Case Law by the Court of Justice of the EU on the European Arrest Warrant

January 2017

This document provides an overview of the case law of the Court of Justice of the European Union ("CJEU") with regard to the application of Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States ("EAW FD").

The following table of contents, the index of keywords and the summaries of judgments have been prepared by Eurojust and do not bind the CJEU. The index and summaries are not exhaustive and are to be used only for reference and as a supplementary tool for practitioners.

The text of the judgments of the CJEU can be found, in all official languages of the EU, at the CJEU's website here.

This document is updated until 31 January 2017. It will be regularly updated in the future.

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Index of keywords with reference to relevant judgments

Keyword	Articles	Case title	Case number
Additional information	Article 15(2) EAW FD	Mantello Melvin West Aranyosi and Caldararu Bob-Dogi	C-261/09 C-192/12PPU C-404/15 and C-659/15PPU C-241/15
Appeal with suspensive effect, see time limits			
Arrest warrant	Article 8(1) EAW FD	Bob-Dogi	C-241/15
Citizenship, *see* EU citizenship			
Consent,*see* subsequent surrender, and *see* speciality rule			
Convention (EU) on Extradition (1996)	Articles 31 and 32 EAW FD	Santesteban Goicoechea	C-296/08PPU
Custody, *see* detention			
Detention	Articles 12 and 26 EAW FD	Lanigan J.Z.	C-237/15PPU C-294/16PPU
Double criminality	Articles 2(2), 2(4) and 4(1) EAW FD	Advocaten voor de Wereld Openbaar Ministerie v A.	C-303/05 C-463/15PPU
Equality (principle of)		Advocaten voor de Wereld	C-303/05
EU citizenship	Article 21(1) TFEU	Petruhhin	C-182/15
Extradition	Article 19 Charter	Petruhhin	C-182/15
Fundamental rights: -Right to a fair trial - Right to be heard -Right of the defence -Right to an effective judicial remedy -Member States' constitutions -Right to liberty and security -Prohibition of inhuman or degrading treatment	Article 1(3) EAW FD Articles 47 and And 48 Charter Article 53 Charter Article 6 Charter Article 4 Charter	 Radu Melloni Lanigan Aranyosi and Caldararu	 C-396/11 C-399/11 C-237/15PPU C-404/15 and C-659/15PPU
Guarantees	Article 5 EAW FD	I.B.	C-306/09
In absentia	Article 4a(1) EAW FD	I.B. Melloni Dworzecki	C-306/09 C-399/11 C-108/16PPU
Judicial authority	Article 6(1) EAW FD	Poltorak Kovalkosas	C-452/16PPU C-477/16PPU
Judicial decision	Article 1(1) EAW FD	Poltorak Kovalkosas	C-452/16PPU C-477/16PPU
Legality (principle of)		Advocaten voor de Wereld	C-303/05
Ne bis in idem	Article 3(2) EAW FD	Mantello	C-261/09
Non-discrimination		Advocaten voor de Wereld	C-303/05

(principle of) Non discrimination on ground of nationality	Article 18 TFEU	Wolzenburg Lopes Da Silva Jorge Petruhhin	C-123/08 C-42/11 C-182/15
Offence other than for which the person was surrendered, *see* speciality rule			
Prison conditions, *see* fundamental rights			
Resident	Article 4(6) EAW FD	Kozlowski Wolzenburg Lopes Da Silva Jorge	C-66/08 C-123/08 C-42/11
Speciality rule	Article 27 EAW FD	Leymann and Pustovarov	C-388/08
Staying in	Article 4(6) EAW FD	Kozlowski Lopes Da Silva Jorge	C-66/08 C-42/11
Subsequent surrender	Article 28 EAW FD	Melvin West	C-192/12PPU
Time limits	Article 17 EAW FD	Jeremy F. Lanigan	C-168/13PPU C-237/15PPU

Chronological list of judgments

1. C-303/05, ***Advocaten voor de Wereld***, Judgment of 3 May 2007.
2. C-66/08, ***Kozlowski***, Judgment of 17 July 2008.
3. C-296/08 PPU, ***Santesteban Goicoechea***, Judgment of 12 August 2008.
4. C-388/08, ***Leymann and Pustovarov***, Judgment of 1 December 2008.
5. C-123/08, ***Wolzenburg***, Judgment of 6 October 2009.
6. C- 306/09, ***I.B.***, Judgment of 21 October 2010.
7. C-261/09, ***Mantello***, Judgment of 16 November 2010.
8. C-192/12 PPU, ***Melvin West***, Judgment of 28 June 2012.
9. C-42/11, ***Lopes Da Silva Jorge***, Judgment of 5 September 2012.
10. C-396/11, ***Radu***, Judgment of 29 January 2013.
11. C-399/11, ***Melloni***, Judgment of 26 February 2013.
12. C-168/13 PPU, ***Jeremy F.***, Judgment of 30 May 2013.
13. C-237/15 PPU, ***Lanigan***, Judgment of 16 July 2015.
14. C-463/15 PPU, ***Openbaar Ministerie v. A***, Order of 25 September 2015.
15. C-404/15 and C-659/15 PPU, ***Aranyosi and Căldăraru***, Judgment of 5 April 2016.
16. Case C-108/16 PPU, ***Dworzecki***, Judgment of 24 May 2016.
17. Case C-241/15, ***Bob-Dogi***, Judgment of 1 June 2016.
18. Case C-294/16 PPU, ***JZ***, Judgment of 28 July 2016.
19. Case C-182/15, ***Petruhhin***, Judgment of 6 September 2016.
20. Case C-453/16 PPU, ***Özçelik***, Judgment of 10 November 2016.
21. Case C-452/16 PPU, ***Poltorak***, Judgment of 10 November 2016.
22. Case C- 477/16 PPU, ***Kovalkosas***, Judgment of 10 November 2016.
23. Case C-640/15, ***Vilkas***, Judgment of 25 January 2017.

1. Validity of the EAW FD

In 2007, the validity of the EAW FD was challenged in *Advocaten voor de wereld* on two grounds, namely the legal basis and the principle of equality and non-discrimination. The CJEU dismissed both arguments and upheld the validity of the EAW FD.

C-303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007.

- ***Background:*** In 2007, a non-profit organisation, Advocaten voor de wereld, brought an action before the Belgian Constitutional Court seeking the annulment of the Belgian law transposing the EAW FD. The non-profit organisation claimed, first of all, that by adopting a "framework decision", the European legislator had not chosen the correct legal instrument, as it should have chosen a "convention". Secondly, it argued that in so far as the new law dispensed with the verification of the double criminality requirement for the so-called list offences (Article 2(2) EAW FD), it violates the principles of legality, equality and non-discrimination. The Constitutional Court considered that some of the grounds put forward by the non-profit organisation related to the validity of the EAW FD itself and decided to refer two question to the CJEU.
- ***Main question***: Can the validity of the EAW FD be questioned in light of (1) the choice of the legal instrument and/or (2) the rule that dispenses with the verification of the double criminality requirement for the list offences (Article 2(2) EAW FD)?
- ***CJEU's reply***: **The examination of the questions submitted has revealed no factor capable of affecting the validity of the EAW FD.** The CJEU's main arguments:
  - **Correct legal instrument -** Under the relevant provisions of the (former) EU Treaty, the Council had discretion to choose amongst several legal instruments, including a framework decision (paras 28-43).
  - **Article 2(2) EAW FD does not breach the principle of legality as the definition of the offence follows from the law of the issuing MS -** The aim of the EAW FD is not to harmonize the legislation of Member States with regard to the criminal offences in respect of their constituent elements or of the penalties which they detract. The actual definition of the offences and the penalties applicable are those which follow from the law of the issuing Member State (para 52).
  - **Article 2(2) EAW FD does not breach the principle of equality and non-discrimination** – The Council was able to form the view that the categories of offences listed in Article 2(2) feature among those the seriousness of which in terms of adversely affecting public order and public safety justify dispensing with the verification of double criminality (para 56). The distinction between listed and non-listed offences is thus objectively justified (para 57). Moreover, it was not the objective of the EAW FD to harmonise the substantive criminal law of the Member States. The (former) EU Treaty did not make the application of the EAW conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question (para 59).

2. Concept of arrest warrant, judicial decision and issuing judicial authority

The CJEU clarified in its case law the meaning of several crucial concepts of the EAW FD, including "arrest warrant", "judicial decision" and "issuing judicial authority". The CJEU held, first of all, that if there is not a national arrest warrant, separate from the EAW, the EAW is invalid and the executing authority must refuse to give effect to the EAW on the basis that it does not satisfy the requirements laid down in Article 8(1) FD EAW (*Bob Dogi*). Moreover, the CJEU clarified in its case law that the term "judicial authority" is an autonomous concept of EU law. The CJEU specified that the Swedish National Police Board and the Ministry of Justice of the Republic of Lithuania do not constitute "judicial authorities" in the meaning of Article 6(1) EAW FD and that their EAWs are not "judicial decisions" in the meaning of Article 1(1) EAW FD (*Poltorak; Kovalkosas*). In relation to the meaning of "judicial decision", the CJEU also specified that a confirmation by a public prosecutor's office of a national arrest warrant that was issued by the police, is a "judicial decision" in the meaning of Article 8(1)(c) EAW FD *(Özçelik)*. The CJEU also underlined that if the executing authority finds that the EAW does not satisfy the requirements as to lawfulness laid down in the EAW FD, that authority must refuse to give effect to it (*Bob-Dogi*).

Case C-241/15, *Bob-Dogi*, Judgment of 1 June 2016.

