen where the coercive measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention. The warrant should not be issued, for instance, where, although preventive detention is admissible, another non-custodial coercive measure may be chosen – such as providing a statement of identity and place of residence – or one which would imply the immediate release of the person after the first judicial hearing. Furthermore, EAW practitioners may wish to consider and seek advice on the use of alternatives to an EAW.

Taking account of the overall efficiency of criminal proceedings these alternatives could include:

- *Using less coercive instruments of mutual legal assistance where possible.*
- *Using videoconferencing for suspects.*
- *By means of a summons*
- *Using the Schengen Information System to establish the place of residence of a suspect*
- *Use of the Framework Decision on the mutual recognition of financial penalties*

Such assessment should be made by the issuing authority.

This interpretation is consistent with the provisions of the Framework Decision on the EAW and with the general philosophy behind its implementation, with a view to making the EAW an effective tool for combating serious and organised crime in particular. Prosecutors may also wish to have reference to the Advocaten voor de Wereld case in Annex VII and Article 49 of the EU Charter on Fundamental Rights.

Further examination should continue in the appropriate bodies in order to provide practitioners with efficient legal instruments so that, where appropriate, the testimony of suspects can be obtained by means of mutual legal assistance or instruments based on the principle of mutual recognition that would not entail the surrender of the person.

However, bearing in mind the differences between the Member States legal systems, in case where undertaking non-legislative measures will not be satisfactory, the Council agreed to re-examine this issue in the future on the basis of a report which would be produced by the Commission, based on factual information and produced at its own initiative or on request of the Council. On that occasion the Council will decide on the necessary steps to be taken in order to foster a coherent solution at EU level."

4.4 Proportionality Assessment in the Executing Member State

In at least one Member State, it appears that an attempt has been made to introduce a proportionality assessment at the time of executing European arrest warrants. In Germany, the Higher Regional Court in Stuttgart has held that Article 49(3) of the Charter of Fundamental Rights of the European Union[118] is a ground for the non-execution of a European arrest warrant if the penalty sought by the issuing Member State would be intolerably severe. This is on the basis that a German court's decision, to issue a domestic arrest warrant in execution of a European arrest warrant, must fully respect the principle of proportionality, which is a principle of German constitutional law. The same Regional Court has declined to give effect to a European arrest warrant where the offence was relatively minor. The effect of these two cases is summarised in the following paragraphs.

In its Decision of 18 November 2009,[119] the Stuttgart Court refused on proportionality grounds to issue a domestic arrest warrant against a person of good character who was wanted in Lithuania to stand trial for possession of 1.435 grams of methamphetamine.

Subsequently, in its Decision of 25 February 2010,[120] the Stuttgart Court held that as an arrest under German law must conform to the requirements of German constitutional law and, since the principle of proportionality forms part of that law, any arrest order must comply with that principle. The case in question concerned a European arrest warrant issued in Spain for an alleged offence of drug trafficking. It was alleged that the accused person had tried to sell 0.199 grams of cocaine to an undercover police officer. For an offence of drug trafficking, the Spanish Criminal Code stipulates a prison sentence of 3 to 9 years, regardless of the quantity of the drug involved. In this particular case, the Spanish Public Prosecutor was seeking a sentence of 4 years' imprisonment. The German Court held that the proposed sentence would not constitute an intolerably severe sentence and held that a decision to issue a domestic arrest warrant would not be disproportionate.

In reaching its conclusion, the Court held that the principle of proportionality of criminal offences and penalties forms part of the constitutional traditions common to Member States and is a general principle of the Union's law under Article 49(3) of the Charter of Fundamental Rights.[121]

In its consideration of the proportionality of the German arrest warrant the Court held the following matters to be relevant:

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[118] Article 49(3) of the Charter provides: "*The severity of penalties must not be disproportionate to the criminal offence.*" This provision is identified in the European arrest warrant handbook as a matter to be taken into account by the issuing judicial authority.

[119] 1 Ausl. 1302/99.

[120] 1 Ausl. (24) 1246/09.

[121] Article 49(3) of the Charter provides: "*The severity of penalties must not be disproportionate to the criminal offence.*" This provision is identified in the European arrest warrant handbook as a matter to be taken into account by the issuing judicial authority.

