THE FIGHT AGAINST TERRORISM IN THE EU: JUDICIAL COOPERATION IN CRIMINAL MATTERS AND PROCEDURAL RIGHTS *

Mar Jimeno Bulnes, Julio Pérez Gil,
Félix Valbuena González, Cristina Ruiz López
Translation and review by Alba Fernández Alonso

* The present report has been realized in the framework of the European project "Lawyers for the protection of fundamental rights" GA n. 806974) and specifically within the work package on the review of the European legal framework on fundamental rights. Against this background, the beneficiaries of the said project chose to focus the analyse on two specific topics:

1) Family law and rights of the child, and in particular the right to family reunification;

2) Criminal law, and in particular fight against terrorism and the relevant rights of defendants, of pre-trial detainees and persons under investigation.

These topics are explored respectively in the first part on "The right to family reunification in the EU and the case-law in accordance therewith", realized by professors Esther Gómez Campelo and Marina San Martín Calvo, and in the second part on "The fight against terrorism in the EU: Judicial cooperation in criminal matters and procedural rights", realised by professors Mar Jimeno Bulnes, Julio Pérez Gil and Félix Valbuena González with support by Cristina Ruiz López.

1. *Introduction*

Chapter VI of the Charter of Fundamental Rights of the European Union (henceforth CFREU) is dedicated to Justice rights (Arts. 47-50) that provide fundamental procedural rights, whose origin must be essentially found in Art. 6 of the European Convention of Human Rights (ECHR) regulating the right to a 'fair trial' in general terms with consequent case law delivered by the European Court of Human Rights (ECtHR) [1]. This essential background must be balanced with the general policy proposed by the European Union on the field of judicial cooperation in criminal matters and the principles supporting it in order to combat terrorism and organized crime in all Member States [2].

As known, judicial cooperation in criminal matters is contemplated in Art. 82 (1) of the TFEU which provides 'the principle of mutual recognition of judgements and judicial decisions' as legal basis together with the principle of 'approximation of the laws and regulations of the Member States' in order to ensure 'recognition throughout the Union of all forms of judgements and judicial decisions' [3]. Both principles justify today's enactment of different procedural instruments related to criminal proceedings in order to make judicial cooperation between Member States possible for the purposes of fighting criminality and delinquency on the one hand as well as guaranteeing procedural safeguards of individuals (suspects and victims) in criminal proceedings on the other hand [4].

---

[1] See generally TRECHSEL, S., *Human rights in criminal proceedings*, Oxford University Press, Oxford, 2005. Also, in relation with confluence between ECHR and CFREU see KOKOTT, J. and SOBOTA, C. (eds.) "Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European Convention and national standards of protection", *Yearbook of European Law*, 2015, vol. 34, n. 1, pp. 60-73. In concrete relation with EU and AFSJ see BANACH-GUTIÉRREZ, J. and HARDING, C., "Fundamental rights in European Criminal Justice: an axiological perspective", *European Journal of Crime, Criminal Law and Criminal Justice*, 2012, vol. 20, n. 3, pp. 239-264, analysing fundamental rights included in the Justice chapter. For an approach to fair trial's right as contemplated in Art. 47 CFREU, see GALERA RODRIGO, S., "The right to a fair trial in the European Union: lights and shadows", *Revista de Investigaçoes Constitucionais*, 2015, vol. 2, n. 2, pp. 7-29; also DOOBAY, A., "The right to a fair trial in light of the recent ECtHR and CJEU case law", *ERA Forum*, 2013, vol. 14, n. 2, pp. 251-262 with comments to specific case law.

[2] See specifically DOUGLAS-SCOTT, S., "The rule of law in the European Union – putting the security into the area of freedom, security and justice", *European Law Review*, 2004, vol. 29, n. 4, pp. 219-242. Also MITSILEGAS, V., "Transnational Criminal Law and the global rule of law", in G. Ziccardi Capaldo (ed.), *The global community yearbook of International Law and jurisprudence*, Oxford University Press, Oxford, 2017, pp. 47-80.

[3] On conjunction of both principles for the functioning of AFSJ see JIMENO-BULNES, M., *Un proceso europeo para el siglo XXI,* Civitas & Thomson Reuters, Madrid, 2011, pp. 33 ff. On mutual recognition principle specifically OUWERKERK, J., *Quid pro quo. A comparative laws perspective on the mutual recognition of judicial decisions in criminal matters*, Intersentia, Antwerpen, 2011.

[4] See specifically SPRONKEN, T., VERMEULEN, G., DE VOCHT, D. and VAN PUYENBROECK, L.

