Common Practical Guidelines - ImprovEAW

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By Christina Peristeridou, Małgorzata Wąsek-Wiaderek & Jan van Gaever

This document contains the Common Practical Guidelines for filling in and assessing the EAW form. The following guidelines are addressed *inter alia* to the issuing and executing authorities of Member States when they issue but also when they receive/execute EAWs. The aim is to aid authorities in filling in and assessing the EAW form and to avoid mistakes or lacunae that could lead to pitfalls and delays. We have separated the guidelines into separate parts representing roughly the steps of dealing with the EAW form. Often there are suggestions of Do's and Don'ts to help national authorities develop good practices and keep the information practice-friendly.

In our project we make several suggestions for amending the EAW form to reflect the newest ECJ jurisprudence and address current problems of the practice.[1] But **the following guidelines concern the current EAW form in its present state to facilitate the current and actual practice**.

Issuing EAWs

1. Before issuing an EAW

Proportionality

Before the authorities issue an EAW, a decision must be made whether it is necessary and appropriate to issue an EAW. As far as prosecution-EAWs go, and whereas most national laws might imbue aspects of proportionality for issuing the national warrant, the issuing of an EAW requires an additional test of proportionality to the proportionality test for the national warrant, with more substantial grounds (see below). Before issuing a prosecution or execution-EAW,

[1] See Report ImprovEAW.

the issuing judicial authorities must establish its proportionality by looking at the case at hand. The issuing judicial authority should be able to refuse issuing an EAW despite the existence of a national warrant or a national judicial judgement, if it would be disproportional, even if the other formal requirements are met. The aspects to be taken into account and weighed against each other are the following:

- Especially for *prosecution-EAWs*, the degree of infringement on the free movement rights of the requested person. For this, the issuing judicial authority must consider the personal situation of the requested person, *e.g.* family, economic and social ties, place of residence when known but also the impact of the execution of the EAW on the life of the requested person. This should be weighed against the purpose of the EAW in the case at hand. That the requested person has the nationality of or resides in another Member State can be but should not in itself be a ground to issue an EAW.[2]

- The seriousness of the offences and, in execution-EAWs, of the length of the sentence to be executed: cases regarding offences barely falling within the scope of the EAW and sanctions too close to the 4-month limit, *e.g.* 6 months, should be treated with special caution, especially since this is a ground of refusal for the execution of sentences in another instrument, see Art. 9(1)(h) of FD 2008/909/JHA. Similarly, regarding the remainder of the sentence: it is recommended that judicial authorities, in principle, do not issue (and execute) EAWs for the purpose of enforcing a sentence where the (total) remainder to be served is less than four months (see as well Art. 9(1)(h) of FD 2008/909/JHA where a remainder of less than 6 months could be a ground of refusal).

- In prosecution-EAWs, the state and progress of investigations (*e.g.* degree of suspicion);

- The existence of alternatives to surrender: issuing judicial authorities are strongly advised to assess the interest/goal in acquiring the requested person and whether this could be fulfilled with less infringing instruments of cooperation. The stage of

[2] See also Commission Notice – Handbook on how to issue and execute a European Arrest Warrant, OJ 2017/C 335/01, 6.10.2017 (thereafter Handbook), para. 2.4.

proceedings might be crucial for that assessment. See for more in the section right below.

Purpose(s) of the EAW, stage of proceedings and alternatives

Issuing judicial authorities should keep in mind that the EAW is not the only way to acquire requested persons for criminal proceedings or to execute sentences. There are other instruments that are less intrusive and perhaps even more efficient than the EAW. These should be explored first as part of the proportionality test but also as part of efficiency of administration of justice.[3]

In a **prosecution-EAW,** if the requested person has a known address in another Member State and the purpose is to obtain or facilitate the presence of the person then *summoning the person* or the *European Supervision Order* based on FD 2009/829/JHA (ESO) could be options. If the purpose of the EAW is to interrogate the requested person, there are alternatives to the physical presence: the European Investigation Order (EIO) could be used for *video conferencing*. In **execution-EAWs**, FD 2008/909/JHA on custodial sentences should be considered instead. Given that many EAWs end up triggering FD 2008/909/JHA because of the application of the refusal ground of Art. 4(6) of FD 2002/584/JHA, it is prudent to directly use this option from the start, when possible. This would lead to less trouble for the requested person and less time and resources used by the authorities of the executing Member State.

Finally, transfer of proceedings might be an attractive option for some cases. This could be regulated, for example, with the use of the 1959 European Convention on Mutual Assistance in Criminal Matters or the 1972 Convention on the Transfer of Proceedings in Criminal Matters.

