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## Fundamental Rights Concerns regarding the European Arrest Warrant

**1.** As already mentioned, the European arrest warrant is the first legal instrument, adopted by the European Union to achieve transnational cooperation in the field of criminal law.

When it was adopted, the primary - and perhaps the only - concern of the European legislator was to replace the extradition procedure between Member States with a flexible and rapid, strictly judicial mechanism for the surrender of persons who are fleeing from justice after having been finally sentenced, or persons suspected of having committed serious criminal offences.

To serve this basic objective, respect for fundamental rights in criminal justice proceedings was taken for granted **in all EU member states.**

A glance to the case law of the European Court of Human Rights would reveal of course that the ground, on which the adoption of the European Arrest Warrant was based, was not sufficiently solid: a large number of EU member states had been convicted on several occasions for violating fundamental freedoms. As Heard and Mansell report, between 2007 and 2010 – that is, within three years - the European Court of Human Rights identified 181 violations of Article 3 and about 1700 violations of Article 6 of the Convention **in EU** member states.

However, the will to accelerate the surrender of suspects and convicted persons was so strong that any objections about deficiencies in the protection of fundamental freedoms were ignored. A general reference to respect for fundamental rights **in the first article** of the Framework Decision was considered to be sufficient.

It soon became clear, of course, that this general clause was not enough to guaranty the necessary level of protection of fundamental freedoms in all Member States. It took six Directives, all adopted after 2010 - eight years after the adoption of the EAW - to achieve equal protection of the rights of suspects and accused persons at European level. The Framework Decision itself was amended in 2009, to address deficiencies in the protection of the rights of persons convicted in absentia, while other parts of the Decision **"are also under review**", **as noted** in the last Report from the Commission to the European

Parliament and the Council on the implementation of the Framework Decision on the European arrest warrant.

In this context, the purpose of this presentation is to examine certain basic shortcomings related to the protection of fundamental rights and formulate relevant proposals to address them.

**2.** A first question that arises is how the general clause on respect for fundamental rights is in practice observed. How does it actually affect the issuing and, in particular, the execution of the European arrest warrant?

As a recent survey of more than **three hundred** Greek court judgments on the **execution** of European arrest warrants has revealed, the clause on respect for fundamental rights is mentioned in almost **all** judgments.

However, this reference does not imply an actual judicial review of a possible violation of fundamental rights and does not lead to a refusal to execute the warrant. In fact, Greek Courts often embrace the position that rights are born only **after** surrender has been carried out, stressing that the risk of a violation of fundamental rights is not included in Articles 3 and 4 of the Framework Decision as a ground for non-execution of the Warrant.

Thus, a relevant European legislative initiative for confronting this problem and recognizing the infringement of fundamental freedoms as a ground for mandatory non-execution of the European arrest warrant seems to be appropriate. The European Parliament also proposed this, in 2014. In addition, this ground for refusing execution has been adopted in other - more recent – European instruments in the field of judicial cooperation in criminal matters. The European **Investigation Order, for example,** cannot be executed when "there are substantial grounds to believe that its execution would be incompatible with the executing State's obligations in accordance with Article 6 EU Treaty and the Charter". Therefore, the insertion of a mandatory human rights ground for non-execution of the European Arrest Warrant seems **now necessary**, also taking into account the **proportionality principle**.

**3.** The need to respect the principle of **proportionality** is in fact a broader issue, which should also be addressed through a European legislative initiative.

According to art. **fifty two** (52) of the Charter, "**Subject to the principle of proportionality**", limitations on the exercise of the Fundamental Freedoms may be made only if they **are necessary** and **meet objectives of general interest** recognised by the Union **or the need** to protect the rights and freedoms of others". This is a general principle that is also binding for the authorities, which issue a European Arrest Warrant. Before issuing the Warrant, they **should** consider whether they could adopt less intrusive measures, such as an invitation for the purpose of voluntarily attend a criminal procedure or a European investigation order for a suspect to be heard in another Member State.