- ***Background:*** A Romanian national, Bob-Dogi, had been the subject of an EAW issued by a Hungarian judicial authority for prosecution purposes. He was arrested in Romania and placed in detention, while waiting for a decision on the execution of the EAW issued against him. The EAW had been issued in Hungary on the basis of a "simplified procedure". Hungarian law allows, under certain conditions, that an EAW is issued directly without the need for any prior national arrest warrant.
- ***Main questions:*** Does the term "arrest warrant" mentioned in Article 8(1)(c) FD EAW refer to a "national" arrest warrant distinct from the EAW, and, if so, does the absence of such national warrant constitute an implicit ground for refusal to execute the EAW?
- ***CJEU's reply:***
  - **National warrant needed that is distinct from the EAW** - On the basis of a textual interpretation of the provision (paras 42-46), its *effet utile* (para 47) and the context and objectives pursued by the FD EAW (paras 49-57), the CJEU concludes that the term 'arrest warrant' mentioned in Article 8(1)(c) FD EAW must be understood as referring to a national arrest warrant that is distinct from the EAW (para 58).
  - **The list of grounds for non-recognition and guarantees is exhaustive** - The lack of a reference in the EAW to a national arrest warrant is not one of the refusal grounds laid down in Articles 3, 4 and 4a EAW FD (paras 61-62).
  - **But, Article 8(1)(c) FD EAW lays down a requirement as to lawfulness which must be observed if the EAW is to be valid -** Failure to comply with it, must in principle result in the executing judicial authority refusing to give effect to that warrant (para 64).

- **Duty to request for additional information** - If an EAW does not contain any reference to a national arrest warrant, the executing judicial authority must request all necessary, supplementary information to the issuing judicial authority, as a matter of urgency, pursuant to Article 15(2) FD EAW. The executing judicial authority must then examine - on the basis of that information and any other information available to it - the reason for the lack of reference to a national arrest warrant in the EAW (para 65).
- **Consequences of the absence of a separate national warrant** - If, the executing authority concludes that the EAW is not valid because it was issued in the absence of any national warrant separate from the EAW, the executing judicial authority must **refuse to give effect to it** on the basis that it does not satisfy the requirements as to lawfulness laid down in Article 8(1) FD EAW (para 66).

Case C-452/16 PPU, *Poltorak*, Judgment of 10 November 2016.

- ***Background:*** A Swedish District Court imposed a custodial sentence of one year and three months on Poltorak, a Polish national, for acts involving infliction of grievous bodily injury. Subsequently, the Swedish police board issued a EAW against Poltorak, with a view to executing that sentence in Sweden. The request for execution of the EAW came before the Dutch District Court which had doubts as to whether a police service is competent to issue a EAW.
- ***Main questions:*** Is the term 'judicial authority', referred to in Article 6(1) EAW FD, an autonomous concept of EU law? Is a police service, such as that at issue in the main proceedings, covered by the term 'issuing judicial authority', within the meaning of Article 6(1) EAW FD? Can the EAW that was issued by that police service with a view to executing a judgment imposing a custodial sentence be regarded as a 'judicial decision', within the meaning of Article 1(1) EAW FD?
- ***CJEU's reply:***
  - **Autonomous concept of EU law** - The term "judicial authority" contained in Article 6(1) EAW FD is an autonomous concept of EU law (paras 30-32);
  - **Meaning of "judicial authority"**
    - The term "judicial authority" is not limited to designating only the judges or courts of a Member State, by may extend, more broadly, to **the Member State authorities that administer criminal justice** (paras 33 and 38):
    - **Police services are not covered** by the term "judicial authority" (para 34), for the following reasons:
      - **The principle of separation of powers:** It is generally accepted that the term "judiciary" does not cover administrative authorities or police services which fall within the province of the executive (para 35);
      - **The context of the EAW FD** (paras 38-42):
        - The entire surrender procedure between Member States

is to be carried out under judicial supervision (with reference to *Jeremy F.*);

- Member States cannot substitute the central authorities for the competent judicial authorities in relation to the decision to issue the EAW as the role of central authorities is limited to practical and administrative assistance for the competent judicial authorities.

- **The objectives of the EAW FD** (paras 24-27 and 43-45):
    - The principle of mutual recognition is founded on the premise that a judicial authority has intervened prior to the execution of the EAW for the purpose of exercising its review.
    - The issue of an arrest warrant by a non-judicial authority, such as a police service, does not provide the executing judicial authority with an assurance that the issue of that EAW has undergone the necessary judicial approval.
- **The fact that a police service is only competent in the strict context of executing a judgment that was handed down by a court and which has become legally binding, does not call into question this interpretation** (paras 47-51):
    - The decision to issue the EAW is ultimately a matter for that police service and not for a judicial authority;
    - That police service issues the EAW not at the request of the judge that adopted the judgment imposing the custodial sentence, but at the request of the prison services;
    - The police service has a discretion over the issue of the EAW and that discretion is not subject to judicial approval *ex officio*.

➢ **Meaning of "judicial decision"** - An EAW issued by that police service with a view to executing a judgment imposing a custodial sentence cannot be regarded as a "judicial decision" within the meaning of Article 1(1) EAW FD (para 52).

➢ **The temporal effects of the judgment are not limited** (paras 54-58).

Case C- 477/16 PPU, *Kovalkosas*, Judgment of 10 November 2016.

- ***Background:*** A Lithuanian Court imposed a custodial sentence of four years and six months on Kovalkosas, a Lithuanian national, for acts involving infliction of grievous bodily injury. Subsequently, the Lithuanian Ministry of Justice issued a EAW against Kovalkosas with a view to executing in Lithuania the remainder of that sentence to be served. The request for execution of the EAW came before the Dutch District Court which had doubts as to whether the Lithuanian Ministry of Justice was competent to issue an EAW.
- ***Main questions:*** Is the term 'judicial authority', referred to in Article 6(1) EAW FD, an

autonomous concept of EU law? Is a Ministry of Justice covered by the term 'issuing judicial authority', within the meaning of Article 6(1) EAW FD? Can the EAW that was issued by that Ministry of Justice with a view to executing the remainder of a custodial sentence be regarded as a 'judicial decision', within the meaning of Article 1(1) EAW FD?

- ***CJEU's reply:***
  - **Autonomous concept of EU law -** The term "judicial authority" in Article 6(1) EAW FD is an autonomous concept of EU law (paras 31-33);
  - **Meaning of "judicial authority**
    - **Article 6(1) EAW FD** must be **interpreted** in a sense **that** the term "**judicial authority**" is not limited to the judges or courts of a Member State, by may extend, more broadly, to the Member State **authorities that administer criminal justice** (para 34, with reference to *Poltorak*);
    - An organ of the executive of a Member State, such as **a ministry,** is **not covered** by the term "judicial authority" (para 35) for the following reasons:
      - **The principle of separation of powers:** It is generally accepted that the term "judiciary" does not cover ministries of Member States which fall within the province of the executive (para 36);
      - **The context of the EAW FD** (paras 37-39):
        - The entire surrender procedure between Member States is to be carried out under judicial supervision (with reference to *F.*);
        - The role of central authorities is limited to practical and administrative assistance for the competent judicial authorities. Member States cannot substitute the central authorities for the competent judicial authorities in relation to the decision to issue the EAW.
      - **The objectives of the EAW FD** (paras 25-28 and 40-45):
        - The principle of mutual recognition is founded on the premise that a judicial authority has intervened prior to the execution of the EAW for the purpose of exercising its review.
        - The issue of an arrest warrant by a non-judicial authority, such as the Lithuanian Ministry of Justice, does not provide the executing judicial authority with an assurance that the issue of that EAW has undergone the necessary judicial approval.
      - **The fact that the Ministry of Justice only acts in the strict context of executing a judgment that has become legally binding, handed down by a court following court proceedings, on the one hand, and at the request of a court, on the other, does not call into question this interpretation** (paras 46-48):

    - The Lithuanian Ministry of Justice, and not the judge that imposed the custodial sentence decision, takes the ultimate decision to issue the EAW;
    - The Lithuanian Ministry of Justice supervises observance of the necessary conditions for that issue and also enjoys discretion as regards its proportionality.
  - **Meaning of "judicial decision" -** An EAW issued by the Ministry of Justice with a view to executing a judgment imposing a custodial sentence cannot be regarded as a "judicial decision" within the meaning of Article 1(1) EAW FD (para 48).
  - **The temporal effects of the judgment are not limited** (paras 51-54).

Case C-453/16 PPU, *Özçelik*, Judgment of 10 November 2016.

- ***Background:*** A Hungarian District court issued a EAW against Özçelik**,** a Turkish national, in connection with criminal proceedings instituted against him in respect of two offences committed in Hungary. In section B of the EAW form, reference was made to an arrest warrant of a Hungarian police department which had been confirmed by a decision of a Hungarian Public Prosecutor's Office. The request for execution of the EAW came before a Dutch court, which expressed its doubts as to whether such a national arrest warrant was covered by Article 8(1)(c) EAW FD.
- ***Main question:*** May a national arrest warrant, issued by a police service and subsequently confirmed by a decision of a public prosecutor's office, be classified as a "judicial decision" within the meaning of Article 8(1)(c) EAW FD?
- ***CJEU's reply:*** **The CJEU concludes that a decision of a public prosecutor's office is covered by the term judicial decision" of Article 8(1)(c) EAW FD**, based on the following arguments:
  - Article 8(1)(c) refers to the ***national* arrest warrant**, which is a judicial decision that is distinct from the EAW (para 27, with reference to *Bob Dogi*);
  - The national arrest warrant was issued by the police, but validated by the public prosecutor, thus the **public prosecutor** is to be assimilated with the **issuer of that arrest warrant** (para 30);
  - Need for **consistency** in the interpretation of various provisions of the EAW FD:
    - In the context of Article 6(1) EAW FD, **the term "judicial authority" refers to Member States authorities that administer criminal justice, excluding police services** (para 32, with reference *to Poltorak*);
    - The **public prosecutor's office constitutes a Member State authority responsible for administering criminal justice** (para 34, with reference to *Kossowski*).
  - **The objectives of the EAW FD support this interpretation** (paras 35-36):
    - The new surrender regime is aimed at contributing to the attainment of the objective set for the EU to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States;

- The confirmation of the national arrest warrant by the public prosecutor provides the executing judicial authority with the assurance that the EAW is based on a decision that has undergone judicial approval.