An important factor in considering alternatives to the EAW is the administrative implications for operationalising them. If the competent authority that makes the decision for the EIO, for example, is another than the authority that issues the EAW, then the EAW issuing judicial authority should explore the possibility of coordination with that authority. If different authorities are competent for different instruments within a legal system, cooperation and coordination should be sought so that alternatives to the EAW can be employed.

[3] See furthermore Handbook, para. 2.5.

Preparation to fill in the form

In preparing for issuing an EAW, the judicial authority must collect all information necessary to assess whether the requirements are met. The issuing judicial authority must have acquired in preparation for an EAW at least:

- The official EAW form.[4]
- A valid national warrant (within the meaning of Art. 8(1)(c) of FD 2002/584/JHA) for **prosecution-EAWs** issued in accordance with the national legislation.[5] Please note that without a national warrant, an EAW cannot be issued, and the issuing judicial authority should be able to verify the existence and content of such warrant. It is strongly advised that the issuing judicial authority receives a copy of the national warrant.
- The court judgment for **execution-EAWs.** Should the EAW be for the execution of a suspended sentence/parole that has been revoked, also the judgement on revoking the suspended sentence/parole should be gathered and it is recommended to refer to it as well in the EAW form.
- The national judicial authority issuing the EAW should have in its possession the appropriate information to assess whether the conditions for issuing the EAW are fulfilled but also whether issuing an EAW would be proportional (see above). While this information may be contained within the national warrant or court judgment, the whereabouts of the person might not be known when the national warrant/judgment is issued. Additionally, sometimes, national warrants are not detailed in this manner. It is recommended that the issuing judicial authority be provided with full access to the case file in order to properly assess the prerequisites for issuing the EAW, fill in the form and assess proportionality. In this regard, additional information regarding the personal circumstances of the requested person must be acquired – if possible and available – in advance (see above).

2. Issuing the EAW

[4] Handbook, para. 1.3.
[5] Also see Handbook, para. 2.1.3.

Given the prevalence of the English language as the common denominator/language amongst most professionals and the difficulties that translations create (contextual inaccuracies, delay but also resources), when issuing EAWs an English translation should be added if possible.

Section (a)

Authorities should fill in all information required in this section, including where photos and fingerprints can be collected, if available and not already added in the SIS alert. Photos (especially when recent) and fingerprints are quite useful to avoid wrongful arrests and to solve problems of identification since the requested person may challenge the identity before the authorities of the executing Member State.[6] Mentioning the time when the photo was taken could prevent doubts regarding the identity of the person. Mentioning the nationality is needed to examine grounds for refusal, while the language of the requested person can assist the authorities to organise the arrest and the ensuing procedure.

Section (b)

Prosecution or execution-EAW?

When filling out *section (b)* mentioning the existence of a national judicial decision in *section (b)*, together with the information provided in *section (c)*, enables the executing judicial authority to determine whether surrender is sought for the purposes of conducting a prosecution or for the purposes of executing a custodial sentence.

Currently, the form does not allow for a clear indication of whether the EAW is a prosecution or execution EAW. Therefore, mentioning in a precise manner, the nature of the national instrument is vital for the executing judicial authority to understand this.

This should also be reflected on the following parts of the form:

[6] Also, Handbook, para. 3.2.1.

For *prosecution-EAWs* and execution-EAWs in cases where an ordinary remedy is still possible (before or after surrender, for example for *in absentia* proceedings), *section b(1)* and *section c(1)* must be filled out and also *section (c)2* if a penalty was already imposed.

For *execution-EAWs* where no ordinary remedy is available, *sections (b)2 and (c)2* must be filled out.

It is not required to include a copy of the national judgement or arrest warrant, either authenticated or not.

The national legal basis

Following the need to comply with the dual-level of protection, the national judicial decision must be a distinct, separate decision even if issued by the same authority that issues the EAW.[7] In prosecution-EAWs, the national basis does not have to be called 'arrest warrant'. It must have though a same effect to a national arrest warrant, namely "to enable, by a coercive judicial measure, the arrest of that person with a view to his or her appearance before a court for the purpose of conducting the stages of the criminal proceedings."[8]

The national warrant(s) must cover all offences for which an EAW is sought.

If the EAW is issued by a public prosecutor, it must be explained under *section (f)* whether the national warrant is issued by a court/judge and how the dual level of protection is fulfilled in this case. This is because the current EAW form does not include all new features of validity of EAWs following the ECJ case law. To avoid a request for supplementary information, when the EAW is issued by a prosecutor, explaining how dual protection is fulfilled avoids delays and possible refusals.

