



European Arrest Warrant

Fundamental rights and constitutional guarantees

While the Framework Decision on the European Arrest Warrant (AWFD) has brought efficiency to surrender procedures, it has also raised concerns about the fundamental rights of individuals.

One particular concern is the lack of a specific right to refuse a warrant's execution where there is a risk of a human rights' breach.

The European Convention on Human Rights (ECHR) provides for guarantees which in certain cases can apply to surrender procedures.

Moreover, fundamental rights are enshrined in national constitutions and therefore some constitutional courts have been compelled to judge on the constitutionality of EAW implementing legislation.

The European Parliament and some stakeholders believe that setting up a detailed catalogue of procedural safeguards at EU level would counterbalance problems resulting from the Decision not being specific on those issues.



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Context

The European arrest warrant (EAW) – introduced by the [Council Framework Decision of 13 June 2002](#) – replaced extradition in relations between EU Member States (MS). The idea was to simplify and depoliticise, leaving the process entirely in the hands of judicial institutions. The statistical data provided in the [Commission's evaluation report](#) of 2005 appears to confirm the new system's efficiency.

EAW was the first instrument adopted in order to implement the principle of **mutual recognition** of judicial decisions, envisaged by the [Tampere European Council](#), and considered to be the 'cornerstone' of judicial co-operation in both civil and criminal matters.

There are considerable differences between national criminal laws throughout the EU. Despite this fact, the MS are supposed to have trust in judicial decisions made by courts of other MS. This trust is not unconditional though, which is illustrated

by decisions to refuse to execute warrants based on grounds other than those listed in AWF. Various problems have emerged in that respect in the implementation process.¹

The issue of fundamental rights protection in the context of EAW appears to be particularly problematic. This is because by making the cross-border surrender of an individual easier and quicker, AWF is likely to create risks in terms of their legal protection. The question arises therefore whether executing EAWs may not lead to conflicts with fundamental rights guarantees enshrined in international conventions, EU law and national constitutions.

Human rights issues

Risk of human rights abuse is not a ground for refusal

The Framework Decision does not explicitly list human rights violations among mandatory or discretionary grounds for refusal of executing an arrest warrant (Articles 3 and 4). Nevertheless it is argued that the Decision should be interpreted as allowing refusal on such grounds as the above catalogue is non-exhaustive.² This view is supported by explicit general references to fundamental rights in the Decision:

- Recitals 10 and 12 of the Preamble, which make reference to principles and mechanisms provided for in Articles 6 and 7 TEU, as well as in the [Charter of Fundamental Rights](#) of the EU.
- Recital 13, which in turn forbids removing, expelling or extraditing individuals in case of a serious risk of them being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
- Article 1(3) stipulating that the Decision does not modify the obligation to respect fundamental rights and the fundamental

legal principles as enshrined in Article 6 TEU.

The Article 6 TEU imposes on the MS respect for fundamental rights guaranteed by the [ECHR](#) and resulting from constitutional traditions common to the MS. It would thus follow that the MS are bound by the provisions of the Decision to fulfil their treaty obligations and – by further reference – those enshrined in international human rights law and, to some extent, respective constitutional laws.³

Nevertheless, it is also argued that the absence of a specific human rights ground for refusal gives way to doubt or at least suggests that MS have not considered the possibility of grave human rights abuses.⁴

This absence has led some MS to shape their implementing legislation so that it provides for refusal on such grounds. Others assumed that human rights are adequately protected by their constitutions and adherence to ECHR.⁵ The latter assumption is, in fact, the basis of the principle of mutual recognition. It is, however, open to question whether MS really meet the Convention's standards of protection, since many, if not all of them, have had cases in the European Court of Human Rights (ECtHR).⁶

The applicability of ECHR provisions

While the ECHR does not prohibit surrendering individuals to another state, it requires that the executing Member State protect the requested person from possible breaches of their human rights. According to ECtHR, a proper balance should be found between "the defence of the institutions of democracy in the common interest and the protection of individual rights" (ECtHR, [Fox, Campbell and Hartley v. UK](#)).⁷

The following ECHR provisions could potentially be invoked with respect to surrender under EAW:

- **Article 3:** "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Serious breaches are rare in the MS, but cannot be excluded (e.g. ill-treatment in prisons or by law-enforcement officers);⁸
- **Article 5:** the right to liberty and security of person;
- **Article 6:** the right to a fair trial. As the extradition hearing (and supposedly EAW proceedings as well) is not about "determination of criminal charges" (Article 6(1)) not all of the minimum rights listed in Article 6(3) apply to it (ECtHR, [Mamatkulov and Abdurasulovic v Turkey](#)). In fact extradition is considered by the ECtHR as an administrative and not a criminal procedure.⁹ However, "the Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country" (ECtHR, [Soering v UK](#));
- **Article 7:** no crime and no punishment without law. AWFD considerably limited the extradition law principle of double criminality. According to this principle extradition is not possible for conduct that would not be criminal in both the requesting and the requested country. This rule no longer applies to 32 types of offence listed in Article 2 AWFD. This raises concern as to the principle of certainty and retrospective application of law (an individual may be surrendered for conduct that was not illegal in the past in the executing state);¹⁰
- **Article 8:** the right to family life. The ECtHR has, however, only exceptionally recognised such breaches in cases of individuals imprisoned far from their families.¹¹

