

# **HOW TO DEFEND A EUROPEAN ARREST WARRANT CASE**

ECBA Handbook on the EAW for Defence Lawyers

**PART I  
UNDERSTANDING THE EAW FRAMEWORK DECISION**

Palma Edition  
October 2017



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## Disclaimer

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This handbook is primarily designed to assist defence lawyers with little expertise in the field. It contains information of a general nature only and is not intended to address the specific circumstances of any particular individual or entity.

This handbook does not contain professional or legal advice. If you need specific advice, you should always consult a suitably qualified defence lawyer.

While the authors and the ECBA have made every effort to ensure the correctness and accuracy of its contents, advice and information in this handbook is not necessarily comprehensive, complete, accurate or up to date. It is a preliminary guide and does not intend to provide exhaustive treatment of the subject. Case law and relevant laws have been selected as deemed appropriate, rather than exhaustively listed or cited. Since European Union laws and case law are constantly changing, users should always check EUR-Lex for the latest published laws (<http://eur-lex.europa.eu/collection/eu-law/legislation/recent.html>) and judgments (<http://eur-lex.europa.eu/collection/eu-law/eu-case-law.html>).

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This handbook is available online, in versions suitable for computers or mobiles at:

<http://handbook.ecba-eaw.org/>

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## About the ECBA

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Since its foundation in 1997 the European Criminal Bar Association (ECBA) has become the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe countries. Membership is composed of individual practitioners from over 40 different European countries including all 28 EU Member States and national defence associations as collective members.

The ECBA aims to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons.

ECBA activities include:

- Organising two conferences a year to present and discuss current issues relevant to criminal law in Europe and meet lawyers from other Council of Europe states
- Providing a forum for exchange of criminal defence information on matters of practical importance
- Establishing a network of contacts to provide mutual assistance for defence practitioners and providing a platform for lawyers and for members of the public to assist them to locate defence practitioners in Europe
- Projects and working groups on criminal law and defence practise
- Training courses for defence practitioners (jointly with ERA)
- Submissions and statements to the EU legislative institutions and participation in many expert hearings at EU level
- Recently established sub-association European Fraud and Compliance Lawyers: [www.efcl.eu](http://www.efcl.eu)

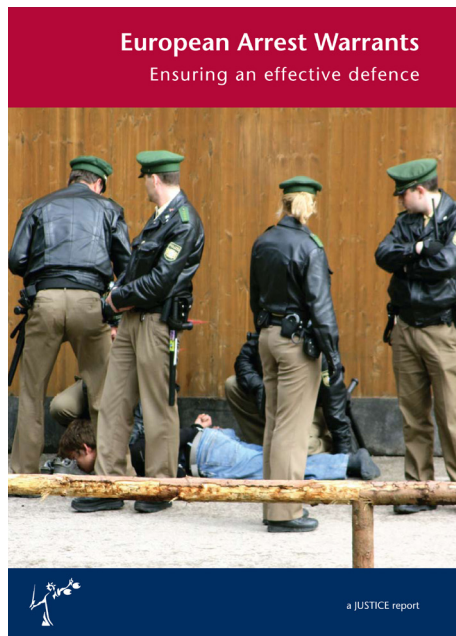
For further information, please see the ECBA's website,

[www.ecba.org](http://www.ecba.org)



## About JUSTICE

Established in 1957 by a group of leading jurists, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. We are a membership organisation, composed largely of legal professionals, ranging from law students to the senior judiciary. For further information, please see JUSTICE's website, [www.justice.org.uk](http://www.justice.org.uk)



This joint ECBA, JUSTICE and ICJ report published in 2012, and part funded by the European Commission, was the culmination of a two year study reviewing defence of EAWs in practice in ten EU member states. It raised concerns about the absence of effective procedural safeguards for requested persons and made five key recommendations:

1. Provision of training for defence lawyers;
2. Availability of dual representation in both Executing and Issuing States;
3. A peer reviewed database through which Issuing State lawyers may be accessed;
4. Updates to the Schengen Information System, to remove inappropriate alerts;
5. Provision of legal interpretation and translation for EAW proceedings.

The report concludes that, without these changes, safeguards intended to provide an effective defence will continue to fail – leaving the rights of individuals subject to an EAW inadequately protected.

## Foreword

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Through the findings of the joint ECBA, JUSTICE, and ICJ report *European arrest warrants: ensuring an effective defence* (2012) and the on-going experience of ECBA members, it is clear that many requested persons in European arrest warrant (EAW) proceedings seek the assistance of a publicly funded lawyer. This lawyer will often be assigned to the case from a general duty appointment list for criminal proceedings. They may only have to represent one or two EAW clients a year through publicly funded work, or even fewer. Although this enables persons without the means to pay for legal advice to access free legal representation, there is a risk that the lawyer will be unable to provide a quality defence through lack of training and expertise in extradition law. In addition to that in some Member States there is no extradition specialisation, therefore privately hired lawyers will also lack experience in EAW cases.

The *ECBA Handbook on the EAW* is therefore designed to provide preliminary information about what an EAW is, how the European Union intends it to operate through its establishing Framework Decision of 2002, and since 2010 through further Directives on certain procedural safeguards, what rights the concerned requested individuals have and what the role of the defence lawyer is in these proceedings to enable persons to be effectively defended. In particular, it explains which options of defence are available for a requested person under the Framework Decision and in terms of fundamental and human rights and certain procedural safeguards established in the new EU Directives that are already or have to be implemented into national law. Throughout the handbook we highlight significant cases of the Court of Justice of the European Union, and where appropriate, the European Court of Human Rights, to help explain the meaning of the Framework Decision. Where we think it is helpful we provide links to further information that will deepen your understanding of the principles that apply in these cases.

The *ECBA Handbook on the EAW* is an on-going project and will be supplemented with national chapters providing information on the implementing laws and practices in each EU Member State. Defence practitioners should be aware that national law and national jurisprudence might open additional options to argue in an EAW case. We hope to provide the readers of this handbook with these national chapters soon.

The *ECBA Handbook on the EAW* is designed for defence lawyers as a preliminary and quick guide when they are in a situation to give legal advice in a European Arrest Warrant case at short notice. However, it cannot replace individual careful research and analysis of facts, applicable law and (national) jurisprudence and practices.

We hope that this guide proves useful!

If you have any comments or queries about the handbook, please contact [secretariat@ecba.org](mailto:secretariat@ecba.org).

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## Abbreviations

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**CCF:**

Commission for the Control of INTERPOL's Files

**CFR:**

Charter of Fundamental Rights of the European Union

**CJEU:**

Court of Justice of the European Union

**EAW:**

European Arrest Warrant

**EAW FD:**

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

**ESL:**

Lawyer in the Executing State

**ISL:**

Lawyer in the Issuing State

**ECHR:**

European Convention on Human Rights

**ECtHR:**

European Court of Human Rights

**TEU:**

Treaty on European Union

**TFEU:**

Treaty on the Functioning of the European Union

## A. Who is this handbook for?

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This handbook is designed to assist defence lawyers who have been instructed or assigned to act for a requested person in European Arrest Warrant (EAW) proceedings both in the Issuing and Executing Member States.

The handbook aims to provide practical answers for defence lawyers with little time and pending EAW proceedings.

It is primarily intended as a resource for lawyers who have had little experience of these proceedings and are unfamiliar with how to defend an EAW case.

As this is a preliminary guide, we provide brief and easy-to-follow explanations and summaries of the relevant EU law. Defence practitioners should be aware that national law and national jurisprudence may provide additional options in defending an EAW case.



## B. The European Arrest Warrant

### 1. What is a European Arrest Warrant?

The EAW is an instrument that confers extraterritorial effects within the EU to a national arrest warrant issued pursuant to national laws.

[Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States \(13<sup>th</sup> June 2002\)](#) defines an EAW as “a judicial decision issued by a Member State 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.”

The EAW system was implemented in order to facilitate, and in particular speed up, the procedure of surrender of those sought for trial or sentence from one country to another and with a view to furthering the objective of the EU becoming an area of freedom, security and justice.

Member States are required to execute EAWs on the basis of the principle of mutual recognition, and in accordance with the Framework Decision. There are a limited number of refusal grounds listed in it. Nevertheless, the Framework Decision states explicitly that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union (“TEU”), to which see further under [section E.3](#).

### 2 When is it used?

All 28 Member States may issue EAWs in order to secure the presence of a person for the purpose of conducting a criminal prosecution or executing a custodial sentence (or a detention order).

For a person wanted for a criminal prosecution, the offence in question must be punishable in the Issuing State with at least 12 months’ imprisonment. Where a person is wanted to serve a sentence, the sentence to be executed must be for at least four months’ imprisonment.

An EAW presupposes the existence of a valid national arrest warrant, which must be issued in compliance with applicable national laws. In the absence of a national arrest warrant issued separately from the EAW, the EAW is invalid and must be refused: [Case C-241/15 Bob-Dogi \(1<sup>st</sup> June 2016\)](#) at [59-67].

An underlying arrest warrant must not only exist: it must be issued by a “judicial authority” within the meaning of Articles 6(1) and 8(1) [EAW FD](#). Recent case-law of the CJEU considered specific examples from some countries and confirms that the term has an autonomous EU law meaning. Thus, the term does include a public prosecutor (Hungary), legally independent of the executive, when it takes a decision confirming (and adopting as its own) an arrest warrant issued by police (see [Case C-453/16 PPU Özçelik \(10th November 2016\)](#)). On the other hand, it does not include the police service (Sweden) or a Ministry of Justice (Lithuania) – even where it merely gives effect to a final court decision imposing a sentence – since these institutions do not offer the guarantees which underpin the mutual trust

that forms the basis of “judicial” cooperation in criminal matters (see, respectively, [Case C-452/16 PPU Poltorak \(10th November 2016\)](#) and [Case C-477/16 PPU Kovalkovas \(10th November 2016\)](#)). It is important to study the information in Box (B) of the EAW to ascertain whether the authority that issued the EAW is a “judicial authority” in light of the objective criteria identified in this case-law. You should consult with a lawyer in the Issuing State to obtain the necessary information (see [section D.2](#) and [section H](#)).

An EAW may only be used in order to secure the presence of a person for the purposes of her/his own criminal prosecution. Hence it may not be used to obtain the presence of third persons (e.g. witnesses) even if they fail to appear in court.

### C. How is a defence lawyer involved in an EAW case?

Defence lawyers can become involved in the representation of requested persons in either the Issuing State or the Executing State. [Article 10 of Directive 2013/48/EU](#)<sup>1</sup> provides for the right of access to a lawyer in an EAW case in both the Executing and Issuing Member States. On some occasions, where a third state is involved (for example, where there are competing EAWs or where the requested person has been tried on the same charges in a third state), it will be necessary for the requested person to have representation in multiple jurisdictions.

The role of the lawyer is to act in the best interests of his/her client. This will involve ensuring that the rights of the requested person are observed by, in appropriate cases:

- Persuading the Executing State not to surrender a requested person;
- Persuading the Issuing State to withdraw an EAW;
- Advising the client to consent to surrender, if that is in his/her best interests, taking into account both Executing and Issuing State's laws;
- In cases where a person is surrendered, ensuring that the surrender procedure is carried out in accordance with the relevant law (for example, by ensuring that any time spent remanded in custody in the Executing State is taken into account in the Issuing State (see Art 26 of the Framework Decision) and that relevant time limits are observed).

In order to effectively participate in proceedings, you must therefore be familiar with the grounds for non-execution of an EAW that may apply according to the applicable laws of the relevant Member State (mandatory or optional), as well as with domestic laws concerning national arrest warrants in the Issuing State. This will usually involve contacting a lawyer in the Issuing State (see [section H](#) below on the role of the Issuing State Lawyer.

[Article 5 Directive 2016/1919/EU](#) ensures the right of a requested person to legal aid in the Executing State upon arrest pursuant to an EAW until they are surrendered, or until the decision not to surrender them becomes final. It also states that requested persons who are the subject of an EAW for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the Issuing State in accordance with [Article 10\(4\) and \(5\) of Directive 2013/48/EU](#) have the right to legal aid in the Issuing State for the purpose of such proceedings, in so far as legal aid is necessary to ensure effective access to justice. These rights may be subject to a financial means test. This directive must be implemented by 25 May 2019.

<sup>1</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

## D. What should I do if I am retained or appointed in an EAW case in the Executing State?

Requested persons are unlikely to be conversant with EAW procedure. They are likely to be in a state of shock when you first meet them and many may be fearful of being returned to the Issuing State.

When acting for those subject to EAWs, it is necessary to consult with your client as soon as possible to take their instructions and advise on whether they should consent to or contest the warrant. It will be necessary to briefly explain the nature of the fast-track EAW scheme. It might be necessary to have an interpreter present. Your role is not to test and challenge the evidence against the person as if they were on trial; guilt and innocence are for the courts in the Issuing State to determine. Your role is to ensure the proceedings are conducted fairly, and in accordance with the Framework Decision. This will entail considering the content of the EAW (see below) to ensure it is valid as well as considering any refusal grounds (see [section E](#) and [section F](#)), and that the person is correctly identified. It is important to go through the allegations with the requested person, outline the potential grounds of refusal or postponement available to them and to advise the person whether they ought to consent to their surrender (see [section D.3.i](#) on consent).

It is important for requested persons to be given a realistic assessment of their prospects of success in EAW cases: they should be informed of the difficulties inherent in contesting surrender, and that most requested persons are eventually surrendered.

In the first instance, your role also involves seeking bail and appropriate bail conditions (see [section G.1](#)).

### D.1 *Checking the Warrant Certificate/Schengen Entry*

As soon as you have been instructed, obtain a copy of the EAW or entry in the Schengen Information System ("Schengen Entry" – see [section I](#)) so that its content can be considered carefully to ensure that it contains all the information required to be a valid document. You should also obtain information about the circumstances surrounding the arrest of the requested person and whether they have any convictions or pending charges in your jurisdiction.

If the EAW or Schengen Entry is not in your national language, you should ask the court to provide a translation. The EAW must be translated into the official language or one of the official languages of the Executing State (Article 8(2) [EAW FD](#)). The same applies if the EAW is not in the language of the requested person (see [Article 3\(6\) Directive 2010/64/EU](#)<sup>2</sup>). The deadline for contesting an EAW should not start running until you have received the translation. It is imperative that you carefully consider the EAW or Schengen Entry.