At the time, before the enforcement of the Treaty of Lisbon [5] in 2009 and the creation of the Area of Freedom, Security and Justice (AFSJ) currently contemplated in Title V, Arts. 67-89 of the TFEU, no legal regulation on principle of mutual recognition existed, and judicial cooperation in criminal matters was part of the so-called prior Third Pillar of the Treaty on European Union joint with the police cooperation [6]. Nevertheless, the principle of mutual recognition of judicial decisions was established by the Tampere European Council held on 15 and 16 October 1999 as '*the cornerstone of judicial co-operation in both civil and criminal matters within the Union*' [7]. Also, the previous Cardiff European Council, held on 15 and 16 June 1998, pointed 'the importance of effective judicial protection in the fight against cross-border crime' asking the Council '*to identify the scope for greater mutual recognition of decisions of each other's courts*' [8].

On the other side, the Stockholm Programme [9] launched at the time by the European Council for the 2010-2014 period contemplated the possibility to extend mutual recognition to '*all types of judgements and decisions of a judicial nature, which may, depending on the legal system, be either criminal or administrative*'. Obvious to say as resulting of same programme that '*mutual trust between authorities and services in the different Member States and decision-makers is the basis for efficient cooperation in this area*'. Mutual trust works as an essential tool in this area, as shown by the application of instruments of mutual recognition,

---

(eds.) *EU procedural rights in criminal proceedings*, Maklu, Antwerpen, Apeldoorn, Portland, 2009, also resulting from European project funded by European Commission (Directorate General of Justice and Home Affairs). In terms of conjunction of both policies on mutual recognition instruments and protection of procedural rights see HODGSON, J., "EU criminal justice: the challenge of due process rights within a framework of mutual recognition", *North Carolina Journal of International Law and Commercial Regulation*, 2011, vol. 37, n. 2, pp. 307-320.

[5] OJ, n. C 306, 17 December 2007; consolidated version in OJ, n. C 115, 9 May 2008 and OJ, n. C 83, 30 March 2010, including the Charter of Fundamental Rights of the European Union (henceforth CFREU). See for example at the time PEERS, S., "EU Criminal Law and the Treaty of Lisbon", *European Law Review*, 2008, vol. 33, n. 4, pp. 507-511.

[6] For a general approach then JIMENO-BULNES, M., "European judicial cooperation in criminal matters", *European Law Journal*, 2003, vol. 9, n. 5, pp. 614-630.

[7] Presidency Conclusions available at http://www.europarl.europa.eu/summits/tam_en.htm, conclusion n. 33. See ELSEN, C., "L'esprit et les ambitions de Tampere: une ère nouvelle pour la coopération dans le domaine de la justice et des affaires intérieures?", *Revue du Marché commun et de l'Union européenne*, 1999, n. 433, pp. 659-663.

[8] Presidency Conclusions available at http://www.europarl.europa.eu/summits/car1_en.htm, con clusion n. 39.

[9] EUROPEAN COUNCIL, "An open and secure Europe serving and protecting citizens", OJ, n. C 115, 4 May 2010, pp 1-38. See BARROT, J., "Le Programme de Stockholm 2010-2014: en marche vers une communauté de citoyéns conscients de leurs droits et de leurs devoirs", *Revue du Droit de l'Union Européenne*, 2009, n. 4, pp. 627-631; also Editorial Comment, "The EU as an area of freedom, security and justice: implementing the Stockholm programme", *Common Market Law Review*, 2010, vol. 47, n. 5, pp. 1307-1316.

particularly the European Arrest Warrant application as the case law delivered by the Court of Justice of European Union (henceforth, CJEU) and national courts show [10].

Especially on the field of judicial cooperation in criminal matters, the simultaneity in the regulation of procedural instruments under the employment of mutual recognition of judicial decisions between Member States has been proved as essential, together with the enactment of procedural safeguards in criminal proceedings for suspects and accused as well as victims, if such was the case. As it would certainly be impossible to analyse all of them, we have made a selection of those considered to be the most important instruments of mutual recognition of judicial decisions in criminal matters, namely: the European Arrest Warrant and the European Investigation Order on the one hand [11]; and on the other, from the perspective of procedural safeguards of individuals, the analysis of Directives on procedural rights of suspects in criminal proceedings together with the general framework on the topic, considering that regulation on protection of victims of crime is likewise generally provided in the EU [12].

2. *European arrest warrant*

2.1. *General background*

The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States (henceforth EAW

---

[10] See HERLIN-KARNELL, E., "From mutual trust to the full effectiveness of EU Law: 10 years of the European Arrest Warrant", *European Current Law*, 2013, n. 4, pp. 373-388; more recently EFRAT, A., "Assessing mutual trust among EU members: evidence from the European Arrest Warrant", *Journal of European Public Policy*, 2019, vol. 26, n. 5, pp. 656-675.

[11] About new perspectives on judicial cooperation in criminal matters along EU Member States see for example COSTA RAMOS, V., "Notas sobre novos desafios da cooperaçao judiciaira internacional em matéria penal", *Revista de Estudios Europeos*, 2019, n. 1, pp. 184-205. In Spain recent and generally, for an overview of mutual recognition instruments, procedural rights of suspects and protection of victims in criminal procedure see JIMENO BULNES, M. (dir.) and MIGUEL BARRIO, R. (ed.), *Espacio judicial europeo y proceso penal*, Tecnos, Madrid, 2018.

