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"The European Arrest Warrant: Between the Practice and the Principles"

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"The European Arrest Warrant: Between the Practice and the Principles"

1. European Arrest Warrant and the construction of an European judicial area based on fundamental rights.

At the core of the European project stands the elemental free movement of people, capitals, goods and services. The freedom of circulation required "compensatory measures", adopted by the Convention implementing the Schengen Agreement incorporated into EU law by the Treaty of Amsterdam regarding the territorial restrictions on national criminal prosecutions. It would become easy to slip away from the grip of Member States' judicial authorities, resulting in the pressing need to extend national rulings in criminal matters – by rendering them acknowledged in all Member States – and allowing their enforcement without thorough examination of the merit of said decisions.

In that endeavor, on 19th September, 2001, the European Commission presented a draft for the Framework Decision on the European Arrest Warrant and Surrender Proceedings. It's important to note the moment in which it came to light; the threat of terrorism, as it happens in present times, was severe and the world stood in grievous and uneasy expectation. Assuring the security of European citizens from terrorism became urging, political pressure rushed into action the measures considered as required to put a stop to it in the amidst the free borders of members states, partly by measures directed against terrorism and partly by enhancing cooperation in criminal matters, and so the Council Framework Decision 2002/584/JHA of 13 June 2002 was negotiated by the Member States and adopted by the Council on 13th, June, 2002[1] .

This marks the launch of the implementation of the principle of mutual recognition[2] in criminal matters recognized by the Tampere Council (October, 1999) as the "cornerstone" of judicial cooperation in the EU, representing the Member States' will to strengthen the cooperation through the free circulation of penal rulings as the answer to the free movement of criminals across Europe within an area of freedom, security and justice.

The EAW innovated in certain traditional aspects of extradition law, in particular in the establishment of an exclusively judicial procedure, by eliminating the involvement of the Government or other political and administrative entities and requiring just a judicial decision to both arrest and surrender the requested person. The "judicialization" of the arrest and

[1] From hereafter all references to a non-identified Framework Decision should be understood as to 1 Framework Decision 2002/584/JHA.

[2] Regarding the EAW, the mutual recognition principle rests on the acceptance of the equivalence between the decision of the issuing and the executing State based on the reciprocal confidence in the quality of the judicial procedures of all Member States.

surrender has been commended by judiciary professional across the Union as an improvement in celerity, efficiency and a welcomed reduction on administrative obstruction.

The EAW is a significant departure from extradition law, which, stemming from the accepted idea that countries have no general obligation to surrender a person who is within their territory, relies on bilateral or multilateral treaties. Whereas the EAW is a judicial decision issued by a Member State in order to arrest and surrender a person who has committed a serious crime in a European Union Member State, and escapes or lives in another, so he/she can be returned to the issuing country for the purpose of conducting a criminal prosecution or to serve a prison sentence for an existing conviction.

Being a judicial decision issued by a national judicial authority, the EAW requires each national judicial authority to recognize and act on, with a minimum of formalities and within a set deadline.

The warrant applies in the following cases: 1) offences punishable by imprisonment or a detention order for a maximum period of at least one year; 2) when a final custodial sentence has been passed or a detention order has been made, for sentences of at least four months.

However executing authorities must refuse to act on a warrant in three cases: a) if an European Union country has already handed down a final judgment on the person concerned for the same offence; b) if the offence is covered by an amnesty in the European union country asked to hand over the perpetrator; and c) if the person concerned may not be held criminally responsible by the European union country asked to act on the warrant, owing to his/her age.

It must be considered that the European Union context differs from others as the development of the principle of European citizenship created very particular circumstances, as such the EAW is applicable to a national of the executing State, allowing the simultaneous judgment of all the people involved even in trans-border cases. Execution can only be denied if the person requested is a national of the executing State, and said State can only refuse to execute the arrest warrant if it enforces the sentence or detention order itself, or can subject the surrender of its national to the condition that they will be returned to serve the sentence or detention issued[3].

An interesting question arises: is the principle of non-discrimination applicable to the EAW, meaning, can an executing State deny the surrender, or surrender the requested person conditionally, if that person is not a national but a resident?[4] The non-discrimination principle,

[3] According to the Framework Decision's art. 4, (6) and art. 5, (3), and as a remainder of the principle of non-extradition of nationals, the Member States can ensure the preeminence of jurisdiction deriving from the active personality principle over other types of jurisdiction.

[4] The question was analyzed on the *Wolzenburg* case: the Netherlands had adopted a voluntary opt-out under Art. 4(6) EAW, saying a Member State may refuse to surrender the requested person if that person is staying in, or is a

cornerstone to European citizenship, is a general principle which cannot be put aside for the sake of the mutual recognition principle. Actually, most of the relevant cases regarding non-discrimination in criminal law context regarded cross-bordering citizens. By applying the grounds of conditional surrender, most Member States have opted for the criteria of main place of domicile, ensuring an equal treatment of their nationals and their residents.

