THE EUROPEAN ARREST WARRANT IN LAW AND IN PRATICE: A COMPARATIVE STUDY FOR THE CONSOLIDATION OF THE EUROPEAN LAW-ENFORCEMENT AREA

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PREFACE

The European Arrest Warrant (EAW) is widely recognised as landmark in European judicial cooperation. It was one of the major achievements within the Third Pillar of the European Union (EU), and the first significant materialisation of the principle of mutual recognition of judiciary decisions. Succeeding the longstanding procedure of extradition for criminal matters among EU member states, it abolished the role political power had always had in such matters, rendering the transfer between countries of convicted criminals or suspects a purely judicial matter. This has led some to qualify it as a revolution in European affairs, signalling the coming of a European integration at the level of high politics and a shift in its means from international to transnational law (Kaunert, 2007; Plachta, 2003; Wagner, 2003). Although it was planned since the Tampere European Council, two years before its approval, the EAW as it came to be represents a great leap forward that was hardly foreseeable in an EU accustomed to more gradual and consensual policies. It was the post-September 11 international climate that hastened its adoption, included in a broad package of measures against terrorism, and furthered its reach beyond the prescriptions of Tampere. In this new guise it was approved at the Laeken European Council of December 2001, the result of a consensus fiercely built over several internal tensions and disagreements. Later on, the Lisbon Treaty gave further and decisive steps in that direction, explicitly consecrating the principle of mutual recognition as the cornerstone of the judicial cooperation in criminal matters.

In this context, all scientific work that brings knowledge and reflection on the construction of a European area of justice gains particular relevance. And so the study we now present in this report attempted to respond to such needs. We consider the knowledge offered by this work on judicial cooperation in criminal matters can be helpful for the development of policies and measures that enable a better consolidation of a so desired common area of justice.

Funded by the European Commission, the research project that based this report, entitled “The European arrest warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area”, was inserted in the

Directorate D (Internal security and criminal justice) of the Directorate-General Justice, Freedom and Security.

This research project specifically aimed to (1) study and compare the different applications of the European arrest warrant in the four member states; (2) to assess and analyze the requested person profile; (3) to assess and analyze the underlying criminality; (4) to assess the judicial actors' perceptions on the European arrest warrant, concerning specifically its practical effects and its efficacy in the prevention and combat against the circulation of criminals and transnational criminality within the Schengen Space; (5) to develop training programs for said judicial actors on the use of this tool; (6) to contribute to the improvement and standardization of judicial procedures concerning the European arrest warrant (by means of publications, debate promotion, and training guidelines).

The fieldwork ran effectively from June 2008 to June 2010. The coordinating entity was the Centre for Social Studies at the University of Coimbra, Portugal, having as scientific coordinator Boaventura de Sousa Santos, and Conceição Gomes as research coordinator.

The project brought together as partners various organizations, ranging from academic institutions to judges' associations: the Research Institute on Judicial Systems (Istituto di Ricerca sui Sistemi Giudiziari – Consiglio Nazionale delle Ricerche, IRSiG-CNR), from Italy; the Montaigne Center at the Faculty of Law, University of Utrecht, from The Netherlands; the Association Judges for Democracy, from Spain; the Portuguese Judges' Association, and the Centre for Social Studies at the University of Coimbra, from Portugal. The four national teams were composed by Davide Carnevali, Marco Fabri and Marco Velicogna (Italy); Philip Langbroek and Elina Kurtovic (the Netherlands); Ignacio Ubaldo González and Sabela Oubiña (Spain); Conceição Gomes, Diana Fernandes, José Manuel Reis (CES, Portugal), António Latas and José Mouraz Lopes (ASJP, Portugal). Additionally, Élida Santos,.Fátima Sousa, Marina Henriques and Pedro Abreu (CES, Portugal) also collaborated with the CES team during different stages of research.

The research team intended the project results to not only consubstantiate an in-depth knowledge of the legal framework and the practices concerning the European arrest warrant, but also to bring about an acknowledgment of the requested persons' profile and status, as well of the underlying criminality in the four member states, by means of a combination of various qualitative and quantitative methodologies, thus providing a thorough data collection, and consequently a comprehensive systemic analysis and evaluation.

All in all, it has been our main intention to stimulate developments in the field of mutual cooperation in criminal matters, both in scientific research and in the promotion of public policies, at national and supranational level. Furthermore, we are determined to produce and present information that can be used to further reflect on the challenges inherent to the construction of a European area of justice. That was precisely the core idea behind the international conference "Towards a European Area of Justice", which was an important output of our research[1]. Besides the proficuous debates that took place there, it was a driving concern of the coordination to encourage a rich cross-country debate, inviting experts in the area to project meetings. The training guidelines on the subject are presented in Annex. Furthermore, a forthcoming book will include the project's findings and further contributions of expert scholars.

This report is divided in two parts. In the first part, after a brief introduction and methodological overview, Chapters 1 (« Comparative analysis of national laws») and 2 (« Practices and perceptions in a comparative perspective ») intend to provide a comparative panorama of the results of research. The national case studies from Italy, the Netherlands, Portugal and Spain constitute the second part[2]. Closing the report is an annex section, with the training guidelines, the programme of the international conference, the English version of the survey, and a CD with the proceedings database and respective statistical outputs.

In addition to the acknowledgements due in each national chapter, we fully acknowledge all entities and practitioners who in the four countries collaborated with us. Without their valuable cooperation this report would not exist. As seen throughout this report, comparative empirical analyses are not easy to accomplish but are indeed possible. Many obstacles were won by the excellent professionalism, commitment and proactivity of the partners that made this multi-national team. The strong work and cooperation dynamics existed much beyond the project meetings. To all colleagues we leave here our utmost appreciation for such an enriching environment. To the IRSiG-CNR and the Faculty of Law at the Utrecht University we as well express our gratitude for so well hosting our project meetings.

1 The Conference, which took place the 11th June 2010, can be watched online at the website of Justiça TV, an online television channel committed to the themes of justice that broadcast the event (http://www.justicatv.com/). The programme can be consulted in the annex section.

2 The results of the national case studies are presented in Part II, and each national team is fully responsible for their respective national report. The coordination did not make any alteration to these documents, only proceeding to uniform the presentation of the texts for publication purposes, and introducing the names of the respective authors on the cover.

We are also indebted to our colleagues at the Centre for Social Studies and the Permanent Observatory for Portuguese Justice Catarina Trincão, João Pedro Campos, Paula Fernando and Tiago Ribeiro for their intervention and support in various stages of the project.

We express our gratitude to the project management team, João Paulo Dias (Director), Rita Pais and André Caiado, for all support in the financial management of this project.

To the conference speakers and commentators, we wish to publicly express our deepest thanks for their important contributions to the debate on this subject.

Last but not least, we cannot end this preface without expressing our gratitude, first and foremost, to the European Commission, who entrusted to us this project and made our research possible.

The Coordination

Boaventura de Sousa Santos

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INTRODUCTION AND METHODOLOGICAL OVERVIEW

Over the last decades, transnational interactions dramatically intensified, from the globalization of production systems and financial transfers to the spread at a global scale of information and images through the media and the mass movements of people, either as tourists or as migrants or refugees (Santos, 2001). In such a scenario, the globalized world witnesses the advent of a new criminal phenomenology, which has become a growing threat to society as we know it, a criminality that is increasingly organized and transnational in its scope of action.

Criminal activities are no longer carried out solely by isolated individuals, but more and more by organized groups, which penetrate the various structures of society. Crime is ever more organized beyond national boundaries, benefiting from the free movement of persons, goods, services and capital within the Schengen area. Technological innovations such as the internet and electronic banking proved to be extremely useful for criminal activity and the transfer of its proceedings to seemingly licit activities. The ease of movement of persons and property facilitates their trafficking. Fraud and corruption take on massive proportions, affecting indiscriminately citizens, private institutions, and states themselves.

This criminal activity, rather than carried out by individuals acting solo or in small groups with a territorially restricted scope of action as in the past, is increasingly consummated by entities of high organization standards, conforming to principles of rationality and division of labour, whether stable or permanent, with the purpose of obtaining enormous profits. Facing such complex and hierarchical structures, criminal field operatives are often completely unaware of ringleaders, a characteristic which safeguards the latter and simultaneously allows an easy replacement of the former. These organizations are also endowed with great flexibility, thus making them virtually invisible.

Such highly organized criminality often extends its activities to various countries, in order to seize the best business opportunities and escape the course of

justice, the global market, and at the European level the Schengen area, showing to be particularly useful for such desiderata (Simões, 2002; Bucho et al., 2000; Rodrigues and Mota, 2002; Valente, 2006).

The enlargement of this criminality's sphere of action to the transnational scale, coupled with the mobility and territorial dispersion of its members, results in a privileged immunity to the inquiry of formal control agencies/entities, in the words of Andrade (1991). Rodrigues and Mota (2002: 14) accurately refer that in this gigantic market the global economy has evolved into there is a demand for prohibited goods that now converts it in the ideal habitat for the proliferation of criminal organizations.

In such a context, the inability of individual states for effective responses is obvious, in terms of limitations in their laws and the very scope of their formal institutions of control, thus showing governance of a global nature would be a most effective solution (the only truly effective, as a matter of fact) in order to respond to the problems today's transnational crime consigns (Bonina, 2003; Hobsbawm, 2008).

It is clear that this new criminal phenomenology – transnational, organized, sophisticated, powerful, invisible – imposes on states a new paradigm of criminal policy, comprising an ideal set of answers that pass through the implementation of new responses by the formal control agencies/entities; more and better means of prevention, investigation and crime prosecution; and better coordination and cooperation of all entities, both judicial and polices. This in a double context, both domestic and international, as national mechanisms are proving very inadequate, since excruciatingly restricted in their scope, to face an increasingly pervasive, plastic, multipolar, and roving criminality.

How can this fight take place? It does not seem at all feasible yo achieve some success through individual performances from each state, which naturally ought to be partial and limited to its territorial jurisdiction in criminal matters. Taking into account the specificities of this transnational reality, the logical answer seems clearly to be a classic "to global problems, global solutions." In the words of Rodrigues and Mota (2002: 15), "the internationalization of crime needs to be addressed by the internationalization of policies to fight crime". Nevertheless, a response as prompt and basic as this must cope with serious difficulties, starting naturally with the "sovereign principle of sovereignty."

In fact, there currently exist complex options and problems for nation states, both in economic and security matters, given the global nature of such phenomena, where this dichotomy is must pulsing. In this respect, Arnaud outlines:

> Les États se trouvent face à un défi: gouverner en matière économique alors qu'ils ne sont pas maîtres du marché mondial; ou bien peser assez pour que la gestion de l'économie globale ne leur échappe pas. (...) Il en va de même en matière de sécurité. La nature de la sécurité globale a changé (2004: 130-131).

In what specifically concerns criminal law, we can push a bit forward and see that the Westphalian state-centric paradigm – there is no "international legislator"; neither a compulsory jurisdiction nor a police entitled to punish offenders is foreseen; international law sets no mandatory standard to assess while creating internal laws; every state is entitled to resort to war; the *ius puniendi* is a prerogative of any sovereign state – has been juxtaposed to the system formally and theoretically dominant in the United Nations – states are no longer the sole subjects of international law; international law obliges states to respect the fundamental rights of individuals; erosion of domestic jurisdictions (Zolo, 1997: 96); general juridical principles are established in an imperative mode and consubstantiating a true *ius cogens*; the right to use force is limited to self-defence; the punitive system is centred on the Security Council.

The case of the European Union can be seen as paradigmatic, as it has shown to be especially attentive to such new criminal phenomena, taking measures for its prevention and prosecution that can be seen as pioneering. Especially since the Amsterdam Treaty, in particular with the adoption of the Action Plan against organized crime, adopted by the Amsterdam European Council on the 16th and 17th June 1997. With the creation of an area of freedom, security and justice at the EU level several initiatives were adopted, both legislative and non legislative, which contribute to the prevention and fight against organized crime. At the Tampere European Council, member states were invited to transform the principle of mutual recognition into the cornerstone of a genuine European area of security, justice and freedom; and by such path, dare we say, aiming at the construction of a European criminal law area. This is a field that has been assuming a special dynamism, subjected to different diplomas since long, as we will now see.

In was back in 1957, with the Treaty of Rome, that the first ideas of a construction of a European judicial area arose (Rodrigues, 2008). Specifically in the

context of judicial cooperation in criminal matters, the first milestone was the adoption of the European Convention on Mutual Assistance in Criminal Matters at Strasbourg on the 20th April, 1959, by the member states of the Council of Europe. This Convention focused, however, on a relationship established between the Ministries of Justice (Simões, 2002) for the fulfilment of rogatory letters between judicial authorities.

Between 1971 and 1972, a number of intergovernmental meetings on terrorism took place, and at a Council of Ministers in December of 1975, UK Foreign Secretary James Callaghan proposed to set up a special working group to combat terrorism in the EC, thus creating the so-called Trevi Group, “which is the institutional forerunner of the EU’s present Third Pillar, home to Europol” (Occhipinti, 2003). The Trevi Group, based on intergovernmental cooperation, was formalised in 1976 and served as a forum for exchange of information to counter terrorism and coordinate policing in the EC (Van Oudenaren, 2005; Davin, 2007). At its highest level, the Trevi Group was represented by the 12 Interior Ministers of the EC.

The Single European Act (SEA), signed in 1986, provided for the necessary adjustments required to the implementation of a free internal market and introduced the idea of a European Union (EU). The free movement of goods, services, people and capital, corresponded to a quick "unification of the international illicit markets" (Pisani, 2007), which necessarily requested effective judicial and police cooperation. Under the new intergovernmental organization established by the SEA and as a result of the work undertaken by the Group of "judicial cooperation in criminal matters", several tools for cooperation were presented. The purpose was to facilitate small European agreements concluded within the Council of Europe in this area, making them more workable. Since ratification of all member states was not needed for entry into force within ratificating member states, some success was reached.

The Treaty of Maastricht, formally known as Treaty of the European Union (TEU), came as a development of the Single European Act, driven in particular by the objective to "facilitate the free movement of persons, while ensuring the security of its people, by creating a space of freedom, security and justice"[3]. It changed the name of the European Economic Community to simply "the European Community" and introduced new forms of cooperation between the member state governments, on the areas of “Common Foreign and Security Policy” and the area of "Justice and Home Affairs". By adding this intergovernmental cooperation to the existing "Community"

[3] Preamble of the Treaty.

system, the Treaty of Maastricht created a new overarching structure with three "pillars", which were political as well as economic – the European Union (EU).

One of the goals of the European Union pointed by the Treaty was to develop close cooperation on justice and home affairs (article B). The provisions on police and judicial cooperation in criminal matters, presented in the third pillar (Title VI), therefore outside the Community pillar, are built upon a logic of intergovernmental cooperation, resting as a "prerogative of the States" (Rodrigues and Mota, 2002).

The Treaty elects, among other, as matters of common interest to achieve the goals of the Union (see article K.1): (no. 1) asylum policy; (no. 2) the rules governing the movement of persons across the external borders of member states and the exercise of controls thereon; (no. 3) immigration policy and policy regarding nationals of third countries; (no. 4) combatting drug addiction; (no. 5) combatting fraud on an international scale; (no. 6) judicial cooperation in civil matters; (no. 7) judicial cooperation in criminal matters; (no. 8) customs cooperation; (no. 9) police cooperation for combating terrorism, drug trafficking and other serious forms of international crime, including customs cooperation, in connection with the organisation of EU-wide information exchange system within a European Police Office (Europol).

For these matters of common interest the Council, acting unanimously as a rule (article K.4, no. 3), was assigned powers to (see article K.3) (a) adopt joint positions and promote cooperation for the pursuit of the Union's objectives; (b) adopt joint actions where they would attain the Union's objectives better than the member states acting individually, and decide that the respective implementing measures be adopted by qualified majority; (c) draw up conventions and recommend them to member states for adoption, without prejudice to article 220 of the Treaty establishing the European Community. These powers were to be exercised on the initiative of the Commission or any member state for most of the matters presented in the previous paragraph, except for matters judicial cooperation in criminal matters, customs cooperation and police cooperation (article K.1, nos. 7-9), where only member states could take the initiative. A Coordinating Committee was created with the responsibility of assisting the Council for its work on these matters (article K.4, no. 1).

The option for a third pillar outside the orbit of the community institutions, especially outside the Commission's activity, ascribed these concerns directly to member states, imposing decisions subject to unanimity, thus removing the third pillar from the logic of integration.

Again outside the Community framework for cooperation (and since a unanimous decision on the suppression of border controls was not possible within the Council of the European Communities), Germany, France, Belgium, the Netherlands and Luxembourg signed, in the town of Schengen, on the 14th June, 1985, an agreement "on the gradual abolition of controls at their common borders" and, in 1990, the Convention Implementing the Schengen Agreement, which came into force in 1995. In March of 1995, border controls were abolished among the ratifiers (which Spain and Portugal joined in June of 1991) and so began the so-called "compensatory measures". The Schengen Information System (SIS) was put into operation, enabling the exchange of information on the movement of suspected or wanted persons for any member state (Caeiro, 2009), through direct communication between judicial authorities.

Also in 1995 the Europol Convention was adopted. Concluded in Brussels, it was ratified by all member states and entered into force on the 1st of October, 1998. Europol, the European Police Office, was established by the Council Act of the 26th of July, 1995, which stipulates that the Convention is based on article K.3 of the Treaty on European Union (Europol Convention) (1995 / C 316/01). It results of the awareness of member states to "the urgent problems arising from terrorism, drug trafficking and other serious international crime", and the consideration that progress is needed “in solidarity and cooperation among Member States (...), particularly through an improvement of police cooperation" and the "common objective of improving police cooperation in the field of terrorism, drug trafficking and other serious forms of international crime through a constant, confidential and intensive exchange of information between Europol and Member States’ national units"[4] [5].

[4] See the Preamble.

[5] Europol was thus created to pursue the main objective of "improving (...) the effectiveness of the competent services of Member States and their cooperation with regard to preventing and combating terrorism, drug trafficking and other serious international crime where there is concrete evidence of the existence of a structure or a criminal organization and two or more Member States are affected by these forms of crime in such a way that the breadth, severity and consequences of criminal acts is required joint action by Member States " (article 2., paragraph 1). In an annex to the Europol Convention a list naming the types of crime which Europol could deal with was published. Among them are the following: "the attacks against life, physical integrity and freedom: murder, grievous bodily harm, trafficking of human organs and tissues, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, attacks on the heritage and public goods and fraud, organized robbery, trafficking in cultural goods, including antiques and works of art, swindling and fraud, racketeering and extortion, counterfeiting and product piracy, forgery of administrative documents and trafficking, counterfeiting money and means of payment, computer crime, corruption, illegal trade and threats to the environment, trafficking in arms, ammunition and explosives, trafficking in endangered animal species, trafficking and endangered plant species and, environmental crime, trafficking of substances hormonal and other growth". The Annex referred to in article 2. provides also that the forms of crime listed above, as well as the corresponding notes, shall “be assessed by national authorities in accordance with national legislation of the States, to which they belong".

The Treaty of Amsterdam amended and renumbered the EU and EC Treaties. It communitarises almost all fields present in the area of freedom, security and justice, which up until then were under the European Union. With this Treaty, of the nine areas of common interest (article K.1 TEU), only two – police and judicial cooperation in criminal matters – remain as matters of intergovernmental cooperation to be developed in the specific context of the EU. The Treaty provides for the first time the possibility of an "approximation, where necessary, of rules of criminal law of the Member States" (see article 29), "adopt[ing] gradually measures establishing minimum rules on the constituent elements of criminal acts and penalties in the fields of organized crime, terrorism and drug trafficking" (article 31, e)). Another novelty introduced by the Amsterdam Treaty relates to the jurisdiction of the Court of Justice of European Communities to give preliminary rulings on the validity and interpretation of Framework Decisions and decisions on the interpretation of conventions established in the field of police cooperation and in criminal matters and on the validity and interpretation of the implementing measures (article 35, §1) (Jimeno-Bulnes, 2003). The Amsterdam Treaty is thus based in a genuine area of freedom, security and justice for the citizen, which is not limited to the common market.

At the operational level, the Joint Action of the 29th of June, 1998, which created the European Judicial Network, was adopted. It was born within the Working Group of the Council of the European Union – The Multidisciplinary Group on Organized Crime – and followed the earlier establishment of the so-called “liaison magistrates" and the network of contact points in all member states.

To encourage the construction of the Freedom, Security and Justice area, and solely dedicated to said objective, the European Council meeting in Tampere on the 15th and the 16th of October 1999, focused primarily on access to justice; combat to crime; strengthening of Europol; creation of Eurojust; adoption of a set of measures to combat money laundering, juvenile delinquency, insecurity in urban areas and criminality linked to drug use. The principle of mutual recognition as a fundamental principle of judicial cooperation in criminal matters was adopted, but with no concern for the need for harmonisation of substantive and procedural criminal law.

In December of 2000, the Council of the European Union established the European Police College (CEPOL), taking into account the conclusions of the Tampere Council. CEPOL is incorporated in the network, bringing together the member states’

national training institutes for senior police officers, which for this purpose should maintain close cooperation.

On the 26th of February 2001, the Treaty of Nice was signed, producing the necessary reform of institutions so that the Union could function efficiently after its enlargement to 25 member states. The main innovation introduced by this Treaty on cooperation in criminal matters was the creation of Eurojust (European Judicial Cooperation Unit, articles 29 and 31, EU), establishing that cooperation between judicial authorities should be carried out "enabling Eurojust to facilitate proper coordination between national authorities of member states responsible for the investigation and criminal prosecution", "encouraging Eurojust's contribution to the investigation of cases relating to serious cross-border crime, especially when dealing with organized crime, taking into account the analysis of Europol", "promoting close cooperation between Eurojust and the European Judicial Network, particularly to facilitate the execution of rogatory letters and extradition requests" (article 31., paragraph 2). This unit (Eurojust), consisting of prosecutors, magistrates or police officers of equivalent competence, was established by Council Decision of the 28th February 2002. The Decision provides for the establishment or designation of one or more national correspondents, who will in principle be a contact point for the European Judicial Network (article 12, paragraphs 1-2).

Finally, in 2002, the European arrest warrant (EAW) was implemented by the Framework Decision of the 13th of June, 2002, accomplishing for the first time the free movement of judicial decisions on criminal matters throughout the European Union area, and modifying the conceptual frameworks of cooperation (Ferreira, 2007). We explore its origins in more detail in the following section on the comparison of national laws. The traditional bureaucratic process of extradition under the Extradition Convention between the member states of the European Union, from 1996, was overturned. The process abandons the political-governmental procedures, including the intervention of the Ministry of Foreign Affairs for scrutiny of political nature, and becomes judicialized.

The Treaty of Lisbon, keeping some of the changes proposed in the Draft Treaty establishing a Constitution for Europe (which was ultimately rejected), put an end to the pillar structure of the Union. Indeed, the area of freedom, security and justice is now moved to Title V of the Treaty on the Functioning of the European Union. Also, the application of qualified majority is extended and the European Parliament

strengthens its power of co-decision. Judicial cooperation in criminal matters is perceived as the whole set of measures and actions aimed at the achievement of certain objectives in criminal matters *prima facie* are based on mutual recognition of judicial decisions.

The principle of mutual recognition of judicial decisions is enshrined as a mean of facilitating access to justice, and the Treaty expressly refers to the possible imposition of "a European Public Prosecutor's Office from Eurojust" (article 86, paragraph 1) in order to combat crimes affecting the financial interests of the Union, acting in this matter "before the courts of the Member States" (article 86, paragraph 2).

All in all, the EU has been taking decisive steps towards a common area of justice. This research project, whose main results are presented in this report, intends to show, by means of the EAW, how this road is being paved, specifically in what concerns the way mutual trust, mutual recognition and judicial cooperation are interacting with the respect for fundamental rights within the EU's borders and, furthermore, the consolidation of a true European citizenship.

Methodological overview

This research project contemplated a vast range of methodologies to assess the reality of the EAW in law, in practice and in perceptions, involving analyses of law, of case law, of EAW judicial proceedings, a survey, interviews and focus groups. In the following section we give an account of these methodologies, their rationale and the issues faced in their implementation by the four research teams. Since the methodological options of each team are thoroughly described in the respective national chapter, this section only intends to offer a very brief panorama.

Doctrine, law and case law

An analysis of law and case law was the first necessary step for an assessment of the state of matters on the EAW at the legal level and legal practice. In the initial stages of research, an online platform was set up to share relevant documentation among partners; it was used throughout the project for exchanging documents of all sorts.

The analysis of laws focused on the EAW Framework Decision (FD), its transposition into the 4 partner countries, and on doctrine related to the issue. Each team performed a thorough analysis of its national EAW transposition law, provided at

the beginning of its case study, and elaborated a table comparing the provisions of its national law to those of the FD on an article-by-article basis. Issues addressed included the broad way in which FD is transposed into national law, the way in which certain norms of the FD are materialised at the criminal, procedural, institutional level (e.g. definition of offences, central authority), the degrees of detail reached by the national legislator, the main deviations from the FD. The results, together with a systematic collection and study of articles in journals related to EAW laws and the underlying doctrinal issues, helped in constructing a comparative perspective of the main issues at the legal level, exposed in the chapter of comparative analysis.

The analysis of case law followed different courses per country, first and foremost because only the Portuguese and Italian regimes leave substantial room for it6, and so were predictably the countries with the most substantial corpus of case law. In Italy, the analysis is based on EAW-related judgements of the Court of Cassation, with rulings given between September 2005 and April 2009; in Portugal, the analysis is based on an exhaustive collection of case law decisions by higher courts – rulings from the Courts of Appeal, the Supreme Court of Justice, and the Constitutional Court; in Spain, the comparatively reduced cases of appeals to the Constitutional Court (recursos de amparo) are the analytical basis.

Proceedings

The EAW's main trait it's the judicial nature, and therefore an analysis of such a procedure in itself, as reflected in the judicial proceedings, is a crucial way to assess it in practice, in its daily working involving institutions, practitioners, requested persons. Thus the four national teams assumed the task of analysing the EAW proceedings in their countries7.

The information we could expect to take from these proceedings was varied in nature, some of it quantitative, some more appropriate for a qualitative treatment. We would be dealing with judicial procedures in four different countries, four different languages and four different legal systems. Furthermore, the information for received EAWs should be much greater than for issued EAWs, since it would include the stages of execution (arrest, hearing, decision, transfer), whereas for the latter one could only expect the initial stages up to warrant transmission to the foreign authority.

[6] For further detail, see the respective chapters.

[7] In annex we include the common access database template, the SPSS outputs of each one of the four national studies, and the SPSS outputs of the comparative cross-country analysis.

With these issues in mind, the lowest common denominator that could be relied upon was the EAW form itself, the document to be transmitted among authorities that is specified in the EAW FD. After examining this document, the partners designed a database that closely followed the form's structure, leaving aside any personally identifiable information. These were fields concerning (a) generic characteristics of the requested person (e.g. nationality, sex, year of birth); (b) the procedural purpose underlying the warrant (e.g. prosecution or execution of sentence); (c) the length of sentences, including the maximum sentence applicable or, for cases of execution of sentence, the effective sentence and the remaining sentence; (d) underlying decisions in absentia, and the guarantees provided in such cases; (e) the number and classification of the offences at stake; (f) other circumstances relevant to the case; (g) requests for seizure and handing over of property; (h) lifetime sentences and the guarantees provided in such cases; and finally (i) information on the authorities and countries involved. With the aforementioned exception of personally identifiable information, all the information in closed, pre-established categories was to be registered and analysed.

For the stage of EAW execution – obviously, only applicable to received warrants – no common pre-established document was at hand, so partners departed from a generic model of this stage, using the EAW FD and national transposition laws to define some fields that presumably would be available in all circumstances and should be registered. These included the results of the warrant (approved and executed, refused etc.); the response of the requested person (consent to surrender, renunciation to speciality rule); the existence and result of appeals where applicable; procedural matters (privileges or immunity, processes pending in the executing country, temporary and conditional surrender); contacts between authorities for the resolution of problems; and the duration of procedures from arrest to hearing to surrender. All this information was therefore to be registered in a database designed for the effect and subject to a quantitative, statistical analysis.

Other than quantitative information, it was expected that EAW proceedings would provide a rich group of qualitative data on the EAW in practice, which should just as well be considered. In the initial stages of research, before having access to the proceedings themselves, this data could only be assumed hypothetically: there was interest, for example, in checking the conduct of the requested person in the process, the arguments used by their lawyers in court, the grounds for appeal. Since there was little certainty on what and how much would actually be found on the field, it was

considered excessive to adopt a predetermined methodology of qualitative analysis; instead, eventual findings could be explored as considered appropriate for the situation. Particularly, it was envisaged to articulate such findings with those drawn from other tasks (e.g. law and case law analysis, interviews, surveys), as a way of assessing conformities/discrepancies between perception and practice. Indeed, much qualitative information was provided by the proceedings, in matters foreseen and unforeseen, and is present throughout the report in articulation with the various tasks.

In brief, the information from the EAW proceedings, assessed through a quantitative, statistical analysis, is grouped in five main categories: (1) profile of the requested persons, (2) profile of the underlying criminality, (3) general procedural aspects, (4) appeals and case law issues, (5) and duration of procedures. Qualitative information was also taken and can be found throughout the report as an empirical complement to other sources.

The other important issue in this task was to determine the number of proceedings to include in a quantitative analysis, namely whether to analyse all proceedings or a sample of them. For this the population of issued and received warrants was required: the European Commission's national evaluation reports on EAW implementation gave figures for most countries, but with uneven levels of detail; after comparing them with national sources, they turned out to be a good starting point, but in the Portuguese case there were significantly more warrants according to the national sources, which appeared to be more reliable. At this stage, it became clear that an analysis of all proceedings would be infeasible, due to the time and resources it would require, and it was decided to draw a random sample. As a starting rule, the sample would have a confidence interval of 95% and a margin of error of 5%.

In common among all partner countries, the proceedings' quantitative analysis draws on representative samples of issued and received warrants for the period 2004-2008. Other than that, the methodology had to be adjusted according to the specifics of each country. In Portugal and Spain, the samples are representative and have no limitations other than missing data. In the Portuguese case, the samples of issued and received warrants are statistically representative and larger than the minimum size required, especially for received warrants, enabling a lower margin of error in the best case (4,3% and 2,9% respectively). In Italy, the sample has some limitations: it covers only warrants issued or received for execution of sentence (not for prosecution), opened from 2007 to the first semester of 2008, and whose underlying judicial decision

was final and not subject to appeal. Due to this, it is an illustrative but statistically not representative sample. In the Netherlands, the sample of 105 issued cases is also illustrative but not representative. The sample of received warrants consists of 250 proceedings: though lower than the pre-established sample size of 310 for a population of about 1600 cases, it is still representative, with a wider margin of error8.

Interviews and focus groups

The analytical axis of grasping the EAW's practice in perceptions and opinions was to be advanced through interviews, focus groups and a survey. Interviews provide a rich, deep portrait of individual perspectives, but have a limitation of representativeness, since they cannot be performed with large numbers of persons. Interviews were meant to give ideas on the main issues concerning the EAW in the eyes of those who deal with it, ideas which could guide further research and be tested empirically through other means (for example, the survey and case file analysis).

Partners established a minimum of 5 interviews to be done, involving a public prosecutor, a judge who issues and a judge who receives warrants, a police officer, a member of the national central authority (if applicable), and a lawyer, and all partners surpassed this number. The material from these interviews appears throughout the report.

Focus groups were planned for the latter stages of the project, as a means of bringing together the various subjective perspectives of actors involved in the EAW, having them face each other in a context of discussion, and discussing with them the insights and results of the research. The composition of the focus groups was left to the discretion of each team, with a guiding principle of having diversity of institutions and opinions. The focus group should include a judge, a public prosecutor, a lawyer, a police officer, a legal scholar.

Survey

The application of a survey to judicial officers on the EAW was another method of inquiry planned, intended as a means to attest in a more extensive and

[8] The lowest margin of error represents the best case scenario where a variable has valid data for all proceedings. It will be larger for each variable the more missing data there is and the less proceedings the variable is applicable to. For example, the sex of the requested person should be available in all cases, so the margin of error for the male/female percentage should be the lowest in the absence of missing data; on the contrary, the sentence imposed applies only to warrants for execution of sentence, not for prosecution, so the margin of error will be greater even if there is no missing data.

representative manner – although more limited in depth, as compared to interviews and focus groups – the perceptions on the EAW that judicial officers.

The elaboration of this inquiry in the form of questionnaire was a long process, involving an extensive and thorough discussion among partners. An initial version of the survey comprised 52 questions, divided among sections on the profile of the respondent, his experience and perceptions on the EAW, and on European judicial cooperation. This version was considered too extensive, with too many open fields, so a streamlining was suggested. A second version was proposed and discussed, resulting in a final survey of 15 questions9 (see annex).

Some questions raised much debate among partners, especially those meant to address value judgements. This was particularly the case for a question on the perception of officers about EAW use for small criminality, which raised a long discussion on how to convey in objective terms the notion of small criminality, with several criteria put forward: crimes within the EAW offence list, maximum sentences less than 3 years, sentences less than 1 year. Eventually, the last criterion was agreed upon10. Questions on practical experience of respondents raised less discussion, the most relevant being whether to ask for specific numbers or for a scale of frequency. As a rule, the second solution was preferred, using a 5-degree Likert scale ("Never" to "Always"), since respondents would find it difficult to provided accurate numbers, and the goal was not to obtain accurate figures anyway, rather a control variable to contextualise the other answers. Exceptions to this rule were questions on the number of warrants officials had issued or received in the previous year.

The survey was to be submitted online primarily, and by post if necessary. An online survey system was set up at the CES server and made available for each partner. The system sends an email to respondents, presenting the project and asking for participation in the survey, for which an individualised link, specific to each email address, is provided. Upon clicking the link, the respondent is led to the survey. After submitting his/her answers, the link is deactivated, so each respondent answers only once. This system ensures to a good degree that only people who receive the email can answer (unless they forward the email to others, but to mitigate that eventuality the link works only once), conferring more reliability to the results. Although no personally

[9] The survey (english version) is presented in annex.

[10] Initial question: "7. Do you consider issuing EAWs for minor crimes within the list justified?"; final question: "7. Do you consider issuing warrants for crimes with sentences less than 1 year imprisonment justified?".

identifiable information was registered in the system to begin with, anonymity of answers was nonetheless expressly provided to respondents in the presentation emails. The latter was achieved by sending an envelope, by post, to all respondents, containing a presentation letter, the survey, and a pre-paid envelope with our address.

Finding a way to contact the respondents was a challenge fraught with obstacles. In principle, the respondents should be all officials (judges and prosecutors) having dealt with the EAW, but it was infeasible in any country to separate those who had effectively dealt with the EAW from those who could theoretically deal with it, so the second group was considered as the potential respondents. This meant in practice all judges and public prosecutors at a criminal court that could deal with the EAW. Obtaining their email addresses proved difficult or impossible to the national teams, given the reluctance of political, judiciary or associative organs in providing them, and this imposed adjustments to the system for each country.

In Portugal, it was possible to obtain in due time only the contacts of judges, and not public prosecutors. Furthermore, e-mail addresses were obtained only for judges at the Courts of Appeal. For the ones at local courts, thanks to the assistance of the Portuguese' Judges Association their professional addresses were obtained, and the survey was sent by post (more than 800 letters) and afterwards inserted into a common database.

In Spain, there was some reluctance in providing the e-mail addresses to be processed at an external institution. The judges' association Jueces para la Democracia generously offered collaboration to send the emails to its associates on behalf of the project. However, since it did not have the survey system used by CES, it could not send individualized links for each email, and sent instead a generic link, common to all emails. Therefore, the Spanish survey was fully open – any person who knew the link to it could submit answers – and in that sense more vulnerable abuse by external persons not meant to be inquired. However, since the link for submissions was only diffused through the emails sent by Jueces para la Democracia, the risk of false submissions should remain low. As a precaution measure, the IP addresses and submission time of answers to the survey could be used to detect bulk submissions.

In Italy, it proved impossible to obtain the email addresses of respondents. Instead, emails were sent to the institutional addresses of court offices and public prosecutor offices, numbering more than 400. The limitation of one answer per email

address was removed, because at a specific office there might be more than one official having experience with the EAW.

In the Netherlands, only prosecutors were to be enquired, since more than half of Dutch judges dealing with the EAW had already been interviewed. However it was not possible to obtain the email addresses of prosecutors in due time, and the survey could not be undertaken.

In conclusion, the survey on the EAW proved difficult to implement and is subject to some limitations: it is not available for the Netherlands; in Portugal, it only includes judges, leaving out public prosecutors. For all countries, the results are illustrative, they cannot be considered statistically representative.

PART I
THE EUROPEAN ARREST WARRANT:
COMPARATIVE ANALYSIS

1. A COMPARISON OF NATIONAL LAWS

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Introduction

In this section we will briefly explain the EAW and undertake a comparative analysis of its national transposition laws in Portugal, Spain, Italy and the Netherlands. We begin by summarising the EAW Framework Decision (FD) in order to establish a common ground – what the EAW consists in, who deals with it, how it is used – from which national contrasts may come to light. We then analyse and compare the four national transposition laws in three dimensions: rights and guarantees, relevant authorities and procedures. We end by summarising the main differences following these dimensions.

A note on terminology is due before proceeding. The subject of this essay abounds in subtleties and niceties. Within it words and their interpretations are particularly important, because they involve fundamental rights of persons and because they operate in a cross-national setting, where the diversity of languages adds a further layer of potential misunderstandings. To address the risks inherent to this analysis, we based our terminology closely in the English version of the EAW FD and tried to use it uniformly through the analysis of national laws, where we relied on the original laws as well as on official English translation whenever available. However, in attempting a broader level of analysis, we used terms of our own – for example, generic or direct warrants. All relevant terms are italicised in their first appearance or definition. To quote the laws under analysis, we used an abbreviation system beginning with the law's origin ("FD" for Framework Decision, "pt" for Portugal, "es" for Spain, "it" for Italy, "nl" for the Netherlands), the article number and eventual subpoints of the article. For example, "pt article 11, d-e)" refers the Portuguese EAW law, article 11, subpoints d) to e).

1.1. Common ground: the Framework Decision

The EAW results from a long history of negotiations, advances and setbacks, of which a brief account is useful before we analyse its legal form. Its beginnings can be traced back to the Tampere European Council of October 1999, where the European area of freedom, security and justice, which had been established two years earlier through the Amsterdam Treaty as a common goal of the EU, began to materialize. The principle of mutual recognition of judiciary decisions was endorsed, as an alternative to an harmonisation of law which had met much resistance, and it was recommended that "the formal extradition procedure should be abolished among the member states... and replaced by a simple transfer" (§35 of Tampere conclusions).

This was still far from what the EAW came to be. For one, the simple transfer envisioned was meant for convicted criminals, not for suspects. Furthermore, there was no agreement on the abolition of double criminality checks and the exclusion of the executive from any role in the proceedings – countries such as Italy, the UK, Ireland, France, Luxembourg or Belgium had many reservations. Work proceeded for two years with no definitive results.

It was the September 11 attacks and the ensuing climate that brought about a normative change and an urge to act that gave the EAW a decisive impetus. The European Commission was instrumental in this dynamic. At the Brussels extraordinary European Council of 20-21 September 2001, in the wake of the terrorist attacks, a wide package against terrorism was approved which included the EAW. In the JHA ministers meeting of 27th-28th September 2001, the Commission secured support for its cause of the Belgian EU presidency, which had been against the EAW. It also used to good effect George W. Bush's 47 demands to the EU, covering judicial and diplomatic cooperation, which included the simplification of extradition within the EU. After the Brussels Council, disagreement centred on what offences should be exempt from double criminality checks in the EAW, not if there should be such exemption at all. The Commission had proposed a "negative list" of offences to be excluded from the warrant, while others preferred a "positive list" of offences covered by the warrant, which the Commission feared would keep extradition as the rule. By the Ghent European Council of 16 October 2001, the Commission conceded a positive list, with the strategy of enlarging it so much (up to 32 offences) as to achieve the same

practical effect as a negative list. Thus it was possible to reach consensus of all 15 member states but Italy and Ireland. All efforts until the Laeken Council centred on persuading them, through reaffirming the drive to join the war on terrorism and exerting political pressure. On a Justice and Home Affairs Council session of 6-7 December, aimed to prepare the Laeken summit, Ireland dropped its objections, but the Italian Minister of Justice maintained a veto on the long offence list, preferring a shorter list of 6 offences (Marin, 2008). Pressure increased on the Italian government, publicly criticized by the Commission, EU Prime Ministers (PM) and the European media, until it finally ceded on the 11th of December, during a visit of Belgium's PM Guy Verhofstadt to Italy. Thus the EAW was born on 15 December 2001 at the Laeken European Council, and with it a landmark in Third Pillar policymaking within the EU (Kaunert, 2007).

The subsequent transposition of the FD into national law went slower than intended, the implementation deadline of the 31st December 2003 met by only 8 of 15 member states, but by in November 2004 only Italy remained with its implementation unfinished, which eventually came through on the 22nd April 2005[14].

1.1.1. Analysis of the EAW Framework Decision

The Council of the EU's Framework Decision 2002/584/JHA (henceforth FD), of the 13th June, on the European arrest warrant and the surrender procedures between member states is the instrument's founding document. It is structured in four chapters consisting on general principles, the surrender procedure, the effects of surrender and general and final provisions. It is the first measure implementing the principle of mutual recognition of judicial decisions established at the Tampere Council, replacing the traditional cooperation relations between member states with a "system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions", and replacing extradition within the EU for a more streamlined procedure (FD Preamble 5-6, article 31).

The EAW is a "judicial decision issued by a member state with a view to arrest and surrender by another member state of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" (FD article 1). The main parts involved in it are the issuing state – state where the

[14] See COM(2005) 63 final.

offence was committed and whose authorities wish to arrest related thereto an individual out of their reach – and the executing member state – where said individual is known or believed to be located. Both of these are necessarily EU member states represented by their judicial authorities, which can include courts, public prosecutors, police forces etc., according to the discretion of each member state (FD article 6). The important point is that the "state" here is the judiciary, not the government, who had always had a role in extradition affairs. Each country may also designate a central authority charged with administrative transmission and reception of the EAW and all related communications (FD article 7).[15]

The EAW is applicable to acts committed in a member state punishable by its law with maximum deprivation of freedom of at least 12 months, if they are still under prosecution, or with a prison sentence of at least 4 months, if they have already been sentenced. (FD article 2) This means a warrant can be issued for purposes of:

prosecution – the requested person must be a suspect under investigation for crimes punishable with a *custodial sentence* (prison sentence) whose maximum is of 12 months or more;

sentence execution – the requested person must have been convicted to a *custodial sentence* of 4 months or more.

The first case elicits some ambiguity. The FD talks of acts punishable "by a custodial sentence or detention order of at least 12 months". Detention, which is not defined in the FD, usually refers to keeping a person in prison during an investigation, while he/she has not been convicted. Thus the FD seems to allow the EAW not only for crimes with a maximum prison sentence of 12 months or more, but also for crimes which admit a *detention order* keeping a person in prison during investigation for 12 months or more. However, any such cases would most likely fall within the first criterion – one can hardly imagine a crime with a detention period longer than the sentence period. Altogether, it is hard to understand the logic behind this explicit introduction of the detention order concept.

The EAW abolishes double criminality checks, habitual in extradition, for a wide range of offences catalogued in article 2, no. 2 – henceforth the *EAW catalogue* – if

[15] These institutional actors are prevalent in EAW provisions. On the other hand, the defendant has no article specifically dedicated to him, he is not contemplated as a part in the FD's general principles, where states reign as subjects. Provisions on the defendant are subsumed under subsequent headings related to the procedure itself. It could be argued that in this way the EAW sticks to administrative law and avoids meddling with criminal law proper.

they are punishable by the issuing state with a maximum custodial sentence or detention order of at least three years. If both these conditions are met, the executing state cannot refuse surrender, even of its own nationals, under the argument that it does not recognise the offence as crime under its jurisdiction – the principle of mutual recognition takes precedence. For offences outside the EAW catalogue, states may or may not retain the double criminality check, according to their will. For offences within the list but under the three-year threshold, the situation is not specified, so double criminality remains by omission. The EAW catalogue may be changed at any time by the EU council after consultation with European Parliament (FD article 2).

Notwithstanding these limits, a margin to condition or refuse surrender remains, through the grounds for non-execution and guarantees that can be demanded to the issuing state. Grounds for a mandatory non-execution exist if a sentence was already served elsewhere for the warrant's offences, if these are covered by amnesty under the jurisdiction of the executing state, or if the requested person's age exempts him/her from criminal liability (FD article 3). Grounds for optional non-execution of surrender are, under FD article 4: (1) offences subject to double criminality check that are not a crime in the executing state, although in the case of tax crimes a mismatch of tax regimes between countries is not a valid ground; (2) acts already under prosecution in the executing state; (3) acts the executing state decided not to prosecute or that were already sentenced elsewhere; (4) acts within the jurisdiction of the executing state whose punishment is statute-barred; (5) acts already prosecuted, sentenced or served in another state, other than the issuing state (*ne bis in idem*); (6) in case of a warrant for sentence execution, decision of the executing state to execute the sentence itself instead of surrendering the requested person for him to serve it abroad; (7) acts committed, in whole or part, in the executing state, or outside the issuing state (FD article 4).

Furthermore, the executing state can demand 3 different kinds of *guarantees*, which, if not given, are in practice further grounds for non-execution: (1) guarantee of retrial if the requested person was sentenced *in absentia*; (2) guarantee of review in case of lifetime sentence; (3) guarantee of sentence serving at home for locals in case of a warrant for prosecution, meaning that in case of prosecution of a national or resident of the executing state, surrender can be subject to the guarantee that the requested person will be returned to serve an eventual custodial sentence or detention order in his country (FD article 5). It is up to the countries to specify further these categories.

With this arrangement, the issue of surrendering national citizens, and conversely the right of not being extradited from one's home country (sentence serving at home), is split into two different categories: in case a warrant is for prosecution, the executing state can demand the guarantee that the person will be returned after hearing (FD article 5, no. 3); in case it is for sentence execution, the executing state has an optional ground for refusal of surrender and accordingly the choice of executing the sentence itself (FD article 4, no. 6). In practical terms, there is little difference for the national legislators: in either case they have the option to make mandatory or leave to their judiciary the refusal of surrendering national citizens.

The issues of *what* and *who* set aside, the greatest part of the FD deals with *how* a EAW is carried out, specifying the procedure to a great extent. We will try to summarize its main features following its sequence of events, which we divide roughly in the stages of:

- transmission;
- arrest;
- hearing;
- surrender decision;
- transfer.

The EAW procedure begins with the stage of transmission when a state issues an EAW, either directly to an executing authority (with possible mediation of the country's central authority or the European Judicial Network) where the requested person is known or believed to be located; and/or generically by introducing an alert in the Schengen Information System (SIS), which has the same value as an EAW, provided that an executing authority subsequently has access to the warrant's content (as defined in FD article 8), through SIS or through contact with the issuing authority (FD article 9).

We refer to these two situations as *direct* and *generic* warrants. generic warrants are usual when the requested person's whereabouts are unknown; once he is found within the EU and confirmed to be referenced in SIS, a direct warrant can be sent, through contact between the issuing and executing authorities, beginning the EAW's regular execution process.

Within this stage of transmission, after a warrant has been received, the executing authority verifies its validity according to the criteria listed above (nature of the offences, double criminality, grounds for refusal, guarantees). It may consider the

warrant invalid and refuse the execute it, or ask the issuing authority for further clarifications. Only when these issues are sorted out can the procedure move on into the next stage.

Arrest and hearing of the requested person are the following stages in the execution of an EAW. They are relatively intermingled in the FD, but tend to be more clearly separated in national laws. These stages comprise two important decisions, the *consent decision*, where the requested person chooses whether to consent to his surrender, and the *detention decision*, where the executing authority chooses whether to keep the requested person under detention or release him provisionally while awaiting the surrender decision.

Once the requested person is arrested, he has the right to being informed of the warrant, its contents, the possibility of consenting to surrender, and assistance by a legal counsel and an interpreter, following local law (FD article 11). The executing authority decides according to its law whether to keep the requested person under detention or release him provisionally until it decides on surrender, taking measures to prevent absconding (FD article 12) – we call this the *detention decision*. if the requested person voluntarily and in full awareness consents to his surrender, such consent is in principle irrevocable, unless the executing state's law explicitly determines otherwise (FD article 13), and reduces the execution's formalities, namely the surrender decision's time limits.

Hearing is a relatively underspecified moment in the FD. the requested person is entitled to it if he does not consent to surrender; but nothing is said for the case where he does consent (FD article 14) – in many countries, hearing takes place in this case too. in case of prosecution, the requested person must either be heard or temporarily transferred to the executing state, under conditions agreed by both states, with the right to return to the issuing state before the surrender decision (FD article 18). The scant provisions on hearing state that it must follow the executing state's law, and that a representative of the issuing country may take part in it (FD article 19). In the end, the acts of the previous paragraph (information of the warrant, detention decision, consent) tend to be integrated in the hearing session at the national level.

After arrest and hearing, it is up to the executing authority to decide on surrender of the requested person – the *surrender decision*. The requested person's consent to surrender provides 10 days to come to a decision, absence of consent provides 60 days. Where these deadlines cannot be met, the executing authority shall

give reasons to the issuing authority and will have 30 further days to come to a decision. Delays will have to be reported with justification to Eurojust and can give rise to an evaluation (FD article 17).

Several circumstances are allowed to factor into the surrender decision process. If there are multiple requests for the same requested person, including extradition requests, the executing country must choose one between them, taking into account the seriousness of the offences, the date of the requests and their purpose (prosecution or execution of sentence) (FD article 16). The deadlines do not start counting if the requested person enjoys privileges or immunity until these are waived. The executing state must request such a waive immediately if it has the power thereto, otherwise it is up to the issuing state to request it to whatever relevant authority (FD article 20). If the requested person had been extradited from a third state, the executing state must first ask that third state for authorisation to surrender him, and the deadlines do not count either until such authorisation comes and the previous speciality rules are relinquished (article 20).

Once a decision to surrender has been taken, the procedure enters the final stage of *transfer*. There are 10 days to surrender the requested person, extensible under impeding circumstances beyond the control of the states.[16] Surrender may exceptionally be postponed for serious humanitarian reasons, e.g. if it endangers the requested person's life or health[17] (FD article 23), or if the executing state has prosecuted or sentenced the requested person for other acts, a situation in which temporary transfer to the issuing state is also an option (FD article 24). Otherwise, if the deadlines for surrender are not met, the requested person must be released. When surrender follows through, the requested person is transported to the issuing state to be prosecuted or serve his sentence.

Finally, after all this procedure from transmission of a warrant to transfer of a requested person, the Framework Decision closes with some provisions concerning the issuing state once it has the requested person in its hands. First and simplest, the duration of arrest under the EAW will be deducted from the time to serve in the issuing state (FD article 26).

[16] The FD seems to lack clarity in this point: it states that in case it isn't possible to set a surrender date within 10 days, the authorities will immediately contact each other and agree on a new date, and surrender will take place within 10 days of that new date. This formulation seems to open the possibility that the new date could be set for anytime.

[17] When such reasons have ceased to exist, the 10-day deadline restarts.

The *speciality rule* establishes that the requested person cannot be prosecuted or sentenced for acts other than those of the warrant. Several exceptions are specified where that might happen however: states may notify the Council of the EU that they allow that practice by omission; the requested person staying in the country of surrender, having the opportunity to leave, after 45 days following discharge from the EAW case; offences excluding restriction of liberty; renouncement of the requested person to the speciality rule; at the request of the issuing state (article 27).

The subsequent extradition from the issuing state to a third state is similarly subject to a convoluted set of rules. In principle, it cannot happen without the consent of the original executing state. But again several exceptions follow, similar though not equal to the previous: states who notify they allow that practice by omission; the requested person staying in the issuing state, now turned into executing state, after 45 days of discharge; renouncement of the requested person to the rule. Otherwise, consent by the original executing state is necessary. The original executing state must give it within 30 days, it can only refuse it if the FD's grounds for refusal (as stated in Arts. 3-4) apply (FD article 28).

1.2. National transpositions and their variations

Among the several national laws implementing this FD, we are interested here in a comparative assessment of the Portuguese, Spanish, Italian and Dutch cases. After some introductory considerations on them, we characterise these laws taking the FD as the point of departure from which to explore their particularities in matters of rights and guarantees, relevant authorities, and procedures. Issues not mentioned can be assumed to have little relevant differences to the FD.

The **Portuguese and Spanish** laws are among the early transpositions of the FD. Both are comparatively short and tend to follow closely the FD. The Portuguese version differs by removing the preamble, present in the FD, which the Spanish version keeps and adapts. Spanish law 3/2003 was enacted on 14 March 2003 and entered into force the day after its publication, on 18 March 2003; Portuguese Law 65/2003 was enacted on 22 August 2003[18] and entered into force on 1 January 2004.

The **Dutch and Italian** laws took longer to enact, considerably so in the Italian case. The Dutch Surrender Act of 29 April 2004, which transposed the FD into Dutch law, entered into force on 12 May 2004. It is more extensive than the other laws, totalling 74 articles where others count 30 to 40 articles. It is perhaps the most meticulous in terms of terminology (it has a specific article defining it) and specification of rights and procedures in its articulation with internal law. It also differs in its internal arrangement, not following the FD's standard of titled articles, making it harder to compare with the FD and national laws on an article-by-article basis.

Italian Law n. 69 of 22 April 2005 was published on 29 April 29 2005, more than a year and four months after the transposition deadline of 31 December 2003. It was the last in the EU to transpose the EAW FD into national law, and had an elaboration process worthy of note. The Italian government never transposed the EAW into Italian law; it was in fact the political opposition who eventually presented a proposal to the Chamber of Deputies. The bill went back and forth in Parliament through several revisions negotiated between opposition and majority until it was approved (Marin, 2008).

[18] An initial draft law was submitted by some members of the Parliament (Proj. de Lei 207/IX, DAR, II Série A, nº 61/IX/1, 25/1/2003, p. 2460ss), and was later merged into the draft law submitted by the government (Proposta de Lei nº 42/IX/1, DAR, II Série A, nº 71/IX/1, 20/2/2003, p. 3086ss).

All these laws share to a certain point the same architecture, something to be expected from national transpositions of a common overarching legal text. In broad terms, the pillars of this legal architecture, close to the FD, are: general provisions and definitions, procedures of execution, procedures of issue, and final, provisional or other measures. Every law contains these as a main unit.[19] Within these constraints, each law varies in its internal ordering and subsumption of specific articles to these units. Some laws stay closer to the FD, such as the Portuguese and Spanish, others add to it or rearrange it significantly, such as the Italian and Dutch laws.

1.2.1. Rights and guarantees

The laws under consideration contrast with the FD in matters of rights and guarantees through the extent to which they use the three main ways left by the FD to condition or refuse surrender – the preservation of double criminality for offences outside the EAW catalogue, the enforcement of the optional grounds for refusal and of the guarantees to demand to the executing state – and how they grant the right to appeal.

Portugal enforces double criminality checks for any offence outside the EAW catalogue (copied verbatim into article 2.2), surrender being admissible only where the underlying acts “constitute an offence under Portuguese law, whatever the constituent elements or however it is described” (pt article 2.3).

The optional grounds for non-execution remain optional, left to the discretion of Courts (pt article 12). However, as noted by Caeiro and Fidalgo (2009), the *ne bis in idem* principle was erroneously transposed: the FD refers in the end of this provision to "the law of the sentencing country" (FD article 4.5), which is turned into "Portuguese law" (pt article 12, f). The mandatory grounds for refusal are extended with two situations taken from the FD's Preamble, probably due to the fact that the Portuguese law doesn't have a preamble: acts punishable with death sentence or any punishment causing irreversible damage to physical integrity, and warrants issued for political reasons (pt article 11, d-e)

Two of the three demandable guarantees are turned from optional into mandatory, those of retrial for decisions *in absentia* and review of lifetime sentences,

[19] The Spanish law stands alone in placing issue before execution of an EAW in its arrangement of chapters.

while the guarantee of sentence serving at home remain optional. In the case of decisions *in absentia*, there is the slight difference that Portuguese law accepts not only a guarantee of retrial, but also a guarantee of appeal. This addition, unique to Portuguese law, derives from a translation mismatch of the FD,[20] which could prove problematic.[21] On the rights of the requested person, it is added that an interpreter will be free of cost to the requested person (pt article 17.3).

A significant addition lies in the provisions on appeals. The Portuguese law admits in article 24 appeals on the detention and surrender decisions. Such appeals must be lodged within 5 days of the decision, always stating their grounds (presented up to five days after the initial request), directly to the Supreme Court of Justice, which has 10 days to respond, and 3 days to send it back to the lower instance court (pt article 25). EAW cases have priority in the Supreme Court to facilitate swiftness of the procedures.

The **Spanish** law is more willing to rely on the discretion of executing authorities, being the less prescriptive of the laws under consideration on the rights and guarantees it demands for surrender. It is the only one which does not enforce double criminality checks for crimes outside the EAW catalogue, leaving surrender in such cases to the discretion of Spanish courts, so a Spanish judge is the only one who has the possibility of surrendering a requested person even for crimes outside the EAW catalogue that are not a crime under Spanish law (es article 9.2).

All the optional grounds for refusal of surrender remain optional, with a slight difference on the decision of the executing state to execute a sentence itself instead of surrendering abroad (FD article 4.6): Spain is obliged to make that decision for Spanish nationals (but not residents or persons staying in the territory, as in the FD), except if they agree to serve the sentence abroad (es article 12, f).As to the guarantees demandable, only guarantee of review of lifetime sentences is mandatory. Guarantee of return after surrender in a prosecution remains optional for Spanish judges to require, and guarantee of retrial in case of a sentence *in absentia* is not mentioned, leading to believe that Spanish judges cannot refuse a warrant for that reason (es article 11). No appeals are allowed on the surrender decision (es article 18), but the

[20] Where the English version of the FD states that surrender may be conditioned to guarantee that the individual will have opportunity “to apply for a retrial of the case in the issuing member state and to be present at the judgement” (FD Article 5.1), the FD's Portuguese version states “to lay an appeal or apply for a retrial etc.”, a formulation kept intact by Portuguese Law.

[21] In an EAW issued to the Netherlands, Portugal provided a guarantee of appeal but not of retrial, leading to its refusal (Alves, 2005).

detention decision can be appealed to the *sala de lo penal* of *Audiencia Nacional* (es article 17), the court centralising all EAW cases received by Spain (see below).

The **Italian** law takes a more explicit stance concerning the EAW's relation to Italy's Constitution and international treaties. article 1 states the law transposes the FD into Italian law, "insofar as these provisions are compatible with the supreme constitutional principles governing fundamental rights, in terms of freedom and a just trial", while article 2 (Constitutional guarantees) subjects enforcement of an EAW to due respect for the fundamental rights established by the Convention for Protection of Human Rights and Fundamental Freedoms,[22] and the right to a fair trial established by the Italian Constitution. article 1 also states that a warrant must be signed by a judge and state its reasons, in case it is for purposes of prosecution, or be based on an irrevocable sentence, if it is for purposes of sentence execution (it article 1.3). A warrant signed by a prosecutor would likely not be accepted under these provisions, which might be an issue with several countries which allow it, in full respect of the FD. The irrevocability of a sentence, a demand unseen in the other laws under consideration, may also raise contention in dealings with other countries, who may be hard-pressed to guarantee it.[23]

It is in the issues of double criminality checks and grounds for non-execution that lie the most contentious particularities of Italy's EAW implementation. The Italian law turns the FD around by making double criminality the rule upfront – "Italy shall enforce the EAW only in cases where the act is also considered to be an offence under Italian law" (it article 7.1) –, only to make an exception for the EAW catalogue (in considerably altered form, as we will see) in the following article. Although in practice other laws, such as the Portuguese, also retain double criminality checks to the maximum extent allowed, this inverted order of precedence could be seen as a signal of mistrust towards the European legislator. Aggravating circumstances are excluded from the calculation of the penalty for which EAWs are applicable (it article 7.3). This is a relevant issue, given the silence of the FD on the matter, and the Italian legislator was one of few taking care to address it through law, rather than leaving it to case law.

Within double criminality, more than its preservation, it is Italy's particular transposition of the EAW catalogue that has raised attention. Contrary to the other

[22] Namely, the right to liberty and security and the right to a fair and public hearing.

[23] For example, in Portugal sentences become irrevocable only after a decision of the Supreme Court or after 90 days without appeal on a decision of a first-instance court or appeal court – in the whole irrevocability can last several months after an initial decision.

countries under analysis, it is not a verbatim translation of the FD's formulation, but instead a full conversion adapted into Italian legal categories, listed exhaustively in article 8.1. Sometimes the correspondence is straightforward, other times it is not, with the Italian version being more detailed. For example, for the FD's offence of "participation in a criminal organisation", the Italian version adds that it is of "3 or more persons with the aim of committing a number of offences" (it article 8.1.a). The offence of "illicit trafficking in narcotic drugs and psychotropic substances" becomes "selling, offering, ceding, distributing, trading, purchasing, transporting, exporting, importing or procuring for others substances which, according to the legislation in force in European countries, are considered to be narcotic drugs or psychotropic substances" (it article 8.1.e). To some authors, this was an attempt to address threats to the Italian constitutional principle of taxativity caused by the lack of definition of the EAW catalogue, but in practice it would reintroduce double criminality control, by asking the Italian judge to check if a warrant's offences correspond to a crime under Italian terms, where only the criminal qualification of the issuing state should matter under the spirit of the FD (Impalà, 2005, p. 71; Marin, 2008, pp. 261-263).

Yet another possibility of refusing surrender on double criminality grounds is introduced in article 8.3, which states that surrender shall be refused for an Italian citizen whose acts are not crime under Italian law and who was not conscious, without negligence, of their status as a crime. This principle of excusable ignorance, common across many countries, has nevertheless been considered in this context a discrimination in favour of Italian citizens, raising problems of compliance with general principles of EU law, because it aims to protect a domestic constitutional principle and was not provided for in the FD (Impalà, 2005, p. 72).

The grounds for non-execution is the other dimension through which Italian law differs significantly from the FD. All the optional grounds for refusal are turned into mandatory,[24] and, more importantly, some additional grounds are added, mostly taken from the Italian Criminal Code. Altogether, article 18 of the Italian law has 20 mandatory grounds for refusal, quite more than 3 mandatory and 7 optional grounds foreseen by the FD.[25] These include: if there was consent of the person whose right was infringed (18.1.b); if the offence was committed (under Italian law) to exercise of a

[24] With one exception for the case of surrendering an Italian national or resident to serve a sentence abroad. Article 18 (r) reinstitutes the court's discretion to decide in this case: "if the EAW has been issued for purposes of executing a custodial sentence or detention order, should the requested person be an Italian citizen, provided that the Court of Appeal order the custodial sentence or detention order be executed in Italy accordance with its internal legislation".

[25] See FD grounds for refusal, p. **Erro! Marcador não definido.**.

right, fulfil a duty, or was determined by chance or force majeure (18.1.c); if there are no limits to preventive detention in the issuing state (18.1.e); if the object of the EAW is a political offence (18.1.f); if there is reason to believe the underlying sentence does not respect the minimum rights of the requested person (18.1.g); if the requested person is pregnant or mother of children under the age of three (18.1.s); if the coercive measure[26] underlying the warrant lacks justification (18.1.t); if the sentence underlying the warrant is contrary to the fundamental principles of the Italian legal system (18.1.v). The remaining provisions deal mostly with the FD's 3 mandatory grounds for refusal and with provisions on fundamental rights transposed from the FD's preamble.

As to the three demandable guarantees, for all the restrictions the Italian law places on surrender, it does maintain them as optional, leaving its enforcement to the discretion of courts.

The Italian law allows appeals to the Court of Cassation by the requested person or the public prosecution “against the measures deciding upon the surrender” – in practice the detention and surrender decisions – within 10 days, which may regard matters of law but also matters of substance (it article 22). The Court of Appeal and Court of Cassation, usually 2nd and 3rd instance courts, function for the EAW as 1st and 2nd instance, so the Court of Cassation exceptionally deals with matters of substance other than law. This is an arrangement similar to the Portuguese. An appeal suspends execution of an EAW and gives the Court of Cassation 15 days to decide upon it, though no consequences are foreseen if it does not. The decision will be joined to the case’s files as well as communicated via fax directly to the Ministry of Justice.

Finally, the **Dutch** surrender act raises an issue on the applicability of the EAW itself even before double criminality and grounds for refusal are considered,. The EAW scope of applicability follows the same rules of the FD for prosecution cases (acts punishable with 12 months or more) and sentence execution cases (sentences of 4 months or more). However, in the first case, this is *both* under the law of the issuing state *and* of the Netherlands itself. In the second case, the sentence execution criteria must apply *together* with the prosecution criteria. For example, a warrant with a sentence of 6 months for offences with a maximum sentence of 10 months would be invalid in the Netherlands. In sum, surrender from the Netherlands for crimes with maximum sentence lower than 1 year is impossible. This raises questions with the

[26] In Italy, the English translation most commonly used is precautionary measure.

principle of mutual recognition. The EU Council's evaluation report of the EAW in the Netherlands noted:

> "As to conviction cases, the Netherlands implementing law requires not only that the sentence passed against the requested person is of at least 4 months but also that the related offence is punishable, by virtue of the law of both the issuing Member State and the Netherlands, by a custodial sentence of at least 12 months. The experts team noted that this regime is not in line with article 2(1) and 2(4) of the Framework Decision. The Netherlands authorities confirmed that they are not considering amending their legislation in this respect (…) wording is not clear enough when saying that surrender shall be allowed for 'serving of a custodial sentence of four or more months', in the sense that it could provide a basis for considering that the 4-month period refers not to the duration of the sentence imposed but to the time to be actually served." (Council of the EU, 2009, p. 30)

Double criminality is retained for crimes outside the EAW catalogue, although the catalogue is accrued in its Dutch transposition with the crime of manslaughter.

The Dutch law turns most optional grounds for refusal of an EAW into mandatory, with three exceptions: on acts already under prosecution in the executing state (FD article 4.2), the Minister of Justice can decide, on advice of the public prosecutor's office, to suspend the Dutch prosecution and enable surrender abroad (nl article 8.2); on acts the Netherlands has decided not to prosecute (FD article 4.3), either because its criminal law is inapplicable or a trial abroad is preferred, a surrender decision is also possible (nl article 9.3); on acts committed on the Netherlands or outside the issuing state (FD article 4.7), refusal of surrender can be waived at a reasoned request of the public prosecutor (nl article 13.2). Other than this, the rule is to refuse surrender.

Two of three demandable guarantees are turned into mandatory: retrial for cases *in absentia* and sentence serving at home.[27] In the latter case, Dutch law is protective of Dutch citizens to a great extent. Dutch nationals will only be surrendered

[27] The only reference to life sentences is found in Articles 8 ("For the purposes of this Act, life sentences and custodial sentences of indefinite period shall be equated to custodial sentences longer than 12 months") and 45 (a Dutch prosecutor issuing a warrant will state that the Netherlands provide measures of clemency for lifetime sentences).

The issuing public prosecutor shall state as follows in or with a European arrest warrant:

that, if the punishable offence underlying the European arrest warrant carries a life sentence, Dutch law allows the possibility of clemency, where appropriate, for the imposed punishment or order.

Since no other reference is made, This leads to believe that

abroad for purposes of prosecution, and this under guarantee of returning for serving an eventual sentence in the Netherlands. They cannot be surrendered to serve a sentence abroad, in such case the Dutch state will always execute the sentence itself. Thus, contrary to other countries we have seen, the option to have nationals serve their sentences in their home country is turned into obligation (nl article 6). This has been interpreted by the EU as discriminatory against non-Dutch citizens and contrary to the spirit of the FD (Council of the EU, 2009, p. 46).

There are no appeals in Dutch law except on legal grounds. The surrender decision of the Amsterdam District Court (ADC) is final, neither public prosecution nor the requested person have the right to appeal. The only exception is an appeal on legal grounds by the prosecutor-general to the Supreme Court (nl article 29). To Kurtovic and Langbroek (2008: 14), this results in a concentration of power at the ADC which is not checked upon by any other authority, and consequently a restriction of the requested person's legal protection, though at least an independent judgement is guaranteed, since political power has no say in the decision.

1.2.2. Authorities

The main issue of interest concerning authorities is the degree of centralisation chosen by states, especially on the execution procedure. Since the thrust behind the EAW is to remove the middleman (governments) in favour of direct contact between judicial authorities, the rule is for any court to be a legitimate issuing authority, with the partial exception of Italy, where courts are compelled to channel their contacts abroad through the Ministry of Justice. Executing authorities are considerably fewer, with some countries opting for a single all-encompassing national authority (Spain, Netherlands). There is also some variety in the existence and role of central authorities as allowed by the FD. We briefly sketch the structure of EAW authorities in each of the four countries considered.

In Portugal issuing authorities are all criminal courts and agencies with competence to prosecute, either through the instances of a judge or a public prosecutor. Portugal has 3 tiers of criminal courts, consisting in the widespread first-instance courts (*Tribunal Judicial*), five second-instance courts or appeal courts in Lisbon, Oporto, Coimbra, Évora and Guimarães; and the last-instance Supreme Court (*Supremo Tribunal de Justiça*) in Lisbon. In the bigger urban centres there is further specialisation within the first instance: in the phase of prosecution, prosecutors can

work in a separate department for criminal investigation (DIAP, *Departamento de Investigação e Acção Penal*) and judges in a preliminary investigation court (*Tribunal de Instrução Criminal*), assuming the judicial acts before the phase of trial that are concentrated in first-instance courts for smaller regions. All these agencies are competent to issue warrants.

As to execution, the five appeal courts are the sole executing authorities designated by law, concentrating the EAW cases received from abroad (pt article 15). The Public Prosecutors Office (*Procuradoria-Geral da República* or *PGR,* also known as *Ministério Público*) is designated as the central authority for the EAW (pt article 9).[28] This is a "light" central authority: the PPO's Documentation and Comparative Law Office is responsible for facilitating communications abroad and for maintaining a centralised archive of outgoing and incoming EAW cases, but local courts can forego it and conduct an EAW process wholly on their own.

In Spain, issuing authority is a judge at any Spanish court with criminal competence, as in Portugal. These can be preliminary investigation courts (*Juzgados de Instrucción*), provincial courts (*Audiencias Provinciales*), the national central court specialized in higher criminality (*Audiencia Nacional*), courts for the execution of sentences, second-instance courts as the 17 higher courts of justice (*Tribunales Superiores de Justicia*) of Spain's autonomous communities, and the last-instance Supreme Court (*Tribunal Supremo*). Only judges are an issuing authority, not prosecutors, because Spain lacks the typical figure of prosecutor, attributing its competences to so instruction judges (*jueces de instrucción*).

On the other hand, there is only one executing authority for the whole country, the *Audiencia Nacional* of Madrid. Two bodies within this court have competence for EAW decisions: the central preliminary investigation unit (*Juzgado Central de Instrucción*) if the person consents to surrender, and the criminal division (*Sala de lo Penal*) if the person does not consent to surrender. The Spanish Ministry of Justice is the central authority (es article 2). This role, similar to Portugal, is not endowed with special competences or responsibilities, so local courts can forego it.

In Italy, issuing authorities are all criminal courts, through their judges or prosecutors, specified in thorough manner based on the code of criminal procedure (it article 28).[29] These can be first-instance courts for judging regular criminality

28

29 it Article 28.1: “A European arrest warrant is issued:

(*Tribunale*) and serious criminality (*Corte di Assise*), second-instance courts for regular (*Corte di Appello*) and serious criminality (*Corte di Assise di Appelo*) and the last-instance Supreme Court, also known as Court of Cassation (*Corte Suprema di Cassazione*).

Where in other countries judges Executing authorities are the second-instance courts (*corte di appello*) of the district where the requested person has fixed residence, domicile, or temporary residence, and the Court of Appeal of Rome if these are unknown. For concurrent warrants on the same offences involving several persons, the same rules apply for determining jurisdiction: the court of appeal where the greatest numbers of requested persons have fixed residence, domicile, or temporary residence, and the Court of Appeal of Rome if these are unknown. For generic warrants, the court of appeal where the arrest occurred has jurisdiction (it article 5).

The Ministry of Justice is the central authority designated by law (it article 4), indeed invested with the most powers of the countries considered. It centralises the administrative transmission and reception of EAWs and related correspondence, translations[30] etc., mediating between the Italian court and the foreign judicial authority, and is also responsible for the transfer arrangements. Direct contact between authorities is possible only "within the limits and the methods provided for by international agreements" and "on condition of reciprocity", and the Ministry has to be given immediate knowledge of the issue or receipt of an EAW (it article 4). The Italian legislator chose thus to use the centralising possibilities of FD article 7 to the fullest extent, possibly beyond the role of administrative assistance originally envisioned in the Framework Decision.[31]

In the Netherlands, any public prosecutor of a criminal court is an issuing authority (nl article 44), but not judges.[32] The Netherlands have a three-tiered court

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a) by the judge who has applied the precautionary measure of prison custody or house arrest;

b) by the public prosecutor through the judge indicated in article 665 of the code of criminal procedure who issued the order to execute the custodial sentence mentioned in article 656 of the same code, provided that it consists of a custodial sentence of least one year and provided that its execution is not suspended;

c) by the public prosecutor identified in accordance with article 658 of the code of criminal procedure as far as the execution of detention orders is concerned."

[30] it Article 28.2.

[31] According to Impalà (2005, p. 69), "this provision was the subject of bitter parliamentary debate, which first saw it introduced, then rejected by the Chamber, and finally reintroduced in the Senate in its modified version", with the addition at the last moment of paragraph 4 to Article 4, allowing the possibility of limited direct contact between judicial authorities.

[32] As explained in the Dutch case study, issue is coordinated by specialised prosecutors at the five

system consisting of district courts (19), appeal courts (5) and the Supreme Court (*Hoge Raad*). The Netherlands Prosecution Service is organised on these lines, although its Supreme Court offices are independent and endowed with special tasks and powers.

On the other hand, there is only one executing authority, the Amsterdam District Court (ADC), and correspondingly its District Public Prosecutors Office (DPPA), centralising all EAWs received by the Netherlands (nl article 1 and 20.1). Where in other countries judges tend to be more prevalent, the public prosecution assumes here a leading role in execution procedures, being responsible for the transmission and handling of EAWs, even being able, in case there is consent to surrender, of leading execution from start to finish with no intervention by a judge, as we will see in the following section. No reference is made in Dutch law to a central authority.

1.2.3. Procedures

The degree of variation of procedures depends more on the specifics of each country's system than on diverging approaches of the legislators, which tend to manifest more clearly in the dimension of rights and guarantees we analysed previously. We focus our attention mostly in the procedures involved in executing an EAW, since issuing procedures are simpler and involve little national variations. We will try to stress the particularities of the various execution procedures following the sequential phases we defined in the FD's analysis: warrant transmission, arrest, hearing, surrender decision and transfer.

In **Portugal**, the procedural dimension of the EAW is where Law 65/2003 adds more of its contribution to the FD. EAW procedures are a matter of urgency according to the FD (FD article 17.1), which is materialised by the Portuguese legislator as the non-suspension of such procedures by judicial holidays, weekends, or working hours (pt article 33).

In the transmission phase, after reception of an EAW the public prosecution office at the appeal court will arrange for its execution within 48 hours, and the judge will issue within 5 days an initial ruling on the validity of the warrant, returning it to the public prosecutors in case it is valid, asking for clarifications to the issuing authority in case it is not (pt article 16).

International Legal Cooperation Centres of the Dutch PPO, but the local prosecutor has the ultimate word.

Arrest is governed by the rules of the Portuguese code of criminal procedure. When the requested person is arrested, the authority performing the arrest, usually a police force, will notify in written form as soon as possible the public prosecution at the appeal court. The requested person will be presented for hearing within 48 hours to a judge at this court.

Hearing is meant for the judge to interrogate the requested person and decide whether to keep him in detention (detention decision), following the Portuguese Code of Criminal Procedure (PCCP). For the hearing, the judge will appoint a legal counsel to the requested person in case he/she doesn't have one. At the hearing, the judge will identify the requested person and inform him of the warrant and his rights, as well as the possibility of renunciation of entitlement to the speciality rule. The answers of the requested person must be formally recorded in written record and signed by the requested person and his counsel (pt article 18). In case it is impossible to present the requested person to an appeal court – for example, on weekends – a first-instance court can temporarily validate the arrest and apply a *coercive measure*, until the next working day, when the requested person should be presented at the appeal court (pt article 19).

Consent to surrender, to be given at the hearing, follows the FD's rules (pt article 13), no exception to its irrevocability is introduced. In case the requested person opposes surrender, his legal counsel is given opportunity to make allegations, based on mistaken identification of the requested person or the existence of grounds for refusing execution, to which the public prosecutor can respond. Evidence can be submitted at the hearing. At request of the counsel, the judge can set a later date to file opposition and submit evidence (pt article 21).

Portuguese law allows keeping the requested person under detention pending the surrender decision and subsequent appeals: 60 days detention in the absence of appeals, 90 days with an appeal to an appeal court, and 150 days with an appeal to the Supreme Court.[33]

[33] There is a terminological ambiguity here that might come into conflict with Portuguese criminal law. The Portuguese EAW law translates detention into *detenção*, but *detenção* in Portuguese criminal law means what we call here arrest. The Portuguese code of criminal procedure (PCCP) defines *detenção* as an act destined solely to take a person before a judge to interrogate and possibly subject him to a *medida de coacção* (coercive measure) within 48 hours. *Detenção* can only last 48 hours, it is the *medida de coacção* resulting from it that can last longer. For the defendant to be kept under *prisão preventiva* (provisional custody), the gravest coercive measure that corresponds to keeping him under detention, the preconditions for all such measures must be met – either risk of absconding, risk of disturbing the investigation, or risk of continuing criminal activity (PCCP Article 204) – and the offences must be punishable with maximum imprisonment greater than 5 years (PCCP Article 202). Lighter measures are

The surrender decision and deadlines follow the FD's formulation of 10 days with consent and 60 days without consent, but one subtle difference appears. In the FD, article 15 remits the time limits of the surrender decision to the subsequent article 17, which establishes the 10- and 60-day limit. In Portuguese law, articles 22 and 26 are functional equivalents of these, but article 22 sets itself a 5-day deadline after hearing for the decision of executing the warrant, while article 26 keeps the original 10- and 60-day formulation.

In the stage of transfer, the Portuguese law reveals a significant omission: the mandatory release of the requested person if the 10-day deadline for transfer is breached. Portuguese article 29 closely replicates the FD's article 23 on time limits for surrender, except for this important provision at its end (FD article 23.5). This lack of regulation may become problematic. To Caeiro and Fidalgo, "Portuguese courts may not apply article 23(5) of the FD, despite its obvious direct effect, since article 34(2)(b) EU [Amsterdam treaty] clearly excludes the right for individuals to rely on the direct effect of the norms of a Framework Decision" (Caeiro & Fidalgo, 2009, p. 449). This is an issue that may arise in case law.

A slight procedural difference appears in the possibility of surrender or subsequent extradition to a third country. Among the conditions allowing it in the FD (article 28), most of them carried over into article 8 of the Portuguese law, one is omitted: when the requested person has not left the issuing country within 45 days having had the chance to (FD article 28, 1).

Turning to **Spain**, arrest follows the Spanish criminal procedure (*Ley de Enjuiciamiento Criminal*). The *Audiencia Nacional* informs the issuing authority when an arrest takes place. The requested person will be taken within 72 hours to a judge at *Audiencia Nacional* (es article 13), who will proceed with the hearing in presence of a public prosecutor (*Ministerio Fiscal*), the requested person's legal counsel and an interpreter, if necessary. As in Portugal, after being given the usual information on the warrant and his rights, and the possibility of renunciation of entitlement to speciality rule, the requested person will be asked if he consents to surrender, with due care taken to ensure full awareness on his part about the decision and especially its irrevocable nature. If he consents, this will be formally recorded and the record signed by the requested person, the clerk of court, the public prosecutor and the judge. Renunciation of entitlement to the speciality rule, if appropriate, will follow the same

available, allowing the defendant to be released provisionally. The national EAW law talks however of 60-, 90- and 150-day limits for *detenção*, instead of provisional custody, which contradicts the PCCP's terminology.

procedure. If the requested person does not consent to surrender, the judge will hear both parties about grounds for refusing or conditioning surrender (the public prosecutor is always heard in either case), and take any evidence that is submitted. If evidence cannot be submitted during the hearing, a time limit will be set for it, taking into account the time limits for the surrender decision (es article 14).

The choice between multiple requests (e.g. EAW and extradition requests), left by FD article 16 to the consideration of states, means in Spain the EAW is suspended while the Ministry of Justice submits the issue to the Council of Ministers. If the Council gives preference to the extradition, the *Audiencia Nacional* will be notified and notify in turn the EAW issuing authority of the outcome; if the EAW is chosen instead, the *Audiencia Nacional* will be notified and resumes the procedure (es article 23).

Time limits for the surrender decision follow the 10- and 60- plus 30-day rule. A decision on surrender without consent is transferred, within the *Audiencia Nacional*, from the *Juzgado Central de Instrucción* to the S*ala de lo Penal* (in Portugal, the same judge decides on both cases). As usual, if time limits for transfer are surpassed, the requested person will be released, but Spanish law specifies that this is no ground for refusing to execute a subsequent warrant based on the same facts.

Focusing now on **Italy**, when the Ministry of Justice receives a warrant, it transmits it without delay to the territorially competent Court of Appeal, whose president informs the competent public prosecutor of the warrant. Some verifications ensue: if it turns out that another court of appeal has jurisdiction, the president will immediately forward the warrant there; if there are problems with reception or authenticity of the information, he will handle them directly with the foreign authority (it article 9.1-9.3). Here comes also into play the documentation demanded, which merits a specific reference.

The Italian law demands quite a bit more information to execute a warrant than that of the warrant itself (as specified by FD article 8). The issuing authority will also have to attach a copy of the decision on the basis of the warrant, “a report of the offences of which the requested person is accused, with evidence of the sources of proof, the time and place in which the offences were committed and their legal classification”, “the text of the legal provisions applicable, with an indication of the time and duration of the penalty”, and finally any other information helpful to determine the identity and nationality of the requested person (it article 6.3-4). It is interesting to note

that a warrant issued by Italy, as specified in Arts. 28-33 of the Italian law, does not have to supply all this information.

If some information is missing (it article 6.2), if there are grounds for refusal of surrender (it article 18), or if further guarantees should be requested of the issuing state (it article 19), the executing court will request clarifications either directly or through the Ministry of Justice to the foreign authority. Italian article 16 makes here a significant addition beyond FD article 15.2: if a response does not arrive within 30 days, automatically "the court of appeal shall reject the request" (it article 6.6).

These issues set aside, the detention decision follows: the president of the Court of Appeal convenes the Court, consults with the public prosecutor, and decides whether to issue an order (which must state its reasons on pain of nullity) to apply a coercive measure, taking care to avoid absconding and respect the provisions of the Criminal Code and Code of Criminal Procedure, thoroughly specified.[34] No coercive measure can be applied if there are reasons to believe that grounds for refusal exist. As was said before, this decision can be appealed by the requested person or the public prosecutor on grounds of violation of the law (it article 9).

If a coercive measure is ordered, the requested person will have to be heard within 5 days of arrest by the President of the Court. The requested person's counsel will have to be notified of the hearing with 24 hours advance. The president, or judge delegated by him, has then to set a date within 20 days of the measure's execution for a hearing in camera where the surrender decision is taken (it article 10).

The procedure up to hearing the requested person is a bit different in the case of a generic warrant. When the police arrests a person referenced in the system, it has 24 hours to make him/her available for hearing to the president of the Court of Appeal of the place of arrest, and will immediately notify the Ministry of Justice, who will in turn notify the issuing state and require the EAW and associated documentation (it article 11). The police itself gives the requested person the information on the warrant and his rights, appoints him a legal counsel in case he doesn't have one, whom it notifies of the arrest (it article 12). Within 48 hours of receiving the report of arrest, the president of the Appeal Court will question the requested person.

[34] it Article 9.5: "The provisions of Title I of Book IV of the Code of Criminal Procedure shall be observed where applicable in matters concerning personal preventive measures, with the exception of Article 273, paragraphs 1 and 1-bis, Article 274.1 (a) and (c), and Article 280".

At the hearing of the requested person, the president of the Court of Appeal, the public prosecutor, the requested person, his legal counsel and if necessary an interpreter will be present. The president will first give the requested person the usual information on the warrant and his rights, unless it has already been given by the police. The requested person will be asked whether he consents to surrender. If so, consent will be recorded in a special report and is irrevocable (it article 14). Notwithstanding a consent to surrender, it is specified that the decision on the execution of the warrant will be taken in camera after consulting the public prosecutor, the requested person's counsel, the requested person, and eventually a representative of the issuing state (it article 15.1).

Time limits for the surrender decision and transfer follow the European prescription, but not the consequences of breaching them, which are harsher. Of the three main deadlines – 10 days for a surrender decision with consent (it article 14), 60 days (plus 30 under special circumstances) without consent (it article 17), and 10 days to transfer – only for a breach of the last one does the FD specify a significant consequence other than informing Eurojust, the release of the requested person. In Italy, a breach in any of these deadlines leads to release (it article 21, 23). Impalà (2005, pp. 73-74) considers this more coherent than the FD – which gives room to hold a person indefinitely until a surrender decision is taken but becomes stringent once it has been – but that it makes the Italian solution as respectful of individual freedom as it is disrespectful of the FD.

Finally, looking at the **Netherlands**, the Dutch procedural system is the one who stands more apart among the countries in study, by the greater protagonism it places on the public prosecution, specifically the District Public Prosecutors Office at Amsterdam District Court (DPPA), who can take decisions usually reserved to judges in the other countries under consideration.

When a warrant is received, the public prosecutor in Amsterdam checks its validity; if he believes surrender is not allowable on the basis of the warrant received, he notifies the issuing authority;[35] he will also request if necessary information on other criminal proceedings in the Netherlands involving the requested person, and whether they can be suspended (nl article 23). The prosecutor then has 3 days to request the court to deal with the warrant, upon which a judge will schedule a hearing of the requested person, taking into account the surrender decision's time limits (nl article 24).

[35] This gives public prosecutors the power to refuse surrender without going through a judge. See EU Evaluation Report on the Netherlands(???)

The Dutch law establishes a distinction between provisional arrest and arrest, based on the difference between generic and direct warrants.[36] Provisional arrests are based on an alert in SIS (nl Arts. 15-19). A provisional arrest is ordered by public prosecutor or deputy (or any investigating officer in their absence), who hears without delay the requested person and decides whether to keep him under police custody for a maximum of 3 days (extendable once by 3 further days), until he is heard by a judge. If the requested person is arrested outside Amsterdam, he must be transferred to the DPPA within this term of police custody. The DPPA may set him free or take him to a judge, who may order his detention pending the surrender decision. However, if no EAW is received within 20 days, he must be set free. When the EAW is received, the provisional arrest turns into an arrest, with due notification to the requested person.

An arrest, as opposed to a provisional arrest, takes place when there is a valid EAW received directly from the issuing authority (nl Arts. 20-21). The requested person must be brought within 24 hours to a public prosecutor, who decides whether to hold him under police custody until hearing. The term for police custody is 3 days, non-extendable as in provisional arrest. In the situation of arrest, the requested person can be kept in detention while awaiting a surrender decision. In both provisional arrest and arrest, police custody can be lifted and the requested person freed at any time before hearing by the ADC or the DPPA.

There is the possibility of an immediate surrender within the police custody term (3 + 3 days in provisional arrest, 3 days in arrest), bypassing transfer to Amsterdam (if necessary) and a court hearing, if both the requested person and a public prosecutor at the ADC assent to it (nl Arts. 17.3, 21.7).

In another important difference, the Dutch law introduces a distinction between an abbreviated surrender procedure and a standard procedure, according to the requested person's consent to surrender. This distinction has consequences in the hearing and surrender decision stages.

The abbreviated procedure has the unique feature that it grants the public prosecution exclusive competence for the surrender decision. Consent to surrender differs to the other laws considered in that it is given directly to the public prosecution, grants it exclusive competence for the surrender decision, and foregoes a court hearing. Thus the act of requesting the requested person for his consent to surrender is excluded from the court hearing and moved into the previous stages of conversation

[36] See the distinction generic/direct warrants, p. **Erro! Marcador não definido.**.

between the requested person and the public prosecution. Another significant feature is the bundling of consent with the speciality rule: consent to surrender automatically implies renouncement of entitlement to the speciality rule. As usual, the requested person must be warned beforehand of the possible consequences of consent. Consent is irrevocable, as with the other laws under analysis (nl Arts. 39-43).

Within the standard procedure, the court hearing (nl Arts. 25-27) follows the European and national prescriptions described previously, though different aspects are stressed. The session is public, unless there is a request or a good cause to hold it privately, which must be stated in the session's reports. The requested person must appear only if obliged by the court, whereas the public prosecutor must always be present. Concurrent warrants for the requested person must be brought up at the session by the public prosecutor, along with his opinion on which should be given priority, following an extensive set of criteria (nl article 26.3).

Another relevant point is the possibility of the requested person pleading not guilty for the acts underlying the warrant and have the court examine this plea (nl article 26.4). The court must refuse surrender if it considers "there can be no suspicion that the requested person is guilty of the acts for which surrender is requested" (nl article 28.2). If it decides to surrender despite this plea, "the verdict shall state the courts finding concerning that plea" (article 28.6). The court will also rule whether to keep the requested person under detention pending the surrender decision (detention decision).

The surrender decision's time limits are, as usual, 10 days with the requested person's consent (abbreviated procedure) (nl article 40), 60 days without consent, extendable by 30 days (standard procedure) (nl article 22). In case no decision is made in the 60- plus 30-day term, the court can extend this term indefinitely, but will release the requested person nonetheless and notify the issuing authority.

Conclusions

In trying to contrast the EAW's legal regimes laws in Portugal, Spain, Italy and the Netherlands, we can begin by making use of a form/substance distinction. In terms of form, the Portuguese and Spanish laws stay closest to the FD, the Dutch law the furthest, the Italian law somewhere in between. The Portuguese and Spanish laws seem closer to a *translation* than a *transposition* of the FD. This is apparent when the Portuguese law translates detention literally into Portuguese *detenção*, which has a very different meaning in Portuguese criminal law, closer to arrest, there through opening the possibility of conflict with Portuguese criminal law. The Italian and Dutch laws are more focused on rights and guarantees and thorough in their specification of offences, procedures and articulation of all these with internal law, especially the Dutch law.

In terms of substance, the dimension of rights and guarantees is where differences of intent between the legislators shine through more clearly. The dimension of authorities exhibits variations in the degree of centralisation of executing authorities; the dimension of procedures, in the role of the public prosecution. Both these tend to reflect differences in national criminal systems and procedures more than in legislators' intentions.

Focusing on rights and guarantees, where differences of intent are clearer, it is hard however to establish a univocal hierarchy between these laws. Taking into account most issues that determine the margin to condition or refuse surrender – double criminality, grounds for refusal, the three demandable guarantees of retrial *in absentia*, review of lifetime sentence and sentence serving at home – we tentatively propose this hierarchy from the least to the most protective of the requested person: Spain, Portugal, Netherlands, Italy. Spain is the only country that, in order to surrender, does not enforce double criminality checks for offences outside the EAW catalogue. All other countries do, and Italy even reinterprets the list through the categories of its criminal code and adds crimes of its own, leading some to say that double criminality was not abolished at all in Italy. As to grounds for refusal and guarantees demanded, Spain maintains optional grounds for refusal as optional, and demands only the second guarantee (it also demands the third, of sentence serving in Spain for Spanish nationals, but allows them to choose otherwise). Portugal maintains the optional grounds for refusal as optional and demands the first and second guarantees. The

Netherlands turn most optional grounds for refusal (4 of 7) from optional into mandatory, and demand the first and third guarantees. As to Italy, it turns all optional grounds for refusal into mandatory (with one exception) *and* adds new grounds of its own, taken from its internal criminal law; although it does maintain the three guarantees as optional demands. Last but not least, any deadline not met in Italy leads to releasing the requested person, elsewhere only delays in transfer have that consequence.

The previous hierarchy is not univocal however, for the right to appeal, a factor of utmost importance in the protection of rights and guarantees, that does fit linearly into it. Here, it is Portugal and Italy who are most protective of the requested person, by granting appeal on the detention decision and surrender decision, with Spain in-between, granting on the detention decision, and the Netherlands the least protective, granting no appeals. Naturally, all countries allow appeals on constitutional matters and in the interest of law.

When it comes to surrendering abroad national citizens or residents, rights and guarantees tend to be more asserted and there is more room to condition surrender. Judges in Spain must refuse surrender of Spaniards unless the requested person agrees otherwise. The Netherlands stand out in this issue as the most protective: it will only surrender Dutch citizens for purposes of prosecution with guarantee of having them returned, and it explicitly refuses to surrender them for serving sentences abroad. Dutch citizens must serve their foreign sentences in the Netherlands. We summarise these findings in the table below.

Table 1: Rights and guarantees

	Portugal	Spain	Italy	The Netherlands
EAW catalogue	transposed verbatim	transposed verbatim	converted into internal legal categories, other offences added	transposed verbatim, offence of manslaughter added
Double criminality check for non-listed offences	mandatory	optional	mandatory	mandatory
Optional grounds for refusal	remain optional	remain optional	turned to mandatory (except one), 10 further grounds added	4 turned to mandatory, 3 remain optional
Guarantees demandable				
1. retrial for sentences *in absentia*	mandatory	optional (not referred in the law)	optional	mandatory
2. review of life-time sentence	mandatory	mandatory	optional	optional
3. sentence serving at home for locals	optional	mandatory, unless requested person wishes otherwise	optional	mandatory
Appeals				
on detention dec.	yes	yes	yes	no
on surrender dec.	yes	no	yes	no
on constitutional issues, interest of law etc.	yes	yes?	yes?	yes

The dimension of authorities seems to reflect differences in national systems and procedures more than differences of intent. Some issues are worth mentioning in any case. In terms of centralisation of executing authorities, Portugal and Spain, countries with similar laws, are quite different: Portugal has its 5 appeal courts as executing authorities, whereas Spain, a country four times the size and population, and much more regional autonomy, has a sole executing authority, the *Audiencia Nacional* of Madrid. The Netherlands, fully centralised in one authority, and Italy, with several authorities, fall more into line with expectations in light of their dimensions. With regard to issuing authorities, the matter is simpler, since any criminal court can issue a warrant; a differences arises however on who within the court can do it. Spain reserves this competence to judges, where Portugal and the Italy also give it to prosecutors under specific circumstances. Portugal is a little ambiguous, giving this competence in the law to those authorities who under Portuguese law are competent to order arrest, detention or prison. Since prosecutors can order arrest, they can be counted in. The Netherlands state that any public prosecutor can act as an issuing judicial authority, making no mention to judges.

Table 2: Authorities

	Portugal	Spain	Italy	The Netherlands
Issuing authorities	all criminal courts	all criminal courts	all criminal courts	all criminal courts
Who can issue a warrant	judges, prosecutors	judges	judges, prosecutors	prosecutors
Executing authorities	appeal courts (5)	Audiencia Nacional, Madrid	appeal courts (17)	Amsterdam District Court

In the dimension of procedures, similarly to authorities, contrasts arise more from the specifics of each country's legal order than from general differences of approach. The latter can be found however in the consequences established for delays. These are harsher in Italy and the Netherlands than in Spain, with Portugal in between. The only consequence for delays established by the FD is releasing the requested person, for delays in transfer. Portugal, Italy and the Netherlands add the same consequence for delays in the surrender decision. Italy and the Netherlands go further and add it for delays in the reception of additional information requested to the issuing authority.

Table 3: Procedures

	Portugal	Spain	Italy	The Netherlands
Irrevocability of consent	irrevocable	irrevocable	irrevocable	irrevocable
Consequences of delays:				
in reception of information requested from issuing state	none	none	release if no information received within deadline set by the court, or 30 days	release if no EAW form received in 20 days
in surrender decision (10, 60 + 30 days) (*)	release if no decision in 60 days, 90 days with appeal, 150 days with Constitutional appeal	none	release	release
in transfer	release (**)	release	release	release
Who can take the:				
detention decision	judges	judges		prosecutors, judges
surrender decision	judges	judges	judges	prosecutors, judges

(*) Other than a notification to the issuing authorities and Eurojust.
(**) The law does not specify this consequence.

An issue of possible interest is the protagonism the Netherlands confer to the public prosecution. In other countries, judges lead the EAW process and make the most important decisions, namely regarding imprisonment. The Netherlands grant the public prosecution a wider scope of action, allowing it to assume full competence to execute a warrant in case of surrender with consent, rendering a judge almost

unnecessary. This invites a deeper enquiry into the rights and guarantees in cases of surrender with consent in the Dutch system.

Putting it together, we divide the laws analysed in two groups, Portugal and Spain on one hand, Italy and the Netherlands on the other. The first group deviates little from the FD and is more permissive of surrender. The second group deviates much more, establishes a more extensive articulation with internal laws, and makes surrender more difficult. This basic profile could benefit from an enlargement to other countries.

The analysis we just undertook should be seen as an initial step in the comparative assessment of the EAW at the national scale for the countries involved in this project – Portugal, Spain, Italy and the Netherlands. First of all, it addresses only law, more specifically the EAW transposition laws of these countries, which although fundamental are just the tip of the iceberg of the legal production around the EAW. Case law is another dimension crucial to profiling the EAW as a lawmaking and social process. Second, differences in practices are all the more important, probably vast, and require other means to assess. Hopefully, the understanding of legal differences attempted here will contribute to hasten that task.

2. PRACTICES AND PERCEPTIONS IN A COMPARATIVE PERSPECTIVE

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Introduction

The research undertaken in this project originated a vast amount of information on the EAW in law and in practice, patent in the chapters dedicated to national case studies. Here, we will attempt to bring some of this information into comparison in order to draw the most relevant similarities and differences among the four partner countries that participated in the research, in terms of their practices concerning the EAW and the perceptions their agents have of it. In a first moment, we will bring together and compare some of the extensive statistics we were able to gather from national proceedings, looking for an understanding of the EAW in its daily practice, as seen through the cold, objective lens of verifiable quantitative data.

Afterwards, we will contrast the views expressed by agents involved in the EAW in their various legal, institutional and national contexts, looking for a more subjective perspective on the EAW, and how it articulates with the objective perspective drawn from case files. It should be noted we do not give primacy to either of these sources in terms of explanatory power, rather being more interested in their articulation and tensions: both of them, proceedings and opinions, objective and subjective perspectives, have their own strengths and weaknesses, and complement each other in building a general portrait of the reality of the EAW.

2.1. The practice: cross-country analysis of judicial proceedings

A comparison of the four national case studies' quantitative data on EAW use poses several challenges. For each of the four countries, the warrant presents itself in two different situations: when it is issued, and when it is received. These are different situations that must be analysed separately, although they share many dimensions where common patterns can be searched (e.g. profile of defendants). Thus a comparison must deal with not four but eight different sets of data, which share most aspects but not all.

A hierarchy of topics was loosely followed by partners to guide the analysis: profile of the requested persons, portrait of the underlying criminality, procedural aspects and some macro-level data such as the countries involved and the yearly evolution of warrants. The information gathered on these is mostly similar across issued and received warrants, except for procedural matters. This category, other than some common items contained in the EAW form (purpose, decisions *in absentia*, seizure of property, lifetime sentences), consists for issued warrants mostly of aspects up to warrant issue, whereas for received warrants it consists mostly of aspects related to the warrant's execution process, from arresting through hearing a person up to their eventual surrender. For the purposes of this project, the latter is a richer source of information, so procedural matters are more developed for received warrants. Although the analyses were separate, the presentation of their results must not be so. It was left to the research teams in their national reports whether to present issued and then received warrants in each of the above topics, or conversely present the topics and within them highlight the similarities/differences between issued and received warrants. For this comparative analysis, we follow the second strategy.

The analysis of proceedings that was undertaken by the national research teams faced different obstacles, responsible for different limitations in their results. These were caused not by limitations of the research teams, but sometimes by constrictions in access to the data sources. These limitations, as well as the construction of samples and its method, are specified in detail in the methodological overview and the national case studies[40]. Given these limitations, we cannot assure a

[40] We mention here only the most important ones: in the Italian sample, both for issued and received

foolproof comparison among countries in terms of statistical reliability. Therefore, the results are to be considered illustrative – a case study of case studies somewhat – but not statistically representative. They do however enable comparisons given the relatively high number of cases. Furthermore, given the previous limitation and the amount of data involved, we will not delve into all the data addressed in the national case studies, but rather focus on a subset of the data that we consider more relevant.

2.1.1.The countries involved: a geography of warrants

A geography of warrant issuing from the four countries under study faced the limitation that the sample for Italy was too small and for the Netherlands the information was not available at all. Relying on the Portuguese and Spanish issuing patterns, we would say that warrants tend to be issued to a small subset of other countries, usually neighbouring countries. Portugal, for example, overwhelmingly sends its warrants to Spain, who in turn overwhelmingly sends its warrants to France.

warrants, the analysed proceedings are from 2007 to the first semester of 2008, instead of 2004 to 2008; does not include warrants for prosecution, only for execution of sentence, and the underlying judicial decisions had to be final, not subject to appeal. Cases outside these criteria were not allowed to be retrieved by the Italian team. For issued warrants, the Italian sample is very small (20 cases). Therefore, we avoid using it for conclusive purposes on issued warrants.

Table 4: Top 5 countries Portugal, Spain and Italy issue warrants to

Issuing country	Receiving country	Frequency	%	Valid %	Cumulative %
Portugal	Spain	80	30,0	55,6	55,6
	France	36	13,5	25,0	80,6
	United Kingdom	11	4,1	7,6	88,2
	Netherlands	4	1,5	2,8	91,0
	Belgium	2	,7	1,4	92,4
	Others (8)	11	4,1	7,6	100,0
	Subtotal	144	53,9	100,0	
	Missing	123	46,1		
	Total	267	100,0		
Spain	France	141	18,0	56,9	56,9
	Italy	20	2,6	8,1	64,9
	Germany	17	2,2	6,9	71,8
	Portugal	16	2,0	6,5	78,2
	Netherlands	11	1,4	4,4	82,7
	Others (14)	43	5,5	17,3	100,0
	Subtotal	248	31,7	100,0	
	Missing	535	68,3		
	Total	783	100,0		
Italy	France	7	35,0	35,0	35,0
	Germany	6	30,0	30,0	65,0
	Spain	2	10,0	10,0	75,0
	Austria	1	5,0	5,0	80,0
	Greece	1	5,0	5,0	85,0
	Others (3)	3	15,0	15,0	100,0
	Total	20	100,0	100,0	20

Table 5: Top 5 countries partner countries receive warrants from

Receiving country	Issuing country	Frequency	%	Valid %	Cumulative %
Portugal	Spain	77	27,0	27,0	27,0
	France	53	18,6	18,6	45,6
	Germany	46	16,1	16,1	61,8
	Romania	20	7,0	7,0	68,8
	Netherlands	19	6,7	6,7	75,4
	Others (14)	70	24,6	24,6	100,0
	Total	285	100,0	100,0	
Spain	Romania	81	34,6	34,9	34,9
	Italy	27	11,5	11,6	46,6
	Germany	26	11,1	11,2	57,8
	Poland	24	10,3	10,3	68,1
	France	23	9,8	9,9	78,0
	Others (15)	51	21,8	22,0	100,0
	Subtotal	232	99,1	100,0	
	Missing	2	,9		
	Total	234	100,0		
Italy	Romania	88	74,6	74,6	74,6
	France	12	10,2	10,2	84,7
	Poland	6	5,1	5,1	89,8
	Germany	4	3,4	3,4	93,2
	Belgium	2	1,7	1,7	94,9
	Others (4)	6	5,1	5,1	100,0
	Total	118	100,0	100,0	
Netherlands	Germany	71	28,4	28,7	28,7
	Belgium	54	21,6	21,9	50,6
	Poland	31	12,4	12,6	63,2
	Italy	27	10,8	10,9	74,1
	France	18	7,2	7,3	81,4
	Others (13)	46	18,4	18,6	100,0
	Subtotal	247	98,8	100,0	
	Missing	3	1,2		
	Total	250	100,0		

When it comes to received warrants, they tend to be more diversified in their origin. Neighbouring countries remain among the most frequent, but along them emerge countries which are more distant, chief among them Romania. Thus Portugal has its neighbour Spain as the main issuer, the Netherlands have Germany and Belgium, Italy has France has the second issuer. Spain is the only country which

deviates from this trend of neighbouring country predominance, having France only as the 5th issuer and Portugal in a negligible position. On the other hand, Spain and Italy have Romania as the top issuer and Poland among the top issuers, hardly countries in their vicinity, buy with strong migrant communities.

The great preponderance of Romania, and in a lesser degree of Poland, as issuers of EAW requests to the countries under study is a relevant fact. Romania is the top issuer to Spain and Italy, and the 4th issuer to Portugal, although it is virtually absent from the Dutch sample. The latest official immigration statistics indicate that Romanians are the largest immigrant community in Spain and Italy, and the 5th largest in Portugal, giving the impression that it is the migration to these countries that is fuelling their surge of Romanian requests. The case files of all countries reveal that Romania asks invariably for Romanian citizens, who can have residence in the executing country, which is the majority in Portugal and Spain, or have their official residence in Romania, the majority for Italy.

In short, the partner countries tend to issue warrants to their neighbouring countries and tend to receive warrants from neighbouring countries as well as countries they have migrations ties with. Geographical proximity and immigration ties seem to be the main force shaping the pattern of warrant traffic.

2.1.2. Profile of the requested persons

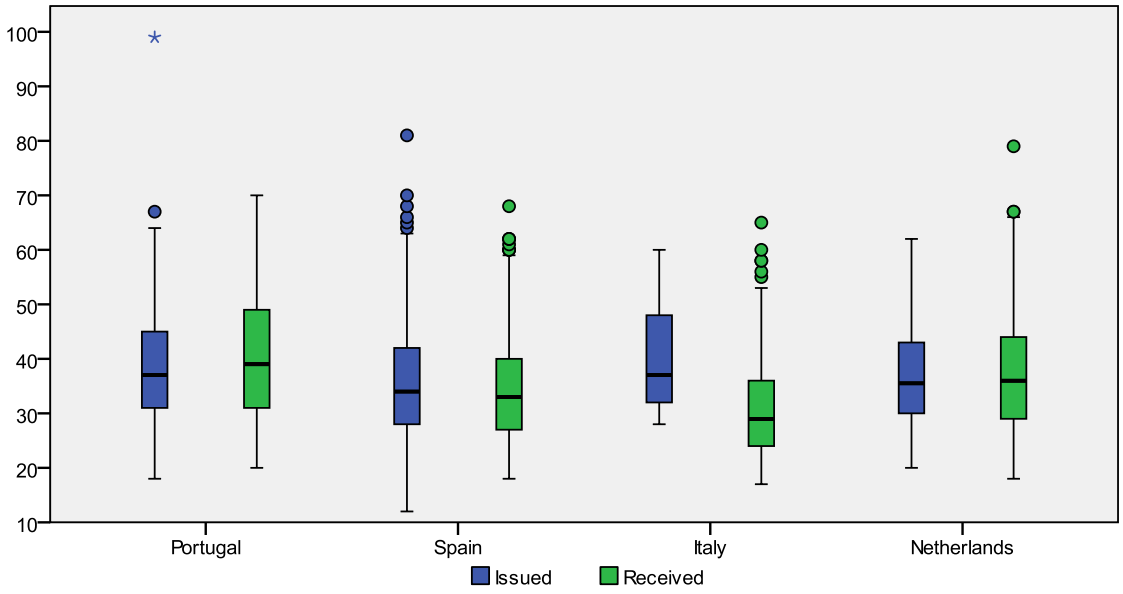
A profile of the kind of requested persons asked for and to the partner member states is a complex task that must approached tentatively. A single profile cannot be expected, rather an array of different profiles for each partner country as well as for issued and received warrants. There are however some dimensions in which similarities are clear and transversal. The clearest is gender: across any situation and partner country, males always outnumbered female defendants by 9 to 1 and more. For all the variety to be found among persons requested through EAW proceedings, one can say as a rule they are male. Another similarity is age: it covers all the spectrum from the lowest to the highest ages in a bell shaped curve centred around 30-40 years, the average age varying from 32,2 years (warrants received by Italy) to at the highest 40,3 years (warrants received by Portugal). This is a visible pattern for all partner countries across issued and received warrants, with a difference within it that for EAWs received by Spain and especially Italy, which seem to be asked for younger persons

that Portugal or the Netherlands. The demographic data that based this analysis and the following tables was retrieved in ine.pt, ine.es, demo.istat.it, statline.cbs.nl.

Table 6: Percent of male requested persons by partner country (issued and received EAWs)

	Male valid %
Portugal, issued	93,3
Portugal, received	94,0
Spain, issued	89,7
Spain, received	95,3
Italy, issued	95,0
Italy, received	95,8
Netherlands, issued	92,4
Netherlands, received	93,6

Chart 1: Box-plot of requested persons' age by partner country (issued and received EAWs)



When it comes to the nationality of the individuals the partner countries request, the first conclusion is that first of all they ask for their nationals: Portugal asks for Portuguese, Spain asks for Spaniards etc. Nationals of the issuing country were always the most requested, outnumbering the second most-requested nationality by 5 times (Spain, the Netherlands) and up to 10 times (Portugal). Second, individuals from countries outside the EU or from the most recent EU member states (e.g. Romania) are the second most requested group. These are usually connected to important

immigrant populations in the issuing country: Brazilians, Cape-Verdeans, Angolans, Romanians and Ukrainians in Portugal; Romanians, Moroccans, Ukrainians and Algerians in Spain; Moroccans and Turks in the Netherlands. Note that, for the nationalities outside the EU, these people are presumed to have escaped but remained within the Schengen area, since an EAW cannot be sent to their home country. Third, nationals from neighbouring countries are among the most requested for some countries but not all: Spaniards are the 2nd most requested by Portugal, French the 3rd most requested by Spain, but the Netherlands request practically no nationals of its neighbouring countries. Altogether, we would say that partner countries ask first of all for their nationals; then, in a much lesser degree, for its immigrants; then, some of them (Portugal, Spain) for nationals of neighbouring countries.

Table 7: Top-5 nationalities requested by partner countries

Issuing country	Nationality	Frequency	%	Valid %	Cumulative %
Portugal	Portugal	164	61,4	65,6	65,6
	Spain	17	6,4	6,8	72,4
	Brazil	12	4,5	4,8	77,2
	Cape Verde	9	3,4	3,6	80,8
	Angola	7	2,6	2,8	83,6
	Others (18)	41	15,4	16,4	100,0
	Subtotal	250	93,6	100,0	
	Missing	17	6,4		
	Total	267	100,0		
Spain	Spain	330	42,1	42,3	42,3
	Romania	69	8,8	8,8	51,1
	France	44	5,6	5,6	56,7
	Morocco	39	5,0	5,0	61,7
	Ukraine	27	3,4	3,5	65,2
	Others (54)	272	34,7	34,8	100,0
	Subtotal	781	99,7	100,0	
	Missing	1	,1		
	Total	783	100,0		
Italy	Italy	9	45,0	45,0	45,0
	Albania	3	15,0	15,0	60,0
	Romania	3	15,0	15,0	75,0
	Germany	2	10,0	10,0	85,0
	Tunisia	2	10,0	10,0	95,0
	Morocco	1	5,0	5,0	100,0
	Total	20	100,0	100,0	
Netherlands	Netherlands	48	45,7	48,5	48,5
	Morocco	9	8,6	9,1	57,6
	Turkey	7	6,7	7,1	64,6
	Bulgaria	4	3,8	4,0	68,7
	Algeria	3	2,9	3,0	71,7
	Others (18)	28	26,7	28,3	100,0
	Subtotal	99	94,3	100,0	
	Missing	6	5,7		
	Total	105	100,0		

Table 8: Major foreign populations by partner country, 2008

Host country	Nationality	N.	% of national population
Portugal	Brazil	106961	1,006%
	Ukraine	52494	0,494%
	Cape Verde	51353	0,483%
	Romania	27769	0,261%
	Angola	27619	0,260%
	Guinea-Bissau	24390	0,230%
	Moldova	21147	0,199%
Spain	Romania	728967	1,579%
	Morocco	644688	1,397%
	Ecuador	420110	0,910%
	United Kingdom	351919	0,762%
	Colombia	280705	0,608%
	Bolivia	239942	0,520%
Italy	Romania	796477	1,326%
	Albania	441396	0,735%
	Morocco	403592	0,672%
	China	170265	0,284%
	Ukraine	153998	0,256%
Netherlands	Indonesia	387124	2,360%
	Germany	379610	2,314%
	Turkey	372714	2,272%
	Suriname	335799	2,047%
	Morocco	335127	2,043%

As for the nationality of individuals that are requested to the partner countries, the patterns are more complex. As a rule, diversity is greater than with the nationals they request, except for Spain. 16 nationalities cover 90% of the warrants Portugal receives while 8 cover 90% of those it issues, a trend also present in the Netherlands (24 *vs* 14), but not in Spain (16 *vs* 21). (1) Nationals of the receiving country remain among the most requested, though by a lesser margin than in issued warrants. They are the most requested to Portugal and the Netherlands, the 2nd most requested to Italy, but are of lesser importance in Spain. (2) Romanians and Poles are another group much requested to partner countries. Romanians thwart by a large margin everyone else requested to Spain and Italy, and are also among the most requested to Portugal, which is in line with the top standing of Romania as issuer to these countries; the weight of the Romanian community in these countries is probably a factor in this prevalence. Poles are among the most requested to all partner countries except

Portugal, but contrary to Romanians, they do not have such numerous communities there. (3) Another group much requested are citizens of the central-northern European area, defined here as a strip stretching from Spain across France to Germany, including the United Kingdom. Chief among these are Germans, among the 3 most requested nationalities for every partner country except Italy.

Table 9: Top-5 nationalities requested to partner countries

Receiving country	Nationality	Frequency	%	Valid %	Cumulative %
Portugal	Portugal	104	36,5	36,6	36,6
	Germany	23	8,1	8,1	44,7
	Romania	22	7,7	7,7	52,5
	Spain	17	6,0	6,0	58,5
	United Kingdom	16	5,6	5,6	64,1
	Others (32)	102	35,8	35,9	100,0
	Subtotal	284	99,6	100,0	
	Missing	1	,4		
	Total	285	100,0		
Spain	Romania	83	35,5	35,5	35,5
	Poland	23	9,8	9,8	45,3
	Germany	18	7,7	7,7	53,0
	Italy	13	5,6	5,6	58,5
	Spain	13	5,6	5,6	64,1
	Other (28)	84	35,9	35,9	100,0
	Total	234	100,0	100,0	
Italy	Romania	88	74,6	74,6	74,6
	Italy	12	10,2	10,2	84,7
	Poland	7	5,9	5,9	90,7
	France	3	2,5	2,5	93,2
	Czech Republic	2	1,7	1,7	94,9
	Others (5)	6	5,1	5,1	100,0
	Total	118	100,0	100,0	
Netherlands	Netherlands	64	25,6	25,8	25,8
	Poland	33	13,2	13,3	39,1
	Germany	23	9,2	9,3	48,4
	Belgium	18	7,2	7,3	55,6
	Italy	14	5,6	5,6	61,3
	Others (39)	96	38,4	38,7	100,0
	Subtotal	248	99,2	100,0	
	Missing	2	,8		
	Total	250	100,0		

In conclusion, and necessarily with much simplification in-between, the persons requested through the EAW are males of all ages, most frequently in their 30s to 40s. When requested to foreign countries, they tend to be nationals of the issuing country, nationals of important communities of the issuing country (mostly residents), and nationals of neighbouring countries. When requested by foreign countries, diversity is greater: nationals of the receiving country remain important (but not as much), as do those of immigrant communities of the receiving country, but nationals of the central-northern European zone, from Spain to Germany and including the United Kingdom, are much more frequent.

2.1.3. Underlying criminality

The criminality that underlies EAW use can be assessed through the offences and the length of imposable/ imposed sentences, which we will address here after highlighting the two main procedural uses of the EAW, which are important for the way sentence lengths are analysed.

The EAW can be used to ask for suspects of a crime or convicts, and there are some significant differences across partner countries and whether they are issuers or receivers, as can be seen in the table below (Italy was left out of this comparison because only warrants for execution of sentence could be retrieved).

Portugal asks more for execution of sentence and is asked for prosecution, while Spain is the opposite, asking more for prosecution and being asked for execution, and the Netherlands both ask and are asked more for prosecution. Put another way, in terms of tendencies, Portugal looks more for convicts, while Spain and the Netherlands look more for suspects; and when asked for persons, Portugal and the Netherlands are asked for suspects and Spain for convicts. These are some of the biggest differences we found for any variable across the partner countries.

Table 10: Procedural purpose of warrants by partner country, issued and received warrants

	Portugal (valid %)	Spain	Netherlands
prosecution, issued	44,1	83,9	73,3
execution of sentence, issued	55,9	16,1	26,7
prosecution, received	63,3	40,2	63,2
execution of sentence,	36,7	59,8	36,8

received

Sentences: wide-ranging, higher when requesting, lower when requested

The maximum and effective sentences are the numerical indicators we can use to assert the gravity of crimes the EAW is being used for. The maximum sentence is a rougher indicator than the effective sentence, but in theory a more representative one, since it should be available for everyone, where the latter would only be available for EAW requests for the execution of sentence. Warrants were issued by partner countries for crimes with maximum sentences in average of 10 to 14 years, as we can see in the statistics and box-plot below. At first sight, the differences between countries are not substantial, but the box-plot is skewed by the proliferation of extreme values in warrants issued by Spain. If we look at it in closer detail, we visualize better that the median lowers progressively: half of the warrants issued by Portugal have a maximum sentence of 15 years or less, while for Spain the figure is 12 years and for Italy and the Netherlands 10 years.[41] Focusing on the interquartile area – that is, the 50% of intermediate values of each country, corresponding to the thick area of its bar in the box-plot – we see that half the cases are in the interval 8½–16½ years for Portugal, 7–20 years for Spain, 6–12 years for the Netherlands. The wider range of sentences which Spain searches for is reflected in its higher standard deviation, doubling that of Portugal and the Netherlands. The tentative conclusion we would draw is that, when looking for suspects, Portugal tendentially looks them for higher (maximum) sentences than the Netherlands, while Spain looks for a wider range of sentences than either of them, as low as the Netherlands and higher than Portugal.

[41] The figure for Italy is extremely limited, having only 5 cases.

Chart 2: Box-plot of maximum sentences across partner countries, issued warrants

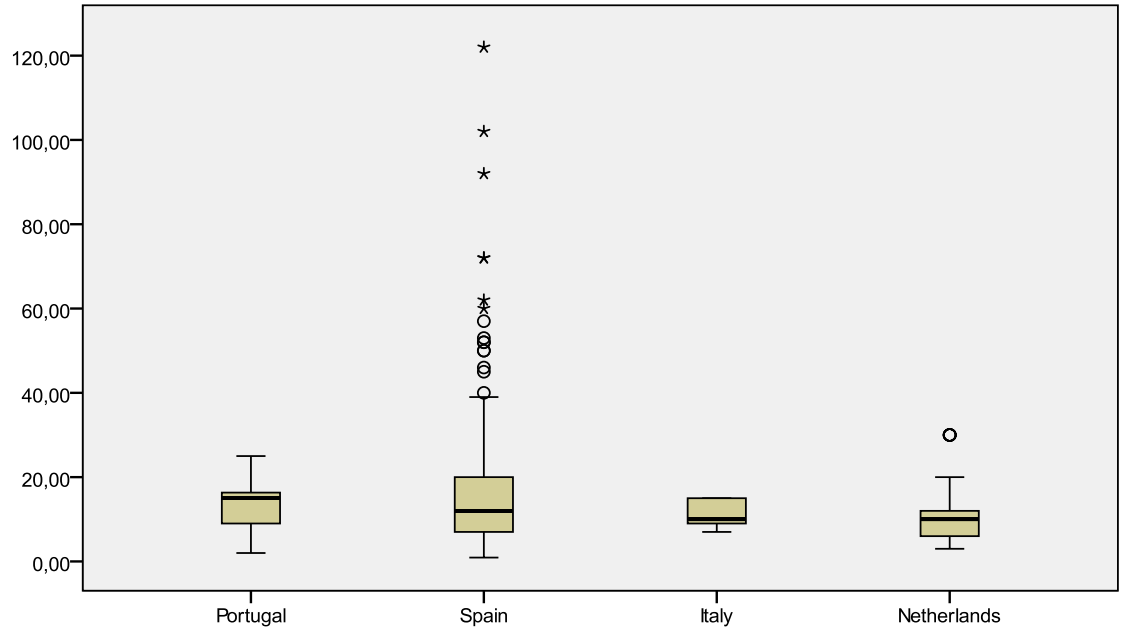
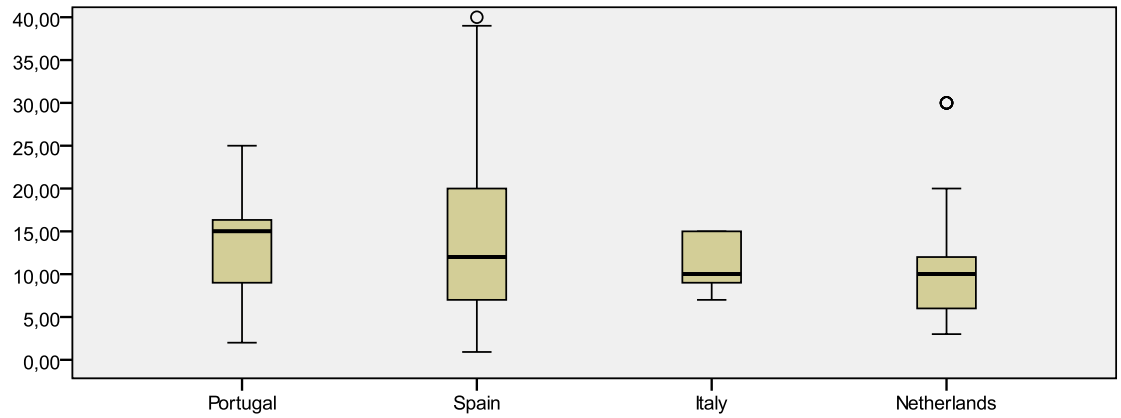


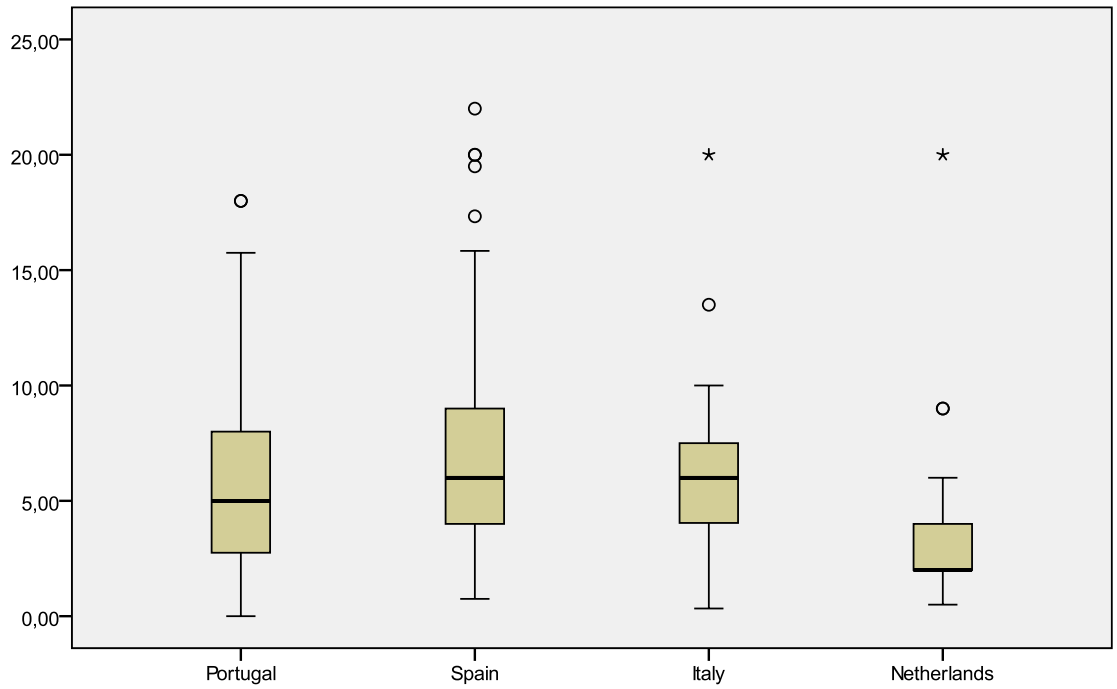
Chart 3: Box-plot of maximum sentences, outlier values excluded, issued warrants



Turning to the sentences effectively imposed, the picture somewhat changes. This variable was rarely missing and is thus a good indicator of sentence execution cases, although it is limited by the overall low number of observations for Italy (16) and the Netherlands (28). Partner countries issued warrants looking for convicts for 3-year (Netherlands) to 5-6-year average sentences (remaining countries). The intermediate (interquartile) sentences were between 3.9–9 years for Spain at the highest, and 2–4 years at the lowest for the Netherlands. Spain appears as the country looking for the

higher-sentenced convicts, with Italy and Portugal in an intermediate position, while the Netherlands look for the lower-sentenced convicts.

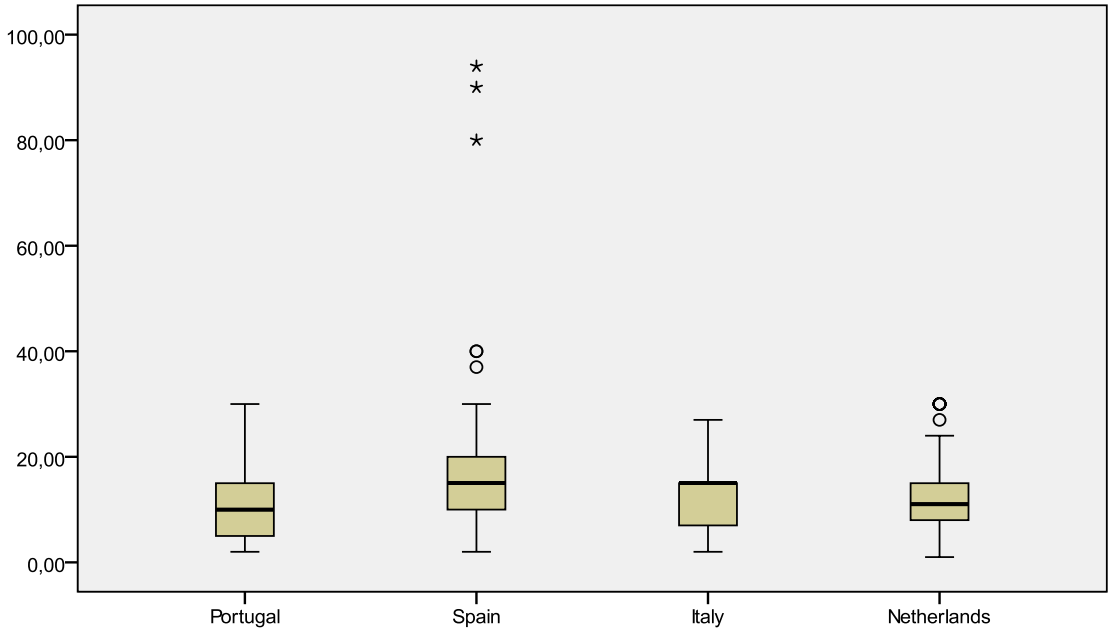
Chart 4: Box-plot of effective sentences across partner countries, issued warrants



The previous analysis of the sentences imposed or imposable to the offences underlying issued EAWs is not as fruitful for received warrants, since the former might be traced back to realities of the judicial-criminal systems of the 4 partner countries under research, while the latter has a wide array of countries acting as issuers, whose national realities we cannot approach through these means. Nevertheless, it is interesting data that can be compared with the issued warrants of the same country.

Maximum applicable sentences for received warrants are relatively similar across countries, as we can see in the graph below, varying between an average of 11-12 years (Portugal, Italy, Netherlands) and 16 years (Spain). Spain receives warrants for somewhat higher maximum sentences than the other countries, as hinted by its higher average and visible in the box-plot.

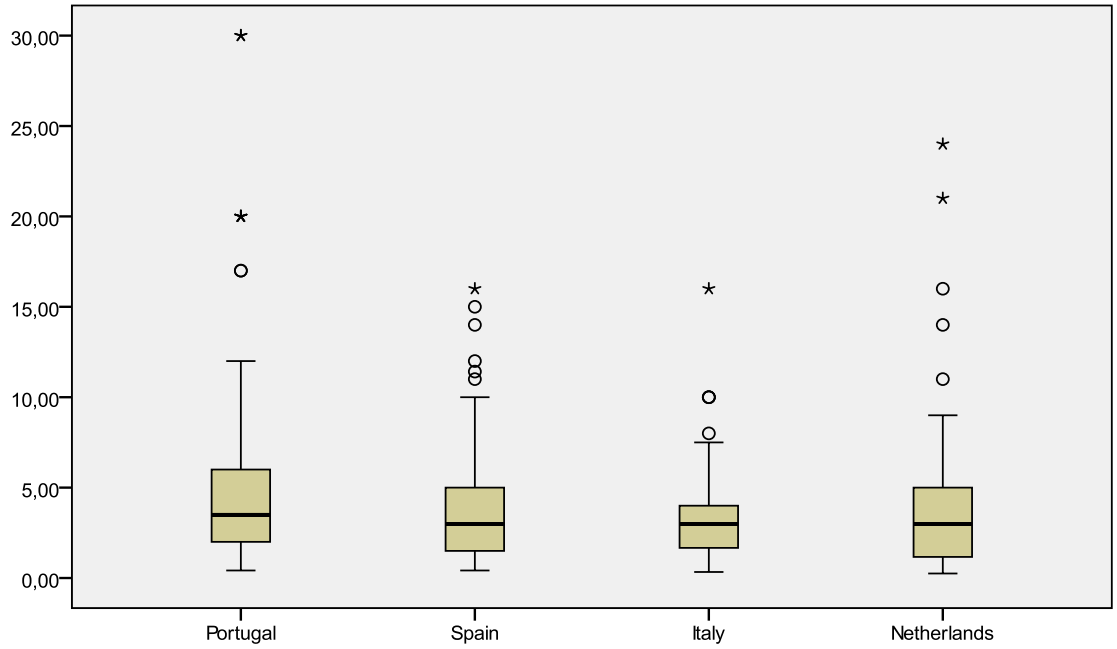
Chart 5: Box-plot of maximum sentences across partner countries, received warrants



When we look at the effective sentences in received warrants, they are again similar across countries. The median effective sentence is 3 years everywhere (the average sentence would also be very similar around that mark were it not for several outlier values in all countries) and intermediate sentences lie between 1,1–5,5 years (Netherlands) and 2–6 years (Portugal); Italy is asked for slightly lower intermediate sentences within 1,6–4,1 years.

All in all, we would say similarity is the rule among the sentences underlying the EAWs received by partner countries, although suspects asked to Spain have slightly higher (maximum) sentences than the rest, and convicts asked to Italy have slightly lower (effective) sentences.

Chart 6: Box-plot of effective sentences across partner countries (received warrants)



If we compare the sentences for issued and received warrants within each country, we note that Portugal tends to issue warrants for higher maximum sentences than it receives for, whereas in Spain and the Netherlands occurs the opposite. Effective sentences display a trend clearer than usual, in that all countries tend to issue warrants for higher effective sentences than they receive for, except the Netherlands (whose data for such cases is limited however). In this matter, Portugal stands in one pole, asking for higher sentences than it is asked for, while the Netherlands stand on the opposite pole, asking for lower sentences than they are asked for. This can be better visualised in the box-plots below.

Chart 7: Box-plot of maximum sentences for issued and received warrants, per partner country

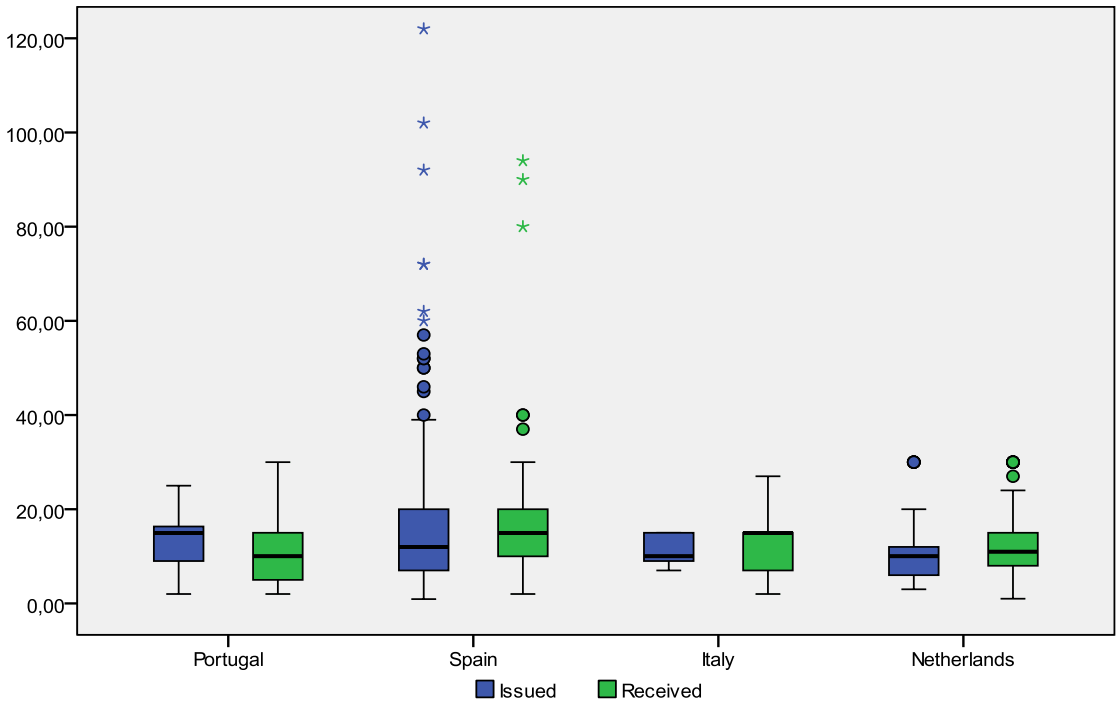
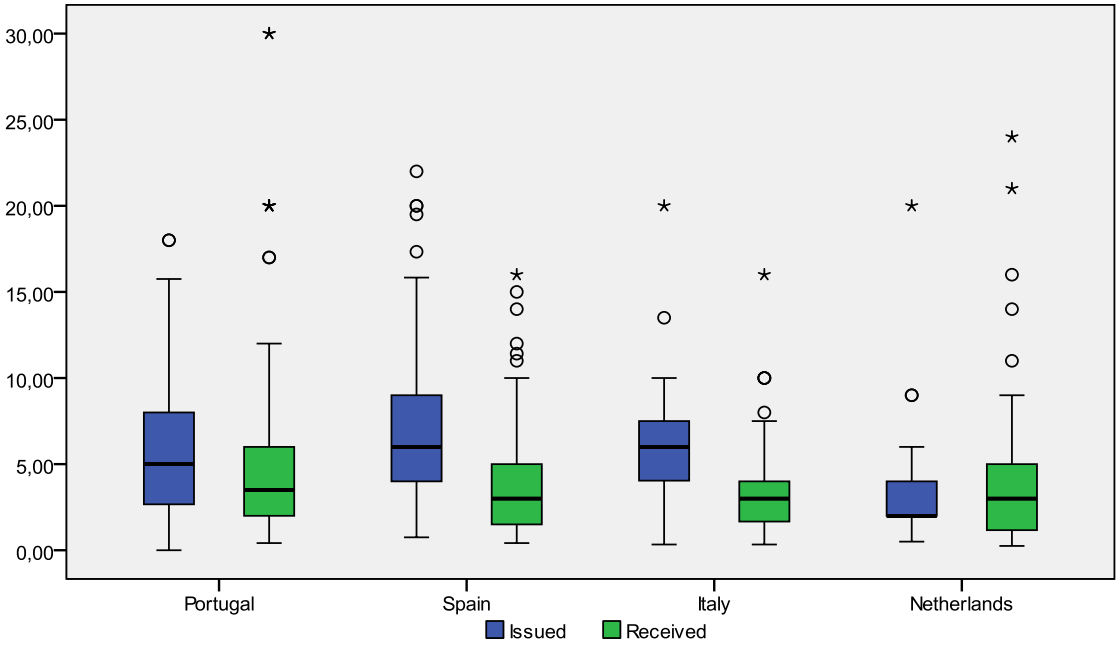


Chart 8: Box-plot of effective sentences for issued and received warrants, per partner country

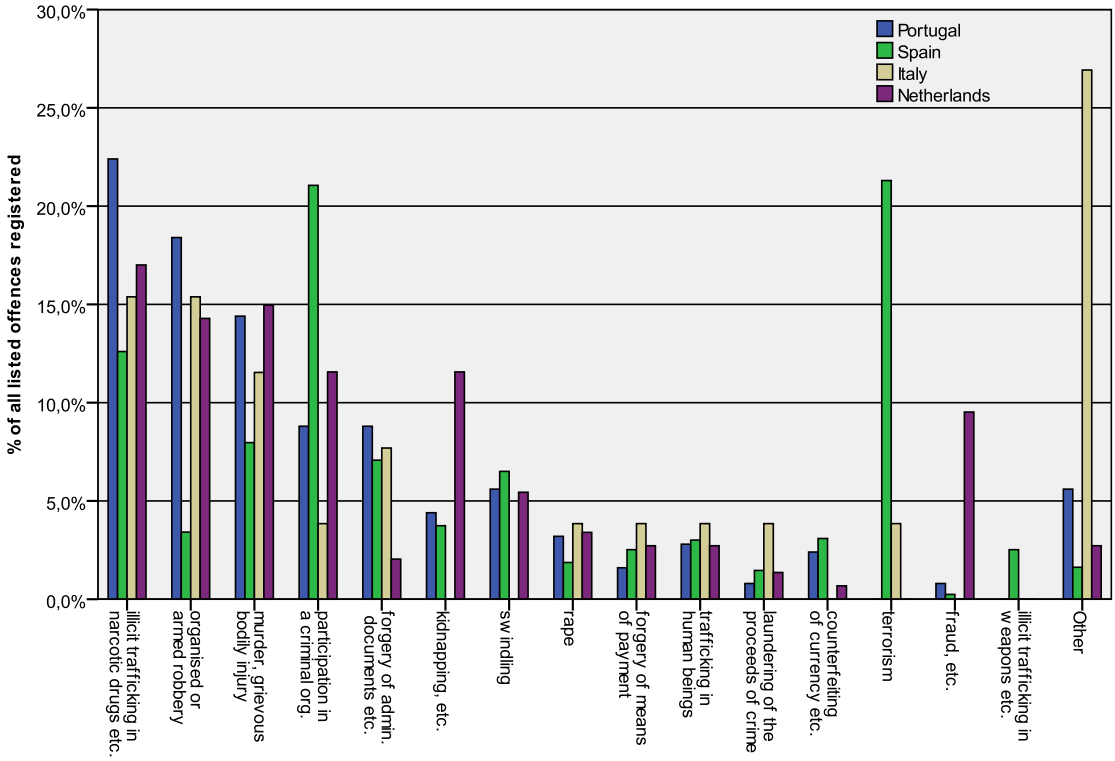


To recapitulate, as seen through the perspective of the duration of sentences, the EAW is being used by partner countries to persecute all sorts of criminality, lowest

to highest. The similarities among countries are prevailing, but differences do exist. Spain and the Netherlands ask more for suspects while Portugal asks more for convicts. Spain exhibits the most diverse use of the EAW, being the one that looks for most serious offences but not holding its use for the pettier either. Portugal and Italy stand in an intermediate position, while the Netherlands use it to persecute pettier crime. When they receive EAW requests, the pattern of sentences is similar among them and is lower than the sentences they issue for, except for the Netherlands. These differences are clearer by convicts (execution of sentence) than suspects (prosecution).