In case of a convicting judgement (execution-EAWs), the judgment must originate from a judicial authority from the Member State and not a third state outside the EU unless it was recognised and rendered as enforceable by the issuing Member State. However, when the EAW

[7] See Handbook, para. 2.1.3.
[8] ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, paragraph 53.

concerns the execution of a sentence that has been taken over by the issuing Member State from a third State, the issuing judicial authority should mention in the EAW whether a judicial review was carried out in the issuing Member State to verify whether the fundamental rights of the person concerned were respected in the proceedings resulting in the judgment in the third State. If the judgment is of another EU Member State, it can also be the basis for an EAW as long as it has been recognised under the law of the issuing Member State.

The judgment should be *enforceable*. If it is enforceable and no ordinary remedies are possible anymore, then the EAW can be issued as an execution-EAW. If it is enforceable, but an ordinary remedy is still possible (*e.g.* an enforceable court decision where an ordinary appeal is pending), then the EAW can be issued only as a prosecution-EAW.[9]

Attention is needed in the case of the so-called 'cumulative judgments', when one or more sentences handed down previously in respect of the person concerned are cumulated into one single sentence in a process leading to one cumulative judgement. To avoid confusion only the cumulative judgment should be filled in under s*ection (b)2* and the cumulative sentence under *section (c)2*. To avoid requests for supplementary information and clarification, the issuing judicial authority should explain aspects of the separate judgments that could lead to applying refusal grounds: the offences, facts (*e.g. locus delicti*), and other aspects that are pertinent for refusal grounds.

From practice, it appears that the date of the decision, the authority and the reference (numbering or identification number) of the decision (warrant or court judgment) are data desired by executing judicial authorities. The issuing judicial authority should therefore mention those three elements even if they are not explicitly required by the form.

Section (c)

When filling in *section (c), fields (c)1 and (c)2* should both be filled in only when it concerns *prosecution-EAWs* and *execution-EAWs* where an ordinary remedy is still possible (before or

[9] In this regard, this is a more nuanced approach than the Handbook, para. 2.1, check also the *Guidelines how to fill in the EAW form* (Annex III to the Handbook).

after surrender, for example for *in absentia* proceedings). In other cases, filling out both the *fields (c)1 and (c)2*, might confuse the executing judicial authority regarding the character of the EAW – see for more above under *section (b)*.

Mentioning the remaining sentence to be served in *section (c)2* is required and important and it should always be filled out. If no part of the sentence has been served yet, the amount of the full sentence should be repeated there.

When filling in the sentences you may add accessory offences. However, be aware that not all Member States accept accessory offences as part of the EAW and the EAW would as a result only partly be executed in that case.

Multiple offences - sentences
Where a *prosecution-EAW* is issued for multiple offences, the maximum sentence for each separate offence must be mentioned in *section (c)*, unless the offences are all covered by the same legal provision, and must clearly link that maximum sentence to the relevant offence.

Currently, the EAW form does not guide the issuing judicial authority to link offences with sentences – *i.e.* which offence corresponds to which sentence. This leads often to supplementary information requests. To avoid this, it is advisable to clearly outline the offences and their sentences in the EAW so that it is clear which maximum sentence corresponds to which offence.

Section (e)
Section (e) is the gist of the EAW. The executing judicial authority might have to raise refusal grounds and diligently filling in *section (e)* is vital for avoiding supplementary information requests, refusals and delays.

The description of the circumstances includes:

- A description of the facts as accurately as possible that gives a clear impression of the factual circumstances.

- Time and place must be included as precisely as possible. This is important to address issues relating to *ne bis in idem*, territoriality and other topics that relate to possible ground of refusals.
- The degree of participation of the requested person must be mentioned. This is often omitted and yet it is vital to comprehend the factual basis for the EAW.

In the current form, the non-listed offences must essentially be mentioned twice: once under the description of offences and a second time below the list of offences under *section (e)II*. This can be confusing. If the offence is a non-listed offence, you can repeat the same description under (e)II and try to keep the same text in the section above to describe the offences. Alternatively, you may explain that this concerns a non-listed offence and refer to the description above.

Please be aware when describing non-listed offences that if the executing judicial authority doubts whether the requirement of double criminality is met, additional information might be requested; being as precise and descriptive as possible might be beneficial.

More offences

If there are more offences, the current form does not guide the issuing judicial authority to outline them separately. It is advised that the issuing judicial authority describes them separately and numbers (1,2,3…) each offence so it is clear which description corresponds to which offence. This also applies to the facts that support each offence separately. It must be clear to the executing judicial authority: how many offences there are, the legal classification for each offence, the description of the facts supporting each offence, and the sanction for each offence.