Implementation and national constitutions

Surrender of the state's own nationals

Surrendering the state's own nationals is at the same time one of the major innovations and one of the most controversial elements of EAW. What was exceptional under extradition law became a rule with very few exceptions under the new system. This rule has not been accepted without reservations. Quite the contrary: as many constitutions expressly prohibit the extradition of nationals, some constitutional courts have had to give rulings touching upon the relationship between EU law and national basic laws. The controversy was exacerbated by the fact that the instrument to be implemented was a third pillar framework decision.¹²

Constitutional courts' rulings

Three courts declared the EAW implementing laws unconstitutional. They did not, however, question the validity of the Framework Decision.

Firstly, in April 2005, the Polish Constitutional Tribunal held that the surrender of Polish citizens was incompatible with the Polish Constitution. The Tribunal emphasised that it retained the competence to examine the conformity of implementing legislation with the Constitution. It also stressed that EU Citizenship does not diminish constitutional guarantees with respect to fundamental rights. Nevertheless the Tribunal recognised its obligation to interpret national legislation in conformity with EU law, within the limits of those constitutional guarantees.

Then, in July 2005, the German Constitutional Federal Court declared the German implementing law null and void. The basis was the breach of fundamental rights and the prohibition on surrendering German citizens, enshrined in the German

Basic Law. More specifically, the Court observed that:

- The EAW procedure does not provide for recourse to the court (no appeal from the decision granting surrender).
- Handing over citizens against their will to a legal system they do not know is contrary to the principle of legality.

The Court also held that the Framework Decision allowed for refusal to execute a warrant by the national court if the offence was committed on the requested Member State's territory.

The Court's decision had an immediate follow-up: Spain and Hungary refused to execute warrants issued by Germany, invoking the principle of reciprocity.

In November 2005 the Supreme Court of the Republic of Cyprus declared that there was no appropriate legal basis in the Constitution for the arrest of a Cypriot national for the purpose of surrendering him or her on the basis of EAW. The Constitution lists the situations where a person can be arrested or detained and the EAW was not on the list, as it was introduced later than the relevant constitutional provision. Moreover – making reference to the CJEU [Pupino case](#) – the Court held that framework decisions, just like directives, had no direct effect.¹³

The three court decisions were followed by relevant amendments to the constitutions and/or implementing laws.

EU law and jurisprudence

Mutual recognition v. procedural safeguards

The Treaty of Maastricht (1992) provisions on judicial cooperation in criminal matters aimed at establishing simplified and efficient procedures based on mutual trust. Then the [Tampere European Council](#)

endorsed the principle of mutual recognition, later expressed in a series of legal acts.¹⁴ At the time, the MS seemed to agree that instruments advancing mutual recognition should be accompanied by approximation measures, reducing differences between national laws.¹⁵

The 11th September terrorist attacks marked a shift towards prioritising those instruments which simplify procedures and improve their effectiveness. The developments in this vein have been very swift ever since. It is argued however, that this has been to the detriment of measures protecting the rights of individuals facing criminal proceedings.¹⁶

The Commission addressed this discrepancy through its [Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings](#) of 2003. The text highlighted the inseparability of fundamental rights from mutual recognition. Its publication was followed by a series of proposals by the Commission, including the [proposal for a framework decision](#) of 2004. The act has not been adopted however by the Council, mainly due to the alleged lack of EU competence in the area concerned. The proposal sets up a catalogue of procedural rights, which is much more extensive than that of AWFD.¹⁷

The European Parliament's position

The Parliament has consistently supported the Commission's proposal. In its [resolution on minimum standards for procedural safeguards](#) of 2003, it judged that the adherence to the common foundation of respect for human rights and fundamental freedoms is the basis for the trust that the MS have in each others' criminal justice systems. Nevertheless, the EP believed that drawing up a set of common procedural safeguards was essential for increasing this trust and thus facilitating the application of the mutual recognition principle.

While supporting this approximation tool, the Parliament opposed the introduction of additional refusal grounds – including those related to human rights – by the MS. In its 2006 [resolution on the evaluation of the EAW](#), it observed that the Council should ensure that the implementing legislation does not require a systematic check by the court executing an EAW of the warrant's compliance with fundamental rights. As the system is based on mutual recognition, such a check is carried out by the issuing Member State.

As to the relationship between AWFD and national constitutions, the resolution stressed that the problems which emerged in some MS undermine mutual trust and threaten the implementation of the EAW by other MS.