[12] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ, n. L 315, 14 November 2012, pp. 57-73. Precisely, in relation with the balancing of rights of suspects and victims in criminal proceedings see KLIP, A., "On victim's rights and its impact on the rights of the accused", *European Journal of Crime, Criminal Law and Criminal Justice*, 2015, vol. 23, n. 3, pp. 177-189; also, by same author recently "Fair trial rights in the European Union: reconciling accused and victims' rights", in T. Rafaraci and R. Belfiore (eds.), *EU Criminal Justice: fundamental rights, transnational proceedings and the European Public Prosecutor's Office*, Springer, Cham (Switzerland), 2019, pp. 3-25.

or EAW FWD, also known as 'euro-warrant')[13], further amended by Council Framework Decision 2009/299/JHA of 26 February 2009[14], was the first instrument enacted on the field of judicial cooperation in criminal matters in EU under the basis of the mutual recognition principle[15]. As defined in its first article, '*the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purpose of conducting a criminal proceeding or executing a custodial sentence or detention order*'. Therefore, the EAW FWD creates compelling obligations to all Member States as long as all of them '*shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision*' (Art. 1 (2) EAW). Only, *ab initio*, the observance of fundamental rights and principles ex Art. 6 TFEU appears to be an exception to such EAW execution according to Art. 1 (3) EAW provisions[16]; this is not a simple issue to handle as it has been shown by CJEU case law[17].

---

[13] OJ, n. L 190, 18 July 2002, pp. 1-18. In the literature see specifically comments by author, eg in English language, JIMENO-BULNES, M., "The application of the European Arrest Warrant in the European Union: a general assessment", in C. Fijnaut and J. Ouwerkerk (eds.), *The future of police and judicial cooperation in the European Union*, Martinus Nijhoff Publishers, Leiden/Boston, 2010, pp. 285-333; also, a literature review existing at the time on the topic is included.

[14] OJ, n. L 81, 27 March 2009, pp. 24-36, amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. On the topic see specifically *In absentiEAW – Research project on European Arrest Warrants issued for the enforcement of sentences after in absentia trials* at https://www.inabsentieaw.eu/, also funded by the European Union's Justice Programme (2014-2020). In the literature BÖSE, M., "Harmonizing procedural rights indirectly: the Framework Decision on trials *in absentia"*, *North Carolina Journal of International Law and Commercial Regulation*, 2011, vol. 37, n. 2, pp. 489-510; also SIRACUSANO, F., "Reciproco riconoscimento elle decisione giudiziarie, procedura di consegna e processo *in absentia"*, *Rivista italiana di Diritto e procedura penale*, 2010, n. 1, pp. 116-144.

[15] See some criticism by PEERS, S., "Mutual recognition and criminal law in the European Union: has the Council got it wrong?", *Common Market Law Review*, 2004, vol. 41, n. 1, pp. 5-36 as well as THOMAS, J., "The principle of mutual recognition – success or failure?", *ERA Forum*, 2013, vol. 13, n. 4, pp 585-588; also in relation with its practice and EU proposals at the time MORGAN, C., "The potential on mutual recognition as a leading policy principle" and VERMEULEN, G., "How far can we go in applying the principle of mutual recognition?", in C. Fijnaut and J. Ouwerkerk (eds.), *The future of police and judicial cooperation in the European Union*, cit., pp. 231-239 and pp. 241-257. Also critical perspective in Spain by DE HOYOS SANCHO, M., "El principio de reconocimiento mutuo de resoluciones penales en la Unión Europea: ¿asimilación automática o corresponsabilidad?", *Revista de Derecho Comunitario Europeo*, 2005, vol. 9, n. 22, pp. 807-843 and "El principio de reconocimiento mutuo como principio rector de la cooperación judicial europea", in M. Jimeno Bulnes (ed.), *La cooperación judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales*, Bosch, Barcelona, 2007, pp. 67-90.

[16] See specifically FICHERA, M., "EU fundamental rights and the European Arrest Warrant", in S. Douglas-Scott & N. Hatzis (eds.), *Research handbook on EU Human Rights Law*, Edwar Elgar,

Particularly, EAW presents itself as a juridical and procedural instrument of exclusive judicial nature by contrast to an extradition procedure, which entails administrative/political and judicial stages. In this context, the EAW supplanted the old system of extradition between Member States, whose Conventions [18] had

Cheltenham, pp. 418-438; also SCHALLMOSER, N.M., "The European Arrest Warrant and fundamental rights. Risks of violation of fundamental rights through the EU Framework Decision in light of the ECHR", *European Journal of Crime, Criminal Law and Criminal Justice*, 2014, vol. 22, n. 2, pp. 135-165. Also at the time GARLICK, P., "The European Arrest Warrant and the ECHR", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, TMC Asser Press, The Hague, 2004, pp. 167-182. In general, on the topic MACKAREL, M., "Human rights as a barrier to surrender", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, TMC Asser Press, Amsterdam, 2009, pp. 139-156.

