The European Arrest Warrant for Advanced Users

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Nico Keijzer and Elies van Sliedregt (eds.), *The European Arrest Warrant in Practice* (The Hague, T.M.C. Asser Press 2009), 428 p., ISBN 9789067042932

The idea of developing a framework for European criminal law has been, and still is, one of the most ambitious projects of European integration. With the abolition of the internal borders, compensating measures were necessary to tackle transnational crime. One of the most successful measures adopted by the European Union in this field, is the European Arrest Warrant.[1]

The European Arrest Warrant is 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. Judges in the executing member states need to recognize this warrant without any further formality being required and will forthwith take the necessary measures for its execution. The introduction of the European Arrest Warrant has meant a revolution in the practice of interstate cooperation in criminal matters. From extradition – long (political) procedures – cooperation has evolved to *surrender* – swift (judicial) procedures – based on the principle of mutual recognition. The changes to the old extradition regime are mostly a result of the introduction of this mutual recognition principle, which was adopted at the Tampere European Council in 1999 as the cornerstone of judicial cooperation in criminal matters. Mutual recognition means that once a judicial decision has been taken in one member state, that measure – in so far as it has extranational implications – is *automatically accepted* in *all other member states* and has the *same* or at least *similar effects* there. This means: less (or preferably no) grounds for refusal, no assessment of the legality of the actions of the requesting State, judicial procedures, strict time limits etc.

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[1] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states, *OJ* L 190, 18 July 2002, 1-20.

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After seven years of practical experience with the European Arrest Warrant, it was high time for academic reflection on the different problems with the instrument that have arisen during this period.[2] Nico Keijzer and Elies van Sliedregt are the editors of this voluminous, 452 pages long, book which is published as a follow up to the *Handbook on the European Arrest Warrant*. The latter book was published shortly after the adoption of the Framework Decision on the European Arrest Warrant and contains several contributions on the different aspects of this, then new, legislative document.[3]

Topical approach

The European Arrest Warrant in Practice follows the same approach as its predecessor: the book contains twenty chapters on different topics that concern the practical application of the European Arrest Warrant. Most of them focus on different sore points within the 'system' of the European arrest warrant (EAW): 'The content of a European Arrest Warrant (Jaan Ginter), 'The consent procedure' (Mariana Sotto Maior), 'Detention' (Adam Lazowski & Susan Nash), 'The Dual Criminality Requirement' (Elies van Sliedregt), 'Locus Delicti Exceptions' (Nico Keijzer), 'The EAW in practice and Ne Bis in Idem' (Sylvie Cimamonti), 'Statutory Limitations' (Guy Stessens), 'Human Rights as a Barrier to Surrender' (Mark Mackarel), 'EAW – Immunities and Amnesties' (Felicity Williams), 'Humanitarian concerns within the EAW system' (Michele Panzavolta), 'The principle of proportionality' (Mariana Sotto Maior), 'Denial of guilt' & 'Abuse of the European Arrest Warrant system' (both chapters written by Katja Sugman Stubbs & Primoz Gorkic), 'Speciality rule' (Otto Lagodny & Christian Rosbaud) and 'The handing over of property according to article 29 of the EAW Framework Decision' (Sabine Gless & Daniel Schaffner).

There is only one chapter on the application of the EAW in an individual member state, being the UK (written by John R.W.D. Jones). Three chapters look also beyond the EAW system. One discusses 'Prisoner transfer within the European Union & the European Enforcement Order' (written by Michael Plachta), another one discusses 'Extradition between Nordic countries and the new Nordic Arrest Warrant' (Asbjorn Strandbakken). The last chapter, written by Leslie W. Abramson, even leaves European territory, as it discusses 'Extradition in the United States'. These chapters are meant to broaden the horizons of the readers,

[2] The European Commission also ordered a fourth round of mutual evaluations on the practical application of the European Arrest Warrant and corresponding surrender procedures between member states. The final report was drawn up in May 2009 (*see* Council doc. 8302/4/09 REV 4, final report on the fourth round of mutual evaluations, 28 May 2009).

