



Council of the
European Union

068152/EU XXVII.GP
Eingelangt am 07/07/21

Brussels, 7 July 2021
(OR. en)

10187/21

JAI 781
COPEN 293
EUROJUST 75

NOTE

From: General Secretariat of the Council
To: Delegations

No. prev. doc.: 6827/21

Subject: Report on Eurojust's Casework in the Field of the European Arrest Warrant

Delegations will find attached the above-mentioned up-dated report by Eurojust, which is also available on Eurojust's [website](#).



Report on Eurojust's Casework in the Field of the European Arrest Warrant

June 2021

Criminal justice across borders

Contents

Executive summary	4
1. Introduction	8
1.1. Background	8
1.2. Scope and purpose of this report	8
2. Validity of the European Arrest Warrant	9
2.1. Competent judicial authority	9
2.1.1. Compilation on the concept of 'judicial authority'	10
2.1.2. Questions on the validity of European Arrest Warrants issued by public prosecutors	11
2.1.3. Questions on effective judicial protection	11
2.1.4. Validation of invalid European Arrest Warrants	11
2.1.5. Questions on additional information provided by public prosecutors	12
2.2. Content and form	13
2.2.1. Identity of the requested person	13
2.2.2. Contact details	14
2.2.3. National arrest warrant	14
2.2.4. Offence(s) and description of the circumstances	15
2.2.5. Sentence	17
2.2.6. Signature	18
2.2.7. Translations	18
2.2.8. Form	19
3. Grounds for non-execution, guarantees and fundamental rights	19
3.1. Grounds for non-execution	19
3.1.1. <i>Ne bis in idem</i>	19
3.1.2. Territoriality grounds	21
3.1.3. Ongoing prosecutions for the same acts in the executing Member State	22
3.1.4. Dual criminality	24
3.1.5. Statute-barred offences	26
3.1.6. <i>In absentia</i> judgments	26
3.1.7. Nationals or residents	30



3.1.8. Proportionality	32
3.2. Guarantees	33
3.3. Fundamental rights	34
3.3.1. Prison conditions	35
3.3.2. Rule of law.....	38
4. Requests for information.....	39
4.1. Necessary and supplementary information before taking a decision on the surrender	39
4.2. Information on the state of play of the European Arrest Warrant proceedings	40
4.3. Follow-up information after a decision on the European Arrest Warrant has been taken	41
5. Transmission of European Arrest Warrants	42
6. Competing requests for surrender/extradition and subsequent surrender/extradition.....	43
6.1. Competing requests for surrender and extradition.....	43
6.1.1. Eurojust guidelines.....	43
6.1.2. Eurojust's advice on competing requests	44
6.1.3. Decisive factors in different scenarios.....	44
6.1.4. Advice, coordination and follow-up measures	45
6.2. Subsequent surrender/extradition	46
7. Time limits for the decision to execute a European Arrest Warrant.....	46
8. Postponement of surrender and problems with the actual surrender	49
8.1. <i>Force majeure</i>	49
8.2. Humanitarian reasons.....	50
8.2.1. Taking care of small children	50
8.2.2. Serious illness	51
8.2.3. The COVID-19 pandemic.....	51
8.3. Ongoing prosecution or execution of a sentence in the executing Member State.....	52
8.4. Transit.....	54
9. Prosecution or carrying out of a custodial sentence for other offences (speciality rule)	54
10. The European Arrest Warrant and its relation to other instruments.....	56
10.1. Coordinated execution of European Arrest Warrants and other mutual recognition instruments	57
10.2. European Investigation Orders and letters of request	57
10.2.1. European Investigation Orders in addition to European Arrest Warrants	57



10.2.2.	European Investigation Orders instead of European Arrest Warrants	58
10.3.	Transfer of sentenced persons.....	59
10.3.1.	European Arrest Warrant replaced with a request for a transfer of sentenced person ...	59
10.3.2.	European Arrest Warrant replaced with a request for a transfer of a sentenced person and replaced again with a European Arrest Warrant	60
10.3.3.	Simultaneous execution of a European Arrest Warrant and a request for the transfer of a sentenced person	61
10.4.	Extradition requests.....	62
10.4.1.	Extradition requests instead of European Arrest Warrants	62
10.4.2.	Extradition requests or European Arrest Warrants: implications of CJEU case-law for the extradition of EU citizens to non-EU countries	62
11.	Conclusions and recommendations.....	63



Executive summary

The framework decision on the European Arrest Warrant and the surrender procedures between Member States (EAW FD) was adopted in 2002. It was the first instrument in the field of judicial cooperation in criminal matters that was based on the principle of mutual recognition and aimed at simplifying and accelerating cooperation between Member States. Over the past 17 years, Member States have gained a lot of experience with the EAW FD.

The aim of this report is to inform both practitioners and policymakers of the main difficulties encountered in the practical application of the European Arrest Warrant (EAW) on the basis of Eurojust's casework and to highlight, where relevant, the role that the European Union Agency for Criminal Justice Cooperation (Eurojust) has played in overcoming such difficulties. Between 2017 and 2020, 2 235 cases involving EAWs were registered at Eurojust. The report clearly indicates that there are still several ongoing issues with the use of the EAW and that Eurojust has played an important role in facilitating cooperation and ensuring coordination in both bilateral and multilateral cases involving EAWs.

Based on Eurojust's casework, solutions and best practices were identified, but the report also stresses some challenges that one should be aware of and sets out the main conclusions reached and recommendations proposed. Some of the conclusions of this report, particularly those that touch upon core features of the principle of mutual recognition, are similar to those of other Eurojust reports on other mutual recognition instruments. Such issues might therefore require a more horizontal approach.

The most relevant issues identified in the report, followed by, where possible, Eurojust's recommendations / best practices, are as follows.

- **Content of EAWs.** The execution of EAWs was often put on hold because of missing, unclear or inconsistent information about the content of the EAWs. Eurojust assisted in clarifying misunderstandings, replying to questions and providing additional information or documents. Requests for additional information were justified to clarify poorly drafted EAWs that were missing crucial information. In a few cases, Eurojust observed requests for additional information that seemed to go beyond what could reasonably be considered justified under the mutual recognition regime.
 - *National authorities might benefit from further guidance on how to fill in EAWs and how to provide correct, concise, complete and consistent information. Cases involving different offences, different sentences and/or different criminal provisions are particularly challenging. In absentia judgments, particularly concerning appeal proceedings, are also challenging with the current EAW FD template. Moreover, (national) templates for some specific scenarios (e.g. return guarantees for nationals or residents) could be seen as a good practice.*
- **Impact of the case-law of the Court of Justice of the European Union (CJEU).** National authorities often approached Eurojust with questions on issues addressed in CJEU judgments, involving, for instance, issues related to the validity of the EAW (e.g. the concept of issuing and/or executing judicial authorities and requirements of effective judicial protection), grounds for non-execution (particularly *in absentia* judgments, nationals or residents, *ne bis in idem*),

fundamental rights issues (prison conditions, rule of law) and extradition of EU citizens to non-EU countries. Either authorities were unaware of certain CJEU judgments, or they were aware but struggling with how to apply them in practice or struggling with issues not yet (fully) settled in the CJEU's case-law.

- *Eurojust will provide frequent updates of Eurojust's overview of CJEU case-law on the EAW.*
- *National authorities should not refrain from sending requests for preliminary rulings to the CJEU, as further clarifications of interpretation can improve the correct application of the EAW FD.*
- *Eurojust will continue to update relevant compilations, if needed, and/or be ready to launch new ones, if needed, in view of further case-law developments.*

— **Limits of direct contact.** Direct contact is an excellent point of departure in judicial cooperation and it might work very well in many cases. However, this report confirms that, for various reasons, direct contact sometimes fails. In most cases, involving Eurojust was the crucial step in breaking the deadlock. Eurojust brought clarification and a better understanding of the legal or practical concerns of the national authorities so that, jointly, workable and satisfying solutions could be agreed upon and the EAWs could be executed.

- *National authorities should not refrain from contacting Eurojust or the European Judicial Network, in accordance with their respective competences and depending on the specificities of the cases, when direct contact is not working.*

— **Good translations and good language skills.** A good translation of an EAW is key to avoiding misunderstandings and unnecessary delays. This might seem obvious and redundant, yet it is a crucial rule that, in practice, is often not complied with, which then becomes problematic.

- *Further investment in good translations and also in good language training (to facilitate direct contact) is crucial and is a key factor in improving the functioning of mutual recognition instruments in general.*

— **Requests for information.** When requests for information remained unanswered, direct contact failed and Eurojust was contacted. Eurojust assisted national authorities in relation to requests for information at different stages and in relation to different topics. Particularly significant was the high number of cases in which executing authorities failed to provide information on how much time the requested person was in detention in the executing Member State on the basis of the EAW (Article 26 of the EAW FD).

- *As requests for additional information are one of the main reasons for non-compliance with time limits, it would be good to provide national authorities with further support on how to apply Article 15 of the EAW FD. In relation to Article 26 of the EAW FD, national authorities are kindly invited to comply with the obligations included in this provision.*

— **Compliance with time limits.** Time limits constitute one of the major features of mutual recognition instruments. Article 17(7) of the EAW FD was meant to keep a good overview of cases in which 'in exceptional circumstances' time limits could not be met and to identify underlying reasons for recurrent delays. Unfortunately, no accurate information is currently available on the number of cases for which time limits are not met. The template that Eurojust

created in 2018 for this purpose is hardly used and only a few countries notify Eurojust when time limits cannot be observed. Yet Eurojust's casework reveals that requests for additional information led to considerable delays in some cases. Furthermore, appeal proceedings in certain Member States seemed to allow cases to last for many years before a final decision was taken.

- *National authorities are kindly invited to comply with the obligations in Article 17(7) of the EAW FD.*

— **Grounds for non-execution and fundamental rights.** The report confirms that there is still margin to further improve the interpretation and application of certain grounds for non-execution and to ensure the assessment of fundamental rights grounds in line with the case-law of the CJEU and the European Court of Human Rights (ECtHR).

- *Practitioners should receive further guidance on how to deal with questions on detention conditions and/or fundamental rights. Further guidance on the case-law of both the CJEU and the ECtHR is relevant in this regard.*
- *Practitioners should receive further guidance on how to apply certain grounds for non-execution.*
- *In cases for which parallel proceedings are ongoing in two Member States, Eurojust can provide support in coordinating and helping to decide which jurisdiction is best placed to prosecute.*
- *When the execution of EAWs cannot take place on fundamental rights grounds, further reflection at EU level is needed on how to avoid impunity in such cases, not only in relation to EAWs for the purpose of prosecution, but also, and more importantly, in relation to EAWs for the purpose of the execution of custodial sentences.*
- *In relation to the application of the dual criminality check, it should be underlined that this test should not be applied in relation to 'list offences' and that the question of whether an offence falls within this list is determined by the issuing Member State's legal framework.*
- *In complex cases, or cases with parallel proceedings or cases in which requests could not be solved through direct contact within a reasonable time, Eurojust can provide assistance with requests for additional information, to avoid multiple requests being sent back and forth. Eurojust can support authorities in obtaining and providing quickly all relevant information to make the correct assessment.*

— **Relation to other instruments.** Eurojust's casework revealed difficulties, but also opportunities, in the use of EAWs vis-à-vis other instruments, particularly European Investigation Orders and transfers of sentenced persons. The report also highlights challenges in the coordinated use of different instruments and/or the choice of alternatives if the EAW is not an option.

- *There is a need for further clarification of the interrelationship between the EAW FD and the framework decision on the transfer of sentenced persons (FD 909), for example the obligation (or not) to send FD 909 certificates in the context of Article 4(6) of the EAW FD, or the margin of discretion of the executing authority in relation to the execution of the sentence in the light of the obligation of 'actually enforcing the sentence'.*
- *Eurojust can assist national authorities with the choice of the most appropriate instrument, coordinating the use of different instruments and/or coordination among Member States.*

- **Competing requests for surrender and extradition.** Although the EAW FD sets out an explicit role for Eurojust, few Member States have implemented this possibility in their national laws and relatively few cases are brought to Eurojust. Yet the report confirms that Eurojust's involvement in such cases can bring many benefits.
 - *National authorities are invited to bring more cases on competing requests for surrender and/or extradition to Eurojust to ensure that a well-informed decision can be taken and to ensure coordination of any required follow-up measures, if needed.*

- **Postponement of the actual surrender.** The report indicates that, even in cases in which a decision is taken to execute the EAW, many issues can arise before the actual surrender takes place.
 - *Close cooperation, communication and coordination are extremely important in scenarios in which the actual surrender has to be postponed.*

- **Speciality rule.** The application of the speciality rule has been rather cumbersome in some cases.
 - *There is a need for further clarification of the scope of the principle of speciality and a need for measures to ensure a correct and more efficient application of the speciality rule in order to avoid considerable delays in the criminal proceedings in the issuing Member State.*

A more detailed explanation of the issues, recommendations and best practices mentioned above, including several other ongoing issues, can be found in this report. In addition, (anonymised) case examples, presented by Eurojust National Desks, have often been provided to clarify the issues at stake.



1. Introduction

1.1. Background

The framework decision on the European Arrest Warrant and the surrender procedures between Member States (EAW FD) ⁽¹⁾ was adopted in 2002. It was the first instrument in the field of judicial cooperation in criminal matters that was based on the principle of mutual recognition and aimed at simplifying and accelerating cooperation between Member States. Over the past 17 years, Member States have gained a lot of experience with the EAW FD.

Questions on the interpretation of the EAW FD have given rise to an increasing number of requests to the Court of Justice of the European Union (CJEU) for preliminary rulings. The CJEU's case-law has assisted practitioners in interpreting and applying the EAW FD. Different tools have been developed to guide practitioners with the use of the EAW FD, such as the Commission's [handbook on how to issue and execute a European Arrest Warrant](#) or the European Union Agency for Criminal Justice Cooperation's (Eurojust's) [overview of case-law by the CJEU on the EAW](#).

In 2020, the European Commission, the European Parliament and the Council of the European Union analysed, from different perspectives, the functioning of the EAW FD, in view of possible future improvements ⁽²⁾. In addition, the ongoing ninth round of mutual evaluations has played an important part in identifying the strengths and weaknesses of this instrument.

1.2. Scope and purpose of this report

This report assesses how the EAW FD has been applied in the Member States. The assessment is based on the analysis of cases handled by the National Desks at Eurojust from 2017 to 2020. Like Eurojust's previous report on the European Arrest Warrant (EAW), which was published in 2017 ⁽³⁾, this report confirms a further increase in cases since 2017 (see figure below), reflecting only a short fall in 2020.

During 2017–2020, Eurojust registered 2 235 cases in its case management system. Given this large number of cases, the National Desks were invited to focus on major issues, practical difficulties and best practices that they encountered in their cases in relation to the practical application of the EAW FD.

A total of 21 National Desks ⁽⁴⁾ provided input based on a selection of 625 cases, which were the basis for this report. Some of the cases are highlighted in text boxes whereas others are grouped and described from a more general perspective throughout the report. The issues identified in the cases relate, in particular, to the validity of the EAW, the content and form of the EAW, the grounds for non-recognition, guarantees, fundamental rights, requests for additional information, the transmission of EAWs, competing EAWs, time limits, the postponement of the EAW and problems with the actual surrender, the speciality rule, and the use of the EAW vis-à-vis other instruments. The report also highlights, where relevant, the impact of the CJEU's case-law in the different fields. In addition to the

⁽¹⁾ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.07.2002, amended by Council Framework Decision 2009/909/JHA.

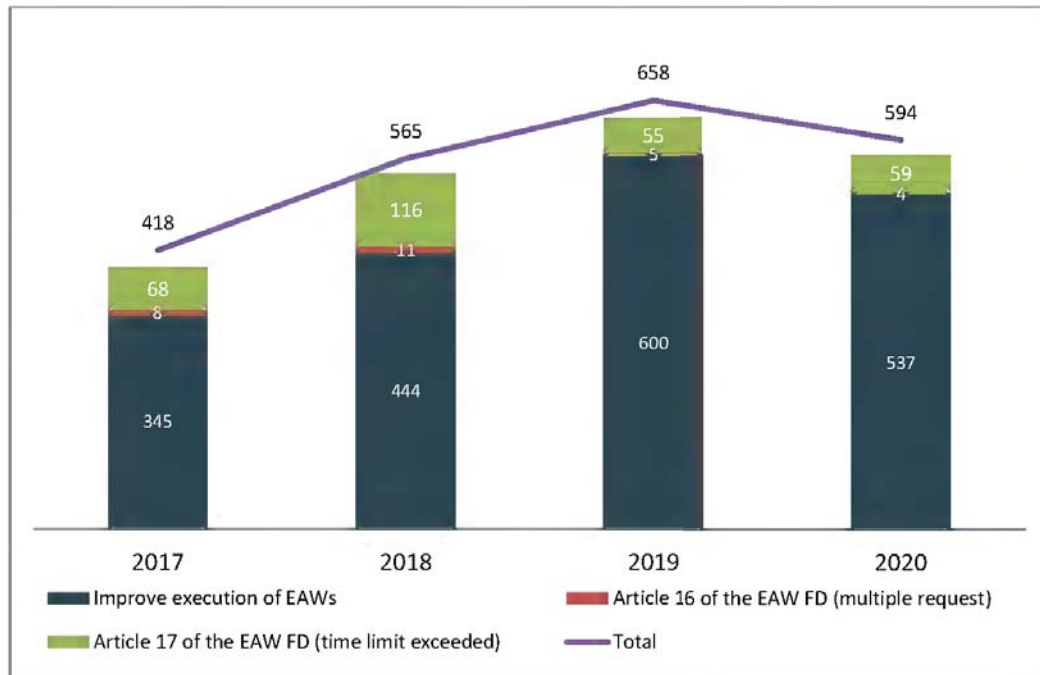
⁽²⁾ Commission's report on the implementation of the EAW FD, the report of the European Parliament on the implementation of the EAW and the surrender procedures between Member States and the Council conclusions on the EAW and extradition procedures – current challenges and the way forward.

⁽³⁾ Report on Eurojust's casework in the field of the European Arrest Warrant (2014–2016).

⁽⁴⁾ AT, BE, BG, CZ, DE, EE, EL, ES, FI, FR, HU, IE, IT, LT, LV, NL, PL, PT, RO, SE and SK.

issues identified in Eurojust's cases, the report also integrates the results of operational topics and other relevant strategic projects. The report concludes with some conclusions and recommendations.

Number of EAW cases registered at Eurojust (2017-2020)



2. Validity of the European Arrest Warrant

2.1. Competent judicial authority

According to Article 6 of the EAW FD, only judicial authorities are competent to issue and to execute EAWs. In recent years, the CJEU has ruled that the term 'judicial authority' is not limited to judges or courts of a Member State, but includes the authorities participating in the administration of criminal justice in that Member State. The CJEU clarified that the term does not cover a police service ⁽⁵⁾ or a ministry of justice ⁽⁶⁾, but can cover a public prosecutor's office when it is adopting a decision to issue ⁽⁷⁾ or execute ⁽⁸⁾ an EAW, provided that it is not exposed to the risk of being subject, directly or indirectly,

⁽⁵⁾ Judgment of the CJEU of 10 November 2016, *Poltorak*, C-452/16 PPU, ECLI:EU:C:2016:858.

⁽⁶⁾ Judgment of the CJEU of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861.

⁽⁷⁾ In relation to the concept 'issuing judicial authority': judgments of the CJEU of 27 May 2019, *OG and PI*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, and *PF*, C-509/18, ECLI:EU:C:2019:457; judgments of the CJEU of 12 December 2019, *JR and YC*, C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:2019:1077, *XD*, C-625/19 PPU, ECLI:EU:C:2019:1078, and *ZB*, C-627/19 PPU, ECLI:EU:C:2019:1079.

⁽⁸⁾ Judgment of the CJEU of 24 November 2020, *AZ*, C-510/19, ECLI:EU:C:2020:953. In this judgment, the CJEU transposed its case-law on



to directions or instructions in a specific case from the executive, such as a minister for justice. The CJEU did not only rule on their independence, but also set certain requirements related to effective judicial protection when a public prosecutor is involved as the competent issuing or executing judicial authority. Eurojust assisted national authorities in clarifying questions and in finding solutions when invalid EAWs (issued by public prosecutors not meeting the requirements of the CJEU's case-law) had to be replaced with valid EAWs (issued by courts).

2.1.1. Compilation on the concept of 'judicial authority'

The abovementioned case-law raised many questions regarding the legal position of public prosecutors in some Member States. Therefore, Eurojust and the European Judicial Network (EJN) worked on a questionnaire and the compilation of replies from the national authorities of the Member States, with the aim of assisting practitioners with the application of the EAW FD in this field. Following further developments in the CJEU's case-law and in the Member States, including changes in national legislation, the compilation has been updated regularly ⁽⁹⁾. The [questionnaire and compilation on requirements for issuing and executing judicial authorities in EAW proceedings pursuant to the CJEU's case-law](#) (hereafter referred to as the compilation) includes a brief summary of the most relevant judgments that the CJEU has delivered on this issue. It compiles the replies received from the EU Member States (in relation to the application of the EAW FD), but also from Iceland and Norway (in relation to the relevant corresponding provisions of the Surrender Agreement of the EU with Iceland and Norway), and the United Kingdom (in relation to the relevant corresponding provisions of the Trade and Cooperation Agreement) ⁽¹⁰⁾. The questionnaire addresses the following issues:

- which are the issuing and executing judicial authorities under the EAW FD and whether public prosecutors can issue/execute an EAW;
- what authority ultimately takes the decision to issue/execute an EAW (including relevant information on ex officio review and/or endorsement by a court);
- whether national law guarantees the independence of the public prosecutors from the executive;
- whether, in those countries where a public prosecutor can issue/execute an EAW, such a decision can be subject to court proceedings that meet in full the requirements inherent in effective judicial protection;
- what legal and/or practical measures have been taken to address the issue in the countries affected by the CJEU's judgments;
- any other additional information, including recent developments in national law and/or certificates issued to ensure compliance with the requirements set by the CJEU's case-law.

the concept of 'issuing judicial authority' in relation to public prosecutors (see previous footnote) to the concept of 'executing judicial authority' within the meaning of Articles 6(2), 27(3)(g) and 27(4) of the EAW FD.