[17] For example CJEU, 5 April 2016, *Aranyosi and Caldararu*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, available at official website form http://curia.europa.eu/juris/recherche; here it takes place a preliminary reference by the *Hanseatisches Oberlandesgericht* in Bremen (Higher Regional Court of Bremen, Germany) in relation with several EAWs issued by Hungarian and Rumanian authorities against both suspect persons, who challenged the detention conditions in their respective countries and, because of that, possible violation of Art. 4 CFREU prohibiting inhuman and degrading treatment. The case provoked a great discussion in academia, e.g., comments by OUWERKERK, J., "Balancing mutual trust and fundamental rights protection in the context of the European Arrest Warrant. What role for the gravity of the underlying offence in CJEU case law?", *European Journal of Crime, Criminal Law and Criminal Justice*, 2018, vol. 26, n. 2, pp 103-109; also MARGUERY, T.P., "Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners frameworks decisions", *Maastricht Journal of European and Comparative Law*, 2018, vol. 25, n. 6, pp. 704-717 as well as GÁSPÁR-SZILÁGYI, S., "Joined cases Aranyosi and Caldararu: converging human rights standards, mutual trust and a new ground for postponing a European Arrest Warrant", *European Journal of Crime, Criminal Law and Criminal Justice*, 2016, vol. 24, n. 2-3, pp. 197-216. Also in other countries, eg, WILDNER ZAMBIASI, V. and CAVOL KLEE, P.M., "A (possibilidade de) nao execuçao do mandado de detençao europeu fundamentada no tratamento ou pena cruel ou degradante", *Revista Brasileira de Direito Processual Penal*, 2018, vol. 4, n. 2, pp. 845-886; in Spain for example BUSTOS GISBERT, R., "¿un insuficiente paso en la dirección correcta? Comentario a la sentencia del TJUE (Gran Sala), de 5 de abril de 2016, en los casos acumulados Pal Aranyosi (C-404/15) y Robert Caldararu (C-659/15 PPU)", *Revista General de Derecho Europeo*, 2016, n. 40, http://wwwiustel.com and MARTÍN RODRIGUEZ, P.J., "La emergencia de los límites constitucionales de la confianza mutua en el espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia Aranyosi y Caldararu", *Revista de Derecho Comunitario Europeo*, 2016, vol. 20, n. 55, pp. 859-900. In general, on the topic BRIBOSIA, E. and WEYEMBERGH, A., "Confiance mutuelle et droits fondamentaux: 'back to the future'", *Cahiers de droit européen*, 2016, vol. 52, n. 2, pp. 469-521 as well as CLASSEN, H.D., "Schwiriegkeiten eines harmonishen Miteinanders von nationalerem und europäischem Grundrechtsschutz", *Europarecht*, 2017, vol. 52, n. 3, pp. 347-366.

[18] Convention on simplified extradition procedure between the Member States of the European Union, signed on 10 March 1995, OJ, n. C 78, 30 March 1995, pp 2-10 and Convention on extradition between Member States of European Union, 27 September 1996, OJ, n. C 313, 23 October 1996, pp. 12-23. On the evolution to classic mutual assistance model to mutual recognition model see LAGODNY, O., "The European Arrest Warrant. Better than a chaos of Conventions?", in C. Fijnaut and J. Ouwerkerk (eds.), *The future of police and judicial cooperation in the European Union*, op. cit., pp. 335-345 as well as VIDAL FERNÁNDEZ, B., "De la 'asistencia' judicial penal en Europa a un 'espacio común de justiciar europeo'", in C. Arangüena Fanego (ed.), *Cooperación judicial pe-*

in any case not been very successful because of the few ratifications produced at the time. The same explanatory memorandum of the EAW FWD deems the extradition mechanism obsolete and establishes, as an objective of AFSJ, to abolish extradition [19] between Member States and replace it 'by a system of surrender between judicial authorities'; explicitly, '*the introduction of a new simplified system of surrender of sentenced or suspected persons for the purpose of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedure*' (Recital 5). For this reason, several Member States had already started bilateral discussions to prepare treaties of simple surrender of arrested persons to judicial authorities, as for example Italy and Spain, and Spain and the United Kingdom [20].

The EAW popularity as a measure to fight international terrorism fully increased because of the deplorable attacks in the United States of America on 11 September 2001 [21]. Moreover, the proposal of such Council Framework Decision was presented exactly eight days after [22], and the political negotiation to reach the necessary agreement among all Member States only needed three months [23]. Its implementation in all Member States should be done before 31 December 2003

---

nal en la Unión Europea: la orden europea de detención y entrega, Lex Nova, Valladolid, 2005, pp. 19-73.