[3] R. Blextoon and W. Van Ballegooij, *Handbook on the European Arrest Warrant* (2005) p. 283.

as they serve as examples of alternative but also effective extradition or surrender practices in the world.

Do not expect to find one comprehensive chapter on the practical application of the European Arrest Warrant in the whole of Europe. The editors of this book have chosen a topical approach to tackle the subject of the practical application of the European Arrest Warrant during the past 7 years. There is thus no comprehensive overview or evaluation of this practice, only evaluations on certain topics in the different chapters. This is a rather logical choice: it is namely impossible to write a detailed chapter of 30 pages on the EAW practice of 27 member states, as there apparently are so many sore points in the system. The alternative to this topical approach is letting the contributors write national reports on the application of the EAW in their system, but this would not lead to many new insights. This exercise has already been done by the European institutions and other authors.[4]

The most interesting thing this book has to offer is indeed the topical, and thus horizontal, approach. On different elements of the EAW system, the book investigates thoroughly the problems that have occurred and the solutions that have (or could have) been used in the member states. It is this topical approach that makes the book interesting for practitioners, as the book can serve as a very good reference work for people that are confronted regularly with the EAW. The comparison between the practice of 27 member states can sometimes have a clarifying effect when one confronted with a specific problem. The fact that in almost every chapter the attitude of all of the member states towards one problem is discussed makes this book not only very informative, but also inspiring.

Most of the contributors to this book have an academic background, sometimes combined with practical experience as ministry deputies, lawyers or (extradition) judges. They are, in other words, very well placed to evaluate the practical application of the European Arrest Warrant in a thorough way and this can be seen throughout the whole book. All of the chapters are well written and the argumentations are clear and thoroughly structured. The authors are often critical and not afraid to discuss politically difficult problems in an open way.

European constitutions under fire

As it is impossible to discuss all of the twenty chapters, I will focus on four chapters that represent the rest of the book in a good way: its topical nature, its thorough way of discussing the different sore points in the EAW system and the fact that the authors are not afraid to carry out a (very) critical analysis. Also, these four

[4] Council doc. 8302/4/09 REV 4, final report on the fourth round of mutual evaluations, 28 May 2009; G. Vernimmen-Van Tiggelen et al., *The Future of Mutual Recognition in Criminal Matters in the European Union* (2009) p. 608.

chapters concern topics that have led to constitutional concerns in the majority of the member states. The Framework Decision on the European Arrest Warrant has indeed transformed extradition into surrender on the basis of the principle of mutual recognition, and the changes brought by the introduction of this principle can raise serious constitutional conflicts.

The first chapter that I will discuss concerns the surrender of own-country nationals, the second the compatibility of the Framework Decision with human rights, the third the place of humanitarian considerations in the Framework Decision and the last the issue of proportionate issuing of European Arrest Warrants.

In the fifth chapter, *Vincent Glerum* and *Klaas Rozemond* discuss the 'Surrender of Nationals'. Nationality has been and still is traditionally a very much used ground for refusal for extradition: countries can refuse to extradite their own nationals to third countries. Within the EU, however, this point of view was no longer workable. As the European Arrest Warrant is based on the principle of mutual recognition, a ground for refusal based on nationality is no longer opportune. Mutual recognition means, in practice, fluent cooperation in criminal matters with preferably (but this was politically not accepted) no grounds for refusal for the executing states. The Framework Decision on the European Arrest Warrant no longer foresees in the possibility to actually refuse the surrender on the sole basis of nationality, but is still foresees in several 'back-up guarantees' for nationals of the executing state. It is, for example, possible for this state to demand the return of its national after he or she had his trial in the issuing country. The person will then serve his sentence in its own country. When surrender is requested only for the execution of an already pronounced sentence, the executing state can ask the issuing state to accept that the already convicted person will serve his sentence in his own (and thus in the executing) state. The surrender itself will be refused then.

Several European constitutional courts have already examined this evolution in their case-law. The offered guarantees are sufficient according to these courts. The Framework Decision is thus compatible with their constitutions.