We now turn to the offences registered in our samples, the other main variable for profiling the criminality the EAW is being used for. Analysing the large amount of possible offences across 4 different countries is a complex task. The chart below, displaying the major catalogue offences clustered by partner country, is the easiest form to grasp its main features. It is complemented by a table expressing the prevalence of the offences as percentage of the warrants. Please notice the data and comments for Italy should be taken with caution, due to its small sample.

Chart 9: Listed offences by partner country, issued warrants[42]



[42] Note that the percentage in the chart is relative to all the catalogue offences marked in the warrants, not the number of cases. For example, if Portugal had 10 issued warrants containing a total of 20 listed offences, and drug trafficking was present 4 times, the percentage in this graph would be 4/20*100=20%, although drug trafficking was present in 4/10*100=40% of the warrants. The percentages in the chart for a given country add up to 100%, while the percentages relative to the number of cases would surpass 100%, since each case can have multiple offences. The percents relative to the number of cases are given in the table below the chart.

Table 11: Catalogue offences by partner country, percent of issued EAWs

	Portugal	Spain	Italy	Netherlands
illicit trafficking in narcotic drugs and other substances	21,0%	19,8%	20,0%	23,8%
organised or armed robbery	17,2%	5,4%	20,0%	20,0%
murder, grievous bodily injury	13,5%	12,5%	15,0%	21,0%
participation in a criminal organization	8,2%	33,1%	5,0%	16,2%
forgery of administrative documents and trafficking therein	8,2%	11,1%	10,0%	2,9%
kidnapping, illegal restraint and hostage-taking	4,1%	5,9%	0,0%	16,2%
swindling	5,2%	10,2%	0,0%	7,6%
rape	3,0%	2,9%	5,0%	4,8%
forgery of means of payment	1,5%	4,0%	5,0%	3,8%
trafficking in human beings	2,6%	4,7%	5,0%	3,8%
laundering of the proceeds of crime	0,7%	2,3%	5,0%	1,9%
counterfeiting of currency, including the euro	2,2%	4,9%	0,0%	1,0%
terrorism	0,0%	33,5%	5,0%	0,0%
fraud, etc.	0,7%	0,4%	0,0%	13,3%
illicit trafficking in weapons etc.	0,0%	4,0%	0,0%	0,0%
trafficking in stolen vehicles	0,0%	1,0%	5,0%	0,0%
facilitation of unauthorised entry and residence	2,2%	0,0%	15,0%	0,0%
racketeering and extortion	1,5%	0,3%	15,0%	1,9%
corruption	0,0%	0,3%	0,0%	0,0%
sabotage	0,0%	0,1%	0,0%	0,0%
arson	0,7%	0,4%	0,0%	1,0%
sexual exploitation of children and child pornography	0,4%	0,3%	0,0%	1,0%
crimes within the jurisdiction of the ICC	0,0%	0,1%	0,0%	0,0%
illicit trafficking in nuclear or radioactive materials	0,4%	0,0%	0,0%	0,0%

There is a group of “big-four” offences that as a rule are clearly the most frequent for warrant issuing: drug trafficking, organised or armed robbery, murder/grievous bodily injury, and participation in a criminal organisation. Drug trafficking is consistently the most frequent offence in EAWs issued by partner countries (if we circumvent a Spanish peculiarity we will explore later). Not everything is fully consistent within this group: organised or armed robbery is far from the top offences in Spain (only the 8th most frequent there), as is participation in a criminal organisation for Italy.

Next, we identify a second tier of offences, less frequent than the previous, lying within the 5-10% area in the graph: forgery of administrative documents; kidnapping, illegal restraint and hostage-taking; and swindling. Exceptions and inconsistencies are greater in this group: in the Netherlands, forgery is negligible but kidnapping is

overrepresented, fitting better in an enlarged Dutch big-five top tier; and swindling is absent in Italy.

A third tier of offences is constituted by rape, forgery of means of payment, trafficking in human beings, laundering and counterfeiting of currency. As a rule, these offences are still found in the EAWs every county issues, but they are the least frequent.

These 3 tiers comprising 15 offences constitute the common panorama of criminality coupled with the issuing of EAWs in the partner countries. The remaining offences (9) were residual and specific of each country. In the Italian sample, 3 of these residual offences (facilitation of unauthorised entry, racketeering and extortion, trafficking in stolen vehicles) were grossly overrepresented due to the small sample size, resulting in the abnormal prevalence in the chart of "other" offences for Italy. Of the 32 possible listed offences, 15 were commonplace among countries, and 9 were isolated occurrences, therefore 8 were never actually underlie EAW requests by any of the partner countries.[43]

Then we find the national peculiarities. Terrorism in Spain is the strongest one. It is interesting to note that, while the EAW was approved in the EU due in great part to the post-September 11 international climate and America's ensuing "war on terrorism", terrorism is conspicuously absent from the big picture of EAW practical use – except for Spain. In Spain, it is the most frequent offence in issued warrants, closely followed by participation in a criminal organization. Both offences are commonly present in the same requests (26,3% of warrants had both, 7,2% only the 1st, 6,8% only the 2nd). This is what stops drug trafficking from being the number one offence behind warrants issued by Spanish authorities, and contributes to Spain's persecution of higher sentences compared to other countries. The vast majority of warrants for terrorism were for suspects rather than convicts (29,9% *vs* 3,6% of all warrants), and their sentences were much higher (average maximum sentence was 20,68 years *vs* 10,35 in warrants for other crimes). Without the warrants for terrorism, Spain's profile of maximum sentences would be lower than Portugal and close to the Netherlands.

The other national peculiarity is the Netherlands' penchant for persecuting fraud and kidnapping. An offence with insignificant relevance in every other country, fraud is

[43] These were: computer-related crime, environmental crime, illicit trade in human organs and tissue, racism and xenophobia, illicit trafficking in cultural goods, counterfeiting and piracy of products, illicit trafficking in hormonal substances and other growth promoters, unlawful seizure of aircrafts/ships.

unusually frequent in Dutch EAW requests, fitting in the second tier of offences for this country, just as kidnapping, a not-insignificant but still minority offence for others.

Despite all the differences among partner countries, the consistencies in the pattern of listed offences they persecute are remarkable.

Turning to the non-catalogue offences, we must remark that data is not as consistent, because these were open-ended offences, specified in the most diverse ways across warrants and countries, and so had to be categorised and harmonised post-factum. Furthermore, the information available on Italian and Dutch proceedings was too little to reach a reasonable number of cases with non-catalogue samples, leading to skewed results for these countries. For this reason, we exclude them from this analysis and give analytical priority to Portugal and Spain. The table below shows the distribution between catalogue and non-catalogue offences per country, showing that non-catalogue offences, discriminated in the last two lines, represent a minority of cases, except for Portugal were they were present in 37% of issued warrants. The offences are discriminated in the chart below and ensuing table.

Table 12: Distribution of cases with catalogue and non-catalogue offences by partner country (issued warrants)

	Portugal (cases, %)		Spain		Italy		Netherlands	
No offences marked	47	17,6%	21	2,7%	0	,0%	9	8,6%
Some listed offences, no non-listed	122	45,7%	590	75,4%	17	85,0%	83	79,0%
No listed offences, some non-listed	41	15,4%	59	7,5%	2	10,0%	3	2,9%
Both	57	21,3%	113	14,4%	1	5,0%	10	9,5%
Total	267	100,00%	783	100%	20	100%	105	100%

Chart 10: Non-catalogue offences, Portugal and Spain (issued warrants)

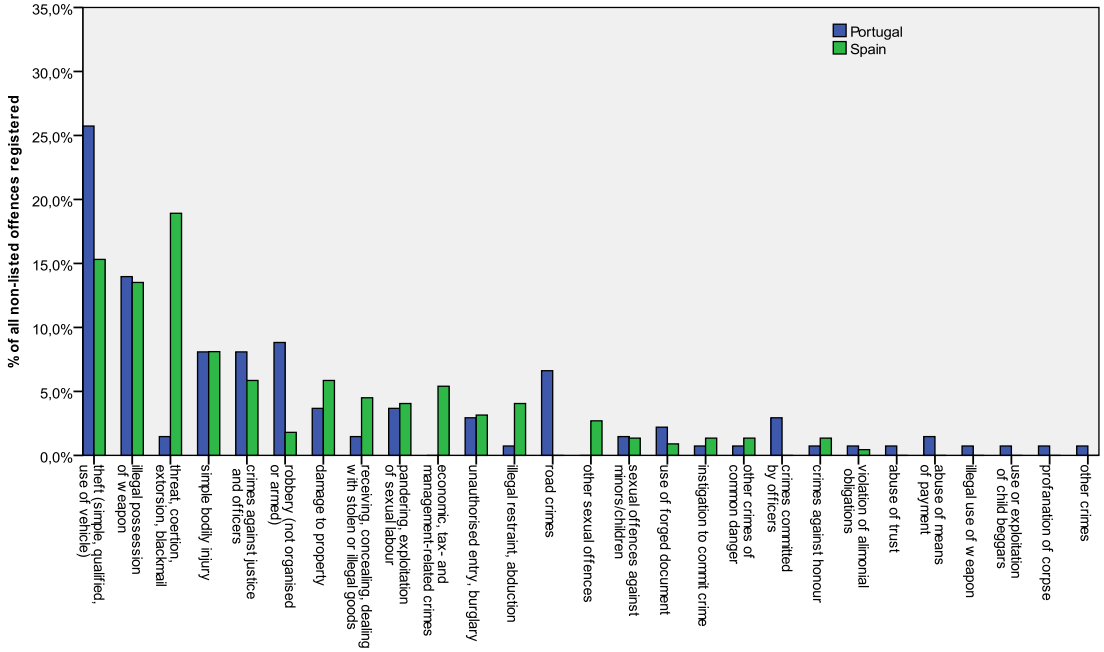


Table 13: Non-catalogue offences in Portugal and Spain – percent of issued warrants

	Portugal	Spain
theft (simple, qualified, use of vehicle)	13,1%	4,3%
illegal possession of weapon	7,1%	3,8%
threat, coercion, extortion, blackmail	0,7%	5,4%
simple bodily injury	4,1%	2,3%
crimes against justice and officers	4,1%	1,7%
robbery (not organised or armed)	4,5%	0,5%
damage to property	1,9%	1,7%
receiving, concealing, dealing with stolen or illegal goods	0,7%	1,3%
pandering, exploitation of sexual labour	1,9%	1,1%
economic, tax- and management-related crimes	0,0%	1,5%
unauthorised entry, burglary	1,5%	0,9%
illegal restraint, abduction	0,4%	1,1%
road crimes	3,4%	0,0%
other sexual offences	0,0%	0,8%
sexual offences against minors/children	0,7%	0,4%
use of forged document	1,1%	0,3%
instigation to commit crime	0,4%	0,4%
other crimes of common danger	0,4%	0,4%
crimes committed by officers	1,5%	0,0%
crimes against honour	0,4%	0,4%
violation of alimonial obligations	0,4%	0,1%
abuse of trust	0,4%	0,0%
abuse of means of payment	0,7%	0,0%
illegal use of weapon	0,4%	0,0%
use or exploitation of child beggars	0,4%	0,0%
profanation of corpse	0,4%	0,0%
other crimes	0,4%	0,0%

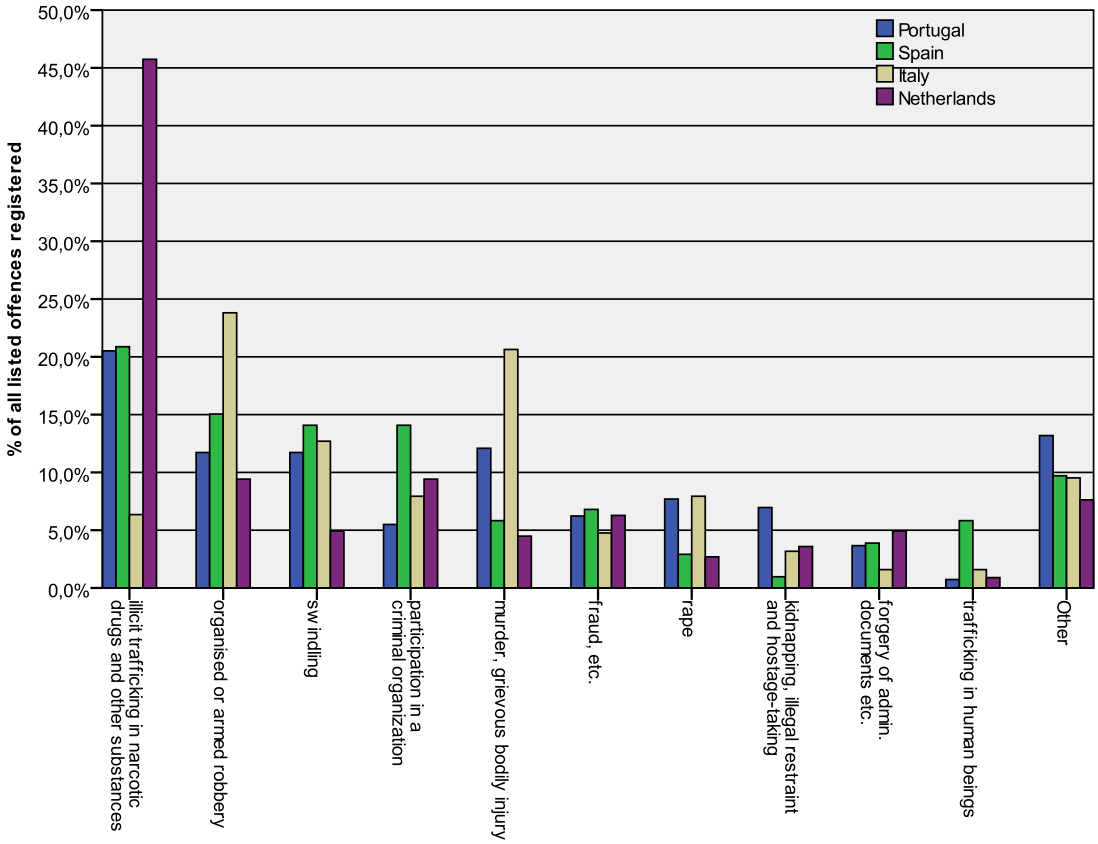
Some of the non-catalogue offences above overlap with catalogue offences and might have been checked as one of them.

There are some visible similarities in non-catalogue offences. In terms of common treats among Portugal and Spain, theft and illegal possession of weapon are clearly the most frequent, theft being particularly frequent in Portuguese warrants. In a second tier of less frequent but still common offences, we find simple bodily injury, crimes against justice and officers, damage to property, receiving stolen goods, pandering/exploitation of sexual labour, and unauthorised entry/burglary. On the realm

of national particularities, threat/coercion/extortion/blackmail were very in demand by Spain, being in fact its single most frequent category; economic, tax- and management-related crimes and illegal restraint/abduction were also almost exclusive to this country. Portugal, on the other hand, has a particular tendency to issue warrants for robbery not checked as a listed offence (hence probably not considered organised/armed) and road crimes. The remaining offences are insignificant.

Turning our attention to received warrants, the data had fewer limitations than for issued warrants, since all countries had a reasonably-sized sample (the smallest, Italy, had 118 cases), which manifested into the results. Listed offences are in the chart and table below.

Chart 11: Listed offences by partner country (received warrants)



The similarities among countries are more striking than what was found for issued warrants: if not for some deviations of Italy and the Netherlands, we could say that partner countries were basically requested for exactly the same offences in the same proportions. Furthermore, the decline from most to least frequent offences is much smoother, smoothing out the abrupt differences that led us to the 3-tiered structure of offences in issued warrants.

Trying to hierarchise these offences, we would divide them in two tiers. The first, constituted by drug trafficking, organised/armed robbery (again the two most frequent listed offences), swindling, participation in a criminal organisation and murder/grievous bodily injury. Except for swindling, these are the same "big four" offences we identified as the dominant group in issued warrants. Their dominance *vis-à-vis* the remaining categories is much weaker though. They occupy 5-25% range in the chart and are found in all countries.

The second tier is constituted by fraud, rape, kidnapping, forgery of administrative documents, trafficking in human beings, and laundering of the proceeds of crime[44]. These offences, still common across all countries, occupy the 5%-and-below range in the chart. The remaining 15 offences registered are residual and not cross-country.

In terms of national peculiarities, the most notorious is the Netherlands' extreme likelihood to be requested for drug trafficking offences, making almost half of all the catalogue offences requested to this country. Drug trafficking is indeed the dominant offence across the country and issued/received divides, but while the Netherlands ask for it just as much as the other countries, they are asked for it twice as much. In Italy, organised armed/robbery and murder/grievous bodily injury are also more requested than usual.

Overall, if we contrast this with issued warrants, the offences are almost completely the same and with the same prevalence, the difference being that those which made tiers 2 and 3 of issued warrants are here grouped together in an enlarged tier 2, and that swindling rose from the 2nd to the top tier of offences.

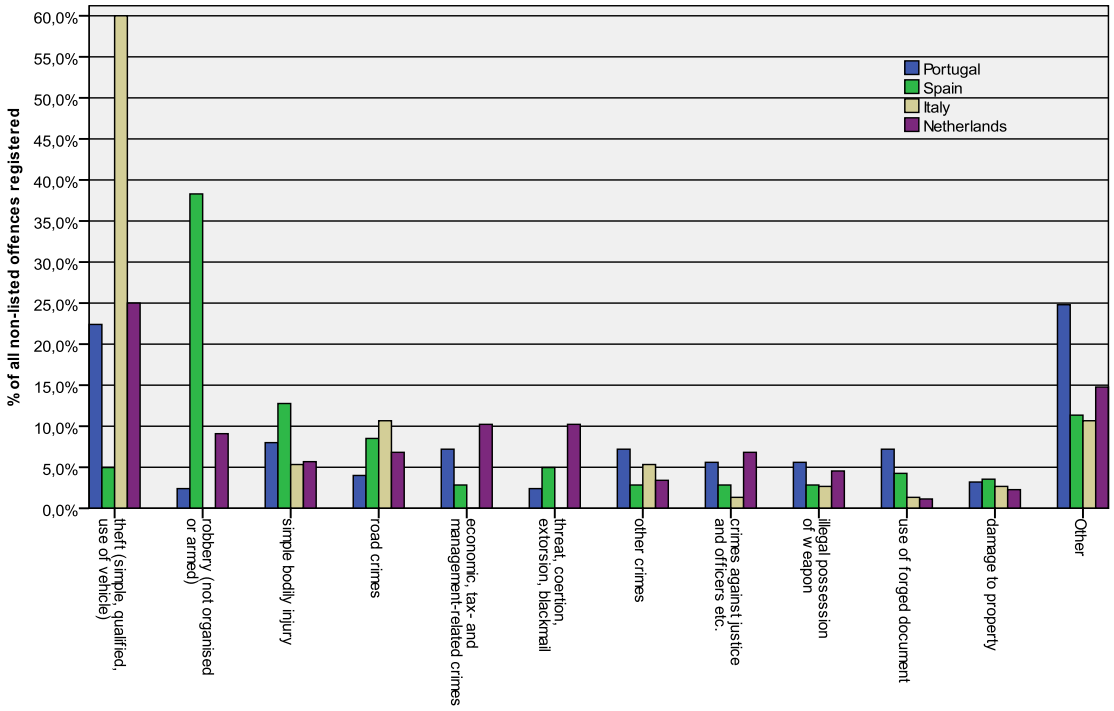
We can thus talk – at least for the four countries in research – of a global pattern of catalogue offences the EAW focuses almost exclusively on, independent of its origins, constituted by two tiers comprising 11 offences. Non-catalogue offences were also less subject to sample limitations, enabling a comparison of all countries that was not possible for issued warrants. Italy registered them in about half the EAW requests it received, as Spain, the Netherlands in about a third, as Portugal.

[44] We exclude sexual exploitation of children because it was not cross-country, being present in Portugal and Spain only.

Table 14: Distribution of cases with catalogue and non-catalogue offences by partner country (received EAWs)

	Portugal (cases, %)		Spain		Italy		Netherlands	
No offences marked	5	1,8%	7	3,0%	5	4,2%	13	5,2%
Some catalogue offences, no non-catalogue	183	64,2%	117	50,0%	49	41,5%	163	65,2%
No catalogue offences, some non-catalogue	64	22,5%	75	32,1%	56	47,5%	61	24,4%
Both	33	11,6%	35	15,0%	8	6,8%	13	5,2%
Total	285	100%	234	100%	118	100%	250	100%

Chart 12: Non-catalogue offences by partner country (received warrants)



The results are not as clear-cut as the previously addressed. Theft is still the most requested to partner countries, as it was the most requested by them, being overrepresented in requests to Italy. Robbery, minor in requests by Spain, becomes major in requests to Spain (precisely the inverse of what succeeds to Portugal), but nowhere else.

We find here not so much a tiered structure, but a wide common ground of minority non-catalogue offences and two outliers. The common ground is made up by all the offences in the chart going from simple bodily injury to property damage, offences in the 10%-and-below range. The first outlier is theft, by and large the non-

catalogue offence most requested to partner countries, despite its intriguing absence in requests to Spain. The second outlier is robbery, its dominance over all other offences a peculiarity of requests to Spain.[45]

Putting it all together, there seems to be a common pattern of criminality across countries, be they issuers or receivers of warrants, that marks EAW use. In terms of severity, as measured by sentences, the EAW serves to pursue all criminality, from lowest to highest. In terms of nature, it focuses on a subset of all the criminality the EAW was explicitly conceived for (through its offence catalogue), and extends to a good part of other, lower-range criminality. The EAW is used tendentially to pursue two main groups of catalogue offences, specified in the figure below, and is also used, to a lesser degree, to pursue a plethora of other offences, the most relevant of which is theft

Table 15: Main criminality of the EAW

Dominating offences		Occasional offences	The non-listed
drug trafficking, organised and armed robbery, participation in a criminal organisation, murder, swindling	Swindling (in-between)	fraud, rape, kidnapping, forgery of documents, trafficking in human beings, laundering, counterfeiting of currency	theft, robbery, simple bodily injury, crimes against justice and officers, illegal possession of weapon, road crimes

2.1.4. Procedures

The procedural aspects of the EAW span a vast range of matters, going from the pre-issue stage (how warrants are issued internally, articulation between authorities, etc.), through matters included in the EAW request form with procedural relevance (prosecution or execution of sentence, decisions *in absentia*, lifetime sentences, etc.), up to the execution process in the executing country (detention, hearing, consent to surrender, use of rights and guarantees, appeals, respect for deadlines). The retrieved proceedings cover only part of these matters, mostly those included in the EAW form, some relative to the execution process. The quantitative nature of the data leaves out aspects that are better captured through perceptions (trends, established practices, behaviour of agents and defendants, among other), which are to be addressed separately. Furthermore, limitations in the results of national

[45] Theft and robbery being similar crimes, an erroneous interpretation of Spanish terminology for them might conceivably have led to a wrong classification. This does not seem the case however: Spanish "hurto" was classified as theft, "robo" as robbery, just as Portuguese "furto" and "roubo" were.

case studies reduce them further to a subset of all the retrieved information. Therefore we will address here just the more revealing matters.

Decisions rendered *in absentia*, we recall, enable the executing country to demand the issuing country for a guarantee of retrial in order to surrender. Warrants received by partner countries posed this situation in very varying degrees: they were comparatively rare in requests to Portugal and the Netherlands, but frequent in requests to Spain and Italy. EAWs issued by the partner countries in this situation were as follows: approximately none in Spain and the Netherlands, but 15% in Portugal and 2/3 in Italy, the latter a highly skewed proportion due to the sample size.

The actual result of the EAW request – whether it led or not to surrender – is the ultimate measure of its efficiency. We assess this primarily through received warrants, but we also present results for issued warrants, since it was possible to partially retrieve this data: in Portugal approximately for half the cases, in Spain for 1/3. For received warrants, the results were almost universally available, although the Netherlands were missing them for about a fifth of its proceedings.

Table 16: EAW result by partner country (issued warrants)

	Portugal	Spain	Italy
was approved and executed	32,6	15,7	70,0
was approved but not executed	5,2	5,2	10,0
was forwarded and executed	1,5	,1	5,0
was withdrawn	2,2	,1	
was refused	6,4	1,4	
Missing	47,9	77,4	15,0

Table 17: EAW result by partner country (received warrants)

	Portugal	Spain	Italy	Netherlands
was approved and executed	78,2	92,3	70,3	70,4
was approved but not executed	10,2	2,1	5,1	2,4
was forwarded and executed	,4		,8	
was withdrawn	7,0			
was refused	3,2	3,4	22,0	9,6
Missing	1,1	2,1	1,7	17,6

The results are clear: EAWs are overwhelmingly approved and executed. For all the variety of countries, languages, judicial cultures, methods that might exist, for all the reservations agents might have, which are developed elsewhere in this report, the principles of mutual trust and mutual recognition seemingly take precedence. The executing authorities of the partner countries surrendered the requested person in about 80 to 95% of valid cases (if we except Italy's skewed unrepresentative value, which nevertheless corroborates this trend). Non-executed warrants were the exception – a very small one in Portugal and Spain (3%), a more important one in the Netherlands and especially Italy. Italy's rate of non-execution, though not reversing surrender as the norm, is an order of magnitude above its partners, but again this could be an effect of sample limitations.

Could the nationality exception play a role in higher refusals? The Netherlands' law does prohibit surrender of its nationals to serve a sentence abroad, but only 21% of Dutch refusals explicitly stated this reason. Spain, who prohibits surrender of a national if he/she requests to serve the sentence at home, has a low rate of refusals. As for Italy, who does not prohibit the surrender of nationals, has a very high rate of refusals (21% of its refusals were on this ground). So a bias of nationality does not seem to be the driving factor in refusals, in fact, the majority of Italian and Dutch refusals were for *non-nationals*. It is rather a ground for non-execution among several others we found, which are in relative balance: double criminality, *ne bis in idem*, insufficient provision of guarantees requested and of additional information, among others.

One final remark is the time it takes to execute an EAW in the partner countries, which could be assessed in most cases. The table and charts below show the number of days between arrest and surrender. This was extremely affected by outlier and extreme values for Portugal and Spain, skewing the distribution considerably.

Chart 13: Box-plot of duration of execution procedure, in days (received EAWs)

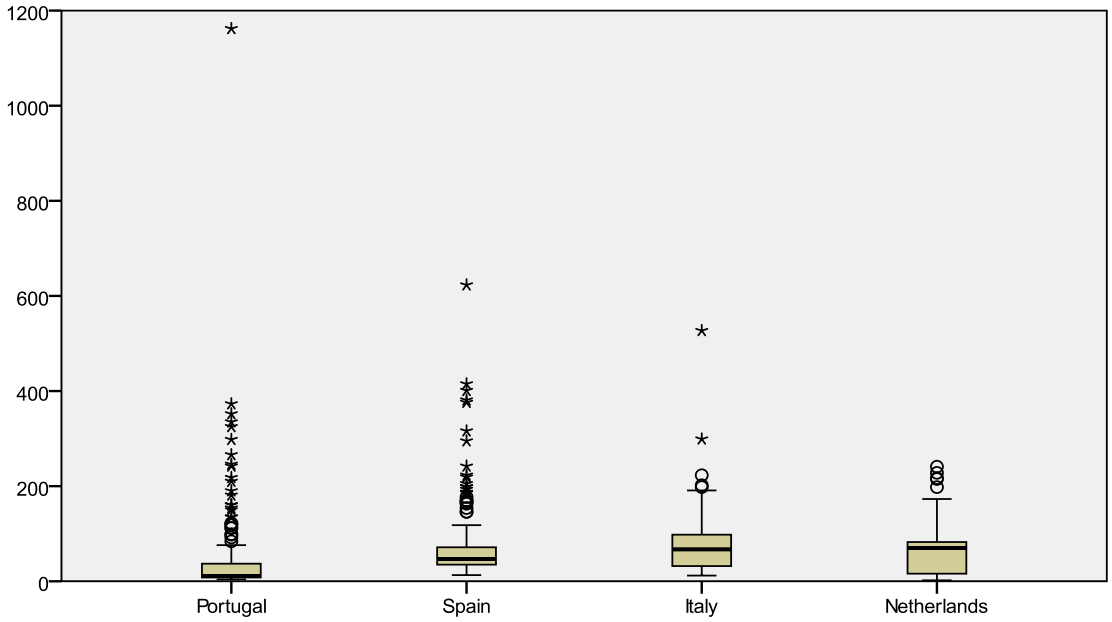
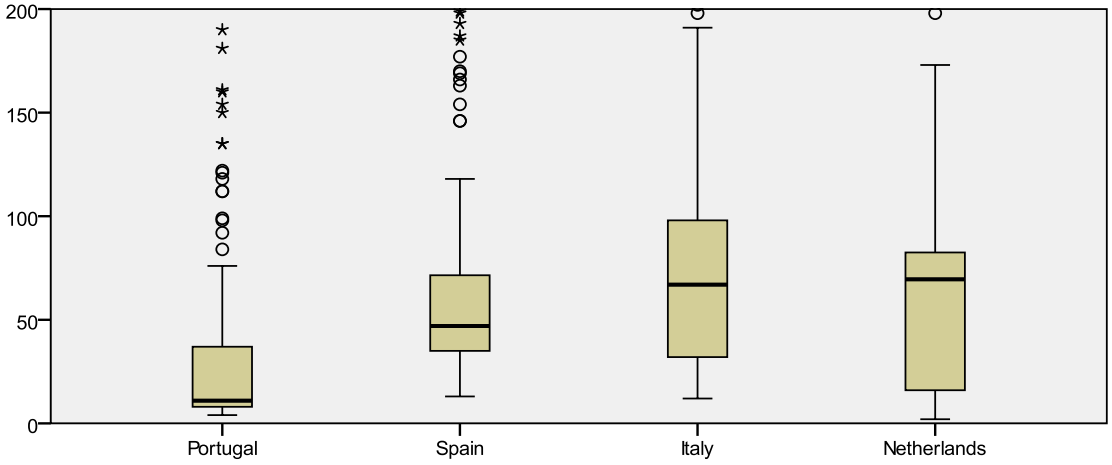


Chart 14: Box-plot of duration of execution procedure, outlier values excluded, in days (received EAWs)



Looking at the box-plot zoomed to exclude outliers, we see a marked tendency for Portugal to have the shortest execution procedure, followed by Spain, while in Italy and the Netherlands it takes longer. Focusing on the median, we can say that half the cases in Portugal were executed in up to a week and a half (11 day), while they took up to a month and a half in Spain (47 days) and two months and week in Italy and the Netherlands (67 and 69 days).

2.2. The perceptions of the actors in a compared perspective

After this comparative analysis of the chief statistical indicators from the four countries, we will now assess the actors' perceptions on the use of the EAW. In fact, the purpose of our study was also to assess the practical application of the EAW in the four countries, including the perceptions of the actors on how this instrument works and how effective it is in combating the circulation of crimes and criminals.

Specifically for such, as previously explained, we have developed a series of qualitative methodologies: semi-structured interviews, a focus group, and a self-administered statistical survey. The main reason behind the use of such varied methodologies was the European arrest warrant's character: since this instrument was created to be the cornerstone of judicial cooperation, favouring mutual trust and aiming at the direct contact between judicial authorities, we have considered the opinions of actors more directly involved in their daily practice in the concretization of said purposes were crucial to achieve a complete portrait of this very instrument. These practitioners' perceptions were due to show us not only their concrete expectations towards the "eurowarrant", but also its limitations and application problems. Such knowledge figured to be fundamental in the development of policies and concrete measures to make the European arrest warrant more effective in the pursue of the goals it was created to achieve, with due respect for general legal principles and fundamental rights. In particular, these methodologies have allowed us to better precise and comprehend gaps in the execution of the European arrest warrant as identified by the actors themselves. This was also most enlightening to sketch training programs for said actors in this area.

The individual results are thoroughly presented in each national case study chapter, leaving for this comparative chapter section a very brief cross-country analysis of these practitioners' perceptions.

Such a comparative task has naturally some intrinsic limitations. First of all, to deal with different justice systems, with varied legal frameworks, and judicial cultures and practices does not allow taking full comparisons, only acknowledging certain tendencies. That is to say, each actor, when answering a certain question or addressing a given subject will do so in accordance to his/her own context, thus

conditioning the answers. Therefore, we may have similar answers shared, nonetheless not sharing the same sociological significance, and vice versa.

These difficulties fully emerged during the construction of the questionnaire, giving place to a complex work of fixating a set of questions built to achieve such homogeneity that it was equally applicable to practitioners of four different judicial systems. A second limitation to the survey itself appeared subsequently: in spite of all efforts, the questionnaire could not be applied in the Netherlands, and the number of respondents and the relative weight of answers collected in the other three member states was so varied (in the case of Spain, for instance, extremely reduced) to compromise any definitive conclusion by the means of the questionnaire itself.

Nonetheless, considering the varied set and thorough use of methodologies used to collect the actors' perceptions towards the European arrest warrant, we believe we have achieved a very approximate picture in each of the four member states, and consequently the now presented cross-country analysis.

The actors' evaluation of the EAW in comparison to the traditional extradition mechanism in the four countries is in general unanimous: practitioners see major differences considering extradition, especially in what concerns the procedural speediness. The fact that there is no longer a political decision seems to be very important for Spanish actors. And practitioners of all nationalities point out the technical simplicity of the new instrument, which is revealed in a quasi-minimalist procedure. This comes out in its issuing, specifically when filling in the EAW form (as pointed out by Italian judges and public prosecutors), as well as in its execution. In the case of execution, the general idea is that the reduced margin left for appreciation by the executing authority, since grounds for non-execution are few and taxative, as well as the short deadlines, lead to fast decisions.

However, this not all perceived as positive: for instance, Spanish and Portuguese actors point out that the grounds for non-execution are better regulated, but it is not less true that Spanish and Dutch judges state a fear that such a limited margin of appreciation makes the foreign state's interests *superior* to the individual's in the end. The perceptions of most practitioners point to a breach in the requested person's procedural status, stating the right to an effective defence should be better guaranteed. Nonetheless, as highlighted by Dutch judges, this simplification and consequent speediness means a reduced detention time for the requested person, as a final decision is quickly achieved.

Not all is fast in the realm of the EAW: Italian and Portuguese practitioners point out that, after issuing, the requested person's detection may take a very long time if his/her whereabouts are unknown. Even if in general the executing procedure runs smoothly in all four countries, according to Italian public prosecutors and Portuguese judges, there may be quite long waiting times when requesting additional information to the issuing authority. Problems in effective surrender, which may be caused by organizational problems form the issuing member state, are also present in these actors' experience. Nevertheless, when answering the survey, respondents from Italy, Portugal and Spain have shown that they perceive the actual procedural time frames as generally within its legal limits.

As a generalized perception, we find the apprehension of a hypertrophy of securitarian interests at the cost of citizenship. This appears to be common to defence lawyers in general, as expected, but is also present in judges, public prosecutors and police officers. All in all, there is some uneasiness in actors of all four countries that blind mutual trust/ mutual recognition overshadow fundamental rights.

Consequently, applicability and effectiveness in itself are not challenged: the EAW is perceived as a fast, swift, and user-friendly (in general – let us not forget some operational difficulties encountered that show a need for further training in the area of judicial cooperation) instrument for judicial cooperation in criminal matters.

As we previously have seen in the proceedings' data analysis and in the case law overview, surrender is the norm and refusal the exception; this seems to be so particularly for Portugal and Spain, and in a lesser degree for Italy and the Netherlands. This is corroborated by the perceptions of agents gathered though interviews and the survey.

Perceptions of effectiveness seem more polarized in Italy, where a good share of survey respondents (27%) stated that in their experience of issuing warrants the defendant was never surrendered, although the majority (60%) thought otherwise. Italy's greater than average inclination to non-execute warrants curiously did not manifest in the survey – although that is probably due to the lack of answers to the respective question – but it did manifest in interviews, for example when a prosecutor mentioned that while refusals of issued warrants were rare, there were "quite a few cases of refusal in passive procedures, for cases in which the crime has taken place (…) in Italy".

The perceptions on the main difficulties in terms of judicial cooperation can be divided in perceptions about countries (or groups of countries) and about procedural matters. On the first group, the most pervasive perception was the profligacy of Eastern European issuing authorities. Two poignant examples of the second group are: United Kingdom's reluctance to execute warrants was also widely pointed out; as for French issuing authorities, non-compliance to conditions stipulated to surrender (namely the requested person's devolution to serve the sentence in the executing country) was also noticed during fieldwork in the Netherlands and in Portugal.

A particularly pervasive perception was a certain degree of mistrust towards Eastern Europe. In various degrees, all national research teams encountered practitioners with the perception that newer member states tend to issue warrants for offences that do not justify this instrument's use, i.e. petty criminality. Thus Portuguese judges complain of Romanian warrants for road crimes with sentences up to 3 years and express discomfort with having to execute warrants from Romania or Bulgaria they have many doubts with; Dutch officials see requests from Poland as less serious in nature than others, including one judge stating he is not always sure whether to trust Eastern European countries and tends to ask them more for clarifications; an Italian prosecutor complains of receiving requests disproportionately from Eastern Europe, especially Romania with "5 times as many requests as Germany", mainly for crimes such as fraud, theft and robbery, "petty crimes and involving punishments that for us are quite light", while "we have few requests for organized crime and they mainly come from Germany, France and the Netherlands". More poignantly, Spanish actors talk of "medieval" and "archaic" offences from Eastern Europe – such as theft of chickens, horses, firewood, scrap material – petty, property-related offences that however command harsh penalties in Eastern European criminal codes, as opposed to older member states (and Spain itself) who issue for more serious offences. This was attributed to Eastern Europe's peculiar sacralisation of property and thus its strict protection following decades of socialist regimes. However, warrants issued for petty offences (mostly theft or drug-related ones) and, moreover, offences committed long ago, were found for many other countries, including some of the oldest member states, such as Germany. Poignant examples of the latter were specifically described in the Portuguese case study.

As previously refereed, another perception that was detected in more than one research country was the United Kingdom as a reluctant executor. In Spain, officials mentioned that British authorities were pickier than usual, asking for a warrant's grounds in great detail, requesting the underlying decisions and evidence, raising

obstacles in matters such as the prescription of offences, and generally having a higher rate of refusals. The analysis on the Portuguese proceedings showed the same picture, to which the practitioners' perceptions also concurred. A further point of apprehension was the common existence of lifetime sentences in the United Kingdom's justice system, where they are foreseen for homicides but also for robbery and all sorts sexual offences. Some Portuguese actors, familiarized to thinking of 25 years imprisonment as the maximum absolute, are openly unsettled by this.

One further perception stated by Portuguese and Dutch actors was of French issuing authorities as less reliable to comply with the guarantee of returning persons to serve their sentences. During the Portuguese fieldwork, a poignant example was found in an EAW proceeding concerning a Portuguese individual, who was requested by France and surrendered under the condition of being returned to serve the sentence in his own country: after years of silence, and as a consequence of serious care by a Portuguese PPO and his own relatives, this individual was found to be serving his sentence in an unspecified prison facility in France.

In connection to this, the surrender of nationals is perceived as a factor of variability in the outcome of an EAW request. Some countries are perceived as systematically refusing to surrender their nationals, probably on account of their legal framework. More specifically, Spanish practitioners refer the Netherlands and Ireland among those.

The existence of pending processes in the executing country is one of the most frequent reasons for not surrendering a requested person, instead postponing it until those processes finish. The balance between a national criminal procedure and the foreign EAW process is not straightforward and poses several challenges to agents, e.g. in matters such as constraint measures. Spanish officials point out the paradox that a person might be kept in detention under an EAW while being prosecuted in Spain for more serious crimes that nonetheless would preclude detention under Spanish terms.

Last but certainly not the least, the quality of translations is another issue recurrently mentioned by officials. Portuguese judges and prosecutors were visibly wary of the quality of translations they dealt with, especially (and curiously) in the most common languages such as English or French (perhaps because they knew them better, or perhaps there are more persons stating to know them), as were Dutch officials with Spanish, French or Italian warrants translated into English. Lawyers also

considered translations a considerable hindrance to their action, especially when the relation and communication with their foreign clients was at stake. Solutions clamoured for were, understandably, the consolidation of reliable high-quality translation services at a national level, but also the availability of a reliable Europe-wide source of (translated and original) legal texts on these matters.

Proportionality is a notion that has much currency in perceptions of the EAW. The FD itself only mentions it in passing in its preamble, and its iron-clad rules of applicability leave little room to interpretation – it could be said that proportional is what fits into the 12-month and 4-month rules. Practitioners however cling to the idea that the EAW should tendentially apply to serious criminality and express discomfort over its excessive use for what they consider petty offences.

Opinions on these matters naturally go together with the perceived profile of requested persons and underlying criminality. The idea officials make of the average requested person is similar to the hard data retrieved from the proceedings: males of all ages and social origins persecuted for a wide range of crimes, more frequently for small to medium offences. For example, Dutch officials see them as spanning all social strata, from managers looked for embezzlement and tax fraud down to small drug couriers, although pettier criminals are more frequent. Sometimes a more normative judgment emerges, as with the Spanish interviewees who viewed the requested persons as people who decided to live by crime, obtained easy proceeds and wanted to enjoy them in pleasant surroundings, heading to Spain's amenable southern coast and bigger cities.

As to the idea that practitioners make of the criminality at stake, it is remarkably consistent. Dutch officials see as most usual offences drug trafficking, then fraud, violence, homicide and murder; they attribute to United Kingdom's judicial authorities the inclination for pursuing grievous bodily injury and homicides; and to Italy for pursuing particularly serious crime associated with mafia.

The division between western/eastern member states (or rather old/new) in their differing standards for criminality that may underlie an EAW is evident for the majority of agents consulted and is a source of scepticism among them. These practitioners distinguish older member states from the newer ones, since they sense the first ones seem to issue EAWs for more serious offences (drug trafficking, economic crimes, computer-related crimes, participation in a criminal organization; and in a 2nd tier murder, kidnapping, trafficking in stolen vehicles and in human beings). The latter as perceived as using the EAW to pursue pettier criminality, in some cases committed

long ago, and appear to be fixated on property-related crimes that often would not be considered serious enough for applying the EAW in older member states, but are punished with penalties above the EAW threshold of applicability (4- and 12-months rule).

Actors across the four research countries seem to share a self-reflexive approval of their use of the EAW as adequate and proportional: it is others and not them that make a disproportionate use of the EAW. An Italian prosecutor points as a main difficulty that “not all crimes are known in the same way among the EU countries”, leading to “different evaluations of certain conducts”, a point reinforced by another prosecutor’s lament for foreigners’ lack of sensibility in perceiving “certain crime typologies such as criminal association as we do for our historic experience”.

In such a scenario, mutual trust not accompanied by further harmonisation is perceived as counter-productive. For many, mutual recognition with an – effective – minimum legal standard (especially a minimum standard of procedural rights) is crucial, as it would considerably further the cause of a real, rather than just formal, mutual trust and consequent mutual recognition.

3. COMPARATIVE REMARKS

The Framework Decision 2002/584/JHA, of the 13th June 2002 on the European Arrest Warrant, by abolishing the system of extradition, materialised a fundamental tool in strengthening judicial cooperation among EU member states and a decisive step in the construction of a European Area of Justice. Its main purpose was to enable the arrest and surrender among member states of persons for the purposes of criminal prosecution or conducting a custodial sentence or detention order

In the previous points we attempted a comparative analysis of the European Arrest Warrant in four countries, looking for convergences and divergences relative to the Framework Decision and in terms of its practical application. Here, we will attempt a final synthesis focusing on the main highlights of this enterprise.

A first point to mention is the complexity of a comparative analysis when the research object concerns justice. As mentioned before, the central goal of this research was to analyse in a comparative perspective the normative framing and the practice of the EAW in the four countries that integrate it. We showed how the transposition into national legal systems led to differences due to their specificities at the level of constitutional law, criminal law and criminal-procedural law. If the Italian, Portuguese, Spanish and Dutch criminal systems do share to a certain point a common legacy, namely in terms of substantive criminal law, they differ on the other hand on their criminal-procedural system and their organic and functional legislation, with direct implications in the EAW's application. The consideration of national specificities must therefore assume a relevant role in a comparative analysis.

Even in the legal frames of the EAW are relatively similar, the differing practices, judicial cultures and conditions of application of each country lead to differing perceptions that highlight the limits of comparisons. In fact, comparative studies with a strong focus on law in action, as ours intended to be, are less common due to the difficulties they entail in the construction of analytical methodologies and their application. Indeed, this research faced difficulties in carrying out uniformly for each country all its planned methodological tasks – e.g. the retrieval of quantitative and qualitative sources on EAW execution, collection and analysis of articles on doctrine and court decisions, interviews with judicial officers such as judges, prosecutors or lawyers – and did not always succeed, necessitating some methodological reconsideration and adjustments.

Let us underline that evaluating the application of the EAW – whose relevance in consolidating judicial cooperation in Europe is widely recognised – is not an exercise in comparative law, but rather an exercise in assessing the effectiveness of a

normative instrument involving agents with judicial cultures and socio-cultural contexts of contrasting nature, at times starkly so. These contrasts can have a significant effect. For example, research revealed various authors who sustain that the judicial evaluation undertaken by an executing judicial authority should incorporate, other than just formal matters, matters of fact analysed in light of the constitutional principles of proibição do excesso, necessidade, proporcionalidade, excepcionalidade e subsidiariedade da privação de liberdade. Otherwise, the execution of a warrant might degenerate in certain cases and countries into a materially unjust and even illegal decision at odds with the national adjective law and constitutional order. Despite this doctrinal judgement, specific national judicial cultures may determine very different practices, even under the same legal, constitutional assumptions. In this research we also tried to analysed in which way national specificities materialised into the application of the EAW.

The complexity of the problems encountered and the diversity of agents and procedural forms in the issuing and reception of this instrument are particularly relevant. We underline in this light the differing functions of the Public Prosecutors Office between, on the one hand, the Italian, Portuguese and Dutch systems, where the prosecutor conducts the criminal procedure, and on the other hand the Spanish system, where the juiz de instrução assumes a proeminent role in the stage of prosecution. The differentiation of authorities at the national level in their competence to receive, analyse and decide on the EAW must also be underlined. In Spain and the Netherlands, reception of a EAW is centralised in a single authority (Audiencial Nacional and Amsterdam District Court respectively) while in Italy and Portugal it is scattered among second-instance courts.

In our opinion, five fundamental forces underlay the EAW Framework Decision and guided its implementation and practical execution in member states. First, the principle of mutual recognition of criminal decisions: if a decision is taken by a competent judicial authority of a EU member state in accordance with its law, it should have full and direct effect over the whole EU territory. Second, the principle of mutual trust: member states trust the legal systems and procedures of other member states, namely the judicial decisions of their competent authorities. Third, the principle of judicialisation: the surrender process is the sole competence of judicial authorities, not of administrative political authorities. Fourth, the principle of speediness: the surrender process should be swift and within short deadlines, both on the surrender decision and on the actual surrender of a requested person. Fifth, transversal to all the previous principles and consequently all acts of warrant issue and reception is the principle of

respect for fundamental rights and guarantees: the execution of a warrant must respect the fundamental rights and guarantees of defence of the requested person.

Some remarks on the practical fulfilment of these fundamental principles in the four research countries follow.

A first remarks goes to unequivocal efficiency the EAW has brought to international judicial cooperation as a procedural instrument for facilitating the surrender of persons. The statistical data on the research countries as well the perceptions of agents involved validate this conclusion. The EAW is still the only tool of European judicial cooperation in criminal matters that is effectively operational across member states. This is particularly relevant for the repercussions it might have in the goal of deepening and developing the EU's justice policies, namely after the Lisbon Treaty consecrated the principle of mutual recognition of judicial decisions.

Our research allows us to conclude that, notwithstanding the normative, procedural and judicial-cultural differences of each member-state, the response of national judicial authorities to requests of their foreign partners is in general positive and swift. Thus we can sustain that the principle of mutual trust, as a cornerstone for the construction of a European Area of Justice posited by the Lisbon Treaty, is a possible, attainable reality that is already underway.

However, our research also shows that this practical development of mutual trust is raising various issues which demand reflection, at the cost of seriously threatening further consolidation of a European Area of Justice. One cannot ignore that mutual trust assumes very different degrees among states and especially judicial authorities, according to their level of independence and autonomy as organs of sovereignty in different states. The material conditions presiding over criminal investigation and defences guarantees must also be taken into account. Only with mutual trust on legal systems, and especially on criminal systems that effectively ensure fundamental rights and guarantees, such as the right to a fair and due process, can the path towards European justice policies be consolidated.

A situation that deserves particular attention, much emphasised by the judicial agents interviewed and discussed in the international conference organised for this project, is that the main target of the EAW in practice is small and medium criminality, not serious and highly organised criminality. The question to rise is whether this instrument, with the costs it involves for states and the restrictions it imposes on the freedom and rights of citizens, should focus to such an extent on small and medium

criminality, sometimes as petty as a theft of some dozens of Euros. A majority of opinions heard during the project favour a greater focus of the EAW on higher criminality, while other forms of cooperation should be developed and tailored for small and medium criminality, not neglecting the demands of preventing and combating criminality in general.

Still on matters of practical use, another situation is the use of the EAW not to prosecute or execute sentences, but to obtain evidence for an investigation. This represents a significant distortion of the EAW's intended goals and spirit, and highlights the urgent need of instituting other cooperation tools for obtaining and using criminal evidence within the EU.

All in all, the EAW's use in practice is far and wide of the types of offences that motivated the debate on its creation and especially its rapid approval and implementation, such as terrorism – recall that the September 11, 2001 attacks were a main factor in that rapid pace. An intensive use of the EAW for small criminality puts at stake the principle of proportionality in the restriction of rights, a situation that deserves serious consideration and correction in short term. The construction of a European Area of Justice should base and rely on respect for the principles of criminal law and not weaken, without serious grounds, the fundamental rights of EU citizens or residents.

In the terrain of fundamental rights, an acute discussion emerged on the guarantees granted to citizens subject to a warrant, on their effective use of defence rights. One cannot talk of a true European citizenship without justice being in full service of citizens and ensuring respect for fundamental rights across the whole EU territory. The Court of Justice of the European Communities has long stated that respect for fundamental rights is an integral part of the general principles of law and their respect and safeguard, inspired by the constitutional traditions common to member states, should be guaranteed in the structure and goals of the EU.

In this regard, the fieldwork uncovered deficits in the execution of warrants, both in the procedure itself and, more importantly, in the exercise of defence rights in matters like the principle of speciality, the right to appeal (which is not universally guaranteed across countries), or access to translation.

Translation deficiencies were detected which had effective and serious repercussions in the exercise of rights such as a real understanding by the requested person of the meaning of renouncing entitlement to the speciality rule. The body of

translators and their certification is left to member states and they do not ensure equally the right to a good translation. Lacking that, it is not possible to talk of an effective exercise of defence rights.

Another deficiency detected is the lack of widespread sources/databases on the member states' national law relevant to warrant practice. Many dispositions are left to national law and it is essential for officials on the execution side to know them quickly and reliably, in order to appropriately ensure defence rights, to know the authority with competence to provide guarantees etc. It is therefore essential to create and diffuse readily accessible tools of common knowledge.

A certain knowledge of the process running on the issuing state and underlying a warrant is also important. For an official or lawyer to raise some grounds for opposing execution of a warrant, he must know aspects of the process which are hard to obtain in the short deadlines foreseen for warrant execution, much less without the cooperation of lawyers and/or judicial authorities in the issuing country. International bar associations could play a relevant role here.

The truth is the implementation of this cooperation mechanism did not foresee and assure on an equal footing mechanisms to improve the rights and guarantees of defence for the citizens involved. Such mechanisms should be object of specific attention in forthcoming policy developments so that an Europe of citizens, a strategic principle posited by the Lisbon Treaty, is not put at stake.

A final question concerns the training of officials and lawyers involved in the EAW. The fieldwork revealed deficiencies in such training with direct implications in judicial decisions. A lack of knowledge of EU cooperation mechanisms and the EAW's specific legal frame is still common and a factor or entropy in the system. Further training of agents in these matters will be an important factor of improvement for member states. States should also seek measures to establish a relevant number of lawyers practicing and specialising in this area, to whom defences should be assigned.

Our research showed that the legal provision of grounds for refusal (mandatory and optional) and guarantees that can be demanded to the issuing state are not sufficient to ensure fundamental rights and effective guarantees of defence across all member states. The risk exists that a European criminal law is being built mostly on considerations of efficiency and pragmatism, more than the necessity of further harmonisation of legal systems, especially in matters of rights and guarantees.

Despite several directives pushing for a greater harmonisation of national legal orders on some criminal matters (e.g. on money laundering, in general on the protection of interests relevant to EU existence and functioning), these remain a reserve of national sovereignty and retain great discrepancies among member states (definition of what constitutes a crime, coercive measures, maximum and effective sentences, procedural aspects).

Under these conditions, the extension of EU outreach onto criminal matters opens up new collision courses between community and national law. In the concrete case of the EAW, its application confronts it with the heterogeneity of substantive and procedural solutions at the national level. One need only think of situations such as: an issuing state requests surrender of a national/resident for a crime that is not recognised by the executing state, or requests a person to apply provisional detention to prosecute a crime that does not allow such a measure under the executing state's law. Differences on the right to appeal complicate this further.

In conclusion, we caution that the EAW is an instrument which considerably affects the rights of EU citizens and residents that was approved without a comparable investment to secure the most uniformly possible application and the defence rights of all citizens involved, in itself or through other instruments. The construction of a common European area of freedom, security and justice requires a proactive policy to consolidate the fundamental rights of European citizens. This research shows that a normative densification of rights in the wake of the movement of expansion of fundamental rights at the European level is far from reached, and weaknesses remains in terms of effective judicial protection.

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PART II
THE EUROPEAN ARREST WARRANT: CASE STUDIES

4. THE EAW IN ITALY

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I have to state that the findings, interpretation, and conclusions expressed in this report are entirely those of the author and should not be attributed in any manner to the above mentioned people and institutions.

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4.1. Introduction

The Italian case study on which this report is based has been carried out by IRSIG-CNR (Research Institute on Judicial Systems of the Italian National Research Council) researchers within the research project "The European Arrest Warrant in Law and in Practice: a comparative study for the consolidation of the European law-enforcement area" coordinated by the Centre for Social Studies at the University of Coimbra, with the participation of the Montaigne Centre of the University of Utrecht, the Spanish Association Judges for Democracy and the Portuguese Judges' Association. The research project, which effectively run from June 2008 to June 2010, has been co-funded by the European Commission (Directorate D -Internal security and criminal justice- of the Directorate-General Justice, Freedom and Security). The research focused on the analysis of the normative framework, the case law, organizational practices, in depth EAW case files, and judicial actors' perceptions.

The Italian team (Davide Carnevali, Marco Fabri and Marco Velicogna) carried out the research through a combination of qualitative and quantitative methods, accordingly to the research design, such as: a comparative analysis of the EAW Framework Decision and national transposition law (No 69/2005), a study of the literature, a compilation and analysis of the case law of the Supreme Court of Cassation, several explorative interviews to the key actors dealing with the European Arrest Warrant, a focus group with experts (including practitioners, academics and researchers), a case-files data collection for issued and executed EAW proceedings, a survey of the perceptions of judges and public prosecutors who dealt with European Arrest Warrant cases.

The study of the EAW in action has shown that the system is technically and organizationally sound. After an initial phase characterized by problems of consistency between norms and lack of operative practices and shared understanding of roles and competences of the relevant actors, normative interpretation has stabilized, and organizational and inter-organizational learning has taken place. At the same time, as the data collected shows, much of the results and trends of the EAW practice must be analyzed and discussed both at national and EU level. EAW data may tell us a story of EU "crime and punishment" geography. But it also shows that different EU countries are

using the EAW in different ways, and that this may result not only in procedural problems, but in the not so long run constitute a political issue.

The following report is structured in four sections: firstly the dimension and role of the EAW Italian transposition law is analyzed, providing some elements of the story preceding its coming into force, and then examining it and the case law of the Italian Supreme Court of Cassation from the Frameword Decision perspective. Follows a description of the actual issuing and executing procedures, the analysis of the EAW data collected at the Ministry of Justice and, finally, the analysis of judges and public prosecutors perceptions about the EAW based on data collected through semi-structured interviews, a focus group and an on-line survey.

4.2. The dimension and role of the EAW Italian law

This section provides an overview of the Italian Law no. 69 of 22 April 2005[47] transposing the Framework Decision on the European Arrest Warrant[48] confronting it with the Framework Decision.

4.2.1. Some elements of the story preceding the Italian Law 69/2005

The Italian implementation law came into force almost a year and a half later than the appointed date and including a number of deviations from the letter and the spirit of the FD. This is without doubt the result of the political and constitutional tensions that characterized the adoption of the FD from the Italian perspective. Even before its approval, the law had been "criticized for diverging from the European Framework Decision in a number of areas, thus revealing some (political) reluctance about the instrument itself."[49]

Let us therefore briefly describe the EU and National events that led to this result. "Until the adoption of the EAW, extradition between EU member states was based on several different intergovernmental measures, themselves based on international law (Peers 2001) — for example, the 1957 Council of Europe European Convention on Extradition, the 1975 and 1978 protocols to the convention, the 1977 Council of Europe European Convention on terrorism, the Schengen Implementing Convention of 1990, a convention in 1995 supplementing the aforementioned conventions, as well as a 1996 convention." [50]

[47] Law no. 69 of 22 April 2005, "Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri". The law was published on 29 April 2005 on the Gazzetta Ufficiale, and came into force 15 days after its publication, on 14 May 2005, See the Addendum by the General Secretariat of the Council 8519/05 ADD 1 of 3 May 2005, http://ue.eu.int/ueDocs/cms_Data/docs/polju/EN/EJN647.pdf.

[48] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA)

[49] Marin, L. (2008) The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case, Maastricht Journal of European and Comparative Law, p.476

[50] Kaunert, Christian(2007) '"Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission', Journal of European Integration, 29: 4, p.389

The first relevant event mapping the EAW roadmap can be considered the European Council special meeting held in Tampere on 15 and 16 October 1999 on the creation of an area of freedom, security and justice in the European Union. In this meeting it was declared that the formal extradition procedures were to be abolished among the member states "as far as persons are concerned who are fleeing from justice after having been finally sentenced…" and for other cases (i.e. prosecution of crimes) it was expressed the need for "fast track extradition procedures, without prejudice to the principle of fair trial".[51] The following step was the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, adopted by the Council on 30 November 2000,[52] addressing the mutual enforcement of arrest warrants, as envisaged in point 37 of the Tampere European Council Conclusions.

The events of 11 September 2001 are turnaround point for a process that was moving only slowly forward. The need to support the war against terrorism increased the peer pressure on EU member states to go toward a deeper integration in the criminal area.[53] Just a few days after, the conclusions and plan of action of the extraordinary European Council meeting on 21 September 2001 states: "the European Council signifies its agreement to the introduction of a European arrest warrant and the adoption of a common definition of terrorism. The warrant will supplant the current system of extradition between member states. Extradition procedures do not at present reflect the level of integration and confidence between member states of the European Union. Accordingly, the European arrest warrant will allow wanted persons to be handed over directly from one judicial authority to another. In parallel, fundamental rights and freedoms will be guaranteed".[54] In his speech of the 4 October 2001 to the Parliament, Tony Blair, refers firm action taken by the European Union: "Transport, interior, finance and foreign ministers have all met to concert an ambitious and effective European response: enhancing police cooperation; speeding up extradition; putting an end to the funding of terrorism; and strengthening air security".[55]

Italy position was to reduce the list of 32 crimes subject to the European Arrest Warrant to six. "The same six descriptions were contained in the Treaty of extradition

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[51] Tampere European Council Conclusions

[52] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:012:0010:0022:EN:PDF

[53] Kaunert, Christian(2007) '"Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission', Journal of European Integration, 29: 4, p.395

[54] http://ec.europa.eu/justice_home/news/terrorism/documents/concl_council_21sep_en.pdf

[55] Tony Blair's speech to parliament - The full text of the prime minister's statement to parliament concerning the terrorist attacks in the US. The Guardian 04 October 2001 http://www.guardian.co.uk/world/2001/oct/04/september11.usa3

recently signed by Italy and Spain, namely terrorism, organized crime, drug trafficking, arms smuggling, people trafficking and sexual abuse of minors".[56] In this situation, "the Commission and its allies amongst the member states, especially Belgium, were quick to apply peer pressure on Berlusconi. Commissioner Vitorino declared that 'we cannot be held hostage to Council unanimity' and indicated that the 'Council might try to proceed without Italy by using the option of enhanced co-operation to allow the 14 member states to go ahead' (Occhipinti 2003, 171). Marc Verwilghen — the Belgian Justice Minister who initially opposed the EAW — warned Italy that the Laeken meeting on 14–15 December would be 'very difficult' for Silvio Berlusconi and that his behaviour was 'incomprehensible'. The German Interior Minister Otto Schily also complained that 'the Italian position is completely unacceptable' (*ibid*.). But the Italian prime minister also came under intense pressure from the Italian media (Blitz 2001) in a public shaming process". [57] In the end, on December 11 2001, Italian Government, the last to oppose the list of thirty-two categories, dropped its position under the mounting pressure coming from the other EU member states.[58] The agreement on the introduction of the European Arrest Warrant reached at the Laeken Summit in December 2001 resulted in the adoption of the Framework Decision on 13 June 2002. The Framework Decision then entered into force on 7 August 2003, with a 31 December 2003 deadline for the member states to comply with its provisions.

At the same time though, while the Italian Government ratified the Framework Decision, the tension at the basis of the opposition were still unresolved. Furthermore, the FD still presented an incompatibility with some of the fundamental rights protected by the Italian Constitution "The Framework Decision was the outcome of the climate created by the terrorist attacks of 11 September 2001, with emotion and the need to send a strong signal to the public taking the place of measured reflection, and it was signed in record time. However, one crucial aspect that is often overlooked is that this Framework Decision is *not just about terrorism*, it is about *all criminal offences* punishable under the criminal laws of the 25 member states". [59]

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[56] Impalà, F. (2005) "The European Arrest Warrant in the Italian legal system Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice" Utrecht Law Review, Volume 1, Issue 2 p.58

[57] Kaunert, Christian(2007) "Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission', Journal of European Integration, 29: 4, p.401

[58] Black, I. "Italy agrees to EU arrest warrant" The Guardian 12 December 2001 http://www.guardian.co.uk/world/2001/dec/12/september11.usa

[59] Impalà, F. (2005) "The European Arrest Warrant in the Italian legal system Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice" Utrecht Law Review, Volume 1, Issue 2 p.59

As a consequence, also the implementation law introducing the EAW into the Italian system was the result of a long and complex process. The then Minister of Justice Castelli set up a Committee (Viola) with the task of drafting the norms needed to comply with the provisions of the Framework Decision. The works of the Viola Committee were concluded at the end of June 2003 and the draft was submitted to the Government before the summer recess. After the summer the Government "sent it back with amendments… and then, nothing". [60] Meanwhile, on July 30 2003, the opposition presented a law proposal (N. 4246 Kessler[61]). "At the same time the Ministry of Community Policy also presented their proposal (in the form of a statutory law)". [62] Also, two other parliamentary proposals were presented (N. 4431 Buemi[63] on October 28 2003, and N. 4436 Pisapia[64] on October 29 2003). As a result, the Kessler text was radically amended "absorbing" the other two parliamentary proposals. "The text, which was approved by the Chamber on 12th May 2004, was amended by the Senate on 26th January 2005 (DDL N. 2958). It was then amended by the Chamber on 22nd February 2005 and subsequently modified by the Senate on 21st March 2005". [65] The Bill was therefore debated for the third time in the Chamber of Deputies. [66] The law was finally approved on the 22 of April 2005[67] and published in the Gazzetta Ufficiale N. 98 of 29 April 2005. It entered into force on 14 May 2005.

While the long time required to adopt the Framework Decision and then to transpose it in the Italian law and (as we will see in more detail in the next section) the differences introduced in the Italian Law have no equivalent in other EU Member states, it should be remembered that Italy is not the only country who has experienced tensions,

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[60] Selvaggi, E. "From extradition to the European arrest warrant: characteristics and prospects of the new handover system", "Implementation of the European warrant for arrest and safeguarding of fundamental rights: field of application and limits of the procedural guarantees regarding persons under inquiry and persons accused in the territory of the European Union" High Council of the Judiciary training seminar, Rome, 4-6 April 2005 p.12

[61] http://www.camera.it/_dati/leg14/lavori/stampati/pdf/14PDL0047810.pdf

[62] Selvaggi, E. "From extradition to the European arrest warrant: characteristics and prospects of the new handover system", "Implementation of the European warrant for arrest and safeguarding of fundamental rights: field of application and limits of the procedural guarantees regarding persons under inquiry and persons accused in the territory of the European Union" High Council of the Judiciary training seminar, Rome, 4-6 April 2005 p.12

[63] http://www.camera.it/_dati/leg14/lavori/stampati/pdf/14PDL0050920.pdf

[64] http://www.camera.it/_dati/leg14/lavori/stampati/pdf/14PDL0051300.pdf

[65] Iuzzolino, G. "Italian Legislation Concerning the European arrest warrant: Problems and Prospects" "Implementation of the European warrant for arrest and safeguarding of fundamental rights: field of application and limits of the procedural guarantees regarding persons under inquiry and persons accused in the territory of the European Union" High Council of the Judiciary training seminar, Rome, 4-6 April 2005, P.2

[66] http://documenti.camera.it/Leg14/dossier/Testi/GI0367a.htm

[67] http://www.camera.it/parlam/leggi/05069l.htm

as it is shown both by the many deviations from the FD in other national transposition laws, both by the work of the Constitutional Courts (i.e. Belgium, Germany, Poland and Cyprus).

4.2.2. The Italian Law and case law from the Frameword Decision perspective

This section is dedicated to the analysis of how the Framework decision has been transposed in the Italian Law 69/2005 and to the case law of the Court of Cassation on the specific topics. The section is therefore structured according to structure (preamble, chapters and articles) of the Framework decision.

The Court of Cassation

The "Corte Suprema di Cassazione" is the highest court within theItalian judicial system; among its main functions, according to the law on the Judiciary of January 30, 1941 No. 12 (Article 65), there is the duty "to ensure the correct application of the law and its uniform interpretation, together with the unity of the national objective law and the respect for the limits between the different jurisdictions".

One of the main features of its task which is essentially unifying and "nomofilattica", i.e. aiming at providing certainty in the construction of law (in addition to the decision issued as third-instance judge), is that the existing rules in principle allow the Court of Cassation to investigate the facts of a case only when they were already dealt with in the previous part of the proceedings and only if necessary for estimating the grounds allowed by the law to support a petition to the Supreme Court.

The petition to the Court of Cassation can challenge the decisions issued by the ordinary judges of second instance or sole instance: the grounds of the petition can be, in the civil field, the infringement of provisions of substantive law (errores in iudicando) or of procedure (errores in procedendo) or defects (lacking, insufficient or contradictory grounds) concerning the grounds of the decision challenged or, furthermore, questions relating to jurisdiction. Similar provisions are set forth for the criminal cases before the Court of Cassation.

When the Court of Cassation singles out one of the above-mentioned defects it quashes the decision of the lower court and states the legal principles that the decision challenged will have to follow: the remand court have to comply with these principles when examining again the facts of the case. On the contrary, the principles asserted by the Court of Cassation are not binding on all the remaining courts dealing with other cases. The decision of the Court of Cassation is considered only as an important "precedent".

No special permission is required to appeal the Court of Cassation. According to Article 111 of the Italian Constitution any citizen can apply to the Court of Cassation for infringement of the law against any decision of whatsoever court without appealing the second-instance judge both in civil and criminal matters or against any limitation to individual freedom.

The Court of Cassation is also entrusted with the charge of defining the jurisdiction (i.e., of indicating, in case of controversy, the court, either ordinary or special, Italian or foreign, which has the power to know the case) and the "competence" (i.e., of settling a conflict between two courts dealing with the merits of a case). The Court of Cassation also performs non jurisdictional functions pertaining to the legislative elections and the referendum repealing the laws.

(adapted from the Italian Court of Cassation on-line presentation http://www.cortedicassazione.it/documenti/FunzSCing.htm)

While judgements of the Court of Cassation are binding only for the case, they clearly provide indications to which the other actors of the Justice System tend to refer to and conform. This is particularly true in the case of EAW, where the Court of Cassation decides not only on errors in the application of law or procedure but, within the surrendering decision procedure, also on the facts (meritis).

Two main trends characterise the case-law of the Court of Cassation until now. A first trend is the interpretation of the Italian Law 69/2005 in conformity with the

Framework Decision. The second trend concerns interpretation of the Italian Law 69/2005 "in conformity with the Italian constitutional system in order to give procedural guarantees with regard to the arrest and surrender of the person requested" (Marin 2008).

The analysis is based on EAW related judgements of the Court of Cassation given between September 2005 and April 2009. The analysis make ample use of (but it is not limited to) the work of the Ufficio Massimario of the Court of Cassation and in particular of the Rel. n. 28/08/bis and n. 28/08/quater "ORIENTAMENTO DI GIURISPRUDENZA - Rapporti Giurisdizionali con Autorità Straniere – - Mandato arresto europeo (M.A.E.) - Legge n. 69 del 2005.

4.2.2.1. Framework Decision Preamble

Two points of the preamble, 12 and 10 are explicitly recalled and elaborated by the Italian Law 69/2005 in article 2.[68]

In its case law, the Court of Cassation (Sez. 6), with judgement No. 5400, 30/1/2008-4/2/2008 (France), held that the EAW emitted by a French authority, based on a sentence in contumacy respect the right to a fair and public hearing as the French law grant the condemned the right to request a new judgement in respect to the right to defence (Article 2.1. a.).

The United Chambers of the Court of Cassation (Sezioni Unite -Sez. Un.), with judgement No. 4614, 30/01/2007- 5/02/2007 (Germany), held that the due respect of the

[68] Article 2. *(Constitutional guarantees)*

Article 2. 1. In compliance with the provisions of Article 6, paragraphs 1 and 2, of the Treaty on European Union and point (12) of the recitals of the preamble to the Framework Decision, Italy shall enforce the European arrest warrant with due respect for the following rights and principles established by international treaties and by the Constitution:

a) the fundamental rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and implemented by Law no. 848 of 4 August 1955, and specifically by Article 5 (right to liberty and security) and Article 6 (right to a fair and public hearing) as well as the additional Protocols to the Convention itself;

b) the principles and rules contained in the Constitution of the Italian Republic pertaining to a fair trial, including those relating to the protection of personal freedom, in relation also to the right to defence and the principles of equality, as well as those relating to criminal liability and the quality of criminal punishment.

Article 2.2. For the purposes referred to in paragraph 1, appropriate guarantees may be requested of the issuing Member State.

Article 2.3. Italy shall refuse to surrender the sentenced or suspected person in the event of a serious and persistent breach by the requesting state of the principles set out in paragraph 1(a) as established by the Council of the European Union in accordance with point (10) of the recitals of the preamble of the Framework Decision.

Italian Constitution principles and rules pertaining to a fair trial (Article 2.1. b.) is limited to the "common principles" referred in Article 6, of the Treaty on European Union. It is therefore not relevant if the issuing state seems to provide less guarantees than Italy. On the same line as to the right to defence and reduced guarantees seemingly provided by the issuing state is the judgement of Sez. 6, No. 17632, 3/5/2007-8/5/2007 (Germany).

Sez. 6, with judgement No. 6416 - 6/2/2008-8/2/2008, (Czech Rep.) found that the EAW concerning a sentence is not to be executed if the person has already served the detention term during prior to the surrender

4.2.2.2. Chapter 1: General Principles - Article 1-8

Article 1. Definition of the EAW and obligation to execute it

The first article of the Framework decision, Definition of the EAW and obligation to execute it is transposed quite literally as the definition of EAW is concerned (Article 1.1 of the FD; Art 1.2 L.69/05) while to the provisions of the Framework concerning the mutual recognition of EAW (Article 1.2 of the FD) adds "as long as the preventive remedy on the basis of which the warrant has been issued has been signed by a judge, is adequately motivated, and the sentence to be enforced is irrevocable" (Art 1.3 L.69/05). According to the Court of Cassation, the warrant to be signed by a judge as to Art 1.3. is not the EAW but the order on which the EAW is based (Sez. 6, No. 8449 - 14/2/2007 - 28/2/2007 (Germany); Sez. 6, No. 6901 - 13/2/2007-19/2/2007, (Germany); Sez. 6, No. 13463, - 28/3/2998-31/3/2008 (Lithuania). Also, it is not within the scope of the EAW the surrender for investigative purposes (interrogation or confrontation). (Sez. 6, No. 15970 - 17/4/2007-19/4/2007 (Belgium)) and the Court of Appeal deciding on the surrender must verify that the sentence to be enforced is irrevocabile (Sez. 6, - 29/10/2008 - 20/11/2008, No. 43341)

Article 1.3 of the Frameword Decision, referring to the "obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union" can be considered as being extended in the already cited Article 2 of the Italian L.69/05.

Article 2. Scope of the EAW

Article 2.1 of the FD is transposed by Art 7.3 and 7.4 of the Italian transposition law with the addition that the calculation of 12 month of maximum custodial sentence or detention order "Aggravating circumstances shall not be taken into account" (Article 7.3 L.69/05). According to the Court of Cassation case law, to verify the detention period, reference must be made not to the concrete case but to the "abstract punishability". This means that it is not relevant if the act is punishable also (in alternativa) with pecuniary sanction, (Sez. 6, No. 8449, 14/2/2007-28/2/2007 (Germany); Sez. 6, No. 11598, 13/3/2007-19/3/2007 (Germany))

Reference to the exclusion of aggravating circumstances is also made in Article 8 L.69/05 transposing Art 2.2 of the FD as the calculation of the 3 years for the cases in which "the surrender shall take place on the basis of the European Arrest Warrant, independently of cases of double punishability, provided that the maximum custodial sentence or detention is of three or more years." Furthermore, in the transposition of Article 2.2 of the Framework Decision, the list of offences has been much detailed in the Italian Article 8.1.[69] Also, according to Article 8.2, "The Italian judicial authority shall

[69] Article 8. Mandatory surrender

Article 8.1. For the following offences, the surrender shall take place on the basis of the European Arrest Warrant, independently of cases of double punishablity, provided that the maximum custodial sentence or detention is of three or more years, excluding any aggravating circumstances:

a) participation in a criminal organisation of three or more persons with the aim of committing a number of offences;

b) performing actions threatening public safety or acts of violence against persons or things, thereby causing harm to a state, institution or international body, for the purpose of subverting the constitutional order of a state or destroying or weakening national or supra-national political, economic, or social structures;

c) forcing or inducing one or more persons, through violence, threats, deception or the abuse of authority, to enter, reside in or to leave the territory of a state or to move from one place to another within that state, in order to subject them to slavery, forced labour or begging or the exploitation of sexual services;

d) inducing persons into prostitution or into committing direct acts for the purpose of abetting prostitution or the sexual exploitation of children; committing acts intended to exploit a child in order to produce pornographic material using any medium; selling, distributing, divulging or publicising pornographic material depicting a minor;

e) selling, offering, ceding, distributing, trading, purchasing, transporting, exporting, importing or procuring for others substances which, according to the legislation in force in European countries, are considered to be narcotic drugs or psychotropic substances;

f) trading, purchasing, transporting, exporting or importing weapons, munitions and explosives in breach of the legislation currently in force;

g) receiving, accepting the promise of, giving or promising money or other benefits to commit or refrain from committing an act pertaining to a public office;

h) committing any act or intentionally omitting to act in relation to the use or presentation of false, incorrect or incomplete statements or documents, which gives rise to the misappropriation or wrongful retention of funds or the illicit depletion of resources from the general budget of a state or the general budget of the European Communities or budgets managed by or on behalf of the European Communities; committing any act or intentionally omitting to act in relation to the misapplication of such funds or purposes other than those for which they were originally granted; committing the same actions or omissions to the detriment of a private individual, corporate entity or public body;

i) substituting or transferring money, goods or other benefits deriving from crime, or carrying out any other

decide on the definition of the offences for which surrender has been requested in accordance with the law of the issuing state, and whether this definition corresponds to those listed in paragraph 1". The Court of Cassation (Sez. 6, No. 39772 - 24/10/2007-26/10/2007 - Romania) stated that the list provided in article 2.2. of the Frameword Decision has to be seen as a list of categories of crimes and not as a specific

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related operations, in order to conceal their illicit origin;

l) counterfeiting of national or foreign currencies that are legal tender in or outside the state or altering them in any way to make them appear to be of a higher value;

m) committing, for personal gain or for the profit of others or to cause harm to others, an direct action to access or remain without authorisation in a security-protected computer or telematic system or damaging or destroying computer or telematic systems, data, information or programs contained in or pertinent to them.

n) endangering the environment through the unauthorised discharge of hydrocarbons, waste oils or sludge produced by water treatment, the emission of dangerous substances into the atmosphere, the ground or water, the treatment, transportation, dumping, or removal of hazardous waste, the discharging of waste into the ground or water and the unauthorised operation of a dump; possessing, capturing or trading in protected animal and vegetable species;

o) committing, for profit, direct actions intended to facilitate the illegal entry to the territory of a state of a person who is not a citizen of that state or is not entitled to reside there permanently;

p) deliberately causing the death of a person or bodily injuries of the same gravity as those envisaged by Article 583 of the Penal Code;

q) obtaining illegally and for profit human organs or tissue or trading in these in any way;

r) depriving individuals of their personal freedom or restraining or holding them by threatening to kill, injure or continue to restrain them in order to force a third party, whether this be a state, an intergovernmental international organisation, a natural or corporate person or a community of natural persons, to commit or refrain from committing any action, subordinating the release of the kidnapped person to this action or omission;

s) public incitement to violence as a manifestation of racial hatred towards a group of persons or a member of such a group because of the colour of their skin colour, their race, religion, or national or ethnic origin; or extolling crimes against humanity for reasons of racism or xenophobia;

t) taking possession of the movable property of others, removing this property from its owners for personal gain or to profit others, through the use of weapons or as part of an organised group;

u) illicit trafficking in cultural goods, including antiques and works of art;

v) inducing a person into error through artifice or deception, thus obtaining unjust personal gain or profit for others to the detriment of other people;

z) demanding through the use of threats, force or any other form of intimidation, goods or promises or the signing of any document that contains or determines an obligation, alienation or payment;

aa) counterfeiting or unauthorised reproduction of commercial products for gain;

bb) forgery of administrative documents and trafficking therein;

cc) forgery of means of payment;

dd) illicit trafficking in hormonal substances and other growth promoters;

ee) illicit trafficking in nuclear or radioactive materials;

ff) buying, receiving or hiding stolen vehicles, or in any way collaborating in their purchase, reception or concealment for personal gain, or for others;

gg) forcing a person to carry out or submit to sexual acts using violence or threats or the abuse of authority;

hh) arson resulting in danger to public safety;

ii) crimes within the jurisdiction of the International Criminal Court

ll) unlawful seizure of aircraft/ships;

mm) illicitly and intentionally causing severe damage to state structures, other public structures, public transport systems or other infrastructure, involving or that might involve a substantial economic loss.

qualification of the crimes (therefore being irrelevant in the case that the issuing authority had checked the field organised or armed robbery while the act that was at the origin of the EAW concerned robbery).

Finally, Article 8.3. add a clause of refusal to surrender of Italian citizen "If the act is not envisaged as a crime under Italian law, an Italian citizen shall not be surrendered if it emerges that he, without any personal fault, was not aware of the legislative provision of the issuing Member State on the basis of which the European arrest warrant has been issued".

In relation to the possibility of adding other categories of offence to the list of 32 offences for which the verification of double punishability is not required, introduced in Art 2.3 of the Framework Decision, Article 3. of the Italian Law introduce a mechanism of parliamentary reservation.[70] In particular, under Article 3. 3. of the Italian law "An unfavourable opinion by the Chamber of Deputies or the Senate of the Republic shall be binding and shall prevent agreement by the Italian State to the proposed amendments".

On the possibility of the double punishability test also for categories of offences other than the list of 32 introduced by Art 2.4. of the Frameword Decision, Article 7. of the Italian Law excludes it. Under Article 7. 1. "Italy shall enforce the European arrest warrant only in cases where the act is also considered to be an offence under Italian law". On this point the Court of Cassation held that it is not up to the executing member state authority to decide if provisions of the criminal law of the issuing state apply to the concrete case. As to say, it is the judicial authority of the issuing member state which will judge the case accordingly to the issuing member state law (Sez. 6, No. 41758, 19/12/2006-20/12/2006 -France; Sez. 6, No. 17810, 27/4/2007-9/5/2007 - Poland)

The Court of Cassation also held that to satisfy the double punishability clause it is not needed that the foreign law correspond to the Italian law but that the concrete fact is considered an offence in both laws (Sez. 6, No. 11598, 13/3/2007-19/3/2007 - Germany; Sez. 6, No. 24771,18/6/2007-22/6/2007- Germany). Also, the fact for which the surrender is requested does not need to be an offence for the Italian law at the time it

[70] Article 3. (Application of parliamentary review)

Article 3.1. The amendments to Article 2.2 of the Framework Decision shall be submitted by the Government for parliamentary review.

Article 3.2. The Prime Minister shall transmit the relative draft amendments to Parliament together with a report illustrating the state of progress of the negotiations and the impact of the provisions on the Italian legal system, and shall ask Parliament to express its opinion in this respect.

Article 3.3. An unfavourable opinion by the Chamber of Deputies or the Senate of the Republic shall be binding and shall prevent agreement by the Italian State to the proposed amendments.

is committed (Sez. 6, No. 22453, 4/6/2008 -5/6/2008 - Romania). Furthermore, it does not matter if for the Italian law the offence can be prosecuted only after a complaint (su querela di parte) (Sez. 6, No. 14040, 7/4/2006-20/4/2006 - France; Sez. 6, No. 46727, 12/12/2007-14/12/2007 - Romania).[71]

Article 3. Grounds for mandatory non-execution of the EAW and Article 4. Grounds for optional non-execution of the EAW

Under Art 18.1. the Italian law, both mandatory and optional grounds for non-execution of the EAW becomes mandatory. In relation to Article 18.1.r. of the Italian law transposing Article 4.6. of the FD "if the European arrest warrant has been issued for the purposes of executing a custodial sentence or a detention order, should the requested person be an Italian citizen, provided that the court of appeal order the custodial sentence or detention order be executed in Italy in accordance with its internal legislation", the Constitutional Court with sentence n. 227 21-24 June 2010, has declared the constitutional illegitimacy of the letter r) in the part in which does not provide for the refusal of surrender for the UE citizen who legitimately and in facts is resident or has dwelling in the Italian territory for the purpose of the execution the custodial sentence or detention order in Italy in accordance with its internal legislation".

Furthermore, nine new grounds for refusal are introduced by the same article: Art 18.1. b) "if an infringement of rights has occurred with the consent of a person or persons who, in accordance with Italian law, have the authority to grant consent"; Art 18.1. c) "if under Italian law the fact represents the exercise of a right, the fulfilment of a duty or has been determined by chance or by force majeure". On this point the Court of Cassation held that it is not a task of the judicial authority of the Executing member state to assess if the alleged offence is the result of a situation of need (Sez. 6, No. 46845 - 10/12/2007-17/12/2007, Romania). Art 18.1. e) "if the legislation of the issuing Member State does not set any maximum limit to preventive detention". The Constitutional Court, with court order n. 109 14-18 April 2008, declared the manifest inadmissibility of the legitimacy question on article 18.1.e. raised in relation to Article 3., 11. and 117.1. of the Italian Constitution. Also On Article 18.1.e., the Court of Cassation held that the appealing party needs not only to claim that the issuing member state does not set any maximum limit to

[71] On more specific topics: a violation of the order to expatriate is considered to be an offence in Italy (Sez. 6, No. 13461 - 27/3/2008- 31/3/2008 Romania) and there are the condition for the surrender for the offence of omission of VAT declaration under German tax law (Sez. 6, No. 6901 - 13/2/2007-19/2/2007 - Germany; Sez. 6, No. 8449 - 14/2/2007-28/2/2007 - Germany)

preventive detention but at least provide indication of the law or attach the law itself (Sez. 6, No. 41758, 19/12/2006- 20/12/2006 - France; Sez. 6, No. 7915, 3/3/2006-7/3/2006 - Belgium; Sez. 6, No. 14040, 7/4/2006-20/4/2006 - France). The concept of "maximum limit to preventive detention" has been initially interpreted excluding the equipollence of periodic control mechanisms (Sez. 6, No. 16542 - 8/5/2006-15/5/2006 - Belgium) even though in another case the Court rejected the claim of maximum time limits for detention on remand pending trial (Sez. 6, No. 24705, 12/07/2006 - 18/07/2006 France). The sezioni unite (Sez. Un. No. 4614 - 30/01/2007- 5/02/2007 - Germany) has later stated that the presence of periodic controls ex-officio and of reasonable time limits and practices which factually allows them is in line with the requirements of Article 18.1.e. (see also Sez. 6, No. 8449 - 14/2/2007-28/2/2007 - Germany). Also French (Sez. 6, No. 331 - 5/12/2007-7/1/2008; Sez. 6, No. 41758 - 19/12/2006- 20/12/2006), Austrian (Sez. 6, No. 12405 - 20/3/2007-23/3/2007) and Lithuanian (Sez. 6, No. 12665 - 19/3/2008 - 21/3/2008; Sez. 6, No. 13463 - 28/3/2998-31/3/2008; Sez. 6, No. 16942 - 21/4/2008-23/4/2008) have been found to have functional equivalents of the maximum limit to preventive detention. Furthermore the court has found to be without importance the fact that the measure loses efficacy after a given amount of time which starts from the surrender (Sez. 6, No. 17810 - 27/4/2007-9/5/2007 - Poland).

Article 18.1. f) "if the object of the European arrest warrant is a political offence, with the exceptions mentioned in article 11 of the International Convention for the Suppression of Terrorist Bombing adopted by the General Assembly of the United Nations in New York on 15 December 1997, incorporated into law no. 34 of 14 February 2003; by article 1 of the European Convention on the Suppression of Terrorism, adopted in Strasbourg on 27 January 1977, incorporated into law no. 719 of 26 November 1985; by the single act of constitutional law no. 1 of 21 June 1967". Article 18.1. g) "if there is any reason to suppose that the final sentence forming the object of the European arrest warrant is not the result of a due and fair process carried out in respect of the minimum rights of the defendant provided for in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, incorporated into law no. 848 of 4 August 1955, as well as into article 2 of Protocol no. 7 to the same Convention adopted in Strasbourg on 22 November 1984, as incorporated into law no. 98 of 9 April 1990 establishing the right to a two-level degree of jurisdiction in criminal matters". According to the Court of Cassation, the EAW based on a sentence in contumacy respects the right to a fair and public hearing if the condemned has the right to request a new judgement (Sez. 6, judgement No. 5400, 30/1/2008-4/2/2008 (France), Sez. 6, No. 5403 - 30/1/2008-4/2/2008 (France)), or allow for the revision of the trial

(Sez. 6, No. 5909 - 12/2/2007-13/2/2007 (Hungary)). Furthermore, the right to a two-level degree of jurisdiction in criminal matters is guaranteed by the right to an appeal even if only for legittimità (point of law?) (Sez. 6, No. 7812 - 12/2/2008-20/2/2008, (Belgium); Sez. 6, No. 7813 - 12/02/2008-20/02/2008 (Belgium). Article 18.1. s) "if the requested person is a pregnant woman or mother of children under the age of three years and living with her, unless, in the case of a European arrest warrant issued as part of a proceeding, the precautionary measures underlying the restrictive order issued by the judicial authority prove to be exceptionally serious". Article 18.1. t) "if the precautionary measure on which the European arrest warrant is based was issued lacking the required justification". According to the Court of Cassation Case law, the required justification of the court order on which the EAW is based does not require the argumentation of the meaning and implications of the proof materials as in the Italian tradition but can be limited to the attachment to the EAW of the factual proofs concerning the requested person (Sez. Un. No. 4614 - 30/01/2007- 5/02/2007, Germany; Sez. 6, No. 34355 - 23/9/2005-26/9/2005,Belgium; Sez. 6, No. 16542 - 8/5/2006-15/5/2006,Belgium). Article 18.1. u) "if the requested person enjoys immunity under Italian law that limits the execution or continuation of criminal prosecution". Article 18.1. v) "if the sentence for the execution of which surrender is requested contains provisions contrary to the fundamental principles of the Italian legal system".

Furthermore, three additional grounds of refusal have been introduced from recitals 12 and 13 of the FD, under Art 18.1. a), d) and h) of the Italian implementing law. According to Art 18.1. a) "if, on the basis of objective elements, there is reason to believe that the European arrest warrant was issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that the position of that person may be prejudiced for any of these reasons". On this point, the Court of Cassation held that the purpose of prosecuting or punishing a person on the grounds of his or her religion, ethnic origin, or political opinions need to be based on objective elements and not on allegations (Sez. F, No. 33642 - 13/9/2005-14/9/2005 - UK). According to Art 18.1. d) "if the alleged offence is an expression of freedom of association, freedom of press or of other means of communication" while under Art 18.1. h) "if there is as serious risk of the requested person being liable to the death penalty, torture or other inhuman or degrading punishments or treatment".

In relation to Article 3.2 of the FD, Article 31.1. of the Italian implementing law states that "The European arrest warrant shall lose its legal effect when the restrictive measure on the basis of which it was issued has been revoked or cancelled or has lost

its legal effect. The general public prosecutor at the Court of Appeal shall immediately notify the Minister of Justice for the purpose of the subsequent notification of the executing Member State". According to the Court of Cassation it is not admissible the appeal to the Court of Cassation against the act with which the public prosecutor has rejected the request of repeal of the EAW as appeal can be made only against the acts (provvedimenti) of the judge and not of the parties in the proceeding. (Sez. 6, No. 9273 - 5/2/2007- 5/3/2007 - Italy; Sez. 6, No. 45769 - 11/10/2007- 6/12/2007 - Italy; Sez. F, No. 34215 - 4/9/2007-8/9/2007 - Italy). Furthermore, it is not admissible the appeal to the Court of Cassation against the detention order for violation of the procedure in the foreign surrendering country, for which is competent the competent authority of the surrendering member state (Sez. 6, No. 18466 - 11/1/2007 - 15/5/2007, Italy; Sez. F, No. 34215 - 4/9/2007-8/9/2007 - Italy)

Transposing Article 4.1. of the FD under which "in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State" the Italian law add an exception under Article 7. 2. "In any case, such taxes and duties must be comparable, by analogy, to taxes or duties whose non-observance under Italian law gives rise to a penalty of a period of detention for a maximum duration, excluding any aggravating circumstances, of three or more years".

Article 5. Guarantees to be given by the issuing Member state in particular cases

The cases and conditions to which surrender may be subject under Article 5. of the FD are literally transposed by article 19. of the Italian Implementation Law. In relation to Article 19.1.a of the Italian law "if the European arrest warrant has been issued for the purposes of executing a custodial sentence or a detention order imposed by a decision pronounced *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing leading up to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives assurances deemed adequate to guarantee that the person who is the subject of the European arrest warrant will have an opportunity to apply for a retrial in the issuing Member State and to be present at the judgement" transposing Art 5.1 of the FD, the Court of Cassation held that it is correct the surrender executing a custodial sentence

or a detention order imposed by a decision pronounced *in absentia* and if the person concerned has had the opportunity to apply for a retrial in the issuing member state in a court of different jurisdiction (Sez. F, No. 33327 - 21/8/2007-27/8/2007, Belgium). Furthermore, according to the Court of Cassation the condition provided for by Article 19.1.a. is respected if the law of the issuing member state allows opportunity to apply for a retrial within a time limit that start to run from the moment the person concerned has concrete knowledge of the decision (Sez. 6, No. 17574 - 18/5/2006-22/5/2006, Belgium).

Art 5.1 of the EAW Framework Decision has been amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial as the "solution provided by the EAW Framework decision was not deemed satisfactory as regards cases where the person could not be informed of the proceedings".[72]

The Framework Decision 2009/299/JHA will "be applied from 1 January 2014 at the latest to the recognition and enforcement of decisions, rendered in the absence of the person concerned at the trial, which are issued by Italian competent authorities" as Italy decided to avail itself of the opportunity offered by Article 8(3) of the Framework Decision.[73]

In relation to the transposition of article 5.3 of the F.D. under Article 19.1. c of the Italian law "if the person who is the subject of a European arrest warrant undergoing prosecution is an Italian national or is resident in the Italian State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him or her in the issuing Member State", the Court of Cassation held that "after being heard" does not refer to the single hearing but to the end of the proceeding concerning the subject (Sez. 6, No. 9202 - 28/2/2007-2/3/2007, Belgium; Sez. 6, No. 12338 - 21/3/2007-23/3/2007 - Austria; Sez. 6, No. 16943, - 23/4/2008-23/4/2008, Austria). The Court of Cassation held that Article 19.1.c. and not 18.1.g has to be applied if the person, condemned *in absentia*, who is the subject of a European arrest warrant has the right to request a new judgement (Sez. 6, No. 5400 - 30/1/2008-4/2/2008, France; Sez. 6, No. 5403 - 30/1/2008-4/2/2008, France). The Constitutional Court, with court order n. 237, 5 - 7 July 2010 declared the manifest inadmissibility of the legitimacy question on article 19.1.c. raised by the Court of Appeal of Bari in relation to Article 3. of

[72] Point 3 of the Preamble of the Framework Decision 2009/299/JHA

[73] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:097:0026:0026:EN:PDF

the Italian Constitution and Art 20 of the Charter of Fundamental Rights of the European Union (Charter of Nice)

Article 6. Determination of the competent judicial authorities

The Italian issuing judicial authority (Article 6.1 FD) is determined under Article 28.1. of the Italian Law "A European arrest warrant is issued: a) by the judge who has applied the precautionary measure of prison custody or house arrest; b) by the public prosecutor through the judge indicated in article 665 of the code of criminal procedure who issued the order to execute the custodial sentence mentioned in article 656 of the same code, provided that it consists of a custodial sentence of least one year and provided that its execution is not suspended; c) by the public prosecutor identified in accordance with article 658 of the code of criminal procedure as far as the execution of detention orders is concerned". On this point, the Court of Cassation held that the European arrest warrant must be issued by the tribunale del riesame if it has issued a precautionary measure following the request of the public prosecutor who was appealing against a decision not to issue a precautionary measure of the judge for the preliminary investigation (Sez. 1, No. 16478 - 19/4/2006-12/5/2006, Italy)

The Italian executing judicial authority (Article 6.2 FD) is determined under Article 5. of the Italian Law which, in line with what set forth under Article 701.1 of the Italian Code of Criminal Procedure in matters of extradition[74] "foresees that the surrender of a defendant or convict to a foreign country cannot be granted without the consent of the Appeals Court".[75] In other words, "the decision concerning execution of the European arrest warrant lies with the judiciary offices that are already competent in the jurisdictional phase of the extradition procedure so that the highly specialised nature of

[74] Iuzzolino, G. "Italian Legislation Concerning the European arrest warrant: Problems and Prospects" "Implementation of the European warrant for arrest and safeguarding of fundamental rights: field of application and limits of the procedural guarantees regarding persons under inquiry and persons accused in the territory of the European Union" High Council of the Judiciary training seminar, Rome, 4-6 April 2005, p.5.

[75] Iuzzolino, G. "Italian Legislation Concerning the European arrest warrant: Problems and Prospects" "Implementation of the European warrant for arrest and safeguarding of fundamental rights: field of application and limits of the procedural guarantees regarding persons under inquiry and persons accused in the territory of the European Union" High Council of the Judiciary training seminar, Rome, 4-6 April 2005, p.5.

these matters guarantees respect of the very short timeframes that characterize the new non-extradition surrender". [76]

More in detail, "Article 5.1. The surrender of a sentenced or suspected person abroad may not be granted without the favourable decision of the Court of Appeal. Article 5.2. Jurisdiction to enforce a European arrest warrant shall lie, in this order, with the Court of Appeal in which district the sentenced or suspected person is resident, has his place of abode or is domiciled at the time the provision is received by the judicial authority. Article 5.3. If jurisdiction cannot be determined in accordance with paragraph 2, the Court of Appeal of Rome shall be competent. Article 5.4. When any one offence is subject to European arrest warrants issued concurrently against more than one person by the judicial authorities of a Member State of the European Union and it is not possible to determine jurisdiction under the terms of paragraph 2, the Court of Appeal of the district in which the greatest number of these persons are resident, staying or domiciled shall have jurisdiction. If it is not possible to determine jurisdiction in this manner, the Court of Appeal of Rome shall have jurisdiction. Article 5.5. In the event a person has been arrested by the police pursuant to Article 11, [the person is arrested in Italy following a SIS alert Article 95] jurisdiction to rule on surrender shall lie with the Court of Appeal of the district in which the arrest was made". According to the Court of Cassation case law, the procedure followed by the section for minors of the Court of Appeal which determined to be of its competence the surrender decision concerning a minor has been implicitly found correct by the Court of Cassation (Sez. 6, No. 8284 - 2/3/2006-8/3/2006, Belgium). Then, more explicitly, the Court of Cassation has recognized as competence of the section for minors of the Court of Appeal the gathering of the information required by article 18.1.i. (Sez. 6, No. 21005 - 22/5/2008-26/5/2008 Romania). Also, according to the Court of Cassation the question of competence "ratione loci" to enforce a European arrest warrant cannot be raised for the first time in front of the Court of Cassation (Sez. 6, No. 42666 - 13/11/2007-19/11/2007, Hungary). The Court of Cassation held that there is no incompatibility between being the judge who validate the arrest and deciding upon the surrender (Sez. 6, No. 6901 - 13/2/2007-19/2/2007 - Germany)

The Court of Cassation has raised a question of constitutional legitimacy of article 701 and 704 of the court of criminal procedure in relation with article 2, 3, 25, 27, 31 and 32 of the Italian Constitution where they give the competence for the surrender decision

[76] Iuzzolino, G. "Italian Legislation Concerning the European arrest warrant: Problems and Prospects" "Implementation of the European warrant for arrest and safeguarding of fundamental rights: field of application and limits of the procedural guarantees regarding persons under inquiry and persons accused in the territory of the European Union" High Council of the Judiciary training seminar, Rome, 4-6 April 2005, p.5.

concerning a minor to the Court of Appeal and not to the Section for minor of the Court of Appeal (Sez. 6, No. 27584 - 14/5/2007-12/7/2007, Romania).

Article 7. Recourse to the central authority

In relation to the provisions of Article 7.1. of the Framework Decision, Article 4. 1 of the Italian Law designates the Minister of Justice as central authority to assist the competent judicial authorities.

According to Article 4.2.-4.3 of the Italian Transposition Law, the Minister of Justice is responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto; If the Minister of Justice receives a European arrest warrant from another issuing member state, he shall transmit it immediately to the judicial authority with jurisdiction for the geographical area in question. If the Minister receives a European arrest warrant from an Italian judicial authority he shall transmit it immediately to the executing member state. According to the case law of the Court of Cassation, once it has been ascertained that a copy of the documents required by law 69/2005 has been officially transmitted by the issuing authority to the Italian Ministry of Justice, according to the Court of Cassation no further question can be raised on the conformity of such documents to the original (Sez. Un. No. 4614 - 30/01/2007-5/02/2007, Germany).

At the same time, according to Article 4.4 of the Italian Transposition Law, "direct correspondence between judicial authorities shall be allowed under conditions of reciprocity. In this case the Italian judicial authorities shall inform the Minister of Justice immediately of the receipt and the issue of a European Arrest Warrant. Responsibility still lies with the Minister of Justice as provided in Art 23.1."

According to Article 23. of the Italian Law, the Ministry is responsible for procedure and understanding agreements for the actual surrender after the final decision has been issued by the competent judicial authority.[77]

[77] Article 23 Surrender of the person. Suspension of the surrender

Article 23. 1. The person requested shall be surrendered to the issuing Member State no later than ten days after the final decision on the execution of the European arrest warrant, or after the order referred to in article 14, paragraph 4, in accordance with the procedure and understanding agreed through the good offices of the Minister of Justice.

Article 23.2. If the surrender of the requested person within the time limit set in paragraph 1 is prevented by force majeure, the president of the Court of Appeal or the judge delegated by him, after suspending execution of the warrant, shall immediately notify the Minister of Justice who shall then inform the judicial

Article 8. Content and form of the EAW

The content of the European arrest warrant in both EAW issued by an Italian judicial authority (transposed by Article 30 of the Italian Law) and executed by an Italian judicial authority (transposed by Article 6.1 of the Italian Law) correspond to what is provided for by Article 8.1. of the FD. On this point, the Court of Cassation held that in case the indication of the minimum and maximum penalty established under the law of the issuing member state is omitted, this does not means that the request has to be rejected (such cases are addressed by article 7, 18 and 6.3) (Sez. 6, No. 40614 - 21/11/2006-12/12/2006 - Germany). the description provided by art 6.1.f. is directed to the indication of the elements useful to assess the EAW. If insufficient elements have been provided, further information can be requested (Sez. 6, No. 9202 - 28/2/2007-2/3/2007 - Belgium). According to the Court of Cassation, Law 69/2005 does not foresee that in the EAW or in the order on which the EAW is based, the indication of the precautionary measures are provided (Sez. 6, No. 11598 - 13/3/2007-19/3/2007 - Germany). Also, the Court of Cassation found that neither the law 69/2005 nor the EAW Frameword Decision require for the EAW to be submitted in true copy. Guarantee is provided by the fact that, "in the event of difficulties arising in relation to the reception or authenticity of the documents sent by the foreign judicial authority, the president of the court shall make direct contact with that authority in order to resolve them" Article 9.2 (Sez. 6, No. 16542 - 8/5/2006-15/5/2006 - Belgium). More in general, once it has been ascertained that a copy of the documents required by law 69/2005 has been officially transmitted by the issuing authority to the Italian Ministry of Justice, no further question can be raised on the conformity of such documents to the original (Sez. Un. No. 4614 - 30/01/2007-5/02/2007, Germany). For cases executed by an Italian judicial authority, though, the Italian Law also foresee, under Article 6.2, that if the European arrest warrant does not contain the information set forth at letters a), c), d), e) and f) of paragraph 6.1,

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authority of the issuing Member State.

Article 23.3. On humanitarian grounds or if there are substantial reasons for believing that surrender would endanger the requested person's life or health, the president of the Court of Appeal, or the judge delegated by him, may issue a reasoned decree suspending the execution of the surrender, immediately notifying the Minister of Justice thereof.

Article 23.4. In the cases mentioned in paragraphs 2 and 3, there being no further grounds for suspension, the president of the Court of Appeal, or the judge delegated by him, shall promptly notify the Minister of Justice who shall negotiate a new date for surrender with the judicial authority of the issuing Member State. In this case the time limit specified in paragraph 1 shall run from the agreed new date.

Article 23.5. At the end of the ten day time limit specified in paragraphs 1 and 4, the person arrested may no longer be held in custody and the president of the Court of Appeal or the judge delegated by him, shall order his or her release provided that the latter him- or herself is not responsible for the non execution of the surrender. In such a case the time limit is suspended until the impediment ceases.

or when it deems necessary to acquire further elements in order to verify whether one of the cases described in paragraphs 18 and 19 are valid, the Italian executing judicial authority may request (according to art 16.1) the necessary additional information to the issuing authority. Failure to comply result in the application of art 6.6 (the request is rejected). The Court of Cassation held that corrections and changes are allowed to correct material mistakes or to integrate omissions in the EAW which refer to the same typology of imprecision that within the Italian law allows the use of the correction procedure referred to in Article 130 of the code of criminal procedure, if such corrections and changes take place before the hearing in chambers for the ruling on the surrender (Sez. 6, No. 13218 - 27/3/2008-28/3/2008 - Spain).

Also, Article 6.3. and 6.4. of the Italian Law introduce additional information requirements, and in particular, a copy of the restrictive measure or custodial sentence, a report on the allegations relative to the individual including the sources of evidence, the text of the law applicable to the case, with an indication of the type and duration of the sentence; any description or other information useful for the ascertain the identity and nationality of the individual to be surrendered.[78] From the Italian legislator's point of view, the request of the judicial decision upon which the European arrest warrant is based "is necessary in order to check the existence of grounds for the custodial sentence. The Appeals Court must carry out such a control in the event that the European arrest warrant has been issued 'for the purpose of conducting a criminal prosecution' and could be the basis for a specific refusal foreseen under Article 18 letter t" [79] of the Italian transposition law. The Court of Cassation has considered sufficient to the requirements of art 6.3. the transmission by means of fax and only in the form of its Italian translation of the copy of the detention order that has given rise to the EAW (Sez. 6, No. 17952, 28/5/2008 - 5/5/2008, Poland). The Court of Cassation has also argued that the custodial sentence must be submitted (Sez. 6, - 29/10/2008 - 20/11/2008, No. 43341). The Court of Cassation has stated that the issuing authority comply with the requirement of article

[78] Article 6.3. Surrender shall be permitted, if the conditions are met, only on the basis of a request to which is attached a copy of the detention order of personal freedom or custodial sentence that has given rise to the request.

Article 6.4. The following must be attached to the arrest warrant: a) a report on the offences of which the requested person is accused, with evidence of the sources of proof, the time and place in which the offences were committed and their legal classification; b) the text of the legal provisions applicable, with an indication of the type and duration of the penalty; c) any physical description or any other information that could help ascertain the identity and nationality of the requested person

[79] Iuzzolino, G. "Italian Legislation Concerning the European arrest warrant: Problems and Prospects" "Implementation of the European warrant for arrest and safeguarding of fundamental rights: field of application and limits of the procedural guarantees regarding persons under inquiry and persons accused in the territory of the European Union" High Council of the Judiciary training seminar, Rome, 4-6 April 2005, p.7.

6.3 providing copy of the custodial sentence that has given rise to the surrender request and that if such sentence included a custodial sentence that been previously conditionally suspended, copy of the documents of the conditionally suspended sentences do not need to be provided (Sez. 6 No. 6185 -. 06/02/2009 - 12/02/2009, Romania).

Also, as the text of issuing country legal provisions applicable to the case is concerned, the Court of Cassation held that the internal legislation of UE member state is no more to be considered "foreign" at least in the part that involve fundamental rights or is intertwined with the Italian jurisdictional function, therefore, the principle of "ius novit curia" is to be applied also to such norms (Sez. 6, No. 6901 - 13/2/2007-19/2/2007, Germany).

According to Article 6.5. of the Italian Law "If the issuing Member State does not provide the judicial provision, the president of the Court of Appeal or the magistrate delegated by him shall ask the Minister of Justice to obtain the provision on the basis of which the European arrest warrant has been issued, as well as the documents referred to in paragraph 4, and shall inform him of the date of the hearing in camera. The Minister of Justice shall inform the judicial authority of the issuing Member State that receipt of the provision and relative documentation is a necessary condition for the consideration of the enforcement request by the Court of Appeal. Immediately after receipt, the Minister of Justice shall transmit the provision and documentation to the president of the Court of Appeal together with an Italian translation". Under Article 6. 6. of the Italian Law "If the judicial authority of the issuing state does not comply with the Justice Minister's request as referred to in paragraph 5, the Court of Appeal shall reject the request". At the same time, according to the Court of Cassation there is no impedimental cause to the surrender in the absence of the report on the offences of which the requested person is accused if the indications contained in the EAW are sufficient for the evaluation referred to in Article 17.4. (Sez. 6, No. 14993 - 28/4/2006-28/4/2006, France; Sez. 6, No. 25421 - 28/6/2007-3/7/2007, Germany; Sez. F, No. 34500 - 13/9/2007-17/9/2007, Germany) or in other equivalent documents (Sez. 6, No. 24771 - 18/6/2007-22/6/2007, Germany; Sez. F, No. 33633 - 28/8/2007-29/8/2006, Austria; Sez. F, No. 33327 - 21/8/2007-27/8/2007, Belgium). The Court of Cassation has ruled that there is no "automatic" impedimental cause to the surrender if to the EAW it is not attached the text of the legal provisions applicable. Such documentation is necessary only when there are specific problems of interpretation , which require knowledge of the scope of the law of the Issuing State such as for the of verification of double punishability (Sez. 6, No. 17650, 10/4/2008-15/4/2008 - Romania). In the same way, there is no "automatic" impedimental cause to the

surrender if to the EAW it is not attached the physical description or other information that could help ascertain the identity and nationality of the ascertain the identity and nationality of the requested person, if such information is available in other documents that have been submitted (Sez. 6, No. 25421 - 28/6/2007-3/7/2007, Germany). The Court of Cassation held that it is an obligation of the judge of the surrendering member state to act to gather, when needed, the necessary additional information. The mere missing transmission of such information does not imply, per se, the decision not to surrender (Sez. 6, No. 16542 - 8/5/2006-15/5/2006, Belgium). Also, it is up to the surrendering judicial authority to establish if the missing information imply a decision not to surrender the requested person (Sez. 6, No. 40614 - 21/11/2006- 12/12/2006, Germany; Sez. feriale, No. 34574- 28/08/2008 - 03/09/2008, Greece). Furthermore, even if the issuing country does not provide the requested missing information, this does not imply a refusal if the Court of Appeal can, in any case, proceed to the evaluations provided for in art 17.4 and 18.t. (Sez. 6, No. 4054 - 23/1/2008-25/1/2008 - Belgium)

The Court of Cassation, though, upheld the decision of the Court of Appeal which refused the surrender because of lack of sufficient element to evaluate the surrender as the issuing authority had not attached the report on the offences of which the requested person is accused, with evidence of the sources of proof, the time and place in which the offences were committed and their legal classification, and had not provided such documentation when requested (Sez. 6, No. 32516 - 22/9/2006-29/9/2006, Lithuania).

Furthermore, under Article 6.7. (transposing Article 8.2. of the FD) the European arrest warrant to be executed by an Italian judicial authority has to be delivered in Italian. On the point, the Court of Cassation upheld the decision of the Court of Appeal which refused the surrender as the European arrest warrant, written in a language unknown to the judge, had not been translated in Italian (Sez. 6, No. 17306 - 20/3/2007-7/5/2007, Germany).

4.2.2.3. Chapter 2: Surrender Procedure - Article 9-25

Article 9. Transmission of a EAW

The provision of Article 9.1 of the FD on Transmission of a EAW are transposed by Article 28.2. of Italian Law 69/05 “The European arrest warrant shall be transmitted to the Minister of Justice who shall have the text translated into the language of the

executing Member State and ensure that it is transmitted to the competent authority. Immediate notification of the issue of the warrant shall be given to the international police co-operation service." and Article 29.1. "The competent judicial authority as defined in article 28 shall issue the European arrest warrant when the defendant or the convicted person is resident, domiciled or else lives in the territory of a member state of the European Union.

The provisions of Article 9.2. and Article 9.3 of the FD are transposed by Article 29.2. of the Italian Law with a significant change in the transposition of Art 9.2 of the FD "The issuing judicial authority *may, in any event, decide to issue* an alert for the requested person in the Schengen Information System (SIS)" [italics added]. According to Article 29.2. of the Italian Law "*When the place of residence, domicile or dwelling is unknown and it is possible that the requested person is in the territory of a Member State of the European Union*, the judicial authority shall order the inclusion of a specific alert in the SIS in accordance with the provisions of article 95 of the convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 which regulates the gradual elimination of common border controls, as incorporated in law no. 388 of 30 September 1993. An SIS alert shall be equivalent to a European arrest warrant accompanied by the information set out in article 30." [italics added]

Article 10. Detailed procedures for transmitting a EAW

Article 28.1. of the Italian Law for EAW issued by an Italian judicial authority "The European arrest warrant shall be transmitted to the Minister of Justice who shall have the text translated into the language of the executing Member State and ensure that it is transmitted to the competent authority. Immediate notification of the issue of the warrant shall be given to the international police co-operation service".

Article 9. and 16. of the Italian Law for EAW executed by an Italian judicial authority

According to Article 9. (Receipt of the arrest warrant. Precautionary measures) "Article 9. 1. With the exception of the cases envisaged by Article 11, once the Minister of Justice has received the European arrest warrant issued by the competent authority of a Member State, he shall transmit it without delay to the president of the Court of Appeal with jurisdiction pursuant to Article 5. The president of the Court of Appeal shall

immediately inform the general public prosecutor of the European arrest warrant, and shall proceed directly, or through authority delegated to another judge of the court, to carry out those procedures for which he is competent. The president of the Court of Appeal shall follow the same procedures in the event that the arrest warrant and relative documentation as referred to in Article 6 have been transmitted directly by the judicial authority of the issuing Member State. Article 9. 2. In the event of difficulties arising in relation to the reception or authenticity of the documents sent by the foreign judicial authority, the president of the court shall make direct contact with that authority in order to resolve them. Article 9. 3. In the event that another Court of Appeal clearly has jurisdiction pursuant to Article 5 paragraphs 3, 4 and 5, the president shall forward immediately the arrest warrant received to that court without delay.[80]

The Court of Cassation stated that Article 9 contains expressions such as "without delay" and "immediately" but do not specify time limits which would made the act null or void. Such are indications of *carattere ordinatorio* (Sez. 6, No. 10544 - 6/3/2007-13/3/2007, Germany).

According to the Court of Cassation coercive measure has to be applied only if considered necessary, taking into specific account the need to ensure that the requested person does not abscond. Furthermore, the measure must be adequate and proportional to the risk of abscond, also considering the seriousness of the crime (Sez. 6, No. 20550 - 5/6/2006-15/6/2006, Germany). It has been considered valid the condition of clandestine of the requested person (Sez. 6, No. 22716 - 27/4/2007-11/6/2007, Austria), not having a fix dwelling (Sez. F, No. 35001 - 13/9/2007-17/9/2007, Austria) and the serious sentence given in the issuing country (Sez. 6, No. 42767 - 5/4/2007-20/11/2007 France).

The Court of Cassation held that the existence of an EAW with a summary description of the fact and indication of the infringed laws, make it so that it does not need to have the same elements in the issuing state court order and it does not allow the evaluation of the proportionality of the requested coercive measure (Sez. 6, No. 19764 - 5/5/2006-9/6/2006 - France). The Court of Cassation held that the existence of impedimental reasons to surrender, even if it is referred to in Article 9.6. as reason not to apply coercive measures, unless there are sufficiently concrete elements, cannot be considered in the summary proceeding deciding only on the coercive measure, as it should be intended as referring to the phase of the evaluation of the surrender (Sez. 6,

[80] 10.6. of the FD "If the authority which receives a European arrest warrant is not competent to act upon it, it shall automatically forward the European arrest warrant to the competent authority in its Member State and shall inform the issuing judicial authority accordingly.

No. 19764 - 5/5/2006-9/6/2006 - France). Also, the Court of Cassation held that the procedure of surrender referred to in Article 18.1.r. "if the European arrest warrant has been issued for the purposes of executing a custodial sentence or a detention order, should the requested person be an Italian citizen…" and in article 19.1.c. "if the person who is the subject of a European arrest warrant undergoing prosecution is an Italian national or is resident in the Italian State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him or her in the issuing Member State", do not preclude the application of the coercive measure that ensure their application (Sez. 6, No. 42767 - 5/4/2007-20/11/2007 - France)

As it is provided in article 13.3 of the Italian implementing law that the coercive measure can be adopted also if the European arrest warrant or a SIS alert have not been received yet, it has to be considered not admissible the appeal against (doglianza contro) missing information in the EAW in the phase of appeal against the coercive measure (impugnazione cautelare), which can only be considered in the surrendering decision phase (fase di merito), after all the integrating information has been acquired (Sez. 6, No. 40614 - 21/11/2006-12/12/2006 - Germany)

Furthermore, it is not competence of the Italian judge to decide about the adoption of a conditional suspension of a sentence which depends from the foreign law and the Italian judge cannot decide on the basis of the issuing country law. Also, the Italian judge can not refer to article 9.5. as the reference is made to the provisions of Title I of Book IV of the Code of Criminal Procedure that shall be observed "where applicable" excluding the automatic application of all the norms of the Title (Sez. 6, No. 19764 - 5/5/2006-9/6/2006 - France)

According to the Court of Cassation it is up to the judicial authority of the issuing country to establish the time limit of the pre trial coercive measure, taking into account the length of the coercive measure undergone in Italy (Sez. 6, No. 20428 - 15/2/2007-24/5/2007 -Latvia)

Questions concerning coercive measure provisions can be (fatte valere) according to what provided by article 719 of the criminal code of procedure (Sez. 6, No. 7915 - 3/3/2006-7/3/2006 - Belgium) and not according to the re-examination procedure (Sez. 6, No. 17170 - 29/3/2007-4/5/2007, Germany). As the questions concerning coercive measure provisions can be (fatte valere) according to what provided by article 719 of the criminal code of procedure, it is not allowed appeal against the coercive measure in the appeal against the EAW unless it concerns the whole time limits

established for the surrendering procedure (Sez. 6, No. 7915 - 3/3/2006-7/3/2006 - Belgium)

The appeal to the Court of Cassation against the order which apply the coercive measure, referring to what provided by article 719 of the criminal code of procedure, follows what provided by article 311 of the criminal code of procedure, giving a time limit of 10 days to appeal from the execution of the order or from the communication or notification of the order in the clerk office of the Court of Appeal, with the possibility to present new issues in front of the Court of Cassation, before the beginning of the discussion and with the obligation to decide according to Article 127. 5. of the criminal code of procedure.

At the same time, the Court of Cassation has noted that the introduction of a simplified procedure, with very short time limits, provided by Law 69/2005 appears to be clearly antithetic with the respect of the usual rules for the judgement at the Court of Cassation (Sez. 6, No. 24655 - 31/5/2006-17/7/2006 - Germany).

It has been considered not admissible in coercive measure decision phase the appeal concerning the compatibility of the health of the required person (AIDS) with the *misura intramuraria* as it is a question to be posed in the phase of decision upon the surrender, having observed the time limits and the guarantees provided for by the law (Sez. 6, No. 17170 - 29/3/2007-4/5/2007 - Germany)

According to Article 16. (Additional information and investigations) “Article 16, 1. Should the Court of Appeal deem insufficient for the purpose of reaching a decision the documentation and information transmitted by the issuing Member State, it may request the necessary additional information from the latter, either directly or through the Minister of Justice. In any case, a time limit shall be set for the receipt of the information requested of not more than 30 days. If the judicial authority of the issuing Member State fails to act upon the request, the provisions of paragraph 6 of article 6 shall apply. Article 16.2. The Court of Appeal, either on its own initiative or at the request of the parties concerned, may order further investigations to be carried out if deemed necessary to reach its decision.”

According to the Court of Cassation, the necessary additional information from the issuing member state that can be request concerns information the issuing member state already posses, and it cannot be required to the issuing state to acquire new information (Sez. F, No. 33642 - 13/9/2005-14/9/2005 - United Kingdom). Also, the time limit set for the receipt of the information requested of not more than 30 days is

(ordinatorio) and does not influence the surrender of the requested person (Sez. F, No. 33633 - 28/8/2007- 29/8/2007, Austria; Sez. F, No. 33327 - 21/8/2007-27/8/2007 - Belgium; Sez. 6, No. 13463, - 28/3/2998-31/3/2008 - Lithuania; Sez. 6, No. 16942 - 21/4/2008-23/4/2008 Lithuania)

If the Italian authority do not establish a time limit within which the information has to be provided, it is not relevant for the decision that such information is provided after the 30 days as it is directed to limit the discretionary power of the Italian authority to postpone the decision. Only if such time limit of 30 or less days has been communicated to the foreign authority, the Italian authority is legitimated, after the time limit, to decide with the information already possessed (Sez. Un. No. 4614 - 30/1/2007- 5/2/2007 - Germany)

If within the time limits provided for in art 16.1 the Italian authority does not receive the integrating information, the Italian authority can decide upon the information already possessed, and it is not obliged to refuse the surrender (Sez. 6, No. 40412 - 26/10/2007-31/10/2007 - France). At the same time, it is up to the Italian authority to evaluate if all the needed information is available (Sez. 6, No. 25420 - 21/6/2007-3/7/2007, Romania)

Also, if the hearing is deferred to give the defence time to read the documentation submitted by the issuing member state, the time limit of 8 days provided by Article 10.4. does not have to be applied (Sez. F, No. 33327 - 21/8/2007-27/8/2007 - Belgium)

Article 11. Rights of a requested person and Article 12. Keeping the person in detention

The provisions of Article 11. of the FD on Rights of a requested person, [81] and Article 12. of the FD on Keeping the person in detention[82] are transposed by the Italian Law under Article 9. and 11.-13.

[81] Article 11 of the FD - Rights of a requested person

11.1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority.

11.2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

[82] Article 12. of the FD - Keeping the person in detention

In case the execution of the EAW begins following the receipt of the arrest warrant by the Court of Appeal as provided for under Article 9.1-9.3 of the Italian Law, the rights of a requested person and the procedure for keeping the person in detention are transposed under Article 9.4 and following "Article 9.4. Once any urgent procedures have been carried out, the president shall convene the Court of Appeal which, having consulted the general public prosecutor, shall proceed, through a motivated order, sanction of failing to comply the nullity of the act, to apply the coercive measure if considered necessary, taking into specific account the need to ensure that the requested person does not abscond. Article 9. 5. The provisions of Title I of Book IV of the Code of Criminal Procedure shall be observed where applicable in matters concerning personal preventive measures, with the exception of Article 273, paragraphs 1 and 1-bis, Article 274.1 (a) and (c), and Article 280. Article 9. 6. No coercive measure may be applied if impedimental reasons exist at the moment of surrender. Article 9.7. The measures provided by article 719 of the Code of criminal procedure shall be applied".

In case the execution of the EAW begins following an arrest at the initiative of the police, Rights of a requested person are provided for under Article 11. and Article 12. of the Italian law: "Article 11, 1. In the event that the competent authority of the Member State has notified the Schengen Information System (SIS) in due and proper form, the police shall arrest the requested person and make him or her available immediately, or in any case in no more than twenty-four hours, to the president of the Court of Appeal in whose district the arrest has been made, by transmitting the relative report and shall immediately inform the Minister of Justice. Article 11, 2. The Minister of Justice shall immediately notify the requesting Member State of the arrest for the purpose of transmitting the arrest warrant and the documentation referred to in paragraphs 3 and 4 of Article 6. According to the Court of Cassation case law, it is not subject to the status of missing the choice between the procedures provided by art 9 and 11. it follows that the fact that the person is resident in the state does not forbid the Use of SIS and the following arrest by the criminal police (Sez. 6, No. 42767 - 5/4/2007-20/11/2007 - France). The Court of Cassation also held that while in cases of extradition the arrest by the police of the person against whom has been issued a provisional arrest warrant imply a discretionary evaluation, (art 716 of the code of criminal procedure), in cases of EAW the arrest is a non discretionary act "the police shall arrest the requested person",

When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding

subordinated only to the verification that the notification through the Schengen Information System has been carried out by a competent authority of a member state, and that this has taken place in the proper form (Sez. 6, No. 20550 - 5/6/2006-5/6/2006 - Germany; Sez. 6, No. 40614 - 21/11/2006-12/12/2006 - Germany; Sez. 6, No. 2833 - 19/12/2006-25/1/2007 - Germany)

Article 12 (Procedures arising from arrest by criminal police) Article 12, 1. The criminal police officer carrying out the arrest pursuant to article 11 shall inform the requested person, in a language he or she can understand, of the warrant issued and its content, of the possibility of consenting to his or her surrender to the issuing judicial authority, and shall also inform him or her of their right to appoint a legal counsel and to be assisted by an interpreter. In the case in which the requested person does not appoint a legal counsel, the criminal police shall immediately proceed to nominate one pursuant to article 97 of the code of criminal procedure. Article 12, 2. The criminal police shall promptly notify the defending counsel of the arrest. Article 12, 3. The arrest warrant must record the steps mentioned in paragraphs 1 and 2 above, as well as the steps taken to identify the requested person, otherwise the warrant shall be considered null and void". Interpreting art 12.3. the Court of Cassation has found legitimate not to have the warrant resulting null and void if police report of arrest records, without further specifications, the information of the arrest on the content of the EAW (Sez. 6, No. 22716 - 27/4/2007-11/6/2007 - Austria)

The procedure for keeping the person in detention in case the execution of the EAW begins following an arrest at the initiative of the police is defined under Art 13 of the Italian Law: "Article 13.1. Within forty-eight hours after receiving the report of arrest, the president of the Court of Appeal or another magistrate of the court delegated by him, after informing the general public prosecutor, shall, in a language known to the requested person and, if necessary, in the presence of an interpreter, proceed to question the person in the presence of legal counsel chosen by the person or else nominated by the court. If the requested person is detained in a location different from that in which the arrest was executed, the president of the Court of Appeal may delegate the president of the territorial competent court to carry out the provisions of article 10, without prejudice to his own competence with regard to the provisions of paragraph 2. Article 13.2. If it is evident that the wrong person was arrested or the person was arrested on grounds other than those pursuant to the law, the president of the Court of Appeal, or the magistrate of the court delegated by him, shall immediately order the person detained to be released, specifying the reasons for his decision. Otherwise the arrest shall be validated by means of an order pursuant to articles 9 and 10. Article 13.3.

If the European arrest warrant or a SIS alert issued by the competent authority is not received within ten days, the order issued by the president of the Court of Appeal pursuant to paragraph 2 shall be considered null and void. The alert shall be equated to the arrest warrant provided that it contains the indications mentioned in article 6."

The Court of Cassation held that the power of the President of the Court of Appeal to delegate the president of the territorial competent court to carry out the provisions of article 10, without prejudice to his own competence with regard to the provisions of paragraph 13.2. can be exercised if the requested person is detained in a location different from that in which the arrest was executed which is within the district of the Court of Appeal which will decide on the case (Sez. 6, No. 40614 - 21/11/2006-12/12/2006 - Germany). Furthermore, the delegation can also not be ad hoc, but instead be disposed for general in general orders. Furthermore, eventual irregularities in the allocation of tasks do not result in the invalidation (Sez. 6, No. 27587 - 12/6/2007-12/7/2007 Belgium)

According to the Court of Cassation the period within which an arrest on the basis of a European arrest warrant should be validated and precautionary measures should be issued by the president of the Court of Appeal or another magistrate of the court delegated by him, is the same as that in the code of criminal procedure for national cases, 48 hours from the reception of the report of arrest. The European Framework Decision does not change the applicability of the constitutionally based legal rules involved. The aim of the arrest warrant's validation is to have the deprivation of liberty scrutinised by a court. (Sez. 6, No. 3640 - 26/01/2006 - 30/01/2006 - Sez. 6, No. 20550 - 5/6/2006-15/6/2006 - Germany)

The term of 48 hours, even if formally considered only for the questioning of the arrested (article 13.1.), should also be considered in relation to the validation of the arrest (article 13.2.). The arrest must therefore be validated within 48 hours from the reception of the arrest report of the police (Sez. 6, No. 40614 - 21/11/2006-12/12/2006 - Germany; Sez. 6, No. 2833 - 19/12/2006-25/01/2007 Germany)

In case the hearing for the of the arrested person is omitted before the validation, the only remedy (which concerns, the followed procedure but also the motivation of the order that has imposed the cautionary custody) is the appeal to the Court of Cassation according to art 719 of the criminal code against the order which impose the measure, as referred to in art 9.7 of the law 69/2009. Asserting this, the Court of Cassation has judged inadmissible the path of the revocation of the measure, following the jurisprudence of the Court of Cassation in relation to art 718 of the criminal code,

following the revocation logic of article 299 of the criminal code, which can be proposed when the needs for precautionary custody change or become nonexistent. Such revocation can therefore be disposed only for supervening insussistence of the needs for precautionary custody as the order imposing such measure require a decision to surrender (Sez. 6, No. 24640 - 28/4/2006-17/7/2006 - France).

The Court of Cassation held that not only the arrest is a non discretionary act of the police, the validation of the arrest by the president of the Court of Appeal or another magistrate of the court delegated by him is based only on formal grounds: verification that the arrest has taken place within the cases foreseen by the law and that the person arrested is the right one (art 13.2) (Sez. 6, No. 20550 - 5/6/2006-15/6/2006 - Germany; Sez. 6, No. 40614 - 21/11/2006-12/12/2006 - Germany).

The Court of Cassation has observed that law 69/2005 require from the president of the Court of Appeal a control which is different from the one provided for in art 391 of the code of criminal procedure, both as the validation terms, both as the jurisdictional guarantees, both as the adoption of the cohercitive measure are concerned. The control exercised by the president of the Court of Appeal is merely cartolare, and does not have any influence on the result of the surrender procedure or on the possibility that, during such procedure, a cautionary measure more suited to the needs of the requested person, is adopted (Sez. 6, No. 7708 - 19/2/2007-23/2/2007 - Germany)

In the silence of the law, the Court of Cassation has observed that, in case the person has been arrested, the authority that has competence of deciding over the adoption of a cohercitive measure is the president of the Court of Appeal. In fact, as there cannot be any temporal iato between the validation of the arrest and the decision to protract the limitation of personal freedom of the requested person, it is implicit that the decision pertain to the same authority which decides over the validation. This is also in conformity to what provided for by art 716.3 of the code of criminal procedure in extradition matters (and, more in general, by art 391.5 of the code of criminal procedure) (Sez. 6, No. 20550 - 5/6/2006-15/6/2006, Germany).

The Court of Cassation has also observed that, while for the cautionary decision referred to in art 9.4 is competent the judges panel, for the decision on the validation of the arrest carried out by the police and on the application of the cohercitive measure is functionally competent the president of the Court of Appeal (Sez. 6. No. 45254 - 22/11/2005-13/12/2005, Spain; Sez. 6, No. 42767 - 5/4/2007-20/11/2007 - France). This disparity of treatment, which is also present in the case of extradition (article 716 of the code of criminal procedure), between the subject cautionary decision ex art 9.4 and the

one in which the measure is applied only after the validation of the initiative of the police, even if it may seems not reasonable, find its justification in the peculiarity of the two situations: In the first case, the requested person is still free and not restricted, in the second case, the requested person has already been arrested following the (exceptional) initiative of the police (Article 13 Italian Constitution) and are imposed very short time limits to the judicial authority to verify the legitimacy and for the stabilization of such situation (Sez. 6, No. 45252 - 22/11/2005-13/12/2005 - Austria).

It has also been stated that, the functional competence of the president of the Court of Appeal to issue, in case of validation of a cautionary measure, does not forbid that the measure is issued by the Court of Appeal deciding in panel, when there is no meaningful temporal interval between the validation and the issuing of the measure (Sez. F, No. 34501 - 13/9/2007-17/9/2007 - Romania).

The Court of Cassation has also affirmed that the special competence of the president of the Court of Appeal, in derogation to the ordinary competence of the panel, is strictly linked to the validity of the action of the police, and go away (venire meno) if the validation result is negative. Once the positive result of the validation is provided, though, eventual (vizzi che lo inficino) even if recognized through appeal to cassation, are not relevant to the end of put into discussion, through ex-post judgement, the competence of the president of the Court of Appeal. What matters is that the cohercitive measure has been adopted on the basis of an arrest which had been recognized as legitimate. It is at the moment of the validation which is (also) rooted the competence of the president of the Court of Appeal over the application of the cohercitive measures, in derogation to the ordinary competence of the panel (Sez. 6, No. 40614 - 21/11/2006-12/12/2006 - Germany).

According to the Court of Cassation the object of the validation of the arrest is to verify the legitimacy of the action of the police, but does not constitute the title for the prolong of a limitation of the personal freedom (Sez. 6, No. 20550 - 5/6/2006-15/6/2006 - Germany). In facts, the order for the validation of the arrest and the one which apply the cautionary measure are two orders structurally and functionally distinct, as required by art 9 and 13 of law 69/2005 (Sez. 6, No. 2833 - 19/12/2006-25/1/2007 - Germany)

As the validation of the arrest carried out by the police is concerned, the requirements for the application of the cautionary measure functional to the surrender are those listed in article 9 and 13 of law 69/2005 and are constituted by the information entered in SIS which is the equivalent of the arrest warrant where it contains the indications needed to identify the crimes for which the surrender is requested and the

indication of the legislation of the issuing country (Sez. 6, No. 7708 - 19/2/2007-23/2/2007 - Germany)

As for the cautionary measures ex art 9, the cautionary order must be motivated on the need of cohercitive measure in relation to the risk of escape of the requested person “apply the coercive measure if considered necessary, taking into specific account the need to ensure that the requested person does not abscond” (Article9.4) and with the implicit inclusions of the criteria of art 274 (b of the code of criminal procedure and the applicable provisions of Title I of Book IV of the Code of Criminal Procedure, ex article 9.5 of the law 69/2005 (Sez. 6, No. 42803 - 10/11/2005-25/11/2005 - France; Sez. 6, No. 2833 - 19/12/2006-25/1/2007 - Germany; Sez. 6, No. 42767 - 5/4/2007-20/11/2007 - France)

The submittal of information referred to in article 13.3 after the established time limit is relevant only as the cautionary order is concerned. It does not concern the surrender decision (Sez. 6, No. 9202 - 28/2/2007-2/3/2007 - Belgium)

Even if reference is made to article 6, the information referred to in art 13.3 is the one provided for in article 6.1 (Sez. 6, No. 46357 - 12/12/2005-20/12/2005 - Belgium)

Only in case of direct transmission for the time limits referred to in art 13 is relevant the date of reception of the EAW or equivalents by the Court, in the other cases reference must be made to the date of reception of the documents by the Italian Ministry of Justice (Sez. 6, No. 9203 - 1/3/2007-2/3/2007, Austria; Sez. 6, No. 47565 - 8/11/2007-28/12/2007, Belgium).

If the SIS alert contains the indications mentioned in article 6.1, the *perenzione* provided for by art 13.3 does not take place (Sez. 6, No. 46357 - 12/12/2005-20/12/2005, Belgium; Sez. 6, No. 16942 - 21/4/2008-23/4/2008 - Lithuania)

In case of *perenzione* according to art 13.3, the reiteration of the questioning of the person once a new measure has been issued (Sez. 6, No. 21974, 11/05/2006-22/06/2006, Germany).

Article 13. Consent to surrender

Consent to surrender is transposed and detailed under Article 14.1.-14.3. of the Italian Law[83] without particular discrepancies. When hearing the requested person according to Article 10.1 and Article 13.1 of the Italian Law, the president of the Court of Appeal (or a magistrate delegated by him), can receive the consent to surrender in the presence of the legal counsel and, if necessary, of the interpreter. Consent can also be given by requested person at a later time. In any case, consent is irrevocable. The Court of Cassation has observed that if the president of the Court of Appeal, or the magistrate delegated by him, does not receive any consent to surrender by the requested person in accordance with art 14.1, this does not have any consequence for the measures adopted by the Court of Appeal (Sez. 6, No. 32516 - 22/9/2006-29/9/2006 - Lithuania). Also, if during the surrender proceeding the issuing authority issues a new EAW which complete or is an evolution of the initial EAW, it is not necessary for the Italian authority to ask again to the requested person for the consent to surrender (Sez. 6, No. 40706 - 5/11/2007-6/11/2007 - Germany)

According to the Italian implementing law, "14.4. In the case of validly expressed consent, the Court of Appeal shall proceed without delay, and in any case within ten days, to decide on the execution of the request, after hearing the opinion of the general public prosecutor, the legal counsel and, if appearing in court, the requested person. 14.5. The order issued by the president of the Court of Appeal pursuant to paragraph 4 shall be promptly deposited with the clerk of the court, duly notifying the legal counsel and the requested person, as well as the general public prosecutor. All the parties are entitled to receive a copy of the order.

Article 14. Hearing of the requested person

Details of the hearing procedure are transposed under Article 10. of the Italian Law. "Article 10. Opening of the proceeding Article 10.1. Within five days of execution of the measure referred to in Article 9. and in the presence of counsel appointed pursuant

[83] Article 14 of the Italian Law- *Consent to surrender*

Article 14.1. When hearing the requested person in accordance with article 10, paragraph 1 and article 13, paragraph 1, the president of the Court of Appeal, or the magistrate delegated by him, shall receive any consent to surrender in the presence of the legal counsel and, if necessary, of the interpreter. The consent and the mode in which it was given shall be duly recorded in a special report.