3. Scope of the EAW

The CJEU clarified in its case law that in the context of Article 2 EAW FD the law of the *issuing* Member State is the frame of reference. This applies both for assessing whether an act is punishable by a custodial sentence of a maximum of at least twelve months (*Openbaar Ministerie v. A*) and for assessing whether an act is to be considered as a list offence or not (*Advocaten voor de wereld*).

C-303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007.

- See *supra* 1.

C-463/15 PPU, *Openbaar Ministerie v. A*, Order of 25 September 2015.

- ***Background***: The referring Dutch court was requested to execute a EAW issued by a Belgian Public Prosecutor seeking the arrest and surrender of A. for the execution of a custodial sentence of 5 years for "the intentional assault and battery of a spouse causing incapacity for work" and "the carrying of a prohibited weapon". The referring court agreed in principle with the surrender for the first act, but had doubts with regard to the execution of the EAW in respect of "the carrying of a prohibited weapon", which is under Dutch law only punishable by a third-category fine. According to the Dutch EAW law, the acts alleged against the requested person must be subject to criminal sanctions in both Member States concerned *and* the maximum custodial sentence applicable to such acts must be at least twelve months in *both* Member States. The referring judge wonders whether a refusal based on such an interpretation is in accordance with Article 2(4) and Article 4.1 EAW FD.
- ***Main question:*** Do Article 2(4) and Article 4.1 EAW FD permit the executing Member State to transpose those provisions into its national law in such a manner as to require that the act should be punishable under its law *and* that, under its law, a custodial sentence of a maximum period of at least twelve months is laid down for that act?
- ***The CJEU's reply***: **No, Articles 2(4) and 4.1 EAW FD do not permit an interpretetation whereby the surrender is also made subject to the condition that the act is under the law of that executing Member State punishable by a custodial sentence of a maximum of at least twelve months**. The CJEU's main arguments:
  - **The wording of Article 4.1 EAW FD** – The option to refuse execution under Article 4.1 is limited to a situation in which a EAW relates to an act that is not included on the list in Article 2(2) EAW FD and does not constitute an offence under the law of the executing Member State (paras 24-25).
  - **The wording of other provisions of the EAW FD** - Neither Article 2(4) and Article 4.1 nor any other provisions thereof provide for the possibility of opposing the execution of a EAW concerning an act which, while constituting an

offence in the executing Member State, is not there punishable by a custodial sentence of a maximum of at least twelve months (para 27).

- **General background & objectives of the EAW FD** – The general background of the EAW FD and the objectives that it pursues also confirm this finding (para 28).
- **Issuing Member State's law is frame of reference** - As is clear from the first two paragraphs of Article 2, the EAW FD focuses, with regard to offences in respect of which a EAW may be issued, on the level of punishment applicable in the issuing Member State. The reason for this is that criminal prosecutions or the execution of a custodial sentence or detention order for which such a warrant is issued are conducted in accordance with the rules of that Member State (para 29).
- **Difference with extradition regime** - In contrast to the extradition regime which was removed and replaced by a system of surrender between judicial authorities, the EAW FD no longer takes account of the levels of punishments applicable in the executing Member States. This corresponds to the primary objective of the EAW FD of ensuring free movement of judicial decisions in criminal matters, within an area of freedom, security and justice (para 30).

4. Human rights scrutiny

There have been a number of judgments where the CJEU explained the impact that human rights can have in the context of the EAW. For instance, the CJEU ruled on the right to be heard (*Radu*), the right to a fair trial in the context of *in absentia* judgments (*Melloni*) and the right to liberty (*Lanigan*, see *infra* 6). Tthe CJEU also gave some guidance as to the kind of assessment that national authorities are required to make if serious concerns regarding prison conditions are being raised (*Aranyosi and Căldăraru*).

In relation to areas of human rights where exhaustive harmonisation took place, the CJEU stated that whenever the EU legislator adopted uniform standards of fundamental rights protection, national courts cannot make the surrender conditional upon the fulfilment of additional national requirements which are not foreseen in that EU legislation (*Melloni*).

C-396/11, *Radu*, Judgment of 29 January 2013.

- ***Background:*** German judicial authorities issued four EAWs for the surrender of Radu, a Romanian national, for the purposes of prosecution in respect of acts of aggravated robbery. Radu opposed his surrender and claimed *inter alia* a breach of the right to a fair trial and the right to be heard (Article 6 ECHR and Articles 47 and 48 Charter), on the ground that he had not been heard before the EAWs were issued. The Romanian court of appeal decided to stay the proceedings and referred a number of questions to the CJEU.
- ***Main question:*** Must the EAW FD -read in light of Articles 47 and 48 of the Charter- be interpreted as meaning that the executing authority can refuse to execute an EAW for

the purpose of prosecution, on the ground that the issuing judicial authority did not hear the requested person before the EAW was issued?

- ***The CJEU's reply:*** **The CJEU replied that the executing authority cannot refuse to execute the EAW on the ground that "the requested person was not heard in the issuing Member State before that arrest warrant was issued".**
- ***Main arguments:***
  - The purpose of the EAW FD (paras 33-34);
  - The exhaustive nature of the list of grounds for non-recognition (paras 36-38);
  - Articles 47 and 48 of the Charter do not require that an executing authority refuses to execute an EAW if the requested person is not being heard by the issuing authority before the EAW was issued (para 39);
  - An obligation for the issuing judicial authority to hear the requested person before the issuing of an EAW would lead to a failure of the surrender system (para 40);
  - The European legislator has ensured that the right to be heard will be observed in the executing Member State (paras 41-42).

C-399/11, *Melloni,* Judgment of 26 February 2013.

- See also *infra*: V, 3, with regard to the interpretation of Article 4a(1) EAW FD.
- ***Background:*** Melloni was sentenced *in absentia* to 10 years 'imprisonment for bankruptcy fraud. An Italian court of Appeal issued an EAW for the execution of this sentence. The Spanish executing court authorised the surrender. However, Melloni started constitutional review proceedings before the Spanish constitutional court claiming a breach of his right to a fair trial (Article 24(2) of the Spanish Constitution). The Constitutional court had doubts as to whether the EAW FD precludes the Spanish court from making Melloni's surrender conditional on the right to have the conviction in question reviewed, and referred the case to the CJEU.
- ***Main questions:*** Is Article 4a(1) EAW FD compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial (Article 47 Charter) and the right of the defence (Article 48(2) Charter)? Does Article 53 Charter allow the executing Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State in order to avoid an adverse effect on the right to a fair trial and the right of the defence as guaranteed by the executing Member State's constitution?
- ***The CJEU's reply:***
  - **Article 4a(1) EAW FD is compatible with the requirements under Articles 47 and 48(2) Charter**:
    - The rights included in Articles 47 and 48(2) Charter are not absolute - The right of the accused to appear in person at his trial is an essential component of the right to a fair trial, but not an absolute right. It can be waived provided that certain safeguards are met e.g. the waiver must be established in an unequivocal manner, it must be accompanied by minimum safeguards and it should not run counter to any important

public interest (para 49);
  - Analogy with the ECHR – The CJEU indicates that the ECtHR takes the same approach in relation to Article 6(1) and (3) ECHR (para 50);
  - EU harmonisation - Article 4a(1)(a) and (b) EAW FD lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial and in which the execution of the EAW cannot be made subject to additional conditions (para 54).
- **Article 53 Charter does not allow that the surrender of a person convicted *in absentia* is made conditional upon a national (constitutional) rule which requires the conviction to be open to review in the issuing Member State:**
  - Under Article 53 Charter, national authorities and courts remain, in principle, free to apply national fundamental rights standards, but only if the level of protection provided for by the Charter, the primacy, unity and effectiveness of EU law are not compromised (paras 58-60);
  - FD 2009/299 effects a harmonisation of the conditions of execution of a EAW in the event of a conviction rendered *in absentia* (para 62);
  - Allowing a Member State to make the surrender conditional upon the fulfilment of a requirement not foreseen under FD 2009/299, would cast doubt on the uniformity of the standard of fundamental rights protection as defined in the EAW FD, would undermine the principles of mutual trust and recognition which the EAW FD purports to uphold and would, therefore, compromise its efficacy (para 63).

C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016.

- ***Background:*** In the *Aranyosi* case, a Hungarian investigating judge issued two EAWs with respect to Aranyosi, a Hungarian national, so that a criminal prosecution could be brought for two offences of forced entry and theft, allegedly committed by Mr Aranyosi in Hungary. In the *Căldăraru* case, a Romanian court issued a EAW with respect to Căldăraru to secure the enforcement in Romania of a prison sentence of one year and eight months imposed for driving without a driving licence. The German court, which had to decide whether those EAWs should be executed, believed that the detention conditions to which both men might be subject in the Hungarian and Romanian prisons respectively were contrary to fundamental rights.
- ***Main question:*** Can or should on the basis of Article 1(3) EAW FD, an executing judicial authority refuse to execute an EAW if there are serious indications that the detention conditions are not compatible with the fundamental rights, in particular Article 4 Charter? Do Article 1(3) and/or Articles 5 and 6(1) EAW FD mean that the executing judicial authority can or must make its decision conditional upon the need for additional information which would assure that detention conditions are compliant?
- ***The CJEU's reply:*** **The CJEU concludes that if there is objective, reliable precise**

and updated information of generalised or systematic malfunctions of the detention conditions in the issuing Member State, the executing judicial authority is under a duty to check if, in the concrete case, there is a real risk. For this, he needs to ask complementary information to the issuing judicial authority. On the basis of the information provided, he needs to assess whether there is indeed a "real risk", or not. He should then decide to execute (if there is no real risk) or to postpone (if there is a real risk). He can also consider putting an end to the surrender procedure if the "real risk" cannot be discarded within a reasonable time.