[19] At the time PLACHTA, M., "European Arrest Warrant: revolution in extradition?", *European Journal of Crime, Criminal Law and Criminal Justice*, 2003, vol. 11, n. 2, pp. 178-194. Also about the discussion of the EAW's nature LAGODNY, O., "Extradition' without a granting procedure: the concept of 'surrender'", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, cit., pp. 39-45 reviewing similarities and differences between extradition and surrender. Nevertheless, still some national laws implementing EAW as well as literature nominates extradition to the EAW, e.g., PÉREZ CEBADERA, M.A., *La nueva extradición europea: la orden de detención y entrega*, Tirant lo Blanch, Valencia, 2008.

[20] Protocol on Extradition signed in Rome on 28 November 2000 and Bilateral Treaty between Spain and UK signed in Madrid on 23 November 2001.

[21] In this context specifically JIMENO-BULNES, M., "After September 11th: the fight against terrorism in national and European law. Substantive and procedural rules: some examples", *European Law Journal*, 2004, vol. 10, n. 2, pp. 235-253. Also, at the time, WOUTERS, J. and NAERTS, F., "Of arrest warrants, terrorist offences and extradition deals. An appraisal of the EU's main Criminal Law measures against terrorism after '11th September'", *Common Market Law Review*, 2004, vol. 41, n. 4, pp. 904-935.

[22] Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States submitted by the Commission on 19 September 2001, COM 2001 (522) final; also published in OJ, n. C 332E, 27 November 2001, pp. 335-319. On the birth of EAW see KEIJZER, N., "Origins of the EAW Framework Decision", in E. Guild and L. Marín (eds.), *Still not resolved? Constitutional issues of the European Arrest Warrant*, Wolf Legal Publishers, Nijmegen, 2009, pp. 13-30 on pp. 19 ff.

[23] JHA Council meeting on 6 and 7 December 2001 in Brussels, previous to European Council in Laeken on 14 and 15 December 2001. See ALEGRE, S. and LEAF, M., "Mutual recognition in European judicial co-operation: a step too far too soon? Case Study- the European Arrest Warrant", *European Law Journal*, 2004, vol. 10, n. 4, pp 200-2017, on p. 202.

according to Art. 34 (1) of the EAW FWD and further evaluation by EU institutions (Commission and Council) shall also have to take place. At the moment, several instruments in support of the EAW's application by national judicial authorities exist, such as a Handbook on EAW [24] elaborated by the Council and Commission with the collaboration of several stakeholders including Eurojust and the European Judicial Network (EJN), whose websites also provided information on the topic [25]. Indeed, the idea to create a form translated into all the official languages of the Member States, which functions as certificate, enormously facilitates the task to the involved judicial authorities.

2.2. *EAW issuance*

In order to observe the principle of proportionality [26], a minimum punishment threshold is required according to Art. 2 (1) EAW, being this different for the purposes of an EAW issuance existing prior sentence or not in the issuing Member State; in particular, 'a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months'. As specified in the EAW Handbook, reference is made exclusively to the maxi-

[24] *Commission Notice - Handbook on how to issue and execute a European arrest warrant*, OJ, n. C 335, 6 October 2017, pp. 1-83, also available at ULR https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do (last access on 20 December 2020) with short explanation and statistics on EAW practice.

[25] See for example in EJN website https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 20 December 2020) including EAW forms as amended by FWD 2009/299/JHA in all official languages in pdf and word format as well as practical information in all Member States, e.g., in relation to competent judicial authorities in each location; also reports by EU institutions, national legislation on EAW as well as case law by CJEU and national courts are provided. About expertise by EU actors see specifically MÉGIE, A., "The origin of EU authority in criminal matters: a sociology of legal experts in European policy-making", *Journal of European Public Policy*, 2014, vol. 21, n. 2, pp. 230-247.

[26] See specifically on the topic VAN BALLEGOOIJ, W., "The EAW: between the free movement of judicial decisions, proportionality and the rule of law", in E. Guild and L. Marín (eds.), *Still not resolved?...*, op. cit., pp. 75-95 as well as VOGEL, J. and SPENCER, J.R., "Proportionality and European Arrest Warrant", *Criminal Law Review*, 2010, n. 6, pp. 474-482; also HAGGENMÜLLER, S., "The principle of proportionality and the European Arrest Warrant", *Oñati Socio-Legal Series*, 2013, vol. 3, n. 1, pp. 95-106. More recently MANCANO, L., "Mutual recognition in criminal matters, deprivation of liberty and the principle of proportionality", *Maastricht Journal of European and Comparative Law*, 2018, vol. 25, n. 6, pp. 718-732; also JANUARIO, T.F.X., "Do princípio da proporcionalidade e sua aplicaçao no mandado de detençao europeu", *Revista Brasileira de Direito Processual Penal*, 2018, vol. 4, n. 1, pp. 435-472. Last, proposing EAW's substitution, SOTTO MAIOR, M., "The principle of proportionality: alternative measures to the European Arrest Warrant", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 213-228.

mum possible punishment in the national law of the issuing Member State without any consideration to the law of the executing Member State according to the principle of mutual recognition; also, consideration of these imprisonment's thresholds takes place with regard to the punishment in abstract. Therefore, as said and also mentioned in the EAW Handbook, the principle of proportionality must always be observed, taking into account specific circumstances of the case [27].