Article 14.2. Consent may also be given at a later date by means of a declaration addressed to the director of the detention centre, who shall immediately transmit it to the president of the Court of Appeal, even by fax, or by a declaration made in the course of the hearing before the court and until the conclusion of the debate.

14.3. Consent shall be irrevocable. The person arrested shall be informed beforehand of the irrevocability of consent and renunciation.

to Article 97 of the Code of Criminal Procedure, if the requested person does not have a private counsel, the president of the Court of Appeal or the delegated magistrate shall hear the person subjected to the precautionary measure and shall inform him or her, in a language understood by that person, of the contents of the European arrest warrant and the execution procedure. The president of the Court of Appeal or the delegated judge shall also inform him or her of the possibility of being surrendered to the issuing judicial authority and renouncing the benefit of not being subjected to another criminal proceeding, of not being convicted or otherwise deprived of his or her personal freedom for offences committed prior to his or her surrender, other than that for which he or she was surrendered. Article 10.2. The defence counsel shall be given at least twenty-four hours notice of the date set for the procedures referred to in paragraph 1. Article 10.3. At the request of the person arrested, the warrant referred to in Article 9, shall be notified to the family, or to the competent consular authorities in case the arrested is an alien. Article 10, 4. The president of the Court of Appeal, or the judge delegated by him, shall issue an order setting the hearing in chambers for the ruling within twenty days of execution of the coercive measure and shall arrange at the same time for the European arrest warrant and the documentation referred to in Article 6. to be deposited. The order shall be communicated to the general public prosecutor and notified to the requested person and his or her defence counsel at least eight days before the hearing. The provisions of Article 702 of the Code of Criminal Procedure shall apply".

The Court of Cassation has observed that the activities provided for in article 10.1 are propedeutic to the procedure for the decision on the surrender. They have the objective to identify the person object of the EAW in the presence of a private counsel, of inform him or her of the content of the EAW and of the possibility to consent to the surrender or to renounce to the speciality clause. It has been argued that in case of irregularities in this phase, it is up to the requested person to provide proof of the concrete damage to the right of defence, which resulted in the invalidation of the following activities of the procedure, and in particular of the decision to surrender (Sez. 6, No. 40614 - 21/11/2006- 12/12/2006 - Germany).

It has been argued by the Court of Cassation that not observing the deadline within which, according to art 10.4. the president of the Court of Appeal, or the judge delegated by him, sets the hearing in chambers for the ruling, does not result in procedural sanction (sanzione processuale) (Sez. 6, No. 47547 - 19/12/2007-21/12/2007 - France).

Failure in the notification to the requested person and his or her defence counsel of the setting of the hearing in chambers for the decision on the surrender result in the absolute nullity, for violation of the rights of defence, of the adopted decision (Sez. 6, No. 16195 - 10/5/2006-11/5/2006 - Austria). Furthermore, having the hearing taking place at a time different from the one indicated in the hearing notice result in an absolute nullity according to art 179.1 of the code of criminal procedure (Sez. 6, No. 1181 - 7/1/2008-10/1/2008 - Romania)

Article 15. Surrender decision

The decision regarding the execution of the request (Article 15.1. of the FD) is transposed in Article 17 of the Italian Law,84 which regulate the first instance decision procedure at the Court of Appeal, and by Article 22 of the Italian Law,85 regulating the

[84] Article 17 Decision regarding the execution request

Article 17.1. Notwithstanding the provisions of article 14 [consent to surrender], the Court of Appeal shall decide in camera whether the conditions exist for the acceptance of the surrender request, after hearing the opinion of the general public prosecutor, the legal counsel and, if present, the requested person, as well as, if present, the representative of the requesting Member State.

Article 17.2. The decision shall be issued within sixty days from the execution of the precautionary measure contained in articles 9 and 13. Should it prove impossible for reasons of force majeure to respect the said terms, the president of the Court of Appeal shall notify the Minister of Justice of the reasons, and the latter shall notify the requesting Member State, also via Eurojust. In this case, the time limit may be extended by thirty days.

Article 17.3. Should the requested person be granted immunity recognised by the Italian legal system, the time limit for taking the decision shall begin, starting from the day on which the Court of Appeal has been notified that immunity has been waived. If the decision regarding the waiving of immunity is the responsibility of an Italian state authority, the court shall make the necessary request.

Article 17.4. In the absence of any impediment, the Court of Appeal shall hand down a decision providing for the surrender of the requested person should serious evidence of his or her guilt emerge or if an irrevocable sentence has been passed.

Article 17.5. When the decision goes against the surrender, the Court of Appeal shall immediately revoke the precautionary measures applied.

Article 17.6. At the conclusion of the discussion in camera, the decision shall be read out immediately. The reading shall be considered as notification to the parties, whether present or not, who are entitled to receive a copy of the measure.

Article 17.7. The decision shall be transmitted immediately, also by fax, to the Minister of Justice, who shall then inform the competent authorities of the issuing Member State as well as, in the case of a decision to grant the request, the international police co-operation service.

[85] Article 22 Appeal to the Court of Cassation

Article 22.1. An appeal in cassation against the measures deciding upon the surrender of the requested

appeal to the Court of Cassation. In particular, Article 17.4. refers to “serious evidence of guilt” for the surrender as an alternative to the existence of an irrevocable sentence.

The Court of Cassation held that the dies a quo from which the deadline provided for in art 17.2 is established and within which the decision shall be issued, given the reference made to article 9 and 13, is the same of the execution of the precautionary measure issued by the judge. In case of prior arrest on initiative of the police, the dies a quo is not the one of the arrest but the one in which it is notified the precautionary measure issued by the President of the Court of Appeal (Sez. 6, No. 45254 - 22/11/2005-13/12/2005 - Spain).

The terms force majeure, used by the legislator to allow the prorogation of the deadline, comprehend all the situations which results in delays in the decision without fault, including the excessive workload of the court office in relation with its workforce, especially in the holiday period (Sez. 6, No. 45254 - 22/11/2005-13/12/2005 - Spain) or for the objective impossibility in finding a translator (Sez. 6, No. 4357 - 1/2/2007-2/2/2007 - Austria)

The expiring of the deadline of 60 days provided for in article17.2 does not have a consequence on the validity of the decision concerning the surrender, but results only in the release of the requested person as provided for in article 21 (Sez. 6, No. 17632 - 3/5/2007-8/5/2007 - Germany; Sez. 6, No. 2450 - 15/1/2008-16/1/2008 - France; Sez. 6, No. 15627 - 14/4/2008-15/4/2008 - Romania).

In case the decision which decide on the surrender is annulled as a consequence of the omission of the notification of the date of the hearing in Chamber to the defence counsel, the precautionary measure provided for in art 21 does not loose efficacy. This happens only when the Court do not decide within the time limits provided for in art 14 and 17 (Sez. 6, No. 1181 - 7/1/2008-10/1/2008 - Romania).

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person may be lodged by his or her legal counsel and the general public prosecutor of the Court of Appeal, also regarding the substance, within ten days of legal notification of the measures themselves pursuant to articles 14, paragraph 5, and 17, paragraph 6.

Article 22.2. The appeal suspends the execution of the sentence.

Article 22.3. The Court of Cassation shall deliver its decision within fifteen days after receiving the documents in the form prescribed in article 127 of the code of criminal procedure. The parties must be notified of the decision at least five days before the hearing.

Article 22.4. The decision shall be deposited at the conclusion of the hearing and accompanied by a specific statement of the underlying grounds. Should it prove impossible to draw up this statement, the Court of Cassation, after in any case reading out the decision, shall ensure that the statement of the underlying grounds is deposited within five days of reaching the decision.

Article 22.5. A copy of the decision shall be immediately transmitted, also via fax, to the Minister of Justice.

Article 22.6. When the Court of Cassation quashes with remittal, the documents are transmitted to the remittal judge, who shall decide within twenty days of receiving them.

The Court of Cassation held that in the evaluation of the existence of serious evidence of culpability of the requested person mentioned in article 17.4 the Italian judicial authority has to limit itself to verify that the arrest warrant is based, both for its content or for the elements collected in the investigative phase, based on a collection of proofs that the issuing authority consider seriously linked to a fact-crime carried out by the requested person (as to say "Italian court has to verify whether according to the issuing authority there is circumstantial evidence indicative of a criminal fact" Marin 2008). (Sez. Un. No. 4614 - 30/1/2007-5/2/2007, Germany; Sez. F, No. 33642 - 13/9/2005-14/9/2005, United Kingdom; Sez. 6, No. 34355 - 23/9/2005-26/9/2005, Belgium; Sez. 6, No. 16542 - 8/5/2006-15/5/2006, Belgium; Sez. 6, No. 8449 - 14/2/2007-28/2/2007, Germany; Sez. feriale, No. 34574- 28/08/2008 - 03/09/2008, Greece).

The Court of Cassation has also stated that it is not a task of the judicial authority of the surrendering State verify the reliability and the concrete (portata probatoria della chiamata in correità) of the charges at the basis of the surrender request issued by the judicial authority of the issuing country, which satisfy its motivation duty (onere motivazionale) just mentioning such proof (Sez. 6, No. 41758 - 19/12/2006- 20/12/2006, France). The Court of Cassation has held that the condition is satisfied if the issuing authority provides a list of evidences against the requested person (Sez. 6, No. 17810, 27/4/2007-9/5/2007 - Poland). In the opposite direction the Court of Cassation has observed that the control over the seriousness of the evidence imply the control from the requested authority of the credibility of the test (del dichiarante) according with the canons of the internal law, as to say considering the personality, the history and the relation with the accused person, the reason that have induced him or her to confess and therefore the reliability of his or her statements (Sez. 6, No. 12453 - 3/4/2006-7/4/2006, France).

It has also been stated that the requirement of "serious evidence" does not apply to the sentences in contumacy, which can be revoked through appeal (opposizione) (Sez. 6, No. 2450 - 15/1/2008-16/1/2008, France).

Even though the Frameword Decision, in relation to the content of the EAW make reference to an "enforceable judgement" (article8), the Italian law implementing the framework make reference to irrevocable sentence.

The Court of Cassation has argued that when the foreign authority, according to its internal law, the sentence against the requested person becomes enforceable, it is not for the requested authority to argue on the basis of which laws of the issuing

authority State has been affirmed the enforceability of the sentence (Sez. 6, No. 17574 - 18/5/2006-22/5/2006, Belgium).

According to Art 22.1., appeal to the Court of Cassation may concern not only the point of law, but also the substance.

Concerning the ten days within which the appeal in cassation against the measures deciding upon the surrender of the requested person may be lodged, the Court of Cassation held that what provided for in art 585.2.b of the code of criminal procedure, which states that in case of reading of the order in hearing, if also the motivation has been written, for all the parties which are present or that must be considered so, is to be referred to all the provisions /orders (provvedimenti) read by the judge in their dispositivo and motivation, when the latter is written at the same time of the former, without any difference between the orders issued following council chamber (camera di consiglio) or after the hearing (dibattimento). The deadline for appealing from the deposit of the order issued after a procedure in council Chamber is applied only if the order is adopted without the presence of the parties, which have not have knowledge of this by other means (Sez. 6, No. 16566 - 16/4/2007-27/4/2007, France).

It has been stated by the Court of Cassation that the motivations (i motivi) concerning the application of the precautionary measure or of any other action which does not concern the surrendering decision (such as getting or not getting consent to surrender by the requested person in the initial phase of the proceeding (Sez. 6, No. 32516 - 22/9/2006 - 29/9/2006 - Lithuania). It has also been stated that it cannot be requested for the first time in front of the Court of Cassation (in sede di giudizio di legittimità) the question of competence “ratione loci” of the Court of Appeal who has to decide on the surrender (Sez. 6, No. 42666 - 13/11/2007-19/11/2007 - Hungary).

The Court of Cassation held that the notices for the proceeding in chambers in front of the Court of Cassation must be notified also to the requested person only if he or she is not assisted by a defence counsel (Sez. F, No. 34500 - 13/9/2007-17/9/2007 - Germany). Rejecting the question of constitutionality of art 22.3. of law 69/2005 in relation to the shortness of the procedural time limits (The Court of Cassation has to deliver its decision within fifteen days after receiving the documents and the parties must be notified of the decision at least five days before the hearing), the Court of Cassation has stated that this shortness is justified by the attempt to rapidly have a final decision which concerns the “status libertatis” of the involved person, without compromising the right of defence of the requested person to whom is in any cased granted the verification, also respecting the adversarial (contraddittorio) principle, of the appealed order

(provvedimento). The right of defence would in any case be safeguarded by the possibility to present new reasons also during the hearing in front of the Court of Cassation, in analogy with what provided for by art 311.4. of the code of criminal procedure (Sez. 6, No. 45254 - 22/11/2005-13/12/2005 - Spain).

It has been stated by the Court of Cassation that the appeal in cassation against a sentence with which it has been ordered the surrender to the State that has issued the EAW is subject to the procedure of "impugnaziione" and not "gravame di merito". Accordingly, before proceeding on the meritis, the Court of Cassation must verify if the sentence against which has been lodged appeal for one of the reasons for appeal provided for in art 606 of the code of criminal procedure has the minimal requirements required by the procedural laws and by the arrest warrant laws and surrender procedure between member states. It is the Court of Appeal that must proceed to all the controls required for the surrender of the requested person. It is then up to the Court of Cassation to assess the evaluation carried out by the Court of Appeal, both on the point of law and on the facts -meritis. Therefore, in case the sentence against which appeal has been lodged does not have a motivation component which allows the Court of Cassation to assess the decision of the Court of Appeal, or if the controls required for the decision according to art 16.2. have been omitted, this deficit cannot be solved through a substitutive intervention of the Court of Cassation. Article 22.6 require the court to quash the decision of the Court of Appeal with remittal (Sez. 6, No. 3461 - 16/1/2007-30/1/2007 - Germany).

At the same time, as shown by several sentences of Sez. 6, the Court of Cassation has requested several times the integration of the information on the case (integrazione istruttoria) through the acquisition of information via Ministry of Justice, according to art 6. law 69/2005. This has been done in cases in which the judge of the Court of Appeal had not proceed to request additional information deemed necessary for the decision on the surrender by the Court of Cassation (così, ad es. in Sez. 6, No. 16542 - 8/5/2006-15/5/2006 - Belgium; Sez. 6, No. 46843 - 10/12/2007-17/12/2007 - Austria).

The Court of Cassation has quashed with remittal ex officio the surrender decision in which, existing a final decision, was followed art 19.1.c. instead of article 18.1.r. (Sez. 6, No. 7813 - 12/02/2008-20/02/2008 - Belgium).

Contrarily to what provided for extradition matters, Article 22.6. provides that the Court of Cassation can quashes the Court of Appeal sentence with remittal. The Constitutional Court, with court order n. 256 n. 237, 23 - 30 July 2009 declared the

manifest inadmissibility of the legitimacy question on article 19.1.c. raised in relation to Article 3. and 24 of the Italian Constitution. Other than in the cases in which the Court of Cassation has quashed with remittal sentences of the Court of Appeal in which the judge of the Court of Appeal had not proceed to request additional information deemed necessary for the decision on the surrender, the Court of Cassation has quashed with remittal also the decision not to surrender judged unlawful (Sez. 6, No. 12453 - 3/4/2006-7/4/2006, France; Sez. 6, No. 9290 - 3/3/2006-16/3/2006, Germany) or if there was a reason of nullity of the appeal decision not solved, which was raised in due time or which was still possible to be raised, (Sez. 6, No. 1181 - 7/1/2008-10/1/2008, Romania; Sez. 6, No. 16195 - 10/5/2006-11/05/2006, Austria)

Request of additional information by the executing authority regulated under Article 15.2 is transposed under Art 16.1 of the Italian Law. "Article 16.1. Should the Court of Appeal deem insufficient for the purpose of reaching a decision the documentation and information transmitted by the issuing Member State, it may request the necessary additional information from the latter, either directly or through the Minister of Justice. In any case, a time limit shall be set for the receipt of the information requested of not more than 30 days. If the judicial authority of the issuing Member State fails to act upon the request, the provisions of paragraph 6 of article 6 shall apply". According to Art 6.6. if the judicial authority of the issuing state does not comply with the information request, the Court of Appeal shall reject the surrender request. This point is clearly not in line with the FD. Furthermore, also not in line with the FD, according to Article 16. 2. "The Court of Appeal, either on its own initiative or at the request of the parties concerned, may order further investigations to be carried out if deemed necessary to reach its decision".

Reference to the possibility provided under Article 15.3 of the FD for the issuing judicial authority to forward at any time additional information to the executing judicial authority is not made in the Italian Law.

Article 16. Decision in the event of multiple requests

Art 16.1.-16.3. of the FD concerning the event of multiple requests is transposed without notable discrepancies in Art 20.1.- 20.3. of the Italian law,[86] apart for the

[86] Article 20 Multiple surrender requests

Article 20.1. When two or more Member States issue European arrest warrants for the same person, the Court of Appeal decides which of the European arrest warrants shall be executed, and shall take into

possibility provided under Art 20.2 for the Court of Appeal deciding on the case to carry out the "necessary investigations" in addition to the possibility to seek the advice of Eurojust. The Court of Cassation held that the procedure provided for in Article 20 is not to be applied in case two EAW have been issued by two different authorities of the same member state (Sez. 6, No. 17951 - 28/4/2008 -5/5/2008, Germany).

Article 17. Time limits and procedures for the decision to execute the EAW

Time limits and procedures for the decision to execute the EAW provided for under Article17 of the FD are transposed in the specific articles of the Italian Law describing the procedure the time limit is applied to. So Article 17.2. of the FD the 10 days period to have a final decision on the execution of the EAW once consent has been given by the requested person is transposed in Article 14.4.-14.5. of the Italian Law.[87] The Court of Cassation held that the fact that according to art 14.4. "the Court of Appeal shall proceed without delay, and in any case within ten days, to decide on the execution of the request, after hearing the opinion of the general public prosecutor, the legal counsel and, if appearing in court, the requested person", does not imply that the judge cannot take his or her decision before the ten days deadline. Accordingly, the Court of Cassation has upheld the decision of the Court of Appeal that, in the case of a validly expressed consent, decided against the surrender because the translation of the request was missing, even if the ten day deadline had not expired (Sez. 6, No. 17306 - 20/3/2007-7/5/2007 - Germany). Article 17.2 of the Italian Law transposes[88] the time limit

account all the circumstances and in particular the gravity and place of the offences, and dates of issue of the European arrest warrants, as well as whether the warrants have been issued during a criminal procedure or for execution of a custodial sentence or detention order.

Article 20.2. The Court of Appeal may carry out the necessary investigations as well as seek the advice of Eurojust when deciding the action referred to in paragraph 1.

Article 20.3. When a the same person is subject to a European Arrest warrant and a request for extradition by a third country, the Court of Appeal competent for the warrant arrest, after consultation with the Minister for Justice, decides whether the European arrest warrant or the extradition request takes precedence, taking into account the gravity of the facts, the order of presentation of the requests and any other element deemed useful for making the decision.

[87] 14.4. In the case of validly expressed consent, the Court of Appeal shall proceed without delay, and in any case within ten days, to decide on the execution of the request, after hearing the opinion of the general public prosecutor, the legal counsel and, if appearing in court, the requested person.

14.5. The order issued by the president of the Court of Appeal pursuant to paragraph 4 shall be promptly deposited with the clerk of the court, duly notifying the legal counsel and the requested person, as well as the general public prosecutor. All the parties are entitled to receive a copy of the order.

[88] Article 17. 2. The decision shall be issued within sixty days from the execution of the precautionary measure contained in articles 9 and 13. Should it prove impossible for reasons of force majeure to respect the said terms, the president of the Court of Appeal shall notify the Minister of Justice of the reasons, and the latter shall notify the requesting Member State, also via Eurojust. In this case, the time limit may be extended by thirty days.

of sixty days for taking the final decision in cases in which consent has been given by the requested person, provided for under Art 17.3 of the FD and describe the procedure provided for under Art 17.4 of the FD to notify the requesting Member State in case such time limit cannot be respected ("for reasons of force majeure" is added in the Italian Law, while the reference to "giving the reasons for the delay" is omitted), extending the time limit of 30 days. The Italian Law add that such notification can be given "also via Eurojust". While Art 17.4 of the FD refers also to the failure in respecting the time limit in case of consent to surrender given by the requested person, Article 17.2 of the Italian Law does not.

The provision to give reasons for the refusal to execute a EAW (Art 17.6 of the FD) is transposed under Article 17.6. of the Italian Law[89] for decisions of the Court of Appeal (though no explicit reference is made to give reasons, reasons are a part of the decision), under Article 22.4. in case of decision of the Court of cassation.[90]

Article 17.7. of the FD[91] which describes the action to be undertaken in case of not respect of the time limits set in Art 17. of the FD are only partially transposed in Article 21 of the Italian Law, under which "If the decision is not made within the time limits set in articles 14 and 17, the requested person shall be immediately released" and in Art 17.2 where is mentioned that the notification that the 60 days limit cannot be respected can be given "also via Eurojust".

Article 18. Situation pending the decision and Article 19. Hearing the person pending the decision

Article 18. is transposed under Article 15.1. and Article 15.3 of the Italian Law on "Temporary measures pending the decision" according to which "15.1. If the European arrest warrant has been issued during a criminal prosecution, the president of the Court of Appeal, at the request of the issuing judicial authority and for the purpose of allowing

[89] Article 17. 6. At the conclusion of the discussion in camera, the decision shall be read out immediately. The reading shall be considered as notification to the parties, whether present or not, who are entitled to receive a copy of the measure.

[90] Article 22. 4. The decision shall be deposited at the conclusion of the hearing and accompanied by a specific statement of the underlying grounds. Should it prove impossible to draw up this statement, the Court of Cassation, after in any case reading out the decision, shall ensure that the statement of the underlying grounds is deposited within five days of reaching the decision.

[91] 17.7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, 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 European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.

the urgent investigations deemed necessary by the latter to be carried out, shall authorise the questioning of the requested person held, or else arrange for his or her temporary transfer to the issuing Member State" and "15.3. When ordering the temporary transfer of the requested person, the president of the Court of Appeal shall inform the Minister of Justice in order to ensure the prompt notification of the requesting judicial authority, also to facilitate the necessary arrangements concerning the conditions and duration of the transfer. Account shall in any case by taken of the need for the requested person to be returned in order to be able to attend the hearings related to the procedures for executing the arrest warrant."

Article 19 of the FD is transposed under paragraph 2. of the same article of the Italian Law according to which "In granting authorisation to question the requested person, the president of the Court of Appeal shall inform the Minister of Justice to ensure the prompt notification to the requesting judicial authority, and all the necessary agreements referring to the date of the beginning of the act. Questioning shall be carried out by a magistrate of the Court of Appeal nominated by the president, if necessary assisted by a person designated by the requesting authority in accordance with the law of the issuing Member State and by an interpreter, if required. The procedures and guarantees governing the questioning mentioned in articles 64, 65, 66 and 294, paragraph 4, of the code of criminal procedure shall apply. A formal record shall be made of the questioning".

Article 20. Privileges and immunities

The provisions in case the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing member state are transposed in Article 17.3 of the Italian law which is part of the procedure regulating the decision on the execution request in front of the Court of Appeal.

According to Article 17. 3. "Should the requested person be granted immunity recognised by the Italian legal system, the time limit for taking the decision shall begin, starting from the day on which the Court of Appeal has been notified that immunity has been waived. If the decision regarding the waiving of immunity is the responsibility of an Italian state authority, the court shall make the necessary request".

Article 21. Competing international obligations

Article 21. of the FD, with the exception of its last phrase,[92] is transposed in its first part under art 38 of the Italian Law -International obligations- "Article 38. 1. The present law shall not prejudice the international obligations of the Italian State where the requested person has been extradited from a third State and where that person is protected by provisions of the arrangement under which he or she was extradited concerning speciality. In such cases the Minister of Justice shall promptly request the consent of the State from which the requested person was extradited so that he or she can be surrendered to the Member State. Article 38. 2. In the case described in paragraph 1, section two, the time limits referred to in Chapter I of Title II shall start running from the day on which these speciality rules cease to apply".

Article 22. Notification of the decision

Notification of the decision is transposed under art 17.7 for decisions of the Court of Appeal "The decision shall be transmitted immediately, also by fax, to the Minister of Justice, who shall then inform the competent authorities of the issuing Member State as well as, in the case of a decision to grant the request, the international police co-operation service", and under art 22.5 for decisions of the Court of Casation "A copy of the decision shall be immediately transmitted, also via fax, to the Minister of Justice".

Article 23. Time limits for surrender of the person

Article 23 of the FD is transposed under Art 23 of the Italian law. Reference to the fact that The person requested should be surrendered as soon as possible (Article 23.1 of the FD) is not made while Art 23.1 of the Italian law state that "The person requested shall be surrendered to the issuing Member State no later than ten days after the final decision on the execution of the European arrest warrant, or after the order referred to in article 14, paragraph 4, in accordance with the procedure and understanding agreed through the good offices of the Minister of Justice", transposing the rest of Art 23.1 and 23.2 of the FD. The Court of Cassation ruled that expired the ten days provided for by Article 23, 1. for the surrender of the requested person without surrender, the efficacy of the final decision with which it has been given execution to the EAW must be deduced

[92] Pending the decision of the State from which the requested person was extradited, the executing Member State will ensure that the material conditions necessary for effective surrender remain fulfilled.

and decided through an *incidente di esecuzione* in front of the Court of Appeal (Sez. 6, No. 21664 - 16/5/2007-1/6/2007, Austria).

Delay for circumstances beyond the control of any of the member states (Article 23.3 of the FD) and postponement of surrender for serious humanitarian reasons (Article 23.4 of the FD) are transposed under Article 23.2. – 23.4. of the Italian Law "Article 23.2. If the surrender of the requested person within the time limit set in paragraph 1 is prevented by force majeure, the president of the Court of Appeal or the judge delegated by him, after suspending execution of the warrant, shall immediately notify the Minister of Justice who shall then inform the judicial authority of the issuing Member State. Article 23.3. On humanitarian grounds or if there are substantial reasons for believing that surrender would endanger the requested person's life or health, the president of the Court of Appeal, or the judge delegated by him, may issue a reasoned decree suspending the execution of the surrender, immediately notifying the Minister of Justice thereof. Article 23.4. In the cases mentioned in paragraphs 2 and 3, there being no further grounds for suspension, the president of the Court of Appeal, or the judge delegated by him, shall promptly notify the Minister of Justice who shall negotiate a new date for surrender with the judicial authority of the issuing Member State. In this case the time limit specified in paragraph 1 shall run from the agreed new date".

According to the Court of Cassation case law, once the surrender to the issuing authority has been ordered, issues (censure) concerning the status libertatis loose their interest (are not of interest anymore for the court) because following the final decision on the surrender issued according to law 69/2005, begins a phase which is merely executive and within which, within a very short time, and if there are not issues of force majeure (Article 23, 2.), the requested person must be physically surrendered to the issuing State. Given the nature merely executive of the event, it cannot be raised a question of pericula libertatis (Sez. 6, No. 17631 - 3/5/2007-8/5/2007, Germany; Sez. 6, No. 17632 - 3/5/2007-8/5/2007, Germany; Sez. 6, No. 11325 - 12/3/2008-13/3/2008, Romania; Sez. 6, No. 15627 - 14/4/2008-15/4/2008, Romania). There is a difference in this with the extradition procedure, where, after the jurisdictional phase, the decision concerning the extradition is subject to the evaluation of the political authority.

In the Italian Law, the release of the person is still being held in custody upon expiry of the time limits referred to in Article 23.2 to 23.4 of the FD, and provided for under Article 23.5 of the FD is subordinated to the condition that the requested person "is not responsible for the non execution of the surrender. In such a case the time limit is suspended until the impediment ceases" (Article 23.5. of the Italian Law). The Court of

Cassation ruled that it is allowed the re-issuing of the custodial measure, once the release of the requested person has been ordered after the expiration of the ten day limit provided for in Article 23, 5., standing the needs foreseen within article 274.b of the code of criminal procedure (Sez. 6, No. 32 - 14/11/2007-3/1/2008, Austria). Also, the case in which for needs of internal justice needs the surrender is postponed, is not to be considered as a case in which the non execution of the surrender is responsible the requested person (Article 23, 5.). The Court of Cassation has ruled that the responsibility of the subject imply an "absolute" impediment which originated directly from the subject. Where the impediment to the surrender originate from an initiative of the State of which the requested person is addressee, and is subject to the initiative of the Court of Appeal (Sez. 6, No. 17606 - 1/2/2007-8/5/2007, France).

Article 24. Postponed or conditional surrender

Article 24 of the FD is transposed under Art 24 of the Italian law without relevant modifications apart the fact that the Italian law do not make reference to the last phrase of Article 24.2 of the FD according to which "The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State".

According to Article 24. of the Italian Law "Article 24.1. The Court of Appeal may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in Italy or, if he or she has already been sentenced, so that he or she may serve a sentence passed for an offence other than that referred to in the European arrest warrant. Article 24.2. In the case described in paragraph 1, if requested by the issuing judicial authority, the Court of Appeal may, after hearing the judicial authority competent for the ongoing prosecution or for the execution of the final decision of conviction, order the temporary transfer of the requested person on the agreed conditions. According to the Court of Cassation the power of the Court of Appeal to postpone the surrender of the requested person so that he or she may be prosecuted in Italy or, if he or she has already been sentenced, so that he or she may serve a sentence passed for an offence other than that referred to in the EAW, imply an evaluation on the opportunity which must take into account of the status of the proceeding and of the seriousness of the crime (Sez. 6, No. 39772 - 24/10/2007-26/10/2007, Romania). The Court of Cassation has considered correctly exercised this discretional power when the postponement has not been granted in case of not imminent execution of final sentence and with the celebration of appeal decision against the sentence of first instance (Sez. 6, No. 45508 - 14/12/2005-15/12/2005, Austria).

The requested person cannot be considered responsible as provided for Article 23,5. for the postponement to the surrender so that he or she may be prosecuted in Italy or, if he or she has already been sentenced, so that he or she may serve a sentence passed for an offence other than that referred to in the European arrest warrant (Sez. 6, No. 17606 - 1/2/2007-8/5/2007, France).

Article24.1 reproduce a disposition similar to that of article19 of the European convention for extradition enforced by art 709 of the criminal code of procedure where it provides that, in case of pending proceeding in Italy, the surrender is postponed till the pending proceeding is concluded. Provisions of Article 9.5 according to which are observed, as applicable, the dispositions of the title I book IV of the criminal code of procedure - almost analogue of art 714.2 on extradition matter- do not extend such procedure to the dispositions which concerns the personal precautionary measures time limits. Both procedures provide for time limits for the personal precautionary measures to be established in relation to each phase of the procedure. In particular, art 23,1 provide that The person whose surrender has been requested must be surrendered to the issuing member states within ten days from the irrevocable judgement with which is given execution to the European Arrest Warrant. If the surrender do not take place within such time limit, the person must be released according to article 23.5 provided that the requested person is not responsible for the non-execution of the surrender. Article 23.2 and 23.3 provide for specific reasons for the suspension of the terms which do not include the postponement for prosecution in Italy.

In relation to the effects that the postponement of the surrender has on the precautionary measure, there has been divergent opinions of the Court of Cassation.

According to a first interpretation, in case of postponement to “satisfy the Italian justice”, it should be applied the regula iuris established by the Sezioni Unite according to which the terms provided for by article 303,4. and article 308 of the code of criminal procedure do not apply to the precautionary measures which are being executed at the time of postponement (Sez. Un., No. 41540 - 28/11/2006-18/12/2006). This should result in the repeal of the precautionary measure and in the release of the person to be surrendered. But the peculiarity of the surrender procedure provided for by the decision framework and implemented by law 69/2005, while it does not allow for the precautionary measure time limits provided for by the Italian procedure, it cannot by itself result in a repeal of the precautionary measure but only in its suspension for the period of time for which the surrender has been postponed. Once the issue at the origin of the postponement of the surrender and of the precautionary measure has been dealt with,

the precautionary measure must be reactivated, without a new court order (provvedimento dispositivo) but just with the recognition (atto ricognitivo) of the competent authority. This is done in order to proceed to the surrender within the time limit set in Article 23,1.

According to this regula iuris, the Court of Appeal and the public prosecutor general provide to request to the judicial offices where the proceedings are talking place and to the competent prison service office, for the timely communication for the situations which end the suspension ex art 24.1. In this context the Court of Appeal, stated the end of the need for suspension of the precautionary measure, will proceed with the needed actions to ensure the surrender of the requested person (Sez. 6, No. 7709 - 19/2/2007-23/2/2007, Germany).

According to a second interpretation, in case the surrender to the issuing State is postponed for reasons of Italian justice needs, according to article 24, the precautionary measure must be repealed (revoked) (Sez. 6, No. 331 - 5/12/2007- 7/1/2008, France)

In another sentence, ordering the release of a person, the Court of Cassation has stated that in such cases the measure loses its efficacy (perde efficacia) as the EAW system, in analogy with what set for the general passive extradition procedure (article 714,4 code of criminal procedure), there is an autonomous discipline for the time limits of the precautionary measures (article21 and art 23 law 69/2005) which preclude the postponement set in article 9.5 law 69/2005 (Sez. 6, No. 17606 - 1/2/2007-8/5/2007, France).

Article 25. Transit

Of Article 25 of the FD, only Article 25.1 (conditions for refusing transit and to which subordinate it)[93] and 25.2 (designation of an authority responsible for receiving

[93] 25.1 of the FD - Each Member State shall, except when it avails itself of the possibility of refusal when the transit of a national or a resident is requested for the purpose of the execution of a custodial sentence or detention order, permit the transit through its territory of a requested person who is being surrendered provided that it has been given information on:

(a) the identity and nationality of the person subject to the European arrest warrant;

(b) the existence of a European arrest warrant;

(c) the nature and legal classification of the offence;

(d) the description of the circumstances of the offence, including the date and place.

Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the Member State of transit, transit may be subject to the condition that the person, after being

transit requests)[94] are transposed in the Italian law under Art 27.1. to 27.3 "Article 27.1. The request for transit through the territory of the State of a person who is to be surrendered is received by the Minister of Justice. Article 27.2. The Minister of Justice may refuse the request when: a) he has not received information concerning the identity and nationality of the person for whom the European arrest warrant has been issued, the actual existence of a European arrest warrant, the nature and juridical nature of the offence and the description of the circumstances of the offence, including the date and place it was committed; b) the person requested is an Italian national or is resident in Italy and the transit is requested for the purpose of executing a custodial sentence or a detention order. Article 27.3. In the case of a transit request involving an Italian national or a person resident in Italy, the Minister of Justice may make the transit subject to the condition that the person, after being heard, is returned to Italy in order to serve any custodial sentence or detention order that may be issued against him or her in the issuing Member State".

No reference is made to Art 25.3 to 25.5 of the FD[95]

4.2.2.4. Chapter 3: Effects of the Surrender - Article 26-30

Article 26. Deduction of the period of detention served in the executing member state

The provisions under Article 26.1 of the FD concerning the deduction of the period of detention served in the executing member state in cases in which the issuing authority is Italian are transposed under Article 33 of the Italian Law - Counting preventive custody undergone abroad "Article 33.1. The period of preventive custody undergone abroad in execution of the European arrest warrant shall be computed in

heard, is returned to the transit Member State to serve the custodial sentence or detention order passed against him in the issuing Member State.

[94] 25.2 of the FD - Each Member State shall designate an authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests. Member States shall communicate this designation to the General Secretariat of the Council.

[95] Article 25.3 to 25.5 of the FD

25.3 The transit request and the information set out in paragraph 1 may be addressed to the authority designated pursuant to paragraph 2 by any means capable of producing a written record. The Member State of transit shall notify its decision by the same procedure.25.4. This Framework Decision does not apply in the case of transport by air without a scheduled stopover. However, if an unscheduled landing occurs, the issuing Member State shall provide the authority designated pursuant to paragraph 2 with the information provided for in paragraph 1.

25.5. Where a transit concerns a person who is to be extradited from a third State to a Member State this Article will apply mutatis mutandis. In particular the expression "European arrest warrant" shall be deemed to be replaced by "extradition request".

accordance with and pursuant to articles 303, paragraph 4, 304 and 657 of the code of criminal procedure". On this point, the Italian Constitutional Court (sentence 143/2008) has declared article 33 unconstitutional in the portion that it does not foresee that The period of preventive custody undergone abroad in execution of the European arrest warrant shall be computed also in accordance with and pursuant to articles 303, paragraph 1, 2 and 3 of the code of criminal procedure. Also on this article, the Italian Constitutional Court, with court order n. 60, 23-27 February 2009, declared the manifest inadmissibility of the legitimacy question on article 19.1.c. in relation to Article 3. and 13 of the Italian Constitution.

The rules for the application of the provisions for the deduction of the period of detention served in the executing member state are provided under Article 23.6. of the Italian law as to the obligations of the executing Italian judicial authority to provide the required information to the issuing authority (Article 26.2. of the FD) "Article 23.6. At the time of surrender the Court of Appeal shall transmit to the issuing judicial authority all the information required to allow the period of detention served pre-emptively arising from the execution of a European arrest warrant to be deducted from the complete duration of detention as a consequence of a sentence, or rather the definition of the maximum length of preventive custody".

Article 27. Possible prosecution for other offences

The principle of speciality is transposed under article 32 of the Italian implementation law" The surrender of the requested person is subject to the limits imposed by the principle of speciality, with the exceptions provided in article 26 regarding the passive surrender procedure". The Court of Cassation held that the Principle of speciality is applied also in the execution phase (Sez. 6, No. 40256 - 19/10/2007-31/10/2007 - Italy)

According to Article 26.1. of the Italian implementation law, passive surrender procedure "is always subject to the condition that, for an offence committed prior to the one for which it has been granted and of different nature, the requested person is not prosecuted, nor deprived of his or her personal liberty in execution of a custodial sentence or detention order, nor subject to any other measure restricting personal liberty". At the same time, though transposing Article 27.3. of the FD, Article 26, 2. of the Italian implementation law states that this conditions do not apply when: "a) the requested person, having had the opportunity to leave the territory of the Member State

to which he or she has been surrendered, has not done so within forty-five days of his or her final discharge, or has voluntarily returned to that territory after leaving it; b) the offence is not punishable by a custodial sentence or detention order; c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty; d) when the person is liable to a penalty or a measure not involving the deprivation of liberty, including a financial penalty, even if this may restrict his or her personal liberty; e) where the requested person consented to be surrendered, as well as renouncing the speciality rule, in accordance with article 14 [of the Italian implementation law]; f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be recorded before the competent judicial authorities of the issuing Member State in a form equivalent to that indicated in article 14 of the Italian implementation law". According to the Court of Cassation, failure in the verification of the principle of speciality is not to be considered a vice of the surrender decision, as it is a guarantee provided both by the Frameword Decision and by the implementation law which violation can be raised by the requested person (Sez. 6, No. 9202 - 28/2/2007-2/3/2007, Belgium). It has been observed by the Court of Cassation that there is no reason to presume that the issuing country do not follow the principle of speciality (Sez. 6, No. 25421 - 28/6/2007-3/7/2007, Germany).

According to Article 26.3. of the Italian implementation law "After the surrender, should the issuing Member State request prosecuting the requested person or to subject him or her to a measure restricting their liberty, the Court of Appeal having executed the arrest warrant shall take the required steps. To this end, the court shall make sure that the request of the foreign State contains the information mentioned in article 8, paragraph 1, of the Framework Decision, accompanied by the relevant translation, and shall make its decision no later than thirty days after receipt of the request. Consent shall be forthcoming when the offence for which the surrender of the person has been requested allows the surrender of the person in accordance with the Framework Decision. The court shall refuse consent when one of the cases provided for in article 18 [of the Italian implementation law] applies. The Court of Cassation held that if the requested person leave the territory of the Member State to which he or she has been surrendered within 45 days of his or her final discharge for a territory (Spain) different from the one of the surrendering member state (Switzerland), an EAW can be issued an offence committed prior to the one for which it has been granted and of different nature without re-requesting consent to the executing judicial authority of the first request

according to the principle of speciality provided for by law 300/1963 (Sez. I, No. 9000 - 04/02/2009 - 27/02/2009, Italy).

Article 28. Surrender or subsequent extradition

Surrender or subsequent extradition is transposed in Article 25 of the Italian implementation law which is titled "**Prohibition** of surrender or subsequent extradition". According to Article 25.1. of the Italian implementation law "The surrender of the requested person is subject to the condition that he or she **may not be** surrendered to another Member State for the execution of a European arrest warrant issued for an offence committed prior to the surrender itself without the approval of the Court of Appeal that ordered the execution of the arrest warrant nor be extradited to a third State without obtaining consent to the subsequent extradition in accordance with the international conventions applicable to the State and with article 711 of the code of criminal procedure".

According to Article 25.3. of the Italian implementation law, transposing Article28.2. of the FD states that "The condition mentioned in paragraph 1 concerning surrender to another Member State is not applicable: a) when the requested person, having had an opportunity to leave the territory of the State to which he or she has been surrendered, has not done so within forty-five days of his or her final discharge, or has returned to that territory after leaving it; b) when the requested person has consented, by means of a declaration delivered before the competent judicial authority of the issuing Member State and officially recorded, to be surrendered to another Member State; c) when the requested person is not subject to the speciality rule, in accordance with article 26, paragraph 2, sections a), e) and f) and paragraph 3."

Article 25, 2. of the Italian Law transposes the request to surrender to another member state (Art 28.3 of the FD) "If requested by the competent judicial authority of the issuing Member State, the Court of Appeal shall grant its consent to the surrender of the requested person to another Member State when the offence for which the consent has been requested leads to surrender pursuant to the present law. Concerning the request for consent accompanied by the elements mentioned in article 6, the Court of Appeal shall decide, after hearing the opinion of the general public prosecutor, no later than thirty days after receipt of the request".

Article 29. Handing over property

In relation to Article29 of the FD on the handing over of property, The Italian implementation law on the one hand, under art 34.1 regulates the request of the Italian judicial authority in the case of seizure or confiscation of property, making it competence of the general public prosecutor at the Court of Appeal, [96] on the other hand, under Article 35. regulates the *Seizure and handing over of property* at the request of the foreign issuing judicial authority, making it competence of the Court of Appeal (which can proceed to the seizure also on its own initiative)[97] and under Article 36 regulating the

[96] Article 34.1. With the European arrest warrant issued in accordance with article 28 the general public prosecutor at the Court of Appeal shall request the judicial authority of the executing Member State to hand over any property subject to enforceable seizure or confiscation order issued by a competent judge, at the same time transmitting a copy of the seizure orders.

[97] Article 34 (Request in the case of seizure or confiscation of property)

Article 34.1. With the European arrest warrant issued in accordance with article 28 the general public prosecutor at the Court of Appeal shall request the judicial authority of the executing Member State to hand over any property subject to enforceable seizure or confiscation order issued by a competent judge, at the same time transmitting a copy of the seizure orders.

Article 35 (Seizure and handing over of property)

Article 35.1. At the request of the issuing judicial authority or on its own initiative the Court of Appeal shall seize any property required as evidence or liable for confiscation insofar as it represents the product, the profit or the price of the offence of the assets of the requested person and within the limits set in the following paragraphs.

Article 35.2. The request mentioned in paragraph 1 contains the specification whether the surrender is necessary only for the purpose of evidence or for that of confiscation. Should this specification not be included in the request the president of the Court of Appeal shall invite the requesting judicial authority to transmit it.

Article 35.3. The Court of Appeal shall issue a reasoned request, after hearing the opinion of the general public prosecutor. If compatible, the provisions contained in articles 253, 254, 255, 256, 258, 259 and 260, paragraphs 1 and 2 of the code of criminal procedure shall apply.

Article 35.4. The handing over of the seized property to the requesting judicial authority shall take place in accordance with the conditions and agreements arranged with the judicial authority itself through the Minister of Justice.

Article 35.5. When the handing over is requested for the purpose of evidence, the Court of Appeal shall order the handover to be subject to the condition that the property be returned once the requirements of the legal proceedings have been satisfied.

Article 35.6. When the handing over of property is requested for the purpose of confiscation, the Court of Appeal shall order its seizure safeguarding the rights specified in paragraph 9 as well as the requirements of the Italian judicial authority pursuant to article 36. In any case when granting the seizure the court shall order that the handing over must be subject to the condition that no acquired rights shall accrue in accordance with paragraph 9.

Article 35.7. The property seized shall be handed over even when the European arrest warrant cannot be executed owing to the death or escape of the requested person.

Article 35.8. The provisions contained in articles 322, 324 and 325 of the code of criminal procedure shall apply.

Article 35.9. Any rights acquired in the property referred to in paragraph 1 by the Italian State or by third parties shall be preserved.

case of concurrent seizure of property, when, the property requested is already under seizure by order of an Italian judicial authority as part of an ongoing criminal[98]

Article 30. Expenses

In line with Article 30 of the FD, under Article 37.1. of the Italian implementation law, the expenses incurred in Italian territory for the execution of a European arrest warrant or for the real measures adopted must be borne by the Italian State, while all other expenses must be borne by the member state issuing the European Arrest warrant or requesting real measures. An interesting clause is introduced under Article 37.2. stating that "The implementation of the present article must not entail new or greater costs to the State budget". The Court of Cassation held that the provisions according to which the Expenses incurred in Italian territory for the execution of a European arrest warrant or for the real measures adopted shall be borne by the Italian State do not concern the appeal system (regime delle impugnazioni) (Sez. 6, court order No. 7915 - 3/3/2006-7/3/2006, Belgium)

Also on this subject the expenses incurred in Italian territory for the execution of a European arrest warrant, Article 12.4 of the Italian implementation law specify that expenses for activities that follows the arrest by initiative of the judiciary police (Article12) must be carried out drawing on the ordinary funds of the Ministry of Justice.

4.2.2.5. Chapter 4: General and Final Provisions - Article 31-35

Article 31. Relation to other legal instruments

Not applicable / not transposed

Article 32. Transitional provision

[98] Article 36

(Concurrent seizure of property)

Article 36.1. In the case of property requested to be handed over for seizure by the judicial authority of the Member State already being under seizure ordered by the Italian judicial authority as part of an ongoing criminal proceeding and its confiscation foreseen by the Italian law, the handing over may be ordered for the sole purpose of it being used as evidence and with the prior authorisation of the Italian judicial authority which shall take into account the limits imposed by article 35, paragraph 9.

Article 36.2. The handing over of property is subject to the same conditions as in paragraph 1 when it consists of property already subjected to seizure in a civil proceeding in accordance with articles 670 and 671 of the code of civil procedure.

Article 40 (Transitional provisions) Article 40. 1.The provisions contained in the present law shall apply to requests for execution of European arrest warrants issued and received after the date of its entry into force. Article 40. 2.To the requests for execution referring to offences committed prior to 7 August 2002, with the exception of the provisions contained in paragraph 3, the provisions regarding extradition in force prior to the date of entry into force of the present law shall continue to apply.

The transitory provision foreseen under Article 40, paragraph 3, of the Italian law 69/2005 finds no correspondence in the Framework Decision. The regime of double criminality provided for under Article 2.2 of the Framework Decision and transposed under Article 8 of the Italian Law 69/2005 apply only to offences committed after the date of coming into force of the Italian transposition law.[99]

The Court of Cassation held that according to Article 40. 1. the provisions contained in the law 69/2005 are applied to requests for execution of European arrest warrants issued and received after 14 May 2005, and it applies only to offences committed after 7 August 2002 (Article 40. 2.) while the mandatory surrender (article8) applies only for facts which have taken place after the 14 of May 2005 (Sez. 6, No. 44235 - 24/10/2005-5/12/2005, Austria)

The rules of the EAW are not applied to the supplying surrender request (domanda di consegna supplettiva) (which concerns an extradition request already granted) which concerns offences committed after 7 August 2002 as they must be referred to the norms regulating the extradition (Sez. 6, No. 44866 - 15/11/2007-30/11/2007, Germany).

In case of accession of a new country in the EU, The Court of Cassation has stated that if the extradition procedure begins before the accession to the EU, the extradition procedure is applied, according to the principle "*tempus regit actum*". Furthermore it is not set in any law the conversion of extradition request into EAW, which requires different forms and procedures (Sez. 6, No. 21184 - 10/05/2007-29/5/2007, Romania; Sez. 6, No. 20627 - 22/5/200-25/5/2007, Romania)

In relation to the concept of "pending" the Court of Cassation has stated that it is applied the EAW norms and not the extradition ones when, following the international search or the alert through SIS, carried out before the assession of the State, the arrest by initiative of police has taken place after the entry into force also for that State of the

[99] Article 40.3. The provisions contained in article 8 shall apply solely to offences committed after the date of entry into force of the present law.

new surrender procedure. In other words, the mere diffusion of the researches through Interpol or SIS to the international field of the requested person does not constitute, per se, the beginning of the extradition procedure. On the contrary, the pending of the procedure or the arrest ex article 716 of the code of criminal procedure or the submission of the extradition request not retired before its forward ex art 703,1. of the code of criminal procedure (Sez. 6, No. 40526 - 24/10/2007-5/11/2007, Romania; Sez. 6, No. 47564 - 8/11/2007-28/12/2007 Romania; Sez. 6, No. 631 - 2/3/2006-8/3/2006, Belgium)

The Court of Cassation has stated that in case the procedure of the law 69/2005 is not applied, the extradition request can be correctly identified in the EAW, if the EAW originated from the authority competent to issue the extradition request and the EAW complies with all the requirement of the extradition request (Sez. 6, No. 20428 - 15/2/2007-24/5/2007, Latvia).

Furthermore, a sentence which quash a sentence which erroneously granted the surrender must be done with remittal as the EAW has to be considered equipollent, as to its effects, to the extradition request (Sez. 6, n, 10113 - 21/3/2006-22/3/2006, Romania; Sez. F, No. 31699 - 2/8/2007- 2/8/2007, Germany).

According to the Court of Cassation, requests concerning offences perpetrated before 7 August 2002 must be dealt by Italy according to the extradition procedure (Sez. 6, No. 29150 - 13/7/2007-19/7/2007, Germany).

The Court of Cassation held that the EAW procedure can be followed in cases of offences perpetrated before 7 August 2002 when unified with offences committed after such date (Sez. 6, No. 40412 - 26/10/2007-31/10/2007, France; Sez. 6, No. 46844 - 10/12/2007-17/12/2007, Poland)

In case of executive arrest warrant, if the offence has been committed before the 7 August 2002, it does not matter that the detention has been conditionally suspended and is afterward being unified to others concerning offences perpetrated after such date for the expiration of the conditional suspension (Sez. 6, No. 9394 - 27/2/2008-29/2/2008, Sez. 6, No. 36995 - 26/09/2008 - 29/09/2008, Romania; Sez. 6, 6185 - 06/02/2009 - 12/02/2009, Romania)

The transitional provisions are applied only to passive EAW, they do not apply to EAW issued by Italian authorities (Sez. F, No. 34215 - 4/9/2007-8/9/2007, Italy; Sez. 6, No. 45769 - 31/10/2007-6/12/2007, Italy)

Article 33. Provisions concerning Austria and Gibraltar

Not applicable / not transposed

Article 34. Implementation

Article 1. of the Italian implementing law (General provisions and definitions): Article 1.1."The present law transposes into Italian law the provisions of the Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between member states (2002/584/JHA), hereinafter the "Framework Decision", **insofar as these provisions are compatible with the supreme constitutional principles governing fundamental rights, in terms of freedom and of a just trial**".

Article 39 of the Italian implementing law (Applicable provisions): "Article 39.1. Unless otherwise provided for in the present law, the provisions of the code of criminal procedure and of the complementary laws, wherever compatible, shall apply. Article 39.2. The provisions contained in law no. 742 of 7 October 1969 as subsequently modified referring to the suspension of the time limits of proceedings during the holiday period shall not apply".

According to the Court of cassation article 391 of the code of criminal procedure applies, as recalled by art 39.111 law 69/2005, combined with Article 11 law 69/2005 and article 13 of the Constitution to the hearing for the validation of the arrest (Sez. 6, No. 3640 - 26/01/2006 - 30/01/2006). Also Sez. F, No. 34501 (13/9/2007-17/9/2007 – Romania); on article 39.111 law 69/2005 recalling art 391 of the code of criminal procedure on the subject of right of the requested person to have a legal councel present at the validation hearing). The Court of Cassation has also stated that Article 39.1, on the subject of Arrest at the initiative of the criminal police, recall the provisions of article 390 c.p.p., comma 2 e article 391 c.p.p., comma 7 (Sez. 6, No. 40614 - 21/11/2006-12/12/2006 - Germany).

Article 35. Entry into force

Not applicable / not transposed

4.3. The EAW in action

4.3.1. Issuing an EAW in Italy

In order to issue an EAW both for the prosecution of a crime and for the enforcement of a sentence, there should be evidence that the requested person is, resides, or is domiciled in the territory of one of the EU member states. The *EAW Vademecum,* mentioned above, suggests the application of the *principle of proportionality* to issue an EAW. The judge or the public prosecutor should assess the gravity of the crime, the personality of the perpetrator, the amount of the punishment and the duration of the precautionary measure, also in consideration of the expiry of the terms of the phase. They should also consider the large amount of resources that the enforcement of the arrest warrant requires.

The competent authority to issue an EAW during the investigation and trial phases is the judge who issued the domestic arrest warrant (precautionary measure of prison custody or house arrest). According to our interviews EAWs are not issued for investigative purposes. In general, the request/draft of the EAW is prepared by the public prosecutor of the PPO attached to the first instance Court or to the Court of Appeal who is following the case and who has all the required information to fill the EAW (and A+M form[100]). In prosecution cases, the issue of an EAW requires the existence of a domestic arrest warrant, which, according to article 280.2 of the Code of Criminal Procedure, can be imposed only for offences which are punishable with maximum imprisonment of four years or more. If the request is approved and signed by the judge, the EAW (and A+M) form are sent to the Ministry of Justice and, frequently, also directly to SIRENE[101] and INTERPOL. In any case, the Ministry of Justice faxes the EAW to SIRENE for issuing a SIS Alert 95[102] and to INTERPOL for the diffusion to "EAW Countries" which are not

[100] Form A corresponds to "Supplementary information (Articlee 95(2)). Form M corresponds to "Miscellaneous information".

[101] "SIRENE is the human interface of the SIS [Schengen Information System]" (Schengen Information System, Sirene: Recommendations and Best Practices - December 2002 -EU Schengen catalogue Volume 2, p.12). The Italian SIRENE Division is part of the Service for International Cooperation, within the Central Directorate of Criminal Police of the Public Security Department of the Ministry of Interior. SIRENE Division is a multi-agency office, manned by personnel of the three main Italian Police Forces: Carabinieri, Polizia di Stato and Guardia di Finanza. Its main task "is to reduce the time needed for the information exchange between the Member Countries' law enforcement agencies, without prejudice to the competence of the Interpol Service regarding the Countries which are not party to the Schengen Agreement" (National Presentation of SIRENE Italy http://www.consilium.europa.eu/uedocs/cmsUpload/Sirene-Italy.pdf).

[102] According to Article 95 of the Schengen Agreement (Chapter on Operation And Use Of The Schengen

included in SIS. In practice, it has happened in a few occasions that the request of issuing a SIS Alert 95 was sent by the issuing judicial authority to the Sirene office without informing the Ministry of Justice. For this reason the Sirene office now alerts the Ministry of such events.

Information System):

Article 95

1. Data on persons wanted for arrest for extradition purposes shall be entered at the request of the judicial authority of the requesting Contracting Party.

2. Before issuing an alert, the Contracting Party shall check whether the arrest is authorised under the national law of the requested Contracting Parties. If the Contracting Party issuing the alert has any doubts, it must consult the other Contracting Parties concerned. The Contracting Party issuing the alert shall send the requested Contracting Parties by the quickest means possible both the alert and the following essential information relating to the case:

(a) the authority which issued the request for arrest;

(b) whether there is an arrest warrant or other document having the same legal effect, or an enforceable judgment;

(c) the nature and legal classification of the offence;

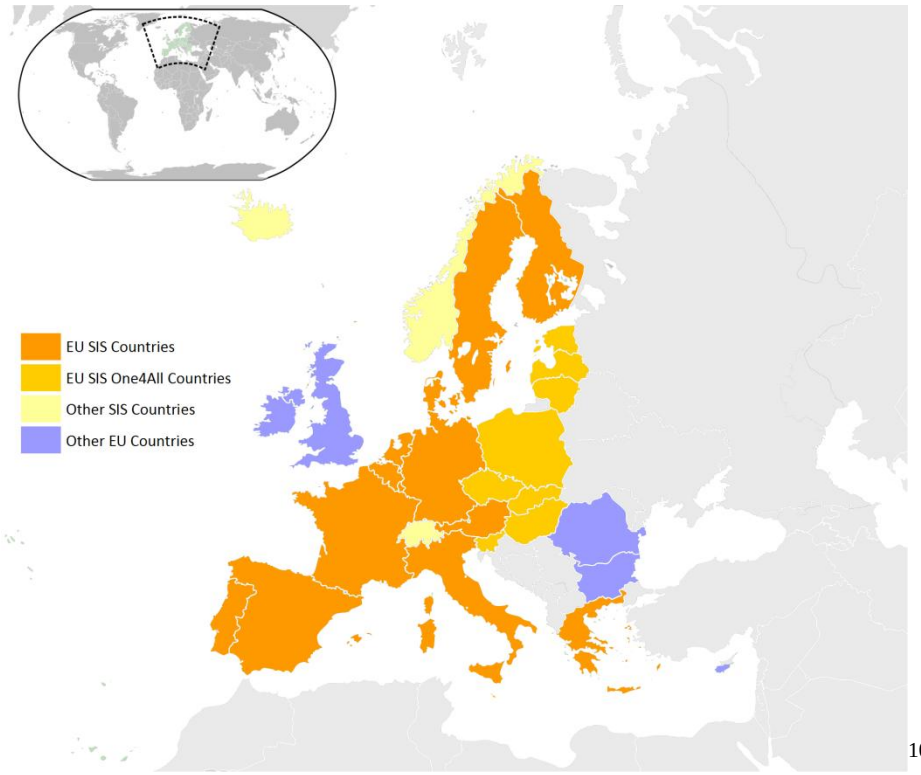
(d) a description of the circumstances in which the offence was committed, including the time, place and the degree of participation in the offence by the person for whom the alert has been issued;

(e) in so far as is possible, the consequences of the offence. 3. A requested Contracting Party may add to the alert in the data file of its national section of the Schengen Information System a flag prohibiting arrest on the basis of the alert until the flag is deleted. The flag must be deleted no later than 24 hours after the alert has been entered, unless the Contracting Party refuses to make the requested arrest on legal grounds or for special reasons of expediency. In particularly exceptional cases where this is justified by the complex nature of the facts behind the alert, the above time limit may be extended to one week. Without prejudice to a flag or a decision to refuse the arrest, the other Contracting Parties may make the arrest requested in the alert.

4. If, for particularly urgent reasons, a Contracting Party requests an immediate search, the requested Contracting Party shall examine whether it is able to withdraw its flag. The requested Contracting Party shall take the necessary steps to ensure that the action to be taken can be carried out immediately if the alert is validated.

5. If the arrest cannot be made because an investigation has not been completed or because a requested Contracting Party refuses, the latter must regard the alert as being an alert for the purposes of communicating the place of residence of the person concerned.

6. The requested Contracting Parties shall carry out the action as requested in the alert in accordance with extradition Conventions in force and with national law. They shall not be obliged to carry out the action requested where one of their nationals is involved, without prejudice to the possibility of making the arrest in accordance with national law.



[103]

The competent authority to issue an EAW for the enforcement of a sentence is the public prosecutor attached to the court that issued the arrest order (*Ordine di Esecuzione e Carcerazione*).[104] According to the Vademecum, an EAW is issued when there is a sentence of at least one year of actual imprisonment. In practice, given the Italian suspension regimen, the sentence must be of at least 3 years imprisonment. Article 656 of the Italian code of criminal procedure describe three tracks to be followed for the execution of detention sentences: the first track include cases with a remaining sentence to be served of more than three years (six years in some specific cases). In these cases the public prosecutor issues the arrest order. The second track include with a remaining sentence to be served of less than three years (six years in some specific cases), the public prosecutor issues the arrest order with suspension (*Ordine di Esecuzione Carceraria con Sospensione*). Finally, the third track includes all cases for

[103] The map is based on the file licensed under the Creative Commons Attribution-Share Alike 3.0 Unportedlicense by the author NuclearVacuum available at http://upload.wikimedia.org/wikipedia/commons/b/ba/EU-Italy.svg

[104] The public prosecutor through the judge indicated in article 665 of the code of criminal procedure who issued the order to execute the custodial sentence of at least one year mentioned in article 656 of the same code, provided that its execution is not suspended (i.e. first offence); the public prosecutor identified in accordance with article 658 of the code of criminal procedure as far as the execution of detention orders is concerned

which the suspension is not applied: sentences of less than three years for cases included in article 656/9.[105]

Again, if an EAW is issued, typically the EAW (A+M) form are sent to the Ministry of Justice and to INTERPOL/SIRENE. In any case, the Ministry of Justice faxes the EAW to INTERPOL/SIRENE for diffusion/issuing a SIS Alert 95. At the same time, the Sirene office keeps informed the Ministry of justice of requests received directly by the issuing judicial authority.

If the requested person is wanted for the execution of more than one sentence, the public prosecutor must fill one EAW (and A+M) form for each sentence and inform the Sirene office about which sentence to use in order to issue the Alert, as SIS allows the entry of just one Alert per person. In general it is inserted the "main" sentence. When the requested person is localized/arrested, The Sirene office inform the executing member state of the existence of more than one sentence and of a plurality of EAWs. As a consequence of the principle of speciality, when more than one EAW exists for the same person, it is necessary that the executing judicial authority decides for the surrender on each one of them. When the surrender takes place, only the sentences for which the EAW has been approved can be enforced. It is still possible, though, to ask the person surrendered to renounce to the speciality clause or, to submit/resubmit an EAW to the executing member state for the sentences for which surrender has not been granted.[106]

As a consequence of both normative restraints and *Vademecum* persuasive reasoning, Italian judges and public prosecutors, typically issue EAWs only in "serious cases" such as terrorism, organised crime, murder, rape, large drug smuggling etc. The existence of other EAWs issued by Italian courts is not checked by the Italian authority issuing an EAW. Checks are made both by the Ministry of Justice and by the SIRENE unit. The SIRENE unit and the Ministry of Justice alert each other that the EAW has already been issued for the same person.

The task to assist the competent judicial authorities and the responsibilities for the administrative transmission and reception of European arrest warrants, as well as for all other official correspondence related, it is delegated by the Minister of Justice

[105] For a broader discussion on the topic, see Di Giorgio G. (2009) "Le attribuzioni del Pubblico Ministero in tema di esecuzione delle pene detentive e di Mandato di Arresto Esecutivo", training seminar "Problemi aperti in materia di esecuzione della pena" Appeal Court of Bologna 30 November 2009

[106] Di Giorgio G. (2009) "Le attribuzioni del Pubblico Ministero in tema di esecuzione delle pene detentive e di Mandato di Arresto Esecutivo", training seminar "Problemi aperti in materia di esecuzione della pena" Appeal Court of Bologna 30 November 2009

(designed as the central authority by the Italian Law 69/05 Art 4. transposing Article7. of the Framework Decision, see section 1.2.2 of the present report) to the Directorate for International cooperation (Ufficio II) within the Directorate General for Criminal Justice.[107] The *Ufficio II* keeps records of all incoming and outgoing EAWs sent from the courts. When an EAW is received from an Italian court (generally the first communication takes place by post or by fax) a case file is created. This file will collect all the documents related to the case sent or received by the *Ufficio II* from then on.

If the location of the person is not known, a SIS Alert 98[108] (or SIS Alert 99[109]) is filed to localize the person. If the person is localized, an Alert 95 and/or an EAW is

[107] The Directorate for International cooperation is located in Rome within the Ministry of Justice building. Directorate is organized in 4 units: EAW, rogatory assistance, extradition and transfer of prisoners and bilateral negotiations.

[108] According to Article 98 of the Schengen Agreement (Chapter on Operation And Use Of The Schengen Information System):

Article 98

1. Data on witnesses, persons summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for acts for which they are being prosecuted, or persons who are to be served with a criminal judgment or a summons to report in order to serve a penalty involving deprivation of liberty shall be entered, at the request of the competent judicial authorities, for the purposes of communicating their place of residence or domicile.

2. Information requested shall be communicated to the requesting Party in accordance with national law and the Conventions in force on mutual assistance in criminal matters.

[109] According to Article 99 of the Schengen Agreement (Chapter on Operation And Use Of The Schengen Information System):

Article 99

1. Data on persons or vehicles shall be entered in accordance with the national law of the Contracting Party issuing the alert, for the purposes of discreet surveillance or of specific checks in accordance with paragraph 5.

2. Such an alert may be issued for the purposes of prosecuting criminal offences and for the prevention of threats to public security:

(a) where there is clear evidence that the person concerned intends to commit or is committing numerous and extremely serious criminal offences; or

(b) where an overall assessment of the person concerned, in particular on the basis of past criminal offences, gives reason to suppose that that person will also commit extremely serious criminal offences in the future.

3. In addition, the alert may be issued in accordance with national law, at the request of the authorities responsible for national security, where there is clear evidence that the information referred to in paragraph 4 is necessary in order to prevent a serious threat by the person concerned or other serious threats to internal or external national security. The Contracting Party issuing the alert shall be obliged to consult the other Contracting Parties beforehand.

4. For the purposes of discreet surveillance, all or some of the following information may be collected and communicated to the authority issuing the alert when border checks or other police and customs checks are carried out within the country:

(a) the fact that the person for whom or the vehicle for which an alert has been issued has been found;

(b) the place, time or reason for the check;

(c) the route and destination of the journey;

(d) persons accompanying the person concerned or occupants of the vehicle;

issued. While a SIS Alert 98 (99) is filed at local level, Alerts 95 are issued only by the SIRENE unit. When receiving an EAW (or A+M forms), the SIRENE office in Rome Italy provides to its translation from Italian to English and enter the data in SIS. The translation is typically made by the operator entering the data. All SIRENE personnel typically speak English at a fair-good level. During the interviews, it was noted though that the task of translating is both delicate and time-consuming, and this may generate problems with the growing number of cases the division is facing. Direct interaction between the public prosecutor/judge following the case and SIRENE may take place in order to better respond to the requirements of the case (i.e. particularly urgent, missing relevant information, ambiguities to be solved to allow a correct translation and the issuing of the Alert etc.). While "an EAW can be issued for several offences at the same time, as long as they are covered by the same domestic arrest warrant or conviction",[110] the SIS alert 95 must refer only to the main offence. This may generate problems in the data enter. All incoming and outgoing messages and documents are recorded in a secure electronic repository.

If the decision at the basis of the EAW is reviewed or retracted, the EAW should be retired and the SIS Alert retired. It happens though that SIRENE is not notified. As a consequence, the notification originally inserted in the SIS appears as being valid. This may give rise to substantial problems. For example, as also noted during the Italian EAW Council of EU peer review, "a person who has been apprehended in Italy and who is subsequently put on trial, without this being communicated to SIRENE, may after his or her release again be detained in a different locality or in a different member state. Police and/or judicial time is thus wasted, and it could also give rise to possible allegations of

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(e) the vehicle used;

(f) objects carried;

(g) the circumstances under which the person or the vehicle was found.

During the collection of this information steps must be taken not to jeopardise the discreet nature of the surveillance.

5. During the specific checks referred to in paragraph 1, persons, vehicles and objects carried may be searched in accordance with national law for the purposes referred to in paragraphs 2 and 3. If the specific check is not authorised under the law of a Contracting Party, it shall automatically be replaced, for that Contracting Party, by discreet surveillance.

6. A requested Contracting Party may add to the alert in the data file of its national section of the Schengen Information System a flag prohibiting, until the flag is deleted, performance of the action to be taken on the basis of the alert for the purposes of discreet surveillance or specific checks. The flag must be deleted no later than 24 hours after the alert has been entered unless the Contracting Party refuses to take the action requested on legal grounds or for special reasons of expediency. Without prejudice to a flag or a refusal, the other Contracting Parties may carry out the action requested in the alert.

[110] Council of the European Union (2009) Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between member states" Report on Italy, 5832/1/09 REV1 p.12

breaches of the law by the executing authority with regard to incorrect data being inserted in the SIS" [111]

After a person has been localized/apprehended in another EU country, the SIRENE office is typically alerted through a Form G[112] sent by the national SIRENE Unit of the Country in which the person has been localized/apprehended. Additional information may be required by the foreign authority. If available, the Office directly provides it through the use of L[113] and M forms. Furthermore, the SIRENE office inform the Ministry of Justice and the issuing authority about the need to provide the translation of the EAW within the required time limit, as well as to provide for eventual additional information asked form the foreign authority. The Ministry of Justice or the issuing judicial authority may also be contacted directly by the foreign authority once the requested person has been apprehended in one of the EU countries. The translation of the EAW is made by the Ufficio II of the Ministry of Justice. English, French, German and Spanish translators are available internally. For other languages the Ufficio II must resort to the services of external translators. As it was noted during the interviews at the ministry personnel, this may generate problems, especially in case of countries with very tight deadlines for the transmission of the official translation. Additional information may be requested by the foreign authority, both in order to evaluate the need for detention measures and to decide on the surrender.

If the surrender is granted, Interpol organizes the transfer of the person, who is arrested by the Frontier Police when passing the border or at the national airport. The Alert 95 is revoked out. In case the surrender is not granted, the foreign authority requires the Italian SIRENE unit to Flag the Alert for that country. The Alert though is still valid for all other SIS countries. Furthermore, the issuing authority may issue a new EAW concerning the same person which results in a new Alert for the same person which is valid also in that country.

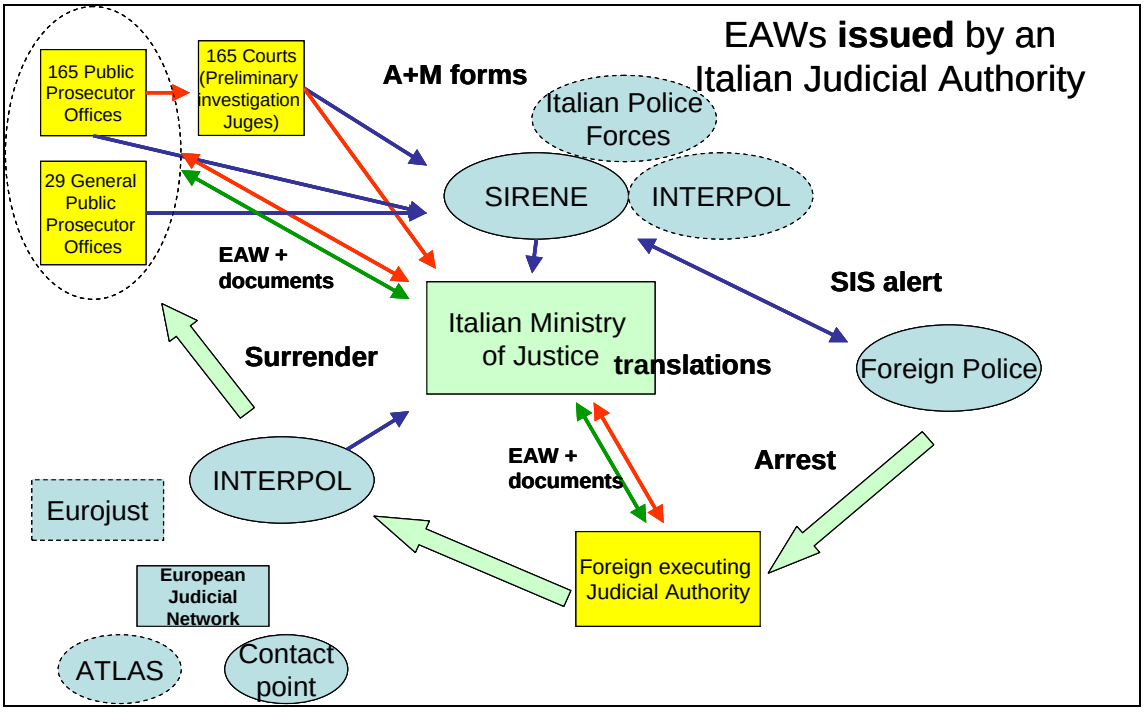
Provisional detention time limits, ranging in general between three months and one year, which is calculated including the detention period matured abroad, may result in the person being released just after the surrender or even in the retirement of the surrender request, while the procedure is being decided in the executing country. In one of the interviews emerged how three persons requested for participation in terrorist acts

[111] Council of the European Union (2009) Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between member states" Report on Italy, 5832/1/09 REV1 p.20

[112] Matching an alert (HIT)

[113] Form L corresponds to "Supplementary information on a person's identity"

were physically surrendered just the day before the provisional detention time limit of the phase of the proceeding.



4.3.2. Executing an EAW

Typically the execution of an EAW begins with the localization/apprehension of the requested person by a local police unit following a check based on an Alert 95 (or on the basis of an Interpol alert -diffusion or red notice) or on a routine check from which the existence of an alert is discovered (i.e. passport control at the airport). If an Alert 95 result when a control is made, the person is immediately taken into custody. The local police immediately contact the SIRENE office which verifies the consistency of the Alert, send a G form (HIT) to the SIRENE office of the issuing country and, if needed, request additional information. This is particularly important to notice cases in which identity thefts have occurred or in which the detail are so vague that no exact identification is possible (i.e. an Alert for Mr. John Brown, no birth date, somatic or other data available). Form M is used for this exchange of information between national SIRENE offices.

The Italian SIRENE unit provides the local police office a “support kit” for the procedure the local police office has to follow according to the Italian implementation law (L 69/05) and the Court of cassation adjourned case law. This kit has been specifically

designed to be easy to use and contain both indications on the activities to carry out and electronic forms to fill out the documents the local police office needs to produce.

The local police office then proceeds with the arrest of the person. This is not necessarily an easy task as the person being arrested should be informed in a language which he or she understands about the EAW and its content, about the possibility of consenting to surrender, about the right to legal counsel and to be assisted by an interpreter. A local office may not have, for example, the availability of a translator with the right competences. The police then informs all the authorities interested providing copy of the report of the procedural steps followed (including the steps taken to identify the requested person) and of the Model A+M to the Court of Appeal of the District, the PPO General attached to it, The Ministry of Justice and the SIRENE unit.

The Ministry of Justice then notifies the requesting member state of the arrest, requesting the transmission of the arrest warrant and eventual additional documentation (in general the issuing country has already been unofficially notified by SIS) translated in Italian as according to Article 6.7. Law 69/05 Italy accepts EAWs only in Italian. Although in cases of urgency the Ufficio II has provided to the translation through its internal translators. A formal certification is not required. The Ufficio II, upon reception of the EAW, makes a check of the EAW and in case of evident problems such as missing parts or the EAW not being translated into Italian, contacts the issuing authority asking it to make the appropriate corrections/integrations. It should be noted that the lack of translation of the EAW into Italian is a common reason for the rejection of an EAW execution on formal grounds.[114] When the Ufficio II receive the EAW from the issuing authority, it then submit it to the Court of Appeal with territorial jurisdiction, which is the court in charge of the decision about the execution of a EAW.

Within 24 hours the person held in custody must be made available by the police to the judges of the Court of Appeal in whose district the arrest has been made. Within forty-eight hours after receiving the report of arrest, the arrest must be validated by the Court of Appeal. If it is evident that the wrong person was arrested or the person was arrested on grounds other than those pursuant to the law, the release of the person is ordered (If the SIS alert is not modified, the person may be arrested again). Also, if the competent issuing authority does not provide an Italian translation of the EAW (or the SIS alert) to the Italian Ministry of Justice or to the competent Judicial Authority within ten

[114] Council of the European Union (2009) Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between member states" Report on Italy, 5832/1/09 REV1 p.25

days of the validation of the arrest by the Court of Appeal, the order imposing the coercive measures is null and void. In case of problems concerning the content or the authenticity of the documents transmitted by the issuing judicial authority, the Court of Appeal can contact directly, or through the Ufficio II of the Ministry of Justice, the issuing authority. If the EAW in Italian is delivered and there is still danger that the person may abscond, new coercive measures can be ordered. The order can be challenged before the Supreme Court of Cassation. The appeal may be lodged by the legal counsel of the requested person or by the public prosecutor general of the Court of Appeal in the interest of the law.

After the first examination by a judge of the Court of Appeal to validate the arrest, a panel of three judges of the Court of Appeal holds a hearing for the discussion of the surrender. This hearing is always held even if the requested person has expressed her or his consent to surrender. However in this case the hearing must take place within ten days from the date in which the consent to surrender has been given (Article14.4. of the Italian implementing law).

Additional information is often requested by the Italian executing judicial authority to the issuing authority to comply with Article 6.3. and 6.4. of the Italian implementing law. One important information is the date in which the crime has been committed. As the Italian implementation law provides that the EAW surrender procedure does not apply to offences committed before 7 August 2002, the lack of indication of the date the offence was committed is a common formal ground for refusal. As already mentioned, according to Article 6.3. surrender is permitted only if a copy of the detention order of personal freedom or custodial sentence that has given rise to the EAW is attached.

According to Article 6.4. of the Italian EAW law, the following clarification are also requested: a report on the offences with evidence of the sources of proof, the time and place in which the offences happened and their legal classification; the text of the legal provisions applicable, with an indication of the type and duration of the penalty, physical description or other information that could help ascertain the identity and nationality of the requested person. If relevant information is missing from the EAW, the executing authority may request it directly or through the Ufficio II.

However, given the case law of the Court of Cassation, while all this information is always requested, failure to receive the report on the offences and the text of the legal provisions applicable or documentation concerning the identification of the requested person does not preclude anymore the surrender.

The request of the court of Appeal is submitted to the Ufficio II, specifying the date of the hearing in camera for which it should be available (Article6.5). The Ufficio II translates the request in the language requested by the issuing Country and submits it to the issuing authority. Ufficio II has a practice to submit such request also to INTERPOL/SIRENE, asking it to inform the corresponding service in the issuing member state in order to ensure the transmission and reduce the possibility of errors through redundancy. [115]

If the issuing authority does not provide such information within 30 days since receiving the request, the court decides anyway on the case. While initially this was considered reason for automatic refusal, the case law of the Court of Cassation has pointed out that a favourable decision may be taken if enough information is available.

The Court of Appeal holds a hearing in the presence of the general prosecutor, the legal counsel of the requested person and the requested person if wants to be present. Immediately following the hearing, the Court of Appeal discusses "in camera" the decision regarding the execution of the EAW. At the conclusion of this discussion, the decision is read out immediately. The reading is considered as notification to the parties, whether present or not. The parties are entitled to receive a copy of the decision (Article 17.6.). [116]

The decision should be issued within sixty days from the execution of the precautionary measures related to the EAW request. The decision is transmitted immediately to the Ufficio II, who informs the competent authorities of the issuing member state also through SIRENE. In the case of a positive surrender decision, INTERPOL is informed by the Ufficio II, in order to organize the physical surrender. From the interviews emerged that in the cases in which it was not possible for the foreign executing authority to arrange surrender within the 10-day deadline, the person is typically released and then re-apprehended for the physical execution of the surrender.

If the Court of Appeal refuses the surrender request, it immediately revokes the eventual precautionary measure related to the EAW procedure and order the release of the requested person

[115] Council of the European Union (2009) Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between member states" Report on Italy, 5832/1/09 REV1 p.29

[116] See also: Council of the European Union (2009) Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between member states" Report on Italy, 5832/1/09 REV1 p.31

The decision of the Court of Appeal on the surrender request may be challenged before the Court of Cassation. The appeal may be lodged by the legal counsel of the requested person or by the public prosecutor general of the Court of Appeal. An appeal is possible also against a surrender decision in a case where the requested person concerned has given her or his consent to the surrender. The appeal must be lodged within 10 days of notification of the decision of the Court of Appeal and suspends the execution of the surrender decision. The short span time of available has been criticized by lawyers as it does not provide, in their opinion, enough time to prepare the documents.

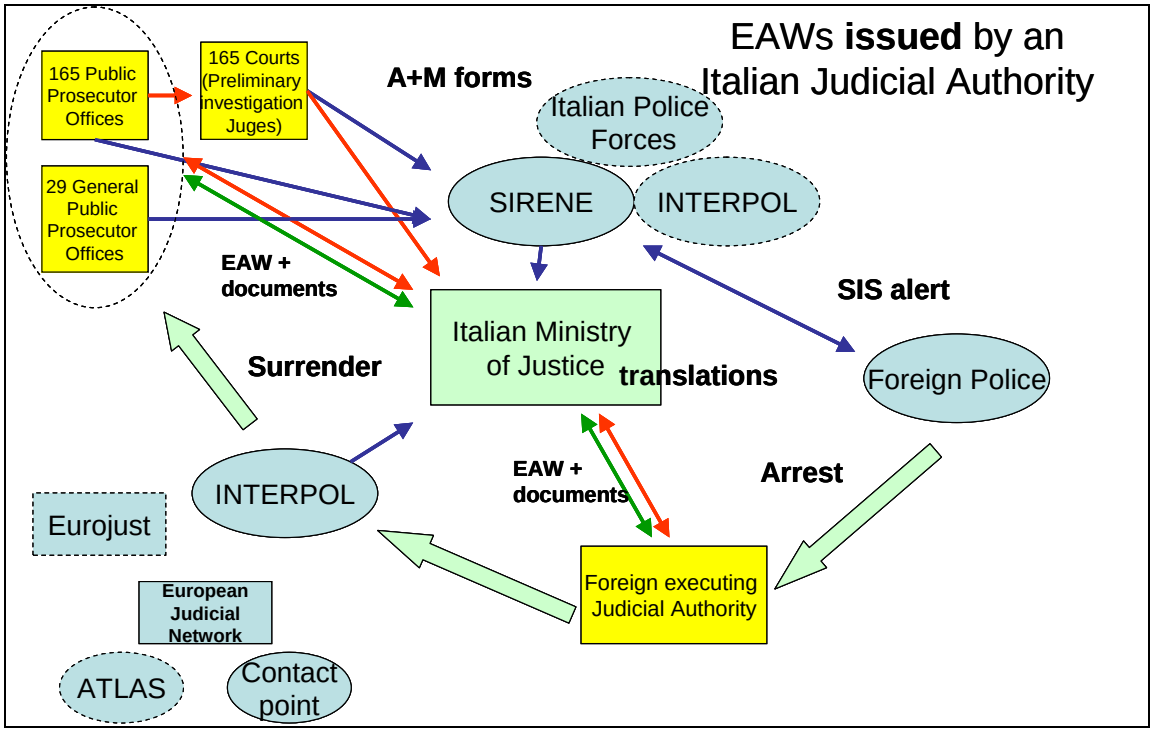
EAW cases are typically allocated to the sixth penal section of the Court of Cassation. The Court of Cassation holds a hearing within fifteen days from receiving the documents of the case. The public prosecutor office and the legal counsel are notified at least five days in advance. Also in this case, the short span time of available has been criticized by lawyers as it does not give enough time to prepare the case. Within the general public prosecutor office attached to the Court of Cassation there is not a functional specialization as EAW is concerned and cases are allocated considering the hearing calendar of the public prosecutors. At the same time, some public prosecutors possess a specific expertise in dealing with such cases.

The Court of Cassation does not decide only on points of law, as it usually does in other cassation procedures, but also on substance of the case. Also, contrary to the typical Court of Cassation procedure, the requested person can be present and is allowed to speak to the court. This, though, takes place quite seldom. At the conclusion of the hearing the Court of Cassation [decides in chamber and immediately afterwards] reads out its decision. The written decision of the Court of Cassation at the conclusion of the hearing should be accompanied by a specific statement containing the grounds underlying it. If it is not possible to immediately deliver this statement, the Court of Cassation should deliver the statement within five days from reaching the decision.

A copy of the decision is immediately transmitted to the Ministry of Justice (Ufficio II). The procedures that follow in case of surrender decision or acquittal are analogue to those described for a decision of the Court of Appeal. The Court of cassation can also quash a decision with remittal, in which case the documents are transmitted by the Court of cassation to the Court of Appeal where the remittal judge should decide the case within twenty days of receiving them.

There is a contact point for EAW matters at the Court of Cassation. The aim of the contact point is, on the one hand, to function as a centre of expertise for the benefit

of the members of the Court of Cassation (and, as appropriate, for members of Courts of Appeal that may need information or assistance in EAW matters), and on the other hand to facilitate contacts with issuing authorities in the other member states. [117]



[117] See also: Council of the European Union (2009) Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between member states" Report on Italy, 5832/1/09 REV1 p.32

4.4. The EAW from the Italian case files perspective

This section focuses on the application of the EAW instrument using the proceedings' data collected by the Italian researchers from the case files.

4.4.1. Notes on the data collection methodology

In the Italian case study, the data collection from the EAW case files took place at the Italian Ministry of Justice, Office II (International Cooperation) of the General Directorate for Criminal Justice. As mentioned earlier, the Ministry of justice is the Italian central authority in charge of supporting and coordinating the EAW document and information exchange. The Office II, within the General Directorate for Criminal Justice, carries out such activities.

Given the sensitivity of the data contained in the case files, a number of limits were given by the Ministry concerning the selection of the case files from which data could be collected and the data itself. In particular, even though the data seek by the research is anonymous, researchers were authorized to enter data only found in EAW case files concerning the enforcement of a sentence and not the prosecution phase. Furthermore, the cases had to be fully closed, as to say, cases in which a not appealable decision had been taken and the procedure had been concluded. A detailed binding form prepared by the Ministry of Justice specifying the limits of the data collection and diffusion were signed by the researchers involved in the data collection. Apart from the definition of data that could or could not be collected, the researchers were also requested to proceed in a way which did not perturb the normal activity of the office.

As EAW case files, concerning both the execution of a sentence and the prosecution of a crime, open and closed procedures, are held together, the researchers would have to go through several thousand files in order to identify the minority of those which could be used for the research purposes. As the information collected on the cover of the case files did not included all the information needed to make a selection, the researchers had to seek such information within the case file documents themselves.

Taking into account the limits imposed on the data collection, and with the support of the head of the office and of the office personnel, which had a quite clear idea

of the cases' distribution, a decision was taken to focus on the case files opened between the end of 2006 and the end of 2008. These upper and lower limits were chosen for several practical reasons. Start from the end of 2006 and not from 2005, when the Italian Law 69/2005 entered into force, took into consideration the fact that the cases concerning EAW for the execution of a sentence in that period were very few compared to the number of cases of EAW for the prosecution of a crime, but also in absolute numbers, because the Italian law limits the use of the EAW which concerns the date in which the crime has been committed.

According to Article 40 paragraph 2, to the requests for execution referring to offences committed prior to 7 August 2002, with the exception of the provisions contained in paragraph 3 (the provisions contained in article 8 shall apply solely to offences committed after the date of entry into force of the Law 69/2005), the provisions regarding extradition in force prior to the date of entry into force of the present law continue to apply.

In order to check this hypothesis for the selection of the case files, researchers analysed the last 90 case files of 2006, from which was found only one case suitable for the data entry.

On the other hand, it was highly probable that recent cases (after the second half of 2008) were not still closed, at least from the perspective of the Ministry, since the Ministry has only a support and coordination role in the procedure, and in many cases it is informed of the closing of a case with some delay. Therefore, it was considered useless to go through the cases collected after July 2008. This has also been confirmed by the analysis of a sample of 60 cases from the second half of 2008, where researchers were not able to pull any case to be used for the data base due to the fact that they were not closes.

Therefore, the cases analyzed focused on the period between the beginning of 2007 and the first half of 2008. In this period, 1076 cases were scrutinized, selecting 138 cases which were inserted in the database. Out of these 138 cases, 118 concerned EAWs received by Italian judicial Authorities, while 20 concerned EAWs issued by an Italian Judicial Authority. It is worth mentioning that these numbers correspond not just to a sample but to the universe of closed case files instructed by the Office II in the period we have considered.

4.4.2. Data analysis

The case file provides some basic socio-demographic data and general information about the requested person, the crime and sentence at the basis of the EAW and about the EAW procedure. The following data analysis will firstly discuss the data from the Italian executing EAW procedure case files, then from the Italian issuing EAW procedure case files. Finally, some comparisons between Italian executing and issuing EAW procedures will be made.

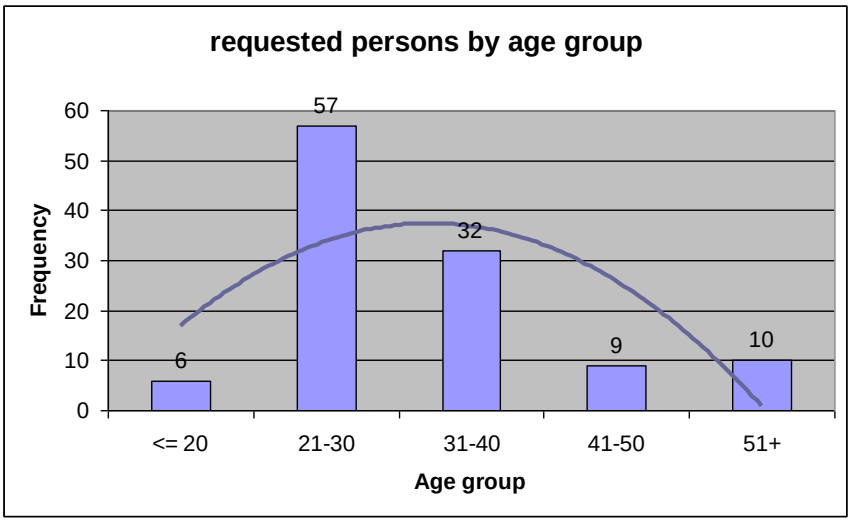
4.4.2.1. Executing EAW procedures

Basic socio-demographic data and general information about the requested person

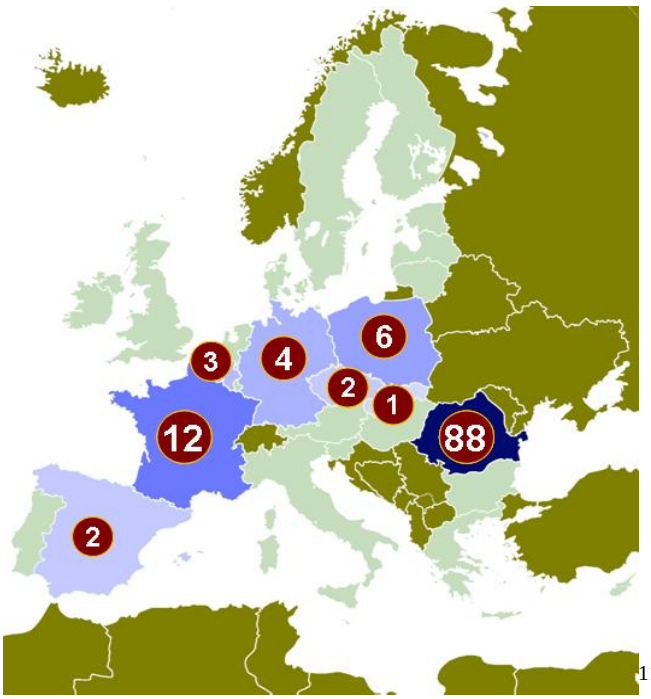
113 out of the 118 person requested were males (95,5%) and five females (4,2%).

As to their nationality, 88 were Romanians (74,6%) twelve Italians (10,2%) seven Polishes (5,9%) three French (2,5%) two Czechs and two Tunisians (1,7%) and one Belgian, Canadian, Moldovan and Slovakian each (0.8%). Data on Country of residence of the requested person was available for 108 cases. For a large majority of those it was Romania (83, around 70%) followed by Italy in 12 cases (10,2%), Poland in 6 (5,1%), France in 3 and Belgium, Czech Republic, Slovenia and Tunisia with one each.

As for the age of the defendants at the time the EAW was issued, on 114 valid cases (the age of three males and one female was not available), the mean is slightly more than 32 years, the median 29 years, with a minimum of seventeen and a maximum of 65 years. Dividing the cases in age groups, 6 cases concerned defendants younger than twenty, 57 of an age between 21 and 30 years, 32 between 31 and 40 years, nine between 41 and 50 and ten defendants more than fifty years old.



Of the 118 EAW requests, 88, corresponding to 74,6% of the total were issued by Romanian judicial authorities, followed by 12 from France (10,2%), six from Poland, four from Germany, three from Belgium, and two from Czech Republic and Spain and one from Slovakia.



[118]

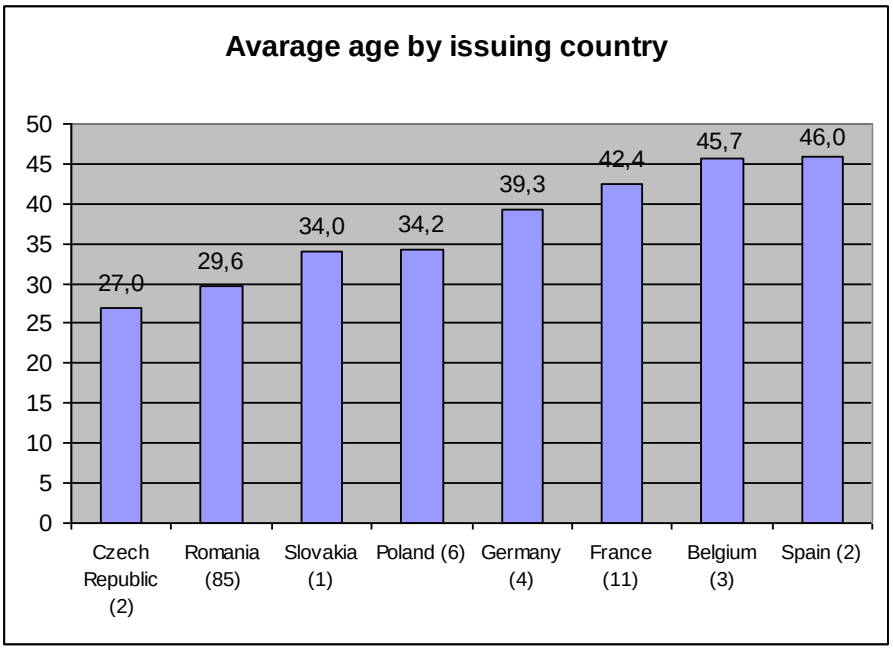
The following table cross the data on EAW issuing country and nationality of the requested person providing some interesting insights on crime geography. While cases

[118] The map is based on the file licensed under the Creative Commons Attribution-Share Alike 3.0 Unportedlicense by the author NuclearVacuum available at http://upload.wikimedia.org/wikipedia/commons/b/ba/EU-Italy.svg

concerning Western Europe countries requests tend to concern first Italians and then issuing country and other countries nationals, Eastern Europe countries cases tend to concern more requests concerning people of the issuing country nationality.

Issuing country	Nationality of the requested person	Frequency
Belgium	Italy	2
	Belgium	1
Czech Republic	Czech Republic	2
France	Italy	4
	France	3
	Tunisia	2
	Canada	1
	Moldova	1
	Romania	1
Germany	Italy	3
	Poland	1
Poland	Poland	6
Romania	Romania	87
	Italy	1
Slovakia	Slovakia	1
Spain	Italy	2

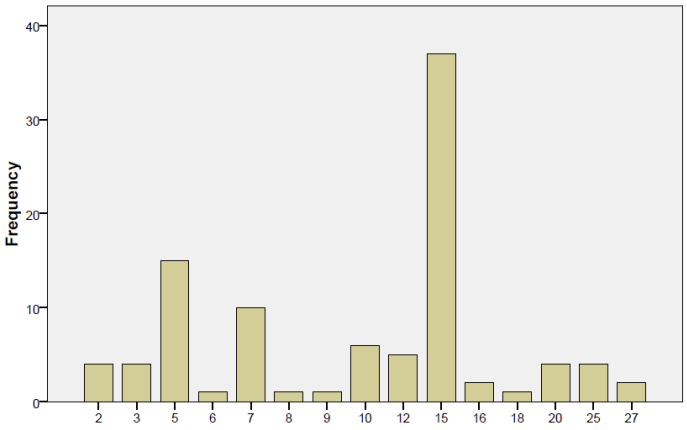
The chart below shows the average age of the requested person by requesting country (data available on 114 cases, missing data from one French and three Romanian requests).

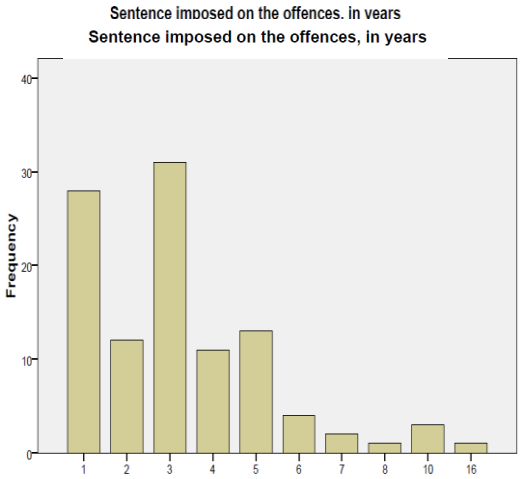


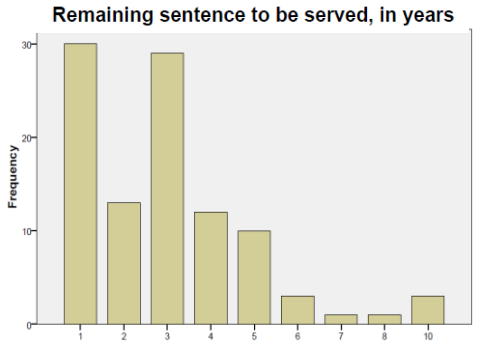
As to the language spoken by the defendants, of the 91 for which the case EAW request provided the data, 87 spoke just one language: 69 spoke only Romanian, seven Polish, seven Italian, and the other spoke one language each between Czech, Dutch, French, Slovak. Of the remaining four, two spoke German and Italian, one French and Italian and One French and Arabic. According to this data, therefore, only slightly more of 10% of the defendants speak Italian and this percentage only slightly increase if German or French are added (13,2%)

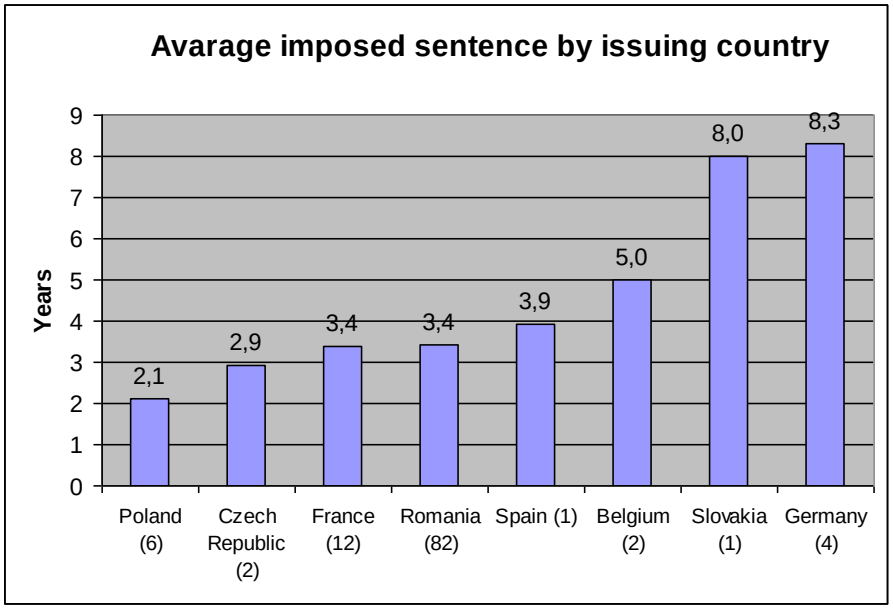
Data on the crime and sentence at the basis of the EAW

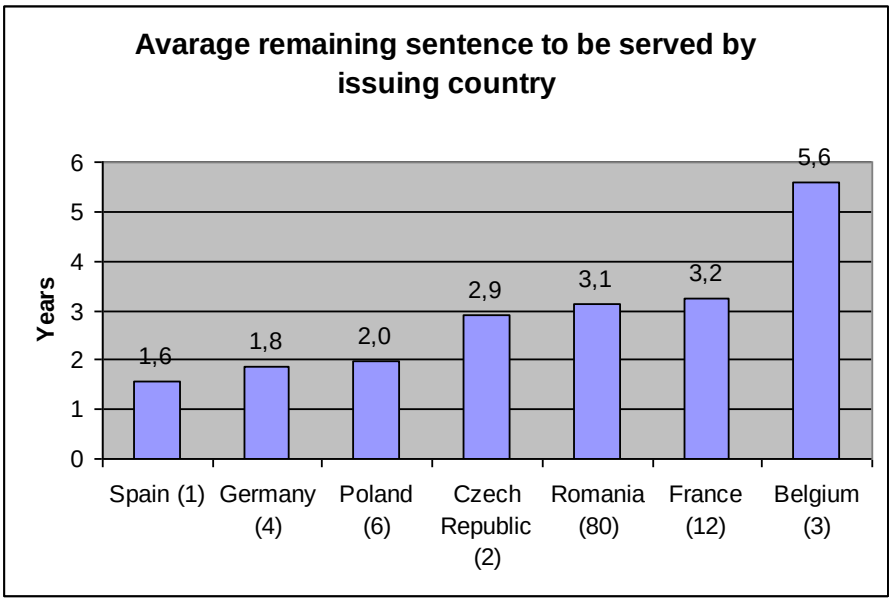
The EAW file provides three measures of the length of the sentence related to the specific case: the maximum sentence applicable to the offence, the sentence imposed on the offence and the remaining offence to be served. The 97 cases that provided indication of the maximum sentence applicable to the offence had a mean of almost 12 years (11,82) a median of 15 years and ranged between a minimum of 2 and a maximum of 27 years. The values related to the sentence imposed on the offence (106 files provided that indication) are quite lower, a mean of a bit more of 3 years (3,26) a median of 3 years and ranged between a minimum of 1 and a maximum of 16 years. The values concerning the remaining offence to be served (102 cases) are slightly lower than those related sentence imposed on the offence: a mean of almost 3 years (2,98) a median of 3 years and ranged between a minimum of 1 and a maximum of 10 years.


Maximum sentence applicable to the offences, in years
Frequency
40
30
20
10
0
2
3
5
6
7
8
9
10
12
15
16
18
20
25
27


Sentence imposed on the offences, in years
Sentence imposed on the offences, in years
Frequency
40
30
20
10
0
1
2
3
4
5
6
7
8
10
16

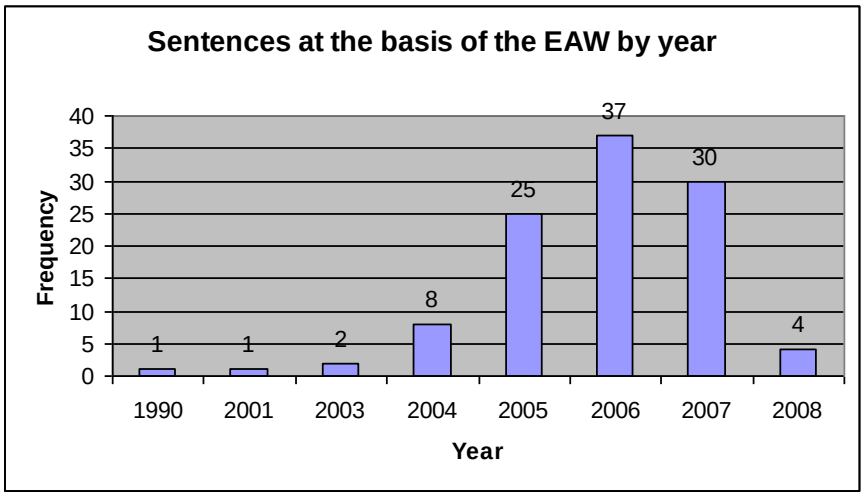

Remaining sentence to be served, in years
Frequency
30
20
10
0
1
2
3
4
5
6
7
8
10


Avarage imposed sentence by issuing country
Years
9
8
7
6
5
4
3
2
1
0
2,1
2,9
3,4
3,4
3,9
5,0
8,0
8,3
Poland (6)
Czech Republic (2)
France (12)
Romania (82)
Spain (1)
Belgium (2)
Slovakia (1)
Germany (4)



The decision of the sentence for which the EAW was issued, was rendered *in absentia* in 69 cases out of 118.

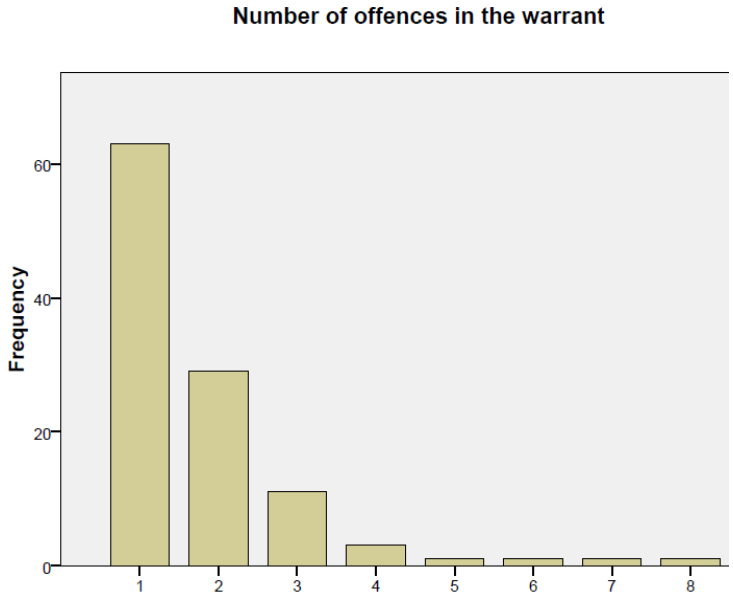
The year in which the sentence at the basis of the EAW was issued, available for 108 cases, ranged between 1990 and 2008 with a 23,6% in 2005, 34,9% in 2006 and 28,3% in 2007.



EAW were issued between 2005 and 2008, with around three quarters issued in 2007 (88) and over one sixth in 2008 (20). Only 7 were issued in 2006 and 2 in 2005. This is consistent with the practice we discovered of issuing the EAW once the person has been localized or arrested following a SIS Alert. In observing the trend (especially the frequency of 2008 cases) it is worth remembering that the data were collected from

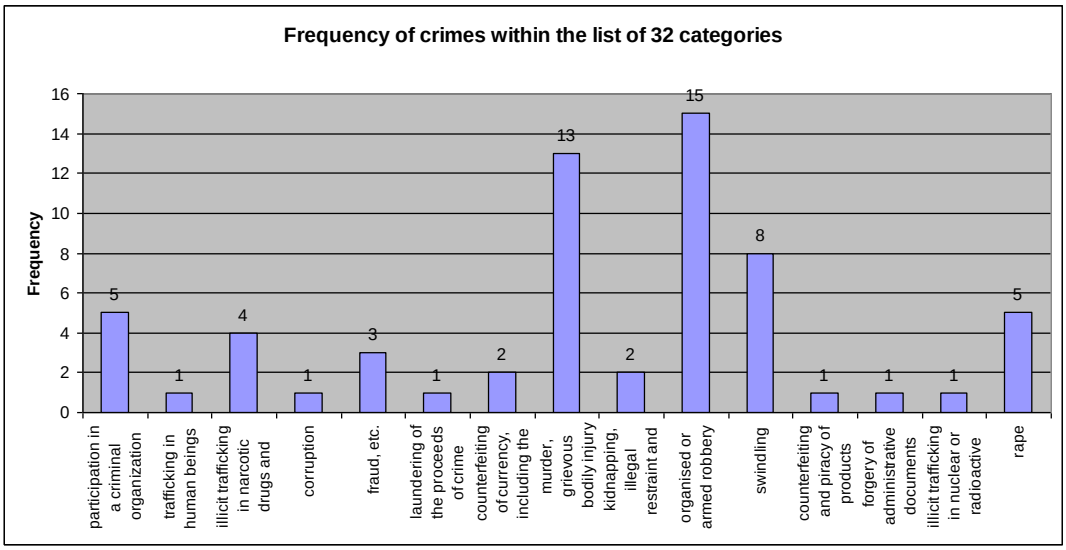
files opened by the Italian Ministry of Justice between the beginning of 2007 and mid 2008.

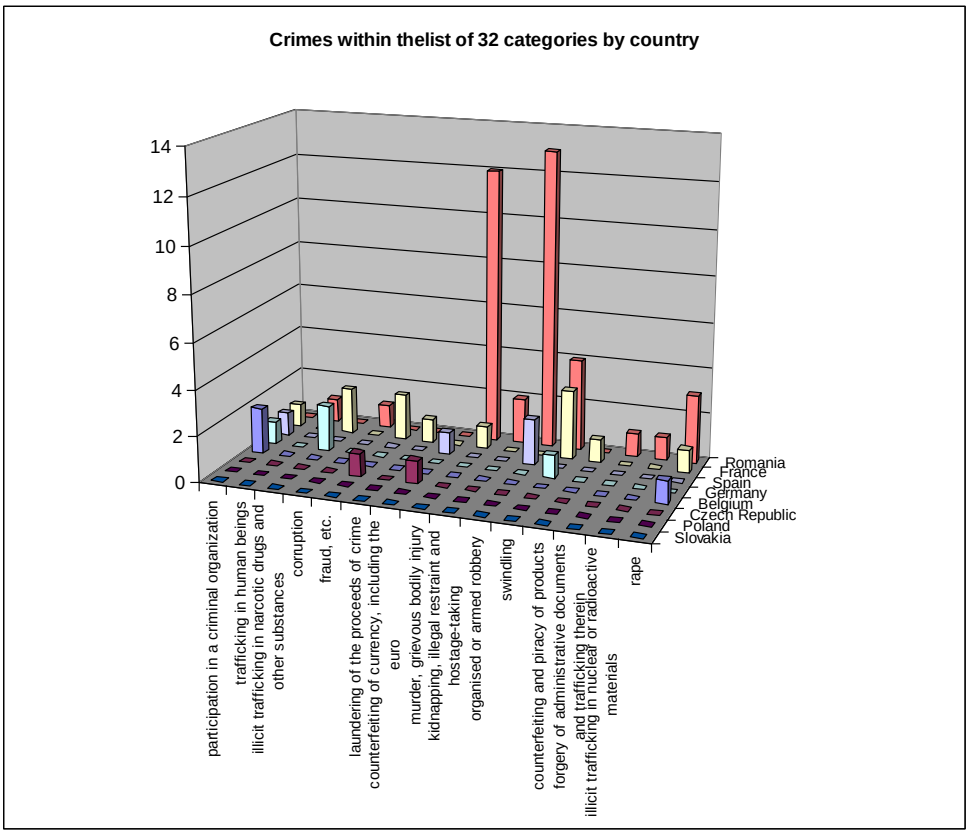
The number of offences for which the requested person had been sentenced ranged, with decreasing frequency, between 1 and 8, with just one case outside these parameters, providing an indication of 34 offences.



57 (48,3%) out of 118 cases, concerned one or more offences (between 1 and 2 categories of the list) included in the list of 32 for which according to Article 2.2 of the FD the double criminality check is not required (if they are punishable in the issuing member state by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing member state). In particular, 15 cases concerning organised or armed robbery, 13 murder or grievous bodily injury, 8 swindling, 5 participation in a criminal organization and 5 rape, 4 illicit trafficking in narcotic drugs and other substances, 3 fraud, 2 counterfeiting of currency, including the euro and 2 kidnapping, illegal restraint and hostage-taking and 1 each trafficking in human beings, corruption, laundering of the proceeds of crime, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, illicit trafficking in nuclear or radioactive materials. None of the of the following categories were signalled: forgery of means of payment, racketeering and extortion, facilitation of unauthorised entry and residence, trafficking in stolen vehicles, sexual exploitation of children and child pornography, illicit trafficking in weapons, munitions and explosives, computer-related crime, environmental crime, illicit trade in human organs and tissue, racism and xenophobia, illicit trafficking in cultural goods, illicit trafficking in hormonal substances

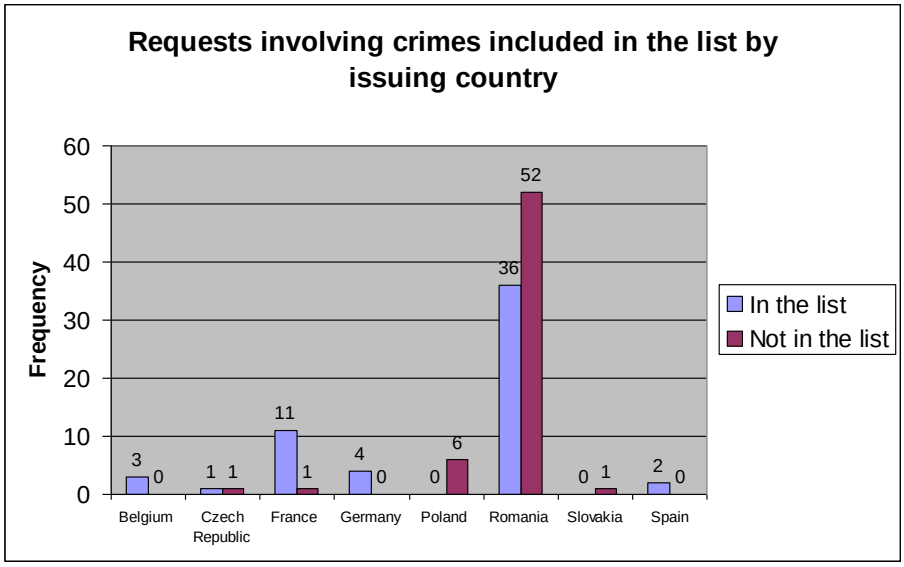
and other growth promoters, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage and terrorism.

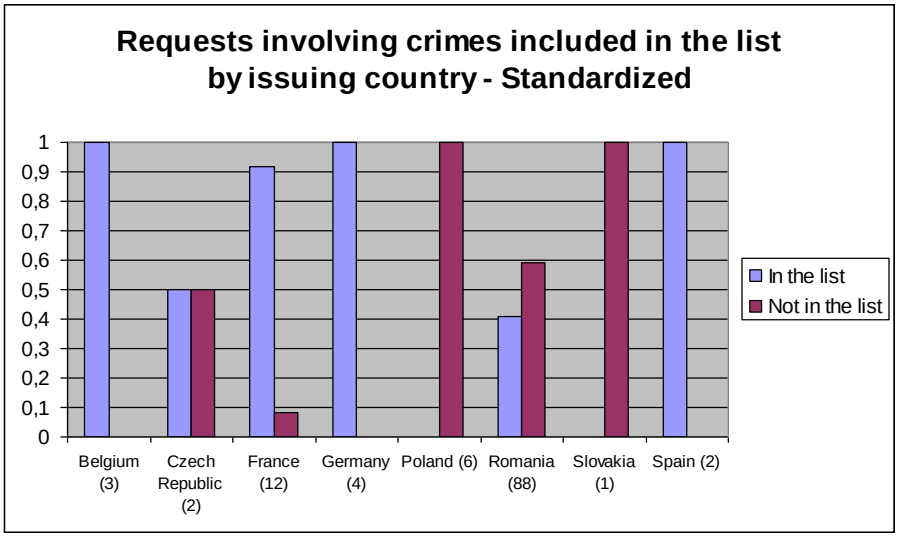


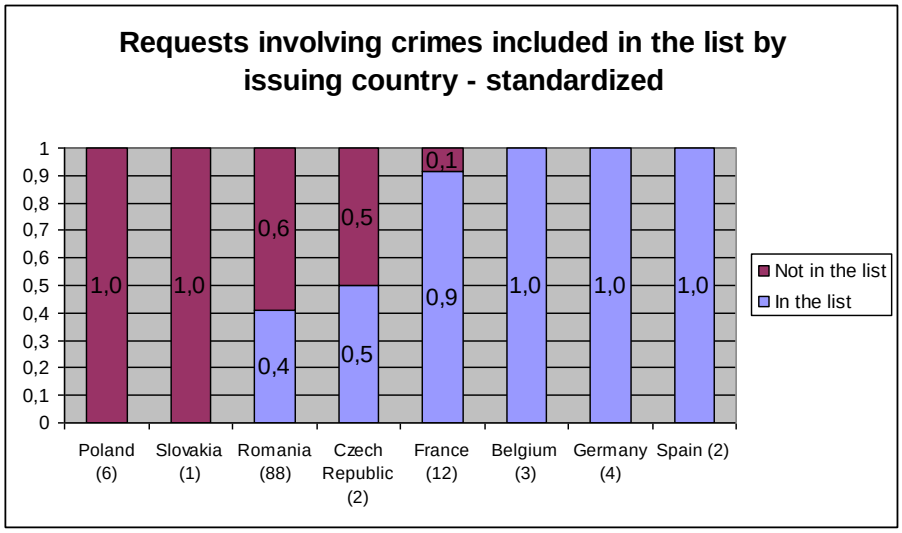


Of the cases not listed within the list of 32 categories for which, according to Article 2.2 of the FD double criminality check is not required, while some can be considered serious offences, many others appear to be petty crimes such as theft of a

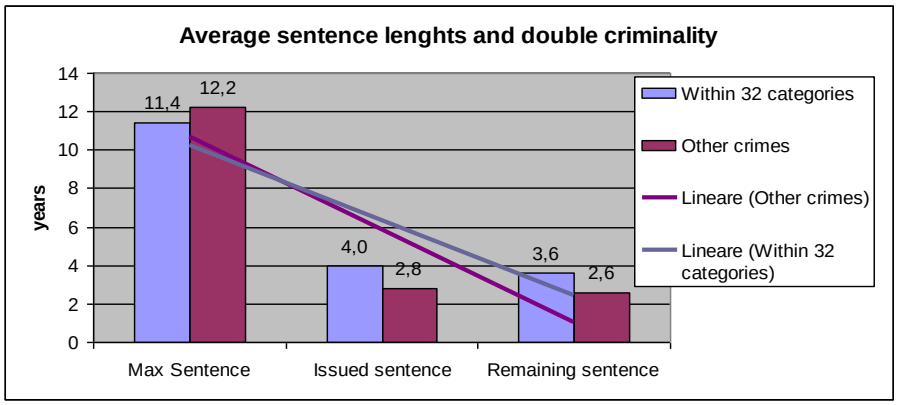
mobile phone in four cases, the theft of an iron from a shop, or of ten birds from a farmhouse in another. The following table shows the kind of request (included in the list of 32 or not) by issuing country.







An interesting result emerges when crossing the average maximum, issued and remaining sentence data available with the presence of one or more crimes in the case pertaining to the list of 32 for which double criminality check is not required. Cases within the 32 list have a lower average maximum sentence (11,4 years - data available in 45 out of 57 cases) than the others (12,2 years - data available in 52 out of 61 cases). On the contrary, cases within the 32 list have a higher average issued sentence (4 years - data available in 52 out of 57 cases) and remaining sentence to be served (3,6 years - data available in 54 out of 57 cases) than the others (respectively an average issued sentence of 2,8 years - data available in 58 out of 61 cases, and an average remaining sentence of 2,6 years - data available in 54 out of 61 cases).

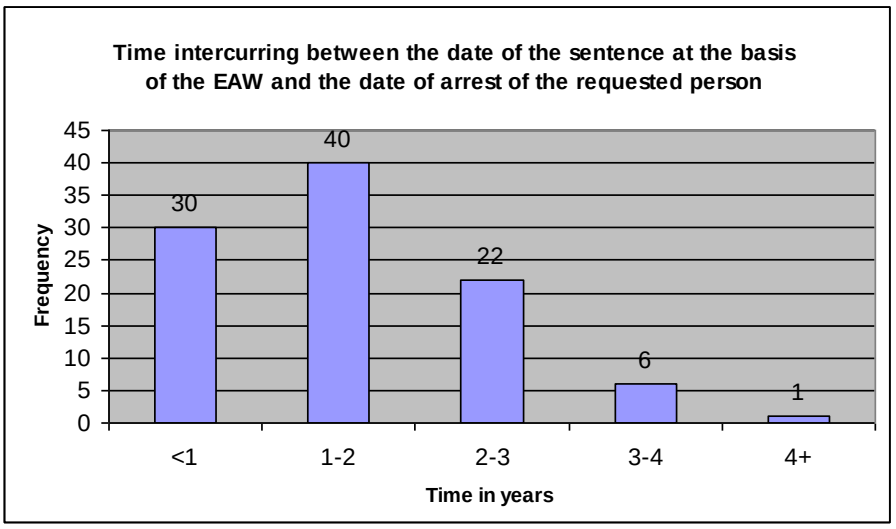


Data on the EAW procedure

In 93 out of 118 cases (78,8%) the execution procedure began with the arrest/detention of the requested person. The defendant consented to surrender in less

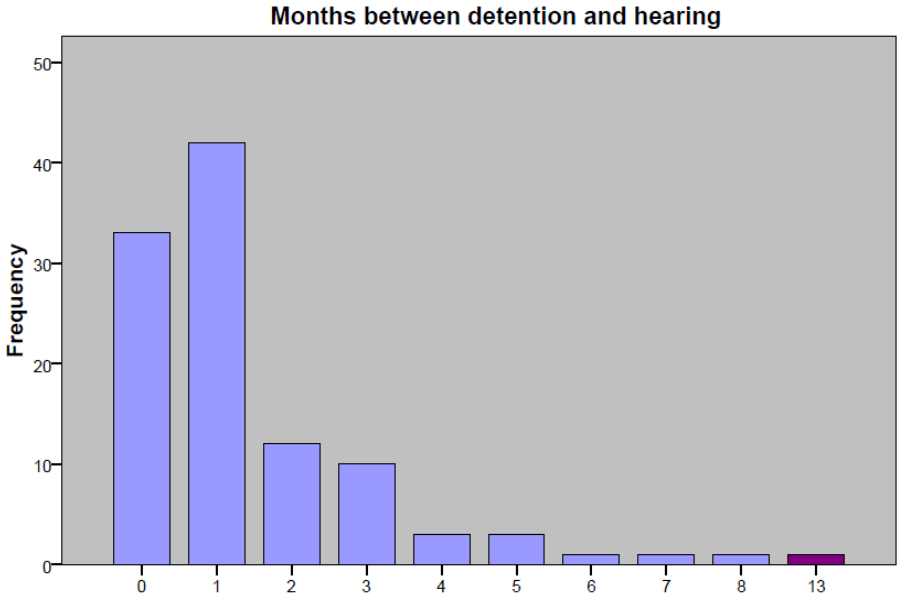
than one quarter of the cases (28, corresponding to 23,7% of the total). In one case the defendant renounced to the speciality rule.

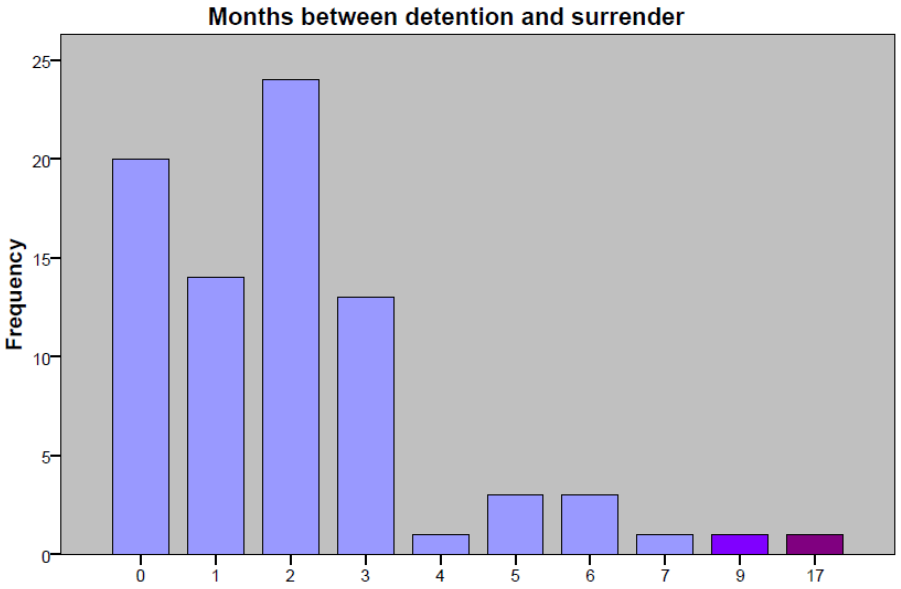
100 files provided valid information on both date of the sentence at the basis of the EAW and the date of arrest of the requested person. This period of time ranged between 38 days and 19 years, with an average of almost 21 months, and a median of slightly more than 18 months.



As a result of the proceeding, in 83 cases the request was approved and executed, in 26 it was refused, in six it was approved but not executed and in one it was forwarded and executed. While the number of cases in which the request was refused may appear high, it should be considered that this value includes the cases in which the requested persons serve the sentence in Italy. In four cases, there were processes pending in Italy and the surrender was postponed.

As to the length of the proceeding, the number of days between the begin of the detention and the hearing deciding on the execution (final decision) ranges between a minimum of three and a maximum of 410, with a mean of almost 60 days (59,77) and a median of 48 days. 30% are then surrendered within 10 days from the hearing in which the final decision on the surrender is taken, 40% within 11 days and 50% within 19 days. The mean of the lag between the final hearing and the actual surrender is 26 days, and ranges between a minimum of 4 days and a maximum of 290 days.





4.4.2.2. Issuing EAW procedures

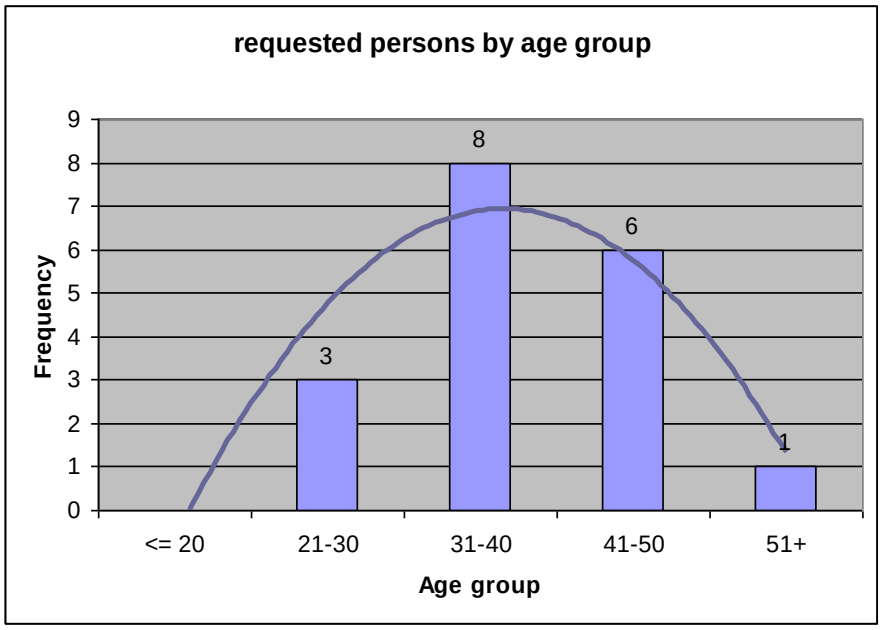
In this case the sample is very small and cannot be used to make any statistical inference, however it gives some piece of information that can be used in a more qualitative perspective.

Basic socio-demographic data and general information about the requested person

Of the 20 persons for which EAW were issued in order to enforce a sentence, 19 were males and only one female. These data are consistent with the one collected for

the executing procedure. As to their nationality, nine were Italian, three Albanians and Romanians each, two Germans and two Tunisians, and one Moroccan. As to the Country of residence of the requested persons, of the 18 for which data were available, for the larger group it was Italy with 7 cases, followed by France and Germany with three cases each and Albania, Morocco, Tunisia and United Kingdom with one each

As for the age of the defendants at the time the EAW was issued, on 18 valid cases, the mean was 39 years, the median 37 years, with a minimum of 28 and a maximum of 60 years. Dividing the cases in age groups, three cases concerned defendants with an age between 21 and 30 years, eight between 31 and 40 years, six between 41 and 50 and only one defendant more than fifty years old.

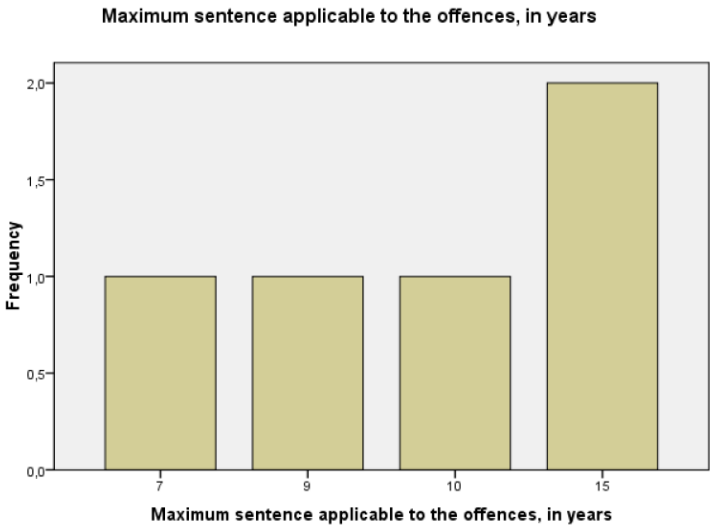


For the 12 for which information on the spoken language was provided, five spoke only Italian, two German and one each Albanian and Romanian, while one spoke Italian and French, one Romanian and Italian and a last one Arabic, Italian and French. [confront this data with the State executing]

Data on the crime and sentence at the basis of the EAW

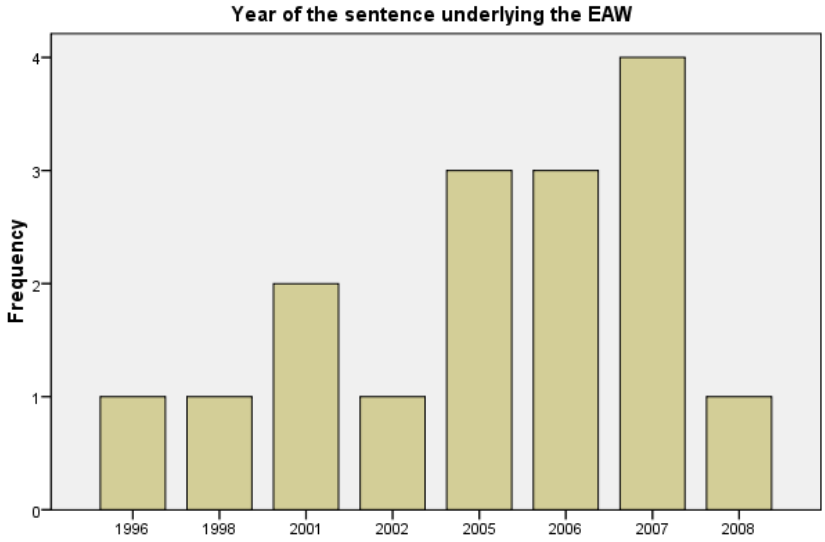
The maximum sentence for the crime underlying the EAW is available only in 5 cases and ranged between a minimum of 7 and a maximum of 15 years, with a mean of 10.2 years. The sentence imposed on the offence is available in 14 cases out of 20, and ranged between a minimum of two and a maximum of 20 years, with a mean of slightly more than seven years (7,21) and a median of six years and a half (6,50). The remaining

offence to be served in years were provided in 17 cases, ranged between a minimum of one year and a maximum of twenty years, with a mean of slightly more than six years and a half (6,53) and a median of four years.

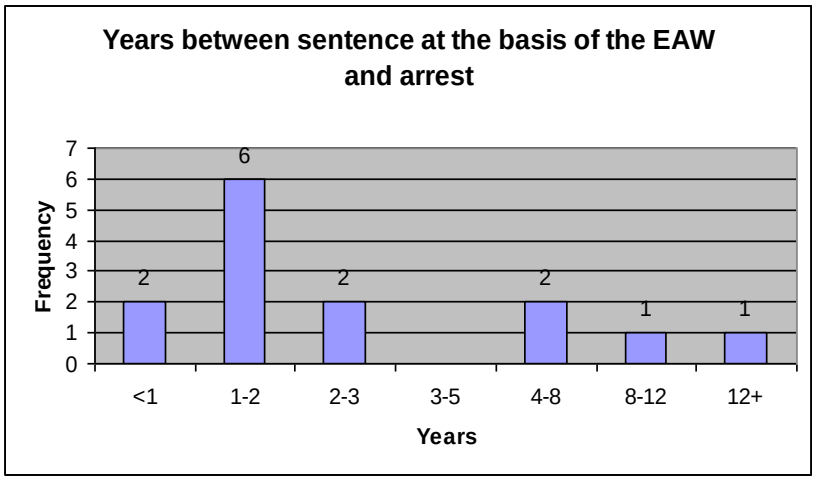


The decision of the sentence for which the EAW was issued, was rendered *in absentia* in almost two thirds of the cases (thirteen out of twenty).

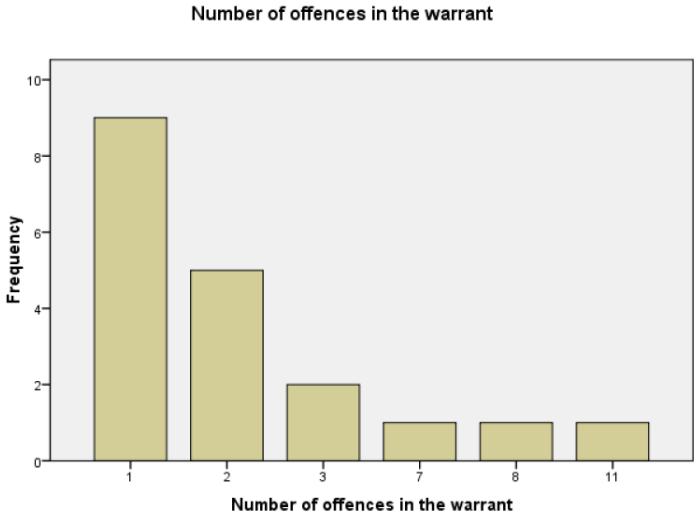
The year in which the sentence at the basis of the EAW request was issued, was provided in 16 cases and ranged between 1996 and 2008 with a three cases in 2005 and 2006, four in 2007 and one in 2008. The year in which the EAW was issued instead ranged between 2007 and 2009 with a eight cases in 2007, ten in 2008 and two in 2009. It is worth remembering that data were collected from cases filed by the Italian Ministry of Justice between the beginning of 2007 and mid 2008, and that in many cases the EAW is issued after the Italian judicial authority is informed of the arrest of the requested person following a SIS Alert.



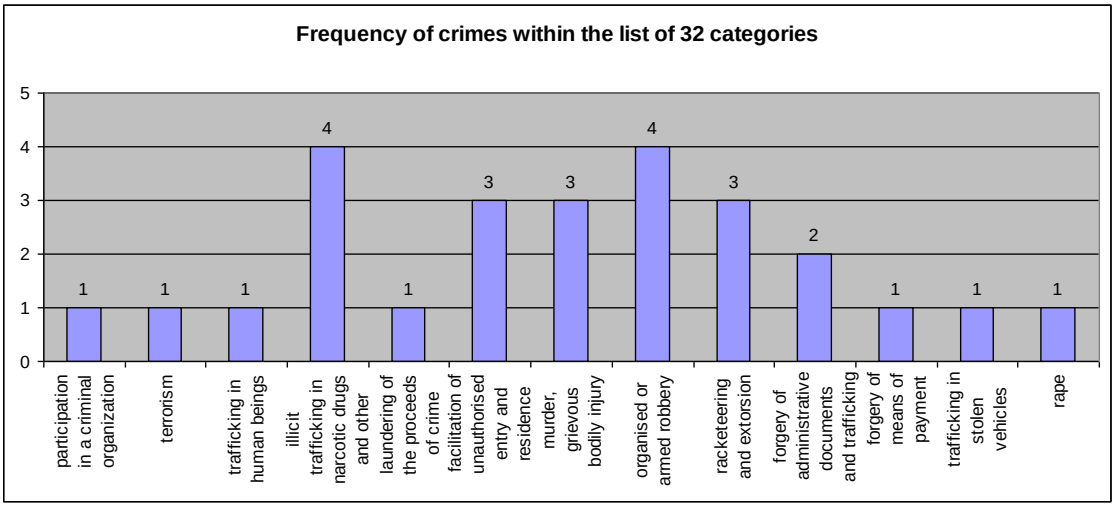
In the 14 cases for which data were available to calculate it, the time between the sentence at the basis of the EAW and the arrest of the requested person ranged between 21 days and a bit less than twelve years and a half. In more than half of the cases the arrest took place within two years from the sentence. The average time is a bit less than 3 and a half year and the median is one year and 5 months.



The number of offences for which the requested person had been sentenced ranged, with decreasing frequency, between 1 (nine cases) and 11, with a mean of 2,68 and a median of 2.



Out of the 20 cases, 18 concerned one or more offences (between 1 and 4 categories of the list) included in the list of 32 for which the double criminality check is not required, with three cases involving serious crimes against minors.



The executing authority was France in seven cases, Germany in six, Spain in two, and Austria, Greece, the Netherlands, Romania and United Kingdom in one case each.

Data on the EAW procedure

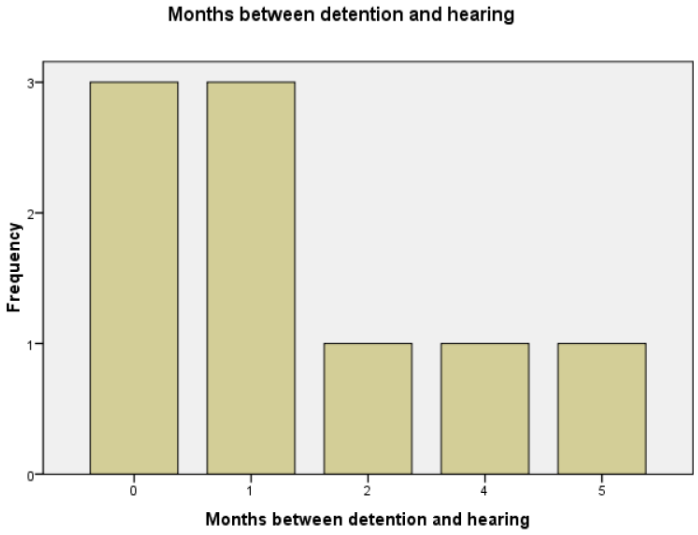
In at least six cases the execution procedure began with the arrest/detention of the requested person. While this information is easily found in executing procedures (the case file usually include the arrest report of the police), this datum is not always available in the active procedure case files.