⁽⁹⁾ The most recent version, at the time of writing of this report, was published as Council document 5607/21 and is retrievable at Eurojust's website [here](#).

⁽¹⁰⁾ See, in relation to the Trade and Cooperation Agreement, Eurojust's [note on judicial cooperation in criminal matters between the EU and the United Kingdom from 1 January 2021](#).

2.1.2. Questions on the validity of European Arrest Warrants issued by public prosecutors

In the aftermath of the *OG and PI* judgment and the *PF* judgment ⁽¹¹⁾, national authorities from different Member States requested urgent support from Eurojust in relation to pending EAWs issued by a public prosecutor when questions arose about whether these public prosecutors met the requirements set by the case-law.

Executing authorities requested, via Eurojust, assurances from the issuing Member State regarding the independence of the public prosecutor and/or information on the requirements of effective judicial protection in the issuing Member State. The abovementioned compilation often served as a first point of reference in concrete cases in which the executing authorities had questions in relation to the legal position of public prosecutors involved in taking decisions on the issuance or execution of EAWs. For requests on additional information, Eurojust facilitated the cooperation between the authorities involved, participated in the discussion on which information was needed and speeded up the delivery of that information, within very tight deadlines.

In a few cases, EAWs were not executed because the executing authority concluded, on the basis of the information available to it, that the prosecutor in the issuing Member State did not fall within the concept of 'issuing judicial authority' and that the EAW issued by them was invalid, as it did not fulfil the requirements inherent in Articles 6(1) and 8(1) of the EAW FD.

2.1.3. Questions on effective judicial protection

In the period between the *OG and PI* and *PF* judgments (May 2019) and the *JR and YC, XD and ZB* judgments (December 2019) ⁽¹²⁾, the primary focus in some of Eurojust's cases was whether a prosecutorial decision to issue an EAW was capable of being the subject of court proceedings meeting the full requirements inherent in effective judicial protection as required by the CJEU's case-law. Executing authorities sent, in some cases, detailed lists of questions to several issuing Member States to scrutinise their systems of judicial protection.

Depending on the outcome of the assessment, executing courts either granted surrender or concluded that the EAWs were invalid and refused to execute them. In several cases, courts suspended their decisions, to wait for an upcoming judgment of the CJEU. When, many months later, the CJEU clarified that a separate legal remedy was only one of the possible ways to ensure a sufficient level of judicial protection in EAW procedures, the executing authority concluded, in some of the cases, that the issuing authority fulfilled all the requirements set by the CJEU's case-law and that the EAWs were valid all along and should thus be executed.

2.1.4. Validation of invalid European Arrest Warrants

National authorities addressed Eurojust in relation to EAWs that might be invalid, that is, issued by public prosecutors allegedly not meeting the requirements set by the CJEU's case-law, to remedy them as soon as possible. Issuing authorities requested information on the state of play of the EAW proceedings and advised that, if a final decision on the execution of the EAW or the actual surrender

⁽¹¹⁾ See footnote 7.

⁽¹²⁾ See footnote 7.



was still pending, the issuing court would issue 'repairing' EAWs to convert the invalid EAWs into valid ones. Often this was due within very tight deadlines in view of upcoming court hearings, limits for pre-trial detention or planned surrenders. Issuing and/or executing authorities contacted Eurojust to facilitate and speed up this validation process by ensuring smooth contact between the national authorities.

Failure to obtain the reissued EAW and its accompanying translation by the set deadline could have led to the requested person's release. Fortunately, EAWs were mostly remedied in time and successfully executed. Yet, in a few cases, executing authorities faced difficulties when some issuing courts in a Member State were not willing to reissue the EAW, as they did not consider themselves competent to do so under their national law. On appeal, most of these decisions were overturned by appeal courts, which validated the EAWs, and surrender could take place.

Courts in an issuing Member State declaring themselves incompetent to issue European Arrest Warrants

A requested person – suspected of six offences of stabbing someone with a knife, two violent robberies, witness intimidation and threats to kill one of the victims – was contesting his surrender on the ground that the EAW was invalid. He argued that, under the issuing Member State's law, local courts did not have the power to issue EAWs, and the notification made under Article 6 of the EAW FD did not explicitly refer to 'local courts'. As the outcome of this case was likely to affect many other EAWs, Eurojust's assistance was requested. The National Desk of the executing Member State was aware that this point had been raised in a number of cases in the issuing Member State. On at least three occasions, the local court had considered itself incompetent and had refused to issue an EAW, whereas in other cases higher courts had overturned such decisions, concluding that the local courts were competent to issue EAWs. Overall, there were conflicting decisions in the issuing Member State, which created confusion and legal uncertainty for the executing court. Therefore, the executing authority was seeking, from a more generic perspective, a response from the Ministry of Justice or other appropriate body that could be served in all relevant proceedings. In essence, it requested clarification of whether EAWs issued by courts in the issuing Member State were permitted by law and were therefore valid. In order to obtain a formal reply, Eurojust facilitated contact between the executing authority and the issuing Member State's Ministry of Justice. The ministry clarified, in general terms, without reference to any specific case, that, since the CJEU's rulings, only courts were competent to issue EAWs, without a need for a change in the legal framework, and that the notification under Article 6(1) of the EAW FD would be updated accordingly. It was also clarified that, while courts are competent to issue EAWs, not every court in every case can do this (e.g. differences between EAWs for prosecution and EAWs for execution purposes).

The act of withdrawing invalid EAWs and replacing them with valid EAWs sometimes led to confusion or misunderstandings. In one case, the executing authority had misunderstood this 'substitution' and assumed that the issuing authority wanted to retract the old EAW. The issuing authorities asked for the support of their National Desks at Eurojust to clarify the situation. By an urgent note, transmitted via Eurojust, the issuing authorities informed the executing authorities that the EAWs were still valid and asked whether the surrender procedure could continue based on the new EAWs. The National Desks ensured urgent transmission of the new EAWs and translations of them.

2.1.5. Questions on additional information provided by public prosecutors

In some cases, the validity of the EAW was questioned not because of the EAW itself, but because additional information related to the EAW had been provided by a public prosecutor not meeting the

CJEU's requirements. The question raised was whether, in such a situation, this additional information needed to be validated by the court in the same way as the EAW.

Additional information provided by a public prosecutor

An issuing authority had received information that the requested person's lawyer had made a complaint before the court that additional information regarding the date and the time of the crimes had been provided to the executing authority by a public prosecutor and was not endorsed by a court. The lawyer argued that a certification of that information by the court and transmitted in the executing Member State's language was required. The issuing authority disagreed, arguing that the additional information, unlike the EAW, is not a legal act, but serves only to clarify the scope of the EAW and can therefore be provided by the public prosecutor. The district court in the executing Member State followed the lawyer's argument and refused the surrender. The public prosecutor filed an appeal against this decision. During a level II meeting at Eurojust, the respective National Desks discussed it and concluded that, in order to avoid the risk of a refusal in the appeal proceedings, it would be best if the issuing authorities provided a document that clarified that the court confirmed the additional information on the EAW that had been provided by the public prosecutor. This was submitted to the appeal court, which subsequently executed the EAW and surrendered the person.

Additional 'crucial' information provided by a public prosecutor

An executing authority had noted that, based on the information included in two EAWs, the offences were statute barred under the executing Member State's law, which constituted a mandatory ground for refusal. However, the executing authority requested additional information, which was provided by the public prosecutor and revealed that the crimes outlined in the EAWs were not statute barred. In the light of that information, the court of first instance in the executing Member State decided to execute both EAWs. The requested person appealed and the case was brought before the supreme court as an appellate court. The supreme court concluded that additional information that had been provided was crucial for the decision on the execution of the EAWs. The supreme court wondered whether, in a situation in which the additional information is crucial for the execution of the EAW, this information needs to be validated by the court in the same way as the EAW. The supreme court referred this question to the CJEU, where the case is currently pending⁽¹³⁾.

2.2. Content and form

Executing authorities often argued that EAWs were filled in inaccurately or that some information was missing or contradictory. All the elements mentioned in Article 8 of the EAW FD have been subject to requests for additional information in Eurojust's casework.

2.2.1. Identity of the requested person

Generally, EAWs included the identity and nationality of the requested person (Article 8(1)(a) of the EAW FD). However, executing authorities sometimes requested the assistance of Eurojust to get in contact with the issuing authority to obtain additional information to confirm the requested person's identity by means of photographs, fingerprints, DNA profile or similar evidence. The reason for these requests was that the requested persons, whose surrender was sought for very serious offences, denied

⁽¹³⁾ Case C-78/20, *Generálna prokuratúra Slovenskej republiky*. The question referred is 'Must the requirements which an European arrest warrant must satisfy as a judicial decision under Articles 1(1) and 6(1) of Framework Decision 2002/584 be applied also to supplementary information provided pursuant to Article 15(2) thereof, where, for the purposes of the decision of the executing judicial authority, it substantially supplements or changes the content of the arrest warrant originally issued?'

being the persons targeted by the issuing authorities. Each claimed that someone had used their identity and committed the offences. However, after the transmission of the additional information via Eurojust, it was confirmed in all these cases that the arrested persons were those who were sought by the issuing authorities. For instance, additional information channelled via Eurojust – linking the suspect to the crime scene by DNA evidence that was discovered on the crime scene – led to successful EAW proceedings and the surrender of the requested person. Similarly, in a case in which the requested person had claimed that they were in prison at the time that the offences had been committed, the competent authorities provided certificates with the precise dates of detention of the requested person, clarifying that these dates did not correspond to the time when the offences had been committed. This information enabled the surrender of the requested person for serious offences, including rape, sexual exploitation of a minor and child pornography.

2.2.2. Contact details

Occasionally, the executing judicial authorities urgently requested Eurojust's support when the contact details of the issuing judicial authority (Article 8(1)(b) of the EAW FD) were missing or incomplete. Eurojust was then consulted to ensure smooth and fast communication.

2.2.3. National arrest warrant

Since the CJEU's *Bob-Dogi* judgment⁽¹⁴⁾, it seems that executing authorities have become more rigorous in checking compliance with the requirement that an EAW must contain evidence of 'an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect' (Article 8(1)(c) of the EAW FD). Executing authorities requested Eurojust's assistance in relation to the following:

- checking the existence of a national decision on which the EAW was based (which was mostly available) and swiftly obtaining information on related questions;
- clarifying misunderstandings or incorrect information in the EAW, for instance a wrong date of issuance of the national arrest warrant or a statement that the EAW was based on an 'international' arrest warrant and/or an indication 'that the national arrest warrant would be notified to the requested person upon arrival' when further clarification revealed that the national arrest warrant already existed;
- clarifying inconsistencies or discrepancies between the offences mentioned in the national arrest warrant and the EAW;
- different views on the interpretation of the concept 'any other enforceable decision having the same effect'.

House arrest and the concept of 'any other enforceable decision having the same effect'

Following a requested person's arrest in the executing Member State in a case related to trafficking in cultural goods, the national arrest warrant in the issuing Member State was converted into a judicial decision ordering house arrest while the surrender procedure was still pending. The executing authority was informed thereof and considered that the conversion of a (national) arrest warrant into a house arrest had no legal basis in the EAW FD and should therefore be considered as a withdrawal of the national arrest warrant. Consequently, the executing authority concluded that there were no

⁽¹⁴⁾ Judgment of the CJEU of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385.

grounds for detention and released the suspect. As it was not possible to enforce the house arrest in the executing Member State, the issuing authorities withdrew the house arrest order and, consequently, the EAW. It should be noted that, under the law of the issuing Member State, a house arrest order amounts to a detention order. The case thus reveals problems related to a lack of understanding of the concept of 'detention order' in the different national legislations.

National Desks at Eurojust assisted the executing authorities with swiftly obtaining the national arrest warrant with the correct information from the issuing authorities, together with a brief cover letter rectifying the mistake in one of the official languages of the executing Member State. In very few cases, issues related to the national decision led to refusals or withdrawals of the EAW.

2.2.4. Offence(s) and description of the circumstances

In many cases, executing judicial authorities requested additional information concerning the nature and legal classification of the offence (Article 8(1)(d) of the EAW FD) and/or the 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 (Article 8(1)(e) of the EAW FD).

Corrections were needed whenever the executing authority discovered that the original EAW or its translation included **wrong information** such as:

- a wrong date of when the offences had been committed;
- reference to a law that had been abrogated several years earlier;
- overlap between the time when the requested person had allegedly committed the crimes and when the suspect was in pre-trial detention in the issuing Member State;
- inconsistency between the offences mentioned in the original EAW and in the translation;
- discrepancy between the number of offences mentioned in the description and the number of list offences that were ticked.

Issuing authorities prepared and transmitted, via Eurojust, additional notes to address identified mistakes, inconsistencies or doubts and/or sent the relevant legal provisions or legal texts and/or judgments or national arrest warrants, which further clarified and described the committed offences. In various cases, the exchange of additional information led to the withdrawal of the incorrect or incomplete EAWs and the issuing of new, adjusted EAWs. In most cases, the additional information was expediently transmitted via Eurojust and the surrender took place shortly after.

Sometimes issuing authorities requested last-minute changes, particularly in view of recent developments in the national investigation, which required extending the scope of the EAW by **adding additional offences**. After modifying the scope of the original EAW, issuing authorities contacted Eurojust. They wanted to find out whether the executing authority could still consider the modified EAW or whether they should request a change to the offences after the surrender under the application of Article 27 of the EAW FD (see Section 9).

Extending the scope of the surrender

A requested person was arrested in the executing Member State based on an EAW for the purpose of prosecution for illegal restraint. The ongoing investigation in the issuing Member State showed new elements and the requested person also became the suspect in a murder (with robbery). Therefore, the issuing authority issued an additional EAW to also prosecute the requested person for murder. As



the EAW proceedings in the executing Member State were already well advanced, the issuing authorities requested Eurojust to urgently contact the executing authority to check if the surrender could be granted for the offences mentioned in both EAWs. Through immediate action of the National Desks, the executing court was informed just in time, right before the EAW hearing started, and agreed to surrender the requested person for the acts included in both EAWs.

EAWs sometimes included **too little information**, such as one line on the time, place (city) and offence, and without any concrete link between the requested person and the offence(s). Despite repeated reminders, the executing authority had often not received any further feedback. The issuing authorities were then requested, via Eurojust, to complete Section (e) of the EAW form in respect of each of the offences of which the person was suspected or convicted, to provide a more detailed description of these acts and to link them to the requested person.

Clarifying the scope of the European Arrest Warrant

An executing authority sought clarification about the exact offences committed by the suspect. It was unclear whether the EAW concerned computer-related fraud, swindling or both. The EAW mentioned three offences, but it was unclear whether it constituted three incidents of selling programs to three different persons and/or whether three different laws were contravened with one act. As the executing authority had not received a reply from its issuing counterpart, it sent a request to Eurojust to facilitate the communication and clarify the scope of the EAW. The issuing authority was requested to describe each of the three offences, the victims and the legal acts that constituted the offence. A new EAW was issued that brought clarification.

Clarifying the scope of the European Arrest Warrant

An executing court needed a more precise and detailed explanation regarding the place where a fraud-related offence had been committed, the time (in particular whether the criminal activities were still ongoing) and how the crime had been committed (modus operandi). The National Desks concerned had long conversations, as the scope of the EAW was not clear. The issuing authorities provided additional information, describing the role of the requested person very well, indicating that he had been active continuously from 2016 until that time, so that there was no risk of any offences being time barred. In addition, a compilation of victims with the exact time when and the place where the damage had occurred was provided. All the additional information was included in a note, translated into the required language and accompanied with the translated national arrest warrant.

EAWs sometimes led to **excessive requests for clarification**. In several cases, executing authorities from certain Member States requested specific elements of evidence available in the criminal file of the issuing Member State, such as letters and minutes of conversations through Skype in a case concerning parental kidnapping, or the detailed content of wiretapped conversations in a criminal investigation into an organised criminal group suspected of drug trafficking. De facto, such requests amounted to a review of the merits of the case, not really in line with the mutual recognition principle. This practice was already subject to criticism in the report on the fourth round of mutual evaluations. In a number of cases, the executing authorities themselves acknowledged systemic difficulties regarding certain aspects of their national law, but also noted attempts to improve the system through national case-law developments.

Issuing authority complying with excessive requests

An executing authority that had issued an EAW for a criminal prosecution for theft requested a standard package of additional documents to the EAW. This included the national arrest warrant, the accusation act, the relevant legal act(s) and, in addition, a statement of the facts of the EAW, the factual evidence, the serious indications that the person was guilty and a formal letter with the evidence

supporting the accusation (e.g. fingerprints, DNA, telephone tapping, co-defendant or witness statements, video surveillance recording). This practice, which was not in line with the EAW FD, was very time-consuming and costly, as all these documents had to be translated into the executing Member State's language. Despite lengthy discussions via Eurojust on the justified need for such a request, the issuing authority in the end provided the requested additional information and the requested person was surrendered.

Limits to an executing authority's power to assess the evidence under the European Arrest Warrant regime

In a case involving drug trafficking and participation in a criminal organisation, the court of first instance had rejected the EAW because the issuing authority had not submitted sufficiently detailed evidence. However, the public prosecutor appealed against that decision and the supreme court dismissed the first court's ruling and granted the surrender. The supreme court underlined that it was not for the executing authority to assess the evidence available in the issuing Member State's file, and thus rightly acknowledged the limits of control in the hands of the executing judicial authority in this regard.

2.2.5. Sentence

Several cases involved questions on the imposed penalty (if the EAW was for the purpose of the execution of a custodial sentence) or the scale of penalties for the offence under the law of the issuing Member State (if the EAW was for the purpose of prosecution) (Article 8(1)(f) of the EAW FD). Executing authorities asked the issuing authorities to clarify or provide additional information related to different aspects of the sentence, such as the following.

- The exact duration of a sentence (if already imposed) or the maximum custodial sentence(s) that the requested person could incur for the committed offence(s), when information provided in Section (c) was unclear or insufficient.
- A copy of the conviction sentence mentioned in the EAW, for instance when the executing authority had to decide on a legal remedy against the first-instance decision that had granted the surrender.
- The final nature of the sentence, whether an appeal had been lodged and the status of the appeal.
- The purpose of the EAW, when it was unclear whether the EAW had been issued for the execution of a custodial sentence (and, if so, its duration) or for the purpose of prosecution.
- Changes in the purpose of the EAW during the proceedings: a new EAW was delivered with the same reference number and there was a need to clarify whether the judgment mentioned in the new EAW was final, whether it was for the purpose of the execution of a custodial sentence and whether the first EAW had been withdrawn.
- The time spent in detention, particularly if the requested person declared that they had served the totality or part of the sentence, as opposed to the information on the remainder of sentences specified in the EAW. Eurojust assisted with the clarification of the length of the sentence still to be served by the individual.
- Time limitation for the execution of a custodial sentence to check the validity of the EAW or to consider when deciding on a possible decision to postpone the surrender, for example if the requested person was under custody in the executing Member State for other offences.
- A copy of the judicial decision or the national rules on converting a non-custodial sentence into a custodial sentence, when the EAW mentioned an alternative sanction (e.g. a community

service) or a financial penalty and it was not clear how these sentences were/would be converted into a custodial sentence.

- Adaptation of merged sentences in line with the principle of speciality (see also Section 9) in the case of a partial execution of an EAW when the executing authority decided to grant the surrender in relation to some of the offences and to refuse it in relation to others.

Adaptation of a merged sentence after a partial execution of a European Arrest Warrant

An executing authority had only partially executed the EAW and wanted to be sure that the merged sentence would be adapted, as it had received information from the issuing court that the cumulative sentence was final, binding and enforceable. A coordination meeting was organised to discuss the surrender of the requested person with full respect for the principle of speciality. The coordination meeting helped to clarify, also in view of other relevant future cases, the legal basis in the issuing Member State's legal system to disaggregate and adapt a cumulative sentence in cases in which an executing authority allowed only a partial surrender. The issuing authority agreed to send a letter signed by its Ministry of Justice confirming that the rule of speciality, as enshrined in the EAW FD, was transposed into the national law. The letter also explained the procedure by which the speciality rule would be observed once the requested person was surrendered to the issuing Member State. Reference was also made to relevant case-law by a supreme court, which reconfirmed that the rule of speciality would be observed in the case of a decision of partial surrender. However, before a final decision on the actual surrender was taken, the requested person returned voluntarily to the issuing Member State. Therefore, there was no need any more to comply with the speciality rule and the issuing Member State could impose the merged sentence in its entirety.

2.2.6. Signature

In a few cases, the issuing judicial authority had not signed the EAW. Eurojust's involvement was needed owing to the urgency of the case. Eurojust facilitated the transmission of duly signed EAWs by the required deadline.

2.2.7. Translations

In many cases, issues arose in relation to the required translations. Often Eurojust intervened to speed up the transmission of pending translations. In several cases, executing authorities needed very urgently – often within a few hours or days – the translation of the EAW, which they had not received, sometimes despite repeated reminders to the issuing Member State. In one case, the requested person had been arrested at the airport based on a Schengen information system (SIS) alert and the executing authority needed the translation of the EAW urgently. The issuing authorities quickly transmitted the requested translation to the executing authorities via Eurojust. In most cases, the very tight deadlines were met and the translation could be provided in time, thanks to close cooperation between the National Desks involved. Only in some exceptional cases was it not feasible to have the EAW translated within the period set by the national law.