Bearing in mind the functioning of the EAW as we just described and that its aim is not to harmonize national procedural criminal law, it becomes clear that some controversial issues may arise, from the fact that this cooperation instrument has to work on the basis of the differences between national legal systems, and, on the assumption that national legal systems meet similar common protection standards of individual rights, as defined by the ECHR according to the interpretation provided by the Court of Strasbourg which sets up the foundation for mutual trust among Member States, as it is defined in the art. 6.1 of the Treaty on European Union, which establishes that «*The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to to the Member States*», and art. 6.2 TUE « *The Union shall respect*

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national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law. In this case, Mr. Wolzenburg was a worker of German nationality in the Netherlands who refused to surrender to Germany and claimed that he wished to serve his suspended but revoked sentence in the Netherlands. But Dutch legislation granted such a possibility only to home nationals and to those in possession of a permanent residence permit. The main question asked was whether the difference in treatment between nationals and non-nationals was in harmony with art. 12 and 18 EC. Therefore, the core question was the required period of residence of the person requested for extradition in the executing state in order for that to be counted as 'staying' or residing. Secondly, whether an additional administrative requirement of a residency stipulated by national law was not in harmony with the principle of non-discrimination The Court mentioned Framework Decision 2008/909/JHA where the implementation time is still running on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences. The Court stressed that art. 3(1) of that measure states that the purpose of the decision is to establish the rules applicable to Member States, with a view to facilitating the social rehabilitation of the sentenced person. Moreover, the Court mentioned the Citizenship Directive 2004/38/EC which states in Article 16(1) that 'Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there'. Thereafter, the Court tackled the core of the issue: it pointed out that although the EAW is a third pillar instrument, which in itself does not mean that Article 12 EC does not apply. More specifically, the Court stated that simply because the EAW is a third pillar instrument does not mean that it cannot be subject to Community review as regards the legality of such an instrument, the Member States cannot in the context of the implementation of a Framework Decision infringe basic principles of Community law. In this regard the Court stated that the grounds for optional non-execution set out in Article 4(6) of the EAW have in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires. The Member State of execution is therefore entitled to pursue such an objective only with respect to persons who have demonstrated a certain degree of integration into the society of that Member State. Regardless of this the Court made it clear that in order for any unequal treatment between nationals and non-nationals to be justified, the difference in treatment must also be proportionate to the legitimate objective pursued by the national law. In other words, it may not go beyond what is necessary in order to attain that objective. There must be 'justified' proportionality, it considered that Mr. Wolzenburg did not meet the requirement of five years residence and therefore could not benefit from the optional grounds for refusal of surrender.

fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law».

Besides the European Member States, there are also other worldwide countries, with their own legislation and extradition rules, that can originate serious conflicts when it comes to executing an EAW.

2. Italy sentences 23 C.I.A. secret agents in Rendition Case: The C.I.A. "Italian Job" and the execution of an EAW in Portugal

The present study was inspired by a recent case presented before the Portuguese authorities regarding the execution of an EAW.

On the 12th of December, 2010, twenty-two Former C.I.A. Operatives and one U.S.A. Coronel Air Force were convicted by the "Corte d'Apello", in Italy, for kidnapping a Muslim clerk suspected terrorist - Abu Omar, out of the streets in Milan, and then taking him, via Germany, to Cairo - Egypt, where he was allegedly tortured during a 4 year imprisonment, including 14 months of secret detention.

According to Armando Spataro, a Milan Special Prosecutor, Abu Omar was kidnapped, on the 17th of February 2003, by the C.I.A. in a program known as the U.S.A. "Extraordinary Rendition", by which suspected terrorists are abducted and flown to a country where torture is a common place to extract information. In this case, it was Egypt.

This ruling marks the first trial, anywhere in the world, evolving the C.I.A. practices of rending terror suspects to countries where torture is allowed.

Although the torture facts have been brought to court by Abu Omar himself, the Italian Public Prosecutor's Office was able to determine that the 23 American secret agents were responsible for the abduction of the Muslim clerk, which constitutes a crime by the Italian law. Inside the CIA this operation was called "the Italian job".

Abu Omar was, in fact, already being investigated by the Italian authorities for being tied to an extremist Islamic group, designated as a terror organization by Egypt. Right after the 9/11, in a Milan mosque, the Muslim clerk drew attention to himself for his regularly aggressive and incendiary speeches against the Americans. The Italian Public Prosecutor's Office assures that its prosecution was interrupted by Abu Omar's abduction by the C.I.A.

During the Italian trial that took place, all the defendants denied all the claims and were convicted in absentia, after the U.S.A. refused to hand them over.