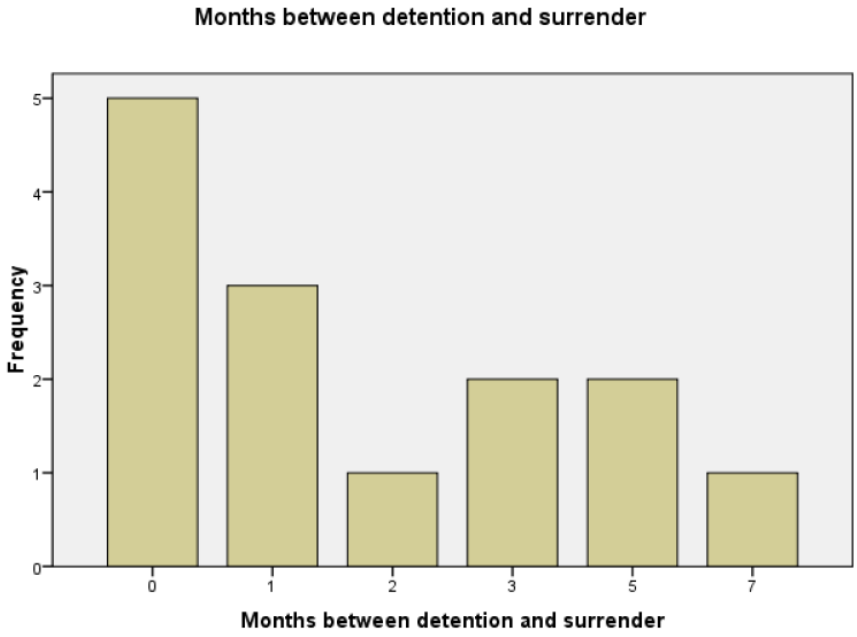
The defendant consented to the surrender in only one case. More in general, as a result of the proceeding, in fourteen cases the request was approved and executed, while in six it was refused. In two of the six cases, the sentence of the requested person was executed in the executing country (Germany) while in one case the EAW was substituted by an extradition request.

In one case there was a process pending in the executing country

As to the length of the proceeding, the number of days between the begin of the detention and the hearing deciding on the execution (final decision) ranged between a minimum of two and a maximum of 166, with a mean of almost 60 days (58,33) and a median of 47 days. Over half of the cases for which data was available (five out of nine) were then surrendered within 10 days from the hearing in which the final decision on the surrender was taken. The mean of the time intervening between the final hearing and the actual surrender was 14,33 days, the median 10 and ranged between a minimum of 6 days and a maximum of 44 days.

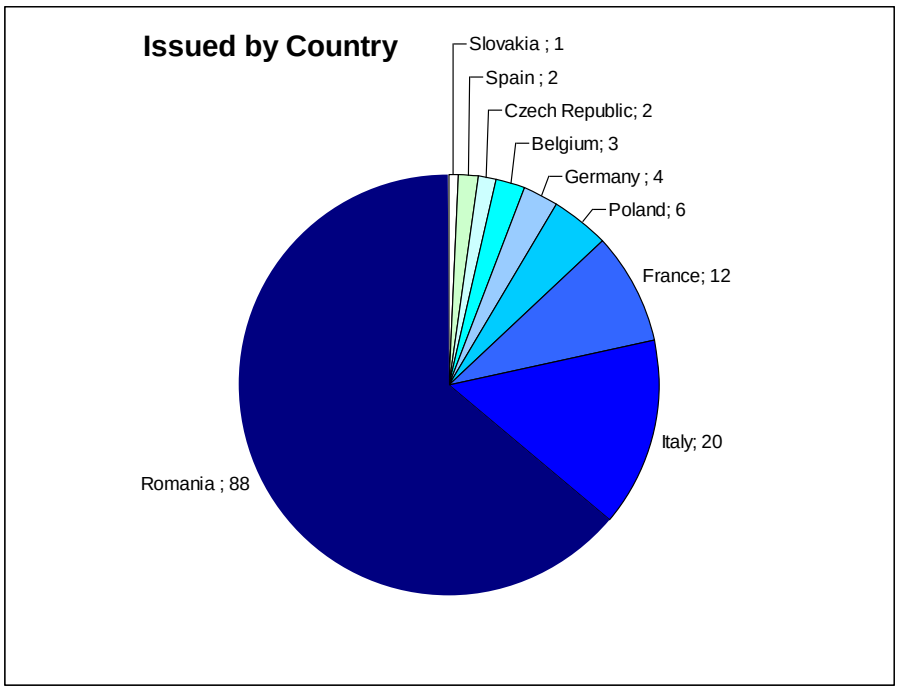
The number of days between the beginning of the detention and the actual surrender (data available in 14 cases) ranged between a minimum of 12 days to a maximum of 235 days, with an average of 77,71 days and a median of 50 days.



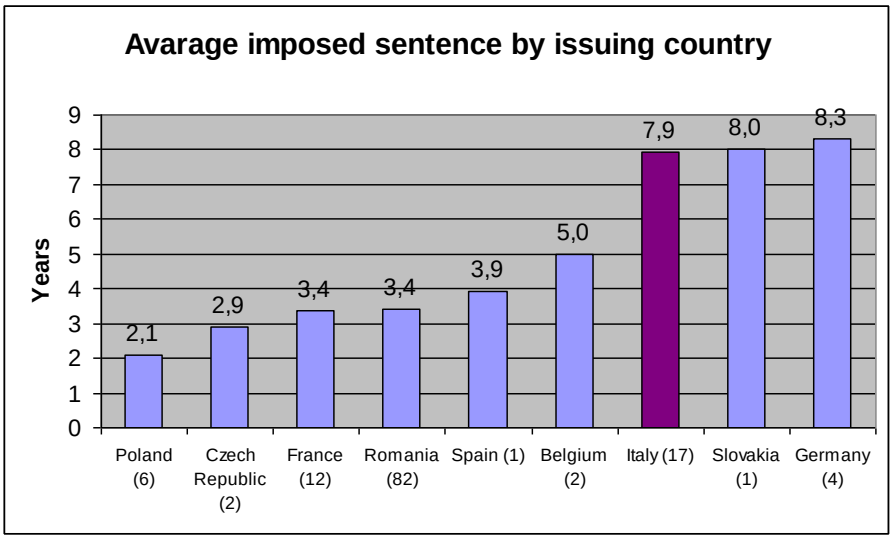


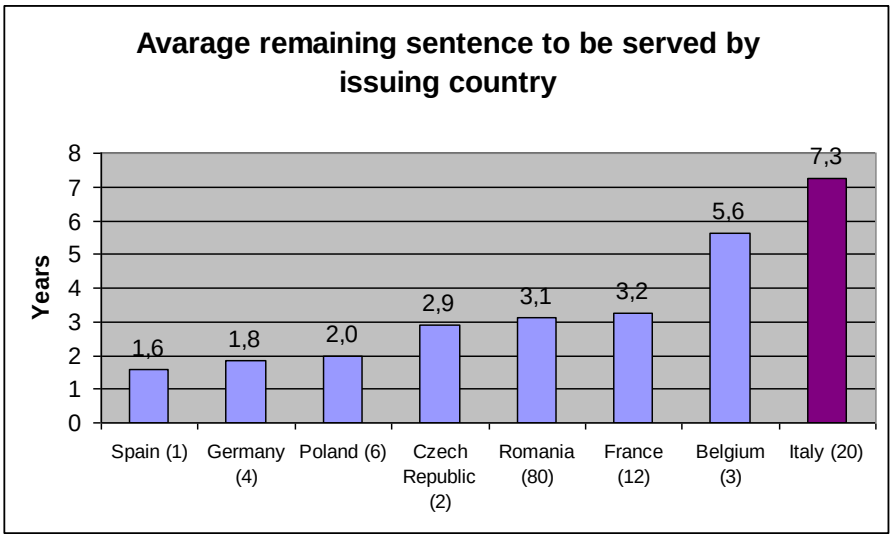
4.4.2.3. Some comparisons between Italian executing and issuing EAW procedures

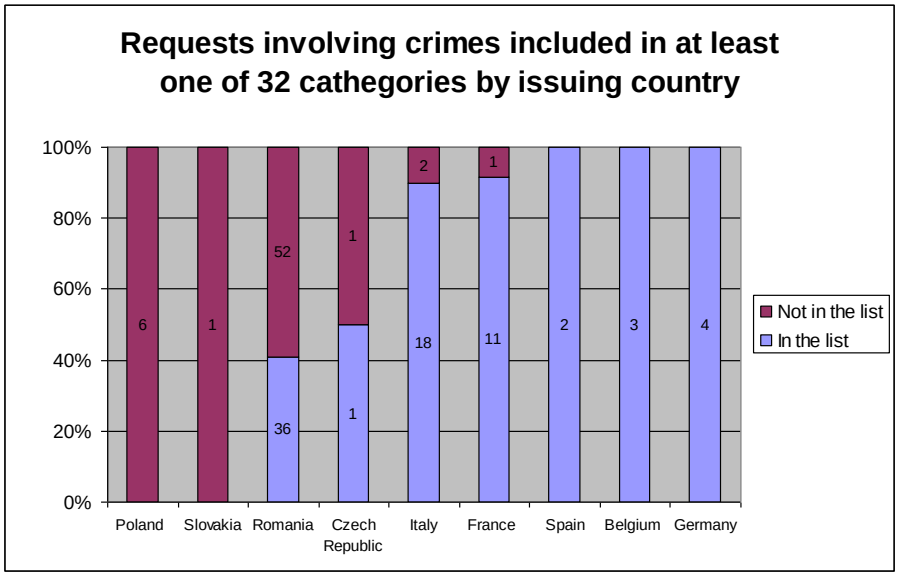
While executing procedures were strongly unbalanced as both nationality of the requested person and issuing country with a very large number of requests of Romanian and from Romania judicial authorities, issuing procedures seem to be more balanced and in line with the data of the other countries studied in this research (the Netherlands, Portugal and Spain).



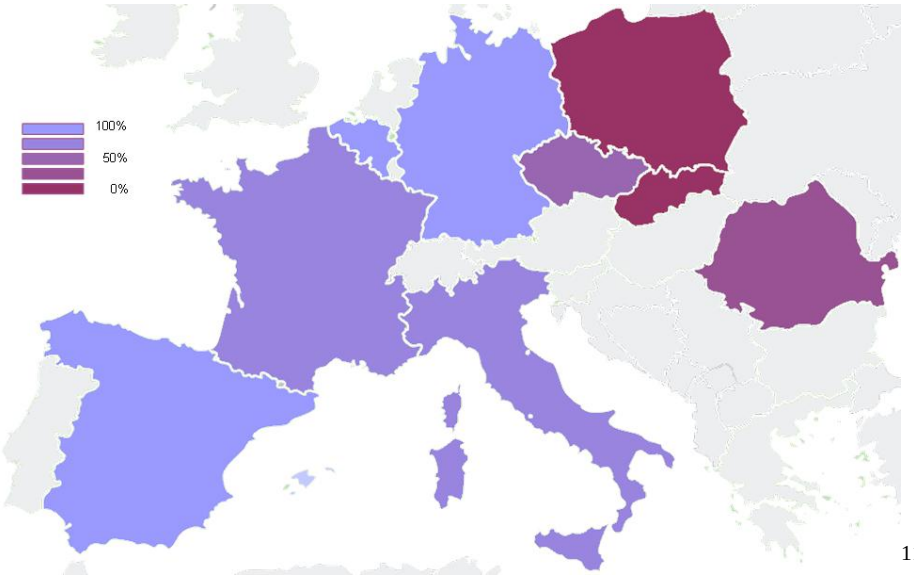
The sentence imposed on the offence and the remaining sentence to be served at the basis of the EAW in issuing procedures were on an average more than double that the executing procedures. The following tables confront the averages by issuing county.







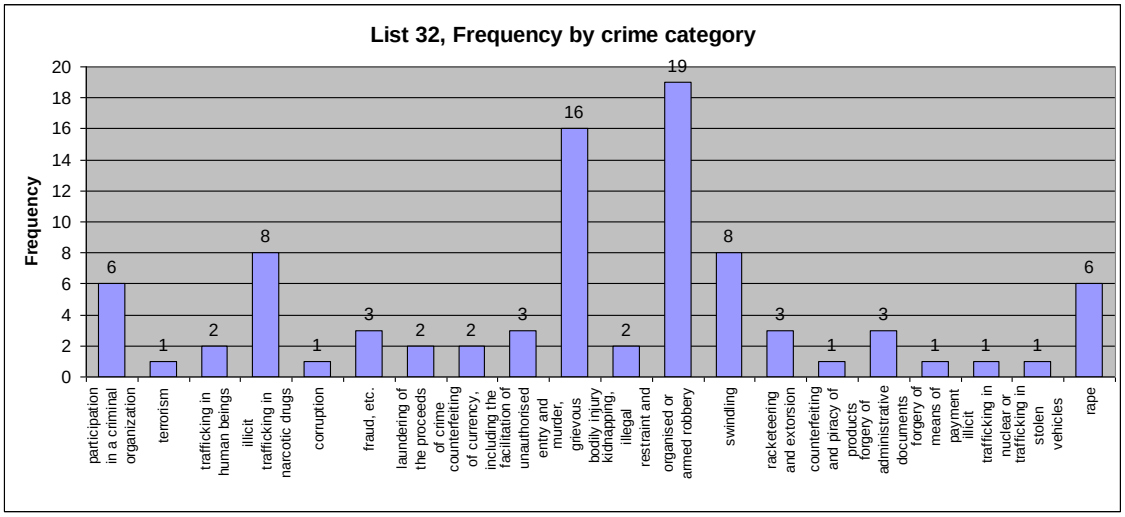
The same data of the previous table is provided in the following Map with colour graded according to the percentage of requests involving crimes included in at least one of the 32 categories for which the double criminality check is not required.

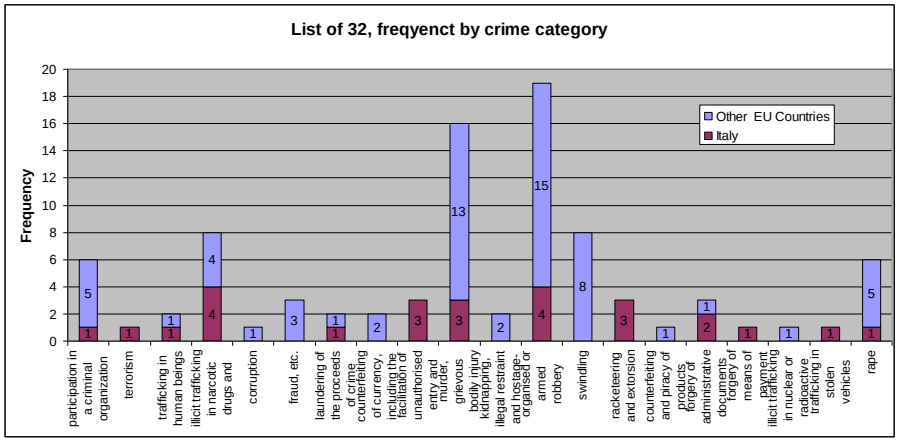


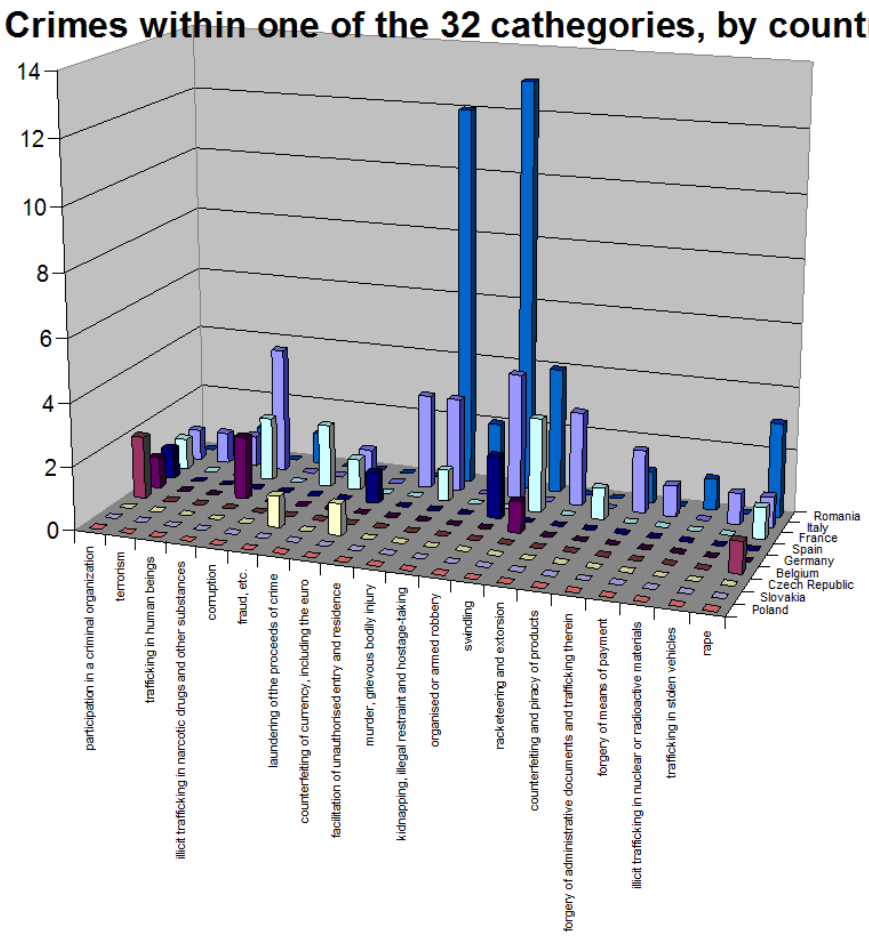
[119]

The following tables look in more detail to the frequencies of the specific crime categories resulting from the data analysis

[119] The map is based on the file licensed under the Creative Commons Attribution-Share Alike 3.0 Unportedlicense by the author NuclearVacuum available at http://upload.wikimedia.org/wikipedia/commons/b/ba/EU-Italy.svg


List 32, Frequency by crime category
Frequency
participation in a criminal organization
terrorism
trafficking in human beings
illicit trafficking in narcotic drugs
corruption
fraud, etc.
laundering of the proceeds of crime
counterfeiting of currency, including the facilitation of
unauthorised entry and murder, grievous
bodily injury kidnapping, illegal restraint and
organised or armed robbery
swindling
racketeering and extorsion
counterfeiting and piracy of products
forgery of administrative documents
forgery of means of payment
illicit trafficking in nuclear or
trafficking in stolen vehicles
rape


List of 32, freqyenct by crime category
Other EU Countries
Italy
Frequency
participation in a criminal organization
terrorism
trafficking in human beings
illicit trafficking in narcotic drugs and
corruption
fraud, etc.
laundering of the proceeds of crime
counterfeiting of currency, including the facilitation of
unauthorised entry and murder, grievous
bodily injury kidnapping, illegal restraint and hostage-
organised or armed robbery
swindling
racketeering and extorsion
counterfeiting and piracy of products
forgery of administrative documents
forgery of means of payment
illicit trafficking in nuclear or radioactive
trafficking in stolen vehicles
rape


Crimes within one of the 32 cathegories, by country
14
12
10
8
6
4
2
0
participation in a criminal organization
terrorism
trafficking in human beings
illicit trafficking in narcotic drugs and other substances
corruption
fraud, etc.
laundering of the proceeds of crime
counterfeiting of currency, including the euro
facilitation of unauthorised entry and residence
murder, grievous bodily injury
kidnapping, illegal restraint and hostage-taking
organised or armed robbery
swindling
racketeering and extorsion
counterfeiting and piracy of products
forgery of administrative documents and trafficking therein
forgery of means of payment
illicit trafficking in nuclear or radioactive materials
trafficking in stolen vehicles
rape
Romania
Italy
France
Spain
Germany
Belgium
Czech Republic
Slovakia
Poland

4.5. The Perceptions of Judges and Public Prosecutors

The analysis of judges and public prosecutors perceptions about the EAW is based on data collected through semi-structured interviews, a focus group and an on-line survey. The analysis is structured around the data provided by the on-line survey, enriched with the more qualitative data collected through the interviews and focus group in order to provide richer insights on an object of study –perceptions- which cannot be easily tackled with only quantitative information.

4.5.1. Notes on the data collection

4.5.1.1. Interviews

Within the Research project, formal semi-structured interviews of judges and public prosecutors were conducted in 4 different cities (Rome, Milan, Naples, Bologna) between January 2009 and February 2010.[120] In order to gain a picture as complete as possible of the phenomenon, the interviews involved personnel working at: Ministry of justice, Public Prosecution Office attached to the First Instance Court, First Instance Court (preliminary investigation judges), Public Prosecution Office General attached to the Court of Appeal, Public Prosecution Office General attached to the Court of Cassation. The interviews investigated the personal experience of the judge or public prosecutor with the EAW, the office caseload and organization, and the perception of the results, problems and difficulties of the implementation of the Framework Decision.

4.5.1.2. Focus group

A Focus group was carried out the 26 of March 2010 and saw the participation of selected practitioners representing most of the roles covered in the EAW practice. The list of participants included public prosecutors and judges dealing with EAWs at first instance and appeal level, a magistrate from the “Ufficio Massimario” of the Court of Cassation, the director of a SIRENE section, two lawyers/professors expert in EAW, the administrative head officer of a Public prosecutor office attached to the court of appeal,

[120] Other interviews to lawyers and administrative personnel were also conducted during the research in order to gain their perspective on the phenomenon.

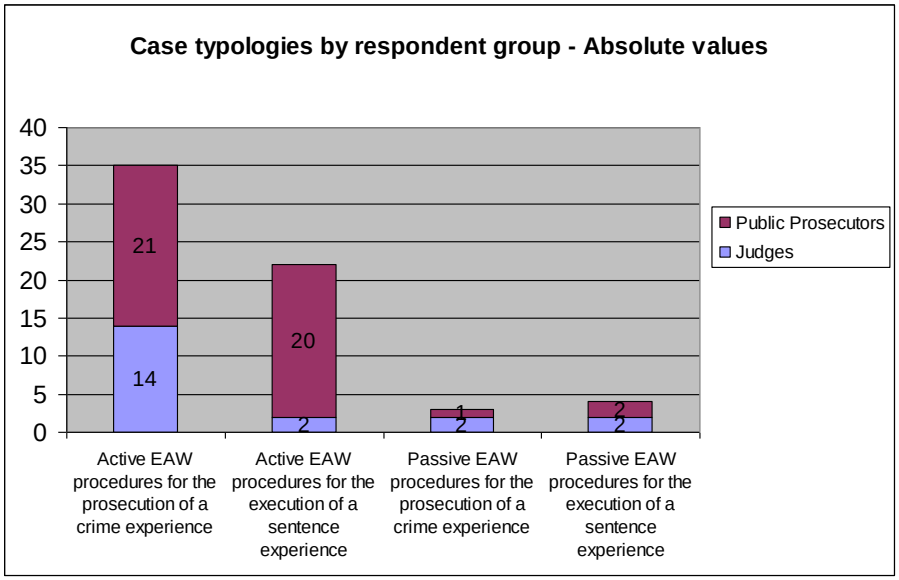
and the head of a district training office for the justice administration. All the participants were quite actively involved in the discussion which was stimulated by short presentations of the research findings. The main topics were: 1) relevant laws and their implementation, 2) organizational and technological issues, 3) evaluation of the EAW.

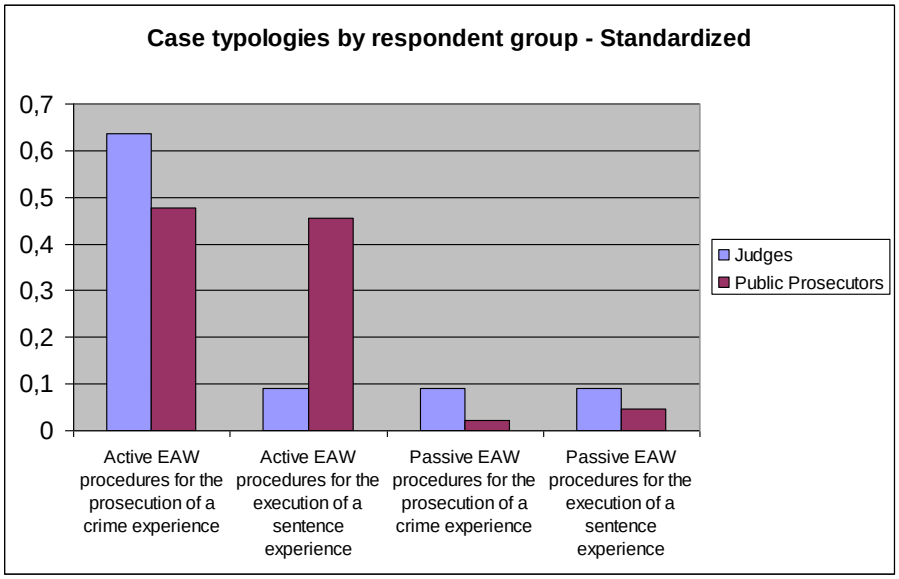
4.5.1.3 On-line survey

As in Italy both issuing and executing EAW procedures are not centralized (this is particularly true for issuing procedures) and the information about the office that issued or executed the procedure is not systematically collected, it proved to be impossible to ask directly judges and public prosecutors who had such experience to fill out the on-line form. Therefore the information letter about the on-line survey was sent submitted to the official e-mail address of 165 first instance court offices and public prosecutor offices, 29 appeal courts and public prosecutor general offices and 29 juvenile courts and related public prosecutor offices. The survey was endorsed by the Office II of the Ministry of Justice, which acts as Italian Central Authority in EAW procedures. 66 judges and prosecutors who filled the questionnaire, dealt with 168 issuing EAW procedures and 134 executing procedures in the last year.

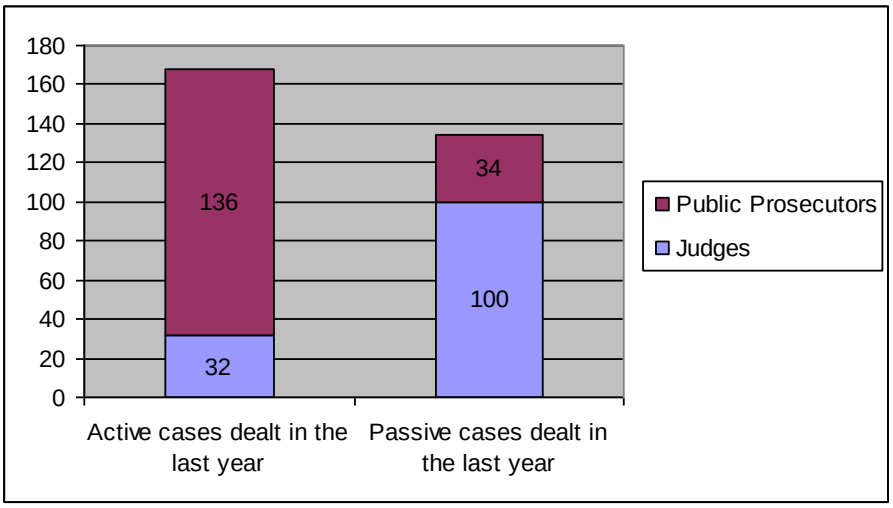
4.5.2. Analysis of the Italian public prosecutors and judges perceptions' data

Of the 66 respondents to the on-line survey, 44 were public prosecutors and 22 judges. Between them, 56 respondents had experience with issuing EAW procedures, while only four treated with executing EAW procedures. This is consistent with the concentration of executing procedure at the Court of Appeal / Public Prosecutor Office General level, while active procedure are much more diffused. More in detail, 35 respondents (14 judges and 21 public prosecutors) reported to have had experience with the issuing of a EAW for the prosecution of a crime, 22 (two judges and twenty public prosecutors) with the issuing of a EAW for the execution of a sentence. Three (two judges and one public prosecutors) dealt with the execution of an EAW for the prosecution of a crime, and four (two judges and two public prosecutors) with the execution of a EAW for the enforcement of a sentence.



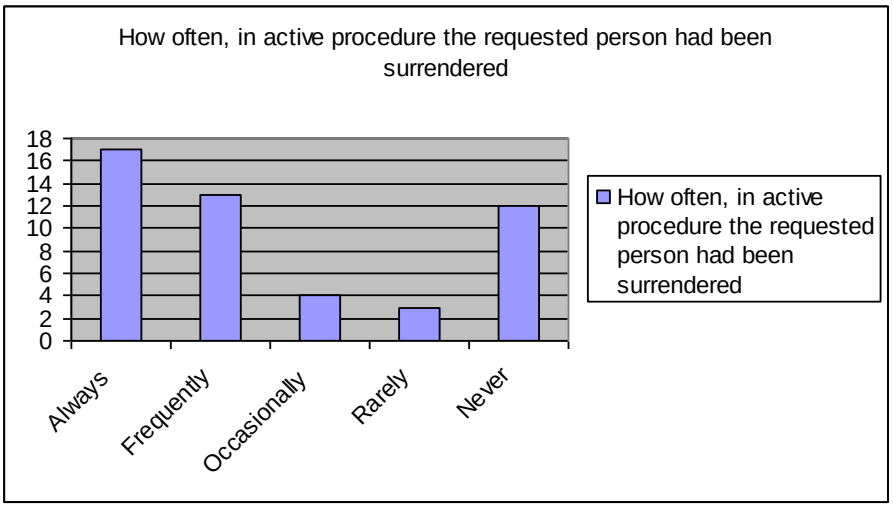


Between them the respondents had participated in the issuing of 168 EAWs (32 judges and 136 public prosecutors). Also, between them the respondents had also dealt with 134 executing surrender procedures (100 by judges and 34 by public prosecutors) in the last year. Given the large number of cases the two judges and two public prosecutors have dealt with just in the last year, while not allowing for statistical inference, allow us to consider them as qualified experts when evaluating their opinions.

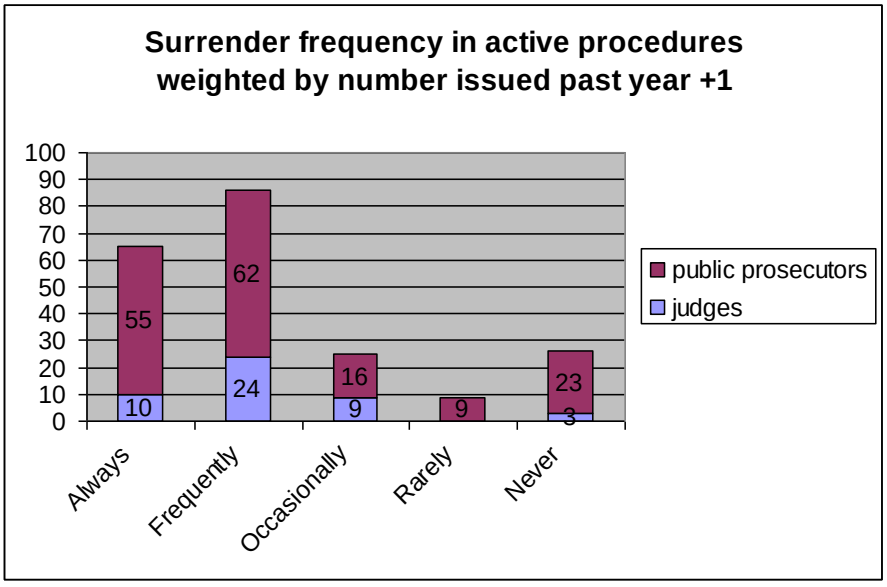


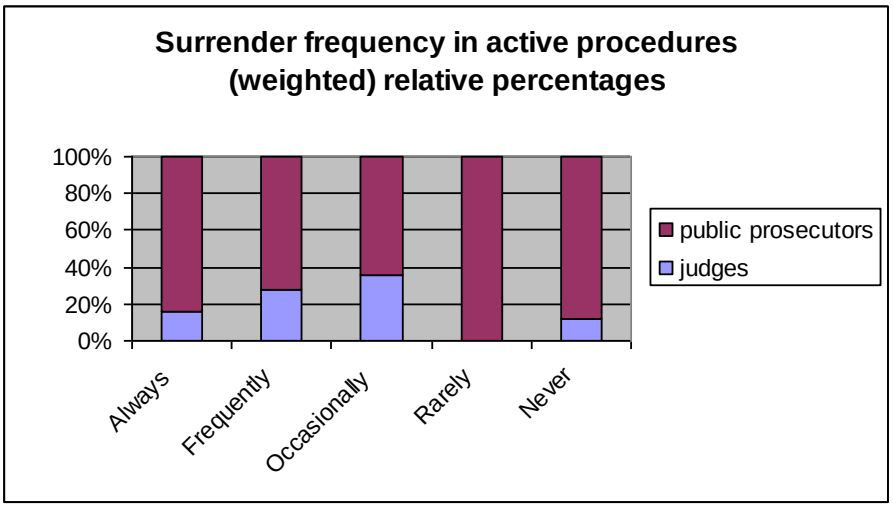
Of the 49 respondents to the question of how often, in issuing procedures, the requested person had been surrendered, 17 replied always, 13 frequently, four each occasionally and rarely and 12 never. In line with these results, a Public Prosecutor affirmed that in his personal experience *"There hasn't been any refusal to surrender. I received a few requests for clarification or, more frequently, the postponement of the surrender to allow the execution of a sentence in the foreign Country"* [PP-1]. Furthermore, as a Judge for Preliminary Investigations noted, *"even if the surrender is not granted, the person may still be caught in another country as the EAW is still active"* [JPI-1].

All 4 respondents with experience in passive procedures, when asked the same question in relation to executing procedure, replied frequently. Referring to the experience of his office, a District Public Prosecutor pointed out that *"the foreign "refusals" are small in number, around 10% of the requests issued. There are instead quite a few cases of refusal in the passive procedures, for cases in which the crime has taken place, at least in part, in Italy"* [DPP-1].



The following two tables present the perception of surrender success in issuing procedure weighted by an "experience indicator" calculated by adding 1 to the number of EAW issued the past year. In this way, the reply of those who dealt with more cases in the last year is weighted more than that of those who dealt with less or none (his or her experience was with cases of previous years).





On the question if they thought it was justifiable to issue warrants for crimes punishable with sentences of less than one year, 35 replied no, while ten yes, and 21 that it is not up to them to decide. Of the four respondents who had experience with executing procedure, 3 (two judges and one public prosecutor) replied no, while just one (public prosecutor) replied that it is not up to her or him to decide.

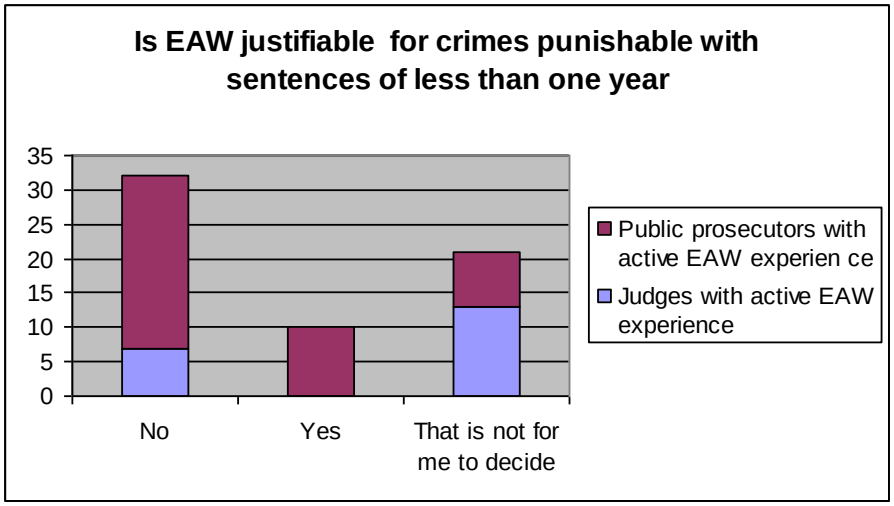
Confronting the replies of judges and public prosecutors with experience in issuing surrender procedures, 7 judges replied no, and 13 that it is not up to them to decide, while of the public prosecutors 25 replied no, 10 yes, and 8 that it is not up to them to decide.

On this topic, a public prosecutor stated that "*the recommendation of the Ministry of Justice is not to advance EAW requests for cases in which the detention order is for less than 6 months or for sentences for which for example is possible the suspension of the sanction. Typically, the request is not made for detention orders with detention order time limits of less than one year. This means that in my case requests are made generally for organized crime*" [PP-1]. He then noted that "*in theory, the EAW can be requested for any absconder. Personally, I request the issuing of an EAW only if I have the elements to do it, after having exhausted the researches in Italy. Since the norm is in place I've requested between 60 and 70 EAW*" [PP-1].

In his interview, a Judge for Preliminary Investigations of a Court of First Instance stated that in his experience "*the EAW is not issued for what are considered petty crimes. It is issued for drug traffic, organized crime, serious sexual crimes*" [JPI-1].

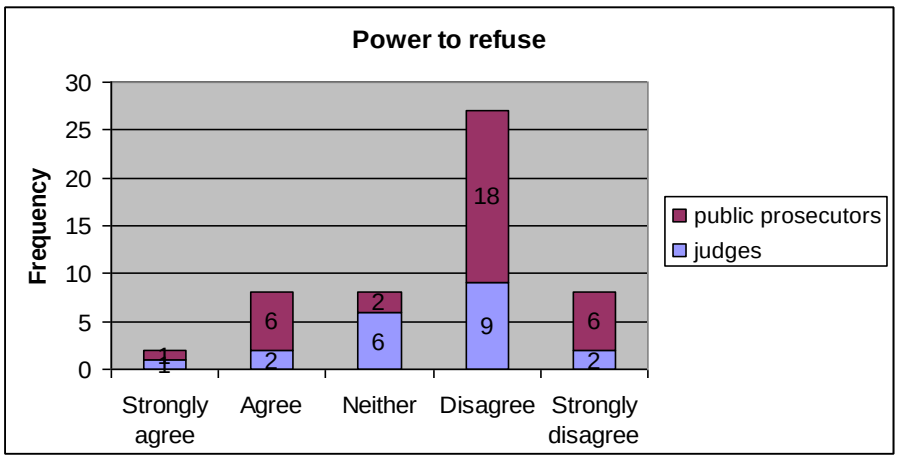
On the executing side, one District Public Prosecutor stated that "*One problem is that we are receiving from Eastern Europe Countries surrender requests concerning*

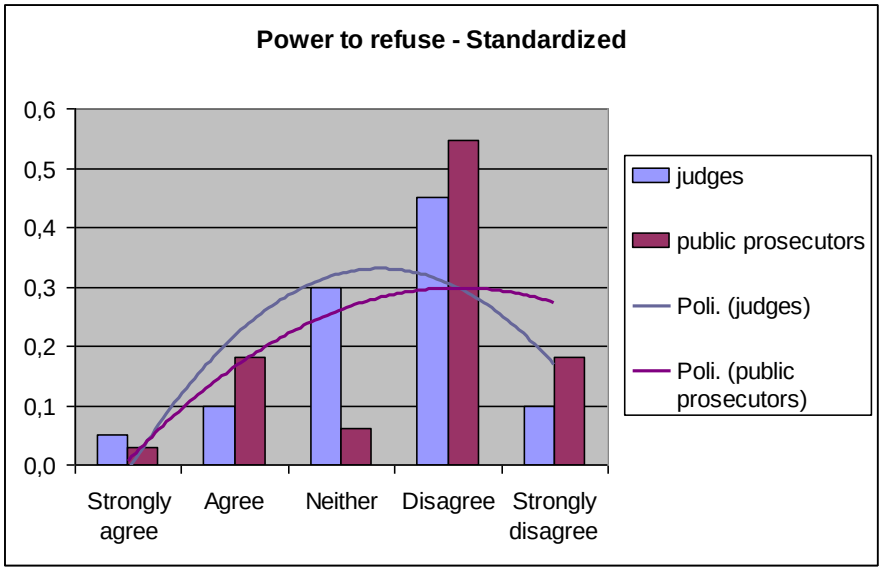
what we consider petty crimes and involving punishments that for us are quite light. When the requested people are residing in Italy in a more or less stable way and work in Italy, there are some perplexities on the adequacy of the tool… in the sense that a person is sent to the requesting country with the concrete risk of losing the job, and a serious disruption in his family life, maybe to serve a very short sentence…" [DPP-1]



The survey also asked about the judges' discretionary power to refuse an EAW notwithstanding all the formalities are correct. 36 think they do not have this discretionary power, while 10 believe to have such power and 8 are somewhere in between. Considering just the four cases with experience in executing procedures, one public prosecutor strongly agreed to have such power, the two judges disagreed and the other public prosecutor strongly disagreed.

As a magistrate working at the Ufficio Massimario of the Court of Cassation noted "*at present the evaluation of the proportionality is left mainly to the sensibility of the judicial authority issuing the EAW*" [CC-1]



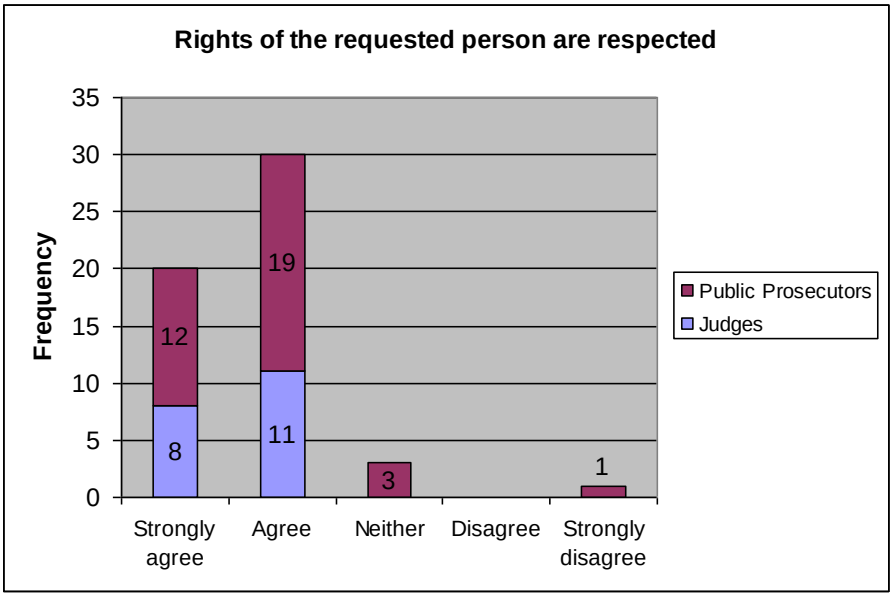


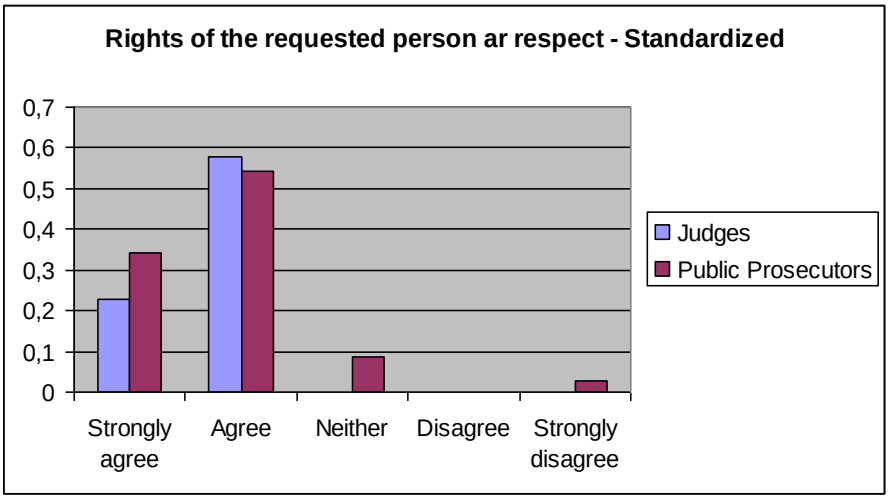
When providing their level of agreement with the statement that the requested person rights had been sufficiently guaranteed and respected in the cases they dealt with, 18 strongly agreed, 30 agreed, three neither agreed nor disagreed and only one strongly disagreed. Judges either strongly agreed or agreed. On this subject, in her interview, a Judge for Preliminary Investigations of a Court of First Instance stated that in her experience *"in general the EAW is issued when the case is well developed"* [JPI-2].

Considering just the four cases with experience in executing procedures, the two public prosecutors strongly agreed while the two judges agreed to the statement.

A judge working at the court of appeal stated that in some cases additional information is required in order to assess the case in relation to the respect of fundamental rights once the person is surrendered: "*in one case it was foreseen a sentence including hard labour… we requested an explanation in order to decide on the surrender*" [CA-1]. Interesting to note, not only the rights of the requested person are at stake. As a District Public Prosecutor noted, *"We have to be careful as the requested persons may be employed as care worker, an elderly carer, and so we have to act with caution"* [DPP-1].

Discussing the topic, a magistrate working at the *Ufficio Massimario* of the Court of Cassation noted how in the Italian case, the rights introduced with the EAW in relation to the protection of the children under the age of three living with the mother have been extended to the extradition procedure [CC-1].

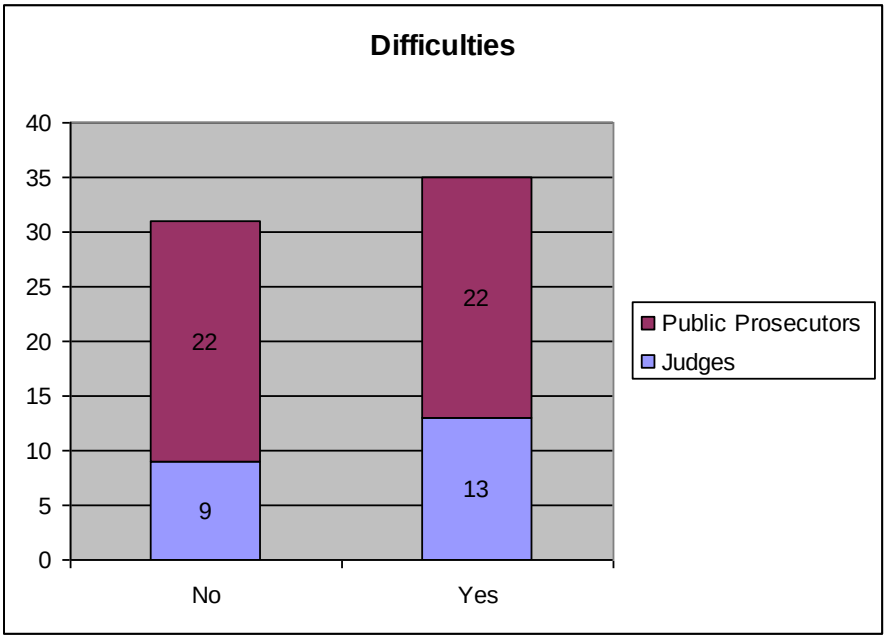


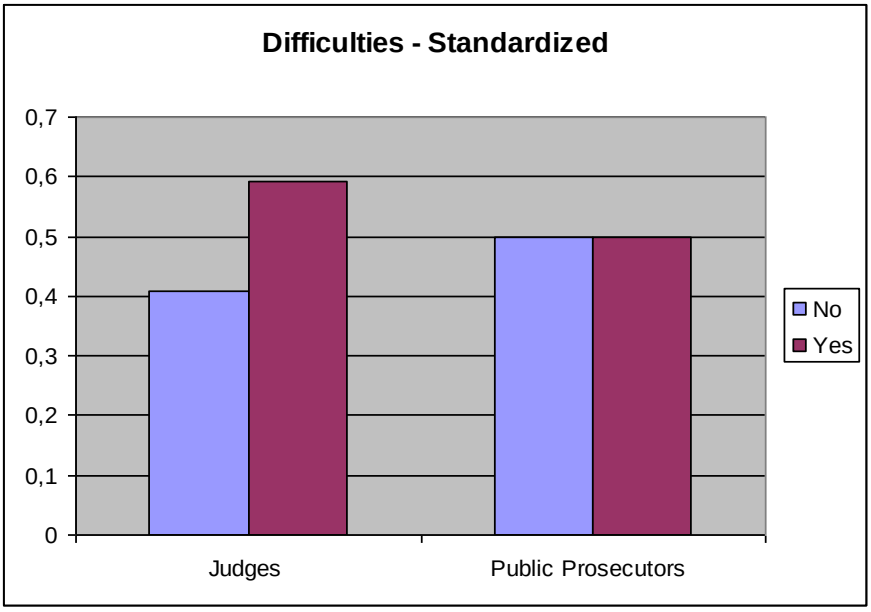


Prompted on the difficulties encountered while dealing with EAW procedures, while almost half of those who responded declared to have been confronted with no particular problems (31 out of 66).

A public prosecutor noted that within the issuing procedure, "*with the EAW, the judges for the preliminary investigation have to deal with much of the work that was previously done by the public prosecutors with the extradition procedure. At the beginning there has been a problem with the lack of experience of the judges for the preliminary investigation but with time the experience has been acquired… it is a matter of learning to know the form… The request of the Public Prosecutor to the Judge for the preliminary investigation is filled in 10 seconds and require 10 minutes of work of the office and of the Judges for the Preliminary Investigation, who takes between 10 minutes*

to few hours to prepare it. In general, the request is issued in no more than 5 days, rarely more than 2 months. It is important to remember that the time is strongly dependent on the other activities that need to be performed by the office" [PP-1]. As the workload is concerned, a Judge for Preliminary Investigations of a Court of First Instance stated "The preparation of the request is 'very fast' especially where 'common crimes' are concerned" [DPI-2]. As another Judge for Preliminary Investigations noted, "*It takes 30 minutes, one hour top*" [DPI-1].



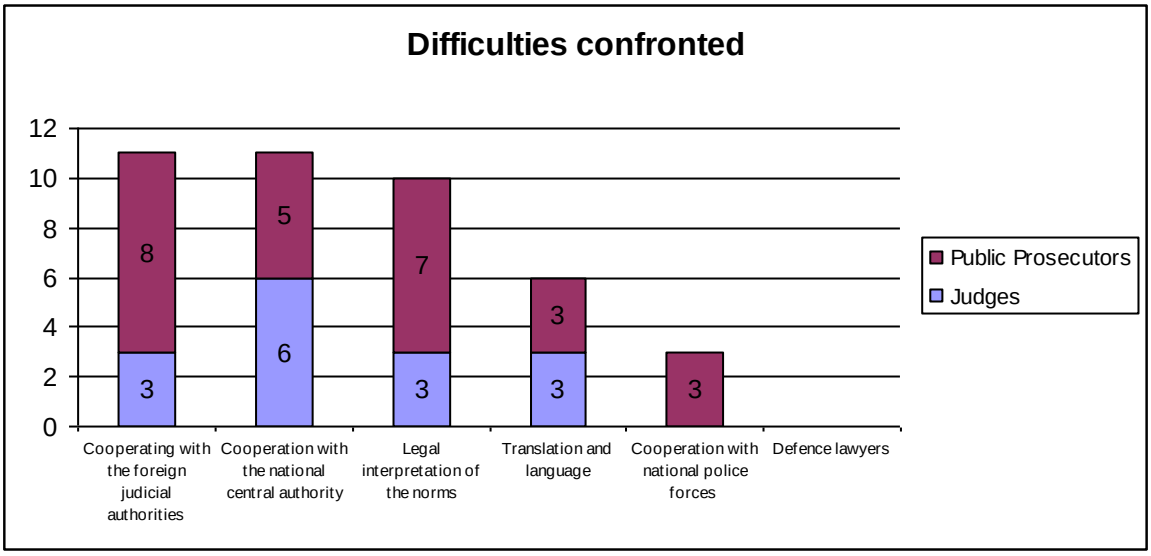


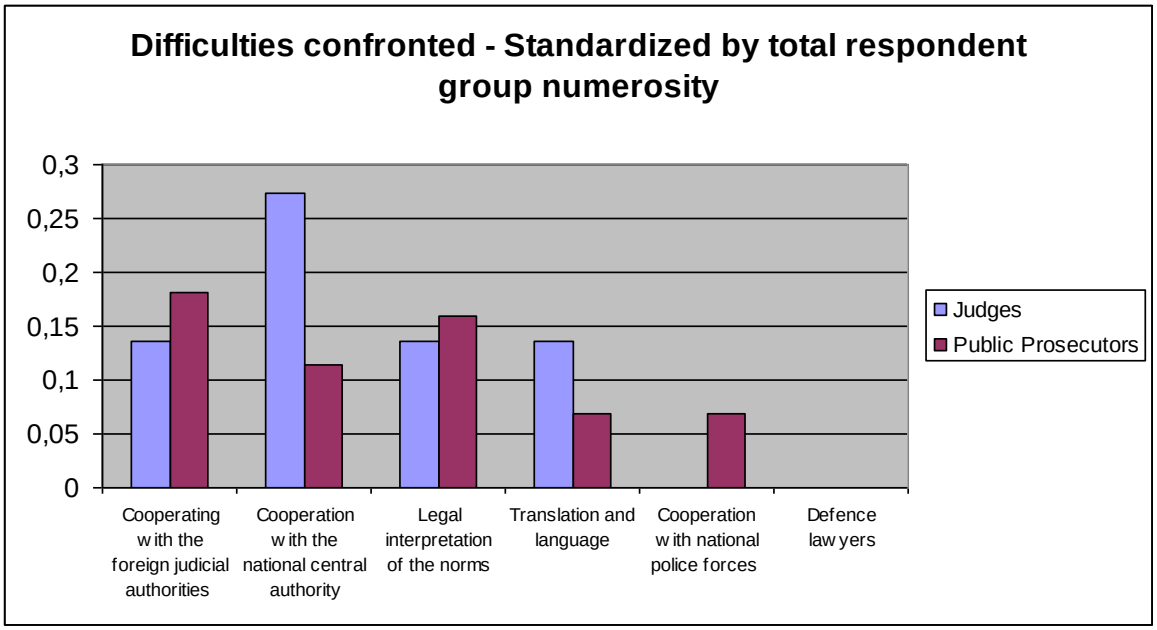
Of the remaining 35 who experienced difficulties, eleven highlighted the difficulties found in cooperating with the foreign judicial authorities (three judges and eight public prosecutors), eleven the difficulties of cooperation with the national central authority (six judges and five public prosecutors), ten those relating to legal interpretation of the norms (three judges and seven public prosecutors), six translation and language problems (three judges and three public prosecutors) and only three problems of cooperation with national police forces (all three public prosecutors) while none highlighted problems with the lawyers.

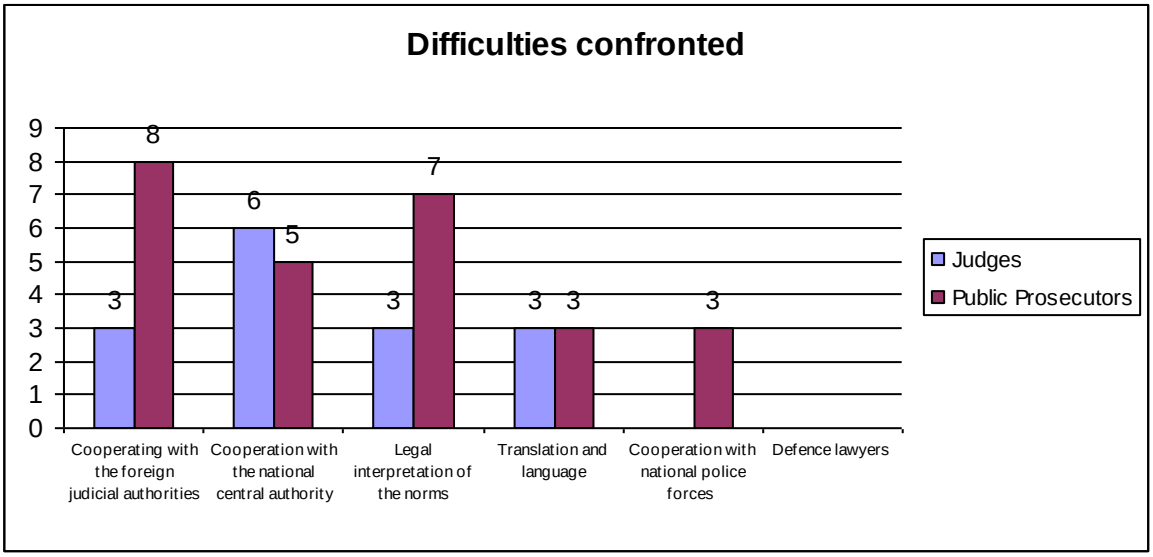
In relation to the difficulties found in cooperating with the foreign judicial authorities, a Public Prosecutor noted that many problems are originated by the fact that *"not all crimes are known in the same way among the EU Countries"* [PP-1] and that *"this results in different evaluations of certain conducts"* [PP-1]. According to the same Public Prosecutor, *"The different sensibility of the various Countries means that requests need to be formulated differently, clarifications can be required and rejection of the request can take place. This is also true in case of requests for which Italy is the executing Country"* [PP-1]. Referring to her experience, a Public Prosecutor reflected that other MS judicial authorities *"do not have the sensibility to perceive some crime typologies such as the criminal association (associazione a delinquere) as we do for our historic experience"* [PP-2]. Another Public Prosecutor reflected that *"We are all trying to align as much as possible the procedure but there are guarantees which each National system consider fundamental… and here is where there is a risk of a closure instead of a mutual assistance"* [PP-3]

On the same topic, a Judge for Preliminary Investigations [DPI-2] noted that in 'difficult' cases, when an understanding between the issuing judge and the executing authority is not reached or the procedure in the Executing member state does not proceed as expected, the role of the 'magistrate of reference' for the Executing member state becomes important. The 'magistrate of reference' acts both as mediator/translator of meanings and procedures both as advocate of the issuing judge position in front of the executing authority. As another Judge for Preliminary Investigations noted, the *"EAW is particularly effective when the investigation is conducted in collaboration with the State who surrender the subject or if it concerns an EU level crime. For example, I've been involved in a large case concerning a criminal organization based in … and committing armed robberies in several EU countries. I ended up issuing 37 EAWs. While the case was complex, I found it simple as the EAWs were concerned, thanks to the support of the … authorities with which the Italian authorities were already collaborating for the investigation"* [DPI-1].

Translation problems may concern for example the additional information requirements of the executing authority. As a Judge for Preliminary Investigations noted, *"sometimes it is difficult to understand what they are looking for… in one case there was a request to know if the case involved guns or little guns… what difference does it make for the surrender?* [what was important was that] *The subject was armed* [when he committed the crime]!" [DPI-1]. In the direct communication between offices the language is clearly a problem. As a public prosecutor noted "*It happens that a foreign authority attempts to communicate directly with us sending a fax in English… the fax get to my office… what should be done? … The knowledge of foreign languages is not so diffused in Italy… what does the fax says? Should the office hire a translator?*" [PP-3]. At the same time, in the Italian case the problems of translation can be related to the cooperation with the national central authority as emerged from the same interview: *"while according to the law the Ministry of Justice should translate the EAW, I translated mines in English…"* [DPI-1]. On the same issue, another Judge for Preliminary Investigations stated that she refused to translate hers [DPI-2]. As a Public Prosecutor noted though, in some cases, even if the judge or public prosecutor is willing to translate a document in English, the intervention of the central authority can be required: *"In one case, for example, the Danish authorities wanted the translation in English of an article I referred… but they wanted the official translation of the Ministry of Justice…"* [PP-3].



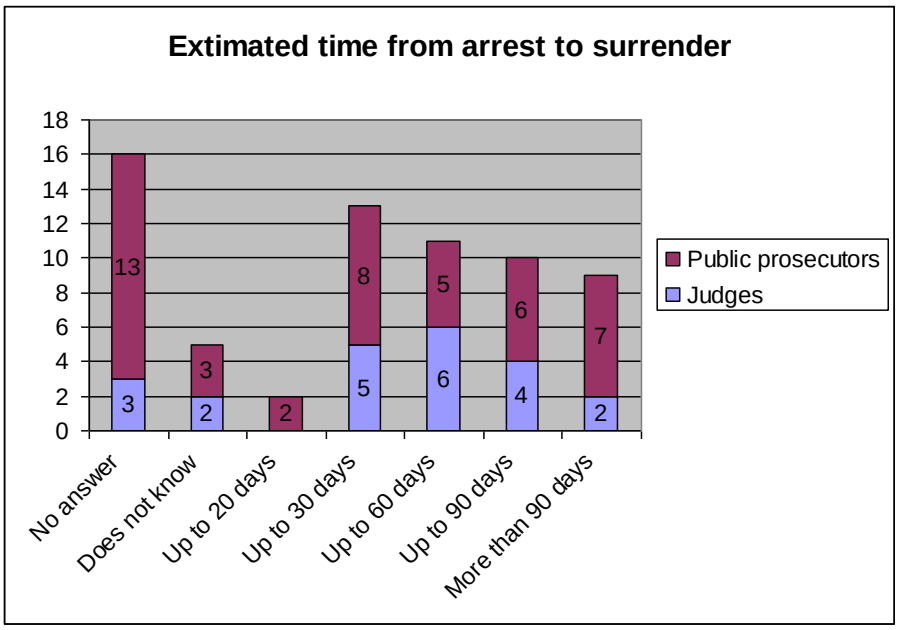


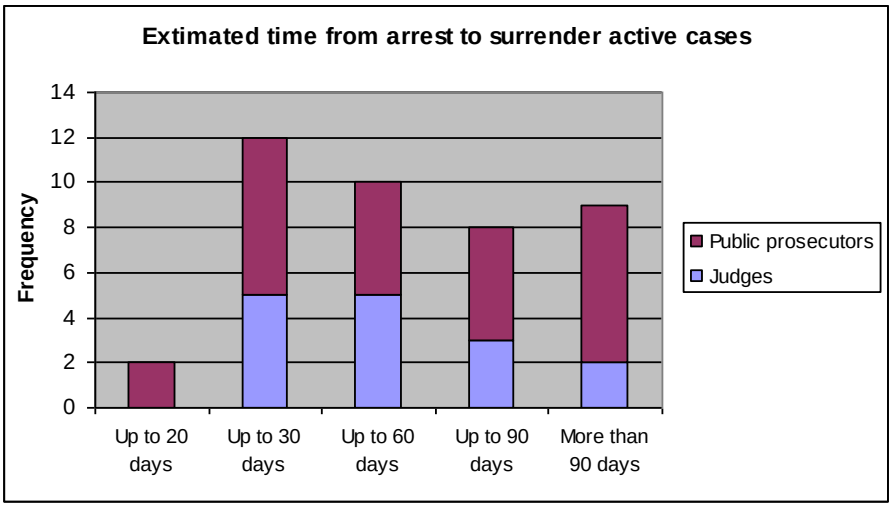


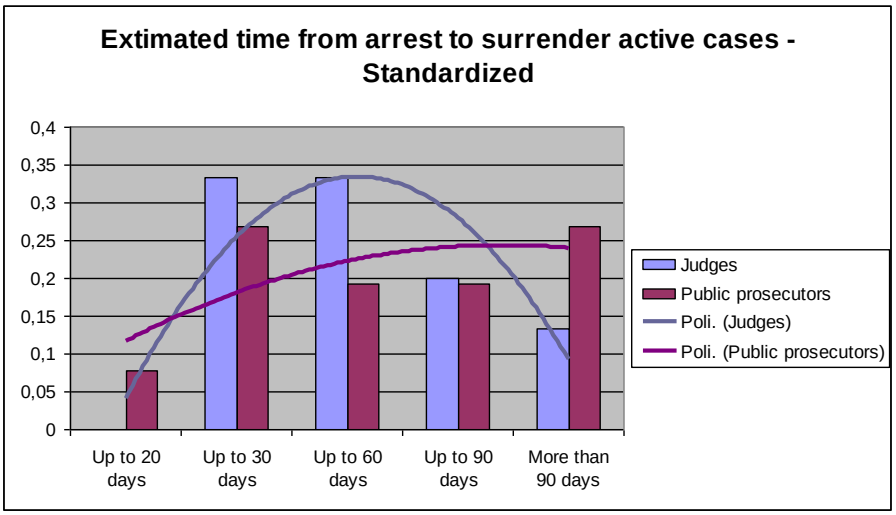
In relation to the time intercurring between the issue of an EAW and the arrest of the request person, a public prosecutor noted that *"If the request is for a subject whose location is known, the answer doesn't take much time. In the other cases, when the EAW is issued for subjects who probably or presumably are within the European territory, the answer is given only when the police of a Country proceed with the arrest and the foreign judge decide on the EAW. It can take a long time before this happens"* [PP-1]. In relation to the execution of the EAWs by Italian Judicial authorities, a District Public Prosecutor stated that *"the procedure is much speedier, even though the time required can increase quite a bit if additional documentation is requested. On the issue though I have to say that the Court of Cassation has reaffirmed several times that there is on need of further*

information apart from that required by the EAW forms of the Ministry of Justice" [DPP-1].

As to the duration of the whole EAW proceeding since the arrest, 16 did not answer (3 judges and 13 public prosecutors) and five stated that they do not know. Of those who provided a quantitative answer (45 answers in total, 17 from judges and 28 from public prosecutors) two stated less than 20 days (two public prosecutors), 13 up to 30 days(5 judges and 8 public prosecutors), 11 up to 60 days (6 judges and 5 public prosecutors), 10 up to 90 (4 judges and 6 public prosecutors) and 9 more than 90 days (2 judges and 7 public prosecutors).







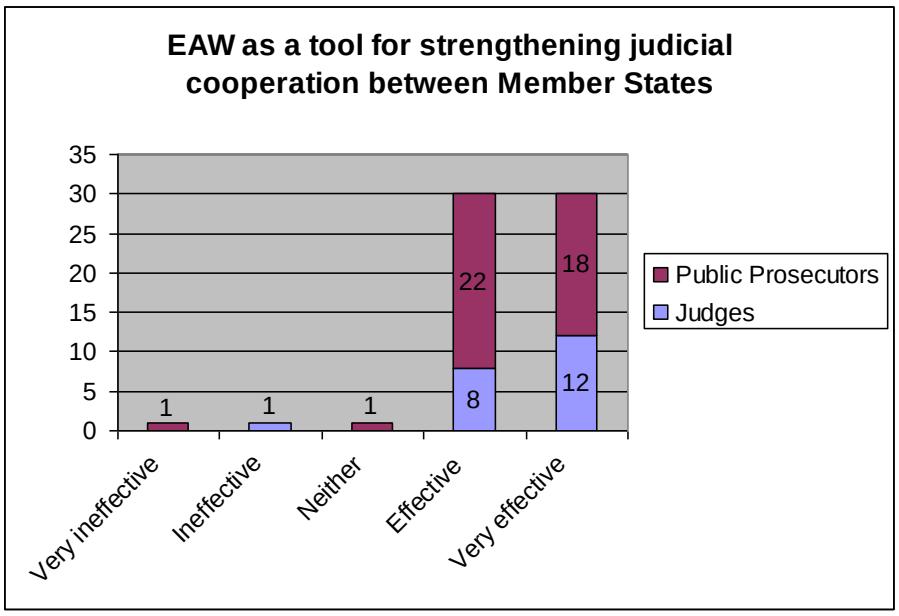
On the issue of EAWs taking too much time, a Judge for Preliminary Investigations with a bad experience noted that "if the EAW is promptly executed and the subject is arrested but then the surrender takes a long time, this can have serious [negative] repercussions… the time limit for preventive custody run from the day on which the arrest has taken place… if the time limit of the preventive custody order on which the EAW is based expires, then the EAW expires too and the subject is not surrendered anymore! and even if the subject is surrendered within the time limit, if too much time has passed by, this may not leave enough time to proceed before the time limit expires and the subject is released! In a case, for example, three subjects requested for terrorism were surrendered after almost one year from the arrest, just the day before the expiration of the preventive custody time limit" [DPI-2].

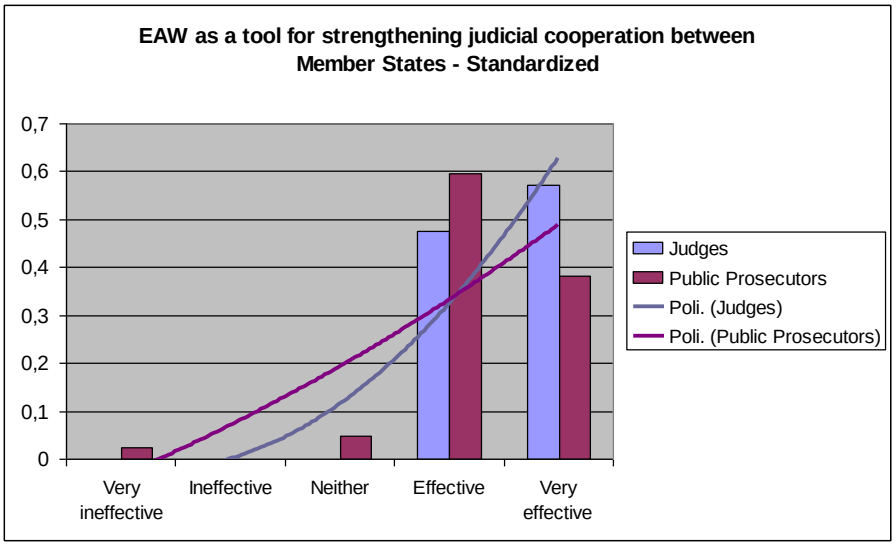
In relation to the execution of an EAW by Italian judicial authority, a District Public Prosecutor noted that it was difficult for him to know what happens to a case after it is appealed which happens "each time the requested person do not consent to its surrender, as to say, almost all the times" [DPP-1]. In facts, if a case is appealed, "It is afterwards problematic to know the result of the appeal as the court of Cassation doesn't have to notify it to the Court of Appeal, and as a consequence, to the District Public Prosecution Office attached to it. This happens only in rare cases when the case comes back to the Court of Appeal" [DPP-1].

The respondents agreed that the EAW is an effective (30) or very effective (30) tool for strengthening judicial cooperation between member states. Only one respondent each replied that the tool is neither effective nor ineffective, ineffective or very ineffective. According to a Public Prosecutor, "*there is a tendency from the executing judge to get into the merits of the case, contradicting the spirit of the framework decision according to*

which the decision of the judge of the executing Country should deal only with the procedure. This shows a low level of trust between European judicial systems." [PP-1].

At the same time, from the executing authority perspective, a District Public Prosecutor considered a problem "*the low quality of the documentation which is provided with the EAW*". He observed that "*Often we just deal with the story of the fact, without a clear indication of the sources of proof. We have to have faith in the authority which conducted the investigation and on its judgment… This does not help increasing mutual trust between systems! Even if the Court of Cassation has stated that we do not have to enter in the meritis, there still are perplexities on the quality of the requests…*"[DPP-1]

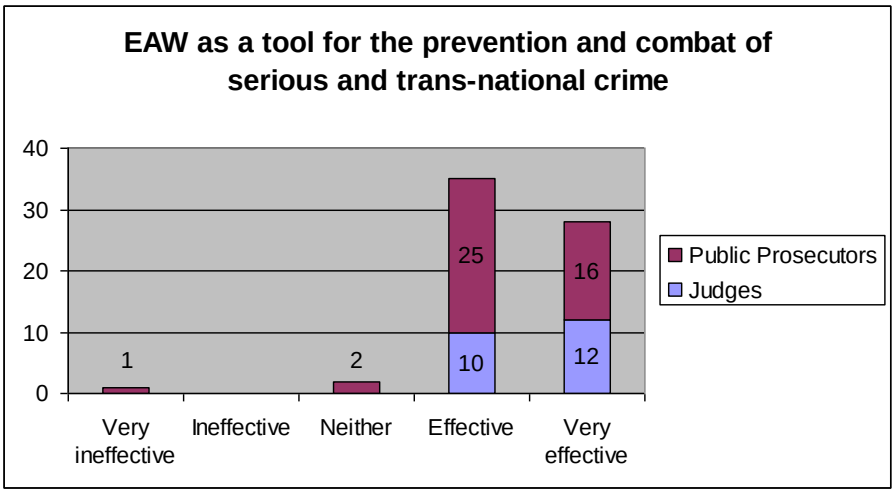


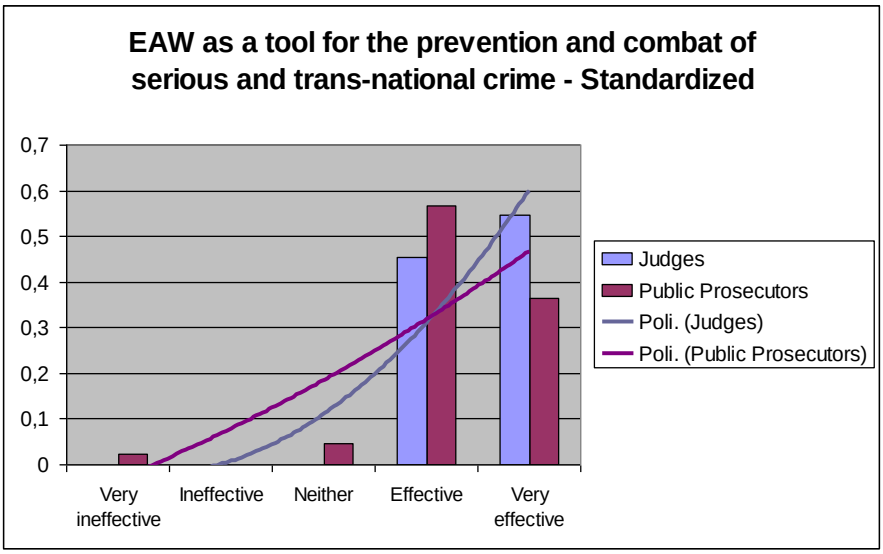


The respondent also generally agree that the EAW is an effective (35 replies) or very effective (28 replies) tool for the prevention and combat of serious and trans-national crime.

From the issuing judicial authority perspective, a public prosecutor noted that while "*the EAW allows us to avoid the administrative phase linked with the intervention of the Ministry. This has resulted in a reduction of the time required" [PP-1], at the same time, "Much still depends on the practices adopted by the various Countries*" [PP-1]. Furthermore, as a Judge for Preliminary Investigations of a Court of First Instance stated "*The improvement has been consistent both as the time required to prepare and submit the request is concerned, both as the time within which the surrender takes place in most cases: it is not even comparable!*" [JPI-1].

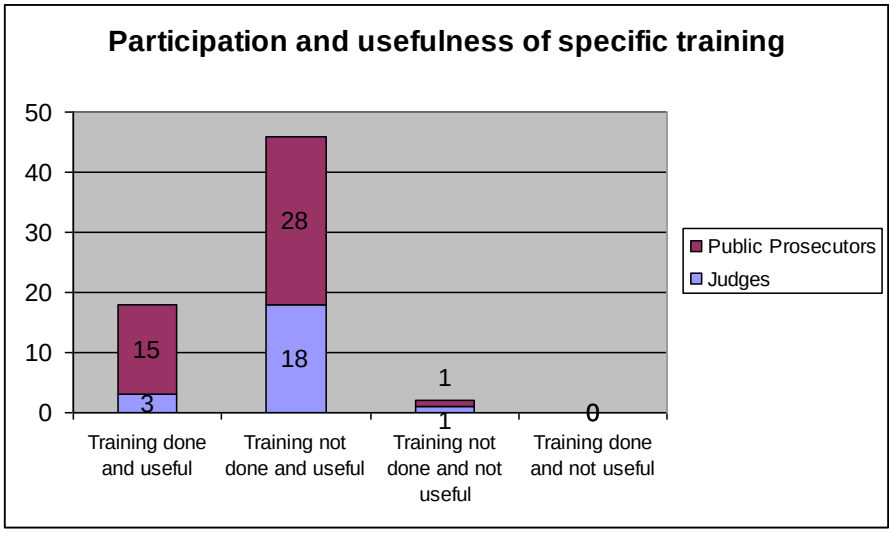
At the same time, from the executing judicial authority perspective, a District Public Prosecutor noted that the EAW is not always used as a tool for the prevention and combat of serious and trans-national crime, and that its use tend to vary from country to country: *"the passive procedures of surrender … mainly concerns Eastern Europe Countries. Rumania, for example, has five times as many requests as Germany. The crimes for which the surrender is requested are mainly fraud, theft and robbery … We have few requests for organized crime and they mainly come from Germany, France and the Netherlands"* [DPP-1].

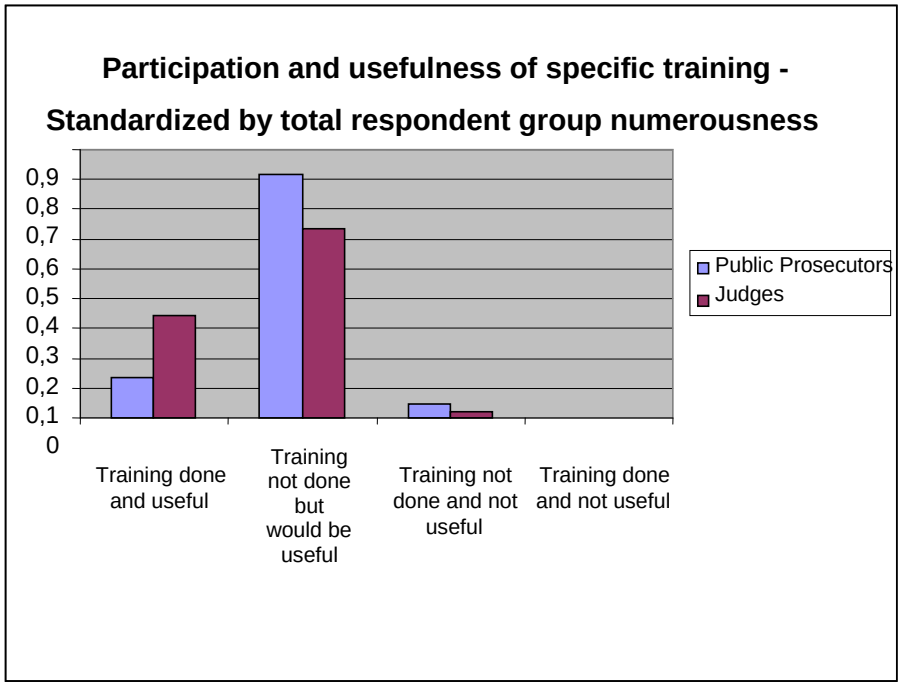




As training is concerned, almost 3/4 of the respondents (48 out of 66) had not participated in specific training courses on the EAW topic, while 65 out of 66 believed that training course on the EAW and European cooperation matters could be useful for them. The only dissenting respondent had not participated in specific training courses. In proportion, public prosecutors had participated in specific training more often.

As it emerged from the interviews and from the focus group, the issue of the training and of exchange of experiences between practitioners is a sensitive issue. Both Judges and Public Prosecutors agreed that while much learning has taken place, often through trial and error, and some trends are emerging also thanks to the case law of the court of cassation, the work of the *Ufficio Massimario* of the Court of Cassation and the *Vademecum* of the Ministry of Justice, the discussion is still open on the procedure to be applied, and on the specific roles of the various actors. Different public prosecutor offices have not only different typologies of cases as the criminality phenomenon differ from place to place, but also have implemented different practices in relation to the problems they have confronted and experiences that have made. So for example, from the interviews with the judges it emerged that the GIP office of Milan tend to resort quite often to the magistrate of reference while in Reggio Calabria tended to look for a direct contact with the foreign judicial authority. Also, differences emerged in the specialization or non specialization of the personnel within an office. Much is still to be learned by the various experiences and their confrontation. The participants to the focus group highlighted in more than one occasion that the experience of being together and discussing both the research results, both their own experiences with each other was of great importance and should be done more often.


Participation and usefulness of specific training
50
40
30
20
10
0
15
3
28
18
1
1
0
Training done and useful
Training not done and useful
Training not done and not useful
Training done and not useful
Public Prosecutors
Judges


Participation and usefulness of specific training - Standardized by total respondent group numerousness
0,9
0,8
0,7
0,6
0,5
0,4
0,3
0,2
0,1
0
Training done and useful
Training not done but would be useful
Training not done and not useful
Training done and not useful
Public Prosecutors
Judges

4.6. Conclusions

At a first glance, the EAW implementation in Italy inevitably attracts the attention of the observer to the differences introduced with the Italian Law, differences that, as pointed out in Section 2.1. have no equivalent in other EU Member states. As we have seen in the following pages of the report, though, the case-law of the Court of Cassation with its interpretation of the Italian Law 69/2005 in conformity with the Framework Decision has consistently decreased this gap in the practice. As one District Public Prosecutor stated "*If one reads the text of the Italian law [69/2005], it is quite distant from the Framework Decision. I have to say that there were difficulties in the application of the Italian law, for example in the evaluation of the evidence which is required by the Italian law… the Sixth Section of the Court of Cassation has indeed helped us in making the Framework decision work … thanks to the case law of the Court of cassation we now have a greater possibility of executing EAWs"* [DPP-1].

Furthermore, as shown by the adoption of the Framework Decision 2009/299/JHA of 26 February 2009 which clearly states that the "*solution provided by the EAW Framework decision was not deemed satisfactory as regards cases where the person could not be informed of the proceedings*",[121] the Italian implementation law sensibility for the rights of the requested person cannot be easily discounted as a somewhat solitary resistance to the principle of mutual recognition.

Looking more carefully at the EAW implementation in Italy, the study of the EAW in action has shown that the system is technically and organizationally sound. After an initial phase characterized by problems of consistency between norms, lack of operative practices, and shared understanding of roles and competences of the relevant actors, legal interpretation has stabilized, and organizational and inter-organizational learning both of national and of other member states norms and practices has taken place. On this topic, for example, a magistrate working at the *Ufficio Massimario* of the Court of Cassation noted that *"Once the law and practice of a certain member state is known on a specific issue, than it is not required anymore to ask for additional information on that topic unless the defence highlights that a change has taken place…"* [CC-1]. Of course, the diffusion of such experience from those who have matured it to those who will find themselves in the same situation does not seem to be always taking place as swiftly as it would be needed.

[121] Point 3 of the Preamble of the Framework Decision 2009/299/JHA

The guide (vademecum) prepared by the Ministry of Justice and the work of the Supreme Court of Cassation have certainly been useful tools to judges and prosecutors for the day-to-day operations. For once a soft law approach has been attempted in Italy, and the results have been positive. The Ministry of Justice Office in charge of giving assistance to courts has also been an important facilitator, in particular for the most difficult cases. The Interpol, the SIRENE unit and the information technology system SIS have showed to be effective, even though some problems arise about the circulation of information between the court and these units.

However, the Italian case shows that much of the results and trends of the EAW practice must be analyzed and discussed at the EU level in comparative perspective. EAW data may tell us a story of EU 'crime and punishment' geography. But they also show that different EU countries are using the EAW in different ways, and that this may result not only in procedural problems, but in the not so long run may constitute a political issue. It is not just a problem of differences in the implementation laws, even if they exist and sometime pose serious problems as clearly expressed by a magistrate working at the Italian Ministry of justice *"the problem is that the FD is one, but the implementation laws are 27!"* [MJ-1] This results, for example, in not having common deadlines for providing the translation of the MAE to the executing authority. As the same magistrate working at the Ministry of justice observed, *"you may find yourself in the situation in which you have to send the translation from Friday to Monday and having to translate the MAE in one language which is not one of the more diffuse in EU… so what looks like a simple task can be quite challenging from an organizational perspective"* [MJ-1]

But the problems are not only on the letter of the implementation laws, that, as we have seen with the Italian case, may not produce so relevant effects. A probably greater and more urgent problem concerns the consistency about the use of the EAW among the EU member states in relation to the typologies of crimes the tool is used for. Consequently, one of the questions raised by the research and by the confront of data on issued and executed EAWs is if the divergence of national practices on the issuing EAWs acceptable. And if it is not, what should be done and at which level? Should the action or inaction of single judges be the response to such tension, questioning -or accepting without entering in the merit- the decision at the basis of the EAW and the proportionality of the action to the crime? Or it is more appropriate for actions to be taken at national or EU level? While a magistrate working at the *Ufficio Massimario* of the Court of Cassation for example pointed out that *"we cannot arrogate to ourselves the right… the faculty to evaluate the congruence of the cautionary measures that for other systems*

are fundamental…" [CC-1], at the same time the investigation of the perceptions of the judicial authorities revealed a tension in accepting decisions of foreign authorities which conflict with what is considered appropriate. And the tension is not limited to the judges deciding on the surrender. A District Public Prosecutor clearly manifested this tension: *"we should reflect more on which is the scope, the objective we are trying to achieve with this tool, which is a strong tool"* [DPP-1]. On the same point, same District Public Prosecutor also stated that *"this instrument, which is a good tool, has consequences which should be researched and better evaluated"* [DPP-1]. As data both on the geography of the EAW requests, both on the type of crimes member states Judicial Authorities issues EAWs, point out, even considering differences in the EU geography of the crimes, the EAW is used for quite different purposes by different member states. Purposes which are not always in line with the vision of a powerful instrument adopted to fight serious organized crime and terrorism. Because if the system has shown to be working quite smoothly in cases involving murder and other serious offences, it has also proved to be quite effective in the majority of cases which concerned petty offences, where the proportionality was ignored by the judicial authority deciding on the surrender in light of an evaluation of the foreign judicial authority who had issued the EAW.

As one of the EAW experts pointed out "there seems to be a problem of too many guarantees and too few guarantees… maybe the problem comes from the fact that we are dealing with other countries, where those that for us are fundamental guarantees are not, and vice versa" [E-1]. This is of course linked with the sometimes profound differences about the criminal procedures and policies in the EU countries that obviously end up in affecting the EAW. As the same expert pointed out, maybe "the problem is not much the homogeneity of implementation as much as to try to reduce the frictions where they are higher" [E-1].

On the one hand we assist to a move toward the standardization, through the use of standard forms, for example, or the identification of the 32 crime typologies, but also on the indications that are given, to mutually recognize the evaluations and decisions of another member state judicial authority. On the other hand the emerging need to evaluate as the EAW is not just an administrative procedure but it is jurisdictional one.

At the same time though, while some perceptions and awareness of the existence of a problem does exist, as most of the actors deals only with a limited portion of the EAW procedure, they have only a vague idea of the broader picture of problems and practices involved in the implementation of the EAW. As a judge for the preliminary investigation noted, "*we talk about the problems we are facing when we issue EAW and*

deal with the various countries, but who knows which are the problems faced when the subject requested by another country has to be surrendered by Italy… may be they [the foreign issuing authorities] *have the same complains we have…"* [JPI-2]. Furthermore, the actors typically have just a vague if any idea of what happens to a case (and to the related requested subject) when it exits his or her area of competence. This condition was clearly highlighted in his interview by a District Public Prosecutor (see section 5.2.) referring to what took place after the cases he was following were appealed. And he was talking of events taking place in Italy. The issue appears to be even more serious in relations to what happens to the subject once he or she cross the national borders.

Finally, the limited space for the defence in the EAW procedure has risen to the attention of the researchers. Some learning has taken place, both in relation to the defence possibilities offered by the Italian Implementation law, both in relation to the problems of preparing the case and act within the very short deadlines of the EAW. At the same time, Italian lawyers usually deal with a very limited number of EAWs. Furthermore, lawyers have lamented the difficulties they have to confront in order to have a direct dialogue with the Italian Central Authority, with the Foreign Judicial Authorities, or even in finding colleagues in the issuing country able to provide assistance. An expert, reflecting on her experience on the EAW, referred to it as to "*a sword without a shield*" [E-2].

Clearly the EAW implementation has shown a quite successful implementation of a complex and quite effective instrument created in a period of emergency. At the same time, while the organizational complexity has been quite successfully confronted, it looks like the time is mature for a deeper, second level reflection on the emerging, unexpected and unwanted results highlighted by this research.

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5. THE EAW IN THE NETHERLANDS

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5.1. Introduction

The European Arrest Warrant (EAW) is based on the Framework decision of the European Commission of June 13, 2002. The main aim of the Framework Decision on the EAW is to broaden judicial cooperation in criminal matters within the third Pillar of the EU. The EAW tries to simplify and expedite the surrender of persons. Therefore it "took the procedure from the hands of politicians and made it a purely judicial matter, whereby only the courts of the member states cooperate without the need to turn to the executive, which traditionally participated in the process of extradition" (Komarek, 2007: 14). Paragraph 12 of the Preamble states the EAW is based "on a high level of confidence between member states. Its implementation may be suspended only in the event of a serious and persistent breach by one of the member states of the principles set out in Article 6(1) of the Treaty on European Union." These words suggest more for citizens than what they actually refer to: enhancing transborder law enforcement within the European Union from an efficiency perspective while neglecting defence issues.

In general terms the European Arrest Warrant sets aside the applicability of the extradition treaties between the member states of the European Union. The Framework decision (hereafter referred to as: FD) obliges the member states to transform it into domestic law. The Netherlands has done so in the Surrender Act (hereafter referred to as: SA), which replaces the applicability of the Extradition Act on Arrest warrants from within the European Union. The Surrender Act makes the District Court of Amsterdam competent to decide on the surrender of a person for whom an EAW has been issued. The aim of the Framework Decision on the European Arrest Warrant is to make law enforcement easier and to put an end to the delays and restrictions of the cross border transfer of suspects and convicts under the extradition treaties regime. Furthermore, its aim is to make it difficult to flee for prosecution to another country and to make law enforcement in the European Union more effective.

This instrument for fighting criminality, consolidating judicial cooperation and for the mutual recognition of decisions calls for an efficient and effective application in all Members States. However, the "law in action" is frequently and significantly different from the "law in the books"; therefore it is essential to examine these differences. The objective of this report is to describe the practical application of the EAW in the Netherlands, the profile of the criminal practices and defendants, as well as the

perception of judges, prosecutors, advocates and scholars on how this instrument works and how effective it is in preventing and combating the circulation of crimes.

Research context

This report is part of a comparative research project organized by the Observatory for Justice of Coimbra University Portugal, co-financed under the criminal justice program 2007 of the European Commission. The research was directed by dr. Conceição Gomes, research coordinator of the Observatory. The aim of the project is to make an inventory of the practices of the implementation of the Framework Decision on the European Arrest Warrant in Portugal, Spain, Italy and the Netherlands. The project was executed by national research teams based at the Faculty of social and juridical sciences, University Carlos III de Madrid), Coimbra University, IRSIG-CNR, Bologna, Italy and at Utrecht Law School. The data were analyzed by the Observatory for Justice in Coimbra.

Methodology

The project combines juridical and qualitative and quantitative research methodologies.

The methodologies used to achieve the aim of providing adequate information for the comparative analysis is, juridical, qualitative and quantitative in order to be able to describe and understand how the European Arrest Warrant actually functions in the Netherlands. To achieve this, we analyzed the relevant judgments of Amsterdam district court and of the Dutch Court of Cassation, de Hoge Raad, in surrender cases, using a traditional juridical research methodology, relying on legislation and the legislative history of the Surrender Act, jurisprudence and analyses published in legal journals and books, and the surrender cases published on www.rechtspraak.nl.

For the empirical part of the research, we sought and acquired the kind cooperation from the Dutch Prosecutions office and the Surrender Chamber of Amsterdam District Court via the Council for the Judiciary.

For the analysis of cases concerning surrender requests from abroad, we got access to the archives of the Public Prosecutions Office in Amsterdam. From the about 1600 surrender cases dealt with by the PPO between 2004 and 2008 we drew a random

sample of 250 cases, based on the production registration of the International Legal Aid Centre of the Amsterdam Public Prosecutions office. These were closed cases. In the archive building, the relevant files based on the file numbers were brought to us by archive personnel, where the data, pre-established during research meetings in Bologna and Utrecht, were entered into SPSS files for further analysis.

For surrender requests from the Netherlands to authorities abroad, we were severely handicapped by the fact that these cases were filed differently at the International Legal Aid Centres of the Public Prosecutions Service. We managed to get access to copies of 105 Dutch EAW's. Their representative character therefore, is questionable.

We also conducted interviews with prosecutors and support staff of the International Legal Aid Chambers in Rotterdam, Haarlem, The Hague and Amsterdam. Furthermore we interviewed five judges of the Surrender Chamber of Amsterdam District Court.

Part of the project as also to have a questionnaire filled out by public prosecutors to catch their perception on the EAW. In order to get cooperation we contacted the Procurator General Office in The Hague. After 3 months we got cooperation, which unfortunately failed. In order to get cooperation we had sent the link to the dummy website of the questionnaire. This was sent without further consultation with us to the prosecutors at the International legal aid centres. The prosecutors filled out the dummy, but, of course, their answers were not saved. Our contact reported that the prosecutors protested, stating that they had shown their answers already to us in interviews. Therefore it was not possible to re-enact the entire operation with a well working website. That is why this report does not show data on the questionnaire.

The research has found cooperation from the PPO and Amsterdam district court. This was quite difficult to achieve, because in late 2008 all authorities involved in the application of the EAW in the Netherlands have participated in the European Unions' process of Peer Review of the practices of the EAW. Our research was of quite a different character, but, of course, we also borrowed information of the Peer review report on the Netherlands, as it was published in the early spring of 2009.

A first version of the report was discussed with stakeholders (PPO, Amsterdam District Court, Advocates) and dr. Luisa Marin of Twente University. That, of course, does not relieve us from our responsibility for this text.

Limitations

This is a case study with limitations. Part of the ongoing debate about the European Arrest Warrant concerns the ways in which surrendered persons are treated in proceedings and prisons in the requesting member states. Reports of Amnesty International and other human rights organizations are critical about the gathering of proof, and the treatment of suspects and convicts in several countries within the EU. Also, refusals of surrender by a 'judicial authority' in one country do not lead to removal of a person from the Sirene system. The same person can be arrested repeatedly in several countries during many years for the same offence, regardless of an evaluation of proof or guilt (Amnesty report, 2005; Cronin, Guardian August 5, 2009; NCRV broadcast 17 December 2007). From that perspective it would have been interesting and relevant for this research to also focus on the gathering of proof concerning a requested person, on the information exchange between the different countries from a defence right perspective and on the treatment of persons (suspects and convicts) after being surrendered to the Netherlands. The first few aspects are not taken into account by the International legal AID Centre or by Amsterdam district court, and an evaluation of the treatment of persons surrendered to the Netherlands was very difficult to achieve in this research. Incoming EAW's are registered separately, and therefore are easily traceable. The same holds for outgoing EAW's, even although this was a little more difficult already. However, surrendered persons are dealt with as ordinary suspects and convicts are, and their files do not have a recognizable marker except their names. This makes it extremely labour intensive to identify these files, trace the persons and their advocates. An explanation for this is that the scope of the Framework decision is limited to surrender proceedings and not to prosecution and court proceedings that are considered to fall within national jurisdictions only. The Framework decision focuses on cooperation between authorities only and almost not on the consequences for suspects and convicts. We, unfortunately, were time wise not able to conduct such research, notwithstanding the suggestion of the Dutch Minister of Justice to develop a monitoring system with the purpose to 'facilitate discussions within the EU context about obstacles in the criminal legal cooperation' (Ballin and Schoordijklezing, 2009). Such obstacles may be a lack of timeliness, failing legal aid, absence of adequate interpretation or encroachments of human rights in gathering proof. And such a monitoring process presumes instruments to identify surrendered persons in criminal proceedings and prisons. These do not exist yet.

This report

As a result of this research, this report entails the following information: chapter 1 deals with the surrender act and an analysis of Dutch literature and case law, chapter 2 deals with the perception of judicial officers on the EAW, and chapter 3 gives information on the application of the EAW following from quantitative research on surrender cases. We finalize this report with a discussion of the application of the EAW in the Netherlands also from a EU-legal perspective, where we confront the issue of defence rights with the issue of enhancing transnational criminal law enforcement.

5.2. Dutch infrastructure and organizational practice concerning the EAW

The Framework decision on the European Arrest Warrant has been implemented in the Surrender Act. The Surrender Act is implemented by the international legal Aid Centre of the Public Prosecutions Office in Amsterdam for incoming European Arrest Warrants. Amsterdam District Court has a separate chamber for Surrender cases, and it is the only court who can decide on EAW´s. Ordinary appeals to a higher court are not possible. For that reason, Amsterdam District Court sits with a three judge panel on Surrender cases.

For incoming EAW's working procedures can be sketched as follows.

In practice, the data of wanted suspects and convicts are entered into the Sirene System and the Schengen information System. Sometimes a notification is sent to Interpol. The Sirene office checks the most important requirements, like the age of the requested person and the applicable maximum sentence for the crime (at least one year imprisonment). This may already lead to refusal to enter a persons' dates into the Sirene System. Once a person is traced or arrested in the Netherlands, the issuing authority, is informed rapidly. This authority then can decide if it wants to send an EAW to the International Legal Aid Centre of the Public Prosecutions Office in Amsterdam. The EAW received is checked first, and if need be, extra information is asked from authorities abroad. During the years since 2004, the International Legal Aid Centres had to learn how to deal with this, but they also had to get acquainted with the different practices and requirements of the authorities in other countries. Then the case is referred to the Surrender Chamber of Amsterdam district court. Sometimes the PPO demands refusal of an EAW, but in the vast majority of cases the PPO demands surrender of the requested person. Refusal of surrender by the court does not automatically lead to removal of a person from the SIS or the Sirene system. The person has to ask that separately.

In case of refusal by the court, the PPO has a possibility to appeal to the Court of Cassation in the interest of law. This has been done only twice until now.

For outgoing EAW's working procedures can be sketched as follows.

Each public prosecutor in the Netherlands is competent to demand the issuance of a European Arrest Warrant against a suspect or convict. The issuing of EAW´s from the Netherlands however is coordinated by the 5 International Legal Aid Centres of the Dutch Public Prosecutions Service. Thus, specialized staff and prosecutors take care of it.

Then the public prosecutor can decide if and how the European Arrest Warrant can be sent to the authorities responsible for surrender of the wanted person. Often this is a matter of information exchange between the authorities, as e.g. for suspects the offence has to be specified quite precisely, and the EAW has to be drafted in the accurate language.

In general, Dutch prosecutors ask for surrender of persons for heavier crimes only.

5.3. Analysis of Surrender Law (legislation, case law and doctrine)

This chapter deals with the Framework Decision and the way it is transposed into the Dutch Surrender Act. Furthermore, this chapter elaborates on the recent literature and case law, which is important for understanding the developments of the EAW in practice.

Abolition of the double criminality test

The Framework Decision on the European Arrest Warrant does away with the double criminality requirement under the extradition regime as far as a list of 32 crimes is concerned - Article 2(2) FD. The Netherlands implemented the double criminality list in complete conformity with this Article and extended it to include manslaughter (European Commission, 24 June 2006). member states can choose whether they require double criminality for offences not mentioned on the list. Thus they are not obliged to require double criminality. In the case of Advocates for the World the question is dealt with whether the list of 32 offences amounts to a breach of the fundamental rights of legality and equality. Advocates for the World argued that no reference has been made to the legal definition and content of these offences. The ECJ refers to Article 7(1) ECHR in which the principle of legality is thus defined: “legislation must define clearly offences and the penalties which they attract”. Then, the ECJ states that the list of 32 offences is not intended to create criminal offences, as the offences listed must be punishable in the issuing member state: “The definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties” (Samiento, 2008: 176; ECJ 03 May 2007, Advocaten voor de Wereld).

Nevertheless, the meaning of some offences remains rather unclear, e.g., of racketeering, terrorism, trafficking in human beings or computer crime. The definition of these offences might be broadened all the time due to international and technological developments. However, the minimum definition – the amount of elements – is always the same. Even so, the translation of the FD into 21 languages might result in different

definitions (Smeulers, 2004: 69). Furthermore, it is possible that some acts are punishable in the issuing country, but not in the executing country. Because judges cannot test the double criminality of offences in concrete terms, they have to surrender the person asked for. This means that a Dutch doctor who carried out an illegal abortion outside the Netherlands has to be surrendered (Smeulers, 2004).

With regard to the principle of equality, the ECJ did not constitute a breach, as the distinction made between facts for which double criminality is tested and facts for which this test no longer exists can be objectively justified. First, introducing the list of 32 offences is based on the principles of mutual recognition and mutual trust and solidarity. Second, "by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality" (ECJ May 2007, par. 57).

The abolishment of the double criminality test with regard to the offences on the list means that the offence does not need a double qualification; only the issuing State qualifies the offence (Blekxtoon, 2004: 28). In the Netherlands the choice of the issuing State to indicate one of the punishable offences from the list is only tested marginally: is it reasonable to conclude one of the listed offences is at issue? The Dutch court does not accept fishing expeditions or lists that are filled out poorly. If the issuing authority does not have a reasonable suspicion, but wants to speak a person to clarify his involvement in criminal offences, then the authorities should use another type of request. Also, when further information is asked for by the court, but is not provided, surrender will be refused (Klip, 2005: 1680).

In the texts of both the FD and the SA, both the terms 'act' and 'offence' are used. As a consequence, whether an act can be regarded as an offence should be examined, in particular when double criminality is required, according to the law of the executing State, i.e., the State of the authority competent to decide on the surrender of a suspect to another State. By the abolition of the requirement of double criminality and by the wording 'offence' a situation is created in which the Netherlands should surrender suspects and convicts for acts that are, according to national law, regarded as minor offence and not as a criminal offence (Blekxtoon, 2004: 28). For example, acts which are mentioned in the Dutch Opium Act.

In a judgment of 6 March 2007 the court ruled regarding a Belgian arrest warrant, which was issued for human trafficking, that some acts for which boxes of the list were

crossed are not punishable in the Netherlands and, for that reason, surrender should be refused (Amsterdam District Court, 6 March 2007). The question rose whether the court has the right to test the double criminality when some acts might not be punishable according to Dutch law. The court stated that the principle of trust between States, on basis of which the suspicions should be assumed to be correct, should prevail, except when there are important clues that a mistake has been made. In a judgment of 10 July 2007 the court examined in detail the suspicion which is part of the defence of innocence (Amsterdam District Court, 10 July 2007).

However, the FD does not allow such examination. Regarding the requirements of the information that is send together with the arrest warrant, Article 8 FD does not give a clear answer. The advocate general did answer this question in the Advocaten voor de Wereld case:

> "The court responsible for executing the warrant must establish that the conditions for handing over an individual who is in its jurisdiction to the issuing court have been satisfied, but the executing court is not required to hear the substance of the case, except for the purposes of the surrender proceedings, and must refrain from assessing the evidence and delivering a judgment as to guilt." (AG. ECJ 12 September 2006, par. 105).

More recently the court has refused surrender of a suspect of having caused a traffic incident in Poland. The question to be answered by the court was not if article 177 Polish criminal code has an analogous provision in the Dutch criminal code. The fact the suspect is requested for, should fall within the scope of a provision of the Dutch Criminal code with a minimum sentence of 12 months. The court found such provisions in articles 5 and 6 of the Road and Traffic Act. However, article 6 did not apply, because the EAW did not contain enough information to make it likely the requested person shouldered the required degree of guilt to the accident described. The other provision in article 5 of the Road and Traffic Act did apply but allows a maximum sentence of 2 months only. Therefore surrender was refused (Amsterdam District Court, 29 July 2009).

The Amsterdam District Court was furthermore used to require the issuing State to add the relevant statutory provisions to the EAW. Subsequently, the court could check whether the requirements are met that the act should be punishable by maximum custodial sentence of at least three years. This was also the result of the EAW being inaccurate, so the Dutch authorities wanted to – marginally – check whether the offence could reasonably be seen as an offence from the list (Council EU 27 February 2009, 18). However, Article 8 FD and Article 2 SA only require that 'the nature and legal status of the offence' have to be mentioned. Checking the reasonableness of ticking a box can be

regarded as marginal double criminality verification (Keijzer and Sliedregt, 2009: 63). Also the Netherlands Supreme Court ruled that the requirement to add the criminal law provisions to the EAW is incorrect (Supreme Court of the Netherlands, 8 July 2008). Not requiring the full texts of the criminal law provisions to be attached, is, according to the Supreme Court, in line with the purpose of the FD, which to a considerable extent is based on trust between the member states in order to avoid difficulties and loss of time. According to Rozemond, it follows from this decision and from the underlying principles that the executing authority has to be very restrictive in examining the ticking of a fact from the list by an issuing authority (Rozemond, 2008: 289).

Breach of fundamental rights

When a flagrant breach of human rights is invoked this can lead to a refusal of surrender, e.g., in case of a violation of reasonable time, because such violation is irreversible. In the Netherlands, such violation leads to remission most of the times (Klip, 2005: 1680). The Netherlands Supreme Court has stated that judges have a wide obligation to examine whether there is a flagrant breach of fundamental rights. A disproportionate prison sentence of 42 years has led a case before the ECHR, which stated that: “extradition of an individual to a State in which he runs the risk of being sentences to life imprisonment without a possibility of early release might in some circumstances raise issues under Article 3” (Klip, 2005). In the Netherlands early release is, however, not possible for persons who are serving a life sentence. The provision of pardon cannot be considered sufficient, because it is difficult to effectuate.

Judges have the responsibility to test surrender against the ECHR, even in absence of Article 11 SA. It follows from Article 94 of the Dutch Constitution that when there is a conflict between an act and a treaty, the latter shall have precedence. On the ground of this Article the ECHR will have priority over the Surrender Act; the explicit regulation of Article 11 SA only confirms this (Smeulers, 2004: 73). The Council of State mentioned in its advice that this regulation is rather unnecessary as well, as it is already the task of the judge to test the execution of the EAW against the Etch (TK 2003-2004: 105). Moreover, the word ‘flagrant’ in Article 11 cannot restrict the Constitutional regulation. For that reason, Article 11 has to be interpreted more widely than the term ‘flagrant’ seems to suggest. Furthermore, it was not the intention of the minister to restrict the test flowing from Article 94 of the Constitution (Smeulers, 2004: 80). Based on the principle of trust, the executing State should not start investigations on the human rights guarantees in the issuing State. Only when there are reasons to believe that the

person involved would risk a denial of human rights, the judge has to examine whether those reasons are substantive and constitute a real risk.

So, as Article 11 SA has a rather open character; its meaning has been filled in by the ECtHR and national case law. The question that remains difficult to answer is to what extent member states have a duty to examine the respect of human rights when granting assistance to other member states. In the Soering case is stated that Article 1 ECHR cannot be read as justification to test whether the circumstances in the other State are in full accord with each of the safeguards of the Convention (ECHR, 07 July 1989, par. 86). Based on Article 3 ECHR, extradition must be refused when there are substantial grounds for believing a person "would be in danger of being subjected to torture, however heinous the crime allegedly committed." (ECtHR, 07 July 1989, par. 86). The obligation not to extradite also extends to cases in which the person concerned "faces a real risk of exposure to inhuman or degrading treatment or punishment" (ECtHR, 07 July 1989, par. 88). The ECtHR also stated that an issue might also be raised under Article 6 ECHR by an extradition decision "where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country." (ECtHR, 07 July 1989, par. 113). It seems as if the ECtHR distinguishes between reversible and irreversible violations. In the Mamatkulov and Abdurasulovic case the ECtHR took into consideration the special nature of the alleged violation of Article 3 of the ECHR and referred to the UN Committee against Torture which stated that there is 'irreparable harm'; this criterion is also used by the ECtHR later on (ECtHR, 6 February 2003). This shows that the ECtHR differentiates between reversible and irreversible violations of human rights (Krationis, 2005: 350).

Since 2003 the Netherlands Supreme Court changed its rulings on human rights exceptions substantially: not only a flagrant denial of Article 6 was required, but also the lack of legal remedy, as prescribed by Article 13 ECHR (Amsterdam District Court, NJ 2004: 42). Moreover, a completed torture does come under to scope of the defence of a risk of flagrant denial of Article 6. The requirement of lack of legal remedy applies as well (Amsterdam District Court, NJ 2004: 41). As a result, the responsibility to examine the warrant shifts from the questioned State to the requesting State by the requirement of lack of legal remedy, as derived from Article 13 ECHR. As a common rule, ECHR-defences should be put forward in the criminal proceedings that are held after extradition or surrender took place (Rozemond, 2008). In 2007 the ECtHR stated that even in case of violation of Article 6 the applicant has to file a complaint with the ECtHR after being extradited. As follows from this reasoning, the ECtHR makes a distinction between extradition to a country which is party to the ECHR and extradition to a country which is

not (Rozemond, 2009: 31). Furthermore, no real risk is required anymore, as the executing country is not obliged to examine the risk of denial of human rights and, subsequently, refuse extradition. It can be concluded that the ECtHR – like the Netherlands Supreme Court – has shifted from holding the State questioned to extradite/surrender responsible, to holding the State requesting to surrender/extradite responsible. The questioned State no longer has to check the requesting State to respect human rights, if that state is party to the ECHR (Supreme Court of the Netherlands, NJ 2008: 44). Only a lack of an effective remedy in the requesting state makes extradition inadmissible (Rozemond, 11 June 2008).

Smeulers argues that this is an unreasonably onerous additional requirement, as the primary goal of the ECHR is to prevent the denial of human rights and not to repair them afterwards. Furthermore, this criterion can result in a burden of proof for the requested person. In other words: when a State has acknowledged an individual's right of complaint, an effective remedy is always guaranteed. In Smeulers' opinion, when the issuing State has acknowledged the individual's right of complaint, an appeal based on Article 6 ECHR is unable to succeed in advance. This might be different when the person asked for can prove that this right has no practical meaning with respect to its content in the issuing State. Therefore, the question whether there is a legal remedy should not only be examined formally in order to determine whether access to a judge is theoretically guaranteed; this remedy also has to be effective in practice (Krianotis, 2005: 355). Smeulers thinks this development in case law, in particular the additional onerous requirement, is worrying (Smeulers, 2004: 78).

Surrender of nationals

Whereas the European Convention on Extradition provided for a mandatory refusal ground when the requested person was a national of the executing country, the Framework Decision on the EAW states that nationals have to be surrendered in order to be prosecuted subject to the condition of being re-surrendered – Article 5(3) FD. This replaces the double criminality test in the extradition practice. This means it is impossible under current extradition treaties – and national law – to transfer a person when the offence is not punishable in both States. But Dutch nationals will not be surrendered for the prosecution of an offence which is not an offence according to Dutch law as well. From case law of the court of Amsterdam it became clear that judges do test the double criminality of the act in concrete terms when it concerns a Dutch citizen or an alien with a residence permit in the Netherlands for an indefinite time. This was confirmed in the

Wolzenburg case by the ECJ (ECJ 6 October 2008, Wolzenburg). The outcome of that case is currently part of the case law of the surrender chamber (Amsterdam District Court 05-01-2010; 23-02-2010).

According to the European Commission, the position of the Netherlands obviously runs counter to the removal of the double criminality test as follows from Article 2(2) FD (European Commission, 24 January 2006: 13). Rozemond and Glerum also call the extra requirement of double criminality 'at odds' with Article 2(2) (Glerum and Rozemond, 2008). How does this work?

Surrender can only take place after the guarantee is given that the person asked for can serve his sentence in the Netherlands after being convicted in the issuing State and when the issuing State agrees to the conversion procedure of Article 11 of the Convention on the Transfer of Sentenced Persons (1983) (Council of the European Union, 27 February 2009: 34). This means that the procedures for execution provided for by Dutch law apply and the legal nature and duration of the sentence will be converted to Dutch law. However, such transfer of a sentence can only take place when the act is punishable in the Netherlands as well (Smeulers, 2004: 70). Therefore, the court has to perform the double criminality test, or – in other words – the double criminality test is "reintroduced 'through the back door'." (Glerum and Rozemond, 2008). The most recently published judgment referring to the double criminality test is

Whenever an EAW is issued for the purpose of the execution of a sentence, it is allowed to refuse surrender under the condition that the sentence is executed in the country of origin – Article 4(6) FD. Glerum and Rozemond argue that this provision, together with Article 5(3) FD, protects only the requested person's interest in reintegration and not that person's interest in being prosecuted and tried in his/her own State" (Glerum and Rozemond, 2008). Furthermore, they conclude that "an issuing Member State's interest in execution in certain cases has more weight than a person's interest in serving a custodial sentence is his/her own State" (Glerum and Rozemond, 2008). For example, when the executing State cannot execute the sentence in accordance with its domestic law, then execution has to take place in the issuing country after all. Moreover, they argue that the guarantee to return to the executing State will be required without exception, and no conditions for the return, such as consent of the requested person, double criminality and adaptation or conversion of the sentence, will be stated. Therefore, Rozemond and Glerum conclude that the principle of reintegration, EU-citizenship and mutual recognition are not explicitly expressed in the text of the Framework Decision (Glerum and Rozemond, 2008).

Judgment *in absentia*

In the Netherlands persons can be tried and convicted *in absentia*. Appeal against these judgments can only be brought to the Supreme Court. Nevertheless, the Supreme Court does not examine the facts of the case, and therefore does not provide a 'retrial'. Without a change of law the Netherlands will not be able to guarantee a retrial. In Germany judgments *in absentia* are only possible in minor cases, while in England and Sweden it is not possible at all. In France and Belgium objections can be lodged against all judgments *in absentia*, which results in new hearings at a special college (Blekxtoon, 2004: 27).

In a case before the Court of Amsterdam in 2004 the Belgian authorities promised that the requested person, who was judged *in absentia*, could raise objections to this judgment after being surrendered to Belgium. However, the Court of Amsterdam regarded the guarantee of a retrial given by Belgium insufficient, as it is not certain whether this application for a retrial will be admissible (Amsterdam District Court, 23 November 2004, NJ 2005/8). Article 12 SA provides for an assessment of the merits of the case, according to the legislature. The court argues that the procedure that the admissibility of the objections lodged has to be evaluated before the surrendered person could make use of his right to defend himself in a retrial is insufficient, regardless the legal validity of the Belgian procedure (Amsterdam District Court, 23 November 2004, NJ 2005/8). The mere existence of a retrial is therefore regarded insufficient to guarantee a new assessment of the merits of the case. This can lead to a situation in which the Netherlands – or Belgium – becomes a safe haven for persons tried and convicted *in absentia* in another State (Jonk & Hamer, 2005). The Netherlands have had several bilateral contacts with Belgium in order to solve these problems. Belgian Procurators-General recently have promised that an amendment of Belgian law, which has to ensure a uniform approach by Belgian prosecutors, will come into force in the early part of 2009 (Council of the European Union, 27 February 2009: 27)

In cases where reason was for doubt that the person had been properly informed of the judgment *in absentia* by prosecuting authorities, Amsterdam district court seeks explicit explanations from the issuing authorities, in conformity with article 12 Surrender Act. In a recent case the doubt arose because of an inaccurate signature under the receipt of a notification of a judgment *in absentia* in Poland (Amsterdam District Court 19 03 2010 and 12-01-2010).

In a case where the surrender of a Bulgarian national was requested, the court did not accept the general declaration of Bulgarian authorities that the suspect would be retried according article 423 Bulgarian Code of Criminal Procedure because the English translation of the provision was unclear (Amsterdam District Court, 13 11 2009).

The new framework decision on trial *in absentia* (Council Framework Decision of 26 February 2009)· stresses the mutual trust authorities in the national member states must have. It restricts the conditions under which a surrender of a requested person that was tried and convicted in his absence may be refused, to cases where the requested person could not have been aware of the trial against him. It furthermore stresses the defence rights of requested persons but it also stresses that is does not aim at harmonizing national legislation on trial *in absentia*. This means that surrender still can be refused unless requesting authorities can proof the requested person should have known of the case against him.

We will have to wait in order to see in how far this change in the FD EAW will affect the jurisprudence of Amsterdam district court.

Locus Delicti

In general, surrender may be refused if the committed act did take place in part or entirely on the territory of the executing State – Article 13 SA. The second paragraph of Article 13 is more complicated, as it introduces an element the court has used extensively to evaluate the legality of the requested surrender: “At the public prosecutor’s request, and only in the terms of paragraphs 1a and 1b, a refusal of surrender shall be waived, unless, in the opinion of the court, the public prosecutor could not reasonably make such a request.” This phrase was introduced into the body of the proposal for the Surrender Act by parliamentary amendment.

The court of Amsterdam elaborated the requirements of Article 13(2) even further. First, in its judgment of July 2, 2004 the court declared surrender inadmissible, because the public prosecutor did not give notice of the personal interests of the requested person in his reasons (Amsterdam District Court, 2 July 2004). The public prosecutor argued that the interests of the requested person are irrelevant for an action based on Article 13(2), but the court declared this unreasonable. Second, the court of Amsterdam introduced a heavier obligation to provide reasons. This was based on the lack of policy rules by which the public prosecution service should make use of its power to take an action based on Article 13(2) SA. Third, the court stated that putting forward

personal circumstances concerning the work, the home, the family, or the state of health of the person claimed, could provide reasons to declare the action of the public prosecutor on the basis of Article 13(2) unreasonable, in particular when he has based his judgment solely on general grounds while the person claimed has put forward concrete interests.

However, according to the Supreme Court, humanitarian reasons are no ground to refuse surrender (Supreme Court of the Netherlands, 28 November 2006). The Supreme Court stated that Article 13(1) only aims at protecting certain interests of the Netherlands, such as the Dutch policy on soft-drugs, euthanasia, abortion, brothel keeping, pornography and adultery (Blekxtoon, 2004: 28). Furthermore, Article 13(2) is written in the interest of a proper administration of justice when an act is partly committed in the Netherlands and a decision has to be made about which member state is designated to prosecute. The Supreme Court also mentions that an increased duty to provide reasons does not follow from the text or the legal history of Article 13 SA. Still, the Supreme Court made no statements with regard to the first requirement of the Court of Amsterdam. For that reason, the court still takes the personal interests of the requested person into consideration when deciding upon the reasonableness of an action of the public prosecution based on Article 13(2) SA (Amsterdam District Court, 15 December 2006; 19 December 2006; 29 December 2006; 12 January 2007). When the interests of the person involved will be disproportionately harmed, the court is – still – likely to refuse surrender (Klip, 2005: 1680).

Nevertheless, these considerations have not led to the refusal of surrender yet (Rozemond, 2007: 493). Procurator-General Fokkens mentions that further substantiation of 'a proper administration of justice' can entail consideration of personal interests. He refers to the ministerial circular 'inzake de overdracht en overname van strafvervolging' (Stcrt. 2001, 143, 13), which says that with regard to a proper administration of justice, in many cases prosecution in the country of origin is to be preferred to prosecution in the country in which the act is committed (Supreme Court of the Netherlands, 28 November 2006). This ministerial circular mentions unfamiliarity with the legal procedure, language problems, and cultural differences as relevant factors. Taking personal circumstances into consideration fits the constitutional meaning of proper administration of justice in which the human individual is placed in the middle. A proper administration of justice, therefore, requires consideration of the domicile principle: the suspect should be prosecuted in the country of which he is resident. The minister of justice said in this regard that a proper administration of justice means that

prosecution in the country of origin is to be preferred to judgment in the country where the offence is committed most of the times.

Another reason for this is that the pre-trial detention can be suspended in the country in which the person has his permanent address, thus limiting so-called 'collateral damage' of the suspect. In the issuing State that is hardly possible, because the surrendered person has no permanent address or residence in that State. Also the interest of – social – rehabilitation can lead to a refusal of surrender. Because the convicted person has to repatriate to society again it is preferable that this person is prosecuted in the Netherlands and that his punishment can be executed there as well. Yet, this goal can also be achieved by the guarantee of Article 6 SA which requires the re-surrender of the person involved to the executing State as soon as he has been convicted in the issuing State. Still, it cannot be guaranteed that this procedure does not harm the possibility to rehabilitate, because the person involved might lose his home or his job in the Netherlands in the meantime. The interest of rehabilitation should not only be considered as an interest of the person claimed, but also of the Dutch society in which this person has to repatriate in.

According to procurator general Fokkens, the public prosecutor has to take all these interests into consideration, but the court can only declare its decision unreasonable after the alternatives for surrender are examined (Rozemond, 2007: 495). Nevertheless, when surrender should be refused on the basis of Article 13(1), the public prosecutor can still surrender the requested person based on Article 13(2); when the prosecution against this person is already started in the issuing State, when the main evidence or the other suspects or witnesses are present in the issuing State, or when the legal order of the issuing State is more shocked by the act (Blekxtoon, 2004: 26). Then, the public prosecution service must explicitly motivate why this ground for refusal is not admissible (Klip, 2005: 1680). Humanitarian reasons can play a role in order to refuse surrender on the basis of Article 13(2), according to the system and the parliamentary history of the SA. These reasons should be balanced by the public prosecutor against the other interests involved in a proper administration of justice. Consequently, the judge can perform a test of reasonableness and can check the clarity of the reasons (Rozemond, 2007, 497).

The Supreme Court judged in its case of 28 November 2006 that the Court of Amsterdam, which examined the public prosecutor's request which contained humanitarian reasons to oppose surrender, has shown an incorrect interpretation of Article 13 SA regarding the criterion that should be used for testing the prosecutor's

request (Supreme Court of the Netherlands, 28 November 2006, par. 3.6). The public prosecutor requested to waive a refusal of surrender, which, according to the court, was unreasonable, as the requested person has behaviour disorders, ADHD and a limited development of his mental faculties. Furthermore, the court considered that prisons in Germany do not provide sufficient forms of therapy and medicine which are required to keep this person mentally stable. Therefore, surrender would have a radical and permanent negative effect on the requested person, so the weighing up of interests by the public prosecutor was considered unreasonable by the court. Nevertheless, the Supreme Court ruled that, regardless the meaning of the term 'proper administration of justice', surrender cannot be refused on the ground of humanitarian reasons, because they are not a relevant factor for answering the question if a refusal of surrender should not be allowed in the interest of a proper administration of justice based on Article 13(2) SA.

Annotator Klip writes that reference to a proper administration of justice became a leading principle for the court, but got rejected by the Supreme Court. He considers that within the EU a request for extradition became a warrant. This means that mutual agreement no longer is required to decide which judicial assistance would be appropriate considering the circumstances of the case. Now, the State that takes the initiative decides what will happen and the interests of that State will be dominant. However, there still is a major inequality in the way suspects are treated in different European countries. This can become problematic when human rights are at stake or with regard to the term a suspect can be placed in pre-trial detention. It seems that the court wants to protect suspects against such problems. But Klip does not think that is the right thing to do. It would be better to uplift the procedural rights of suspects to an acceptable level within the EU. There is no place for the principle of proper administration of justice within the EU- context of rules for surrender of suspects and convicts. Moreover, it is contrary to the mandatory character of judicial assistance within the EU. There is no place for discussion, weighing of interests or own judgment; a State simply has to execute a warrant. That is the main principle of mutual recognition. The goal of the EU is a totally free movement of judicial warrants and decisions. In the long run, also the surrender procedure will be abolished, as the government stated in the explanatory memorandum (Tweede Kamer II, 2002-2003, 29042, nr. 3, 8). This should stimulate the court to put forward less, rather than more, obstacles to the EAW. Nevertheless, though mutual trust is required by the EU; in practice it is not always present (Supreme Court of the Netherlands, 28 November 2006).

Life Sentence

Article 5 FD and Article 45 SA enable executing authorities to consider whether effective remedies are present in order to transform life sentences into 20 years sentences. The Netherlands is one of the EU member states still interpreting a life-time detention order as detention until the end of the life of the person involved. It seems as if the Framework Decision does not think it is a good idea to interpret life-time too literally. Twenty years seems to be the maximum. In the Netherlands, 20 years is practically the maximum for temporarily detention. The execution of life-time detention can only be stopped after requesting a pardon. However, pardon is almost never given. The German Explanatory Memorandum of the German Act based on this Framework Decision says that the possibility of pardon is not sufficient: "*Entscheidend ist, dass ein Rechtsanspruch auf Überprüfung besteht. Die immer bestehende Möglichkeit einer Begnädigung ist jedoch hierfür nicht ausreichend*." (Blekxtoon, 2003: 1237). Also Portugal does not regard the provision of pardon sufficient, as in Portugal life-time detention is not provided for by law and is regarded inhumane. When the Dutch legal system will not be changed, it remains possible to give ad hoc guarantees in every single case. Such guarantees are also asked by the Netherlands for extradition to countries in which the death penalty is possible. Germany itself has a regulation that provides for a conversion of life-time detention into a conditional sentence after 15 years are served and the seriousness of the guilt of the convicted person does not require further execution and the public safety will not be prejudiced. This review provision is made, because Germany regards life-time detention without any prospect inhumane (Blekxtoon, 2003: 1238).

Lapse of Time

Article 9(4)(f) SA provides an optional ground for refusal when the Netherlands can exercise legal authority, but punishment of the offence is no longer possible because terms of limitation concerning lapse of time apply. Whether there is a lapse of time in accordance with the law of the issuing State is not examined. This is probably based on the principle of trust and on the assumption that issuing surrender has no use when lapse of time applies regarding the offence in the issuing State (Blekxtoon, 2004: 27). When the Netherlands have jurisdiction as well, a lapse of time needs to be assessed according to national law. When Germany issues a warrant, e.g., for murder, this offence is on the list of Article 7(1) SA and no double criminality test has to be executed anymore. However, for examining the punishability of the act according to the law of the

executing State, all the facts have to be taken into consideration. These facts are only considered for acts that are not included in the list. Regarding acts from the list of Article 7(1), Annex 2 only requires a "description of the circumstances in which the offence(s) were committed, including the time, place and degree of participation in the offence(s) by the requested person." Regarding acts not covered by this list, Annex 2 requires a full description of the offence. This was a problem in a case where surrender was issued by Germany for a murder, because in the Netherlands murder is defined differently. Consequently, the same act is often only punishable as homicide in the Netherlands, which will result sooner in a preclusion of the right to prosecute because lapse of time applies (Blekxtoon, 2004: 27). As a result, it will be inevitable that Dutch authorities will ask to add a complete outline of the facts to every EAW in accordance with Annex 2 of the Surrender Act even when the issuing State has ticked a box on the list.

Humanitarian grounds for refusal

The Supreme Court of the Netherlands decided in 2006 that surrender cannot be refused on humanitarian grounds (Supreme Court of the Netherlands, 28 November 2006). The Procurator-General of the Supreme Court has brought forward an appeal to the Supreme Court in the interest of the law – Article 29(2) SA. It can be concluded from the FD as well as from the SA that refusing surrender on humanitarian grounds can only postpone the surrender – Article 35(3) SA. Some comments on this can be made. First, the humanitarian grounds may be permanent, for example when the state of health of the person involved does not seem to improve. Moreover, judges cannot decide on this, as it is the responsibility of the minister of Justice (Rozemond, 2004: 491). Second, it can be possible to institute interlocutory proceedings against the public prosecutor when he refuses to apply Article 35(3) SA. This is similar to decisions made by the minister of Justice under to the European Convention on Extradition, against which interlocutory proceedings could also be instituted to invoke the hardship clause of Article 19(2) of the Dutch Extradition Act. As the nature of the humanitarian grounds can result in the postponement being permanent, the judge has to decide upon such issue. It can also be stated that in some circumstances the humanitarian grounds fall within the scope of the protection of Article 3 ECHR which make the surrender inhumane, e.g., when the person involved is seriously ill or dying. In that case there is a mandatory ground to refuse surrender which has to be applied by the judge (Rozemond, 2004: 492).

Appeal

Every requested person has to be handed over to a public prosecutor in Amsterdam within three days in order to have his case examined by the Court of Amsterdam. As follows from Article 22 SA the court has to decide within 60 days. Because of this short period of time, appeal and cassation have been abolished. Only cassation in the interest of the law remains possible. The minister of Justice justifies this be claiming that appeal in cassation is only meant to maintain unity of the law. However, since there is one specific chamber of the Court of Amsterdam that is authorized to deal with EAW's, unity will be guaranteed without a doubt (Smeulers, 2004: 84). This means that this chamber has a huge responsibility, because its judgments will not be checked at another instance. This results in a concentration of the power of decision with one authority. Without the possibility of appeal this is a huge restriction of legal protection for the person asked for. However, because the power to decide is granted to the judge, an independent judgment will at least be guaranteed (Smeulers, 2004: 84). Some advocates and judges favour introduction of the option to appeal in the Dutch surrender procedure. Yet, the Dutch authorities concluded that this "would not be feasible in the current system." (Council of the European Union, 27 February 2009).

Multiple requests

In 2005 the court of Amsterdam dealt with a case concerning multiple requests – Article 26(3) SA – as Germany, as well as Belgium, issued a EAW for the same person (Amsterdam District Court, 14 January 2005). The court ruled that the public prosecutor could reasonably give priority to the German warrant in the interest of a proper administration of justice, as Germany argued that there were more aggrieved parties and that the harm caused is probably bigger in Germany. Therefore, it could be argued that the offences for which the requested person will be prosecuted are more serious than the offences mentioned in the Belgian warrant. Moreover, the German warrant is of an earlier date than the Belgian one.

Subsequently, the court answered the question whether surrender to Belgium can be permitted based on the facts the EAW is issued for. The court says this is not possible, because it is not sure whether the refusal ground of Art 9(1)(e) might be applicable after the person is surrendered to Germany and has been sentenced by final judgment there. Because it has not become clear for what offences the Belgian judicial authorities want to prosecute the surrendered person, the court claimed it is not justified

to decide upon whether or not to allow surrender to Belgium. In order to make surrender possible in the future, it should be established for which facts the German judge shall sentence or acquit the requested person by final judgment.

5.4. Perception of judicial officers, advocates, scholars and policymakers

In this chapter we describe the information and perception based on the interviews and expert meeting held for this research. The opinions are described by subject. We make a distinction between the different functionaries, and also between the context they refer to: judges, public prosecutors, support staff, scholars, and the Netherlands as executing state and the Netherlands as requesting state. Judges only consider incoming EAW´s when the Public Prosecutor demands surrender from a person to a judicial authority in a requesting EU member state.

Differences between surrender and extradition

Judges

The major difference between the former extradition procedure and the present surrender procedure is it´s speediness. In extradition procedures, suspects could lodge an appeal against a decision and, subsequently, appeal to the Supreme Court. Due to the fact that many suspects in extradition proceedings lodged an appeal with the court of cassation, the extradition procedure could not be as short as the surrender procedure. At that time, also human rights defences could be put forward at the proceedings. According to the Surrender Act there is no possibility to appeal against the decision of the court anymore. The public prosecutor's office can appeal to the Supreme Court in the interest of the law, but this happens very rarely. The only reason for appealing is when the court made a series of judgments which have a public effect and which is considered not to be in line with the law.

As a consequence of the extradition procedure, detainees that had to be extradited could have to wait in prison for one up to two years before their actual extradition took place. In contrast, the surrender procedure first took about eighty days, which means that the maximum period of sixty days was often extended by a twenty days – Article 22 SA. Nowadays the Amsterdam District Court can deal with most surrender cases within sixty days. Eighty percent of the surrender cases can be closed within the maximum period of ninety days. This includes the actual transport of the requested person from Dutch borders or the airport to the issuing country. For suspects

this means that the actual time of pre-trial detention is much shorter than under the former extradition procedure.

Another important change that contributed to the speediness of the surrender procedure is the reduced intensity of the examination by the court. Maintaining a critical attitude was much easier under the extradition convention than under the current surrender act. The ECtHR approves surrender between European countries very easily, even when human rights are at stake, e.g., in Albania (see the *Cenaj* case). Nowadays, the discussion about human rights became blurred. Whether a case will be examined critically often depends on the activity of the chair of the court. First of all, the court has to take good care of a correct and sufficient description of the facts. One judge explained not to feel hindered to ask questions to the public prosecutor. However, there is a tendency to not test *ex officio*. Many judges claim to depend on the defences that advocates put forward. Yet, they think most advocates do not know the case law on surrender, because it has always been a very special branch of law. For that reason, judges think they cannot let the procedure become a complaint procedure. They do have to discuss things that catch their attention during the hearing, even when there is no complaint brought forward by the advocate.

Another major difference with the former extradition procedure is the constricted margin of appreciation. The extradition procedure was considered to be more severe as requests were examined more seriously and the principle of mutual trust, although applicable, was not prevailing. The surrender procedure only takes ticking off one or more boxes and meeting some minimum requirements. Therefore, it can be regarded as being standardized. As a consequence, the case files are less extensive than the files in extradition cases.

A third cause of the speediness of the surrender proceedings is that the court has a limited margin of appreciation of EAW´s. Under the extradition conventions it was up to the minister of Justice to assess whether there were humanitarian grounds that appealed for non-extradition. Now it seems that the interest of another member state to prosecute and sentence suspects has become much more important than the interest of the individual, i.e., the suspect. This trend could also be observed in criminal law – e.g. the Dutch ISD-measure that could imprison re-offenders for 2 years after committing a minor offence – and in immigration law. The Dutch Supreme Court decided that human right defences should be put forward in the issuing country, as all EU member states are member of the ECHR.

One judge thinks that the constricted margin of appreciation has been a political decision: the legislature made the decision that almost all decision-making powers should be in the hands of the Public Prosecution Service and judges can do nothing but accept that. He argues that the power of the public prosecutor cannot be limited by judges; they only examine whether the public prosecutor could have reasonably come to his decision. A judge argued that in the case of Wolzenburg (ECJ 6 October 2009), the EC said that on certain points judges in the Netherlands have a very small margin of appreciation because the law is very strict. The court is the judicial authority that can put mutual trust in practice best and that can protect the unity of the law. Nevertheless, Europe keeps stressing that member states should pay more attention to not take away too much examining power from judges.

Mutual trust

The surrender procedure is based on mutual trust between all EU member states. For example in the *Cenaj* case the ECtHR ruled that it is not up to a member state to establish a breach of human rights in another member state (ECtHR, 4 October 2007). In principle, every State that is a member to the ECHR provides its own safeguards to protect human rights and to realize a fair trial. The principle of mutual trust also lies at the basis of the European Convention on Extradition. For instance, a requested person could be extradited to Macedonia (Supreme Court of the Netherlands, 27 May 2008) or Serbia. In 2003 the Netherlands Supreme Court clearly stated that it is the issuing country that shall decide upon a human rights defence. Moreover, the Council of Europe has supported the idea to convert the extradition procedure into the simpler and faster surrender procedure.

Judges

For the judges we interviewed, the principle of mutual trust requires a distant approach to a case. This is, however, not always common practice, a judge observes. When a judge bases his decision on his emotions too much, the Court of Cassation may be asked to squash that judgment by the Public Prosecutions Office and is likely to actually do as asked. The judge stresses the legal norm of mutual trust they have to depart from when evaluating a surrender request. Therefore, their evaluation of a case usually is, and should be, restricted to the technicalities of the surrender proceedings and disregard the contents of the case. However, some of the judges are inclined to do more than that.

One judge believes that every surrender judge will carry out a marginal examination sooner or later, because “it is all in the head”. However, sometimes it frightens him a little that some of the intuitive judges seem to be right at the end. This judge mentions one incident that happened recently:

> A Polish person had to be surrendered and was about to be picked up from the Dutch police station by Polish policemen. He resisted. When the Polish policemen came, they handcuffed him, kicked him to the ground and kept on kicking him while he was lying on the ground. The Dutch police intervened and made a report of this offence. Consequently, the Dutch police refused to hand him over to the Polish police. Yet, the pre-trial detention of this Polish person has not been suspended. Nevertheless, the court has to consider this case as an incident and not as a common practice of the Polish authorities.

A judge stated that since mutual trust is the basic principle in surrender law, he deals with cases rationally and starts from the idea that judges elsewhere in Europe are honourable and take their work seriously as well. Nevertheless, this judge is an advocate of the Framework Decision on minimum – procedural – rights. He argues that minimum rights on a EU basis are necessary. The Framework Decision on the EAW was a correct measure to take right after 9/11, but does need some improvement by now.

Another judge stated that he is not always sure whether they can trust all the Eastern European countries. When necessary, judges ask for clarification or additional information to be added to the arrest warrant sometimes. When the requested information will not be provided they will refuse surrender. This judge thinks they need more evidence to know for sure whether the rights of the suspects are not taken seriously. Nevertheless, the judicial authorities in the Netherlands cannot supervise what happened to a person after they allowed his surrender. A judge believes this knowledge can be useful in order to maintain the quality of the procedure.

Since mutual trust is a basic principle in EAW law, all EU member states have to trust each other in having a decent criminal procedure. Some judges mention that mutual trust is hard to work up since the new Eastern European countries became part of Europe. Since the expansion of the EU there is a tension between de-facto trust and the legal implication of the principle. The reason that Eastern European countries became member of the EU is mainly an economic one. The ideal situation of equal rights in all European countries is still a big fiction, as the legal systems of Eastern European countries differ very much from the legal systems in Western Europe. So, there is a certain tension between the trust the legislature takes as starting point and the trust that judges have in practice.

Advocates

An advocate believes the problem the EAW faces at this moment is that there is mutual trust between States flowing from the principles of the EU, but not between citizens of those States who will be imprisoned in another country. Requested persons fear e.g. that the maximum of pre-trial detention will be much higher than in the Netherlands and that there will be no guarantee of qualitatively good legal counsel for a reasonable price – some advocates ask extra fees, but do not do anything. Thus, this advocate argues, the European Council have invented a repressive instrument in order to fight – international – crime, but seem to have forgotten about the legal position of the suspect. Only some of the requested persons have the possibility to bring their situation to the notice of the government, e.g. by calling in the media.

Advocates believe, with regard to mutual trust, that judges use emergency steps sometimes, e.g. when humanitarian reasons cannot constitute a ground for refusal. Then, judges seem to check more profoundly whether the EAW meets all the requirements and, e.g., whether prosecution might be statute-barred in the issuing State, while in other cases they try to repair such small errors and give issuing States the opportunity to fix them. This advocate argues that because there is no margin of appreciation in the executing State and because mutual recognition requires States to execute all kinds of requests from abroad, the minimum standard of the suspect's rights will be adjusted to the lowest common denominator.

