European Implementation Assessment 2004-2020 on the European Arrest Warrant

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

ABSTRACT

This article provides a summary of an assessment and conclusions on the implementation of the Framework Decision on the European Arrest Warrant (FD EAW) recently published by the European Parliamentary Research Service. It also contains recommendations on how to address the shortcomings identified. It is intended to contribute to the European Parliament's discussions on this topic, improving understanding of the subject, and ultimately feeding into an implementation report by the European Parliament. The study concluded that the FD EAW has simplified and sped up surrender procedures, including for some high-profile cases of serious crime and terrorism. A number of outstanding challenges relate back to core debates concerning judicial independence, the nature of mutual recognition and its relationship with international and EU law and values, constitutional principles and additional harmonisation measures. Furthermore, there are gaps in effectiveness, efficiency and coherence with other measures and the application of digital tools. The study recommends targeted infringement proceedings, support to judicial authorities and hearing suspects via video-link where appropriate to avoid surrender whilst ensuring the effective exercise of defence rights, as well as a range of measures aimed at achieving humane treatment of prisoners. In the medium term, for reasons of legitimacy, legal certainty and coherence, a review of the FD EAW as part of an EU judicial cooperation code in criminal matters is recommended.

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CITATION SUGGESTION

W. Van Ballegooij, "European Implementation Assessment 2004-2020 on the European Arrest Warrant", 2020, Vol. 15(2), eucrim, pp149–154. DOI: https://doi.org/10.30709/eucrim-2020-013

Published in
2020, Vol. 15(2) eucrim pp 149 – 154
ISSN: 1862-6947
https://eucrim.eu

I. Introduction

The Framework Decision on the European Arrest Warrant (FD EAW)[1] is the most well-known tool for judicial cooperation within the EU. The product of rapid negotiations after the 9/11 terrorist attacks on New York and Washington, it has been in force since 2004. The European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) is currently drawing up an own-initiative implementation report on the FD EAW (2019/2207(INI), rapporteur: MEP *Javier Zarzalejos*, EPP, Spain). A European Implementation Assessment[2] authored by me for the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, Directorate-General for Parliamentary Research Services (EPRS), supports the implementation report by providing an assessment and conclusions on the implementation of the Framework Decision. It also contains recommendations on how to address the shortcomings identified, as per the request of the rapporteur.

The study concludes that the FD EAW has simplified and sped up handover procedures, including for some high-profile cases of serious crime and terrorism. In 2018, the average time between the arrest and surrender of people who did not consent to surrender was 45 days, a remarkable reduction compared to the lengthy pre-existing extradition regime.[3] A number of challenges in the issuance and execution of EAWs remain. Those challenges related back to core debates concerning judicial independence, the nature of mutual recognition[4] and its relationship with international and EU law and values, constitutional principles[5] and additional harmonisation measures.[6] The second section of this article will explore those challenges in more detail. Furthermore, there are gaps in effectiveness, efficiency and coherence with other measures and the application of digital tools. Those gaps will be further discussed in the third section. Finally, as will be detailed further in the fourth section, the study recommends targeted infringement proceedings, support to judicial authorities and hearing suspects via video-link where appropriate to avoid surrender whilst ensuring the effective exercise of defence rights, as well as a range of measures aimed at achieving human treatment of prisoners. In the medium term, it recommends a review of the FD EAW as part of an EU judicial cooperation code in criminal matters for reasons of legitimacy, legal certainty and coherence.

II. Challenges in the Issuance and Execution of the European Arrest Warrant

Chapter 2 of the study identifies challenges in the issuance and execution of EAWs concerning the following matters:

- The definition of issuing judicial authorities and their independence from government, which excludes police officers[7] and organs of the executive,[8] but can include public prosecutors in accordance with certain conditions;[9]
- The proportionality of a number of EAWs issued for "minor crimes" and before the case was "trial ready", also in view of other possible judicial cooperation measures, where the European Parliament's call for legislative reform[10] has been answered through guidelines in a Commission Handbook;[11]
- The situation pending the hearing by the executing judicial authority, such as possibilities offered for hearing by the issuing judicial authorities via video-link prior to surrender[12] and the time limits to be respected;[13]