The EP has again urged the Council to adopt the framework decision on procedural rights, taking account of Parliament's amendments to the original EC proposal.

The CJEU ruling on the validity of AWFD

The Court of Justice of the European Union (CJEU) was called on to judge the validity of the AWFD¹⁸ following a request for preliminary ruling by a Belgian court ([Advocaten voor de Wereld](#) case). The national court asked whether:

- The relevant treaty provisions allowed for regulating EAW by a framework decision and not by a convention (in a field which used to be governed by extradition conventions).
- Setting aside double criminality for 32 offences listed in Article 2(2) AWFD was compatible with the principles of legality and the principle of equality and non-discrimination.

CJEU gave affirmative answers to both questions, ruling that:

- The Council is free to choose the instru-

ments by which it enhances closer cooperation between judicial authorities of the MS.

- The seriousness of the 32 offences justifies dispensing with the double criminality check. The AWFD's objective is not to harmonise substantive criminal laws of the MS. Therefore the burden of ensuring respect for fundamental rights (including the principles invoked by the Belgian court) lies with the MS issuing the warrant.

On those grounds, the CJEU held that the Framework Decision was valid.

Stakeholders' views

The adoption of AWFD has raised particular interest among human rights NGOs. While they welcomed its adoption, their analysis suggests that the Decision leaves too much space for doubt as to individual rights' protection.

Prior to its adoption [Statewatch](#) published a comprehensive [report](#) in which it identified numerous possible implications for civil liberties of the new tool.

[Justice](#) – a UK human rights organisation – has pointed to the need for particular vigilance with respect to:

- The right to a fair trial;
- The limitation of the principle of double criminality and the lack of clarity in the list of offences not covered by this principle;
- Uncertainty created by a Member State's possible opt-out from the so-called speciality rule, which prohibits prosecution after the surrender for any offence other than the one which led to the surrender.¹⁹

The independent [Standing Committee of Experts](#) in international immigration,

refugee and criminal law has [emphasised](#) in turn the growing importance of an instrument harmonising procedural rights.

Main references

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Endnotes

- ¹ [The Commission's evaluation report](#), COM(2005) 63 final, 23 February 2005, p.2.
- ² The European Arrest Warrant and the ECHR / Garlick, P. in Handbook on the European Arrest Warrant *Op. cit.* p. 182.
- ³ As long as those constitutional guarantees are a part of "constitutional traditions common to the Member States" (Article 6(3) TEU). The protection of fundamental rights within the EU has been strengthened with the Treaty of Lisbon (the new Article 6(1) and (2) TEU). It recognised that the EU Charter has the same legal value as the Treaties and provided for the EU's accession to ECHR. Although there is general agreement that this will strengthen human rights protection in the EU, the exact impact of these provisions is still unknown.
- ⁴ Alegre, S. Leaf, M. *Op. cit.* p. 203.
- ⁵ *Ibid.*, p. 203.
- ⁶ *Ibid.* pp. 201-204.
- ⁷ Extradition and Human Rights in Transnational Fugitive Offenders in International Law / Gilbert G. p. 149.
- ⁸ Alegre, S. Leaf, M. *Op. cit.* p. 205.
- ⁹ [Extradition and fundamental rights : the perspective of the European Court of Human Rights](#) / Langford, P. International journal of human rights 2009, v. 13, n. 4, p. 521.
- ¹⁰ Alegre, S. Leaf, M. *Op. cit.* p. 207.
- ¹¹ Gilbert G. *Op. cit.* p. 171.
- ¹² The supremacy of the EU law under the former Third Pillar is controversial. It is also argued that the national interests are not adequately protected in the context of the former Third Pillar due to "democratic deficit and imperfect judicial control" See: The European Arrest Warrant : Between Trust, Democracy and the Rule of Law / van Sliedregt, E. European constitutional law review : - EuConst - 2005 - PERI - T.M.C. Asser Press : 2007, v. 3, n. 2, p. 246.
- ¹³ DG IPOL Study, *Op. cit.* 1999, p. 18.
- ¹⁴ Konstadinides, T. *Op. cit.*, p. 181. The series was open by AWFDF and the [Framework Decision on the execution in the European Union of orders freezing property or evidence](#).
- ¹⁵ The European arrest warrant and the sovereign state: a marriage of convenience? / Fichera, M. European law journal: - review of European law in context - 1995 - PERI - Blackwell Publishers : 2009, v. 15, n. 1, p. 72.
- ¹⁶ *Ibid.* p. 72; Alegre, S. Leaf, M. *Op. cit.* p. 213.
- ¹⁷ AWFDF provides among others the right to be informed of the content of the EAW (Article 11) and the right to be heard (Article 14).
- ¹⁸ It is important to note, however, that the jurisdiction of the CJEU in the area of judicial cooperation in criminal matters is not accepted by all MS.
- ¹⁹ [A Justice Briefing](#), January 2002.