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<sup>2</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

Once you have a copy of the EAW or Schengen Entry in the necessary language(s), you should ensure that all the information required by Article 8 EAW FD is present. The following information should be clearly present on the EAW or Schengen Entry:

- (a) the identity and nationality of the requested person;
- (b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
- (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2 EAW FD;
- (d) the nature and legal classification of the offence, particularly in respect of Article 2 EAW FD;
- (e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
- (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
- (g) if possible, other consequences of the offence.

If any of the above information is not present, and depending on the national laws of your country, the EAW may be invalid and you should make an application to the relevant national court for your client to be discharged, or, if this is refused, to request supplementary information from the Issuing State. The CJEU has confirmed that deficiencies in the information in the EAW may require the refusal of the EAW as, although Article 8 EAW FD is not a refusal ground *per se*, the refusal grounds are premised upon the basis of a valid EAW. In particular, Article 8(1)(c) refers to a national arrest warrant, distinct from the EAW. Therefore, where an EAW does not bear reference to the underlying national arrest warrant, the Executing authority must seek further information from the Issuing judicial authority. If, in light of such information, the Executing authority concludes that the EAW was issued in the absence of a national arrest warrant, it must refuse to give effect to the EAW ([Case C-241/15 Bob-Dogi \(1st June 2016\) at \[59-67\]](#)).



## ***D.2 Contacting a lawyer in the Issuing State***

You should contact a lawyer in the Issuing State (“ISL”) in almost every case. Very often your client will already have instructed a lawyer in the Issuing State, or one will have been appointed by the State. If this has not occurred, consider making contact with a lawyer registered with the ECBA in the Issuing State who is a criminal lawyer familiar with conducting EAW cases.<sup>3</sup>

An ISL can assist by:

- Gaining access to, and consulting, the case files in the Issuing State;
- Advising on the applicable law and procedure in the Issuing State;
- Importantly, checking whether the underlying national warrant is valid (for example in relation to statute limitation);
- Advising on whether the EAW can be withdrawn or substituted with less coercive measures;
- Where an EAW is issued following the activation of a suspended sentence for failure to pay a fine or compensation, assisting the requested person to pay the money owing and apply for the sentence to be re-suspended.
- Obtaining expert evidence to support your client’s application to challenge the execution of the EAW.

In EAW proceedings for the purpose of executing a sentence, the national laws of the Executing State and of the Issuing State will determine whether and how the ISL might be funded by public legal aid systems. In EAW proceedings for criminal prosecution [Article 5 Directive 2016/1919/EU](#) states that the law of the Issuing State must grant financial legal aid to requested persons who exercise their right to appoint a lawyer in the Issuing State in accordance with [Article 10\(4\) and \(5\) of Directive 2013/48/EU](#), for the purpose of such proceedings, in so far as legal aid is necessary to ensure effective access to justice. Financial legal aid in the Issuing State may be subject to a means test. See [section H](#) for more details on the role of the ISL.

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<sup>3</sup> Check the “[Find a Lawyer](#)” section on the ECBA website.

### D.3 Consulting with the client

If your client does not speak your language, it is imperative that you ask the relevant national court to provide an interpreter ([Article 11\(2\) EAW FD](#)) and [Article 2\(7\) Directive 2010/64/EU](#). Ensure that your client has been provided with a copy of the EAW/Schengen Entry and that they understand the content. Ensure that your client has been given an [EAW Letter of Rights pursuant to Annex II Directive 2012/13/EU](#).



#### **Indicative model Letter of Rights for persons arrested on the basis of a European Arrest Warrant**

*The sole purpose of this model is to assist national authorities in drawing up their Letter of Rights at national level. Member States are not bound to use this model. When preparing their Letter of Rights, Member States may amend this model in order to align it with their national rules and add further useful information.*

You have been arrested on the basis of a European Arrest Warrant. You have the following rights:

##### **A. INFORMATION ABOUT THE EUROPEAN ARREST WARRANT**

You have the right to be informed about the content of the European Arrest Warrant on the basis of which you have been arrested.

##### **B. ASSISTANCE OF A LAWYER**

You have the right to speak confidentially to a lawyer. A lawyer is independent from the police. Ask the police if you need help to get in contact with a lawyer, the police shall help you. In certain cases the assistance may be free of charge. Ask the police for more information.

##### **C. INTERPRETATION AND TRANSLATION**

If you do not speak or understand the language spoken by the police or other competent authorities, you have the right to be assisted by an interpreter, free of charge. The interpreter may help you to talk to your lawyer and must keep the content of that communication confidential. You have the right to a translation of the European Arrest Warrant in a language you understand. You may in some circumstances be provided with an oral translation or summary.

##### **D. POSSIBILITY TO CONSENT**

You may consent or not consent to being surrendered to the State seeking you. Your consent would speed up the proceedings. [Possible addition of certain Member States: It may be difficult or even impossible to change this decision at a later stage.] Ask the authorities or your lawyer for more information.

##### **E. HEARING**

If you do not consent to your surrender, you have the right to be heard by a judicial authority.

Instructions should be taken from your client to ascertain whether the EAW can be challenged.

The following information should be obtained from your client as a minimum in order to assist with that decision:

- Is your client the person sought by the EAW?
- Has your client been tried in another country for the facts disclosed in the EAW or have they/are they being prosecuted for the same conduct in your country?
- Was your client old enough at the time of the offence to be held criminally liable in your country for the conduct alleged in the EAW?
- Has there been an amnesty for the conduct alleged in your country?
- Does your client have any prosecutions pending in your country or are they currently serving a sentence of imprisonment in your country?
- If the EAW is a conviction warrant, were they or a lawyer they appointed present at the trial or notified of the trial date?
- If the client is a national of your country, do they wish to apply to serve the sentence (if a conviction EAW) in your country?
- Does your client have any concerns about returning to the Issuing State? For example, with regards to ensuring the fairness of their trial, prison condition, discrimination or other treatment, or separation from their family in the Executing State (see [section E.3](#)).

You should also ask your client what their living and working arrangements are in your country, to assist with an application for bail.

### ***i. Consent***

The decision to consent requires careful consideration and the client needs to be advised fully, since a decision to consent implies waiving the right to oppose the execution of the EAW. It may also revoke the specialty rule (see below) and is often irrevocable. Consent is dealt with in Article 10 [EAW FD](#).

Consenting to surrender will ordinarily result in your client being surrendered more quickly. Consent might therefore be adequate where there is no applicable refusal ground (see [section E](#)) and no possibility of having the EAW revoked or withdrawn in the Issuing State. However, given the risks, you should not usually advise your client to consent to surrender or waive their specialty protection without consulting with an ISL (see [section H](#) on the role of the ISL).

In order to consent to surrender, the decision must be formally recorded (in accordance with the laws of your country) and the individual must be legally represented.

### ***ii. Voluntary return***

Another option where there are no applicable refusal grounds and no possibility of the EAW being revoked or withdrawn is for the requested person to voluntarily return to the Issuing State. This can only occur if they are granted bail in the Executing State. A voluntary return might enable the requesting person to travel by his or her own means rather than under arrest and could therefore be less draconian.

Nevertheless it should be pointed out that, since there might be an INTERPOL or a SIS II alert (see [section I](#)), the person risks being detained in any EU Member State she might have to travel through. Should this happen, the EAW proceedings in the Executing State will be closed, and new EAW proceedings will be started in the state where the person has been arrested for the second time. A voluntary return will usually show willingness to engage in the criminal proceedings in the Issuing State. This may assist the requested person in the substantive proceedings in the Issuing State. For example, a court in the Issuing State may be more willing to grant alternatives to pre-trial detention to your client.

### **iii. Specialty Principle**

The specialty rule is a guarantee that other outstanding allegations of criminal acts committed in the Issuing State prior to surrender may not be pursued against the requested person whilst they are in the Issuing State for the purposes of being prosecuted, sentenced or serving a sentence for the offence(s) contained within the EAW.

Specialty is therefore an important protection built into the EAW scheme and prevents a person being prosecuted in the Issuing State for conduct not set out in the EAW. You should advise your client of their 'specialty' rights as they will be asked in court whether or not they 'waive their specialty rights', and in some member states, consenting to surrender may also include the waiver of specialty protection.

Specialty protection is afforded in accordance with Article 27 [EAW FD](#). Article 27 sets out the circumstances when specialty protection is *not* afforded to requested persons once returned to the Issuing State.

Specialty does *not* apply when:

- (a) the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has 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) the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;
- (e) the person consented to be surrendered, where appropriate at the same time as he or she renounced the specialty rule, in accordance with Article 13;
- (f) the person, after his/her surrender, has expressly renounced entitlement to the specialty rule with regard to specific offences preceding his/her surrender;
- (g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

The categories are therefore very broad, particularly Article 27(3) (d), which may mean that protection will not be available to your client following surrender. In some jurisdictions, such as the UK, consenting to surrender does not result in the waiver of specialty. It is therefore important, for a client that wishes to consent to surrender, to be fully advised about whether such consent will result in specialty being waived. It may be that your client is not concerned because they have not been involved in other criminal offences. However, they may be unaware of past investigations carried out into their conduct, which may only come to light once they have been surrendered to the Issuing State.

If in doubt, specialty should not be waived. In any event, your client can always waive it at a later stage, even after surrendered (Article 28(3)(f) [EAW FD](#)).

Once returned to the Issuing State, the authorities may nevertheless desire that specialty be waived. If the requested person does not waive specialty at this point, the Executing State can nevertheless consent to prosecution for further offences. If there is a request by the Issuing State to the Executing State for it to waive specialty, proceedings will follow the same rules as for the execution of an EAW, i.e. the same refusal grounds will apply (Article 27(4) [EAW FD](#)). The ISL should ensure that specialty is not violated in the Issuing State after surrender (see beneath [Section H](#)). If your client has decided to consent (or has been surrendered), and the Issuing State's judicial authority requests permission to prosecute for another offence, you may have a role in opposing or challenging the grant of such permission before the Executing State judicial authority.



## E. Refusal grounds

Verifying whether there are grounds of refusal is one of the most important tasks for the defence lawyer during EAW proceedings. The likelihood of a refusal ground applying is not only relevant for a final decision on surrender, but may also influence the decision of the court in the Executing State to grant alternatives to detention during the proceedings (see [section G.1](#)).

In this section we will outline the relevant refusal grounds, mandatory and optional under the Framework Decision, and the overarching refusal grounds that might apply by way of fundamental rights.

### E.1 Mandatory Refusal Grounds

Article 3 [EAW FD](#) provides mandatory grounds upon which the Executing State court must refuse to execute an EAW. These mandatory grounds are as follows:

1. Amnesty in the executing Member State;
2. *Ne bis in idem* pursuant to [Article 54 Convention Implementing the Schengen Agreement \(CISA\)](#)
3. Beneath age of criminal liability at the time of the offence

Article 3(1) will be applicable only if the Executing State has jurisdiction to prosecute the offence under national criminal law. In that event, should the offence be covered by amnesty according to national law, you should invoke this refusal ground.

Article 3(3) applies irrespective of whether the Executing State has jurisdiction over the circumstances underlying the EAW. It will apply, for example, if a person is arrested in Portugal, where the age of criminal responsibility is 18, pursuant to an English EAW for criminal prosecution for an offence committed when he was 14 years old.

These issues may also arise in consideration of the laws of the Issuing State, since the EAW, as noted above, presupposes the existence of a valid national arrest warrant. But the mandatory grounds only refer to Executing State laws. An argument based on Issuing State amnesty or liability must be raised with the Issuing State authority by the ISL in the substantive criminal proceedings (see [section H](#)).

Article 3(2) provides for an EU-wide mandatory refusal ground regulated solely by EU law. It protects the fundamental legal principle that a person cannot be tried twice for the same offence: if the requested person has been subject to a final decision in criminal proceedings for the same acts in another EU Member State, surrender must be refused, pursuant to Article 54 CISA and Article 50 Charter of Fundamental Rights of the European Union ("CFR").<sup>4</sup> The rule is subject to the proviso that, where there has been a 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.

There is extensive CJEU case law on the topic, which should be taken into account when dealing with EAW cases.

<sup>4</sup> The CJEU has clarified that "an interpretation of that concept given in the context of the CISA is equally valid for the purposes of the Framework Decision"- [Case C-261/09 Gaetano Mantello, Grand Chamber \(16<sup>th</sup> November 2010\)](#)

**i. *Ne bis in idem* (Article 3(2) [EAW FD](#) and 54 CISA) – definition**

In order to invoke this refusal ground you must verify with your client, the ISL and other authorities or defence lawyers in the relevant Member State(s) that:

- The case relates to your client;
- The case relates to the same offence;
- A final decision has been made in an EU Member State;
- Where your client has been convicted, the “execution condition” has been fulfilled.

***The “same person”***

The “same person” will obviously be the same individual person, but could also relate to a legal person, which may have subsidiaries and other entities.

***The “same offence”***

Through its jurisprudence, the CJEU has established an autonomous EU Law definition of “the same acts” based on the factual approach (*idem factum*), as opposed to the legal approach (*idem crimen*). This means that the concept “has been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected: [Case C-261/09 Gaetano Mantello](#), Grand Chamber (16<sup>th</sup> November 2010), citing [Van Esbroeck and Van Straaten](#). Whether there is an inextricable link between factual circumstances has been assessed through their connection in time, space and subject matter:

- [Case C-436/04 Van Esbroeck](#) (9<sup>th</sup> March 2006); at [38];
- [Case C-467/04 Gasparini and Others](#) (28th September 2006) at [56] ;
- [Case C-150/05 Van Straaten](#) First Chamber (28th September 2006), at [52];
- [Case C-288/05 Kretzinger](#) (18th July 2007), at [34];
- [Case C-367/05 Kraaijenbrink](#) (18th July 2007), at [27]<sup>5</sup>.

Examples of identical acts are:

- the import and export of drugs from one MS to another MS, even if the persons involved and the amount of drugs are not identical (*Van Esbroeck; Van Straaten*);
- receiving contraband foreign tobacco in a MS and importing that tobacco into another MS and being in possession of it there, with intention from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several MS in the process (*Kretzinger*) ; and,
- the marketing of goods in another MS, after their importation into a MS where the accused was acquitted of the offence of smuggling (*Gasparini and others*).

<sup>5</sup> The meaning of “subject-matter” is not very clear. The wording in the original language of Van Esbroeck states “verbonden zijn naar tijd en plaats en wat het voorwerp ervan betreft”.