Section (f)

A plethora of aspects can be communicated to the executing judicial authority under this section and there can be no exhaustive suggestions. This section is meant to be used at the discretion of the issuing judicial authority to communicate to the executing judicial authority anything that might assist the positive evaluation of the request.

The executing judicial authority should not assess the merits of the case (*e.g.* level of suspicion, quality, adequacy of evidence) and information pertinent for such an assessment is superfluous.

Unsolicited information could be both a blessing and a curse, as it could confuse and lead to unnecessary discussions at the executing judicial authority.

Having said that, below is a non-exhaustive collection of information that could be useful to include under *section (f)*, when relevant, as it could facilitate the process:

- Guarantee of Art. 5 (3) of FD 2002/584/JHA: if the issuing judicial authority is ready to commit to such a guarantee, giving it in advance *proprio motu* will facilitate proceedings. Please consider it especially when the requested person is a resident or national of the executing Member State. If so, please include under *section (f)* a guarantee that can be relied upon (see below under Guarantee of Art. 5 (3) of FD 2002/584/JHA) for more).
- Information about the possible whereabouts of the requested person or other information that could be helpful in finding the requested person. This could also be included under *section (a);*
- Warnings that the person might be aggressive or armed;
- The fact that the EAW will be used as the basis for a conditional surrender of Art. 24 of FD 2002/584/JHA (see below for more);
- Statute of limitation: if there is a large time-lapse leaving the impression that the EAW might be based on a national prosecution or enforcement which is statute-barred, you may mention that the statute of limitations is not expired yet, to alleviate any concerns regarding Art. 8 (1) (c) of FD 2002/584/JHA (that the EAW is not based on an enforceable decision).
- If the statute of limitation is close to expiration and this is a particularly urgent request: please mention this under *section (f)*. Alternatively, you may use the option of the conditional transfer of Art. 24 of FD 2002/584/JHA.
- Explain if an accumulated sentence for more offences can be disaggregated, or to address issues relating to cumulative judgements, aggregated offences and their sanctions.

- Detention conditions: you may give a guarantee that the person will (not) be held in a particular prison facility, to accelerate surrender. Please read below under the section on detention conditions on how to maximise the efficiency of such guarantee. Respectively the same can be done as well for deficiencies in the system of justice.
- Issuing judicial authority and dual protection: if the EAW is issued by a prosecutor, it will help to explain how the dual-level protection is fulfilled.
- The reasons for the delay between the imposition of the sentence and the issuing of the EAW.
- Information about other EAWs against the requested person.
- Other information *proprio motu* about special aspects of the judicial system of the issuing Member State or the case at hand, in anticipation of any questions that may arise.

Executing EAWs

Power to assess the EAW

When assessing the form, the executing judicial authority has a specific limit to its powers: *e.g.* to check the conditions of Art. 8 of FD 2002/584/JHA, grounds of refusal. The executing judicial authority does not have the power to assess the merits of the case pending in the issuing Member State, *e.g.* level of suspicion, maturity and adequacy of the evidence. The executing judicial authority cannot assess whether an arrest would have been lawful for similar circumstances under the law of the executing Member State. There can also be no checks regarding the lawfulness of the content of the national warrant and the law of the issuing judicial authority.

An example is the statute of limitation in the issuing Member State which cannot be checked by the executing judicial authority, this is not a type of assessment that falls within the powers of the executing judicial authority. However, if after the issuing of the EAW and due to lapse of time the act is statute-barred in the issuing Member State, then the national judicial decision on which the EAW is based cannot be said to be 'enforceable' any longer in the sense of Art. 8

(1) (c) of FD 2002/584/JHA; based on this provision, the executing judicial authority may control the validity of the EAW (and not based on statute of limitations). Preferably those issues should be clarified before the requested person is exposed to detention.

Listed-offences

Executing judicial authorities in principle cannot assess whether the described offence would fall under the listed-offence ticked in the EAW under the law of the executing judicial authority or even make that assessment based on the information of the EAW themselves. This is for the issuing Member State to decide.

Double criminality cannot be checked for listed-offences even if it concerns one's own nationals.

