

# **The European Arrest Warrant (EAW) and its Implementation in the Member States of the European Union**

International Research Questionnaire

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## **1. Constitutional issues**

- a. Please specify views of doctrine and judicature in your country concerning the legal character of the third pillar framework decisions (FD) issued on the basis of art. 34.2 TUE**

The general point-of-view in doctrine on the legal character of framework decision in justice and home affairs focuses on the lack of involvement by the national parliaments and the manner in which framework decisions are used beyond their original purpose of approximation of national laws. (see G. Vermeulen, 'Where do we currently stand with harmonization in Europe?' in A. Klip and H. Vander Wilt (eds.), *Harmonisation and Harmonising Measures in Criminal Law*, Royal Netherlands Academy of Science, Amsterdam, 2002, p. 7 and G. Vermeulen and T. Vander Beken, 'International/regional legal framework for combating organized crime', in B. De Ruyver, G. Vermeulen and T. Vander Beken (eds.), *Strategies of the EU and the US in Combating Transnational Organized Crime*, Antwerp-Apeldoorn, Maklu, 2002, p. 201 – 225).

The same view was presented by the applicants in the case before the Belgian Constitutional Court, in which the applicants (the non-profit making organization called 'Advocaten voor de Wereld') disputed the validity of the Framework Decision on the European Arrest Warrant. A preliminary procedure was started before the ECJ (See Case 303/05 Opinion by Advocate General delivered on 12/09/2006).

- b. Please indicate the position of the doctrine and courts in your country concerning the relation between the domestic norms being a result of implementation of framework decisions – and conventions on European cooperation in criminal matters, accepted within the EU/Council of Europe?**

International treaties or conventions need to be approved by law before they may be ratified by the Government in order to take effect. According to Article 75, 3<sup>rd</sup> para in conjunction with Article 77, under 6°, of the Constitution, the Government must therefore introduce a bill to Parliament, both Senate (first) and House of Representatives (subsequently) being equally required to give their approval.

Further, according to Article 34 of the Constitution, both domestic law and international convention law (if binding, and thus requiring preliminary approval by law and subsequent ratification and entry into force) may entrust international organisations (including the EC and the EU) to exercise certain state powers, including legislative powers.

Moreover, the decision of the *Cour de Cassation* in the case *Belgium v S.A. Fromagerie Franco-Suisse Le Ski* (Cass., 27 May 1971, *Journal des Tribunaux*, 1971,

460), made away with the dualistic regime regarding the relationship between international convention law and domestic law that had applied in Belgium until then. With the decision concerned, in which the Court ruled that a self executing treaty (*in casu* the TEC – Treaty establishing the European Community) prevails over acts adopted at the domestic level either before or after the ratification of such treaty and hence, that the courts should give effect to such treaty, monism has taken the place of the formerly applied dualistic approach. Self executing treaties or conventions since are deemed to be an integral part of the domestic legal order, and to supersede over incompatible domestic legislation. In this respect, it makes no difference whether the domestic legislation is the implementation legislation of a framework decision or another piece of domestic legislation. However, implementation legislation for framework decisions implementing EU mutual recognition obligations, is particularly precise in delineating its application as that of conventions previously applied between the EU member states in the given field, so that incompatibility between directly applicable international convention law and implementation legislation for EU framework decisions does usually not arise.

In order for a treaty to be self executing and entail direct effect in the domestic legal order, its provisions must be clear, unconditional and not subject to discretionary implementing measures. Whereas for the European Communities' legal order, the direct effect notion has longstanding tradition (since the European Court of Justice's ruling in the case *Van Gend & Loos v Nederlandse Administratie der Belastingen*, 1963, 26/62), this is not the case for the field of police and judicial cooperation in criminal matters between the Member States under Title VI of the TEU (Treaty establishing the European Union). Apart from 'third pillar' *conventions* (as meant in Article 34, 2<sup>nd</sup> para, under d) TEU), which may surely entail direct effect following adoption, ratification and entry into force and where its provisions have the required characteristics for sorting direct effect (*supra*), the legal instruments the (JHA – Justice and Home Affairs) Council may adopt in the area of police and judicial cooperation in criminal matters do not entail any direct effect (Article 34, para 2 TEU). In sum, as regards EU 'third pillar' legal instruments, only conventions may entail direct effect, though often their adoption at domestic level requires passing implementing legislation, because not fully self executing.