Nevertheless, the main and most revolutionary feature of the new legal instrument is the suppression of the double criminality requirement for a list of 32 crimes with the condition imposed by Art. 2 (2) EAW, that is a punishment 'for a maximum period of at least three years. Initially, this is a *numerus clausus* list that includes those crimes that are supposed to be the most serious ones with a cross-border profile [28]; in fact, a possible extension to other offences or even amendment is contemplated in further Art. 2 (3) EAW by Council according to specific proceeding there considered, which at the moment has not taken place. The proper exemption of this double criminality principle has also been strongly criticized by some literature [29] as a kind of violation of the principle *nullum crime*

---

[27] As proposed in EAW Handbook, following factor can be taken into account: "a) the seriousness of the offence (for example, the harm or danger it has caused); b) the likely penalty imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence); c) the likelihood of detention of the person in the issuing Member State after surrender; d) the interests of the victims of the offence" (p. 14, par. 2.4). Also it is indicated in general terms that "issuing judicial authorities should consider whether other judicial cooperation measures could be used instead of issuing an EAW" (p. 15, par. 2.4).

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

[29] See, for example, ALEGRE, S. and LEAF, M., "Mutual recognition in European judicial cooperation …", op. cit. on pp. 208-209 in their comment to Art. 7 ECHR, double criminality and retrospective application. Also ANDREU-GUZMÁN, F., *Terrorism and Human Rights No.2: New challenges and old dangers*, Occasional papers n.3, International Commission of Jurists, March 2003, on pp. 45 ff. See analysis of 32 crimes' list by KEIJZER, N., "The double criminality requirement", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, op. cit., pp 137-163, on pp. 152 ff and "The fate of the dual incrimination requirement", in E. Guild and L. Marín (eds.), *Still not resolved?...*, op. cit., pp. 61-75 at pp. 69 ff; also VAN SLIEDREGt, E., "The dual

sine lege, but it is one of the most important developments introduced by the EAW regulation in comparison with the classical extradition procedures and one of the outcomes of the mutual reliance on criminal legislation between Member States [30]. Furthermore, the objection as to the difficulty of making the legal typification contained within the different Member State legislations coincide with regard to the offences enumerated in this precept, has been solved by the jurisprudence of some national constitutional courts in relation to extradition proceedings [31].

For the effective transmission of a European arrest warrant, and pursuant to Art. 6 (1) of the EAW, it shall be assured that both, issuing and executing judicial authorities, are competent in their territories to issue/execute the EAW 'by virtue of the law of that State'. It means that, by contrast to other topics in the EU [32], there is not initially a European notion of judicial authority, but this is attached to

---

criminality requirement", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 51-70 as well as BARBE, E., "El principio de doble incriminación", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea,* Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2006, pp. 195-205.

[30] That implies the new 'out of state' character of principle of criminal legality (*nullum crime sine legge et nulla poena sine legge*). By the way, to be remembered that principle of legality is provided joint with the principle of proportionality in Art. 49 CFREU, textually, "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed" looking more for a temporal than space or geographic dimension.

[31] See, for example, in Spain ATC n. 23, 27 January 1997, ECLI: ES: TC: 1997:23A, and STC n. 102, 20 May 1997, ECLI: ES: TC: 1997:102, both available at https://hj.tribunalconstitucional. esarguing the supreme Court that the double criminality principle "does not mind an identity of the criminal rules between both states" and "does not require neither the same juridical qualification in both legislations nor an identical punishment. The significance of this principle consists of the fact is criminal and has a certain punishment in the criminal legislations of requesting state and requested state (Art 2.1 European Convention on Extradition)" (ATC 23/1997, FJ 2). In relation to EAW specifically, see literature specialized in Criminal Law as SANZ MORÁN, A., "La orden europea de detención y entrega: algunas consideraciones de carácter jurídico-material", in C. Arangüena Fanego (ed.), *Cooperación judicial penal en la Unión Europea …*, op. cit., pp. 75-125, on pp. 95 ff and SÁNCHEZ DOMINGO, M.B., "Problemática penal de la orden de detención y entrega europea", in M. Jimeno Bulnes (ed.), *Justicia versus seguridad en el espacio judicial europeo. Orden de detención europea y garantías procesales*, Tirant lo Blanch, Valencia, 2011, pp. 61-107, on pp. 85 ff.

[32] In concrete, promotion of preliminary ruling according to CJEU case law, which first example was *Vaasen-Göbbels* judgment on June 30th, 1966, 61/65, ECLI:EU:C:1966:39; here the reference proposed by the *Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf Heerlen* was 'considered a court or tribunal within the meaning of Article 177' and 'therefore the request for interpretation was admissible' although it was not considered an ordinary court of law under Dutch law. See in favor of such European concept of judicial body JIMENO BULNES, M., *La cuestión prejudicial del artículo 177 TCE*, Bosch, Barcelona, 1996, on pp. 184 ff; also specifically SOCA TORRES, I. *La cuestión prejudicial europea. Planteamiento y competencia del Tribunal de Justicia*, Bosch, Barcelona, 2016, on pp. 122 ff in relation to *Vaasen-Göbbels.*

domestic Law; proof of it are the notifications addressed to General Secretariat of the Council ex Art. 6 (3) EAW by Member States determining competent judicial authorities in order to issue and execute an EAW[33]. Moreover, designation of central authority takes place in order to assist the competent judicial authorities according to Art. 7 EAW, usually the Minister of Justice.