(i) the wanted person's right to liberty and safety;

(ii) the cost and effort of formal extradition proceedings;

(iii) the interest of the issuing Member State to prosecute;

(iv) any reasonable alternative options for the issuing Member State such as proceeding by way of summons or *in absentia* proceedings.

It is significant to note that the proportionality exercise conducted by the Court was carried out in relation to the German arrest warrant and not the underlying European arrest warrant. It was held that this was permissible on the basis of Article 12 of the Framework Decision which provides:

> "*When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention in accordance with the law of the executing Member State.*"

4.5 Poland

The following is taken from the mutual evaluation report for Poland carried out by the European Council.

"*Article 607a CCP provides that "in the case of suspicion that a person prosecuted for an offence committed in the territory of the Republic of Poland is in the territory of a European Union Member State, the Circuit Court having territorial jurisdiction over the case, on the request of the public prosecutor, may issue the European Arrest Warrant, hereinafter referred to as "Warrant".*

……

7.3.1.2. Proportionality check

The proportionality check should be understood as a check additional to the verification of whether or not the offence meets the threshold set by the Polish legislation and the Framework Decision. In other words, there is a proportionality check when, among EAWs related to offences which meet this threshold, some are not issued because it is estimated that this would violate a principle of proportionality in the context of costs/benefits analysis. The issue was discussed in depth with judicial authorities (Judges and Prosecutors).

The Prosecutors were of the opinion that, even in pre-trial cases (where the issuing of the EAW depends on their initiative) they have no possibility to decide not to file a motion for the issuing of an EAW on the basis of proportionality (if the threshold set by the Polish legislation and the Framework Decision is met). Prosecutors have an obligation to take all measures available to bring the person to justice. If an EAW can be issued, it must be used. Some Prosecutors indicated that they expected that a proportionality check would be done by the Circuit Court.

However, the Judges whom the expert team met during the visit did not consider themselves as having the right to refuse the issuing of an EAW if it complied with all the conditions set out in the legislation (which does not provide for a proportionality requirement additional to the penalties

threshold). This statement was made irrespective of the stage of proceedings (pre-trial, trial or post-trial).

Some of the judges indicated that the Prosecutors may have this possibility, at pre-trial stage, not to apply for an EAW.

However, in their reply to the questionnaire, the competent Polish authorities indicated that the issuing of several EAWs had been refused because "the offence was not felt to have caused very much damage to society, for example in property offences where the value of the damage was low, failure to pay maintenance, possession of small quantities of drugs (1,5 grams of marijuana, a second case of 0,15 grams of heroin, a third case of 0,33 grams of marijuana and a fourth case of 3 ecstasy tablets), or driving a car under the influence of alcohol, where the driver was not significantly over the limit (e.g. breath alcohol reading of 0,81 mg/l)". Furthermore, it was mentioned during the visit that, in some cases, the Judge will decide that an EAW is not necessary and that it is more appropriate to simply notify the person and use a procedure in absentia. Several authorities, both Prosecutors and Judges, stressed that if a person must be arrested in the course of criminal proceedings, this should happen irrespective of the fact that the person has crossed the border. For the first time, there is a European instrument allowing that and it should be used with that objective.

The expert team can only share the enthusiasm of the Polish authorities regarding the efficiency of the EAW and the solution it can bring to criminal proceedings which, in the extradition regime, would have ended too often unsatisfactorily. It should also be recalled that the Framework Decision does not provide any ground of refusal based on proportionality. A refusal to execute an EAW on that basis, as long as the threshold set by the Framework Decision is met, could be a violation of the Framework Decision. Such a refusal would lead to a questioning of the criminal policy in place in the other Member State and that would jeopardise the EAW system based on mutual recognition and mutual trust.

However, the expert team also estimates that it is not possible and not realistic to set all practical considerations aside. It is true that the objective should be that the person is treated in the same way, irrespective of his location within EU territory (within or outside Poland). It is a goal, which must always be kept in mind, but it must be accepted that it cannot be entirely achieved in the immediate future. Although simplified and much more efficient than the extradition procedure, the EAW procedure still requires significant resources in the executing State.

In other words, the opinion of the expert team is that, in principle (and apart from the requirements of the Framework Decision itself), an EAW should be issued as soon as the offence (or the circumstances of the case, such as previous convictions) is considered serious enough to justify the arrest of the person at national level. However, that should be supplemented by a control of the proportionality of the practical resources required for the execution of the EAW compared to the seriousness of that offence.