In the 2002 Framework Decision, however, no such condition has been set. Thus, the authorities responsible for issuing the European arrest warrant generally consider it their duty to issue such a warrant whenever a **national** arrest warrant has been adopted. Only recently, a Swedish citizen, against whom the Swedish authorities had issued a European arrest warrant, claimed before the Supreme Court of Greece that the authorities of the issuing State did not invite him to attend voluntarily the criminal procedure, although he had a known residence.

The obligation to respect the principle of proportionality applies also regarding European Arrest Warrants issued for the execution of a sentence or security measure. In this case, the issuance of a warrant is permissible for all custodial sentences and all security measures involving deprivation of liberty with a maximum duration of at least four months; that is, even for sentences of very short duration. Issuing authorities should therefore consider in each case whether they could adopt less onerous measures.

In particular, when the convicted person has a known residence in another EU member state, it is very likely that they could benefit from an option to serve their sentence or security measure in that state. This choice could be of great importance for the convicted person, since in many EU member states short-term sentences are suspended regardless of any previous convictions, an option that does not exist in other states, as for example in Greece. In addition, while in Greece the provision of community service as a main sentence has been suspended since August 2019, in most EU Member States this sentence is in force.

Consequently, the issuance of a European Arrest Warrant for the execution of a relatively short custodial sentence violates the principle of proportionality, if the issuing authorities do not first check whether under the law of the country of residence it would be possible to suspend the execution of the penalty or provide a community service instead.

At the end of 2020, the Council, in its conclusions on the implementation of the EU legislation on European Arrest Warrant, **urged** Member States to formulate non-binding guidelines in order to assist the issuing authorities as regards the verification of whether the conditions for issuing a Warrant are met and whether the principle of proportionality is observed[1].

Still, the process of drafting these guidelines, even if it has progressed in some countries, it has not even started in others. **Therefore, a legislative initiative seems to be necessary in order to insert an explicit proportionality clause for the issuance of a European Arrest Warrant.** As has been rightly pointed out, the added value of this clause at EU level would remedy the uncertainty in the current legal landscape and create an EU-wide uniform proportionality test that would encourage a more moderate use of the European Arrest Warrant, based on common standards, and simultaneously support the adoption of less intrusive alternative measures.

However, compliance with the principle of proportionality is not only an obligation of the authorities issuing the European Arrest Warrant, but **it is equally binding for the executing authorities.**

The lack of a specific provision in the Framework Decision results in significant differences between the executing States. In some States, as for example in Germany, courts assess the incoming EAWs from a proportionality perspective and abstain from executing them if their execution appears to be 'intolerable'. On the contrary, in other states, such as Greece, the courts usually reject the requested person's claim regarding the violation of the proportionality principle, arguing that it refers to a measure taken by the authority of the issuing state, **which they cannot control.**

This will continue as long as the European Legislator will not amend the Framework Decision. There is no doubt that the proportionality check is primarily a duty of the issuing state. Still, the executing state should also make a relevant control, especially when the requested person provides evidence that the issuing state did not take into account the proportionality issue. This could also be necessary when there is evidence that the execution of the warrant is disproportionate on grounds relating with the requested person. In such cases, when the consultations among member states do not come to a compromise, the executing state should have the right to refuse surrender. This is why

[1]Council conclusions 'The European arrest warrant and extradition procedures – current challenges and the way forward" (2020/C 419/09), OJ C 419 /4.12.2020, σ. 23, σημείο 9.

the insertion of a ground for non-execution of a European arrest warrant on proportionality issues is also necessary.

**4.** Another particularly important issue relating to the protection of fundamental rights in the issuance and execution of European Arrest Warrants is the potential violation of Article 3 of the European Convention of Human Rights.

As already mentioned, many EU Member States have been found several times to have violated Article 3 of the European Convention, because of the detention conditions in jails. However, these states may still issue European Arrest Warrants. The problem thus shifts to the executing States, which cannot surrender the requested person if they do not have enough evidence that they will not be subjected to torture or inhuman and degrading treatment or punishment in the issuing State.