### ***A final decision in an EU Member State***

Firstly, it is necessary that two or more criminal proceedings are at stake (in the Issuing State and another Member State). The concept “criminal proceedings” is a material one and may go beyond what is labelled as “criminal” in the national laws of Member States.

The CJEU has explicitly adopted the ECtHR case-law (*Engel criteria*) - *Engel and Others v. the Netherlands*, App. No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, (judgment 8th June 1976), at [80-2], followed in *Sergey Zolotukhin v. Russia*, App. No. 14939/03, (10th February 2009), at [52-3] – *Case C-617/10 Åklagaren v Hans Åkerberg Fransson*, Grand Chamber (26th February 2013), at [35]:

*“The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur.”*

Secondly, a final decision need not necessarily be a court decision but must constitute the exercise of the *ius puniendi* of a Member State, which presupposes: (i) that the state had jurisdiction to adjudicate in the first place; (ii) the absence of voluntary relinquishment of jurisdiction over the acts; (iii) the application of the national criminal justice system, either by a standard trial and judgment, or by alternative means. The decision must follow a determination of the “merits” of the case. The judgment may be based on the merits of the case *stricto sensu* or on a lack of evidence (*Van Straaten*), or statute limitation (*Gasparini and Others*) and may have been imposed *in absentia*: *Case C-297/07 Bourquain* (11<sup>th</sup> December 2008)<sup>6</sup>.

A decision which does not, under the national law of the deciding Member State, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Member State: *Case C-398/12 M.* (5th June 2014) and *Case C-486/14 Kossowski* (29<sup>th</sup> June 2016).

Examples of final decisions are:

- The formal discontinuance of criminal proceedings by a public prosecutor, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, paid a sum of money determined by the public prosecutor, following which further prosecution is barred (*Joined cases C-187/01 and C-385/01 Gözütok and Brügge*, (11<sup>th</sup> February 2003) .
- An order that there are no grounds upon which to refer a case to a trial court, which precludes the bringing of new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person comes to light (*Case C-398/12 M.* (5th June 2014).
- If the decision generally precludes further proceedings in the deciding Member State, but could be subject to extraordinary remedies, or even the exceptional reopening of a case due to new evidence, this will not affect the “final” nature of such a decision for the purposes of Article 54 CISA and 3(2) EAW FD (a reopening against the same person for the same acts can be brought only in the Member State in which the final decision was handed down in the first place) (*M* at [39-40] citing relevant ECtHR case law).

Examples that are *not* final decisions are:

- A decision by a police authority, after examining the merits of the case at a stage before charging the person suspected with a criminal offence, to suspend the criminal proceedings, where the suspension decision does not, under national law, definitively bring the prosecution to an end and therefore does not preclude new criminal proceedings in respect of the same acts ([Case C-491/07 Turanský, Sixth Chamber \(22<sup>nd</sup> December 2008\)](#)).
- A decision of a public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, where it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out (the prosecutor did not proceed solely because the accused had refused to give a statement and the victim and a hearsay witness were living in another Member State, such that it was not possible to interview them in the course of the investigation and it had therefore not been possible to verify statements made by the victim) ([Case C-486/14 Kossowski \(29<sup>th</sup> June 2016\)](#)).
- A decision by a judicial authority declaring a case to be closed, after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case ([Case C-469/03 Miraglia \(10<sup>th</sup> March 2005\)](#)).

### **Execution condition**

There are three conditions of enforcement relevant to the execution condition: (1) the sentence has been served; (2) is currently being served; or (3) may no longer be executed under the law of the sentencing Member State.

If the sentence has been fully served, it is considered to have been enforced. For example, the payment of a fine by a person also sentenced to a custodial sentence that has not been served in the deciding Member State is not sufficient to consider that the penalty has been enforced (nor that it is 'actually in the process of being enforced') because the sentence is not fully served: [Case 129/14 PPU Zoran Spasic \(27<sup>th</sup> May 2014\)](#).

When does a sentence start to be enforced for the purposes of 'being served'? The CJEU has confirmed that the sentence commences as soon as it becomes enforceable, and that this includes any probation period. Once the probation period has come to an end, the sentence is to be regarded as having been enforced (*Kretzinger*).

If the penalty is actually being enforced in the deciding Member State, no prosecution can be brought in another Member State. This means that it might be disproportionate under EU law for a Member State to start or continue a second set of proceedings for the same acts where the Member State of the first decision has not yet started to enforce it, but is in the process of doing so. Should this circumstance occur, you should consider whether an attempt to activate the execution of the first decision is favourable to your client being prosecuted for the second time in the Issuing State.

The final condition, that the sentence can no longer be enforced in the deciding Member State, includes pardon or amnesty, as well as statute limitation (*Bourquain*).

The execution condition set out in Article 54 CISA has been held to be compatible with Article 50 CFR (*Zoran Spasic* at [65-74]).

**ii. *Ne bis in idem* (Article 3(2) [EAW FD](#) and 54 CISA)  
– *how to invoke it***

You should ask your client whether they have already been subject to criminal proceedings in another Member State for the same offence.

If you have reason to believe that this is the case, you should verify whether the conditions set out in Article 54 CISA and Article 3(2) [EAW FD](#) are satisfied. You should ask an ISL or a lawyer in the relevant Member State to provide you with copies of the relevant case materials, as well as with an expert opinion of the “final” character of the decision, if necessary.

In certain cases you need only provide a copy of the indictment and final decision of that Member State to the Executing State court in order to prove this refusal ground. In other cases the final decision might not specify the facts of the case or the motives for closing it and it might be necessary to add further case materials to your submissions.

Should you have difficulties in obtaining these materials, you should request that the Executing Authority obtain such materials from the deciding Member State (Article 15(2) [EAW FD](#) and Article 57 CISA), directly or through a further request to Eurojust (see [section J](#) on Eurojust).

**iii. *Ne bis in idem* (Article 3(2) [EAW FD](#) and 54 CISA)  
– *what to do after a decision not to surrender***

If surrender is refused pursuant to Article 3(2) [EAW FD](#) you should request that the ISL lodge a request for the EAW to be withdrawn in the Issuing State and for criminal proceedings in that State to be closed, according to Articles 54 CISA and 50 CFR. This will create a bar to prosecution in Issuing State national criminal proceedings, irrespective of whether that national law has explicit provision on the matter.

This request should include the evidence used in the EAW proceedings of a final decision in the deciding Member State.

**If any of these grounds are present in your case, you should consider with your client refusing execution of the warrant and making an application for the warrant to be discharged on the basis of the relevant ground.**



## E.2 Optional Refusal Grounds

Article 4 of the Framework Decision provides optional grounds for refusing to execute an EAW. Upon implementation, Member States could choose to either incorporate some or all of the optional grounds into national law as mandatory grounds of refusal or leave the decision to refuse surrender to the discretion of the Executing State court. Both routes have been applied across the Member States.

The optional grounds are as follows:

1. Dual criminality
2. Precedence of domestic prosecution
3. Domestic decision not to prosecute
4. Limitation due to the passage of time
5. *Ne bis in idem* in non-EU ("third") states
6. Nationality/residence
7. Territoriality

### i. Article 4(1) - Dual Criminality

Generally, if the conduct on which the EAW is based does not constitute an offence in the Executing State, then that Member State should refuse to execute the EAW.

Dual criminality is assessed by verifying whether the factual elements underlying the offence, as described in the EAW, would also be subject to a criminal sanction in the Executing State if they had taken place there. In this analysis it is irrelevant whether the laws infringed concern a legal interest of the Issuing State, but rather whether, if the conduct had been committed in the territory of the Executing State, 'it would be found that a similar interest, protected under the national law of that State, had been infringed' [C-289/15, Jozsef Grundza \(11th January 2017\)](#), §§47, 49). This case law refers to FD 2008/909/JHA but will be highly likely be applied in EAW proceedings.

There is an exception, however for 32 *categories of offence*, for which there is no requirement that the act is a criminal offence in both countries. The only requirement for these categories is that the offence must be *punishable by at least 3 years of imprisonment in the issuing country*. The CJEU has held that "in so far as it dispenses with verification of the requirement of double criminality in respect of the offences listed in that provision, Article 2(2) of the Framework Decision is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties" and "is not invalid inasmuch as it does not breach Article 6(2) TEU or, more specifically, the principle of legality of criminal offences and penalties and the principle of equality and non-discrimination" ([Case C-303/05 \*Advocaten voor de Wereld VZW v Leden van de Ministerraad\*](#), at [49-50], [52-54] and [57-60]).

The list of categories of offences is as follows:

- Arson;
- Computer-related crime;
- Corruption;
- Counterfeiting currency;
- Counterfeiting and piracy of products;
- Crimes within the jurisdiction of the International Criminal Court;
- Environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;
- Facilitation of unauthorised entry and residence;
- Forgery of means of payment;
- Forgery of administrative documents and trafficking therein;
- Fraud, including fraud affecting the financial interests of the European Union;
- Illicit trade in human organs and tissue;
- Illicit trafficking in cultural goods, including antiques and works of art;
- Illicit trafficking in hormonal substances and other growth promoters;
- Illicit trafficking in narcotic drugs and psychotropic substances;
- Illicit trafficking in nuclear or radioactive materials;
- Illicit trafficking in weapons, munitions and explosives;
- Kidnapping, illegal restraint and hostage-taking;
- Laundering of the proceeds of crime;
- Murder, grievous bodily injury;
- Organised or armed robbery;
- Participation in a criminal organisation;
- Racism and xenophobia;
- Rape;
- Racketeering and extortion;
- Sabotage;
- Sexual exploitation of children and child pornography;
- Swindling;
- Terrorism;
- Trafficking in human beings;
- Trafficking in stolen vehicles; or
- Unlawful seizure of aircraft and ships.

The Issuing State will have indicated in the EAW if it considers that the offence falls within one of these categories, and its assessment will bind the Executing State court. However you may assess whether the conduct described in the EAW is capable of falling within the category in question; if there is a manifest inconsistency, depending on the national practice you may be able to argue that the EAW is invalid (see [section D.1](#)) or that the dual criminality check should be performed.

### **ii. Article 4(2) – Precedence of domestic prosecution**

If the requested person is already being prosecuted in the Executing State for the same act, then it may be possible to invoke this optional ground for refusal.

You may have to persuade your Executing Authority that your jurisdiction is best placed to prosecute and that this refusal ground should apply (see [section J](#) on conflicts of jurisdiction).

You should also consider whether national law prevents your State from waiving jurisdiction, which would make this a mandatory refusal ground.

### **iii. Article 4(3) – Domestic decision not to prosecute**

Article 4(3) [EAW FD](#) states that surrender may be refused “where the judicial authorities of the Executing State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings.”

This provision will apply in cases where, despite there being (or having been) proceedings for the same acts in the Executing State: i) there is no final decision; or ii) there is a final decision but it does not fall within Articles 54 CISA and 3(2) [EAW FD](#) (see [section E.1](#) for a definition of what falls under these provisions).

Examples that could fall under this provision are:

- The prosecution authorities exercised their discretion under national law not to prosecute;
- A case was closed because the person cooperated with the police and was exempted from prosecution;
- There is a final conviction in the Executing State, but it has not been enforced yet and may still be enforced.

If your national law protects people in these situations from further criminal prosecution for the same acts, you should argue that this refusal ground must be applied.

### **iv. Article 4(4) – Statute of limitation**

Where the Executing State has jurisdiction to adjudicate the facts underlying the EAW and the prosecution of the offence would be statute-barred in the Executing State, this ground provides another avenue to refuse to execute the EAW.

**v. Article 4(5) – *Ne bis in idem* in non-EU (“third”) states**

If your national law in general protects people from further criminal prosecution for the same acts where there has been a decision in a third state, you should argue that this refusal ground must be applied. The same conditions and process as set out in E.1 will apply.

You should also check whether your Member State has any treaty arrangements with the relevant third state whereby it recognises the *ne bis in idem* effect of such decisions. If so, you should argue that this refusal ground must be applied.

**vi. Article 4(6) – National or resident of the Executing Member State**

This provides a ground for an Executing State to refuse execution of an EAW which has been issued for the purpose of enforcing a custodial sentence, where the requested person is a national or resident of the Executing State. The CJEU has confirmed that it is permissible for Member States to restrict the availability of this provision either to nationals or those lawfully resident in the Member State for at least five years: [Case C-123/08 Wolzenburg \[2009\] ECR I-9621](#). A person is ‘resident’ for the purposes of this ground of refusal if he has established his actual residence there, is living there and, following a stable period of residence, he has acquired connections (such as family or employment) to the Executing State similar to those resulting from nationality: [Case C-66/08 Kosłowski, Grand Chamber \(17<sup>th</sup> July 2008\)](#).

Note, however, that the Framework Decision requires the Executing State to assume responsibility for execution of the sentence or detention order in accordance with its domestic law in place of the Issuing State. Therefore you will need to consider which jurisdiction has the most favourable sentencing regime before seeking that this be applied. The execution of foreign judgments is regulated by [Framework Decision 2008/909/JHA 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 \(27<sup>th</sup> November 2008\)](#) (Article 25).

**vii. Article 4(7) – Territoriality**

Article 4(7)(a) provides a ground of refusal where the offence for which the person is sought is committed either in whole or in part in the territory of the Executing State.

Article 4(7)(b) deals with extra-territorial offences, and allows an Executing State to refuse execution where the offence is committed outwith the territory of the Issuing State and the Executing State has no law to allow that offence to be prosecuted in the same circumstances.

### **viii. Trials in absentia**

[Framework Decision 2009/299/JHA \(26<sup>th</sup> February 2009\)](#)<sup>7</sup> is the only legislation so far to have amended the EAW FD. The Framework Decision concerns decisions rendered without the requested person having been present and lays down the conditions upon which a further optional refusal ground to a conviction EAW can be based. It recognises that the right to be present at one's trial is an integral part of the right to a fair trial protected by Article 6 ECHR. The amended conditions comply with the Charter of Fundamental Rights, and are the only basis upon which an *in absentia* decision can be refused; no stronger national constitutional principles may be invoked: [Case C-399/11 Melloni \(26<sup>th</sup> February 2013\)](#). The Framework Decision inserts Article 4a into the [EAW FD](#), deleting the previous requirement for a guarantee under Article 5 [EAW FD](#) that a retrial could be sought. Article 4a enhances the procedural safeguards of the requested person.