Consideration should be given at EU level to the opportunity of introducing a proportionality check, in the sense described above, in the EAW legislative framework. This proportionality check would be done by the issuing authority only; this should be explicitly stated."[122]

[122] Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between member states" Report on Poland 14 December 2007 14240/2/07 REV 2

At the recent hearing held by the ALDE Group on 17 October a representative of the Polish Ministry of Justice explained the reasons for the high number of EAWs issued by Poland. The first was the domestic principle of legality which was interpreted to mean that an EAW had to be issued[123]. The second was that the Polish criminal justice system did not envisage financial penalties in many cases and instead it was more common for suspended prison sentences to be imposed which would become effective if a person failed to comply with conditions such as not leaving Poland without permission. The third was the high level of emigration from Poland. Poland has tried to deal with these issues by distributed the EAW Handbook and providing training to judges and prosecutors and notes to courts on proportionality. A legislative amendment was adopted in September 2013 which will mean that an EAW should not be issued if it is "not required by the interests of justice"[124]. However, this amendment will come into force in 2015 as it is part of a wider series of reforms to the Polish Criminal Code. Poland is also looking at reforming its criminal code to allow for more financial penalties which may indirectly lead to less EAWs being issued.

Poland has required domestic legislation to introduce a proportionality bar despite trying a number of other measures for a number of years.

4.6 Examples of cases which might be considered to be disproportionate

> *"A case in point is that of Natalia Gorcowska, a Polish woman who was arrested aged 17 for possessing a small amount of amphetamine and given a 10-month suspended sentence. Soon after, she moved to the UK, and later gave birth to her son, but because she had left without telling her parole officer, Poland sought her extradition to serve the 10 month prison sentence. If she had been extradited, her baby would have been taken into care as she's now a single parent. We found her a lawyer in Poland and the warrant was lifted. But not before thousands were spent in costs and legal aid, not to mention the human impact."*
>
> Libby McVeigh, Head of Law Reform, Fair Trials International, ALDE Hearing 17 October 2013

The following are a summary of cases from the UK in which the court has tried to reconcile the mutual recognition principle with the issue of proportionality.

4.6.1 *Celinski v Regional Court in Lublin, Poland*[125]

Conviction warrant
Offence: Appellant was cycling when drunk- this is not imprisonable in the UK as the penalty is a fine.
Sentenced to 12 months' imprisonment in November 2005

[123] However, some Polish courts had used Article 49 of the Charter to refuse to issue EAWs.

[124] Article 607a Polish Code of Criminal Procedure.

[125] [2012] EWHC 3877 (Admin)

The convicted person served two months and was then given leave to look after his sick mother. However, he did not return to prison.

"*… it is up to the Polish authorities to determine the issue of proportionality. Under the system of mutual respect which operates in the European Union we must accord other Member States a wide ambit.*" at [11].

"*This is not a case where this sentence can be said to be grossly disproportionate.*" at [12].

Appeal refused.

4.6.2 *AC v Polish Judicial Authority*[126]

Convicted in February 2003 of theft from a dwelling including a handbag, two wallets, a mobile phone and some money. Total value: £110 - £130.
Sentenced to 10 months' imprisonment suspended (Court found that the convicted person would not have received a prison sentence in England and Wales).
The convicted person was 17 at the time of the offence. She pleaded guilty.
Her husband was in prison at the time and she had no money to buy food and milk for her children.
Three children at the time (with two more following in 2004 and 2007)
During suspension she committed a similar offence and the suspended sentence for the initial offence was activated. (She was also sentenced to six months imprisonment suspended for five years for the later offence.)

"*We must proceed on the basis that there is a high level of mutual confidence between Member States as set out in recital 10 to the Framework Decision and therefore respect that decision* [of the Polish Courts to activate the suspended sentence and refuse to further stay it]" at [29].
Appeal dismissed.

4.6.3 *Justyna Anna Biernikiewicz V District Court Of Koszalin*, **Poland**[127]

Convicted of five charges of making a false statement about her employment in January 2008.
At the time of the EAW, she had 18 months' imprisonment to serve.
Appellant argued (which was not disputed) that her initial prison sentence was suspended upon payment of a fine and that an elderly aunt was helping her with the payments but when the aunt died the Appellant could no longer pay.
At the time of the hearing there was a relatively small amount of the fine outstanding.