The authors first give an overview of the status of the nationality exception in extradition law. They also discuss the innovations made by the Framework Decision on the EAW in this area and look more closely into the case-law of the different constitutional courts. The implementation of these guarantees (as they were foreseen in the Framework Decision) has not been identical in all of the 27 member states. The discussion on the problems that will follow from these differences between legislations, together with suggestions for solutions, form the main part of the contribution of these two authors. The main problems do indeed follow from the discrepancies existing between the Framework Decision and the national legislations. One of the biggest problems is uniform interpretation: the

Framework Decision makes it, for example, *possible* for the executing states to ask for a return guarantee, but some member states made this an *obligation* for their extradition judges. The member states have not, however, taken into account the *ratio legis* of the optional nature of the return guarantee: the judge should investigate where the person concerned is most likely to re-integrate in the best way. Making his or her return obligatory ignores this balancing exercise and the rationale of the return guarantee. The authors of this chapter feel their opinion strengthened by the ECJ judgement in the Kozlowski case, where the Luxembourg judges indeed decided that the transfer of the sentence to the executing state, in the case of an EAW issued for the execution of a sentence, is optional, not mandatory.

Another problem that arises today concerns the practical consequences of the execution of a sentence pronounced in another member state: the Framework Decision has left this question of legal basis open and leaves it to the member states to determine the practical aspects of the transfer of sentences in their national laws or on the basis of old Council of Europe treaties. In the future, this problem will no longer exist, according to the authors, as the EU Council has adopted a new Framework Decision on the enforcement of custodial sentences in 2008.

This chapter is thus a rather practical one. In the seven years of practice that have passed, the surrender of own country nationals has given rise to a lot of case-law, as member states are often confronted with EAW issued for the surrender of their citizens. The authors are highly critical of the national laws that implemented the Framework Decision, because they have not respected the aims of this legislative document.

Mark Mackarel has written a very thorough and critical chapter on 'Human Rights as a Barrier to Surrender'.

Before the European Arrest Warrant, the relationship between extradition and human rights was regulated in the case-law of the European Court of Human Rights (ECtHR). According to this case-law of the ECtHR, human rights can indeed be a barrier to extradition. The Framework Decision, however, does not foresee in an express ground for refusal based on human rights.[5] The first comment Mackarel makes concerns the ECtHR case-law on extradition: does this case-law still stand, after the adoption of the EAW and the principle of mutual recognition? According to the author, this probably is the case, although academic comments remain divided in this matter.

[5] According to Art. 1(3) of the Framework Decision 'this Framework Decision 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'. This is however, according to the Commission and the Council, not a ground for refusal.

Second, Mackarel examines the critique regarding the absence of a clear ground for refusal based on human rights. The Union is capable of drawing up different framework decisions on cooperation between judicial authorities in criminal matters, but at the same time reaching a consensus on the content of a common legislative document on procedural rights for suspects seems impossible. Efforts made by the Union to tackle this problem of procedural rights in the EU appear to be inadequate.[6]

This can be seen very clearly when looking at the implementation of the Framework Decision by the member states: some of them have incorporated in their national laws, contrary to the Framework Decision on the EAW, a ground for refusal based on human rights. The content of these clauses differ from state to state. It thus seems impossible for the member states to adopt one common attitude towards human rights in the framework of surrender. To illustrate this *status quo* in Europe, Mackarel also discusses some national judicial decisions in which human rights have served effectively as a barrier to surrender, for example in the UK, Ireland and The Netherlands. The refusal of the surrender, based on human rights arguments, was not foreseen in the Framework Decision, and the introduction of grounds for refusal by some member states thus creates legal uncertainty in the EU. Whether or not you will be able to build a legal reasoning on the basis of human rights depends on the state where you were arrested. This is clearly illustrated by the case-law of the different national courts.