This means that none of the defendants were present in court. And, at least, six of them didn't meet or spoke to their lawyers, before or during the trial.

These twenty-three Americans, now international fugitives, will be ordered to jail if they try to leave the U.S.A. More specifically, they will face an European Arrest Warrant if visiting any European country.

Among those twenty-three C.I.A. agents, is Sabrina de Sousa, a dual U.S./Portuguese citizen and a veteran undercover C.I.A. officer, who resigned from the Central Intelligence in the year of 2010.

She was convicted in 2013 by the Italian jurisdiction, for the rendition of Abu Omar in Milan, in a 4 year prison sentence.

Afterwards, in October 2015, despite the fact there was an EAW issued for her, Sabrina decided to take a risk and left the U.S.A., travelled to Morocco and then to Portugal, where she was detained at the Lisbon airport en route, to visit her sick, 89 year old, mother in India.

She was released one day later, but was forced to surrender her U.S. and Portuguese passports in Lisbon, where she has been living for the past months.

Although there's an EAW issued against her, Sabrina refused her surrender to the Italian authorities and demands a new trial, in order to offer new evidence, alleging her innocence and declaring that she was not notified of the conviction neither of the trial itself.

Due to her Portuguese nationality, she also requires to serve the sentence in Portugal, if convicted once again. On the other hand, Italian Public Prosecutor's Office declares that she could have defended herself in front of the Court if she wanted to, but instead she decided to remain a fugitive.

In the meantime, Italy is waiting for the decision of the Portuguese Court about the surrender. The Portuguese *Tribunal da Relação* has decided the execution of the EAW and the subsequent Sabrina's surrender. However, Sabrina has applied to the Portuguese *Supremo Tribunal de Justiça*, which is now reviewing the decision of the court of appeal, in order to determine the execution or the refusal of the EAW.

3. The Fundamental Human Rights requirements - principle which the judicial authorities must rely on when surrendering or receiving a fugitive; or specific exception to the mutual recognition principle?

The first matter we must address is to shed some light on the perspective on fundamental rights by the CJEU and the Member States.

As we noted before, the *Framework Decision* [5] marks the beginning of the implementation of the principle of mutual recognition on criminal matters, which was strengthen by the Hague Program of 2004, representing the Member States will to reinforce the cooperation regarding the free circulation of penal rulings[6] as the answer to the free movement of criminals across Europe.

However, further steps were taken with the Treaty of Lisbon, which amended the Treaty on European Union (TEU) and the latter named Treaty on the Functioning of the European Union" (TFEU), and established the area of police and judicial cooperation in criminal matters will follow the rules of the former first Pillar. In art. 82 of the TFEU the principle of mutual recognition is mentioned for the first time in a treaty and there recognized in the legal documents as a cornerstone for judicial cooperation in criminal matters along with the harmonization of the criminal law of the Member States (art. 67,82 (2), 83 TFEU). Fundamental rights, as defined by the ECHR and as constitutional tradition common to all Member States, have long been considered as general principles of European law. The Treaty of Lisbon, going further than the Maastricht Treaty and the Amsterdam Treaty[7], recognized the CFREU as legally binding and required the EU to become party to the ECHR, thus reinforcing fundamental human rights as part of EU law.

That being said, the Framework Decision does not predict a human rights violation as grounds for non-execution. In the traditional extradition model, and among the States parties to the 1957 European Convention – still applicable outside of the European Union and in relations between EU Member States and third countries – the fair trial clause allows refusal when the requested State has grounds to believe the request is based on the purpose of prosecution or punishment for reasons of religion, race, nationality or political standing. However the Framework Decision does not mention those safeguards as a ground for non-execution of a EAW, other the creation of a system of guarantees to enable the executing authorities to provide for surrender, in cases where there was the possibility for a facultative cause of refusal in Art. 5 (1) and (2) of the Framework Decision[8].

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[6] Known as the "*free movement of prosecutions*" as a corollary to the free movement of persons – VENNEMAN, Nicola, "*The European Arrest Warrant and Its Human Rights Implications"*, 2003, page 105. "*In effect as soon as the link of causality between the opening of the borders and the development of organized crime is established Member States will have to choose between Europe as a "sieve" or Europe as a "fortress"."* – GAY, Corinne, "*The European Arrest Warrant and its application by the Member States*", 2006, page 1.

[7] The Treaty of Amsterdam was paramount on reshaping cooperation on justice and home affairs by setting up an area of freedom, security and justice and, for the first time, promoting the approximation, where necessary, of rules on criminal matters in the Member States.

[8] For instance, the surrender in case of nationals for criminal procedure, in case of possible application of prison for life, or in case of prison term produced after an *in absentia* trial can be considered if guarantees are presented:

On this basis, one could argue that protective provisions on the Framework Decision are less extensive than those principles applicable to extradition.