The EAW may be refused unless the requested person:

- In due time, was informed in person of the scheduled date and time of the trial, or "actually received" official notification in such a manner that it was "unequivocally established" that he or she knew about it, and that a determination could be made in his or her absence; or
- Having been so informed, instructed a lawyer to appear in his or her defence, who did represent them; or
- Having been convicted, was served with the decision and informed about the right to a retrial, and expressly accepted the conviction or did not request a retrial within the timeframe specified; or
- Having been convicted, has not yet been informed of the right to a retrial, but will be served with the decision and notice of the right as soon as they are surrendered.

Article 4a specifies that a retrial, or appeal, must enable the merits of the case, including fresh evidence, to be re-examined, during which the requested person can participate and which may result in an acquittal.

In *in absentia* cases, the Issuing Judicial Authority may assert that a condition of Article 4a(1) is satisfied, such that the requested person may be surrendered despite their absence from trial.

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<sup>7</sup> Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby 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. In the future, Articles 8 and 9 of Directive 2016/343/EU will also become relevant - [Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings](#), which must be implemented by 1<sup>st</sup> April 2018.



The CJEU has held that Article 4a(1) contains an autonomous concept of EU law and that it cannot be ‘unequivocally established’ that a person was aware of the date and place of their trial where the summons was served upon a third person (e.g. their grandfather), in the absence of any conclusive evidence that the person himself received the required notification (see [Case C-108/16 PPU Dworzecki \(24th May 2016\)](#)). The same judgment underlined, however, that where the Article 4(1) exceptions are inapplicable, the residual refusal ground is merely optional, such that an Executing Judicial Authority might nevertheless be able to satisfy itself that the requested person’s defence rights would not be infringed by surrender in such circumstances, e.g. if it was apparent that they had deliberately avoided service and would have a right to apply for a retrial once in the Issuing State, on the basis that they had not received service.

At the time of publication, there are references for preliminary rulings pending before the CJEU as to the question whether Article 4a applies to proceedings other than the substantive ‘trial’, namely: appeal proceedings where the original sentence is altered, suspended and/or activated ([Case C-376/17 Lipinski](#)); and proceedings aggregating separate custodial sentences or varying an aggregate sentence, or appeal proceedings involving an examination of the merits resulting in a new sentence or confirmation of a sentence at first instance ([Case C-271/17 Zdziaszek](#)). You may need to take specific instructions from your client as to his or her knowledge of and presence or representation at any appeal proceedings depending on the rulings in these cases.

If the EAW is for the execution of a sentence, you should ask your client if they were present at their trial or any of the first three conditions are satisfied. If not, the fourth condition effectively replicates the guarantee previously required by Article 5 EAW FD and you should consult with your client about whether to seek refusal of the EAW.

In the first instance, you should ascertain whether the judgment rendered *in absentia* is final, i.e. the deadline for appeal or retrial has expired. If this is not the case, you should also ascertain whether your client was, or would have been, placed in pre-trial detention pending the outcome of the case. If this has not been ordered you should seek to oppose surrender on the ground that the EAW is disproportionate, and mutual legal assistance or a European Investigation Order should have been used by the Issuing State instead.

Article 4a(2) enables the requested person to have sight of the decision resulting in their conviction prior to deciding whether to consent to surrender. You should assist in obtaining a copy of this in order to advise fully on whether the requested person should consent to surrender. You should also ask the ISL for evidence as to whether a full retrial is possible in the Issuing State, and if not, seek refusal on this basis (see [section H](#) on the role of the ISL).

[Directive 2016/343/EU \(9th March 2016\)](#) has since further regulated the right to a retrial in the Member States, specifying that a new trial or other legal remedy must allow effective participation and exercise of defence rights (Article 9). The CJEU has yet to comment on the relationship between this provision and Article 4a of the EAW FD, but it appears that Article 9 confers an enforceable right to a new trial for a person whose extradition is required under Article 4a(1)(d) (i.e. who was not present at trial but will have the right to a new trial). It will be prudent to explore with the ISL whether the 'new trial' procedure available in the Issuing State offers full the full guarantees of Article 9, particularly in light of further interpretation of that provision by the CJEU after the Directive's transposition deadline on 1 April 2018.

**If any of these grounds are present in your case, you should consider with your client refusing execution of the warrant and making an application for the warrant to be discharged on the basis of the relevant ground.**

Since these grounds for refusal may be optional, and at the discretion of the court in your Member State, you will have to convince the court that it is appropriate to refuse surrender in your case (for example, you may bolster your argument by stating that there is a better chance of rehabilitation in the Executing State, or because it is more appropriate to prosecute there – see sections on fundamental rights and [section J](#) on conflicts of jurisdiction).

### ***E.3 Refusal on the grounds of fundamental rights***

#### ***i. General Legal Framework***

Overarching the express grounds of refusal that the Executing State can be requested to consider under the Framework Decision is the fundamental rights protection referenced in [Article 1\(3\) of the Framework Decision](#), the [European Convention on Human Rights](#) ("ECHR") and the [Charter of Fundamental Rights of the EU](#) ("CFR" or "Charter"). These instruments provide additional grounds of refusal where fundamental rights have been or are likely to be violated by surrendering the person to the Issuing State.

Article 1(3) [EAW FD](#) makes clear that the Member States' obligations to respect fundamental rights are not modified by anything contained in the Framework Decision. Recital 12, which can be used to assist interpretation of the operative articles of the Framework Decision, clarifies that it respects and observes fundamental rights set out under article 6 of the Treaty on the European Union and Charter of Fundamental Rights. It states that surrender may be refused where it is shown that the EAW will cause discrimination on grounds of sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. It also asserts that the Framework Decision does not prevent Member States applying constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

Whilst a number of Member States have expressly provided a refusal ground in their domestic implementing acts based upon respect for fundamental rights, others have not done so. However, the absence of an express refusal ground does not prevent fundamental rights being relied upon. You can request the Executing State court to refuse surrender by invoking the Charter or, subsidiarily, the ECHR. If there is a real risk that a specific fundamental right of the requested person will be violated by surrendering him or her to the Issuing State, the court should refuse to do so: [Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru](#) (5th April 2016).

You must bear in mind that invoking a fundamental right as a ground for refusal is a very difficult task in most Member States. Therefore it is of utmost importance to prepare your case and to show strong prima facie evidence to convince the Executing State court to hear your arguments and evidence and to apply this refusal ground.

You should bear in mind the possibility of making a reference to the CJEU for a preliminary ruling where the interpretation of the above EU fundamental rights norms requires clarification (see [section G.3.ii](#)).

### ***Charter of Fundamental Rights of the European Union***

The Charter is binding upon Member States as well as the EU Institutions and holds equal value with the Treaties, as set out in Article 6(1) TEU. It applies whenever a matter falls within the scope of EU law, and when Member States and their courts apply national legislation that gives effect to that law. The [EAW FD](#) is a piece of EU law and therefore the Charter applies to its application in the Member States. It continues to apply when Member States fail to properly implement EU law, or specifically derogate from optional provisions. The Charter should be invoked instead of the ECHR because not only is there potential to provide wider protection of rights under it, but where EU or national legislation is held to be in violation of a Charter right, the national court must disapply the conflicting legislation. It is not necessary that this be referred to the domestic parliament or lawmakers for the consideration of legislative or constitutional amendment, as many Contracting States to the ECHR must: [Case C-617/10 Åklagaren v Hans Åkerberg Fransson, Grand Chamber \(26<sup>th</sup> February 2013\)](#).

#### ***ii. Three “Key Rights”***

In EAW proceedings, there are three Charter rights relevant to the consideration of whether surrender will violate fundamental rights:

- Article 4 CFR on the prohibition of torture and inhuman and degrading treatment or punishment, and
- Article 7 CFR on the right to respect for private and family life.
- Articles 47-50 on the right to a fair trial

The first two replicate the similarly titled ECHR provisions. The third differs from the ECHR by providing more detailed protection. The General Provisions in Title VII of the Charter explain how these rights should be applied (arts 51-54). Although the Charter should be pleaded rather than the ECHR, article 52(3) CFR explains that where rights in the Charter correspond with rights guaranteed by the ECHR, the meaning and scope will be the same as that provided by the ECHR and the jurisprudence of the European Court of Human Rights (ECtHR). However the article also says that the ECHR ‘shall not prevent Union law providing more extensive protection’.

Article 52(1) CFR accepts that limitations may be imposed on the exercise of rights, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

The three key rights are likely to be relevant in relation to arguing how the requested person will be affected upon their return, through imprisonment during trial, and through absence from their family and community ties forged in the Executing State.

### ***Prison conditions***

One of the most important concerns in the surrender of a requested person to the Issuing State will be whether they are going to be detained there, and under what conditions. The prohibition on inhuman or degrading treatment under article 4 CFR (and article 3 ECHR) is absolute. The Executing State court cannot therefore surrender someone to conditions that will amount to inhuman or degrading treatment. This has been confirmed explicitly by both ECtHR and the CJEU (See *Aranyosi*, above).

To ascertain if this issue is relevant to your case you will need to look for evidence on the conditions in the Issuing State prison. In the first instance, your client may have a view on whether there is anything to be concerned about, either through anecdote or experience. However, even if they have no knowledge about the prison system, you should ensure that the conditions are adequate as they may not be aware of a problem persisting.

In order to do this, you should:

- Look at Article 3 ECHR decisions of the Strasbourg court;
- Look at Committee for the Prevention of Torture and UN Committee Against Torture reports;
- Look at any international or local NGO or academic reports;
- Contact an ISL to ask if there is a problem with condition of detention that could be relevant to your case.

Depending on how much evidence is revealed by your search, you may have enough to at least raise the issue with the Executing State court. You may need to obtain an expert report to ensure that the information is up to date and sufficiently relevant to the requested person's situation.

It is not sufficient to raise the issue in court without providing any evidence on the underlying prison conditions. Therefore, if you want the court to inquire further as to the prison conditions in the Issuing State, you must not only argue this refusal ground, but submit relevant evidence.

Prison conditions will be relevant if they are a cause of concern in the Issuing State, be it systematically across all prisons; in particular types of prison or regions in the Issuing State; or for a person with the requested person's characteristics (which may encompass a broad range, such as their age, ethnicity, gender, sexual orientation, religion, political status, medical condition or other potential distinction).

It is not sufficient to assert that some prisons have inhuman conditions if it is not clear that the requested person will be sent there, nor to make an assumption that the prison authorities cannot manage their characteristics. You may need to take steps to ascertain in which prison your client is likely to be held. There must be specific and precise risks affecting that requested person:

*"In order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated,*

*is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the Issuing State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4," Aranyosi [94].*

The CJEU in *Aranyosi* held that, should there be evidence of this kind, pursuant to article 15 [EAW FD](#), the court must seek supplementary information from the Issuing State to ascertain the current risk posed by the prison conditions. If, following that information it cannot discount the risk, the court must decide whether the surrender procedure should be brought to an end [95] – [98] and [104], and you will be in a strong position to argue that the EAW should be refused at that stage.

If there is evidence of a real risk of inhuman treatment, it is highly likely that this process will involve the assessment of diplomatic assurances given to the Executing State by the Issuing State that although conditions may not be appropriate in general, it will guarantee conditions that do not amount to inhuman treatment for this requested person.

You should ensure that the court assesses in some detail the veracity of the proposed arrangement, bearing in mind the inadequate conditions that persist for all other prisoners.

The following factors, set out in *Othman (Abu Qatada) v UK*, App. No. 8139/09 (judgment 17<sup>th</sup> January 2012), at [188], should be ascertained before accepting an assurance:

- (i) Whether the terms of the assurances have been disclosed to the Court;
- (ii) Whether the assurances are specific or are general and vague;
- (iii) Who has given the assurances and whether that person can bind the receiving State;
- (iv) If the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them;
- (v) Whether the assurances concern treatment which is legal or illegal in the receiving State;
- (vi) Whether they have been given by a Contracting State (of the Council of Europe and not a third country where the person is to be sent on to);
- (vii) The length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances;
- (viii) Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
- (ix) Whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
- (x) Whether the applicant has previously been ill-treated in the receiving State; and
- (xi) Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.



## Family Life

Another area where fundamental rights are often invoked to prevent surrender is the protection of family life, in particular the effect on any children left behind. Article 7 CFR is the equivalent of Article 8 ECHR. Article 24 CFR also expressly sets out the rights of the child as a fundamental right – which includes protection and care, and maintaining a personal and direct relationship with their parents. In particular the best interests of the child must be a primary consideration.<sup>8</sup> There are no CJEU or ECtHR decisions as yet on this issue, although there have been many in some Member States, in particular the UK.

Some helpful guidance might be provided by the ECtHR case law in the context of expulsion. This follows a similar framework to the consideration that should be made by the Executing State court in EAW proceedings, with obvious adaptations, see [Boultif v Switzerland App. No. 54273/00 \(judgment 5<sup>th</sup> October 2000\)](#) and [Üner v Netherlands App. No. 46410/99 \(judgment 18<sup>th</sup> October 2006 at \[57-58\]\)](#), as well as CJEU Case law concerning the free movement directive (Directive 2004/38); see [Case C-145/09 Land Baden-Württemberg v Panagiotis Tsakouridis \(judgment 23<sup>rd</sup> November 2010\)](#), at [50], applying the ECtHR's reasoning to the application of Article 7 CFR).

Where the Court will not refuse to execute a warrant on the grounds of family life, you should nevertheless make an application for a guarantee from the Issuing State that the person be able to serve any ensuing sentence in the Executing State where they live and their family resides, so as to increase the possibility of reintegrating into society: Article 4(6) or 5(3) FD; *Wolzenburg* at [62]; and [Case C-306/09 I.B. \(judgment 21<sup>st</sup> October 2010\)](#) at [57 and 58] (in the context of judgments rendered *in absentia*). (See [section F](#) on guarantees).

The issue of family life can also be raised in the Issuing State as a ground for substituting the EAW for another measure pending criminal proceedings, such as a European Supervision Order (see [section H](#)).

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<sup>8</sup> The [UN Convention on the Rights of the Child](#) provides detailed provision on ensuring children can maintain the relationship with their parents post separation, including for deportation and exile, see in particular article 9.