During the expert meeting we organized, a debate evolved on the discretion of the court to protect basic values. The participating judge maintained, that the competences of the court in surrender proceedings are limited. The Framework decision is the European construction to deal with transfer of suspects and convicts, and we have to apply that as it is elaborated in the Dutch Surrender Act. The representative of the Public Prosecutions office stressed that what they do in Surrender cases is not just execute the requests. In so far there is no blind trust between authorities. She explained that the Sirene office checks the eligibility of signalization of suspects of crimes from abroad against the rules of the surrender Act. Their work leads also to refusals, even before a case is dealt with by the PPO. A participating scholar recognized the inevitability of the restricted discretion of the surrender chamber under the Surrender Act. However, she was amazed by the fact that the Netherlands have almost no possibilities to protect their basic constitutional values. The participating advocate explained that if you start to differentiate in the amount of trust between countries, the cooperation between countries could be at risk. It is all or nothing, and "noting" is not acceptable anymore in today's EU.

The scholar presented the attitude of the German Constitutional Court as an example, because it forced German parliament to better exploit the possibilities of the Framework decision to protect the rights of requested persons. However during the meeting participants agreed that such an approach would require an unlikely change of the Surrender Act.

Developments in surrender practice

The first development is that the Dutch Supreme Court quashed the judgments in which judges used a certain margin of appreciation regarding the principle of territoriality. In principle, surrender shall not be allowed when the EAW concerns an offence which is regarded as having been committed in whole or in part in the territory of the Netherlands – Article 13(1) SA. However, the public prosecutor can waive a refusal of surrender, unless, in the opinion of the court, the public prosecutor could not reasonably do so – Article 13(2) SA. The Supreme Court ruled that there should not be much discretion for judges on this matter; they can no longer decide easily that such a waiver of refusal is unreasonable. Consequently, there is almost no margin of appreciation left for the court to decide on matters of territoriality. Therefore, this Article is rendered useless in practice.

The second development in Dutch surrender practice is that Article 6(5) SA became a hot issue. The main question is by what criteria an alien can be considered 'an alien with a residence permit for an indefinite time'. The Amsterdam District Court even referred questions to the ECJ for a preliminary ruling on the subject The ECJ answered with stating a standard of 5 years of lawful non national residents. (ECJ 6 October 2009).

The third development is that the *in absentia*-guarantee of Article 12 SA has taken shape. Without this guarantee no one will be surrendered by the Netherlands. When the Court of Amsterdam ever refuses surrender, it will be based on this Article.

The fourth development is that the Court of Amsterdam wanted to refuse surrender for humanitarian reasons; however, the Supreme Court did not allow that.

Characteristics of surrender cases

The characteristics of surrender follow for the greater part from the quantitative research. Nevertheless, it can be considered interesting to examine what practitioners

believe to be common practice in surrender procedures, and compare that with the analysis of our sample. In this section characteristics will be given with regard to the country that issues a EAW and to the type of crime for which the EAW is issued.

Countries and types of crime

Most judges, advocates, prosecutors and scholars agree that the majority of the cases deal with drug crimes. This does not imply that the majority of the cases deal with criminal organizations; it can concern the smallest courier as well as the highest drug baron. However, EAW's are mostly issued for the 'small guys': a mafia boss will rarely be surrendered. One of the reasons so many EAW's deal with drug crimes is that the Netherlands can be considered a transit country. The location of the Netherlands leads up to a lot of drugs to be imported through the harbour of Rotterdam or Schiphol Airport and to be exported from the Netherlands. There are some familiar drug trafficking routes, so it will be likely that importing marihuana is a crime often committed in Spain or France and exporting (hard) drugs from the Netherlands to Germany also takes place frequently.

Furthermore, EAW's are being issued for all sorts of other crimes, such as fraud, violence, homicide and murder. Several of these crimes take place within an organized structure. The United-Kingdom often asks for surrender for causing grievous bodily harm or for murder. Offences for which surrender is asked by Italy are often serious offences, sometimes committed by the mafia, which have resulted in large-scale investigations.

The majority of the EAW's that are executed by the Netherlands come from Germany, Belgium, France and Poland. An estimated 80 % of all EAW's received from Germany, France, Spain and Italy concern drug crimes. One judge notes that the public prosecution service in the Netherlands thinks it is great that the French will prosecute these crimes themselves. On the one hand, the maximum penalties are much higher in France, and on the other, it will yield profit for the capacity of the Dutch public prosecution service.

Many of the acts Poland asks surrender for can be considered less serious offences. The reason for receiving many EAW's concerning petty crimes from Poland is the principle of legality. Because of this principle, Poland is obliged to prosecute every type of crime for which a victim lodges a complaint. Moreover, prosecuting means issuing a EAW whenever necessary as well, so surrender will be requested for lots of petty offences. In addition, there are many Polish immigrants in the Netherlands, so they could be requested for offences they have committed in their country of origin. Therefore,

the Polish EAW's hardly request the surrender of a Dutch national. When the requested person is sentenced in Poland, the sentence has to be executed in Poland as well, as Poland is not a party to the Convention on the Transfer of Sentenced Persons.

Types of persons

According to the persons we interviewed, the persons that are requested are a little more different from the – standard – type of Dutch criminals. The types of persons that are requested to be surrendered are mostly male. Many of those persons have a police record in the Netherlands. The persons that are requested are from all social-economic positions. It can be poor people who try to earn some extra money by transporting drugs, but it can as well be managers of a business who embezzled money or committed tax fraud. Moreover, all kinds of people from all over the world can be arrested in the Netherlands on the basis of a SIS alert e.g. whenever they have to change planes at Schiphol Airport. Consequently, three-fourth of the requested persons is no Dutch national. The most Dutch nationals that are surrendered are requested by Germany.

Seniors can be surrendered as well, because there is no maximum age for surrendered to be allowed. The criterion to be surrendered is whether someone is fit to be held in prison. It is up to the public prosecutor to decide whether someone can travel or not, based on health reasons – Article 35(3) SA.

Problems with the requests from other countries

Judges have more experience with EAW's coming from Italy, Poland, France and Belgium. This gives them a better knowledge of proceedings in those countries and that allows them to better check these EAW's. Italy issues many EAW's, but the description of the facts is mostly quite general. Poland often mixes up times and places of offences and gives a very broad definition of the time an offence was committed, e.g. from 2004 until 2007. With France and Belgium there might arise problems concerning judgments *in absentia* and the guarantee to be present at a retrial. Belgium often provides only a very limited description of the facts. No problems at all occur with requests from England, Germany or Romania.

A public prosecutor mentioned that in some countries he had the impression that prosecuting authorities use an EAW to be able to close the file after an EAW has been

refused. Thus they export the work to authorities that have to consider the execution of the EAW. He called that a waste of time. He had rather use his time to prosecute suspects of heavy crimes.

Judges, as well as advocates, note that there have been small problems with the requests from Belgium with regard to judgments *in absentia*. It was not always clear when exactly the term to lodge an appeal would begin. Then, the Dutch public prosecution service had to ask explicitly how the Belgian authorities interpret *in absentia* and the right to a retrial. This judge notes that the public prosecution office acts very pro-active by asking extra questions in order to complete the information of a surrender case. However, countries still not always deal the same way with judgments *in absentia*, while the Netherlands want an effective retrial to be guaranteed. Therefore, this judge is supporter of the development of a Framework decision on judgments *in absentia*.

Judges also notice some differences in the procedure of re-surrender between countries. Often the issuing authorities do not inform the Netherlands on the fact that prosecution of their national is finished (Council of the European Union, 27 February 2009). Furthermore, the time between the judgment and the actual return can be very long. France, for example is seen as a country that de facto violates its return guarantees.

Fighting international crime

The Framework Decision on the EAW is introduces as a measure to combat terrorism which entered into force right after 9/11. One judge believes that European countries reacted hysterically on terrorism after 9/11. In the first years of the EAW there was a large deal of arrest warrants was issued for terrorist offences. Later on, this kind of offences formed only a small percentage of all offences for which EAW's are issued. Therefore, it cannot be concluded that the EAW is an effective instrument to fight international crime.

An advocate believes that the EAW is developed by people 'pursuing European unity' and instrumentalists who are thinking something like 'it will not happen to me' and 'the offence is committed by the offender'. As a result, politicians are not inclined to pay attention to the rights of the suspect. While the EAW came into force shortly after 09/11, this advocate argues it has nothing to do with terrorism as an EAW may be issued for acts punishable with a maximum of at least 12 months – Article 2(1) SA. As a result, EAW's have been issued for minor offences. Two examples were given in this regard:

> An EAW was issued for a person who rented a holiday home in Cyprus. When he arrived the home was a complete mess and not ready for use. He went back to the Netherlands and did not pay the rents. Greece requested this person by issuing a EAW for swindling. As no marginal examination of the substance of the case is possible before the Amsterdam District Court, this person had to be transported to Greece before he could defend himself.
>
> In another case, someone has been surrendered for defalcating two videos because he did not return them in time to the video shop. The maximum penalty for this offence is at least 12 months, so the person had to be surrendered.

One of the scholars we interviewed is of the opinion that the EAW has not proved to be an effective instrument to fight international crime as surrender cases account only a small part of all criminal cases a State has to deal with.

We think this means the effectiveness of the EAW in fighting crime should be evaluated in combination with other instruments used.

The Principle of proportionality and non-discrimination

As follows from the examples above, some countries, in particular Poland, issue many EAW's for minor offences. Consequently, an EAW can be issued for offences which the Netherlands deal with by a simple fine. One advocate notices that under the extradition convention international legal assistance was only asked for severe cases, for which severe penalties were likely to be imposed. In contrast, surrender is now being asked for petty crimes which would be dealt with by the police court judge in the Netherlands. Yet, if other countries consider something to be a serious offence, it is not up to the Netherlands to decide they should not consider that type of crimes severe.

Nevertheless, this practice can be regarded as disproportional for the suspects. Therefore, the Amsterdam District Court recently stated in one of its verdicts that the actual application of the Surrender Act could be disproportional damaging for the requested person (Amsterdam District Court, 30 December 2009). Only in *special circumstances* surrender could be refused because it would constitute a violation of the proportionality principle. The special circumstances refer to an individual case in which the nature of the offence, the duration, or the objective of the requesting country, could be disproportional with regard to the rights en freedoms of the requested person. In this regard the court referred the Council of Europe which recently stated in its 'Handbook on how to issue a European Arrest Warrant' that:

> "Considering the severe consequences of the execution of an EAW as regards restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant, bear in mind, where possible, considerations of proportionality by weighing the usefulness of the EAW in the specific case against the measure to be applied and its consequences. Therefore, the EAW should not be chosen where the coercive measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention" (European handbook, 2008: 14).

However, one of the judges explained that the proportionality principle as follows from EU recommendations is written for public prosecutors who decide to issue an EAW; it is not for the court to judge whether the use of an EAW is (dis-) proportional. Furthermore, as follows from the *Pupino* judgment, the court has to judge a case according to the objective and the purpose of the Framework Decision. This means that the court has to allow the execution of an EAW whenever that it is possible. There is only one case this judge remembers in which surrender was refused because it would have been disproportional considering the *personal circumstances* of the requested person. Disproportionality is often argued by the defence counsel in cases where there is a big difference between the sentence that could be imposed in The Netherlands as compared to the expected penalty in the issuing State. Anyway, it is not up to the Amsterdam District Court to decide for foreign States which crimes can be regarded as serious offences.

Another judge said with regard to this verdict that is was sort of a small hint to advocates that they could put up the proportionality principle as a defence. For that reason, the court even mentioned the website of the EU which mentioned that this principle plays a role in issuing EAW's. Yet, it is up to advocates to come up with it. Yet, this could be problematic, because there are only a few law firms that frequently deal with surrender cases. The rest of them has a common practice, and, therefore, they are not well-informed about the recent case law on the field of surrender. While in that field you have to know the law thoroughly, otherwise you will not succeed in court. An advocate needs to have some routine in defending persons who are requested to be surrendered. Moreover, advocates could make more use of EC and EU law in their defences. Therefore, they have to know ECJ case law on the principles of European law.

As the Dutch Surrender Act does not provide for a proportionality check, they have to refer to – general principles of – EC and EU law, which has priority over national law. In European law judges and advocates can also find room to put forward personal circumstances of the requested person based on the principle of non-discrimination. In Directive 2004/38 EU-citizenship is explained as "a primary and individual right to move

and reside freely within the territory of the member states". Article 24 of this Directive states that "all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty." This means that EU-citizens cannot have fewer rights in a foreign country. For the Netherlands this could imply that EU-citizens cannot be held in pre-trial detention for the only reason that they have no permanent address in the Netherlands.

Moreover, the personality principle, which makes re-surrender dependent on being a national of the Netherlands, can lead to a discriminatory distinction between EU-citizens. The question is whether someone with the nationality of another EU-member state which lives here for quite some time and, therefore, should be considered to be rooted here, should be considered an 'alien with a residence permit for an indefinite time' – Article 6(5). The ECJ ruled in the *Kozlowski* case that:

> "the terms 'resident' and 'staying' cover, respectively, the situations in which the person who is the subject of a European arrest warrant has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence. (…) It is necessary to make an overall assessment of various objective factors characterizing the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State" (ECJ 17 July 2008, par. 46 & 48).

Moreover the ECJ states that:

> "the terms 'staying' and 'resident', which determine the scope of Article 4(6), must be defined uniformly, since they concern autonomous concepts of Union law. Therefore, in their national law transposing Article 4(6), the Member States are not entitled to give those terms a broader meaning than that which derives from such a uniform interpretation" (ECJ 17 July 2008, par. 43).

As no broader meaning can be given to those terms, it is important to know for the Netherlands whether a stricter meaning is still possible. In that regard, the court of Amsterdam referred the *Wolzenburg* case to the ECJ and asked preliminary questions on Article 4(6) in relation to the EU-principle of non-discrimination. The Court of Amsterdam asked the ECJ: "may the executing Member State lay down, in addition to a requirement concerning the duration of lawful residence, supplementary administrative requirements, such as possession of a permanent residence permit?". The ECJ has answered the question stating that a lawful stay of 5 years of a non-national requested

person in a member state, under the non-discrimination clause of article 12 EC, allows national authorities to treat this person in the same way as a national concerning the execution of custodial sentences (ECJ 6 October 2009). This means that under that condition surrender may be refused and the requested person's sentence can be executed by the state requested to execute the EAW.

Possible defences

Advocates agree that under the extradition convention there were more possibilities for the defence, because: 1) the request had to be more substantial with regard to the description of the facts, 2) there had to be a more elaborated description of the particular suspicion, and 3) the requested person could appeal to the Supreme Court. They note that currently the margin to put up defences is small, just as the margin for judges to decide on the case. Advocates mention that only the following defences are possible to come up with before the court:

Is the act mentioned in the list or could it reasonably be regarded as a listed act?

Is the form filled in correctly (time, place, fact) – Article 2(d)(e) SA?

Is the identity of the requested person correct – Article 2(a) SA?

Are the relevant sections of the law enclosed?

Is the EAW translation correctly and clear?

Is criminal prosecution or punishment statute-barred – Article 9(f) SA?

Has the requested person reached the age of 12 at the time the offence was committed – Article 10 SA?

Is the judgment given *in absentia* without sufficient possibility of a retrial – Article 12 SA?

Is there a risk of a flagrant breach of human rights – Article 11 SA?

Is sufficiently guaranteed that the surrendered person will be able the serve his sentence in the Netherlands – Article 6 Sa?

Is the ne bis in idem principle violated – Article 9(a-e) SA?

Is the offence committed in its whole on Dutch territory – Article 13(1)(a) SA?

Regular defences of criminal procedure and criminal law, such as the defence of innocence or reference to the principle of discretionary powers, are not possible, as the substance of the case is only dealt with by the issuing State. Moreover, there is no obligation to send the underlying records of a request to the Court. This creates the risk that EAW's are issued by the authorities of the issuing State without sufficiently examining the importance of the incriminating materials. One advocate argues that if no sufficient information is given, the authorities of the executing State should ask for additional information. When there is only a – general – description of the suspicion it will become difficult for advocates to put up a defence of innocence. Another advocate gives the following example:

> Sometimes an EAW is issued for a very severe offence. However, the judge in the issuing country does not see any sufficient evidence to prove that the requested person committed that offence and sends this person back to the Netherlands within 10 days. Nevertheless, the consequences are often devastating. For example, a man who was wrongfully surrendered and was also involved in a child guardianship case: while he was in pre-surrender custody, the judge gave parental guardianship to his ex wife.

One scholar argues that the Dutch Surrender Act allows the court to examine whether there is a reasonable suspicion on the basis of evidence or testimonies of witnesses. According to the European Commission this is not up to the court of the executing State to decide. Therefore, this part is incorrectly implemented by the Netherlands. An advocate thinks that only when someone can prove he was lying in the hospital, he has been imprisoned, or he was on the moon, it will be regarded as a sufficient alibi by the court to proof his innocence. Then, the doctor from the hospital or the director of the prison has to testify as a witness before the court. The court considers a doctor or a prison director as a firm witness, but is not likely to trust any other type of witness. Only in extraordinary cases a defence of innocence will succeed before the Court of Amsterdam. The court applies very strict rules, i.e., there has to be immediate and absolute proof of the innocence of the requested person before this defence will be taken into consideration. In fact, this defence has succeeded only once since the EAW came into force! (Council of the European Union, 27 February 2009: 31).

For that reason, another advocate argues that, to improve the surrender procedure, at least a marginal examination of the substance of the case should be allowed in order to avoid excesses. Firstly, double criminality has to be checked in order to ensure the re-surrender of a person after he is convicted in the issuing State. Secondly, it should be examined whether it regards an offence punishable in both States – not only in the issuing State – by at least a custodial sentence or a detention order, as

is required in Article 2(1) SA. The Netherlands only allow for a fine or community service to be imposed for relatively many offences.

Advocates agree that another way to improve the possibility to put up defences and effectuate the rights of the suspect in the EAW procedure is to receive the case files in time. Records can now be handed in two days before proceedings take place. Sometimes, the case files are even incomplete until the last moment and the advocate receives the additional files, such as a fax between the Netherlands and the issuing State, when he arrives at the Court. When the court would require that all documents relating to a case must be handed in one week before the court session, advocates will able to prepare good defences.

Another advocate argues that a Framework Decision on certain procedural rights in criminal proceedings is necessary. Only then, minimum rights for the suspect will be guaranteed and 'forum shopping' can be excluded. The Netherlands have already implemented many procedural rights in its Code of Criminal Procedure, such as short periods for pre-trial detention and for dealing with requests of legal assistance, while other countries have not. Consequently, the Netherlands have to reduce the guarantees for suspects in a European context.

Cooperation with foreign colleagues

Contact with issuing authorities

During the procedure of extradition, States could confer on what the best instrument to deal with a criminal case would be. For example, when it concerned a Dutch national, the Netherlands could argue that it would be better if that person is prosecuted in the Netherlands and they could request to send the evidence to the Netherlands instead of sending the requested person to a foreign State. Yet, Dutch public prosecutors do not seem to mind very much that – Dutch – persons are surrendered to other countries. For example, when the surrender of a supplier of drugs is requested by German authorities, the public prosecution service will not consider prosecuting that person in The Netherlands. One of the reasons for this policy is that the costs of the prosecution of a surrendered person will not have to be borne by the Netherlands. Furthermore, public prosecutors would feel disrespectful to a foreign colleague if they took over his case. International cooperation also requires rational solutions, which may need support from Dutch authorities by not withholding a requested

person from a trial abroad, when the case best can be tried abroad. But this also depends on if the crime was committed in the Netherlands and the connection of this crime to the crimes prosecuted abroad (Amsterdam District Court 23-February 2010).

Moreover, surrendering a suspected person has more impact on him than prosecution in the Netherlands. Another reason is that the maximum penalties, especially for drug crimes, are much lower in the Netherlands than in other European countries. In contrast, the public prosecution service also refuses requests for surrender without referring the case to the court, most of the times because of *ne bis in idem*.

In general, judges and prosecutors agree that the cooperation with colleagues from abroad functions well. For example, the Dutch authorities can ask the issuing authorities for additional information, e.g., the maximum sentence that can be imposed in the issuing country. However, since the Supreme Court ruled that it is not in line with mutual recognition to ask for the full texts of the relevant criminal law provisions, the public prosecutor's office does not ask this anymore. Now, it looks at the description of the facts and converts it into an offence from the Dutch penal code.

Yet, one problem that often arises in contacts with foreign authorities is translation difficulties. The Netherlands accept EAW's in the Dutch and the English language. Consequently, most EAW's have to be translated. The quality of the translations is a major concern to the Dutch authorities, in particular the English translations from France, Spain and Italy (Council of the European Union, 27 February 2009: 16). Very often, misunderstandings arise between the issuing authorities and the public prosecutor and/or the court due to errors in the translation. Another problem contributing to translation complexities is that some countries require receiving a EAW within very short time periods. This will lead to high translation costs in order to get the EAW translated into the official language of the executing State in time (Council of the European Union, 27 February 2009: 10).

A judge stated that the public prosecution service works pro-actively and ask for supplementary information if necessary. When the public prosecutor, while preparing a case for the court hearing, finds that the EAW lacks necessary information, he will ask the issuing authority to provide this information. In some cases the court finds that the information provided is still insufficient. Then, the court will usually adjourn, in order to request extra information from the issuing authorities. The court will refuse the execution of the EAW only in exceptional cases, in view of the lack of necessary information. As the *ne bis in idem*-principle does not apply for EAW's, the issuing authority can – continually – send a new EAW as soon as it is informed of the refusal. The Court

therefore believes that a refusal on these grounds is not in the interest of the suspect. The Amsterdam District Court does not consider itself to be unreasonably strict.

Besides asking for the relevant criminal law provisions, the Dutch authorities ask for the guarantee of return of their nationals, the guarantee of retrial, arguments on why prosecution in the issuing country is preferable and should be given priority as the facts are partly committed on Dutch territory, and information about the exact time and place of the act and the degree of participation of the requested person (Council of the European Union, 27 February 2009: 20).

Improper usage

The EAW-instrument contributes to the fact that other instruments, such as a request for evidence or hearing witnesses or suspects through telecommunication, will be used in a smaller amount of cases. These instruments make use of requests, which are not based on mutual recognition and trust to the same extent as EAW's. Thus, the EAW enables States to surrender suspects much easier and quicker to other States compared to other forms of international legal aid. According to one scholar, one could notice a general tendency of using the EAW more often for criminal investigation instead of prosecution, because other instruments are executed by way of requests. A disadvantage of using to EAW so easily is that the requested person is likely to be surrendered and detained to the issuing State; even if a simple hearing of this person would make clear he has not committed the offence he is suspected of (Amsterdam District Court, 8 May 2008).

Among judges and prosecutors there is the strong impression that Belgium asks the surrender of persons for the goal of hearing them as a witness in a case. The reason for issuing EAW's for this purpose is because the procedure is rather simple and quick. This is regarded as wrongful behaviour and as using the EAW for improper reasons. However, the Court of Amsterdam does not have any proof of this. The mutual trust States ought to have in one another prevails here, as they have no means to know on beforehand that the wanted person will be used as a witness. When there is a strong suspicion that the requested person is only a witness in that particular case, the court firstly examines facts of the case and looks whether the documents relating to the case are sufficient. Thereby, the court is also dependent of what the advocate puts forward. If it appears that the name of the requested person cannot be found in the documents, further comment from the issuing State is required. When no concrete criminal offence

can be held against the requested person, the court can refuse to surrender this person. The court can also make a provisional decision and let the public prosecutor ask for an explanation from the issuing State again. Public prosecutors are tending to give more favourable consideration to EAW's than judges.

Dutch authorities are worried that this kind of improper usage will undermine the support of Dutch society for the EAW. Using such radical instruments as the EAW can result in a long period – more than one up to three years – of pre-trial detention, while there might not be any suspicion against this person. Moreover, in Belgium, 50% of the surrendered Dutch nationals got released or conditionally released right after their surrender, while there will never be a follow-up (Council of the European Union, 27 February 2009: 35). Alegre and Leaf noted that "while the EAW sets tight time limits for execution of an EAW, there are no such time limits for disposing of a case after surrender" (Alegre and Leaf, 2004: 209).

The public prosecutor's office in Amsterdam does not know for sure whether EAW's are issued for other goals then the prosecution or imprisonment of the requested person, because a warrant is a quick way to get a person to be send over to the requesting State. Judges also do suspect this happens, but do not have any proof of it. The court cannot know beyond doubt that a person is requested for such an aim. Improper use is not easy to prove, and mutual trust is the primary principle. Judges try to examine the facts as good as possible, however, on the basis of a EAW they cannot always get a completely clear picture of what happened. This is something you cannot do much about as a judge. Furthermore judges are not informed about what happens with a person after surrender. So, judges will also not be informed of a possible violation of the specialty rule after a person has been surrendered. Therefore, judges depend on the information an advocate brings up.

When everything functions correctly, it is up to the public prosecution service to pay attention to these cases and to consult authorities of the issuing State about it. The public prosecutor's office checks incoming EAW's on 1) whether alternative instruments, such as requests, are used first; 2) whether the facts are not too severe for other instruments to be used; and 3) whether – physical – confrontation with the victim might be necessary. A public prosecutor notices that Germany seemed to be willing to withdraw their EAW when the requested person promised to come voluntarily to Germany in order to be examined. But it also happened that the requested person was summoned in order to be examined several times, but did not go to the requesting country, so he is finally requested to be surrendered.

A judge notes that, sometimes, countries ask for a person to be surrendered for a simple theft which this person already confessed. Then, after the surrender took place, the authorities in the issuing country ask the Dutch public prosecution service for supplementary permission to prosecute for other facts as well, such as murder. The public prosecution service in the Netherlands will often allow this because of the proprieties and will not have extra contact with the requesting country. However, this could also be regarded as improper usage of the EAW, because in this manner countries can have a person surrendered and prosecuted for cases that are emotive subjects in the Netherlands, such as euthanasia and abortion, or for cases in which the evidence is not arranged yet. This could constitute a violation of the principle of fair play and the prohibition of arbitrariness (*détournement de pouvoir*). Matters like abortion and euthanasia are kept out of the – Dutch – surrender act, but now risk to have re-entrance in the Netherlands via the backdoor.

Problems from the defence's point of view

Advocates agree that the quality of interpreters can be problematic, because it is difficult to check. One of the major lacks of interpreters is that some of them use very simple words when translating complex specific juridical terms. Moreover, the right to an interpreter is guaranteed during judicial proceedings; however, there is no right of translation of all the case files, as it is very expensive. For this reason, an advocate has to go visit his client in jail to translate what is written in the – Dutch – records.

Another problem, which is related to translation, is that it can be difficult for advocates to know the law of the issuing State. It can be important for an advocate to gain in-depth knowledge of the – criminal – law of the issuing State, e.g., about the procedure of re-trial in case of judgment *in absentia* and about whether or not prosecution is statute-barred. Therefore, it is important to understand the language of other countries which have not translated all their criminal legislation in English yet. Sometimes advocates need to call in acquainted advocates or experts from the issuing State in order to collect arguments for the court of Amsterdam to refuse surrender. One advocate raised the question whether it is already possible for his clients – who are arrested in the Netherlands – to receive legal aid from the issuing State while the person is still in the Netherlands.

It can also be really difficult to check whether the issuing State respects the principle of specialty. Therefore, advocates from the issuing State sometimes ask for

additional records to be able to check for which facts surrender was exactly allowed. Yet, the records, which are written in the official language of the executing State, are not translated, so the advocate has to put in extra effort to find out whether or not the issuing State prosecutes his client for facts that he is not surrendered for in the first place. Moreover, the ECtHR ruled in the Leymann and Pustovarov case that, in order to establish whether an 'offence other' than that for which the person was surrendered is at issue – Article 27(2) FD, it is necessary to:

> "ascertain whether the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision." (ECJ 1 December 2008, par. 57).

Another important problem is for a surrendered person to find a good advocate in the issuing country. Clients abroad are only entitled to consular assistance, which very explicitly contains no legal aid. Some of the Dutch advocates happen to know colleagues they which are excellent advocates, but that definitely cannot be said about every country or every part of the country. Therefore, one advocate believes it is necessary to set up a European bar of excellent advocates. Then, the Netherlands can pay for legal counsel of their nationals who are surrendered to other States. It can also be regarded necessary for advocates to have a small network of colleagues in other member states to rely on, e.g., when witnesses should be examined.

Finally, it can be stated that advocates have to act very pro-actively in surrender cases. There are a few Dutch advocates who put considerable effort in such cases. For example, by making arrangements with the public prosecution service in the issuing country, so that the requested person will voluntarily come over for a hearing or even for a court session, instead of staying in prison during the surrender procedure and pending his trial. Getting in contact with the issuing authority requires a lot of effort (Council of the European Union, 27 February 2009, 43).

5.5. The practice of the EAW in the Netherlands in numbers

In this chapter we first show the data on the EAW's issued to the Netherlands. These data concern the requested persons, their (alleged) crimes, the issuing countries and the way the authorities (the international legal aid centre of the public prosecutor's office in Amsterdam and the surrender chamber of Amsterdam District Court) have dealt with these cases.

Next, we show the data of cases issued by the Dutch Public Prosecutors.

The data for the EAW's issued to the Netherlands were gathered by drawing a random sample of 250 out of approximately 1600 files of concluded cases (2006-july 2008), of the international legal aid centre in Amsterdam. Frequently we were confronted with incomplete files. We could not always fill out all the data we wanted.

The data of the EAW's issued by the Netherlands are the cases issued by the international legal aid centre in the Hague. This sample of 105 cases is probably not a good representation of the EAW's issued by Dutch public prosecutors.

EAW issued to the Netherlands

The order of subjects is: The requested persons, the content of the arrest warrant, and the way the authorities (the international legal aid centre of the public prosecutors' office in Amsterdam and the surrender chamber of Amsterdam District Court) have dealt with these cases.

The requested persons

We report here on aspects of the requested persons, like age, sex, nationality, country of residence and language abilities.

TABLE 1 Sex of the defendant

Sex of defendant	Frequency	Percent	Valid Percent	Cumulative Percent
Male	234	93,6	93,6	93,6
Female	16	6,4	6,4	100

Table 1 shows that a large majority of the requested persons is male.

TABLE 2 NATIONALITY OF DEFENDANT

Nationality of defendant	Frequency	Percent	Valid Percent	Cumulative Percent
Netherlands	64	25,6	25,8	25,8
Poland	33	13,2	13,3	39,1
Germany	23	9,2	9,3	48,4
Belgium	18	7,2	7,3	55,6
Italy	14	5,6	5,6	61,3
Turkey	12	4,8	4,8	66,1
Romania	8	3,2	3,2	69,4
Hungary	7	2,8	2,8	72,2
Albania	4	1,6	1,6	73,8
Czech Republic	4	1,6	1,6	75,4
France	4	1,6	1,6	77,0
Nigeria	4	1,6	1,6	78,6
Bulgaria, Ireland, Morocco	3	3 x 1.2	3,6	83,9
Algeria, Bosnia and Herzegovina, Colombia, Latvia, Liberia, Luxembourg, Macedonia, Pakistan, Serbia, Spain, Tunisia, United Kingdom	12 x 2	12 x 0.8	9,6	93,5
Australia, Burundi, Congo, Croatia, Cyprus, Finland, Greece, Iran, Kosovo, Portugal, Sierra Leone, Slovakia, Sudan, Suriname, Sweden, Switzerland	16 x 1	16 x 0,4	6,4	99,9
Total	248	99.2	100	100
Missing	2	.8		
Total	250	100	100	

Table 2 shows the nationality of defendants. With the Dutch on top, Polish defendants are second, where one would expect Germans and Belgians as they are from the neighbouring countries. An explanation is twofold. First, there has been an inflow of Polish persons in the Netherlands to work there in the last 5 years. Second, Polish prosecutors do not have the competence to decide not to prosecute cases which are based on a citizens' complaint. Even so, it is also an indication of the high activity of Poland in prosecution.

TABLE 3 Age of the defendant at the time of the EAW issue

Age of the defendant at the time of the EAW issue	Frequency	Percent	Valid Percent	Cumulative Percent
≤ 20	3	1,2		1,2
21-30	70	28		29,9
31-40	91	36,4		67,2
41-50	51	20,4		88,1
51-60	20	8,2		96,3
61-70	8	3,3		99,6
> 70	1	0,4		100
	244	97,6		
Missing	6	2,4		
Total	250	100		

Table 3 shows that over 80% of the defendants is between 21 and 50 years old.

TABLE 4 Residence country of defendant

Residence Country of defendant	*Frequency*	*Percent*	*Valid Percent*	*Cumulative Percent*
Netherlands	96	38,4	71,1	71,1.
Belgium	8	3,2	5,9	77,0
Poland	8	3,2	5,9	83,0
Italy	5	2,0	3,7	86,7
Germany	4	1,6	3,0	89,7
France	2	0,8	1,5	91,1
Hungary	2	0,8	1,5	92,6
Portugal	2	0,8	1,5	94,1
Bulgaria	1	0,4	0,7	94,8
Colombia	1	0,4	0,7	95,6
Latvia	1	0,4	0,7	96,3
Lithuania	1	0,4	0,7	97,0
Nepal	1	0,4	0,7	97,8
Romania	1	0,4	0,7	98,5
Spain	1	0,4	0,7	99,3
USA	1	0,4	0,7	100
Total	135	54	100	
Missing/ Unknown	113	45,2		
ND	2	0,8		
Total	115	100		

Table 4 shows the majority of defendants lives in the Netherlands. The table shows also a large number of missing data or ‘unknown’. This is due to the fact that these data were not in the file. This may be explained by the circumstance that quite a number of persons probably does not have a formal address.

TABLE 5 Languages spoken by defendants

Languages spoken by defendants	N	Percentage	Percentage of cases
Albanian	6	2,4	2,6
Arabic	5	2,0	2,2
Bulgarian	3	1,2	1,3
Croatian	1	0,4	0,4
Czech	5	2,0	2,2
Dutch	89	35,0	38,5
English	21	8,3	9,1
French	8	3,1	3,5
German	33	13,0	14,3
Hungarian	5	2,0	2,2
Italian	10	3,9	4,3
Kurdish	1	0,4	0,4
Latvian	1	0,4	0,4
Lithuanian	3	1,2	1,3
Polish	30	11,8	13,0
Portuguese	2	0,8	0,9
Romanian	4	*1,6*	*1,7*
Russian	2	0,8	0,9
Serbian	1	0,4	0,4
Serbo-Croatian	1	0,4	0,4
Somali	1	0,4	0,4
Spanish	7	2,8	3,0
Sudanese	1	0,4	0,4
Swedish	1	0,4	0,4
Turkish	12	4,7	5,2
Urdu	1	0,4	0,4
Total	254	100	110

According to table 5, languages spoken are mostly Dutch, German, Polish, English and Turkish – in that order.

TABLE 6 Language abilities of suspects

Language abilities of suspects	N
1 language	231
2 languages	20
3 languages	3
Dutch +	8
English +	10
German +	5

This Table (6) together with table 5 shows that interpreting activities are a must in 65% of the cases. Multiple language abilities are scarce in our sample. This sustains worries of advocates concerning translations, especially after surrender.

The Content of the Arrest Warrants sent to the Netherlands

We report here on the aim of the EAW, and its contents in terms of issuing country, crimes committed, maximum sentences or imposed sentences, and the results of the warrant.

TABLE 7 Purpose of the EAW

Purpose of the EAW	Frequency	Percent	Cumulative Percent
Prosecution	160	64	64,8
Execution of sentence	87	34,8	100
Missing	3	1,2	
Total	250	100	

Table 7 shows that 64% of EAW's serve the prosecution of a suspect and 34% relates to a sentence to be executed in the issuing country.

TABLE 8 Issuing Country

Issuing Country	Frequency	Percent	Valid Percent	Cumulative Percent
Germany	71	28,4	28,7	28,7
Belgium	54	21,6	21,9	50,6
Poland	31	12,4	12,6	63,2
Italy	27	10,8	10,9	74,1
France	18	7,2	7,3	81,4
Spain	10	4,0	4,0	85,4
Austria	6	2,4	2,4	87,9
United Kingdom	6	2,4	2,4	90,3
Hungary	5	2,0	2,0	92,3
Czech Republic	4	1,6	1,6	93,9
Lithuania	3	1,2	1,2	95,1
Portugal	3	1,2	1,2	96,4
Latvia	2	,8	,8	97,2
Luxembourg	2	,8	,8	98,0
Sweden	2	,8	,8	98,8
Bulgaria	1	,4	,4	99,2
Finland	1	,4	,4	99,6
Slovakia	1	,4	,4	100,0
Total	247	98,8	100,0	
Missing/ND	3	1,2		
Total	250	100		

This table 8 shows that 50% of the cases come from Belgium and Germany. Poland, France, Italy and Spain take care of another 35%.

TABLE 9 Number of offences in the warrant

Number of offences in the warrant	Frequency	Percent	Valid Percent	Cumulative Percent
1	110	44,0	45,1	45,1
2	51	20,4	20,9	66,0
3	27	10,8	11,1	77,0
4	9	3,6	3,7	80,7
5	10	4,0	4,1	84,8
6	4	1,6	1,6	86,5
7	5	2,0	2,0	88,5
8	7	2,8	2,9	91,4
9	1	,4	,4	91,8
10	1	,4	,4	92,2
11	3	1,2	1,2	93,4
12	1	,4	,4	93,9
13	1	,4	,4	94,3
14	1	,4	,4	94,7

16	**2**	**,8**	**,8**	**95,5**
17	**1**	**,4**	**,4**	**95,9**
18	**1**	**,4**	**,4**	**96,3**
19	**1**	**,4**	**,4**	**96,7**
22	**1**	**,4**	**,4**	**97,1**
23	**1**	**,4**	**,4**	**97,5**
24	**1**	**,4**	**,4**	**98,0**
32	**1**	**,4**	**,4**	**98,4**
34	**1**	**,4**	**,4**	**98,8**
37	**1**	**,4**	**,4**	**99,2**
40	**2**	**,8**	**,8**	**100,0**
Total	**244**	**97,6**	**100,0**	
System	**6**	**2,4**		
total	**250**	**100,0**		

The number of offences in the majority of warrants received is between 1 and 3. However in 20% of the cases it is 5 or higher. The range ends with 2 cases of 40 offences. We wonder why sometimes so many offences are mentioned in one EAW.

TABLE 10 Listed offences in the EAW

Listed Offences in EAW's[124]	N= 176	Percentage	Percentage of cases
Illicit trafficking in narcotic drugs and other substances	102	45,7%	58,0%
Organised or armed robbery	21	9,4	11,9
Participation in a criminal organization	21	9,4	11,9
Fraud, etc.	14	6,3	8,0
Swindling	11	4,9	6,3
Forgery of administrative documents and trafficking therein	11	4,9	6,3
Murder, grievous bodily injury	10	4,5	5,7
Kidnapping, illegal restraint and hostage taking	8	3,6	4,5
Rape	6	2,7	3,4
Trafficking in stolen vehicles	4	1,8	2,3

[124] In an EAW more than 1 crime per suspect is possible.

Facilitation of unauthorised entry and residence	**4**	**1,8**	**2,3**
Racketeering and extortion	**3**	**1,3**	**1,7**
Trafficking in human beings	**2**	**0,9**	**1,1**
Illicit trafficking in weapons, munitions and explosives	**2**	**0,9**	**1,1**
Terrorism	**1**	**0,4**	**0,6**
Corruption	**1**	**0,4**	**0,6**
Laundering of the proceeds of crime	**1**	**0,4**	**0,6**
Forgery of means of payment	**1**	**0,4**	**0,6**
Total	**223**	**100,0**	**126,7**

This table shows that of the List offences, 45% concerns drugs, about 10% armed robbery and about 10% participation in a criminal organization. Terrorism is less than 1%. In an EAW more than 1 offence can be mentioned.

TABLE 11 Non-list offences in EAW

NON-LIST OFFENCES in EAW's[125]	Frequency	Percentage
Robbery	**36**	**38,16**
Physical assault	**9**	**9,54**

[125] This table summarizes the original, which contains separate descriptions for each non-list crimes, as far as in the sample. Combinations of listed crimes and non-listen crimes are possible

Threatening	**6**	**6,36**
Fraud	**6**	**6,36**
Forgery	**4**	**4,24**
Illegal possession of firearms	**4**	**4,24**
Swindling	**4**	**4,24**
Tax offence	**4**	**4,24**
Handling stolen goods	**3**	**3,18**
Violation of Drug Act	**3**	**3,18**
Causing a road accident	**2**	**2,12**
Blackmailing	**2**	**2,12**
Vandalism	**2**	**2,12**
Driving while being intoxicated	**2**	**2,12**
Preparation of a crime	**2**	**2,12**
Computer fraud	**2**	**2,12**
Sexual assault	**1**	**1,06**
Embezzlement	**1**	**1,06**
Removing a child from lawful custody	**1**	**1,06**
Hit-and-run	**1**	**1,06**
Attempted murder	**1**	**1,06**
Pimp	**1**	**1,06**

Criminal conspiracy	**1**	**1,06**
Abduction	**1**	**1,06**
Attempted manslaughter	**1**	**1,06**
Hooliganism	**1**	**1,06**
Disobeying an official command	**1**	**1,06**
Threatening with deprivation of life	**1**	**1,06**
Violation of the Foreigners Act	**1**	**1,06**
Smuggling	**1**	**1,06**
Spreading an infectious disease	**1**	**1,06**
TOTAL	**106**	**100,00**

This table shows the huge variety of non-listed crimes in EAW's. Robbery in different guises (e.g. theft by threatening, attempted robbery) and physical assault are the highest numbers.

TABLE 12 Decision rendered in Absentia

Decision rendered in absentia	Frequency	Percent	Valid Percent	Cumulative Percent
No	**238**	**95,2**	**95,2**	**95,2**
Yes	**12**	**4,8**	**4,8**	**100,0**
Total	**250**	**100,0**	**100,0**	

EAW's received contained in about 5% cases where persons were convicted *in absentia*.

TABLE 13 EAW pertains to seizure and handing over of property

EAW pertains to seizure and handing over of property	Frequency	Percent	Valid Percent	Cumulative Percent
No	248	99,2	99,2	99,2
Yes	2	,8	,8	100,0
Total	250	100,0	100,0	

About 1% of the EAW's is about seizure and handling over of property. In those two cases the goods were 'materials for selling drugs', like phone numbers of suppliers and buyers, and money.

TABLE 14 Suspects : maximum sentence applicable in years

Suspects: maximum sentence applicable to the offence, in years	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of suspects in sample)	Cumulative Percent
1	1	0,4	0,6	0,6
2	3	1,2	1,8	2,4
3	5	2,0	3,0	5,4
4	3	1,2	1,8	7,2
5	22	8,8	13,2	20,4
6	1	0,4	0,6	21,0
7	1	0,4	0,6	21,6
8	7	2,8	4,2	25,7
9	1	0,4	0,6	26,3
10	39	15,6	23,4	49,7
12	2	0,8	1,2	50,9

14	**2**	**0,8**	**1,2**	**52,1**
15	**51**	**20,4**	**30,5**	**82,6**
16	**1**	**0,4**	**0,6**	**83,2**
20	**17**	**6,8**	**10,2**	**93,4**
24	**1**	**0,4**	**0,6**	**94,0**
27	**1**	**0,4**	**0,6**	**94,6**
30	**9**	**3,6**	**5,4**	**100,0**
Total	**167**			
Missing plus ND	**83**	**33,2**	**100**	
Total	**250**	**100,0**		

Accepting this sample represents all cases means that the majority of EAW's issued to the Netherlands prosecutors' office concerns offences for which more than 5 years imprisonment is possible, according to the national law of the issuing country. This suggests that the majority of the EAW's issued to the Netherlands concerns important crimes, and not just the light ones as the stories go.

TABLE 15 Convicts, sentence imposed in years

Convicts: sentence imposed to the offence, in years	Frequency	Percent	Valid Percent	Cumulative Percent
1	**8**	**3,2**	**15,1**	**15,1**
2	**4**	**1,6**	**7,5**	**22,6**

3	**9**	**3,6**	**17,0**	**39,6**
4	**8**	**3,2**	**15,1**	**54,7**
5	**4**	**1,6**	**7,5**	**62,3**
6	**6**	**2,4**	**11,3**	**73,6**
7	**1**	**,4**	**1,9**	**75,5**
8	**5**	**2,0**	**9,4**	**84,9**
9	**3**	**1,2**	**5,7**	**90,6**
11	**1**	**,4**	**1,9**	**92,5**
14	**1**	**,4**	**1,9**	**94,3**
16	**1**	**,4**	**1,9**	**96,2**
21	**1**	**,4**	**1,9**	**98,1**
24	**1**	**,4**	**1,9**	**100,0**
Total	**53**	**21,2**	**100,0**	
Missing/ ND	**197**	**78,8**		
Total	**250**	**100,0**		

Table 15 shows quite the opposite of the table about the maximum sentences applicable to an offence (14). This table shows that the majority of the sentences

imposed are 5 years or less imprisonment. It is unclear how this relates to the crimes committed and the maximum sentences in different countries.

Decisions and Outcomes

Below, we show the result on the outcomes of the EAW's.

TABLE 16 Defendant consented to surrender

Defendant consented to surrender	Frequency	Percent (relative to total sample)	Valid Percent (relative to valid numbers in sample)	Cumulative Percent
No	197	78,8	78,8	78,8
Yes	53	21,2	21,2	100,0
Total	250	100,0	100,0	

About 20% of the defendants consented to surrender. As a consequence, they can no longer refer to specialty rules.

TABLE 17 It was demanded that the person be returned after hearing

It was demanded that the person be returned after hearing	Frequency	Percentage (relative to total sample)	Valid Percent (relative to valid numbers in sample)	Cumulative Percent
No	214	85,6	85,9	85,6
Yes	35	14	14	99,6
missing	1	0,4	0,1	100,0
Total	250	100,0	100,0	

The return guarantee was asked in 14% of the cases concerning suspects and convicts. This is a peculiar number, because for persons of Dutch nationality always a return guarantee is asked. Dutch nationals will not be allowed to be surrendered for execution of their sentence abroad. The percentage of persons of Dutch nationality in the total sample is 25 (64 cases). Of the 250 EAW's received, 87 had the purpose of *execution* of the sentence, 160 had the purpose of *prosecution*. 36 is 22.5% out of 160. An extra check on the data shows that of the 36 warrants where return was demanded, 31 was for Dutch citizens, four concerned none – Dutch residents and one was a file

concerning a Dutch national where purpose (execution or prosecution) could not be found and that was counted.[126]

TABLE 18 There were contacts between authorities for the resolution of problems

There were contacts between authorities for the resolution of problems	Frequency	Percent (relative to total sample)	Valid Percent (relative to valid numbers in sample)	Cumulative Percent
No	146	58,4	58,4	58,4
Yes	104	41,6	41,6	100,0
Total	250	100,0	100,0	

In the sample, in case of a life time sentence, no guarantee of measures of clemency was demanded. There were 2 cases with a possible life time sentence.

TABLE 19 Result of the warrant

Result of the Warrant	Frequency	Percent (relative to total sample)	Valid Percentage (relative to valid numbers in sample)	Cumulative Percent
Was approved and executed	176	70,4	85,4	85,4
Was refused	24	9,6	11,7	97,1
Was approved but not executed	6	2,4	2.9	100,0
Total	206	82,4	100,0	
Missing/ND	44	17,6		
Total	250	100,0		

70 -85% of the EAWs was approved of. The data do not show who decided to refuse the surrender; the surrender chamber or the district court or the public prosecutors' office.

[126] Data mining thanks to José Reis.

Aspects of time of Dutch surrender proceedings

Here we show data on the time that was needed to catch, decide and surrender suspects and convicts.

TABLE 20 Suspects, year of the offence underlying the EAW

Suspects: year of the offence underlying the EAW	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of suspects in sample)	Cumulative Percentage
1990	1	0,4	0,6	0,6
1993	2	0,8	1,3	1,9
1994	1	0,4	0,6	2,6
1995	1	1,6	0,6	3,2
1997	4	0,4	2,6	5,8
1998	1	2,4	0,6	6,4
1999	6	3,2	3,8	10,3
2000	8	2,8	5,1	15,4
2001	7	0,8	4,5	19,9
2002	2	2,4	1,3	21,2
2003	6	5,6	3,8	25,0
2004	14	12,4	9,0	34,0
2005	31	12,4	19,9	53,8
2006	31	12,4	19,9	73,7
2007	36	14,4	23,1	96,8
2008	5	2,0	3,2	100,0
Total	156	62,4	100	
Missing (convicted persons plus ND)	94	37,6		
Total	250	100,0		

This table shows that relatively old crimes are still being listed. 15% of the EAW's issued to the Netherlands concerned offences that have been committed before the year 2001. The majority of the EAW's, however, result from the time after the Framework decision and the surrender act entered into force in 2004.

TABLE 21 Suspects: months between offence and EAW issue

Suspects: months between offence and EAW issue	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of suspects in sample)	Cumulative Percent
up to 6 months	45	18,0	29,8	29,8
6 months to 1 year	20	8,0	13,2	43,0
1 to 1,5 year	21	8,4	13,9	57,0
1,5 to 2 years	10	4,0	6,6	63,6
2 to 2,5 years	9	3,6	6,0	69,5
2,5 to 3 years	7	2,8	4,6	74,2
More than 3 years	39	15,6	25,8	100
Total	151	60,4	100	
Missing (convicted persons plus ND)	99	39,6		
Total	250	100,0		

Table 21 shows that it may take considerable time before the decision to prosecute may result in an EAW. In 25% of the cases this may be more than 3 years. This has to do with the way the search for a suspect is organized. The person is signalled in the Schengen Information System. Apart from direct searches, if the persons is accidentally found, e.g. because of a traffic violation, the prosecuting authority will be informed and sends a formal EAW.

TABLE 22 Convicts : months between the sentence and the EAW issue

Convicts: months between the sentence and the EAW issue	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of convicts in sample)	Cumulative Percent
up to 6 months	8	3,2	10,0	29,8
6 months to 1 year	8	3,2	10,0	43,0
1 to 1,5 year	7	2,8	8,7	57,0
1,5 to 2 years	3	1,2	3,7	63,6
2 to 2,5 years	8	3,2	10,0	69,5
2,5 to 3 years	7	2,8	8,8	74,2
More than 3 years	39	15,6	48,8	100
Total	80	32	100,0	
Missing (convicted persons plus ND)	170	39,6		
Total	250	100,0		

The outcome of table 22 is clear. Most of the sentences were given at least two years before the EAW was issued. This could be an indication of the time needed to actually enforce a sentence on a convicted person.

TABLE 23 Convicts : year of the sentence underlying the EAW

Convicts: year of the sentence underlying the EAW	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of suspects in sample)	Cumulative Percent
1992	3	1,2	3,5	3,5
1993	1	0,4	1,2	4,7
1994	1	0,4	1,2	5,9
1995	4	1,6	4,7	10,6
1996	1	0,4	1,2	11,8
1997	2	0,8	2,4	14,1
1998	5	2,0	5,9	20,0
1999	4	1,6	4,7	24,7
2000	4	1,6	4,7	29,4
2001	3	1,2	3,5	32,9
2002	6	2,4	7,1	40,0
2003	6	2,4	7,1	47,1
2004	15	6,0	17,8	64,7
2005	14	5,6	16,5	81,2
2006	9	3,6	10,6	91,8
2007	5	2,0	5,9	97,6
2008	2	0,8	2,4	100,0
Total	85	34,0	100,0	
Missing (convicted persons plus ND)	165	66,0		
Total	250	100,0		

For convicts, 20% of the sentences dates back from earlier than 1999. 36% of the sentences were given since 2004, when the EAW framework decision was enacted.

TABLE 24 Months between custody and hearing

Months between EAW Issue and custody	Frequency	Percent	Valid Percent	Cumulative Percent
0	81	32,4	47,6	47,6
1	20	8,0	11,8	59,4
2	11	4,4	6,5	65,9
3	10	4,0	5,9	71,8
4	5	2,0	2,9	74,7
5	9	3,6	5,3	80,0
6	3	1,2	1,8	81,8
7	6	2,4	3,5	85,3
8	2	0,8	1,2	86,5
9	1	0,4	0,6	87,1
10	1	0,4	0,6	87,6
11	1	0,4	0,6	88,2
12	3	1,2	1,8	90,0
13	2	0,8	1,2	91,2
14	4	1,6	2,4	93,5
16	1	0,4	0,6	94,1
17	1	0,4	0,6	94,7
19	1	0,4	0,6	95.3
20	2	0,8	1,2	96,5
22	1	0,4	0,6	97,1
24	1	0,4	0,6	97,6
25	1	0,4	0,6	98,2
30	1	0,4	0,6	98,8
33	1	0,4	0,6	99,4
55	1	0,4	0,6	100,0
Total	170	68,0	100,0	
Missing/ND	80	32,0		
Total	250			

80% of the EAW's lead to custody within 6 months or less. 2,5% of the EAW's lead to a detention after more than 2 years. The missing numbers relate to incomplete files.

The value of these data is questionable, not because of inaccuracy, but because a requested person usually is signalized in the SIS, before he is arrested. The files at the International Legal Aid Centre in Amsterdam did not contain this information.

TABLE 25 Months between custody and hearing

Months between custody and hearing	Frequency	Percent	Valid Percent	Cumulative Percent
0	52	20,8	32,9	32,9
1	69	27,6	43,7	76,6
2	34	13,6	21,5	98,1
3	2	0,8	1,3	99,4
6	1	0,4	0,6	100,0
Total	158	63,2	100,0	
Missing/ND	92	36,8		
Total	250	100,0		

This table shows that 76 % of the requested persons have a hearing within one month after custody, 98 % within 2 months. This is fairly within the 60 days limit of the surrender act. The missing numbers relate to incomplete files

TABLE 26 Months between hearing and surrender

Months between hearing and surrender	Frequency	Percent	Valid Percent	Cumulative Percent
0	127	50,8	82,5	82,5
1	9	3,6	5,8	88,3
2	6	2,4	3,9	92,2
3	3	1,2	1,9	94.2
4	1	0,4	0,6	94,8
5	5	2,0	3,2	98,1
6	3	1,2	1,9	100,0
Total	154	61,6	100,0	
Missing/ND	96	38,4		

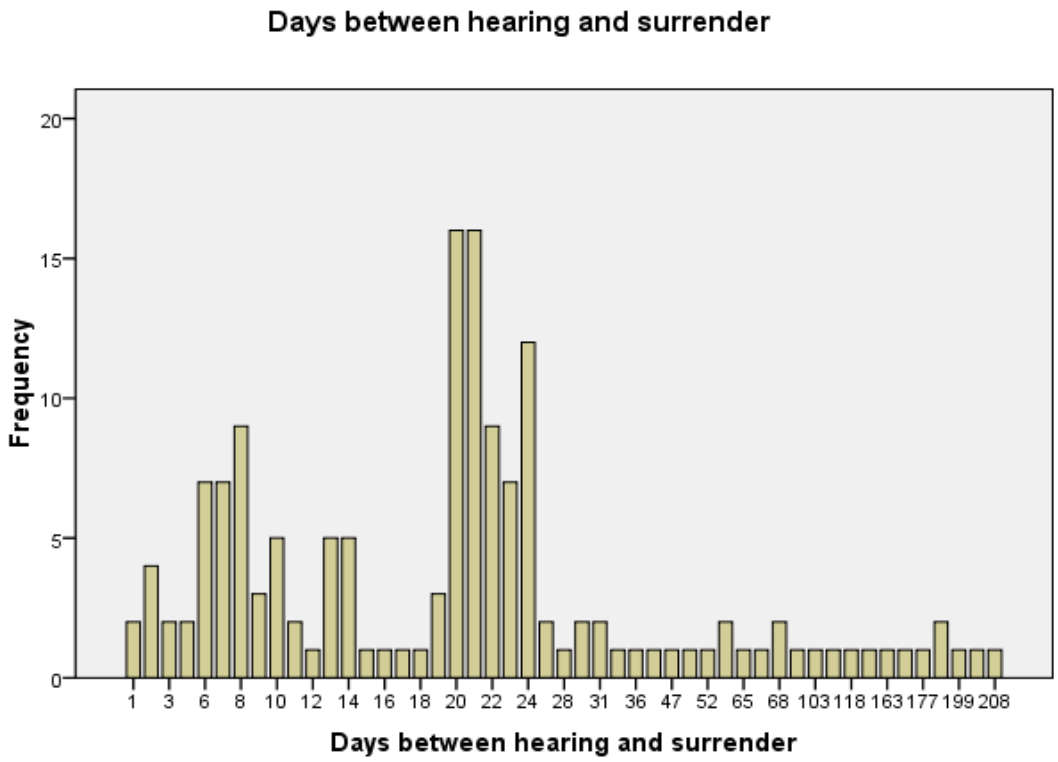

Table 26 shows that 82% is surrendered within 1 month following the hearing, 92% within 2 months. However, article 35 Surrender Act prescribes that surrender takes place 10 days following the hearing at the latest. The diagram above shows that a large majority of surrenders take place after that deadline, whereas the mean is 20 days!

Once an EAW has been issued, proceedings evolve quite fast, on average. The unknown number is how long it takes to catch the suspect. This is due to the fact that requested persons usually are first entered into the SIS. When they are (accidentally?) caught, the signalling prosecutors' office is informed and they then can decide whether they should send an EAW.

Discussion

First of all, it should be noted that the data– based on the archived files- are not complete. The data show that most of the EAW's concern male suspects/convicts. The crimes concerned often are 'ordinary' crimes. Most of them have a severe character, but some of them have not. An indicator for this is the maximum sentence for a crime

according to the national criminal laws. Most of the alleged crimes (about 80%) of suspects are punishable by more than 5 years of imprisonment.

Does this somehow contradict the urgency of the debate on proportionality in relation to the EAW? Or does it only show that relatively small crimes get quite a lot of attention in this debate?

Regarding the actual sentences of convicts, 60% concerns 4 years or less imprisonment. One explanation might be that the maximum sentence is not often imposed. This would mean that further research needs data about the sentences following surrender of suspects. The maximum sentence in an EAW may turn out to be a primitive indicator of the severity of the crime. E.g. theft of a mobile phone is not the same as stealing a valuable painting from a museum.

The crimes that occur the most in EAW's are drugs related, participation in a criminal organization, robbery in some way or another, fraud and physical assault. Participation in a criminal organization is only 10% of the cases, terrorism less than 1 percent. In so far the issued EAW's for the PPO's concern 'business as usual'. 106 out of 250 cases regard crimes that are not listed. In 223 cases the EAW concerns FD-listed facts. It often happens that an EAW contains several more crimes. We do not know why sometimes high numbers of offences are listed in an EAW.

Furthermore, Germany and Belgium are as neighbouring countries the countries that issue most EAW's to the Netherlands, followed by Poland. This matches with the nationality and the country of residence of the largest proportions of defendants, and with the language abilities of the defendants.

The large majority of EAW-requests are granted by Amsterdam District Court. The proportion of refusals is about 11%. This number does give no information on the question whether the refusal was by the court or by the PPO. So, the discussion on: should surrender be a judicial decision or just a decision of the PPO cannot be fed with arguments based on those data. However, the peer review report shows that in 2006 33 EAW's were refused by the DPPA and 38 by Amsterdam district court (Council of the European Union, 27 February 2009, 29). That is a low proportion.

Requests for seizure of goods in EAW's do occur very rarely. Practically this is a competence of the prosecutors' office where the suspect lives. Is easier to address those persons directly.

For only 14 % of cases a return guarantee of the requested person was demanded, while 25% of the requested persons concern Dutch nationals and another part will be aliens with a residence permit for an indefinite time according to Article 6 Surrender Act. In about 40% of the cases there have been contacts between the PPO-Amsterdam and the issuing authorities.

Regarding the timeliness, once an EAW is issued (and the suspect or convict is held in custody) proceedings move rapidly forward in 80% of the cases. Amsterdam district court is quite successful in making the legal deadline of a hearing within 60 days in 98% of the cases. This outcome contradicts the peer review report (Council of the European Union, 27 February 2009, 25). However, the peer review report shows that there are increasing throughput times from 2006 onwards. Nevertheless, the speed of handling cases upon receipt of an EAW is considerable. This may be considered the biggest success of the EAW-FD. Actual surrender following the hearing takes about 20 days on average. That is too long as the Surrender Act demands surrender within 10 days following the hearing.

The explanation for the huge time between the offence committed and the issuing of an EAW in 25% of the cases, lays with the prosecuting authorities abroad. We do not know why this sometimes takes several years.

EAW issued by the Netherlands

We gathered data on 105 EAW's. We present the same tables as for the EAW's received in the Netherlands, but leave them out when the data are too limited to present them. No information was available on the time that passed between the issuance of the EAW and actual surrender, This may be registered in the executing state, but not in the Netherlands as issuing state.

Characteristics of the suspects

TABLE 27 Sex of defendants

Sex of defendants	Frequency	Percent	Valid Percent	Cumulative Percent
Male	97	92,4	92,4	92,4
Female	8	7,6	7,6	100,0
Total	105	100,0	100,0	

This table confirms the male- female *ratio* of defendants.

TABLE 28 Nationality of defendant

Nationality	Frequency	Percent	Valid Percent	Cumulative Percent
Netherlands	48	45,7	48,5	48,5
Morocco	9	8,6	9,1	57,6
Turkey	7	6,7	7,1	64,6
Bulgaria	4	3,8	4,0	68,7
Algeria	3	2,9	3,0	71,7
Poland	3	2,9	3,0	74,7
Romania	3	2,9	3,0	77,8
United Kingdom	3	2,9	3,0	80,8
Iraq	2	1,9	2,0	82,8
Serbia	2	1,9	2,0	84,8
Suriname	2	1,9	2,0	86,9
-- Other --	2	1,9	2,0	88,9
Albania	1	1,0	1,0	89,9
Austria	1	1,0	1,0	90,9
Bosnia and Herzegovina	1	1,0	1,0	91,9
Colombia	1	1,0	1,0	92,9
Egypt	1	1,0	1,0	93,9
Jordan	1	1,0	1,0	94,9
Lebanon	1	1,0	1,0	96,0
Nigeria	1	1,0	1,0	97,0
Pakistan	1	1,0	1,0	98,0
Russia	1	1,0	1,0	99,0
Tunisia	1	1,0	1,0	100,0
Total	99	94,3	100,0	
Missing/ND	6	5,7		
Total	105	100,0		

Almost half of the defendants is Dutch. There are quite some defendants from Northern African Countries, from Turkey and from Eastern Europe. There are no Germans and Belgians in this sample and this may be explained by the circumstance that German, Belgian and French suspects are dealt with by other prosecutors' offices in the Netherlands.

TABLE 29 Age of defendants in categories

Age of defendants	Frequency	Percent	Valid Percent	Cumulative Percent
<=20	1	1,0	1,0	1,0
21-30	25	23,8	24,3	25,2
31-40	41	39,0	39,8	65,0
41-50	26	24,8	25,2	90,3
51+	10	9,5	9,7	100,0
Total	103	98,1	100,0	
Missing/ND	2	1,9		
Total	105	100,0		

Also in this sample most defendants are between 21 and 50 years old.

TABLE 30 Residence country of defendant

Residence country of the defendant	Frequency	Percent	Valid Percent	Cumulative Percent
Netherlands	19	18,1	54,3	54,3
Spain	2	1,9	5,7	60,0
Turkey	2	1,9	5,7	65,7
United Kingdom	2	1,9	5,7	71,4
Austria	1	1,0	2,9	74,3
Belgium	1	1,0	2,9	77,1
Brazil	1	1,0	2,9	80,0
Bulgaria	1	1,0	2,9	82,9
Egypt	1	1,0	2,9	85,7
France	1	1,0	2,9	88,6
Germany	1	1,0	2,9	91,4
Poland	1	1,0	2,9	94,3
Thailand	1	1,0	2,9	97,1
-- Other --	1	1,0	2,9	100,0
Total	35	33,3	100,0	
Missing/ND	70	66,7		
Total	105	100,0		

Table 30 shows that a lot of data are missing, also based on the fact that the public prosecutors' office simply does not know where most of the suspects live.

TABLE 31 Languages the defendant speaks

Languages the defendant speaks	Responses		
	N	Percent	Percent of Cases
Arabic	12	10,2%	12,8%
Bulgarian	4	3,4%	4,3%
Bosnian	1	,8%	1,1%
English	13	11,0%	13,8%
Spanish	3	2,5%	3,2%
French	2	1,7%	2,1%
Hindi	1	,8%	1,1%
Lingala	1	,8%	1,1%
Dutch	60	50,8%	63,8%
Polish	3	2,5%	3,2%
Romanian	3	2,5%	3,2%
Russian	1	,8%	1,1%
Albanian	1	,8%	1,1%
Serbian	2	1,7%	2,1%
Turkish	11	9,3%	11,7%
Total	118	100,0%	125,5%

Those data do match the data of the nationality of the defendants, more or less.

TABLE 32 Language abilities of defendants

Language abilities of defendants	Cases					
	Valid		Missing		Total	
	N	Percent	N	Percent	N	Percent
language_1	94	89,5%	11	10,5%	105	100,0%
language_2	23	21,9%	82	78,1%	105	100,0%
language_3	1	1,0%	104	99,0%	105	100,0%
Dutch +	18					
English +	6					
Arabic+	5					

This table shows that most of the non-Dutch speakers do need interpreters for their defence.

Content of the EAW's

TABLE 33 Purpose of the EAW

Purpose of the EAW (prosecution or execution of sentence)	Frequency	Percent	Valid Percent	Cumulative Percent
prosecution	77	73,3	73,3	73,3
execution of sentence	28	26,7	26,7	100,0
Total	105	100,0	100,0	

About 25% of the EAW's are directed at the arrest of convicts.

TABLE 34 Number of offences in a warrant

Number of offences in the warrant	Frequency	Percent	Valid Percent	Cumulative Percent
1	42	40,0	40,0	40,0
2	26	24,8	24,8	64,8
3	19	18,1	18,1	82,9
4	7	6,7	6,7	89,5
5	4	3,8	3,8	93,3
6	2	1,9	1,9	95,2
7	2	1,9	1,9	97,1
8	1	1,0	1,0	98,1
10	1	1,0	1,0	99,0
17	1	1,0	1,0	100,0
Total	105	100,0	100,0	

This table shows that most of the EAW's do not count more than 3 offences. But larger enumerations do occur.

TABLE 35 Listed offences

Offences in the EAW[127]	**N**	**Percent**	**Percent of Cases**
illicit trafficking in narcotic drugs and other substances	25	17,0%	26,9%
murder, grievous bodily injury	22	15,0%	23,7%
organized or armed robbery	21	14,3%	22,6%
participation in a criminal organization	17	11,6%	18,3%
kidnapping, illegal restraint and hostage-taking	17	11,6%	18,3%
fraud, etc.	14	9,5%	15,1%
Swindling	8	5,4%	8,6%
Rape	5	3,4%	5,4%
trafficking in human beings	4	2,7%	4,3%
forgery of means of payment	4	2,7%	4,3%
forgery of administrative documents and trafficking therein	3	2,0%	3,2%
laundering of the proceeds of crime	2	1,4%	2,2%
racketeering and extortion	2	1,4%	2,2%
sexual exploitation of children and child pornography	1	,7%	1,1%
counterfeiting of currency, including the euro	1	,7%	1,1%
arson	1	,7%	1,1%
Total	147	100,0%	158,1%

A large proportion is dedicated to drugs-related crime, but an even larger proportion concerns heavy crimes like murder, armed robbery kidnapping and the like. The Dutch PPO appears to follow a selective policy for using the European Arrest Warrant infrastructure.

[127] One arrest warrant can have more offences listed.

TABLE 36 Non-listed offences

Non-Listed offences	Frequency	Percent	Valid Percent	Cumulative Percent
Opium Act	4	3,8	14,8	14,8
Robbery	5	4,8	18,4	33,2
Assault, Robbery, Extortion, Threatening with assault & Opium Act	1	1,0	3,7	36,9
Attempted assault	1	1,0	3,7	40,6
Deprivation of liberty and Robbery	1	1,0	3,7	44,3
Illegal possession of weapons	1	1,0	3,7	48,0
Illegal resident	1	1,0	3,7	51,7
Escape from parental authority or from youth care	4	3,8	14,8	66,5
Opium Act and Act Weapons and Munitions	1	1,0	3,7	70,2
Opium Act and Selling stolen goods	1	1,0	3,7	73,9
Selling of stolen goods	3	2,9	11,1	85,0
Sexual assault	1	1,0	3,7	88,7
Tax offence	1	1,0	3,7	92,4
Theft and embezzlement	1	1,0	3,7	96,1
Embezzlement	1	1,0	3,7	99,8
Missing				
Total	27	25,7	100,0	
Missing	78	74,3		
Total	105	100,0		

This is a strange set of apparently auxiliary crimes. A large number of files did not contain this category.

TABLE 37 Decision rendered *in absentia*

Decision rendered in absentia	Frequency	Percent	Valid Percent	Cumulative Percent
No	105	100,0	100,0	100,0

This sample does not contain *in absentia* decisions.

TABLE 38 EAW pertaining to seizure and handing over of property

EAW pertains to seizure and handing over of property	Frequency	Percent	Valid Percent	Cumulative Percent
No	102	97,1	97,1	97,1
Yes	3	2,9	2,9	100,0
Total	105	100,0	100,0	

		Property which may be required as evidence			
		No		Yes	
		Count	Subtable N %	Count	Subtable N %
EAW pertains to seizure and handing over of property	Yes	1	33,3%	2	66,7%

Description of goods to seize	Frequency	Percent	Valid Percent	Cumulative Percent
Money	1	1,0	50,0	50,0
passport driving license other identification documents or passes	1	1,0	50,0	100,0
Total	2	1,9	100,0	
Missing	103	98,1		
Total	105	100,0		

Those tables show 3 cases out of 105 where seizure of goods is requested.

TABLE 39 Maximum sentences

Maximum sentence applicable to the offences, in years	Frequency	Percent	Valid Percent	Cumulative Percent
3	1	1,0	1,0	1,0
4	5	4,8	5,0	5,9
6	23	21,9	22,8	28,7
8	12	11,4	11,9	40,6
9	8	7,6	7,9	48,5
10	7	6,7	6,9	55,4
12	29	27,6	28,7	84,2
15	7	6,7	6,9	91,1
16	1	1,0	1,0	92,1
20	2	1,9	2,0	94,1
30	6	5,7	5,9	100,0
Total	101	96,2	100,0	
System	4	3,8		
Total	105	100,0		

Considering the maximum sentences according to Dutch law, the crimes committed are rather heavy, and this fits the listed offences above.

TABLE 40 Convicts : sentences imposed, in years imprisonment

Sentences imposed on the offences, in years	Frequency	Percent	Valid Percent	Cumulative Percent
2	2	1,9	16,7	16,7
3	1	1,0	8,3	25,0
4	3	2,9	25,0	50,0
5	2	1,9	16,7	66,7
6	1	1,0	8,3	75,0
9	2	1,9	16,7	91,7
20	1	1,0	8,3	100,0
Total	12	11,4	100,0	
Missing/ND	93	88,6		
Total	105	100,0		

The imposed sentences are quite milder than the maximum sentences.

Decisions and outcomes

Considering the nature of the data analyzed, we cannot give many data on e.g. consent to surrender, actual seizure of property, or the communications between the executing authorities abroad and the Dutch prosecutors' office.

Aspects of time concerning Dutch issued EAW's

TABLE 41 Year of the prosecutions act underlying the EAW

Year of the prosecution act underlying the EAW	Frequency	Percent	Valid Percent	Cumulative Percent
1997	1	1,0	1,4	1,4
1998	2	1,9	2,7	4,1
1999	1	1,0	1,4	5,4
2000	1	1,0	1,4	6,8
2001	1	1,0	1,4	8,1
2002	3	2,9	4,1	12,2
2003	3	2,9	4,1	16,2
2004	5	4,8	6,8	23,0
2005	10	9,5	13,5	36,5
2006	25	23,8	33,8	70,3
2007	4	3,8	5,4	75,7
2008	12	11,4	16,2	91,9
2009	5	4,8	6,8	98,6
	1	1,0	1,4	100,0
Total	74	70,5	100,0	
Missing	31	29,5		
Total	105	100,0		

This table shows most prosecution decisions date back to the time the surrender act was in force.

TABLE 42 Months between prosecution act and EAW issue

Months between the prosecution act underlying the EAW and EAW issue	Frequency	Percent	Valid Percent	Cumulative Percent
Up to 6 months	33	31,4	46,5	46,5
6 months to 1 year	14	13,3	19,7	66,2
1 to 1 1/2 year	7	6,7	9,9	76,1
1 1/2 to 2 years	4	3,8	5,6	81,7
2 to 2 1/2 years	2	1,9	2,8	84,5
More than 3 years	11	10,5	15,5	100,0
Total	71	67,6	100,0	
Missing/ND	34	32,4		
Total	105	100,0		

Two thirds of the EAW's is issued within a year following the prosecutions act. This leaves the question unanswered why in other cases – one third, it takes longer to issue an EAW.

Discussion

It follows from this limited set of data that the The Hague international legal aid centre has a functional approach to the EAW. The data, as far as they are representative for the Netherlands, show that the EAW's issued concern major offences. Proportionality for using the EAW is not a point for debate concerning the The Hague practice.

Still information on the Dutch practice of issuing EAW's is hard to gather. The information is dispersed over various Public prosecution offices, who have their own practices. Gathering of data therefore is extremely time consuming and therefore prohibitive for a decent quantitative (evaluation) research without extra funding.

5.6. Conclusion and Discussion

Here we present our findings and the discussions that have evolved during interviews and the expert meetings. It should be noted that the sample of the files we studied reflects the first 4 years of the EAW practice in the Netherlands. For the International Legal Aid Centres and for the surrender chamber, this functioned as learning period, in which they had to learn to work with relatively new responsibilities. As we write this report, the International Legal Aid Centres and the surrender chamber have developed policies and routines within the context of the Dutch Surrender Act. We summarize the outcomes below.

In separate paragraphs at the end of each subject description we will give our own views.

Timeliness

Shifting from extradition to surrender has led to several – radical – changes. One of the major differences between the former extradition procedure and the present surrender procedure is the speediness of it. As a consequence of the extradition procedure, requested persons could have to wait in prison for one up to two years before their actual extradition took place. Nowadays, the Amsterdam District Court can deal with incoming surrender cases within sixty days, and eighty percent of the cases can be dealt with within the maximum period of ninety days. See tables 25 and 26 in chapter 5.

Another important change, which also contributed to the speed of the surrender procedure, is the reduced intensity of examination of requests. The surrender procedure is based on mutual trust and is standardized; it only takes ticking off one or more boxes and meeting formal minimum requirements. As a consequence, the case files are less extensive than the files in extradition cases. Due to the norm of mutual trust there is a constricted margin of appreciation in surrender cases. There is a tendency to not test *ex officio*. The Court of Amsterdam ruled that the principle of trust between states, on the basis of which the suspicions should be assumed to be correct, should prevail, except when there are important clues that a mistake has been made (Amsterdam District Court, 6 March 2007).

Therefore, judges depend on the defences that advocates put forward. Still, the court used to require from the issuing State to add the relevant statutory provisions to the EAW. The Dutch authorities wanted to – marginally – check whether the offence could reasonably be seen as an offence from the list. Later on, the Netherlands Supreme Court ruled that not requiring the full texts of the criminal law provisions to be attached is more in line with the purpose of the FD, which is based to a considerable extent on trust between the member states in order to avoid difficulties and loss of time (Supreme Court of the Netherlands, 8 July 2008).

Developments in the Netherlands

Next to the changes that followed from the Framework Decision, there are also developments in surrender law that follow from practice. The first development is that the Court of Amsterdam wanted to refuse surrender based on human rights; however, the Supreme Court did not allow that. Since 2003 the Netherlands Supreme Court changed its rulings on human rights exceptions substantially: not only a flagrant denial of Article 6 ECHR was required, but also the lack of legal remedy, as prescribed by Article 13 ECHR (Amsterdam District Court, *NJ* 2004, 42). Moreover, a completed torture does come under to scope of the defence of a risk of flagrant denial of Article 6. In 2007 the ECtHR stated that in case of violation of Article 6, the applicant has to file a complaint with the ECtHR after being extradited. Consequently, human rights defences should be put forward in the criminal proceedings after extradition or surrender took place with regard to countries that are party to the ECHR. The questioned State is not responsible anymore for respecting human rights after surrender when there is an effective remedy in the issuing State. The ECtHR differentiates between reversible and irreversible violations of human rights (ECtHR, 6 February 2003).

The second development is that the Dutch Supreme Court quashed the judgments in which judges used a certain margin of appreciation regarding the principle of territoriality (Supreme Court of the Netherlands, 28 November 2006). In principle, the public prosecutor can waive a refusal of surrender – based on the territoriality principle –, unless, in the opinion of the court, the public prosecutor could not reasonably do so – Article 13(2) SA. The Supreme Court ruled that there should be only a marginal test for judges on this matter; they can no longer decide easily that such a waiver of refusal is unreasonable. Consequently, there is almost no margin of appreciation left for the court to decide on matters of territoriality. Therefore, this Article is rendered useless in practice. Moreover, according to the Supreme Court, humanitarian reasons are no

ground to refuse surrender. Therefore, they are no relevant factor to decide on the question whether the refusal of surrender should be waived.

The third development in Dutch surrender practice is that there are questions raised on whether someone with the nationality of another EU-member state who lives here for quite some time and, therefore, should be considered to be rooted here, should be considered an 'alien with a residence permit for an indefinite time' – Article 6(5). The personality principle, which makes re-surrender dependent on being a national of the Netherlands, might lead to a discriminatory distinction between EU-citizens, as follows from EC law. To answer this question, the Court of Amsterdam referred the *Wolzenburg* case to the ECJ and posed the question: "may the executing Member State lay down, in addition to a requirement concerning the duration of lawful residence, supplementary administrative requirements, such as possession of a permanent residence permit?" (ECJ, 6 October 2009; Glerum and Rozemond, 2010).

The fourth development is that the *in absentia*-guarantee of Article 12 SA has taken shape. The Court of Amsterdam regarded the guarantee of a retrial given by Belgium insufficient, because it is not certain whether an application for a retrial will be admissible (District Court of Amsterdam, 23 November 2004). Article 12 SA provides for an assessment of the merits of the case, according to the legislature. Therefore, the Court of Amsterdam argued that the procedure, in which the admissibility of the objections lodged has to be judged before the surrendered person could make use of his right to defend himself in a retrial, is insufficient. The mere existence of a retrial is therefore regarded insufficient to guarantee a new assessment of the merits of the case. In how far the new framework decision on trial *in absentia* (Council Framework Decision 26 February 2009) will lead to a change of course of the practice of the surrender chamber of Amsterdam District Court is not clear yet, as the practice focuses on the adequacy of notifications of the pending trial and its outcome to the requested person in the issuing member state.

Principles and legality

Currently, practitioners speak of three important problems that arose in Dutch EAW practice. The first problem, in the opinion of judges, prosecutors and advocates, is the lack of a proportionality test. For example Poland often issues a EAW for petty offences, which the Dutch authorities claim to be disproportional. Therefore, the Amsterdam District Court recently stated that in special circumstances surrender could

be refused because it would constitute a violation of the proportionality principle (Amsterdam District Court, 30 December 2008). The court referred to the Council of Europe which stated that: “Considering the severe consequences of the execution of an EAW as regards restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant, bear in mind, where possible, considerations of proportionality by weighing the usefulness of the EAW in the specific case against the measure to be applied and its consequences.” (European handbook, January 2008: 14). Yet, this recommendation is written for public prosecutors who decide on issuing an EAW; it is not for the court to judge whether the use of an EAW is (dis-)proportional and to decide which crimes foreign States can consider the most serious.

From the data we assembled for incoming EAW’s 80 percent of the cases concern crimes with a possible maximum sentence of more than 5 years. 20 % has a possible maximum sentence of less than 5 years (table 14). We consider this an indication that the majority of the EAW’s concern serious crimes. However regarding imposed sentences for convicted persons about 70 % concerns sentences of less than 5 years imprisonment and about 30% concerns heavier sentences. This is a contrary indication that better fits the perception of judges that the EAW regards ordinary criminals (table 15). Also the data we gathered on Dutch issued EAW’s have a similar ratio between 5 years and less max. sentences and 70% more than 5 years sentences. This is one of the subjects that needs more research and monitoring.

The second problem is improper usage of the EAW. The EAW is sometimes used for criminal investigation instead of prosecution, because other instruments are executed by way of requests which are not as simple and quick as EAW’s. Among judges and prosecutors there is the strong impression that Belgium asks the surrender of persons for the aim of hearing them as a witness. In Belgium, 50% of the surrendered Dutch nationals got released or conditionally released right after their surrender, while the will never be a follow-up in their case. In other situations, using a radical instrument as the EAW can result in a long period – more than one up to three years – of pre-trial detention, while there might not be any suspicion against this person. This is not in line with the tight maximum for a requested person to be surrendered – 90 days. Some judges and prosecutors are worried that this kind of improper usage will undermine the support of Dutch society for the EAW.

We were not able to gather numbers on this phenomenon.

It should be noted that during the expert meeting both the judge and the person from Rotterdam international legal aid centre protested against this finding, because the PPO had undertaken efforts to find better understanding between Dutch and Belgian authorities. We do not doubt these efforts but we also do not doubt that these are opinions we heard during interviews.

The third problem that judges and prosecutors as well as advocates face, are translation difficulties. The quality of the translated EAW's is a major concern to the Dutch executing authorities, because translation errors very often lead to misunderstandings. Another problem contributing to translation difficulties is the very short time period within which countries require the transmission of an EAW, because it takes much extra effort and costs to get the EAW translated into the official language of the executing State in time. For advocates, it can be very difficult to get to know the law of the issuing State when no translation is available. This reduces their defence possibilities and it also reduces their ability to adequately contribute to the defence of the suspect following surrender.

Furthermore, advocates agree that the quality of interpreters can be problematic, because it is difficult to check. One of the major lacks of interpreters according tom advocates is that some of them only use simple words when translating complex specific juridical terms.

Mutual trust

In general, judges and prosecutors agree that the EAW functions well as an instrument to combat international crime. This was contested by a scholar who maintains it is mainly used for ordinary crime. For the EAW to function properly a basic quantity of mutual trust between judicial authorities is required, as it is the cornerstone of the EAW. The principle of mutual trust requires a distant approach to a surrender case. In order to give mutual trust priority, judges have to look to a case in a more technical way and not look too much at the problems concerning human rights and the treatment of persons in the requesting state.

The judicial authorities in the Netherlands cannot supervise what happens to a person after they allowed the surrender. Some of the judges think this information would be useful in order to maintain the quality of the procedure. Other maintain that they would not be able to use this information in surrender proceedings whatsoever.

Prosecutors are not unwilling to surrender persons to neighbouring countries, nor seem to mind to surrender a person to their foreign colleagues when the act is partly committed on Dutch territory. They give four reasons for this. One, public prosecutors usually cooperate with coordinated international action against organized crime, sometimes it is easier to have a person transferred abroad because all the evidence is located there. Two, it will yield profit for the capacity of the Dutch public prosecution service. Three, the maximum penalties are often higher in other European countries, in particular concerning drug crimes.[128] Four, surrendering a suspect has more impact on him than prosecuting him in the Netherlands.

In contrast, advocates do notice some problems regarding mutual trust. There may be trust between authorities of EU member states, but that is not the same for the citizens of those States who have to be imprisoned in another country. Requested persons fear for example that the maximum of pre-trial detention will be much higher than in the Netherlands and that there will be no guarantee of qualitatively good legal counsel, for a reasonable price. Advocates and judges agree that the ideal situation of equal rights in all European countries is still a fiction, as the legal systems of Eastern European countries differ very much from the legal systems in Western Europe. So, there is a certain tension between the mutual trust the European legislator has taken as a starting point, and the trust suspects, advocates and some judges have in practice. Some of them, therefore, are in favour of a framework decision on minimum rights or improvement of the FD with regard to the legal position of the suspect.

For future research, therefore the time of pre-trial imprisonment after surrender in the different EU countries should be registered and monitored.

Several advocates believe that judges sometimes use emergency steps when there is no mutual trust. Then, they seem to check more profoundly whether the EAW meets all the requirements and whether any refusal ground applies. Nevertheless, because mutual recognition requires States to execute all kinds of requests from abroad, the minimum standard of the suspect's rights will be adjusted to the lowest European common denominator. The Netherlands have already implemented many procedural rights in its Code of Criminal Procedure, such as short periods for pre-trial detention and for dealing with requests of legal assistance, while other countries have not. This reduces the rights of suspects to a European minimum quality of criminal proceedings.

[128] It would be interesting to check if this still holds. Sentences have increased considerably in the Netherlands during the past 5 years.

We reiterate that although the European Union takes a rather strict approach to enforcing the Framework decision on the EAW, it has no competences to steer or monitor proceedings after a person was surrendered. Therefore it is not possible to do research on how surrendered, requested persons were actually treated abroad. From a mutual trust perspective, we think this is desirable, as a part of the debate on transnational criminal law enforcement evolves about defence rights and living up to minimum requirements from a human rights perspective, in criminal proceedings, in custody and concerning imprisonment.

Defence rights

With regard to the legal position of the requested person, the possibility to put up a defence is strongly reduced under the surrender system. The extradition procedure did allow for appeal and cassation. Moreover, the request had to be more substantial with regard to the description of the facts and of the particular suspicion. The EAW does not require sending the underlying records of a request to the executing authorities. In some cases, when the court regards the information provided insufficient, the case will be adjourned in order to request extra information from the issuing authorities. Yet, the court will refuse the execution of the EAW only in exceptional cases, in view of the lack of necessary information. As the *ne bis in idem*-principle does not apply for EAW's, the issuing authority can – continually – send a new EAW as soon as it is informed of the refusal, which the court does not consider to be in the interest of the suspect.

The defence of innocence will only be taken into consideration by the court when there is immediate and absolute proof of the innocence of the requested person. Testimonies of witnesses are not easily accepted as a sufficient alibi to proof someone's innocence. In fact, this defence has succeeded only once since the EAW entered into force. Advocates agree that an important way to improve the possibility to put up defences and effectuate the rights of the suspect in the EAW procedure is to receive the case files in time. Records can now be handed in two days before proceedings take place and, sometimes, the case files are even incomplete until the last moment before the hearing starts.

Advocates' expertise and cooperation

Finally, it is very important for advocates to gain in-depth knowledge of surrender law and – particularly – case law. Judges agree that many advocates do not have any routine in defending requested persons and are not well-informed on the recent case law on surrender procedure. Yet, this could be problematic, because there are only a few law firms that frequently deal with surrender cases, while in this field you have to know the law thoroughly, otherwise you will not succeed in court. Moreover, advocates could make more use of EC and EU law in their defences, such as the principles of proportionality and of non-discrimination. Judges agree that they are dependent of the defences that advocates put forward. Sometimes they seem to be worried about the lack of creativity on the side of the defence. For that reason, judges cannot let the procedure become a complaint procedure; they have to discuss things that catch their attention during the hearing, even when there is no complaint brought forward by the advocate.

Furthermore, advocates have to cooperate with their colleagues from abroad, however, that does not happen in the majority of the cases. It is important to know good advocates in every other member state, e.g., to explain the law of the issuing country. For that reason, it might be necessary to set up a European bar of advocates. In addition it would be in the interest of the requested person if the Dutch State would pay for the legal counsel of their nationals before and after their surrender. Finally, it can be stated that advocates would have to act very pro-actively in surrender cases. At the moment, only a small number of them put considerable effort in such cases. Sometimes it can be profitable to make arrangements with the public prosecution service in the issuing country, in order for the requested person to voluntarily go there for a hearing or even for a court session, instead of staying in prison during the surrender procedure and pending his trial.

Outcome in numbers

The vast majority of incoming EAW's is executed within the 90 days timeframe (tables 25 and 26). However, the data do not show how much time lapses between signalization of the requested persons and their arrest. Most requested persons are men (93%) (table 1). Only 5% of the incoming EAW's concerns judgments *in absentia* (table 12). 20% of requested persons consented with surrender (table 16). Only in 1 % of cases seizure and handing over of property was requested (table 13). 45% of the EAW for

listed crimes are drugs related (table 10). For 80% of the EAW's there were 5 months or less between the EAW and custody (table 24).

Most incoming EAW's are from the neighbour countries, Poland, France and Italy (table 8).

60% of incoming EAW's concern requested persons from Dutch, Polish, German, Belgian and Italian nationality (table 2). The numbers of the EAW use in the Netherlands show for incoming EAW's with the purpose of prosecution that the majority (80%) is for crimes with a maximum sentence of more than 5 years (table 14). The mirror image is shown by EAW's with the purpose of execution: 80% is for crimes with a maximum sentence of 5 years or less (table 15). Return guarantees were asked for Dutch defendants for EAW's with the purpose of prosecution (table 17).

Furthermore it is interesting to note that about 10 % of the incoming EAW's are refused, about half by the PPO and the other half by the surrender Chamber of Amsterdam District Court (table 19).

For Dutch issued EAW's, most requested persons, are Dutch, male. They do concern drugs in 25% of cases, but also murder (23%) and organized or armed robbery (23%). So this gives the impression that the Dutch PPO issues EAW's for heavy crime predominantly. This is also confirmed by the fact that 72% of these EAW's concerns crimes with a maximum sentence of 6 years or more imprisonment (table 39). However, the imposed sentences (table 40) are apparently less severe than the maximum sentences.

It should be noted that the analyzed Dutch issued EAW's are not a random sample.

The numbers show that the majority of the EAW's concern heavy crimes (if measured by the maximum sentence). The peculiarities debated amongst lawyers (judgments *in absentia*, seizure and handing over of property, return guarantees for non-nationals) are not major parts of this sample. This does not mean that these debates are not important. They are.

The human rights perspective is as good as absent in surrender proceedings. The routines are very efficient and the number of refusals of EAW's is limited. Surrender law is quite complicated, but the discretion for judges in surrender cases is very limited. Now that defence rights are almost non-existent in surrender proceedings, a question is if the surrender chamber needs a three judge panel to decide on surrender cases.

The discomfort of strangers[129]

First of all, we are convinced a system of transnational cooperation in criminal law enforcement is a necessity in an integrating Europe. The development of the current system based on the Framework decision on the European Arrest Warrant, however, leaves several urgent problems unsolved. From the perspective of citizenship and the constitutional state this is unacceptable.

It is a feature of the EAW system in Europe that it is for the requesting authority to decide to put the data of a wanted person into the SIS and Sirene systems. And it is up to the executing authorities to decide if a requested and arrested person will actually be surrendered in accordance with national legislation. However, if a court refuses surrender, this by no means involves that the requested person will be removed from the signalling system. Of course, there can be different reasons to refuse surrender, apart from the age or the maximum punishment for the offence, e.g. the requesting authority delivered a bad EAW that could not be repaired in time. But the cases described also are of a different nature, e.g. persons that by all means cannot have committed the crime; persons that have been put in the signalling system on instigation of criminals that corrupted a prosecutor. The administration of criminal law enforcement is not infallible, whereas the EAW system in effect ignores (postpones) the presumption of innocence and the defence rights evolving from that basic constitutional value.

The current EAW system has no way to deal with such situations at the detriment of the unjustly requested persons, who appear as 'wanted' throughout Europe. Even when the executing country is able to remove the data of the requested person from the national signalling system, the person is likely to remain signalled in the SIS. The usual crime fighting attitude amongst law enforcers, policemen and prosecutors alike, that persons have not been entered into the signalling systems for no reason, also does not help. In this regard Europe needs legislation that makes it possible for persons dismissed from surrender to have their details removed from the SIS ((Amnesty report, 2005; Cronin, Guardian August 5 2009; NCRV broadcast 17 December 2007). That also can be marked as a means to enhance mutual trust, this time not from an institutional but especially from a citizens' perspective.

A question to be answered is, in how far judges in Amsterdam District Court really are restricted to only test the administrative accuracy of an issued EAW. The

[129] This paragraph header paraphrases a novel by Ian MCEwan, The Comfort of Strangers, 1981.

International legal aid chamber of Amsterdam District court has tried to invoke human rights arguments into surrender law, but was corrected by the Supreme Court. Now one wonders if and how they are able to invoke defence rights based on the EU treaty (Klip, 2010). If this will not be possible the question is if a three judge panel is necessary to take these decisions, even although surrender law is a complicated area of law. Would one judge be enough or can surrender cases just as well be left to be decided by the public prosecutions office?

Furthermore national bar institutes need to join forces in Europe in order to support the defence for surrendered suspects. This regards not only supervision of interpreter's services but also the services of advocates that have to deal with suspects from abroad. Not only the efficiency of transnational law enforcement, but also respecting civil rights that are also a part of European citizenship should be high on the agenda of European policymakers. The proposal of the Commission for Framework decision on procedural rights dates back to 2004 and still has not been realized (European Commission, 28 April 2004). The European Commission has stressed that the procedural rights from the proposal, more than other rights need harmonization, because that would contribute most to mutual trust and cooperation between EU-member states. The proposal wants to promote that these rights will be respected at a minimum level, "To promote compliance at a consistent standard" (European Commission, 28 April 2004, 2). Moreover, according the European Commission, the knowledge and the respect for human rights will increase by giving them more visibility. This fact only already calls for the question how come that this proposal has not yet reached legal status, as it contains only minimum requirements. A report of the House of Lords (House of Lords 2009) explains that the reason is that certain countries do not want to do more than they do, whereas others (the UK) find the proposal too limited. This is all the more disturbing, as the European Council did manage to bring about a Framework Decision on judgments *in absentia*, thus amending the Framework Decision on the EAW. Hope comes from the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01.

For us it seems essential that before mutual trust will be stretched even further from the defence interests of EU citizens, defence related rights can be enforced on a minimum level throughout the EU, if possible on a better level than the minimum requirements of the European Convention on Human Rights, and before too much 'collateral damage' can be imposed by law enforcement bureaucracies. As far as we are concerned, the European Frameworks designed to deal with transnational criminal law

enforcement need further elaboration by giving guarantees for minimum defence rights for EU citizens and others alike. We do hope the new decision making proceedings in the EU based on article 82 of the Lisbon Treaty will enable the European Legislator to cut through the political stalemate on this issue.

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6. THE EAW IN PORTUGAL

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6.1. Introduction

As one of the earliest transpositions of the Council Framework Decision no. 2002/584/JAI, 13th June (FD), the Portuguese EAW Act, Law 65/2003, was enacted on the 23rd August, 2003, and came into force on the 1st January, 2004. Thus the European arrest warrant (EAW) was introduced in the Portuguese legal system, bringing forth the principles and purposes enunciated in Tampere.

It is the outline of this instrument's concretization inside the Portuguese justice system that we have tried to discern throughout this research. And so, following the analytical approach and the methodology defined for the national case studies, we present in this chapter the main results of the Portuguese case study. We had two main purposes: on the one hand, to examine the way the Portuguese legislator transposed the FD into its internal order; and on the other to assess said regime's application, especially discerning practical problems, and taking into account its practitioners' perceptions and experiences.

For such, in Section I we start by presenting the main characteristics of the EAW Act, summoning its concretizations, similarities and deviations before the FD, thus assessing in which way the national transposition legislator incorporated its underlying principles, but not forgetting the protection of the requested person's status (i.e. fundamental rights, such as procedural rights). This is followed by a brief overview of national case law trends, with the intention of bringing forth the practitioners' understanding of this legal regime.

In Section II, we present and analyse statistical data retrieved for EAW (issued and executed) proceedings, thus offering the main statistical indicators concerning this instrument application by national judicial authorities. More specifically, we outline: the profile of the individuals requested to and by Portuguese authorities, the underlying criminality, and the procedural development.

To know the opinions and perceptions of the actors involved in the application of the EAW was also essential for the development of measures destined to improve the use of this instrument, in Portugal and in other member states. Such subject is therefore addressed in Section III of our national report.

We conclude this analysis presenting the main conclusions of the Portuguese case study, bringing forth some matters worth further reflection.

6.2. The dimension of law

6.2.1. The EAW Act and the Framework Decision: an overview

The Portuguese EAW Act, Law 65/2003, is one of the earliest transpositions of the Council Framework Decision no. 2002/584/JAI, 13th June. It was enacted on the 23rd August, 2003, and came into force on the 1st January, 2004. It is a very condensed, concise diploma, whose text is remarkably close to the Framework Decision (FD). In fact, most articles of the transposition law are a sheer translation. The actual procedural dimension of the EAW process is where the EAW Act adds more of its contribution to the FD, especially in what concerns a broad right to appeal. Unlike most transposition laws, the Portuguese EAW Act foresees the right to appeal from (1) the Portuguese executing authority's final ruling on surrender; (2) and from the decision of maintaining detention or replacing it for other measure.

Before addressing the actual procedural aspects of the EAW regime, we will show in better detail some general aspects of this FD transposition.

First of all, on the matter of **double criminality check**, the catalogue of 32 offences which spare the verification of double criminality of the act is copied *verbatim* from the FD's article 2 to the EAW Act, article 2 as well. Also to notice is the legislative option to keep the list with broad offences as they were in the FD, and not transposing them to crimes, leaving its definition and subsumption to the judicial user. Such an option differs from what took place in other countries, such as in Italy, thus (not) offering further concretization to such a nuclear matter.

Still on double criminality, the EAW Act presents an incongruence between the optional ground of refusal foreseen in article 12, no. 1, a), and its scope of application, on article 2, no. 3. On the one hand, article 2, no. 2, prescribes that if the offence underlying the EAW request is a catalogue offence, and if it punishable in the issuing member state by a custodial sentence or a detention order of a maximum period of at least 3 years, it shall be cause of surrender, under the EAW Act, with no need of double criminality check by the executing Portuguese judicial authority.

As for offences out of the catalogue, on its no. 3, the law prescribes that "the requested person's surrender shall only take place if the acts for which the EAW has

been issued constitute an offence under the Portuguese law, whatever its constituent elements or its description." I.e. offences that are not of catalogue must be punishable with deprivation of freedom for a maximum period of less than 3 years to underlie an EAW. And we can therefore conclude that offences out of any of these 2 options cannot be cause of surrender, as being out of the application scope of this instrument, thus being a *de facto* mandatory cause of refusal. Nonetheless, article 12, no. 1, a), that lists the optional grounds for non-execution, prescribes that the existence of such an offence creates an optional, and not a mandatory, ground of refusal.

Hence the EAW Act has two very different answers for the same situation. Some interpretative ways have been acknowledged: (1) to simply ignore article 12, 1, a); (2) the exact opposite, i.e., to bring forth the principle of mutual recognition as general interpretive guide on EAW matters, and prefer its discipline, thus disregarding article 2, no. 3, in favour of the more "liberal" ruling of article 12, no. 1, al. a); (3) and a 3rd, mitigated option, suggested by Caeiro and Fidalgo (2009), though the authors clearly seem to be in favour of the 1st option: a restrictive interpretation of both norms, which in the end is dissatisfying for both sides, and does not seem to be of any help.

Nonetheless, if this matter is of extreme interest, also true is the fact that has not yet been thoroughly acknowledged by the Supreme Court of Justice (at least in published rulings of our knowledge). It also must be taken into account that this situation has not yet been frequently raised before the courts.

In what concerns the **grounds for non-execution**, the Portuguese EAW Act (article 11) adds to the **mandatory grounds for non-execution** patent in the FD (eventual amnesty in the executing member state; ne bis in idem principle; age of the requested person. See article 3, FD[133]) the situations where §d) the offence is punishable by death penalty or any other penalty causing an irreversible injury to a

[133] Article 3

Grounds for mandatory non-execution of the European arrest warrant

The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

person's physical integrity; §e) the arrest warrant has been issued on account of the political opinions of the person concerned. By this addition, the EAW Act also complies with article 33, no. 6, of the Portuguese Constitution. As a matter of fact, and unlike its Communitarian counterpart, the national transposition Law does not present a preamble, being some of issues present in the FD's one scattered throughout its articles. It is the case of some highlights of the preamble paragraphs – concerning the respect for fundamental rights, and refusal to surrender when the purpose of prosecuting or punishing the requested person is grounded on race, religion, ethnic origin, nationality, language, political opinions or sexual orientation (see paragraph no. 12, Preamble, FD[134]), or when there is a serious risk of the requested person will be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (see paragraph no. 13, Preamble, FD[135]) – can roughly be found on article 11 of the Portuguese EAW Act, which, as just seen, materialize these general principles as mandatory grounds for non-execution.

Still comparing the transposition law with the FD, we witness the **optional grounds for non-execution** remain the same, and remain optional, therefore left to the discretion of the executing judicial authorities (article 12, EAW Act).

The main issue worth further attention in this brief overview is the situation concerning **surrender of a national or resident for the purposes of sentence execution**. The interpretation and application of article 12, no. 1, g) has been raising some controversy. More specifically, among other optional ground of refusal, the EAW Act, in said normative, prescribes that (1) if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, (2) if the requested person is staying in national territory, (3) if said person has Portuguese nationality or lives in Portugal, (4) and if the Portuguese State undertakes to execute the sentence or

[134]This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

[135]No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

detention order in accordance with Portuguese law; then the Portuguese executing authority may refuse to surrender the requested person. A question arises immediately: which "Portuguese law" is this? I.e. which law rules on the execution of this sentence in Portugal? The Act on International Judicial Cooperation in Criminal Matters[136], along with the Code of Criminal Procedure[137], thus being compulsory the special process of revision of foreign criminal sentence's revision? Or directly the laws on the execution of sentences – at the present time, the new code of execution of sentences? The dubious text of the law obviously does not provide for a concrete answer, its interpretation being left to case law for the time being, as seen in the next section.

On the account of the **ne bis in idem principle's** transposition as an optional ground of refusal a warning note must be present. Said principle was much differently transposed when concerning a previous judgment in a third state: the FD[138] refers to "the law of the sentencing country", whilst in the EAW Act we find a reference to "Portuguese law"[139]. In national doctrine, Caeiro and Fidalgo (2009:449) see this inversion as lapsus calami. As for Valente (2006:189), the situation is potentially grievous, as such a formulation indeed "reduc[es] the protective sphere, and the dignity this principle is worthy of".

Finally, the consecration of a ground for non-execution, whether optional or compulsory, for **humanitarian reasons** remains inexistent, just as in the FD. Nonetheless, the subject is addressed in article 29, EAW Act: "The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the

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[136] Article 123, no. 1 to article 100, no. 1.

[137] Article 234.

[138] Article 4, no. 5, *in* fine, of the FD.

Grounds for optional non-execution of the European arrest warrant

The executing judicial authority may refuse to execute the European arrest warrant:

(…)

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

[139] Article 12, f), of the EAW Act:

Grounds for optional non-execution of the European arrest warrant

1 - The execution of a European arrest warrant may be refused in the following cases:

(…)

f) If the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the Portuguese law.

requested person's life or health." In the opinion of authors such as Lopes, here lies an important escape valve within the EAW regime:

> (…) courts cannot close their eyes to marginal situations that go beyond the formal limits, thus being imposed by matters of material justice. Within this category we find situations related to humanitarian reasons, which can impose the surrender's suspension through the procedural mechanisms of postponement (2008:11).

As for the **guarantees for surrender**, several important issues are raised and deserve further attention.

First of all, considering the strength of the normative, national authors (similarly to foreign doctrine) are not unanimous on its practicality: several voices rise to condemn the lack of "security/practicality" of the guarantees provided. It is indeed an issue of major concern between the judicial actors (as seen below), thus proving this matter has indeed serious practical reflections. Still, authors such as Pereira defend that these guarantees are *tangible*, concerning the conditions from FD article 5 may be demanded by the Portuguese judicial authority (2003:48). Nonetheless, Caeiro and Fidalgo advert to the fact that "there is place for a concrete act assuring that it [the issuing judicial authority] will do so" (2009:450). This controversial issue is followed in the perceptions section. A norm such as the one present in the Act on Judicial Cooperation (Law no. 144/99, article 6, no.2), prescribing that all guarantees must be binding to the foreign State, seems to be missing in the EAW diplomas.

It is also interesting to note that two of the three guarantees demandable by Portugal as executing state are turned from optional (in the FD) into mandatory (EAW Act): (1) possibility of retrial for decisions *in absentia,* and (2) review in case of lifetime sentence. The (3) guarantee of serving the sentence at home remains optional. According to Caeiro and Fidalgo (2009:450), such legislative option is justified considering "this is a case where judicial discretion is fully justified, because it may be more convenient that the requested person serves the sentence in the issuing State (*e.g.* if he or she is a Portuguese national residing in that country)".

On this matter we also find two *out of the ordinary mishaps* between the FD (article 5) and the EAW Act (article 13).

For starters, article 13 reads "...if the issuing State provides one of the following guarantees", for most authors and actors "it is clear that the FD allows the MS to make surrender dependant on the verification of *more than one condition*" (Caeiro and

Fidalgo, *idem*). Agreeing in this matter, see also Pereira (2003:48). This formulation comes *ipsis verbis* from the Portuguese version of the FD, which differs from the original English and French official version.

Secondly, such a difference appears to be more problematic in what specifically concerns the guarantees to be given in case the underlying decision was rendered *in absentia*. It is here that the relation between the FD and the EAW Act was further complicated on account of the double translation/transposition process, from the FD official text in English/French to its translation into Portuguese, and from the Portuguese version of the FD to its transposition into national law. Let us see. Whilst the official English version of the FD is as following:

> Article 5
>
> Guarantees to be given by the issuing Member State in particular cases
>
> The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:
>
> 1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment.

The Portuguese translation of said norm reads as (our translation, our highlights):

> Article 5
>
> Guarantees to be given by the issuing Member State in particular cases
>
> The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to **one of** the following conditions:
>
> 1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, **the surrender will only take place if the issuing judicial authority gives guarantees deemed**

> **enough to ensure to the person who is the subject of the European arrest warrant the possibility to appeal** or to apply for a retrial of the case in the issuing Member State and to be present at the judgment. (our highlights)

This *alternative* version was the one used for the transposition law:

> Article 13
>
> Guarantees to be given by the issuing Member State in particular cases
>
> The execution of the European arrest warrant may be subject to the condition that the issuing Member State gives **one** of the following guarantees:
>
> a) Where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the requested person that **he/she will have an opportunity to appeal or** apply for a retrial of the case in the issuing Member State and to be present at the judgment. (our highlights)

The possibility to appeal is therefore added to the already foreseen right of a retrial. The practical implications of such a mishap differ considerably if Portugal is the issuing or the executing State. In a situation where the issuing authority is Portuguese, its compliance to Portuguese law (EAW Act and Code of Criminal Procedure) may become problematic, since the guarantee of retrial is not foreseen by the national code of criminal procedure in cases of a judgment *in absentia*, but solely the right to appeal. As a matter of fact, this is indeed a regime that is controversial among the national doctrine, and probably where the reason behind the different FD's translation into Portuguese language lies. Therefore, in such cases the Portuguese issuing authority cannot offer the guarantee of retrial, as expected by the executing authority, but solely the right to appeal. A strong ground of refusal can be perceived here.

On the other hand, in a situation where the executing authority is Portuguese, no problems seem to be at bay, since "Portuguese law enlarges the ambit of cooperation: even if the law of the issuing State does not provide for a retrial, the possibility of appealing against the conviction suffices for the execution of the EAW" (Caeiro and Fidalgo, 2009:451)[140].

[140] For further detail on this matter, see Pereira (2003) and Alves (2005).

6.2.2. Procedural characterization

The EAW came to replace the extradition process within the group of adherent member states. In comparison to the politically-based extradition, this judicial proceeding bears significant differences. First of all, as said, it has an exclusively judicial nature, being a request issued, received and executed by judicial authorities, and with no room for any previous political considerations. The EAW process is also a simplified one, characteristic which is revealed in several of its aspects:

a. It is speedy, as it obeys to very narrow procedural deadlines, and is an urgent proceeding – hence its non-suspension by judicial holidays, weekends, or working hours, in accordance to national procedural law;

b. The control by the executing judicial authorities is reduced to a minimum, being mainly a formal kind of control, courtesy of the principles of mutual recognition and mutual trust;

c. Hence the double criminality check is reduced to 32 offences, when and if "they are punishable in the issuing member state by a custodial sentence or a detention order for a maximum period of at least 3 years and as they are defined by the law of the issuing member state, punishable in the issuing member state with a sentence" (article 2, no. 2, EAW Act);

d. Hence the grounds for non-execution are more limited, as in comparison to strict extradition mechanisms;

e. Hence national citizens can be extradited by means of an EAW. In the Portuguese transposition of the FD, Portuguese nationality is not contemplated as a ground of refusal. Nonetheless, if the warrant is issued for the execution of a criminal sentence, Portuguese nationality or residence can stand as optional ground of refusal, given certain circumstances.

6.2.2.1. Authorities

Judicial Authorities

The principle of mutual trust brought forth the removal of political entities intervention in favour of direct contact between judicial authorities: hence the rule is for any court to be a legitimate issuing authority. Therefore, according to the EAW Act, Portuguese issuing authorities are all courts with criminal competence, and judicial investigation departments. An EAW request may be issued whether by a public prosecutor – if issuing occurs during the phase of inquiry (investigation), for which he/she is the competent figure – or by a judge – also if issuing occurs during the phase of inquiry, and exclusively during the subsequent procedural phases, and during the execution of the imposed sentence.

As for the reception/execution of an EAW request issued by a foreign judicial authority, the five appeal courts (situated in the cities of Coimbra, Évora, Guimarães, Lisbon, and Oporto) are the sole competent authorities (article 15, EAW Act), concentrating the EAW cases received from abroad in reason of each one's territorial competence.

Central Authority

The Public Prosecution General Office (Procuradoria-Geral da República) [PPGO] is the designated Central Authority for the purposes of the EAW Act. It is not, however, a Central Authority with the powers existent in other countries. More specifically, the PPGO's Documentation and Comparative Law Office (GDDC) is responsible for facilitating international communications when required, and maintaining a centralised archive of issued and incoming EAW proceedings. The EAW Act provides the PPGO the following powers (Ferreira, 2007):

a. Assisting judicial authorities in case of difficulties concerning the transmission of the request or the authenticity of any documents needed for execution of the EAW, where not be resolved by direct contacts between the judicial authorities involved (article 5/4);

b. Requesting the executing judicial authority its consent for waiver of the speciality rule (article 7/5);

c. Requesting the executing judicial authority its consent for subsequent surrender of the requested person to another member state or for subsequent extradition of that person (article 8/ 7);

d. Providing information to the issuing judicial authority on the period of detention served in execution of an EAW (article 10/2);

e. Informing EUROJUST when, in exceptional circumstances, it is not possible to comply with the time limits for a decision on the person's surrender (article 26/ 5); and

f. Receiving and forwarding transit requests (article 38/ 3).

6.2.2.2. Iter processualis

Issuing an EAW

An EAW may be issued during the phase of inquiry (investigation), for which both the public prosecutor in charge of the investigation and the instructor judge are competent, in accordance to internal criminal procedural law. Note that if the issuing takes place during the subsequent procedural phases and during the execution of the sentence, it may only be issued by a judge.

During this phase, translation support may be requested to the PPGO (the GDDC division). After the issuing, copies of the document are sent to said organ for administrative and statistical purposes, as well as to the SIRENE National Office (SNO). The INTERPOL National Office, the National Member at EUROJUST, and the PPGO/GDDC (for statistical purposes) are also notified and receive copies of the warrant[141].

The circuit's start-up within the SNO takes place in the following manner.

1. When an EAW is issued (either by a public prosecutor or a judge, eventually with technical support from the GDDC), the form is sent via registered mail to the SNO. In urgent cases, the form is delivered straight away by fax, with the original form still sent by registered mail. It may also be exceptionally delivered in person.

141 This is compulsory for all public prosecutors, in accordance to hierarchical demand.

2. After being received by the SNO secretariat, the form is distributed (by hand) to the legal service.

3. This service, currently composed by one officer who possesses a law degree, validates and confirms its juridical – formal and substantial – validity. This specifically implies the following tasks:

3.1. The legal service searches the requested person's name in the SIS, in order to determine if he/she is already inserted by order of another national or foreign authority.

It must be taken into account that the issuing authority may sometimes issue a whereabouts request (article 98.º), and simultaneously/afterwards issue an EAW for the same subject. Even when the requested person was not inserted in SIS under article 95.º or article 98.º), it may happen that he/she is was inserted under article 96.º (foreign citizen not admissible in the Schengen Area).

3.2. If the requested person was in SIS under article 95.º by order of a national judicial authority, the insertion number is registered and the EAW is delivered straight to the operational group[142]. If this new form is in every way equal to the previous one, they are both filed in the same process; if not, the necessary modifications/updates are inserted.

3.3. If the requested person is inserted in SIS (i) under article 95.º by a judicial authority from a different member state, (ii) or is inserted under article 98.º, (iii) or was not previously inserted in SIS (which is the more common hypothesis) this EAW form continues the circuit in the SNO, following the subsequent steps.

4. The legal service searches a similar previous EAW form in the internal service files, whether (i) refused by the judicial service (ii) or awaiting translation, in order to track and file together same subject requests.

If the SNO is before a corrected EAW form, said new form is treated as an improved version of the previous one and attached to the file. If it was already being translated, the form returns to the legal services for the following tasks.

5. Afterwards, analysis, validation and treatment of an EAW form take place.

142 The Operational Group is composed exclusively by Polícia Judiciária officers [Judiciary Police – criminal police force] (PJ), which is the competent service for the SIS insertion.

5.1. This new form is subjected to registration in the SNO files, with an internal file number.

5.2. The legal service validates and confirms the form's juridical – formal and substantial – validity.

5.2.1. If flaws exist – which is very common – the SNO's *ex officio legal help desk* (i.e. the legal officer) starts a set of contacts in order to address the situation.

(i) If these flaws are deemed correctable, the legal service contacts the issuing authority by telephone, usually addressing the court's registrar, and alerts to the detected flaws. Detailed counselling is then offered (including personalized help in filling in the form), thus avoiding the formal procedure of issuing a refusal notice. In order to hasten the SIS insertion, the court usually sends a corrected version by official fax, also sending the original – corrected – document by registered mail, which is essential in case the requested person is detected.

(ii) Nonetheless, written notices of refusal are issued in two situations: (1) when the errors are too serious and a refusal notice is deemed compulsory by the legal service; (2) when a refusal notice is requested by the issuing authority, which may happen even when the flaws were easily correctable by the first, "semi-informal", approach. The latter seems to be a non-essential "legitimacy" procedure. Take notice that since the jurist officer at the legal service is not a public prosecutor at the moment, as has been in the past, some interviewees consider the SNO's legitimacy before the courts would be better achieved if that situation were reinstated[143]. Either way, the ultimate purpose is that a flawless EAW form can be presented to an executing judicial authority when the requested person is detected.

6. When an EAW form is received on acceptable conditions, the jurist officer at the legal service creates a computer file containing exclusively the data needed for the SIS insertion. This used to be made by hand; now a computer application – specifically developed by this officer, at his own expense – is used. To facilitate work, a computer application for the translation was also created by the same officer.

143 In the words of a judge: "One way to build some of that needed confidence – both internally and internationally – would be to re-instate a public prosecutor instead (...). I don't discuss the service's quality, but I believe it'd be most helpful, since it'd be easier for him/her to address both public prosecutors and judges… It would give the SNO a completely different authority before the courts. "

7.&8. Since the SIS insertion is in English, the file used to be personally delivered to the translation services, but as the SNO is currently working without a translator, the file (in Portuguese) is delivered straight to the operational group[144]. Nonetheless, before said insertion takes place, the appointed police inspector proceeds to translate the file – by himself. When serious doubts arise, or when there is time, a fellow translator officer from the Foreigners and Borders Department (*Serviço de Estrangeiros e Fronteiras)* [SEF]. is personally contacted to provide the necessary aid. Without this informal procedure, even considering these inspectors are not certified translators, no SIS insertions would currently take place in Portugal[145]. This is a strong claim of the SNO's operationals.

After the SIS insertion

The SIS insertion will be active during three whole years. If a person requested by a Portuguese judicial authority is detected, police authorities from the member state where he/she was detained contact the SNO trough the PJ's operational group. A deadline to receive the original EAW form is then communicated. This form ought to be translated to the official language of the executing authority.

Afterwards, the SNO communicates the detection to the Portuguese issuing authority, as well as the PPGO and the Europol National Office. The latter's officers will be responsible for bringing the requested person to national territory.

If the requested person is not found and the SIS insertion is still active, the PJ's operational group, before the end of the third year contacts by fax the issuing authority, asking if a validation of this EAW request is intended. If the answer is positive, this validation takes place by means of the issuing of a new EAW.

All EAW forms that are refused and sent back, as well as all physical SNO files that do not correspond to an active SIS insertion are compulsory destroyed, in accordance to standard data protection requirements. Formal destruction records,

144 The Operational Group is composed exclusively by Polícia Judiciária officers (Judiciary Police – criminal police force) [PJ], which is the competent service for the SIS insertion.

145 In the words of a SNO police officer: "… we have no translation services – or rather, they formally exist, but don't work because there's no appointed translator. ... When it's very urgent, we have to translate everything by ourselves... When there's more time, we send it to SEF, who do us a great favour and translate. I must stress this: it is as a favour! ...The situation at the Office is very serious, as it's been dragging for many years and nobody cares. Who translates when it's urgent? Us! The police inspectors!"

containing solely the date of destruction and internal file number, are produced and filed. Any other information in the SNO's private databases is also erased.

Receiving an EAW

The executing proceeding of an EAW by a Portuguese judicial authority differs if the request was directly issued to said authority, or if it is a generic request, inserted in the Schengen Information System (SIS). The latter, which appears to be far more common, starts with the detention of the requester person, with the (only) subsequent promotion of its surrender by the Public Prosecutor, while the first one starts directly with the PPO's promotion.

In those situations, this insertion will produce the same effects as the EAW, since it is contain the information required in the EAW Act (article 4, paragraphs 2 and 4). The EAW Act established a transitional regime, during which the SIS insertions have the same effect as an EAW form, until the reception of the original in due and proper form (article 39, EAW Act). It should be emphasized here that, in reality, the rule is not the direct invoice of the EAW to the judicial authority. In most cases the issuing foreign authority is unaware of the whereabouts of the person, so the exception is in most cases the rule.

That is to say, the rule in law is that the process begins with the issuing of an EAW by a foreign judicial authority and its submission to the competent Portuguese judicial authority – in this case, the Court of Appeal in the area of residence of the requested person (article 15, paragraph 1). After the reception of an EAW, the PPO at the territorially competent appeal court will promote the requested person's surrender, ordering its detention. This detention is governed by the rules of the Portuguese code of criminal procedure. When the requested person is arrested, the responsible police authority will notify the PPO at the territorially competent Appeal Court in written form as soon. The requested person is then presented to an appeal court judge within a maximum of 48 hours after detention. If the presentation is by any reason not possible within this deadline (most likely weekends/judicial holidays), the requested person will be heard by a judge at the court of first instance where the competent court sits, for sole purpose of validating and maintaining the detention, or applying one of the coercive measures provided for in the code of criminal procedure. The EAW hearing at the appeal court will then take place on the first subsequent working day.

Some clarifications to the issuing authority may be asked through the Court of Appeal PPO, who is requested to provide for all necessary information. Afterwards, the Court of Appeal judge will issue an initial ruling on the validity of the warrant within 5 days. At the hearing, the judge will identify the requested person and inform him/her of the warrant's content and his/her rights, as well as the possibility of renunciation of entitlement to the speciality rule. The answers of the defendant must be formally recorded in written record and signed by the defendant and his/her legal counsel (article 18). If the requested person consents to surrender, it is understood that he/she renounces to the judicial EAW process, and the court makes a final decision within 10 days from the date consent was given (articles 20 and 26, paragraph 1).

The requested person may oppose surrender, which can only be founded in error in the person's identity or the existence of grounds for non-execution. The process follows, culminating with a decision of acceptance or refusal of EAW execution (article 21).

In case the requested person opposes surrender, his/her legal counsellor is given opportunity to make allegations, based on mistaken identification of the defendant or the existence of grounds for refusing execution, to which the public prosecutor can respond. Evidence can be submitted at the hearing. At request of the counsel, the judge can set a later date to file opposition and submit evidence (article 21).

The final surrender decision must take place no later than 10 days. In case of *force majeure*, the period is extendable for another 10 days (article 29, paragraphs 1 and 3). The final ruling is subjected to ordinary appeal to the Supreme Court, and in case constitutional issues are raised, to the Constitutional Court.

Portuguese law allows keeping the defendant under detention pending the surrender decision and subsequent appeals: 60 days detention in the absence of appeals, 90 days with an appeal to the Supreme Court of Justice, and 150 days with an appeal to the Constitutional Court.

As for the requested person's transfer, the transposition law has a significant omission in relation to the FD, when the 10-day deadline for surrender is breached. Such is a case when for mandatory release of the requested person (article 23 FD). Thus the transposition law (article 29) closely follows the FD on the time limits for surrender, but nonetheless leaves behind this situation's specific regulation (article 23,

no. 5, *in fine*, FD). As noted by some authors and actors, this lack of regulation may become problematic: "Portuguese courts may not apply Article 23(5) of the FD, despite its obvious direct effect, since Article 34(2)(b) EU [Amsterdam treaty] clearly excludes the right for individuals to rely on the direct effect of the norms of a Framework Decision" (Caeiro and Fidalgo, 2009:449).

Still on the possibility of surrender or subsequent extradition to a third country, we find yet another mishap between the EAW Act and the FD. Most of them the conditions foreseen in article 28, of the FD, were transposed into article 8, of the EAW Act. Still, the one concerning the case when the defendant has not left the issuing country within 45 days, having had the chance to (FD article 28, 1), is omitted in the EAW Act.

Regime of Appeals

The regime of appeals offers one of the most significant additions to the FD. A note to be made refers to the fact that the appeals' regime, in what concerns an EAW request (whether it is being issued or executed), differs greatly in Portugal from the generality of other member states.

In what concerns the reception for execution of an EAW request in Portugal, an appeal may be filed against both (1) the decision to maintain the detention or to replace it by a coercive measure, and (2) the final decision on the execution/non-execution of an EAW request Thus the Portuguese EAW Act, in accordance to both the Constitution and the text of the Framework Decision in the Portuguese language, respects the constitutional principles of general right to appeal from judicial decisions and of the double degree of decision.

In such cases, the EAW Act foresees the Supreme Court (Criminal Chamber) is the competent forum. Since the EAW procedure is an urgent one, the deadlines are extremely reduced: the time limit for lodging the appeal is five days, the person affected by the appeal must also respond within five days, and the decision also becomes unappealable within five days counted from its publication. Both the Public Prosecution and the requested person may appeal in such cases.

In a brief overview of article 24, EAW Act: appeals concerning the execution of an EAW request must be lodged within 5 days of the executing authority's final ruling. They are to be known by the Criminal Chamber of the Supreme Court of Justice. Being

this an extremely fast procedure, as well as priority one, the Supreme Court has then 10 days to respond, plus 3 days to send it back to the executing Court of Appeal (article 25)[146].

[146] In addition, it is also possible to appeal from the decision of issuing an EAW request, when it is issued by a judge. This regime appears in obedience to the general principle of criminal procedure: even if this possibility is not directly foreseen in the EAW Act, it is allowed owing to the principle consecrated in the article no. 399, Code of Criminal Procedure, according to which it is always allowed to appeal from sentences issued by a court (single or collegial), as well as intermediate decisions when otherwise is not predicted by law. On this subject, there is a distinction that must be addressed. That an EAW request, in Portugal, may be issued whether by a public prosecutor – if the issuing occurs during the phase of inquiry (investigation), for which he/she is the competent figure – or by a judge – also if the issuing occurs during the phase of inquiry, and exclusively during the subsequent procedural phases and during the execution of the sentence. From this framing, we can apprehend all depends on the procedural moment in which the request is issued, it will be the competence of whether a judge or a public prosecutor: (1) on the event of an EAW request issued by a judge, the decision of addressing such request is appealable, since it is a judicial decision, following the referred procedural principle; (2) on the event of a request issued by a public prosecutor, the decision of addressing such request is not appealable, since it is not a judicial decision, and can only be syndicated trough the hierarchical chain of the Public Prosecution Office, not by an appeal to the superior courts. The Courts of Appeal are competent for the appeals concerning the judge's decision to issue an EAW request. In such cases, the Public Prosecution is by far the most common plaintiff, even if in theory it is possible that other interested subjects may appeal. Nevertheless, it is quite a stretch that the requested person itself, as he/she the most obvious and serious party, would have knowledge of the request and signal his/her presence by appealing against it. During our research, we have not come to terms with any published appeal decision on the issuing of an EAW request with that characteristic, i.e. where the appellant is not the Public Prosecution Office.

6.3. The role of Case Law

Hereupon the legislative study, we now proceed to analyse the role of case law in the concretization of the EAW regime in Portugal. Since the national transposition of the FD includes a broad right to appeal, in the previously seen terms (from the issuing decision, as well as a remedy against the Court of Appeal's final ruling on execution/non-execution and its specific terms, as well as its rulings on maintaining the requested person detained or not), the analysed rulings provided additional in-depth analysis to national judicial practice on this instrument.

The purpose of this section is therefore to compile and proceed to an overview of the case law from the superior courts related to EAW requests in the Portuguese justice system. This section entails an analysis of the relevant case law, in order to achieve the needed knowledge and study of the issues which cause more controversy in the superior courts and/or are the most common grounds for appeal, identifying trends in the themes brought forth, and the rulings' direction(s) of said organs, with reference to emblematic rulings, and case law quarrels.

In what refers to the sources of the analyzed rulings, we use the two more important and comprehensive case law publications: (1) the *Colectânea de Jurisprudência* (a printed periodic published by a Judges' Association – *Associação Casa do Juiz*); (2) the online case law database compiled by the Institute for the Technologies of Information in Justice (ITIJ), from the Ministry of Justice, available at www.dgsi.pt. Notice that though our collection and analysis is thorough and exhaustive, the resulting figures do not pretend to offer an accurate vision of the appeals' demand, since the rulings publishing is not exhaustive, only corresponding to a selection of the editors and/or the courts, based on criteria unknown to us. Firstly, for the period 2004-2008 (the same as for the collected EAW proceedings), we have collected all Supreme Court of Justice's rulings concerning the EAW, in a total of 50 rulings. These figures correspond to the decisions published on the Ministry of Justice's Online Database, and on the *Colectânea de Jurisprudência*.

For the same period, all published rulings on the decisions of first instance criminal courts concerning issued warrants (presented before the Courts of Appeal) were as well collected. Their figures are considerably modest, reaching the number of ten. In order to follow the subjects under discussion which presented interesting

evolutions, we have also entailed a collection of selected rulings, from the Supreme Court of Justice and the Constitutional Court, dated from 2009 and the first semester of 2010, on the same sources. In addition, doctrinal production addressing national case law was a rich source of information.

One final note: the Supreme Court of Justice's rulings take primacy in this digest, since the Constitutional Court has not yet been called upon and thus not profoundly addressed the transposition law's constitutional compatibility[147] Said rulings are from the Supreme Court's Criminal Chamber, and their effects are restraint to the correspondent proceeding, as unifying rulings on EAW case law quarrels have not yet been emitted.

6.3.1. Case law: brief characterization

National case law on the subject presents peculiar traits, reflecting in written word the judicial officers' approach to the EAW. Its main trends can be thus summarized.

Both for the executing authorities (Courts of Appeal), and for the Supreme Court of Justice, EAW requests are in principle executed, and to be executed[148]. Optional grounds for non-execution (i.e. refusal) are exceptionally used, hence revealing a judicial practice that undoubtedly promotes cooperation. Mutual trust and mutual recognition are (the) general principles recurrently convoked to ground decisions. As read in a ruling of the Supreme Court of Justice[149]:

> Provided that a decision is made by a competent judicial authority under the law of the Member State from which proceeds in accordance with its law, that decision must have a full and direct effect on the whole territory of the Union, which means that the competent authorities of the Member State where the decision must be executed grant their cooperation to implement the decision as if it were a decision by a competent authority of that State.

Complementing this idea, Graça (2008:8) states that in the judiciary practice "therefore an evidentiary control of the crime by the judicial authority of the State of

[147] For further detail see Lopes, 2008.

[148] Nonetheless, notice decisions such as the Supreme Court's rulings from 27.04.2008 and 12.11.2008, where the surrender was refused, stating "there are no significant reasons to execute the warrant and significant reasons to refuse its execution".

[149] SCJ 10.01.2007.

enforcement has no place in the European arrest warrant". Nonetheless, authors that are also judicial actors, such as Alves, advert:

> The consolidation of the principle of mutual recognition requires the affirmation of the principle of mutual trust, which is are not created by decree but indeed based on the principles of liberty, democracy, respect for human rights and fundamental freedoms, as well as the rule of law, as defined in article 6 of the European Union Treaty, common to all Member States (2005:68).

Specifying this position, the Supreme Court warned[150]:

> (…) the automatism inherent to the principle of mutual recognition within the EAW must not overlap procedural guarantees and fundamental rights consecrated in the European Charter of Human Rights, such as the right of defence within the right to a fair process.

6.3.2. Summoned matters

As for the assessment of the matters summoned in appeals before the Supreme Court of Justice, they specifically concern the following.

a) speciality rule

In the context of a *habeas corpus* request concerning the detention of a person requested through an EAW, the Supreme Court[151] decided that since the person requested and surrendered by means of an EAW (1) had not renounced to the speciality rule in the executing country, (2) and being now subjected to pre-trial detention in the issuing country (Portugal) for different facts, (3) said detention was illegal, in violation of article 222, no. 2, b), from the CCP (principle of speciality). In this specific case, after the surrender had already taken place, a second EAW request was issued by the same court, intending to be an extent of the first one. Though the underlying facts were the ones for which the person was then detained in the issuing country, since the second request was pending the Supreme Court ruled in said terms, thus ordering the requested person's immediate release.

[150] SCJ 10.10.2007.

[151] This is in fact the first published Supreme Court's ruling from an EAW proceeding, dated from 21.10.2004.

b) double criminality check: offenses not criminalized in Portugal

In a case where the underlying offenses were not criminalised in Portugal, the Supreme Court of Justice ruled that in accordance to the principles of mutual recognition and of mutual trust the executing authority's double criminality check should assess if the underlying acts integrate the "material domains of criminality" (article 2, no. 2, FD) or are "manifestly beyond them"[152].

c) surrender of national citizens: EAW for execution of sentence

Interpretation and application of article 12, no. 1, g), EAW Act

Among other optional ground of refusal, the EAW Act, in its article 12 no. 1, g) prescribes that, (1) if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, (2) if the requested person is staying in national territory, (3) if said person has Portuguese nationality or lives in Portugal, (4) and if the Portuguese State undertakes to execute the sentence or detention order in accordance with Portuguese law; then the Portuguese executing authority may refuse to surrender the requested person. A question arises immediately: what "Portuguese law" is this? I.e. which law rules on the execution of this sentence in Portugal: (1) the Act on international judicial cooperation in criminal matters[153], along with the code of criminal procedure[154], thus being compulsory the special proceeding of revision of a foreign criminal sentence?; (2) or directly the laws on execution of sentences, at the present time, the new code of execution of sentences?

The Supreme Court and the Courts of Appeal have been following the 1st understanding in several decisions[155]. Nonetheless, the Supreme Court, in some not less famous rulings[156], and also some Courts of Appeal[157] have also followed the 2nd understanding, once again bringing forth the principle of mutual trust and mutual

[152] SCJ 04.01.2007.

[153] Articles 123.º, no. 1, to 100.º, no. 1.

[154] Article 234.º.

[155] For instance, see SCJ 09.01.2008 and 26.11.2009; Appeal Court of Coimbra, 07.02.2007; Appeal Court of Lisbon, 29.04.2009 and 08.03.2006.

[156] SCJ 27.04.2006 and SCJ 23.11.2006.

[157] Lisbon Court of Appeal, 25.03.2009.

recognition, in order to interpret that remission to "Portuguese law" as directly to the law on execution of sentences. The other understanding, is said, would be contrary to the *ratio* and nature of the EAW itself as an instrument of international judicial cooperation in criminal matters. Such remission, is also said, reflects only a reserve of sovereignty specifically for the execution of a sentence.

Requested person's consent

After the EAW Act came into force, this optional ground of refusal's application is still dependent of the requested person's consent. The consent, its form and terms, is bound to the Act for International Cooperation on Criminal Matters (Law 144/99, article 194, no. 1, e), in obedience to article 68, of the Convention implementing the Schengen Agreement. Since some doubts had arisen on the applicable regime, the Supreme Court's ruling from 04.10.2006 came to be clear and decisive on this subject.

Principle of Reciprocity

The underlying question is basically if reciprocity of the issuing state is compulsory for the acceptance of a request for execution of sentence in Portugal. The basis for the analysed demands was the constitutional consecration of reciprocity as *conditio sine qua non* in matters of extradition (article 33, of the Portuguese Constitution). For instance, in several appeals has been alleged that the Spanish law for international cooperation does not foresee the reciprocity in such circumstances, as the Portuguese law does. Hence the execution of a Spanish request for said objective would be unconstitutional, as it would be against article 33, no. 3, of the Portuguese Constitution. The Supreme Court of Justice has been highlighting in such cases that the Portuguese Constitution itself, on its article 33, no. 5, consecrates an exception to this principle of reciprocity: the international cooperation on criminal matters within the EU – i.e. the EAW. Going further, the Supreme Court brings forth the "higher value" of the principle of mutual recognition to ground such decisions. In this way the Supreme Court has been recurrently deciding the execution of an EAW for such a purpose (execution of sentence) is not dependant of reciprocity by the issuing state, and the EAW Act is not unconstitutional. In consequence, neither are such decisions[158].

[158] SCJ 13.01.2005.

d) ne bis in idem

Article 12, no. 1, b), of the EAW Act, offers the possibility of not surrendering a person who is being prosecuted in Portugal for the same conduct as that for which the European arrest warrant was issued.

Specifically dealing with cases of pending criminal investigation/prosecution[159], whether when the territorial principle was at stake (discussions on the *locus delicti*, i.e. the place where the underlying offense was consummated), or directly when article 12, no. 1, b) (pending process in Portugal) was summoned, the Supreme Court, as well as the executing Courts of Appeal, show in their rulings the understanding that the application of this (as others) ground of refusal is seen as exceptional, and "cannot be conceived as a gratuitous or arbitrary act from the court"[160], lying on a case by case analysis.

On another decisive ruling[161], the Supreme Court also underlined that a refusal based on a *ne bis in idem* situation had to be grounded on additional factual elements brought to the process, namely by the requested person[162].

The Appeal Court of Évora[163], deciding on a situation whit simultaneous pending processes, ruled the refusal to execute the EAW if it was possible for the Portuguese authorities to delegate competences to the foreign court, especially if the requested person does not oppose. Presenting a very restrictive understanding of the expression "same conduct as that for which the European arrest warrant was issued" (here understood as a coincidence in all elements of the conduct, both illicit and guilt), the Appeal Court of Lisbon[164] ruled in a similar EAW execution process for the requested person's effective surrender.

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[159] See Supreme Court rulings from 16.02.2005, 17.03.3005, 27.04.2006, 22.06.2006, 02.01.2008, and 12.11.2008; Appeal Court of Coimbra from 16.05.2006; Appeal Court of Évora from 03.04.2005; Appeal Court of Lisbon from 16.03.2005.

[160] SCJ 17.03.2005 SCJ 22.06.2006, retrieved in Lopes, 2008:11.

[161] SCJ 17.03.2005.

162 For further comments, see Barreiros, 2006.

[163] Ruling from 03.05.2005.

[164] Appeal Court of Lisbon 16.05.2006.

e) decisions in absentia*: requested person's notification*

In situations where the decision underlying the EAW was rendered *in absentia*, questions were raised before the Supreme Court on the requested person's notification (form and terms of the notification: at stake can be found circumstances such the absence of personal notification or no translation of the underlying judicial decision). The Supreme Court has made clear that the "personal notification" as requested in article 13, EAW Act, must be done in strictly person, and not to a third person, regardless of its effects in accordance to internal law[165].

f) form flaws

The Supreme Court has frequently expressed the position that if the EAW form presents content and form flaws (i.e. insufficient data – such as no translation, no description of the underlying facts –, or contradicting information, etc.), but nonetheless they are correctable, or further information may be or is effectively requested to the issuing authority, such matters cannot be a cause of refusal[166]. As ruled by the Supreme Court[167]:

> Content and form absences in a European arrest warrant, as referred in article 3, of the Law 65/2003, from the 23rd of August, are not mandatory or optional grounds of refusal, as foreseen in articles 11 and 12. The lack of such requirements is a correctable, in the terms of article 123, of the CCP, which is subsidiarily applicable *ex vi* article 34, of the Law no. 65/2003.

g) necessity of grounding the decision

No reference to the cause of refusal, or a mere normative reference to the optional cause of refusal (literal indication of the norm), by the executing authority is insufficient to ground the executing authority's decision. Specifically considering the

[165] See rulings from 10.10.2007, 20.12.2007 and 11.12.2008. The three ended with the requested person's surrender.

[166] Take for instance SCJ 16.02.2006, 19.07.2006, 27.07.2006, 10.01.2007 ("invocation of formal irregularities is not relevant in the present case"), 25.01.2007, 08.03.2007, 11.07.2007, 12.07.2007, 04.12.2008 ("the executing authority must attempt to obtain said elements [further guarantees] otherwise its decision is null, and if the guarantees can still be asked to the issuing authority, as promoted by the PPO, then the surrender must take place, if such guarantees are indeed received.")

[167] SCJ 15.03.2006.

executing authority's (Court of Appeal) necessity of grounding its decision, this superior court explained[168]:

> (…) the grounds of refusal are not solely important on an internal level (within the executing Member State), but moreover must be notified to the issuing authority (article 28, EAW Act) - and therefore they must be thoroughly expressed.
>
> The lack of grounding on the application of an optional ground of refusal gives cause to the decision's annulment, in accordance to article 379.º, no. 1, a), ex vi article 425, no. 4, of the CCP.

Nonetheless, this view is softened by a case by case approach: a decision from 15.03.2006 reads "even if in a very abridged manner, the executing authority considered the norms at stake, so there is no omission of pronunciation".

h) "substantial defence" allegations

Being confronted with what can be baptized as "substantial defence" allegations – such as allegations of innocence, identity errors, and existence of impending nationalization processes[169] – the Supreme Court of Justice has been regularly reassuring the EAW procedure cannot be confounded with the criminal prosecution itself against the requested person[170]:

> The circumstance that the requested person understands he/she has not committed the conducts which determine the underlying criminal responsibility is irrelevant to the Portuguese State.
>
> [Otherwise] the EAW process would be turned into an investigation process, thus delaying surrender.

i) SIS insertion

The Supreme Court has been called upon to decide on various situations which relate the EAW request form and the SIS insertion.