- The verification of double criminality by executing judicial authorities,[14] leading to a lively academic debate on the compatibility of this requirement with the principle of mutual recognition[15] and potential further questions to be raised with the CJEU;[16] and the lack of approximation of certain offences for which verification is no longer allowed;[17]
- EAWs for nationals and residents of the executing Member State[18] and their interplay with the framework decision on the transfer of prisoners[19] with the dual aim of social rehabilitation and the prevention of impunity;
- EAWs issued in cases concerning final judgments for the same acts, where the sentence has been served, or is currently being served, or can no longer be executed (*ne bis in idem*)[20] and the larger issue of the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings;[21]
- EAWs based on decisions following proceedings at which the person concerned was not present (*in absentia*)[22] raising practical problems caused by non-implementation, differences concerning implementation, or incorrect implementation of the framework decision on in absentia decisions;[23]
- The role of the executing judicial authority in safeguarding the fundamental rights of the requested person as developed in the CJEU's case law, both regarding EAWs where there are concerns relating to poor detention conditions[24] and broader concerns relating to the right to a fair trial, including an independent and impartial tribunal;[25] and
- The relationship with third states generally based on CJEU case law,[26] in accordance with treaties between the EU and the third states concerned (Norway, Iceland)[27] and those that might result from negotiations with the UK.[28]

Finally, requested persons have also faced difficulties in effectively exercising their procedural rights in the issuing and executing Member State based on the FD EAW itself[29] and specific provisions relating to the EAW and various directives approximating the rights of suspected and accused persons within the EU.[30]

III. Implementation Gaps

Chapter 3 of the study draws conclusions regarding the implementation of the FD EAW. This has been done by applying the following evaluation criteria as set out in the European Commission's better regulation toolbox:[31]

- Effectiveness;
- Efficiency;
- Coherence;
- Relevance;
- EU added value;
- Compliance with EU values including fundamental rights.

On this basis, semi-structured interviews were held with a wide range of stakeholders. In terms of *effectiveness*, the study concludes, as mentioned, that the FD EAW has achieved the objective of speeding up and simplifying surrender procedures. However, in practice, the executive is still called in to assist judicial authorities and practical cooperation based on the EAW form does not always run smoothly. Court of Justice

(CJEU) case law, through offering more clarity on a number of aspects left open by the generic drafting of the FD EAW, has also led to further practical questions. Finally, the rights of the defence may have been compromised due to the shortening of appeal possibilities.[32]

The objective of limiting the grounds for refusal based on the verification of double criminality seems to have been achieved overall. However, there are remaining uncertainties as regards the scope of the test to be applied in situations where such verification is still allowed. The limitation of the nationality exception has also been successful. Still, in cases relating to nationals and residents of the executing Member State, it is found that issuing judicial authorities do not sufficiently focus on the perspectives of social rehabilitation, before issuing an EAW. The decision of certain Member States to no longer surrender their nationals to the UK during the transition period[33] demonstrates the enduring sensitivities. CJEU case law has reinforced control by (independent) judicial authorities in the issuing and executing Member State. At the same time, there are concerns regarding the degree in which this case law results in effective judicial protection of requested persons.[34]

EU action to monitor and uphold EU values has not led to a swift and effective resolution of threats to the rule of law in certain Member States. CJEU case law, which requires the executing judicial authorities to assess potential violations of fair trial rights in the issuing Member State on a case-by-case basis, has led to different outcomes regarding EAWs issued by the same Member State,[35] also revealing a different appreciation of the relationship between (constitutional) values and mutual recognition.[36] Furthermore, CJEU case law puts the spotlight on the need to provide national courts with proper human and financial resources. They also need access to (centralised) knowledge on the criminal justice systems (including EAW decisions) and safeguards for compliance with EU values in the other Member States.