The last question Mackarel asks himself in the evaluation is one of necessity. Is it actually necessary to have a human rights clause in the Framework Decision? Procedural rights for the defence differ widely between the member states and it is possible that one standard, applied in a state, is not in conformity with the human rights standards of another member state. In principle, when applying the principle of mutual recognition in its entirety, this cannot affect the surrender. However, the question remains: are states willing to give up their own standards? The implementation of the Framework Decision clearly shows that this is not the case. So far, no widespread or systematic breaches of human rights have been identified in the Union, so the question of human rights has only been raised in a small number of cases. But if a widespread breach of human rights in one member state becomes the case in the future, a real ground for refusal based on these rights will be necessary, according to Mackarel. This future is now probably nearer than Mackarel thought when writing his chapter: the ECtHR has decided in October 2009 that the prison conditions in Polish cells are contrary to Article

[6] Recently, new initiatives for a step by step approach (only one right in a legislative document in stead of a comprehensive document) have been taken by the member states.

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3 ECHR.[7] Will this affect surrenders to Poland in the near future? This will only be the case in countries where a ground for refusal based on human rights is foreseen. Today, legal uncertainty concerning your human rights is thus a fact. One common viewpoint of the Union is thus necessary.

Michele Panzavolta discusses in his chapter on 'Humanitarian concerns within the EAW system' several humanitarian concerns that can play a role within the system of the European Arrest Warrant.

The problem of criminal responsibility of minors, for example, a ground for refusal in the Framework Decision, is explained by him from a comparative perspective. He discusses all of the 27 national legislations on this point and draws several conclusions from the differing legislations for the European Arrest Warrant. In some member states, for example, the question of criminal responsibility can only be answered by examining the effective maturity of the minor. For this, enough time is needed, as the investigation needs to be carried out with an appropriate amount of legal scrutiny. The short time limits foreseen in the Framework Decision do not leave the time for the member states to carry out this investigation properly. The carrying out of this research also makes it necessary for the executing state to ascertain certain facts on the live and attitude of the minor. This, however, runs contrary to the principle of mutual recognition, as the executing state will need to assess the merits of the case. Also, in some member states, the threshold for criminal liability depends on the commission of certain crimes. In practice, this means a double criminality check which is, again according the Framework Decision, not acceptable when applying the principle of mutual recognition.

These discrepancies are, according to Panzavolta, the result of incoherencies in the Framework Decision itself: the ground for refusal based on the age of criminal responsibility is not in accordance with the principle of mutual recognition, which again has results for the practical application of the European Arrest Warrant. However, because of humanitarian concerns, it was necessary to have a ground for refusal based on the age of criminal responsibility in the Framework Decision. He thus admits that it is not easy to find a good balance between the principle of mutual recognition and humanitarian arguments.

Panzavolta puts forward the Italian EAW legislation as an example of a humanitarian approach to the criminal responsibility of minors in the system of the European Arrest Warrant. The Italian law bars surrender when domestic legislation would have deemed the person to be not liable at the time of the commission of the offence because of his age (in Italy, 14 years is the minimum age of criminal responsibility). Italian judges cannot surrender a requested person between 14 and

[7] *Orchowski* v. *Polen* (No. 17885/04, 22 Oct. 2009) and *Norbert Sikorski* v. *Polen* (No. 17599/05, 22 Oct. 2009). *See also* T. Christou and K. Weis, ' The European Arrest Warrant and Fundamental Rights: An Opportunity for Clarity', 1 *NJECL* (2010) p. 1, 31-43.

18 years when the surrender is asked for a crime punishable with a sentence of less than 9 years imprisonment, when the detention consequent to surrender would harm the ongoing educative development of the person or when the legislation of the requesting state does not provide for distinct prison systems between adults and young offenders. These grounds for refusal are clearly based on humanitarian grounds. They do not ask for a careful scrutiny on the side of the judicial authority that has to execute the EAW: the issuing state can already send the necessary information together with the EAW. Applying these provisions, however, still makes it necessary for the executing state to look into the legislation of the issuing state. It thus runs contrary to the principle of mutual trust and mutual recognition. The discrepancies still remain, because of the conflict between mutual recognition and grounds for refusal based on humanitarian concerns.