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[168] See SCJ 04.01.2007 and 22.03.2007.

[169] See SCJ 13.01.2005, 31.03.2005, 01.06.2005, 16.02.2006, 22.06.2006, 04.10.2006, 25.01.2007, 08.03.2007, 18.04.2007, 17.10.2007, and 29.05.2008.

[170] See SCJ 25.01.2007 and 17.01.2007.

According to article 39, of the EAW Act, "until the SIS is capable of transmitting all the information described in Article 3, the issue of an alert for the requested person in the SIS shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form". Being raised doubts, this legal regime has been underlined by the Supreme Court[171].

In another case where the SIS insertion was more restricted than the EAW request form, The Supreme Court ruled in the sense that the detention could take place, if restricted to the – more *restrict* – facts and offenses from the SIS insertion[172].

Finally, in a situation in which the SIS insertion was previous to 01.01.2004 (date in which the EAW Act came into force), but the requested person's detention took place in a posterior date, the Supreme Court was called upon to decide in which date the issuing authority's request should be considered: the SIS insertion, or the full EAW form's reception? This superior court explained that the reception of a full request in the appropriate form was essential to consider that the request took place, thus opting for the second point of view[173].

j) detention

Considering a matter previous to the plea itself, i.e. the right to appeal against the maintenance of detention or its replacement for other measure during the EAW execution procedure, the Supreme Court has recurrently decided, in consideration to both the specific nature of the EAW and the constitutional right to appeal, the defendant has always that possibility to appeal when his/her detention is maintained or replaced for other measure.

Still the matter was disputed within this superior court, namely with a 15.02.2006 ruling in which was decided the Court of Appeal's Judge's decision on maintaining the requested person's detention could not be known directly by the Supreme Court, since it was not a collegial decision, hence not a Court of Appeal's ruling in its true sense: in accordance to article 432, a), CCP, article 24, no. 1, a), EAW Act, was not applicable to such situations.

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[171] For instance, see SCJ 11.08.2006.

[172] See SCJ 21.03.2005.

[173] See SCJ 19.01.2006.

Later on, in what is considered to be a landmark decision[174], the Supreme Court ruled the application of said norm from the CCP was not to take place, since the EAW Act, as *lex specialis*, would take primacy over the CCP as *lex generalis*. Its articles 24 and 25 thus offer sufficient regulation on the matter of appeals within an EAW process. This is the understanding currently and unanimously followed.

On substantive matters, other divergences and interpretative difficulties arise, mostly considering the nature and the applicable regime of the detention suffered by the requested person during an EAW process. Different interrogations rise: (1) are we before a *sui generis* EAW detention or a standard pre-trial detention; (2) in other words, the applicable regime (crucial on grounds, and maximum periods) is the one from EAW Act or the general one from a code of criminal procedure; (3) and is it the regime of the issuing member state or the executing member state. The latter was almost immediately cleared by the Supreme Court: in a concise ruling of 13.01.2005, we find the applicable procedural law is the issuing country's law, not the executing Portuguese law. Other rulings[175] cemented this understanding. On the other two situations, the already cited 12.07.2007 ruling is indeed a landmark. In this very comprehensive decision on detention matters we read:

> (…) the detention for the purpose of executing the EAW is less demanding on its grounds than pre-trial detention, namely by the shorter deadlines foreseen in article 30.º, of the Law no. 65/03.
>
> Its application must take into account the objective circumstances in which the warrant was issued, which implies the requested person's danger of escape, firstly given the gravity of the crime at stake (…), and his/her nationality and residence.
>
> This understanding does not hurt any constitutional principles, namely the ones consecrated on article 27, such as §f) of its no. 3, when allowing pre-trial detention with the purpose of securing the detained person's presence before the competent authority, which is indeed the case.

This(these) understanding(s) are found in other Supreme Court's rulings[176] on the detention's duration, on the grounds/ purpose of the detention ("its purpose is to

[174] Dated from 12.07.2007.

[175] For instance, see SCJ 29.11.2005.

[176] For instance, SCJ 10.09.2008.

secure the executing state obligations of effective surrender")[177], or on the maintenance / replacement of detention for a different coercive measure[178].

[177] SCJ 02.02.2005 and SCJ 29.11.2005.

[178] SCJ 16.02.2005 and SCJ 29.11.2005.

6.4. The EAW in figures

In this section, we present an analysis of EAW cases issued and received by Portugal, based on a representative sample of case files for these two situations. For both issued and received warrants, we begin with methodological details, present some overall characteristics of the sets (evolution in time, intervening countries) and then focus on a profile of the requested persons involved, the underlying criminality, and the most relevant procedural issues, including the duration of procedures. After profiling these two situations individually, we attempt to draw some comparative highlights between them, by assessing their similarities and particularly their differences, while also taking note of eventual outliers, more unusual cases that may be of interest to understand the limits to which the EAW can be taken by the parties involved.

To facilitate the understanding of this section, in our analysis we will differentiate issued EAW requests from the received ones.

6.4.1. Issued EAWs

6.4.1.1. Methodology

The construction of a representative sample raised different question for issued and received EAW requests. For issued warrants, assessing the population was the first challenge, since there were conflicting numbers. The EU evaluation report of the EAW in Portugal mentioned a total of 341 warrants issued for the period 2004-2007, but national sources suggested the numbers were higher. Our national sources were the Office for Documentation and Comparative Law (GDDC) of the Public Prosecution General Office (PPGO), and the SIRENE National Office (SNO). A consultation of the GDDC's archives revealed a total of 545 warrants for the period 2004-2008; the SNO indicated 640 insertions in SIS for the period 2006-2009, an even higher number for a shorter period of time[179]. This is an indication that a part of issued EAWs do not reach

[179] As previously seen, the Public Prosecution General Office (Procuradoria-Geral da República) [PPGO] is the designated Central Authority for the purposes of the EAW Act. It is, however, a *sui generis* central authority, as its role, trough the PPGO's Documentation and Comparative Law Office (Gabinete de Documentação e Direito Comparado) [GDDC] is to facilitate communications with foreign authorities and to maintain a centralised archive of issued and incoming EAW proceedings. Therefore, authorities who issue an EAW ought to notify and send a copy of the form to the PGR for statistical purposes, although this may

the GDDC in a short time, or may not reach it at all. Therefore, for the period under research (2004-2008), the population is larger than the numbers provided by the GDDC, although we do not have exact figures of how much.

The GDDC kindly granted access to its archive of EAW proceedings for the research. For that reason, we work with the PPGO-GDDC's population of 545 EAWs. Using the standard formula for a statistically representative sample with a confidence interval of 95% and a margin of error of 5%, the sample size reached 226 cases. Given that the actual population was larger by an indeterminate amount, this was considered a minimum sample size, and a larger sample should be retrieved within the constraints that fieldwork might reveal. Proceedings were chosen randomly from a flat listing of all cases in the archives and collected in March 2009 at the GDDC's offices in Lisbon.

A problem of data discrepancy was detected at this stage: many proceedings did not contain a copy of the EAW form, and the information available varied from case to case. In the proceedings with no EAW form, some contained other documents which enabled to reconstitute most of the information, while others still had too little information. This usually happened with the most recent warrants, of 2007 and especially of 2008. The reason was mostly because the issuing authority had not yet sent the information to the PPGO's central archive. Using the absence of data on the underlying offence(s) as the criterion for sorting out these proceedings, we arrived at a list of 41 files in need of replacement. A second round of data collection was undertaken in April of 2009, where for each case lacking information a new proceeding from the same year was randomly selected. It was also decided to collect all proceedings of 2008, to try to compensate their perceived lack of information. The distribution per year of the final sample is in the table below.

Table 18: Population and sample structure

	Population (in GDDC archives)	% in pop.	Sample	% in sample
2004	79	14,5	29	13,3
2005	140	25,7	66	30,3
2006	109	20,0	48	22,0
2007	119	21,8	46	21,1
2008	98	18,0	29	13,3
Subtotal	545	100,0	218	81,6
Missing	0	0,0	49	18,4
Total	545	100,0	267	100,0

not always take place, or take place with significant delay.

In brief, the sample of issued EAWs consists of 267 cases, representing 49% of the population of proceedings available at the GDDC, with the lowest margin of error for results at 4,3%. As referred, the GDDC covers the majority but not all the population of warrants issued by Portugal, because a part of warrants inserted in SIS may take large amounts of time to reach its archives.

The GDDC gave the research team full access to their proceedings. The selected sample was then consulted and the data retrieved by the research team at the GDDC office in Lisbon.

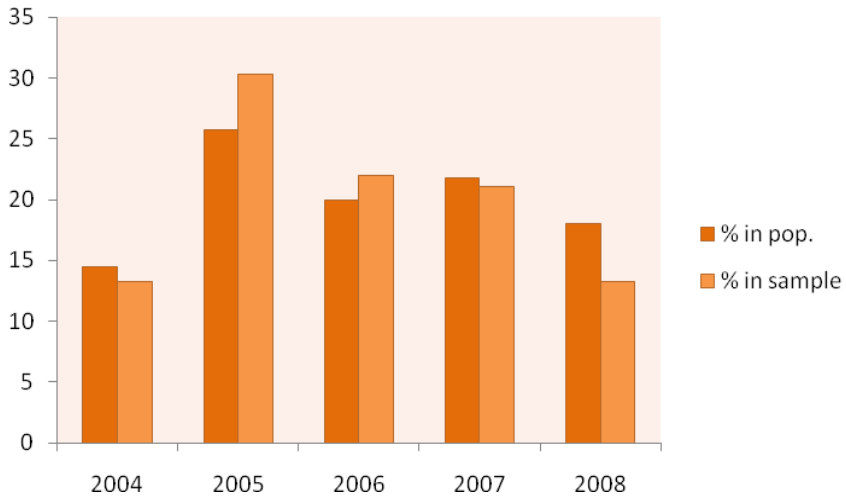
6.4.1.2. Evolution in time and destination countries

The EAW cases provide much information of different nature. In the following pages, we will organise the analysis in a personal profile of the requested persons, a criminal portrait of the offences underlying the EAW request, and a characterization of the procedures, both in the situations and acts that they entail and in their overall duration. Before that, however, a broad characterisation of these EAWs, in what their evolution and geographical origins are concerned, is deemed useful.

Data on the yearly evolution of warrants issued by Portugal is available for the whole population, which we use for this characterization. The other statistical indicators are from the proceedings' sample.

Looking at the yearly evolution in itself, there seems to be a downward trend in issuing after an initial peak. 2005 was by far the year when most EAW requests were issued by Portuguese authorities. Considering its entry into force was the preceding year, the adhesion to this instrument was quick.

Chart 15: Distribution by year



As seen above, EAWs are issued from all around the Portuguese territory. Looking at the location of the issuing authority, except for the cases of Lisbon and Oporto – the largest territorial circumscriptions in terms of population, installed courts, and respective caseload –, which together gather about 1/3 of all cases, we can observe they are scattered throughout the territory.

Table 19: Location of Portuguese courts issuing EAWs

	%	Cumulative %
Lisboa	22,3	22,3
Porto	12,8	35,1
Coimbra	5,7	40,8
Bragança	3,4	44,2
Évora	3,4	47,5
Elvas	2,3	49,8
Lagos	2,3	52,1
Albufeira	1,9	54,0
Braga	1,9	55,8
Setúbal	1,9	57,7
Barreiro	1,5	59,2
Cascais	1,5	60,8
Loulé	1,5	62,3
Macedo de Cavaleiros	1,5	63,8
Sintra	1,5	65,3
Loures	1,1	66,4
Ourém	1,1	67,5
Portimão	1,1	68,7
Santo Tirso	1,1	69,8
Silves	1,1	70,9
Tavira	1,1	72,1
Others with 2 cases (18)	18x,8	85,7
Others with 1 case (38)	38x,4	100,0
Total	100,0	

Executing countries were indicated in 53,9% of cases. The residual value of these indicators suggests that roughly half of warrants issued by Portugal are generic warrants, where a person is inserted into SIS but his/her whereabouts are unknown, so there is no contact with a specific foreign judicial authority. Where there was an executing country, we can state that Portugal issues the vast majority of its EAWs to Spain and France, countries that are geographically close, as well as traditional migration destinations.

The United Kingdom also has some statistic relevance, while for the remaining cases the executing countries are as varied as they are residual. As we may observe, a significant part of issued EAWs concerns Portuguese citizens, the relevance of said foreign countries being connected to their geographical proximity and/or significant weight in Portuguese emigration patterns.

Table 20: Destination countries

	%	Cumulative %
Spain	55,6	55,6
France	25,0	80,6
United Kingdom	7,6	88,2
Netherlands	2,8	91,0
Belgium	1,4	92,4
Germany	1,4	93,8
Luxembourg	1,4	95,1
Romania	1,4	96,5
Greece	0,7	97,2
Italy	0,7	97,9
Poland	0,7	98,6
Portugal	0,7	99,3
Slovakia	0,7	100,0
Total	100,0	

6.4.1.3. Profile of the requested persons

The information on the requested persons available in the EAW form, other than personal identification data of no research interest, consists in their gender, nationality, date and place of birth, place of residence and languages spoken. This is too little to produce a far-reaching sociological or criminological picture, but nonetheless useful to analyse and attempt an initial profile which may guide further research.

The socio-demographic characteristics of the individuals requested by Portuguese judicial authorities are in all aspects identical to the general profile of the requested person and inmate in the country[180]. This is by no means surprising, considering these requested persons are part of that universe. That is to say, in what concerns gender, age group, and nationality, evidence is that the average requested person (mirroring the average requested person and inmate) is male, aged between 21 and 50, and Portuguese.

In what gender is concerned, 93,3% of the persons requested in the sample were male, a figure identical to the general statistics of justice for the same period. As for age, it goes from a minimum of 18 to a maximum of 99 (one isolated case), with an

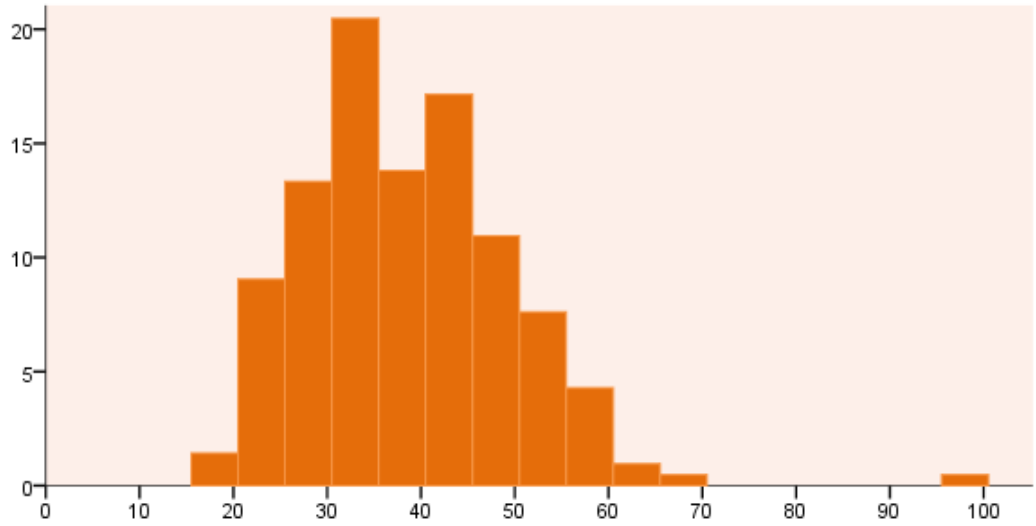
[180] Such data is patent in some of the Portuguese Observatory for Portuguese Justice's most recent studies (for the same period, cf. Judiciary Map, as well as Monitoring of the Criminal Laws Reform).

average age of 38,7 years, standard deviation of 11,0, and a median age of 37 years, scattered in a bell curve resembling a normal distribution, as can be seen in the chart below.

Table 21: Age of the requested persons[181]

	%	Cumulative %
<=20	1,4	1,4
21-30	22,4	23,8
31-40	34,3	58,1
41-50	28,1	86,2
51+	13,8	100,0
Total	100,0	

Chart 16: Age of requested persons (issue time)



Looking at the nationality of the requested persons, the first and clearest conclusion is that Portugal asks overwhelmingly for its nationals – in about 2/3 of the cases, according to our sample. This is almost 10 times as much as Spanish citizens, the second most requested nationality (6,8%) We then find in a 2-5% range of Brazilian citizens, Cape Verdean citizens, Angolan citizens and Guinea-Bissau citizens (all of which are Portuguese-speaking nationalities, as former colonies, and co-members of CPLP[182]), with strong immigrant communities in Portugal; and in a 2-3% range

[181] Age at the time of issuing.

[182] Community of Portuguese Language Countries (Comunidade dos Países de Língua Portuguesa).

Romanian citizens and Ukrainian citizens, who also have important immigrant communities in Portugal. French are the other nationalities still show some statistical relevance in relative terms (2%). These 9 nationalities make for over 90% of issued warrants where nationality was available, and the remaining 10% are divided among 14 residual nationalities.

Table 22: Nationality

	%	Cumulative %
Portugal	65,6	65,6
Spain	6,8	72,4
Brazil	4,8	77,2
Cape Verde	3,6	80,8
Angola	2,8	83,6
Romania	2,8	86,4
Ukraine	2,4	88,8
France	2,0	90,8
Guinea-Bissau	1,6	92,4
Algeria	0,8	93,2
Colombia	0,8	94,0
Moldova	0,8	94,8
Morocco	0,8	95,6
Netherlands	0,8	96,4
Bangladesh	0,4	96,8
China	0,4	97,2
Congo, Democratic Republic of (Congo-Kinshasa, Zaire)	0,4	97,6
Cuba	0,4	98,0
Guinea	0,4	98,4
Hungary	0,4	98,8
Italy	0,4	99,2
Russia	0,4	99,6
Slovenia	0,4	100,0
Total	100,0	

On the country of residence, in the proceedings where this information was available (80,5% of cases), we see once again the preponderance of Portugal, with 47% of valid cases. Two more countries, Spain and France, are of some relevance, at 22,8 and 13%. Nineteen further countries were registered at residual levels, accounting together for 17,2% of valid cases.

Table 23: Residence country

	%	Cumulative %
Portugal	47,0	47,0
Spain	22,8	69,8
France	13,0	82,8
Luxembourg	2,3	85,1
United Kingdom	2,3	87,4
Belgium	1,9	89,3
Germany	1,4	90,7
Netherlands	1,4	92,1
Brazil	0,9	93,0
Romania	0,9	94,0
Switzerland	0,9	94,9
Bangladesh	0,5	95,3
Cape Verde	0,5	95,8
Colombia	0,5	96,3
Greece	0,5	96,7
Ireland	0,5	97,2
Italy	0,5	97,7
Moldova	0,5	98,1
Russia	0,5	98,6
South Africa	0,5	99,1
Swaziland	0,5	99,5
Ukraine	0,5	100,0
Total	100,0	

When we cross nationality and residence country, a more intricate picture emerges. In the table below we see the residence country for the top nationalities, representing more than 85% of all cases. The Portuguese citizens, as could already be deducted by the disproportion of their dominance from nationality to residence country, divide themselves between residents and Portuguese diaspora. In fact, more reside abroad than in Portugal, usually in countries with important Portuguese communities (France, Luxembourg, United Kingdom, Germany, and Switzerland) or geographically close (Spain). We could say that, when asking for nationals, Portuguese judicial authorities ask for non-residents who committed a crime in their homeland, followed by residents who fled homeland.

We see the opposite in the second most requested group, the Spanish citizens, who in our sample were all residents in Spain. In the case of Portuguese-speaking non-nationals (from Brazil, Cape Verde, Angola), they tend to reside in Portugal.

Table 24: Top nationalities by residence country

Nationality	Residence country	%	Cumulative %
Portugal	Portugal	48,2	48,2
	Spain	19,9	68,1
	France	16,3	84,4
	Luxembourg	3,5	87,9
	Belgium	2,8	90,8
	United Kingdom	2,8	93,6
	Germany	2,1	95,7
	Switzerland	1,4	97,2
	Ireland	0,7	97,9
	Netherlands	0,7	98,6
	South Africa	0,7	99,3
	Swaziland	0,7	100,0
	Total	100,0	
Spain	Spain	100,0	100,0
	Total	100,0	
Brazil	Portugal	77,8	77,8
	Brazil	22,2	100,0
	Total	100,0	
Cape Verde	Portugal	77,8	77,8
	Netherlands	11,1	88,9
	Spain	11,1	100,0
	Total	100,0	
Angola	Portugal	75,0	75,0
	United Kingdom	25,0	100,0
	Total	100,0	
Romania	Romania	33,3	33,3
	Spain	33,3	66,7
	Moldova	16,7	83,3
	Portugal	16,7	100,0
	Total	100,0	
Ukraine	Portugal	60,0	60,0
	France	20,0	80,0
	Ukraine	20,0	100,0
	Total	100,0	
France	France	50,0	50,0
	Portugal	50,0	100,0
	Total	100,0	
Guinea-Bissau	France	33,3	33,3
	Portugal	33,3	66,7
	Spain	33,3	100,0
	Total	100,0	

Altogether, we would draw the profile of the person requested by Portuguese authorities as a male aged between 21 and 50, overwhelmingly a Portuguese national, otherwise a Spanish citizen or a national of a Portuguese-speaking (Brazil, Cape Verde, Angola) or of a Eastern European country (Romania, Ukraine) who resides in Portugal.

6.4.1.4. Underlying criminality

The information on procedures patent in the EAW form and the proceeding it belongs to is vast, enabling a rich characterization of the underlying offences. The kind of criminality for which the EAW is being used can be assessed through the nature of these offences, sometimes their number, as well as the abstract and concrete duration of imposable/imposed sentences, information which is all contained in the EAW form. Notice that the sentences at stake provide a picture of the seriousness of the underlying offence, to which three variables are of interest: the maximum sentence applicable to the offences, the sentence effectively imposed on the offences, and the remaining sentence to be served.

For a more thorough analysis of this criminality, we now analyze the correspondent sentences, in order to cross-analyze all data on the criminality underlying Portuguese EAW requests.

In what concerns the maximum applicable sentence, only 36% of the cases indicate the sentence imposed, i.e. roughly 4/5 of warrants issued for prosecution purposes. With this limitation in mind, the results are still worth a look. In our sample, warrants were issued for offences with a maximum sentence of 2 to 25 years, within the limits of the EAW FD (maximum sentence of at least 1 year) and Portuguese criminal law (maximum sentence is 25 years). The average maximum sentence is 14,39 years, the median maximum sentence 15 years. Maximum sentences longer than 10 years account for the majority of issued warrants (68,8% in our sample), while sentences under 5 years are the least frequent (9,4%)[183].

Considering the abstract limits of the sentences, we would be lead to conclude that Portugal tends to issue warrants for more serious criminality and avoid its use to

[183] Naturally, these sentences' abstract limits may lead to very different limits in the imposed sentence itself.

pursue petty criminality. Nonetheless, this is not fully attested when we look at the sentences effectively imposed, as we shall now observe.

Table 25: Maximum sentence applicable to the offences

	%	Cumulative %
Up to 5 years	9,4	9,4
6 to 10 years	21,9	31,3
11 to 15 years	36,5	67,7
16 to 20 years	11,5	79,2
21 to 25 years	20,8	100,0
Total	100,0	

Chart 17: Maximum sentence applicable to the offences (in years)

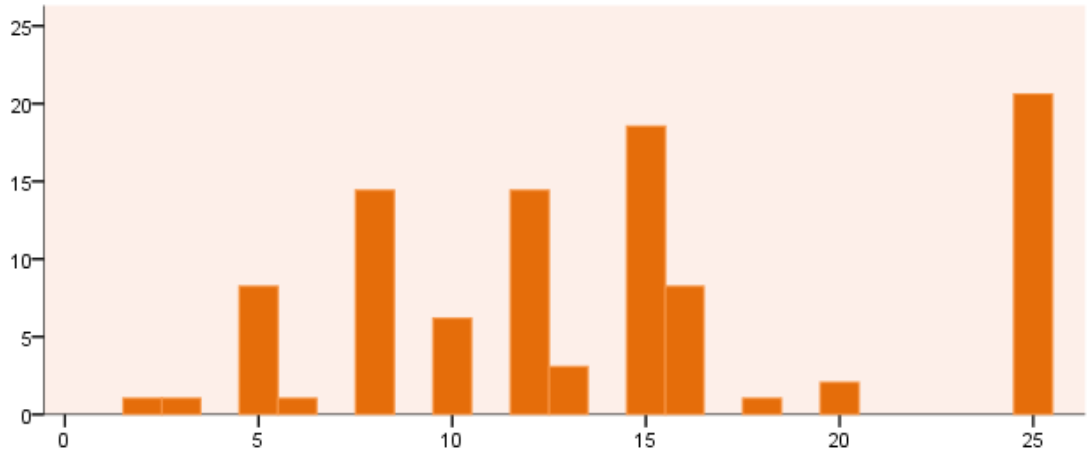
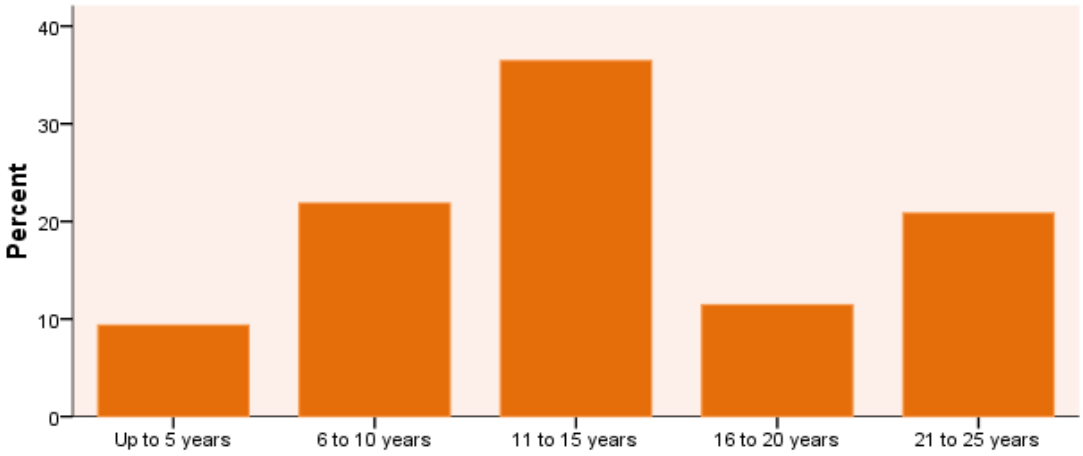
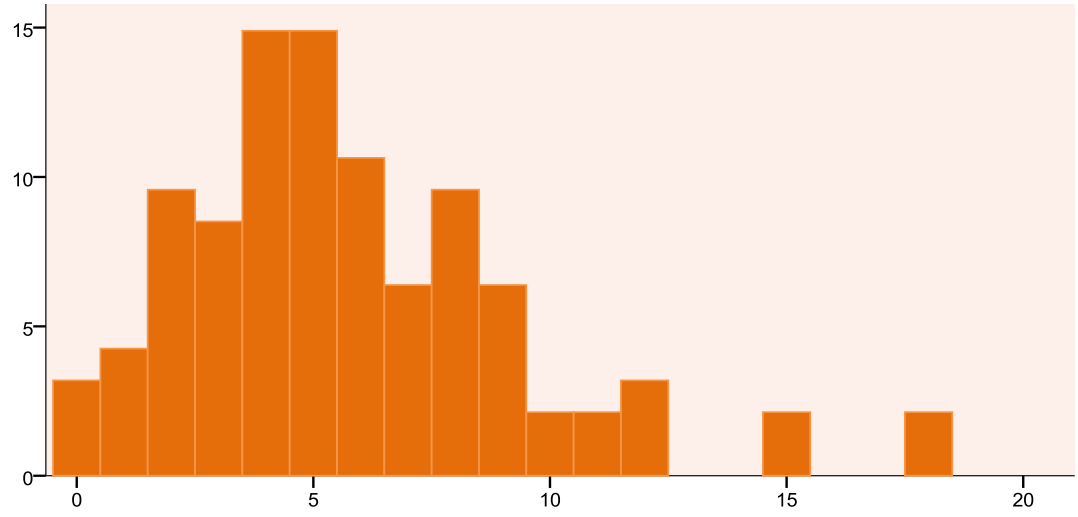


Chart 18: Maximum sentence applicable to the offences (in 5-year groups)



The representativeness of the sentence effectively imposed was also limited, being available for 94 of 123 (76,4%) sentence execution cases in the sample. Convicts are split about mostly between up-to-5-year sentences (55,3%) and 6- to 10-year sentences (35,1%), with an average of 5,79 years. Most strikingly, it is rare to ask for a convict sentenced to more than 10 years prison: only 9,6% of convicts in the sample were above that threshold. Also interesting is the small but not insignificant level of sentences under 1 year (3,2%), in practice sentences of 4 to 12 months, given that the EAW cannot be used for effective sentences lower than 4 moths.

Chart 19: Sentence imposed on the offences (in years)

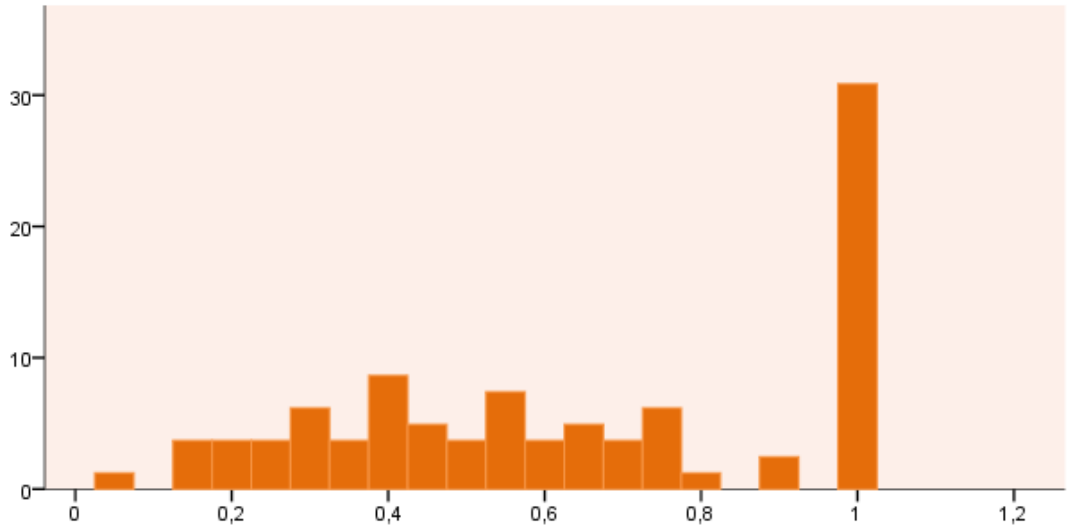


So, in contrast to the impression left by maximum imposable sentences, it seems EAW requests issued by Portuguese judicial authorities refer in its vast majority to medium criminality.

Although not quite relevant from a statistical point of view, it was still possible to identify several proceedings in which the underlying criminality had reduced seriousness. Such information seems to be in accordance to a tendency found in other member states.

The remaining sentence to be served also enables to see, by contrasting it with the effective sentence, whether the requested person was serving a sentence and escaped, or had never begun serving the sentence in the first place (case in which effective and remaining sentence would be equal). We calculated the proportion of sentence left to serve by dividing remaining sentence by effective sentence, obtaining results in 81 of 124 cases of sentence execution. The majority of these requested persons (69,1%) had already served part of their sentence in various proportions, having in average 63,6% of the sentence left to serve, while 30,9% of them had not begun serving their sentence.

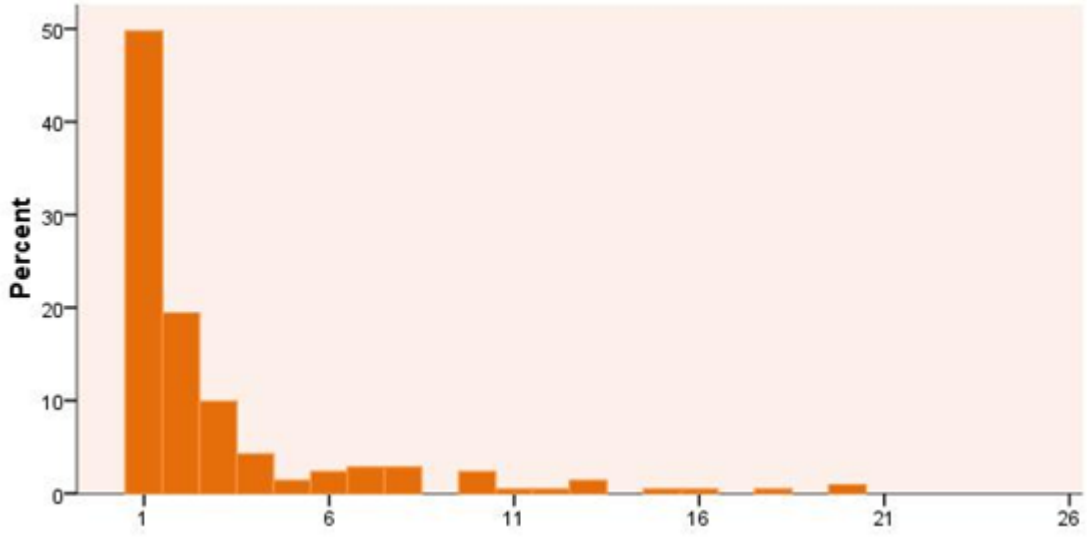
Chart 20: Proportion of sentence left to serve



In what refers to the number of offences underlying issued EAWs, in approximately half of the cases there was one offence per for, and warrants containing up to 10 offences could be considered usual; more than 10 offences were more unusual cases (6,5%), going in one extreme case to a maximum of 146. The average

ratio offence/request was 3,98 offences, while the median ratio was 2. These data may be considered indicators on how severe (as reiterated) the underlying criminality is.

Chart 21: Number of offences



Naturally, the most relevant indicator to assess the underlying criminality's profile is the offenses at stake themselves. Unfortunately, 47 of 267 cases (17,6%) had no specification of the underlying offences. Considering the total of proceedings for which this data was available (250), we gather that about 2/3 of cases had catalogue offences and about 1/3 (36,7%) had offences out of the catalogue, with some overlapping between these situations (see table below). The proportion of cases with offences out of the catalogue (15,4%) is somewhat striking.

Table 26: Distribution of catalogue and non-catalogue offences

	Non-listed offences absent	Non-listed offences present	Total
Listed offences absent	47	41	88
	17,6%	15,4%	33,0%
Listed offences present	122	57	179
	45,7%	21,3%	67,0%
Total	169	98	267
	63,3%	36,7%	100,0%

Looking at the catalogue offences, we may observe the most common type of offence is illicit trafficking in narcotic drugs and other substances (31,3% of cases with listed offences), followed by organized or armed robbery (25,7%) and murders or

grievous bodily injury (20,1%). At a much lower but still significant level are forgery of administrative documents and trafficking therein, and participation in a criminal organization (12,3% each).

Table 27: Catalogue offences

Listed offences	%	% within cases w/ listed offences	% of all cases
illicit trafficking in narcotic drugs and other substances	22,4%	31,3%	21,0%
organised or armed robbery	18,4%	25,7%	17,2%
murder, grievous bodily injury	14,4%	20,1%	13,5%
forgery of administrative documents and trafficking therein	8,8%	12,3%	8,2%
participation in a criminal organization	8,8%	12,3%	8,2%
swindling	5,6%	7,8%	5,2%
kidnapping, illegal restraint and hostage-taking	4,4%	6,1%	4,1%
rape	3,2%	4,5%	3,0%
trafficking in human beings	2,8%	3,9%	2,6%
counterfeiting of currency, including the euro	2,4%	3,4%	2,2%
facilitation of unauthorised entry and residence	2,4%	3,4%	2,2%
racketeering and extorsion	1,6%	2,2%	1,5%
forgery of means of payment	1,6%	2,2%	1,5%
arson	0,8%	1,1%	0,7%
fraud, etc.	0,8%	1,1%	0,7%
laundering of the proceeds of crime	0,8%	1,1%	0,7%
illicit trafficking in nuclear or radioactive materials	0,4%	0,6%	0,4%
sexual exploitation of children and child pornography	0,4%	0,6%	0,4%
Total	100,0%	139,7%	

The latter (participation in a criminal organization) is always associated with other offences, which was to be expected considering the nature of such offense, and somewhat indicates a form of organized criminality underlining the EAW requests by Portuguese authorities. The most commonly connected offences are forgery of documents; organized or armed robbery; trafficking in human beings; facilitation of unauthorized entry and residence; drug trafficking; and murder or grievous bodily injury.

Table 28: Offences associated with participation in a criminal organisation

	%	% within cases of participation in a crim. org.
forgery of administrative documents and trafficking therein	20,0%	36,4%
organised or armed robbery	17,5%	31,8%
trafficking in human beings	15,0%	27,3%
facilitation of unauthorised entry and residence	12,5%	22,7%
illicit trafficking in narcotic drugs and other substances	10,0%	18,2%
murder, grievous bodily injury	10,0%	18,2%
counterfeiting of currency, including the euro	2,5%	4,5%
illicit trafficking in nuclear or radioactive materials	2,5%	4,5%
kidnapping, illegal restraint and hostage-taking	2,5%	4,5%
laundering of the proceeds of crime	2,5%	4,5%
racketeering and extorsion	5,0%	9,1%
Total	100,0%	181,8%

Nonetheless, considering this universe of EAW requests, such figures suggest, for now, two different ideas: (1) both criminality involving personal rights and criminality involving some sort of economic interest have a similar weight in what concerns EAW requests issued by Portuguese authorities; (2) one third of the crimes do not belong to the EAW Act catalogue, i.e. were not specifically foreseen by the legislator(s), and request a double criminality check.

Here we find other interesting data. Turning to the offences out of the catalogue, i.e. those subject to s double criminality check, the far most common is theft (appearing in 35,7% of warrants with offences out of the catalogue), followed by illegal possession of weapon. Less common but still relevant are robbery that was not organised or armed, simple bodily injury, crimes against justice and officers, and road crimes. The full list of such offences can be observed in the table below.

Table 29: Non-catalogue offences

	%	% of cases w/ non-listed offences	% of all cases
theft (simple, qualified, use of vehicle)	25,7%	35,7%	13,1%
illegal possession of weapon	14,0%	19,4%	7,1%
robbery (not organised or armed)	8,8%	12,2%	4,5%
simple bodily injury	8,1%	11,2%	4,1%
crimes against justice and officers (prison escape and mutiny, false testimony, resistance to arrest, duress over officer, disobedience)	8,1%	11,2%	4,1%
road crimes	6,6%	9,2%	3,4%
damage to property	3,7%	5,1%	1,9%
pandering, exploitation of sexual labour	3,7%	5,1%	1,9%
crimes committed by officers	2,9%	4,1%	1,5%
unauthorised entry, burglary	2,9%	4,1%	1,5%
use of forged document	2,2%	3,1%	1,1%
threat, coertion, extorsion, blackmail	1,5%	2,0%	0,7%
abuse of means of payment	1,5%	2,0%	0,7%
sexual offences against minors/children	1,5%	2,0%	0,7%
receiving, concealing, dealing with stolen or illegal goods	1,5%	2,0%	0,7%
illegal use of weapon	0,7%	1,0%	0,4%
profanation of corpse	0,7%	1,0%	0,4%
illegal restraint, abduction	0,7%	1,0%	0,4%
abuse of trust	0,7%	1,0%	0,4%
crimes against honour	0,7%	1,0%	0,4%
violation of alimonial obligations	0,7%	1,0%	0,4%
use or exploitation of child beggars	0,7%	1,0%	0,4%
instigation to commit crime	0,7%	1,0%	0,4%
other crimes of common danger	0,7%	1,0%	0,4%
other crimes	0,7%	1,0%	0,4%
Total	100,0%	138,8%	

As expected, it is indeed in the offences out of the EAW catalogue that less serious criminality (we may say petty criminality) is visible. The relative weight of such offences is still considerable, especially as thefts are concerned. This it patent in the graphic/table below, which gathers the top-20 of all offences, listed and non-listed, the latter underlined.

Table 30: Top 20 of all offences[184]

	%	% of cases w/ offences specified	% of all cases
illicit trafficking in narcotic drugs and other substances	14,5%	25,5%	21,0%
organised or armed robbery	11,9%	20,9%	17,2%
murder, grievous bodily injury	9,3%	16,4%	13,5%
theft (simple, qualified, use of vehicle)	9,1%	15,9%	13,1%
participation in a criminal organization	5,7%	10,0%	8,2%
forgery of administrative documents and trafficking therein	5,7%	10,0%	8,2%
illegal possession of weapon	4,9%	8,6%	7,1%
swindling	3,6%	6,4%	5,2%
robbery (not organised or armed)	3,1%	5,5%	4,5%
kidnapping, illegal restraint and hostage-taking	2,8%	5,0%	4,1%
simple bodily injury	2,8%	5,0%	4,1%
crimes against justice and officers (prison escape and mutiny, false testimony, resistance to arrest, duress over officer, disobedience)	2,8%	5,0%	4,1%
road crimes	2,3%	4,1%	3,4%
rape	2,1%	3,6%	3,0%
trafficking in human beings	1,8%	3,2%	2,6%
counterfeiting of currency, including the euro	1,6%	2,7%	2,2%
facilitation of unauthorised entry and residence	1,6%	2,7%	2,2%
damage to property	1,3%	2,3%	1,9%
pandering, exploitation of sexual labour	1,3%	2,3%	1,9%
racketeering and extorsion	1,0%	1,8%	1,5%

One final observation: crossing the offences themselves with the sentences' duration, we observe that the indicators confirm the EAW is most commonly used to pursue medium criminality (according to the Portuguese criminal justice system), punishable with a prison sentence of 5 to 9 years. Organized, serious transnational criminality is clearly out of range in most of the EAW's application.

6.4.1.5. Procedural matters

As for procedural matters, the *iter processualis* was previously addressed in the legal section, so at this stage we will only analyse indicators that reveal how the EAW flows in practice.

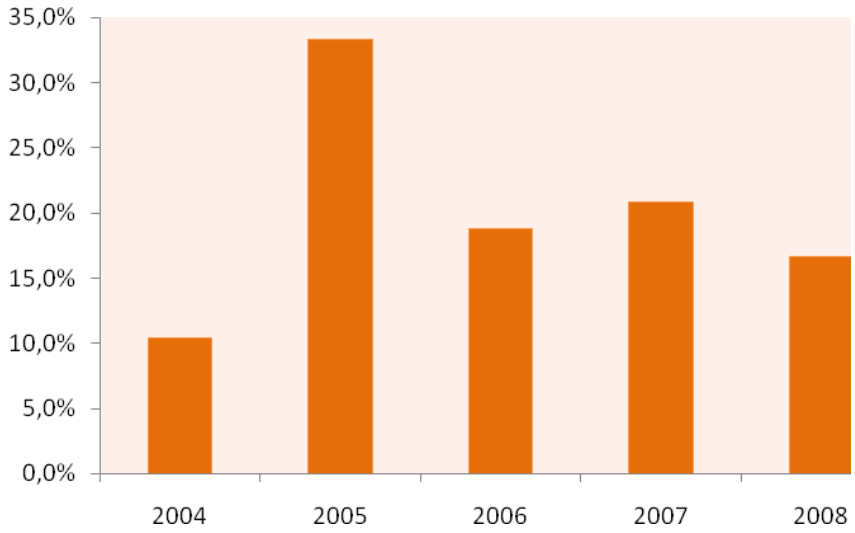
For issued warrants, relevant information on procedural matters was limited to the stages prior to issuing, as well as the information patent in the EAW form such as procedural purpose, existence of a decision *in absentia*, or seizure of property. Some items in the EAW form provided little relevant information ("other circumstances") or were not applicable to the Portuguese case (such as the possibility lifetime sentence,

[184] Non-catalogue offences are underlined.

which does not exist in the Portuguese justice system). It was also possible to draw limited information on some matters posterior to the actual issuing, such as the results of the warrants.

First of all, flaws in the completion of EAW forms are frequent, which is cause for these being sent back by the SNO, before any SIS insertion. Issuing authorities may request assistance to the GDDC, as well as the SNO, which detect flaws and may provide expert advice. Most EAW request forms are directly sent to the SNO for SIS insertion without a previous flaw check by the GDDC, which many times leads to formal refusals and devolutions for corrections, as previously addressed. During fieldwork, we have registered this situation in about 30% of the analysed proceedings. In said proceedings, errors were mostly connected with insufficient specification of the offences, of the maximum/imposed/remaining sentences, among others. Corrections were requested to the issuing courts up to 5 times, though usually one time sufficed, and led to delays up to more than one year, though 1 to 4 months was the most usual. This is in accordance to the data and perceptions provided by the SNO, which pointed to about 40% of such cases (for further detail, see also the iter processualis and the perceptions sections). Although most cases are located in 2005, right after the EAW's enactment, it may be of some concern the existence of a significant number of EAW forms presenting flaws. Such a situation calls for adequate training programs for practitioners acting on this field.

Chart 22: Warrants returned for corrections before issue (per year)[185]



[185] Percentage relative to warrants where year was available.

In the analysed proceedings, it was possible to identify some cases (11,4%) in which an International arrest warrant was issued as well as an EAW, usually because of uncertainty on the requested person's whereabouts. More rarely, some courts issued International Arrest Warrants and were suggested to use an EAW instead (2,6% of cases), or, conversely, issued an EAW and then converted it into an IAW (2,6% of cases) – this specifically happened with Luxembourg, since their executing authorities refused EAWs for offences committed prior to the enactment of the EAW regime.

In what concerns the purpose of the Portuguese authorities for the EAW request, though approximately ¼ of the consulted proceedings did not contain such information, taking into account the ones containing such information (221 out of 267), we see that issuing for execution of sentence is slightly more frequent than for prosecution, though not by far (55,7 vs. 44,3%). Where it was possible to determine a more specific purpose in case of prosecution, warrants were issued mostly to take the requested person into custody (65,7% of such cases), issuing in order to question the requested person and eventually subject him to a coercive measure was also common practice. This can be observed in the table below.

Table 31: Procedural purpose

	%	Cumulative %
execution of sentence	56,1%	56,1%
prosecution	43,9%	100,0%
of which, prosecution for:		
questioning/hearing	33,3%	33,3%
taking into custody	65,2%	98,6%
to be trialed	1,4%	100,0%
Total	100,0%	

Warrants with underlying decisions that were rendered *in absentia* were 15,7% of cases. Of these, only two were *stricto sensu* decisions rendered *in absentia* according to internal procedural law, i.e. the defendant was summoned but not present.

Table 32: Decisions rendered *in absentia*

	%	Cumulative %
Not in absentia	84,3	84,3
In absentia	15,7	100
of which:		
person was summoned	4,8	
person was not summoned	95,2	
Total	100	

Of the guarantees that could be demanded in such cases, Portuguese provided a guarantee of appeal in 14 of 40 cases (35%).

Cases of requests involving seizure of property are also residual, and with little specification of its purpose.

Table 33: Seizure of property

	%	Cumulative %
No property to seize	97,8	97,8
Property to seize	2,2	100
of which, property:		
which may be required as evidence	50	
acquired as a result of the offence	83,3	
Total	100	

On the post-issue stages, where information was limited, most relevant were the results of the warrants. In order to distinguish different situations that in the EAW FD are conflated as refusal of a warrant, we used the following categories:

approved and executed – warrant approved as valid by the executing authority, the requested person was surrendered;

approved but not executed – warrant approved as valid by the executing authority but the requested person was not surrendered, for example because surrender was postponed due to processes pending in the executing state, or because the executing state assumed for itself the execution of a sentence (this situation is considered a ground for refusal in the FD, but here was included in this category);

refused – the warrant was considered not valid on substantive grounds and thus refused by the executing authority, for example because it does not recognise the offences under its law;

withdrawn – the issuing authority withdrew on its initiative the warrant, for example because it lost interest in arresting the person, or because it reached by its own means the person in the meantime.

The results were unknown for over half of the proceedings, usually because the requested person had not been found so there was no executing country, or because the information was not yet available at the GDDC's archives.

Table 34: Results of issued warrants

	%	Cumulative %
was approved and executed	72,7	72,7
was withdrawn	13,6	86,4
was approved but not executed	8,3	94,7
was refused	5,3	100,0
Total	100,0	

Nonetheless, where the results were available, we see that the vast majority of requests were approved and executed, meaning the person was effectively surrendered to Portugal.

In the second most common situation the requests were withdrawn, usually because the requested person was arrested or turned himself to Portuguese authorities after the warrant was issued, or because there was no more interest in arresting the requested person, due for example to prescription of the offences or death of the requested person.

In the third most common situation the requests were approved but not executed, mostly because there were processes pending for the person in the executing country and surrender was postponed until those were closed; occasionally because the executing country assumed for itself the execution of the sentence.

The least common situation was refusal (5,3%). Its most common cause was warrants for offences prior to some limit set by the executing state: Luxembourg refused 2 warrants because the offences were prior its enactment of the EAW regime,

so the warrant had to be converted into an extradition request; France refused one warrant because it was for offences prior to November of 1993, for which France doesn't apply the EAW regime. Double criminality was ground for one refusal by Spain, who did not recognise the crime of driving without license put forward by Portugal. The United Kingdom refused the most warrants, usually after a long correspondence with Portuguese authorities, usually due to form flaws and procedural matters.

In what concerns the execution of EAW requests issued by Portuguese authorities, in 6,2% of cases there were registered contacts where the executing authority asked for more information, mostly after surrender had taken place. The most common situation was asking to the foreign authority how long the person had remained under arrest there, in order to deduct that period from the time to serve in Portugal (10,9% of all cases, 21,9% of cases were warrant was executed).

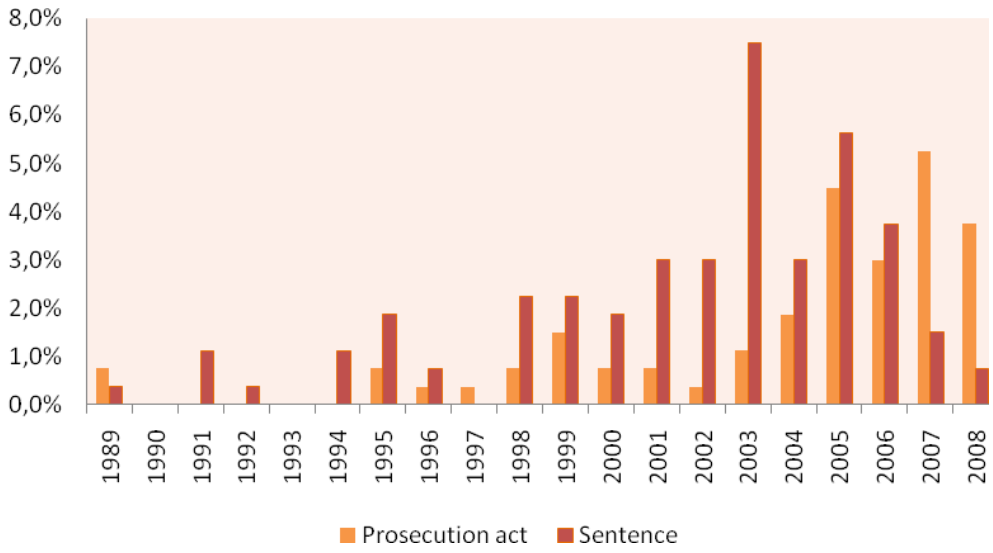
The time dimension: duration of procedures

Having portrayed the warrants issued by Portugal through their evolution and countries concerned, the requested persons, the underlying criminality and the procedures, we finish by looking at their flow through time.

For a global understanding of the duration of procedures, three phases must be assessed: (1) the lapse of time between the underlying decision (accusation/condemnatory sentence) and the issuing of the EAW itself; (2) the lapse of time between issuing and detention of the requested person; (3) and the lapse of time between detention and surrender.

The indicators that are now presented give us an indication of the lapse of time between the underlying decision and the issuing of the EAW.

Chart 23: Year of underlying judicial decision



As expected, warrants were issued mostly for judicial decisions taken after the EAW enactment and in the period immediately preceding it, reaching back to 1998 (88,6% of valid cases, i.e. where dates were available). There were warrants for decisions before that, as far back as 1989, but these are fringe cases (11,9% of valid cases). Sentences tend to be older and prosecution acts more recent, which is understandable: an investigation for prosecution tends to have time limits, whereas, when requesting for the execution of a sentence, a person may be serving an ancient sentence and evade prison in the meantime. This was the case for the majority of convicts sentenced up to 2000 (48 convicts, of whom 34 had served part of their sentence, 6 had not, 9 unknown).

The warrants for prosecution acts from 1989 and the mid-90s are intriguing in this light, but not representative. Time in prosecution cases from the underlying judicial decision to warrant issuing is measured in the months, usually within one month (46,4% valid cases) – in fact, most of the times in the same day (20,6%) or within one week (17,6%) – or up to a year when not so (23,2%). In contrast, for sentence execution cases this time is best measured in years, 3,76 years in average, though for over half of the cases it is up to two years.

Chart 24: Months between underlying prosecution act and EAW issue

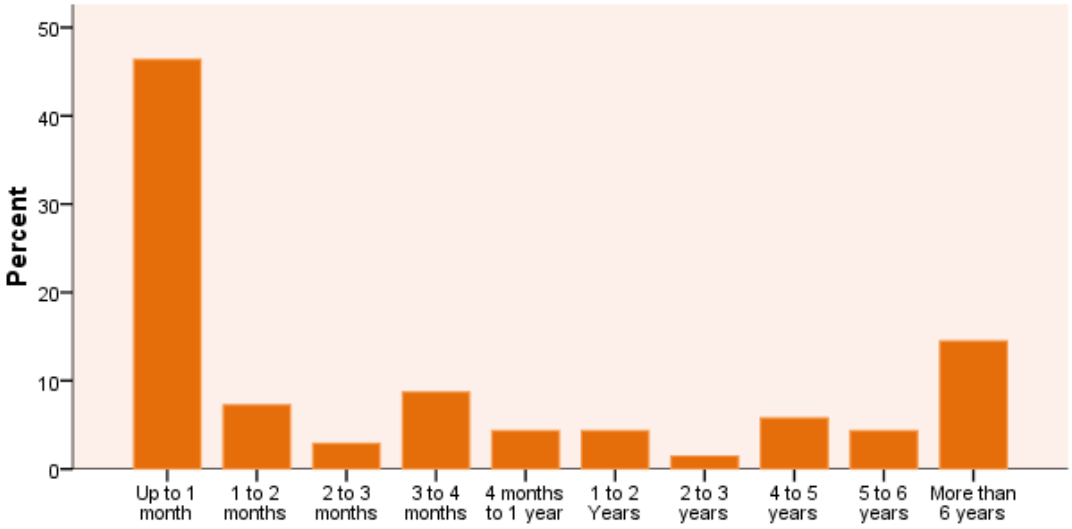
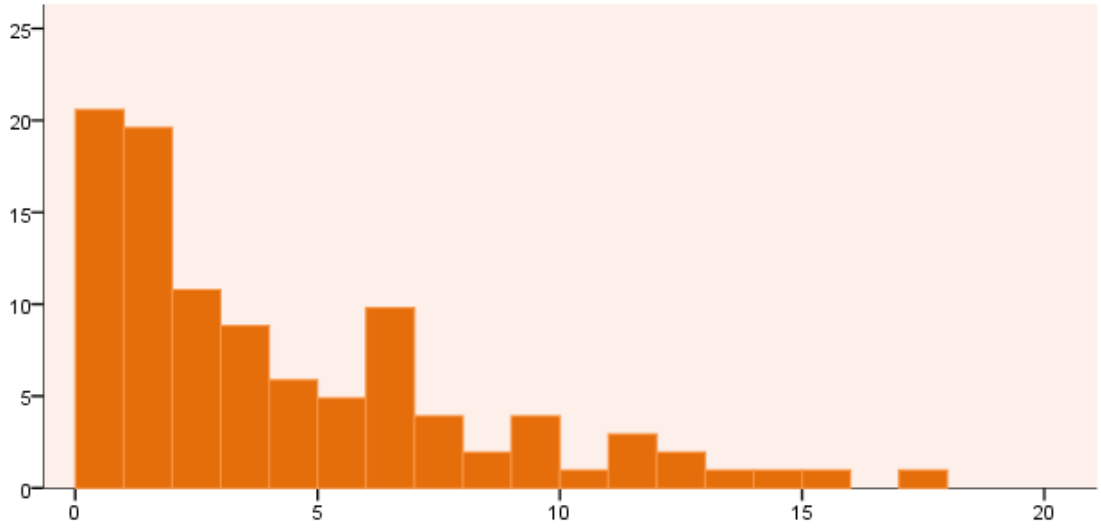


Chart 25: Years between underlying sentence and EAW issue



It was also possible to measure how long the execution in the foreign country took for most cases (81 out of 96) where the warrant was executed. Most of the surrenders took place in less than a month, 29,6% in 1 to 2 months, and only 7,4% took more than 5 months. When the process took less than 1 month, it could take anywhere from 6 to 31 days, in a bell-curve distribution where the most common was 18-20 days. Altogether, the average duration was 2,04 months. We did not detect relevant differences among countries in this regard.

The general conclusion that can be taken from all these data is that in general when surrender takes place, it does so quite quickly. All in all, the EAW is characterized by speediness, as acknowledged by agents.

Table 35: Duration of execution procedure, from arrest to surrender (in months)

	%	Cumulative %
Less than 1 month	50,6	50,6
1 to 2 months	29,6	80,2
2 to 3	6,2	86,4
3 to 4	2,5	88,9
4 to 5	2,5	91,4
5 to 6	1,2	92,6
More than 6 (7 to 16)	7,4	100
Total	100	

Chart 26: Duration of execution procedure, from arrest to surrender (in months)

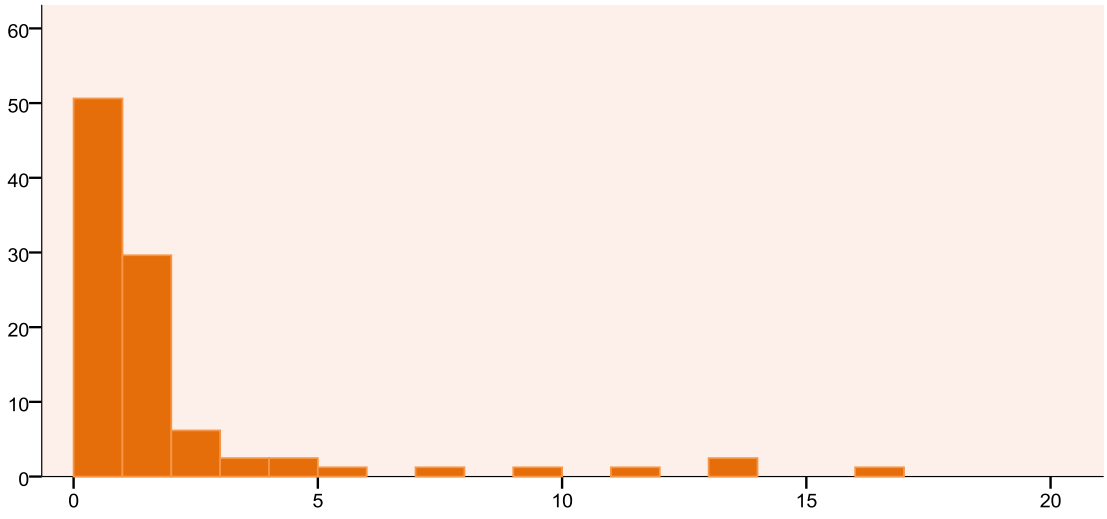
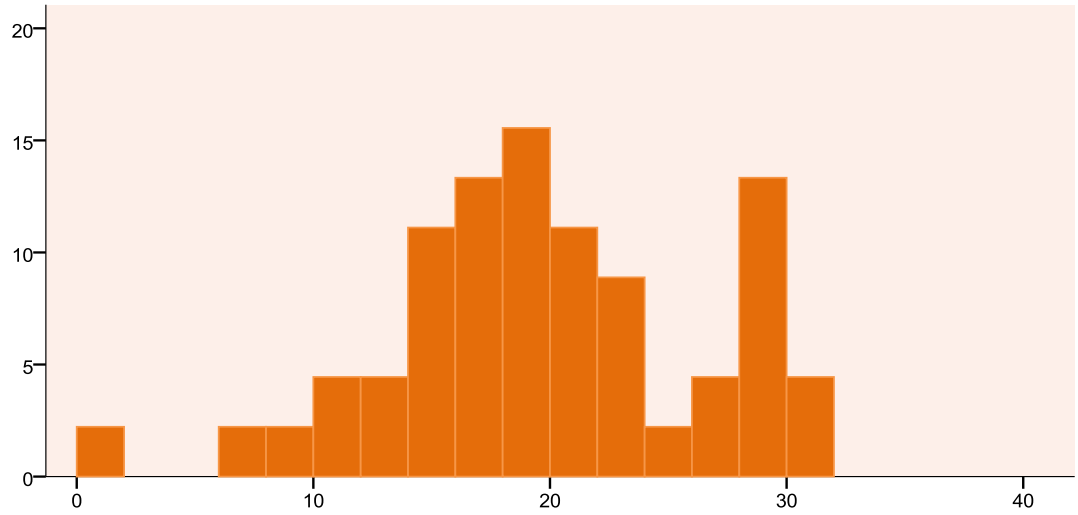


Chart 27: Duration of execution procedure for cases within 1 month (in days)



6.4.1.6. Concluding remarks

Bringing together the previous findings, Portugal issues warrants usually in generic form, as an insertion in SIS without a specific executing country, and only about half of them the requested person was detected. When so, it mostly issues to neighbouring countries (Spain) and countries with relevant Portuguese communities (such as France and the United Kingdom). We can thus sketch the requested person's profile: a male aged between 21 and 50, who we typify (in decreasing order of importance) as non-resident nationals, nationals who were residents and fled, foreigners who were residents and fled (e.g. Brazilians and CPLP nationals), and non-resident foreigners (e.g. Spaniards, Romanians). These people are as likely to be the object of a recent prosecution, after the EAW was introduced, as they are to be convicts who fled Portugal, usually after starting to serve their sentence rather than before it (about 2/3 to 1/3).

They are sought for a criminality of medium severity, mostly punishable with prison sentences inferior to 6 years (close to 3/4) and very rarely going over 10 years. The offences at stake are very diverse, the most common ones being drug trafficking, organised and armed robbery, murder, theft, participation in a criminal organisation and forgery/trafficking of documents – of these, only theft does not belong to the catalogue. Catalogue offences are the most common (2/3 of cases), but other offences are frequent too (1/3 of cases), and at times the only ones present. From the analysed proceedings, almost ¾ ended with an effective surrender of the requested person.

When the requested person is detected and ends up not being surrendered, it is usually because the issuing authority lost interest in executing the warrant or surrender had to wait for processes pending in the executing state; warrants are rarely refused on substantial grounds (about 5%). The requested person is usually surrendered within one month, rarely does the surrender take longer than 2 months.

Over six years passed since the EAW was introduced, some difficulties from issuing authorities can still be assessed, as well as some internal coordination issues between issuing authorities, GDDC and SNO. To this and other issues, as better addressed in the perceptions' section, add all problems concerning translation to foreign languages. Such specificities – which appear to be by no means exclusive to the Portuguese case – result in a practice where this instrument, although characterized by speediness, especially in its foreign execution, can at times be slow internally – thus leading to sometimes the time lapse between the decision to issue an EAW and its effective insertion in SIS being quite long, and longer than surrender itself.

In conclusion, the essential features of these issued EAWs (requested person's profile, procedural characterization, underlying criminality) are close to what is found in other member states, i.e. it an instrument used to persecute all types of criminality. It is nonetheless not quite mastered by issuing courts, resulting in flaws and delays in their validation which can be longer than any delays abroad. These internal pitfalls seem to be more important than external ones at this point, signalling the need for a better training of Portuguese judicial officers on how to use the EAW, and a better coordination with the national organs more specialised in external affairs, namely the GDDC. When it enters into action, the EAW seems efficient and quick. At what cost to rights and freedoms is what remains to be seen, and an issue for which the analysis of the execution of warrants received by Portugal, as well as the perceptions of Portuguese officers, are good indicators.

6.4.2. Received European arrest warrants

6.4.2.1. Methodology

EAWs received by Portugal are dealt with by the five Courts of Appeal, situated in Coimbra, Évora, Guimarães, Lisbon and Oporto. For received warrants, the construction of the sample was therefore different, as well as data collection itself, since these proceedings were not centralised in one institution, such as with the GDDC

for issued warrants. The complete proceedings were made available and consulted by the research team at the correspondent Court of Appeal. The database was then filled in *in loco* by the team.

According to the information provided by these executing authorities, the whole population of warrants received by Portugal between 2004 and 2008 was 382. Their distribution by court is specified below.

Table 36: EAWs received by Court, 2004-2008

	Population	%	Sample size
Coimbra	33	8,6	17
Évora	112	29,3	56
Guimarães	n/d	n/d	n/d
Lisboa	200	52,4	101
Oporto	37	9,7	19
Confirmed total	382	100	192

Unfortunately, it was not possible to reach a figure for Guimarães. The numbers in the Commission's evaluation report on Portugal,[186] as well as evidence from the contacts undertaken, made us acknowledge it was a Court of Appeal with a very reduced number cases, less than Coimbra, which did not jeopardize our sample.

This data allows us to build a representative sample. Following the common method used in statistical sampling, we set a confidence level of 95% and a margin of error of 5%. For a total population of 382 cases, these conditions require a sample of 192 cases.

Data missing in the case files turned out to be a problem during fieldwork. To counter it, it was decided to retrieve more cases than necessary, as long as it didn't overrun the time and resource limits established. In the end, the sample effectively retrieved was larger than the theoretical sample by a reasonable margin: 285 cases, 48% more than the initial 192 cases. This resulted in a slight deviation in proportionality of the sample effectively retrieved relative to the theoretical sample. The biggest difference was in the smaller courts of Coimbra and Porto, where almost all cases were retrieved, practically doubling the necessary number; while the Lisbon appeal court, though also reinforced in number, saw its proportion diminished.

[186] See EAW Evaluation Report on Portugal, p. 50.

On the other hand, additional data enables additional certainty in the results. For quantitative variables, the larger sample would reduce the margin of error from 5 to 2,93%. In order to restore the proportionality of the sample and strengthen the results, a weighting factor was introduced, consisting in the percentage in the theoretical sample divided by percentage in the retrieved sample.

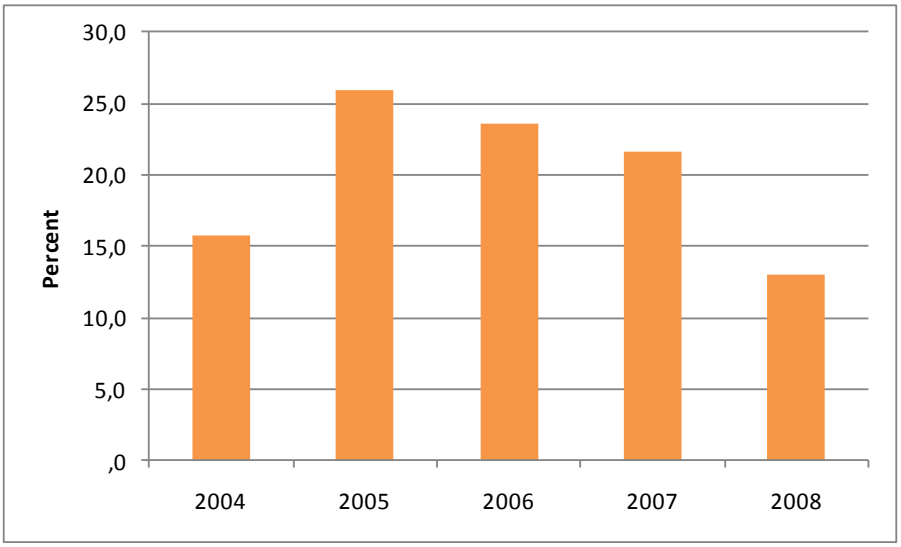
In short, the results that follow come from a representative sample of 74,6% of EAWs received by Portugal, except those of the Guimarães Appeal Court, excluded due to logistical reasons, a court with few cases which should represent at most 10% of the population. As a point of departure, presupposing we are considering the whole sample and there is no missing data, quantitative results have a confidence level of 95% and a margin of error of 3%.

6.4.2.2. Evolution in time and requesting countries

Although the data on the number of received warrants was available for the whole period, at some Courts of Appeal their yearly distribution was not available. For this analysis we therefore work with the sample from the beginning.

The yearly evolution of warrants received in Portugal follows an interesting trend. After the introduction in 2004, there was something of boom in 2005, with 65% more warrants than the previous year. Since then, however, there has been a downward trend, culminating in a low number of warrants in 2008, comparable to the levels at the time of introduction in 2004. This downward trend opens several questions. What are the reasons behind it? Several possibilities come to mind: a reduction in crime in the countries that send warrants to Portugal, a reduction of the people coming into Portugal along the years, an adjustment of practices of judicial authorities after an initial moment where warrants were overused. These are beyond the scope of this analysis, but can be interesting hints to explore through other methods.

Chart 28: Distribution by year



What countries issue warrants to Portugal? The sample results suggest different realities (Table 37). Spain is clearly the country issuing most warrants to Portugal, about a quarter of them. It is the only country that borders Portugal, so this is not particularly surprising. People who commit crimes in Spain have in Portugal a natural escape route, the more so the closer they are to the border. France and Germany make a second group of issuing countries, at 16-18%. The flow of people between Portugal and these countries, other than tourism and business travel, is augmented considerably by the vast community of Portuguese immigrants in these countries, especially France – a factor that may have an influence in this. Romania is the fourth country issuing most warrants, at 7%. Historically, relations between Romania and Portugal were scarce, but this changed with a wave of immigration in the late 90's that brought Ukrainians, Romanians and Moldovans to Portugal. One further country, the United Kingdom, can be said to have strong ties to Portugal, for it has the second largest community of Portuguese immigrants in Europe, while Portugal also has an important community of English immigrants, comparable in number to the Romanians. The remaining countries do not elicit the previous geographical, demographic, historical factors, which may have an influence in the patterns of warrant issuing.

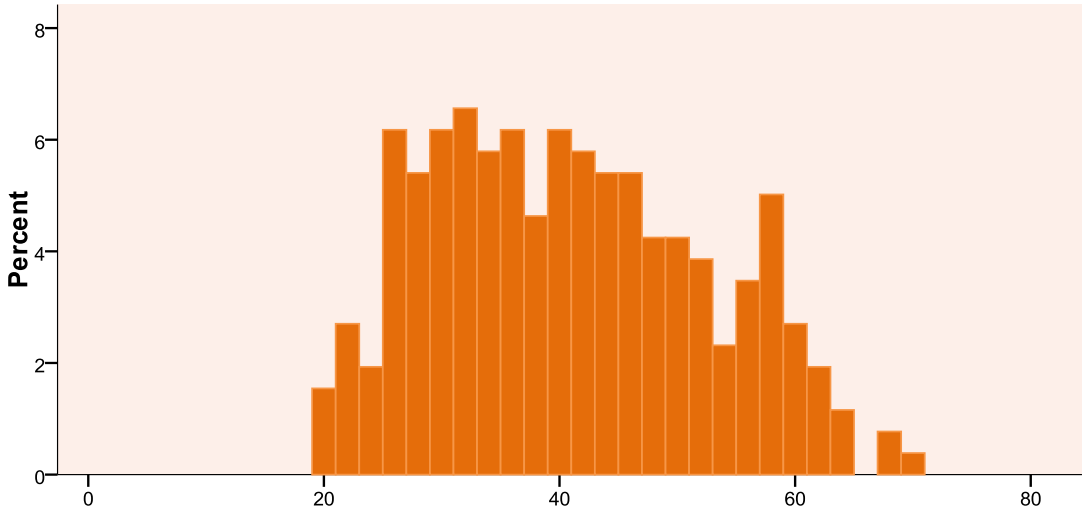
Table 37: Countries issuing to Portugal

	Valid %	Cumulative %
Spain	27,0	27,0
France	18,6	45,6
Germany	16,1	61,8
Romania	7,0	68,8
Netherlands	6,7	75,4
United Kingdom	6,3	81,8
Belgium	4,9	86,7
Lithuania	3,2	89,8
Italy	2,8	92,6
Luxembourg	2,1	94,7
Poland	1,4	96,1
Austria	,7	96,8
Hungary	,7	97,5
Sweden	,7	98,2
Bulgaria	,4	98,6
Denmark	,4	98,9
Greece	,4	99,3
Norway	,4	99,6
Turkey	,4	100,0

6.4.2.3. Profile of the requested persons

In terms of sex and age, the picture is very similar to that of issued warrants. Requested persons are overwhelmingly male (94% to a mere 6% female), with an average age of 40,34, and a median age of 39.

Chart 29: Age of requested persons (at the time of warrant issue)



As for the requested persons' nationalities, Portuguese citizens are by far the most requested by foreign countries, making more than 1/3 of cases (36,6%). The

remaining nationalities are scattered through EU countries like Germany, Romania, Spain, United Kingdom, France, the Netherlands and Lithuania. After those, we see citizens from CPLP countries with strong immigration ties to Portugal, such as Brazil and Guinea-Bissau (both 2,5%) or Cape Verde (1,8%).

Table 38: Nationality

	Valid %	Cumulative %
Portugal	36,6	36,6
Germany	8,1	44,7
Romania	7,7	52,5
Spain	6,0	58,5
United Kingdom	5,6	64,1
France	5,3	69,4
Netherlands	3,9	73,2
Lithuania	3,5	76,8
Brazil	2,5	79,2
Guinea-Bissau	2,5	81,7
Italy	2,5	84,2
Cape Verde	1,8	85,9
Colombia	1,8	87,7
Belgium	1,4	89,1
Poland	1,4	90,5
United States	1,4	91,9
Hungary	,7	92,6
Morocco	,7	93,3
Other (19)187	19 x ,4	100
Total	100,0	

This distribution of nationalities is quite different from what was seen in issued warrants. Essentially, nationalities representing strong immigrant communities in Portugal, due to language/former colonial ties (Brazil, Cape Verde, Angola, Guinea-Bissau) or migratory waves from the late nineties (Ukraine), which are close to the top in issued warrants, are displaced by nationalities from central Europe (Germany, United Kingdom, and the Netherlands) and Eastern Europe (Lithuania) in received warrants. Diversity is also much more significant: issued warrants involve 23 nationalities, received warrants involve 37; 8 nationalities account for 90% of issued warrants, while 15 nationalities account for 90% of received warrants. But some similarities remain. Portuguese nationals remain dominant, though their dominance is halved from issued to received warrants, from about 2/3 to 1/3 of cases; Spanish, Romanian and French citizens remain in the top ten.

Looking now at the residence country, more than half of the requested persons (54,7%) had residence in Portugal, close to 5% had residence in Spain or France, and

[187] Angola, Argentina, Austria, Bulgaria, Chile, Guinea, India, Ireland, Lebanon, Moldova, Nigeria, Norway, Senegal, Serbia, Sweden, Turkey, Ukraine, Uruguay, Venezuela.

11,2% are scattered at negligible levels through 17 countries, while the remaining 24,6% are unknown.

Table 39: Residence country, received warrants

	Valid %	Cumulative %
Portugal	72,6	72,6
Spain	6,5	79,1
France	6,0	85,1
Brazil	1,9	87,0
Romania	1,9	88,8
United Kingdom	1,9	90,7
Germany	1,4	92,1
Belgium	,9	93,0
Ireland	,9	94,0
Netherlands	,9	94,9
Poland	,9	95,8
Austria	,5	96,3
Other (8)188	8x,5	100,0
Total	100,0	

Such disparities among nationality and residence country invite further scrutiny. Given that Portuguese nationals account for 36,6% of received warrants, it would be expectable that Portugal be the dominant residence country, but not by a proportion as large as 54,7%. This suggests an important part of foreigners requested are established in Portugal.

Focusing on requested persons with residence in Portugal reveals indeed that half of them are foreigners (27,4% of all requested persons), mostly from the EU and in a lesser degree from CPLP.

[188] Cape Verde, Italy, Lithuania, South Africa, Swaziland, Sweden, United States, Venezuela.

Table 40: Nationality of the requested persons resident in Portugal

	Valid %189	Cumulative %
Portugal	50,0	50,0
Romania	8,3	58,3
Germany	7,7	66,0
United Kingdom	4,5	70,5
Guinea-Bissau	3,8	74,4
Netherlands	3,8	78,2
Lithuania	3,2	81,4
Spain	2,6	84,0
Cape Verde	1,9	85,9
Belgium	1,3	87,2
Brazil	1,3	88,5
Italy	1,3	89,7
United States	1,3	91,0
Other (14)190	14x,6	100
Total	100,0	

A look at the top nationalities by residence country, listed in the table below for the top 11 nationalities, representing 84,2% of cases, reveals a similar picture. Portuguese nationals asked by foreign countries are almost exclusively resident in Portugal. For many of the top foreign nationalities, the majority resided in Portugal as well, such as Germans (85,7%), Romanians (72,2%), British (63,6%), Dutch (85,7%) or Lithuanians (83,3%). Exception to this trend were Spaniards, split about evenly between their home country and Portugal (55,6 vs. 44,4%), and French, none of whom resided in Portugal.

[189] Percent relative to requested persons with residence in Portugal.

[190] Argentina, Bulgaria, Chile, Hungary, India, Lebanon, Moldova, Morocco, Nigeria, Norway, Serbia, Turkey, Ukraine, Venezuela.

Table 41: Top nationalities by country of residence

Nationality	Residence country	Valid %	Cumulative %
Portugal	Portugal	90,7	90,7
	France	5,8	96,5
	Germany	1,2	97,7
	Netherlands	1,2	98,8
	United Kingdom	1,2	100,0
	Missing		
	Total		
Germany	Portugal	85,7	85,7
	Germany	14,3	100,0
	Missing		
	Total		
Romania	Portugal	72,2	72,2
	Romania	22,2	94,4
	Ireland	5,6	100,0
	Missing		
	Total		
Spain	Spain	55,6	55,6
	Portugal	44,4	100,0
	Missing		
	Total		
United Kingdom	Portugal	63,6	63,6
	United Kingdom	27,3	90,9
	Spain	9,1	100,0
	Missing		
	Total		
France	France	72,7	72,7
	Cape Verde	9,1	81,8
	Spain	9,1	90,9
	Swaziland	9,1	100,0
	Missing		
	Total		
Netherlands	Portugal	85,7	85,7
	Brazil	14,3	100,0
	Missing		
	Total		
Lithuania	Portugal	83,3	83,3
	Lithuania	16,7	100,0
	Missing		
	Total		
Brazil	Brazil	60,0	60,0
	Portugal	40,0	100,0
	Missing		
	Total		
Guinea-Bissau	Portugal	85,7	85,7
	Spain	14,3	100,0
	Total	100,0	
Italy	Portugal	50,0	50,0
	Italy	25,0	75,0
	South Africa	25,0	100,0
	Missing		
	Total		

Looking at who is asking for whom, the table below discriminates the top 11 nationalities by issuing country. The main conclusion to draw is that non-nationals are

usually requested by their country of origin, except foreigners from outside the EU. Chief among the latter, we find CPLP citizens, requested by the EU's central countries, starting in Germany, passing through the Benelux countries and France, and reaching down to Spain. As to Portuguese citizens, they are requested by this same geographical area – first by Spain (where none of them resided in our sample), then France, Germany and the Benelux – and additionally the United Kingdom.

Table 42: Top nationalities by issuing country

Nationality	Issuing country	Valid %	Cumulative %
Portugal	Spain	32,7	32,7
	France	28,8	61,5
	Germany	17,3	78,8
	Belgium	5,8	84,6
	Luxembourg	4,8	89,4
	United Kingdom	4,8	94,2
	Italy	1,9	96,2
	Netherlands	1,9	98,1
	Poland	1,0	99,0
	Sweden	1,0	100,0
	Total	100,0	
Germany	Germany	91,3	91,3
	Austria	4,3	95,7
	Spain	4,3	100,0
	Total	100,0	
Romania	Romania	90,9	90,9
	France	4,5	95,5
	Spain	4,5	100,0
	Total	100,0	
Spain	Spain	100,0	100,0
United Kingdom	United Kingdom	81,3	81,3
	Spain	12,5	93,8
	Belgium	6,3	100,0
	Total	100,0	
France	France	93,3	93,3
	Belgium	6,7	100,0
	Total	100,0	
Netherlands	Netherlands	100,0	100,0
Lithuania	Lithuania	90,0	90,0
	Spain	10,0	100,0
	Total	100,0	
Brazil	France	28,6	28,6
	Netherlands	28,6	57,1
	Spain	28,6	85,7
	Germany	14,3	100,0
	Total	100,0	
Guinea-Bissau	Spain	85,7	85,7
	Denmark	14,3	100,0
	Total	100,0	
Italy	Italy	42,9	42,9
	Germany	28,6	71,4
	Spain	28,6	100,0
	Total	100,0	

Putting all together and attempting to draw the profile of the requested persons asked to Portugal are first and foremost males with an average age of 40,34, and a

median age of 39. Secondly, they are mostly foreigners, although Portuguese is the single most frequent nationality. In terms of nationalities, they are, in decreasing order of relevance: Portuguese; central Europeans; eastern Europeans (most of them Romanians and Lithuanians established in Portugal); southern Europeans (from Spain and, in a lesser degree, Italy); and CPLP citizens (Brazil, Guinea-Bissau and Cape Verde). Thirdly, be they nationals or non-nationals, they tend to be residents in Portugal (with the exception of Spanish and French citizens).

In brief, these individuals can be typified as: (1) Portuguese resident in Portugal who are looked for crimes abroad, (2) EU-nationals residing in Portugal who are looked for crimes in their home countries (Central and Eastern Europeans), (3) non-nationals and non-residents who flee their homeland to Portugal (French, some Spaniards), and (4) non-European foreigners established in Europe, within which the most homogenous subgroup comes from CPLP.

6.4.2.4. Underlying criminality

Looking at the maximum applicable sentences, they have clear peaks in 5, 10, 15 and 20-year sentences. If we abstract the intermediate values between these five-year peaks, maximum sentences seems to follow a bell curve centred around 10-year sentences, as seen in the charts below.

Chart 30: Maximum sentence applicable to the offences (in years)

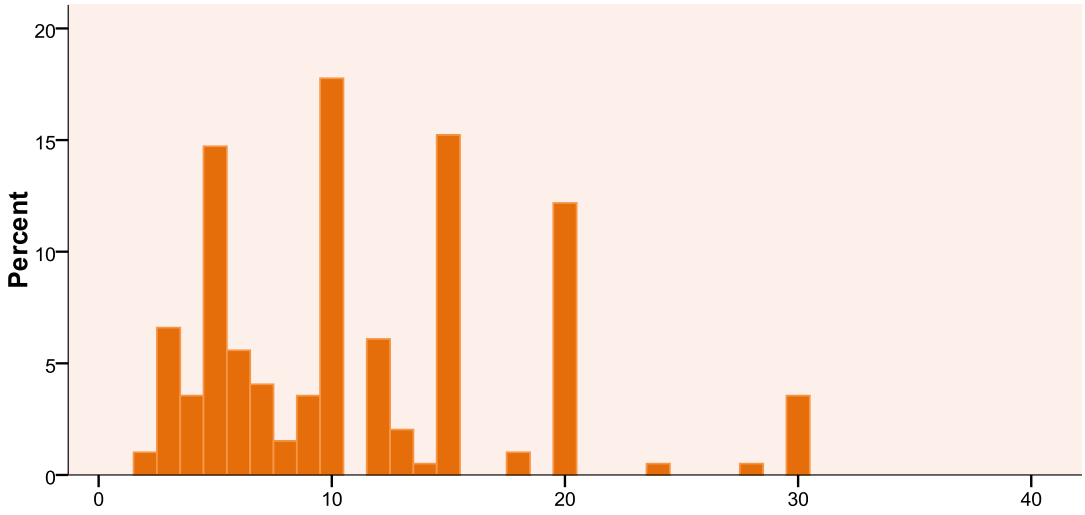
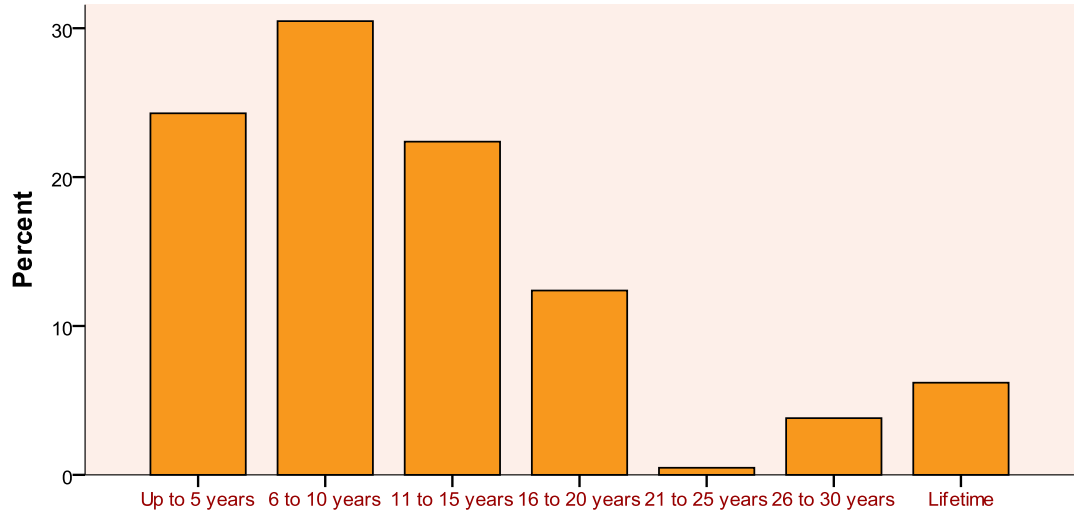
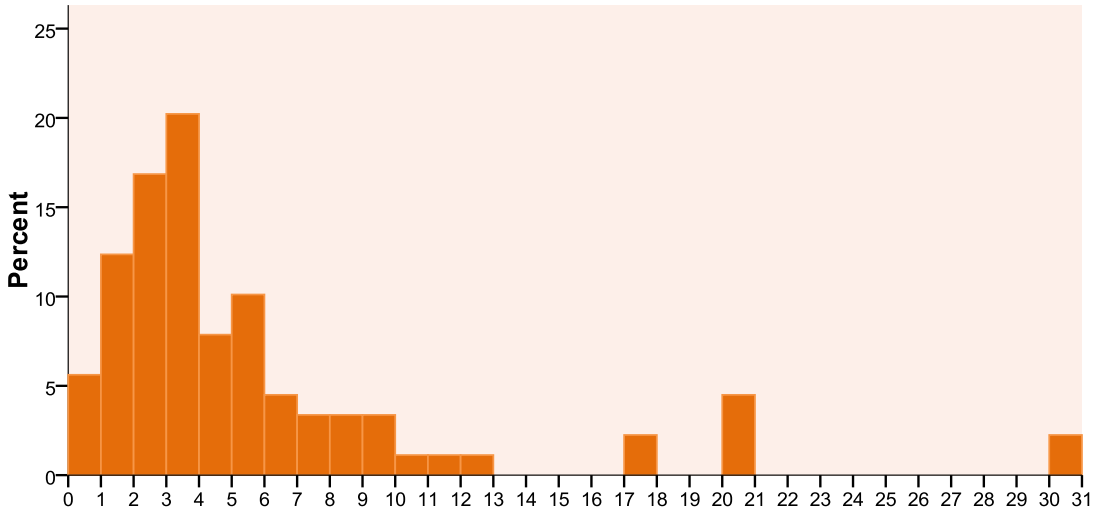


Chart 31: Maximum sentence applicable to the offences (in 5-year groups)



Data concerning the effective sentences imposed was available for 87,3% of proceedings for execution of sentence. Their duration forms a bell curve centred around 3 years, which is the median sentence.

Chart 32: Imposed prison sentence (in years)



Looking at the chart of sentences, we could group these in 3 main categories: convicts sentenced for up to 3 years (55,1%), for 4 to 12 years (35,9%), and for 17 to 30 years (9%). An initial impression from this is that, for convicts, while the EAW is being used for sentences of short or medium duration (according to the Portuguese criminal justice system) to the larger sentences, it tends to fall upon smaller sentences.

Of course, this may be just a reflection of the pattern of effective sentences in the issuing countries, which would have to be known in order to draw further conclusions.

The distribution of remaining sentences is in the chart below, and its similarity to the distribution of effective sentences is visible, suggesting there is little difference between these two variables, i.e., most of the convicts requested never begun serving their sentences. This perception is confirmed when we look at the proportion of sentence already served (Chart 34). The majority of convicts asked to Portugal present in our sample (58,9%) had not begun serving their sentences, which leads to believe many cases may be of decisions rendered *in absentia*.

Comparing the proportion of sentence served for issued and received warrants, we see that whereas Portuguese authorities asks for convicts who mostly had served part of their sentence (69,1%), Portugal is asked for convicts who mostly had not (58,9%).

Chart 33: Remaining sentence to be served (in years)

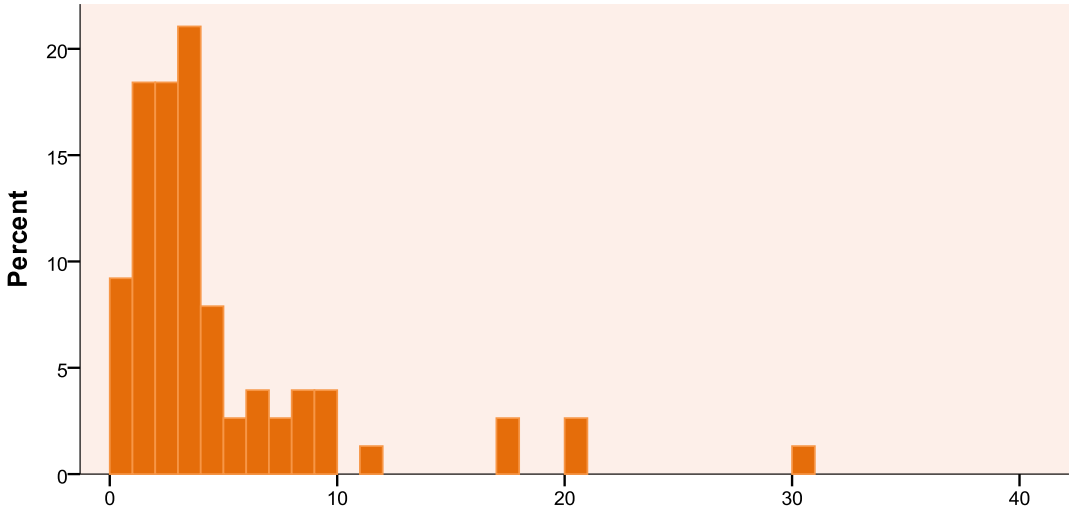
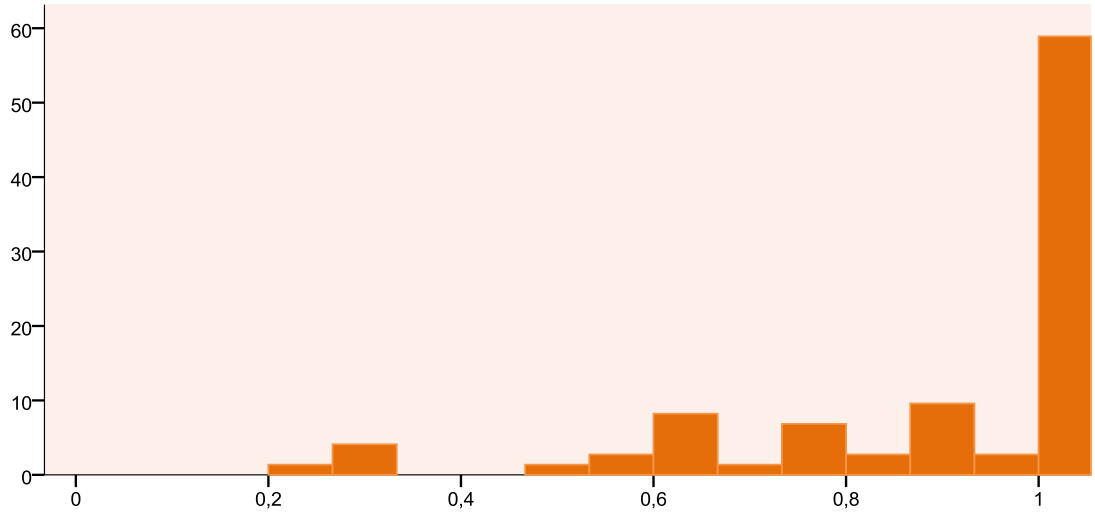


Chart 34: Proportion of sentence left to serve



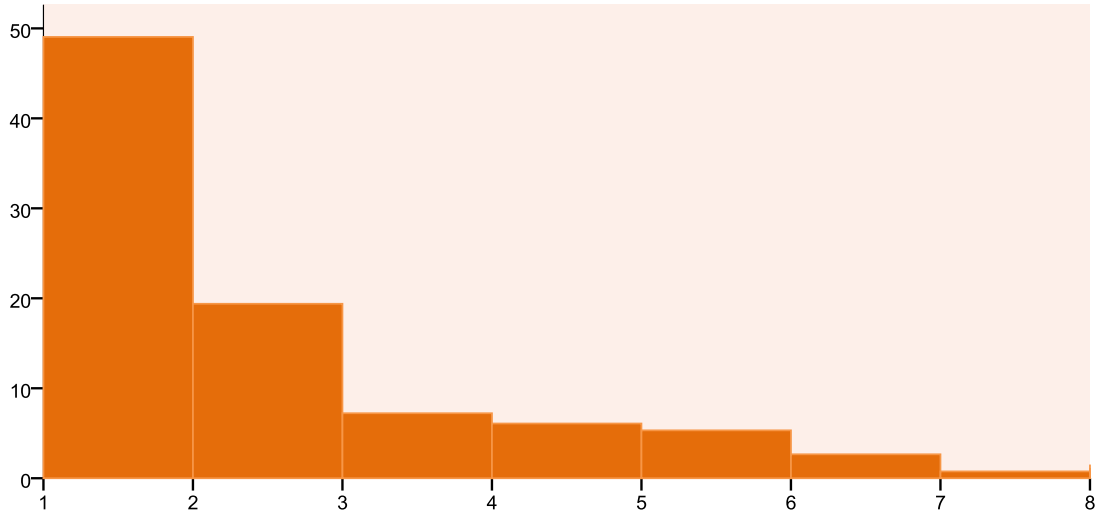
The number of offences for which the requested person was requested might give an indication whether career criminals or occasional criminals are more frequently involved in EAW procedures, at some extent the seriousness (as reiterations) of the underlying criminality. 49% of the requested persons (where this data was indicated) had committed one crime, 40,7% two to six crimes, and 10,3% had committed more than six crimes. The number of offences was unknown in 7,7% of cases, giving these figures a maximum margin of error of 3,38%. The average number of offences per warrant was 9,46, with a standard deviation of 58,2, but this value is visibly skewed by some outlier and extreme values at the top: in the most extreme case, one requested person was referenced for 766 offences.[191] When we exclude the outliers and extremes from the sample, the average drops to 2, the standard deviation to 1,45. The threshold separating occasional from career criminal is somewhat arbitrary, and this variable is only an indicator which would need other control variables for greater certainty, but the hypothesis to test further is clear: the EAW applies mostly to occasional criminals, who committed 1 to 2 offences.

[191] The statistical definition of an outlier is a value 1,5 times greater than the 3rd quartile plus the interquartile range (> 1,5(Q3 + IQR)), or 1,5 times lower than the 1st quartile minus the interquartile range (< 1,5(Q1 – IQR). In this case, 1,5(Q3 + IQR) = 1,5 (3 + 2) = 7. There were 9,5% of valid cases (those not missing the number of offences) that were outliers, from 8 offences to a maximum of 766.

Table 43: Number of offences per EAW request

	Valid %	Cumulative %
1 offence	49,0	49,0
2 offences	19,4	68,4
3 offences	7,2	75,7
4 offences	6,1	81,7
5 offences	5,3	87,1
6 offences	2,7	89,7
More than 6 (7 to 766)	10,3	100,0
Total	100,0	

Chart 35: Number of offences per EAW request (outlier values excluded)



The offenses at stake in the warrants are another important element for a portrait of what the EAW is being used for. Looking at catalogue offences (Table 45), we identify four main groups.

Drug trafficking is by far the most common, similarly to issued warrants. Anecdotal evidence from the consulted proceedings suggests that many of these requested persons are small traffickers. In one case, a person was requested to Portugal for selling on a Spanish street one dose of cocaine to one person; in another case, a person was requested for cultivating cannabis in Portugal and then sending it per post to a familiar in Germany; in yet another case, a convict for possession of LSD, which was filled in the offence list as drug trafficking, was requested and surrendered to Spain. Granted, we also encountered cases such as the one concerning a suspect of "leading an international network of cocaine trafficking" from an African country, caught in transit at the Lisbon airport and surrendered to France, but such cases seem to be a minority.

The second main group of offences, about half as frequent as drug trafficking (around 11% of cases), is murder, robbery and swindling.

The third main group involves, in decreasing order, rape, kidnapping, fraud, participation in a criminal organization, sexual exploitation, forgery of documents, money laundering, and forgery of means of payment. These offences represent 7,4% down to 2,1% of cases, in a markedly linear decrease.

Finally, the fourth group involves all remaining offences, at residual levels (1,4 to 0,4%). Interestingly, terrorism, a crime so essential in the political development and establishment of the EAW, is virtually non-existent in the warrants received by Portugal.

Table 44: Distribution of listed and non-listed offences, received warrants

	Without non-catalogue offences	With non-catalogue offences	Total
Without catalogue offences	5	64	69
	1,8%	22,5%	24,2%
With catalogue offences	183	33	216
	64,2%	11,6%	75,8%
Total	188	97	285
	66,0%	34,0%	100,0%

Table 45: Catalogue offences

Catalogue offences	%	% of cases w/ catalogue offences	% of all cases
illicit trafficking in narcotic drugs and other substances	19,6%	25,9%	19,6%
murder, grievous bodily injury	11,6%	15,3%	11,6%
organised or armed robbery	11,2%	14,8%	11,2%
swindling	11,2%	14,8%	11,2%
rape	7,4%	9,7%	7,4%
kidnapping, illegal restraint and hostage-taking	6,7%	8,8%	6,7%
fraud, etc.	6,0%	7,9%	6,0%
participation in a criminal organization	5,3%	6,9%	5,3%
sexual exploitation of children and child pornography	4,2%	5,6%	4,2%
forgery of administrative documents and trafficking therein	3,5%	4,6%	3,5%
laundering of the proceeds of crime	2,8%	3,7%	2,8%
forgery of means of payment	2,1%	2,8%	2,1%
illicit trafficking in weapons, munitions and explosives	1,4%	1,9%	1,4%
facilitation of unauthorised entry and residence	1,4%	1,9%	1,4%
racketeering and extortion	1,4%	1,9%	1,4%
arson	1,1%	1,4%	1,1%
counterfeiting and piracy of products	,7%	,9%	,7%
illicit trafficking in cultural goods, etc	,7%	,9%	,7%
trafficking in human beings	,7%	,9%	,7%
counterfeiting of currency, including the euro	,4%	,5%	,4%
illicit trade in human organs and tissue	,4%	,5%	,4%
terrorism	,4%	,5%	,4%
Total	100,0%	131,9%	

The EAW offence catalogue is in a way a normative prescription and a practical guidance of what conducts justify issuing a warrant, even if it can be issued for other crimes. It this thus interesting to see that 22,5% of cases do not contain any catalogue offence, and 11,6% contain both. Taking these altogether, 97 cases (34% of all cases) had a total 125 occurrences of non-catalogue offences, making in average 1,29 different non-catalogue offences per case. The non-catalogue offences were categorised and are in the table below.

Table 46: Non-catalogue offences

	%	% of cases w/ non-catalogue offences	% of all cases
theft (simple, qualified, use of vehicle)	22,6%	28,9%	9,8%
simple bodily injury	8,1%	10,3%	3,5%
sexual offences against minors/children	8,1%	10,3%	3,5%
use of forged document	7,3%	9,3%	3,2%
economic, tax- and management-related crimes	7,3%	9,3%	3,2%
illegal possession of weapon	5,6%	7,2%	2,5%
crimes against justice and officers (prison escape and mutiny, false testimony, resistance to arrest, duress over officer, disobedience)	5,6%	7,2%	2,5%
road crimes	4,0%	5,2%	1,8%
threat, coercion, extortion, blackmail	4,0%	5,2%	1,8%
other crimes	4,0%	5,2%	1,8%
damage to property	3,2%	4,1%	1,4%
abuse of trust	3,2%	4,1%	1,4%
robbery (not organised or armed)	2,4%	3,1%	1,1%
other sexual offences	2,4%	3,1%	1,1%
illegal restraint, abduction	2,4%	3,1%	1,1%
violation of alimonial obligations	2,4%	3,1%	1,1%
abuse of means of payment	1,6%	2,1%	0,7%
unauthorised entry, burglary	1,6%	2,1%	0,7%
crimes against honour	1,6%	2,1%	0,7%
receiving, concealing, dealing with stolen or illegal goods	,8%	1,0%	0,4%
other crimes of common danger	,8%	1,0%	0,4%
crimes against privacy	,8%	1,0%	0,4%
Total	100,0%	127,8%	43,5%

Table 47: Non-catalogue offences without an associated catalogue offence

	N (a)	N with no catalogue offence associated (b)	% of cases with no catalogue offence associated (b/a)
theft (simple, qualified, use of vehicle)	28	22	78,57%
simple bodily injury	10	8	80,00%
sexual offences against minors/children	10	6	60,00%
economic, tax- and management-related crimes	9	5	55,56%
road crimes	9	5	55,56%
crimes against justice and officers (prison escape and mutiny, false testimony, resistance to arrest, duress over officer, disobedience)	9	4	44,44%
damage to property	7	4	57,14%
illegal restraint, abduction	5	3	60,00%
threat, coercion, extortion, blackmail	4	3	75,00%
use of forged document	4	3	75,00%
illegal possession of weapon	4	2	50,00%
other crimes	3	2	66,67%
robbery (not organised or armed)	3	2	66,67%
violation of alimonial obligations	3	2	66,67%
abuse of means of payment	3	1	33,33%
abuse of trust	3	1	33,33%
crimes against honour	2	1	50,00%
other sexual offences	2	1	50,00%
receiving, concealing, dealing with stolen or illegal goods	2	1	50,00%
unauthorised entry, burglary	2	1	50,00%

The most relevant non-catalogue offences underlying received warrants on their own are theft (78,6% of warrants for theft had no other offence), simple bodily injury (80%) and sexual offences against minors (60%) In the remaining 40% which have a catalogue offence associated, we found rape and sexual exploitation of children. Some other offences, such as road crimes, damage to property, illegal restraint and receiving stolen or illegal goods, seem even more impressive, never having any catalogue offence associated. However, the low number of observations for these offences deters us from drawing further conclusions.

6.4.2.5. Procedural matters

Considering the purpose of the warrant, one can say Portugal is asked disproportionately more for suspects than convicts. 61,8% of warrants are for purposes of prosecution in the issuing country, 35,8% are for execution of a sentence, while 2,5% are unknown. Taking out these missing cases, this comes close to a 2/3 to 1/3 imbalance between prosecution and execution.

It was possible to assess the specific objective of prosecution for 50 cases, representing 28,4% of prosecution cases and 17,5% of all cases. Of these, 84% were

meant for taking the requested person into custody, and 16% for questioning the requested person.

Table 48: Procedural purpose

	Valid %	Cumulative %
execution of sentence	36,7	36,7
prosecution	63,3	100,0
of which, prosecution for:		
questioning	16,0	16,0
taking into custody	84,0	100,0

These results, with the caution of not being statistically representative, suggest that asking for individuals just to question them, although not widespread, is a practice of some significance. A further look at these cases, which only totalled 8 in the sample, reveals that they were mostly from Spain (7 cases, and 1 from Italy), spanned the whole gamut from petty to serious criminality (maximum sentences uniformly spread from 3 to 30 years), and were almost always approved and executed (6 cases, 1 was approved but not executed, 1 withdrawn). In one specific case, Spain informed that a warrant was issued only to notify the defendant, a Portuguese citizen living in Portugal, that he had been accused in a Spanish criminal process. This is a peculiar example, admittedly residual, of widening the use of the EAW for purposes much beyond its intended scope.

Decisions rendered *in absentia* represented 10,9% of all cases. France seems overrepresented among the countries who issued such warrants, accounting for almost half of them (48,4%), while Spain, who issues 1,45 times more warrants than France and is the main issuer of warrants to Portugal, accounts for only 9,7%. The other countries in the list are among the top ten of issuing countries (except Greece, an isolated case), but other countries from the top ten are notably absent from this list: Germany, the Netherlands, the United Kingdom, Lithuania. The main impression to draw from this is France's apparent inclination to issue warrants for decisions rendered *in absentia* and Spain's lack thereof.

Table 49: Decisions rendered *in absentia* by issuing country

	Valid %	Cumulative %
Not in absentia	89,1	89,1
In absentia	10,9	100,0
of which, issued by:		
France	48,4	48,4
Romania	16,1	64,5
Belgium	12,9	77,4
Italy	9,7	87,1
Spain	9,7	96,8
Greece	3,2	100,0

Table 50: Provided guarantees - decisions rendered *in absentia*

	Frequency	%
Guarantee of retrial	13	41,9
Guarantee of appeal	4	12,9

Decisions rendered *in absentia* enable a country to condition surrender to the guarantee of a retrial in the issuing country. The issuing country is supposed to provide such guarantee at the moment it issues a warrant, through a field in the EAW form. The case files show that guarantees were provided in just 41,9% of cases, and that in 12,9% the right to appeal was also given. In the end the factor of a decision *in absentia* seemed to have little effect in the Portuguese authorities' response: most of these warrants were still approved and executed (64,5%) and only a small fraction was withdrawn (6,5%).

As for seizure of property, such a request was residual, representing only 3,9% of cases. This situation is similar to the one detected for the EAW requests issued by Portuguese judicial authorities.

Lifetime sentences were similarly residual, accounting for 4,6% of cases. Warrants with this provision came from just 4 countries: the United Kingdom, the Netherlands, France and Germany. The guarantees demandable for these cases were not always provided: review was specified in 30,8% of instances, measures of clemency in 61,5%. When they were provided, there was not a clear pattern per country: review was provided by France, Germany and the United Kingdom, measures of clemency were provided by all countries, but not in all their cases.

Table 51: Lifetime sentences

	Valid %	Cumulative %
Non-lifetime sentence	95,4	95,4
Lifetime sentence	4,6	100,0
of which, issued by:		
UK	53,8	53,8
Netherlands	23,1	76,9
France	15,4	92,3
Germany	7,7	100,0
of which, guarantees provided:		
Review	30,8	
measures of clemency	61,5	
of which, guarantees demanded:		
Review	15,4	
measures of clemency	30,7	

The results of the EAW request show that surrender is the rule, and refusal to surrender the exception. 78,2% of warrants were approved and executed, leading to surrender of the requested person. In 10,2% of cases, the warrant was approved but not executed. This happened in cases such as where surrender was postponed due other processes pending in Portugal that were still running, where the requested person fled or presented himself voluntarily to the issuing authorities, where the wrong person was arrested, where the requested person died, where there was a previous request that overruled the current request, among some other situations. In 7% of cases, the EAW was withdrawn by the issuing country; in half of these, it was possible to determine the cause for withdrawal, which was mostly the extinction of the criminal procedure in the issuing country (6 cases), together with cases where the requested person fled or was arrested in the issuing country, many times presenting himself/herself to the authorities.

Refusals were the exception, representing 3,2% of cases. The grounds for non-execution were diverse: *ne bis in idem*, where the requested person had been prosecuted/sentenced for the same facts in the issuing country; double criminality, where the Portuguese authorities considered the offence not punishable by its law; underlying non-custodial sentence; lack of data provided by the issuing country; the EAW request was previous to the enactment of EAW law; underlying offences had prescribed; underlying decision *in absentia* where the issuing country failed to provide for guarantees. The issuing authorities to which Portuguese executing authorities refused warrants were from Spain, France, Italy and Luxembourg.

Table 52: Results of received warrants

	Valid %	Cumulative %
was approved and executed	79,1	79,1
was approved but not executed	10,3	89,4
was withdrawn	7,1	96,5
was refused	3,2	99,6
was forwarded and executed	,4	100,0

At the hearing in a Portuguese Court of Appeal (executing authorities), the requested person is asked whether he/she consents to surrender and whether he/she renounces to entitlement to the speciality rule. Consent is very evenly divided, with 52,6% of requested persons consenting and 47,4% not. On the other hand, requested persons seldom renounce to the speciality rule (9,1% of cases). When requested persons do not consent to surrender, they almost invariably do not renounce to the speciality rule – only in 3 cases did they do so. When they consent to surrender, usually they also do not renounce, though in a minority of cases they do (8,1%).

Table 53: Consent to surrender and speciality rule

	Did not renounce to speciality rule	Renounced to speciality rule	Total
Did not consent to surrender	132	3	135
	46,3%	1,1%	47,4%
Consented to surrender	127	23	150
	44,6%	8,1%	52,6%
Total	259	26	285
	90,9%	9,1%	100,0%

Portuguese authorities requested that the requested person be returned after surrender in 30 cases, or 10,5% of all cases. These mostly concerned Portuguese citizens or residents, and were cases of prosecution (76,7%). In about half of these cases (14 cases, 46,6%), the reason for demanding return was that the requested person had processes pending in Portugal. It is worth noting that in two cases, involving France and the United Kingdom, these countries refused to return the requested person afterwards.

Table 54: Return of the requested person was demanded

	Valid %	Cumulative %
Return not demanded	89,5	89,5
Return demanded	10,5	100,0
of which, nationality:		
Portugal	66,7	66,7
France	10,0	76,7
Brazil	6,7	83,3
Spain	6,7	90,0
Germany	3,3	93,3
Lithuania	3,3	96,7
Romania	3,3	100,0
of which, residence country		
Portugal	87,5	87,5
France	8,3	95,8
Spain	4,2	100,0
of which, purpose:		
Prosecution	79,3	79,3
execution of sentence	20,7	100,0

In 14,7% of cases there were processes pending in Portugal involving the same requested person, most of them involving Portuguese and Spaniards. This situation affected surrender only in part: in 54,8% of these cases the surrender was postponed, in 35,7% the surrender was temporary.

Table 55: Processes pending in Portugal

	Valid %	Cumulative %
No processes pending	85,3	85,3
Processes pending	14,7	100,0
of which, nationality:		
Portugal	40,5	40,5
Spain	23,8	64,3
Lithuania	7,1	71,4
France	4,8	76,2
Romania	4,8	81,0
Brazil	2,4	83,3
Cape Verde	2,4	85,7
Germany	2,4	88,1
Guinea-Bissau	2,4	90,5
Italy	2,4	92,9
Lebanon	2,4	95,2
Poland	2,4	97,6
Serbia	2,4	100,0
of which, situation from pending process:		
serving sentence, incarcerated	64,3	64,3
awaiting sentence, incarcerated	28,6	92,9
serving sentence, not incarcerated	7,1	100,0
Missing		
of which, surrender was postponed	54,8	
of which, surrender was temporary	35,7	

The Portuguese EAW law allows appeals against the detention decision (decision to keep the requested person in detention after hearing and until a final decision) and against the surrender decision itself. Both the requested person and the

PPO can appeal. Appeals were registered in 12,6% of cases, but almost 80% of them were dismissed.

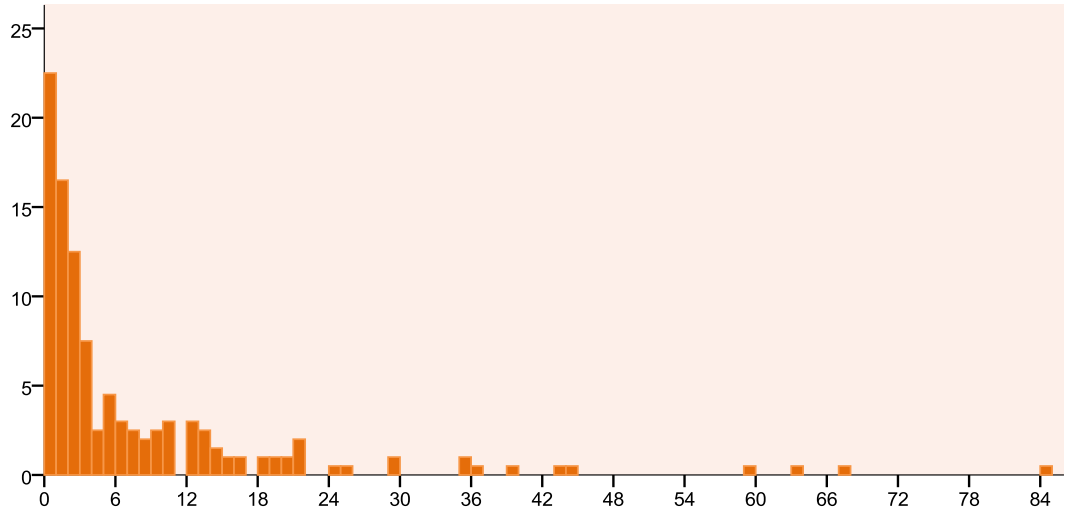
Table 56: Appeals

	Valid %	Cumulative %
No appeal	87,4	87,4
Appeal	12,6	100,0
of which, result was:		
Dismissed	77,8	77,8
Allowed	22,2	100

The time dimension: duration of procedures

In this section we address the received EAW's time dimension. The duration of the actual execution procedure encompasses the time lag that spans from arrest to surrender, but beforehand a foreign judicial authority had issued the underlying EAW request. But although not directly connected to the judicial procedure itself, it may be of interest to assess how long does the requested person stays in SIS, i.e. how long it takes from issuing to arrest. In the chart below we see that detention usually takes place within 6 months after issuing, especially right in the first month. Most may be cases of EAW requests where the requested person's whereabouts were known. On the other hand, SIS insertions where the individual takes more than 2 years to be detected are residual, thus proving the SNO's practice of revising their records every 3 years seems sensible.

Chart 36: Months between EAW issue and arrest



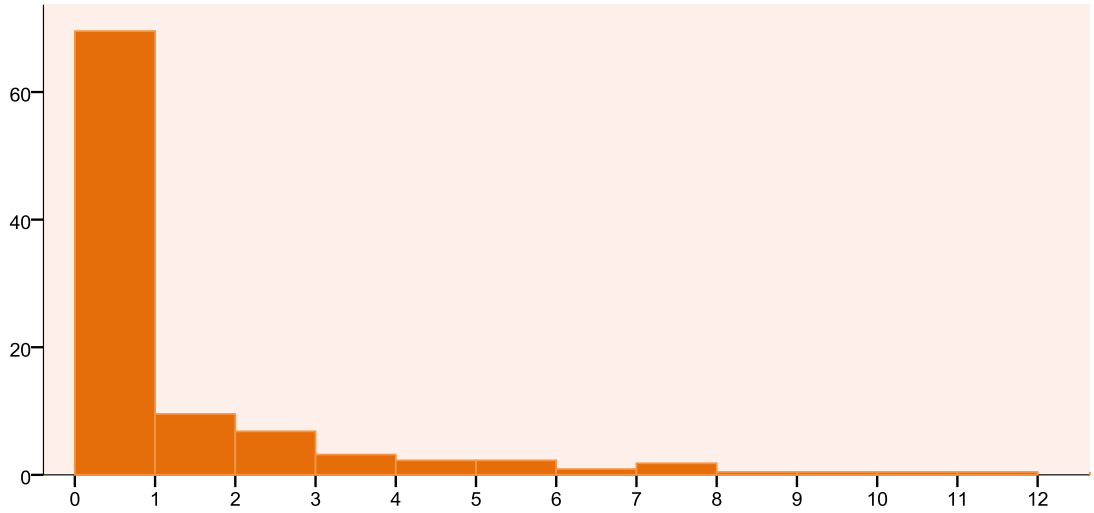
How long does an EAW procedure take in Portugal? From arrest to hearing and from hearing to surrender, we tracked the dates of these moments to produce a chronological portrait of Portuguese EAW procedures. Between arrest and hearing, both the EAW Act and the internal criminal procedure regime stipulate a maximum of 48 hours that for no reason can be breached. In the rare cases when the Court of Appeal cannot hear the detained within said period (in the case of weekends or public holidays), a local court pre-hears the subject, in order to validate detention until the Court of Appeal hears the requested person in the next available date.

After hearing, the judge should make a surrender decision in 10 days, or 60 if the requested person did not consent to surrender. The time that takes between hearing and surrender (i.e. the time it takes for the judicial authority to decide) was calculated between 3 years and 2 months, out of a 218 proceedings' sample containing this data. For more than 2/3 of cases where surrender took place, it took place within a month of hearing; and for 16,4% of them, from one month to up to 3 months. Surrender took 3 and more months after hearing for 14,1% of cases, which was caused by various reasons, such as the existence of appeals, requests for further information or guarantees, or postponed surrender.

Table 57: Months between hearing and surrender

	Valid %	Cumulative %
0	69,5	69,5
1	9,5	79,1
2	6,8	85,9
3	3,2	89,1
4	2,3	91,4
5	2,3	93,6
6	,9	94,5
More than 6 (7 to 38)	5,5	100,0
Total	100,0	

Chart 37: Months between hearing and surrender[192]



As for the duration of the whole execution process from arrest to surrender, which is the sum of the two previous time lapses, the majority takes up to 1 month (71,8%); and in fact usually 15 days when that is the case (59,1%). When they take longer, they will normally take up to 6 months (23,6%), rarely longer than that, though we registered a small number of cases where it happened, including one extreme case where execution took a full 3 years and 2 months until surrender. This was a peculiar case where the requested person, a Portuguese, repeatedly came up with processes in Portugal, in different courts and for different facts, in what seemed a deliberate strategy to postpone surrender indefinitely, which ultimately failed.

Table 58: Duration of execution procedure, from arrest to surrender (in months)

	Valid %	Cumulative %
0	71,8	71,8
1	8,7	80,5
2	6,2	86,7
3	3,6	90,3
4	2,1	92,3
5	2,1	94,4
6	1,0	95,4
More than 6 (7 to 38)	4,5	
Total	100,0	

[192] Values above 11 omitted from this chart.

Chart 38: Duration of execution procedure, from arrest to surrender (in months)[193]

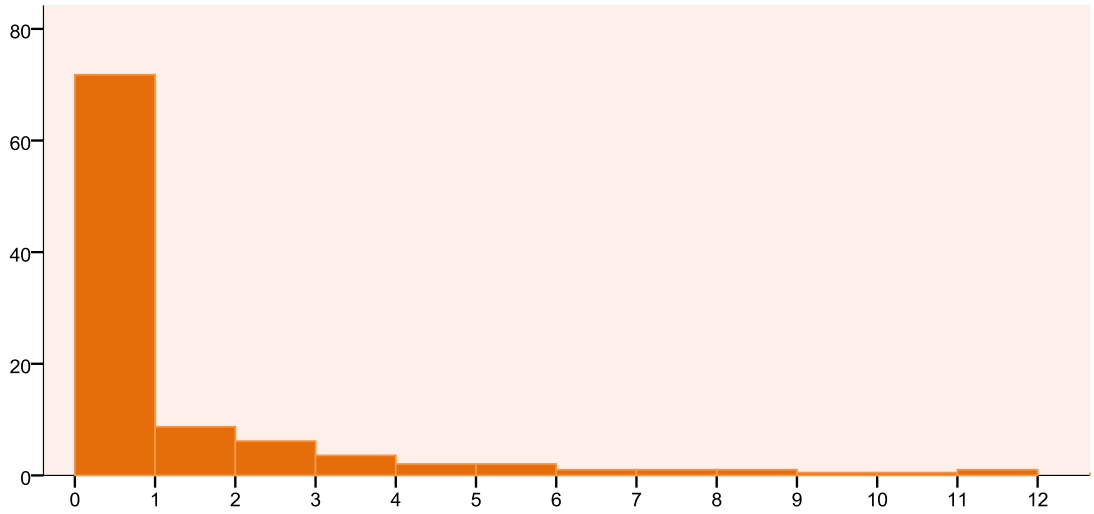
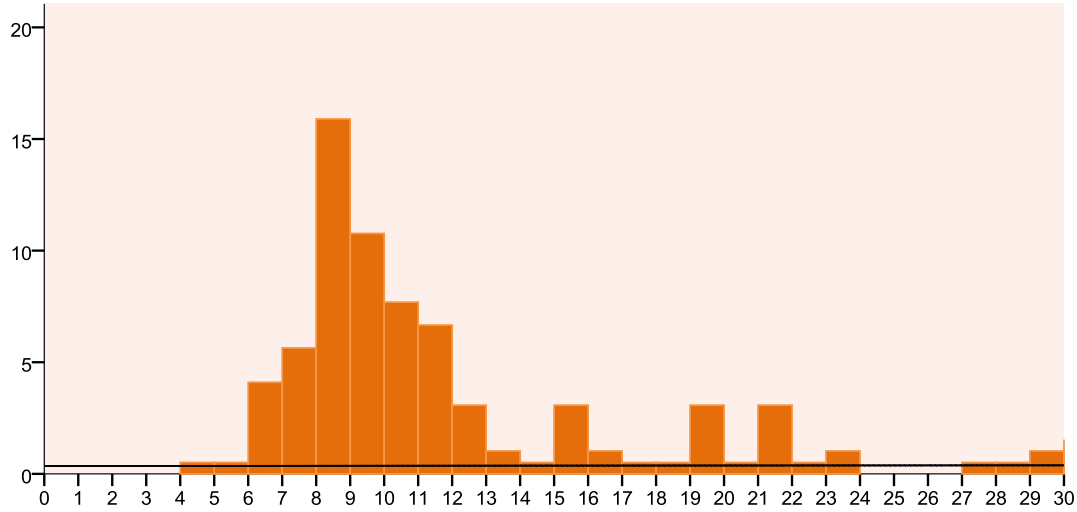


Chart 39: Duration of execution procedure for cases within 1 month (in days)



All in all, we can profile the time flow of the common EAW received by Portugal as such: after arrest, the requested person is heard in up to two days, as mandated by law, and afterwards is surrendered within a month. This profile corresponds to the majority of warrants that Portugal executes; however, there is a significant minority of outliers, about 1/3 in the sample, where the procedure is longer.

[193] Values above 12 omitted from this chart.

6.4.2.7. Concluding remarks

Portugal receives warrants mostly from its neighbouring country (Spain), from the central European area (France, Benelux, Germany) and some eastern European countries (Romania, Lithuania). In terms of the profile of requested persons, it is asked for males aged around 40, usually non-nationals who committed crimes in their home countries (when they are from the EU), or nationals who committed crimes abroad and returned to Portugal. Both of these reside mostly in Portugal, though a few non-nationals do not (mostly French, and some Spaniards). We typify them as (1) national residents, (2) non-nationals who are EU-immigrants residing in Portugal and are looked for crimes in their home countries (Central and Eastern Europeans), (3) non-nationals who fled their homeland to Portugal (French, some Spaniards), and (4) non-nationals who are extra-European Union and reside in a EU member state.

In terms of their procedural status, requested persons are tendentially suspects rather than convicts (about 2/3 to 1/3); when suspects, they are usually requested to Portugal in order to be taken into custody.

In what concerns the underlying criminality, these individuals are sought for offences across the whole spectrum, with a theoretical maximum sentence going from 2 years to lifetime; once again however, they seem to fit into small to medium criminality when looking into the subgroup of convicts with effective sentences, about half the convicts having sentences under 3 years and ¾ of them under 6 years. The spectrum of offences is equally wide, the most frequent being drug trafficking, murder, organised and armed robbery, swindling and theft. Catalogue offences are the most common (3/4), but non-catalogue offences are commonplace and frequently the only ones present (1/4). Among the non-catalogue offences, theft is by far the most frequent, followed by sexual offences against minors and simple bodily injury.

As for procedural issues, we can rely on information for both the pre-issue stages and the post-issue stage of execution, where in warrants issued by Portugal we could only rely on the first. Pre-issue situations such as decisions *in absentia*, seizures of property or lifetime sentences were residual. Looking at the execution process itself, hearing happens shortly after detention, mostly within the 48-hour deadline, and the requested person consents to surrender about half the times, but rarely renounces to the speciality rule. A minority of the requested persons (14%) has processes pending in Portugal, and this usually leads to a postponed or a temporary surrender. Another

minority situation is that of appeals (12,6%), almost always filed by the requested person in order to avoid surrender, and most unsuccessfully (about 4/5).

As a rule, the EAWs result in the surrender of the requested person (4/5), which happens in average within a month of arrest. When not, it is usually because a decision was postponed or the issuing authorities withdrew the request, since warrants are rarely refused on substantive grounds.

6.5. Perceptions

The perceptions of judicial officers involved in the EAW are a crucial element for a global portrait of this instrument, especially to appraise on its guiding principles' substantiation. Taken together with the objective dimension of EAW practice, evaluated through means such as the analysis of case law and of proceedings, it should allow assessing the gap between written law and practice, representation and hard data.

Such a subjective portrait of the EAW was reached in first instance through semi-structured interviews conducted to judicial officers, and a focus group in which participated judges, public prosecutors, police officers, and lawyers. Since a broader evaluation of the officers' perceptions would confer more reliability to the impressions gathered through interviews, an inquiry in the form of questionnaire was also applied to all Portuguese judges at the Courts of Appeal and at the Local Courts with competence to deal with an EAW, i.e. who might had been involved in a process of that sort. The main purpose was to broaden as much as possible the subjects of our survey, in order to collect the maximum of the agents' perceptions.

6.5.1. Opinions of agents

The opinions of agents are in general frankly positive, as the matters of cooperation, efficiency in execution and legal framework do not raise insurmountable problems. Least positive views proved to be mostly related to the protection of fundamental rights and legal guarantees.

Three main issues have emerged from the interviews and the focus group: (1) the EAW's speediness and efficiency in what concerns answering to a request from a judicial authority seeking to retrieve a person within a given criminal procedure; (2) its efficiency in fighting crime; (3) the balance between mutual recognition and the deepening of judicial cooperation *vs* the respect for fundamental rights.

Speediness is unanimously highlighted, especially in comparison to the traditional extradition process. In fact, for our interviewees and focus group participants, the introduction of the EAW undoubtedly represented a definite progress in comparison to the traditional extradition process. The pointed out reasons concern

mostly a procedural improvement, specifically: (1) the hastiness of the EAW procedure, which is related to shorter yet perceived as reasonable deadlines; (2) the simplicity of the new procedure, as present in the EAW Act; (3) the procedural standardization, which is said to bring confidence to both judicial officers and requested persons; and (4) the facilitation of direct contact between entities. In the words of some interviewees:

> The EAW truly made things much easier, hastening and simplifying the procedures. (Public Prosecutor)
>
> It is a much faster procedure. (…) And procedurally simpler, the law is extremely schematic. (…) The law allowed a standardization of procedures which I see as very advantageous. Moreover, everything is much easier on the whole, since the contact between issuing and executing authorities is now direct. In short, for me it is overall easier: for those who issue, for those who execute, and for the requested persons. (Public Prosecutor)

Considering the EAW's **efficiency against crime** within the Schengen Area, the most spread perception among our interviewees and focus group's participants is that it is indeed an effective weapon against crime. Nonetheless, this insight is commonly attached to the opinion that this instrument is mostly used for small to medium criminality.

> (…) experience tells us that in Europe most petty criminality is well handled with the European arrest warrant, and that's all about criminality. The main issue lies precisely there. (Judge)
>
> Well, here at our Court of Appeal, the European arrest warrants that have appeared are mostly… trifle, except for a few murder cases, or drug trafficking, which often is not even transnational… Oh, and the kidnapping of a famous businessman. But the underlying offences are by no means connected to serious, transnational. (...) If the purpose was to combat transnational crime, the aim was terrible. From what I see, the EAW is used for theft, petty scams, bodily injuries, a rare homicide, and trifle drug trafficking. But this is not the law's fault, this is simply due to the fact that there are few cases of organized and transnational crime... At least here, when we have them, they're extremely rare. (Public Prosecutor)

This perception is indeed corroborated by the empirical data collected in the EAW proceedings. On account of this fact and considering the EAW's process characteristics and inherent costs, for many actors this instrument should be reserved for more serious offences, while being effectively complemented by other – less severe – judicial cooperation instruments, more adapted to less serious criminality.

Representatives of the authorities involved in its execution (SIRENE officers and Court of Appeal judges) openly stress how much **cooperation and mutual trust**

are privileged on their daily practice. Nonetheless, proportionality in the EAW's current use is recurrently pointed out as a major concern. A petty use of expensive resources is particularly shadowed by a recurrent concern for the requested person's status. As one interviewee stated:

> The costs may be rather high, and not only in the monetary sense, with translation services, travels, etc., but also in what concerns the professionals' time and, of course, citizens' rights. (...) Sometimes I get the impression many EAWs are issued for petty situations, just for the comfort of some bureaucrat, to keep his/her desk tidy. I can give you an example: a Portuguese judge who issued an EAW for a Romanian woman who had already returned to her home country. She was being accused of theft: the woman had stolen a cream in a supermarket with a price tag of 2,50€. The woman was detained, flown to Portugal and detained again just because of an item worth 2,50€! There's a severe proportionality issue at stake here. (Public Prosecutor)

Notably, the most poignant critiques specifically refer to a much felt difficulty to achieve balance between cooperation and mutual trust, on the one hand, and respect for the requested persons' **fundamental rights**, on the other. The importance of respecting the **principle of proportionality** was widely highlighted in this context.

> We can argue whether the initial legislative option, at European level (…) if it was to have this. Did the European legislator want or not this scope?. (…) For example, a theft of chickens takes place in a foreign village, and it falls under a certain article of their law… The foreign judge then fills in the EAW form, and even if the underlying conduct is not punishable in Portugal I have to execute. (…) The ball is always in the issuing authority's field, he/she needs to ask himself/herself if the case justifies all that will come ahead. (Judge)

A **feeling of powerlessness** surrounds many judges, who feel this judicial procedure has more administrative characteristics than it should, as their role as judges is more formal, their decision power and discretion reduced to a minimum by the FD and its transposition law. The impossibility of refusing a formally "bulletproof" yet materially arguable warrant is a recurrent source of concern.

> What strikes me the most is that both this Framework Decision and the law give very little importance to proportionality. (…) I've seriously considered refusing this warrant based on the principle of proportionality, but then I thought to myself: "Why do I want to play Don Quixote, when the written law restrains me so?" And I ended up sending the man back to Germany for stealing a box of razors from the local supermarket, or whatever (…). The truth is that I could not refuse surrender under article 11, and I didn't apply directly the principle of proportionality because the PPO would most likely appeal to the Supreme Court and they'd just say:

> "Stop thinking, cooperate, and execute this warrant." It would end up being a futile exercise. (Judge)

Already the data collected by the survey conducted to judges showed that the vast majority of respondents feel incapable of refusing an EAW if all formalities are correct, even when they think they should. Notwithstanding, more than 3/4 believes the requested persons' rights are in general sufficiently guaranteed and respected in an EAW procedure. A more or less proactive attitude of executing judges may indeed lead to very different results. If a less questioning approach means a more correct compliance to core legal principles – namely the principles of mutual trust and mutual recognition – is a different issue.

A poignant example was retrieved during fieldwork. An opposite result was achieved at two similar situations brought before the same executing Court of Appeal: two warrants, issued by two different German courts, for prosecution, for robbery allegedly committed by two different individuals, who were foreigners. In both cases, the requested persons alleged there was an identity error, since they carried fake passports bearing other persons' name and further identification. In case A, the judge compelled strictly to the EAW legal regime and the prevalent case law trend (see case law section for further detail). Invoking the principle mutual trust, the presentation of further evidence was refused, and the requested person was surrendered. In case B, judged by a different chamber of the same Court of Appeal, further evidence was presented, including a declaration of the requested person's employer in Portugal, who stated the individual had been working in Portugal and not in Germany, on the precise day, the day before, and the day after the underlying crime had taken place. Placed before this testimony, the executing judge requested the PPO to demand further evidence from the issuing German authorities. At the PPO's special request, they sent the fingerprints collected at the crime scene. This was the piece of evidence that had been matched to the individual titular of the passport, who had a previous criminal record. But the fact was the requested person alleged in his defence that he was not such individual, since he had illegally bough the document. All in all, the fingerprints collected at the German crime scene did not match the requested person's, hence the executing authority refused to execute the EAW. Though it is impossible to know further details on case A, it is patent these were two apparently similar situations in which the judicial actors' proactivity, mostly trough a different understanding of their role within the EAW, led to much different results.

The lack of consecration of a **ground of refusal for humanitarian reasons** is a source of concern, though the EAW Act foresees a temporary postponement "for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health" (article 29, EAW Act). Although the norm is seldom used, during fieldwork the researcher have encountered some situations where severe humanitarian reasons (most commonly, pregnant women/recent mothers who were requested by a foreign authority) grounded long surrender postponements. In one particular case where the requested person was a quadriplegic individual with severe mental disability (both conditions were posterior to committing the crime), the Portuguese executing authority ruled for an *ad aeternum* postponement which can be seen as a groundbreaking *de facto* refusal to surrender. This particular ruling was not appealed by the Public Prosecution Office (PPO), who agreed with it.

Underlying **petty offences**, as referred above, are other source of concern, also when it is perceived by the practitioners that small crimes are too severely punished is some countries. The most common example is warrants issued by Romanian authorities for road crimes, punished with prison sentences of 2 to 3 years. In these cases, the newest countries to be integrated in the EU are perceived as the ones with a greater need to update their criminal laws and judicial system, hence a certain feeling of distrust – which however seems not to be causing refusal of warrants.

> I actually see a distinction there. From my experience, I see that in general warrants from countries that have entered later in the EU have a much summarized description of the offences; most times they just give us their criminal code's norm. (...) And from that I just can't grasp what the actual crime is, which is essential for the double criminality check, for instance… It's stressful, because I just can't work with so few information. (Judge)
>
> That precise situation also happens to me frequently (…), perhaps it's just because they're starting now. (Judge)

Nonetheless, it must be noted, as quasi-anecdotal evidence, that during fieldwork the researches have encountered one recent (and very rare) EAW issued by a Turkish court which met perfectly the highest standards of mutual trust: the issuing authority, without being asked for, provided all necessary documentation and information, and more – including a comprehensive and accurate French translation of all the needed norms, with explicative summaries of the applicable legal regime. Such a care was unique in all of the EAW proceedings analyzed. On the other side of the spectrum, many warrants for petty drug-related offences (most of them from the late

80s and 90s) issued by German authorities were also retrieved, customarily causing further information requests, notably on prescription deadlines.

These feelings of distrust are by no means exclusive to newer member states or to petty criminality. Even when medium to high criminality is at stake, the existence of life sentences, although soothed by parole and other *remedy* options (in countries such as the United Kingdom, where life imprisonment is enforced not only for crimes such as homicide, but also for all sort of sex crimes, among other) creates some reactivity in judges, public prosecutors and police officers, who are not used to deal with – or even *think* of – prison sentences superior to 25 years at its worse. This is closely related to the problems concerning guarantees, which appear as crucial in such a context.

The **poignant differences between systems** (and their compliance, or not, to the rule of law) are often perceived as one of the most important sources of distrust and eventual backlash.

> I want to make a point that has to do with the principle of mutual trust that underpins the EAW. This principle is fundamental, but it assumes that the rule of law in issuing countries is strong and responsible as it is in Portugal, France, Italy and other countries. The problem is that in some countries the rule of law is feeble, sometimes it is very weak! From my personal experience, Romania and Bulgaria, at least these two fellow EU countries, leave me with serious doubts… I have to execute their warrants, and sometimes I feel rather uncomfortable with their requests, with that... (Judge)
>
> (…) this reinforces the idea: the effectiveness of the right of defence between us cannot be dissociated from the extent and effectiveness of remedies – such as the right to appeal from all judicial decisions, but also other. For instance, if I travel to Holland I'll be more worried about the defence at the first instance court, because there is no other instance to re-evaluate my decision, I can't appeal from there. I need to know, I must feel, that although the right to appeal was the ideal situation for me personally, I will have the greatest possible first instance defence if I'm there and an EAW had been issued against me. (Public Prosecutor)

Mutual recognition *per se* without further harmonization is seen as futile exercise, as mutual trust without a minimum legal standard – at the present state, especially in procedural rules and in the EAW regime itself – is not possible. An effective minimum standard of procedural rights, for instance, (as idealized at European level in instruments such as the Council Framework Decision 2009/299/JHA, of the 26th February 2009, but not yet put in practice) is frequently brought up by practitioners.

> We're in the world of judicial cooperation, but a very special one, as it's grounded on mutual trust. It's a cliché, but it's nonetheless true! But unfortunately there's a set of criminal laws to be followed in that state, and other set of criminal laws to be followed in the executing state… And not even in 50 years we'll have a harmonized criminal procedure. (…) What we have here is a conduct, a person and a crime that the issuing state considers to be connected. And we need to cooperate, acting as the issuing state's *longa manus*. There are many things we can't discuss or control, and the major problem is that we must act as if a common European criminal procedure truly existed. And it does not exist! For me, what is needed is to take baby steps. But decisive steps. For the defence, we'd need to harmonize, to create a minimum standard with the five most fundamental rights within a criminal procedure: information, translation, interpretation, appointed defence, and right to be informed of one's rights. This has been tried in the EU and failed miserably, but… That'd be a start! (Public Prosecutor)

As has just been referred, a major point of concern revolves around **the guarantees for surrender**. Most judicial officers consider article 13, of the EAW Act (as well as its FD counterpart, article 5), lacks effective strength: not only the judicial authority who gives the guarantee may not have actual power to enforce it later on; but if said guarantee is not enforced, the executing authority has no power on the subject after surrender, not even being informed on the subject. Such possibilities raise constrictions to mutual trust and consequently judicial cooperation.