- The CJEU's main arguments:
  - **Mutual recognition and mutual trust are the rule** (paras 75-80):
    - Article 1(1) and 1(2) EAW FD and recitals 5 and 7 indicate that the EAW FD constitutes a completely new regime based on mutual recognition and mutual trust;
    - An EAW must in principle be executed unconditionally, unless one of the grounds for non–recognition (Articles 3, 4 and 4 bis EAW FD) or one of the guarantees (Article 5 EAW FD) applies.
  - **Exceptions to the rule are only allowed in exceptional circumstances** (paras 82-87):
    - In Opinion 2/13 on access of the EU to the ECHR, the CJEU already indicated that exceptions are possible;
    - Article 1(3) EAW FD underlines the duty to comply with the Charter;
    - Article 4 Charter constitutes an absolute right and thus derogations are not permitted.
  - **The Charter** (not national law) **is the frame of reference** for assessing whether there is a real risk of inhuman or degrading treatment (para 88);
  - **If there are elements that demonstrate a real risk of inhuman or degrading treatment, the following assessment must be made** (paras 88-97):
    - **Existence of a general risk** – In order to assess whether there is a real risk of inhuman or degrading treatment due to general detention conditions in the issuing Member State, the executing authority needs to make its assessment on the basis of objective, reliable, specific and properly updated information. This information may be obtained from e.g. judgments of international courts, such as judgments from the ECHR, judgments of courts of the issuing Member State and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations. The deficiencies may be systemic or generalised or may affect certain groups of people or certain places of detention.

      Evidence of a real risk in relation to general detention conditions in the issuing Member State cannot, in itself, lead to a refusal to execute the EAW.

- **Existence of a concrete risk** - If there is evidence available of a real risk in relation to general detention conditions, the executing authority must determine whether, in the particular circumstances of the case, there are substantial grounds to believe that the requested person, if surrendered, will run a real risk of being subject to inhuman or degrading treatment. For this, the executing authority must request of the issuing judicial authority all necessary supplementary information on the conditions in which the requested person will be detained (Article 15 EAW FD). It can also request information on the existence of mechanisms for monitoring detention conditions. In relation to this request, the issuing authority can set a timeline taking into account the time required to collect the information as well as the time limits set in the EAW FD (Article 17 EAW FD).
- **The obligation to postpone the execution of the EAW** - If the executing authority finds a concrete risk for the requested person, he must postpone the execution of the EAW, and inform Eurojust in accordance with Article 17(7) EAW FD giving the reasons for the delay. During the postponement, the requested person can either be held in custody or provisionally released subject to measures aimed at preventing absconding.
- **The final decision on the execution of the EAW** - If the executing judicial authority obtains supplementary information that allows him to discount the existence of a real risk that the requested person will be subject to inhuman and degrading treatment in the issuing Member State, it must adopt its decision on the execution of the EAW. If, however, the existence of such a risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

➢ In case of delays, Member States are, pursuant to Article 17(7) EAW FD, under a **duty to inform Eurojust and/or the Council** (para 89).
  - Where the executing authority decides on a postponement, the executing Member State is to inform Eurojust, in accordance with Article 17(7) giving the reasons for the delay;
  - In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of EAWs, is to inform the Council with a view to an evaluation, at Member State level, of the implementation of the EAW FD.

5. Refusal grounds and guarantees

The CJEU held, repeatedly, in its case law that the executing judicial authority may refuse to execute an EAW only in the cases, exhaustively listed, of obligatory non-execution, laid down in Article 3 EAW FD, or of optional non-execution, laid down in Articles 4 and 4a EAW FD and that moreover, the execution of the EAW may be made subject only to one of the conditions exhaustively laid down in Article 5 EAW FD. Despite the "exhaustive" nature of the list of refusal grounds and guarantees, the CJEU's case law has revealed that there are other circumstances where the executing authorities should refrain from executing EAWs, for instance in the context of the validity of the EAW (*Bob Dogi*, see *supra* 2) or in case of human rights issues (*Aranyosi and Căldăraru*, see *supra* 4).

So far, the CJEU has interpreted in its case law the following refusal grounds and guarantees: nationals residents and persons staying in the executing Member State (K*ozlowski*, *Wolzenburg* and *Lopes Da Silva Jorge*), ne bis in idem (*Mantello*) and *in absentia* judgments (*I.B.*, *Melloni* and *Dworzecki*).

5.1. Nationals, residents and persons staying in the executing Member State

The rulings in K*ozlowski*, *Wolzenburg* and *Lopes Da Silva Jorge* relate to the application of Article 4(6) EAW FD, which allows the executing judicial authority to refuse to execute the EAW, if it has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.

C-66/08, *Kozlowski*, Judgment of 17 July 2008.

- ***Background:*** A Polish issuing judicial authority sent an EAW to a German executing judicial authority to surrender Kozłowski for the purposes of the execution of a sentence of five months imposed on him by a Polish court. The German court, when assessing possible grounds for refusal, had doubts as to whether Kozłowski's habitual residence was Germany and therefore referred the case to the CJEU.
- ***Main question:*** What is the scope of the terms "resident" and person "staying in" as mentioned in Article 4(6) EAW FD?
- ***The CJEU's reply:***
  - **Automomous concepts of EU law** - The interpretation of the terms "staying" and "resident" cannot be left to the assessment of each Member State. They are autonomous concepts of Union law that must be given a uniform interpretation throughout the Union (paras 41-43).
  - **Meaning of 'resident'**- The requested person is 'resident' in the executing Member State when he has established his actual place of residence there (para 46).
  - **Meaning of 'staying in'** - The requested person is **'staying'** in the executing

Member State when, following a stable period of presence in that State, he has acquired certain connections with that State which are of a similar degree to those resulting from residence. In order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying', it is for the executing judicial authority to make **an overall assessment of various objective factors** characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State (paras 46-49). The fact that the person systematically commits crimes in the executing Member State and the fact that he is in detention there serving a custodial sentence are not relevant factors for the executing judicial authority when it initially has to ascertain whether the person concerned is 'staying' within the meaning of Article 4(6) (para 51). By contrast, such factors may, supposing that the person concerned is 'staying' in the executing Member State, be of some relevance for the assessment which the executing judicial authority is then called upon to carry out in order to decide whether there are grounds for not implementing a European arrest warrant.

C-123/08, *Wolzenburg*, Judgment of 6 October 2009.

- ***Background:*** A German issuing judicial authority sent an EAW to a Dutch executing judicial authority to surrender Wolzenburg, a German citizen, for the purposes of the execution of a sentence of one year and nine months imposed on him by a German court. Wolzenburg established his principal residence for just over one year in the Netherlands, where he lived with his wife and where he was exercising a professional activity. The Dutch court is hesitant about refusing the EAW on the basis of Article 6 of the Dutch law on the surrender of persons, which is the Dutch implementation of Article 4(6) EAW FD. However, according to the Dutch law, a foreign person can only benefit from an application of this ground for non-recognition when two conditions are met: (i) being in the possession of a residence permit of indefinite duration and (ii) having been lawfully resident in the Netherlands for a continuous period of five years. Wolzenburg did not fulfil any of these criteria.
- ***Main questions:*** Can the person rely on the principle of non-discrimination on ground of nationality? Can the refusal ground of Article 4(6) EAW FD be made subject to a residence permit of indefinite duration and to a continuous, lawful residence period of five years in the executing Member State, whilst the refusal ground is applied automatically to nationals?
- ***CJEU's reply:***
  - **The principle of non-discrimination on ground of nationality applies** to the present case where a national of one Member State, who is lawfully resident in another Member State, is subject to an EAW in the latter State (paras 42-47).
  - A national legislation that applies the ground included in Article 4(6) EAW FD **automatically to its own nationals** whilst it requires **a lawful residence for a**

continuous period of five years for non-nationals, is **compatible** with the principle **of non-discrimination on ground of nationality** (para 74), as:

- It pursues a legitimate objective, the reintegration in society (paras 67-68);
- It is proportionate (paras 69-73).

➢ **Article 4(6) EAW FD cannot be made subject to supplementary administrative formalities, such as a residence permit of indefinite duration**

- Article 19 of Directive 2004/38 does not require Union citizens who have acquired a right of permanent residence in another Member State to hold a residence permit of indefinite duration (para 50);
- A residence permit has only declaratory and probative force, but does not give rise to any right (para 51).

C-42/11, *Lopes Da Silva Jorge*, Judgment of 5 September 2012.