Panzavolta also discusses other humanitarian concerns. For example, offences punishable with a life sentences are the subject of a ground for conditional surrender in the Framework Decision, as some member states (Spain, Portugal and Slovenia) do not foresee in such sentences and find them to be very harsh treatments. Together with the ECtHR, they state that there must be a right to reassess the life sentence. Surrender is thus only possible when the law of the issuing state has provisions for a review of the penalty on request – or at the latest after twenty years – or for the application of measures of clemency. Only half of the member states have implemented this provision of the Framework Decision in their national laws and the ones that have implemented this ground for conditional surrender have also done this in slightly different ways. These changes, however, all tend to reduce the intensity of the guarantee (amongst others by not foreseeing in the possibility of clemency) and this does not run contrary to the aim of the Framework Decision, as surrender will be more likely to happen. However, and this is not mentioned by Panzavolta, these differing implementations are not a positive evolution for the legal certainty in Europe. Again, your defence options vary from state to state.

He does mention that the legislation of some member states (for example Poland, Spain, Lithuania and Estonia) does not foresee in a review of the penalty according to the time limits mentioned in the Framework Decision or in clemency. It is thus possible that in the future, this ground for refusal will be actually used by national courts.

The general approach of the Framework Decision when it comes to humanitarian concerns is also carefully scrutinised by Panzavolta: the Framework Decision foresees in the postponement of the execution of the EAW when this would manifestly endanger the requested person's life or health because of his or her age or state of health or because of other peremptory humanitarian reasons. Again,

member states have implemented this provision in different ways. Some member states have, for example, not filled in the notion of 'humanitarian concerns', leaving the exact content of it open for interpretation; others have, by stating that this ground concerns only risk to life and health. This will have results for the concrete grounds on which the execution of the EAW can be postponed. One can also ask oneself if the postponement of the execution is in some cases a *de facto* refusal of the EAW. In some cases, for example with terminally ill people, this will actually mean no surrender.

Also, some member states have introduced their own grounds for refusal based on humanitarian reasons. In Great Britain, for example, the court can refuse to execute the EAW when the surrender might be unjust or oppressive due to the passage of time. This is heavily criticised, firstly because it is an invention of the British legislator and has no corresponding provision in the Framework Decision, secondly because it runs contrary to the principle of mutual recognition. In Italy, the surrender of a pregnant woman or the mother of a child younger than 3 years old is to be refused. Panzavolta expects problems with this clause in the future, as it will harm criminal procedures and is again, contrary to the principle of mutual recognition.

Should there be bars to surrender based on humanitarian concerns? The principle of mutual recognition is in principle not compatible with this suggestion. Here, Panzavolta refers to the problem of human rights, which can be compared with the issue of humanitarian arguments as a bar to surrender. He recognizes the entanglement of both subjects, as they are closely linked with each other. However, he finds a ground for refusal based on humanitarian concerns easier to accept then the creation of a ground for refusal on the basis of human rights, as the latter would completely run contrary to the presumption underlying the principle of mutual recognition, being that every member state respects human rights. Humanitarian concerns do not concern state practices, they concern issues that are bound to a specific case. There is thus no assessment of the legal system of other member states. He concludes by stating that until now, the efficiency of the European Arrest Warrant has not been endangered by the existing (national) grounds for refusal based on humanitarian concerns. He believes that creating more uniformity between the member states is crucial and that the refusal of a EAW on the basis of humanitarian concerns needs to be possible, on the condition that the executing state does not need to carry out an evaluation of the merits of the case.

Chapter 12 on 'The principle of proportionality', written by *Mariana Sotto Maior*, can serve as a fourth example of the tension between national constitutional values and the European Arrest Warrant. In the past seven years of practice, a 'proportionality problem' has arisen in the EU. Some member states issue Eu-

ropean Arrest Warrants for petty crimes, which is not appreciated by some other member states. A requested State may not assess the legality of the actions of the requesting State according to its own concept of legality and it does not have the right to assess the importance of a particular case in terms of its own approach to specific forms of crime. The principle of proportionality, a constitutional principle in the majority of the member states, can thus not be touched upon by the executing authorities. The executing state thus has to surrender the person to the issuing state. This is often not in proportion with the costs of the surrender and it breaches the fundamental rights of the surrendered person in a disproportionate way.