In some cases, translation issues were raised by the lawyer of the requested person, who argued that the conformity of the translation of the EAW with the original EAW could not be established, as the translation received so far was not an authorised/certified one. Eurojust facilitated obtaining a certified translation. Additional issues arose in other cases when, at a given time, the issuing authority started to require that any requests for additional information were to be sent in the language of the issuing Member State.

Another common problem was the overall quality of the translation of the EAWs or of the additional information requested or provided. There were translation errors, which made it difficult to understand the information included therein. Therefore, new translations had to be provided. In some cases, translations provided by the Eurojust National Desk member were enough to clarify the doubts that had arisen.

2.2.8. Form

A national authority requested clarification from Eurojust further to a case in which it had encountered issues with a judge who had refused to fill in the EAW form. Instead, the judge had issued a court order in which he had confirmed the national arrest warrant and had requested an international search for the relevant person. The national authority wanted to know whether authorities in other Member States would start an execution procedure and be able to execute such a request without the EAW form. The reply provided to this authority was that a person could be arrested based on a SIS alert only, but that the EAW had to follow directly. The lack of the EAW form could be a reason to reject the request.

3. Grounds for non-execution, guarantees and fundamental rights

3.1. Grounds for non-execution

Eurojust has often assisted judicial authorities when grounds for non-execution were under discussion (see Sections 3.1.1–3.1.7). A recurrent issue in relation to many grounds for non-execution is a too rigid interpretation of these grounds. This applies particularly in relation to ‘optional’ grounds, which were introduced in some national legal orders as ‘mandatory’ grounds, often leaving executing authorities with little to no margin of discretion. Such an approach is clearly not in line with the CJEU’s case-law, in which the CJEU has underlined that, in relation to the grounds included in Article 4 of the EAW FD (‘optional’ grounds for non-execution), the executing judicial authority should have a margin of discretion, allowing them to make an assessment in a specific case, taking into consideration all relevant factors ^[15].

3.1.1. *Ne bis in idem*

Executing authorities raised questions about whether the requested person had been ‘finally judged’ by a Member State in respect of the ‘same act’ as that on which the EAW was based (Article 3(2) of the EAW FD).

In several cases, involving migrant smuggling, drug trafficking and organised criminal groups, requested persons were arrested based on an EAW and then claimed that they had already served a custodial sentence (*bis*) for the same acts (*idem*) in another Member State. The executing authority

^[15] Judgment of the CJEU of 29 April 2021, *X (Mandat d'arrêt européen – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, paras 43-44 and the case-law mentioned there.

approached Eurojust to get in contact with the authorities of the Member State concerned to check when and on what basis the requested person had been in detention in that Member State. Eurojust's role was crucial to obtaining the relevant information. Often incomplete or inaccurate information was available or authorities had simply not replied or not provided any translations of the requested information. Eurojust assisted in speeding up and transmitting the relevant information.

Assessments were then made and decisions taken based on the information transmitted via Eurojust, in the light of the relevant CJEU case-law⁽¹⁶⁾. In many cases, it was clarified that the requested person had been detained for similar – but not the same – offences, so there was no *bis in idem* scenario and surrender could be granted. However, in some cases the consultation process revealed that the requested person's claim was accurate and that the EAW was wrongly still 'active' in the SIS II and/or INTERPOL databases. Following Eurojust's intervention, competent authorities withdrew the EAW.

Ne bis in idem situation detected and remedied via Eurojust

Upon receiving a request for assistance concerning EAW proceedings, the National Desk of an executing Member State realised that the same EAW (same person and same offence) had already been executed in the past. The National Desk acted immediately by informing the National Desk of the issuing Member State that its national authorities had most likely omitted to delete the EAW from SIS II, as the same person had been arrested and surrendered before based on that same EAW. The National Desk of the issuing Member State swiftly verified and confirmed this information with its national authority. The EAW was then quickly withdrawn and the arrested person released. Needless to say, in such cases an urgent reaction is vital.

National authorities also approached Eurojust with questions about the extent to which a **public prosecutor's decision to dismiss proceedings** could trigger the application of the principle of *ne bis in idem* under the EAW FD (Article 4(3) of the EAW FD). In the *Kossowski* judgment, the CJEU ruled that the principle of *ne bis in idem* must be interpreted as meaning that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, cannot be characterised as a 'final decision' when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out⁽¹⁷⁾. In a case in which the investigation could be reopened, but the public prosecutor had already carried out a detailed examination, some questions were raised on the application of the principle of *ne bis in idem*.

Impact of a public prosecutor's decision to dismiss a case

In a case related to trafficking in human beings involving six victims who had been recruited and trafficked as objects of labour exploitation, an executing authority refused to surrender the main suspect on *ne bis in idem* grounds. The executing authority explained that a public prosecutor in the executing Member State had also looked into this case and had decided to dismiss the case and terminate the prosecution. The issuing authority brought the case to Eurojust and questioned the applicability of these grounds, including in the light of the CJEU's case-law. After further discussions, authorities agreed that the *Kossowski* judgment could not be applied by analogy, as, in the present

⁽¹⁶⁾ Eurojust overview of the case-law of the CJEU on the principle of *ne bis in idem* (updated April 2020).

⁽¹⁷⁾ Judgment of the CJEU of 29 June 2016, *Kossowski*, C-486/14, ECLI:EU:C:2016:483.

case, a detailed investigation had been carried out in the executing Member State. A coordination meeting was organised to discuss the matter in depth; following the discussions and the exchange of information, the executing authority agreed to assess a possible reopening of the case in the executing Member State. However, later on, while noting that no sustainable elements were identified that could prove that the facts had taken place, the executing authority decided not to reopen the case. As it was very likely that a new EAW would again be refused on the same grounds, the case was closed.

The **enforcement condition** has also been subject to discussions in Eurojust's casework. In the *Spasic* judgment, the CJEU held that, when a custodial sentence and a fine were imposed as principal penalties, the payment of the fine alone was not sufficient to consider that the penalty had been enforced or was in the process of being enforced within the meaning of the Convention Implementing the Schengen Agreement⁽¹⁸⁾. The CJEU has not yet addressed whether the same applies when part of a custodial sentence has been executed, which occurred in a case handled by Eurojust.

The principle of ne bis in idem and the enforcement condition

An authority in a Member State sent an extradition request – as the case did not fall within the temporal scope of the EAW FD – for the execution of a 9-year custodial sentence. The requested Member State refused to execute it because not all requested supporting documents had been provided. Subsequently, the competent authorities in the executing state started their own proceedings. They requested assistance from Eurojust in obtaining feedback from the requesting Member State about whether the requested person had already served a number of years of the 9-year custodial sentence and whether there were documents available from the proceedings such as witness hearings, police reports, protocol of the trial, etc. The competent authorities also discussed the possible application of the principle of *ne bis in idem* in the light of the CJEU's case-law. They acknowledged that the case was slightly different from the abovementioned *Spasic* judgment. While *Spasic* concerned a custodial sentence and a fine, and *Spasic* had not yet begun to serve the custodial sentence, in the present case a part of the sentence was served, namely 3 years out of a 9-year sentence. Yet the executing authority concluded that the sentence imposed by the issuing Member State had not been (fully) enforced and was also not currently being enforced; therefore, it decided to continue its proceedings.

3.1.2. Territoriality grounds

In cases involving offences that were not – or not fully – committed in the territory of the issuing Member State, refusal on the grounds of territoriality (Article 4(7) of the EAW FD) sometimes came into play. Such cases often involved parallel proceedings in the issuing and executing Member States and/or the competent authorities of the executing Member State being under a rigid obligation to refuse the execution of the EAW when part of the crime had been committed on their territory.

In relation to cases in which **parallel proceedings were ongoing in the issuing and executing Member States**, coordination meetings were often organised at Eurojust to exchange all relevant

⁽¹⁸⁾ Judgment of the CJEU of 27 May 2014, *Spasic*, C-129/14 PPU, ECLI:EU:C:2014:586.



information and to discuss the jurisdiction issue in depth. Not only territoriality, but also other relevant factors, such as the availability of evidence, the interest/protection of victims, the protection of witnesses, the presence of co-suspects, the stage of proceedings and the other factors mentioned in [guidelines for deciding 'which jurisdiction should prosecute?' \(revised 2016\)](#), would be looked at and taken into consideration. The possible application of the 'territoriality ground' was then often discussed in this context long before an EAW was issued. At coordination meetings, competent authorities reached conclusions on which Member State should prosecute people suspected of trafficking in human beings, murder, sexual assault and other serious offences. The National Desks concerned sometimes issued formalised and reasoned (joint) requests to their national authorities in line with Article 4(2)(b) of the Eurojust Regulation ⁽¹⁹⁾. Such requests constituted an important element for executing authorities in their decision to execute EAWs and to dismiss a possible application of territoriality grounds. It confirms the importance of close cooperation and coordination in cases of parallel proceedings, preferably before issuing an EAW.

More problematic were cases in which executing authorities were under a **rigid obligation under their national law to refuse** the execution of EAWs, **even when only a very small part of the crime had been committed on their territory**. During coordination meetings, executing authorities sometimes acknowledged that they were not the best-placed Member State to prosecute the case. Yet they explained that, owing to the rigid grounds for non-execution, prosecution in the executing Member State would be the only viable option, unless the requested person returned voluntarily to the issuing Member State and/or travelled to another Member State from where surrender would be feasible. In such cases, the focus during the coordination meeting was then on how to ensure that, after a refusal of the EAW, impunity could be avoided. The aim was to ensure that the available evidence in the issuing Member State would be shared with the executing Member State through European Investigation Orders (EIOs), letters of request (LoRs), joint investigation teams and/or transfer of proceedings. In some of these cases, the issuing Member State had to transmit all the evidence to the executing Member State to ensure a successful prosecution in the executing Member State because it was allegedly impossible in the executing Member State to make a less rigid interpretation of the grounds for non-execution.

3.1.3. Ongoing prosecutions for the same acts in the executing Member State

Executing authorities sometimes refused to execute an EAW on the grounds that the requested person was being prosecuted in the executing Member State for the same act as that on which the EAW was based (Article 4(2) of the EAW FD). The most relevant or recurrent issues identified in Eurojust's casework related to the following.

- Meaning of the 'same acts': executing authorities raised further questions on the description of the facts when there were ongoing criminal proceedings against the requested person for very similar offences in the executing Member State. The executing authorities needed a more detailed description before deciding whether there was an obstacle to the surrender or not.

⁽¹⁹⁾ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018, p. 138.

- Limited feedback: if the executing authority had refused to execute an EAW without providing information on whether national proceedings for the same offences had been or were being conducted, Eurojust was contacted to obtain more information on the executing Member State's decision.
- Parallel proceedings in another Member State: when applying Article 4(2) of the EAW FD, executing authorities considered not only ongoing proceedings in their own Member State, but also ongoing proceedings in other Member States. While grounds for non-execution should be interpreted restrictively, it is also true that keeping a good overview of ongoing proceedings in other Member States is crucial to decide which country is best placed to prosecute. Refusing to execute an EAW, against this background, might serve that purpose

Parallel proceedings in the requested person's Member State of origin

An executing authority arrested a requested person and took him into preliminary custody. The requested person informed the competent authority that criminal proceedings for the same offence were being conducted against him in his home Member State and that he had already been indicted there. The requested person provided the executing authority with a copy of a judicial decision stating that the same EAW had been refused by his home country because he was being investigated there for the same criminal activity. The executing authority requested further information from the home country, first without any response, and later with a short, insufficient reply. As the person was in custody, the executing authorities needed to obtain the information as soon as possible. Shortly after the registration of the case at Eurojust, more information was exchanged and the executing authority then informed Eurojust that the EAW had been withdrawn. The requested person was released from custody and the EAW proceedings were closed.

- Parallel proceedings triggered by the issuing of an EAW: national authorities sometimes refused to execute an EAW, not because national proceedings were already ongoing in their Member States, but because, following the receipt of the EAW, they had initiated investigations themselves on the ground that the suspect and/or the victim were nationals. Issuing authorities sometimes questioned whether such an interpretation fell within that specific ground for non-recognition and was compatible with the context of the EAW FD and the underlying principle of mutual recognition.

European Arrest Warrant triggering criminal proceedings in the executing Member State

An issuing judicial authority that was investigating a murder case that had occurred on its territory contacted Eurojust when the executing authority had refused to execute the EAW. There were parallel criminal proceedings for the same offence in the executing Member State, but they had started only after the executing authority had received the EAW. A coordination meeting was set up to decide which country was best placed to prosecute. The National Desks involved finally agreed to issue a joint request and decided that the executing Member State was best placed to prosecute. The deciding factors for this decision were the nationality of the suspect and the victim (they were both nationals of the executing Member State) and the place where the suspect was located (he had returned to the executing Member State, after committing the murder, and that Member State refused to surrender the suspect). In addition, the interest of the (secondary) victims (the parents of the murdered person) played an important role. During the coordination meeting, the issuing authorities underlined that they would be interested in going to trial only if the suspect could be present during the trial. The authorities also discussed the executing court's refusal to execute the EAW, and the executing authorities confirmed that this decision was final. When the executing authorities were asked why



they had decided to open their own investigations upon receipt of the EAW, they referred to provisions of their national criminal code and criminal procedure code and explained that these provisions were applied rigorously. The issuing authorities explained that they had similar provisions in their legislation, but exceptions are available in the case of proceedings in another (Member) State. All authorities agreed that a rigid interpretation of such a provision entails the risk of creating unnecessary conflicts of jurisdiction.

Eurojust's casework confirms that it is generally good practice to involve Eurojust at an early stage in cases of parallel proceedings to ensure close cooperation and coordination, and a well-informed decision on which jurisdiction should prosecute ^[20].

Eurojust request instrumental in setting aside the Article 4(2) EAW FD refusal ground

In a drug-trafficking case, the requested person's lawyer relied on Article 4(2) of the EAW FD in the EAW proceedings in the executing Member State. The executing court dismissed this argument based, inter alia, on an agreement reached at Eurojust and the subsequent request that the national member had issued to its national authorities. This request clearly set out the background of the case and the discussions and conclusions reached at the coordination meeting between the two Member States involved, including the envisaged transfer of proceedings to the issuing Member State, as it was concluded that the issuing Member State was best placed to prosecute.

3.1.4. Dual criminality

National authorities brought several cases to Eurojust with issues on the dual criminality condition (Articles 2(4) and 4(1) of the EAW FD). While the total number of cases involving dual criminality issues was relatively low, they were not necessarily the easiest cases to solve ^[21].

The offences for which Eurojust was asked to assist with a dual criminality assessment included:

- preparatory acts for the use of a counterfeit document as an authentic one;
- non-compliance with a court's interdiction on operating motor vehicles;
- failure by a sex offender to report the existence of a conviction for sexual assault to a local police authority and/or to notify any change of address;
- sedition;
- parental child abduction.

Based on this list, the offence that most often, by far, triggered dual criminality issues in Eurojust's cases was **parental child abduction**. Eurojust was asked to assist in assessing the dual criminality condition, which in some cases resulted in a surrender and in others did not, depending on the national legal frameworks involved and the factual circumstances of each case. Often civil law decisions in the issuing and/or executing Member State(s) affected the outcome of that assessment. In some cases, courts referred in their decisions to Articles 3 and 9 of the UN Convention on the Rights of the Child. In addition to legal issues, Eurojust was also involved in consultations and exchanges of information on more

^[20] See also Eurojust's guidelines for deciding 'which jurisdiction should prosecute?' (revised 2016).

^[21] One of the cases dealt with at Eurojust was finally settled in 2020 by the CJEU (Judgment of the CJEU of 3 March 2020, X, C-717/18, ECLI:EU:C:2020:142). The question that was brought to the CJEU in that case focused not on the dual criminality assessment as such, but on whether a dual criminality check had to take place (Article 4(4) of the EAW FD) or not (Article 4(2) of the EAW FD), depending on the applicable legal regime of the issuing Member State.

practical issues, such as the involvement of social worker services and how to get the child back from the executing Member State to the issuing Member State in those cases in which surrender was granted. In some cases, follow-up questions were raised and discussed.

In addition to the abovementioned offences, Eurojust's casework also included a few instances when executing authorities sometimes seemed to overstep their competences when applying dual criminality checks in cases involving '**list**' offences such as corruption or extortion. As clearly stated in Article 2(2) of the EAW FD, and recalled by the CJEU in *Advocaten voor de Wereld* (22) and *X* (23), there should not be any verification of dual criminality for the offences mentioned in this provision. The issuing Member State's legal framework is decisive here, and any interference on behalf of the executing authority should be modest. Unfortunately, Eurojust's casework reveals some examples of bad practices. Executing courts sometimes refused to execute EAWs, arguing that the description of the offence was not consistent with the characterisation of the corresponding list offence, despite the issuing court's firm commitment that the constituent elements of the issuing Member State's law and the threshold of Article 2(2) of the EAW FD were met.

Another challenge in some cases was the proper **assessment of the dual criminality test**. Each Member State has a different approach. Some authorities refrained from discussing the details of the case and underlined that, in the context of EAW proceedings, the merits of the case should not be discussed. Other authorities requested very detailed information in relation to the case in view of assessing the double criminality test, which almost came down to a full assessment of the merits of the case from the perspective of the executing Member State's legal order. These different approaches indicate the difficult boundaries that judicial authorities encountered when they struggled with the application of the double criminality requirement. Eurojust provided the opportunity to discuss sometimes sensitive or difficult cases, from a strictly legal point of view, in a very positive and cooperative setting. Authorities could exchange requests for additional information quickly via Eurojust prior to and after coordination meetings. Authorities could clarify uncertainties regarding the different national legal frameworks and discuss questions concerning the dual criminality test from a national and a European (24) perspective. The aim was to prepare well for upcoming EAW hearings in the executing Member State.

The exact moment when cases with dual criminality issues were brought to Eurojust differed greatly from case to case. It is noteworthy that, in some Member States, public prosecutors are obliged to first determine, as part of the preparation process for issuing an EAW, whether the law in the executing Member State penalises the offences subject to the EAW. Such **early involvement** of the executing Member State and/or Eurojust can be seen as good practice, as it can give a good indication of whether an EAW would be executable in a specific Member State. In some cases, Eurojust was consulted after the EAW was issued, to provide further guidance on the dual criminality assessment before the executing authority would decide on the execution. In many cases, authorities consulted Eurojust when an EAW

(22) Judgment of the CJEU of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261.

(23) Judgment of the CJEU of 3 March 2020, *X* (European Arrest Warrant – Double criminality), C-717/18, ECLI:EU:C:2020:142.

(24) The CJEU's case-law in relation to other mutual recognition instruments can be relevant too; in particular, see judgment of the CJEU of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4.



was refused. Authorities then wanted to understand the decision and discuss if a decision by a court of first instance could be reversed by an appeal court's decision.

The **outcome** following a dual criminality assessment varied from case to case. Sometimes executing authorities decided to refuse the EAW. Sometimes they decided to execute the EAW either fully (allowing surrender for all offences) or partially (allowing surrender only for offences that had passed the dual criminality test). In some of these cases, Eurojust was involved in follow-up requests. For instance, in some cases, clarifications were needed when, in the case of an EAW for the execution of a custodial sentence, the merged sentence would need to be adopted in the light of the outcome of the partial execution (see Section 2.2.5). In other cases, the issuing authority sometimes decided to withdraw the EAW, for instance if co-suspects were already in pre-trial detention in the issuing Member State, and going ahead with the surrender might then lead to contradictory and diverging results for the different suspects involved, which constituted an inseparable legal unity.

3.1.5. Statute-barred offences

If EAWs included offences that had been committed a long time ago, executing authorities sometimes approached Eurojust to obtain further information from the issuing Member State before making a final assessment on whether the criminal prosecution or the punishment of the requested person was statute barred under the executing Member State's law (Article 4(4) of the EAW FD).

Executing authorities requested information on the exact time that the requested person had been charged with the offences for the first time or raised questions on limitation periods under the issuing Member State's law. In a few cases, this led to the withdrawal of the EAW and the release of the requested person.

If courts of first instance had decided to refuse the execution of the EAW, issuing authorities sometimes requested Eurojust's support to explore whether an appeal against that decision could be successful. The issuing authorities then sought clarification of how the date of prescription had been calculated under the executing Member State's law or how the provisions on prescription in the executing Member State should be understood. Sometimes, this information was needed urgently, as the right to appeal was subject to a time limit of only a few days. In some of these cases, an appeal was successful and the EAW was executed.

3.1.6. *In absentia* judgments

Eurojust intervened in several cases to clarify issues raised by the executing authorities in relation to EAW proceedings involving *in absentia* judgments. In most cases, the executing authorities requested, via Eurojust, additional information with regard to incomplete or unclear information in the EAW form, and/or further guarantees. The recurrent requests included questions on:

- whether any of the procedural requirements set out in Article 4a(1) of the EAW FD were applicable;
- how accurately the requested person had been summonsed or notified about the trial;

- how it had been unequivocally established that the requested person was aware of the scheduled trial, for example how and when the requested person had received the relevant information;
- whether the requested person had or had not been represented by a lawyer;
- whether the lawyer had been appointed by the requested person or ex officio;
- whether the requested person or their mandated lawyer had submitted a writ of appeal;
- how it could be proven that the accused had voluntarily sought to avoid trial;
- whether and how it could be demonstrated that a conviction judgment had been served to the requested person;
- to what extent the requested person had an unequivocal right to a retrial – with no discretion for the court – and which time limits would apply to a request for retrial;
- whether the appeal/cassation procedure included a re-examination of the merits of the case;
- whether the issuing authority could give a return guarantee ensuring that the requested person, who was a national or resident of the executing Member State, could be returned to the executing State to serve there the sentence passed against them, following a new trial organised in their presence in the issuing Member State (Articles 4a(1) and 5(3) of the EAW FD);
- clarifications of whether, after surrender, the requested person was arrested in view of a retrial and not in view of the execution of the custodial sentence.