Detention conditions may be easier to assess than compliance with EU values more generally, especially if the resources of the Fundamental Rights Agency (FRA, criminal detention database[37]) and Eurojust[38] and other relevant information from the ground are relied upon in the process. Nevertheless, there is no mechanism in place to ensure a proper follow-up to assurances provided by issuing judicial authorities after surrender.[39] Much is to be gained through further intensifying cooperation and funding to international prison monitoring bodies and making sure their reports are properly followed up by EU Member States. Furthermore, a lot is expected of EU funding to modernise detention facilities in the Member States and to support them in addressing the problem of deficient detention conditions. However, this should go hand-in-hand with domestic criminal justice reforms.

EU legislation in the area of detention conditions could have added value.[40] However, the impact would depend on the scope of such legislation (only addressing procedural requirements in terms of reasoning for pre-trial detention and regular reviews, or also material detention conditions), the level of harmonisation chosen[41] and its ultimate implementation.

In terms of *efficiency*, it is reported that the majority of Member States have put mechanisms in place in their domestic systems for ensuring that EAWs are not issued for minor offences. This has resulted in the impression that there is a decrease of EAWs issued for "minor crimes". At the same time, there are still some cases where a suspect appears to be wanted for questioning, rather than prosecution. Here, another cooperation mechanism (the European Investigation Order, EIO)[42] should be used. The option provided by the FD EAW for the issuing judicial authorities to hear the requested person by video-link could also be further stimulated. Another important issue is that the requested person has access to a lawyer in the issuing Member State.[43] In some cases (where surrender would be disproportionate), this lawyer could encourage the withdrawal of the EAW. However, certain Member States still do not provide and/or facilitate such access.[44] Furthermore, the inability of a lawyer to access information on the case in the issuing state[45] can make provision of effective assistance impossible.

As regards *coherence,* the study points out that the EAW should be seen as a tool for surrender to be used within the criminal proceedings of the Member States as a subsidiary measure to other, less intrusive options, in the spirit of a common EU criminal justice area. However, judicial authorities see it too often as a tool to obtain the person for the benefit of *their* criminal proceedings, or to obtain execution of *their* sentence. In part, this is due to inconsistencies between various EU measures. Other EU measures either have different objectives (social rehabilitation versus free movement of judicial decisions for instance), intervene at a different point (a supervision measure[46] should be considered before issuing an EAW) or do not contain mandatory language in their operational provisions regarding the need to consider them as an alternative to issuing an EAW (this is e.g. the case for the EIO). Finally, a number of Member States have so far not made sufficient efforts to transpose and implement EU procedural rights directives on time and correctly.[47] In the absence of the Commission launching infringement proceedings, it is to be feared that practitioners will only see EU legislation in this area as guidance.

In terms of *relevance*, it must be noted that the FD EAW was adopted in 2002. This was prior to the accession of 13 new Member States and the recent departure of the UK. Since 2002, the European Parliament has achieved and exercised equal legislative powers with the Council as regards the field at stake. As long as the FD EAW is not adapted to the Lisbon Treaty framework, it lacks the democratic legitimacy provided by the involvement of the European Parliament based on the ordinary legislative procedure. In terms of the serious crimes addressed, terrorism continues to constitute a major threat to security in EU Member States as identified in Europol reports.[48] At the same time, globalisation and digitalisation have led to forms of cyber criminality that one could have not imagined in 2002.[49] The list of "serious crimes" referred to in Art. 2(2) FD EAW should reflect this reality.

Technological advancement since the adoption of the FD EAW could also seized upon to improve the efficiency and *fundamental rights compliance of the EAW* procedure. In this regard, cooperation between judicial authorities can be improved through the use of modern techniques. The Covid-19 crisis has forced Member States to enhance the use of modern technologies in the criminal justice area. The aforementioned option of hearing a requested person by video-link should therefore be more accessible. At the same time, the Covid-19 crisis has highlighted the need to ensure the effective exercise of defence rights, notably access to a lawyer and their guaranteed physical presence (with appropriate safety measures) during questioning and trial.