As for the form in which to issue a European arrest warrant, the European rule provides an annex including same concepts numerated in Art. 8 of the EAW[34], and the EAW Handbook includes specific guidelines on how to fill the EAW form (Annex III). Furthermore, the translation 'into the official language or one of the official languages of the executing Member State' is requested, according to Art. 8 (2) of the EAW; each country chooses which language shall be required, usually the official one/s and an additional common one, usually English[35]. With regard to the transmission procedure of the EAW, the rule makes a substantial difference if the location of the requested person is known or unknown; in this last case there is the possibility for the judicial authority to issue an alert for the requested person in the Schengen Information System or SIS[36] ex Art. 9 of the

---

[33] All of them contained in prior EJN website in relation to EAW at https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 20 December 2020). These judicial authorities can be not only judges but also public prosecutor and even police in some countries, e.g., Sweden where the National Police Board (*Rikspolisstyrelssen*) can be issuing judicial authority when the purpose of a EAW is to enforce 'a custodial sentence or other form of detention' according to cover note received on April 3rd, 2009, COPEN 101, EJN 31, EUROJUST 33.

[34] Textually, "a) the identity and nationality of the requested person; b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority; c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect; d) the nature and legal classification of the offence; e) a description of the circumstances in which the offence was committed including the time, place and degree of participation in the offence by the requested person; f) the penalty imposed, if there is a final judgment or the prescribed scale of penalties for the offence under the law of the issuing Member State; g) if possible, other consequences of the offence". Besides EAW Handbook prior mentioned see in literature GINTER, J., "The content of a European Arrest Warrant", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 1-17.

[35] Such information usually is included in prior notifications or notes, eg, according to prior Swedish cover note "Sweden will accept a European arrest warrant written in Swedish, Danish, Norwegian or English" (p. 4).

[36] According to Art. 26 Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ n. L 205, 7 August 2007, pp. 63-84, which explicitly contemplates that "data on persons wanted for arrest for surrender purposes on the basis of a European Arrest Warrant or wanted for arrest for extradition shall be entered at the request of the judicial authority of the issuing Member State". Definition of alert is included in Art. 3 (1) (a) SIS II as "set of data entered in SIS II allowing the competent judicial authorities to identify a person or an object with a view to taking specific action". In this case transmission takes place through national SIRENE Bureau as indicated in EAW Handbook. See at the time with prior regulation JIMENO BULNES, M., "Las nuevas tecnologías en el ámbito de la cooperación judicial y policial europea", *Revista de Es-*

EAW. Nevertheless, and in practice, SIS is extensively employed in most of the Member States [37] even when the location of the requested person is known, something that is not prohibited according to Art. 9 (2) of the EAW.

Finally, Art. 18 of the EAW FWD also regulates the possibility for the issuing judicial authority to ask for 'temporary surrenders' while a procedure of definitive surrender is being carried forward in the executing Member State, or even a national criminal proceeding in order 'to avoid lengthy delays' [38]. According to Art. 18 (2) of the EAW, 'the conditions and the duration of the temporary transfer shall be determined by mutual agreement between the issuing and executing judicial authorities'; the EAW Handbook recommends to express such agreement 'by writing and in clear terms'. Also, a provision establishing the possibility for the transferred person 'to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure' is also included in Art. 18 (3) of the EAW. In fact, such temporary surrenders could be substituted by the possibility of using another kind of resource instead, such as a videoconference initially provided in the first draft of the EAW Framework Decision [39] as well as in other European and national texts; particularly, such measure is now specifically contemplated in the European Investigation Order [40].

---

tudios Europeos, 2002, n. 31, pp. 97-124, on pp. 117 ff and more specifically DE FRUTOS, J.L.M., "Transmisión de la euroorden. Aspectos policiales desde una perspectiva práctica", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea*, op. cit., pp. 175-185.

[37] With the only exception of Ireland and Cyprus according to information provided in EAW Handbook at p. 22 (par. 3.3.3); in these countries the EAW is sent either directly or through Interpol National Office, which is provided according to Art. 10 (3) EAW. This is known as "red notice alert"; see on the topic KÜHNE, H.H., "Der mangelhafte Rechtschutz gegen einen internationalen Hftbefehl", *Europarecht*, 2018, vol. 165, n. 3, pp. 121-126.