Ne bis in idem

Please note that for raising the ground of *ne bis in idem*, the ECJ has developed jurisprudence on the definition of when the acts are the same ("same acts"), where the same facts are connected only with the factual circumstances and not the legal classification of the offences or the protected legal interests *per se*. This means that there could be "same acts" triggering *ne bis in idem* even if the legal classification and protected interests differ.[10]

Double criminality

The ground for refusal of double criminality for non-listed offences is meant to be optional, in that the executing judicial authority may choose to go ahead and execute the EAW even if the offence (which is not a listed-offence) is not criminalised under the law of the executing Member State. The executing judicial authority should make use of this discretion where

[10] ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, paragraph 39; ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, paragraph 81.

required[11] and where possible under national law.[12] For example, if there are compelling reasons for executing the EAW, the conclusion could be that the ground will not be applied.

When assessing double criminality, the constituent elements of the offence of the two legal systems do not necessarily have to match. What is important is whether the factual elements underlying the offence, *as these are described in the EAW*, would also be criminalised, even if criminalised as a different offence (see the ECJ jurisprudence in this regard).[13]

Supplementary information may be requested if factual data important to assess the existence of double criminality are missing from the EAW.

The double criminality ground does not include any check of proportionality.

Prosecution in the executing Member State for the same 'act'

Note that the ground of refusal in Art. 4(2) of FD 2002/584/JHA is not a corollary of *ne bis in idem*. This ground can be raised when there are multiple prosecutions and is meant to be raised as optional ground. Accordingly, the executing judicial authority should make use of this discretion where required[14] and where possible under national law.[15] One guideline could be that the prosecution that should 'prevail' is the one that makes sense from the point of view of the best jurisdiction to prosecute. The executing judicial authority should be able to take into account the availability of evidence, where the damage was the greatest or, even, whether the case in the executing Member State is as progressed as the one pending before the issuing judicial authority.

Execution of judgments – Art. 4 (6) of FD 2002/584/JHA

[11] Cf. the duty of conforming interpretation.
[12] Under EU law there is no duty to interpret national law *contra legem*.
[13] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4.
[14] Cf. the duty of conforming interpretation.
[15] Under EU law there is no duty to interpret national law *contra legem*.

When considering a refusal based on Art. 4(6) of FD 2002/584/JHA, the executing judicial authority must explore whether it has all the information it needs to be able to actually execute the foreign sentence on the basis of FD 2008/909/JHA, *while examining this ground*. In this way, if there is a need for supplementary information for applying FD 2008/909/JHA it can be asked upfront.

This smart practice is to avoid that the ground is applied by the national court with insufficient information to proceed immediately with FD 2008/909/JHA and delays occur accordingly to acquire the certificate of Art. 6 of FD 2008/909/JHA. If that is so, it will stipulate so in one single decision. If there is insufficient information to order execution, the executing judicial authority will ask for further information that will enable it to refuse the EAW and order the execution.

Territorial jurisdiction

This ground is meant to be optional and the executing judicial authority must have discretion on when to raise it.

Cross-border cases are often complex to prosecute, and the executing judicial authority should think twice when considering this ground. The practice to raise this ground in an automatic way once the requirements of territoriality are fulfilled does not serve the purposes of the EAW. One example is if only minor acts, or even some of the acts, took place within the territory of the executing judicial authority; in those cases, the executing judicial authority should only raise the ground after careful consideration of whether claiming jurisdiction is sensible in the case: *e.g.* whether it can prosecute all the acts, availability of evidence and prospects of prosecution, interest in prosecuting, the effect of applying this ground (the outcome may not lead to impunity), the fact that no prosecution was launched in the executing Member State, that the facts were only partially committed in the executing Member State.

The *Guidelines for deciding 'Which jurisdiction should prosecute?'* by Eurojust provide for good practices in assessing jurisdiction. The executing judicial authority should take these aspects into account before applying this ground.

Conditional surrender Art. 24(2) of FD 2002/584/JHA

Conditional surrender on the basis of Art. 24(2) of FD 2002/584/JHA should be arranged based on a bilateral agreement between the competent authorities. The following aspects could be included in the bilateral agreement to achieve clarity of what is agreed upon:

- stating for what type of procedural activity (*e.g.* for the duration of proceedings or for other activity) the conditional surrender is required;
- the estimated/ planned deadline for the execution of the conditional surrender and the deadline for the conditional surrender;
- an undertaking to return the conditionally surrendered defendant within the requested or permitted time limit after the specified procedural step;
- an undertaking that the conditionally surrendered person will remain in restraint/ detention in the Member State during his or her stay until his or her return;
- a declaration that the requesting Member State will bear the costs incurred in connection with the conditional surrender and return of the person charged (or another type of agreement regarding the costs).