> The principle of mutual trust gains a special twist in the matter of guarantees. (…) Who tells me that the issuing entity is not competent to make a certain commitment, such as giving us back our citizen to serve the sentence here, on behalf of the issuing state? I mean, who tells me it is not of the exclusive competence of a certain Ministry, such as the Ministry of Justice, the Ministry of Internal Affairs, or the Ministry of Foreign Affairs? I cannot be sure of anything! (Judge)
>
> For me, it's just not enough to receive a guarantee to trust and give no more thoughts to the subject. (…) For instance, the German PPO tells me "We give you these guarantees", but I must ask "And are you entitled to give us those guarantees? Are they compelling?" (Judge)
>
> What the legislator tells us on article 13 of the Act are in fact two different things: on the one hand, it is assumed that surrender can be refused; on the other hand, there is what I see as a *sprout* of *ius imperium* (of *their ius imperium*) that leads us to accept as true and indisputable a guarantee provided by any foreign issuing entity, thus *forcing* us to accept their word with no further questions, and act accordingly. (Judge)

During fieldwork, the researchers analyzed a proceeding with an extreme case: a Portuguese individual surrendered to France to stand trial, on the condition of being sent back to serve his sentence in Portugal. After a long silence, and at the instance of the requested person's relatives, the PPO at the executing Court of Appeal addressed

multiple information requests to the French issuing court, only to be later informed that the individual had been found guilty and convicted to a prison sentence, which was being served at an unknown prison facility. The issuing court was no longer competent and could not provide further information. There was no more information on this specific EAW proceeding file.

Another subject raising controversy among the interviewed judges concerns the **surrender of a national citizen or resident for the execution of sentence**. The already addressed difficult interpretation, and consequent application, of article 12/1,g), of the EAW Act[194], which judicial officers seem unable to grasp, leaves two possible answers: (1) should the special process of revision of a foreign criminal sentence (article 234, Code of Criminal Procedure) be attached to the EAW process; (2) or the EAW Act directly call forth the execution of sentences' regime, thus skipping the foreign sentence's recognition? In doubt, the ground of refusal is not convoked, and the requested person is simply surrendered.

> In my opinion, the law presents several problems, but they're surmountable… The worse for me is the void within §g), from article 12, number 1. What "Portuguese law" law is that? I mean, there's no easy way of solving this problem, or at last can't think of one. (Public Prosecutor)
>
> Indeed, the EAW has never been thoroughly regulated. And in this case when a national is requested to serve a foreign sentence it's particularly complicated, I mean… (Judge)
>
> The FD was transposed in a way our own law ended up way too generic. For me, there is a very large casuistic extent in each individual case assessment. And I believe sometimes there is a lack of harmonization between the law and the speed the EAW as a new instrument aims to inculcate to the proceedings. The specific situation we're addressing now allows nationals to serve their sentence here, if they wish so, thus surrender being refused. It's an optional ground of refusal. But this first situation should be compatible with another situation, a situation that has to do with the commitment the executing State has in ensuring a legal process, a different process, for the penalty to be enforced here. And it implies the recognition of the foreign sentence, its execution, and so on. An alignment with the EAW is not easy. At first sight, it seems that the EAW exists only for surrender purposes, I mean, that it will only decide, and only has to decide, if the requested person is surrendered or not to

[194] Article 12

Grounds for optional non-execution of the European arrest warrant

1 - The execution of a European arrest warrant may be refused in the following cases:

g) If the arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in the national territory, has the Portuguese nationality or lives in Portugal and the Portuguese State undertakes to execute the sentence or detention order in accordance with **Portuguese law**. (our emphasis)

> the issuing State. The point is that there's more to than that, and in the end the EAW process is too restricted, and actually not suitable for other procedures that are necessary too. After all, the decision to surrender or not needs to be sustained in various elements found in the proceeding itself. Typically, in this sort of proceeding, inside the actual file, we find the accusation and the request for criminal prosecution, or in this case, the actual sentence. For the execution of sentence, I mean. These documents can be enough to decide in many cases, but some other formalities may be needed. Like in this case of surrendering a Portuguese citizen to serve a foreign sentence… Because in the end… In compliance with our system, we would need a kind of executing process grafted on the EAW process. And this is not easy to accomplish because the law isn't clear. And because the two of them just don't match. They don't match even in a matter of time, of the EAW deadlines, which prove to be too short in these cases. The whole picture ends up being lacunose and incongruent. (Judge)

When problems arise on **legal interpretation** of the EAW Act, a common rescue for our interviewees comes in the form of the FD. I.e., when in doubt most turn to the original text and succeed in finding an adequate answer in it. That being said, a few problems on the EAW Act text were systematically pointed out, most of them seen as failures on the FD's transposition.

> Whenever in doubt, I turn to the Framework Decision. (…) to tell you the truth, for me, the translation or rather the transposition of our law was not very accomplished. The translator was very unfortunate in some steps. But in the end there's always a solution for every problem, if one tries hard. As I said, if in doubt go to the Framework Decision, the original version. (Public Prosecutor)

A lack of official and easily **accessible sources of foreign criminal – substantial and procedural – laws** is also referred by some judges and public prosecutors, though their proactivity seems to be counterbalancing this deficiency. A common, updated, easily accessible and if possible translated source of criminal legislation from the different member states is seen as highly desirable by many, especially from the side of defence. A frequent reflection was that if a correct application of the EAW legal regime demands the knowledge of the issuing country's laws, it would be logic to provide easy access to them.

Another related matter is **training**. On the training of judges and public prosecutors, some of our focus group participants and interviewees consider the initial training provided by the Centre for Judicial Studies is currently appropriate.

> What I'm saying is that we've achieved rather good standards in initial training. (Public Prosecutor).

> (...) as for me, the training at the Centre of Judiciary Studies provides very good bases. (...) But some just seem to forget what they learn. (Judge)

As for their continuous training, the lack of offer is almost unanimously pointed out, in accordance to the opinions retrieved on the survey conducted to judges.

> The offer in continuous training has been decaying a lot in the judicial cooperation area. The last year there was none, for instance. (Public Prosecutor).
>
> In terms of training of judges in implementing the EAW I'm convinced that most judges, despite not having either conditions for (…) or lack of information would like to have more. Sometimes they don't want to. I accept that, but… A few judges can access to the continuous training sessions provided by the Centre for Judiciary Studies, if they're high enough on the list. And that's all about it! There is no other offer. This is very serious! We're talking about an instrument which entered into force over five years ago… Even in publications, we only have very few articles, from judicial actors, on the EAW subject, event on international cooperation, or mutual recognition… With this, we're not at third pillar level. (Judge)

In spite of this scenario, some agents have highlighted that practical experience and learning is crucial, as or more important than good theoretical bases without further application on daily practice. For said actors, training courses on the subject would therefore need a highly practical approach. In addition, further knowledge of foreign experiences, as well as the need for continuous training together with lawyers, is highlighted, since they are perceived as beneficial for all parts involved.

> What's important isn't to stay closed in a room listening to gibberish. What's important is daily practice, is to embrace daily these issues. Things are solved in everyday practice, as they appear. For me, the field of international judicial cooperation is a very practical one, you know! From my experience, that's the way to learn: one learns how to cooperate by cooperating. (Public Prosecutor)
>
> (…) I won't stop fighting for more and better training. Permanent, continuous training is inexistent in this area. And should take place together with lawyers. This is essential and has not yet been done. (Public Prosecutor)

In fact, the lack of training courses' offer is also patent for lawyers. Nonetheless, it is also recognized that this class' interest in such a specific subject may not be much, as EAW procedures are rare, and therefore a not very rewarding investment for the average lawyer.

> From my own experience, I believe lawyers are neither aware nor interested in these cooperation issues, and specifically in the discipline of the European Arrest Warrant. (Public Prosecutor)
>
> The main issue on the training of lawyers on these matters is no other than motivation. I don't think they have any motivation for it (…) There's not market, an EAW is very rare, and when one indeed appears is always urgent and not very opportune, as the lawyer must stop other issues to pay attention to this urgent procedure. (…) Therefore there's no sense of "habit" that creates an actual "need" in the lawyer. (Judge)

Probably on account of this, the **quality of defence** – or rather the lack of it – is commonly referred as well, the average lawyer's knowledge of the EAW legal regime being deemed as feeble on several occasions. For instance, during fieldwork, there were reported cases where the defence lawyer had no precise notion of the principle of speciality, and the implications of refusing or not its application.

> For the very precise aspects of the lawyers' training, there's an unbeatable "barometer": the principle of speciality, do they know what a refusal implies here? (…) Is there such a lack in their training? (Judge)

However, it must be taken into account that many times the nominated defence lawyer has very little time to study the proceeding and to conference with the requested person, which naturally brings added difficulties to his/her action.

Nonetheless, evidence of first instance judges' lack of knowledge was also detected during fieldwork. According to the figures provided by the SNO, in 2009 the SNO received 340 EAW forms (including repetitions and corrected versions), from which a little over 170 were effectively inserted in SIS under article 95.º. From the EAW forms received from January 2010 until now, in a total of 220, 118 were validated. For SNO's officers, at least 40% of the EAW request forms received by their services suffer from flaws such as errors and omissions, and subsequent alterations. The most common flaws that imply a straightforward refusal by the SNO concern the execution of a fine or a prison sentence inferior to 4 months, or an EAW request in which the underlying offence is punishable with a prison sentence inferior to 12 months.

Other frequent cases are EAW requests just to apply the requested person *termo de identidade e residência* (an injunction imposed to the defendant that complies him/her to provide his/her identity and home address to the court) or to notify him/her of a given procedural act. Sometimes national arrest warrants of international arrest warrants are mistakenly sent to the SNO for insertion. Finally, forms which are altered (i.e. in which one or more fields are deleted), incomplete or inexistent descriptions of

the facts, forms with incoherent/contradictory information, or forms written directly in a foreign language are also found. Several of these examples can be found in the SIS insertion requests refused by the SIRENE National Office. A particular poignant one retrieved during fieldwork featured a very recent written notice addressed to the SIRENE National Office, in which a first instance judge simple ordered the issuing of an EAW and consequent SIS insertion of six listed individuals.

Training deficiencies, moreover, the system structures' *unpreparedness* is thus reflected on daily practice.

> I notice a great lack of knowledge and of training in judges – in what the EAW is concerned. (…) Many times they show to have no knowledge, they don't even comprehend what an EAW is. It's very disturbing, especially considering how many years the EAW has been around. (Police Officer)

For some interviewees and focus group participants, the defence's role would profit from a remarkably different approach to the EAW process: to see this **process as a whole, unitary criminal process both in the issuing and executing member states.** Which would gather useful information for everyone involved, especially the requested person's defence in the executing country – thus overcoming severe difficulties sensed by both lawyers and executing judges due to insufficient information in the EAW form.

> (...) We need to think in what truly an EAW is. We were talking about one defence lawyer there and one defence lawyer here, about a proceeding there and one here, and the problem lies precisely there. We're not seeing the EAW process as a whole, continuous process. It is one tree with two branches: a branch is in the issuing state and the other in the executing state. (…) As an executing authority, we deal with an EAW request as a procedural appendix when we don't have appendixes, if we look farther there's just one sole process, and there should be one sole procedure, and one sole proceeding file with all the information. We should fight for a unitary process by creating more and more mechanisms that help building that unity. (…) For instance, on the guarantees of defence. (Public Prosecutor)
>
> From the defence's point of view, the main problem in the executing state is information, access to information. For instance, to invoke the *ne bis in idem* the lawyer can't do anything without further information. (…) It is essential that the lawyer here contacts the lawyer there, if the requested person knows who he/she is, it's possible, if not… (Lawyer)

On this subject, direct contact, not only among judges/public prosecutors but defence lawyers (lawyers from the original criminal procedure and from the EAW

procedure) is sensed as highly beneficial, being effectively sought by some, and seen as highly desirable for the vast majority.

Solutions gathered during fieldwork range from adding a field to the EAW form for information on the issuing country's lawyer's name and contact (when there is one), to the creation of effective supranational contacts/protocols of various kinds between Bar Associations.

Another affair of major concern orbits the use of foreign languages, i.e. **translation**: difficulties in accessing translation services (especially quality ones) were emphasized throughout our fieldwork. Problems were general and sensed by public prosecutors and judges (issuing and executing EAWs), by officers at the SNO, and by defence lawyers (who also refer the requested persons, especially during questionings or hearings). Paradoxically, lower quality translations were more common in more common languages (such as English and French), though (perhaps because) translators/interpreters for such languages are easier accessible. Nonetheless, the actors' perceptiveness of low quality translations in these, more common, languages may be connected to the fact that errors are more easily detected in them because said actors have some knowledge of them. Not necessarily that the translations for/from other languages are better: their quality, or lack of it, might as well just not be so easily detected. Evidence collected during fieldwork accounts not only for frequent poorly translated EAW forms (most of them received ones), but even translated forms that *did not follow the form's form*. Several forms present in the analyzed proceedings were barely readable. Once again, the actors' proactivity in this field must be underlined. When in doubt, they attempt to interpret and translate the original documents, with the help of previous knowledge, dictionaries, foreign laws and doctrine books, etc. Therefore the existence of a body of high-quality official translation services, accessible in different bodies and to the various intervenients, was almost unanimously defended. Such a solution would indeed overpass several constrictions (already addressed in the legal framework section) felt by the entities involved in the EAW circuit, such as first instance courts, courts of appeal, and the SIRENE National Office. As for warrants received by Portuguese authorities in poor linguistic conditions, the actors reckon such problems would have to be solved at a higher level, perhaps with a common similar solution.

As a remedy for this and the other referred problems in the issuing of warrants by Portuguese authorities, some practitioners question the option for a **total dispersion in the issuing competence**. A central authority with exclusive

competence to receive and control requests from all Portuguese criminal courts and PPOs, which would then issue the EAW to the competent foreign authority, was discussed by some actors heard during fieldwork. For them, such entity would be either a superior court or the Public Prosecution General Office.

> There should be an entity centralizing everything (…) and they'd also have privileged communication channels with the foreign entities, because at the other Member State there'd be another entity centralizing information. (…) It could be a superior court, and there they could control the issuing. (Lawyer)

Nevertheless, for some actors this recentralization would mean a significant step back in the way of European judicial cooperation and mutual trust, as the direct contact between issuing and executing authorities is perceived as highly beneficial. For these practitioners, the needed quality control could also be achieved by other measures, such as mandatorily placing a judge or public prosecutor in all SIRENE National Offices (as defended for the Portuguese case), since the SNO's legitimacy (and, in consequence, the EAW's legitimacy) would be better achieved if that situation were reinstated in Portugal and applied in all member states. In the words of a judge:

> One way to build some of that needed confidence – both internally and internationally – would be to re-instate a public prosecutor instead (...). I don't discuss the service's quality, but I believe it'd be most helpful, since it'd be easier to address both public prosecutors and judges… It would give the SNO a completely different authority before the courts. (Judge)

6.5.2. Survey

The main purpose of applying a survey was to gather the broadest number of actual perceptions on the EAW, specifically its field application, its efficiency, and the requested persons' status, as well as the concretization of the underlying principles of cooperation, mutual trust and consequent mutual recognition.

As said above, this inquiry in the form of questionnaire was applied to all judges of local courts and courts of appeal abstractly competent to deal with EAW, i.e. with criminal competence at the first and second instances (which, we advert, does not mean they had actually dealt with this instrument). It was sent to 798 recipients, of which 133 answered, at an answer rate of 16,7%. As for the respondents' distributions, 2/3 of all answers were retrieved from local courts, and the remaining 1/3 from the Courts of Appeal. Judges at the Criminal Chambers of the Courts of Appeal answered

proportionally twice as much: 150 surveys were sent to the latter, and 46 answers were obtained (answer rate of 30,7%); 648 surveys were sent to the local courts with criminal competence (answer rate of 13,4%). As for the results' reliability, the confidence level is of 95%, with a margin of error (by default) of 7,76%. Specifying by court: for the local courts, the margin of error (by default) is of 9,78%, and for the Courts of Appeal 12,07%.

6.5.2.1. Experience with the EAW

The respondents' experience with the EAW was scarce: 34% of them had never issued or received an EAW. Nonetheless, those actors chose to answer our survey and give their opinions, which were taken into account. At the Courts of Appeal, only 30,4% (14 out of 46) of respondent judges from the Criminal Chambers dealt with this sort of procedure. The distribution by type and purpose of the warrants dealt by our respondents is shown in the table below.

Table 59: EAW processes by type and purpose

	N	% of respondents
issued	87	65,4
for prosecution	33	24,8
for execution of sentence	63	47,4
unknown	7	5,3
received	14	10,5
for prosecution	3	2,3
for execution of sentence	8	6,0
unknown	4	3,0
neither	45	33,8

6.5.2.2. EAWs issued during the previous year

As for the number of warrants issued by local court judges during the last year, we see this sort of procedure also occurs rarely in these actors' daily practice. The figures are as low as expected: judges who effectively issue an EAW do it only occasionally in a year. The answer rate was quite reasonable: 65,5% of those who issued warrants provided a number, 24,1% did not know, and 10,3% did not answer.

Table 60: EAWs issued during the last year

	Valid Percent	Cumulative Percent
0	8,8	8,8
1	31,6	40,4
2	31,6	71,9
3	8,8	80,7
4	10,5	91,2
6	7,0	98,2
10	1,8	100,0
Total	100,0	

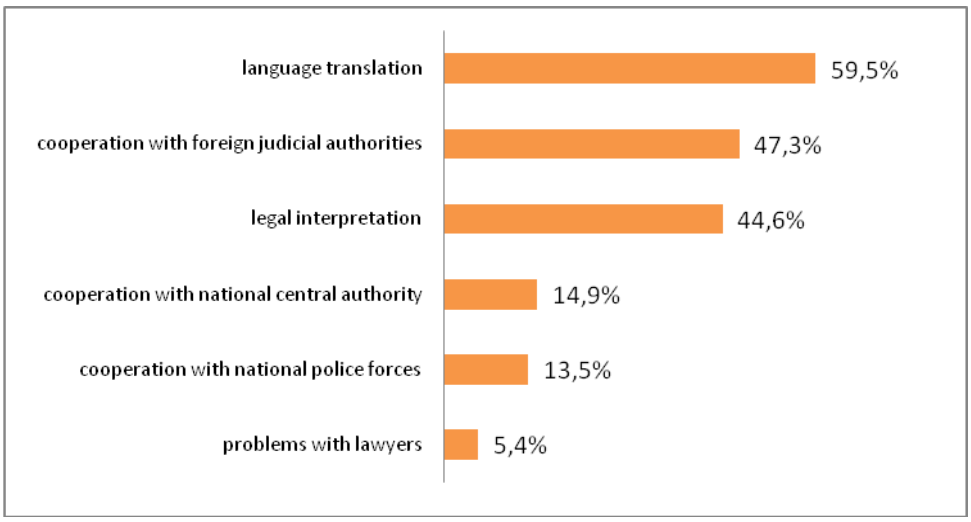
6.5.2.3. EAWs received during the previous year

In this section very few answers were obtained: 8 out of the 14 judges who had received an EAW provided a number, while 3 did not know, and other 3 did not answer. Therefore these results should be read with caution, since they are only indicative. Nevertheless, we may conclude that executing judges seem to receive as few warrants per year as those who issue them.

6.5.2.4. Difficulties encountered

One of the matters we have tried to identify concerned the difficulties felt by these judicial actors on their daily practice when issuing/receiving and EAW. 44,4% of our respondents did not identify any difficulties in their daily practice with the EAW. Judges at the Criminal Chambers of the Courts of Appeal are twice as likely not to find them. Of those respondents that did identify difficulties, the most referred are concerned with translation, cooperation with foreign authorities, and legal interpretation. Analyzing by type of judge, we see that the cooperation with foreign judicial authorities, the national central authority, and the police forces were felt more by local court judges, while problems with lawyers seem to be exclusive to the Court of Appeal judges. Taking into account the interviews and the focus group, these judges feel that asking and obtaining further information can prove problematic when executing an EAW.

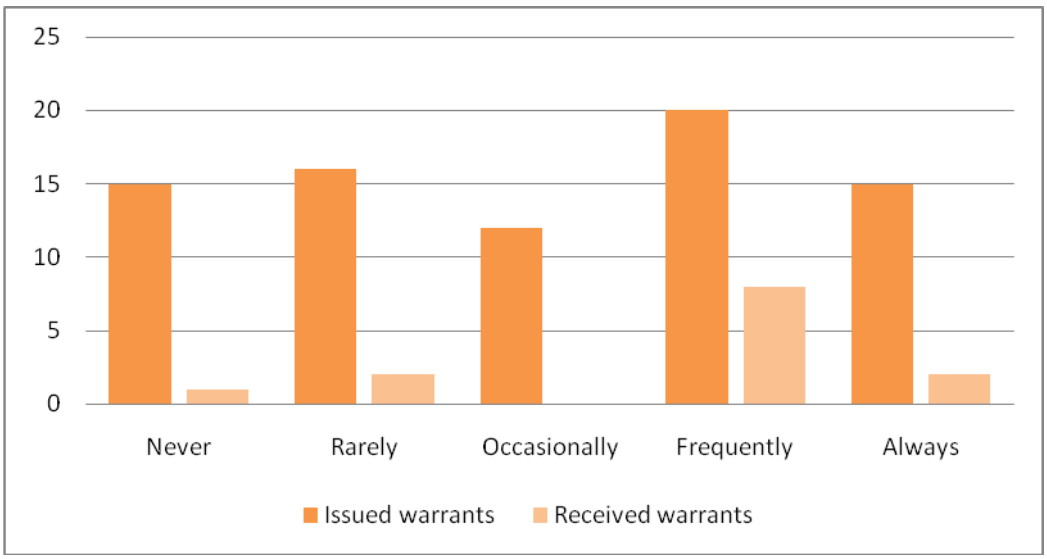
Chart 40: Difficulties encountered



6.5.2.5. Outcome: how often was the requested person effectively surrendered?

As expected, the answers on this subject vary according to the type of judge responding. For the judges who issued warrants, opinions are diverse: 39,7% say the requested person is never or rarely surrendered, 15,4% opine he/she was occasionally surrendered, and 44,9% say he/she is frequently or always surrendered. Here lies an interesting comparison to the empirical data collected from the EAW proceedings: the proceedings' analysis shows that about 1/3 of all issued EAWs do not lead to surrender, and it is indeed a comparable proportion to these sceptical judges. As for the judges who receive warrants, the perception that surrender effectively takes place in the majority of cases seems to be dominant, but the low number of retrieved answers invites caution. Nevertheless, once again, the comparison with data retrieved from proceedings at the Courts of Appeals concurs with these respondents' perceptions.

Chart 41: Result of the EAWs



6.5.2.6. Duration of procedures

In what concerns the duration of an EAW procedure, few answers on the subject were retrieved: 45,9% of respondents did not know or did not answer. Most of these silent respondents (40,6%) were local courts judges at the almost all 1st instance judges. For the ones who actually answered, their perception is that the usual procedural duration is of one month: about half of respondents answered so. It is interesting to notice that, in accordance to the hard data collected from the proceedings, as well as the perceptions of interviewees and focus group participants, legal time frames and deadlines appear to be respected.

Chart 42: Duration of procedures

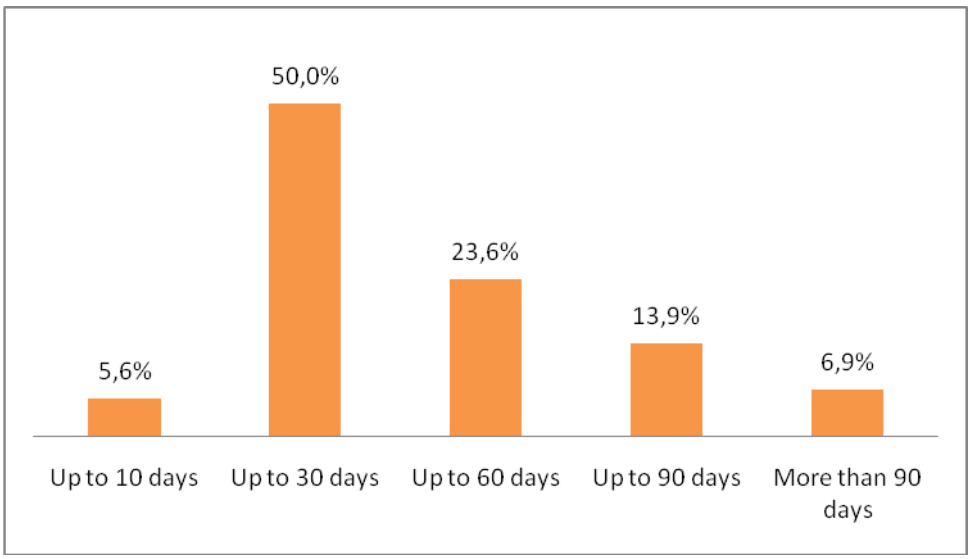
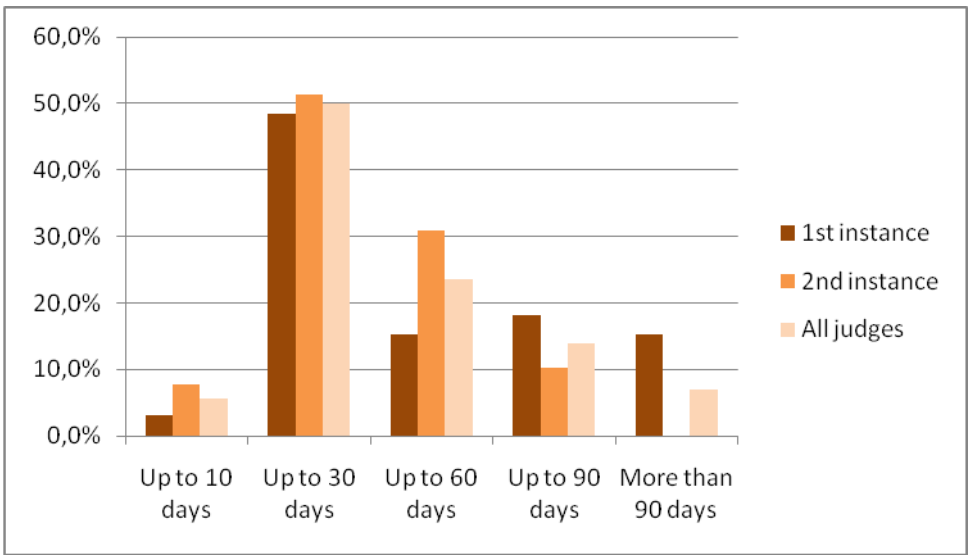


Chart 43: Duration of procedures (by type of court)



6.5.2.7. Other opinions

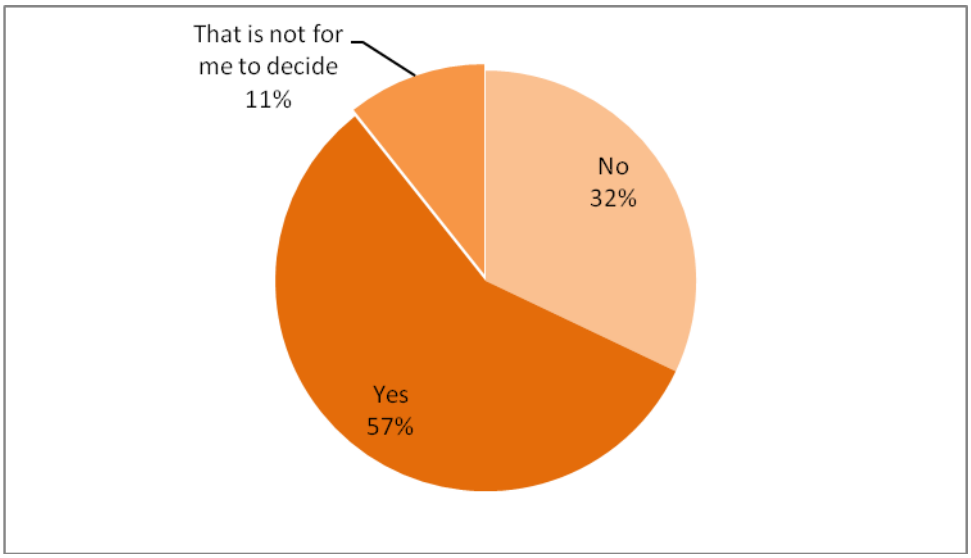
Use of the EAW for small criminality

As previously referred, some critics raised by authors and practitioners specifically concern the use of this instrument to pursue criminality of small to medium criminality, hence the choice of this questions for our survey. Nonetheless, we must underline that the now presented opinions are naturally influenced by the legal framework (which allows this practice), as well as the lack of a correspondent, but less

severe, instrument to pursue less serious criminality, so they must be viewed in close relation to the perceptions gathered in a discussion environment (i.e. interviews and focus group), which are significantly different.

As observed in the chart below, the majority of respondent judges (57%) agree with issuing an EAW for small criminality, i.e. offences punishable with prison sentences with duration of a 1 year maximum. Local court judges are more favourable (64%). Notice the executing judges refrain more from stating their opinion (21% *vs* 6%).

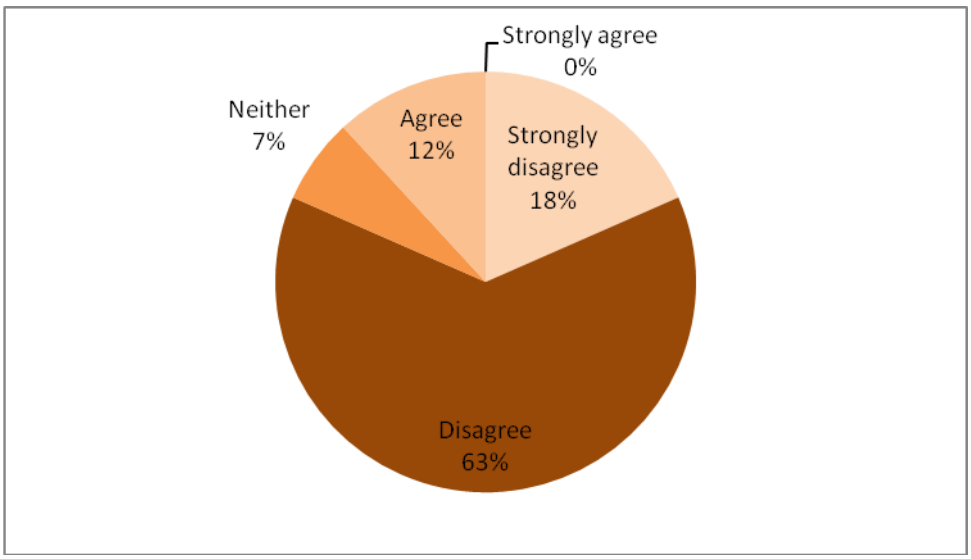
Chart 44: Use of the EAW for small criminality



Power to refuse an EAW

The feeling of powerlessness is overwhelming: the vast majority of respondents (81,6%) feel incapable of refusing an EAW if all formalities are correct, even when they think they should. Such a sensation is based on the already referred concept of form before content, which underlies the quasi-automatic and administrative actuation that seems to be expected from an executing authority in most occasions.

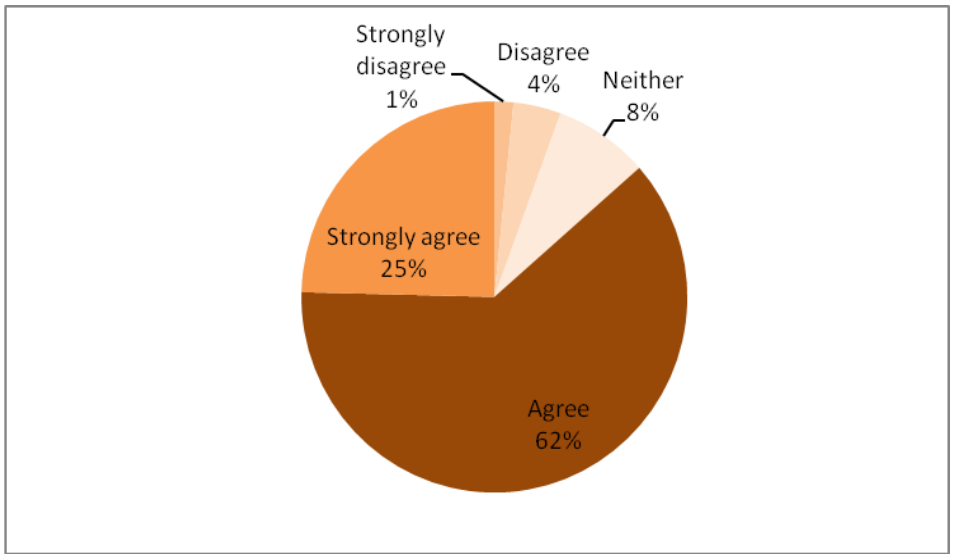
Chart 45: Power to refuse an EAW



Respect for fundamental rights

Notwithstanding, a clear majority of respondents (more than 3/4) believes the requested persons' rights are in general sufficiently guaranteed and respected in an EAW procedure. Nevertheless, it must be taken into account that these answers mostly refer to the respondents' experience with his/her own proceedings, and that in a context of discussion (interview/focus group) further interrogations and worries came to light.

Chart 46: Respect for fundamental rights



Effectiveness for judicial cooperation and in combat to crime

The respondents' positive outlook on this instrument's effectiveness: the vast majority finds the EAW effective in strengthening judicial cooperation and in combating serious crime, namely transnational crime.

Chart 47: Effectiveness for strengthening judicial cooperation

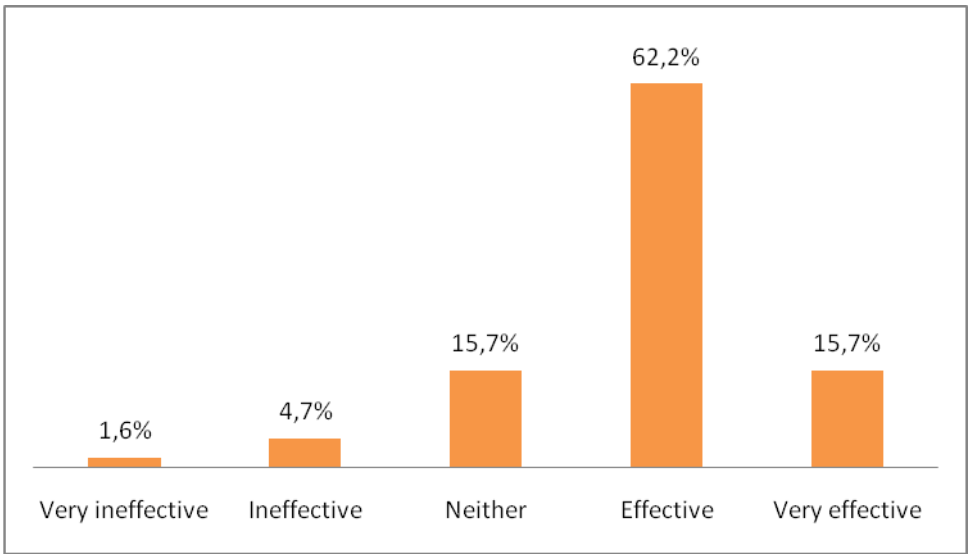
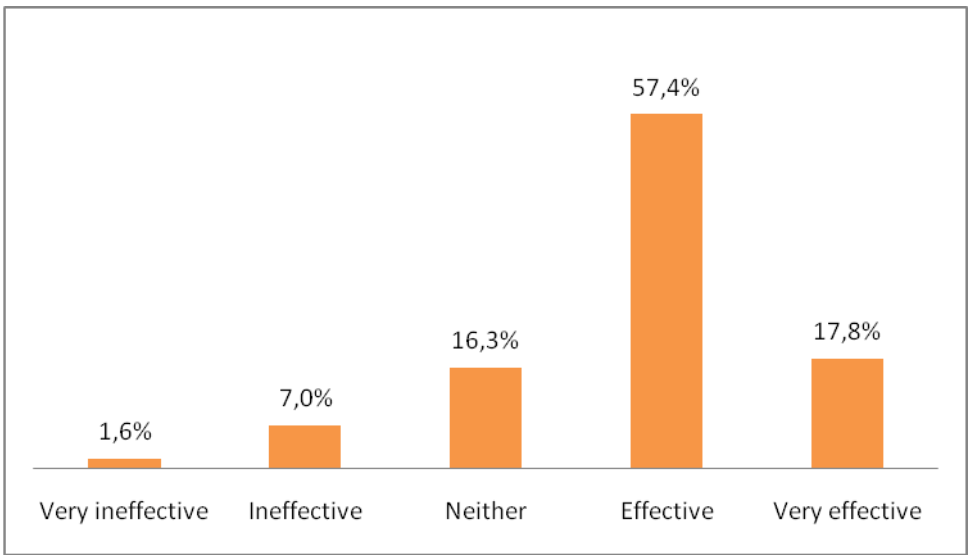


Chart 48: Effectiveness for the prevention and combat to serious crime, namely transnational crime



Training

Though almost all respondents (95,4%) find a training course on the EAW and European cooperation matters useful, 69,5% of them have never participated in a course on this subject.

Table 61: Participation in a training course on the EAW

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	91	68,4	69,5	69,5
	Yes	40	30,1	30,5	100,0
	Total	131	98,5	100,0	
Missing	N/a	2	1,5		
Total		133	100,0		

Table 62: Usefulness of a training course on the EAW and European judicial cooperation

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	6	4,5	4,6	4,6
	Yes	125	94,0	95,4	100,0
	Total	131	98,5	100,0	
Missing	N/a	2	1,5		
Total		133	100,0		

As previously addressed, the issue of continuous training arises as a potential constraint in the use of this instrument, not only in a perspective of effectiveness (the multiple flawed forms that reach the SNO are an evidence that cannot be overlooked), but and foremost in what the requested persons' status is concerned.

6.6. Conclusions

The Portuguese EAW Act, Law 65/2003, is one of the earliest transpositions of the Council Framework Decision no. 2002/584/JAI, 13th June, as it was enacted on the 23rd August, 2003, and came into force on the 1st January, 2004. We meet a very condensed, concise diploma, whose text is remarkably close to the FD's. Most articles of the transposition law are a sheer translation, starting in article 2, which presents the same 32 catalogue of offences which spare the verification of double criminality.

The optional grounds for non-execution remain the same, and remain optional, therefore left to the discretion of the executing judicial authorities. In the mandatory grounds for non-execution, the EAW Act adds to the patent in the FD the situations where the offence is punishable by death penalty or any other penalty causing an irreversible injury to a person's physical integrity; and the arrest warrant has been issued on account of the political opinions of the individual, ideas presents in the FD's preamble.

As for the guarantees for surrender, since the practical effect of the normative are arguably dim, national doctrine is not unanimous on its effectiveness (i.e. compulsoriness). Nevertheless, it is interesting to note that two of the three guarantees demandable by Portugal as executing state are turned from optional into mandatory: possibility of retrial for decisions *in absentia*, and review in case of lifetime sentence.

The procedural concretization is, as expected, where the transposition law adds more to the FD discipline. This is especially true in what concerns the right to appeal, a regime which differs greatly from most member states. An appeal may be filed against both the decision to maintain the detention or to replace it by another coercive measure; and the final decision on the execution/non-execution of an EAW request. To both these situation, the Supreme Court (Criminal Chamber) is the competent forum. In addition, it is also possible to appeal from the decision of issuing an EAW request, when it is issued by a judge.

Though strong constitutional questions were not raised, both during the legislative period and after the EAW Act entered into force, some strictly legal mishaps concerning the regime of grounds for non-execution and guarantees for surrender deserve a final warning: (1) the incongruence between the applicability scope of the

EAW and the optional ground for non-execution foreseen in article 12, no. 1, g); and (2) the lack of a directly foreseen applicable legal regime concerning the execution of a foreign sentence in Portugal when the requested person is a national. We also find a mishap concerning the guarantees to be provided when the decision underlying the EAW was rendered *in absentia*: the possibility to appeal was added to the already foreseen right to a retrial. The practical implications differ considerably if Portugal is the issuing or the executing member state. In the 1st case, compliance to Portuguese law may become problematic, since the guarantee of retrial is not foreseen by the Portuguese Code of Criminal Procedure in cases of a judgment *in absentia*, but solely the right to appeal, and so in such cases the Portuguese issuing authority cannot offer the guarantee of retrial, but solely the right to appeal. If the situation is the opposite, i.e. the executing authority is Portuguese, no problems seem to arise, since the ambit of cooperation is actually broaden.

One final note concerning national case law is due. The rulings on this subject present peculiar traits, reflecting in written word the judicial officers' approach to the EAW. Its main trends can be thus summarized. Both for the executing authorities (Courts of Appeal), and for the Supreme Court of Justice, EAW requests are in principle executed, and to be executed. Optional grounds of refusal are exceptionally used, hence revealing a judicial practice that undoubtedly promotes cooperation. Mutual trust and mutual recognition are the general principles recurrently convoked to ground decisions.

As for the profile of the individuals requested by Portuguese judicial authorities, their socio-demographic characteristics are in all aspects identical to the general profile of requested persons and inmates in the country: the average requested person (mirroring the average requested person and inmate) is male, aged between 21 and 50, and mostly Portuguese, starting with non-resident nationals followed by nationals who were residents and fled, and then entering foreigners who were residents and fled (e.g. Brazilians and CPLP nationals), and non-resident foreigners (e.g. Spaniards, Romanians).

The destination countries of EAW requests issued by Portuguese judicial authorities are mostly near, in what geography (Spain) and settling of Portuguese communities (especially France and the United Kingdom) are concerned.

The underlying offences are very diverse, but the most common one is clearly drug trafficking, which is followed by organised and armed robbery, murder, theft,

participation in a criminal organisation and forgery/trafficking of documents. Notice that only theft does not belong to the catalogue. Catalogue offences are the most common (2/3 of cases), but other offences are sometimes the only ones underlying a warrant. These are mostly punishable with prison sentences inferior to 6 years (close to 3/4) and very rarely going over 10 years.

As for the outcome, almost ¾ of the analysed proceedings ended with an effective surrender of the requested person. When the requested person is detected but is not surrendered, it is usually because the issuing authority lost interest in executing the warrant or surrender had to wait for processes pending in the executing state, and not for the existence of grounds for non-execution.

Portuguese executing authorities receive EAWs mostly from Spain, but also from the central European area (France, Benelux, Germany) and some eastern European countries (Romania, Lithuania).

The individuals Portuguese judicial authorities are asked for differ from the one previously addressed: sketching the profile of requested persons, we find males aged around 40, who are (1) national residents, (2) non-nationals who are EU-immigrants residents in Portugal, looked for crimes in their home countries (Central and Eastern Europeans), (3) non-nationals who fled their homeland to Portugal (mostly French, but also Spaniards), and (4) non-nationals who are extra-European and residing in Europe. In terms of their procedural status, requested persons are tendentially suspects rather than convicts.

In what concerns the underlying criminality, these requested persons are sought for offences punishable from two years imprisonment to lifetime sentences. However, once again the offences at stake appear to fit into small to medium criminality when we assess the sentences effectively imposed (in the case of EAWs for the execution of sentence): about half of these were inferior to three years and ¾ of them inferior to six years. The spectrum of offences is equally wide. Once again, the most common one is drug trafficking, which can be of various degrees of severity. Murder, organized and armed robbery, swindling and theft follow. Catalogue offences are the most common, and among the non-catalogue ones theft is by far the most frequent, followed by sexual offences against minors and simple bodily injury.

As a rule, the EAW requests result in the surrender of the requested person (about 4/5 of cases), which in average happens within a month of arrest. When a

surrender decision takes longer, it is usually because appeals were lodged, or the issuing authority withdrew the request. Once again, warrants are rarely refused on substantive grounds.

The opinions of agents are in general frankly positive, as the matters of cooperation, efficiency in execution and legal framework do not raise insurmountable problems. Least positive views proved to be mostly related to the protection of fundamental rights and legal guarantees.

Three main issues have emerged from the interviews and the focus group: (1) the EAW's speediness and efficiency in what concerns answering to a request from a judicial authority seeking to retrieve a person within a given criminal procedure; (2) its efficiency in fighting crime; (3) the balance between mutual recognition and the deepening of judicial cooperation *vs* the respect for fundamental rights.

Speediness is unanimously highlighted, especially in comparison to the traditional extradition process. Considering the EAW's efficiency against crime within the Schengen Area, the most spread perception among our interviewees and focus group's participants is that it is indeed an effective weapon against crime. Nonetheless, this insight is commonly attached to the opinion that this instrument is mostly used for small to medium criminality – as seen, this perception is indeed corroborated by the empirical data collected in the EAW proceedings. On account of this fact and considering the EAW's process characteristics, for many actors the EAW should be reserved for more serious offences, while being effectively complemented by other – less *severe* – judicial cooperation instruments.

Representatives of the authorities involved in its execution (SIRENE officers and Court of Appeal judges) openly stress how much mutual trust and cooperation is privileged in their daily practice. Nonetheless, proportionality in the EAW's current use is recurrently pointed out as a major concern. A petty use of expensive resources is notably shadowed by a recurrent concern for the requested person's status. Notably, the most poignant critiques specifically refer to a much felt difficulty to achieve balance between cooperation and mutual trust, on the one hand, and respect for the requested persons' fundamental rights, on the other. The poignant differences between judicial systems (and their compliance, or not, to the rule of law) are often perceived as one of the most important sources of distrust and eventual backlash. Connected to this landscape, emerges another major point of concern: the guarantees for surrender. Most judicial officers consider the law lacks effective strength, since not only the judicial

authority who gives the guarantee may not have actual power to enforce it later on; but if said guarantee is not enforced, the executing authority has no power on the subject after surrender. Such possibilities raise constrictions to mutual trust and consequently judicial cooperation. A lack of official and easily accessible sources of foreign criminal – substantial and procedural – laws is also referred by some judges and public prosecutors, though their proactivity seems to be counterbalancing this deficiency. A common, updated, easily accessible and if possible translated source of criminal legislation from the different member states is seen as highly desirable by many.

On the training of judges and public prosecutors, some of our focus group participants and interviewees consider the initial training provided by the Centre for Judicial Studies is currently appropriate. As for their continuous training, the lack of offer is almost unanimously pointed out, in accordance to the opinions retrieved on the survey conducted to judges. In addition, the need for continuous training together with lawyers is highlighted, as beneficial for both parts. In fact, the lack of training courses' offer is also patent for lawyers. Nonetheless, it is also recognized that this class' interest in such a specific subject may not be much, as EAW procedures are rare, and therefore a not very rewarding investment for the average lawyer.

Probably on account of this, the quality of defence – or rather the lack of it – is commonly referred as well, the average lawyer's knowledge of the EAW legal regime being deemed as feeble on several occasions. Nonetheless, evidence of first instance judges' feeble knowledge was also detected during fieldwork. Training deficiencies, moreover, the system structures' *unpreparedness*, is thus reflected in daily practice, and claims for more and better offers of training for all actors involved.

Finally, another topic of major concern: translation. Difficulties in accessing translation services (especially quality ones) were emphasized throughout our fieldwork, and sensed by all actors. In this context, the existence of a body of high-quality official translation services was almost unanimously defended, and is in fact a serious claim of the SNO.

For some practitioners, the defence role would profit from a remarkably different approach to the EAW process: to see this process as a whole, unitary criminal process both in the issuing and executing member states, which would enable a collection of useful information for everyone involved (especially the requested person's defence in the executing country). Direct contacts between judges/public prosecutors and defence lawyers from issuing and executing countries are viewed as highly beneficial and

deserving to be deepened, especially concerning the latter. Solutions gathered during fieldwork range from adding a field to the EAW form for information on the issuing country's lawyer's name and contact (when there is one), to the creation of effective supranational contacts/protocols of various kinds between Bar Associations. The main gap in cooperation appears to lie precisely here.

As a general remedy for problems sensed in the use of this instrument internally, the need for a better offer in continuous training for all practitioners involved is obvious. A (re)centralization of issuing competences was also advanced, with different solutions, but this subject was by no means unanimous, as such an hypothesis would mean a significant step back in the way of mutual trust.

All in all, if the EAW is considered a fine tool of judicial cooperation in criminal matters, it is no less true that an effective concern for fundamental rights in its use is growing: this instrument truly calls for other mechanisms that make proportionality, legal guarantees and procedural standards truly effective for European citizens, non-European resident citizens, and other individuals circulating within the Schengen Area.

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7. THE EAW IN SPAIN

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The research project

The Directorate-General for Justice, Freedom and Security of the European Commission gave a grant in June 2008 for a research project from the Centro de Estudos Sociais (CES) of Coimbra University (Portugal) on the European Arrest Warrant, under the title “The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area”, the reference number of which is JLS/2007/JPEN/245 and ABAC 30-CE-0178645/00-20. The aforementioned Portuguese research centre led the project, and had the collaboration of the Utrecht School of Law (Netherlands), L'Istituto Ricerca sui Sistemi Giudiziari (Italy) and, from Spain, the Asociación de Jueces para la Democracia.

7.1. Spanish report

The Spanish research group for this project comprises two people: 1. Mr. Ignacio González Ubaldo, Senior Judge of the Criminal Court number 20 of Madrid and member of the Association "Asociación de Jueces para la Democracia"; 2. PhD Sabela Oubiña Barbolla, Visiting Professor of Procedural Law from the University Carlos III of Madrid and researcher of the Instituto Alonso Martínez de Justicia y Litigación. The Spanish report was written and analysed by Sabela Oubiña Barbolla.

7.1.1 Introduction

The purpose of this research project is to offer a broader knowledge of the European Arrest Warrant[197] which allows the theoretical and practical problems[198] of the first effective instrument of European judicial cooperation to be detailed. From that perspective, and although it may seem a contradiction to talk about "European judicial cooperation", it is also necessary to obtain the suitable indicators in order to be able to make a comparison on a European level, in particular of the national experiences of four member states: Portugal, The Netherlands, Italy and Spain.

This summary offers a simplified view from Spain of the four activities that the Centro de Estudos Sociais of Coimbra had established as a priority in the request presented to the Directorate-General Justice, Freedom and Security of the European Commission. Simplified because it presents the most salient relevant data of the Spanish version of this project. But since the Spanish perspective also intends to be rich in

[197] Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the member States, 13 June 2002 OJ L 190, 18 July 2002, pp.1-20. According to article 32 the EAW became operational on 1 January 2004.

[198] Van Sliedregt, E., "The European Arrest Warrant: Between Trust, Democracy and the Rule of Law. Introduction. The European Arrest Warrant: Extradition in Transition", European Constitutional Law Review, 3, 2004, p. 244 points out that although the EAW has an overall positive appraisal, its application has showed serious problems. This is also the purpose of a *research* study of FICHERA, M., "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?", *European Law Journal*, Vol. 15, No.1, January, 2009, pp.70-97 who asks himself "is this instrument effectively promoting normative mutual trust among the judicial authorities in the EU? Should it be amended or is it the wrong response at the wrong time?".

information and useful for the Spanish or foreign reader, the report ends with a separate appendix[199] of four sections containing all the documents that concluded each phase.

7.1.2 Topicality of the subject

The European Arrest Warrant (hereinafter EAW) is a judicial instrument issued by a member state which requires another member state to detain and surrender a requested person[200]. The EAW could be issued for two different purposes: either to conduct a criminal prosecution, or to execute a custodial sentence or detention order (Article 1 Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the member States, 13 June 2002 hereinafter FD).

The traditional mechanisms of judicial cooperation had to resort to a new method based on mutual trust[201] and observing relations among the judicial systems of the member states. This is where the principle of mutual recognition[202] comes in as the cornerstone of judicial cooperation.

The EAW and other instruments of judicial cooperation are receiving a great deal of attention in EU policymaking circles in order to adjust and reform it. We just have to consider the European Council Meeting on 3 and 4 June 2010, in Luxembourg, where its conclusions were presented and the final report included recommendations on the fourth round of mutual assessments of the EAW procedures among member states.

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[199] Appendix Section I: Comparative grade EAW FD and EAW Spanish Law; Appendix II: Data results from SPSS program; Appendix III: Jurisprudence; Appendix IV: Survey questionnaire; Appendix V: Interview questionnaire and interviews.

[200] At first there were other definitions. For example, the European Commission proposed that the EAW "means a request, issued by a judicial authority of a Member State, and Addressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgment or a judicial decision, as provided for in Article 2 [Article 3 (a)]." Proposal submitted by the Commission on 10 September 2001 for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States (2001/C 332 E/18) COM(2001) 522 final. 2001/0215(CNS).

[201] As the heart of the European Union like the European Constitutional Law Review explains, see "Editorial", *European Constitutional Law* Review, 2006, Vol. 2, pp. 1-3. See clause 33, Tampere Conclusions European Council, Special Meeting, 15 and 16 October 1999. Available at http://www.europarl.europa.eu/summits/tam_en.htm#c. The importance of recognizing judicial decision was previously highlighted many times; vide DE KERCHOVE, G. et.al. WEYEMBERGH, A*., La Reconnaissance Mutuelle des Décisions Judiciaires Pénales dans l'Union Européenne*, Bruxelles, Éditions de l'Université de Bruxelles, 2001, 255 p. See also the Préface of LENAERTS, K.

[202] GUTIERREZ ZARA, "La Orden de Detención Europea y el futuro de la cooperación judicial penal en la Unión Europea: reconocimiento mutuo, confianza recíproca y otros conceptos clave", *Manuales de formación continuada*, CGPJ, No. 42, 2007, pp. 17-52. DE LA QUADRA-SALCEDO JANINI, "La Orden europea de detención y el principio constitucional de reciprocidad", *Civitas. Revista Española de Derecho Europeo*, No. 18, 2006. pp. 279-321.

Interestingly the project's title perfectly shows the roadmap of the study: "The EAW in Law and in Practice: a comparative study for the consolidation of the European law-enforcement area". Two perspectives: theory and practice; on the one hand, legal diagnosis and, on the other hand, quantitative and qualitative data, as what seems very easy in law may be less so in practice.

No one doubts that the EAW has played a relevant role as the first legal instrument to further European judicial cooperation. It is almost a platitude to remark that the EAW has been significant in the full success of judicial cooperation. However, it is fair to say that from a practical point of view flaws and irregularities have emerged in the theoretical model of the Framework decision, and the resulting national EAW laws. Fortunately, and as a result of the comprehensive outlook obtained throughout this project, we are firmly convinced that, in spite of what people might think, many of the problems of applying the EAW are not inherent to judicial criminal cooperation. For this reason, with a concerted effort of will and working at a steady pace we can resolve them and achieve better and more effective judicial cooperation.

The EAW has existed for nearly seven years, so this is a good time to take stock of its practical application according to different criteria. For example: (1) legality; (2) effectiveness; and (3) respect for fundamental rights.

Close judicial cooperation between member states is definitely necessary for an effective European area of freedom, security and justice. But if we want to create a real judicial system without borders or infringement of rights I think it is vital to look back, we must "Look to our Past to plan our Future". In other words, sometimes we need to look to the past to be well prepared for the future. Generally speaking, the background of the EAW can help us plan or design a better European Area of Justice with its instruments. Instruments that have come into force like the Framework decisions which are already approved, but others, too, that are just proposals or simple initiatives like the "European Protection Order": mutual recognition of supervision measures[203]; European Evidence Warrant (EEW)[204]; supervision of sentenced persons or persons on conditional

[203] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

[204] The European Evidence Warrant (EEW) replaces the system of mutual assistance in criminal matters between Member States for obtaining objects, documents and data for use in criminal proceedings.

release[205]; mutual recognition of custodial sentences and measures involving deprivation of liberty[206]; recognition and execution of confiscation orders[207]; mutual recognition of pre-trial supervision measures[208]; mutual recognition of financial penalties[209].

The research work is surely too extensive, it is about diverse questions that by themselves are very complex and would be worth a separate chapter and, in addition, the report collects very specific data that we jurists are not always used to. For this reason, it is not our intention to turn these pages into a monographic deployment of the project. We will briefly describe where we intend to justify the chosen subject and the methodology with which we approached the work, and we will outline some of the barriers that the EAW raises in Spain, from both the issue and the execution perspectives.

7.1.3 Methodology and structure

Our aim is to understand the role that the EAW is currently playing (and may play in the future) in European judicial cooperation in criminal matters in order to show the system's real situation, its problems, its virtues, its efficacy, etc., without forgetting the existing barriers that the EAW's application is facing at legal, practical and logistic levels. That is why the study of this subject could not be limited, in our opinion, to a technical-legal analysis or only a dogmatic analysis[210] of the problems of the EAW.

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[205] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [See amending act(s)].

[206] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [See amending act(s)].

[207] Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [See amending act(s)].

[208] Proposal for a Council Framework Decision of 29 August 2006 on the European supervision order in pre-trial procedures between Member States of the European Union [COM(2006) 468 final - Not published in the Official Journal]. The Commission has put forward a series of initiatives to enhance the protection of fundamental rights in the European law-enforcement area.

[209] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [See amending act(s)]. This Frameword Decision extends the principle of mutual recognition, the cornerstone of judicial cooperation, to financial penalties.

[210] MIGUEL KHÜN, W., "Problemas jurídicos de la Decisión Marco relativa a la Orden de detención europea y a los procedimientos de entrega entre los Estados Miembros de la Unión Europea", *Revista General de Derecho Europeo*, No. 12, 2007. MARTÍN MARTÍNEZ, M.M., "La implementación y aplicación de la orden europea de detención y entrega: luces y sombras", *Revista de derecho de la Unión Europea*, No. 10, 2006, pp. 179-200.

The work was approached from four angles: 1. comparative analysis of the FD and the EAW in Spanish Law; 2. qualitative examination of the perceptions of those who work daily with this instrument of judicial cooperation (i.e. judges, prosecutors, Ministry advisors, lawyers from the Constitutional Court, etc.), and of those who have studied it in depth (i.e. professors, researchers); 3. qualitative investigation of the EAWs issued and executed by Spain; 4. study of the constitutional case law.

The EAW's overview from these standpoints could represent an added value (essential, in our opinion) when evaluating the suitability of the variety of solutions that the doctrine proposes to channel, in the most reasonable and efficient way possible with respect to some of the problems that have arisen form a "Europeist" and rational point of view.

1. The **comparative legal analysis** of the FD and the Spanish law culminated in a chart of both texts. The text of the FD is officially available in both Spanish[211] and English, but there is no official English translation of the Spanish law. For this reason, one of the thorniest questions of this first section was the unofficial translation[212] of the Spanish legislation[213]. From that point, taking the FD as reference, we compiled a comparative chart of the text with its closest equivalent in the Spanish legislation. The final compared document is in the first section of the appendix.

2. The **qualitative examination** of the EAW was intended to gather the main actors' perceptions. We used three different research techniques: a) interview; b) survey and c) expert panel discussion.

The interview was conducted individually with each of the experts (a total of 20) who accepted our invitation to participate in the project. A wide range of experts from diverse specialties were invited: Central Preliminary Investigation Senior Judges, Magistrates from the Criminal Division of the National Court, Prosecutors of the National Court, expert Prosecutors in legal cooperation (General Council of the Judiciary),

[211] In general, see DÍEZ RIAZA, S., CARRETERO GONZÁLEZ, C., GISBERT POMATA, M., *La orden europea de detención y entrega: estudio de la Ley 3/2003, de 14 de marzo*, Navarra, Cizur Menor, Civitas-Aranzadi, 2005. URREA CORRES, M., "La Orden europea de detención, captura y entrega", *Revista española de derecho internacional*, Vol. 53, No.1, 2001, pp.707-711.

[212] Spain, as Ignacio González Ubaldo explained in Bologna, does not have an official English translation of its legislation on the EAW. However the Portuguese team leader considered that a direct translation by a researcher will be sufficient.

[213] In this section we worked from a draft that professor Mar Jimeno Bulnes from Burgos University offered us and we want to express our gratitude here for her selfless cooperation. Mar Jimeno Bulnes is one of the few Spanish researchers to have published papers on the EAW in international journals.

provincial Prosecutors, Lawyers specialised in EAW, University professors, clerks of the Constitutional Court, etc.

The interviews were structured, i.e. following predetermined questions. The interview was long, with a total of 19 questions, and other questions may have arisen within each of them. The content of the questions was established at the first meeting of the research group in Bologna (Italy). The average duration of each conversation was one and a half hours. For this reason, and in order to ensure the gathered data was the most reliable possible, the interviews were recorded in audio format. They were then transcribed in Spanish and later translated into English. The Spanish team conducted twenty interviews. The template and the interviews are available in the appendix (second section).

The survey focused on gathering similar information to that of the interviews, but (in theory) from a larger number of individuals. A questionnaire consisting of 15 questions was formulated in a similar way to those of the polled Magistrates. The questions, the format, the method of sending them out and the remaining details were discussed at two meetings: in Utrecht on 24 April 2009 and in Coimbra on 18 December 2009. The Spanish team explained during a series of meetings with the coordinator (Portuguese team leader of the research project) the difficulties[214] which had arisen and the questions that were raised, in our opinion, by this technique: data protection of the e-mails, low response rate, etc.; particularly relevant when given that we considered that the necessary data had already been obtained in the interviews.

There are several points that differentiate these research methods. Whereas an interview is aimed at a small number of people, surveys tend to include a lot more. The interview implies open-ended questions where interviewees can present their points of view in detail; in other words, they are supposed to create a more open and focused dialogue between interviewer and interviewee leading to a fuller understanding of the perceptions of the interviewee and to deeper knowledge of the EAW. That is why, in theory, the information from the interviews is richer and more useful than that from the survey, unless there is a high number of completed questionnaires. Despite the effort we had agreed to put into it there were several reasons for suspecting that the number was not going to be high enough.

However, after many ups and downs, the survey was also sent out in Spain. It would be limited to one of the legal associations in Spain, the members of the Asociación

[214] Some were intrinsic and others particular to the Spanish case.

de Jueces para la Democracia, as this was the institution responsible for the project in Spain, having signed the research contract.

Broadly speaking, the survey followed the same schema as in other countries. It was in electronic format and comprised 15 closed questions with answers a), b), c) or d). Unlike the other countries, the Spanish team did not use the sending platform that the CES had created because this would require sending a team outside Spain the e-mail details of an undetermined list of Spanish judges and magistrates. Obviously, the CES offered all possible guarantees of security and destruction of the data after the survey but although every effort was made to reach an agreement between the Spanish Association and CES, the Association remained reluctant. In the end, therefore, the Asociación de Jueces para la Democracia[215] was in charge of sending a general purpose e-mail to the Magistrates of the criminal section with a link on it requesting their collaboration to fill it in.

In the final stage, the discussion of some of the results of the project took place in Spain in a panel or internal meeting which several national experts attended[216].

3. The **quantitative investigation** of the EAWs issued and executed by Spain was conducted over a sample of the EAWs issued and executed in Spain between 2004 and 2008. The fieldwork lasted several months.

In the case of EAWs issued, the only files available where in the hands of the Ministry of Justice, as the central authority. After many meetings and despite the initial resistance of the authorities, and after a Collaboration Agreement was signed by the Ministry of Justice and the Carlos III University of Madrid, the Ministry gave permission for the files to be consulted and the necessary information[217] to be gathered.

Consulting the received EAWs and the executed cases was easier. After Mr. Ignacio González Ubaldo and Ms. Sabela Oubiña Barbolla met with Mr. Javier Gómez Bermúdez, President of the Criminal Division of the National Court, the latter allowed the files that were still available in the 1st section of the Criminal Division of the National Court to be consulted.

[215] After ten days only 3 responses to the survey had been received. In order to tackle the low-response rate, Ignacio González Ubaldo reminded his colleagues of the invitation to participate in this activity, but even so, in the end we only received 11 responses.

[216] Some of whom had already helped in some of the other activities (i.e. interviews, International conference in Lisbon, etc.).

[217] Prof.PhD.Sabela Oubiña Barbolla was the professor who collected the data.

On the whole, and compared with the other investigation teams, Spain has consulted the most proceedings, but it should be noted that the perceptibly more EAWs were issued and executed by Spain than by other countries.

	EAWs Issued	EAWs Executed	Total
ITALY	20	118	138
PORTUGAL	267	285	552
NETHERLANDS	105	250	355
SPAIN	783	234	1,017

4. Finally, the report shows a **study of the constitutional case law**[218] on EAWs; this examination required a prior search, identification of the cases relating to this subject so as to subsequently analyse and systematise the required person's declarations when they filed an appeal for protection before the Constitutional Court for violation of some fundamental right (Article 53.2 Spanish Constitution).

7.1.4 Acknowledgments

It would have not been possible to prepare this work without the generous collaboration of many people and organizations to which we want to show our gratitude here. This report has benefited from the collaboration of several institutions, associations, and, most importantly, experts who freely gave us their help in each phase.

In particular, we would like to acknowledge the Judiciary Association for Democracy, the University Carlos III of Madrid, the Instituto Alonso Martínez de Justicia y Litigación and the Ministry of Justice.

We want to extend this recognition to Mr. Víctor Moreno Catena, for his valuable help as intermediary with the Ministry of Justice. It would have not been possible to prepare this work without the generous collaboration of various people to which we want to show our gratitude here.

[218] IGLESIAS SÁNCHEZ, S., "La jurisprudencia constitucional comparada sobre la orden europea de detención y entrega, y la naturaleza jurídica de los actos del Tercer Pilar", *Revista de Derecho Comunitario Europeo*, No. 35, 2010, pp. 169-192.

NAME	STATUS	PROFESSION
E.Velasco	Magistrate	Central Preliminary Investigation Court
F. Andreu	Magistrate	Central Preliminary Investigation Court
F.Grande Marlaska	Magistrate	Central Preliminary Investigation Court
J.R. De Prada	Magistrate	Criminal Division National Court
M.Fernández Prado	Magistrate	Criminal Division National Court
R. Saenz	Magistrate	Criminal Division National Court
A. Hurtado	Magistrate	Criminal Division National Court
A.Guevara	Magistrate	Criminal Division National Court
C. Ballarri	Magistrate	Criminal Division National Court
C. Penin	Magistrate	Supreme Court.Basque Autonomous
R.Castillejo	Full Professor	Univ. Santiago de Compostela
M. Jimeno Bulnes	Full Professor	University of Burgos
J.Sanchéz Tomás	Clerk/Professor	Constitutional Court
V. González Mota	Prosecutor	Criminal Division National Court
R. Morán	Prosecutor	General Prosecutor office
I. Guajardo	Prosecutor	General Prosecutor office
A. San José	Prosecutor	Santiago de Compostela Region
C. Gómez-Jara	Lawyer	Lawy Firm
Jiménez Villarejo	Prosecutor	Málaga Region

Likewise, thanks are due to Mr. Javier Gómez Bermúdez for making it possible for us to consult the EAWs executed in Spain; to Ms. Ana Gallego (Deputy Director of International Judicial Cooperation of the Ministry of Justice[219]). Finally, but not less important, grateful thanks to Mr. Juan José López Ortega for his valuable and much appreciated comments.

[219] To the civil servants of the Ministry of Justice who work every day with the EAW, specially Javier Blanco Nieto, Antonio Romero Reinares, Eva Salguieiro Varela, Valentín Meneses García y Amado Jesús González Lucas. And the postgraduate researchers Mr. Emil Gil Breton and Ms. Maraia Eilts.

7.2. EAW Legislation

The Council of the European Union Framework Decision[220] on the EAW (2002/584/JAI) of 13 June 2002 regarding the European Arrest Warrant and the surrender procedures between member states (hereinafter EAW FD) established 31 December 2003 as the deadline for transposition into the member states' national law (Article 34). On 14 February 2002 Spain, France, Belgium, Portugal, Germany and Luxemburg stated their intention to revise their national law during the first quarter of 2003 in order to implement the EAW as soon as possible[221].

7.2.1 The Framework Decision's transposition history

In this chronological context Spain was the first EU member state to transpose the Framework Decision and, moreover, the only one to meet the deadline agreed upon unofficially by the aforementioned group of six member states. Spanish Law did not cover a *vacatio legis* until its enforcement and it states that it would be in force the day following its publication in the Spanish National Official Gazette. Naturally, however, the EAW would not be fully operative until the other member states had adapted their own national laws.

By the time of the FD's deadline (Article 25), that is to say, on 1 January 2004, only eight countries had adopted the necessary legal measures. The rest of the member

[220] On the nature of the EAW FD see KAUNERT, C., "Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission», *European Integration*, Vol.29, No.4, September, 2007, p. 390. The EAW FD is a European law - not an international law - and it replaces the previous range of international legal measures operated in the Member States with a legal instrument of the EU, so this is a revolutionary European extradition law. Also, VOGEL, J., "Abschaffung der Auslieferung? Kritische Anmerkungen zur Reform des Auslieferungsrechts in der Europäischen Union", *Juristenzeitung*, 56(19), pp. 937-943. Furthermore, a few member States had no previous arrangements for this matter. See, FENNELLY, N., "The European Arrest Warrant: Recent Developments", *ERA Forum*, 2007, 8, pp.519-520; published online 6 November 2007 and based on his presentation at the ERA conference "EU Courts in the Area of Freedom", Security and Justice: Recent Developments, Trier, 14-15 June, 2007.

[221] IRUNRZUN MONTORO, F., "El proceso de adaptación de la Decisión Marco a los quince Estados miembros", *La orden de detención y entrega europea* (dirs. ARROYO ZAPATERO, L. et al. NIETO MARTÍN, A.), Cuenca, Editorial Universidad Castilla-La Mancha, 2006, pp. 58-61.

states[222] joined them gradually, meaning that the process of effective transposition of the FD was held up[223] beyond the official deadline initially envisaged by the Commission.

Those of us who are familiar with the transposition to the national legislations of the European legislation are aware that these delays, far from being an exception, are the general rule. However, and without prejudice to the specific circumstances, the transposition pledges should have been respected as far as dates were concerned, at least roughly[224].

Leaving this issue aside and getting into the Spanish Law analysis of the EAW, we must start by highlighting that the transposition into Spanish Law required two laws to be approved.

The first and more important one, considering its content, is Law 3/2003 of 14 March[225] with a very simple title "on the European Arrest Warrant" (to which we refer as EAW Spanish Law). Second, there is Law 2/2003 of 14 March, of an organic nature, that complements the previous one[226]. Spain, unlike other member states, did not have to revise its Constitution in order to transpose the FD. However, Spain had to change on the same date (14 March) Articles 65.4 and 88 of the Spanish Law on the Judicial System[227] (hereinafter, LOPJ) so that the law setting each judicial body's jurisdiction (LOPJ) in Spain encompassed the new powers of the Criminal Division of the National Court and the Central Preliminary Investigation in the execution of the EAW procedure.

Finally, and before continuing examining the principal features of the EAW Spanish Law, the fact that the Spanish transposition law is essentially characterised by following the FD practically to the letter must be highlighted; so much so that sometimes instead of a transposition it seems like a translation and, moreover, it is not always

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[222] Especially conspicuous were Italy's delay (1 year, 3 months and 27 days); Czech Republic (1 year and 19 days later) or the Republic of Germany (6 months and 22 days).

[223] *Report from the Commission*, Brussels, 23.02.2005, COM (2005) 63 final based on article 34 of the Council Framework Decision of 13 June 2002 on the EAW and the surrender procedures between Member States.

[224] For another opinion see MACKAREL, M., "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant", *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, p. 46 who concludes that the "timescale for entry into force of the EAW throughout the EU was a great success compared to some previous agreements".

[225] *Spanish Official State Gazette*, 17 March 2003, no. 65, p. 10244.

[226] For more information, please check the Preamble EAW Spanish Organic Act (LO 2/2003 de 14 de Marzo) in the Appendix.

[227] Spanish Organic Law 6/1985, of 1 July. Spanish Official State Gazette, 2 July 1985, no. 157, pages 20632 to 20678

correct[228] and mature. We must not ignore this first critical feature, because we might have to come back to it later when we study the legal problems raised by the EAW in Spain.

In this context we could even consider if this haste with which Spain transposed the FD can explain some of the most far-reaching problems posed for some time by the EAW in Spain. It is important to briefly describe the relevant characteristics of the Spanish system according to the EAW Spanish Law.

7.2.2 EAW Spanish Legislation

To start with, the differences we find in each of the national experiences of the EAW (Portuguese, Dutch, Italian and Spanish) are, as we will explain, inherent to the choice of the Framework Decision as a legal Instrument[229]. In general, a Framework Decision implies a certain regulatory homogenisation of the subject of regulation, but in some points it allows the States freedom in the transposition to the respective internal legal system. Hence the different national legal solutions to the different practical experiences. The Court of Justice expressly endorsed the use of the FD as the particular legal instrument in the EAW in the Advocaten voor de Wereld case[230] because Article 31(1)(a) and (b) do not indicate a specific type of legal instrument; this means that the Council had the power of "choice between several instruments to regulate the same subject-matter (…)" and in this case it decided to use the vehicle of a FD.

[228] We agree with this point GONZÁLEZ-CUÉLLAR SERRANO, N., "La 'euroorden': hacia una Europa de los carceleros", *Diario La Ley*, Nº 6619, 29 December 2006, Ref. D-281, LA LEY 4425/2006. A Prosecutor from Galicia warned that during her interview: "Our laws are extremely literal when used to interpret the FD, it is practically a duplicate and this creates problems because the system is not adapted to our procedures. There are also issues in that it is practically a literal copy of the FD which in turn gives way to arbitrary and imprecise actions. Therefore I believe these to be relevant legal issues that we must address, considering the fact that it is a copy".

[229] PEERS, S., "Proposed Framework decision on European Arrest Warrant", *Statewatch post*, 11.09.01 analyses, No. 3, available at www.statewatch.org. WAGNER, W., "Building an Internal Security Community: The Democratic Peace and the Politics of the Extradition in Western Europe", *Journal of Peace Research*, 40(6), pp. 695-712. MACKAREL, M., "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant", *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, p. 46.

[230] Case C-303/05, 3 May 2007, Advocaten voor de Wereld VZW v Leden van de Ministerraad.

7.2.2.1 Competent Spanish authorities

The judicial authority competent to issue[231] an EAW is the judge or the court hearing the case in which this type of warrant is in order.

On the other hand, two judicial bodies are competent to decide to execute an EAW depending on whether the requested person gives their consent or not to their surrender to the issuing State. Thus, the execution procedure of an EAW can take one of two paths:

A) If the person concerned has given their consent to their surrender to the issuing State and the Public Prosecutor sees no grounds for refusing or setting conditions on surrender, the judicial authority competent to execute the EAW would be the Central Preliminary Investigation Court.

B) Otherwise, if the requested person does not give their consent to their surrender to the issuing State and/or the Public Prosecutor sees any grounds for refusing or setting conditions on surrender, the judicial authority competent to execute the EAW would be the Criminal Division of the National Court.

In brief, concerning competent authorities, the Spanish legislator decided on two different solutions for the issue of the EAW and the execution (or decision) of the EAW. As for the execution or decision of the EAWs, the legislator leaned towards a centralised system in the Criminal Division of the National Court, but we could regard it as a double-headed system (Central Preliminary Investigation Courts, Criminal Division of the National Court). Whereas for issuing the EAWs, the Spanish legislator sets a diffuse and decentralised system which considers that any judge or court hearing a criminal proceeding in which an EAW is appropriate may issue it.

Even so, the decentralisation is naturally not absolute since it is reserved for the criminal judicial authorities. But this demarcation does not imply[232] that in Spain only the Preliminary Investigation Courts can issue EAWs as competent judicial authorities for adopting precautionary measures. It is one thing that, in practice, it is mostly the Preliminary Investigations Courts that issue EAWs, and, another to state that only these Courts may issue an EAW. The EAW is "a judicial decision issued in a member state of

[231] PENIN ALEGRE, "Orden de Detención Europea: España como estado de emisión", *Manuales de formación continuada*, No. 42, 2007, pp. 185-264.

[232] Against, JIMENO BULNES, "La orden europea de detención y entrega: aspectos procesales", *Diario La Ley*, No. 5979, Sección Doctrina, 19 March 2004, Year XXV, Ref. D-67, LA LEY 408/2004, p.1.

the European Union with a view to the arrest and surrender by another member state of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" (Article1.1 EAW FD, and Article 1.1 EAW Spanish Law). Therefore, when the purpose of issuing an EAW is for a criminal prosecution, the judicial body that will issue it is normally a Court of Preliminary Investigations[233]. However, when the EAW pursues the execution of a deprivation of liberty penalty already imposed, it may be the judicial body that judged the case that issues it (Criminal Court, Provincial High Court, National Court, etc.) or the judicial body in charge of enforcing the judgment (Execution Court).

Concerning the execution, the Spanish legislator has kept to the same model of passive extradition[234], giving power to the National Criminal Court, but, to different judicial bodies in the National Court depending on the proceedings phase[235].

The EAW FD left the member states free to establish their 'competent judicial authorities', but as FICHERA[236] observes *some of them have interpreted it rather broadly* (e.g. Denmark, Germany, Cyprus).

Much of the doctrine and some experts[237] see centralisation in the National Criminal Court as an advantage for judicial security and the unification of the EAW criteria, because it avoids having differing decisions in similar cases. Hence the Magistrates of the National Criminal Court are fully specialized in this topic. For this reason, the executing countries which do not have a centralized judicial authority[238] work within the parameters of an extradition case because they will only decide on a few, isolated EAWs; they do not have as much experience as those countries with a centralised presiding body which hears cases involving EAWs. Therefore, this

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[233] Despite its limited scope, it has also been argued that the military courts could issue EAWs. Vid. ARANGÜENA FANEGO, C., "La orden europea de detención y entrega. Análisis de las Leyes 2 y 3 de 14 de Marzo de 2003, de transposición al ordenamiento jurídico español de la Decisión Marco sobre la 'euroorden'", *Revista de Derecho Penal,* 2003, No. 10, p. 41.

[234] Articles 8.2 and 12.2 the Spanish Law of Passive Extradition (Act 4/1985, of 21 March).

[235] JIMENO BULNES, "La orden europea de detención y entrega: aspectos procesales", op. cit., Editorial LA LEY, LA LEY 408/2004, p. 3.

[236] FICHERA, M., "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?", *European Law Journal*, Vol. 15, No.1, January, 2009, p.88.

[237] Regarding the opinion expressed by Fernando Grande Marlaska (Magistrate of the Central Preliminary Investigation Court), Gónzalez Mota (Prosecutor of the National Court), Guajardo (Prosecutor of the International Cooperation Section).

[238] Spain has centralised the decision on EAWs issued by other countries in the EU through the NC: other countries, on the other hand, have not done this and any judicial authority can make decisions concerning the surrender of a requested individual in the case of a Spanish EAW. The States who have centralised the judicial authority which presides over surrenders hears dozens of cases a week, while these that have not hear maybe three.

centralisation avoids problems caused by the lack of experience of some judicial bodies, the lack of harmonised criteria, etc. However, in Spain it is obvious that this EAW executing system simply mimics the extradition proceedings system. Another plus is that communication between judicial authorities is easier when it is all centralised. Although Spain has several Central Preliminary Investigation Courts and different sections in the Criminal Division of the National Court, there is more unity within that judicial body both in executing proceedings and issuing proceedings. This is because if there is an issue they will most likely call a jurisdictional plenary session in an effort to harmonise the criteria at that level, and also in the realm of communication among authorities, which complicates matters because the execution process is not centralised.

Disagreeing with the abovementioned criteria, other sectors[239] consider that the concentrated system is inconsistent. This critical stance has backed transferring the material and territorial competence of the execution to the Court of Preliminary Investigations of the last known address of the requested person. In relation to this voices have been raised in favour of specialisation[240] by Autonomous Communities of some Court of Preliminary Investigation with regard to this matter. Another problem with this centralisation is that Spain is sometimes the transporting of suspects in 72 hours to Madrid in bad weather conditions or from the Islands (Canary or Balearic) might be a problem. Consequently, in their view the judge in the province where the suspect is arrested should be able to decide on the EAW.

But Spain is not the only country to decide to centralise the execution of an EAW in a single judicial body. Other EU member states have also chosen this system. In particular, and considering only those countries which have taken part in this research project, in the Netherlands the execution of EAWs is the province of the Amsterdam District Court.

From the execution of an EAW point of view, we can say that Italy and Portugal have a mixed system, that is to say, half way between the concentrated and diffuse ones. In both countries the decision on the execution of an EAW is not to the responsibility of a single judicial body but is shared by a very limited number of judicial

[239] Within this group, among others, the following author may be mentioned: DE MIGUEL ZARAGOZA, J., "Algunas consideraciones sobre la Decisión Marco relativa a la orden de detención europea y a los procedimientos de entrega en la perspectiva de extradición", *Actualidad Penal,* 2003, No. 4, p. 144.

[240] Among others, vide MORENO CATENA, V. y CONDE-PUMPIDO TOURÓN, C., "Mesa Redonda: la Orden de Detención Europea", *Conferencia Internacional: "El Espacio Judicial Europeo"*, Toledo 29-31 October 2003, www.uclm/espaciojudicialeuropeo.es Clara Penin (Magistrate of the Basque Autonomous Superior Court) and Fernando Andreu (Magistrate of the Central Preliminary Investigation Court) shared this opinion.

bodies. So, in Italy execution judicial authorities are the appeal courts (known as *Corte di appello*) in the region where the requested person has his address (fixed or temporary). Of a subsidiary character, in cases when this "forum" or territorial circumstance is unknown, the decision is taken by the *Corte di appello* of Rome. In Portugal, the EAW's execution is again to the responsibility of the appeal courts, known there as *Tribunal de Relação*. In both cases there is a limited number of jurisdictional bodies: Italy has 29 *Cortes de Appello* and Portugal has only 5 *Tribunais de Relação*.

That is why we believe the numerical factor is a relevant component that must be taken into account when considering decentralising reforms. The risks of conferring this power on a large number of judicial bodies must not be underestimated. Maybe this and other, points have not been taken into account, or at least not considered thoroughly, by those who have backed decentralising the execution of EAWs in Spain in favour of Courts of Preliminary Investigations. According to the latest data[241] from the Spanish General Council of the Judiciary, there are 453 Courts of Preliminary Investigation in Spain, to which another 1065 mixed courts must be added (called *Juzgados de 1ª Instancia e Instrucción*) with jurisdiction in both civil and criminal matters. We do not share the thesis of an absolute decentralisation of the EAW's execution in the Courts of Preliminary Investigations because that would mean that in Spain there would be more than 1518 execution judicial authorities. That is why the extent of decentralisation is an important matter. A more reasonable alternative, as suggested by MORENO CATENA and CONDE-PUMPIDO TOURÓN[242], would be a restricted decentralisation in favour of a specific number of Courts of Preliminary Investigations, for example, Courts of Preliminary Investigations specialising in EAWs in each Spanish Autonomous Community.

Finally, in Spain the Central Authority is the Ministry of Justice, which has several competences, including carrying out statistical functions, but there are others with a wider scope and significance which are more arguable, like proposal to refer the decision to the Council of Ministers if an EAW request and an extradition request concur (Article

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[241] La Justicia dato a dato 2009, Madrid, CGPJ, p. 10. Also available online: http://www.poderjudicial.es/eversuite/GetDoc?DBName=dPortal&UniqueKeyValue=153903&Download=false&ShowPath=false

[242] MORENO CATENA, V. y CONDE-PUMPIDO TOURÓN, C., "Mesa Redonda: la Orden de Detención Europea", op. cit., www.uclm/espaciojudicialeuropeo.es. CONDE-PUMPIDO FERREIRO, C., "La orden de detención y entrega europea. La perspectiva española", *La orden europea de detención y entrega europea* (MUÑOZ MORALES ROMERO, M., ARROYO ZAPATERO, L.A, NIETO MARTIN, A. coords.), Universidad Castilla La Mancha, 2006, pp. 39-48. MORENO CATENA, "La orden europea de detención en España", *Revista del poder judicial*, No. 78, 2005, pp. 11-38.

23.2 Spanish Law); or the authorisation of movement within Spanish territory of a person to execute an EAW (Article 25.3 Spanish Law).

Some authors[243] put forward arguments against this, saying that the entry on the scene of a gubernatorial authority in the EAW procedure - even as a central authority - is contrary to the spirit of the FD (and, moreover, the Spanish Law) considering the distinctive key feature of an EAW compared to extradition. The EAW is a procedural decision and not a political one; it is an exclusively legal procedure where there is direct communication between the judicial authorities, and without governmental elements[244]. That is why, on several occasions, the idea that the role of Central Authority in Spain should be performed by other bodies, or at least shared, has been argued. For example, JIMENO BULNES[245] suggests that the Spanish Judicial Network of Mutual Assistance in Judicial Matters (REJUE) should be this authority, while the Spanish General Council of the Judiciary (CGPJ) argued in the report to the bill (preliminary draft law) that it should be the one to assume the role of Central Authority. In this scenario, PLACHTA[246] dismisses this view as one-sided and suggests that in this system the role of the 'central authority' has been significantly diminished.

7.2.2.2 Scope: classes of offences

Spanish Law establishes the same schema of the FD (Article 2): a mixed system essentially sustained by two elements. The first is the "type of criminal offence" or "offence" that is underpins the EAW; second, and closely linked to it, the "penalty" entailed by the offence or that has been effectively handed down.

The "class of offence" distinguishes the EAW according to whether it is included or not in the list of Article 9.1 EAW Spanish Law (which is the same as Article 2.2 of the FD). The second factor, "the period of the detention order" (or custodial sentence)

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[243] CASTILLEJO MANZANARES, R., "El procedimiento español para la emisión y ejecución de una orden europea de detención y entrega", *Actualidad Jurídica Aranzadi*, núm. 587, Base de datos: aranzadi.es, BIB 2003\922, p. 3. JIMENO BULNES, "La orden europea de detención y entrega: aspectos procesales", *Diario La Ley*, Nº 5979, 19 Mar. 2004, Año XXV, Ref. D-67, LA LEY 408/2004, p. 4. Also working group on EAW comprising expert magistrates of the National Criminal Court, General Prosecutor, Legal assistance from the Judicial Ministry and Home Affairs Ministry. For more information: (http://www.mjusticia.es/cs/Satellite?pagename=Portal_del_Derecho/InternacionalPrincipal/TplInternacional&idCInter=1075994483764&tipoCInter=PT&cid=1075994483764&c=InternacionalPrincipal&p=1151913189285&menu_activo=1151913189285

[244] Vide the Preamble EAW Spanish Law.

[245] JIMENO BULNES, M., "La orden europea de detención y entrega: aspectos procesales", op. cit., p.4.

[246] PLACHTA, M., "European Arrest Warrant: Revolution in Extradition?", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 11/ 2, 2003, p. 188.

distinguishes the abovementioned cases according to certain minimum limits. Anyway, the facts qualification (in theory) and the valid penalty are those established by the State issuing the request. In Spain this implies referring to the Criminal Code and to other special criminal laws. With these strokes of the brush, the resulting EAW would look like this:

a) Internal or proper EAW, that is to say, when the EAW request refers to some of the offences included in the list (Article 9.1 EAW Spanish Law).

a.1. The offences (included in the list) for which the EAW is requested must also be punishable with a custodial sentence of three or more years.

b) External or improper EAW, if the EAW is requested for a different offence or one not included in the list in Article 9.1 EAW Spanish Law.

b.1. In this case, the maximum limit of the penalty varies depending on the aim of the EAW. If the EAW has been issued to launch or continue proceedings against the requested person, the offence should be punishable with a custodial sentence of 12 or more months. In any other case, if the EAW has been issued for the fulfilment of a final conviction decision (sentence that has been passed or a detention order that has been made), the sentence must be of at least four months.

In Spain, the nature of the cases determines, from the execution point of view, whether the principle of double incrimination is at stake[247] and, in some cases, even the automatic refusal of the EAW.

The outline of the schema with the different possible scenarios is:

A. The control of the double incrimination principle disappears.

Offence on the list of the 32 offences of Article 9.1 of the EAW Spanish Law and, in addition, the custodial sentence imposable or actually handed down is 3 years' imprisonment or more.

B. Optional control of the principle of double incrimination[248] [Article 12.2 a) EAW Spanish Law]

[247] On the content and significance of the double incrimination principle see CEZÓN GONZÁLEZ, C., *Derecho Extradicional, op. cit.,* esp. pp. 88 and ff., as well as MANZANARES SAMANIEGO, J. L., *El Convenio Europeo de Extradition,* Barcelona, 1986, esp. pp. 48 and ff., in connection with Article 2 of the said convention signed on 13 December 1957.

Offence not included in the list, and in any case with custodial sentences of less than 12 months if it is an EAW for the prosecution of an offence or continuation of a criminal proceeding, or of 4 months if the EAW is to serve a sentence.

Offence included in the list with custodial sentences of less than 3 years' imprisonment, but of more than 1 year if it is for continuing with the investigation or the judgment in a criminal proceeding, and of more than 4 months if it is to serve a final conviction decision.

C. Non admission of the EAW

The EAW corresponds to an offence included in the list, but the penalty provided for the offence or that has been effectively served is less than 1 year if it is to continue a criminal proceeding, or than 4 months if it is to serve a sentence.

Offence not included in the list that, moreover, provides for a penalty of less than 1 year if the EAW's aim is to carry out further criminal proceedings, or than 4 months if the EAW's aim is to execute a final conviction decision.

One of the most outstanding features of the Spanish system is that, unlike other countries (Italy, Portugal or The Netherlands), the double incrimination principle in Spain is an optional cause of refusal of surrender of requested persons for offences not included in the list [Article 12.2 a) EAW Law]. Accordingly, the Spanish law does not demand that judicial bodies in charge of the execution (Criminal Division of the National Court, and Central Preliminary Investigation Courts) control the double incrimination of the EAW received for offences outside the list.

At first glance the schema may seem straightforward, but it is not so easy in practice. As we will see, problems and doubts arise almost at every stage. We shall now clarify briefly, as a critical summary, some of these controversial points.

[248] On the content and significance of the double incrimination principle, see CEZÓN GONZÁLEZ, *Derecho extradicional*, Madrid, Dykinson, 2003. BARBE, E., "El principio de doble incriminación", *La orden de detención y entrega europea* (MORALES ROMERO, M. et al. ARROYO ZAPATERO L.A. coord.), Burgos, Universidad de Castilla La Mancha, 2006, pp. 195-206. SÁNCHEZ DOMINGO, M.B., "La armonización en la orden de detención y procedimiento de entrega", *Revista Penal*, No. 24, 2009, pp.151-156. CUERDA RIEZU, A.R., "Los principios de legalidad, doble incriminación e igualdad en la orden europea de detención y entrega", *Nuevos desafíos del derecho penal internacional: terrorismo, crímenes internacionales y derechos fundamentales* (CUERDA RIEZU, A.R. et al JIMÉNEZ GARCÍA coords.), Madrid, Tecnos, 2009, pp. 541-566.

Article 9.1 of the EAW Spanish Law replicates the list[249] in Article 2.2 EAW FD. This circumstance has been criticised by the doctrine with different arguments. On the one hand, the lack of logical order in this record of offences, since they could have been grouped together following logical criteria[250]; for example, the legal interest being protected and/or the seriousness of the crime.

Considering other specific offences included in the list, there are (or were) other problems. First, some of them are not (or, more precisely, were not) categorised in the Spanish Criminal Code. Therefore, Spain would never be able to issue an EAW for this kind of behaviour, but if the opposite were to occur, without other impediments, it would be obliged to surrender a requested person for these offences. For example, the illicit trade in human organs and tissues was not a crime in Spain until recently. This gap has been corrected in the last reform of the Spanish Criminal Code, but it will only become effective when the reform enters into force on 23 December 2010[251] (vide new Article 176 bis Spanish Criminal Code); the crime of swindling is also unknown in English and Scottish Criminal Law. In other member states, these issues have resulted in some member States excluding some offences from the list, alleging that they are not punishable under their criminal codes. This is the case of abortion and euthanasia in Belgium, or the generic exclusion by Austria, until 31 December 2008, if the act for which the EAW has been issued is not punishable under Austrian Law. In relation to this, Spain has recently seen several initiatives to legislate euthanasia; the concrete cases for legal abortion have also been widened, which may perhaps be a problem for EAWs received

[249] The offence list includes the following crimes: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, including the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage. The compilation of this list gave a lot of important troubles in a phase of the normative construction, especially with Italy and Ireland during the final stages. For a more detailed discussion of these difficulties, see KAUNERT, C., "Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission", *European Integration*, Vol.29, No.4, September, 2007, p. 400. IMPALÀ, F., "The European Arrest Warrant in the Italian system, between mutual recognition and mutual fear with the European area of freedom, security and Justice", *Utrecht Law Review*, 1(2), 2005, pp. 56-78.

[250] Concerning this, ARANGÜENA FANEGO, C., "La orden europea de detención y entrega. Análisis de las Leyes 2 y 3 de 14 de Marzo de 2003, de transposición al ordenamiento jurídico español de la Decisión Marco sobre la 'euroorden'", *Revista de Derecho Penal*, num. 10, September 2003, p. 28.

[251] Organic Law 5/2010, of 22 June, modifying Organic Law, 10/1995, of 23 November, of the Criminal Code does not, however, enter into force until 23 December 2010.

in Spain based on these acts because the Court of Justice[252] notes that the only valid definition is that which gives the issuing judicial authority according to its domestic law.

On the other hand, some of the terminology or specifications used in the FD in that list are too abstract[253]. See, for example, corruption[254], computer related crime[255], swindling, terrorism, racketeering[256], etc. That is why, as suggested by a group of the doctrine[257], it would be useful (and would have been useful) for each member state to publish a record/catalogue of all the behaviours that according to its national law could be classified within some of the offences in the list.

However, opposing the various criticisms of the offence list, DE MIGUEL ZARAGOZA[258] holds that the majority (if not all) of the thirty-two offences from the list are punished in all the member states.

The confrontation that has been briefly described on the list of offences would, in our opinion, raise the question on the often praised[259] "key" of the FD: the disappearance

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[252] See, case C-303/05, 3 May 2007, Advocaten voor de Wereld VZW v Leden van de Ministerraad.

[253] Vide ORMAZABAL SÁNCHEZ, G. "La Orden europea de detención y entrega y la extradición de nacionales propios a la luz de la jurisprudencia constitucional alemana. [Especial consideración de la Sentencia del Tribunal Constitucional alemán de 18 de julio de 2005 (2 BvR 2236/2004)]", *Diario La Ley*, Nº 6394, 5 January 2006, Ref. D-4, Editorial LA LEY 5481/2005, p. 2. DE HOYOS SANCHO, M., "Cooperación judicial en la Unión Europea. Reflexiones en torno al nuevo sistema de extradición simplificada", *Actas del II Congreso Internacional "El futuro de Europa a debate"* (CALONGE VELAZQUEZ, A. dir)*, Valladolid,* Instituto de Estudios Europeos, 2004, p. 11. Article 2.2 of the EAW FD has been also criticised for its vagueness, see PÉRIGNON, I., *et al*. DAUCÉ, C., "The European Arrest Warrant_ a growing success story", ERA Forum, Vol. 8, 2007, p. 207. MACKAREL, M., "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant", *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, p. 44. Same critique, FICHERA, M., "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?", *European Law Journal*, Vol. 15, No.1, January, 2009, pp. 79-80.

[254] JIMÉNEZ VILLAREJO, "Reflexiones sobre el concepto de corrupción a propósito de la orden de detención europea", *Actualidad Jurídica Aranzadi*, No. 560, 2002, BIB 2002\2212.

[255] POCAR remarks on the need for clarification based on the diverging international praxis and domestic laws on what constitutes this crime, which activities are included in "cyber crime", etc., see in particular, POCAR, F., "New challenges for international rules against cyber-crime", *European Journal on Criminal Policy and Research*, 2004, Vol. 10, p. 32, more pp. 34-37.

[256] PLACHTA, M., "European Arrest Warrant: Revolution in Extradition?", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 11/ 2, 2003, p. 190.

[257] Vid. FONSECA MORILLO, F. J., "La orden de detención y entrega europea", *Revista Española de Derecho Comunitario Europeo*, No. 14, January/April 2003, p. 89.

[258] DE MIGUEL ZARAGOZA, J., in "Algunas consideraciones sobre la Decisión Marco relativa a la orden de detención europea y a los procedimientos de entrega en la perspectiva de la extradición", *AP,* No. 4, January 2003.

[259] Vid. JIMENO BULNES, "La orden europea de detención y entrega: aspectos procesales", op.cit., LA LEY 408/2004, p. 4; the same author again in "After September 11th: the Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples", *European Law Journal*, Vol. 10, No. 2, pp. 235-253. The mail characters of the execution of EAWs as well, some of the Central Courts of Preliminary Investigations, vid. among others: GARZÓN REAL, "Eurowarrant: European extradition in the 21st century", *JUSTICE Conference*, p. 2. The Spanish legislator also highlights this fact in the sixth paragraph of the Preamble: "the deeply innovative nature of this procedure is accentuated by the fact that it is applied with regard to a long list of categories of offences established in the Framework Decision, in

of the double incrimination principle. In view of DE MIGUEL ZARAGOZA's assertion one might wonder[260] if the disappearance of the control of double incrimination is really a significant novelty in the EAW or if it is a deceit. The considerations would be thus: if it is true that most of the offences on the list are envisaged in all their versions and forms (excluding some problematic exceptions) in all of the member states, what is the advantage or what discovery does the fact of not demanding this offence of double incrimination represent with regard to the old extradition if the result of this control would always have been in favour of the surrender, because of the weight of the offence in both legislations. In other words, if, for the majority of the offences on the list, the principle of controlling double incrimination was known beforehand to show a positive effect, because the offence (excluding some occasional exceptions) is punished both in the issuing country and in the executing one, what advance or improvement does the disappearance of the double incrimination principle imply? This is what the Advocate General explained in his allegation to the case VOOR DE WERELD. In RUIZ JARABO's view *the acts listed are classed as offences in all the Member States*, so *it is not the double criminality requirement which is set aside but rather* only *the requirement of its verification*[261]*.*

Accordingly, in our opinion, the abolition of a double criminality check for the offences listed has to some extent been blown out of proportion because technically the verification is superfluous, since it was also positive in the previous system (extradition). It is already known that the main practical problem in the previous system was not this principle, but the intervention of political authorities in issuing or executing proceedings. It is therefore our view that, above all, the main point about this system that is different is the judicial nature of the EAW which replaces the powers of political authorities in extradition[262].

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respect of which the existence of double incrimination can no longer be examined. Thus, on receiving a European warrant for one of the classes of offences established in this list, provided that the European warrant crosses a certain penalty threshold, the judicial authority must execute the warrant regardless of whether its own criminal law includes such types of offences". MACKAREL, M., "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant", *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, p. 40.

[260] PLACHTA, M., "European Arrest Warrant: Revolution in Extradition?", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 11/ 2, 2003, pp. 178-194.

[261] They are offences where the verification of double criminality is regarded as superfluous because the acts concerned are punished throughout the Member States. Paragraph 90. See, also footnote No. 86. Advocate General's opinion. Case C-303/05, 3 May 2007, Advocaten voor de Wereld VZW v Leden van de Ministerraad.

[262] Jégouzo, I., "Le mandat d'arrêt européen ou la première concrétisation de l'espace judiciaire européen", *Gazette du Palais – Recueil* , July-August 2004, p. 2311.

Nevertheless, the hypothesis we have just formulated must be incorrect because otherwise we could not explain how the formal disappearance of the double incrimination principle from that list has been the object of so much criticism[263] inside and outside Spain, for the possible violation of the principle of legality (*nullum crime sine lege certa*).

Anyway, the double incrimination principle cannot be compared, according to the Spanish Constitutional Court, to an identity of the criminal regulations between the requiring State and the required one. Therefore, the double incrimination principle does not require that the offence has the same denomination in both legislations, or that the respective criminal regulations are identical (STC 102/1997, of 20 May, as well as AATC 49/1999, of 4 March, FJ 2).

Leaving this matter aside, in other cases the difficulty arises because the maximum penalty under Spanish law for some listed offences is always lower than three years. For example, the illegal trafficking of an endangered plant species has a maximum penalty of two years of imprisonment (Article 332 Criminal Code). Therefore, despite the fact the offence is on the list, in Spain it would be automatically excluded because of the penalty duration, and, in the end, a EAW of this type of offence would depend on the requirements of offences not included on the list.

So FONSECA MORILLO[264] criticises setting a minimum duration of the penalties for the offences on the list, because it generates disparities between the member states. And, curiously and paradoxically, it favours surrender to the countries with a more repressive or implacable criminal legislation.

Finally, and although it is impossible to tackle all the problems derived from the Spanish mixed system of control or not of the double incrimination principle in depth, we must outline the aura of insecurity; in our opinion this is due to having configured this

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[263] By way of example, LÓPEZ ORTEGA, J. J., "La orden de detención europea: Legalidad y jurisdiccionalidad de entrega", p. 30; also the author in "El futuro de la extradición en Europa (una reflexión desde los principios del Derecho europeo de extradición)", *Derecho Extradicional (*CEZÓN GONZÁLEZ, dir.), pp. 327 and ff. ALEGRE, S. and LEAF, M., "Mutual recognition in European judicial co-operation: a step too far too soon? Case Study—the European Arrest Warrant", commentary to Article 7 ECHR "Double Criminality and Retrospective Application", *European Law Journal,* Vol. 10, No. 2, March 2004, pp. 208–209. GONZÁLEZ-CUÉLLAR SERRANO, N., "La «euroorden»: hacia una *Europa de los carceleros", Diario La Ley*, No. 6619, 29 December 2006, Ref. D-281, LA LEY 4425/2006, pp. 5-8. PÉRIGNON, I., *et al*. DAUCÉ, C., "The European Arrest Warrant - a growing success story", *ERA Forum*, Vol. 8, 2007, p. 206.

[264] FONSECA MORILLO F. J., "La orden de detención y entrega europea", *Revista Española de Derecho Comunitario Europeo,* n. 14, January/April 2003, p. 88. Opinion that seems to be shared by ARANGÜENA FANEGO, C., in "La orden europea de detención y entrega. Análisis de las Leyes 2 y 3 de 14 de marzo de 2003, de transposición al ordenamiento jurídico español de la Decisión Marco sobre la eurorden", op. cit., p. 30. DEL POZO PÉREZ BLANCA, "La orden europea de detención y entrega: un avance en el principio de reconocimiento mutuo de resoluciones judiciales entre los Estados de la Unión Europea", *Diario La Ley*, No. 6164, 10 January 2005, Year XXVI, Ref. D-5, LA LEY 2683/2004, p. 8.

principle as an optional reason for denying surrender of an EAW for offences not included in the list. In such cases, the Criminal Division of the National Court may[265] demand the double incrimination principle. This surrender with possible demand of the double incrimination principle allows a large degree of freedom to the corresponding section of the Criminal Division of the National Court. At this stage, we must recall that the aforementioned Criminal Division of National Court has four sections. Therefore, the system allows (and even favours) unequal results in identical situations. One section of this Criminal Division may therefore agree to the surrender for an offence not included on the list, although the behaviour may not be illicit in Spain or, even if it is, it constitutes only a petty offence, while another section may refuse a person's surrender in the same circumstances. One of the main problems that we stress is the unequal application of the EAW throughout member states[266]. The legal and practical power of executing judicial authority in each member state is not really clear, therefore the belief that the EAW will function harmoniously is not enough for it to conform with the implementation.

In the same way, the question arises for the practical application of these optional causes of denying surrender [Articles 91.2 in relation to 12.2 h) Spanish Law, Art 4.1 FD]. Regardless of the specific optional cause, what does an optional cause of denial mean in itself to the executing judicial body? An optional condition is, according to the Royal Academy of Spanish Language (RAE), one whose fulfilment depends on the interested party's will and which is licit in successions; in other words, that the decision is a choice of the interested party, but that any of the options will be licit or valid. In our opinion, the problem arises earlier. Regardless of the option that the executive body chooses for applying the optional cause or not, is the judicial body obliged *sua sponte* to control each of them, that is to say, to know if in each case they could be applied or not? Actually, the judicial body that decides on the execution of the EAW is only obliged to control *sua sponte* the mandatory causes of denial of surrender (*non bis in idem*, being a minor, pardon), or should it also verify the optional ones to voluntarily and knowingly decide whether or not to apply these?

In short, judicial insecurity generated by the double incrimination configuration, like a surrender denial contingent on offences not included in the list, constitutes a

[265] For more details on this principle, see KEIJZER, "The Double Criminality Requirement", *Handbook on the European Arrest Warrant* (BLEXTON, R. et. Al. VAN BALLEGOOIJ, W.), The Hague, TMC Asser Press, 2005, pp. 137-163. MACKAREL, M., "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant", *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, p. 43.

[266] As GUILD, E., "Introduction", *Constitutional challenges to the European Arrest Warrant (GUILD.,E.)*, Nijmegen, Wolf Legal Publisher, 2006, pp. 101-124.

serious danger of violating the principles of equality, legality and the fundamental rights of interdiction of defencelessness and due process.

7.2.2.3 Procedures

We will focus our attention on the procedure that follows the execution of the EAW in Spain, because the issuing procedure in Spain is simple and very similar to that of any other member state. In the executing proceeding, however, there are some differences. In general, according to the EAW FD, the EAW executing procedure is dealt with as a matter of urgency and within preclusive time-limits (Articles 17 and 23), the requested person is entitled to a hearing (Articles 14 and 19), to be assisted by a lawyer and an interpreter [Article 11(2)], to the rights available to arrested persons and, where appropriate, to provisional release in accordance with the executing State's Law. The next sections explain how it works in Spanish EAW Law.

Reception of the EAW

The issuing procedure can start in different ways depending on how the EAW request is received in Spain, which will depend in turn on the medium or transmission[267] channel that the issuing state has used.

- One possibility is that the Central Preliminary Investigation Court receives the EAW directly, in which case the Judge will order the arrest, if appropriate, of the named person. In addition, it will inform the Ministry of Justice about the EAW request.

- A variant of the previous process is that the foreign judicial authority sends the EAW directly to a Spanish judicial body but to one that is not competent (objectively, functionally or territorially). In this case, the Spanish judicial body that has received the EAW by mistake shall send it to the dean judge of the Central Preliminary Investigation Court, so that they can forward it to the competent one and this last judicial body will then proceed as described above.

- The issuing judicial authority may also transmit the EAW by SIRENE, in which case any enforcement agency of the member states can carry out the arrest

[267] MARIA DE FRUTOS, L.M., "Transmisión de la orden europea. Aspectos policiales desde una perspectiva práctica", *La orden de detención y entrega europea* (dirs. ARROYO ZAPATERO, L. et al. NIETO MARTÍN, A., Cuenca, Editorial Universidad Castilla-La Mancha, 2006, pp. 175-186.

directly if the requested person is or is found in the territory of that State (Spain, in our case).

In practice, the majority of the EAWs get to Spain through this last channel. This seems logical if we consider the reasons for issuing an EAW: the issuing judicial authority normally does not know where the person requested in the EAW is. The dossiers consulted in this research project and the opinions of consulted experts confirm that most of the EAWs received in Spain[268] have been sent via SIRENE.

The rare cases of direct transmission are generally due to one reason, which is that nobody renounces the speciality rule. These are EAW requests for persons who have previously been claimed in an EAW for other facts; the decision on the previous EAW may be pending or even have been executed already.

Arrest and bringing before the judicial authority

Once the requested person has been located or found in Spain, the police will proceed with his or her arrest with the corresponding reading of rights, among which the cause of the arrest is prominent (Article 520 Spanish Criminal Procedure Law, Article 13.1 Spanish EAW Law). The arrested person may be brought before the Central Preliminary Investigation Court, directly or through the Preliminary Investigation Court within the jurisdiction where the person has been arrested, within no more than 72 hours of the arrest (Article 13.2 Spanish EAW Law).

When the arrested person has been brought before the judicial authority, it will inform them of the existence of the European warrant, its content, the possibility of irrevocably consenting[269] to surrender to the issuing State and the rest of their rights (Article13.3 EAW Spanish Law).

The arrested person shall be heard by the Central Preliminary Investigation Court no later than seventy-two hours after being brought before the judicial authorities, with the attendance of the Public Prosecutor, legal counsel for the arrested person and,

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[268] The same dynamic is also applied in the reverse situation. The general rule is that the Spanish judicial bodies send requests via SIRENE.

[269] About the requested person's consent, see DE PRADA, J.R, "Consentimiento a la entrega. Renuncia al principio de especialidad", *La orden de detención y entrega europea* (dirs. ARROYO ZAPATERO, L. et al. NIETO MARTÍN, A., Cuenca, Editorial Universidad Castilla-La Mancha, 2006, pp. 355-362. In particular, for the right to know the content of the order as a fundamental right, BERNARD, D., "El derecho fundamental a ser informado acerca del contenido de la orden de detención y entrega europea", *La orden de detención y entrega europea* (dirs. ARROYO ZAPATERO, L. et al. NIETO MARTÍN, A., Cuenca, Editorial Universidad Castilla-La Mancha, 2006, pp. 319-325.

where necessary, an interpreter. The hearing must be conducted according to the Criminal Procedure Law regarding the hearing of the arrested person.

The main judge of this Central Preliminary Investigations Court will ask the arrested person if they consent irrevocably to their surrender and if they renounce entitlement to the speciality rule[270] (Article 14 Spanish EAW Law). The judge shall make sure that the consent to surrender and renunciation of entitlement to the speciality rule have been given freely and with full understanding of the consequences, in particular of its irrevocable nature.

Whether the requested person has given consent to the surrender or not, the judge will also hear the Public Prosecutor's Office on the origin of the surrender, the existence of impediments or the need to impose conditions on the surrender, etc.

In this hearing, any of the parties (requested person or Public Prosecutor's Office) may propose the use of any necessary source of evidence regarding the concurrence of causes for refusal or conditioning of the surrender. As a general rule, the evidence will be assessed in the same act but, if necessary, the judge will fix a time limit for its assessment, taking into account the need to respect the maximum time limits provided by law.

In the course of this hearing, the Judge of the Central Preliminary Investigations Court will decide on the personal situation[271] of the requested person. In view of the pleas in law of the requested person and the Public Prosecutor's Office on this subject, the Judge of the Central Preliminary Investigations Court shall decree the precautionary measures he considers necessary to ensure the requested person is fully available and the EAW is executed: provisional imprisonment, provisional release or any other measure provided for that purpose in the Criminal Procedure Law.

The judge or the Criminal Division of the National Court may modify the precautionary measure initially agreed during the procedure (Article 17 Spanish EAW Law). The decision (judicial order) of the Central Preliminary Investigations Court on the

[270] According to data collection, see Appendix II, none of the requested persons that we have consulted in the sample renounced the speciality rule.

[271] ANDREU MERELLES, F., "Las medidas cautelares personales en la ejecución de una orden europea de detención y entrega: visión del juez central de instrucción", *Manuales de formación continuada*, No. 42, 2007, pp. 281-292. ARANGÜENA FANEGO, C. "Las medidas cautelares en la legislación de la orden europea de detención y entrega: especial consideración de la prisión provisional y sus alternativas y de la intervención de objetos y efectos del delito", *La orden europea de detención y entrega europea* (MUÑOZ MORALES ROMERO, M., ARROYO ZAPATERO, L.A, NIETO MARTIN, A. coords.), Universidad Castilla La Mancha, 2006, pp. 383-430.

personal situation of the requested person may be appealed to the Criminal Division of the National Court.

If the person concerned has consented to surrender to the issuing State and the Public Prosecutor sees no grounds for refusing or setting conditions for surrender, the Judge of the Central Preliminary Investigating Court may issue a writ for surrender to the issuing State. This writ shall be issued no later than ten days after the hearing and no appeal is possible (Articles 18.1 and 19 Spanish EAW Law).

Where the requested person has not agreed to their surrender and/or the Public Prosecutor's Office notices a refusing cause or that conditions have been set for the surrender, the Central Preliminary Investigation Court shall refer the proceedings to the Criminal Division of the National Court so that it may decide within sixty days of the arrest (Article 18.2 Spanish EAW Law).

The Public Prosecutor's Office protocol states, among other recommendations, that the Central Preliminary Investigation Court includes a written note when forwarding the file to the Criminal Division of the National Court stating how many days are left before the sixty days provided in Article 19 EAW Spanish Law expire. Usually the file arrives without that information, so the corresponding Criminal Division of the National Court must infer it from the arrest date in order to know how long it has to decide without exceeding the ordinary limit established in the law. During some of the interviews, several Judges of the Criminal Division of the National Court complained that the Central Preliminary Investigation Courts used up or even exceeded the time they had to bring the file before the Criminal Division of the National Court.

It is worth discussing, even superficially, an exceptional situation that has been admitted in practice even though it is not covered by the EAW Spanish Law. Any of the procedures previously described, which are within the competence of the Judge of the Central Preliminary Investigations Court, could exceptionally be heard as an ordinary legal hearing before the Judge of the Preliminary Investigation Court from where the requested person has been arrested or where they are. Under the intervention protocol of the EAW signed by the Crown Prosecution Service in Spain the General Council of the Judiciary expressly allows this exceptional pre-recorded appearance before the Central Preliminary Investigation Courts. These Courts may use the ordinary hearing to regularise the personal situation of the requested person in the Preliminary Investigation Court near to where the person has been arrested. The judge will send the proceedings urgently (via fax, etc.) to the Central Preliminary Investigation Court. They may even take

place via videoconferencing from the place of the arrest or the closest place with videoconference facilities.

A Prosecutor –coordinator- of the South of Spain has been strongly critical of this possibility because it violates the terms of the reform of Articles 65 and 88 of the Organic Law of the Judiciary (hereinafter LOPJ) written in accordance with the EAW Organic Spanish Law 2/2003. The LOPJ establishes that whatever the place of detention may be, the competent judicial body for the execution of an EAW shall be the Central Preliminary Investigation Court or the Criminal Division of the National Court.

Unofficially allowing the hearing to take place in the Preliminary Investigation Court of the place where the requested person was arrested, instead of in the Central Preliminary Investigation Court, is a doubtful legal perversion that, furthermore, would (or could) unleash a lot of insecurity in various situations. For instance, if that other extraordinary Preliminary Investigation Court agrees to a precautionary measure against the requested person (e.g., provisional imprisonment) and this person appeals that decision, which would be the competent judicial body to hear that appeal? Article 17 of the EAW Spanish Law confers this power on the Criminal Division of the National Court; but how can the National Court hear a decision agreed in a Preliminary Investigation Court (let us say in Marbella)?. On the other hand, the time taken and the procedure's prolongation because of allowing the authority of the Central Preliminary Investigation Court, instead of being almost immediate or lasting only hours, is going to suffer a delay of days or even weeks, etc. In short, this "ordinary" judicial hearing (that should not be so) accepted in the Spanish protocol violates (or may violate) many fundamental rights of the requested person: the right to defence, the right to freedom, the right to a procedure without delays, etc.

In spite of everything, this questionable "judicial hearing" in EAWs was only used in the first stage and, what is more, was exceptional because it was improved upon little by little. Nowadays, the police inform the corresponding Preliminary Investigation Court through a written note that a person has been arrested in its territorial jurisdiction and that they are going to be taken to the National Court (Central Preliminary Investigation Court).

Decision contested cases and execution

When the requested person does not consent to their surrender, the decision falls to the Criminal Division of the National Court which has 60 days to decide on the

surrender. However, according to Article 17 EAW Spanish Law, in both cases[272] the time limits may be extended by a further 30 days if the grounds are considered reasonable.

If the decision is to approve the execution of the EAW, the effective surrender should be no later than 10 days after the final decision on the EAW execution (Articles 23, 35, 36 and 43 EAW Spanish Law). The issuing judicial authority designates the police authority that will come to Spain to pick up the requested person. Obviously, the issuing authority has to inform the Spanish executing authorities of the place and date for the surrender.

The EAW Spanish Law envisages the possibility of a new surrender date being agreed by the two judicial authorities if the previous one frustrates Articles 23(4) FD and 20(2) EAW Spanish Law, within a further time limit of ten days of the date first set. The surrender can also be postponed for serious humanitarian reasons[273] [Article 20(3) Spanish EAW Law].

Some authors[274] see an incongruence in the legislation (both FD and EAW Spanish Law) because the EAW FD (and so the EAW Spanish Law) fix short time limits to proceed with the surrender; surprisingly it is silent on the case of non-fulfilment.

In addition, the EAW Spanish Law establishes the grounds for mandatory and optional non-execution in very similar[275] terms to those used by the EAW FD. According to the first paragraph of Article 12 EAW Spanish Law, the Spanish executing judicial authority shall refuse to execute the EAW in the following cases: *non bis in idem*[276], age (requested person is a minor), and pardon. Formally, the article establishes:

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[272] If the decision to surrender is handed down by the Central Preliminary Investigation Court because the requested person has consented to it; and also, when the requested person does not consent and the Criminal Division of the National Court is the judicial authority that finally decides the case.

[273] As JIMENO BULNES notices the delays sometimes involve the risk that the requested person will have to be released upon expiry of the time limits stipulated in European and national rules. Some of these problems have also been mentioned in the interviews and meetings. See section about interviews.

[274] See, HOYOS SANCHO, M., "Il nuovo sistema di estradizione semplifcata nell'Unione Europea. Lineamenti della legge spagnola sul mandato d'arresto europeo", XLV *Cassazione Penale*, 2005, pp. 303-315. JIMENO BULNES, M., "The Enforcement of the European Arrest Warrant: A Comparison Between Spain and the UK", *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, p. 303. The authors criticise the fact that no kind of juridical sanction or penalty is contemplated.

[275] See in particular GONZÁLEZ CANO, M.I "La ejecución condicionada del mandamiento de detención y entrega europeo", *Unión Europea Aranzadi*, June, 2003, pp. 5-15; HOYOS SANCHO, M., "Euro-orden y causas de denegación de la entrega", *Cooperación judicial penal en la Unión Europea: la orden europea de detención y entrega* (C. Aranguena Fanego, C. ed.), Valladolid, 2005, pp. 207-312. DE HOYOS SANCHO, M., "Eficacia transnacional del *non bis in idem* y denegación de la Euroorden", *Diario La Ley*, No. 6330, Sección Unión Europea, 30 Sep. 2005, Ref. D-218, ref. LA LEY 4768/2005.

[276] See, LÓPEZ BARJA DE QUIROGA, J., *El principio "non bis in idem",* Madrid, 2004, págs. 14 y ff. DE HOYOS SANCHO, M., "Eficacia transnacional del *non bis in idem* y denegación de la Euroorden", *Diario La*

a) If the Spanish executing judicial authority is informed that the requested person has been judged by a member state other than the issuing State with respect to the same acts, provided that, where there has been sentence, the sentence has been served or is currently being served, or may no longer be enforced under the law of the sentencing member state.

b) If the person who is the subject of the EAW cannot, due to their age, be held criminally responsible under the law of Spain for the acts on which the arrest warrant is based.

c) If the requested person has been pardoned in Spain for the penalty or measure imposed for the same acts on which the EAW is based, and can be prosecuted under Spanish jurisdiction.

The Spanish executing judicial authority may refuse to execute the EAW in the following cases:

a) In the circumstances referred to in Article 9(2); however, in relation to taxes or duties, customs and exchange, execution of the EAW shall not be refused on the grounds that the law of Spain does not impose the same kind of tax or duty, or does not contain the same type of rules as regards taxes, duties, and customs and exchange regulations as the law of the issuing member state.

b) Where the person who is the subject of the EAW is being prosecuted in Spain for the same act as that on which the EAW is based.

c) Where a non-suit judgement has been given in Spain for the same acts.

d) Where a final judgement has been passed upon the person who is the subject of the EAW in another EU member state with respect to the same acts, which definitively prevents further proceedings.

Ley, No 6330, Sección Unión Europea, 30 Sep. 2005, Ref. D-218, ref. LA LEY 4768/2005. CEDENO HERNAN, M., "La orden de detención y entrega europea. Especial consideración del non bis in idem como motivo de denegación", *El Derecho Procesal en la Unión Europea* pp. 75-106. IRURZUN MONTORO, F. "El espacio judicial europeo en una encrucijada?", *Diario La Ley* (2006) 24 July, No. 6532 pp. 1-12. VERVAELE, J. "The transnational *ne bis in idem* principle in the EU: mutual recognition and equivalent protection of human rights", *Utrecht Law Review,* No. 1, 2005, pp. 100-118. BAILIN, A., "Double jeopardy", *Cross border crime* (LEAF), JUSTICE Publication, 2006, pp. 103-120. WASMEIER, M.*et al*. THWAITES, N. "The development of non bis in idem into a transnational fundamental right in EU law: comments on recent developments", *European Law Review*, No. 31, 2006 pp. 65-78. VAN DER WILT, H., "The European Arrest Warrant and the principle *ne bis in idem*", *Handbook on the European Arrest Warrant* (BLEKXTOON, R and VAN BALLEGOOIJ,W.), The Hague, 2005, pp. 99-117; ECJ jurisprudence about the non bis in idem: judgments *Miraglia*, 5 April 2005, C-469/03; *Van Esbroeck,* 9 March 2006, C-436/04; *Gasparini,* 28 September 2006, C-467/04; *Van Straaten*, also 28 September 2006, C-105/05.

e) If the person who is the subject of the EAW has been finally judged by a third State not belonging to the EU regarding the same acts provided that, when there has been a sentence, it has been served or is currently being served, or may no longer be executed under the law of the sentencing country.

f) If the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is of Spanish nationality, save when they consent to serving the sentence in the issuing State. Otherwise, the requested person must serve the sentence in Spain.

g) Where the EAW relates to offences which are regarded by Spanish law as having been committed in whole or in part in Spanish territory.

h) Where the EAW relates to offences which have been committed outside the territory of the issuing State and Spanish law does not allow prosecution for the same acts when committed outside its territory.

i) Where, under Spanish legislation, the criminal prosecution on which the EAW is based or the punishment is statute-barred, if Spanish courts were competent to prosecute the criminal acts.

Nevertheless, other member states have converted optional non-execution EAW grounds into mandatory ones. Obviously, from the outset it does not indicate the best signal of a "mutual trust" practice. At this point, the most formally restrictive transpositions of the FD is the Italian one[277]; but the interviews and meetings show us that in other Members States refusals are based on grounds that neither the FD nor their transpositions envisage, because the negation comes from their own legal system and jurisprudence.

7.2.2.4 Guarantees

The national's surrender

Another of the important novelties of the EAW FD is that it overcomes the old extradition principle[278] that prevented nationals'[279] surrender. Art 5.3 of the FD eliminates

[277] Italian EAW Law establishes twenty mandatory grounds for non-execution, even pregnancy or care of children under 3 years old (Article 18 Law n. 69 on 22 April 2005, *Gazzetta Ufficiale* No. 98 on 29 April 2005).

[278] Vide in Spain, for instance, Article 3 of the Law 4/1985, of 21 March, on Extradition.

the generic prohibition of extraditing or surrendering to other State nationals of their own State. As Kaunerts[280] explains, since 1648 this ability to protect its own citizens from outside power has been one of the most important features of the national sovereignty.

In fact, the efficacy of the old principle had been subject to discussion in the doctrine for some time and in practice before the EAW FD; in particular, in areas like the EU that propose a strong ideal of integration. Not in vain, the European Convention on Extradition no longer expressly prohibited national surrendering but established that "a Contracting Party shall have the right to refuse extradition of its nationals"[281]. However, almost every member state has provisions under their respective national laws preventing the surrender of their nationals; the only difference is the legal rank of those provisions: one is judicial and others constitutional.

Spanish law, like that of every other State, incorporated the general character of the prohibition of surrendering its nationals in Article 3 of Spanish Law 4/1985, 21 March, of Extradition. However, other States such as Poland[282], Czech Republic, Germany[283], Netherlands and Cyprus[284], have (or had) this provision in their constitutional text. And it

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[279] The European Council's first opinion on this matter was different because it tried to lay down the person's main residence criteria instead of the nationality condition.

[280] KAUNERT, C., "Without the Power of Purse or Sword: The European Arrest Warrant and the Role of the Commission", *European Integration*, Vol.29, No.4, September, 2007, p. 387.

[281] "…. b) Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term "nationals" within the meaning of this Convention. Nationality shall be determined as at the time of the decision concerning extradition (…)".

[282] Nußberger , A., "Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant", *ICON*, Vol. 6, No. 1, 2008, pp. 162–170. Lazowski, L., "Poland Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005", *European Constitutional Law Review,* No. 1, 2005, pp. 569–581. BEM, K., "The European Arrest Warrant and the Polish Constitutional Court Decision of 27 April 2005", *Constitutional challenges to the European Arrest Warrant (GUILD.,E.)*, Nijmegen, Wolf Legal Publisher, 2006, pp. 125-136. LAZAWSKI, A., "Poland. Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005", *EuConst*, No. 1, 2005, pp. 569-581.

[283] TOMUSCHAT, C., "Inconsistencies – The German Federal Constitutional Court on the European Arrest Warrant", *European Constitutional Law Review,* Vol. 2, 2006, pp. 209-226. MOLDERS, S., "Case Note - The European Arrest Warrant in the German Federal Constitutional Court", *German Law Journal*, No. 1, 2006, pp. 45-57. GEYER, F., "The European Arrest Warrant in Germany-Constitutional mistrust towards the Concept of Mutual Trust", *Constitutional challenges to the European Arrest Warrant (GUILD.,E.)*, Nijmegen, Wolf Legal Publisher, 2006, pp.101-124. PARGA, A.H., "Bundesverfassungsgericht (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German Arrest Warrant Law", *C.M.L.Rev*., No. 43, 2006, 583. SINN, A., *et al*., WÖRNER, L., "The European Arrest Warrant and Its Implementation In Germany – Its Constitutionality. Laws and Current Developments", *ZIS- Zeitschrift für Internationale Strafrechtsdogmatik*, http://www.zis-online.com/dat/artikel/2007_5_135.pdf.

[284] SARMIENTO, D., "European Union: The European Arrest Warrant and the quest for constitutional coherence", *International Journal of Constitutional Law*, Vol. 6, 2008, pp. 171-183. SERRANO MASSIP, M., «"Fractura en la cooperación judicial en materia penal en la Unión Europea: análisis de la Sentencia del Tribunal Constitucional Alemán, Sala Segunda, de 18 de julio de 2005, acerca de la Ley sobre la Orden de Detención Europea", *Sentencias de TSJ y AP y otros Tribunales*, No. 4, 2006, BIB 2006\606. Also some thoughts in IRURZUN MONTORO, F. "¿El Espacio Judicial Europeo en una encrucijada?", *Diario La Ley*,

has been precisely in these last cases where doubts have arisen on the constitutionality[285] of the national transposition of the FD. Furthermore, each Constitutional Court resolved the compatibility problem of its legislation differently: some from a Europeanist view, and others from the standpoint of national supremacy[286].

In Spain, however, the problems of a national's surrender have arisen in terms of the specific guarantees that may be demanded in these cases. Articles 11.2 and 12.2 (f) of the EAW Spanish Law establish, agreeing with Articles 4(6) and 5(3) FD, a series of guarantees to be asked of the issuing State if the requested person is Spanish. Those guarantees[287] will vary depending of the aim of the EAW.

A) If the EAW has been issued to execute a detention order or a custodial sentence, the executing judicial authority will ask the Spanish citizen if they give their consent to serve the penalty passed against him in the issuing State.

B) If the EAW has been issued for the purposes of prosecution, the judicial authority will ask the requested Spanish person if they want to be returned to Spain in order to serve the custodial sentence or detention order that could be passed against them in the issuing State.

Strictly, therefore, Spain cannot refuse to surrender its nationals to other member states, unless in a very particular case of the first assumption [vide Article 12.2 (f)]: when the Spanish citizen requested by an EAW to serve a custodial sentence does not consent to do so in the issuing State. However, denying surrender implies not that the requested person does not serve the sentence, but that he will do so in Spain. That is

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No. 6532, 24 July 2006, Ref. D-178, LA LEY 2067/2006, in particular fifth pp. 7-10 dedicated to "La sentencia del Tribunal Constitucional alemán sobre la Ley de implementación de la Orden europea de detención". NOHLEN, N., "Germany: The European Arrest Warrant case", *ICON*, Vol. 6, 2008, pp. 153–161. ORMAZÁBAL SÁNCHEZ, G., "La Orden europea de detención y entrega y la extradición de nacionales propios a la luz de la jurisprudencia constitucional alemana. [Especial consideración de la Sentencia del Tribunal Constitucional alemán de 18 de julio de 2005 (2 BvR 2236/2004)]", *Diario La Ley*, No. 6394, 5 January 2006, Ref. D-4, LA LEY 5481/2005. DEEN-RACSMÁNY, Z., "Lessons of the European Arrest Warrant for Domestic Implementation of the Obligation to Surrender Nationals to the International Criminal Court", *Leiden Journal of International Law*, Vol. 20, 2007, pp. 167–191; also the same author in "The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 14/3, 2006, pp. 271-306. ETXEBERRIA GURIDI, J.F., "Vicisitudes de la orden europea de detención y entrega. El caso alemán en particular", *Diario La Ley*, No. 6613 and 6614, 20 y 21 December, 2006, Ref. D-275, LA LEY 4353/2006.

[285] COMBEAUD, S., "Implementation of the European Arrest Warrant and the Constitutional Impact in the Member States", *Constitutional challenges to the European Arrest Warrant (GUILD.,E.)*, Nijmegen, Wolf Legal Publisher, 2006, pp. 187-194.

[286] "The European Arrest Warrant: Between Trust, Democracy and the Rule of Law. Introduction. The European Arrest Warrant: Extradition in Transition", *European Constitutional Law Review*, No. 3, 2004, p. 246.

[287] FLORÉ, D. "La entrega de nacionales del Estado miembro de ejecución de la Orden Europea de Detención", *La orden de detención y entrega europea* (dirs. ARROYO ZAPATERO, L. et al. NIETO MARTÍN, A., Cuenca, Editorial Universidad Castilla-La Mancha, 2006, pp. 207-218.

why this *sui generis* refusal cannot be considered in itself contrary to the mutual recognition, nor to a shadow of the classical principle that forbids the surrender of nationals. Data from Appendix II discovers that only in the 97% of the EAWs received was it demanded that the person be returned after hearing.

In the interviews phase, some judges[288] of the Criminal Division of the National Court complained that the Central Preliminary Investigation Courts frequently forgot to ask the requested Spanish persons whether they consented to serve the sentence in the issuing State or whether they wished to be returned to Spain to serve the detention order or the custodial sentence that may be delivered against them by the issuing State. That is why the Criminal Division of the National Court has on several occasions returned proceedings to the corresponding Central Preliminary Investigation Court, so that this formality is fulfilled. This action by the Criminal Division of the National Court is based on the idea that the executing judicial body that should deal with these proceedings is the Central Preliminary Investigation Court. The comings and goings of the proceedings (Central Preliminary Investigation Court-Criminal Division National Court-Central Preliminary Investigation Court) naturally prolong the procedure and there is a risk of not meeting the time limits fixed by law.

We agree in broad terms with this approach; logically it should be the Central Preliminary Investigation Court who, under Article 14 of the Spanish EAW Law, asks the Spanish citizen requested by the EAW about this matter. However, there is no obstacle to the Criminal Division of the National Court also obtaining this information if the Central Preliminary Investigation Court has already referred the proceedings to the Criminal Division of the National Court, and therefore the said proceedings are already within its competence. The law does not strictly prevent it [vide Articles[289]. 11.2, 12.2 f) and 14.2 last paragraph]. In fact, whatever the personal situation in which the requested person may be, they will no longer be at the Central Preliminary Investigation Court's disposal, but at that of the Criminal Division of the National Court.

[288] See in particular the section “The perception of the EAW among the actors of the criminal justice”.

[289] Last paragraph of Article 14.2 of the EAW Spanish Law states that if the requested person (Spanish in this case) has not given consent, the Judge presiding “shall hear the parties on the concurrence of grounds for refusal of or the setting of conditions for the surrender”. On the other hand, Article 11.2 states that “where a person who is the subject of a European warrant for the purposes of prosecution is of Spanish nationality, surrender may be subject to the condition that the person, after being heard, is returned to Spain in order to serve the custodial sentence or detention order passed against him in the issuing State”. Also Article 12.2 f) that establishes that “If the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is of Spanish nationality, save when he consents to service in the issuing State. Otherwise, the requested person must serve the sentence in Spain”.

Yet the corresponding section of the Criminal Division of the National Court sometimes warns that the Central Preliminary Investigation Court has not asked the Spanish person requested by the EAW about this matter. Thus, the Criminal Division of the National Court approves the surrender to the issuing State without respecting this specific guarantee of the procedure of execution of the EAW that involves a Spanish citizen.

For this reason some requested Spanish persons who have found themselves in this situation have appealed the surrender decision for legal protection of the Constitutional Court for violation of the fundamental right to obtain effective judicial protection and be defended. That is what happened in the judgement of the Constitutional Court 177/2006 of 5 June. This dealt with a case that has had consequences because the requested Spanish citizen actually had to appeal the Constitutional Court twice for violation of several fundamental rights. Both times the Constitutional Court declared that in the surrender procedure several fundamental rights had been violated, and, consequently, declared null and void the decisions of the National Court that had agreed to the surrender. To this and other matters we will dedicate a complete section on the constitutional jurisprudence.

Surrender of persons imposed by a decision rendered in absentia

Contrary to the FD, the EAW Spanish Law does not formally provide any specific guarantee for the EAW that has been rendered to serve an imprisonment judgement (or other security/precautionary measure) imposed in a decision rendered *in absentia*. To be precise, Article 5(1) FD states that "where the EAW has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the EAW that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment".

The doctrine logically strongly criticised the absence of such guarantee (or another similar one) in the Spanish legislation. However, without knowledge of this discussion, the National Court interpreted the Law strictly instead of inclining to a more guarantistic interpretation in accordance with the fundamental rights recognised by the Spanish Constitution (Article 24).

That is why, until not long ago, when Spain received an EAW against a person condemned *in absentia* in the issuing State, the Criminal Division of the National Court proceeded with the surrender in absence of other refusal causes without demanding any guarantee of the issuing State. Roughly speaking this means that the Criminal Division of the National Court surrendered to the issuing State a Spanish citizen condemned *in absentia* without worrying whether the surrendered person would have the right to a review of the judgement and to be present at the new trial that effectively guarantees their right of a defence. Curiously, this jurisprudential stance was backed by some authors. For example, CASTILLEJO MANZANARES[290] argued that the exclusion of this guarantee "matched the expressions and bilateral commitments previously assumed by Spain with the Italian Republic, that concluded with the signing of the Treaty of 28 November 2000".

However, this reasoning and practice was not acceptable to the Spanish Constitutional Court (see, Judgements 177/2006 of 27 June, and 91/2000 of 30 March). The problem with a sentence rendered *in absentia* is that the EAW FD does not require the member states to establish such conditions for surrender, but it refers this matter to national legal systems. In this scenario, the Constitutional Court further points out that the EAW Spanish Law does not specifically envisage any rule to this effect, but in the Spanish legal system this guarantee arises from the right to a trial with full guarantees. Therefore, the Spanish National Court should have expressly provided this guarantee in the surrender-approval order as a condition to the issuing State.

Lifetime sentence: guarantee of review was demanded

Finally, if the offence for which the EAW has been issued is punishable by custodial life sentence, or a life-time detention order, the Spanish Judicial authority shall subject the surrender to the condition that the issuing member state has provisions in its legal system for a review of the penalty or measure imposed, or the application of measures of clemency which the person is entitled to apply for under the law or practice of the issuing State, aiming at a non-execution of such penalty or measure (Article 11.1 EAW Spanish Law). When looking at the study sample of received EAWs, the data reported one case among 234 EAW executions for which this guarantee was demanded.

[290] CASTILLEJO MANZANAREZ, "El procedimiento español para la emisión y ejecución de una orden europea de detención y entrega", op.cit., BIB 2003\922, p. 8.

7.3. The data on the EAW in Spain

The only accessible data today on EAWs that allow a comparative analysis are to be found in the reports that the European Commission periodically produces on the impact of the EAW[291], but on some occasions their data are very generic.

In Spain, the Ministry of Justice, as the central authority, has not made any detailed report on this matter public. Nor has the General Council of the Judiciary (CGPJ) which, in theory, could identify the cases of EAWs issued and EAWs executed through the judicial statistics, and based on this provide some data in their annual review or in their annual reports on Justice data per data. The scarce concrete data on the EAW in Spain appears in the annual reports of the Crown Prosecution Service in the section dedicated to the National Court Prosecution Service, but it is scattered, very generic and only connected with the EAWs received on which Spain must decide.

For these reasons, existing studies on the problems of the EAW are more theoretical rather than practical. Some have even been constructed from simple 'intuitions' on criminal judicial cooperation and in most cases, real statistical references are scarce and sporadic, limited in the end to short paragraphs or footnotes.

Perhaps the 'keys of this project' are the time frame and the empirical data on the EAW that we have collected in each country: How is the EAW being used in practice? What kind of requested person is involved? How long does the procedure take? For which type of crimes is the EAW being issued? How do EAWs end? Were they approved or refused? Etc.

As far as possible, in this project we want to cover both theory and practice, and provide an answer to these and other questions. We really think that it is a great time to assess the EAW in order to remind ourselves why this instrument was created. This snapshot of the past and present of the EAW is indispensable to evaluate the future and

[291] Report from the Commission of 23 February 2005 based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [COM(2005) 63]. Report of the Commission of 24 January 2006 based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [COM(2006) 8]. Article 34 of the EAW FD "3. On the basis of the information communicated by the General Secretariat of the Council, the Commission shall, by 31 December 2004 at the latest, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals. 4. The Council shall in the second half of 2003 conduct a review, in particular of the practical application, of the provisions of this Framework Decision by the Member States as well as the functioning of the Schengen Information System".

the degree of criminal judicial cooperation we want in the short and medium term, with the same EAW or a reformed EAW, with changes driven by the experience, with new instruments along the same lines or with different ones. Instruments like "European Protection Order": Mutual recognition of supervision measures; European evidence warrant (EEW); Supervision of sentenced persons or persons on conditional release; Mutual recognition of custodial sentences and measures involving deprivation of liberty; Recognition and execution of confiscation orders; Mutual recognition of pre-trial supervision measures; Mutual recognition of financial penalties.

The simplified tables and charts in this section are designed to make reading easier and to highlight the most relevant data on the practical functioning of the issuing and execution of the EAW in Spain. However, as we mentioned in the introduction, all the results produced using the programme SPSS are available in the corresponding second section in the appendix.

7.3.1 Limitations in the fieldwork

Ideally, in order to conduct an empirical study the statistical data should be reliable and regular; furthermore the information should be public. "Information is like light", hence the importance of "spreading the data on the real functioning of institutions"[292].