The concrete outcomes differed between cases. In some cases, the further exchange of information resulted in a decision granting the surrender when clarifying and satisfactory replies were received. In other cases, in which the issuing authority did not manage to convince the executing authority that one of the criteria under Article 4a was fulfilled, the EAW was refused. Often the refusal was preceded by intensive discussions and different views on whether the requested persons had been duly summonsed, whether they were duly represented (e.g. by a lawyer ex officio) or whether they would be entitled to a retrial (e.g. discussions were still ongoing or it was 'very likely' that the requested person would be entitled to a retrial, but still subject to a decision after the surrender).

Different perspectives from various national legal orders with different interpretations of key concepts of Article 4a(1) of the EAW FD, for which the CJEU has not yet provided an autonomous and uniform interpretation, implied that, despite many efforts, the EAW could not be executed, as a result of insurmountable differences between the legal systems. In various cases, the non-execution of an EAW was not related to concerns about the requirements concerning *in absentia* judgments, but followed from a refusal by the issuing Member State to grant a return guarantee. This was triggered by misunderstandings of the interplay between Article 4a(1) of the EAW FD (*in absentia*) and Article 5(3) of the EAW FD (return guarantee), despite the clarifications provided by the CJEU's *IB* judgment⁽²⁵⁾ (see also Section 3.1.7).

Following the CJEU's judgments in August 2017 in *Tupikas* and *Zdziaszek*⁽²⁶⁾, Eurojust faced a significant increase in cases involving questions on *in absentia* judgments related to appeal proceedings

⁽²⁵⁾ Judgment of the CJEU of 21 October 2010, *IB*, C-306/09, ECLI:EU:C:2010:626.

⁽²⁶⁾ Judgment of the CJEU of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628; judgment of the CJEU of 10 August 2017,



and procedures leading to cumulative judgments. In the light of questions raised following this case-law, Eurojust opened two operational topics.

In March 2018, **an operational topic was opened on the impact of the CJEU's *Tupikas* and *Zdziaszek* case-law on EAW proceedings**. The questions addressed the following issues: requests for additional information, adequacy of the form, time limits, refusals and the meaning of the concept of 'other circumstances' as mentioned by the CJEU in *Tupikas* and *Zdziaszek*. The main outcomes of the operational topic can be summarised as follows.

- Cases involving Article 4a(1) of the EAW FD **often triggered requests for additional information**, not only in cases in which the model form corresponding to Article 4a(1) was ticked, but also in cases in which this form was not ticked, and also in cases in which contradictory information about the procedure was contained elsewhere in the EAW.
- Respondents' views were divided in relation to the **(in)adequacy of the EAW form in relation to appeal or subsequent proceedings**. A few respondents simply replied that the form was adequate for appeal and subsequent proceedings. Some respondents also considered the form to be adequate if accurately completed, but indicated that the ticking of the form is usually not sufficient to take a decision. Additional information should therefore be provided on the form to explain the circumstances fully. Other respondents concluded that the form was not adequate, particularly in cases of aggregate judgments and cumulative sentences, as the form did not allow the judicial authority to provide comprehensive and clear data on the national case. One of the respondents suggested the use of box (d) 4 (provide information) in order to explain the national procedural law and the circumstances of the concrete case. Another respondent explained that, in some cases, there had been a need to seek a chronology of procedural history to establish whether there was actual personal service, whether someone was personally present and whether there was a solicitor instructed who appeared. According to this respondent, it might be feasible to produce a form covering these aspects for each stage of proceedings up to any cumulative sentencing.
- Some respondents replied that they did not have any information on whether the requests for additional information had caused **delays** and/or whether **time limits** were respected. Others replied that, in relation to the cases that they were aware of, time limits had been met or only occasionally not met. One respondent replied that they had experienced considerable delays, explaining that finding out if there was an appeal or a merger of penalties is complex and time-consuming. Furthermore, this same respondent explained that, in some countries, information requests need to be made to different courts in the same country. As in most countries, this information is not registered in a centralised system; different courts and different people have to answer the same questions, which makes it more difficult for the issuing authority to retrieve all the requested information at once.
- A majority of respondents replied that, to their knowledge, such EAW proceedings had not led to **refusals of the execution of an EAW** or had done so only very rarely, and particularly if additional information had not been provided. A few respondents replied that EAWs were not executed when the requested information was not provided, or not by the given deadline. In

Zdziaszek, C-271/17 PPU, ECLI:EU:C:2017:629.

some jurisdictions, Article 4a(1) of the EAW FD is implemented into national law as a mandatory ground for refusal, and the court in charge is therefore quite thorough when it comes to the interpretation of that provision.

- None of the respondents was aware of EAW proceedings for which, in the context of Article 4a(1) of the EAW FD, '**other circumstances**' – as mentioned by the CJEU in *Tupikas* and *Zdziaszek* – had been taken into account. One respondent replied that they had tried to obtain relevant information from the requested persons by questioning them about the details of the trial, but the information had not enabled them to take a decision on the EAW in any such case. Another respondent explained that, under their national law, they would not be allowed to consider any circumstances other than those mentioned in Article 4a(1) of the EAW FD. Another respondent mentioned the relevance of the case-law of the European Court of Human Rights (ECtHR) in this regard.

In November 2018, another **operational topic related to the *Tupikas* case-law** was opened. The operational topic was triggered by a case brought to Eurojust **involving a cassation appeal**. It concerned a formal written procedure whereby the parties did not have a right to attend, neither the prosecutor nor the accused. The requested person's lawyer and the public prosecutor had different views on whether the cassation appeal was part of the 'trial resulting in the decision' within the meaning of Article 4a(1) of the EAW FD. The requested person maintained that he had been tried *in absentia* and could not be surrendered without an undertaking that he would be allowed to request a retrial. However, the public prosecutor defended the view that the cassation appeal appeared to fall outside the parameters of *Tupikas* because it was not 'an assessment, in fact and in law, of the incriminating and exculpatory evidence', but a procedural examination of whether the law had been correctly applied to the facts. The operational topic that was opened in relation to this case was aimed at gathering information about different aspects related to cassation appeal systems in the EU Member States.

The main outcomes of this questionnaire can be summarised as follows.

- The **concept of cassation appeal** is not part of all legal systems within the EU. Many respondents indicated that their legal system explicitly provides for cassation appeals, whereas a minority stated that such an appeal procedure is not part of their legal system. Some respondents explained that, while their court of last instance is not formally described as a court of cassation, the appeal process and the possibilities it provides have some features of a cassation appeal procedure: the court of last instance focuses on points of law or procedural errors, and thus does not re-examine the merits of the case.
- A number of respondents whose legal systems include cassation appeals indicate that **the parties are allowed to attend the proceedings**. Some legal systems that do not formally hold cassation appeals allow the parties to be present in proceedings before the court of last instance. However, **attendance may not be the general rule** and may only be permitted in specific cases and circumstances, sometimes depending on whether the matter is such that the court sits in public session.
- The ruling pronounced by the court of cassation or by the court of last instance is considered the **final decision** in many legal systems. However, while in some systems the court of last instance can change the decision of the lower courts, in other jurisdictions the ruling is the final

decision only in certain cases, depending on the matter dealt with by the court. In several legal systems that have cassation appeals, the decision of the court of cassation is not the final ruling on the guilt of the accused. In these legal systems, the court of cassation can only overturn the judgment of the lower court and refer the case back to a lower court, either the court of first instance or the court of appeals, depending on the legal system and/or the subject matter.

3.1.7. Nationals or residents

In a number of cases, the surrender for the execution of a custodial sentence was refused because the requested person was a national or a resident of the executing Member State and this state preferred to execute the sentence itself (Article 4(6) of the EAW FD).

Prior to the enforcement of the sentence, Eurojust often facilitated the exchange of additional information, such as the sending of a certified copy of the sentence to be served, certified information on the date when the judgment became final and/or certified information on the remaining time to be served. Furthermore, questions often arose about how the sentence should be submitted and how Article 4(6) of the EAW FD interrelates with the application of Framework Decision 2008/909/JHA on the transfer of sentenced persons (FD 909) ⁽²⁷⁾ (see also Section 10.3).

The key provision that addresses **the interrelation between the EAW FD and FD 909** is Article 25 of FD 909 ⁽²⁸⁾. The EU legislator seems to have been aware that the application of this provision might create some problems in practice ⁽²⁹⁾. Some of the issues encountered in Eurojust's casework have related to the following:

- need to send an FD 909 certificate or not: while some Member States insisted on the need to send a certificate under FD 909, other Member States believed that there was no need to use a certificate in the context of an application of the ground for refusal under Article 4(6) of the EAW FD;
- withdrawal of EAW and SIS alert: in some cases, despite a final decision on the FD 909 request and the transfer of the custodial sentence, EAWs were still active;
- meaning of the wording '*mutatis mutandis*' of Article 25 of FD 909 and questions about the extent to which rules on amnesty or pardon (Article 19 of FD 909) or rules on alternative sanctions, in the light of the provision on the law governing the enforcement (Article 17 of FD 909), allow an executing judicial authority to reduce and/or convert a custodial sentence

⁽²⁷⁾ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union OJ L 327, 5.12.2008, p. 27.

⁽²⁸⁾ This provision establishes that, without prejudice to the EAW FD, the provisions of FD 909 shall apply, *mutatis mutandis* to the extent that they are compatible with provisions under the EAW FD, to enforcement of sentences in cases in which a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of the EAW FD or in which, acting under Article 5(3) of the EAW FD, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned so as to avoid impunity of the person concerned.

⁽²⁹⁾ Article 29(4) of FD 909 states that 'Without prejudice to Article 35(7) of the Treaty on European Union, a Member State which has experienced repeated difficulties in the application of Article 25 of this Framework Decision, which have not been solved through bilateral consultations, shall inform the Council and the Commission of its difficulties. The Commission shall, on the basis of this information and any other information available to it, establish a report, accompanied by any initiatives it may deem appropriate, with a view to resolving these difficulties.'

- into an alternative sanction and whether this is compatible with the requirement that the sentence will actually be enforced;
- clarification of the conditions that must be met for a correct application of Article 4(6) of the EAW FD, including interpretation of the concepts 'resident' or 'person staying in' and 'actual enforcement of the sentence';
- clarification of unclear or contradictory information, for instance in the EAW, certificate and/or accompanying letters.

It follows from the CJEU's case-law in *Sut* and *Poplawski* ⁽³⁰⁾ that an executing judicial authority, before refusing surrender based on Article 4(6) of the EAW FD, must make some verifications. First, it must check whether the requested person falls within the scope of that provision, meaning that the requested person is a 'national', 'a resident' or a person 'staying' in the executing Member State. Second, it must verify whether the custodial sentence passed in the issuing Member State can actually be enforced in the executing Member State. Finally, it must consider whether there is a legitimate interest to execute the sentence in the executing Member State. In relation to some of these conditions, national authorities approached Eurojust with requests for clarification.

In relation to the condition that it should concern '**a national, a resident or a person staying in the executing Member State**', issuing authorities requested clarification of the requested person's links with the executing Member State, before or after a decision had been taken. In addition, there were a few cases in which executing authorities requested, via Eurojust, information related to previous refusals of the same EAW by another Member State on the grounds of Article 4(6) of the EAW FD.

Impact of a previous refusal decision in another Member State

A requested person had been convicted in her Member State of nationality, but the Member State of residence – where the requested person had been residing for more than 4 years with her partner and children – refused the surrender and agreed to execute the sentence. Before the execution of the sentence started, the requested person went to another Member State, where she was arrested again based on the same EAW. She objected to the surrender on the ground that the Member State of residence had engaged to execute that sentence. The executing authority obtained, via Eurojust, the decision of the court of the Member State of residence. Subsequently, it agreed – in the light of that decision and the underlying reintegration objectives included in Article 4(6) of the EAW FD, which linked the requested person to the Member State of residence – not to execute the EAW and to let the person return voluntarily to the Member State of residence.

The abovementioned case is an interesting example of how a decision to refuse to execute an EAW in one Member State, while not per se binding upon the authorities of other Member States, can have an important impact in another Member State, depending on the grounds for refusal and the circumstances of the case. Furthermore, in a few similar cases, executing Member States refused to execute an EAW when they had received confirmation that another executing Member State had previously refused that same EAW on the basis of Article 4(6) of the EAW FD and that Member State had committed itself to

⁽³⁰⁾ Judgment of the CJEU of 13 December 2018, *Sut*, C-514/17, ECLI:EU:C:2018:1016, para. 37; judgment of the CJEU of 24 June 2019, *Poplawski*, C-573/17, ECLI:EU:C:2019:530, para. 100.



execute the sentence. It is not clear why, in these cases, the issuing authorities had not withdrawn the EAWs after decisions on the transfer of the sentence had been taken in the other Member States.

In relation to the condition of '**the actual enforcement of the sentence**', questions arose in cases in which either no information was provided on the execution phase or custodial sentences were converted into alternative sentences. In some cases, the issuing authority requested, repeatedly, information on the execution of the sentence and Eurojust had to intervene to clarify, for instance:

- whether a court in the executing Member State had issued a decision on the recognition and execution of the judgments imposing the custodial sentences;
- whether the decision on the recognition and execution could be sent to the issuing Member State;
- whether the person had started the execution of the sentence of imprisonment and, if so, when and where (address of prison);
- whether the requested person had already served part of / the entire custodial sentence (and/or what was the total duration of the served sentence) or whether they were conditionally released earlier and, if so, why and on what conditions.

Particularly problematic were cases in which courts in the executing Member State applied Article 4(6) of the EAW FD to refuse the EAW, and committed to execute the sentence in the executing Member State, but, later on, other courts, competent to execute the sentence, converted custodial sentences into alternative sanctions by applying their national legal framework. Questions were raised about whether such conversion would be in line with the abovementioned condition that the sentence must be 'actually enforced' in the executing Member State, in the light of the CJEU's case-law.

Eurojust also intervened when executing authorities had provided **unclear or contradictory information**. For instance, when, in an accompanying letter, the executing authority had asked the issuing counterpart to take the necessary actions to transfer the requested person to the issuing Member State, while, in the corresponding decision, the executing court had concluded that the EAW could not be executed and requested that the court of the issuing Member State transfer its custodial sentence for execution to the executing Member State, Eurojust clarified that the information in the accompanying letter was wrong.

On other occasions, the fact that EAWs had been withdrawn after the executing authority's decision to apply Article 4(6) of the EAW FD created confusion. Executing authorities had doubts whether such withdrawals meant that the sentence had been revoked and wondered whether they should release the requested persons. Information provided by Eurojust confirmed that the sentence was still valid and that the issuing authority had revoked the EAW because the procedure had changed from a surrender procedure to a procedure on the transfer of the sentence. This again underlines the importance of a good understanding of the interrelationship between the EAW FD and FD 909 (see also Section 10.1).

3.1.8. Proportionality

As clearly indicated in the Commission's handbook on the EAW, the EAW FD does not provide for the possibility of evaluation of the proportionality of an EAW by the executing Member State. Only if serious

concerns on the proportionality of the received EAW arise in the executing Member State are the issuing and executing judicial authorities encouraged to enter into direct communication. ⁽³¹⁾

In Eurojust's casework, proportionality arguments were only very rarely raised in the period covered by this report.

Proportionality arguments leading to withdrawal of the European Arrest Warrant

The requested person was wanted for a minor drug-related offence committed 5 years earlier in the issuing Member State. The requested person objected to his surrender, holding that his surrender would be a disproportionate measure and that it would breach the suspect's right to respect for family life. Eurojust facilitated the hearing of the requested person in the executing Member State and the exchange of documents, including contact details of relevant authorities. In the end, the requested person was convicted and fined, which the requested person paid voluntarily, and the EAW was withdrawn by the executing court.

3.2. Guarantees

Eurojust dealt with many cases involving Article 5 of the EAW FD. Nearly all of them concerned return guarantees for nationals or residents of the executing Member State (Article 5(2) of the EAW FD). Only very few cases concerned guarantees for life sentences (Article 5(1) of the EAW FD). Eurojust was asked to improve the communication between issuing and executing authorities in view of obtaining the return guarantee and clarifying some misunderstandings. The most frequent issues concerned the following:

- guarantees not being sent, or not being sent in the original and/or translated version;
- the submitted documents not being a return guarantee, as they included completely different information not related to the requested person's return;
- questions about which authority should give the return guarantee;
- urgency of the case in view of upcoming court hearings to avoid the postponing of decisions;
- updates of guarantees, for example following a request for an extension of the EAW under Article 27 of the EAW FD and/or after Eurojust had identified links with other cases involving additional criminal proceedings against the requested person in the issuing Member State;
- corrections of previously provided return guarantees, for example when the executing authorities realised that they had made a mistake, as the requested person was not a national but a resident;
- clarifying misunderstandings on the interplay between *in absentia* judgments and return guarantee in the light of the *IB* judgment ⁽³²⁾.

Eurojust's intervention led to a positive outcome in most cases. Return guarantees were obtained swiftly through Eurojust and led to successful surrenders. If needed, some National Desks also provided their home authorities with a template for a return guarantee to assist them with preparing a correct and complete return guarantee, which can be considered good practice. In a few cases, surrenders were refused or court hearings adjourned, when the guarantee did not arrive in time. Sometimes such delays

⁽³¹⁾ [Commission's Handbook on how to issue and execute a European Arrest Warrant](#), p. 34.

⁽³²⁾ Judgment of the CJEU of 21 October 2010, *IB*, C-306/09, ECLI:EU:C:2010:626.



resulted in requested persons being at large or requested persons returning voluntarily to the issuing Member State and reporting themselves to the competent authorities.

Confusion on the interplay between in absentia judgments and return guarantees

An executing authority arrested the requested person based on an EAW that was issued for the purpose of the execution of a custodial sentence imposed *in absentia*. The requested person was a national of the executing Member State. The executing authority asked the issuing judicial authority to provide it with a return guarantee in accordance with Article 5(3) of the EAW FD so that the requested person would be returned to the executing Member State in order to serve there the sentence passed against him, but only following a new trial organised in his presence in the issuing Member State. The executing authority did not receive a guarantee and was informed that the Ministry of Justice of the issuing Member State had been asked to transfer the sentence to the executing Member State for recognition and execution. As, at that time, the recognition of the decision was not an option, the executing authority asked Eurojust's support with obtaining the return guarantee from the issuing Member State as soon as possible. Despite the CJEU's *IB* judgment, the issuing authority maintained its initial position, saying that the only 'guarantee' it could provide was the right to a retrial. As the issuing authority had failed to provide sufficient reassurance that the requested person would be returned after the retrial, the executing court decided that the requested person would not be surrendered to the issuing Member State and the case was closed.

After a surrender, Eurojust's intervention was still sometimes needed. When the issuing authority had provided a return guarantee and the executing authority had surrendered the requested person, issues sometimes arose when the requested person, following their surrender and conviction in the issuing Member State, had to be sent back to the executing Member State for the execution of their custodial sentence. In several cases, issuing authorities had sent formal requests to the executing Member State in view of transferring the convicted person back to their home country in order to serve their custodial sentence there; Eurojust was requested to assist in obtaining the information concerning the status of that request and speeding up its execution.

Ensuring compliance with a return guarantee

A return guarantee had not been explicitly emphasised in the enclosed letter granting the surrender, but it was specifically mentioned in the formal court decision that was attached to the letter. The requested person was sentenced to 2 years and 6 months of imprisonment in the issuing Member State. Instead of being transferred back to the executing Member State, the requested person was informed that he would be sent to a prison in the issuing Member State to serve his sentence. The executing authority sent an urgent request to the issuing authorities recalling the return guarantee. However, since the executing authority did not receive any reply to this request, the case was settled via Eurojust, which speeded up the transfer in line with the return guarantee.

3.3. Fundamental rights

Since the CJEU's *Aranyosi and Căldăraru* judgment⁽³³⁾, there has been a large increase in fundamental rights issues in the cases brought to Eurojust. In the light of these developments, in 2017 the College of Eurojust held a College thematic discussion on the EAW and prison conditions. Moreover, later that year, Eurojust also hosted an expert meeting organised by the European Union Agency for Fundamental

⁽³³⁾ Judgment of the CJEU of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

Rights (FRA) on co-creating a tool to assess detention conditions. Subsequently, FRA developed a [criminal detention database](#), which combines, in one place, information on detention conditions in all EU Member States.

The [outcome report of the College thematic discussion](#) includes conclusions that are still relevant today, particularly those related to the importance of requests for additional information and the role Eurojust can play with level II meetings and coordination meetings, the difficulties in complying with time limits and the challenges of avoiding impunity.

In recent years, Eurojust has dealt with a considerable number of fundamental rights issues in its cases; these were predominantly cases in which the requested person, their defence counsel or the executing court raised questions on the compliance of the surrender with certain provisions of the Charter of Fundamental Rights of the EU (hereafter referred to as 'the Charter'), particularly Article 4 of the Charter (prohibition of torture and inhuman or degrading treatment or punishment, hereinafter 'prison condition' cases; see Section 3.3.1) or with Article 47(2) of the Charter (right to a fair trial, hereinafter 'fair trial' cases see Section 3.3.2). In addition, Eurojust has dealt with a few cases in which arguments were partially based on Article 7 of the Charter (respect for private and family life).