A single exception so far to the absence of domestic legal effect for non-convention-type 'third pillar' legal instruments, is reflected in Article 12*bis* of the Preliminary Title to the Code of Criminal Procedure (following changes brought by Act of December 22<sup>nd</sup>, 2003, *Moniteur belge*, December 31<sup>st</sup>, 2003). The revised Article attributes direct effect to provisions of EU secondary legislation (term encompassing *inter alia* framework decisions) to the extent that these establish obligations for the Member States to prescribe extraterritorial jurisdiction. The above rule is the only one where equal effect is attributed to international convention-type legal instruments and framework decisions (even without the latter having been expressly implemented). The provision serves as a type of default *a priori* implementation international obligations regarding 'jurisdiction to prescribe', irrespective of the nature of the legal instrument in which the obligation can be found.

- c. **Is the doctrine and judicature in your country opting for “pro-european” (“European – friendly”), interpretation of domestic law, including constitutional law? Is it also applied as regards third pillar instruments?**

The Belgian doctrine and judicature remains European-friendly in its interpretation of domestic law, including constitutional law.

**d. What is the influence of ECJ judicial decisions on the implementation of domestic law (e.g. Pupino case)?**

The case Gözütok and Brügge (C-187/01 and C-385/01) before the ECJ lead to the inclusion in the Belgian implementation law on the EAW of the compulsory refusal of the execution of a EAW when for the same facts another final decision has been made which precludes the subsequent commencing of prosecution, for example a settlement or an alternative administrative procedure.

With regard to the Pupino-case, the only ‘influence’ that can be detected is a reference to the Pupino-case in the aforementioned opinion of the Advocate General of the ECJ in the preliminary ruling from the Belgian Constitutional Court on the validity of the FD on the EAW.

**e. Is interpretation of domestic law implementing framework decisions in your country possible solely by referring to the wording or inhalt of the framework decisions? Is it possible also when a framework decision is not yet implemented into the domestic legal order?**

Implementation laws have, so far, never just referred to the Framework Decision but have always been elaborated laws, complemented with circulars concerning the application of the law in practice.

**f. To what scope, if at all, is it possible to ask EJC preliminary questions as refers to the interpretation of framework decisions (art. 35 TUE). Can such question be asked by constitutional court (or equivalent)?**

All national courts can start a preliminary procedure with the ECJ in the case of the interpretation of EU legislation. In the case of Framework Decisions, this happened once in the aforementioned preliminary ruling started by the Belgian Constitutional Court regarding the Framework Decision on the European Arrest Warrant.

**g. What is the technical form of implementation of the framework decision on EAW in your country (e.g. separate law, a part of the CCP, separate from extradition provisions, other ways)? When exactly did the law implementing the framework decision enter into force?**

Framework Decisions are implemented into Belgian legislation by means of a separate law, supplemented with a circular concerning the application of the law in practice.

The law implementing the European Arrest Warrant was adopted on 19/12/2003 (published in the ‘Belgisch Staatsblad’, which is the official publication for legislation on 22/12/2003) and entered into force on 01/01/2004.

**h. Was the implementation the framework decision and the framework decision itself subject of proceedings of the constitutional court in your country?**

Yes, the non-profit-making association called ‘Advocaten voor de wereld’ started proceedings against the Council of Ministers before the Belgian Constitutional Court

concerning the validity of the Framework Decision on the European Arrest Warrant. Consequently, the Constitutional Court submitted a preliminary question to the ECJ in the aforementioned case.

**i. Is the surrender procedure according to the EAW understood as a form of extradition or is it treated as a separate legal instrument?**

Treated as a separate legal instrument and fully disconnected from extradition law. All Belgian legislation (laws and circulars) concerning extradition procedures between EU member states have been substituted by the implementation law and circular on the EAW due to the significant difference between extradition and surrender based on the EAW.

## **2. The implementation of the FD on the EAW in the domestic legal order**

**a. Are there differences between the way of implementation of the EAW in your country and the “pattern” provided by the framework decision? If so, do the differences concern:**

**- the negative premises (compulsorily and optional) of surrender?**

The optional ground for refusal in art. 4, 4° of the Framework Decision (criminal prosecution or punishment of the requested person is statute-barred) was changed into a compulsory ground for refusal in the Belgian law.

**- the catalogue of “crimes” listed in art. 2.2. FD. Are all those “crimes” criminalised in your country. Please specify which are not criminalized?**

All crimes are criminalized, however an exception is included in the Belgian law on the EAW regarding the acts of abortion and euthanasia which will not be considered as ‘murder’ in the sense of art. 2.2 of the Framework Decision.