## ***Fair Trial***

The third key right relates to the proceedings that will take place once the requested person is returned for trial. Articles 47-50 CFR provide as follows:

### **Article 47**

#### **Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

### **Article 48**

#### **Presumption of innocence and right of defence**

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

### **Article 49**

#### **Principles of legality and proportionality of criminal offences and penalties**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

### **Article 50**

#### **Right not to be tried or punished twice in criminal proceedings for the same criminal offence**

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Guidance on interpreting these articles can be found in the Explanations to the Charter.<sup>9</sup> The Explanations state that article 48 CFR is to be interpreted in accordance with article 6(2) and 6(3) ECHR. Article 49 CFR follows the traditional rule of non-retroactivity, unless it is a more lenient penal law, in accordance with article 15 of the International Covenant on Civil and Political Rights and article 7 ECHR.

Article 50 CFR is to be read in accordance with article 4 of Protocol 7 to the ECHR and Articles 54 to 58 CISA. The *ne bis in idem* rule already applies in Union Law and has been repeatedly interpreted by the CJEU (see [section E.1](#)).

These rights will be significant where the requested person or the ISL raises concern about certain aspects of the trial process in the Issuing State. Some of these concerns have already been identified expressly in the Framework Decision, for example the right not to be tried *in absentia* or twice for the same proceedings (see [section E.2](#)).

In addition to the protections offered by the CFR, the Directives on minimum procedural rights may apply. Examples of protections offered by these Directives include a limitation of the right against self-incrimination ([Directive 2016/343/EU strengthening certain aspects of the presumption of innocence and the right to be present at one's trial in criminal proceedings](#)) or on the right of access to a lawyer during police detention or other stages where the accused is asked questions, limited or no access to the case file in the pre-trial stages or allowing the court to see evidence obtained in breach of procedural safeguards.

However, the procedural safeguards instruments established in the EU are in their early days of implementation and there has as yet been no guidance from the CJEU of what remedy should be available for the breach of these safeguards.

The ECtHR has ruled that in extradition proceedings, there is a high bar to be met to persuade an Executing State that a fair trial cannot take place in the Issuing State. There must be a real risk of a flagrant denial of justice. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures that result in a breach of Article 6 ECHR. What is required is a breach of the principles of fair trial that is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article: *Othman (Abu Qatada) v UK* (*supra*) (risk of reliance at trial on evidence obtained through torture), see also *Bader and Kanbor v Sweden*, App. No. 13284/04 (judgment 8<sup>th</sup> November 2005) (a trial that is summary in nature and conducted with total disregard for the rights of the defence). It will be very difficult to demonstrate that another EU Member State satisfies this test, without substantial and convincing evidence.

ECtHR case law suggests that, as between Contracting Parties to the Convention, it is more appropriate for the Issuing State court to determine whether there is any unfairness:

*The Court notes, in this regard, that the United Kingdom is a Contracting Party and that, as such, it has undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein, including those guaranteed by Article 6 ([Stapleton v Ireland App. No 56588/07 \(admissibility decision of 4<sup>th</sup> May 2010\)](#)), concerning a claim of inordinate delay in the proceedings).*

The above arguments apply in respect of prospective violations of the right to a fair trial if the person is sought to face prosecution in the Issuing State, where the requested person will seek to rely upon systemic risks likely to affect his or her case on return. If the requested person is sought to serve a sentence for a *historic* conviction, in respect of which there is no retrial available because they attended or were represented, this argument may be more appropriately framed according to Article 6 CFR (right to liberty): imprisonment on the basis of a concluded trial which was flagrantly unfair, with no right to a retrial upon return, would constitute a flagrant violation of that right (*Othman (Abu Qatada) v UK (supra)* confirms such an argument is available under Article 5 of the Convention (at 232), and therefore as a minimum under Article 6 CFR).

## F. Guarantees to be given before a requested person can be surrendered

The Framework Decision also provides in Article 5 that two specific guarantees may be demanded from the Issuing State before the requested person can be surrendered.<sup>10</sup>

Article 5 EAW FD applies when other mandatory or optional grounds have been considered and the court is satisfied that they do not create a bar to surrender. However, when making your application for refusal, you should include a subsidiary application that, where applicable, these guarantees be given, since in some Member States there is no opportunity to request them at a later stage. The guarantees must be given by the Issuing State prior to surrender. Your role includes not only requesting that the guarantees be given, but also making sure that they are reliable. These are:

### *Article 5(2) – review of life sentence*

Where a life-time custodial sentence or detention order has been imposed, the Member State must have a provision in its legal system for review of the sentence on request or at the latest after 20 years, or for the application of measures of clemency.

You will need to check with an ISL if this is the case in practice. The Framework Decision states that such guarantee may be demanded if the law of the Executing State so requires. Nevertheless, since this guarantee involves fundamental rights laid down in the ECHR and Charter, it should be noted that these instruments require it and therefore you should apply for it to be given.

The ECtHR has held that a life sentence will remain compatible with Article 3 ECHR only if domestic law and procedure provides both a prospect of release and a possibility of review. The fact that in practice a life sentence might be served in full does not make it irreducible, for example if a life prisoner has the right under domestic law to be considered for release but that is refused on the ground that he or she continues to pose a danger to society: *Hutchinson v United Kingdom* App. No. 57592/08 (3<sup>rd</sup> February 2015).

<sup>10</sup> Article 5(1) no longer applies since it was revoked by FD 2009/299/JHA of 26 February 2009. [See the consolidated version.](#)

### ***Article 5(3) – transfer of sentence***

Where the person is wanted for prosecution and is a national or resident of the Executing State, if convicted, they may request to return there to serve their sentence.

[Framework Decision 2008/909/JHA](#)<sup>11</sup> gives practical effect to this process and enables the state where the person is convicted to request transfer of the requested person to the Executing State for them to serve the sentence there, either of its own volition or upon the request of the person. It is possible to transfer the person without their consent. Certain conditions apply to this process.

The transfer request may only be lodged after there is a final conviction in the Issuing State. However, if you act to ensure that there is a guarantee in place, the Issuing State will not be able to deny a transfer request, which will assist the ISL to instigate transfer proceedings should the Issuing State not do so upon conviction. This guarantee also applies following a decision rendered in absentia in respect of which a retrial following surrender is guaranteed: [Case C-306/09 I.B. \(21<sup>st</sup> October 2010\)](#).

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<sup>11</sup> See also “[EU Commission summary](#)” for a brief explanation of its operation and also [Council Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions relating to the post-trial stage](#), which allows for transfers for sentences on non-imprisonment.



## G. Procedural stages in the Executing State

Following arrest in the Executing State pursuant to the EAW, the requested person must appear in court to state whether or not they consent to surrender. EAW proceedings are intended by the EU to be speedy. A final decision upon surrender where a person does not consent must take place within 60 days of arrest, extendable by a further 30 days (Article 17 [EAW FD](#)).

### G.1 Hearings

Although the EAW does not expressly specify it, in practice, there should be an initial hearing at which the person can consent to surrender, and if they do not, the hearing should be adjourned for the arguments against surrender to be fully considered. In some Member States there is no further oral hearing and all submissions will have to be made in writing. Nevertheless, you could argue that a further oral hearing is necessary, in particular when oral evidence has to be heard. You could argue that the intention of Articles 13 and 14 [EAW FD](#) is that a further, substantive oral hearing should take place, in order for your client to be properly heard on why one or more refusal grounds apply to his or her case.

You should explain to the court that you will need to prepare the arguments and to obtain evidence with the assistance of an ISL, in accordance with [Directive 2013/48/EU on the right of access to a lawyer](#) (see [section H](#)). You may also need to submit to the court that it should request further information from the Issuing State in order to make its decision regarding surrender, pursuant to Article 15 [EAW FD](#), which will require an adjournment of the surrender hearing.

You will then need to make submissions based on the refusal grounds that apply in your case ([section E](#) and [section F](#)). As explained above, you will need to present evidence to support these grounds. Much of this can be obtained with the assistance of an ISL.

### G.2 Alternatives to detention

If appropriate, you may also need to challenge the imposition of detention in the Executing State pending surrender. In most cases your client will want to receive bail instead of remaining detained. Nevertheless, since detention periods in the Executing State must be deducted from any prison sentence in the Issuing State (Article 26 [EAW FD](#)), you should evaluate together with your client and an ISL whether it is more suitable for the client to remain in detention (especially but not exclusively where the EAW is for the purposes of serving an enforceable prison sentence or where it is highly likely that they will be convicted in the Issuing State to a prison sentence). This will involve comparing prison conditions and treatment of people in detention.

Article 12 [EAW FD](#) states that a requested person may be kept in detention following their arrest, or provisionally released in accordance with the Executing State's laws, providing all necessary steps are taken to prevent the person from absconding.

Making an application for detention not to be applied will be similar to making an application for pre-trial detention not to be applied in a national criminal case. In addition to the usual grounds based on national law, if you can persuade the court from the outset that a refusal ground may apply, that will facilitate the application of an alternative measure.

Article 6 CFR/article 5 ECHR on the right to liberty and security of the person can also be invoked. In general, to avoid being arbitrary, detention under Article 5(1)(f) ECHR must be carried out in good faith; it must be closely connected to the ground of detention relied on by the state; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued: [A v UK App. No. 3455/05 \(judgment 19<sup>th</sup> February 2009\)](#); see also [Yoh-Ekale Mwanje v. Belgium App. No. 10486/10 \(judgment 20<sup>th</sup> December 2011\)](#), at [117-119] and cases cited therein.

This can change during the course of proceedings, and can be re-visited if it is taking a long time for the surrender decision to be made. You should consider whether an application for the requested person's release should be made initially, and then later on if a long time has passed.

Although the CJEU has held that there is no requirement to release a requested person simply because the time limits for a decision on surrender to be taken have expired, the continuing detention of the person must not be excessive in all the circumstances of the case and in accordance with article 6 CFR: [Case C-237/15 PPU Lanigan \(16<sup>th</sup> July 2015\)](#). This requires the Executing State court to assess the crime for which the person is requested; the likely sentence they will receive; and any risks posed. It must then balance this assessment against whether there has been due diligence in progressing the EAW request in both Issuing and Executing States, to decide if continuing detention is proportionate (Lanigan at [58] and [59]). The court must also consider if any measures should be attached to the provisional release to prevent the person absconding and ensure that they can be returned should a surrender decision be made (at [61]).

You should assist the court by making suggestions for alternative measures, such as surrender of the requested person's passport or presenting themselves at a local police station, if the Executing State has these options in its laws. You should always consult the ISL in order to try to have the EAW revoked or substituted by another measure in the Issuing State.

### **G.3 Legal Remedies/Appeals**

#### **i. National law appeal**

The EAW FD has no provision concerning the right to appeal a surrender decision. Notwithstanding, most jurisdictions confer upon the requested person the right to appeal against such decisions (the CJEU has already confirmed that this is in conformity with EU law - [Case C-188/13 PPU \*Jeremy F.\* \(30th May 2013\)](#)). Therefore you should confirm whether your national law entitles the requested person to appeal against a surrender decision. Ensure that you are aware of the deadlines for lodging an appeal in EAW proceedings as these might be shorter than the regular deadlines for lodging appeals in criminal cases.

#### **ii. Reference to the CJEU for a preliminary ruling**

If the meaning of EU law is unclear during the execution procedure, questions may be referred to the CJEU for a preliminary ruling as foreseen by Article 267 TFEU<sup>12</sup>. A court of final instance on the specific question at issue has an obligation to make a reference where a ruling from the CJEU is necessary to enable it to give judgment. The procedure operates at the initiative of the national court, which, in a written order sent to the CJEU, summarises the case, explains how its decision turns on the point of EU law and asks specific questions concerning interpretation of provisions of EU law.<sup>13</sup>

This and the rest of the procedure, including the filing of written observations by the parties to the national case and hearings before the CJEU, will be in the national court's language. The ordinary timeframe for the ruling is a little over one year. However, the national court may ask the CJEU to apply its urgent procedure (which reduces the timeframe to less than two months) where the CJEU's ruling may lead to the release of a person in detention (in this context, because they are detained pending execution of an EAW and the CJEU's decision could entail the refusal of surrender). As a lawyer in the Executing State you can make an application to your national court raising a question of interpretation or validity of a provision of EU law applicable in your case and requesting that your national court make a reference to the CJEU.

<sup>12</sup> The organisation Fair Trials has produced a guide to the Court of Justice of the European Union in criminal practice which includes a training module.

<sup>13</sup> The CJEU has produced recommendations for national courts

#### **G.4 After the decision to surrender**

##### ***i. Postponement of removal***

Although the court may decide to surrender, there are two circumstances in which the surrender may be temporarily postponed.

Firstly, Article 23(4) [EAW FD](#) provides for where it would manifestly endanger the requested person's life or health. You should rely on this ground where your client is suffering from an illness that cannot be properly treated in the Issuing State, or moving them would aggravate their illness. You may have already relied on these circumstances under Article 4 CFR as an argument for permanent refusal. Article 23(4) provides an alternative by which to at least delay the surrender. You will need expert medical evidence to support this argument, and an ISL to assist in obtaining evidence concerning treatment in the Issuing State.

Secondly, Article 24 [EAW FD](#) allows for postponement where the requested person is already being prosecuted or is serving a sentence for a different criminal act to the EAW in the Executing State. The Executing and Issuing State judicial authorities may agree for a temporary surrender in the alternative, the terms of which are for them to agree. This may be demanded by the Issuing State if there is some urgency in progressing the case for which the EAW has been issued. You will need to ensure the most favourable position for your client in terms of prison conditions, deduction of prison days from the relevant sentence, their family life, and in which jurisdiction it is in fact better that proceedings progress in order to ensure a fair trial. You should consult with both your client and the ISL before making submissions to the Executing State court.

For either scenario, the requested person must be surrendered as soon as the grounds of postponement have ceased.

##### ***ii. Execution (time-limit for removal)***

According to Article 23(1) [EAW FD](#) the requested person should be surrendered as soon as possible on a date that is agreed between the Executing State and the Issuing State. In any event, a requested person should be surrendered no later than 10 days after a final decision is taken on the execution of the EAW.

If the surrender of the requested person is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities are to immediately contact one another and agree on a new surrender date. Removal must then take place within 10 days of the new date agreed. This often occurs if arrangements cannot be made for the removal of the requested person because no flights are available.

If Article 23(4) [EAW FD](#) has been applied (see above), the executing judicial authority must immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

### **iii. Non Execution of removal**

If the time limits imposed for removal are not met, and no alternative arrangements have been made, a requested person in detention in the Executing State must be released (Article 23(5) [EAW FD](#)). You should request immediate release, should this not be ordered by the authorities.