Developments in the case-law of the CJEU ⁽³⁴⁾ and the ECtHR ⁽³⁵⁾ have further clarified the executing court's obligations when assessing a concrete risk. Yet it is clear that, despite these clarifications, the assessment requires a thorough and detailed assessment, which, in several cases, led to final decisions going well beyond the time limits included in Article 17 of the EAW FD.

3.3.1. Prison conditions

Prison condition cases usually started with requests for additional information; Eurojust became involved when either no additional information had been provided or the information submitted by the issuing judicial authorities was, after numerous requests or reminders, still not satisfactory. The executing authorities requested specific, updated and reliable information to address violations identified in ECtHR judgments or official reports. Obtaining the relevant information was crucial as, in some of these cases, the outcome could have an impact on the outcome in many other pending cases in the executing Member State. The information that was provided was often too limited, too general or simply stereotyped replies. Coordination meetings were often seen as a last resort to address outstanding issues, as, in the absence of relevant supplementary information, the requested person would be released. During coordination meetings, competent authorities discussed and clarified, with Eurojust's support, what type of supplementary information should be sent, by when, in order to satisfy the deadline set by the court in the executing Member State.

⁽³⁴⁾ In relation to prison conditions: judgment of the CJEU of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198; judgment of the CJEU of 25 July 2018, *ML (Conditions of detention in Hungary)*, C-220/18 PPU, ECLI:EU:C:2018:589; and judgment of the CJEU of 15 October 2019, *Dorobantu*, C-128/18, ECLI:EU:C:2019:857. In relation to rights to a fair trial: judgment of the CJEU of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, ECLI:EU:C:2018:586; and judgment of the CJEU of 17 December 2020, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033.

⁽³⁵⁾ See, particularly, the interplay between the execution of EAWs and risks of breaches of fundamental rights under the European Convention on Human Rights: ECtHR, *Romeo Castaño v Belgium*, application number 8351/17; and ECtHR, *Bivolaru and Moldovan v France*, application numbers 40324/16 and 12623/17.

Discussions during coordination meetings enabled clarifications and a useful exchange of information, and were a vital step in preparation for upcoming court hearings. If the information provided was not sufficient to rebut the concerns expressed in experts' reports or judgments, authorities discussed, during coordination meetings, whether assurances could be provided, and the content of such assurances. The overall aim was to avoid the release of the requested persons.

At coordination meetings or level II internal meetings, competent authorities and National Desks discussed, for instance:

- in which prison the requested person will be detained if surrendered, and later, if convicted, and under which conditions; if the requested person will be detained for the entire duration of the custodial sentence in that prison or if it is already foreseeable that they will go to other prisons (if so, which ones, and what conditions apply there);
- how much personal space the requested person will have and whether they will be held in a single or shared cell;
- what other prison conditions apply, for example adequate sanitary conditions, access to natural light and/or artificial lighting and ventilation, clean mattresses and bedding, adequate and partitioned toilet facilities, access to basic hygiene products;
- whether the requested person will be detained in a closed, open or semi-open regime;
- what purposeful and/or outdoor activities will be available and whether they will have outdoor exercise for at least 1 hour a day;
- measures that have been taken to address interprisoner violence, intimidation and exploitation in a specific prison in the issuing Member State as follow-up to a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) report;
- availability of medical facilities;
- availability of rehabilitation programmes for requested persons who have a drug addiction.

Authorities also discussed what assurance could look like and what information they could include:

- the requested person will **not** serve any part of their imprisonment at ... or ...;
- the requested person will serve the entire duration of their imprisonment at ...;
- the requested person will be held at a cell that provides a minimum of 3 m² per inmate (excluding sanitary facilities, toilet, sink, shower) and be able to move freely around the furniture in compliance with Article 3 of the European Convention on Human Rights (ECHR) / Article 4 of the Charter;
- any cells occupied by the requested person while imprisoned will have lighting, a clean mattress, sheets and heating, and be free from pests, and there will be outside activities for at least 1 hour a day in compliance with Article 3 of the ECHR / Article 4 of the Charter.

In some cases, issues were also raised from the perspective of Article 8 of the ECHR when requested persons indicated that they preferred to be surrendered to a prison close to their home (and family life).

Coordination meetings sometimes served to provide clarifications or updates of the information that was available in previous reports or judgments:

- clarifications that the calculations relied upon in a CPT report were based on 3 m² (per inmate), while units in the issuing Member State now had 4 m² or 6 m²;

- clarifications that the prison mentioned in a CPT report had been closed and replaced with a brand new prison with a similar name;
- recently updated data from the prison service regarding statistics on prisoner numbers and the prison population;
- details of the number of prisons in the issuing Member State and plans for the creation of new prison units and dates when they were likely to be made available;
- information on national and international monitoring agencies (ombudspersons).

The main challenge identified in prison condition cases relates to the exact information that could or should be requested/provided in the light of the executing authority's assessment of whether there is a concrete risk in the case in question. The jurisprudence of the ECtHR indicates that a wrong assessment of the factual basis can lead to the ECtHR convicting the executing Member State not only in cases in which an executing authority decided to surrender ⁽³⁶⁾, but also in cases in which an executing authority decided not to surrender ⁽³⁷⁾.

The competent authorities involved sometimes struggled with identifying what was 'necessary' information to assess, not only the factual basis of the case, but also compliance with future or past assurances. For instance, in one case, an executing authority first considered requesting a hearing of prisoners in the issuing Member State by videoconference to double-check the written statements of other prisoners. After further discussion at Eurojust, a formal request for a hearing was not sent, as it was concluded that the very detailed replies provided by the issuing Member State's government sufficed to refute the allegations made in the written statements and to confirm the mutual trust that is the basis of judicial cooperation within the EU ⁽³⁸⁾. The requested person was surrendered after exhausting all possible appeals and well beyond the time limits included in Article 17 of the EAW FD.

⁽³⁶⁾ ECtHR, *Bivolaru and Moldovan v France*, Application numbers 40324/16 and 12623/17 (violation of Article 3 of the ECHR in the case of Moldovan; no violation of Article 3 of the ECHR in the case of Bivolaru). In *Moldovan*, paras 121–126, the ECtHR concluded that the executing court had a sufficiently solid factual basis to conclude the existence of a real risk that the requested person would be subjected to inhuman or degrading treatment related to prison conditions in the issuing Member State.

⁽³⁷⁾ ECtHR, *Romeo Castaño v Belgium*, application number 8351/17, paras 82–91. In this judgment, the ECtHR stated that there is, in principle, an obligation on EU Member States to cooperate in order to clarify the circumstances of a homicide and to bring the perpetrators to justice, and that the revocation of the presumption of respect for human rights on the part of the Member States should be justified by evidence of a concrete and evident danger of violation of the human rights of the person surrendered and should have sufficient factual basis. The ECtHR concluded that the executing court had not carried out an updated assessment of the circumstances of the situation in the issuing Member State in 2016 and had not proved the existence of a real and individualised risk of violation of the requested person's human rights. The examination had thus not been sufficient to justify the refusal of surrender, and the executing Member State had failed in its obligation to cooperate and had violated Article 2 of the ECHR.

⁽³⁸⁾ In its case-law, the ECtHR considered as evidence written statements by fellow inmates in support of applicants' allegations in the context of breaches of Article 3 of the ECHR. However, the ECtHR also underlined that 'Once a credible and reasonably detailed description of the allegedly degrading conditions of detention, constituting a prima facie case of ill-treatment, has been made, the burden of proof is shifted to the respondent Government who alone have access to information capable of corroborating or refuting these allegations. They are required, in particular, to collect and produce relevant documents and provide a detailed account of an applicant's conditions of detention ...' ECtHR, *Mursic v Croatia*, application number 7334/13, para. 128. Moreover, within the EU, the rule is that confidence and recognition underpin the EAW system, which was meant to introduce clarity and simplicity. There may be, in very rare cases, circumstances in which mutual trust and confidence has broken down or where there is cogent evidence of bad faith or of abuse. In those circumstances, it may well be appropriate to go beyond the answers and seek more information, but these cases should remain the exception.



An additional challenge for the executing authority was obtaining all the necessary additional information within the time limits set by the EAW FD ⁽³⁹⁾. While, in many cases, Eurojust enabled the speeding up of surrender procedures, there have been exceptional cases in which years have passed before the requested persons could be brought to justice (see Section 7).

3.3.2. Rule of law

Since the CJEU's judgment in *Minister for Justice and Equality (Deficiencies in the System of Justice)* ⁽⁴⁰⁾, a few National Desks at Eurojust have received 'rule of law' cases, involving the same issuing Member State. Executing authorities sent a series of questions to the issuing authorities in order to assess whether there was – in the concrete case in question – a real risk that the requested persons would suffer a breach of their right to an independent tribunal /right to a fair trial (Article 47(2) of the Charter). Often, executing authorities approached Eurojust when previous attempts by the executing authorities to obtain that information directly from the issuing authorities had remained unsuccessful and a court hearing was approaching. Sometimes the issuing authorities approached Eurojust to obtain a state of play on the execution of the EAW proceedings.

The requests for additional information that the executing authorities submitted via Eurojust to the competent issuing authorities included information related to the following issues.

- Competent court: which court (which formation of the court) heard the indictment or which court would be responsible in the event of an indictment being served. In the event of a conviction of the person prosecuted for the acts listed in the EAW, is an appeal available and, if so, what appeal is it and how is it structured? Which court would be called upon to rule on this appeal and is there any subsequent appeal?
- Judicial staff: any retirements, transfers or dismissals of judges since the entry into force of the law on the system of common courts; any retirement as a result of the retirement age shift (number of retirements within a given judicial body); any cases of prolonging the term of office of judges after they reached the retirement age.
- Assignment of cases: any changes to the rules and procedures for the assignment of criminal cases such as those pending against the requested person.
- Disciplinary proceedings or other disciplinary measures: whether disciplinary measures were initiated against judges (if so, on what basis and which outcome); a binding assurance that no disciplinary proceedings will be initiated against judges of the formation(s) of the court called upon in the present proceedings concerning substantive decisions.
- Procedures protecting the right to an independent court: remedies available to the requested person.

The assessment that the executing judicial authority needs to make under Article 47(2) of the Charter is based on the two-step assessment developed by the CJEU in *Aranyosi and Căldăraru*. Eurojust's

⁽³⁹⁾ For instance, judgment of the CJEU of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 105, in which the CJEU held, with reference to *Aranyosi and Căldăraru*, 'that authority not only cannot tolerate a breach of fundamental rights but, as provided for in Article 15(2) of Framework Decision 2002/584, it must also ensure that the time limits laid down in Article 17 thereof for taking the decision on the European arrest warrant are complied with, with the result that it cannot be required to resort to that Article 15(2) again.'

⁽⁴⁰⁾ Judgment of the CJEU of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, ECLI:EU:C:2018:586.

casework indicates that the specific elements that the executing judicial authority must take into consideration when performing the test in the context of Article 47(2) of the Charter seem more complicated under that provision than in the context of Article 4 of the Charter. Only in a few cases did the executing court find that there was, in the case in question, a real and concrete risk that the requested person would face a breach of their right to a fair trial. As in prison condition cases, the application of requests for additional information (Article 15 of the EAW FD) by the set deadlines (Article 17 of the EAW FD) has been very challenging and not always met.

4. Requests for information

Eurojust often assisted national authorities in relation to requests for information when such requests had remained unanswered by direct contact, despite repeated reminders, and when the need for a reply had become extremely urgent. Clarifications, additional information, court decisions, updates and/or translated documents were needed within a few days, sometimes even within a few hours. Various reasons were given for the urgency of the request, for example the suspect was in preliminary custody with strict time limits, the scheduled date for a court hearing was approaching or the requested person was serving a custodial sentence and would be released soon. In most cases, Eurojust managed to successfully assist the national authorities in obtaining the requested information and sending it by the set deadlines. In some cases, deadlines were not met and it took great efforts by the National Desks to get the requested information.

Eurojust assisted national authorities in relation to requests for information at different stages: not only requests for information pursuant to Article 15(2) of the EAW FD before a decision on the EAW was taken (see Section 4.1), but also requests for information on the state of play of the EAW proceedings (see Section 4.2) and follow-up information after a decision on the EAW had been taken (see Section 4.3).

4.1. Necessary and supplementary information before taking a decision on the surrender

An executing judicial authority that finds the information communicated by the issuing Member State insufficient to take a decision on the surrender must request the necessary supplementary information. Article 15 of the EAW FD mentions, non-exhaustively, different topics on which additional information can be requested, namely the grounds for non-execution (see Section 3.1), guarantees (see Section 3.2) or the content and form of the EAW (see Section 2.2). In Eurojust's casework, many requests for additional information related to these categories, but some requests for additional information also concerned topics outside the scope of these provisions, such as questions regarding the issuing judicial authority (see Section 2.1), fundamental rights (see Section 3.3) or the possible use of other instruments (see Section 10). In several cases, executing authorities requested further information in relation to one of the aforementioned elements or a combination of them. Sometimes issuing authorities had omitted to fill in certain parts of the EAW and/or other parts were unnecessarily filled in and clarifications were then needed.



Issuing judicial authorities sometimes approached Eurojust and argued that the information requested by an executing judicial authority was excessive. For instance, when executing authorities asked about very detailed circumstances of the case and/or supporting evidence, this felt to the issuing authority as if there was a need for them to prove that the EAW was lawful and that the information given was accurate and supported by documents. It seemed to go beyond the legal requirements under Article 15 of the EAW FD that the requested additional information was 'necessary' (see also Section 2.2.4). In the context of prison conditions, requests for a hearing of prisoners by videoconference to double-check their written statements led to similar concerns (see Section 3.3.1). Other examples were requests for legal provisions (and their translation), lengthy reports by non-governmental organisations (and translations of them) or judgments of supreme courts (and translations of them in their entirety) when these judgments simply confirmed earlier rulings. In most of these cases, the intervention of Eurojust led to a reconsideration of the request for additional information and a successful surrender.

4.2. Information on the state of play of the European Arrest Warrant proceedings

In many cases, issuing authorities approached Eurojust to obtain information on the state of play of an EAW. Executing authorities sometimes provided initial feedback, for instance when the requested person was arrested or conditionally released. Then sometimes several months passed without any further follow-up information on the EAW proceedings being given. Depending on the cases involved, issuing authorities requested to be informed of different issues:

- whether the EAW had been received in good order and which was the competent executing judicial authority;
- whether the requested person had been arrested and was in detention and, if so, on which basis (EAW or other proceedings);
- whether the EAW seemed executable or whether any obstacles had been identified that could be overcome and/or whether any further information was needed;
- whether there were any ongoing proceedings in the executing Member State, whether the requested person was executing another custodial sentence and/or whether the executing authority was interested in executing the sentence itself;
- whether there was information on the stage of the proceedings and the expected time frame for the decision on the surrender.

The fact that the executing authority had not yet replied did not always mean that the execution of the EAW was problematic. Sometimes, the procedure was simply ongoing or an appeal had been launched. Sometimes delays were due to pending or recent judgments of the CJEU. Executing authorities were then postponing their decision until a CJEU judgment on a related topic became available, or they were analysing the impact of a recent CJEU judgment and had not yet figured out how to apply it in practice. In many cases, Eurojust's intervention enabled a fast reply on the state of play with an (estimated) date or month of the court hearing and/or information on when the decision would be final.

Executing authorities also clarified, in some cases, that the surrender had actually been granted, but that it was postponed, as the suspect was under house arrest or in detention in the executing Member State for the execution of a custodial sentence (see also Section 8.3).

4.3. Follow-up information after a decision on the European Arrest Warrant has been taken

Eurojust also assisted in obtaining and providing information at a later stage both in cases in which the executing authorities had decided to execute the EAW and in cases in which they had decided not to execute the EAW.

In cases in which **the surrender was refused**, issuing authorities requested, for instance, the following information via Eurojust.

- The executing court's decision with the exact reasons for the refusal.
- Information on possibilities and chances for reissuing an EAW. In some cases the executing authority suggested the reissuing of an EAW, but the issuing authority informed it that, under its national law, the reissuing of an EAW was possible only if new case-related circumstances had arisen, which had not occurred.
- Information on possibilities of and chances for appeal proceedings against the executing authority's decision.
- Information on the current stage of the execution of the sentence, particularly if the EAW was issued for executing a custodial sentence against a national or resident of the executing Member State and the latter had agreed to execute the custodial sentence itself (Article 4(6) of the EAW FD).

In cases in which **the surrender was granted**, issuing or executing authorities requested, for instance, the following information via Eurojust.

- Information about the exact duration of the detention period arising from the execution of the EAW in the executing Member State. Despite the clear obligation in Article 26 of the EAW FD, issuing authorities often had to insist to obtain this information. In some of these cases, this information was transmitted exclusively via the Supplementary Information Request at the National Entry (SIRENE) bureau and had not reached the issuing judicial authority.
- Whether the deprivation of liberty in the executing Member State had been for the purpose of the EAW or for the purpose of a domestic case. In some cases, the information received from police sources and from the requested person in relation to the date of the requested person's arrest was contradictory and needed to be clarified.
- Information, if applicable, in relation to details of the bail the requested person was admitted to, the terms of a curfew and/or conditions of release, in order to evaluate their relevance and how they should be considered in terms of deduction of the time of imprisonment to be served.
- Reasons why the requested person had not yet been surrendered to the issuing Member State, urging the executing authorities to agree on a date for the actual surrender. In some of these cases, the executing authority explained that the surrender could not yet take place, as the decision was not yet final and could be appealed against.
- The executing court's decision to obtain precise information about the basis on which the requested person was surrendered, for instance to check for which offences the surrender was

- granted or to verify the requested person's allegations that their surrender related to a different EAW, issued by another court in the issuing Member State.
- Information and court decisions on previous convictions in the executing Member State when relevant in the context of an ongoing trial in the issuing Member State.
 - The executing authority's consent to a subsequent surrender (see Section 6).
 - Information on whether the requested person had waived their right to the principle of speciality or the executing authority's consent to prosecution for other offences (see Section 9).

5. Transmission of European Arrest Warrants

In its casework, Eurojust was asked to intervene if problems occurred in relation to the chosen means of transmission (Articles 9 and 10 of the EAW FD) and to facilitate the transmission of EAWs, translations or supporting documents.

Recurrent issues requiring Eurojust's intervention related to the following:

- verifying whether the transmission by fax or email had reached the competent authorities and, if not, transmitting the EAWs via the National Desks;
- transmitting a copy of the EAW via the National Desks and establishing the contact details, preferably email address, of the competent executing authority that should receive the original directly from the issuing authority;
- Urgently transmitting corrected EAWs;
- addressing problems resulting from the use of SIRENE, police channels or central authorities;
- resolving questions in relation to SIS II alerts or flagging;
- raising awareness of pending SIS alerts in cases in which the requested person was to be released soon after serving a custodial sentence in the executing Member State;
- clarifying that EAWs had erroneously been removed while they were still valid;
- clarifying that EAWs were no longer valid and that the executing authority needed a withdrawal notification, as they were not in the SIS II system, so a SIS notification was not enough;
- checking the validity of several coexisting EAWs relating to the same acts and the same person and issued by the same authority and whether the last EAW had repealed the previous ones;
- understanding why a previous EAW had been withdrawn and whether the new EAW, which referred to the same acts, was valid;
- clarifying why an EAW was flagged in the system.

Clarifying why a European Arrest Warrant was flagged

An issuing authority had issued a fourth EAW when three previous EAWs had already been refused. The executing authority advised that it could not proceed any longer with the fourth EAW, as the executing authority had already decided on the previous EAWs addressing the same offences and the same person. The issuing authority was asked to withdraw the EAW, but refused to do so. In the end, the fourth EAW was flagged in SIS for the executing authority, to prevent repeated EAW proceedings in the executing Member State in relation to this specific case. At the same time, the EAW remained valid in respect of the other EU Member States.

In 2018, an **operational topic** was opened in relation to **the requirement of the original paper version of the EAW**. The questionnaire focused particularly on the question of how the Member States interpreted the term 'EAW', particularly whether, in their Member State, the transmission of an EAW by fax, email or SIRENE alone was sufficient for the purpose of its execution or whether, at any stage of the EAW proceedings, the original paper version of the EAW was required before a decision on the execution of the EAW could be taken.

The replies to the questionnaire indicate that, in the 22 Member States that replied to the questionnaire, the term 'EAW' is interpreted in a way that does not require the EAW to be the original paper version. In the vast majority of Member States, the transmission of an EAW by fax, email or SIRENE alone is sufficient for the purpose of its execution. EAWs transmitted by fax or other electronic means are treated and accepted as the original EAW. The original paper version of the EAW is not required, at any stage of the EAW proceedings, before a decision on the execution of the EAW can be taken, except when the authenticity is put in question, but this seldom occurs, according to the replies.

6. Competing requests for surrender/extradition and subsequent surrender/extradition

6.1. Competing requests for surrender and extradition

Article 16(2) of the EAW FD explicitly states that Eurojust may be requested by the executing judicial authority to provide advice on which of the EAWs should be executed when the requested person is subject to EAWs issued by two or more Member States ('competing EAWs').

6.1.1. Eurojust guidelines

In 2004, Eurojust published, for the first time, guidelines to support national authorities in the event of competing EAWs and to assist them in deciding which request to execute. These guidelines are flexible and non-binding, and fully respect national legal orders. They include the factors mentioned in Article 16 of the EAW FD, but complement and develop these factors in the light of different scenarios.