**- the period of time for execution of the EAW?**

In the case of a procedure in which the arrested person consents to his surrender, the Belgian legislator has included the possibility for the arrested person to revoke his consent. Therefore, the period between the date of consent and the date of the revocation is not taken into consideration in establishing the time limits.

In the case of a procedure in which the arrested person does not consent to his surrender, there is no difference in time for executing the EAW with the Belgian law.

**- other issues. Please specify.**

Regarding taxes and in the case of customs and exchange, the execution of the EAW can not be refused for the reason that the Belgian law does not provide in the same type of taxes or the same legislation concerning taxes or customs and exchange as the issuing state.

- b. Can lack of dual criminality in cases other than mentioned in art. 2.2. FD constitute optional reason to refuse the execution of the EAW (to surrender)?

No.

- c. **Did your country make a proper notification to the Secretary of the CUE, concerning the waiver of the specialty rule (according to the art. 27.1 FD)?**

No, the specialist rule is applicable according to art. 27 -28 of the FD.

- d. **Did your country appoint a central authority (art. 7 FD). If so, which one? What is the scope and tasks it is supposed to perform and its practical meaning?**

Federal Public Administration Justice  
Directorate-general Legislation and Fundamental Rights and Freedoms  
Central authority for mutual legal assistance in criminal matters  
Waterloolaan 115  
B - 1000 Brussels

The Federal Public Service Justice will receive information on every procedure concerning the execution or issue of an EAW. This authority will use the received information to produce statistics on the implementation of the Belgian law on the EAW.

### **3. The principle *ne bis in idem* and EAW**

- a. **What is the meaning of the identity of an act in the context of the art. 3 FD (ground for refusal of the execution of EAW) – is it its description or legal qualification as made by the domestic court?**

The Belgian law uses the criterion of the facts, not the offences.

- b. **Is the valid judgement/conviction/discontinuance of the procedure in your country a mandatory ground for non – execution of the EAW?**

Yes, the execution of the EAW is refused in the case a final decision has been delivered against the arrested person regarding the same facts, on the condition that in the case of a conviction, the sentence has been served, is served at the present time or can no longer be served by virtue of the legislation of the member state in which the judgment was pronounced, or in the case a final decision regarding the same facts against the arrested person has been delivered that precludes the subsequent commencing of prosecution.

- c. **Is the valid judgement/conviction/discontinuance of the procedure in other UE Member State the same ground for refusal as in “b”?**

Yes.

**d. What is the meaning and/or interpretation of “the finally disposal of the trial” in art. 54 SDU in your country?**

- **Is such a disposal the valid decision on discontinuance of the criminal process because its legal inadmissibility?**

Yes. Prosecution is no longer possible when a final decision has been delivered against the arrested person regarding the same facts, on the condition that in the case of a conviction, the sentence has been served, is served at the present time or can no longer be served by virtue of the legislation of the member state in which the judgment was pronounced.

- **Is such a disposal the valid decision on discontinuance of the criminal process because lack of advisability of prosecution?**

Although the opportunity principle governs the initiating of criminal proceedings in Belgium, the consequence of the *ne bis in idem* principle is the inadmissibility of a prosecution for the same facts, when a final decision has been delivered against the person concerned.

**e. Was the problem of the European application of the principle *ne bis in idem* a subject of judicial interpretation in your country (e.g. by the Supreme Court, Constitutional Court)?**

No.

#### **4. The issuing of the EAW**

**a. Which judicial authority in your country decides on the issuing of the EAW?**

In the case of surrender in order to prosecute a person, the examining magistrate (‘onderzoeksrechter’) issues a EAW.

In the case of surrender in order to execute a criminal sentence or a measure, the public prosecutor (‘procureur des Konings’) has the competence to issue a EAW.

**b. Is, according to the domestic law, the decision on issuing of the EAW made on a motion (on request) of a national organ or ex officio. If the former, on which organ’s motion/request?**

No.

**c. If a court is entitled to issue the EAW – of what rank and panel?**

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**d. Do the parties or other participants to the process have the right or duty to take part in the session?**

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**e. Is evidence procedure made in the proceedings on the issuing of the EAW?**

No.

**f. Who (party, other participant), if anyone, is entitled to appeal against the decision on the issuing (accordingly: rejecting issuing) of the EAW? Which judicial authority reviews these decisions?**

In the case of a judgment rendered in absentia against the person concerned and this person has not been subpoenaed or in another manner informed of the date and location of the hearing during which the judgment was pronounced, the EAW should include a provision that the person concerned can appeal against this judgment in absentia.