On the other hand, it should be stressed for instances, the art. 11 of the Framework Decision establishes the "rights of a requested person", firstly providing that, after the arrest, the requested person shall be informed of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority, which corresponds to the prevision on art. 5 (1) and (2) of the ECHR (everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him), relating also to art. 6 (3), (a) ECHR (the right of everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him) and, lastly, to art. 6 (3), (b) and (c) s ECHR (the right of every suspect to have the necessary time and facilities at his disposal to prepare his defence properly)[9].

Although art. 1, (3) of the Framework Decision, states the implementation of the EAW does not modify *"(...) the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union*", a non-regression clause could be interpreted in two ways: either as a general principle on which the judicial authorities must rely when surrendering or receiving a fugitive; or as a specific exception to the mutual recognition principle[10].

The references to human rights' protection – such as in art. 1(3) and 12. and 13. of the Preamble – would indicate that national law and judicial authorities may consider it as an exception to the principle. Actually, when implementing into national law the Framework

for example, the national will be returned after being sentenced; the prison for life will be reviewed; or there is the possibility of a new trial.

[9] Some other norms relating to fundamental rights may be found on art. 13 (if the person consents or renounces the specialty rule - the principle of specialty in the field of the EAW restricts the issuing judicial authorities which received a person surrendered from the executing state, meaning the issuing state may exercise its criminal jurisdiction only within the conditions of surrender which have been checked and approved by the sending state – as ascribed on art. 27 (3), (f),, the executing Member State must adopt measures to assure that consent or renunciation are expressed voluntarily and conscientiously; art. 14 (the requested person does not consent to the surrender, said person is entitled to be heard by the executing judicial authority, in accordance with the its law, all in accordance with art. 19); (). The right to specialty is stipulated in Art. 27 and 28 of the framework decision) shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences and, to that end, the person shall have the right to legal counsel; art. 18 (3) (after temporary transfer, the requested person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure).

[10] FICHERA, Massimo, "*The implementation of the European Arrest Warrant in the European Union: law, policy and practice",* 2009, page 196.

Decision, many Member States, provided for additional mandatory grounds for refusal relating to art. 4 or to fundamental rights[11].

Those safeguards on fundamental rights stem essentially from two norms.

Firstly, the art. 47 CFREU, which provisions the right to an effective remedy and to a fair trial, a fundamental right to everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal (also relative to art. 6 and 13 ECHR), has been long been uphold on many rulings by the CJEU. We will return to this point, relating with art. 5 FRAMEWORK DECISION, when addressing decisions *in absentia* – but also applicable to life sentences – and conditional surrenders.

Secondly, art. 6 CFREU provides that everyone has the right to liberty and security of person, as does the art. 5 ECHR, which, according to art. 52(3) CFREU, has the same meaning and scope. Fundamental rights such as the right to a fair trial, the right to a public hearing in reasonable time by an impartial court established by law, the presumption of innocence and the right of defense – art. 6 (1) of the ECHR and Art. 47 and 48 of the CFREU – play a central role in criminal proceedings and as such.

Finally, it begs to question, is the actual level of protection of human rights throughout the EU the same? The Council of Europe Commissioner for Human Rights has had the opportunity to single out a few serious flaws not only in the newcomers, but also in many traditional Member States[12], weakening the trust in the mutual recognition principle and allowing - and we dare say imposing on the executing Member State - to consider the specific human rights of the requested person.

Regarding Portugal higher courts, namely the *Supremo Tribunal de Justiça*, has considered, as it was called to rule on the opposition to the EAW from the requested person, that "*it is for the issuing judicial authority (which directs the process) to choose which are the appropriate legal means necessary, whereby it is not for the executing state to syndicate the options of that authority, provided that they conform to the applicable international instruments. The execution of an EAW is not to be confused with the judgment on the merits of the question of fact and law from which it stands, that judgment, if that is the case, will take*

[11] In 2009, in adopted by the Council of the EU, it is stated that "*there are diverging tendencies in the transposition by the Member States of the optional and mandatory grounds for non-execution laid down in the FD (...)"* – "The practical application of the EAW and corresponding surrender procedures between Member States", 18 May 2009.