- ***Background:*** In 2006, a Portuguese court issued an EAW against a Portuguese citizen, Lopes Da Silva Jorge, for the execution of a five years' imprisonment sentence. Subsequently, Lopes Da Silva Jorge moved to France, where, after a few years, he married a French national with whom he has been resident in French territory ever since. He was also employed as a long-distance lorry driver in France under an open-ended contract. In 2010, a French court proceeded to give effect to the EAW. Lopes Da Silva Jorge asked the French court not to execute the EAW and to order his sentence of imprisonment to be served in France. However, the French court notes that Article 695-24 of the French Code of Criminal Procedure, which implements Article 4(6) EAW FD, only applies to French nationals, and therefore decides to refer the case to the CJEU.
- ***Main questions:*** What is the margin of discretion left to Member States when implementing Article 4(6) EAW FD? Is Article 695-24 of the French Code of criminal procedure compatible with the principle of non-discrimination on ground of nationality (Article 18 TFEU)?
- ***CJEU's reply:***
  - ➢ **A Member State**, when transposing Article 4(6)EAW FD, **cannot exclude automatically and absolutely nationals of other Member States residing or staying in its territory, irrespective of their connections with it** (para 52);
    - Member States have **a certain margin of discretion** when implementing Article 4(6) EAW FD (para 33);
    - But, the terms "resident" and "staying in" are autonomous concepts of EU law and thus the margin of discretion is subject to **limits** (paras 35-39):
      - Member States cannot give those terms a broader meaning than that which derives from a uniform interpretation;
      - Member States must give those terms a meaning that complies with Article 18 TFEU:
        - Member States must take into account the social reintegration objective of Article 4(6) EAW FD (paras 32

and 40) meaning that nationals and nationals of another Member State that are integrated into the society should, as a rule, not be treated differently (para 40).

- Member States are not allowed to invoke the alleged impossibility to enforce a custodial sentence imposed in another Member State on a non-French national to justify the difference in treatment between such a national and a French national (paras 44-49);

- **Obligation to interpret, so far as possible, the whole body of domestic national law in the light of the wording and purpose of the EAW FD**:
  - This obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU since it permits national courts, for matters within their jurisdiction, to ensure the effectiveness of EU law (paras 53-54, with reference to *Pupino* and other case law);
  - Limitations to this duty: general principles of law and no interpretation of national law *contra legem* (paras 55-57).

5.2. Ne bis in idem

C-261/09, Mantello, 16 November 2010

- ***Background:*** A German court received an EAW from an Italian court for the surrender of Mantello, an Italian national, for the prosecution of drugs related offences and participation in a criminal organisation. The German court wondered whether it should refuse to execute the EAW on the basis of Article 3(2) EAW FD, particularly in view of the following circumstances. Mantello had been convicted in Italy for possession of cocaine intended for resale whilst at the time of the investigation which led to Mantello's conviction, the investigators already had sufficient evidence to charge and prosecute him in connection with the criminal charges set out in the EAW. However, for tactical reasons, such as breaking up the trafficking network and arresting other persons involved, the investigators had refrained from providing the relevant information and evidence to the investigating judge. The German judge wondered whether this was a case of *ne bis in idem* particularly since under German law, as interpreted by the German Federal Court, subsequent prosecution for participation in a criminal organisation would only be allowed if the investigators were unaware of this offence at the time of the first conviction which was not the case .
- ***Main questions:*** Is the existence of "same acts" of Article 3(2) EAW FD to be determined according to the law of the issuing member State, according to the law of the executing Member State or according to an autonomous interpretation of EU law? May the executing authority in circumstances such as those in the main proceedings refuse to execute an EAW on the basis of Article 3(2) EAW FD?
- ***The CJEU's reply:***
  - **' Same acts' is an autonomous concept of EU law** – The interpretation of 'same acts' cannot be left to the discretion of the judicial authorities of each Member

State on the basis of their national law. It follows from the need for uniform application of EU law that, since that provision makes no reference to the law of the Member States with regard to that concept, the latter must be given an autonomous and uniform interpretation throughout the EU (para 38).

- **'Same acts' has same meaning in CISA and EAW FD** – The concept 'same acts' is also present in Article 54 of the Convention Implementing the Schengen Agreement (CISA) and in that context it has been interpreted as referring to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.[1] In light of the shared objective of Article 54 CISA and Article 3(2) EAW FD, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, the interpretation given in the rulings concerning the CISA must be equally applied to the provision of the EAW FD (paras 39-40).
- **The present case relates more to the concept of ' finally judged'** (para 43).
- **Whether a case has been 'finally judged' must be determined by the law of the Member State in which judgment was delivered** – The CJEU refers to its *Turanský* judgment on the interpretation of Article 54 CISA and concludes that whether a person has been 'finally' judged for the purposes of Article 3(2) EAW FD is to be determined by the law of the Member State in which judgment was delivered (para 46). Since, in the case at stake, the Italian authorities had clearly stated that the facts upon which the EAW was based had not been object of the trial, the German authorities were bound to draw the appropriate conclusions from that assessment and had no reason to apply Article 3(2) EAW FD (paras 49-50).

5.3. In absentia judgments

In the context of *in absentia* judgments, the CJEU has clarified, first of all, that an executing Member State may make the surrender of a person subject to the joint application of the conditions laid down in Articles 5(1) and 5(3) EAW FD (*I.B.*). The CJEU also interpreted Article 4a(1) EAW FD explaining that this provision has harmonised -in an exhaustive way- the circumstances in which the execution of the EAW must be regarded as not infringing the rights of the defence. The latter means that executing judicial authorities cannot impose any additional requirements based on national law (*Melloni*). Finally, the CJEU ruled that the terms 'summoned in person' and 'actually received by other means [...] in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' of Article 4a(1)(a)(i) FD EAW constitute autonomous concepts of Union law. The CJEU also clarified how these terms should be interpreted (*Dworzecki*).

[1] For an analysis of the meaning 'same acts' in the context of Article 54 CISA, see Eurojust Note *on The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union.*

C- 306/09, *I.B.*, Judgment of 21 October 2010.

- ***Background:*** A Romanian court sentenced I.B., a Romanian national, to four years' imprisonment for the offence of trafficking in nuclear and radioactive materials. The court ordered that the sentence, upheld on appeal, was to be served under a system of supervised release. Later, the Romanian Supreme Court upheld the sentence imposed on I.B., but ordered that it be served in custody. The decision of the Supreme Court was rendered *in absentia* and I.B. was not personally notified of the date or place of the hearing which led to the decision. I.B. fled to Belgium and the Romanian court of first instance issued an EAW for the arrest of I.B. with a view to executing the sentence of four years' imprisonment. The Belgian court was uncertain as to whether the EAW should be characterised as a warrant for the execution of a sentence or as a warrant for the purposes of prosecution. The decision as to which way to characterise it had important consequences: if it was a warrant for the execution of a sentence, I.B. could not apply to serve the sentence in Belgium for the situation does not concern the execution of a final judgment; by contrast, if it was a warrant for the purposes of prosecution, the Belgian authorities could make the surrender subject to the condition that I.B. should subsequently be returned to Belgium, his country of residence. The case was brought before the Belgian constitutional court which made a reference to the CJEU for a preliminary ruling.
- ***Main question:*** Must Articles 4(6) and 5(3) EAW FD be interpreted as meaning that the execution of a EAW issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of Article 5(1) EAW FD may be subject to the condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing State in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing Member State?
- ***The CJEU's reply:*** **The Court replied in an affirmative way to this question and concluded that an executing Member State may make the surrender of a person in a situation such as that of I.B. subject to the joint application of the conditions laid down in Articles 5(1) and 5(3) EAW FD**.
- ***The CJEU's main arguments:***
    - Articles 3 to 5 EAW FD make it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State (para 51);
    - Articles 4(6) and 5(3) EAW FD have the objective of increasing the requested person's chances of reintegrating into society (para 52);
    - There is no indication in the EAW FD that persons requested on the basis of a sentence imposed *in absentia* should be excluded from that objective (para 53);
    - The mere fact that Article 5(1) EAW FD makes the execution of an EAW issued following a decision rendered *in absentia* subject to a re-trial guarantee, cannot have the effect of rendering inapplicable to that same EAW the application of Articles 4(6) or 5(3) EAW FD (para 55);

- The situation of a person who was sentenced *in absentia* and to whom it is still open to apply for a retrial, is comparable to that of a person who is the subject of a EAW for the purpose of *prosecution* and to which Article 5(3) EAW FD can therefore apply (para 57);
- That interpretation avoids putting the person in a situation where he would waive his right to a retrial in the issuing Member State in order to ensure that his sentence may be executed in the Member State where he is resident pursuant to Article 4(6) EAW FD (para 59).

C-399/11, *Melloni,* Judgment of 26 February 2013.

- ***Background:*** See *supra* IV.
- ***Main question:*** Must Article 4a(1) EAW FD be interpreted as precluding the executing judicial authority from making the execution of an EAW conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State?
- ***The CJEU's reply:*** **Article 4a(1) EAW FD does not allow that an executing judicial authority makes the execution of an EAW conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.**
- ***The CJEU's main arguments:***
  - The purpose of the EAW FD (paras 36-37):
  - The exhaustive nature of the list of grounds for non-recognition (para 38);
  - The wording, scheme and purpose of Article 4a(1) (paras 39-42);
  - The objective of FD 2009/299 (para 43);
  - The exhaustive nature of the list of circumstances in which the execution of the EAW must be regarded as not infringing the rights of the defence (paras 43-44).

Case C-108/16 PPU, *Dworzecki*, Judgment of 24 May 2016.

- ***Background:*** Polish judicial authorities issued a EAW for the surrender of Dworzecki, a Polish national, for the purpose of executing in Poland three custodial sentences of two years, eight months and six months respectively. The request for a preliminary ruling concerned only surrender for the purpose of executing the second custodial sentence. As regards that sentence, point D of the EAW stated that Dworzecki had not appeared in person at the trial leading to the judgment in which the sentence was imposed. The Polish judicial authority acknowledged in the EAW form that the person was not summoned in person, but the summons was sent to the address which Dworzecki had indicated for service of process and it was received by Dworzecki's grandfather, who had undertaken to pass the process on to the addressee. Against this background, the Dutch executing judicial authority had some questions about the interpretation of Article 4a (1)(a)(i) FD EAW.
- ***Main questions:*** Are the terms of Article 4a(1)(a)(i) EAW FD 'summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision' and 'by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' autonomous concepts of EU law? Does a

summons, such as that at issue in the main proceedings, satisfy the conditions laid down in that provision?