Much of the information has been lost because often the authorities are not aware of the usefulness and value of the information they have in their hands. To this we must add the decentralisation of the information: each authority has its own information, but there is nobody in charge of gathering it and compiling it to be treated and analysed.

Shortly after starting this stage of the project we became aware that this would also be one of the hurdles we would have to overcome (and accept) when undertaking fieldwork on the EAW. The collection of the data was problematic from the start. Some authorities were especially reluctant to allow a researcher to consult this information about the EAWs. They are loath to share this operational information because they think

[292] PASTOR PRIETO, *¡Ah de la Justicia! Política Judicial y Economía*, Madrid, Civitas, 1993, pp. 62-64. Íd. Preface *La nueva regulación de la oficina judicial*, Madrid, Thomson-Aranzadi/ CEJ, Madrid, 2006, pp. 14-16. In this context, see the doubts that Eurojust expressed in its 2005 Annual Report, p. 34 about the accuracy of some data of the Commission Report (for example time limit). In particular, Eurojust regretted the low rate of response because at this point the Commission had only received the data from seven Member States.

it can be perceived as an assessment of their workload[293]. They want to control this information, which is why until now no proper research on this matter has been carried out.

As we explained in the methodology section, the empirical analysis should be carried out in two stages: on the one hand, the EAWs that Spain issues and sends to other member states; and on the other hand, the EAWs that Spain receives from other member states and on which it must decide whether or not to surrender.

Spanish law stipulates that "the Central Preliminary Investigation Court shall notify the Ministry of Justice as soon as possible of the receipt of any European warrants forwarded to it for execution" (Article 10.3, EAW Spanish Law). The Central Preliminary Investigation Courts regularly apply this provision, but merely from a formal point of view. Apart from exceptional cases, the information that the Ministry of Justice has is limited to a copy of the form received via SIRENE. The Central Preliminary Investigation Courts and, when applicable, the National Court, do not send any information on the subsequent formalities, nor even on the final decision, or, as the case may be, the effective surrender to the issuing judicial authority.

To tackle this problem, we decided to carry out the fieldwork using the specific proceedings from the judicial authorities. However, new obstacles soon arose: obtaining authorisation is often very difficult; many of the proceedings of the EAWs executed (those from 2004-2005) have already been transferred to a file which is stored outside the body's main building due to space constraints. Nonetheless, we managed to consult 237 proceedings in the 1st Section of the Criminal Division of the National Court. The lack of time and other complications prevented us from doing the same with a sample of proceedings from the Central Preliminary Investigation Courts. These factors, mean that the results commented on below only refer to adversarial EAW proceedings, that is, cases where the requested person has not given their consent on the surrender and/or there is cause for refusal.

In addition, the final paragraph of Article 7 of the EAW Spanish Law stipulates that "Spanish issuing judicial authorities shall forward to the Ministry of Justice a copy of European warrants sent". However, the Preliminary Investigation Courts only send the EAWs they issue to the Ministry of Justice (Directorate-General of International Legal Cooperation) sporadically. Moreover, on many occasions they only sent a single copy, excluding any information that may have come up afterwards: the requested person may

[293] They are also afraid of cases being leaked to the media, beyond a reasonable level of information.

have been found in another member state, in a third State, the date when they were arrested if they were found in Spain, the date of the effective surrender, etc.

For obvious reasons, we could not travel to all the Spanish Preliminary Investigation Courts[294] in order to find out if they had issued an EAW. That is why we had to be content with the practical information published in the Ministry of Justice's proceedings, although the information might be poor. We tried to solve the problem by broadening the number of proceedings consulted and we therefore considered all the proceedings from 2004 to 2008.

The causes of the information deficit are varied, but maybe it has to do with the fact that the Central Authority in Spain is a political body like the Ministry of Justice.

In order to solve this problem it will be necessary to explain the importance of this information to Judges and Senior Judges, not only because it is required from a legal and formal point of view, but also in order to improve the system, learn from repeated errors, try and find parameters common to States that request more EAWs than others and find States that could be infringing the principle of mutual trust by refusing an EAW in cases not envisaged or requesting additional information non-mandatory, etc.

Unless the Ministry of Justice or the General Council of the Judiciary takes action, data that reaches the Ministry of Justice is useless, because we are not only talking about a population, but about a sample that has uneven and incomplete information. Obviously a simple, common, homogeneous and well designed procedural managing system would make the job much easier, but given that new technologies have spent decades trying to make their way into the Spanish jurisdictional bodies and that the EAW is only a drop in the ocean when it comes to the matters that our jurisdictional bodies deal with.

The snapshot arrived at from the data obtained offers a relatively reliable view of the practical reality of EAWs in Spain. Data will be useful to confirm or reject the problems identified by the authors and perhaps to shed light on the causes underlying some of them.

[294] Cf. the section of this report titled "Spanish competent authorities" where we highlight that there are more than 453 Preliminary Investigation Courts, to which we must add 1065 mixed courts (*Juzgados de 1ª Instancia e Instrucción*) with competences in civil and criminal matters. Even so, the number of judicial authorities that can issue an EAW can be larger.

7.3.2 The numerical side of the EAW: an empirical investigation into flight from Justice in the EU

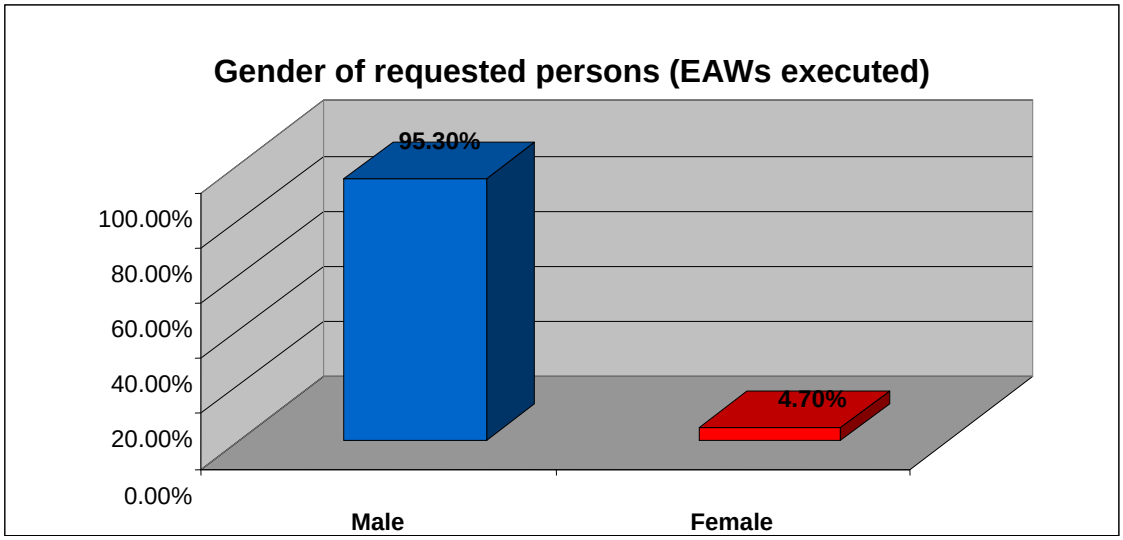
7.3.2.1 A leap to a detailed profile of the requested person

Looking at the gender profile of the requested persons, 95.3% of the persons requested in an EAW sent to Spain are male.

Table 63: Gender of requested persons (EAWs executed by Spanish authorities)

	Number	Valid Percentage
Male	223	95.30%
Female	11	4.70%
Total	234	100%

Figure 1: Gender of requested persons (EAWs received)

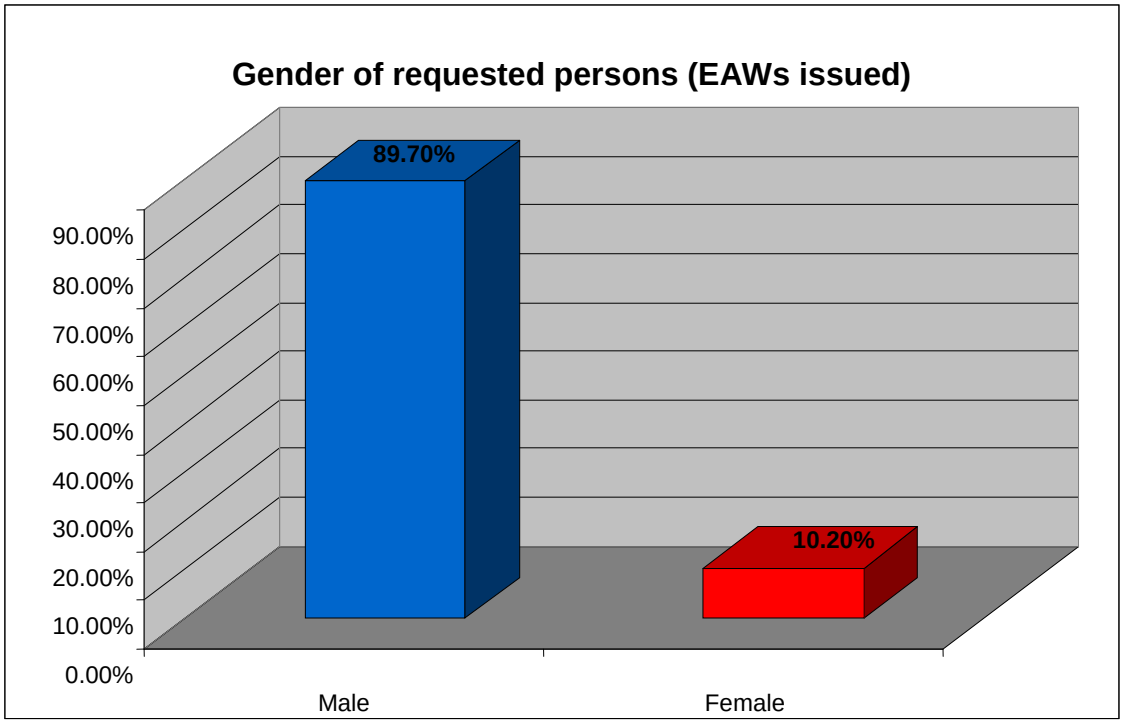


This figure is only slightly less, 89%, for EAWs issued by Spain.

Table 64: Gender of requested persons (EAWs issued by Spanish authorities)

	Frequency	Valid Percent
Male	702	89.70%
Female	80	10.20%
Missing	1	0.10%
Total	783	100%

Figure 2: Gender of requested persons (EAWs issued by Spanish authorities)

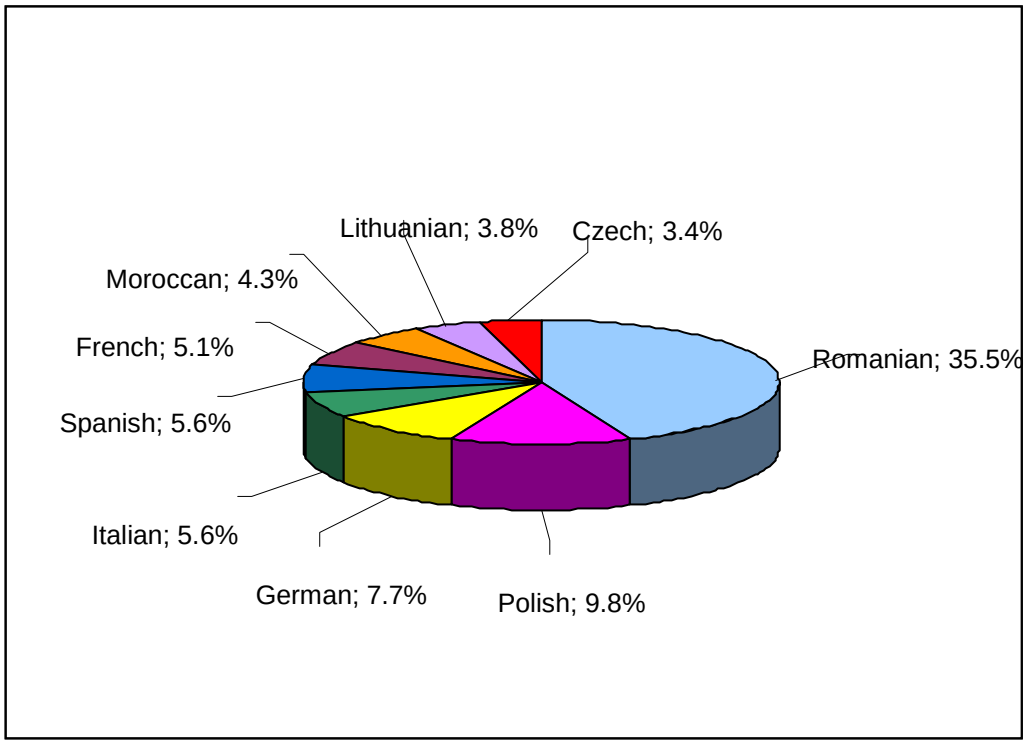


Moving on to the nationality of the requested persons, 35.5% of those requested to be extradited to Spain are of Romanian nationality; this is followed by Poles, almost 10%, Germans, 7.7%, and then Italians, Spanish, French, Moroccans and Lithuanians who account for between 7 and 4% each.

Table 65: Nationality of requested persons (EAWs executed)

Nationality	Number	Valid Percentage	Cumulative Percentage
Romanian	83	35.50%	35.50%
Polish	23	9.80%	45.30%
German	18	7.70%	53%
Italian	13	5.60%	58.50%
Spanish	13	5.60%	64.10%
French	12	5.10%	69.20%
Moroccan	10	4.30%	73.50%
Lithuanian	9	3.80%	77.40%
Czech	8	3.40%	80.80%
British	5	2.10%	82.90%
Colombian	4	1.70%	84.60%
Portuguese	4	1.70%	86.30%
Hungarian	3	1.30%	87.60%
Slovakian	3	1.30%	88.90%
Algerian	2	0.90%	89.70%
Bulgarian	2	0.90%	90.60%
Chinese	2	0.90%	91.50%
Estonian	2	0.90%	92.30%
Greek	2	0.90%	93.20%
Moldavian	2	0.90%	94%
Other*	2	0.90%	94.90%
Albanian	1	0.40%	95.30%
Austrian	1	0.40%	95.70%
Bolivian	1	0.40%	96.20%
Bosnian/Herzegovina	1	0.40%	96.60%
Croatian	1	0.40%	97%
Cuban	1	0.40%	97.40%
Dominican	1	0.40%	97.90%
Guinean (Guinea-Bissau)	1	0.40%	98.30%
Luxembourgish	1	0.40%	98.70%
Nigerian	1	0.40%	99.10%
Turkish	1	0.40%	99.60%
Venezuelan	1	0.40%	100%

Figure 3: Nationality of the requested persons (EAWs executed)



This picture is completely different when Spain issues the EAW: Spanish people are the most requested, at 42%, and as can be seen, the nationalities that follow (Romanian, French, Moroccan, Ukrainian, Algerian, Italian, Portuguese or English) each account for a comparatively small percentage.

Table 66: Nationality of requested persons (EAWs issued)

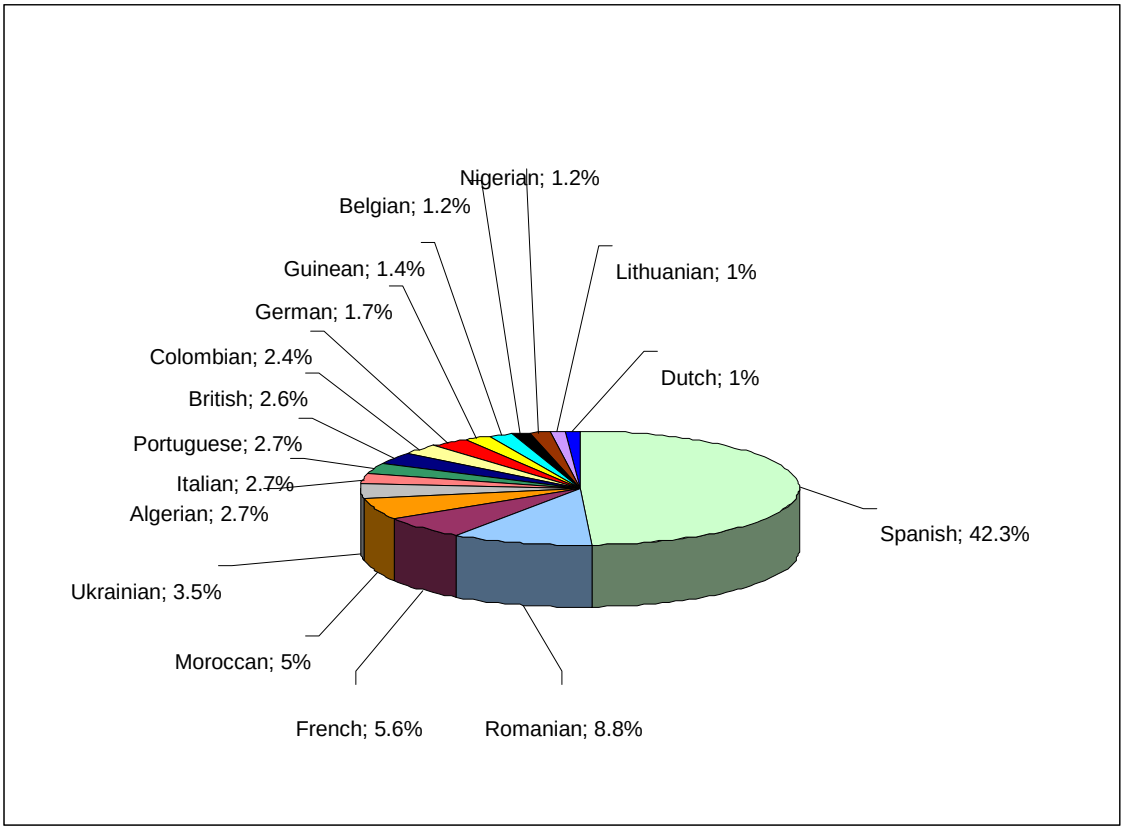
	Number	Valid Percentage	Cumulative Percentage
Spanish	330	42.3%	42.3%
Romanian	69	8.8%	51.1%
French	44	5.6%	56.7%
Moroccan	39	5%	61.7%
Ukrainian	27	3.5%	65.2%
Algerian	21	2.7%	67.9%
Italian	21	2.7%	70.6%
Portuguese	21	2.7%	73.2%
British	20	2.6%	75.8%
Colombian	19	2.4%	78.2%
German	13	1.7%	79.9%
Guinean (Guinea-Bissau)	11	1.4%	81.3%
Belgian	9	1.2%	82.5%
Nigerian	9	1.2%	83.6%
Lithuanian	8	1%	84.6%
Dutch	8	1%	85.7%
Argentinean	7	0.9%	86.6%
Chinese	7	0.9%	87.5%
Croatian	7	0.9%	88.3%
Pakistani	7	0.9%	89.25
Russian	7	0.9%	90.1%
Non specified	7	0.9%	91%
Venezuelan	6	0.8%	91.8%
Greek	4	0.5%	92.3%
Albanian	3	0.4%	92.7%
Bulgarian	3	0.4%	93.1%
Ecuadorean	3	0.4%	93.5%
Moldovan	3	0.4%	93.9%
Serbian	3	0.4%	94.2%
Turkish	3	0.4%	94.6%

Too make the table more compact, it does not include the nationalities where the number of requested persons was less than three. However, the table below details these minority nationalities in case they are of interest.

Table 67: Nationality of requested persons (EAWs issued by Spain)

	Number	Valid Percentage	Cumulative Percentage
Angolan	2	0.3%	94.9%
Armenian	2	0.3%	95.1%
Bosnian/Herzegovina	2	0.3%	95.4%
Brazilian	2	0.3%	95.6%
Dominican	2	0.3%	95.9%
Gambian	2	0.3%	96.2%
Guinean	2	0.3%	96.4%
Hungarian	2	0.3%	96.7%
Norwegian	2	0.3%	96.9%
Palestinian	2	0.3%	97.2%
Slovenian	2	0.3%	97.4%
Syrian	2	0.3%	97.7%
American US	2	0.3%	98%
Andorran	1	0.1%	98.1%
Beninese	1	0.1%	98.2%
Chilean	1	0.1%	98.3%
Costa Rican	1	0.1%	98.5%
Czech	1	0.1%	98.6%
Danish	1	0.1%	98.7%
Georgian	1	0.1%	98.8%
Ghanaian	1	0.1%	99%
Honduran	1	0.1%	99.1%
Iranian	1	0.1%	99.2%
Peruvian	1	0.1%	99.4%
Philippine	1	0.1%	99.5%
Saudi Arabian	1	0.1%	99.6%
Slovakian	1	0.1%	99.7%
Swiss	1	0.1%	99.9%
Ugandan	1	0.1%	100%

Figure 4: Main nationalities of requested persons (EAWs issued)

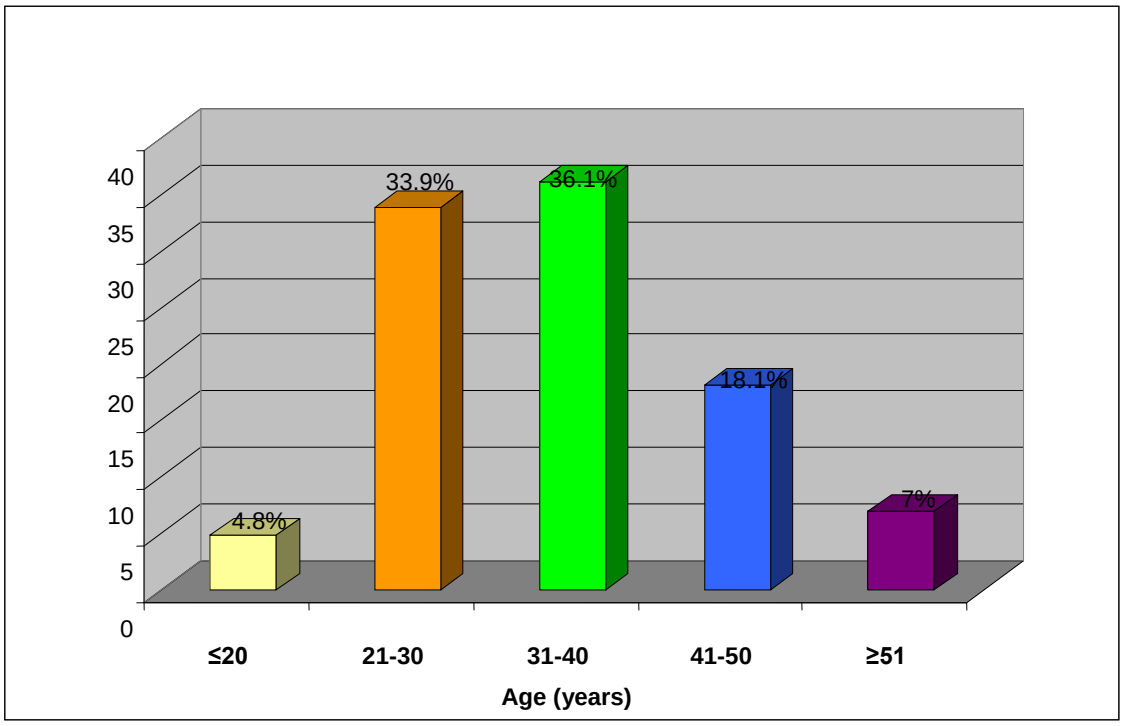


We conclude this first analysis with the requested person's age: in the majority of the EAWs received by Spain the requested persons were in their thirties, followed by people in their twenties. It is also interesting to note that there is a group of requested persons who are aged twenty or under, but in this sample there were no minors. We must recall that being a minor is one of the mandatory causes for refusing an EAW [Articles 12.1 (b) EAW Spanish Law, 3(3) FD].

Table 68: Age profiles of requested persons (EAWs executed)

	Number	Percentage	Valid Percentage	Cumulative Percentage
≤20	11	4.7%	4.8%	4.8%
21-30	77	32.9%	33.9%	38.8%
31-40	82	35.0%	36.1%	74.9%
41-50	41	17.5%	18.1%	93.0%
≥51	16	6.8%	7.0%	100.0%
Total	**227**	**97.0%**	**100.0%**	
Missing	7	3.0%		
Global Total	**234**	**100.0%**		

Figure 5: Ages (percentage) of requested persons (EAWs executed)

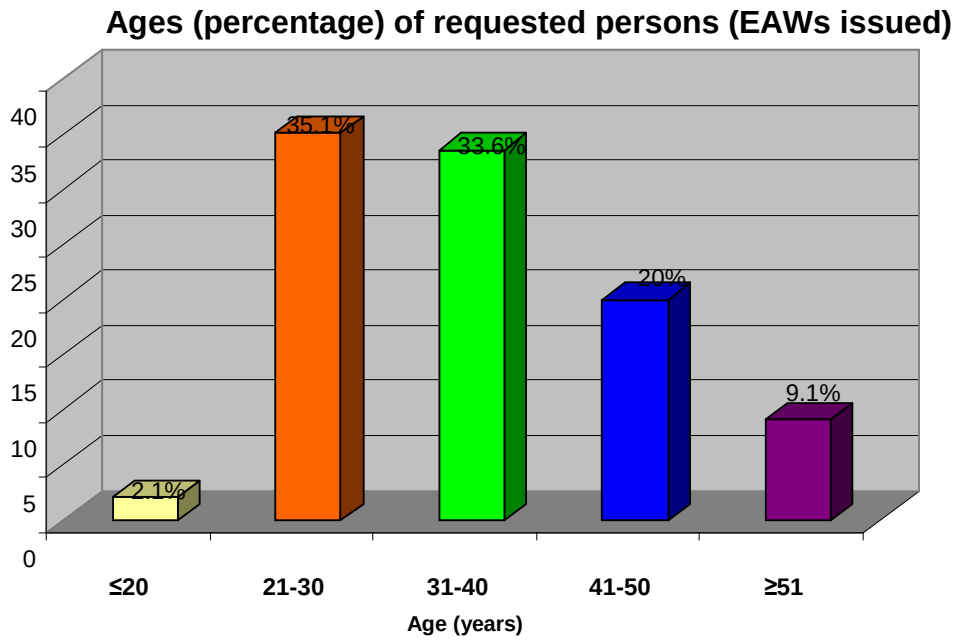


The ages of the requested persons in the EAWs issued by Spain are very similar to those presented above.

Table 69: Age profiles of requested persons (EAWs issued)

	Number	Percentage	Valid Percentage	Cumulative Percent
≤20	16	2	2.1	2.2
21-30	271	34.6	35.1	37.4
31-40	259	33.1	33.6	70.9
41-50	154	19.7	20	90.9
≥51	70	8.9	9.1	100
Total	**771**	**98.5**	**100**	
Missing	13	1.5		
Global Total	**783**	**100**		

Figure 5: Ages (percentage) of requested persons (EAWs issued)



7.3.2.2 The EAW in practice

Another important element to get a picture of the EAW in practice is the specific issuing country. In our case, the majority of the EAWs Spain receives are from Romania, with nearly 35%, followed by Italy, Germany, Poland and France, with around 10 percent each.

Table 70: Issuing State (EAWs executed)

	Number	Percentage	Valid Percentage	Cumulative Percentage
Romania	81	34.6%	34.9%	34.9%
Italy	27	11.5%	11.6%	46.6%
Germany	26	11.1%	11.2%	57.8%
Poland	24	10.3%	10.3%	68.1%
France	23	9.8%	9.9%	78%
Czech Republic	9	3.8%	3.9%	81.9%
Lithuania	8	3.4%	3.4%	85.3%
Belgium	5	2.1%	2.2%	87.5%
Portugal	5	2.1%	2.2%	89.7%
United Kingdom	5	2.1%	2.2%	91.8%
Hungary	3	1.3%	1.3%	93.1%
Netherlands	3	1.3%	1.3%	94.4%
Slovakia	3	1.3%	1.3%	95.7%
Austria	2	0.9%	0.9%	96.6%
Bulgaria	2	0.9%	0.9%	97.4%
Greece	2	0.9%	0.9%	98.3%
Estonia	1	0.4%	0.4%	98.7%
Finland	1	0.4%	0.4%	99.1%
Luxembourg	1	0.4%	0.4%	99.6%
Sweden	1	0.4%	0.4%	100%
Total	**232**	**99.1%**	**100%**	
Missing	2	0.9%		
Global Total	**234**	**100%**		

The nationalities of the requested persons that we looked at above do not have to match the EU State that issued the EAW. For instance, Germany can issue an EAW requesting the surrender of a French national, but it can also issue an EAW for a national

of a country that is not part of the EU (e.g. Russian). In the case of Germany, if the requested person is German, due to the country's constitutional issues and its reluctance to surrender its nationals, the Criminal Division of the National Court announced[295] that as long as Germany does not change its legislation, Spanish judicial authorities would deal with German EAWs issued for Spanish nationals using the extradition scheme, and therefore based on the principle of reciprocity.

In general, the Spanish experience using the EAW has been very favourable compared with the previous extradition system. As time passes, the EAW works better; this instrument for judicial cooperation has been increasingly employed. Therefore, until now, there has been a progressive increase in the use of EAWs in all countries. This instrument has been largely successful for achieving the surrender of requested persons across EU nations.

In our opinion, the EAW is used frequently and largely successfully in all situations, that is, those involving Spanish executing judicial authorities and those where the warrants were issued by Spain. In spite of the scope[296] of this study, Spain really is mainly an exporter of requested suspects, so there are many people living in Spain who have fled, trying to escape justice in their own country. According to some interviewees, each Central Preliminary Investigation Court receives approximately 350 EAWs annually which, multiplied by the six Central Preliminary Investigation Courts, yields a total of 2100 EAWs per year. Therefore, Spain is among those member states that least often request surrenders, though the number is growing significantly.

For some time there has been criticism because apparently there are some States that may be issuing a very high number of EAWs; some even talk about the abuse of this instrument of judicial cooperation. Ultimately, Spain does not use or abuse the clause [Article 15 EAW law, and Article 15 (2) EAW FD] that allows for the request of additional information. Nevertheless, there are countries that systematically fail to comply with an EAW without first abusing the clause, petitioning supplementary information, all of which goes against the principle of mutual trust and, above all, the principle of speed. It seems like Spain is the most liberal country in the EU because it is the country where the most EAWs are executed and few barriers to granting the warrants are created.

[295] Spanish National Criminal Court Agreement, 20 September 2005.

[296] The number of files that we have consulted for EAWs issued is larger than the number of files for EAWs executed.

In terms of the EAWs issued by Spain, for more than half of the sample France is the executing country (56%), followed by countries such as Italy, Germany, Portugal and the Netherlands.

However, it must be emphasise that while the sample size of EAWs issued by Spanish courts was significant, with 783 files, details of the executing country are only available in 31.7% of these cases. For the remaining 68.3% of the records, we do not have any information on this. A first reading of this figure might suggest that this rate corresponds to EAWs that are in limbo. For example, EAWs issued by Spain in which the requested person has not been found (yet) in any member state. This number might be close to reality, but we must be cautious because, as we explained at the beginning, we must allow for a margin of error in this empirical study due to the source of information used. In many cases, as we have already mentioned, the data of the EAWs issued do not reach the Ministry of Justice. In other cases the Ministry received only a copy of the EAW form, but no information regarding the ongoing process or the final outcome of the EAW; for example details such as the member state where the requested person was detained; the result of the execution of the EAW (approval or refusal) and in the event of a refusal, the reasons given, etc.

Anyway, the number of EAWs issued by Spanish authorities that we have consulted may be slightly inflated and unrepresentative since many of these EAWs are sent to all member states because the fugitives have not been located in a particular member state.

The statistics for the issuing countries are similar to those for the requested person's nationality, but there are differences in the orderings. The ranking of nationalities from highest to lowest is: 1. Romanian; 2. Polish; 3. German, Italian, Spanish and French, with similar percentages. Regarding the issuing State, Romania is still in first place, but it is now followed by Italy in second, Germany in third and Poland is in fourth place.

Table 71: Executing State (EAWs issued by Spanish authorities)

	Number	Percentage	Valid Percentage	Cumulative Percentage
France	141	18%	56.9%	56.9%
Italy	20	2.6%	8.1%	64.9%
Germany	17	2.2%	6.9%	71.8%
Portugal	16	2%	6.5%	78.2%

Netherlands	11	1.4%	4.4%	82.7%
Hungary	10	1.3%	4%	86.7%
Romania	9	1.1%	3.6%	90.3%
United Kingdom	5	0.6%	2%	92.3%
Belgium[297]	3	0.4%	1.2%	93.5%
Spain	3	0.4%	1.2%	94.8%
Austria	2	0.3%	0.8%	95.6%
Lithuania	2	0.3%	0.8%	96.4%
Slovakia	2	0.3%	0.8%	97.2%
Slovenia	2	0.3%	0.8%	98%
Cyprus	1	0.1%	0.4%	98.4%
Finland	1	0.1%	0.4%	98.8%
Ireland	1	0.1%	0.4%	99.2%
Poland	1	0.1%	0.4%	99.6%
Sweden	1	0.1%	0.4%	100%
Total	**248**	**31.7%**	**100%**	
Missing	535	68.3%		
Global Total	**783**	**100%**		

Purpose of the EAW

Regarding the purpose of the EAWs received by Spain, the majority, nearly 60%, are issued for the execution of sentences. Nevertheless, the proportion issued for prosecution is also quite high.

[297] Previously, with the extradition of terrorists, Spain and Belgium had a long-running problem due to the different interpretations of 'terrorism' of the Belgian authorities. This was one of the reasons behind Belgian opposition to the EAW and therefore one of the crusades that the Commission had to deal with in the normative construction of the EAW. For more details, see KAUNERT, C., "'Without the Power of Purse or Sword': The European Arrest Warrant and the Role of the Commission", *European Integration*, Vol.29, No.4, September 2007, p. 398.

Table 72: Purpose of the EAW (EAWs executed)

	Number	Valid Percentage	Cumulative Percentage
Prosecution	94	40.20%	40.20%
Execution sentence	140	59.80%	100%
Total	**234**	**100%**	

On the other hand, the data for EAWs issued by Spain, given in table 10 and Figure 6, show that Spain issues more EAWs for prosecution than for the execution of sentences.

Table 73: Purpose of the EAW (EAWs issued)

	Number	Percentage	Valid Percentage	Cumulative Percentage
Prosecution	657	83.90%	84%	84%
Execution sentence	125	16%	16%	100%
Total	**782**	**99.90%**	**100%**	
Missing	1	0.10%		
Global Total	**783**	**100%**		

Figure 6: Purpose of the EAWs received

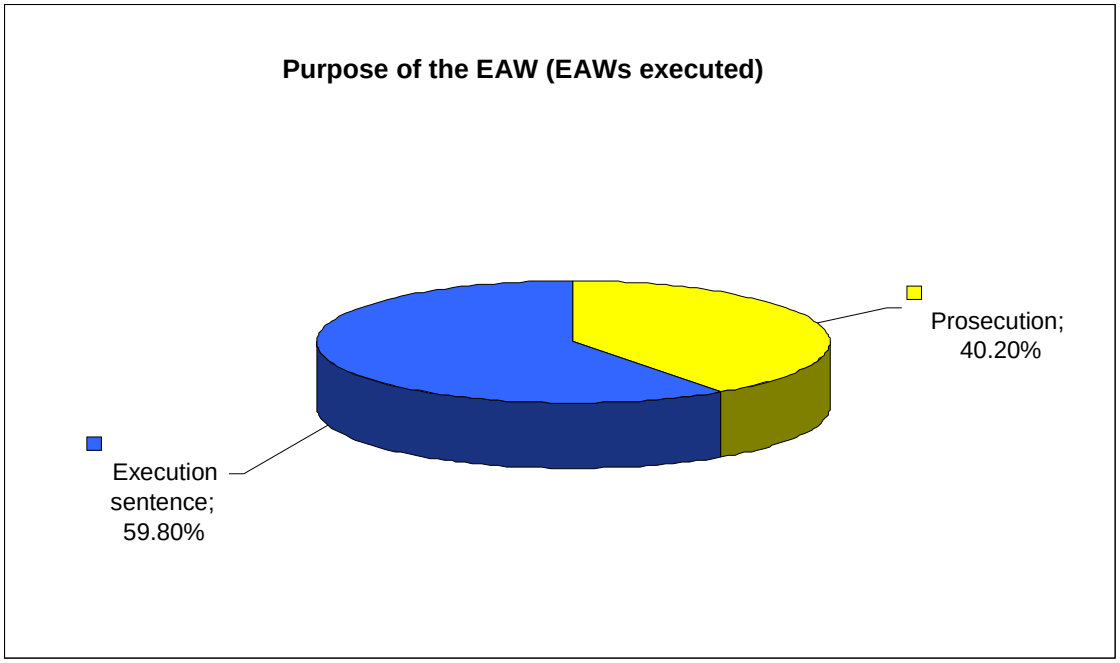
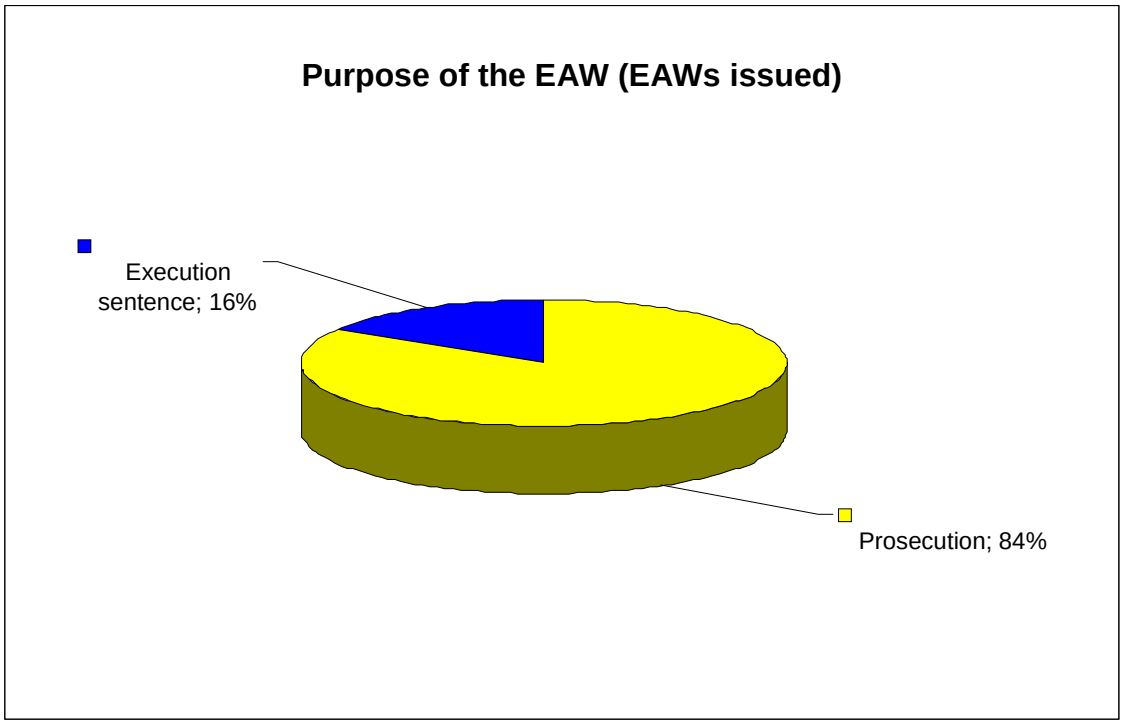


Figure 7: Purpose of the EAWs issued



In the case of EAWs executed for prosecution, almost 99% relate to EAWs issued in order to take the requested person into custody.

Table 74: Aim of the EAW, EAWs executed for prosecution

	Number	Valid Percentage
questioning/hearing	1	1.06%
taking into custody	93	98.94%
Total	**94**	**100.00%**

Table 75: Aim of the EAW, EAWs issued for prosecution

	Number	Valid Percentage
questioning/hearing	3	0.50%
taking into custody	652	99.50%
Total	**655**	**100.00%**

Offences and the EAW

The following tables provide information on the kind of criminality for which the EAW is being used. In line with the scope defined by the FD and Spanish law, we must make a distinction between EAWs issued for offences on the offence list, EAWs issued for offences that are not listed, and EAWs issued for both types of offences.

Table 76: EAWs executed

	Responses		Cases
Offences in the EAWs executed	**N**	**Percent**	**Percent of Cases**
participation in a criminal organisation	29	13.80%	19.10%
trafficking in human beings[298]	12	5.70%	7.90%
sexual exploitation of children and child pornography	4	1.90%	2.60%
illicit trafficking in narcotic drugs and other substances	43	20.50%	28.30%
illicit trafficking in weapons, munitions and explosives	1	0.50%	0.70%
corruption	2	1.00%	1.30%
fraud, etc.	14	6.70%	9.20%
laundering of the proceeds of crime	5	2.40%	3.30%
counterfeiting of currency, including the euro	2	1.00%	1.30%
computer-related crime	1	0.50%	0.70%
facilitation of unauthorised entry and residence	2	1.00%	1.30%
murder, grievous bodily injury	12	5.70%	7.90%
kidnapping, illegal restraint and hostage-taking	2	1.00%	1.30%
organised or armed robbery	31	14.80%	20.40%
swindling	29	13.80%	19.10%
racketeering and extortion	1	0.50%	0.70%
forgery of administrative documents and trafficking therein	8	3.80%	5.30%
forgery of means of payment	4	1.90%	2.60%
trafficking in stolen vehicles	1	0.50%	0.70%
rape	6	2.90%	3.90%
unlawful seizure of aircraft/ships	1	0.50%	0.70%
Total	**210**	**100.00%**	**138.20%**

[298] For more information see RIJKEN, C., "Challenges to Criminal Justice co-operation in Combating Trafficking in Human beings in the European Union", *ERA-Forum*, Vol. 6, No. 2, pp. 267-281, available in: DOI: 10.1007/s12027-005-0035-z.

Table 77: EAWs issued

	Responses		Cases
Offences in the EAWs issued	**N**	**Percent**	**Percent of Cases**
participation in a criminal organisation	259	21.10%	36.80%
terrorism	262	21.30%	37.30%
trafficking in human beings	37	3.00%	5.30%
sexual exploitation of children and child pornography	2	0.20%	0.30%
illicit trafficking in narcotic drugs and other substances	155	12.60%	22.00%
illicit trafficking in weapons, munitions and explosives	31	2.50%	4.40%
corruption	2	0.20%	0.30%
fraud, etc.	3	0.20%	0.40%
laundering of the proceeds of crime	18	1.50%	2.60%
counterfeiting of currency, including the euro	38	3.10%	5.40%
murder, grievous bodily injury	98	8.00%	13.90%
kidnapping, illegal restraint and hostage-taking	46	3.70%	6.50%
organised or armed robbery	42	3.40%	6.00%
swindling	80	6.50%	11.40%
racketeering and extortion	2	0.20%	0.30%
forgery of administrative documents and trafficking therein	87	7.10%	12.40%
forgery of means of payment	31	2.50%	4.40%
trafficking in stolen vehicles	8	0.70%	1.10%
rape	23	1.90%	3.30%
arson	3	0.20%	0.40%
nes within the jurisdiction of the International Criminal Court	1	0.10%	0.10%
sabotage	2	0.20%	0.30%
Total	**1230**	**100.00%**	**175.00%**

It is interesting to observe that the most common type of crime is by far the illicit trafficking in narcotic drugs, with 28%. This is closely followed by organised or armed robbery, with 20.5%, and swindling and participation in a criminal organisation (19.1% each). The statistics show that Spain issues EAWs more frequently for participation in a criminal organisation or terrorism than for drug trafficking, which in this case (EAWs issued) plays a significantly smaller role.

Although all member states agree that terrorism is a serious crime, it has been a highly controversial listed offence category from the start. There are dissenting views on international terrorism[299]. The problems arise when it comes to national terrorism, which is a highly sensitive and critical issue for Spanish society, even for different forms of this crime. "Advocacy or justification" of terrorism, "extolling terrorist acts" or "supporting armed struggle" are punished under the Spanish Criminal Code, but not in other member states. This has caused several problems between the Spanish National Criminal Court, in particular the Central Preliminary Investigation Court, and the executing authorities of other member states (e.g. with Irish authorities in the De Juana Chaos[300] EAW case).

There are also a great many EAWs for crimes that are not listed: thefts, simple bodily injury (sometimes a simple slap), road crimes such as drunk driving and driving without a license, criminal tax offences, women (or gender) mistreatment, unpaid child support, etc.

The records of offences outside the catalogue are so varied that it is impossible to systematise them in any useful way. For this reason it is essential that any statements made based on these cases are cautious. There is no question that some EAWs are used to request the surrender of persons for offences beyond the catalogue of offences, but this is a possibility envisaged in the FD and accepted by all of the member states.

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[299] Although the Council Framework Decision on combating terrorism, 13 June 2002 (2002/475/JHA), O.J., 22 June 2002, L 164/3. As the European Commission points out, the deadline for the transposition of this FD has not yet expired (9 December 2010), so it is still too early to assess its practical impact; see European Commission, Brussels, 20.7.2010, SEC (2010) 911 final, Commission Staff Working Paper, "Taking stock of EU Counter-Terrorism Measures", attached to the document "The EU Counter-Terrorism Policy: main achievements and future challenges", p.3. PLACHTA, M., in the "European Arrest Warrant: Revolution in Extradition?", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 11/ 2, 2003, p. 185, points out somehow a trouble for non definition "terrorism". More in DUMITRIU, E., "The E.U.'s Definition of Terrorism: The Council Frame-work Decision on Combating Terrorism", *German Law Journal*, 2004, Vol. 5, No. 5, pp. 585-602, available at http://www.germanlawjournal.com/pdfs/Vol05No05/PDF_Vol_05_No_05_585-602_special_issue_Dumitriu.pdf

[300] BBC news, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8543846.stm

In the group of offences not on the list there is a very wide range of punishable categories: from serious offences (although not considered in the catalogue[301]), to not so serious offences and even petty crimes. The abuse of the EAW arises in very specific cases: EAWs only issued for petty crimes.

Looking at the duration of the EAW execution procedure

When a decision is expected, not only does it matter that the right to effective judicial protection is satisfied, but also that it is taken within a reasonable time[302.]

While the time lapse is important in any criminal procedure, perhaps it is even more essential in the case of the EAW because the judicial body of the executing state is provisionally depriving the requested person of their freedom. Moreover, it is about thinking on the efficacy of time in fundamental rights of the requested person, and, why not, on the consequences that the criminal procedure opened in the issuing State has in a belated surrender.

The execution procedure can be seen as a whole, from the detention date to the definitive surrender; but it can also be divided into small time periods303. An easy way to measure the duration is to take the differences between the relevant dates. Nowadays, any process management software provides this variable. However, as with other parameters, the National Court does not publish any information on this matter.

The whole EAW execution process can be divided into different stages.

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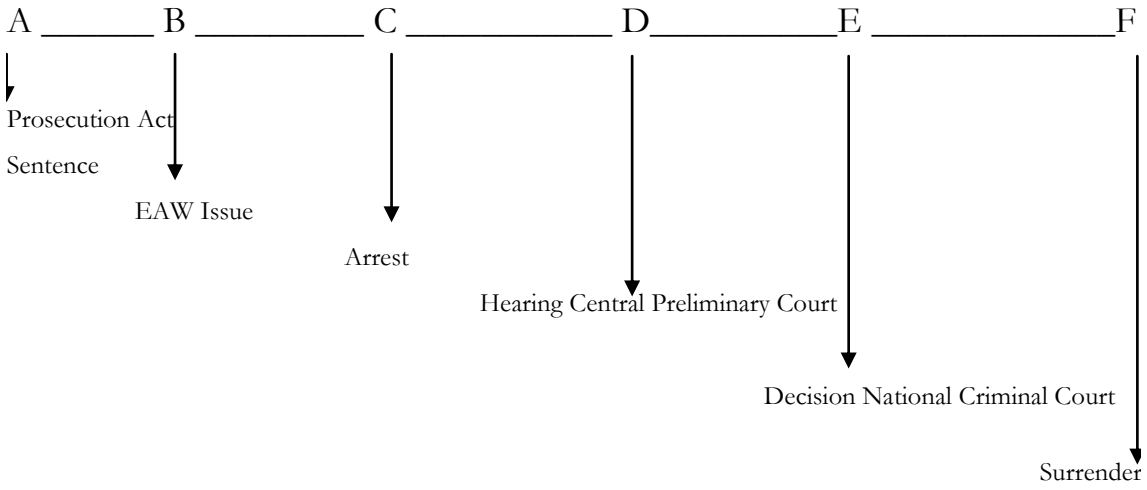
[301] In fact, on more than one occasion there have been debates about whether all the offences on the list are very serious offences.

[302] Precisely in one of its first judgments, the Spanish Constitutional Court explained that the right to a jurisdiction recognised in article 24.1 C*E "cannot be understood as something separated from the time in which it must be given by the bodies of the Judicial Power but it must be comprised in the sense that it is given by them within the reasonable time terms in which persons require it in the exercise of their rights and legitimate interests (…)"* (STC 24/1981, 14 July, *Sala 1ª*, speaker Díez de Velasco, FJ 3); the right to a procedure without improper delays (article 24.2 CE) *"requires to be fulfilled an adequate equilibrium between, on the one side, the execution of all the indispensable judicial activity to solve the case being heard and for the guarantee of the rights of the parties (article 24.1 CE) and, on the other, the time that such execution requires, that shall be as brief as possible"*. For all, SSTC 58/1999, of 12 of April, *Sala 1ª*, speaker Jiménez Sánchez; 124/1999, of 28 of June, *Sala 1ª*, speaker Cachón; 198/1998, of 25 of October, *Sala 1ª*, speaker Garrido.

[303] ANDREU MERELLES, F., "Procedimiento de ejecución de la Orden de Detención Europea: diagramación del procedimiento", *Manuales de formación continuada*, No. 42, 2007, pp. 265-280.

Table 78: Diagram – the stages of EAW process



To begin with, while the majority of the prosecution acts underlying the EAWs executed by Spain took place between 2006 and 2007, the median year of the sentence is lower (2005). The minimum year of a prosecution act in the EAWs executed was 2000 and for the sentence it was 1981. The maximum year in both cases was 2008.

Table 79: Year of the prosecution act underlying the EAWs executed

	Missing	145
	Valid	**89**
Parameters	Median	2006
	Mode	2006
	Minimum	2000
	Maximum	2008
Percentiles	25^{th}	2006
	50^{th}	2006
	75^{th}	2007

Table 80: Year of the sentence underlying the EAWs executed

Missing	96
Valid	**138**

Parameters	Median	2005
	Mode	2004
	Minimum	1981
	Maximum	2008
Percentiles	25th	2002
	50th	2005
	75th	2006

It should be pointed out that these numbers are different in the case of the EAWs issued by Spanish judicial authorities, because although the median and maximum year of the prosecution order are similar, the sample includes at least one prosecution act from 1981. Finally, the median year of the sentence for which the Spanish judicial bodies issued an EAW is very close to the median sentencing year for the EAWs executed.

Table 81: Year of the prosecution act underlying the EAWs issued

	Missing	137
	Valid	**646**
Parameters	Median	2008
	Mode	2008
	Minimum	1981
	Maximum	2008
Percentiles	25th	2006
	50th	2008
	75th	2008

Table 82: Year of the sentence underlying the EAWs issued by Spain

	Missing	661
	Valid	**122**
Parameters	Median	2006
	Mode	2007
	Minimum	1992

	Maximum	2008
Percentiles	25th	2004
	50th	2006
	75th	2007

The first stage of the EAW is the period between the prosecution act and the issuing of the EAW; or between the sentence for which the execution EAW has been issued and the issuing of the EAW. According to the scheme presented above, this is given by the difference B-A[304]. In the first case, for EAWs executed, the average is nearly three years and nine month (33.10 months, to be precise), in the case of executing a sentence. For prosecution, the issue is almost immediate; only in 25% of the cases is the EAW issued 6 months after the prosecution act. If we look at the EAWs issued by Spain, the average number of months between the sentence and the issuing of the EAW is 36.88, while for the prosecution act it is 0.48 months.

Table 83: Months between the prosecution act underlying the EAW and its issue (EAWs executed)

	Valid	86
	Missing	148
Parameters	Median	0
	Mode	0
	Minimum	0
	Maximum	69
Percentiles	25th	0
	50th	0
	75th	6

Table 84: Months between the sentence underlying the EAW and its issue (EAWs executed)

	Valid	**128**
	Missing	106
Parameters	Mean	33.1

[304] See diagram – The stages of EAW process (table 15).

	Median	17.5
	Mode	0
	Std. Deviation	44.412
	Minimum	0
	Maximum	327
Percentiles	25^{th}	6
	50^{th}	17.5
	75^{th}	46.75

Table 85: Months between the prosecution act underlying the EAW and its issue (EAWs issued)

	Valid	**633**
	Missing	150
Parameters	Median	0
	Mode	0
	Minimum	0
	Maximum	276
Percentiles	25^{th}	0
	50^{th}	0
	75^{th}	1

Table 86: Months between the sentence underlying the EAW and its issue (EAWs issued)

	Valid	121
	Missing	662
Parameters	Mean	36.88
	Median	22
	Mode	0
	Std. Deviation	45.523
	Minimum	0
	Maximum	193
Percentiles	25^{th}	6.5

	50th	22
	75th	46

In almost 75% of the EAWs executed for prosecution, the EAW is issued within 6 months of the prosecution act.

Figure 8: Time between the prosecution act and EAW issue (EAWs executed)

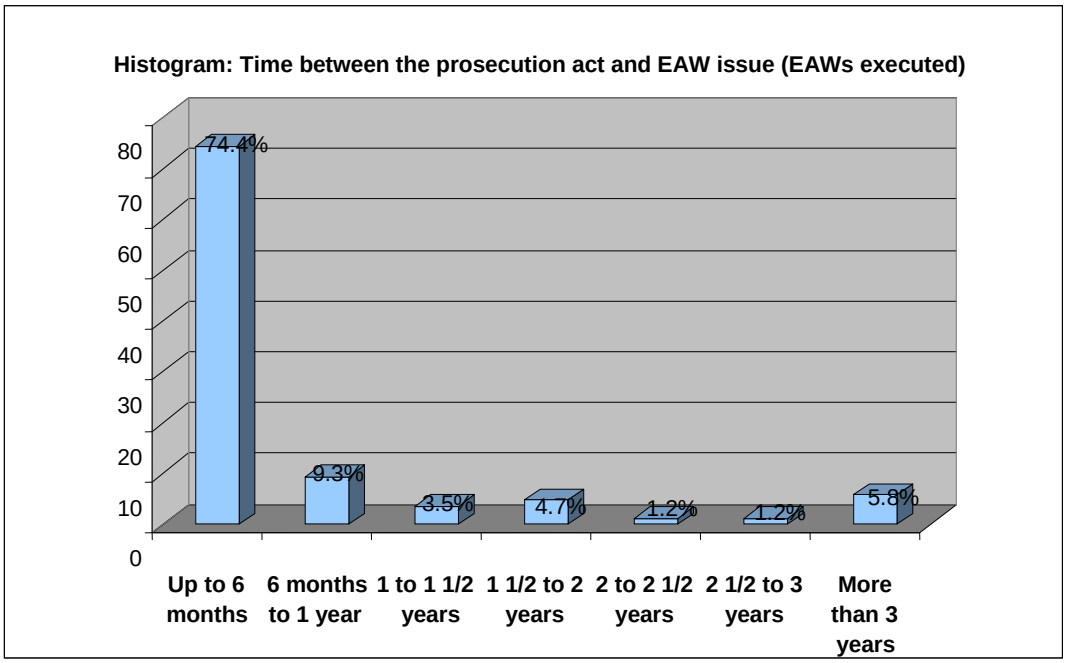
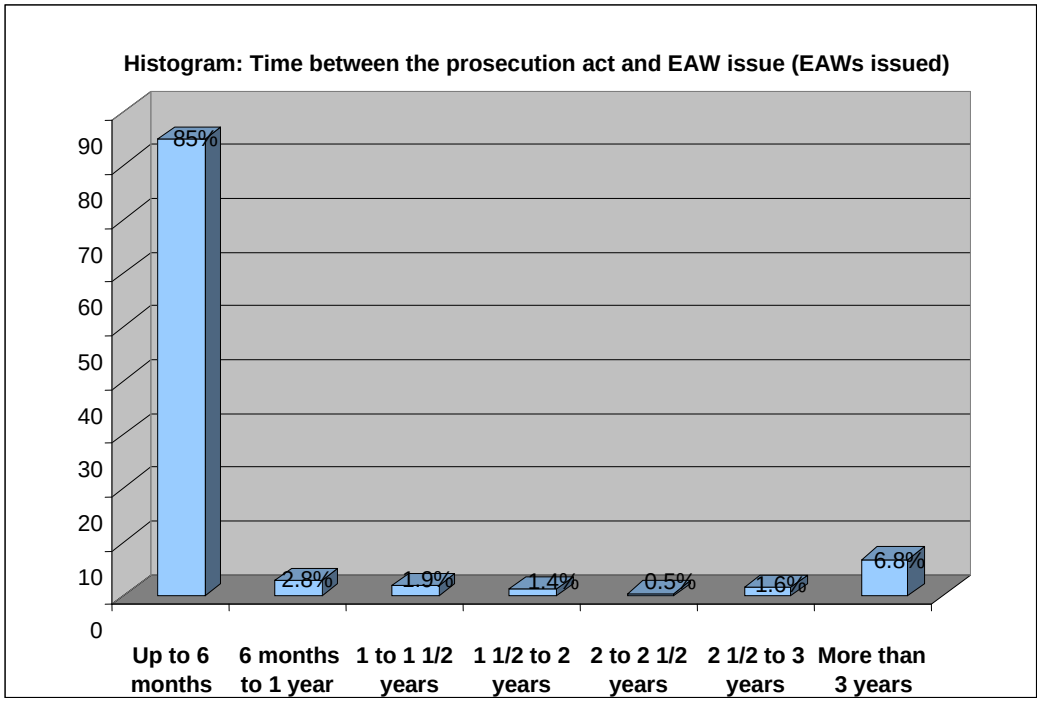


Figure 9: Time between the prosecution act and EAW issue (EAWs issued)



Similarly, for EAWs issued by Spanish judicial authorities, 85% are also dispatched within 6 months of the prosecution act.

The figure above shows the time period between detention and the hearing at the Central Preliminary Investigation Court. Summary statistics for this variable, which is calculated using the formula (C-A), are presented in the table below.

Table 87: Days between detention and hearing (EAWs executed)

	Valid	212
	Missing	22
Parameters	Mean	3.05
	Median	1
	Mode	1
	Std. Deviation	19.12
	Minimum	0
	Maximum	277
Percentiles	25^{th}	1
	50^{th}	1
	75^{th}	2

The results confirm that normally the hearing at the Central Preliminary Investigation Court takes place within three detention days. However, this period increases when we look at the EAWs issued by Spain. The explanation for this disparity is the different layout and deadlines determined by the laws of each member state. For example, according to EAW Spanish law, the hearing must take place at the Central Preliminary Investigation Court, often at the same time as the decision about the provisional imprisonment or release of the requested person. In other member states, the hearing takes place just before the final decision on the execution of the EAW.

Table 88: Days between detention and hearing (EAWs issued)

	Valid	26
	Missing	757
Parameters	Mean	51.23
	Median	1.5
	Mode	0
	Std. Deviation	189.084
	Minimum	0
	Maximum	960
Percentiles	25^{th}	0
	50^{th}	1.5
	75^{th}	10.5

We can also use this framework to estimate the time between the hearing and the effective surrender[305], if the EAW was approved. In this case, the measure is based only on information drawn from the EAWs executed[306]. The average duration is 73 days, which is almost two and a half months. Roughly twenty percent of the surrenders take almost three months. This problem arises because the EAW law (Article 20) states that the surrender of the requested person shall be done within 10 days of the judicial decision on surrender; but if the surrender cannot be done within this time limit, the judicial authorities involved shall immediately contact one another to set a new date, within a further deadline of ten days from the date first set. However, an inspection of the data shows that some of these surrenders had been postponed for a short period. It can also be said that within the first month only 68% of surrenders had been implemented and 2% of the surrenders took almost a year.

[305] Readers should note that this measure relies on the formula F-D (see table 15).

[306] Because for EAWs issued the data collected only has 9 valid files in this case.

Table 89: Days between hearing and surrender (EAWs executed)

	Valid	**209**
	Missing	25
Parameters	Mean	73.09
	Median	47
	Mode	33[a]
	Std. Deviation	87.02
	Minimum	10
	Maximum	638
Percentiles	10th	23
	20th	30
	25th	33
	30th	35
	40th	39
	50th	47
	60th	55
	70th	62
	75th	71
	80th	88
	90th	163

The periods between hearing and surrender are extremely diverse, much more so than those between arrest and hearing[307], which extend in a very scattered distribution from one day to over 1161 days, i.e., more than 3 years and 2 months.

[307] See figure 8: Diagram - The stages of EAW proceedings: the period between hearing and surrender is given by F-D; and the period between hearing and arrest by D-C.

Table 90: Months between hearing and surrender

		Number	Percentage	Valid Percentage	Cumulative Percentage
Valid	0	43	18.4%	20.5%	20.5%
	1	100	42.7%	47.6%	68.1%
	2	29	12.4%	13.8%	81.9%
	3	13	5.6%	6.2%	88.1%
	4	2	0.9%	1%	89%
	5	7	3%	3.3%	92.4%
	6	5	2.1%	2.4%	94.8%
	7	3	1.3%	1.4%	96.2%
	9	1	0.4%	0.5%	96.7%
	10	1	0.4%	0.5%	97.1%
	12	2	0.9%	1%	98.1%
	13	2	0.9%	1%	99%
	20	2	0.9%	1%	100%
	Total	**210**	**89.7%**	**100%**	

Finally, we should look at the complete duration of EAWs executed in Spain, from arrest to surrender[308]. The whole EAW execution process from detention to effective surrender lasts 1.89 month, on average. 67% of executed warrants in the sample take up to a month to be completed and nearly 88% end within 3 months, while 5% take more than 6 months to be completed.

[308] According to table 15, this equals F-C.

Table 91: Months between detention and surrender (EAWs executed)

	Valid	**204**
	Missing	30
Parameters	Mean	1.89
	Median	1
	Mode	1
	Std. Deviation	2.594
	Minimum	0
	Maximum	20
Percentiles	25^{th}	1
	50^{th}	1
	75^{th}	2

Table 92: Months between detention and surrender (EAWs executed)

		Frequency	**Percent**	**Valid Percent**	**Cumulative Percent**
Valid	0	35	15	17.2	17.2
	1	102	43.6	50	67.2
	2	29	12.4	14.2	81.4
	3	14	6	6.9	88.2
	4	2	0.9	1	89.2
	5	6	2.6	2.9	92.2
	6	6	2.6	2.9	95.1
	7	3	1.3	1.5	96.6
	9	1	0.4	0.5	97.1
	10	1	0.4	0.5	97.5
	12	2	0.9	1	98.5
	13	2	0.9	1	99.5
	20	1	0.4	0.5	100
	Total	**204**	**87.2**	**100**	

The data on EAWs issued shows that overall the execution process in other countries is a bit longer than in Spain, since on average it takes almost 2.6 months.

Table 93. Months between detention and surrender (EAWs issued)

	Valid	74
	Missing	709
Parameters	Mean	2.59
	Median	1.5
	Mode	0
	Std. Deviation	4.131
	Minimum	0
	Maximum	21
Percentiles	25^{th}	0
	50^{th}	1.5
	75^{th}	3

Furthermore, although 35% percent were resolved within one month of the detention, 11% took more than 6 months.

Table 94: Months between detention and surrender (EAWs issued)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	26	3.3	35.1	35.1
	1	11	1.4	14.9	50
	2	15	1.9	20.3	70.3
	3	8	1	10.8	81.1
	4	3	0.4	4.1	85.1
	5	2	0.3	2.7	87.8
	6	1	0.1	1.4	89.2
	7	2	0.3	2.7	91.9
	8	2	0.3	2.7	94.6
	12	1	0.1	1.4	95.9
	16	1	0.1	1.4	97.3
	20	1	0.1	1.4	98.6
	21	1	0.1	1.4	100
	Total	**74**	**9.5**	**100**	

Result of the EAW: surrender or refusal

This section summarises the outcomes of EAWs, which is another important consideration in this research work. For almost 93% of cases, the EAW was approved and executed, 3.5% were refused, and 2 % were approved but not executed[309].

[309] These cases have been referred to in article 21 Spanish EAW Law as Postponed or conditional surrender.

Table 95: Result of the EAW (EAWs executed)

	Number	Percentage	Valid Percentage	Cumulative Percentage
Approved and executed	216	92.30%	94.30%	94.30%
Refused	8	3.40%	3.50%	97.80%
Approved but not executed	5	2.10%	2.20%	100%
Total	**229**	**97.90%**	**100%**	
Missing	5	2.10%		
Global Total	**234**	**100%**		

Turning to the EAWs issued, almost 70% were approved and executed, while 6.3% were refused.

Table 96: Result of the EAW (EAWs issued)

	Number	Percentage	Valid Percentage	Cumulative Percentage
Approved and executed	123	15.70%	69.90%	69.90%
Approved but not executed	41	5.20%	23.30%	93.20%
Refused	11	1.40%	6.30%	99.40%
Forwarded and executed	1	0.10%	0.60%	100%
Total	**176**	**22.50%**	**100%**	
Missing	607	77.50%		
Total	**783**	**100%**		

We also looked at the reasons for non-execution, which include the following: another process was pending in the executing country; prescription and the *non bis in idem* principle; the requested person had been convicted in Spain; there were no guarantees of a retrial in the issuing State in the case of a sentence rendered *in absentia*; the requested person was Spanish and chose to serve the sentence in Spain.

Table 97: Grounds for refusal (EAWs executed)

	Number	Valid Percentage
Process pending in executing country (Spain)	3	42.90%
Time limitation and *non bis in idem*	1	14.30%
The requested person was punished for the same offence in Spain	1	14.30%
The Court had refused the extradition before because the sentence was rendered in absentia and there were no guarantees for another trial	1	14.30%
The person was Spanish and decided to serve the sentence in Spain	1	14.30%
Total	7	100.00%
Missing	1	
Global total	8	

Table 98: Grounds for refusal (EAWs issued)

	Number	Cases percentage	Valid Percentage
The requested person had already been sentenced to 8 years prison by the French authorities for the same offence.	1	9.09%	11.10%
The French authority refused (06/01/2008) the EAW due to formal problems, doubts about the date, place, circumstances of the offence and involvement in crime	1	9.09%	11.10%
The facts are the same as a before, extradition executed on 16/09/1998.	1	9.09%	11.10%
The evidence of the offence did not appear in the EAW	1	9.09%	11.10%
The date of the decision of the Court of appeal was 22/10/2008; the execution was neither approved or refused, the court requested more information about the implication of the requested person in the offence and wanted to continue the deliberation on 14/01/2009	1	9.09%	11.10%
Released from prison because the public prosecutor did not receive the information requested on time	1	9.09%	11.10%
Proceedings for the same offence in the executing country	2	18.18%	22.20%
According to Austrian law, extradition cannot be granted	1	9.09%	11.10%
Total	**9**	**81.82%**	**100.00%**
Missing	2	18.18%	
Global total	**11**	**100.00%**	

Other relevant data

Looking at this information in more detail, we see that only in around 16% of cases did the requested person have other proceedings pending in Spain.

Table 99: There were processes pending in the executing country (EAWs executed)

	Number	Percentage	Valid Percentage	Cumulative Percentage
No	197	84.2%	84.2%	84.2%
Yes	37	15.8%	15.8%	100%
Total	**234**	**100%**	**100%**	

When there were proceedings pending in the executing country, 56% of requested persons were awaiting sentence in provisional imprisonment; 25% were already serving the sentence incarcerated in Spain and nearly 19% were also serving a sentence but were not incarcerated.

Table 100: Situation of requested person in pending processes (EAWs executed)

		Number	Percentage	Valid Percentage	Cumulative Percentage
Valid	awaiting sentence, incarcerated	9	3.8%	56.3%	56.3%
	serving sentence, incarcerated	4	1.7%	25%	81.3%
	serving sentence, not incarcerated	3	1.3%	18.8%	100%
	Total	**16**	**6.8%**	**100%**	
	Missing	218	93.2		
	Global Total	234	100		

For the EAWs issued, only 5.6% of cases had proceedings pending in the executing country. Of these, 61.8% involved cases where the requested person was imprisoned, serving a sentence, while for 38% the requested person was still awaiting a sentence in prison.

Table 101: Where proceedings were pending in the executing country (EAWs issued)

	Number	Percentage	Valid Percentage	Cumulative Percentage
No	739	94.4	94.4	94.4
Yes	44	5.6	5.6	100
Total	**783**	**100**	**100**	

Table 102: Situation of requested person in pending processes (EAWs issued)

		Number	Percentage	Valid Percentage	Cumulative Percentage
Valid	serving sentence, in prison	21	2.7	61.8	61.8
	awaiting sentence, in prison	13	1.7	38.2	100
	Total	34	4.3	100	
Missing		749	95.7		
	Global Total	783	100		

7.4. Spanish Case Law

In this section we will briefly cover the legal discussions on EAWs that the Spanish Constitutional Court has dealt with. Before we begin we should point out, as was briefly explained in the legal analysis section, that in Spain the National Court's decision to accept or refuse surrender under the EAW, is not subject to appeal. Neither the requested person nor the Public Prosecutor's Office can appeal the judicial decision of the National Court, regardless of its content.

However, the requested person may appeal for legal protection before the Constitutional Court if they consider that the National Court's decision or the procedure followed before this Court has violated any of their fundamental rights. In spite of its name, the appeal for legal protection is not really an appeal, but an extraordinary petition or challenge limited to very specific cases.

The third section of the appendix presents a summary, in English, of all of the judgements on the EAW from 2004 to June 2010. At this point it is also necessary to take into account that when somebody appeals for legal protection before the Constitutional Court they make very diverse statements in the hope that at least one is admitted and that the Constitutional Court pronounces a judgement in their favour (on the assumption that the requested person's surrender had been approved).

For this reason, we will only present a summary of the most relevant problems below. The reasons alleged by the requested persons before the Constitutional Court essentially revolved around five issues:

(1) Double jeopardy; Res judicata effect; Right to effective judicial protection (cf. Judgements 293/2006, 10th October, First Chamber; and Judgement 120/2008, 13th October, First Chamber)

(2) Right to freedom (cf. Judgement 99/2006, 27th March, Second chamber; Judgement 95/2007, 7th May, Second Chamber; or Judgement 211/2005, 18th July, Second Chamber).

(3) Right to defence (cf. Judgement 81/2006, 13th March, First Chamber; or Judgement 339/2005, 13th April, First Chamber).

(4) Due Process and right to a trial with full guarantees (cf. Judgement 199/2009, 28th September, First Chamber; Judgement 177/2006, 5th June, Second Chamber; Judgement 37/2007, 12th February, Second Chamber; Judgement 191/2009, 28th September, Second Chamber; Judgement 83/2006, 13th March, First Chamber; Judgement 328/2005, 12th December, Second Chamber).

(5) Principle of reciprocity (cf. Judgement 292/2005, 10th November, Grand Chamber; and Judgement 30/2006, 30th January, Second Chamber).

7.4.1. Double jeopardy; Res judicata effect; Right to effective judicial protection

These cases usually occurred when Spain had previously refused the extradition of the requested person for the same crime for which the EAW was being issued. Moreover, 99% percent of these problems arose in cases where France was the issuing state. These are common cases in Spain, because they were closed as extradition procedures and reopened with the EAW. Previously, as extradition procedures, they had reached a “non-surrender clause”, coming to a dead end in the extradition process, and were revived with the EAW.

The appellants in these cases wanted to allege that the decision to refuse the extradition of the same person for the same offence had the effect of “res judicata” on the decision regarding the execution of the subsequent EAW.

The Constitutional Court insists that the orders which approve or reject in these proceedings, EAW and extradition, are not decisions on the guilt or innocence of the requested person (including, Judgements 277/1997, of 16th July; 141/1998, of 29th June, Legal Basis 3; 156/2002 of 23rd July, Legal Basis 3). The purpose of these processes (EAW and extradition) is only to fulfil the requirements and guarantees provided by the surrender Law, but "they do not have effect of res judicata and, therefore, can in certain cases be replaced by others" (Judgements 227/2001, of 16th November, and 156/2002 of 23rd July, Legal Basis 3). However, this general rule should sometimes be relaxed given the specific circumstances of each case, because the answer might vary depending on the *ratio decidendi* upon which the refusal or the approval in the first or previous process (usually an extradition process) was based. So there are limited exceptions to this rule of the non-res judicata effect of the extradition decisions because "in certain cases” resolutions which decide the extradition proceedings cannot be replaced by others.

The problem is that the Constitutional Court does not clarify under what specific circumstances a previous refusal of extradition had res judicata, so a later EAW for the same offence should also automatically be refused based on *non bis in idem*. For example, if the ground for refusing extradition was a lack of reciprocity, the Criminal Division of the National Court might approve a later EAW for the same case.

The Constitutional Court rejects that there was any violation of the right to effective judicial protection. In fact, the Constitutional Court concluded that citizens involved in a decision which refuses an extradition based on the absence of reciprocity do not have a legitimate expectation that the first decision[310] will be modified.

And the key to distinguishing one case from another is the specific reason for the refusal in the first extradition process. The Court should distinguish those refusals based on purely formal or procedural reasons for not executing the extradition or EAW request, that do not have a connection with the grounds for refusal, from those related to the procedural reasons or content reasons of the real "criminal case". In the first case, the decision does not produce a res judicata effect on successive requests for extradition or surrender. On the other hand, when the formal or procedural reasons for the first refusal are connected with the procedural or content reasons of the criminal case, the former might lead this person to legitimately expect the decision to be modified.

7.4.2. Right to freedom

In this case, problems arise from the provisional custody injunction of the requested person in the EAW proceeding. Sometimes because it has exceeded the deadline for a pre-trial arrest, or because there is no clear idea about the judicial or criminal proceedings for which the requested person was in provisional custody, in particular when the requested person has other criminal proceedings pending in Spain.

The Constitutional Court recalls its constant jurisprudence in Article 17.1 of the Spanish Constitution: no one may be deprived of his or her freedom except on legal grounds and in accordance with procedures provided for by law (Judgement 140/1986 of 11th November, Legal Basis 5) and, therefore, the law establishes the 'reasonable' time for which it may be admissible to maintain that situation of freedom deprivation. Hence, the right to freedom can be violated both when provisional imprisonment is approved without coverage of the law, and also when it operates against what the law provides.

[310] That which had decided the extradition procedure.

In one case, the Constitutional Court accepted the claim of the requested person which referred to paragraph 3 in Article 20 of the EAW Spanish law. This paragraph establishes that “Exceptionally, the judicial authority may temporarily postpone surrender for serious humanitarian reasons, but surrender must take place as soon as these grounds have ceased to exist. The surrender shall take place within ten days of the new date agreed when these grounds have ceased to exist”.

In this case there were no serious humanitarian reasons, and moreover, the cause takes part only exceptionally. Therefore, the Constitutional Court noted that the reasoning of the National Court was unconstitutional when it argued that the surrender could not be on time due to “instrumental problems with Interpol” and approved an extension of the deadline until 17th January.

The Constitutional Court has also stated that the maximum period of provisional detention or imprisonment when the trial is pending is a constitutional requirement (Article 17.4, Spanish Constitution) to be determined by a specific law (in this case the law on the EAW). Therefore, exceeding the time limits provided by law implies a disproportionate restriction of the right to freedom and, thus, involves an infringement of the right to freedom.

Following the doctrine set forth, the Constitutional Court concluded in this case that the failure to meet the maximum deadlines set by Article 20 of EAW Spanish Law 3/2003 and maintaining the appellant in provisional imprisonment had violated the right to freedom of the appellant.

The applicant (requested person) had had remained in provisional detention under the Central Court of Instruction, although he consented to his surrender and he had not any imprisonment custodial injunction in the pending Spanish criminal proceeding.

Article 21 of EAW Spanish Law 3/2003 stipulates that “where the requested person has criminal proceedings pending with a Spanish Court for an act different than that referred to in the EAW, the Spanish executing judicial authority may, even if it has decided to execute the warrant, postpone the surrender until the trial has been held or the sentence passed has been served”. However, this provision or any other provision of the EAW Spanish law does not mean that provisional imprisonment can be extended for the period of the suspension.

Therefore, the maintenance of provisional imprisonment does not have a specific legal basis, without it being constitutionally inferred from the extension of maximum time periods for provisional imprisonment set forth in the Spanish Criminal Procedure Law, because it would imply ignoring the exceptional nature of the custodial detention or imprisonment injunction that have to be interpreted in the sense most favourable to freedom (Judgement 98/2002 of 29th April, Legal Basis 6).

7.4.3. Right to defence

In this group, problems arose in the hearing at the Preliminary Investigation Court when the requested person chose a lawyer, and the Court appointed a different public lawyer for this hearing.

To sum up the requested person alleged the infringement of the right to legal assistance of Article 17.3 of the Spanish Constitution in conjunction with the right to choose his own defence lawyer counsel and a trial with full guarantees (Article 24.2 Spanish Constitution), because the Criminal Division of the National Court assigned him a public lawyer in the hearing of Article 14 EAW Spanish Law 3/2003, although the requested person had expressly claimed the defence of the lawyer of his choice.

The Constitutional Court observed that, contrary to what was stated in the appealed order, the appellant did in fact request a lawyer of his own choice. Thus, on page 165 of the file that contains details of the day of the hearing, 17th April 2004, when the requested person was informed by the Central Preliminary Investigation Court of the reasons for his arrest and of the charge against him, he very clearly requested the legal assistance of a specific person to act as his a lawyer[311].

In summary, the Constitutional Court held that the right to counsel is a fundamental right pursuant to Articles 10.2 and 24.1 of the Spanish Constitution because this right should be interpreted according to Article 6.3 of the ECHR and Article 14.3 of the ICCPR.

The right to legal assistance of a lawyer of your own choosing (Judgement 216/1988, 14th November, Legal Basis 2) essentially means that the person under arrest can choose the professional in whom s/he trusts and considers most suitable for the

[311] In this case, D. Javier de las Heras.

case and to carry out the defence (Judgements 30/1981 of 24th July, Legal Basis 3; 7/1986 of 21st January, Legal Basis 2; 12/1993, of 18th January, Legal Basis 3)

Thus, the freedom to choose a lawyer can only be restricted in very exceptional circumstances "provided by law and proportionate to the purpose, constitutionally permissible, persecuted, and must always prevail over the appointment a public lawyer".

In the Spanish System, "the only situation where the law allows the imposition of official public defence assistance is when the person is arrested and kept in solitary confinement", according to Article 527(a), Criminal Procedural Law, which has been declared constitutional by the Court in the Judgement 196/1987 of 11th December, based on a balance of the right to legal assistance and the necessary protection of other constitutionally recognised values.

The Constitutional Court began by highlighting the doctrine of the request person's previous sentence in another EAW case (Judgement 165/2005 of 20th June). In that case, the Constitutional Court emphasised the importance of the "confidence" that the accused had in the professional and human qualities of the defence lawyer. Hence, the Constitutional Court has always interpreted the right to freely choose one's own defence lawyer as a fundamental right and part of the constitutional right of defence.

The hearing of Article 14 of the EAW Spanish law must take place with a defence lawyer, who has been chosen by the requested person. The Court cannot limit this right because the law has no restricting provisions. Therefore, the Constitutional Court did not agree with the reasoning of the Division of the National Court when the latter argued that the appellant had had effective counsel every time during this hearing because the accused (requested person) had received the assistance of a public lawyer during the hearing, although this was not the lawyer initially chosen by the requested person.

The Constitutional Court referred to a previous judgement of the European Court of Human Rights which specified the substance of that guarantee [Article 6.3(c) ECHR]. The safeguarding of this right requires not only a defence lawyer, but also that the accused has an effective defence. In this sense, the effectiveness of the defence and the legal assistance in the context of the right to a trial with full guarantees (Article 6 ECHR and Article 24.2 Spanish Constitution), is an additional guarantee. So this guarantee cannot be interpreted disregarding the choice of the accused because this will imply a restriction and violation of this right.

7.4.4. Due Process - Right to a trial with full guarantees

The problems here arise in two situations. First, in the absence of a guarantee to review a sentence rendered *in absentia*. Second, if the requested person is a Spanish national and the Court did not ask them about their consent to serve the sentence in the issuing State, since otherwise the sentence would be served in Spain.

The second situation is an infringement of the right to a trial with full guarantees (Article 24.2 CE) because the Spanish authorities did not condition the surrender of the requested person to the issuing State[312] on the guarantee of a review of a sentence rendered *in absentia*.

Here, the Constitutional Court recalled the doctrine on the constitutional relevance that the possibility of reviewing a judgement rendered *in absentia* has for the surrender decisions both in extradition procedures and in the EAW. On this point, the Constitutional Court stated that it is not that the Spanish National Court requires any preconditions from the issuing authority to approve the extradition or EAW, but that the order in which the surrender is accepted must include the guarantee that the issuing State gives the requested person a right to an appeal. The issuing State takes full responsibility for compliance with the guarantee, "which is expressly made in the extradition agreement".

The previous doctrine has also been considered applicable in Judgement 177/2006 of 27th June for the EAW. The Legal Basis 7 of this sentence states that although the EAW FD and the EAW Spanish Law 3/2003 do not establish that requirement as a sine qua non condition for surrender for the executing authority, this does not mean they can ignore it because it is an essential part of the fundamental right to a trial with full guarantees recognised by Article 24.2 of the Spanish Constitution, and therefore it must be respected implicitly or explicitly by any Spanish law. In addition, Article 5 of the EAW FD establishes that "when the EAW has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the

[312] In this case Romania.

European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment".

The FD does not make it mandatory for member states to establish such conditions for surrender, but it forwards this matter to the national legal systems.

In fact, the EAW Spanish law does not envisage any specific rules in this respect. However, in the Spanish legal system this guarantee arises from the right to a trial with full guarantees. Therefore the Spanish National Court should have expressly provided this guarantee in the surrender-approval order as a condition to the issuing State. For these reasons, the decision of the National Court infringed the right to a trial with full guarantees because it had approved the surrender of the requested person to Romania to serve a sentence of four years imprisonment rendered *in absentia*, without including the guarantee of a review of the sentence. The Constitutional Court believed that failure could have happened because the Spanish National Court had understood that the sentence was not really rendered *in absentia*, so the guarantee of a review was not necessary because the appellant granted power of attorney to a lawyer who had defended him in the Romanian court.

The Constitutional Court rejected the argument of the Criminal Division of the National Court that the presence of a lawyer at the trial was the same as the effective presence of the accused. The Spanish Constitutional Court based its reasoning on the case law regarding the essential content of the due process, i.e. judgement 91/2000 of 30th March, Legal Basis 3, arguing that "the defendant's right to be present at the hearing is not only a requirement of the principle of contradiction, but also the tool that makes possible the exercise of the right of self defence to answer the accusatory claim". Only by physical presence at the trial can the accused accept or dispute the accusation, can the statement of the accused be an act of defence, can the witnesses recognise the accused or not, and can the accused coordinate with their legal assistance.

The Constitutional Court analysed the appellant's claim of insufficient reasoning of the National Court in relation to the requirement of reciprocity, because this case involved a surrender to France, the requested person was a Spanish national and the facts had happened before the 1st November 1993 (refer to the next section).

7.4.5. Principle of reciprocity

Problems related to the principle of reciprocity arose in the EAW issued by France in which the requested person was a Spanish national. Under the old extradition system, France had a special provision in the European Convention on Extradition, under which France did not extradite its nationals. Under the new EAW system, these circumstances changed, although not completely since France also had a special provision in the EAW FD concerning acts committed before 1993[313]. All these legal problems are resolved by the Constitutional Court. The Constitutional Court ruled out that the decision of the National Court had violated the right to effective judicial protection based on a lack of reasoning. The Constitutional Court remarked that France had used the provision of Article 32 EAW FD, but that that did not mean that Spain had to do the same. Therefore France, as the executing state, established that EAWs issued relating to acts committed before the 1st of November 1993 must be decided on according to the extradition system and not the EAW system, which has been in force since the 1st of January 2004.

The Constitutional Court explained to the plaintiff that he was right when he said "that, according to this declaration, France would not approve the surrender of a French national to Spain for acts committed before the 1st November 1993". However, the Constitutional Court denied that this forced Spain to do the same and adjust the surrender system, since this might imply a breach of the principle of reciprocity and, therefore, of the right to effective judicial protection (Article 24 of the Spanish Constitution).

The Constitutional Court emphasised that the decision of the National Court, which had not made the surrender conditional on a review of the sentence rendered *in absentia*, was a violation of the right to a trial with full guarantees (Article 24.2 of the Spanish Constitution).

The Constitutional Court referred to a previous case (Judgement 91/2000 of 30th March, Legal Basis 14): "it constitutes an indirect violation of the due process (Article 24.2 Spanish Constitution) (...) to approve the extradition to countries that, in cases of serious offence, give validity to the sentences rendered *in absentia*, without subjecting

[313] Other Member States, such as Austria and Italy, have made a reservation under Article 32 of the EAW FD in order to decide requests related to acts committed before a specific date in accordance with the previous extradition procedure instead of the EAW system. For Italy and Austria the date is 7th August 2002.

the surrender to the condition that the convicted person has an opportunity to review the sentence to safeguard his right of defence".

The Constitutional Court noted that it is true that the EAW FD and the EAW Spanish law 3/2003 do not provide this review as a sine qua non condition for the executing state to approve the EAW issued.

The Constitutional Court declared that the fact that neither European nor national legislation on the EAW sets this guarantee does not imply that it can ignore this requirement because it is inherent to the fundamental right of due process or a process (in that case the EAW or the extradition proceedings) with full guaranties recognised by the Spanish Constitution. So both laws must observe this guarantee of a trial with full guarantees.

The Constitutional Court has established on several occasions that "the determination of the content and scope of the principle of reciprocity is a problem with numerous interpretations", in particular regarding the degree of similarity or even identity of the factual circumstances that is a pre-requisite in this principle between the issuing and executing state. The provision that the extradition is granted "as the principle of reciprocity" (Article 13.3 of the Spanish Constitution) is a guarantee to protect certain legal rights safeguarded by Spanish law and, in particular, the rights of the person whose surrender is requested. Therefore, only in the event of a possible infringement of these rights should the principle of reciprocity be a ground for refusal.

7.5. Experts opinion

During qualitative-opinion research this strategy could be triangulated from the information provided by the survey[314], the interviews and experts meeting.

7.5.1. Survey

Not surprisingly, the overwhelming majority of survey respondents (90,9%) belongs to the judicial body, in other words, they are either Judges or Magistrates. Going into depth about this matter, the respondents have considerably more experience in receiving EAWs than issuing them: 90,9% and 54,5% respectively. So the data lead us to think that the majority of replies were from Magistrates of the National Criminal Court (Preliminary Investigation Court or Criminal Division of National Court), since according to article2.2 of Spanish Law[315] the judicial authority competent to execute and decide the EAW is the National Court.

In the issuing, apparently the EAWs are sent out equally for prosecution (54,5%) and execution of sentence (45,4%). However, the EAWs received are much more for execution of sentence (83,3%) than for prosecution (16,67%).

In average, each Judge issues 3,5 EAW per year. According to the survey, the highest number of EAW issued by a Judge per year was fifteen. However, there are also two Magistrates who never issued an EAW last year (2009). On the other hand, they received in average twenty-two EAW per year. Two respondents said that they had received more than forty.

The replies of all respondents to the question “how often person was surrendered”, for issued EAWs[316] are the following: the majority (37,5%) say “frequently”, 25% “occasionally” and only 12,5% “always”. Surprisingly, there are also another 12,5% who think that the requested person was never finally surrendered.

[314] See questionnaire, section IV of the Appendix.

[315] In Spain the ‘executing judicial authorities’ competent for the purpose of complying with the European warrant are the Central Preliminary Investigating Court and the Criminal Division of the National Court, in the cases determined herein.

[316] In case of EAW received, it is not useful to show any result because the question only received two answers.

Data about proportionality of issued EAWs indicate that for 66,7% of the respondents an EAW is not justified for crimes punishable with sentences inferior to one year. Despite this, 33,3% disagree.

None of the respondents agrees with the statement of question No.8: "When I think a warrant should be refused, even if all formalities are correct, I have the power to refuse the EAW". In particular, 30% strongly disagree and 60% disagree. However, at the time of the interviews, different ideas were brought up For example, when we asked about a possible disproportionate use of the EAW, a Magistrate of the Criminal Division of the National Criminal Court said that even for Romanian EAWs concerning petty crimes, somehow some factor (law, mutual trust, europeist face, etc.) may in practice tie the hands of the Magistrate in the decision. That is to say, obviously there is a whole list of professional reasons that would impede the decision, but there is a tendency to ignore these because Judges (or Magistrates) are so focused on this idea of European collaboration. Consequently, the judicial authorities of almost all EU member states have a tendency to agree to surrender the requested person, even thought they might be professionally opposed.

In overall the respondents share the opinion that the requested person's rights were sufficiently guaranteed and respected (see question No. 9 of the questionnaire). In particular, 50% is agree with this statement, and other 50% is strongly agree.

Relating to the difficulties they have to deal with, 50% do not have any problems with the EAW. Nevertheless, other 50% mention troubles in the proceeding. The main problem is "language translation" (30% of the cases), follows by "legal interpretation" (20% of the cases) and "cooperation with foreign judicial authorities" (20% of the cases). Almost every respondent has had problems with the defence lawyer (10% of the cases) or cooperation with national central authority (10% of the cases).

The respondents' opinions about the duration of the whole EAW proceeding since arrest are kinder than those we have seen in the data collection[317]. For them (Magistrates and Senior Judges) only a 40% of the EAWs executed needs more than 90 days, the other 60% is resolved within 90 days; and even a 20% is finally executed in the first month (30 days).

[317] See the section No. 3 "The data of the EAW proceedings in Spain" and in particular point B.3 called "Looking at the duration of the EAW executing procedure".

The image of the EAW's effectiveness in strengthening judicial cooperation is positive[318], only a 9,1% of respondents estimates that this instrument is ineffective. Moreover, 60% of the replies[319] say that the EAW is very useful and effective in the prevention and combat to serious crime (10%), or effective (50%). A 30% declares that it is ineffective (10%) or very ineffective (20%).

Finally, only 45,5% of the Magistrates who answer the survey ever participated in a training course on the EAW. A training course on the EAW and other cooperation matters is a desire for everyone. Furthermore, all survey respondents say "YES" to the last questions, which means future training course on EAW on other criminal judicial cooperation will be very complete because the actors of this EAW proceedings think it is an important determinant in their knowledge.

7.5.2. Results and Lessons about the EAW learned from Spanish Interviews and the expert meeting

During 2009-2010, PhD. Sabela Oubiña conducted a series of interviews[320], primarily with Magistrates, Prosecutors, Policy Makers, but also with University Professors, Defence Lawyers, etc. The interview process targeted all actors of the criminal justice, especially those who work with the EAW.

They were selected from the Judicial Association for democracy. The interviewees selected were twenty. Most of the time, the interviews were conducted on their own office, even if they were not located in Madrid (i.e. Santiago de Compostela, etc.). In other cases we took the opportunity of the interviewee's trip to Madrid to conduct it.

The questionnaire was designed for interviews taking in average forty-five minutes, but some interviews were spread over more than an hour and a half with respondents' agreement and engagement.

This series of interviews was designed to collect information on various essential aspects of the EAW functioning, including knowledge of the issuing and executing, etc. Based on a transcription and translation of the information collected, the next section

[318] In general for 90,9% is effective, for a more detail of this rate: 63,6% effective and 27,3 very effective.

[319] Sum of the answers "effective" and "very effective".

[320] Questionnaire in Section V of the Appendix.

describes highlights, observations and lessons learned from the respondents' various experiences with the EAW.

The observations collected were grouped into themes to facilitate reading and so that these themes can be related to the elements and activities described in the previous sections such as "Legal analysis"; "Data collection"; "Survey". We have chosen to group the comments and remarks under common themes frequently brought up by respondents during the interviews. The information reported below is based on respondents' comments and interpretations, sometimes reported anecdotally.

7.5.2.1. General Opinion about the EAW: significant differences in comparison to the previous extradition and an evaluation of its evolution.

Overall respondents were generally very satisfied with the EAW, they have a very positively opinion on this instrument, which they describe as efficient.

Fairly consistently they highlight huge differences between the EAW and the extradition system. The main difference lies in the simplicity of the new instrument compared with the old extradition procedure. Essentially, it lies in the complete jurisdictionalization of the EAW, because it is exclusively a judicial process, where the Council of Minister no longer interferes with the preliminary or secondary phases of the process, thereby the Council of Minister does not involve anymore. Governing elements disappear; consequently it is no longer a political decision.

Furthermore, this contributes to short proceeding-times, so there is also an important change in the speed in the surrender because the EAW is a much simpler procedure, with a direct communication between judicial authorities.

For some Magistrates respondents, the EAW is like a national warrant, in other words it is very similar to that of a warrant that is used habitually between Spanish judges. Somehow they put the EAW on the same level as any national detention and surrender warrant. Moreover, they speak of a better regulation of refusal grounds, in particular the prescription, in comparison with the previous extradition system.

On the other hand, a problem often cited is the EAW's abusive use in some member states. In this sense, the majority of Magistrates and Prosecutor noted that the EAW success has a reverse side precisely because the process is easier. It seems that the EAW seems to be misinterpreted and applied for irregular situations. Issuing an EAW

is not always suitable in the first place, but rather other alternative should have been used. In this context, the debate about "proportionality" is brought to the scene.

Relating to its evolution, it is a general opinion among Magistrates, Senior Judges and Prosecutors that the EAW runs extremely well. As time passes, it functions better and better. Therefore the principle of mutual trust is growing between Members States, which it is proved by the increase of effective surrenders. However, this does not mean that is exempt from difficulties or small problems. At the beginning, some interviewees pointed out that Judges, Magistrates, Prosecutors and Civil Servants are not familiar with the EAW. Every time it is used, the EAW becomes more well-known and, as a result, it is used more.

From the point of view of execution, this entails that maybe at the very beginning the National Preliminary Investigation Court and the Criminal Division of the National Court were at the mercy of the extradition control. However, the time has served to clarify and define the EAW. In the case of issuing, most of the respondents[321] think that apart from the Criminal National Court, other Spanish judicial bodies are not familiarized with the EAW, thereby it frightened them. In these circumstances, these Spanish judicial bodies are not getting the full benefit of the EAW. Very often they issue a simple national arrest warrant, but not an international arrest warrant. Seeking out an explanation for this fact, one Prosecutor of a province in the south of Spain points at the poor legislation.

Finally, some practitioners reported that from the early stages of the EAW the principle of security became more important than a fair protection and interpretation of the fundamental rights, especially to right to personal freedom.

7.5.2.2. Offences and penalties: a particularly controversial proportionality

There are varied opinions about the type of criminal offences. However, it continues depending somehow on who is the issuing authority. The point in common for all interviewees is the difference all of them highlighted[322] between older member states (as Netherlands, Germany, Belgium, Italy, etc) and young member states such as Eastern countries (Romania, Bulgaria, Slovenia, Estonia, etc.). The first group tends to

[321] This opinion in general come from those (Magistrates, Senior Judges, Prosecutor) who work at the National Court.

[322] In some cases they distinguish more than two groups.

issue more for serious crime such as drug-trafficking, economic crimes[323] (fraud, swindle, forgery, etc), computer-related crime, participation in a criminal organization, etc. Sometimes their EAWs are for murder, kidnapping, trafficking stolen vehicles, trafficking in human beings, etc. The last one issues for robbery, theft and petty crimes; which in some cases were crimes that were committed a long time ago. In the last case, for most of the interviewees, it appeared to be an amazing connection between Eastern member states and offences against property. Central Preliminary Investigation Magistrates and Magistrates of the Criminal Division of the National Court explained that European eastern countries have a much more radical concept of property than other EU member states; in other words, there "the property" is valued above all else. This proved for some of them that these countries that stem from planed-economy regimes are still behind others, from the perspective of democratic evolution.

The preliminary investigation Magistrates underline that the majority of requested individuals are detained on the Gold Coast of Spain, the Mediterranean coast of Spain known for tourism, so Malaga, Alicante and the Islands (Balearic as well as Canary), as they are locations where delinquents seek refuge. The north of Spain (Galicia, Asturias, Basque Country, etc.) and the rural centre of Spain are not places where criminals are commonly found. The average criminal is an individual who decides to live by crime, who obtains easy money, and want to spend it agreeably so he takes two days and goes to the lovely coasts. Under these circumstances, it can be said that the profile of a requested person is someone who obtains money easily through crime and wants to spend it in agreeable locations, such as the Gold Coast. Obviously, they are also arrested in Madrid and other big cities (as Barcelona, Seville, Valencia), but in these cases because they are a high-traffic.

With regard to the issuing perspective, the EAWs are issued for a wide variety of crimes: drug-trafficking (frequently), fraud, forced robbery, homicide, murder, swindle, etc. For most interviewees[324], the number 1 perhaps is drug-related crimes, since Spain has many petty foreign traffickers and also because our penal code calls for harsher sentences for the majority of those crimes.

[323] DE PRADA SOLAESA, J.R. «La orden europea de detención y entrega», *El fenómeno de la internacionalización de la delincuencia económica*, CGPJ, Escuela Judicial, No. 61, 2005, pp. 349–433.

[324] In particular Magistrates of criminal judicial bodies and Prosecutors.

The general opinion among Magistrates and Prosecutors is that Spain tends to issue warrants[325] only for severe offenses with serious penalties, and not for minor offenses or crimes that are not serious; which means it is in accordance to the legal parameters for crimes – requiring over four months for execution and over 12 months for the investigation. However, one Magistrate[326] points out that at the very beginning there were cases where Spanish Judicial authorities issued EAWs even when it was not technically necessary. Finally, a university professor[327] pointed out that Spanish judicial bodies do not use as much as other EU States the EAW for child pornography and trafficking in human beings.

One concern at the time of the research was that there may be an abuse of the EAW. As we have noticed before, most of the respondents indicated that Baltic Countries and Eastern Europe member states issued EAWs for any crime, while the countries with more of a history in the EU only issue them for serious offenses. These Eastern European countries with extremely severe penal codes are issuing EAWs without restraint because with their harsh penalties those weird, trifle or petty crimes meet the basic minimum legality of EAW FD standards (of the four months or of the twelve months prison sentences)[328].

Nobody doubts that Spain is the first receiver of these EAWs. The high-level of immigration could explain, among other variables, why some countries issue EAWs more frequently than others. In this scenario, Spain certainly receives, in comparison with other countries, a high number of EAWs because we have many immigrants from other countries settled in Spain.

This problem has opened a discussion about "proportionality" which is highly controversial in the doctrine and practice and is not yet resolved. Some interviewees pointed out the troubles which involve an instrument such as the EAW, that demands

[325] PELLUZ ROBLES, L.C., «Prisión provisional. Requisitorias. Orden europea de detención», *Hacia un catálogo de buenas prácticas para optimizar la investigación judicial*, *Manuales de formación continuada*, No. 46, 2009, pp. 523-546

[326] When other judges contact with this Senior Judge as local contact-consultant point, he/she reminds them if they are in the early stages of the investigation of a fraud, it might perhaps be more convenient to set up a video conference or, request a statement, rather than bring the subject to Spain only to free them, taking into account the cost of an EAW.

[327] CASTILLEJO MANZANAREZ, «Cuestiones que suscita la aplicación de la orden europea de detención y entrega», *Administración & cidadanía: revista da Escola Galega de Administración Pública*, Vol. 3, No. 1, 2008, pp. 9-30.

[328] Nevertheless the countries in old Europe or the countries that joined the EU earlier on (i.e. Spain) do not normally issue EAWs for minor offenses even though they could.

such a close cooperation, when the countries in the EU do not have comparable criminal judicial systems.

As a matter of fact, Spain also receives many warrants from Germany for individuals that a mainly settled on the Gold Coast. Therefore it is not solely use on itself, but that some countries simply have more or less volume of citizens settled in our country.

The interviewees remark specially Romanian EAWs with underlying patrimonial crimes because in the majority of cases they can hardly be classified as serious crime, or even as an offense. See for example: horse theft, chicken theft, firewood theft, steal of wire or scrap materials. These facts are slightly medieval or archaic, but according to the Romanian Criminal Code they carry a 2-3 years prison sentence. For most of the respondents, it is not disproportionate if they are considered isolated, but extremely inconsistent when compared to their penalties to other offences. For example, a minor rape can only be punished with a sentence of3-4 years duration.

7.5.2.3. Purpose of the EAW

At the same time, the respondents predominantly observed that the rate of EAWs for prosecution or executing a sentence is really very close to 50-50. However, sometimes differences can exist, again depending on the country. For example, Senior Judges and Magistrates often mention that Romania issues more for executing a sentence than for prosecution, while in other States it is the other way round. One interviewee explained that somehow there is the assumption that to issue an EAW for executing a sentence is more clear and simple than for prosecution.

Anyway, at this point the interviewees also differentiate between the block of countries located around us, more or less the traditional nucleus of the EU, who issue more for prosecution, and the recent EU member states, which use it more to execute a sentence. Therefore, the general statistics is openly in favour of executing a sentence, but only because by comparison with other Central EU member states, they issue more EAWs.

Nevertheless, the answers were not unanimous whether the rate for one concrete purpose is slightly higher than the other one. While for some of the interviewees, EAWs for prosecution or attending a trial might be a bit superior, others have expressed an opposite view (i.e. to serve a sentence).

More accurately, in cases where the purpose was prosecution, the answers fit in with being mostly used to be present at a trial, that is to say, in the phase of the trial or the sentencing phase.

On the other hand, from an active point of view, the interviewees[329] have the perception that Spanish judicial bodies issue more frequently EAWs for prosecution or to have the accused person (in this case the requested person) present at the trial.

Rightly, they highlight that this fact is obviously connected with the time–length of the penalties established by the EAW FD. Taking into account the crimes punished under Spanish Criminal Code within these standards and the narrow limits to conduct a trial *in absentia*, it is more probable that the EAWs are issued for prosecution than for executing a sentence. In Spain, a criminal sentence cannot be rendered *in absentia* unless the crime has a custodial sentence less or equal to 2 years of prison, or less than or equal to 6 years of a penalty of another nature. In this scenario, it seems obvious that in Spain the EAWs are issued more for investigation and above all to be able to conduct a criminal trial.

It might be even clearer if the issuing judicial authority is the National Criminal Court, according to the type of crimes that fall under its jurisdiction (see article 65 of the Organic Law of the Judicial Power, LO 6/1985, 15 June). Nevertheless, again it is not a unanimous opinion: a Prosecutor of the National Criminal Court has the impression that maybe the number of the EAWs for executing a sentence is greater than of those issued for prosecution. A Prosecutor of the National Criminal Court points out that one has to take into account that in some countries the possibility of rendering a sentence *in absentia* is much wider than in Spain. From this point of view, it is understandable that other EU member states issue more EAWs for executing a sentence than for prosecution.

The last statement must be paired with the fact that Spanish National Criminal Court has only jurisdiction to prosecute and judge serious offenses. Therefore the only possibility for the National Court to issue an EAW for serving a sentence implies that the requested person (the accused) has been condemned while he or she was provisionally released during the trial. So it is very unlikely according to the severity of the crimes over which the National Criminal Court has jurisdiction. Consequently, in Spain, to issue an EAW for execution of a sentence only makes sense when the crime is not very serious

[329] However, a slim of respondents disagree (for example a researcher and full professor) who thinks that Spain issues more EAWs for the execution of a sentence than for the investigation of a crime.

and in a situation in which there is no danger (*periculum in mora*) that the accused remains free until sentencing.

7.5.2.4. The common purpose of an EAW

In order to evaluate the result of this instrument which has a very hard assumption on mutual trust[330] and is also supposed to strength it, we now take in consideration the final decision of the EAW (refusal or approval). As always interviewees have different opinions, depending on taking into account issuing or executing.

EAWs executed by Spain

In general, the interviewees said that the refusal rate is insignificant; it would not reach 5-7%. The EAWs refused are in a very small number. In this case, it clearly appeared that almost all respondents are quite in accordance about refusal grounds. Among other reasons they mention: (1) the requirement of double incrimination (in other words, the principle of double criminality, because the offense is not considered a crime in Spain according to the Spanish Criminal Code). Obviously, in the case of EAWs with non-listed underlying crimes, for example petty theft, petty behaviour, consumption of drugs[331]; (2) others such as “ne bis in idem”.

Likewise, in the case of EAWs for the purpose of executing a sentence, if the requested person is a Spanish citizen and prefers to serve the sentence in Spain, surrender is denied and the sentence is served in Spain. That too represents a recognizable percentage.

They clarify that however there is not a large number of refusals, since execution is quite often postponed, and not only because there is a pending case in Spain, but rather when there is a lack of necessary information.

Some interviewees added some important topics of discussion about the existence of a pending process in Spain, in the case were the requested person is released from custody (i.e., the defendant was not in provisional imprisonment), or even

[330] GÓMEZ JARA, «Orden de Detención Europea y Constitución Europea: reflexiones sobre su fundamento en el principio de reconocimiento mutuo», *Diario La Ley*, No. 6069, Sección Doctrina, 26 Jul. 2004, Ref. D-165, LA LEY 1785/2004.

[331] According to a Magistrate of the National Criminal Code, Romania penalizes this fact as a form of drug-trafficking. For him, this represents a problem specially when the EAWs is for executing a sentence and the requested person is Spanish because the EAW is not a sufficient cause to execute a sentence, other words in his opinion it is not a tool to use to enforce sentences.

he/she does not have any other injunction. The respondents explain us that they do not necessarily feel hindered by the fact that there is a pending case in Spain, but rather they just convey the necessary information about the existence of the EAW to the judge. And if this judge of the pending case in Spain does not take any cautionary measure, the National Court approves the EAW.

Relating to the principle of proportionality, there is another circumstance that perhaps has to be considered. We are talking about the seriousness of the offences involved. On one side, considering the issuing of an EAW, and on the other side the offence underlying the criminal case which the requested person has pending in the executing country. The severity should always be taken into account. For example, if one is aware that the suspect is being pursued in Spain for a particularly serious offense, comparatively more severe and more complicated from an investigation standpoint, usually the suspect remains in Spain, but then one will be faced with the decision of whether or not to keep the suspect in prison because the criteria governing the cautionary measures of an EAW differ than those used to prosecute defendants in Spain. To explain in greater detail, logically this applies to when you receive an EAW requesting an individual that has fled to another country. Or one that at least has not been caught in that country, thus becoming necessary to apply a cautionary measure for the crime that was committed in Spain. Ultimately the situation is somewhat contradictory because the suspect is imprisoned by way of the EAW, and nevertheless he or she is pursued in Spain for crimes that, curiously, are more serious than those for which they are still allowed to be free.

EAWs issued by Spain

On the other hand, while requests addressed to Spain are hardly ever refused, the interviewees have the sense that EAWs issued by Spanish judicial bodies are not receiving the same treatment. In many instances, other EU executing authorities are not saying no, but rather are temporarily denying the EAW because the requested person is serving other sentences or has other pending cases in the executing state. The interviewees distinguish between countries and concrete refusal ground. For example, some of the respondents points out the case of the United Kingdom because authorities[332] are always worried about the "lapse of time" or "prescription" of the offence.

[332] The concrete answer explain that they (English) "ask for all of the preliminary proceedings which end up becoming negative "conditioned" responses; that is to say that they require you to do a report and then the Prosecution does step in to assist the issuing judicial body to do the report. And generally speaking if the act

It is said that sometimes English executing authorities based their refusal on this reason. Spanish Magistrates complain that even when such authorities approve the EAW the proceeding finishes with a delay.

For some Magistrates of the Central Preliminary Investigation Court, the United Kingdom is denying to execute EAWs with such a frequency that suggests they continue using the much stricter perspective and criteria of simple extradition. In addition to this, they burden the executing authorities with several requests for further evidence and proof.

This does not mean that Spanish Judicial bodies who issue an EAW have always problems with the United of Kingdom; some Prosecutors and Criminal Senior Judges from different provinces gave examples that illustrate the contrary[333].

Along similar lines, some respondents report unforeseen refusals based on "nationality" of the requested person, i.e. because he or she has the nationality of the executing country. For some of them, this problem was more common at the very beginning, but some of them state it still takes place with executing authorities from some EU member states. In this situation, they specifically mention Irish and Dutch cases.

In other circumstances, there is also a proceeding for the same crime pending in Spain[334]. Sometimes, the crime can be tried in Spain and therefore Spain assumes jurisdiction over the offence.

Interviewees were asked that if the requested person consents to his/her surrender, he/she is kept in provisional imprisonment until the effective surrender in the following ten days. The Magistrates of the Central Preliminary Investigation Courts explain that because of the deadlines fixed in the EAW Spanish Law, they frequently order the provisional prison of the requested person. According to the EAW Spanish Law, if the requested person consents to the surrender, there are only 10 days to decide and further 10 days to execute the physical surrender. So it would not be wise to release the requested person. In this particular matter, a Magistrate of the Preliminary Investigation Courts added that he personally gives provisional prison time because if the defendant has, in theory, already fled from his or her country to seek refuge in a third

was committed some time ago, more than 10 years earlier for example, the executing judicial body will plead lapse of time in order to deny the surrender".

[333] An interviewee from Galicia remembered a Spanish EAW case with United of Kingdom (executing country), in which the Spaniard requested had been surrender to Spain without a month.

[334] It exists in parallel a pending proceeding.

one, the illusion of Justice in your country has already been jeopardized. Furthermore, in almost all of the cases they already know about the request. Therefore, if one has already eluded judicial action in his or her own country by coming to Spain, it is possible that one might try to escape a second time; accordingly there is a threat of escape, based on the escape from the issuing country. For this reason, except in cases in which situations or concrete examples of little import and strong ties to Spain are presented, the average defendant will be awarded provisional prison time because in the majority of cases the situation is one of high penalty and few ties (i.e. instances of tourism, in which the individual was only caught by being in the airport), with the precedent that the individual has fled from another country.

But there is not a rule because the Central Preliminary Investigation Courts take into consideration issues such as: if the individual has Spanish citizenship; if he or she has temporary or legal residence, if he or she has family, a job, etc. However, a few respondents explain that somehow it might be difficult to release the requested person because that would be expecting too much for someone who has already fled from justice. In this context, other Magistrate of the Central Preliminary Investigation Court told us that he is under the impression that it is the defence lawyer who suggests, during the interview at the Central Preliminary Investigating Court, that the requested person accepts the terms of the EAW because it will be briefer and faster.

This is particularly important because according to the answers of the Magistrates of the Preliminary Investigation Court, surprisingly when the requested person does not consent to the surrender, the Central Investigation Judge does not always require provisional prison, because in this case the final decision will be delayed since the decision corresponds to the Criminal Division of the National Court.

But in each case Central Preliminary Investigation Court also considers other circumstances, for example, the character or importance of the crime, the time and roots that the individual has in Spain, and, relating to the last point, the guarantees that the requested person can call upon to allege that there is no risk of escape. As some respondents from the Preliminary Investigation Court explained: “during this stage, the requested person reorganizes his or her life before the surrender because he knows that the Criminal Division of the Nation Court (with very few exceptions) will always be surrender”.

As we have highlighted before, one or two respondents (a Judge and a Prosecutor) think that some refusals can be connected with the fact that in other EU

Members States the executing authority can be any judicial authority. Due to the fact that they do not have a centralized judicial authority[335], they work within the parameters of an extradition case to reach a decision because they will only decide on a few, isolated EAWs, and therefore they do not have as much experience as those countries which have a centralized authority competent for all cases involving EAWs.

There is a sense among some of the respondents that, for a substantial amount of EAWs in which surrender has been approved, the effective surrender does never happen because at the last step of the proceeding the issuing judicial authority renounces to the EAW. From the view of fundamental rights, this is particularly worrying because we have to realize that perhaps at this point of the proceeding the requested person has been in provisional imprisonment for a long period of time, for example up to 60 days.

Some of the respondents of the Magistracy noted that prescription is one of the most common defensive tactics of the defendants at the National Criminal Court[336].

In other context, in the EAWs for execution a sentence, the length of time that remains to serve might be considered when deciding whether or not to issue an EAW. This happens because sometimes the length of time is not significant. Perhaps the provisional imprisonment due to the EAW proceeding could even be longer than the sentence imposed in the original criminal proceedings.

Finally, the circumstance of a minor being requested within an EAW is rarely summoned as refusal ground. However, according to the collected answers, sometimes the respondents are not sure if in other EU member states the legal age to be classified as an adult is different, or if the EAW was issued because a minor can be judged as an adult there.

A controversial matter of the EAW Spanish system is the lack of an appeal to the decision. Regarding the guarantees of the criminal procedural fundamental rights, in particular the right for appeal. It is noted the fact that the transpositions of other EU member states always have this measure.

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[335] Spain has centralized the decision about the EAWs issued by other countries in the EU through the National Court: other countries on the other hand have not done this and any judicial authority can make decisions concerning the surrender of a requested individual in the case of a Spanish EAW. The States who have centralized the judicial authority which presides over surrenders sees dozens of cases a week, while these that have not see maybe three.

[336] See in particular the section of this report about the Spanish Case Law.

Experts[337] have, in this context, two clear different opinions. First are those interviewees[338] who believe that it is a barbarity. Even one has revealed us that during a long period of time he thought to present the question of unconstitutionality to the Constitutional Court. Moreover, many interviewees notice a connection between the lack of an appeal system and the use by the requested person of the protection clause at the Spanish Constitutional Court; which obviously it is not a solution because the individual proceeding at the Constitutional Court (called "recurso de amparo") has not this purpose. For them, only a loose interpretation of double instance would lead one to accuse the court of possible unconstitutionality if the suspect is caught and the case presented under article 24 Spanish Constitution, or article 15 of the International Pact of Civil and Political Rights (judicial guardianship effective without a defence lawyer present).

On the other side are those who support[339] that the EAW Spanish Law does not establish an appeal against the decision of the National Criminal Court which refuses or approves the EAW. In their opinion, this is a logical system if one does not see the EAW as a process of resolution because it doesn't resolve anything, but rather only as a French judge asking for a detention and surrender[340]. In other words, the EAW is the request of an issuing judicial authority, therefore it is under their jurisdiction, and since Spain has signed a treaty it must be allowed. They compare the EAW to a warrant between two Spanish judges with a request for detention and surrendering of a person, in which neither there is the right to appeal, because it is like and administrative process of surrender. From this point of view, if it is considered as an administrative procedure of surrender, it cannot be considered a scandal that the EAW has not a second instance. The case is first seen by a Central Preliminary Investigation Court and then by a Criminal Chamber of the National Criminal Court which decides if the case meets all of legal requirements. Taking all of that into account, the appeal would go against the speediness and efficiency of the EAW. Furthermore, the extreme pro of this thesis lies in the fact that a normal evolution of the EAW should lead to cases being solved entirely and directly by the Central Investigation Court. For them, only in that case would it make sense to provide for an appeal against the executing decision.

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[337] Magistrates of the National Criminal Court (Criminal Division or Central Preliminary Investigation Court), Prosecutors, Defendants, University Professor, etc.

[338] Different sort of professionals: Magistrates, Prosecutors, Professors; but always lawyers defendants.

[339] Some Magistrates of the Criminal Division of the National Court, Prosecutors, University Professors.

[340] Some of them said things like "the decision about the execution of an EAW, is a formal decision because it deals with the surrender of a suspect to an EU judicial authority, who is the one in charge of the case, it is based on the principle of confidence and should not be an interminable decision, but rather a decision made in a brief period of time for very particular motives because the essence of the matter has to be brought before the Tribunal which is issuing the reclaiming".

From the point of view of the execution, Central Preliminary Investigating Courts and the Criminal Division of the National Court are among the EU member states' judicial bodies which trust more on other EU States and approve the execution of their EAWs. They do not attempt in any case to evaluate the underlying terms of the original case for which the surrender is being requested, because the requested person/defendant will have to dispute these issues before the issuing judicial body, within the legal proceedings which are already taking place or which may have been already sentenced.

7.5.2.5. Debate about the lack of right to appeal: different theses

Anyway, when specifically addressed this issue to Central Preliminary Investigation Magistrates, who suggested that the Central Preliminary Investigation Court should still be competent for the decision concerning the personal situation of the requested person, and also the decision concerning consent to surrender. Differently, for cases where the requested person did not consent to surrender, the decision should correspond to the Central Criminal Court, which is the legal body competent to rule on cases of minor offenses, and which has a reduced workload. Finally, the decision could be appealed for the Criminal Division of the National Court.

During this discussion, the majority of Prosecutors[341] gave us another important point of view, which nobody had mentioned before. If the EAW Spanish Law is modified in order to establish an appeal, the appeal might be for everyone and every type of decision. It means it will exist for the requested person, in case of approval positive decision on the execution, but also for the Prosecutor, in case of a refusal because in that case the Prosecutor assumes the role of defending the interests of the issuing authority (see for example the French or English system).

On the contrary, other interviewees think that the process would be much quicker if the EAW could be decided by the Central Preliminary Investigation Court, with the possibility of an appeal before the f Criminal Division of the National Court only in special cases.

[341] Obviously, "Prosecutors" which had been interviewed for this project; or who had participated in it.

7.5.2.6. Brainstorming about problems concerning the EAW

Interviewees have come across different sorts of problems in their experience with the EAW. We finish this section by reporting the main problems[342] mentioned during the interviews and focus group.

There is the case of a revisited sentence in which the execution Court always has to ask for further information because the issuing authority only sends the condemnatory sentence from one underlying offence, but not from the offence(s) that has/have been added in the extension of the request. According to the answers collected, the lack of information usually appears in cases of revisited sentences, when there is a subsequent conviction and the benefit of a conditional suspension on a prior count is revoked, in which case the EAW asks for a total observance (both on the prior penalty and the actual). Dealing with re-cast sentences (for example when there is a violation of the sentence in which the terms of the original sentence are not applicable) and it becomes necessary to evaluate the applicable conditions and causes for inadmissibility. They calculate that almost 10% of the EAW requests they received are issued for breaking the terms of a conditional sentence.

Other cases concern efficiency and proportionality problems when the requested person also has a pending process in Spain. The same applies, for example, when the requested person has an EAW as well as a national arrest warrant for a crime committed in Spain. In these cases, problems arise at the execution phase, when the National Criminal Court attempts to coordinate trial dates with the appropriate judicial authority because they are different, and the defendant must be prosecuted by the Investigating Court which has jurisdiction over the region in which the crime was committed in Spain, as well as the Central Preliminary Investigating Court which is competent for the EAW[343].

This sort of situation meets some critics that have been mentioned before (concerning the cases where the requested person has a pending case in Spain), but he/she is still free and is not surrendered to the requesting country. In that case, the

[342] The troubles cannot be divided by the concrete professional interviewee because Magistrates and Prosecutors usually underline the same. The only opinion that could be a bit different is the one of the defendant's lawyers.

[343] In the opinion of a Prosecutor of the South of Spain, it would be necessary to first establish more fluid channels of communication between the peripheral judges, the courts and the National Court in that order to avoid allowing suspects to go without being held in preventative prison simply because there is confusion about whether or not the National Court has ordered it or the acting investigative Judge must do so; these people are quite dangerous after all and have important pending cases in Spain that can go without judgment or punishment.

requested person is not serving a sentence here, nor is he or she satisfying the terms of the foreign crimes. Also there is the problem of the lack of economic resources of some issuing countries, which issue an EAW for petty and weird non-listed offences, but even when the executing Court approves the EAW according to a generous interpretation of mutual trust, the issuing country finally renounces to the EAW because he cannot afford the surrender and transportation of the requested individual.

From another point of view, the majority of respondents agree that it might be necessary that the law protects more the right to an effective defence[344]: the excessive brevity of some stages of the EAW procedure causes sometimes that the judges do not fulfil their obligations; the idea that a suspect must be available for transfer in such a short period of time; furthermore, the fact that the only moment in which one can exercise an effective defence is during an appearance before the central investigating judge. In this context, it might become necessary to allow further time expressly for allegations before the Criminal Division of the National Court, that is to say, without the argument that the decision is limited solely to the hearing before the Central Preliminary Investigation Judge, which takes place immediately after the detention. It would be better, according to the principle of contradictory, if the arguments were done orally and fully in the cases where the requested persons did not accept the terms of the surrender, and the arguments are brought before the Criminal Division of the National Court.

It is set up as an urgent process, therefore that first appearance needs to be carried out within 72 hours. Many times the Central Preliminary Investigation Court still does not have the form with all details, they have only the information that was entered into SIRENE – which normally complies the same information as the form, just in a different order, but sometimes not. Therefore, the Preliminary Investigation Magistrate has to infer the essence of the EAW based on what is in SIRENE system, i.e. what offense is, what sentence it involves, etc. In other words, only basic information of an EAW request. From the point of view of the defence (defendant or requested person), this is a serious problem and in that moment when the defence should be deciding whether or not there is ground to refuse, etc. Furthermore, this few information it is what the National Court decision will be based on, and afterwards there will no trial and no more questioning or appeals.

[344] JIMÉNEZ VILLAREJO, F., «Armonización de las garantías procesales y derecho a la asistencia letrada en la orden europea de detención y entrega», *Garantías procesales en los procesos penales en la Unión Europea* (ARANGÜENA FANEGO, C. coord.), 2007, pp. 119-154.

Another important difficulty belongs to the defence lawyer, because he/she often shows a lack of familiarity with the EAW law, thus confusing jail-time, allegations, and refusal grounds[345]. The EAW proceedings need an extremely qualified professional lawyer. At least, one who has attended to a specialized course on criminal cooperation matters.

The Central Preliminary Investigation Court receives the information afterwards, but deals with the EAW at this early stage using the information that is contained in the SIRENE archives.

On the other hand, experts highlight several important logistic obstacles. The lack of communication between authorities, lack of coordination with regard to the surrender, and lack of information are the main ones. In a Magistrate's point of view, within the Criminal Division of National Court an agreement regarding the proper internal protocol with regard to taking action must be reached; as well as clear and precise protocol because this Magistrate believes the problems in executing an EAW have something to do with a lack of coordination between judicial bodies that we should attempt to establish.

For example, they have problems with the computer systems that are in use by the judicial bodies. With the added difficulty that these computer systems are different from one Autonomous Community to the other. The problem is that in most cases the system used by a certain judicial body is incompatible with the forms (and the sections) required by the EAW. It is obvious that the proceedings have to be introduced in the system; however, the EAW cannot be included in this process. Also, he Judges and Magistrates do not normally have the telephone numbers of SIRENE. In addition, sometimes translation intimidates Judges.

In some cases, the respondents and experts told us about specific problems with some EU member states, when the execution of an EAW request is at stake. For example, on moving individuals to Poland, a Magistrate of the National Criminal Court noted that during surrender the requested person became violent and the captain of the plane prohibited them from boarding the plane for security reasons.

[345] However, during the interview one Prosecutor of the National Criminal Court explains that the professional qualification of the lawyers is adequate to defend their clients' interests in a criminal trial; the defense that is required to defend a person requested using an EAW should be (and is) the same as those asked to defend an individual under investigation for a crime. The alternative would come from the lack of experience of some lawyers who agree to a reclaiming trial that the judges and prosecutors that are in charge of those sorts of cases already have under control. Certainly, one should not criticize because the same criticism should then be shown towards the prosecutors and judges in those countries where the deciding body that handles EAW cases is not centralized.

Oftentimes, there are also problems concerning the United Kingdom with the information they require to the issuing authorities; for example, the idea of information about evidence materials. At times they request excessive proof or justification. Particularly, the United of Kingdom lists exceeding time limits as a cause for refusal, but without understanding how others have carried out the process, but rather only taking into account their own internal rules of applicability. They proceed to evaluate if there has been a situation that has lasted a long time in the issuing nation, and then attempt to decide if it is indeed fair to surrender the subject taking into account said delay. This sort of problems needs, in our opinion, more regular international meeting (perhaps sometimes in a bilateral conference) to discuss fair practices in order to bring mutual trust closer and to offer better understanding of each system.

There are also countries such as France that do not put the requested person at the disposition of the issuing judicial authority, but rather surrender them to the Spanish authorities guarding the borders, thus creating several problems. First of all, the surprise felt by the investigating judge presiding over that section of the border, who then is responsible for a requested person for which he/she has not issued a warrant (let alone an imprisonment decree), but whose situation has to be legalized immediately, in case the corresponding stage does not allow time for the requested person to be transferred to the judicial authority which issued the EAW.

From an issuing point of view, there is also another common critic to the EAW Spanish Law: it has not taken into account prior intervention on behalf of the prosecutor. Basically because it makes no sense that a Judge or Magistrate issues an EAW with the intent to prosecute without first consulting a Prosecutor.

There are also complaints concerning the issuing in cases where member states will not communicate within a reasonable time period the concrete date when their Police comes to take the requested person for effective surrender. Sometimes it means that the surrender should be postponed, sometimes they inform the executing country the day before it is intended to take place, or give said information during weekends.

7.5.2.7. Evaluating the impact of the EAW on transnational crime

In these final reflections, we explore how effective do interviewees think the EAW is in the prevention and fight against transnational crime.

The majority of respondents[346] believe that the EAW works better and more efficiently than the extradition request system. However, they always remarks that this does not exactly mean "prevention"[347]. In other words, the EAW system does not lead to a fall in rate of transnational crime, because it mainly implies an easier surrender process for prosecution, which is very important, but the prosecution of transnational crime is more complicated than the mere efficiency of the arrest and surrender of those criminals. For example, proof, witness, location of commission, time limits, etc.

Therefore, the EAW is a useful tool in practice for cooperation on criminal matters. Every day it plays a more relevant role in combat against transnational crime, but it is only a piece, a small part, of a really close scenario for cooperation on criminal matters based on a really mutual trust. The EAW avoids certain governmental interventions that previously blocked extradition and prosecution of some individuals connected to transnational criminal organizations.

It has not been more preventive but it has been more punitive: juxtaposing with the previous situation, criminals knows that upon being caught here, they will pay their crime here, as well as everywhere else in Europe, since they are now sure that if they are located in the UE area, they will be surrendered on a shortened time frame. The EAW creates a cross-border situation in terms of persecution of transnational crimes that with extradition would have probably ended in impunity.

[346] In general: Magistrates, Judges, Prosecutors, Civil Servants, University Professors.

[347] The term "prevention" was included in this concrete question of the questionnaire. Afterwards, I realize that perhaps it was not the best term to use in this question.

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ANNEXES

GUIDELINES FOR AN EAW TRAINING PROGRAMME

Ignacio Ubaldo González Vega
Jueces por la Democracia, Spain

António Latas
ASJP, Portugal

Description of the international virtual course on European Arrest Warrant

The aim of this e-learning activity centred on European Arrest Warrant is to train (initial and continuous) judges, prosecutors, court clerks, administrative staff and lawyers (as trainees) at the European level in this subject.

As trainers: Academic experts (university professors and researchers), National practitioners (representatives of the national ministries of justice and the interior, judges and prosecutors, administrators, representatives of the law enforcement and border guards, and defence lawyers) and EU experts (representatives of the EU organs such as the European Court of Justice, the Council, Commission, European Parliament, and EU-agencies such as Eurojust, the European Judicial Network, Europol, Frontex).

All aspects related to this virtual course are included in this description, from the design, pedagogical guidelines, development of the activity and evaluation.

They are to include:

- Identification of the basic training topics that are to be offered in the area of EAW.
- Establishment of the basic pedagogical principles and procedures that are to guide the elaboration of the activity.

- Establishment of the basic principles that will have to rule the thematic extension, contents and limits of the topics to be covered (lessons, practical cases, forums…).
- Integration of the activity in the training guidelines to be offered to trainees.
- Development of the training activity with the software available.
- Evaluation of the activity so that proposals for improvement could be developed.

Time frame: The main activities are to be developed in 4 months starting with the preparation workshop and then ensuring the training activity itself with 2 Seminars (initial and final) and the e-learning part itself (lasting 12 weeks).

Output: A complete program with contents on training on EAW available to the European Union and at its disposal for future training actions.

The preparation workshop

The aim of this workshop is to treat the pedagogical organisation of the action, the assignment of tasks to experts (lessons to prepare, cases, forum …), the role to be played by each in the Seminars and the e-learning part of the action, time schedules, fixation of priorities and evaluation criteria. This will enable experts a clear picture of their tasks and start the development of their part so that it can be ready both for the Seminars and for the e-learning action.

The topics to be covered are to be organised among the basic points of EAW are:

- European arrest warrant: General Topics.
- Institutional and Technical Instruments for European arrest warrant.
- Framework Decision 2002/584/JAI, EC), 13th of June 2002, from European Council, about the European arrest warrant.

Output: Clear delimitation of tasks, basic document of time schedules, profiles for the development of the e learning activity (Stile Guide), delimitation of tasks among experts and contents for both initial and final Seminars. An academic guide of the subjects of the course will be produced.

Initial seminar: E-learning training on EAW

Method, Description, Aims and Results

Seminar of 3 days to be developed in one European country with the presence of all experts involved in the project and all trainees to whom the training is to be addressed.

The aim of this Seminar is both to offer all trainees an overall view of the basic principles of EAW, its institutional and technical instruments so that they could start the e-learning part which is to cover an in depth study of all topics covered.

Besides this the aim of the Seminar is to explain all trainees how it is to be developed (time frame, cases, requirements for participation in forums) and the way in which it is to be technically implemented. A special attention to the navigation interface and web doubts of the trainees will be paid.

The topics to be covered are to be organised among the basic points included in EAW:

- EAW: General Topics.
- Institutional and Technical Instruments for EAW.
- Pedagogical and technical tools for the e-learning part

Output: Training offered in basic EAW enabling trainees to be acquitted with the basic tools and points so that they can fully profit the e-learning part of the action. Besides it training on the technical tools to be used as well as all data on the development of the Seminar is to be achieved.

Resources: Trainers, Trainees to whom the training action is to be directed.

Other resources: translation, interpretation, documents.

Development of training on the EAW and follow up evaluation meeting

Method, Description, Aims and Results

E Learning Activity on the basic topics on EAW to be developed in 12 weeks (6 lessons are covered offering all trainees two weeks for the development of each lesson) with interaction by electronic means among trainers and trainees.

Besides it a follow up of the training action is to be fulfilled through a mission by the Coordinator to judges following the activity so that they can be fully involved in it.

The topics to be covered are to be organised in 6 thematic areas that could cover:

I. General Principles of International Cooperation on Criminal Matters.
II. The principle of mutual recognition.
III. European Arrest Warrant: General Principles, Surrender procedure, Effects of the Surrender.
IV. The Framework Decision on EAW.
V. The implementation of the Framework Decision on European Arrest Warrant in the European countries.
VI. European jurisprudence and national jurisprudence.

Output: Training offered in EAW with a follow up to ensure the proper implementation and results.

Resources: Trainees to whom the training action is to be directed.

Other resources: translation, interpretation, documents.

Final seminar: E-learning training on the EAW

Method, Description, Aims and Results

Seminar of 2 days to be developed in European countries with the presence of all experts involved in the project and all trainees to whom the training is to be addressed. Only those trainees who have passed the course will attend this seminar.

The aim of this Seminar is both to offer all trainees an in depth view on some of the topics covered by the e-learning part of the component on that those who have participated actively on it can have a broader view of aspects covered by EAW with an active participation in the form of workshops on some topics to be developed. An overall evaluation of the activity is also to be done.

The topics to be covered are some (foreseen according to the development of the e-learning part) so that national experiences could also be exchanged. They are to be selected among the ones object of the previous training.

Output: Training offered in depth EAW with results of debates in workshops offered to all trainees and to be distributed and publicized with the contents of the Seminar (publication of results)

Resources: Trainees to whom the training action is to be directed and have passed the course.

Publication of results of the e-learning action and conclusions of workshops.

Other resources: translation, interpretation, documents.

EAW INTERNATIONAL CONFERENCE PROGRAMME

Towards a European Area of Justice

11th June 2010
CES-Lisbon
City Hall Auditorium, Picoas Plaza
Free entrance

PROGRAMME

10h00-10h30 | OPENING SESSION

Alberto Martins – *Ministry of Justice*

João Miguel – *Eurojust, Nacional Member of Portugal*

Joana Ferreira – *Attorney General's Office*

Boaventura de Sousa Santos – *Center for Social Studies, University of Coimbra*

10h30-13h15 | THE EUROPEAN AREA OF JUSTICE BEYOND THE LISBON TREATY

Chair: Conceição Gomes – Center for Social Studies, University of Coimbra

Cunha Rodrigues – *Court of Justice of the European Communities*

John Vervaele – *School of Law, Utrecht University; College of Europe*

COMENTÁRIOS

Andrew Williams – *School of Law, University of Warwick*

Pedro Caeiro – *School of Law, University of Coimbra*

15h00-16h30 | THE EUROPEAN ARREST WARRANT IN LAW AND IN PRACTICE

Chair: José Mouraz Lopes – Coimbra Appeal Court; Portuguese Judges' Association

The Eaw in Italy: Marco Fabri and Marco Velicogna – *IRSIG-CNR, University of Bologna*

The EAW in The Netherland: Philip Langbroek and Elina Kurtovic – *Montaigne Center, University of Utrecht*

The EAW in Spain: Ignacio Ubaldo González and Sabela Oubiña – *Association Judges for Democracy; School of Law, Carlos III University of Madrid*

The EAW in Portugal: Conceição Gomes, Diana Fernandes and José Reis – *Center for Social Studies, University of Coimbra*

16h45-18h30 | COMPARATIVE ANALYSIS, COMMENTS AND DEBATE

Chair: António Latas – Évora Appeal Court; Portuguese Judges' Association

Conceição Gomes – *Center for Social Studies, University of Coimbra(Portugal)*

Federica Curtol – *Eurojust, Case Management Analyst (Itália)*

Nicolaas Rozemond – *School of Law, Free University of Amsterdam (The Netherlands)*

Manuela Fernández de Prado – *National Audience, Madrid (Spain)*

José Mouraz Lopes – *Coimbra Appeal Court (Portugal)*

18h30 | CLOSING

Funding | Partners | Support

SURVEY

Survey on the experiences and perceptions of the judicial officers concerning the European Arrest Warrant

1. To which professional body do you belong?
- ☐ (not for es) Public Prosecutor
- ☐ (not for nl) Judge
- ☐ (for nl only) Secretary

2. Which kind of EAW proceedings have you experienced? *[you may choose as many options as needed]*
- ☐ issued for prosecution of a crime
- ☐ issued for the execution of a sentence
- ☐ (not for nl) received for prosecution of a crime
- ☐ (not for nl) received for execution of a sentence

3. How many EAW's did you issue approximately during the last year?
- ☐ Number .....
- ☐ I do not know
- ☐ Not applicable

3. (alternate version for nl only) How many EAW's did you issue approximately since 2004?
- ☐ 2009 .....
- ☐ 2008 .....
- ☐ 2007 .....
- ☐ 2006 .....
- ☐ 2005 .....
- ☐ I do not know
- ☐ Not applicable

4. (except for the Netherlands) How many EAW's did you receive approximately during the last year?
- ☐ Number .....
- ☐ I do not know
- ☐ Not applicable

(see previous question)

5. If you have issued an EAW, how often was the requested person surrendered?
- ☐ Never
- ☐ Rarely
- ☐ Occasionally
- ☐ Frequently
- ☐ Always
- ☐ Not applicable

6. (except for the Netherlands) If you have received a EAW, how often was the requested person surrendered?
- ☐ Never
- ☐ Rarely
- ☐ Ocasionally
- ☐ Frequently
- ☐ Always
- ☐ Not applicable

7. Do you consider issuing EAWs for crimes with sentences less than 1 year imprisonment justified?
- ☐ Yes
- ☐ No
- ☐ That is not for me to decide

8. Please specify your level of agreement with the following statement: "When I think a warrant should be refused, even if all formalities are correct, I have the power to refuse a warrant"
- ☐ Strongly disagree
- ☐ Disagree
- ☐ Neither
- ☐ Agree
- ☐ Strongly agree
- ☐ Not applicable

9. Please specify your level of agreement with the following statement: "In the situations I dealt with, the requested person's rights were sufficiently guaranteed and respected"
- ☐ Strongly disagree
- ☐ Disagree
- ☐ Neither
- ☐ Agree
- ☐ Strongly agree
- ☐ Not applicable

10. Which kind of difficulties have you encountred dealing with EAW proceedings? *[you may choose as many options as needed]*
- ☐ language translation
- ☐ legal interpretation
- ☐ problems with lawyer defendants
- ☐ cooperation with national central authority
- ☐ cooperation with national police forces
- ☐ cooperation with foreign judicial authorities
- ☐ No problems

11. In your experience, how long does the whole EAW proceeding usually take since the requested person is arrested?
- ☐ Up to 10 days
- ☐ Up to 30 days
- ☐ Up to 60 days
- ☐ Up to 90 days
- ☐ More than 90 days.
- ☐ I do not know

12. How effective do you think the EAW is in strengthening judicial cooperation between Member-states?
- ☐ Very ineffective

☐ Ineffective
☐ Neither effective nor ineffective
☐ Effective
☐ Very effective

13. How effective do you think the EAW is in the prevention and combat to serious crime, namely transnational crime?
☐ Very ineffective
☐ Ineffective
☐ Neither effective nor ineffective
☐ Effective
☐ Very effective

14. Did you ever participate in a training course on the EAW?
☐ Yes
☐ No

15. Do you think a training course on the EAW and European cooperation matters would be useful to you?
☐ Yes
☐ No

16. (for nl only) In which circumscription do you work?
☐ Alkmaar
☐ Almelo
☐ Amsterdam
☐ Arnhem
☐ Assen
☐ Breda
☐ Dordrecht
☐ 's Gravenhage
☐ Groningen
☐ Haarlem
☐ 's Hertogenbosch
☐ Leeuwarden
☐ Maastricht
☐ Middelburg
☐ Roermond
☐ Rotterdam
☐ Utrecht
☐ Zutphen
☐ Zwolle-Lelystad
☐ Landelijk

DIGITAL OUTPUTS

- Final scientific report
- Final narrative report
- Proceedings database
- Statistical outputs