[12] "*Among these, he mentioned the overcrowding in the prisons and the living conditions of detainees (for instance in Latvia, Estonia and Poland, but also in Spain, France and Italy)15 and the very low remuneration granted to lawyers providing free legal aid (e.g. in Estonia and Poland)16. While in Poland pre-trial detention (which is normally two years before the first instance decision) has sometimes lasted for up to six years (thus in breach of Article 5 (3) ECHR), in France no legal assistance is given for a period of seventy-two hours in drug trafficking and terrorism cases*." – FICHERA, Massimo, "*The implementation of the European Arrest Warrant in the European Union: law, policy and practice",* 2009, page 199.

place before the court and in the issuing State responsibility, all that remains to the executing State is to inquire over the formal regularity of the EAW and execute it, acting in this task on the basis of mutual recognition principle.", it clarifies that "*The judicial inquiry by the receiving State is very limited, without abandonment, however, of the respect for fundamental rights, the judicial decision of the issuing State produces, at least, equivalent effects to a decision taken by the national judicial authority. As long as a decision is taken by a competent judicial authority under the domestic law of the issuing Member State, in accordance with the law of that State, such decision shall have full and direct effect on the entire territory of the Union, which means that authorities of the State where the decision is to be executed should cause it the least embarrassment.*". The Court considered, on the same ruling the alleged violation to the fundamental rights of the requested person, the Supreme Court ruled "*The defendant claims to fear for its physical integrity entering the prison system in Spain, evoking art. 13 al. c) of Law 65/2003, the defendant disagrees with the terms of the guarantee assured on the contested decision. However, there are no concrete elements of the dangerousness of the Spanish prison system, especially the potential effects alleged by the applicant in his life, which means the innocuousness of that claim. Rather, on the contrary, it is to assume that the legal institutions of the Kingdom of Spain - integrated in the EU, and subordinate to its democratic principles and justice - especially its prison system, are guided by the respect and application of fundamental rights and compliance with legality, in the light of the ECHR and CFREU.*"[13]

It is an interesting decision, where the Court has stated that Member States are bound to the same fundamental right's protection and are to be trusted because they are integrated in the UE, but, at the same time, has analyzed – and discarded – the potential fundamental rights violation alleged by the defendant.

The before mentioned decision is in line with those of the CJEU, although the CJEU has been less affirmative. However, Member States, intervening in the proceedings before the Court, have repeatedly express concerns over fundamental rights and the EAW accepting, on hypothesis, that the EAW may be refused if it risks the person's fundamental rights[14].

[13] Ruling on the process n. 445/12.3YRLSB.S1, dated 20.06.2012, by the Lisbon Court of Appeal.

[14] In the Case C-396/11 (the *Radu* case), with several governments intervening and suggesting that the execution of an EAW could exceptionally be refused if there are s*erious reasons to believe* the execution would lead to infringements of the requested person's fundamental rights; the same happened on the Case C-399/11 (the *Melloni* Case). On the Case C‑237/15 (the *Lanigan* Casa) the Court restrain its decision to the question of time-limits stipulated on the Framework Decision, stating "*it being clear that the effects of a European arrest warrant continue irrespective of the consequences which the taking into account of a potential deprivation of liberty may have on the enjoyment by the requested person of his fundamental rights. The executing judicial authority, and more broadly the executing Member State, thus remain required, in spite of the expiry of those time-limits, to adopt a decision in that regard*", and that for the period on which it detains the requested person, must assure their rights

Celerity and efficiency are essential to achieve a just decision, but those values cannot be enhanced to such a degree as to pinch, in a disproportionate manner, fundamental rights.

4. Judgment rendered *in absentia* as grounds for refusal on EAW's execution.

In order to fully apprehend the problems related to Sabrina's surrender case, it is necessary to consider the mutual recognition principle when applied to custodial rulings rendered in the absence of the person concerned at the trial.

The Council Framework Decision-2009/299/JHA, which amended the Framework Decision, provided clear and common grounds, allowing the executing authority to enforce the decision, despite the absence of the person at the trial, while fully respecting the person's right of defence.

The right to a fair trial[15] includes the right to appear in person at the trial. In order to exercise this right, the concerned person needs to be aware of the scheduled trial.

The grounds set forth in the Framework Decision for refusing EAW's execution based on a trial in absentia are alternative conditions. Therefore, when one of the conditions is satisfied, the issuing authority, by completing the corresponding section of the EAW[16], gives the sufficient assurance that the requirements have been or will be met.

According to the amended Framework Decision's article 4.º-A, EAW's execution should not be refused if the sought person was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or if he or she actually received, by other means, official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial.

Under this Framework Decision, the person's awareness of the trial should be ensured by each Member State own criminal procedural system. Nevertheless, the national law must comply with the requirements of the ECHR[17].

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guaranteed by Article 6 of the CFREU, with several governments considering that, although Member States must assure fundamental rights, they are not incompatible with the EAW and its efficiency must not be compromised.

[15] As guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, as interpreted by the ECHR. The same right is provisioned in article 47, on the Charter of Fundamental Rights by the European Union (2000/C-364/01), also referring article 53.

[16] See Annex I – section d) on the Framework Decision.

[17] Therefore, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, the diligence or effort exercised by the concerned person in order to become aware of the trial must also be take into consideration. The ECHR has also declared that the right of the accused person to appear in person at the trial is not absolute and that under certain conditions the accused person may, expressly or tacitly but unequivocally, waive that right.