Supplementary information Art. 15(2)-(3) of FD 2002/584/JHA

Requesting supplementary information

Supplementary information may only be requested when necessary to take the decision on surrender.[16] Supplementary information may only be requested in exceptional cases and not when it concerns minor issues that are not decisive for the decision, or issues that are clearly within the EAW-form already. The practice of requesting supplementary information in an automatic and structural way, with, *inter alia*, standardised lists of questions/requests is not in line with EU law and should not be done.

[16] See for an outline of examples where supplementary information might be necessary in Handbook, para. 4.4.1.

The executing judicial authority has discretion to decide when supplementary information is necessary. If necessary, it must be requested. See, *e.g.*,:

(i) when examining whether the EAW meets the requirements of lawfulness set out in Art. 8(1) of FD 2002/584/JHA;[17]

(ii) when examining whether the requirements of Art. 4a(1)(a)-(d) of FD 2002/584/JHA are met;[18]

(iii) when examining whether there is a real risk for the requested person of a violation of Art. 4 of the Charter or of a violation of the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter.[19]

Supplementary information is requested, usually, on account of a judicial authority's decision in the executing Member State. In some countries, also non-judicial authorities might take the initiative to send such a request. To avoid misunderstandings, such requests from non-judicial authorities should be kept to a minimum and only if they concern obvious mishaps in the interest of procedural economy, *e.g.* signature missing.

When requesting supplementary information, it is advised to include the following information in the request as clearly as possible:

- Exactly what information is requested; it has to be clear to the issuing judicial authority what it must provide. If for example what is missing is the role of the requested person in the criminal offence, then the question should be "what was the role..." and not "describe the facts better". It is advisable to request what is missing and be as specific as possible. Vague requests *e.g.* "better explanation of *section (e)"* may lead to vague answers. Make sure generic language is used, avoiding national terminology which might confuse the issuing judicial authority.

[17] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 65.
[18] ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paragraphs 101-103.
[19] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paragraph 95; ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system*), C-216/18 PPU, ECLI:EU:C:2018:586, paragraph 77.

- Reasons for requesting such information, especially when it concerns possible grounds for refusal or guarantees. By explaining the context of the request, the executing judicial authority can enable the issuing judicial authority to provide the appropriate context in the answer. Often additional documents might be needed which the issuing judicial authority can provide once the context is clear. For example, if the information is requested in the context of *ne bis in idem*, the issuing judicial authority might have an interest to provide more information than the executing judicial authority requests, *e.g.* the copies of judgments – which would not have been sent had it not known the context of the request for supplementary information.

- **Avoid irrelevant questions**: while the relevancy of the request might depend on the legal system and can be judged differently by other systems, there are some topics for which the executing judicial authority should not normally request any information. Questions relating to the merits of the case should not be part of supplementary information. Examples of questions which are irrelevant as they imply a control of the merits of the case outside the scope of the executing judicial authority include *inter alia*: *e.g.* quality or probative value of evidence supporting the case, whether there are witnesses and, if so, how many, communication of the prosecution file to the suspect, bail conditions, readiness of the case for trial, grounds for reasonable suspicion.

- Set a **deadline**: there must always be a deadline set to the request, to ensure that there will be no delays. Such deadline might be provided by legislation or on a case-by-case basis by the executing judicial authority. Regardless of the mechanism used to impose a time limit (*e.g.* legislative deadline, determination based on hearing date, fixed scheme of deadlines or context-sensitive approach in calculating), the executing judicial authority must ensure that: time limits are *sensible* for the issuing judicial authority to procure the requested information in the case at hand, they should *take into account the liberty status* of the requested person and must not lead to a violation of the *time limits of Art. 17 of FD 2002/584/JHA*. For example, if the information requested is quite bulky, a more generous deadline should be provided. The deadline must be communicated clearly to the issuing judicial authorities. It is advisable that the executing judicial authority includes the direct contact information of the executing judicial authority. If

there is difficulty in communication, Eurojust should be contacted to assist. The form for informing Eurojust of delays of Art. 17 of FD 2002/584/JHA should also be used in this case https://www.eurojust.europa.eu/electronic-forms-article-177-eaw-framework-decision

- Make sure that all questions are included in the first request to avoid more requests being sent later. The EAW must be assessed thoroughly before the request is made to ensure that all issues that must be included in the request are there. The attitude with Art. 15(2) of FD 2002/584/JHA is to "get it right the first time".

Answering supplementary information requests

When receiving requests for supplementary information in the context of Art. 15(2) of FD 2002/584/JHA, it is important to deal with the request as a priority matter of urgency. If, after all efforts, deadlines cannot be met, please contact immediately and as soon as possible the executing judicial authority, because often the deadline corresponds to the day of the hearing in the executing Member State. If there is difficulty in communication, Eurojust should be contacted to assist.