Bean J, in relation to the proportionality argument put forward on behalf of the Appellant and following JP, said:

"*… secondly, that the fact that an offence is relatively minor is a factor to be weighed in the balance, but it rarely prevails against the public interest in honouring treaties and giving effect to extradition requests.*" at [4]
Appeal dismissed.

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[126] [2012] EWHC 3201 (Admin)
[127] [2013] EWHC 257 (Admin)

4.6.4 *Pawel Bachanek v Regional Court in Warsaw, Poland*[128]

Conviction warrant
Sentenced 18 months' imprisonment suspended for four offences of non-dwelling house burglary (one or more pigeon lofts).
Offences committed in 1998 or 1999 when Appellant aged seventeen.
Suspended sentence activated following an unclear breach of the suspension.
Extradition resisted on basis of triviality of the offence, the fact the penalty was imposed for no more than a breach of the terms of his probation and his law abiding life in the UK. Also argued that it was oppressive to "bring somebody to book" when he is thirty for something he did when he was seventeen.
Bean J applying JP stated:

"*…it is not for the English court to impose its view of seriousness or its view of sentencing policy on the authorities of the requesting state, and also that lapse of time can count for very little, even under Article 8, in a case where an appellant is a knowing fugitive.*" at [8].

"*The present appellant is in a weaker position [than the appellant in JP] in that he has no children, so no-one else's Article 8 rights are affected.*" at [8].

"*…the principle that the English court must not impose its view of seriousness on the requesting state would apply, and I do not consider that a sentence brought into effect on breach of the terms of its suspension is distinguishable [from an immediate custodial sentence].*" At [9]

"*Again, it may be that no English court would have brought the sentence into effect – that may depend on the exact facts of the terms of the breach – but in any event, even that were the case, it would not be for me to tell the Polish court that it was wrong.*" [at 9].

4.7 Conclusion

Article 1(3) of the EAW Framework Decision and preamble 12 both require the execution of an EAW to accord with Article 6 TEU, through which both the ECHR and the EU Charter on Fundamental Freedoms are brought into play[129].

A core requirement of the Charter, and a clear and consistent theme of the jurisprudence of the CJEU, is the principle of proportionality.[130]

The Commission report in 2011 noted that confidence in the application of the European arrest warrant had been undermined by the systematic use of European arrest warrants for the surrender of persons sought in respect of minor offences. It noted a general agreement among Member States that a proportionality requirement is necessary to

[128] [2013] EWHC 258 (Admin)

[129] See the discussion by Advocate General Sharpston in *Ministerul Public v Radu* [2012] C-396/11 discussed above.

[130] See, for example, Articles 49(3) and 52 of the Charter

prevent European arrest warrants from being issued for offences which are not serious enough to justify the cooperation which the European arrest warrant requires.[131]

Despite the recommendation contained in the European arrest warrant Handbook[132] Member States appear to have continued to issue EAWs which do not appear to satisfy the proportionality test as some of the cases cited above relate to EAWs issued after the EAW Handbook was issued. It is also clear from looking at the example of Poland which is bringing into force domestic legislation. However, the test being used by Poland is not that used in the EAW Handbook but instead a reference to whether it is "in the interests of justice".

There is a growing consensus that this requires a mandatory proportionality assessment for an issuing Member State to be provided for in the EAW Framework Decision which would consider:

(i) the seriousness of the offence;

(ii) whether there is a reasonable chance of conviction

(iii) the harm caused to the victim or the community;

(iv) the likely sentence (in an accusation case);

(v) the previous convictions of the requested person;

(vi) the age of the requested person;

(vii) the views of the victim;

(viii) any reasonable alternative options for the issuing Member States such as proceeding by way of summons.

Many have criticised the current threshold test in Article 2(1) for accusation cases as it does not operate to ensure that the offence is serious whereas looking at the likely sentence would provide a much better indication of this. There have also been suggestions that the threshold for conviction cases should be increased from four months given the costs, both financial and personal, which result from the execution of an EAW. The UK Government has estimated the cost of executing an EAW in the UK at approximately £20,000. This figure is supposed to include "*costs to the police, the CPS [Crown Prosecution Service who normally act for the issuing state], court and legal aid costs, as well as detention before extradition.*"[133] These costs are wider than just the direct costs of the

[131] A similar conclusion had been reached by the Council in its Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European arrest warrant and by a Commission experts' meeting: Implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrants: The issue of proportionality (Brussels 5 November 2009).