- ***The CJEU's reply and main arguments:***
  - **The terms** 'summoned in person' and 'actually received by other means [...] in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' of Article 4a(1)(a)(i) FD EAW constitute **autonomous concepts of Union law** and thus need to be interpreted in the same way in the whole EU (para 32);
  - **A summons** that was not directly handed over to the person concerned, but **sent to the person's address and given to an adult resident of the person's household who undertook to pass it on to the latter, <u>is not enough in itself</u> to satisfy** the condition set out in Article 4a(1)(a)(i) FD EAW (para 55).
  - **Duties and options for issuing and executing authorities under Article 4a(1)(a)(i) FD EAW**:
    - **The <u>issuing</u> judicial authority** is required **to indicate in the EAW the elements** on the basis of which he found that the person concerned actually received official information of the scheduled date and place of the trial (para 49);
    - **The <u>executing</u> judicial authority**, when **assessing whether the conditions of Article 4a(1)(a)(i) EAW FD are fulfilled**, can rely not only on the EAW, but also **take into account other circumstances** (para 50), including:
      - specific circumstances of which the executing judicial authority was informed in the framework of the hearing of the person concerned (para 49);
      - a possible lack of diligence in the conduct of the concerned person e.g. if he tried to escape the summons directed to him (para 51);
      - or specific provisions of national law of the issuing Member State such as the provision of the Polish criminal procedure, which grants the person a right to ask for a new trial under certain conditions (para 52).
    - The **<u>executing</u> judicial authority can always request, urgently, additional information on the basis of Article 15(2) FD EAW** if he is of the opinion that the information provided by the issuing judicial authority is insufficient (para 53).

6. Time limits

The CJEU clarified that a failure to observe the time limits of Article 17 EAW FD does not preclude the executing court from taking a decision on the execution of the EAW (*Lanigan*). The CJEU also clarified in that same judgment that even after expiry of the time-limits, the requested person can, in principle, be kept in custody, subject to the limits of Article 6 Charter. The CJEU also clarified the time limits for surrender of the person mentioned in Article 23 EAW FD (*Vilkas*). The CJEU clarified inter alia the "force majeure"concept and underlined that authorities remain obliged to agree on a new surrender date if the time limits mentioned in Article 23 have expired.

C-237/15 PPU, *Lanigan*, Judgment of 16 July 2015.

- ***Background:*** An issuing judicial authority from the UK sent an EAW for the surrender of the requested person, Lanigan, to an Irish executing judicial authority. Criminal proceedings were brought against him in the UK for murder and possession of a firearm. Lanigan was detained in Ireland while he fought the execution of the EAW on different grounds. At one of the hearings, Lanigan submitted that the request for surrender should be rejected since the time limits stipulated in the EAW FD had not been complied with. The Irish court decided to stay the proceedings and referred the case to the CJEU.
- ***Main questions:*** Does a failure to observe the time-limits stipulated in Article 17 EAW FD preclude the executing court from taking a decision on the execution of the EAW? And does it preclude that authority from keeping the person in custody where the total duration of the period that person has spent in custody exceeds those time-limits?
- ***The CJEU's reply:***
  - **Even after expiry of the time-limits, the executing authority must adopt a decision on the execution of the EAW**:
    - The wording, context and objective of Article 15(1) EAW FD (paras 35-36);
    - The central function of the obligation to execute the EAW and the absence of any explicit indication as to a limitation of the temporal validity of the obligation to execute the EAW in the EAW FD (paras 36-37);
    - Article 17(7) EAW FD shows that the EU legislature considered that in a situation in which time-limits have not been observed, the execution of the EAW is postponed, not abandoned (para 38);
    - Article 17(5) EAW FD includes obligations that only makes sense if the executing authority remains required to adopt the decision on the execution of the EAW after expiry of the time limits (para 39);
    - An opposite interpretation would run counter to the objective of the EAW FD as it could force the issuing authority to issue a second EAW or

it could encourage delaying tactics aimed at obstructing the execution of European arrest warrants (paras 40-41).

- **Even after expiry of the time-limits, the requested person can, in principle, be kept in custody** (paras 43-52):
  - Article 12 EAW FD does not require that the requested person is released following the expiry of the time-limits of Article 17 EAW FD (paras 43-46);
  - There is a clear difference in consequences with regard to the expiry of time limits between Article 23(5) EAW FD (the requested person "shall be released") and Article 17(5) EAW FD (time-limits "may be extended");
  - If one assumes that after the expiry of the time-limits the executing authority must still adopt a decision on the execution of the EAW, a release of the requested person could limit the effectiveness of the surrender and obstruct the objectives pursued by the EAW FD;
  - Article 26 EAW FD on the deduction of periods of detention served in the executing Member State, also supports this interpretation.
- **The requested person can only be kept in custody within the limits of Article 6 Charter** (paras 53-60):
  - Article 12 EAW FD must be read in light of Article 6 Charter (right to liberty and security of person);
  - In light of **Article 6 Charter**, the requested person can only be held in custody if the procedure for the execution of the EAW has been carried out in a sufficiently diligent manner and in so far the duration of the custody is not excessive;
  - The executing judicial authority needs to carry out **a concrete review of the situation** at issue taking account of all the **relevant factors**, including: possible failure to act on the part of the authorities of the Member States concerned; any contribution of the requested person to the duration; the sentence potentially faced by the requested person or delivered in his regard in relation the acts which lead to the issuing of the EAW; the potential risk of the person absconding; the fact that the person has been held in custody for a period the total of which greatly exceeds the time limits stipulated in Article 17 EAW FD.
- **If the person is provisionally released, measures might be needed until a final decision on the execution of the EAW has been taken** (para 61):
  If, after the review, the executing judicial authority concludes that it must bring the requested person's custody to an end, it is required, in light of Articles 12 and 17(5) EAW FD, to attach to the provisional release of that person any measures it deems necessary:
  - to prevent him from absconding;
  - to ensure that the material conditions necessary for his effective surrender remain fulfilled.

C-640/15, *Vilkas*, Judgment of 25 January 2017

- ***Background:*** Vilkas was a subject of two EAWs issued by a Lithuanian court. The Irish authorities attempted to surrender him to the Lithuanian authorities by using a commercial flight. However, he was not allowed on the flight because of the resistance he put up. Two weeks later, a second surrender attempt, also by means of a commercial flight, failed following a series of similar events. The Irish Minister for Justice and Equality then applied to the High Court (Ireland) for authorisation for a third attempt at surrendering Vilkas. However, the High Court held that it lacked jurisdiction to hear this application and ordered Mr Vilkas's release. The Minister for Justice and Equality brought an appeal against that judgment before the Court of Appeal which stayed the proceedings and referred the case to the CJEU..
- ***Main question:*** Does Article 23 EAW FD preclude, in a situation such as that at issue in the main proceedings, the executing and issuing judicial authorities from agreeing on a new surrender date where the repeated resistance of the requested person has prevented his surrender within 10 days of the new agreed surrender date?
- ***The CJEU's reply:*** **National authorities remain obliged to agree on a new surrender date if the presecribed time limits have expired**.
- ***The CJEU's main arguments***:
  - **In the even of *force majeure*, where two previous surrender attempts failed, a third surrender day must be set:**
    - **Rule and exceptions** (paras 21-24)- Article 23(2) EAW FD states that the requested person is to be surrendered no later than 10 days after the final decision on the execution of the EAW, but this rule is subject to certain exceptions, particularly in case of *force majeure* (Article 23(3) EAW FD).
    - **The wording of Articl 23(3) EAW FD** (paras 25-29) **-** This provision does not expressly limit the number of new surrender dates that may be agreed on between the authorties concerned in cases of *force majeure*. It also does not exclude the setting a new surrender date where surrender has failed more than 10 days after the final decision on the execution of the EAW.
    - **The objective of Article 23 EAW FD** (paras 30-33)– This provision is aimed at accelerating judicial cooperation by imposing time limits for adopting EAW decisions.
    - **Article 23(3) EAW FD read in light of Article 23(5) EAW FD** (paras 34-39).
  - **In the even of *force majeure*, the requested person can only be kept in custody within the limits of Article 6 Charter** (para 43, with reference to *Lanigan*).
  - **The concept of *force majeure* must be interpreted strictly and refers to unforeseeable circumstances whereby the consequences could not have been avoided in spite of the exercise of all due care** (paras 44-65):

- The fact that certain requested persons put up resistance to their surrender cannot, in principle be classified as an "unforeseeable"circumstance;
- A fortiori, if the requested person has already resisted a first surrender attempt, the fact that he also resists a second surrender attempt cannot normally be regarded as unforeseeable;
- It is, however, for the referring court to assess whether there were "exceptional circumstances" on the basis if which it is objectively apparent that the resistance put up by the requested person could not have bene foreseen by the authorties concerned and that the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities

➢ **If the referring court cannnot classify the case as a case of "force majeure", the authorities are still required to agree on a new surrender date** (paras 66-72):

- The principle of mutual recognition imposes an obligation, in principle, to execute the EAW and there is no limitation of the temporal validity of that obligation in the EAW FD;
- Article 23(5) EAW FD foresees that ,in case of expiry of the time limits, the requested person is to be released if he is still being held in custody. This provision does not confer any other effect on the expiry of those time limits. It does not provide that the expiry deprives the authorities concerned of the possibility of agreeing on a surrender date nor that it releases the executing Member State from the obligation to give effect to a EAW;
- The objective of the EAW FD of accelerating and simplifying judicial cooperation also supports this interpretation.