Notwithstanding the CJEU has ruled that in certain circumstances the person may be kept in detention. The CJEU has ruled that where it was not possible to surrender the person on the 10 days following the decision, or on the first new date, Article 23 (3) requires the Issuing and Executing Authorities to agree on a second new date. Article 23 (3) will apply (i.e. the second new date has to be within 10 days of the first new date) and if removal of the person was impeded due to reasons de *force majeure*, the person may be kept in detention, as long as not for an excessive period ('only in so far as the surrender procedure has been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the custody is not excessive. In order to ensure that that is indeed the case, that authority will be required to carry out a concrete review of the situation at issue, taking account of all of the relevant factors' - [C-640/15, Tomas Vilkas \(25th January 2017\)](#), §43). *Force majeure* may exist in circumstances such as 'on account of the repeated resistance of that person, in so far as, on account of exceptional circumstances, that resistance could not have been foreseen by those authorities and the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities', which is for the Executing court to ascertain.

This applies even where the time limits of Article 15 (1) have expired, but if there was no situation of *force majeure*, then the person has to be released from custody pending his or her removal ([C-640/15, Tomas Vilkas \(25th January 2017\)](#), §§39, 66, 72-73).

## **G.5 Procedural Fundamental Rights applicable in EAW proceedings**

Articles 47 to 50 CFR (see above [section E.3](#)) are also relevant to EAW proceedings, with respect to whether a person will receive due process rights in the Executing State during the EAW hearing.

With respect to article 47 CFR, the Explanations to the Charter confirm that EU law has gone further than the ECHR in that the right to an effective remedy is guaranteed before a court: [Case 222/84 Johnston \[1986\] ECR 1651 et seq.](#), not just a national authority as is set out in article 13 ECHR. The right to a fair trial is also not confined to disputes relating to civil law rights and obligations, or a criminal charge, as article 6(1) ECHR is. This means that article 47 CFR could potentially be invoked in the Executing State to seek due process rights in the course of the surrender proceedings, which has not been possible under article 6 ECHR. For example, if the court refuses to allow an adjournment for you to prepare your case for the surrender hearing, or refuses to hear evidence from experts or an ISL, or does not provide a translation of the EAW or an interpreter to assist your client. However, there is no jurisprudence from the CJEU as yet as to whether the article can be applied in this way.

## H. The role of the lawyer in the Issuing State

### H.1 How can a lawyer in the Issuing State help me?

The EAW is merely a tool for giving effect to criminal prosecution in the Issuing State. Therefore the root of the problem is in the Issuing State and can only be solved in the long-term with the intervention of a lawyer there. Therefore it is apparent that the effective exercise of a person's rights in the scope of EAW proceedings is not possible without dual representation.

The arrested person has the right to the assistance of a lawyer in the Issuing State pursuant to [Directive 2013/48/EU on the right of access to a lawyer](#). This states that the ISL's role is:

*"to assist the lawyer in the Executing State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA" (article 10 (4) Directive 2013/48/EU).*

This Directive recognised explicitly the need for "dual representation" or "double defence" in EAW cases, which had been advocated for many years.

In 2016 a Directive on legal aid was also published. [Article 5 Directive 2016/1919/EU](#) ensures the right of requested persons to legal aid in the Executing State upon arrest pursuant to an EAW until they are surrendered, or until the decision not to surrender them becomes final. It also states that requested persons who are the subject of an EAW for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the Issuing State in accordance with Article 10(4) and (5) of [Directive 2013/48/EU](#) have the right to legal aid in the Issuing State for the purpose of such proceedings, in so far as legal aid is necessary to ensure effective access to justice.

These rights may be subject to a financial means test.

In order to be effective, dual representation must involve the provision of legal assistance (legal consultation or advice and legal representation) by lawyers from two different jurisdictions, concomitantly and subsequently, in a coordinated manner, which is required by the cross-border dimension of the case. In some cases the intervention of lawyers from more than two jurisdictions is required. In these cases the expression "multiple representation" would be more accurate.

Dual representation enables genuine reasons for refusal of execution of an EAW to be properly argued and spurious ones to be discontinued. Therefore, the intervention of a lawyer from the Issuing State is essential to help both the lawyer and the court in the Executing State to assess the verification of any refusal grounds as swiftly as possible. Many, if not most, rights of the requested person in EAW proceedings may only be exercised effectively by the two lawyers in cooperation.

It will have become evident from the previous chapters that, although it is usually the Executing State lawyer ("ESL") who has first contact with the case and an important role in initially advising the client, she cannot give effective and full legal advice without consulting a lawyer in the Issuing State.



You, as the ESL, should therefore contact a lawyer in the Issuing State as soon as you start acting. If you do not know one you can ask for help via existing networks (for example on the [ECBA "Find a Lawyer" webpage](#)).

You can also request that the authorities of the Executing State seek information from the authorities of the Issuing State on how to appoint a lawyer in the Issuing State (Article 10(5) Directive 2013/48/EU).

## ***H.2 What should I do if I am retained or appointed in an EAW case in the Issuing State?***

Your role as ISL is two-fold:

- To assist and advise the lawyer in the Executing State concerning the grounds of refusal and other relevant matters of the [EAW FD](#);
- To check the validity of the national arrest warrant underlying the EAW and any possibilities of the EAW being revoked or withdrawn. You should then take the necessary action in the Issuing State to request that it is.

In order to fulfil these tasks it is essential that you do the following:

- Check the EAW, which should be provided to you by the ESL
- Consult the case files of the criminal proceedings in the Issuing State (if necessary invoking [Art. 7\(1\) Directive 2012/13/EU](#)<sup>1</sup> in order to gain access to the case files)

<sup>1</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. Article 7(1) provides: "Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers."

After a decision on the execution of the EAW, your role will also be to ensure that: specialty is not violated, the detention period served in the Executing State is deducted in the Issuing State, pending alerts are deleted, resolution of conflicts of jurisdiction is triggered and, if applicable, transfer of your client to serve their sentence in the Executing State takes place (see [section H.3](#)).

## ***i. Assisting and Advising the ESL***

### **Consent and Specialty**

The decision on consent and the renunciation of the specialty principle depend mostly on information concerning the Issuing State (see [section D.3](#)). In your capacity as an ISL you should advise the ESL whether there are other pending proceedings against the client and whether it is beneficial for him to waive specialty (for example, if the EAW is for purposes of serving a sentence and the client has further outstanding sentences to serve, in certain jurisdictions it is more convenient for him to be able to serve them together, since this will result in less prison time than serving sentences consecutively).

### **Refusal Grounds**

You should assist the ESL in assessing whether there are any refusal grounds. In particular, the following might be relevant:

Any *ne bis in idem* defence will depend on a proper assessment of the facts being prosecuted in the Issuing State (see [section E.1](#)). As an ISL you should consult the case files, conduct the necessary analysis and provide the ESL with a copy of the case materials, as well as with an expert opinion on whether the cases cover the same acts, if necessary and requested.

You should provide the ESL with details on whether proceedings have been conducted in absentia and on whether proceedings in place according to your national law comply with Council Framework Decision [2009/299/JHA](#) (26<sup>th</sup> February 2009)<sup>14</sup>, namely: if the person has been duly informed of the proceedings and date of the trial; has waived her right to be present; and whether your national law provides for the right to a new trial (see [section E.2.viii](#)).

Acting as ISL you should also provide information to the ESL on whether prison conditions are adequate and help her check whether assurances concerning prison conditions or life sentences are reliable (see [section E.3](#) and [section F](#)).

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<sup>14</sup> Amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby 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. In the future, Articles 8 and 9 of Directive 2016/343/EU will also become relevant - [Directive \(EU\) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings](#).

### ***Application for bail in the Executing State***

Since detention periods in the Executing State must be deducted from any prison sentence in the Issuing State (Article 26 [EAW FD](#)), you should evaluate together with the ISL and client whether it is more suitable for the client to remain in detention there (especially but not exclusively where the EAW is for the purposes of serving an enforceable prison sentence or where it is highly likely that they will be convicted in the Issuing State to a prison sentence). This will involve comparing prison conditions and treatment of people in detention.

### ***Removal of Schengen and Interpol Alerts***

Your intervention as an ISL may be necessary for flagging of a Schengen or Interpol Alert, or for finding out whether such alerts are in place (see [section I](#)).

### ***Conflicts of Jurisdiction***

Where the criminal activity is cross border and arrest warrants have been issued by multiple countries, it is your duty as ISL to consider, together with the ESL and where applicable a lawyer in a third EU Member State, which is the most appropriate jurisdiction for your client to be prosecuted in. This evaluation must consider the most adequate legal means for your client to be prosecuted in that jurisdiction, including to consider whether any action should be taken with the relevant authorities, or not (see [section J](#)).

If a conflict of jurisdiction is not solved, as soon as there is a final decision in one of the Member States involved, it is the duty of the ISL to inform the lawyers of the other relevant Member States of that decision in order for them to ask for the proceedings in their respective states to be discontinued. Likewise, if a final decision is made in one of the other states, the ISL should, as soon as she becomes aware of the decision, lodge a request for proceedings to be discontinued in the Issuing State, pursuant to Article 54 CISA and Article 50 CFR (see [section E.1](#)).

**ii. *Checking the validity of the national arrest warrant underlying the EAW and any possibility of the EAW being revoked or withdrawn in the Issuing State***

As outlined above, an EAW presupposes the existence of a valid national arrest warrant in the Issuing State, which must be issued in compliance with applicable national laws. In the absence of a national arrest warrant issued separately from the EAW, the EAW is invalid and must be refused: [Case C-241/15 Bob-Dogi \(1st June 2016\)](#) at [59-67].

An underlying arrest warrant must not only exist: it must be issued by a “judicial authority” within the meaning of Articles 6(1) and 8(1) of the Framework Decision. As ISL you should assist the ESL in determining whether your national authorities that issued the EAW are “judicial authorities” in light of the objective criteria identified in the CJEU’s case-law (see [C-453/16 PPU Özçelik \(10th November 2016\)](#); [C-452/16 PPU Poltorak \(10th November 2016\)](#); [C-477/16 PPU Kovalkovas \(10th November 2016\)](#) and above [section B.2](#)).

That national warrant should be valid for both the execution of a sentence, or for remanding the person in custody pending trial. If it would not be possible to remand a person in custody pending trial in the proceedings in the Issuing State, then an EAW should never have been issued, since its execution involves a lengthy period of detention. The Issuing State should rather have made use of other legal instruments to achieve its purposes (for example, the European Supervision Order, pursuant to [Council Framework Decision 2009/82/JHA 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 \(23rd October 2009\)](#), or mutual legal assistance for service of documents or for conducting interviews).

Acting as an ISL you should be able, in most cases, to analyse the case files in the Issuing State in order to advise the ESL whether the EAW has been issued lawfully and, if not, to request its withdrawal by the Issuing State. As an ISL you should make the necessary applications pursuant to national law in order to seek withdrawal of the EAW.

There are many others services in the Issuing State that you can provide as the ISL to determine whether the EAW is lawful or disproportionate:

- You should check whether a prison sentence could be avoided by the simple payment of a fine, since often EAWs are issued where prison sentences are imposed for breach of an order to make a financial payment. In these cases you should immediately inform the ESL and your early intervention will allow an early payment of the fine, negating surrender and unnecessary detention.
- You should review whether it would be sufficient for an alternative measure to pre-trial detention to be imposed, and if so, request the substitution of the EAW for this alternative measure. In this area you should take into account

that the European Supervision Order enables your national authorities to impose alternative measures to detention abroad.

- You should consider whether the Issuing State authority seeks a preparatory act, such as to interview the suspect or accused person, or to serve him/her with certain documents. If so, you should apply for that authority to substitute the EAW for mutual legal assistance or a European Investigation Order) or for a hearing of the person with the participation of Issuing State authorities to be conducted during EAW proceedings in the Executing State (Articles 18 and 19 [EAW FD](#)).
- Finally, you should check whether proceedings might be statute limited in the Issuing State, or whether there has been an amnesty, or any other grounds that would bar prosecution and consequently oblige the Issuing State authority to revoke the underlying national arrest warrant and the EAW. If you conclude that this is the case, you should lodge the corresponding application in the Issuing State.

### ***H.3 What should I as ISL do after the EAW case is finished?***

#### ***i. After a decision to surrender***

After a decision on the execution of the EAW, one of the tasks in the case of a surrender decision is to ensure that specialty is not violated. You can also advise your client whether he should make a subsequent waiver of specialty (see [section D.3.i](#) and [section D.3.iii](#)).

Another important task is to make sure that the detention period suffered in the Executing State is deducted from any sentence imposed following conviction, or the service of a sentence pursuant to a conviction EAW, in the Issuing State (Article 26 [EAW FD](#)). House arrest may be deductible pursuant to that provision, but the CJEU has decided that “[...] measures such as a nine-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents, are not, in principle, having regard to the type, duration, effects and manner of implementation of all those measures, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as ‘detention’ within the meaning of that provision, which it is nevertheless for the referring court to ascertain”: [Case C-294/16 PPU JZ v Prokuratura Rejonowa Łódź — Śródmieście](#), (28<sup>th</sup> July 2016).

ESL and ISL should communicate as to what measures are imposed during the surrender procedure and whether these will be taken into account in the Issuing State, both to ensure that the Executing Judicial Authority is appraised of any risk of excessive detention upon surrender and to ensure that any required deduction is duly made after surrender. In the CJEU’s approach, an objective assessment is required, so a rigid application of national law preventing the real nature of the measures imposed from being considered would be insufficient.

After the person has been surrendered, you should also ensure that INTERPOL or SIS II alerts have been deleted and, if not, make an application in the Issuing State or the CCF for this to take place (see [section I](#)).

If your client has been surrendered and convicted to a prison sentence, where the client wishes it, you should request that he or she serves their sentence in the Executing State. If there was a guarantee in place, you should help your client avail themselves of the corresponding guarantee given by the Issuing State during the EAW proceedings (see [section F](#)).