The EU Court of Justice, in its judgement on Aranyosi και Căldăraru cases[2], stated that where there is objective and reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or certain places of detention, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

This decision was undoubtedly important because for the first time the Court acknowledged a ground to refuse execution, which was **not** included in articles 3 or 4 of the Framework decision.

Three years later, the court adopted the same two – step model when there are issues related to safeguarding the principle of a fair trial, such as when the independence of judges is questioned.

However, this model presents serious problems when applied in practice in these cases.

[2] ΔΕΕ, απόφαση της 5ης Απριλίου 2016, Aranyosi και Căldăraru, C-404/15 και C-659/15 PPU.

Firstly, **as regards the conditions of detention in the issuing state**, the duration of the proposed procedure is rather long and therefore onerous for the requested person, who may be deprived of their freedom for a long period in the executing State.

Furthermore, the implementation of the model is left to the **discretion of the executing authorities** to assess whether there is indeed objective, reliable, specific and properly updated evidence that the requested person will be subjected to torture or inhuman and degrading treatment. Very often, however, the executing authorities judge that no problem exists. It is worth mentioning, for example - as revealed by the above-mentioned survey - that although Greece has a very large number of convictions for violation of Article 3 of the European Convention of Human Rights, due to the conditions of detention in its prisons, only German and British authorities generally ask for evidence regarding the conditions of detention of requested persons. As a result, the majority of those who are handed over to the Greek authorities are quite likely to be subjected to inhuman and degrading treatment in the country's detention facilities.

This certainly works vice versa. Even when the issuing state has been convicted for violating human dignity in detention facilities **many times**, Greek executing judicial authorities do not normally consider that there is a reason to refuse to execute the European Arrest Warrant, nor do they consider it necessary to request safeguards from the issuing state. One could cite, as examples, **2 recent** judgments of the Supreme Court of Greece, adopted in 2021 (AP 1150) and 2022 (AP 447. According to them, the sole fact that Bulgaria, during the period 1959 and 2020, was the 5th country (after Russia, Turkey, Ukraine and Poland) with the highest number of convictions for violating Article 5 of the European Convention on Human Rights -which includes pre-trial detention- was not enough for denying the execution.

Hence, the 2-step model presents problems in its implementation. Instead, one could follow a more simple procedure, which would even be faster and therefore better for the person concerned. Specifically, it would be sufficient to include relevant information already when issuing the warrant, as is also the case with information regarding trials in absentia. In other words, the relevant authorities, when issuing a European Arrest Warrant, should present evidence that the conditions of detention of the requested person will be in accordance with the minimum standards set by the Council of Europe and the EU, **specifying how** it will comply with these standards.

Of course, in the long term, EU will have to take concrete measures to improve the overall situation of detention conditions in its member states.

**The two-step model** presents serious problems also when there are issues related to safeguarding the principle of a fair trial, such as when there are deficiencies regarding the independence of judges. According to the settled case-law of the European Court of Human Rights, compliance with the requirement of judicial independence is assessed, in particular, on the basis of **statutory criteria**, such as the manner of appointment of its members and the duration of their term of office, or the existence of sufficient safeguards against the risk of outside pressures[3]. The nature of the case or the suspect's relationship with the government are completely irrelevant. Moreover, the inquiry into the independence of each individual judge is not even conceivable.

To confront the problem, a European legislative initiative is also here necessary. Instead of the two-step model, one should consider to amend the framework decision, adding a ground for mandatory non-execution of the warrant when systemic deficiencies of such significance are identified in a Member State that the Commission has initiated proceedings against that State in accordance with Article 7(1) of the EU Convention. Such a rule would not only ensure equal treatment of all persons requested by the issuing State, guaranteeing their right to a fair trial, but it would also act as a deterrent to governments seeking to "restrict" judicial independence.

**[3] ΕΔΔΑ, CASE OF MUSTAFA TUNÇ AND FECİRE TUNÇ v. TURKEY, 14.4.2015, παρ. 221.**