[132] The Council of Ministers agreed Council Conclusions which amended the European arrest warrant handbook and emphasised the need for a coherent solution at European Union level.

[133] Paragraph 81, page 95 of Cm 8671 July 2013 (Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union). This was prepared to assist with consideration of whether or not the UK should continue to be bound by the police and criminal justice measures, which includes the EAW, which were adopted before the Treaty of Lisbon

extradition process but can also extend, for example, to the costs of supporting the defendant's family if the defendant loses his employment.

The Commission recognised what could happen if there was not effective action to deal with the issue of proportionality at EU level.

"*It might also lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based.*"[134]

This is exactly what has happened in Germany although this is justified by reference to a review of the domestic arrest warrant and only considers the proportionality of the sentence.

In the UK, draft legislation has been introduced to put in place an explicit proportionality test.

> "*(2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.*
>
> *(3) These are the specified matters relating to proportionality –*
>
> *(a) the seriousness of the conduct alleged to constitute the extradition offence;*
>
> *(b) the likely penalty that would be imposed if D was found guilty of the extradition offence;*
>
> *(c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.*" [135]

Proportionality is also part of an assessment of a potential violation of Article 8 as any interference has to be necessary. In the UK a quite exceptionally compelling feature or combination of features is required to show there is a violation of Article 8 which should stop extradition.[136] The Court may consider the gravity of the offence[137], the potential violation of the Article 8 rights of other family members[138] and the length of any sentence left to serve[139], the delay since offences had been committed and the circumstances in which the offender left the requesting jurisdiction[140].

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entered into force.

[134] Page 8, 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

[135] Clause 138, Anti-Social Behaviour, Crime and Policing Bill

[136] *Norris v Government of USA (No. 2)* [2010] 2 WLR 572 at paragraph 56.

[137] *Norris v Government of USA (No. 2)* [2010] 2 WLR 572 at paragraph 63

[138] *Norris v Government of USA (No. 2)* [2010] 2 WLR 572 at paragraph 64

[139] *Wysocki v Polish Judicial Authority* [2010] EWHC 3430 (Admin)

[140] *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338

The difficulty with not having a proportionality test in the executing Member State is that this might lead the executing judicial authority to assume that a proportionality test has been carried out by the issuing Member State (as the UK courts seem to do). However, the Irish Supreme Court has recognised that it should not be assumed that the issuing judicial authority has in fact considered proportionality[141]. Therefore, Ireland has applied a restricted proportionality assessment (which it has derived from its domestic case law and which it will apply bearing in mind the ECtHR case law).[142] However, if a proportionality test is in fact not carried out in the executing Member State, no proportionality assessment will ever be carried out. Even if the EU takes action to introduce a legislative change in the EAW Framework Decision to require a proportionality assessment before issuing an EAW this will not deal with the EAWs already issued without a proportionality assessment which may in future be executed. Finally some matters which are relevant to a proportionality assessment can only be known by the executing Member State at the time of execution as they relate to developments which have taken place after the issue of the EAW. In those cases where the defendant has never been before the court, the issuing judicial authority may have had insufficient information to make a proportionality assessment even at the time the EAW was issued.

In any event there seems to be general agreement Member States should use measures of cooperation other than the European arrest warrant where possible and that this should be mandatory. These measures include:

(i) Framework Decision 2005/214/JHA[143] of 24 February 2005 on the application of the principles of mutual recognition to financial penalties. This Framework Decision makes provision for fines or penalties of €70 or more imposed by the authorities in one Member State to be recognised and enforced in another Member State.

(ii) The Framework Decision 2009/829/JHA[144] concerning pre-trial supervision orders which is designed to promote the use of non-custodial supervision measures such as release on bail from the Member State where a non-resident is suspected of having committed an offence to the Member State where he is normally resident.

(iii) Serving a summons pursuant to mutual legal assistance arrangements.