**g. Can the EAW be issued retroactively? (as regards to crimes allegedly committed before the implementation of the EAW)?**

The Belgian implementation law (19/12/2003) is only applicable to the arrest and surrender of persons from 1/1/2004. The requests for surrender dated prior to 1/1/2004 are regulated by the old legislation regarding extradition.

In the relations between Belgium and the competent French authorities, the Belgian implementation law is applicable for criminal acts committed after 1/11/1993.

In the relations between Belgium and the competent Italian and Austrian authorities, the Belgian implementation law is applicable for criminal acts committed after 7/8/2002.

In the case a person is arrested before 1/1/2004 on the basis of an arrest warrant with a view to extradition and the request for his extradition has not been sent to the Belgian authorities before 31/12/2003, the original arrest warrant remains to be valid and this person's extradition will be regulated by the old legislation regarding extradition.

**h. How many EAWs were issued in your country until the day mentioned above in point 1g of the questionnaire?**

According to the Central Authority (mentioned under 2.d), which should be notified of all incoming and outgoing EAWs (but clearly does not, surrender law having become a matter of the judicial authorities, an important deal whereof is believed not to systematically do the requested notification to the Central Authority, the total of EAWs issued and received between 1 January 2004 and 21 June 2006 was 841. No split figures for issued and received EAWs are available for this entire period. For 2005, however, official figures made available by the Central Authority for the calendar year 2005, show a volume of 212 EAWs having been issued. As indicated before, the dark number (both in issued and received EAWs, is believed to be important).

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**i. Which "crimes" mentioned in art. 2.2. of the FD on EAW were subject to issuing the EAW in your country? If possible, please specify exact numbers?**

No data available or Central Authority refused access.

- j. Were the EAW's issued in your country subject to crimes other than "crimes" mentioned in art. 2.2. FD. If so, in how many cases?**

No data available or Central Authority refused access.

- k. How many such request were rejected by the deciding judicial authority? (applies only if EAW's are issued on request)**

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- l. Which information channels are used before/along with the issuing of the EAW in your country (SIS, EJN, Europol, other means)? Is EAW issued only if the exact place of residence of the requested person is known? If not, what is the procedure if the place of residence of the requested person is not known?**

Sending through SIS is used as a first channel and Interpol is mentioned as a subsidiary channel (due to the fact that the secured telecommunications system of the European Judicial Network is not operational yet). In last instance, every trustworthy system that allows to obtain a printed trail, on the condition that the executing state can verify the authenticity of the warrant.

In the case the place of residence of the person is known, the EAW is addressed directly to the competent authority. In the case the place of residence of the person is not know, the necessary research can be done through the contact persons of the European Judicial Network in order to obtain this information of the executing state.

- m. How many EAW's issued by the judicial authority in your country were executed in other Member States? In how many cases was the requested person effectively surrendered?**

No data available or Central Authority refused access.

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- n. In how many cases did the executing of the EAW issued by judicial authority in your country refuse? What were the grounds for refusal?**

No data available or Central Authority refused access.

## **5. Executing of the European Arrest Warrant**

- a. Which judicial authority in your country decides on executing of the EAW?**

The Council Chamber ('raadkamer') decides on the execution of a EAW.

- b. Is the decision on execution of the EAW performed ex officio or on request of other domestic judicial authority. If yes – what is that judicial authority?**

The Council Chamber makes the decision after hearing the examining magistrate ('onderzoeksrechter'), the prosecutor and the arrested person.

- c. Does your domestic law envisage a period in which the decision on the execution of the EAW should be made? If so, what is that period of time?**

The motivated decision should be taken within 15 days (starting from the arrest of the person concerned).

- d. Can the judicial authority deciding upon the execution of the EAW verify the information provided in the EAW? Can it perform evidence?**

Before the decision by the Council Chamber, the examining magistrate hears the arrested person and can – if necessary – request additional information in order to report to the Council Chamber.

- e. How, if at all, does your domestic law regulate the solution of the concurrent EAWs?**

In the case of several EAW's from several member states, the implementation law states that the competent prosecutor should inform the federal prosecutor, who requests the Council Chamber to decide (within 15 days) which EAW will be executed. The federal prosecutor advises the Council Chamber on this decision and the Chamber can take all circumstances into consideration, especially the seriousness of the committed criminal acts, the place where the criminal acts were committed, the information which is in the several EAW's and the fact whether the EAW is issued with a view to prosecute the person or execute a sentence or measure. The federal prosecutor can request advise from Eurojust.