If you have discovered that there are multiple prosecutions in different Member States against your client for the same facts, and the conflict of jurisdiction has not been resolved during the EAW proceedings you should consider, together with the ESL and where applicable a lawyer in a third EU Member State, which is the most appropriate jurisdiction for your client to be prosecuted in (see [section J](#)). As soon as there is a final decision in the Issuing State, it is the duty of the ISL to inform the lawyers of the other relevant Member States of that decision in order for them to ask for the proceedings in their respective states to be discontinued. Likewise, if a final decision is made in one of the other states, the ISL should, as soon as she becomes aware of the decision, lodge a request for proceedings to be discontinued in the Issuing State, pursuant to Article 54 CISA and Article 50 CFR (see [section E.1](#)).

## ***ii. After a decision not to surrender***

Your intervention as an ISL may be necessary for requesting the removal or flagging of a Schengen or Interpol Alert, or for finding out whether such alerts are in place (see [section I](#)).

If the Executing State has refused surrender, there is no obligation upon the Issuing State to withdraw the EAW and SIS II alert as a consequence and the person may be re-arrested in any other Member State. In your capacity as ISL you should check whether the underlying national warrant and/or the EAW could be revoked on national legal grounds, or whether they could be replaced by less coercive measures (see [section H.2.ii](#)).

If surrender is refused pursuant to Article 3(2) [EAW FD](#) you as ISL should lodge an application for the EAW to be withdrawn in the Issuing State and for criminal proceedings in that State to be closed, according to Articles 54 CISA and 50 CFR. These create a bar to prosecution that is directly applicable in national criminal proceedings, irrespective of whether your national law has explicit provision on the matter. This application should include evidence of the existence of a final decision in the other Member State. A lawyer in the deciding Member State can provide you with a copy of the decision and case materials, as well as with an expert opinion of the “final” character of the decision, if necessary.

If you have found out that there are multiple prosecutions in different Member States against your client for the same facts, and the conflict of jurisdiction has not been resolved during the EAW proceedings, the same process applies as in the case of a decision to surrender (see the preceding section and [section J](#)).



As soon as there is a final decision in the Issuing State, or if a final decision is made in one of the other states, the same process applies as in the case of a decision to surrender (see the preceding section and [section E.1](#))

**iii. *After the Issuing State withdraws or revokes an EAW***

After the Issuing State has withdrawn or revoked an EAW, you should also ensure that INTERPOL or SIS II alerts have been deleted and, if not, make an application in the Issuing State or to the CCF in order to obtain their deletion (see [section I](#)).

If you have discovered that detention of your client on the basis of the EAW was illegal or arbitrary and disproportionate (Article 6 CFR and 5 ECHR), you should consider whether it is appropriate and/or possible to claim for compensation (see Article 5(5) ECHR).

If you have discovered that there are multiple prosecutions in different Member States against your client for the same facts, and the conflict of jurisdiction has not been resolved during the EAW proceedings, the same process applies as in the case of a decision to surrender (see [section H.3.i](#) and [section J](#)). As soon as there is a final decision in the Issuing State, or if a final decision is made in one of the other states, the same process applies as in the case of a decision to surrender (see [section H.3.i](#) and [section E.1](#)).

## I. How can I get an EAW alert removed after a successful case?

### I.1 SIS II alerts

The fact that a person is wanted under an EAW will be notified to other countries' police and border authorities via an electronic alert. There are two systems used for this purpose: the 2<sup>nd</sup> Generation Schengen Information System ("SIS II") and the databases of the International Criminal Police Organization ("INTERPOL").

In each case, there are actions you should take in relation to the alert, either prior to the arrest, or after the conclusion of the EAW proceedings.

SIS II, governed (in relation to the EAW) by [Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System \(12th June 2007\)](#) (the "SIS II Decision"), is a centralised database in which EU Member States' authorities enter data concerning persons wanted under an EAW (Article 26 SIS II Decision).<sup>15</sup> Each Member State has authorities responsible for a national database ("N.SIS II") and for sending any additional information via the system (the "SIRENE Bureau").<sup>16</sup> Border and police authorities are able to search the system directly.<sup>17</sup>

Alerts concerning a person wanted for surrender under an EAW are entered into SIS II together with data covering all the key fields of the EAW. This combination is treated as being the EAW itself (Article 31 SIS II Decision) and suffices for an arrest (and what we have referred to in [section D](#) as the Schengen Entry).

The SIS II Decision contains provisions on "flagging," which enables an Executing State to require the Issuing State to add a flag to the alert prohibiting any arrest in the Executing State (Articles 24 and 25).

#### i. Before an arrest

##### *Finding out if there is a SIS II alert*

A person in any Member State can apply to find out whether there is currently a SIS II alert concerning them (Article 58 SIS II Decision). The provision of information is subject to any national rules that apply and the Issuing State's opinion. Information will not be provided if it is "indispensable for the performance of a lawful task in connection with an alert or for the protection of the rights and freedoms of third parties" (Article 58(4) SIS II Decision).

You will need to identify the competent authority and the procedure in your Member State.<sup>18</sup> Practice varies, and though some authorities will disclose the existence of an alert, others will not. The process may also take many months and the answers

<sup>15</sup> Be aware that in older resources these are commonly referred to as 'Article 95 alerts' (a reference to the Convention Implementing the Schengen Agreement, which established the original Schengen Information System, which SIS II has replaced).

<sup>16</sup> [List of N.SIS II Office and the national SIRENE Bureaux](#) (OJ 2014 C 278, p145)

<sup>17</sup> [List of competent authorities that are authorised to search directly the data contained in \[SIS II\]](#) (OJ 2014 C 278, p. 1)

<sup>18</sup> National authorities are set out in [The Schengen Information System: A guide for exercising the right of access](#) (this concerns the system before SIS II but the authorities and practices are likely to be the same for SIS II).

provided may be inconclusive. You may also try to find out whether there are EAW and SIS II alerts issued by your or third Member States by checking for pending proceedings directly at the court, prosecution or police authorities or a given pending proceedings register, if that is permitted in the respective Member State. A lawyer in the Issuing State can help you with this task.

### ***Having the SIS II alert flagged pre-emptively***

If you are asked to represent someone who is aware of an EAW pending against them, and therefore that a SIS II alert is in place, it is possible for a flag to be added at the behest of a competent judicial authority where it is obvious that the EAW will have to be refused (Article 25 SIS II Decision). So, for instance, if you can demonstrate that one of the mandatory refusal grounds under Article 3 [EAW FD](#) applies, or that a fundamental right is at risk (see [section E](#) and [section F](#)) you could seek an order from a national court or authority (whichever is competent for these purposes in your Member State) ordering the SIS II / SIRENE Bureau to require that a flag be added to the alert by the Issuing State. This will prevent the person being arrested and EAW proceedings being started in your Member State. Of course, you will need to evaluate how strong such an application would be and the risk of inviting arrest upon the EAW by initiating such a challenge.

## ***ii. After EAW proceedings***

### ***Ensuring that the SIS II alert is flagged in your Member State***

If the Executing State judge refuses to surrender your client pursuant to the EAW, you should apply to the court to include in the decision an instruction to the Issuing State to add a SIS II flag, and ensure that the SIRENE Bureau requests that the flag be added. This will prevent further arrests in your Member State.

### ***Dealing with the outstanding SIS II alert***

If the EAW has been resisted by persuading the Issuing State to withdraw the underlying arrest warrant and EAW, the ISL should ensure that the issuing judicial authority also orders the withdrawal of the SIS II alert when it revokes the EAW. You should remind them to do this, since issuing authorities do not always do it automatically (see [section H.3.iii](#)).

If the Executing State judge accepts your arguments and refuses to surrender the requested person, there is no obligation upon the Issuing State to remove the EAW and SIS II alert as a consequence. You must advise your client that they could face further arrests in other countries pursuant to the same EAW. In considering what, if any, action may be taken about the outstanding alert, you should ask an ISL whether there is any prospect of the EAW and underlying arrest warrant being challenged in light of your Member State's refusal to surrender, particularly if it was established in the EAW proceedings that the *ne bis in idem* rule applies, or a fundamental right is at risk (see [section H.3.ii](#)).

If there was a refusal based on EU Law grounds (for example, the Executing State considered that surrender should be refused on the basis of the *ne bis in idem* principle pursuant to Article 54 CISA and Article 3(2) EAW FD), the ISL should consider challenging the underlying warrant on this basis and, if necessary, seek a preliminary reference to the CJEU on the compatibility of the continuance of the EAW and SIS II Alert with EU law, and the Charter (see [section E.1](#) on *ne bis in idem* and [section E.3](#) on fundamental rights). However, we are not yet aware of a SIS II alert being challenged successfully after an EAW has been refused.

## I.2 INTERPOL alerts

Member States also use INTERPOL ‘wanted person’ alerts to seek the person’s arrest with a view to EAW proceedings. These are electronic alerts entered into INTERPOL’s databases at the request of the National Central Bureau (“NCB”) of the issuing country.<sup>19</sup> These alerts will be either “Red Notices” or “diffusions” (a more informal alert which may be limited to the European area). Some Red Notices are visible on INTERPOL’s website but, for obvious reasons, many are not, and are visible only to border and police authorities. For INTERPOL alerts, there is one central body to which requests may be directed for access to data and to seek the deletion of an alert: the Commission for the Control of INTERPOL’s Files (“CCF”). The organisation Fair Trials has produced a [guide on how to make requests for access to INTERPOL alerts and to seek their removal](#). The full set of rules governing INTERPOL alerts can be found on INTERPOL’s website.<sup>20</sup>

A request may be made at any time to the CCF to find out whether an alert has been posted, including before an arrest has happened. Under new rules applicable since March 2017<sup>21</sup>, the CCF is required, in principle, to determine such a request within at most five months from receipt of an admissible request, with a further period for notification of the decision. However, as with SIS II, the CCF may not provide a conclusive answer. The rules place an onus on the Issuing State’s authority to justify why disclosure cannot be made, but maintaining an element of surprise in respect of an ongoing investigation is likely to be seen by the CCF as constituting a valid reason for withholding the information, at least in the situation where there has yet to be any arrest on the basis of the alert. If you can demonstrate knowledge that there is an alert, you may enhance your chances of obtaining a substantive answer as to its content: consult the rules for further detail upon this.

If the EAW and underlying arrest warrant are revoked, linked INTERPOL alerts should be removed and you should request that the CCF do this if the issuing NCB fails to do so. A fundamental criterion for the issue of an INTERPOL alert is the existence of a valid arrest warrant or equivalent, so the revocation of such entails deletion of the alert.

<sup>19</sup> Each NCB can be located [here](#)

<sup>20</sup> [INTERPOL’s website: Legal materials](#)

<sup>21</sup> Statute of the CCF, available [here](#)

However, if the EAW is refused by the Executing State, this will not automatically lead to the removal of the alert. The onus is on you. It is possible for a person to request to the CCF for the deletion of their INTERPOL alert on the basis that it violates INTERPOL's rules – an application best made after the conclusion of the EAW proceedings when you are in possession of the refusal decision with its grounds.

The CCF is required, in principle, to determine such a request within a total of at most ten months from receipt of an admissible request (with a further period of up to three months for implementation and notification of the decision) though the Issuing State may request an extension. Applications are limited to ten pages (excluding evidence) and translations may be needed into the CCF's four working languages. Such applications will require careful argument based on INTERPOL's rules and published decisions that the CCF has begun releasing in 2017. There are many potential arguments and a detailed examination is beyond the scope of this handbook. However, some arguments which may be relevant so far as EAW cases are concerned are:

- Minimum conditions for publication of alerts: these include the existence of an underlying arrest warrant (invoke this if the ISL has secured the withdrawal of the underlying warrant); minimum sentence condition (potentially relevant for EAW to serve minor sentences, as the minimum for an INTERPOL alert is six months, as opposed to four under the EAW FD); basic particulars of criminal conduct (if these are lacking in the EAW, they may also be lacking in the INTERPOL alert).
- Fundamental rights: Article 2 of its Constitution requires INTERPOL to comply with international human rights norms (interpreted in the context of police cooperation), so arguments successfully invoked against extradition may also affect the validity of an INTERPOL alert. Be alive to the fact that the CFR and ECHR do not apply directly to INTERPOL so arguments will need adapting (the simplest way being to refer to the corresponding right under the Universal Declaration of Human Rights, to which Article 2 refers). INTERPOL's practice in respect of Article 2 remains unclear and is under review, so be sure to consult up to date materials online.
- Dual criminality: if the EAW has been refused because the circumstances alleged do not constitute an offence in the Executing State (e.g. in areas falling in grey areas between civil, administrative and criminal liability, strict liability offences or offences out of step with a given international convention approximating criminal law definitions), an argument may be available for the deletion of the INTERPOL alert if the conduct would likely not constitute an offence in most other INTERPOL member countries either. Consult available materials online for this purpose.

- Excessive retention / absence of purpose: the rules require INTERPOL to limit retention of information to the period necessary to achieve a purpose, and require that there be a valid law enforcement purpose for information processing. There may be merit in making representations to the CCF about the proportionality of retaining information after an initial refusal of surrender, on the basis that surrender will not be achieved elsewhere and/or that retention of the information is disproportionate in light of the low possibility of surrender.

You will, in due course, receive a reasoned decision from the CCF in response to a deletion request. As of 2017, some of the decisions reached by the CCF are available for consultation and can be used for the purposes of framing requests. There is currently no appeal mechanism, though revision of a decision can be requested if new information comes to light (e.g. a further refusal, suspension of the warrant etc.).

When making an application to the CCF, your client's expectations must be managed. Time frames (despite the in-principle time limits) may be lengthy. And, in general terms, the refusal of the EAW by a judge in your Member State alone will likely not lead to the deletion of the INTERPOL alert unless it establishes that surrender will have to be refused in any other state (a significant hurdle to overcome). The likelier outcome is that the CCF orders that the refusal to surrender the requested person by your Member State be reflected in the INTERPOL alert as an 'addendum': a textual note on the file which will bring further information to the attention of another country whose authorities encounter the wanted person. The addendum cannot as a matter of law dilute another Executing State's obligation under Article 1(2) of the EAW FD to arrest upon an EAW, though it may (possibly) be taken into account in a non-EU country considering whether to arrest or not. In general terms, an addendum offers little protection.

Unless and until the INTERPOL alert is deleted outright, you should advise your client that they face a risk of arrest if they travel. If the CCF does order deletion of the alert, be aware that traces of the INTERPOL alert will remain on domestic police databases, giving rise to a residual risk of arrest. And the CCF's decision will have no impact upon any SIS II alert; so even if the CCF orders deletion of the INTERPOL alert, arrest within the EU on the SIS II alert is still a risk unless that SIS II alert is itself deleted.