In 2019, Eurojust published a revised version, the Eurojust [guidelines for deciding on competing requests for surrender and extradition \(revised 2019\)](#) (hereinafter 'Eurojust guidelines'). The Eurojust guidelines enlarged the scope of the original guidelines by including scenarios not only for Article 16(1) of the EAW FD (competing EAWs), but also for Article 16(3) of the EAW FD (competing EAW and extradition request(s)). Moreover, they further developed the factors to be used in the decision-making process (e.g. reintegration objective). They also addressed coordination and follow-up measures that could be relevant before and after an executing authority decides which of the requests it will execute, for example temporary surrender, transfer of proceedings, transfer of prisoners and subsequent surrender (Article 28 of the EAW FD).

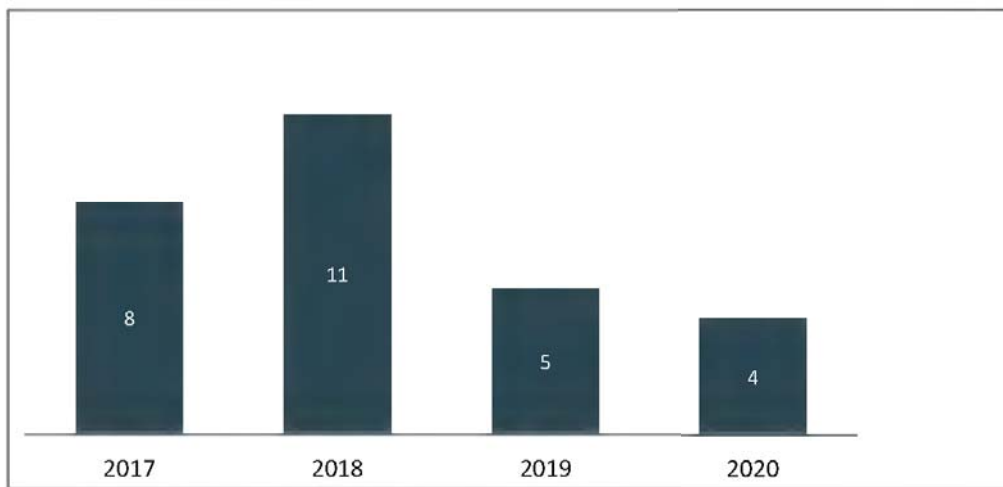


6.1.2. Eurojust's advice on competing requests

Between 2017 and 2020, Eurojust provided advice and assistance to national authorities in the context of competing requests for surrender and extradition in 28 cases (see figure below).

For cases of competing requests, Eurojust organised level II meetings, with representatives from the National Desks concerned, and issued in many cases, on the basis of the Eurojust guidelines and the additional information provided by the issuing authorities, formal, non-binding opinions on which request should be executed (first).

Number of Article 16 EAW FD cases in which Eurojust's assistance was requested (2017-2020)



6.1.3. Decisive factors in different scenarios

A first group of cases concerned cases in which all requests were issued for the purpose of prosecution ('Scenario 2' or 'Scenario 5' cases under the Eurojust guidelines). Factors that were mostly decisive in such cases were the seriousness of the offence (number of incidents of the type of crime and/or damage), the prosecution of co-suspects and advanced stage of the investigation, the risk of the prosecution being time barred, the number of victims and the link of the requested person with one of the issuing Member States. If the requested person's immediate presence was due in both issuing Member States, authorities discussed arrangement for a temporary surrender (Article 24(2) of the EAW FD) to the other issuing Member State so that the investigative judge could finalise the investigation and take a formal decision on the indictment.

A second group of cases concerned competing requests for the purpose of prosecution and for the execution of a custodial sentence ('Scenario 3' or 'Scenario 5' cases under the Eurojust guidelines). In these cases, priority was normally given to the request for prosecution, unless (i) there was a risk that the execution of the custodial sentence would be time barred or (ii) the sentence in the other country was related to an extremely serious offence, compared with the other case. For instance, in a competing case of an EAW for prosecution for forgery and an extradition request for the execution of a 23-year

custodial sentence for murder, participation in a criminal organisation and illegal possession of firearms, the extradition request was prioritised.

When the execution of the sentence was prioritised, authorities often agreed on measures to ensure that, in such cases, the prosecution could move forward, for example the issuing of an EIO (for the hearing of the requested person) and/or a temporary surrender (for the duration of the trial and appeal). In other cases, in which the EAW for prosecution was given priority and the requested person was a national of the executing Member State, the surrender was granted under a return guarantee. Moreover, it was agreed that, upon the requested person's return to the executing Member State, that state would agree with the other issuing Member State on a transfer of sentence based on FD 909.

Finally, a third group of cases concerned competing requests for the execution of custodial sentences ('Scenario 4' or 'Scenario 5' cases under the Eurojust guidelines). In such cases, priority was usually given to the EAW that concerned the more serious acts and/or the acts that were committed first. Afterwards, a subsequent surrender took place. In some cases, consideration was also given to the rehabilitation objective; the requested person was then surrendered to the Member State of nationality / habitual residence, which could not only execute the custodial sentence that itself had imposed, but also, after a transfer of sentence, the custodial sentence imposed by the other Member State. In such a scenario, there was no need for a subsequent surrender as the requested person could execute both sentences in the Member State of nationality / habitual residence.

6.1.4. Advice, coordination and follow-up measures

Despite the explicit reference to Eurojust's role in Article 16 of the EAW FD, the number of cases of competing requests in which Eurojust has become formally involved has remained very limited, compared with other EAW cases. Yet Eurojust's involvement in such cases can bring many benefits.

- Providing advice within tight deadlines and providing all relevant information from the issuing authorities so that the executing authority can take a well-informed decision. This information can relate to, for example, the purpose of the EAW, the seriousness of the offence, possible co-suspects, any statute of limitation and the state of play of the investigations.
- Not only focusing on the decision of which EAW should be executed (first) (see Section 6.1.3), but also coordinating the required follow-up actions in relation to the other EAW(s) or extradition request(s), such as a subsequent surrender, a transfer of sentenced persons or a transfer of proceedings.
- Clarifying in some cases that competing requests were in fact not 'competing requests', for instance when one of the EAWs was not valid.
- Giving information on appeal proceedings and helping to launch them if there were arguments to set aside the decision taken by a court of first instance, for example if the only factor that the court of first instance considered was the requested person's consent/preference to be surrendered to one of two Member States.

Deciding where to prosecute an international contract killer

A contract killer of dual Serbian and Hungarian nationality was suspected of committing three proven murders, connected to drug-trafficking crimes in Amsterdam, Budapest and Belgrade. The contract killer, who remained at large, was therefore wanted in two EU Member States and in one non-EU country (Serbia). On 1 March 2019, following intensive judicial cooperation via Eurojust, the suspect was arrested and successfully searched for evidence in Prague. The Czech authorities had to decide which surrender/extradition request they should prioritise and serve with the evidence seized. The National Desks at Eurojust quickly arranged a close dialogue between the countries concerned, advised on a possible transfer of proceedings to avoid potential conflicts of jurisdiction, and offered round-the-clock translation and transmission of EAWs and EIOs. Following the agreement to transfer the Dutch proceedings to Hungary, the joint conclusion set up and disseminated by Eurojust suggested that Hungary was best placed to prosecute. As Serbia was not legally in a position to either try the Dutch case or surrender its case to Hungary, the suspect was subsequently surrendered to Hungary upon the decision of the Czech Municipal Court in Prague and Minister of Justice. In 2021, the contract killer was sentenced to life imprisonment in Hungary.

6.2. Subsequent surrender/extradition

In many cases related to competing requests, the subsequent surrender/extradition was already discussed at the time when the executing authority decided on which request to execute (see Section 6.1). However, in cases in which the second EAW was issued or known only **after** the first surrender or extradition took place, the competent authorities needed to obtain the consent of the authority that arranged the first surrender/extradition (Article 28 of the EAW FD).

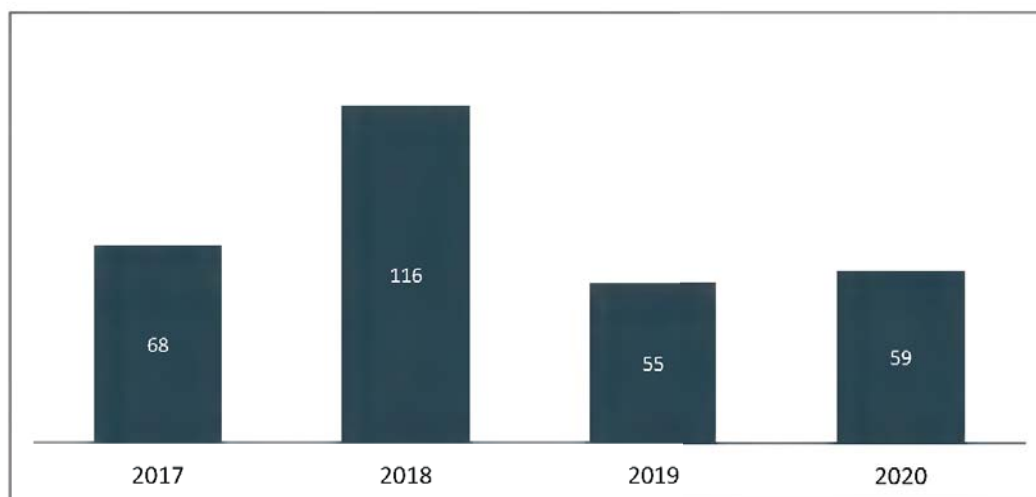
Eurojust's casework reveals several difficulties in obtaining that consent. Eurojust was involved in:

- facilitating the exchange of relevant information on the pending request;
- clarifying which authority/state should approve the subsequent surrender/extradition;
- clarifying which authority/state should request the subsequent surrender/extradition;
- speeding up obtaining the consent to avoid the lifting of the EAW proceedings;
- clarifying that, despite confusing communication via SIRENE, an EAW was still active, and thus consent for the subsequent surrender was still needed.

7. Time limits for the decision to execute a European Arrest Warrant

According to Article 17(7) of the EAW FD, if a Member State cannot observe the time limits provided for in Article 17 of the EAW FD, it must inform Eurojust, giving the reasons for the delay. When notified of breaches of time limits in the execution of EAWs, Eurojust can contribute to reducing delays in the execution of EAWs and to improving the smooth operation of EAW proceedings, at both operational and strategic levels.

Overview of the number of formal Article 17 EAW FD notifications (time limit exceeded) to Eurojust (2017-2020)



Overview of the number of formal Article 17 EAW FD notifications to Eurojust, per country (2017-2020)

Country (*)	2017	2018	2019	2020	Total
BG	0	3	1	0	4
CY	0	0	0	3	3
CZ	24	6	2	4	36
EL	1	0	0	1	2
ES	0	0	0	1	1
HR	1	1	0	0	2
HU	0	1	0	1	2
IE	42	79	0	43	164
LV	0	2	0	0	2
PT	0	1	0	0	1
SE	0	0	0	3	3
SI	0	1	0	0	1
SK	0	0	0	2	2
UK	0	22	52	1	75

(*) The countries not included in this table have zero notifications.



The figure and table above give an overview of the number of cases that national authorities formally brought to Eurojust as 'Article 17 EAW FD' cases, meaning that the executing authority could not comply with the time limits. It is unlikely that these numbers represent the total number of cases for which breaches of time limits occurred. It also follows from other sources that national authorities do not always comply with their obligation to notify Eurojust when time limits are exceeded ⁽⁴¹⁾. Moreover, sometimes cases are registered at Eurojust in view of facilitating the execution of the EAW without the time breach being mentioned. Consequently, such cases are not registered in Eurojust's case management system as 'Article 17 EAW FD' cases.

In order to improve the compliance with Article 17(7) of the EAW FD, in 2018 Eurojust created a smart PDF form that national authorities can use when informing Eurojust that they cannot observe the time limits, giving the reasons for the delay (Article 17(7) of the EAW FD). [This form](#) is available on Eurojust's website in 22 languages. Unfortunately, the use of this template has been quite limited and has not contributed to an increase in the number of notifications.

On the basis of the notifications that were made to Eurojust in previous years, 'requests for additional information' and the 'length of appeal proceedings' continued to be the main reasons explicitly mentioned for non-compliance with time limits, together with, since 2020, 'COVID measures'. However, in the vast majority of notifications (91 %), no reasons were given for the delay in the execution of the EAW. When looking at cases that were brought to Eurojust to facilitate the execution of the EAW, it can be concluded that time limits were often exceeded in cases in which requests for additional information on fundamental rights issues or *in absentia* judgments led to follow-up questions, and also sometimes in cases for which national proceedings had been suspended in view of a pending CJEU judgment.

In some cases, involving very serious offences, the EAW proceedings lasted for so many years that they were more like lengthy and cumbersome extradition procedures than efficient EAW procedures.

Requested person surrendered in 2020 to stand trial for a murder committed in 1981

A requested person was wanted for prosecution for a murder in 1981 and membership of a terrorism group. In 2013, executing authorities refused the EAW for the first time, and subsequent refusals followed. Eurojust supported the national authorities in the exchange of relevant information related to time-bar limitation, prescription of the offences and fundamental rights grounds (prison conditions). In 2019, the ECtHR condemned the executing Member State for having violated Article 2 of the ECHR by refusing to execute the EAW for the surrender of the requested person ⁽⁴²⁾. After a court of first instance again refused to execute the EAW, the court of appeal requested, via Eurojust, a statement by the issuing authorities with guarantees on the concrete and precise conditions of detention, in particular the 'incommunicado' regime and the alleged lack of assistance from a lawyer of the requested person's choice. The court of appeal received the additional information and concluded that neither the 'statute bar' grounds nor the prison condition argument could be invoked, and therefore granted the surrender. The supreme court dismissed the arguments raised by the requested person in their appeal. Finally, in November 2020, the requested person was surrendered to the issuing Member State to stand trial for the murder committed in 1981.

⁽⁴¹⁾ See particularly Commission staff working document, Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2018, SWD (2020) 127 final, Council doc. 9341/20, p.22. This document, which includes information related to 2018, reveals in point 8.2 differences from the numbers available in the table mentioned above and confirms that Eurojust is not always informed in cases where time limits are exceeded (see also point 8.1 of Council doc. 9341/20).

⁽⁴²⁾ *Romeo Castaño v Belgium* (see footnotes 35 and 37).

8. Postponement of surrender and problems with the actual surrender

According to Article 23 of the EAW FD, the requested person must, in principle, be surrendered not later than 10 days after the final decision on the execution of the EAW. Exceptions are set out in the event of *force majeure* (Article 23(3) of the EAW FD), for serious humanitarian reasons (Article 23(4) of the EAW FD) or in the event of prosecution or execution of a sentence in the executing Member State (Article 24(1) of the EAW FD). In its casework, Eurojust has come across cases that fall within each type of exception. Eurojust's assistance was also requested in relation to other issues involving the actual surrender (e.g. transits).

8.1. *Force majeure*

In several cases, the actual surrender could not take place and competent authorities had to agree on a new surrender date. In some cases, repeated attempts to surrender the requested person were not successful, and the actual surrender could only take place months after the decision granting the surrender had been taken. Eurojust was requested to facilitate the agreement on a new surrender date and the exchange of information regarding transport arrangements.

A reason for invoking Article 23(3) of the EAW FD was, for instance, when requested persons **strongly resisted their surrender** by plane and the airline company consequently refused to transport them. In one case, authorities considered picking up the requested person with a military aircraft, but finally concluded that this would be unreasonably expensive.

In other cases, the requested persons were not kept in detention, but were required to present themselves every 2 weeks at the police station and simply **did not show up on the day of the surrender**. Issuing authorities then often had difficulties in understanding why the requested persons were not in detention prior to the surrender and requested further explanations via Eurojust. Some National Desks underlined that it is a recurrent issue with some Member States that the actual surrender at the date previously agreed between police authorities cannot take place because the requested persons cannot be found.

Since April 2020, it has been impossible for many surrenders to take place as a result of the outbreak of the **COVID-19 pandemic**. Measures applied by the Member States in relation to the COVID-19 pandemic, such as lockdowns, curfews and closures of borders, have seriously affected the final stage of the EAW procedure, that is the physical transfer of a requested person to the issuing Member State. The most frequent scenario identified in the cases brought to Eurojust was when the executing authority decided on the recognition and execution of the EAW, but it was not possible to organise the transfer of the requested person to the issuing Member State. In a majority of cases, the request for the postponement of surrender was based on either Article 23(3) of the EAW FD (*force majeure*) or Article 23(4) of the EAW FD (humanitarian reasons) or both. In 2021, Eurojust published a report on [the impact of COVID-19 on judicial cooperation in criminal matters – analysis of Eurojust casework](#), which addresses this subject in more detail.



In most cases, the requested person remained in detention until the final date of the transfer was agreed between the authorities involved, but, on occasion, the requested person was released. In this regard, it should also be recalled that Member States are required to take all the measures that they deem necessary to prevent the person from absconding (Article 12 of the EAW FD) ⁽⁴³⁾.

COVID-19 affecting the actual surrender of a person suspected of child abduction and domestic violence

An issuing authority had issued an EAW in December 2019 against the requested person for prosecution for child abduction and domestic violence. The individual was arrested in the executing Member State based on a national arrest warrant concerning other offences for which he had first to serve a 4-month prison term. The executing authority had agreed to surrender the requested person to the issuing authority after the full execution of his sentence, but the actual surrender could not take place because of the outbreak of the COVID-19 pandemic. The executing authority agreed to extend the detention of the suspect based on the EAW proceedings, but, as the actual surrender did not take place within the deadline of 10 days set in Article 23 of the EAW FD, the question arose of the postponement of the surrender and the release of the suspect. On 17 April 2020, the executing authority considered it impossible to plan a new date of surrender owing to the uncertainty of the health situation and the duration of the restrictions applied in the Member States, and decided to release the individual until the issuing and executing authorities would be ready to resume the surrender proceedings. After the surrender procedures between both countries started again and a new date was agreed, the actual surrender could not take place because the requested person did not show up. Judicial and police cooperation continues in this case to try to locate the requested individual.

8.2. Humanitarian reasons

Eurojust assisted in a number of cases in which humanitarian issues were raised. The most common grounds for raising issues were taking care of small children, physical or mental illness and the COVID-19 pandemic.

8.2.1. Taking care of small children

When the requested person was living with small children – usually up to the age of 3 years – and executing authorities feared that the surrender would be a traumatic experience for the children, the executing authorities decided to postpone the surrender and reflected, with Eurojust's support, on possible solutions. In most of these cases, the surrender succeeded in the end, for example when the children had turned a certain age. Sometimes, it could take some time. For instance, in one case, when the child had turned 3 years, the requested person was pregnant again and the executing authority postponed the surrender again.

In some cases, alternative or complementary measures were discussed, such as the transfer of criminal proceedings to the executing Member State, a temporary surrender, an LoR (e.g. for the service of documents) or an EIO (e.g. for the hearing of the requested person or a house search). In some other cases, the requested person disappeared before a solution could be found.

⁽⁴³⁾ For an interpretation of this provision in the light of the Charter, see the judgment of the CJEU of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, with reference to the judgment of the CJEU of 16 July 2015, *Langjan*, C-237/15 PPU, ECLI:EU:C:2015:474.

Executing courts sometimes took into consideration the nature of the crimes for which the surrender was requested and/or the lack of a previous criminal record when deciding on the postponement of the requested person's surrender.

8.2.2. Serious illness

Eurojust intervened in several cases in which the requested person suffered from a serious physical or mental illness, to discuss whether a surrender would be justified and to find solutions to enable the surrender or to find alternative solutions, if surrender was not an option:

- guarantees with regard to a specific medical treatment in the issuing Member State;
- arrangements on a specialised medical air transport;
- streamlining the communications and speeding up the processes by clarifying certain requirements;
- withdrawal of the EAW and instead issuing an EIO for an interview so that information could be obtained to enable the issuing authorities to finalise their proceedings;
- withdrawal of two competing EAWs after the requested person was hospitalised following a very serious heart attack;
- questions on the reliability of a medical report of the executing Member State, which contradicted a report of the issuing Member State, leading to the appointment of an independent medical expert;
- obtaining the final court decision to understand why the court had ruled that the person's health condition did not permit him to be incarcerated or to fly;
- exchange of information that indicated that the requested person was committing crimes again, which raised doubts about the requested person's alleged illness and called for a medical examination;
- arrangements for a surrender with a medical assistant (doctor, paramedic) in order to avoid any danger and harm to the requested person and/or others during transport;
- arrangements to transfer the requested person on board a military aeroplane with medical equipment and staff, together with the requested person's minor child, who needed breast feeding, and to detain the suspect subsequently in an appropriate detention centre;
- providing a 'fit to fly' declaration, signed by a doctor of the executing Member State and duly translated for the issuing Member State;
- ensuring the presence of medical personnel on board during a flight and assurances on adequate medical treatment in the issuing Member State.

8.2.3. The COVID-19 pandemic

In some cases, national authorities invoked Article 23(4) of the EAW FD when surrenders could not take place owing to the outbreak of the COVID-19 pandemic (see also Section 8.1 and the report mentioned there).



8.3. Ongoing prosecution or execution of a sentence in the executing Member State

If the requested person is the subject of an ongoing prosecution, or is serving a sentence, in the executing Member State, then the executing authority can decide to either postpone the surrender (Article 24(1) of the EAW FD) or temporarily surrender the person to the issuing Member State (Article 24(2) of the EAW FD).

Close cooperation, communication and coordination were often key to ensuring that the criminal proceedings or the execution of custodial sentences in both Member States were successful. In some cases, problems arose when the competent authorities failed to keep up the communication when the requested person's date of release was approaching or if the requested person could be released before the prison term was fully served, for example early release or conditional release. Good communication could enable the requested persons to be taken in surrender detention at the moment of their release, with a view to a smooth surrender.