7. Requests for additional information

In a number of judgments, the CJEU mentioned Article 15(2) EAW FD and gave concrete examples where an executing judicial authority should request from the issuing judicial authority additional information, e.g. legal information on the precise nature of a judgment delivered in the issuing Member State in the context of a *ne bis in idem* assessment (*Mantello,* see *supra* 5.2), information on the reason why the EAW does not mention a national arrest warrant (*Bob Dogi*, see *supra* 2), information on consent in a case of subsequent surrender (*Melvin West*, see *supra* 8.3) or information on the conditions in which it is envisaged that the individual concerned will be detained in the issuing Member State (*Aranyosi and Căldăraru,* see *supra* 4).

8. Effects of the surrender

The CJEU clarified in its case law different aspects related to the effects of the surrender. The CJEU gave some guidance as to how the term 'detention' of Article 26(1) EAW FD should be interpreted (J.Z.) as well as the term "offence other than for which the person was surrendered" (Article 27 EAW FD). The CJEU also explained which Member State needs to give consent in the context of subsequent surrender as regulated in Article 28(2) EAW FD (Melvin West). Finally, the CJEU also clarified to what extent a Member State can provide for an appeal with suspensive effect against a decision to execute an EAW or in the context of Article 27 EAW FD or Article 28 EAW FD (Jeremy F.).

8.1. Deduction of period of detention served in the executing Member State

C-294/16 PPU, *JZ*, Judgment of 28 July 2016.

- ***Background:*** By a judgment of 2007, a Polish court gave JZ a custodial sentence of three years and two months. As JZ had absconded, a EAW was issued for him and in 2014 JZ was arrested by the UK authorities under that EAW. From June 2014 to May 2015, JZ, who was released on bail, was required to stay at the address which he had provided between 10 p.m. and 7 a.m., and his compliance with that requirement was subject to electronic monitoring. In addition, JZ was required to appear regularly at a police station, not to apply for foreign travel documents and to keep his mobile telephone switched on and charged at all times. Those measures were applied until the date on which he was surrendered to the Polish authorities. JZ requested in the Polish court that the period during which he was subject to a curfew in the UK and to electronic monitoring count towards the custodial sentence imposed on him in Poland. JZ invokes Article 26 FD EAW which provides that the issuing Member State is to deduct all periods of detention arising from the execution of that warrant from the total period of detention to be served in that issuing Member State as a result of a custodial sentence or detention order being passed.
- ***Main question****:* Does the term 'detention' of Article 26(1) FD EAW also cover measures applied by the executing Member State that consist in the electronic monitoring of the whereabouts of the subject of the warrant, in conjunction with a curfew?
- ***The CJEU's reply:*** **Measures such as a nine-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents, are not, in principle, having regard to the type, duration, effects and manner of implementation of all those measures, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as 'detention' within the meaning of Article 26 EAW FD. It is nevertheless for the referring court to ascertain this.**

- The CJEU's main arguments:
  - **Conform interpretation** (paras 32-33): The CJEU recalls the duty to interpret national law, as much as possible, in light of the wording and purpose of the FD EAW.
  - The term '**detention**' of Article 26(1) FD EAW is an **autonomous concept of Union law**: this concept must be interpreted uniformly throughout the EU taking into account the wording, context and objective pursued by the legislation in question (paras 35-37).
  - **Article 26(1) FD EAW refers not to a measure that is restrictive of liberty, but to one that deprives a person of it** (paras 38-47): After assessing the wording, context and objective of Article 26 FD EAW, the CJEU concludes that one should distinguish between measures that are restrictive of liberty (in principle not included in Article 26) and measures that deprive a person of its liberty (included in Article 26). The concept "detention" of Article 26(1) FD EAW therefore includes, apart from imprisonment, also other measures that due to their nature, duration, effects and means of implementation deprive the person concerned from his liberty in a way that is comparable to imprisonment.
  - **ECHR case law supports this interpretation** (paras 48-52).
  - **The assessment is to be made by the issuing judicial authority**(paras 53-56):
    - It is for the issuing judicial authority **to assess** the measures taken against the person concerned in the executing Member State and to **consider whether these measures must be treated in the same way as a deprivation of liberty** and therefore constitute "detention". The issuing judicial authority can ask the executing judicial authority to send him all the necessary information. In the course of that assessment, the judicial authority of the Member State which issued the EAW may, under Article 26(2) EAW FD, ask the competent authority of the executing Member State to transmit any information it considers necessary.
    - In principle, a nine hour daily curfew monitored by means of an electronic tag does not seem to have the effect of depriving a person of its liberty in the meaning of Article 26(1).EAW FD.
    - Article 26(1) FD EAW imposes a **minimum level of protection**. An issuing judicial authority can decide, on the basis of national law alone, to deduct from the total period of detention all or part of the period during which that person was subject, in the executing Member State, to measures involving not a deprivation of liberty but a restriction of it.

8.2. Speciality rule

C-388/08, *Leymann and Pustovarov*, Judgment of 1 December 2008.

- ***Background:*** Leymann and Pustovarov were wanted for illegal import of drugs into Finland. The Finnish authorities sent EAWs and the warrants indicated that they were suspected of committing a serious drug trafficking offence which related to a large

quantity of amphetamines. Leymann and Pustovarov were surrendered to the Finnish authorities on the basis of those EAWs and were remanded in custody. Sometime later, the indictment against Leymann and Pustovarov stated that the serious drug trafficking offence concerned not amphetamines, but hashish. Leymann and Pustovarov meanwhile were both convicted and sentenced to imprisonment. They both appealed and argued that they had been convicted for an offence other than that for which they had been surrendered, contrary to the 'specialty rule'. The Finnish Supreme Court referred a number of questions on the exact scope of the specialty rule to the CJEU.

- ***Main questions:*** (i) How must the expression "offence other than for which the person was surrendered" (hereinafter "other offence") of Article 27(2) EAW FD be interpreted and when is the consent of Article 27(4) EAW FD required? (ii) Does a modification of the description of the offence -which concerns only the kind of narcotics in question- fall within the classification of "offence other" and thus requires consent from the executing authority? (iii) How must the exception to the speciality rule in Article 27(3)(c) EAW FD be interpreted, taking into account the consent procedure laid down in Article 27(4) EAW FD?
- ***CJEU's reply and main arguments:***
  - **The expression "other offence" requires a comparison between the description of the offence in the EAW and the description in the later procedural document** in order to assess whether (paras 55 and 57):
    - The consitutent elements of the offence, according to the legal description given by the issuing Member State, are those for which the person was surrendered;
    - There is a sufficient correspondence between the information given in the EAW and that contained in the later procedural document.
  - **The speciality rule does not require a consent for every modification of the description of the offence** (paras 56-57):
    - A consent for every modification would go beyond what is implied by the speciality rule and interfere with the objective of speeding up and simplifying judicial cooperation as pursued by the EAW FD;
    - Modifications concerning the time or place of the offence are allowed if:
      - They derive from evidence gathered in the course of the proceedings conducted in the issuing Member State concerning the conduct described in the EAW;
      - They do not alter the nature of the offence;
      - They do not lead to grounds for non-execution under Articles 3-4 EAW FD.
  - **A modification of the description of the offence concerning the kind of narcotics is not such, of itself, as to define "other offence"** (paras 61-63):
    - The indictment relates to the importation of hashish whereas the EAW refers to the importation of amphetamines;
    - The offence is still punishable by imprisonment for a maximum period of at least three years;

    - The offence comes under the category "illegal trafficking in narcotic drugs" of Article 2(2) EAW FD.
- **The exception in Article 27(3)(c) EAW FD must be interpreted as meaning that** (paras 73-76):
    - When there is a "other offence", consent must, in principle, be requested and obtained if a penalty or a measure involving the deprivation of liberty is to be executed;
    - A measure restricting liberty can, however, be imposed on the person before consent has been obtained, if the restriction is lawful on the basis of other charges which appear in the EAW;
    - The person can be prosecuted and sentenced for the "other offence", before consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when the judgment is given for that offence;
    - If after judgment has been given, the person is sentenced to a penalty or a measure restricting liberty, consent is required in order to enable that penalty to be executed.

8.3. Subsequent surrender

C-192/12 PPU *Melvin West*, Judgment of 28 June 2012

- ***Background:*** Melvin West, a national and resident of the United Kingdom, was the subject of three successive EAWs. First, he had been surrendered by the judicial authorities of the United Kingdom ('the first executing Member State') to Hungary pursuant to a EAW issued by the Hungarian national authorities for the purposes of conducting a criminal prosecution. Next, he was surrendered by Hungary (the 'second executing Member State') to Finland pursuant to a EAW issued by the Finnish judicial authorities for the purposes of execution of a custodial sentence. Finally, he was subject to a surrender procedure in relation to an EAW issued by the French authorities for the purposes of execution of a custodial sentence imposed in absentia for crimes committed prior to the first surrender. The Supreme Court of Finland ('the third executing Member State') had some doubts and referred the case to the CJEU.
- ***Main question:*** Does "executing Member State" (Article 28(2) EAW FD) mean the Member State from which a person was originally surrendered to another Member State on the basis of a EAW, or that second Member State from which the person was surrendered to a third Member State which is now requested to surrender the person onward to a fourth Member State? Or is consent perhaps required from both Member States?
- ***The CJEU's reply:*** Article 28(2) EAW FD must be interpreted as meaning that the subsequent surrender of the requested person to a Member State other than the Member State having last surrendered him is subject to the consent only of the Member State which carried out that last surrender.

- ***The CJEU's main arguments:***
  - The wording of Article 28(2) EAW FD (paras 50-52);
  - The objective pursued by the EAW FD of accelerating and simplifying judicial cooperation between the Member States (paras 53-62).