Therefore, the person concerned should have received such information 'in due time', meaning sufficiently in time to allow him or her to participate in the trial and to effectively exercise his or her right of defence.

On the other hand, EAW's execution refusal should not take place when the concerned person, being aware of the scheduled trial, was defended at the trial by a legal counsellor to whom he or she had given a mandate to do so, ensuring that legal assistance is practical and effective.

In Sabrina's case, the Italian authorities issued a warrant fulfilling section 2, *d)* and 3.4 on the EAW, saying that she did not appear in person at the trial resulting in the decision and also was not personally served with the decision.

Nevertheless, Italian authorities assured that she would be personally served with this decision without delay after the surrender, and when served she would be expressly informed of:

a) her right to a retrial or appeal, in which she had the right to participate and which allows to challenge the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

b) the time frame within which she had to request a retrial or appeal, would be 30 days.

In what extent can the executing authority judge the assurance given by the issuing state?

The assurance deemed adequate to guarantee the rights of defence of the person concerned may require further analysis on the issuing state procedural system [article 4.º-A, (1) of Framework Decision 2009/299/JHA, specifically provides, in fine; "in accordance with further procedural requirements defined in the national law of the issuing Member State"].

The adequacy of such an assurance is a delicate matter to be decided by the executing authority, and it is therefore difficult to know exactly when execution may be refused based on the breach of right of defence or the right to a fair trial.

That said, can the Portuguese authorities refuse Sabrina's surrender by stating that there is no sufficient assurance that she will benefit from an effective retrial with the possibility of reversal and fresh evidence examination?

As stated in the Framework Decision-2009/299/JHA, when analysing the right of the person concerned to a retrial or an appeal, the executing judiciary authority must consider the diversity of legal systems and criminal proceedings.

That Framework Decision established a common base: such a retrial, or appeal, is aimed at guaranteeing the rights of the defence and is characterised by the following elements: he or

she, person concerned, has the right to be present, to challenge the merits of the case, to the examination of fresh evidence, and the decision being reversed as a possible outcome.

The new article 12.º-A on Portuguese Law 65/2003, introduced by Law No. 35/2015, 4/5, transposing into national law art. 2 from Framework Decision-2009/299/JHA, replaced former Law No. 65/2003, article 13, al. a), which allowed the executing authority to require the issuing authority to give an assurance deemed adequate to guarantee the person concerned that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present when the judgment is given.

This article corresponded to article 5, paragraph 1) on Framework Decision 2002/584/JHA, also explicitly revoked by Framework Decision 2009/299/JHA.

The scope of the revocation was to remove arbitrary voluntary refusal decisions based upon trial *in absentia* decisions.

Now, the EAW's execution issued for the purpose of enforcement a judment may not be refused, when either one of the four situations mentioned in sections a) to d) on paragraph 1, Article 12-A is verified.

Prima facie, once marked one of these assumptions on the form [annex d) – section 3.4, for instance], EAW's execution shall not be refused.

In spite of that assertion, is there space for an exception to the mutual recognition principle based on the breach of fundamental rights of defence?

Hypothetically speaking, one could argue that the normative commands enshrined on the article *6* of the Treaty on European Union, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also on article 47, on the Charter of Fundamental Rights by the European Union (2000/C-364/01) are received in the Portuguese internal law, at least as an interpretative parameter, as provided by articles 8 (4) and 16 (1) on the Portuguese Republic Constitution[18].

Although the topic is debatable, we consider that a human rights safety-guard clause as a mechanism for EAW's refusal, specifically in case of fair trial rights of defence, should be interpreted and applied strictly, as a specific exception to the mutual recognition principle.

Otherwise, the EAW's effectiveness would be in jeopardy. Maximizing that human rights safeguard scope, only with regards to procedural rights of the defendant, would place the national judiciary authority of the executing member state on the position to judge and evaluate the EAW's issuing state criminal procedural system, in accordance with the demands of article

[18] In labour law matters some high court rulings in Spain are using the European social rights charter as an hermeneutic parameter for social rights in national law. See Salcedo Beltrán, "Trabajo e Derecho" (2016), n.º 13, fls. 34.

6 of the Treaty on European Union and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

One must also take into account that Framework Decision-2009/299/JHA, is limited to refining the definition of grounds for non-recognition in instruments implementing the principle of mutual recognition, not aiming at harmonising national legislation.

That said, Sabrina's case could be related to case C-396/11, the Radu case, in which the ECJ established that EAW's execution could exceptionally be refused if there are serious reasons to believe the execution would lead to infringements of the requested person's fundamental rights.

If the Italian authorities have issued the assurance provisioned in the EAW's 3.4 section, and if there are no evidences of virtual future breach on the requested person fundamental rights of defence, the EAW's execution should not be refused on those grounds.