Lack of coordination leading to a release

A requested person's surrender was postponed until a 6-month custodial sentence in the executing Member State was executed. The requested person was released after 6 months, but – despite the postponement decision – the surrender was not carried out. Issuing authorities requested information on the reason for non-surrender; since the executing authority did not reply, they contacted Eurojust. Via Eurojust, it was clarified that the requested person had been released owing to a mistake of the executing authorities: the prison authorities had not been informed that the EAW was pending. Fortunately, the requested person could still be arrested shortly afterwards in the executing Member State and the EAW could be executed.

Eurojust assisted national authorities in exchanging relevant information related to:

- the expected date of the requested person's surrender so that the issuing authority could also plan a number of investigative measures in other Member States;
- the reasons for the requested person's imprisonment in the executing Member State;
- the expected duration of the proceedings in the executing Member State;
- the expected trial date in the executing Member State;
- the state of play of the execution of the sentence in the executing Member State;
- the requested person's expected release from prison;
- practical issues in allowing the requested person to examine the criminal file related to the proceedings in the issuing Member State in a prison in the executing Member State, for example the presence of police authorities from the issuing Member State, transport of the extensive file and interpretation;
- the temporary removal of the EAW from SIS, subject to the executing authority's commitment to inform the issuing authority when the EAW could be uploaded again in SIS in view of a surrender;
- the requested person's links with the issuing Member State, to consider a possible transfer of prisoners under FD 909.

Temporary surrenders were very helpful to ensure the continuity of criminal proceedings in the issuing Member State. Eurojust successfully assisted national authorities in assessing the feasibility of **temporary surrenders** in concrete cases and in reaching agreements on the temporary surrender. Such agreements contained all relevant information, including the date and duration of the temporary surrender and any other specific requirements. Sometimes executing authorities approached Eurojust when issuing authorities were ignoring the temporary nature of the surrender and refusing to send the requested person back to the executing Member State. The issuing authority argued, for instance, that there had been only 'email exchange' on the temporary surrender, but not a 'formal agreement'. However, such arguments were set aside during discussions at Eurojust. Following an interpretation of the national laws in the light of the EAW FD, the conclusion was that neither the wording nor the purpose of the EAW FD require a formal agreement. An agreement can thus also be reached through email exchange, but it was underlined that it is important that the content of what was agreed must be clear and unequivocal.

In most cases, executing authorities postponed the requested person's surrender until the moment that the criminal proceedings in the executing Member State had ended **and** a possible sentence had been executed. However, in some cases, executing authorities surrendered the requested person after the trial and conviction phase, but before the execution of the custodial sentence had started, and without making any clear arrangements with the issuing Member State on the future execution of that sentence. The case mentioned below illustrates how problematic such an approach can be.

Lack of coordination leading to a sentence becoming statute barred

An executing authority agreed to execute an EAW for a non-EU country national, but postponed the surrender until the criminal proceedings in the executing Member State had ended. Shortly afterwards, the executing Member State sentenced the requested person to a custodial sentence of 2 years and 9 months for aggravated rape. They surrendered him to the issuing Member State, without a condition that the suspect should be returned to the executing Member State to serve the sentence for the aggravated rape. The issuing Member State then prosecuted and convicted the requested person for other very serious crimes and decided to deport him to his country of origin after finalising the custodial sentence of the issuing Member State. After serving several years in prison in the issuing Member State, the sentence of the executing Member State was close to becoming statute barred. The executing Member State then issued an EAW to the issuing Member State for serving the sentence for the aggravated rape. The EAW was not executed, as the requested person was still serving the sentence imposed in the issuing Member State. The authorities briefly considered the possibility of a transfer of the sentence, but this idea was rejected, since the requested person would be deported to his country of origin after finishing the sentence of the issuing Member State, and transfer of the sentence could be arranged only in order to facilitate social rehabilitation in the issuing Member State. This led to a situation in which the sentence of the executing Member State became statute barred. Looking back, the statute bar could possibly have been avoided if the surrender from the executing Member State had been done on a temporary basis subject to the condition that the requested person would return to the executing Member State for the execution of his sentence when the criminal proceedings and trial in the issuing Member State had come to an end.



8.4. Transit

Eurojust intervened in several cases in which transits (Article 25 of the EAW FD) were requested. Eurojust helped to obtain, urgently, the consent of the competent authority in the transit country to a transit. In most cases, the consent was successfully obtained. Yet problems occurred in some cases, for instance when transfers had to be rearranged at the last minute, as the airline company in the transit country declined to take prisoners on its flights. Solutions were usually found quickly and the requested person was transferred with another airline company or on a direct flight or via another transit country. In some cases, the feasible alternatives were more cumbersome.

Finding an alternative solution in the case of a transit refusal

An issuing authority had issued an EAW against the requested person, who was convicted of drug-related offences. First, it was planned to surrender the requested person by plane, but he resisted a lot and the operation had to be cancelled. The next attempt was to transfer him by car through a transit country. Unfortunately, the authorities of that country declined to transport him through their territory because they did not allow the officials of the issuing Member State to be present in the case of a transit by land, while this was a requirement under the issuing Member State's law. The final solution in this case was to organise a transit via another country, not only by land, but first by ship (so as not to go through the other country that had refused the transit) and then by land via the other country. It was agreed that police officials of the issuing Member State could be present during the transit, but they were not allowed to carry weapons with them on the territory of the transit country. Armed police of the transit country would assist them during the transit. It was also specified that the cost of the transfer would be borne by the issuing Member State. This solution was also applied in other cases where the first-addressed transit country refused to cooperate.

9. Prosecution or carrying out of a custodial sentence for other offences (speciality rule)

When an issuing authority wanted to prosecute a requested person or execute a custodial sentence in relation to offences that were different from those for which the surrender was granted, difficulties sometimes arose in relation to the application of the 'speciality rule' (Article 27 of the EAW FD). Both issuing and executing authorities approached Eurojust when there was a need to speed up the process of obtaining consent or the requested additional information.

Issuing authorities often approached Eurojust prior to the surrender indicating that they urgently needed to alert the executing authority to necessary changes related to the offences included in the EAW. Such changes resulted from further developments in the criminal proceedings or because the issuing authorities had become aware that the requested person was also wanted for other offences in the issuing Member State. In most cases, the EAW was updated and executed in time before the surrender took place and no recourse to Article 27 of the EAW FD was needed (see Section 2.2.4).

In other cases, in which there were requests for extending the EAW and/or additional EAWs arrived after the surrender, Eurojust assisted in facilitating the process of obtaining consent and/or clarifying different issues in relation to the application of Article 27 of the EAW FD. Recurring issues related to the following.

- **Lack of reply.** Requests for consent through direct contact had remained unanswered and issuing authorities urgently needed to know the state of play of the consent proceedings.
- **Clarification** of whether or not requested persons who had been surrendered under the consent procedure had renounced the principle of speciality.
- **Urgency of requesting consent**, often in view of a pending indictment, or during a temporary surrender, but sometimes at the last minute, following a conviction for the other offences ⁽⁴⁴⁾.
- **(Re)drafting of consent.** When consent was not accurately drafted or did not refer to the correct offences or did not include any reference to a guarantee under Article 5(3) of the EAW FD, which had previously been provided in relation to the offences included in the EAW, new consent was needed.
- **Modifications of the description** of the offence following **further developments in the investigation.** Even though the CJEU clarified that the speciality rule does not require consent for every modification of the description of the offence ⁽⁴⁵⁾, national authorities sometimes struggled with different interpretations in concrete cases. For instance, in a few cases in which the requested persons had been surrendered on the basis of murder, the issuing authority later requested an extension of the surrender to 'assault' and 'non-intentional killing'. The executing authorities involved disagreed that consent was needed, as it concerned the 'same' acts and did not constitute a different offence, yet they agreed to provide consent, as the issuing authorities insisted that they needed it to succeed with their proceedings.
- **Modification of the description** of the offence to **correct factual mistakes in the EAW.** Issuing authorities realised only after the surrender that the EAW had not specified the dates when drugs offences had actually occurred, but only when the drugs plantation was discovered. After consultation with the Eurojust National Desk, the issuing authority issued a request, using the EAW form, to extend the period in which the offences had occurred, specifying clearly that it concerned an 'additional' EAW, more particularly a request for an extension of the surrender granted by the court of (place) on (date). The issuing authority also sent the executing authority a document that confirmed that the requested person was informed of this extension.
- Specific requirements under national law related **to the requested person's involvement in the consent proceedings in the executing Member State.** For instance, executing authorities requested, via Eurojust, the contact details of the requested persons, including the address of the detention centre where they were serving their prison sentence or contact details of their defence lawyer. Sometimes they requested support with organising a hearing of the requested persons or with obtaining the requested person's opinion. Often this considerably delayed the consent proceedings in the executing Member State and the criminal proceedings in the issuing Member State.
- **Partial executions of cumulative judgments**, in particular when the executing authority wanted to be sure that the cumulative sentence would be adjusted in the light of the speciality principle. Before granting the actual surrender, coordination meetings were held at Eurojust, at

⁽⁴⁴⁾ As the CJEU clarified in *Leymann and Pustovarov*, the requested person can be prosecuted and sentenced for the 'other' offence before the consent has been obtained, provided that no measures of deprivation of liberty are applied during the prosecution on the basis of this 'other' offence. If the person is sentenced to a penalty or a measure restricting liberty, then consent is required in order to enable that penalty to be executed. Judgment of the CJEU of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:669, para. 73.

⁽⁴⁵⁾ Judgment of the CJEU of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:669, paras 56–63.



which issuing authorities ensured that they would comply with this requirement and provided additional supporting material in this regard (see Section 2.2.5).

- Explanations of **why consent was not granted**, for example dual criminality or *in absentia*. Exceptionally, executing authorities refused based on 'the principle of speciality', but did not mention any of the reasons of Articles 3 or 4, as required under Article 27(4) of the EAW FD. This even happened in a case in which the requested person had voluntarily left the issuing Member State's territory to return to the executing Member State (see example below).

Problematic interpretation of the rule of speciality

An issuing authority issued an EAW against the requested person for engaging in a fraudulent value added tax carousel. The executing Member State surrendered the requested person to stand trial in the issuing Member State for this offence. During the trial phase, he was released from custody on probation. However, after his release, he almost immediately returned to the executing Member State. The issuing authorities then issued a second EAW for other fraud-related offences. The executing court recalled that the first surrender was being made 'subject to the law of speciality'. Then the court noted that the requested person had left the issuing Member State 'before his final discharge' and that, thus, the 45 days mentioned in Article 27(3)(a) of the EAW FD had not started running. The executing court argued that 'since Article 27(3)(a) found no application, Article 27(2) EAW FD applied' and concluded that the requested person's return to the issuing Member State was barred by the rule of speciality.

It is difficult to understand the executing court's reasoning in applying the speciality rule in a case in which the requested person had voluntarily left the issuing Member State and was back in the executing Member State, where the executing authority was asked to assess a second EAW. National Desks exchanged views on the problematic interpretation of the rule of speciality, but also explored alternative solutions, as the decision in the executing Member State was final and could not be appealed against.

10. The European Arrest Warrant and its relation to other instruments

Eurojust dealt with several cases in which difficulties or questions arose from the simultaneous application of an EAW and other instruments (see Section 10.1). In some cases, the EAW was not the (only) appropriate instrument to use and it was suggested that the authorities either use another measure or combine an EAW with another legal instrument such as an EIO or an LoR (see Section 10.2) or a transfer of sentenced persons (see Section 10.3). In some cases, given the temporal scope of the EAW FD as implemented in national law, EAWs had to be replaced by extradition requests (see Section 10.4.1). Eurojust was also consulted in relation to extradition requests concerning EU citizens, in order to assist national authorities in the consultation mechanism established in the CJEU's *Petruhhin* case-law (see Section 10.4.2).

The use of other mutual recognition instruments, such as Framework Decision 2009/829/JHA⁽⁴⁶⁾ or Framework Decision 2008/947/JHA⁽⁴⁷⁾, was barely⁽⁴⁸⁾ raised in the context of the EAW cases analysed for this report; therefore, this is not discussed in a separate section.

10.1. Coordinated execution of European Arrest Warrants and other mutual recognition instruments

Eurojust intervened in both bilateral and more complex multilateral cases in which its primary role was to ensure the coordination of the execution of EAWs and other instruments of judicial cooperation, often simultaneously across Member States and/or non-EU countries. The execution of the EAWs was then part of a bigger operation and went hand in hand with the execution of EIOs or LoRs (e.g. house searches, telephone intercepts, hearing of persons) and freezing measures, and the action was coordinated through coordination meetings and/or coordination centres. Authorities exchanged beforehand updated information related to the state of play of their respective proceedings and ideally agreed on a joint prosecutorial strategy with an overview of which Member States would issue (or withdraw) EAWs. Liaising with SIRENE bureaux was also needed to prepare for the synchronised activation of the EAWs in SIS, often a couple of hours before the planned action. In level II meetings, preparatory steps were often taken *ex ante* to ensure that the EAWs and other instruments fulfilled all legal requirements and that the simultaneous actions across the Member States would not be jeopardised.

10.2. European Investigation Orders and letters of request

10.2.1. European Investigation Orders in addition to European Arrest Warrants

Eurojust supported national authorities when EIOs or LoRs had to be issued in addition to EAWs. For instance, in a case concerning rape and sexual assault, the EAW proceedings were preceded by an EIO sent to the executing Member State seeking to obtain a DNA sample. In another sensitive case, involving a minor, it was discussed and confirmed that first an EIO or LoR was needed to locate the requested person in order to facilitate the surrender. In other cases, EIOs were sent for house searches, banking information and the seizure of money. Often, coordination of the execution of both measures was key to a successful result.

⁽⁴⁶⁾ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11.11.2009, p. 20 (FD 2009/829/JHA).

⁽⁴⁷⁾ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, p. 102 (FD2008/947/JHA).

⁽⁴⁸⁾ In one case, in which an EAW had been executed, Eurojust facilitated the transmission of relevant documents for supervision measures requested under FD 2009/829/JHA after the trial phase. In another case, Eurojust became involved subsequent to a request for additional information in relation to the legal status of the requested person and the circumstances under which the EAW had been issued. The issuing state replied that the requested person had been convicted of drug trafficking by a court of first instance and given a suspended sentence. The prosecution office in the issuing Member State had appealed against this judgment, so it was not final. As the accused unlawfully did not attend the appeal hearing, the issuing authority issued a national arrest warrant and an EAW. The EAW was executed so that the requested person could attend the appeal. In the margins of the consultations, the question was raised why the issuing authorities had not used FD 2009/829/JHA or FD 2008/947/JHA, but, as this was considered to be an issue outside the scope of the EAW proceedings, it was not discussed further.



Sometimes EAWs were issued in one case, and EIOs were issued in separate, linked, cases, involving different authorities. The assistance of Eurojust was then requested in order to coordinate common actions and discuss the next steps in view of the links between the cases (e.g. same suspects). Coordination was also crucial in a case in which the requested person was needed in the issuing Member State for a dual purpose: he was suspected of having committed a very serious offence, but also wanted for a hearing as a witness in a different case. After exploring several options to obtain the requested person's statement, in tight cooperation with the National Desks, it was confirmed that the surrender of the requested person was scheduled soon enough for him to be also summonsed to the trial to be heard as witness.

EIOs were also often sent with a view to obtaining the objects that the requested persons had with them at the time of their arrest. In some cases, the objects were transmitted directly, based on Article 29 of the EAW FD (handing over of property). Yet, in many other cases, executing authorities specified that they required from the issuing authorities an EIO to secure all belongings and evidence seized during the arrest of the requested person, for example luggage, clothes, phones and IT devices. These examples show that Member States do not have a common understanding of this, but take different approaches. The practical advantage in sending an EIO is that the issuing authorities can obtain the items immediately, whereas, with the EAW FD, the issuing authorities need to wait until the person is surrendered.

Finally, LoRs were often sent in addition to EAWs in order to obtain the surrender decision issued by the competent executing judicial authority and other relevant documents concerning the surrender.

10.2.2. European Investigation Orders instead of European Arrest Warrants

In a very few cases, it became clear that EAWs had been issued for the purpose of serving procedural documents. After clarification via Eurojust, the EAWs were withdrawn and replaced by LoRs. Such cases reflect justified concerns that EAWs should be issued 'for the purpose of conducting a criminal prosecution' (Article 1 of the EAW FD), and not merely for investigative purposes, and are also related to the requirement of 'trial readiness' ⁽⁴⁹⁾. It should be underlined, though, that, in Eurojust's casework, such cases were very rare in the time period covered by this report.

In cases where the execution of the EAW was postponed because of the execution of long-term custodial sentences and the requested person would be released only after a long period, authorities were prompted to explore other possibilities in order to avoid further adjourning of the trial. In several cases, EAWs were withdrawn and EIOs were issued for the hearing of the requested person by videoconference during the trial phase, when allowed under the issuing Member State's law.

Finally, in some cases, national authorities sought clarification of which legal instrument to use when transferring a person to another Member State. Recital 25 of the directive on the European Investigation Order ⁽⁵⁰⁾ clarifies that when a person is to be transferred to another Member State for the purposes of

⁽⁴⁹⁾ See also the reports mentioned in Section 1.1, particularly the European Commission's [report on the implementation of the EAW FD](#), pp. 7 and 13, and the report of the European Parliament on the implementation of the EAW and the surrender procedures between Member States, p. 21.

⁽⁵⁰⁾ 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 L 130, 1.5.2014, p. 1.

prosecution, including bringing that person before a court for the purpose of standing trial, an EAW should be issued in accordance with the EAW FD. When a person is to be transferred to another Member State for evidence gathering, an EIO should be issued in accordance with the EIO directive. Two cases mentioned in the [report on Eurojust's casework in the field of the European Investigation Order](#) clearly illustrate the sometimes challenging relation between the EAW and the EIO in relation to the temporary transfer of persons held in custody ⁽⁵¹⁾.

10.3. Transfer of sentenced persons

Eurojust encountered a number of recurrent practical and legal issues in its casework with regard to the application of the EAW FD in combination with the FD 909. Some of these issues related to problems resulting from the interpretation of Article 25 of FD 909, particularly in the context of Article 4(6) of the EAW FD (see Section 3.1.7). Eurojust also provided support in cases in which a request for the transfer of a sentenced person was issued in addition to an EAW, and the main question was how to coordinate the execution of both requests and/or how to determine which of the requests should be maintained.

10.3.1. European Arrest Warrant replaced with a request for a transfer of sentenced person

Some issues occurred in cases in which a custodial sentence needed to be executed that had been issued by an issuing judicial authority and concerned a national of the executing Member State whose whereabouts were not clear. In a number of cases, the judicial authorities first issued an EAW to the executing Member State for the purposes of executing a custodial sentence and subsequently, when the EAW procedure was still pending, asked for the suspension of the effective surrender of the requested person with a view to issuing instead a certificate under Article 4 of FD 909 requesting the enforcement of the custodial sentence in the executing Member State. Problems also occurred in cases in which issuing authorities had issued both an EAW and an FD 909 request, but then, when the FD 909 request was executed, did not withdraw the EAW. In some cases, the executing authorities then requested the assistance of Eurojust to discuss with the issuing authorities the withdrawal of the EAW and to facilitate the surrender of the requested person to serve the prison sentence in the executing Member State.

These situations created a number of difficulties:

- hampering judicial cooperation;
- two different procedures including differences related to the competent authorities, the channels of communication and the languages accepted;
- generating an extra burden on the executing authorities (and also on the issuing authorities), which had to deal with two different procedures;
- generating the risk that the person would be first surrendered to the issuing Member State on the basis of an EAW and then, at a later stage, on the basis of an FD 909 certificate, sent back to the executing Member State, which is cumbersome, costly and unnecessary;
- creating confusion with regard to the legal basis on which the person should be deprived of liberty;

⁽⁵¹⁾ See Section 3.2.2.1, pp. 15 and 16, of the [report on Eurojust's casework in the field of the European Investigation Order \(2020\)](#).

- entailing the risk of releasing the requested persons from their provisional arrest while the overlapping procedures were pending;
- creating uncertainty as to the outcome, since the final objective of having sentenced persons serve the sentence in their Member State of nationality with a view to facilitating their social rehabilitation was not always achieved.

In one of these cases, Eurojust organised a coordination meeting at which constructive discussions took place to clarify the legal frameworks and implications, as well as to identify practical solutions to overcome some of these difficulties. It was clarified that one of the main reasons why an issuing judicial authority first issued an EAW, and only afterwards issued a certificate under FD 909, was that the EAW/SIS alert was needed to locate the sentenced person. Once the person was located in the issuing Member State, and if all the requirements were met, the judicial authority issued a certificate under the FD 909. During the coordination meeting, the following way forward was suggested for future cases between the Member States involved, which could also be an example of best practice for other Member States.

- Whenever possible, the best solution would be to rely upon police cooperation in order to locate the sentenced person beforehand (SIS alert only for location). If the sentenced persons are located in their Member State of nationality, the issuing competent judicial authority should issue only and directly, if all the requirements are met, an FD 909 certificate instead of an EAW.
- When the sentenced person cannot be located beforehand and an EAW has been issued, once it is established that the sentenced persons are located in their Member State of origin and all the requirements to issue an FD 909 certificate are met, the issuing competent judicial authority should transmit to the competent executing judicial authority, as soon as possible, one single document requesting that it simultaneously (i) withdraw the already issued EAW and (ii) provisionally arrest the person in accordance with FD 909.
- Such a single document should preferably be translated into the language of the executing Member State. The certificate and (the essential parts of) the judgment imposing the custodial sentence, duly translated, should be then transmitted within 30 days.
- When the person is already under provisional arrest under the EAW procedure, both requests contained in the single document should be dealt with urgently by the competent executing authority.
- Ideally, for both the withdrawal of the EAW and the provisional arrest under FD 909, the same court in the executing Member State should be competent. This means that the decision on the two requests could happen simultaneously to avoid any risk of escape by the requested person. If different authorities are competent, close coordination is required.