(iv) Transferring probation or non-custodial measures for execution rather than issuing a European arrest warrant for a sentence imposed in default.[145]

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[141] Paragraph 20, *Ministry of Justice and Equality v Jaroslaw Ostrowski* [2013] IESC 24

[142] Paragraph 128, *Ministry of Justice and Equality v Jaroslaw Ostrowski* [2013] IESC 24

[143] [2005] OJ L 76/16.

[144] [2009] OJ L 294/20.

[145] 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. However, this is not a measure which the UK is proposing to try and opt back into despite criticism of this position- see, for

(v) Applying to transfer sentences where appropriate.[146]

(vi) Using the European Investigation Order, once it is in effect, to allow for efficient and effective investigation measures to take place before deciding if and when an EAW is to be issued.

However, this requires these measures to be implemented and to be used in practice.

In relation to the financial penalties, in some cases EAWs are used to enforce custodial sentences imposed as a result of a failure to pay financial penalties in the issuing Member State. The convicted person is surrendered and then released from custody on payment of the outstanding financial penalty. This situation could be avoided if greater is to be made of the Framework Decision on the recognition of financial penalties.

In relation to the Framework Decision on pre-trial supervision, the effective use of the European arrest warrant should, in theory, lead to bail being granted in an increasing number of cases. Under the terms of the Framework Decision on pre-trial supervision, it is still necessary for the requested person to be surrendered to issuing Member State but, following surrender, the courts in the issuing Member State should proceed in appropriate cases to grant bail confident in the knowledge that the individual will return voluntarily for the trial proceeding, or if not, another European arrest warrant could be executed speedily so as to ensure their return. However, this will require both the implementation of the Framework Decision[147] and trust between Member States that conditions will be enforced. It is not clear that either is currently in place.

Steps could be taken to improve the cooperation between Member States in the initial stages of a prosecution. For example, it is possible to envisage a procedure where an accused person is summoned to court by mutual legal assistance process; charged having appeared by video-link and then placed on bail in the Member State they reside in (if this is not the Member State prosecuting them) before surrendering for trial. If they did not surrender for trial then an EAW could be issued.

In the Commission's press release following the publication of the third report evaluating the operation of the EAW the Commission again exhorted that "*Member States should make sure the arrest warrant system is not undermined by multiple arrest warrants for offences that are not very serious, such as the theft of a bicycle. Before issuing an arrest warrant, Member State judicial authorities should consider the seriousness of the offence, length of sentence and the costs and benefits of executing an arrest warrant. The principle of proportionality needs to be carefully respected when implementing the warrant.*"[148]

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example, the House of Lords European Union Committee's "Follow-up report EU police and Criminal Justice Measures: The UK's 2014 opt-out decision" and the Eighth Report of the House of Commons Justice Committee, "Ministry of Justice measures in the JHA block opt-out" HC 605 published on 31 October 2013.

146 Framework Decision 2008/909/JHA.

147 The UK has only recently said that it will in fact implement the European Supervision Order FD.

148 IP/11/454 Brussels, 11 April 2011

5. The need for EU action and an assessment of costs and benefits

Some issues require action at an EU level and if this does not happen then it may lead to unhelpful developments at a national level. This message was clearly conveyed by the Irish Supreme Court in the context of the lack of a proportionality assessment by the issuing Member State:

> *"76. It is clear, admitting of little controversy, that the spirit of the Framework Decision is being stood down: not on isolated occasions or in a haphazard way or even randomly without reason. What has happened is that some Member States have utilised the process to seek the return of individuals who are suspected of having transgressed criminal law, in some very minor way. Even making generous allowance for the variety and diversity of individual legal systems and for differences relating to social, political, religious and cultural norms within each and where such norms may sit in the hierarchy of the particular society, nonetheless, at least at the level of principle, each Member State who bought into the scheme did so appreciating its core objectives, and in so doing committed themselves to further them, even if individual and isolated cases had to be sacrificed. To offer the principle of compulsory prosecution as a justification for such action, if that is the case, is to fail to appreciate the fact that unlike purely domestic crime, which is of concern only to the host State, the issuance of an EAW imposes obligations and responsibilities on another sovereign State. Therefore, such an act has much wider implications than the former and accordingly requires a more critical assessment in the first place. As Lord Phillips said in Assange "It does not necessarily follow that an offence that justifies the issue of a domestic warrant of arrest will justify the issue of an EAW" (para.90). No Member State is entitled to, and as a matter of prudence should not, stretch the operation of the Framework Decision to a point, even if technically within its terms, where mutuality of respect and confidence is compromised. If this should repeatedly occur, in a manner recognised by other Member States or those entities at EU level involved in its operation, it is not difficult to foresee that consequences will follow.*
>
> *77. Whilst I recognise that what may be of concern at the collective level of all Member States ("higher level concern"), may be much subdued at individual state level, nonetheless it should not be assumed that a Member State which is frequently called upon to deal with very minor offences, will continue to do so without searching its own legislation for means of legitimately rejecting such requests. Such a step would be undesirable but understandable even where the State is otherwise fully committed to the Framework Decision. It can readily be avoided. In a word the principles of the Framework Decision must be respected: the successful operation of the system, which is so critical to the prevention of crime, the bringing to justice of those suspected of crime, and the incarceration of convicts to serve their imposed sentence, is so vital to the citizens of all Member States, individually and collectively, that the mutuality of which I speak, must be visibly adhered to. Any regression from such must therefore be avoided.*
>
> *78. As I have stated there is available an immediate solution to the difficulty. It is I believe fully accepted that the Framework Decision allows for the application of a proportionality test at the issue stage. Art. 2.1 states "A European Arrest Warrant may*

be issued …" [emphasis added]. This affords the basis for such approach. If adopted and applied in a uniform way, this long-running and serious issue could be resolved."[149]

The court also went on to consider what may happen if action is not taken at an EU level:

"*If the absence of a proportionality test in applying states is not addressed by those charged with the monitoring the operation of the EAW procedures, one can envisage that, in some member states, questions may arise as to whether the "apparent absence" of a proportionality test on the part of surrendering states can be in accordance with fundamental rights whether identified under that Member State's own Constitution or under EU fundamental rights law. Unless this issue of concern is addressed, there must surely be a risk that the law, as is applied in Member States, may develop in a manner unintended by those who drafted, and who must monitor the operation of the Framework Decision.*"[150]

Attempts have been made, particularly with respect to proportionality, to effect change by non-legislative measures[151]. Whilst these may have had some success, they are not as effective as legislation (as there is no obligation on Member States to take action and no sanction if they do not), they tend to have a slower effect and they do not ensure consistency across all Member States. It is clear that even when there is a clear obligation in EU legislation this does not mean that Member States will comply with it in a timely way or at all. It remains to be seen whether this will change when the Commission and CJEU acquire their additional powers in 2014. EU level action may also help to drive positive change in terms of wider improvements to the criminal justice systems in Member States. For example, the concern that surrender may be refused on the basis of prison conditions which violate Article 3 ECHR may lead Member States to improve their prison conditions.

One option to bring about EU legislative change is to have a FD which amends the EAW FD and potentially other mutual recognition FDs. This would use a similar mechanism to that adopted to deal with trials in absence by FD 2009/299/JHA.[152] Alternatively amendments could be made to the EAW FD. Whilst these alternatives might have different political consequences, both would appear to be equally effective in ensuring legislative amendment of the EAW FD.

It is critical that Member States implement the mutual recognition measures which may provide alternatives to the EAW. Some Member States have not done this and hopefully the new powers of the Commission and CJEU will be used to ensure that this position is remedied.

There are also difficulties for the EAW scheme which are caused by the different conditions in Member States concerning their criminal justice systems. These require action at EU level in order to ensure that the trust which should exist to underpin mutual

[149] *Ministry of Justice and Equality v Jaroslaw Ostrowski* [2013] IESC 24

[150] Paragraphs 6-7, Judgement of Mr Justice John MacMenamin, *Ministry of Justice and Equality v Jaroslaw Ostrowski* [2013] IESC 24

[151] For example see 4.3-4.5 above.

[152] This amended FDs 2002/584 JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA.

recognition is fostered. It is also important that action is undertaken at EU level to improve the overall conditions in Member States in order to avoid creating an incentive for defendants to become fugitives. Currently a fugitive may receive better treatment as a result of being surrendered following EAW proceedings than if they had been arrested in the issuing Member State. This happens when assurances are given as to, for example, the prison they will be held in to ensure that the executing Member State will not find that the prison conditions in the issuing Member State violate Article 3 ECHR.