8.4. Appeal with suspensive effect

Case C-168/13 PPU, *Jeremy F*, Judgment of 30 May 2013.

- ***Background:*** Jeremey F., a UK national, was surrendered from France to the UK for child abduction. He had agreed to be surrendered without, however, waiving the specialty rule. Shortly afterwards, the French court received a request from the judicial authorities of the UK for the consent of the French court to the prosecution of Jeremy F. for acts committed in the United Kingdom before his surrender, namely sexual activity with a child under 16. The French court decided to give consent to this request and Jeremy F. appealed to the French Supreme Court against this judgment. The French Supreme Court referred to the French Constitutional Council a priority question of constitutionality relating to Article 695-46 of the Code of Criminal Procedure, concerning in particular the principle of equality before the law and the right to an effective judicial remedy. Under French law, there was no appeal against that decision provided and for Jeremy F. this could lead to a denial of his right to an effective judicial remedy, a situation incompatible with French constitutional law. Therefore, the Conseil constitutionnel decided to stay the proceedings and to refer a question to the CJEU for a preliminary ruling.
- ***Main question:*** Must Articles 27(4) and 28(3)(c) EAW FD be interpreted as precluding Member States from providing for an appeal with suspensive effect against a decision to execute a EAW or a decision giving consent to an extension of the warrant or to an onward surrender?
- ***The CJEU's reply and main arguments:***
  - **Member States are entitled to foresee an appeal with suspensive effect, but they are not obliged to do so** (paras 37-55)
    - The aabsence of an express provision does not mean that the EAW FD prevents the Member States from providing for such an appeal or requires them to do so;
    - The EAW FD is not to have the effect of modifying the obligations of Member States as regards respect for fundamental rights and legal principles enshrined in Article 6 TEU;
    - The entire surrender procedure between Member States is carried out under judicial supervision, including the action by a judicial authority with respect to the consent provided for in Articles 27(4) and 28(3)(c) EAW FD;
    - In the case of a decision to execute a EAW, the possibility of having a right of appeal follows implicitly, but necessarily from the expression 'final decision' used in Article 17(2), (3) and (5) EAW FD. There is no reason to suppose that such a possibility must be excluded in relation to

a decision whereby the judicial authority gives its consent to the extension of an arrest warrant or to an onward surrender to another Member State.

- **If Member States foresee a right of appeal with suspensive effect, there are certain limits that they must respect** (paras 56-75):
  - As regards a decision to execute a EAW:
    - Article 17 EAW FD sets clear time limits which an appeal with suspensive effect must respect.
    - These time-limits must be interpreted as requiring the final decision on the execution of the EAW to be taken, in principle, either within 10 days from consent being given to the surrender of the requested person, or, in other cases, within 60 days from his arrest. Only in specific cases may those periods be extended by an additional 30 days, and only in exceptional circumstances may the time-limits prescribed in Article 17 not be complied with by a Member State.
  - As regards the decisions to give consent to the extension of the warrant or to an onward surrender:
    - Articles 27(4) and 28(3)(c) EAW FD foresee that such decision shall be taken 'no later than 30 days after receipt of the request'.
    - Unlike Article 17 EAW FD, these provisions do not set time-limits for the 'final' decision', but relate only to the original decision and do not concern cases in which such an appeal is brought.
    - It would, however, be contrary to the underlying logic of the EAW FD and to its objectives of accelerating surrender procedures if the periods for adoption of a final decision under Articles 27(4) and 28(3)(c) EAW FD were longer than those laid down in Article 17 EAW FD. Consequently, to ensure the consistent application and interpretation of the EAW FD, any appeal with suspensive effect provided for by the national legislation of a Member State against the decisions referred to in Articles 27(4) and 28(3)(c) EAW FD must, in any event, comply with the time-limits laid down in Article 17 EAW FD.

9. Transitional regime and relation to other instruments

In its case law, the CJEU has specified the meaning of Articles 31 and 32 EAW FD (*Santesteban Goicoechea*).

C-296/08 PPU, Santesteban Goicoechea, 12 August 2008

- ***Background:*** In 2000, Spain requested France to extradite Goicoechea, who was serving a sentence in France, in relation to different offences committed in Spain in the early nineties. The extradition request was first done on the basis of the 1957 Convention, but was refused by France on the ground that the offences for which extradition was sought were statute-barred under French law. Subsequently, in 2004, an EAW was issued by Spanish judicial authorities, but it was not executed by French judicial authorities in view of the date of the acts and the statement made in relation to Article 32 EAW FD. Then, in 2008, the Spanish authorities requested the extradition on the basis of the 1996 Convention. The French Court halted proceedings and referred to the CJEU for the interpretation of Articles 31 and 32 EAW FD which regulate the transitional regime of the EAW FD and its relation to other legal instruments.
- ***Main questions:*** (i) Must Article 31 EAW FD be interpreted as meaning that -having regard to the word "replace" in this provision- the failure of a Member State to notify that it intends to apply bilateral or multilateral agreements in accordance with Article 31(2), has the consequence that that Member State cannot make use of extradition procedures other than the EAW procedure with another Member State which has made a statement pursuant to Article 32 EAW FD? (ii) Must Article 32 EAW be interpreted as precluding the application by an executing Member State of the 1996 Convention where that Convention became applicable in that Member State only after 1 January 2004?
- ***CJEU's reply:***
  - **Article 31 refers only to the situation in which the EAW system is applicable**. It does not apply where an extradition request relates to acts committed *before* a date specified by a Member State in a statement made under Article 32 EAW FD:
    - The aim of the EAW FD was to replace all the previous instruments concerning extradition (para 51);
    - Article 31(1) EAW FD sums up the extradition instruments that are replaced by the EAW FD, including the 1996 Convention (para 53);
    - Article 31(2) EAW FD foresees that Member States are allowed to continue to use some bilateral or multilateral extradition instruments. This does not refer to the instruments mentioned in Article 31(1) (paras 54-56);
    - Articles 31 and 32 EAW FD refer to distinct situations which are mutually exclusive: Article 31 deals with the consequences of the application of the EAW system for international extradition conventions whilst Article

32 envisages a situation in which that system does not apply (para 59).
  - The instruments mentioned in Article 31(1) EAW FD, including the 1996 Convention, remain relevant in cases covered by a Member State's statement under Article 32 EAW FD (para 58).
- **Article 32 EAW FD allows an executing Member State to apply the 1996 Convention even if that Convention became applicable in that Member State only after 1 January 2004**:
  - The application of the 1996 Convention is consistent with the EAW system since the Convention can only be used where the EAW system does not apply (para 74)
  - The application of the 1996 Convention is consistent with the objectives of the Union (para 77);
  - According to settled case-law, procedural rules –such as provisions governing the extradition of persons- are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (para 80).

10. Extradition of EU citizens

In its case law, the CJEU has interpreted the provisions on EU citizenship (Article 21(1) TFEU) and non-discrimination on the basis of nationality (Article 18 TFEU) in the context of extradition to a third country, but with a clear impact on the application of the EAW FD. The CJEU has ruled that if a Member State receives an extradition request from a third State, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of the EAW FD provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory (*Petruhhin*). In other words, in such circumstances, surrender will have to prevail over extradition. The CJEU has also explained that Member States have certain duties under Article 19 Charter when they receive a request from a third State seeking the extradition of a national of another Member (*Petruhhin*).

C-182/15, *Petruhhin*, Judgment of 6 September 2016.

- ***Background:*** Russian authorities had issued an extradition request to the Latvian authorities in relation to Petruhhin in connection with a drug-trafficking offence. Petruhhin, an Estonian national, had made use of his right to move freely within the EU. Under Latvian law, Latvian citizens are protected against extradition. Petruhhin claimed that - as an EU citizen - he should enjoy the same rights in Latvia as a Latvian national. The Latvian Court halted proceedings and referred to the CJEU for the interpretation of Articles 18 and 21(1) TFEU (non-discrimination and EU citizenship) and Article 19 Charter (protection in the event of removal, expulsion or extradition).

- ***Main questions:*** Must under Article 18(1) TFEU and Article 21(1) TFEU an EU citizen enjoy the same level of protection as a national of the Member State in question in the event of an extradition request from a third State to an EU Member State regarding a citizen of another EU Member State? Is under Article 19 Charter, a Member State that decided to extradite an EU citizen to a third State, required to verify that the extradition will not prejudice the rights provided for in Article 19 Charter?
- ***The CJEU's reply and main arguments:***
  - **Article 18 TFEU and Article 21 TFEU must be interpreted as meaning that, when a Member State receives an extradition request from a third State, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of the EAW FD provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory**.

    - The unequal treatment which allows the extradition of a Union citizen who is a national of another Member State, gives rise to a restriction of freedom of movement within the meaning of Article 21 TFEU (para 33).
    - Such a restriction can be justified if it based on objective considerations and proportionate to the legitimate objective of the national provision.
      - Legitimate objective (para 37): preventing the risk of impunity for persons who have committed an offence;
      - Proportionality (paras 38-49): in the absence of EU rules that govern extradition between EU and the third country involved, the requested Member State must exchange information with the Member State of origin and must give priority to a potential EAW over the extradition request.
  - **Where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter**.

    - The prohibition of inhuman or degrading treatment or punishment included in Article 4 Charter is absolute (para 56);
    - The existence of declarations and accession to international treaties are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the ECHR (para 57);
    - If the competent authority of the requested Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State and it is called upon to decide

on the extradition of a person to that State, it is bound to assess the existence of that risk (with reference to *Aranyosi and Căldăraru*).

- For the purpose of this assessment, the competent authority of the requested Member State must rely on information that is objective, reliable, specific and properly updated (para 59).

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