10.3.2. European Arrest Warrant replaced with a request for a transfer of a sentenced person and replaced again with a European Arrest Warrant

Sometimes EAW proceedings were ongoing in parallel in two executing Member States, and the issuing court asked for the support of Eurojust:

- to make the two Member States aware of this situation;
- to obtain information on the status of these proceedings and the requested person's whereabouts;

- to understand which EAW proceeding should continue and which should be discontinued;
- and/or to determine whether a request for a transfer of a sentenced person would be more appropriate than an EAW.

European Arrest Warrant or FD 909 request in a case involving multiple executing Member States

A requested person was sought based on an EAW for the execution of a 5-year custodial sentence. The requested person was first arrested in a first Member State (Member State of nationality). The executing authority decided to refuse the EAW and to take over the enforcement of the custodial sentence in accordance with FD 909. Later, the requested person was arrested in a second Member State, based on the SIS alert issued by the issuing authorities. The issuing authority asked the first executing state to clarify whether or not the requested person had served (part of the) 5-year imprisonment. The latter replied that, unfortunately, the custodial sentence had not been enforced, as the person had absconded. As the enforcement of the sentence in the first executing state had not begun and the requested person was no longer in that country, the issuing court, after considering the case and all the information received, decided to withdraw the FD 909 certificate in accordance with Article 13 of FD 909. Subsequently, the issuing authority issued a new EAW. Finally, the requested person was arrested in a third Member State based on that new EAW and surrendered to the issuing Member State.

10.3.3. Simultaneous execution of a European Arrest Warrant and a request for the transfer of a sentenced person

Sometimes Eurojust provided support in the simultaneous execution of an EAW and a request for the transfer of a sentenced person.

Simultaneous execution of a European Arrest Warrant and an FD 909 request

An issuing judicial authority had issued an EAW for prosecution while the person was serving a previous conviction sentence in the executing Member State. After exploring different possibilities, including a temporary surrender or a transfer of prisoners, and after a hearing at which the executing court gained the consent of the convicted person, the executing authority decided to transfer the (remaining part of the) sentence to the issuing Member State, as this would enhance the requested person's social rehabilitation. The assistance of Eurojust was instrumental for opening the consultations between the competent authorities of the issuing and executing Member States and forwarding the judgment and the certificate to the competent executing authority. The support of Eurojust permitted the simultaneous transfer of the requested person to serve the remaining part of the sentence in the executing Member State, and to allow the requested person to be tried there for the outstanding criminal offence. The two processes were coordinated so that the requested person was surrendered both to serve the remaining sentence and to face trial on the offence committed in the executing Member State. The coordination required taking into account the need to coordinate two very different competent authorities in the Member States involved. Once the competent judicial authority sent the FD 909 certificate, and the decision on the enforcement of the sentence and the actual transfer was agreed, Eurojust alerted the EAW executing authority, which had previously authorised but suspended the surrender, so that the transfer and the surrender could be dealt with simultaneously.

10.4. Extradition requests

10.4.1. Extradition requests instead of European Arrest Warrants

A few cases involved EAWs related to acts committed before 2002, and the executing Member State had made a statement that it would continue to apply the extradition regime in relation to acts committed before a certain date (Article 32 of the EAW FD). Eurojust then facilitated the transmission of the extradition request and the supporting documents. In some of these cases, it was urgent to comply with certain time limits, for example under Article 16(4) of the 1957 Council of Europe Extradition Treaty.

In some cases, the extradition was granted and the requested person was extradited successfully. In a few other cases, the requested state refused to extradite the requested person. In a first case, the executing authority refused and based its decision on a statute of limitation, but the EAW and extradition request nevertheless stayed in force. The requested person returned voluntarily to the issuing Member State and agreed, without any objections, to go to prison to serve the 3-year custodial sentence. In a second case, the executing authority refused the extradition because it had not received all relevant supporting documents. Subsequently, the executing authorities started their own criminal proceedings against the requested person (see also Section 3.1.1).

10.4.2. Extradition requests or European Arrest Warrants: implications of CJEU case-law for the extradition of EU citizens to non-EU countries

On 6 September 2016, the CJEU introduced, in its *Petruhhin* judgment⁽⁵²⁾, specific obligations for Member States that do not allow extradition of their own nationals when they receive an extradition request concerning an EU citizen who is a national of another Member State. The *Petruhhin* judgment implied an obligation for the requested Member State to inform the Member State of nationality of the extradition request; to give that Member State the opportunity to issue an EAW, as far as it has jurisdiction; and to give priority to that potential EAW over the extradition request. This new approach was confirmed and, to a certain extent, refined in subsequent case-law⁽⁵³⁾. The application of this case-law has proved difficult in practice, raising many questions of a legal and a practical nature.

In 2020, Eurojust published, together with the EJN, a [joint report on the extradition of EU citizens to non-EU countries](#). The report provides an overview of recurring practical and legal issues that have been encountered in Eurojust casework and in the experience of the EJN in the process of implementing the obligations stemming from the CJEU's case-law on extradition requests from non-EU countries. As the support that Eurojust and EJN contact points provided to national authorities predominantly occurred during the consultation procedure, the part of the report that deals with that procedure is more extensive than the part on the extradition proceedings. The report also highlights the roles of Eurojust and the EJN in relation to such cases and concludes with the main findings of the analysis.

The report concludes that only in a very few cases did the CJEU's case-law regarding extraditing EU citizens to non-EU countries result in the requested Member State giving priority to a prosecution in the

⁽⁵²⁾ Judgment of the CJEU of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630.

⁽⁵³⁾ Judgment of the CJEU of 10 April 2018, *Pisciotti*, C-191/16, ECLI:EU:C:2018:222; judgment of the CJEU of 13 November 2018, *Raugevicius*, C-247/17, ECLI:EU:C:2018:898; judgment of the CJEU of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262 and judgment of the CJEU of 17 December 2020, *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*, C-398/19, ECLI:EU:C:2020:1032.

Member State of nationality. The mechanism seems particularly relevant in cases in which parallel criminal proceedings are ongoing in the Member State of nationality for the offence mentioned in the extradition request. It allows the Member State of nationality to become aware of the extradition proceedings and/or to take action to prevent its criminal proceedings from being affected by the execution of the extradition request.

Even though the CJEU further clarified its case-law after the joint report was published, many issues raised in the report still remain valid and highlight the important role that Eurojust can play in this field in support of the national authorities.

11. Conclusions and recommendations

This report describes the main issues identified in Eurojust's casework in the field of the EAW. 2 235 EAW cases were registered between 2017 and 2020, which is a significant increase in case numbers compared with the previous report, which covered 2014–2016. This increase may have multiple causes. First of all, the report confirms that many of the issues identified in the previous report have not been remedied, but rather persist. Second, new issues have arisen, particularly those following from CJEU case-law developments. Finally, it is possible that practitioners have addressed Eurojust more frequently as they realised that, in many circumstances, problems can be solved more easily with the assistance of Eurojust. Eurojust has played an important role in facilitating cooperation and ensuring coordination in bilateral and multilateral EAW cases. In many of these cases, issues were resolved and EAWs were executed. In other cases, lessons were learnt to address certain issues differently in the future, if possible.

This section summarises the main conclusions and formulates, where relevant, some recommendations. The report is complementary to the reports of the European Commission and the European Parliament and the conclusions of the Council (see Section 1.1). Many of the issues identified in their documents also appeared in Eurojust's casework, and many of their suggested recommendations are very valid. For instance, reference could be made to the suggestions by the European Parliament and the Council to promote further soft law tools (e.g. the Commission's [handbook on how to issue and execute a European Arrest Warrant](#) or Eurojust's [overview of case-law by the CJEU on the EAW](#)) and to invest more in training.

It is also noteworthy that some of the conclusions of this report, particularly those that touch upon core features of the principle of mutual recognition, are strikingly similar to those of other Eurojust reports on other mutual recognition instruments⁽⁵⁴⁾. Such issues might therefore require a more horizontal approach.

⁽⁵⁴⁾ See, for instance, the [report on Eurojust's casework in the field of the European Investigation Order](#) (2020), pp. 51–56, particularly the conclusions related to requests for additional information, restrictive interpretation of grounds for non-execution, compliance with time limits, direct contact, language issues, transmission and coordination.

- **Content of EAWs.** The execution of EAWs was often put on hold because of missing, unclear or inconsistent information about the content of the EAWs. Eurojust assisted in clarifying misunderstandings, replying to questions and providing additional information or documents. Requests for additional information were justified to clarify poorly drafted EAWs that were missing crucial information related to, for example, the (existence of a) national arrest warrant, the offences, the description of the circumstances, the sentence(s) or *in absentia* judgments. In a few cases, Eurojust observed requests for additional information that seemed to go beyond what could reasonably be considered justified under the mutual recognition regime. For instance, the legitimacy of requests for specific evidence available in the criminal file ⁽⁵⁵⁾ could be questioned and sometimes led to decisions not to execute the EAW. Fortunately, in recent years, such bad practices seem to have occurred less often following developments in national case-law.
- *National authorities need further guidance on how to fill in EAWs and how to provide correct, concise, complete and consistent information. Cases involving different offences, different sentences and/or different criminal provisions are particularly challenging. In absentia judgments, particularly concerning appeal proceedings, are challenging with the current EAW FD template. Moreover, (national) templates for some specific scenarios (e.g. return guarantees for nationals or residents) could be seen as a good practice.*
- **Impact of the CJEU's case-law.** National authorities often approached Eurojust with questions on issues addressed in CJEU judgments, involving, for instance, issues related to the validity of the EAW (e.g. the concept of issuing and/or executing judicial authorities and requirements of effective judicial protection), grounds for non-execution (particularly *in absentia* judgments, nationals or residents, *ne bis in idem*), fundamental rights issues (prison conditions, rule of law) and extradition of EU citizens to non-EU countries. Either authorities were unaware of certain CJEU judgments, or they were aware but struggling with how to apply them in practice or struggling with issues not yet (fully) settled in the CJEU's case-law.
- *Eurojust will provide frequent updates of Eurojust's overview of CJEU case-law on the EAW.*
 - *National authorities should not refrain from sending requests for preliminary rulings to the CJEU, as further clarifications of interpretation can improve the correct application of the EAW FD.*
 - *Eurojust will continue to update relevant compilations, if needed, and/or be ready to launch new ones, if needed, in view of further case-law developments.*
- **Limits of direct contact.** Direct contact is an excellent point of departure in judicial cooperation and it might work very well in many cases. However, this report confirms that, for various reasons, direct contact sometimes fails. In some cases, there was, from the very beginning, a complete lack of contact or reaction after an EAW was sent. In other cases, direct contact became problematic after repeated requests for additional information, when differences in legal systems led to confusion and misunderstandings, and/or when language barriers complicated basic communication. In most of these cases, involving Eurojust was the crucial step in breaking the deadlock. Eurojust brought clarification and a better understanding of the legal or practical

⁽⁵⁵⁾ See also the [Commission's report on the implementation of the EAW FD](#), p. 10.

concerns of the national authorities so that, jointly, workable and satisfying solutions could be agreed upon and the EAWs could be executed.

➤ *National authorities should not refrain from contacting Eurojust or the EJN, in accordance with their respective competences and depending on the specificities of the cases, when direct contact is not working.*

— **Good translations and good language skills.** A good translation of an EAW is key to avoiding misunderstandings and unnecessary delays. This might seem obvious and redundant, yet it is a crucial rule that, in practice, is often not complied with, which then becomes problematic. Incomprehensible Google translations seriously hampered the execution of numerous EAWs and caused considerable delays. All too often, either poorly translated EAWs were sent back to the issuing authority via Eurojust in order to request further clarification and/or a more accurate translation, or problems were resolved at the National Desks themselves in close cooperation with the national authorities. Moreover, for urgent EAWs there was often no time to wait for the official translation. The National Desks at Eurojust themselves then often prepared, within very tight deadlines, an English version of the original EAW so that the executing authority could at least start the preparatory work, and the translation into the requested language would follow soon.

➤ *Further investment in good translations and also in good language training (to facilitate direct contact) is crucial and is a key factor in improving the functioning of mutual recognition instruments in general.*

— **Requests for information.** When requests for information remained unanswered, direct contact failed and Eurojust was contacted. Eurojust assisted national authorities in relation to requests for information at different stages: requests for necessary additional information before a decision on the EAW was taken (e.g. questions on the content of an EAW, requests to provide a guarantee), requests for information on the state of play of the EAW proceedings and follow-up information after a decision on the EAW has been taken. Particularly significant was the high number of cases in which – despite the clear obligation under Article 26 of the EAW FD – executing authorities often failed to provide information on how much time the requested person was in detention in the executing Member State on the basis of the EAW.

➤ *As requests for additional information are one of the main reasons for non-compliance with time limits, it would be good to provide national authorities with further support on how to apply Article 15 of the EAW FD⁽⁵⁶⁾. In relation to Article 26 of the EAW FD, national authorities are kindly invited to comply with the obligations included in this provision.*

— **Compliance with time limits.** Time limits constitute one of the major features of mutual recognition instruments, including the EAW FD. Article 17(7) of the EAW FD was meant to keep a good overview of cases in which 'in exceptional circumstances' time limits could not be met and to identify underlying reasons for recurrent delays. Unfortunately, no accurate information is currently available on the number of cases for which time limits are not met. The template

⁽⁵⁶⁾ See also the [Council conclusions on the EAW and extradition procedures – current challenges and the way forward](#), p. 8, marginal number 20, which focuses on requests for additional information regarding detention conditions.

that Eurojust created in 2018 for this purpose is hardly used and only a few countries notify Eurojust when time limits cannot be observed. Yet Eurojust's casework reveals that requests for additional information led to considerable delays in some cases. Furthermore, appeal proceedings in certain Member States seemed to allow cases to last for many years before a final decision was taken ^[57].

➤ *National authorities are kindly invited to comply with the obligations in Article 17(7) of the EAW FD.*

— **Grounds for non-execution and fundamental rights.** The report confirms that there is still margin to further improve the interpretation and application of certain grounds for non-execution and to ensure the assessment of fundamental rights grounds in line with CJEU and ECtHR case-law.

As regards fundamental rights issues, authorities sometimes provided too little information, or only stereotyped information, while executing authorities sometimes requested too much information or refused to execute an EAW despite not having sufficient grounds to do so. Coordination meetings have proved useful in specific cases, but more guidance might be needed. As regards grounds for non-execution, the following issues can be singled out.

- General issue: optional versus mandatory grounds for refusal and lack of flexibility in applying 'optional' grounds, which were implemented in some national law as 'mandatory' grounds and applied rigidly.
- *Ne bis in idem*: despite clarifications given in the CJEU's case-law, some questions were raised in Eurojust's casework in relation to a public prosecutor's decision to dismiss a case and the enforcement condition.
- Territoriality grounds: sometimes a too rigid obligation under national law created an unnecessary conflict of jurisdiction and created a 'forced' transfer of proceedings to a Member State that was not necessarily 'best placed' to prosecute, but which was the only option to avoid impunity.
- 'Ongoing' proceedings in the executing Member State for the same acts: sometimes a too rigid interpretation of national law, whereby criminal proceedings were not yet ongoing in the executing Member State, but were triggered by the receipt of the EAW, created unnecessary conflicts of jurisdiction.
- Dual criminality: Member States took different views on how to assess the dual criminality check and sometimes applied this ground incorrectly by applying it in relation to list offences.
- *In absentia*: different perspectives depended on the different national legal orders involved; they focused on national interpretation of the concept of the EAW FD rather than EU interpretation. Sometimes there was a lack of knowledge of relevant CJEU and ECtHR case-law.
- Nationals or residents: several problems were raised by the interrelationship between the EAW FD and FD 909, for example the meaning of the concept *mutatis*

[57] See also the Commission's report on the implementation of the EAW FD, p. 21, which states that 'Less than half of the Member States transposed this provision completely' and also indicates that 'problems meeting the time limits ... seem to stem also from lengthy appeal proceedings'.

mutandis, questions on the need to send an FD 909 certificate or not and the obligation to 'actually enforce the sentence'.

- *Practitioners should receive further guidance on how to deal with questions on detention conditions and/or other fundamental rights. Further guidance on the case-law of both the CJEU and the ECtHR is relevant in this regard.*
- *Practitioners should receive further guidance on how to apply certain grounds for non-execution.*
- *In cases for which parallel proceedings are ongoing in two Member States, Eurojust can provide support in coordinating and helping to decide which jurisdiction is best placed to prosecute.*
- *When the execution of EAWs cannot take place on fundamental rights grounds, further reflection at EU level is needed on how to avoid impunity in such cases, not only in relation to EAWs for the purpose of prosecution⁽⁵⁸⁾ but also, and more importantly, in relation to EAWs for the purpose of the execution of custodial sentences.*
- *In relation to the application of the dual criminality check, it should be underlined again that this test should not be applied in relation to 'list offences' and that the question of whether an offence falls within this list is determined by the issuing Member State's legal framework.*
- *In complex cases, or cases with parallel proceedings or cases in which requests could not be solved through direct contact within a reasonable time, Eurojust can provide assistance with requests for additional information, to avoid multiple requests being sent back and forth. Eurojust can support authorities in obtaining and providing quickly all relevant information to make the correct assessment.*

— **Relation to other instruments.** Eurojust's casework revealed difficulties, but also opportunities, in the use of EAWs vis-à-vis EIOs and in the relationship between the EAW FD and FD 909. The report also highlights challenges in the coordinated use of different instruments and/or the choice of alternatives if the EAW is not an option.

- The EAW FD and the EIO directive have distinct purposes and are not alternative instruments. That being said, there have been cases when it was not always clear which instrument to use (e.g. temporary surrender) or whether an EIO was necessary in addition to an EAW (e.g. questions surrounding the scope and national implementation of Article 29 of the EAW FD). In some cases, when a surrender was impossible, EIOs or other tools of judicial cooperation were helpful to move forward with the investigation in the issuing Member State (e.g. a hearing by videoconference during the trial phase).
- The EAW FD and FD 909 have raised many questions on the use of certain provisions of FD 909 in the context of Article 4(6) of the EAW FD. In addition, both instruments sometimes were used in parallel, leading to confusion and duplication of procedures.
- *There is a need for further clarification of the interrelationship between the EAW FD and FD 909, for example the obligation (or not) to send FD 909 certificates in the context of Article 4(6) of the*

⁽⁵⁸⁾ See also Council conclusions 'The European Arrest Warrant and extradition procedures – current challenges and the way forward', p. 12-14, marginal numbers 32–38.

EAW FD, or the margin of discretion of the executing authority in relation to the execution of the sentence in the light of the obligation of 'actually enforcing the sentence'.

- *Eurojust can assist national authorities with the choice of the most appropriate instrument, coordinating the use of different instruments and/or coordination among Member States.*

— **Competing requests for surrender and extradition.** Although the EAW FD sets out an explicit role for Eurojust, few Member States have implemented this possibility in their national laws and relatively few cases are brought to Eurojust. Yet Eurojust's involvement in such cases can bring many benefits. Eurojust can provide advice within short time frames and obtain all relevant information from the issuing authorities so that the executing authority can take a well-informed decision. Moreover, Eurojust will not limit its advice to the decision on which EAW should be executed (first), but will also address, if requested, the required follow-up actions in relation to the other EAW(s) or extradition request(s), such as a subsequent surrender, a transfer of sentenced persons or a transfer of proceedings, in close consultation with all involved authorities.

- *Eurojust would like to invite national authorities to bring more cases on competing requests for surrender and/or extradition to Eurojust to ensure that a well-informed decision can be taken and to ensure coordination of any required follow-up measures, if needed.*

— **Postponement of the actual surrender.** The report indicates that, even in cases in which a decision is taken to execute the EAW, many issues can arise before the actual surrender takes place:

- persons who are not held in pre-trial detention prior to their surrender not showing up for the surrender;
 - the need to reflect on alternative measures in case of postponements of the surrender, for example transfer of proceedings, temporary surrender, LoR/EIO;
 - the need to agree on guarantees of specific medical treatment during travel / in issuing Member State and/or additional independent medical checks;
 - last-minute problems with transits and the need to agree on alternatives;
 - issues arising due to insufficient coordination, for instance, risk of a person being released in the executing Member State after an execution of a custodial sentence while prosecution is still ongoing in the issuing Member State.
- *Close cooperation, communication and coordination are extremely important in scenarios in which the actual surrender has to be postponed.*

— **Speciality rule.** The application of the speciality rule has been rather cumbersome in some cases:

- national authorities sometimes struggled with its application – when it should be invoked and when it should not;
- the role of the requested person in the consent proceedings in the executing Member State sometimes created considerable delays, with a negative impact on the criminal proceedings in the issuing Member State;
- problems sometimes arose when it was not clear whether the issuing Member State would modify a cumulative sentence in the event of a partial execution of an EAW.

- *There is a need for further clarification of the scope of the principle of speciality and a need for measures to ensure a correct and more efficient application of the speciality rule in order to avoid considerable delays in the criminal proceedings in the issuing Member State.*



Eurojust, Johan de Wittlaan 9, 2517 JR The Hague, The Netherlands
www.eurojust.europa.eu • info@eurojust.europa.eu • +31 70 412 5000
Twitter & LinkedIn: @Eurojust

PDF: Catalogue number: QP-03-21-273-EN-N • ISBN: 978-92-9490-610-6 • DOI: 10.2812/650674