First, the author gives a very good overview of the problems that have arisen all around Europe regarding disproportionate European Arrest Warrants. Regarding the possible solutions, she includes the discussions going on at the moment at the level of the EU and at the level of the national states in her text: on the level of the Council, member states are namely discussing the introduction of issuing guidelines on the subject of proportionality. Some member states, however, already apply a proportionality check when issuing a EAW, but the content of these checks differ from state to state. This has consequences regarding the number of European Arrest Warrants issued in Europe: some member states will issue less European Arrest Warrants, as their proportionality standards are higher, other will issue more. Belgium for example only issues EAW for the enforcement of sentences when a threshold of two years is exceeded. In Lithuania no proportionality test applies. On the contrary, Lithuanian authorities are obliged to undertake all the steps necessary to prosecute the offender. Logically, Lithuania will issue more European Arrest Warrants then Belgium. Again, legal uncertainty becomes the rule, depending on the state that issues the European Arrest Warrant against you.

Notwithstanding her promise in the introduction, the alternative solutions for the issuing of disproportionate European Arrest Warrant are only mentioned in a very brief way in the conclusion. This is regrettable, as alternatives like videoconferencing can indeed provide a solution for these cases of petty crimes.

This chapter derives its added value from the thorough and interesting comparison of national proportionality standards. It is clearly necessary that at the EU level one common proportionality check should be decided, but politically this is will not be easy.

The technical aspects of the European Arrest Warrant

The European Arrest Warrant in Practice is probably not the perfect read for every person interested in the European Arrest Warrant, because of the book's topical nature and advanced approach. Especially people that are confronted with this instrument for the first time would find the chapters rather hard to understand.

It is advisable for them to first read a book on the Framework Decision and its content itself, before reading this book to deepen their knowledge.[8]

For advanced users of the European Arrest Warrant, this book is a clear recommendation. The topical approach makes it very easy to find the discussion and solutions you are searching for. The comparative perspective used by the contributors is very clarifying. It will broaden your horizon and open your eyes for alternative solutions. It is, however, not a fluent read, as the topics are not always connected with each other. Also, the differing opinions of the writers can sometimes have a rather confusing effect. In one chapter, a writer clearly chooses the road of mutual recognition (see, for example, the chapter written by Klaas Rozemond and Vincent Glerum), but others can be highly critical of this principle and the evolutions that have taken place in the past years (Mark Mackarel). This is inevitable, as the academic world is indeed divided on this subject. It clearly shows that European criminal law is an area where the EU still has a lot of work to do. This is also one of the main conclusions that can be drawn from the book: the implementation of the Framework Decision and the state practices differ (sometimes in a strong way) from the letter of the Framework Decision. There is thus a need for more mutual trust: not only between the legislators of the member states, but also between the national judicial authorities that issue and execute European Arrest Warrants.

The book is one of the first that gives an evaluation of the practices in member states concerning the European Arrest Warrant. It is not afraid to criticize the basic concepts chosen of EU judicial cooperation in criminal matters, and in this it differs from the evaluations carried out by the European institutions themselves. It is this critical approach that gives the book its added value.

Of course, because of the subject, the book sometimes becomes rather technical. This is inevitable, and it does not frustrate the reader. The European Arrest Warrant is a rather technical instrument, just because of the application of the principle of mutual recognition. It was the choice of the European legislator to make judicial cooperation in criminal matters a rather technical and judicial operation, and no longer a political one. To transcend these technical aspects of the European Arrest Warrant, the reader should understand the concepts on which the Framework Decision is built. The contributors clearly succeed in helping the readers understand these concepts and criticise them. This is clearly a strong point of the book.

All in all, this book is a perfect reference work for people who are dealing with the European Arrest Warrant.

[8] For example: R. Blekxtoon and W. Van Ballegooij, *Handbook on the European Arrest Warrant* (2005) p. 283.