In conclusion, one must consider that Sabrina's surrender would be precisely aimed at maximizing her rights of defence practical extent at the request retrial, in accordance with the Italian procedural system, therefore, promoting the fair trial human right's dimension on the European Union (according to article 6, TEU and Article 6, CHRFF).

5. Optional non-execution rulings grounded on nationality or residence in light of the mutual recognition system.

Since Sabrina is a Portuguese national and petitioned to serve time in Portugal, in the event of a future conviction after retrial, we must address some practical conundrums concerning the application of *Framework Decision's* art. 4 (6).

It provisions: "*if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law"*

We must also consider the Council Framework Decision-2009/299/JHA, of 26 February 2009, amending the *Framework Decision*-2002/584/JHA and 2008/909/JHA, enhancing the procedural rights of persons and fostered the application of the principle of mutual recognition to decisions rendered in the absence.

This possibility must be addressed in light of the recently [19] published Law no. 158/2015, of 17 September, transposing the Council Framework Decision-2008/909/JHA, of 27

[19] The entree in force occurred on the 18Th December of 2015 as provisioned in its article 47.

November 2008, which approved the legal regime for transmission and enforcement of judgments in criminal matters, imposing custodial sentences.

Worthy of highlight, its preamble, point 12, states: "*This Framework Decision should also, mutatis mutandis, apply to the enforcement of sentences in the cases under Articles 4(6) and 5(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*".

With utmost importance, Portuguese Law 158/2015, 17th September, in particular its article 16, paragraph 1, provisions that: "Once the judgment is received, duly passed by the competent authority in the issuing State[20], judicial authority shall immediately take the necessary measures to its recognition, subject to the reasons provided for refusing recognition and enforcement" [emphasis added].

The Portuguese legislative innovation is based on article 8 of the Council Framework Decision 2008/909/JHA, under which "the competent authority of the executing State shall recognize a judgment which has been forwarded in accordance with Article 4 and following the procedure under Article 5, and shall forthwith take all the necessary measures for the enforcement of the sentence, unless it decides to invoke one of the grounds for non-recognition and non-enforcement provided for in article 9 of the Framework Decision" .

The contrast between the two legal standards highlights that the Portuguese legislator was more cautious on the act of transposing. As a matter of fact, Law 158/2015, 17th September article 16(1) does not provision immediate enforcement measures but, rather, the immediate recognition.

Nevertheless, the Council Framework Decision 2008/909/JHA (namely in its points no 8 and 12) *is clear*: classical procedure for reviewing and confirming of foreign judgment was abolished in the EAW's non executing rulings context – art. 4(6) of the Framework Decision – and substituted by the mutual recognition principle on custodial sentences and security measures between member-states.

According to ANNEX I on the Council Framework Decision-2008/909/JHA, of 27 November 2008 [and also as stated in the Portuguese Law 158/2015, 17/9, article 26, section a)], the executing judicial authorities when ruling a non-execution case grounded on nationality or residence[21], may resort to the mechanism of official communications, with the scope of

[20] According to Law 158/2015, 17th September, article 8 (1) the issuing State shall send, by any written means fit adequate, the sentence and the respective certificate form, as seen in annex I.

[21] For that purpose, the prosecution should, whereas it is the moment for previous promotional diligences, or following the sought person's opposition to EAW's execution, initiate communications with the judgment issuing authority and achieve the sending of the written judgment applying a custodial sentence and its certificate. That way, the Court of Appeal can immediately recognize and commit to enforce that judgment, in case of an EAW's non-execution ruling.

streamlining the custodial sentence and its certificate in order to incorporate the non-execution ruling of the EAW as mentioned.

That said, returning to Sabrina's case, one must consider the Framework Decision's article 5 (3), which establishes that when a person who is the subject of a EAW for the *purposes of prosecution* and is a national or resident of the executing Member State, his or her surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

Hence Sabrina had not yet been served with the custodial sentence[22] (therefore a ruling not yet *res judicata* - still plausible object of an appeal or retrial) one could consider that the EAW issued by the Italian authorities was still aimed at *prosecution purposes.*

If Sabrina, being a Portuguese national, opposes the EAW's execution alleging and proving that her social rehabilitation would beneficiate from the enforcement of a custodial sentence in Portugal, the national executing authorities should resort to Law 65/2003, art. 13, section *b),* the Portuguese law transposed equivalent of art. 5(3), on the Framework Decision.

In accordance, the EAW's execution process must remain open and wait for the eventual or future custodial sentence issued by the Italian court of law.

That will allow the Portuguese judicial authority to control the fulfillment of the re-surrender grant or assurance for time-serving in Portugal.

When that eventual custodial judgment is definitive, executing authorities must obtain a certificate of the conviction for its recognition in Portugal in the heart of the primitive EAW's proceedings.