- f. Does the domestic law in your country envisage the collision of an EAW and extradition procedure? If so, please clarify.**

In this case, the federal prosecutor and the government are informed by the competent prosecutor. Within 30 days (starting from the moment of notification by the prosecutor), the government decides upon advise by the federal prosecutor and the remarks made by the competent examining magistrate and taking into consideration all circumstances (especially these mentioned before in e.) and the applicable conventions, whether preference is given to the EAW or the extradition procedure.

In the case the government decides to give preference to the EAW and the competent judicial authority decides not to execute the EAW, the government is informed by the prosecutor in order to decide upon the execution of the extradition procedure.

- g. Is the EAW issued in other Member State of the EU a sole legal basis for the deprivation of liberty for the sake of procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?**

The examining magistrate hears the person within 24 hours of his arrest and decides upon his further arrest or (conditional or not) release.

**h. What is the maximum period for the arrest of the requested person before his or her effective surrender?**

At the latest 10 days after the decision on the execution of the EAW, the arrested person should be surrendered. In cases of ‘force majeure’, the prosecutor should set a new date for the surrender with the competent authorities of the issuing state within 10 days.

In the case of serious humanitarian reasons, the surrender can be temporarily suspended. The person is surrendered when these reasons no longer exist. The prosecutor informs the competent authorities of the issuing state when the reasons cease to exist and a new date for the surrender is set within 10 days of the notification.

**i. What rank – and panel – of the court decides on surrender (the execution of the EAW)?**

The Council Chamber is a chamber of one judge with the Court of First Instance.

**j. Do parties or other participants of the proceedings have the right or duty to take part in the session?**

The Council Chamber decides upon a report by the examining magistrate and the competent prosecutor and after hearing the arrested person.

**k. Can the decision on surrender be complained. Who has the right to complain? Which judicial authority reviews this decision?**

The arrested person and the prosecutor can appeal to the decision of the Council Chamber within 24 hours (starting from the moment the decision was taken for the prosecutor and from the moment of notification for the arrested person). Appeals to the decision of the Council Chamber are reviewed by the Court of Indictment (‘Kamer van Inbeschuldigingstelling’).

**l. Does the person in question have the right to:**

- **the assistance by the defense lawyer?**

Yes.

- **the right to interpreter?**

Yes.

**m. Does the domestic law in your country envisage any barriers as refers to the surrender of own nationals?**

No.

**n. How many EAWs issued by other MS was executed by your country from the date mentioned in 1g of the questionnaire. In how many cases was the person effectively surrendered?**

According to the Central Authority (mentioned under 2.d), which should be notified of all incoming and outgoing EAWs (but clearly does not, surrender law having become a matter of the judicial authorities, an important deal whereof is believed not to systematically do the requested notification to the Central Authority, the total of EAWs issued and received between 1 January 2004 and 21 June 2006 was 841. No split figures for issued and received EAWs are available for this entire period. For 2005, however, official figures made available by the Central Authority for the calendar year 2005, show a volume of 185 EAWs having been received (and therefore mostly executed). As indicated, the dark number (both in issued and received EAWs, is believed to be important).

- o. In how many cases did judicial authority in your country refuse to execute the EAW. What were the grounds for non – execution?**

No data available or Central Authority refused access.

- p. For what “crimes” listed in art. 2.2 of the FD were EAWs executed in your country. If possible, please specify by providing exact numbers.**

No data available or Central Authority refused access.

- q. Was the EAW executed for crimes other than listed in the above mentioned art. 2.2. FD? If so, in how many cases?**

No data available or Central Authority refused access.

- r. Were there cases in your country, in which courts rejected the executing of the EAW because of possible violation of guarantees of the requested person in the country of issuing of the EAW (esp. human rights)?**

No.

No data available or Central Authority refused access.

- s. In how many cases was the decision on the execution of the EAW subject of the judicial control? What were the results of such control? In how many cases was the decision on the execution of the EAW revoked?**

In the case of Moreno-Garcia, the decision on the execution of the EAW was appealed to and revoked twice. The third and final decision of the Chamber of Indictment decided that the execution of the EAW was impossible due to the criminal prosecution being statute-barred according to the Belgian law while the acts fall within the jurisdiction of the Belgian authorities.

- t. What is the average period of time between the execution of the EAW and the effective surrender of the requested person?**

No data available or Central Authority refused access.

## **6. Others**

- a. Are there any special difficulties in putting the EAW into practice, resulting from particularities of legal system in your country (esp. common law countries)?**

No.