If it is not clear what information is requested, communication with the executing judicial authority should be initiated as soon as possible to clarify. In doubt, it is better to send more information than less.

Often the executing judicial authority might be unfamiliar with some aspects of the legal system of the issuing Member State. A fruitful attitude is to anticipate follow-up questions that could arise.

The authority answering the requests and providing the supplementary information should be, if possible, the issuing judicial authority (within the meaning of Art. 6(1) of FD 2002/584/JHA) especially if the content of the information changes substantially the EAW, for example when the more elaborate description of the offences leads to more offences being included in the

form. If not, the danger is that the executing judicial authority might question the validity of the EAW and the supplementary information.

How to use Art. 15(3) of FD 2002/584/JHA – *Proprio motu*

The EAW gives the possibility to the issuing judicial authority to anticipate trouble and/or simplify procedures by sending on its own initiative supplementary information. This can be done under *section (f)* of the form.

Issuing judicial authorities are encouraged to use this option when certain particularities in their system might be the source of possible misunderstanding and lead to Art. 15(2) of FD 2002/584/JHA requests or unnecessary refusals; when particularities in the present case might lead to additional questions; or to expedite the procedure. The guarantee of Art. 5(3) of FD 2002/584/JHA for example could be given in advance, as a way of speeding up the process. Another possibility is to mention in advance the prison(s) in which the requested person, after surrender, will likely be detained.

If you make use of Art. 15(3) of FD 2002/584/JHA make sure the information communicated is clear.

DO's

- be precise and formulate clear and specific questions and answers
- set a deadline
- respect the deadline

- include direct communication details (Skype, email address etc) for easier communication between authorities and specify what language you speak/understand;
- communicate with the authorities of the other Member States to streamline the process;
- anticipate possible questions arising and if possible, send this information *proprio motu.*

DON'T's:

- with regard to direct communication: avoid using intermediaries such as administrative personnel to draw up requests or handle incoming answers;
- send standardised lists of questions;
- vague and general requests for clarification of the form's sections;
- irrelevant questions especially when relating to topics for which the executing judicial authority has no competence;
- unnecessary requests for supplementary information.

The guarantee of Art. 5(3) of FD 2002/584/JHA

The guarantee of return aims *inter alia* at social rehabilitation. It should be requested only when the requested person invokes it. Automatic or obligatory triggering of this guarantee is not appropriate, even if it concerns nationals of one's state. This guarantee should be offered to both nationals and residents. Executing judicial authorities should examine carefully whether social rehabilitation is served by triggering the guarantee.

If the issuing judicial authority is prepared to accept such guarantee when issuing the EAW, they should mention it in advance using art Art. 15(3) of FD 2002/584/JHA *proprio motu* in the form of the EAW (*section (f)* – see above).[20]

The issuing judicial authority should give the guarantee in a clear and unconditional manner. For example, the guarantee cannot be made dependent on the finding by the court of the issuing Member State that this would indeed help social rehabilitation or other objectives. The text of the guarantee should leave no doubts that the issuing Member State commits to return the person to the executing Member State after the end of proceedings.

Some proposed texts to use (shorter and longer version):

> "*In case of surrender to [insert country], if convicted to a custodial sentence, the requested person will be returned to the executing* Member State *in accordance with Framework Decision 2008/909."*
>
> *"The guarantee is given in accordance with article 5, § 3 of the Framework Decision 2002/584/JHA for the return to (fill in the executing Member State) of (fill in the identity of the person concerned) if surrendered to (insert issuing* Member State*). This guarantee entails that the person concerned, after a final decision imposing a custodial sentence or measure involving deprivation of liberty has been given, will be returned to (fill in the country) in order to serve there the custodial sentence or detention order passed against him according to the dispositions of Framework Decision 2008/909/JHA."*

The return should be executed as soon as possible after the final judgement in the issuing Member State unless there are other procedural steps. Those procedural steps that could delay the execution of the return guarantee to the executing Member State include:

- additional steps/procedures for the determination of the sentence or due to concrete reasons;

[20] As also in Handbook, para. 3.2.2 and 5.8.2.

- the presence of the requested person is essential in the issuing Member State for safeguarding the rights of defence of the person concerned or the proper administration of justice.

This assessment requires a balancing exercise on whether delay is necessary, and it should be strictly applied by the issuing judicial authority. The issuing judicial authority may not systematically and automatically postpone the return *e.g.* until a certain amount of time has been served in the issuing Member State.