To fulfill that goal, the Portuguese authorities should resort to the mechanism of official communications referred to in Framework Decision-2008/909/JHA, of 27 November 2008, streamlining the future/ eventual custodial sentence and its certificate, and allowing a more efficient and less complex process for its enforcement in Portugal.

Following on another perspective or solution for the case, one could argue that the issuance of the EAW by the Italian authorities was solely based on a judgement imposing a custodial sentence (in spite of that decision not being yet served on the defendant, therefore not definitive).

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[22] We must note that according to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (which supplements the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959) the sending and service of procedural documents amongst Member States is possible, under its art. 5. On art. 7 of the same instrument, it is said that national authorities may, spontaneously, exchange of information which could, in the case under consideration, be helpful.

Then, hypothetically speaking, what if Sabrina pretended to waive the right to be present in the retrial session, as assured by the issuing authorities?

We must recall that the ECHR has also declared that the right of the accused person to appear in person at the trial (by identity, in the retrial too) is not absolute and that under certain conditions the accused person may, expressly or tacitly but unequivocally, waive that right.

Eventually, Sabrina, once served with the custodial sentence[23], could request a retrial or appeal by nominating a legal counsellor to whom she then would give a mandate and that would represent her, granting that legal assistance is practical and effective and that all the assurances in section d), point 3.4 on the EAW are fulfilled.

This way, the EAW's execution would, in practical terms, cause an unnecessary compression on the subjects' right to freedom.

This would happen because, in the event of a new conviction on the retrial, Sabrina would actually serve time in the executing authorities' state, as provided by Framework's Decision articles 5(3) or 4(6). Regardless of the EAW's scope – for procedural or enforcement objectives – the nationality safeguard clause would always be applicable.

One could argue that it would not be necessary, or rather adequate and proportional, to surrender a national that will, ultimately, serve time in Portugal, in light of the before mentioned optative refusal safeguard for nationals or residents, just for the purpose of requesting a retrial, or appealing.

Also, the Portuguese criminal procedural system provisions a norm that allows the defendant or accused person to expressly waive the right to be present in some special cases (see article 334.º, n.º 2, of the Criminal Procedure Code[24]).

If the Italian procedural system contains a similar norm, granted that the defendant is properly served with the custodial judgement and waves the right to be present at the retrial, after her surrender, one could also consider the possibility of applying supervision measures in Portugal, as provisioned by the Framework Decision 2009/829/JHA, of 23 October 2009, granting the application between Member States of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

[23] The FD, art. 4.º-A, specially provisions that if the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, *request to receive a copy of the judgment before being surrendered.* Nevertheless, the provision of the judgment to the person concerned is *for information purposes only*; it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal. See also *supra* footnote 22.

[24] "Whenever the accused is unable to attend the hearing, grounded on his or her age, serious illness or *residence abroad*, he may require or allow the audience to take place in his absence."

The scope of that measure would be to avoid lengthy pre-trial detention abroad. It would be possible for Sabrina to return home in Lisbon, until her retrial begun (eventually waiving her right to be present but represented by a legal counsellor).

Portugal would then supervise her using a non-custodial (outside prison) measure. For example, asking her to report to a police station every day/week.

This hypothesis underlays a fundamental rights concerned perspective (article 6 of the Treaty on European Union) abridging unnecessary limitation to the person concerned right to freedom, as provisioned by article 5(1) by the ECHR.

The holistic reading of all this international cooperation mechanisms in criminal matters, could suggest an EAW's non-execution ruling, on grounds of a human right's violation safeguard valve.

This human right's safeguard clause would then be based in article 6 of the Treaty on European Union and article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also on article 6, on the Charter of Fundamental Rights by the European Union (2000/C-364/01). And also heraldically enshrined in the *Framework Decision* 2002/548/JAI preamble, point 12, provisioning the respect for fundamental rights and for the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union.

This perspective or solution would have the merit to enshrine the principle of law interpretation, in particular, *procedural norms*, in conformity with the Treaties and secondary legislation adopted under the Treaties, with the protection of fundamental human rights in its scope.

Hence the person concerned is a Portuguese national, benefiting from the legal safeguard on Framework's decision articles 4(6) or 5(3) - by the enforcement of the custodial sentence in Portugal or by the conditional surrender – it would constitute a legal paradox to execute a EAW just to comply with procedural retrial assurances (*maxime*, when the person concerned *waves the right to be present*), with the pretext to maximize his or hers fundamental rights of defence.

In conclusion, the rational accommodation or legal dilemma between the right to liberty and the right to defence should be thoroughly weighted by the executing authority, in light of the preceding arguments, when considering the refusal of an EAW's execution not only on grounds of nationality or residence, but also based on a human rights' safeguard general clause.

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