## J. Conflicts of Jurisdiction and using Eurojust

Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (30<sup>th</sup> November 2009) ("CJ Framework Decision") defines parallel proceedings as "criminal proceedings, including both the pre-trial and the trial phases, which are conducted in two or more Member States concerning the same facts involving the same person."

It is not unusual during EAW proceedings for your client to be faced with parallel proceedings in two or more EU Member States for the same facts, i.e. that there is a conflict of jurisdiction. The conflict may arise between the Executing and Issuing Member States, or between the Issuing State and a third EU Member State, which might involve competing EAWs (Article 16 EAW).<sup>22</sup>

As explained above (see [section E.2](#)), conflicts of jurisdiction may give rise to an optional ground for refusal where one of the proceedings is pending in the Executing State (Article 4(2) [EAW FD](#)).

EU law has a very underdeveloped legal framework on this topic. The CJ Framework Decision only establishes information sharing and consultation obligations between the Member States, as opposed to binding criteria or procedures through which the jurisdiction of prosecution must be decided.

It should be noted that conflicts of jurisdiction are an issue dealt with between prosecuting authorities where the defence may not have had an opportunity to intervene. Therefore, the EU legal arguments suggested below might not have been tested and there is no EU case law to provide guidance on the topic.

Ultimately it should always be kept in mind that solving conflicts of jurisdiction in parallel proceedings against the same person for the same facts aims primarily at preventing the violation of the *ne bis in idem* principle, which is a fundamental right laid down in Article 50 CFR (see [section E.1](#)).

### J.1 Which is the best jurisdiction for your client to be prosecuted in?

Resolving any conflict of jurisdiction will most likely be influenced by a consideration of which jurisdiction is best placed to prosecute. This will typically entail a prosecution-oriented / crime control perspective only.

The circumstances specified in the [CJ Framework Decision](#) and in the [guidelines published in the Eurojust Annual Report 2003](#) ("the Eurojust Guidelines") will be taken into account:

- I. the place where the major part of the criminality occurred;
- II. the place where the majority of the loss was sustained;
- III. the location of the suspected or accused person and possibilities for securing their surrender or extradition to other jurisdictions;
- IV. the nationality or residence of the suspected or accused person;
- V. significant interests of the suspected or accused person;
- VI. significant interests of victims and witnesses;
- VII. the admissibility of evidence;
- VIII. any delays that may occur.

<sup>22</sup> Conflicts with third states will not be addressed here and are in principle a matter for national law.



It is your role as a defence lawyer to consider, together with the ISL and where applicable a lawyer in a third EU Member State, which is the most appropriate jurisdiction for your client to be prosecuted in. You will then need to seek to convince the relevant authorities to adopt a decision in conformity with your client's interests.

From the defence perspective, the following aspects, amongst others, should be considered:

- I. the client's language and the availability and quality of interpretation and translation;
- II. the cost of the defence and the availability of proper legal aid funding;
- III. the length of proceedings;
- IV. the likelihood of obtaining alternatives to pre-trial detention and the maximum length for pre-trial detention;
- V. the chances of mounting an effective defence and obtaining an acquittal or of receiving a sentence not depriving one's liberty;
- VI. the availability of plea bargaining schemes, including alternatives to prosecution;
- VII. the applicable sanctions and confiscation measures;
- VIII. the applicable exclusionary rules;
- IX. prison conditions;
- X. early release possibilities (although these can be considered later on with a view to requesting transfer for the purposes of serving the sentence).

All of these may fall within the category of "significant interests of the suspected or accused person" mentioned in the CJ Framework Decision and in the Eurojust Guidelines.

## ***J.2 Conveying (or not) your position to the relevant authorities***

After you have determined, together with the ISL lawyer and, where applicable, a lawyer in a third EU Member State, the best place for your client to be prosecuted, you should consider whether it is appropriate to make representations to the relevant authorities.

Since the CJ Framework Decision does not provide binding criteria on how the jurisdiction should be chosen, and Article 50 CFR has not been interpreted as proscribing the existence of parallel proceedings, ultimately the decision is one for the national prosecuting authorities, or the competent court dealing with the criminal case, in the relevant Member States. This will be determined in accordance with their national law and practice. If no agreement can be reached between them, they will all proceed with their cases and the decision that first becomes final will prevail, pursuant to Article 54 CISA and Article 50 CFR.

But since EU law does lay down information and consultation obligations for the Member States, as soon as parallel proceedings are detected, you should consider whether to invoke these provisions in an attempt to trigger consultation proceedings (Articles 5 to 13 CJ Framework Decision 2009/948/JHA together with Recital 5), or whether to let parallel proceedings continue and seek a final decision to be reached first in the most favourable Member State for your client.

It may be difficult to convince the relevant authorities to proceed in a Member State that is still investigating a case if another Member State has already issued a formal indictment, is already at the trial stage, or has progressed even further.

The financial capacity of your client to fund a cross-border dual or multiple defence team to defend him simultaneously in the multiple parallel proceedings may also have a bearing on whether the conflict issue should be brought to the attention of the authorities.

If the conflict arises during EAW proceedings and you conclude that the most suitable jurisdiction is the Executing State, then you may have no choice but to argue the issue in order to obtain a decision not to surrender. If the person is surrendered, it is highly likely that the Executing State will have waived jurisdiction (or made use of a similar mechanism) in favour of the Issuing State. The same applies if the conflict is between the Issuing State and a third EU Member State. If you have concluded that the latter would be the best place for your client to be prosecuted, together with the ISL and third Member State lawyer, they should trigger consultation proceedings in their Member States, which could ultimately lead to the EAW being withdrawn, should the Issuing State waive jurisdiction (or use a similar mechanism).

### ***J.3 To which authorities should I address my application?***

This will depend on national law, but you could in principle raise this issue in the Executing State with the Executing authority, or with the authority responsible for the substantive criminal case. The former might not be competent to decide on the conflict, but you can request that your application for consultation proceedings between the Member States be forwarded to the competent authority.

Simultaneously, or alternatively, the ISL (or the EU third state lawyer) may lodge a request with their competent national authorities for consultation proceedings to be launched.

You could also consider lodging a request to the relevant National Member at Eurojust. Eurojust is a judicial cooperation unit composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to their own legal systems: see [Council Decision 2002/187/JHA on setting up Eurojust, as amended by Council Decision 2003/659/JHA, and Council Decision 2009/426/JHA \(16th December 2008\)](#) on the strengthening of Eurojust<sup>23</sup>. It is “particularly well suited to provide assistance in resolving conflicts of jurisdiction” (Recital 14 CJ Framework Decision).

In practice it has extensive experience on the matter.<sup>24</sup> Although consultation proceedings are primarily between the national authorities involved, they may take place with the assistance of Eurojust and where no agreement can be reached, the case should in principle be referred to Eurojust (Recitals 4, 10 and 14 and Article 12 CJ Framework Decision).

<sup>23</sup> For more information, see [Eurojust's website](#)

<sup>24</sup> See a report on [Eurojust's casework on conflicts of jurisdiction drafted for the Eurojust Strategic Seminar on Prevention of Conflicts of Jurisdiction](#).

Eurojust, through its National Members or the College, can contact national competent authorities and draw their attention to a possible conflict and establish consultation proceedings under its auspices (Articles 82(1)(b) and 95(1)(c) Treaty on the Functioning of the EU and Articles 6(1)(a)(ii) and (c) and 7(1)(a)(ii) and (c) Eurojust Decision). The College may in certain situations issue a non-binding opinion on which jurisdiction should prosecute (Article 7(2) Eurojust Decision). Eurojust may also assist in cases of multiple EAWs (Article 16(1) and (2) [EAW FD](#)).

National Members of Eurojust must be informed by national authorities of cases where conflicts of jurisdiction have arisen or are likely to arise (Article 13(7)(a) Eurojust Decision).

Despite the absence of any provision establishing a right of the concerned person to trigger Eurojust's intervention, the fact that national authorities must inform National Members of possible conflicts and that Eurojust may intervene, should be a sufficient legal basis for you to address a request to Eurojust, and for the relevant National Member to take action.

You can also attempt to trigger Eurojust's action indirectly by requesting your competent national authority (eg. the Executing State authority in an EAW case) to forward the case to Eurojust. The ISL may also trigger Eurojust's action directly or indirectly via her competent national authorities.

#### ***J.4 How can I raise the defence position?***

Should consultation proceedings commence, as set out above, EU law does not explicitly give you a right to intervene. You should ascertain whether your national law gives this right, i.e. to be informed of the positions of both Member States, to make representations, be present in any meetings between the authorities, and to be informed of any decisions.

Since there is no guarantee that you will be able to intervene, your application for consultation proceedings to be launched should include detailed representations on the defence perspective as to the most appropriate jurisdiction.

Can you challenge a decision on jurisdiction? At the moment the decision on waiving or maintaining jurisdiction is a matter of national law and you will only be able to challenge it in accordance with procedures established under national law.

#### ***Fundamental Rights***

If you have not had the chance to be heard or to intervene in consultation proceedings, you could try to challenge the decision of your national authority invoking Articles 47(1) and (2) CFR in conjunction with the CJ Framework Decision (the Charter only applies where there is relevant EU law in scope).

Article 47(2) provides that "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law". Since the CJ Framework Decision was enacted to prevent the infringement of the *ne bis in idem* principle, already protected by Article 54 CISA and Article 50 CFR, which is a fundamental right of the person

concerned (see Recital 3), it could be argued that the suspected or accused person should be entitled to be heard on this matter. The provisions in the CJ Framework Decision concerning consultation proceedings should therefore be interpreted in conformity with Article 47(2) CFR. A reason not to allow defence engagement could be the “protection of the investigation.” Usually when there are EAW proceedings involved, this justification should not be invoked as a reason to restrict the intervention of the defence in this process, since the person will already be aware that there are multiple investigations taking place. Where there might be compelling reasons not to involve the person due to the need for “protection of the investigation”, they must have the right to challenge the decision on the best placed jurisdiction to prosecute as soon as those grounds cease to exist and at the latest when a formal indictment against him/her has been brought.

Article 47(1) provides the right to an effective remedy. This could be invoked as a legal basis for challenging a decision on jurisdiction, in particular where the defence has not been able to exercise the right to intervene and convey its views, contrary to Article 47(2).

When requesting or challenging a decision on the choice of jurisdiction, you might also want to consider invoking procedural Charter rights (for example, if legal aid is manifestly insufficient or lacking in quality in a given Member State you could try to argue that choosing such a jurisdiction would constitute a violation of Article 47(3): “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”).

These provisions could also be invoked in order to seek to intervene in any consultation procedures under the auspices of Eurojust. It will be necessary to overcome the rule of confidentiality (Article 25 Eurojust Decision), which the arguments suggested above could be utilised for, among others. If nothing more, it is possible to at least request access to personal data stored at Eurojust, notwithstanding certain limitations, and to appeal to Eurojust’s Joint Supervisory Board if no information is given (see Article 19ff Eurojust Decision). This route could be used to determine what decision has been made about jurisdiction.

***J.5 If the conflict is not solved  
and parallel proceedings  
continue***

If the conflict is not resolved, both (or more) Member States will proceed with their cases and the decision that first becomes final will prevail, pursuant to Article 54 CISA and Article 50 CFR.

Should this happen, your role, together with the ISL and if applicable the third EU Member State lawyer, is to seek a final decision to be reached first in the Member State that you consider to be the most appropriate for your client to be prosecuted.

If coercive measures are ordered in both (or more) parallel proceedings, you should consider invoking EU law and using a transnational rights approach to challenging them, for example:

***Pre-trial detention***

According to EU law the person may only be tried once for the same facts (Article 50 CFR and Article 54 CISA). It follows from this that the person may only serve one sentence. Any detention periods served for the same facts should be accounted for in that sentence (Article 50 CFR and Article 56 CISA).

Consequently, even where there is a risk of absconding, or interfering with witnesses that might usually justify remanding the person in pre-trial detention, you could argue that it would be disproportionate pursuant to Article 6 CFR/ 5 ECHR to impose subsequent pre-trial detention periods in two or more Member States that, notwithstanding respecting national laws, are disproportionate taking into account that only one sentence for the same facts may be imposed and enforced in only one of the Member States (for example, if the person is being prosecuted in different Member States for the same facts that carry a sentence of up to one year of imprisonment and has already spent six months in prison in one Member State and six months in another Member State, it would be disproportionate to remand her in pre-trial detention, irrespective of the risk of absconding, since she has already been detained for the time equivalent to the maximum sentence that may be imposed).

***Freezing of Assets***

If there are cumulative orders freezing the assets of the person in parallel proceedings, they may be challenged on grounds of proportionality (Articles 17, 50 and 52 CFR).

## EAW Defence Checklist

### ***Check the EAW form or Schengen-Entry:***

- Does it contain all the relevant information required to be a valid document?
- Is the location of the facts in your country or in a third country?
- Ask the court for a translator if the EAW form or Schengen entry is not in your language

### ***Consult with your client and:***

- Ask the court for an interpreter if your client cannot speak your language
- Check that your client is actually the requested person identified in the EAW
- Check whether your client has been given an EAW Letter of Rights pursuant to Annex II Directive 2012/13/EU in a language she understands and, if not, ask the court to give her one
- Check that your client has not been tried for the same facts in any other country
- Check whether your client is old enough to be held criminally liable in your country
- Check whether there has been an amnesty for that crime in your country
- Check whether the facts are a crime in your country or if they are a "list offence" exempt from dual criminality
- Check whether your client is being or has been prosecuted in your country for the same facts
- If your client could be tried for the EAW facts in your country, check for statute limitation
- Check whether your client has other cases pending in your country or any other country
- If your client is a national or a resident of your country, ask him if he wants to serve his sentence there
- If your client has already been convicted, ask if he was present at his trial or informed of the trial date
- Do not advise to consent or waive the specialty principle without consulting an Issuing State Lawyer
- Ask your client if he has any concerns about returning to the Issuing State (e.g. health, family, fairness of trial, prison conditions)
- Ask your client about his work, social and family ties in your country to apply for release from detention

### ***Contact an Issuing State Lawyer to:***

- Consult the case files in the Issuing State
- Advise on the applicable law and procedure
- Check if the EAW can be withdrawn or substituted by other measures (e.g. service of papers, hearing by video-link, payment of fine) or voluntary appearance
- Obtain evidence to support client's account



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