[38] EAW Handbook, cit., p. 36, par. 5.9.3. On temporary urrenders see specifically DELGADO MARTÍN, J., "Entregas temporales", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) y M. Muñoz de Morales (ed.), *La orden de detención y entrega europea*, op. cit., pp. 431-451.

[39] Art. 34 Proposal EAW Framework Decision, cit.

[40] Art. 24 (1) Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ, n. L 130, 1 May 2014, pp. 1-36 replacing prior Art. 10 (9) Convention on mutual assistance in criminal matters established by Council Act of 29 May 2000, OJ, n. C 197, 12 July 2000, pp. 1-23. See specifically on this topic VALBUENA GONZÁLEZ, F., "La intervención a distancia de sujetos en el proceso penal", *Revista del Poder Judicial*, 2007, n. 85, pp. 545-565 and "Una perspectiva de Derecho Comparado en la Unión Europea acerca de la utilización de la videoconferencia en el proceso penal: los ordenamientos español, italiano y francés", *Revista de Estudios Europeos*, 2009, n. 53, pp. 117-127.

2.3. *EAW execution*

According to the general rule provided in Art. 1 (2) of the EAW and confirmed by CJEU case law[41], 'Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision'. As stated, this is the general rule but also exceptions to this one are contemplated in the same EAW regulation as Art. 1 (3) of the EAW provision which requires the 'obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union', which has been argued in relevant CJEU case law as in the mentioned *Aranyosi and Caldararu* and *Celmer* cases. In both of them, the CJEU understood that refusal to execute an EAW should be an exception to be strictly interpreted requiring the executing judicial authority to ask for supplementary information to the issuing judicial authority in order to determine 'specifically and precisely' if there is a real risk of breach of fundamental rights of the concerned individual, in which case a postponement of the EAW execution should take place[42]; nevertheless this decision must consider personal circumstances of con-

---

[41] See recent case *LM* (also known as *Celmer*), 25 July 2018, C-216/18, ECLI:EU:C:2015:586, where is pointed that, "while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (see to that effect, judgement of 10 August 2017, *Tupikas* C-270/17 PPU, EU:C:2017:628, paragraphs 49 and 50 and the case law cited)" (par. 41). Here the CJEU answers the request for a preliminary ruling promoted by the High Court of Ireland challenging the execution of several EAWs issued by Poland on the basis of Art. 1 (3) EAW due to the impact of legislative changes related to the judiciary in this country and the possible breach of the fundamental right to a fair trial guaranteed by Art. 47 (2) CFREU. The case has caused great discussion in literature like prior *Aranyosi and Caldararu* case due to the breach of mutual trust between Member States on the basis of such possible violation of fundamental rights; see recent comments on consequences by WENDEL, M., "Mutual trust, essence and federalism – Between consolidating and fragmenting the Area of Freedom, Security and Justice", *European Constitutional Review*, 2019, vol. 15, n. 1, pp. 17-47. Also about same discussion DE AMICIS, G., "Esecuzione del mandato di arresto europeo e tutela dei diritti fondamentali in presenza di gravi carenze nel sistema giudiziario dello stato di emissione: Corte di Giustizia dell'Unione Europea, Grande Sezione, 25 luglio 2018, C-216/18", *Cassazione Penale*, 2018, vol. 58, n. 11, pp. 3907-3913 and VERHEYEN, L., "The principle of mutual trust between the Member States in the context of an European Arrest Warrant at risk again? – the case of M. Artur Celmer (LM)", available at https://www.academia.edu/37996015/THE_PRINCIPLE_OF_MUTUAL_TRUST_BETWEEN_THE_MEMBER_STATES_IN_THE_CONTEXT_OF_A_EUROPEAN_ARREST_WARRANT_AT_RISK_AGAIN_The_case_of_Mr._Artur_Celmer_LM (last access on 20 December 2020).

[42] In concrete, the CJEU ruled in *Aranyosi and Caldararu* that "Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest

cerned individuals in a case-by-case basis and not argued in a general context accordingly [43].

The EAW rule likewise regulates specific grounds for non-execution in a double category classification, as it is mandatory and of optional nature. The first ones are numerated in Art. 3 EAW and are the same in all Member States as a consequence of such compulsory nature; they contemplate, specifically and briefly, 'if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State', 'if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided' (*ne/non bis in idem*) [44] and 'if the person who is subject of

warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information to be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end." Such case law is also introduced in the EAW Handbook providing concrete guidelines in relation to fundamental rights considerations on pp. 33 ff (par. 5.6); in sum, some procedural steps are numerated to guide the executing judicial authority in order to verify the risk of violation of fundamental rights if the requested person is surrendered.

[43] As it was ruled in *Celmer* case by CEU, "Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States … must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalized deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State".

[44] "Where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State", otherwise it will fall under the following grounds for optional non-execution of the EAW according to Art. 4 EAW. See on the topic VAN DER WILT, H., "The European Arrest Warrant and the principle *ne bis in idem"*, in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, op. cit., pp. 99-117 as well as CIMAMONTI. S., "European Arrest Warrant in practice and ne bis in ídem ", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 111-129;