However, legislation will not be sufficient. It is also necessary for Member States to use less intrusive measures than the EAW when possible.[153] This requires a change of culture in Member States which may need training and network building. It also needs the effective implementation of the other mutual recognition instruments which may allow an alternative to the EAW. In order for Member States to begin to use these other mutual recognition measures effectively they need to understand them and to trust that other Member States will apply them properly. Without this trust it is difficult to see, for example, the European Supervision Order[154] operating effectively. The EAW scheme replaced a familiar system of extradition and did not introduce a new procedure as many of the other mutual recognition instruments have done. It is also necessary for bilateral contact to take place between Member States to build the practical systems needed to ensure that effective use is made of the available processes. Whilst the Framework Decision on Financial Penalties has been implemented by the UK it issues very few requests for penalties to be enforced and receives even fewer[155].

There are financial costs generated by the inappropriate use of EAWs and the inefficiencies in the EAW process. The UK Government has estimated the cost of executing an EAW in the UK at approximately £20,000. This figure is supposed to include "costs to the police, the CPS [Crown Prosecution Service who normally act for the issuing state], court and legal aid costs, as well as detention before extradition." However, the financial costs are wider than just the direct costs of the extradition process but can also extend, for example, to the costs of supporting the defendant's family if the defendant loses his employment. There are also the personal costs to the defendant, their family and their community if they are surrendered following EAW proceedings.

Effective action at an EU level may reduce the direct financial costs of unwarranted EAWs and ensure that the EAW process is shortened by avoiding legal argument where there is no clarity.

[153] See 4.1 above.

[154] See 4.1.3 above.

[155] A Review of the United Kingdom's Extradition Arrangements, Paragraph 4.24 at footnote 30 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

Appendix A- Statistical information

The Council of the European Union has collected detailed statistical information from each Member State on the operation of the EAW and this data is available for the period 2004 to 2011.

2004	11 July 2005[156]
2005	30 June 2006[157]
2006	30 January 2008[158]
2007	11 June 2008[159]
2008	9 June 2009[160]
2009	8 September 2010[161]
2010	22 June 2011[162]
2011	28 September 2012[163]

These include statistics for each Member State of the:

- EAWs issued
- EAWs executed
- Requested persons arrests
- Arrested requested persons surrendered
- Consents to surrender
- Refusals to consent to surrender
- Time taken to surrender if consent given
- Time taken to surrender if consent not given
- Surrenders refused.

The Commission Staff Working Document of 11 April 2011[164], which accompanied the third report from the Commission to the Council, contains statistical information on the issuing and execution of EAWs between 2005 and 2009 broken down by Member State. Annex 1 of the third report[165] provides an overview of the numbers of EAWs issued and executed in the same period and also provides details of the average time periods for surrender where a person consents or does not consent and provides the percentage of requested persons who consent to their surrender.

156 7155/4/05 REV 4 LIMITE COPEN 49 EJNB 15 EUROJUST 15

157 9005/4/06 REV 4 COPEN 52 EJN 12 EUROJUST 21

158 11371/4/07 REV 4 COPEN 106 EJN 20 EUROJUST 39

159 10330/08 COPEN 116 EJN 44 EUROJUST 58

160 9734/09 COPEN 87 EJN 28 EUROJUST 28

161 7551/4/10 REV 4 COPEN 64 EJN 5 EUROJUST 34

162 9120/1/11 REV 1 COPEN 83 EJN 46 EUROJUST 58

163 9200/6/12 REV 6 COPEN 97 EJN 32 EUROJUST 39

164 Part IX -11.4.2011 SEC (2011) 430 final

165 11.4.2011 COM (2011) 175 final

The United Kingdom carried out a review of its extradition arrangements and the Report which followed this review contains statistics concerning the operation of the EAW in the UK between 2004 and 2011 at Appendix D[166]. The UK Government discovered that there had been errors in compiling the statistics relating to EAWs from 2009/2010 onwards and so conducted an audits.[167] Following this review audited figures[168] were published on 20 June 2013.[169]

[166] Pages 462-463
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

[167] https://www.gov.uk/government/speeches/european-arrest-warrant-data

[168] https://www.gov.uk/government/speeches/european-arrest-warrant-data--2

[169] https://www.gov.uk/government/publications/european-arrest-warrant-data-2009-2013