The European Commission's indications for assessing the added value of EU criminal law[50] do not offer sufficient guidance for assessing the *added value of the FD EAW*. However, the FD EAW is clearly a founding stone for the establishment of an area of freedom, security and justice. Its level of cooperation could not have been achieved without having this objective in mind. This may be illustrated by the relationship with non-EU Schengen States and the negotiations with the UK after Brexit, in which traditional grounds for refusal based on national sovereignty return.[51]

IV. Recommendations to Overcome Shortcomings of the EAW

Finally, Chapter 4 of the study offers a number of recommendations on how to overcome the shortcomings identified. The effective implementation of the FD EAW could be further improved. In this regard, the initiation of infringement proceedings against those Member States that have incorrectly or deficiently transposed the FD EAW and the related provisions of the procedural rights directives is recommended. Furthermore, the assistance and coordination of Eurojust to the judicial authorities in the Member States could be further promoted and funded through the EU budget. The same holds true for training and exchanges between judi-

cial authorities. The Commission (in cooperation with Eurojust, the European judicial (training) network and the FRA) could also develop and regularly update a "handbook on judicial cooperation in criminal matters within the EU". Finally, judicial authorities would benefit from a centralised database containing the national jurisprudence on the EAW (as is the case in other areas of EU law).

Compliance with EU values and fundamental rights could be enhanced by systematically involving judicial authorities in the development of Commission, European Parliament and Council mechanisms monitoring compliance with EU values (Art. 2 TEU) in the Member States. More generally, Member States could be reminded of the need to comply with international obligations by properly executing European Court of Human Rights judgments and Council of Europe recommendations, notably related to prison conditions.[52] In this regard, all EU Member States could be encouraged to ratify the relevant international conventions.[53] At the same time, cooperation within the area of freedom, security and justice based on the principle of mutual recognition requires a specific level of fundamental rights protection for Member States to comply with.[54] The FRA could be requested to conduct a comparative study on the follow-up of assurances given by issuing judicial authorities on detention conditions in their Member States, in the context of EAW procedures. EU funding to modernise detention facilities in the Member States could be further exploited.[55] Finally, as discussed, the Commission could propose EU legislation in the area of detention conditions.

In terms of efficiency, beyond further stimulating the use of alternatives to an EAW, the proportionality test to be conducted by judicial authorities could be revised and further clarified in the light of CJEU case law[56] and comparable provisions in the EIO.[57] The Commission could be called upon to take enforcement action against those Member States that have not (properly) implemented the relevant provisions of the Access to a Lawyer Directive. Such enforcement action should also be taken against Member States that do not grant lawyers access to the case file prior to the surrender, as without such access this lawyer (in the issuing Member State) would not be able to effectively assist the lawyer in the executing Member State.

To enhance coherence, the Commission could adopt a communication discussing the list of the 32 "serious crimes" referred to in Art. 2(2) FD EAW, relevant EU harmonisation measures and their national transposition. This communication could also assess the need for adopting or revising the definitions and sanctions of these offences at EU level to ensure mutual trust. Where deemed appropriate, the Commission should suggest updates to the list. As discussed, in terms of relevance, technological advancement could be used to improve the efficiency and fundamental rights compliance of the EAW procedure.

In the medium term, for reasons of democratic legitimacy, legal certainty and coherence with other judicial cooperation and procedural rights measures, a 'Lisbonisation" of the FD EAW is recommended. This process could be part of a proposal on an "EU judicial cooperation code in criminal matters". Such an initiative could also contain legislative proposals on the prevention and resolution of conflicts of exercise of criminal jurisdiction and the transfer of proceedings.[58] The final decision on embarking on such a comprehensive review should take into account the implementation report that has recently been issued by the European Commission[59] and the mutual evaluations that the Member States are currently conducting in the Council. In addition, the European Parliament could also consider requesting the Commission to conduct a "fitness check"[60] evaluating and identifying gaps and inconsistencies, and considering possible ways of simplifying and streamlining the current EU framework in the area of judicial cooperation in criminal matters. Finally, the European Parliament could conduct further implementation reports on related judicial cooperation instruments, notably the EIO and the FD on transfer of prisoners.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union