The procedure of the return must follow FD 2008/909/JHA, thus acquiring and sending the certificate to the other Member State. The provisions of FD 2008/909/JHA are applied *mutandis mutatis* to the return guarantee including the provisions regarding an additional consent (see Art. 6 FD 2008/909) but this is insofar as they are compatible with FD 2002/584/JHA.

The authorities in both the executing and issuing Member States must trigger the procedure of return; the execution of the return should not be 'forgotten'. An attentive attitude is recommended so that guarantees given do not remain unexecuted.[21]

Time Limits - Art. 17 of FD 2002/584/JHA

The executing judicial authority should treat the EAWs with urgency, given the state of affairs and the restriction of the person's liberty.

This also includes the practice of Art. 15(2) of FD 2002/584/JHA, which should be performed within the time limits. Executing judicial authorities must trigger those procedures early and not wait until the last minute. A good practice is to schedule as early as possible hearings for

[21] In the Handbook, para. 5.8.2. it is suggested that the issuing Member state is responsible to contact the executing Member State to arrange the return.

EAWs or that the judge prepares the case in advance to anticipate the triggering of procedures that take more time.

Using the 30-day extension of Art. 17(4) of FD 2002/584/JHA should always be accompanied by an explanation of the reasons, and it should be used only in specific cases.

Exceeding the time limit of 90 days might be acceptable in exceptional cases, *inter alia*:

- the executing judicial authority assesses whether there is a real risk that the requested person will, if surrendered to the issuing judicial authority, suffer inhuman or degrading treatment, within the meaning of Art. 4 of the Charter, or a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Art. 47 of the Charter, or,
- proceedings are stayed pending a decision of the ECJ in response to a request for a preliminary ruling made by an executing judicial authority, on the basis of Art. 267 TFEU.[22]

If the time limits of Art. 17 of FD 2002/584/JHA cannot be respected, the issuing judicial authority must be informed. Eurojust should also be informed (Art. 17 (7) of FD 2002/584/JHA) in case the time limits cannot be respected and the following form should be used to do so https://www.eurojust.europa.eu/electronic-forms-article-177-eaw-framework-decision.

Failing to inform Eurojust however does not impact the validity of the detention. If there is a delay and the limits of Art. 17 of FD 2002/584/JHA are violated, the requested person must not *per se* be released automatically. The national law in this case must provide a clear and foreseeable legal framework. If the decision to release the person is taken, the executing judicial authority must ensure that absconding will be prevented using alternatives to detention measures. If, however, this risk cannot be minimised to an acceptable degree, a release simply based on the exceeding of time limits is not appropriate.

[22] ECJ, judgment of 12 February 2019, TC, C-492/18 PPU, ECLI:EU:C:2019:108, paragraph 43.

Detention conditions and deficiencies in the system of justice

Detention conditions

Should there be an argument that the detention conditions in the issuing Member State are not appropriate, the executing judicial authority must perform a test to assess such risk. The so-called *Aranyosi test* includes two steps: an *in abstracto* step (systematic or generalised and structural deficiencies affecting a group of persons or specific facilities) and an *in concreto* step (substantial grounds proving that the requested person will be exposed to those detention conditions).[23] Only when following this test, the detention conditions can lead to a postponement of the execution in line with the ECJ jurisprudence.[24]

To prove the *in-abstracto* risk (first step), executing judicial authorities must take into account information which is objective, reliable, specific and properly updated. For example, ECtHR case law, reports from NGOs and international organisations and the information submitted by the defence.

Attention should be paid as to whether that information is updated and is currently representative of the situation at the issuing state. Often there is a lack of properly updated information and the executing judicial authority must combine sources.

A finding of an *in abstracto* risk does not suffice to refuse execution of the EAW. Once such a risk is established, then the national court must proceed to the second part of the test.

The second step of the test (*in-concreto* risk) necessitates a request for supplementary information based on Art. 15(2) of FD 2002/584/JHA. This is an obligation that cannot be avoided and must be complied with. However, this obligation is somewhat nuanced when it

[23] See more analytically Handbook, para. 5.6.
[24] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198; ECJ, judgement 15 October 2019, *Dorobantu*, C-128/18, ECLI:EU:C:2019; ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589.

concerns the deficiencies in the systems of justice (see below under Deficiencies in the system of justice).

The executing judicial authority may not request supplementary information on all prisons of the issuing Member State, but may only request information on the actual and precise facility where the requested person will likely be detained, including on a temporary or transitional basis.[25] The executing judicial authority should rely on the information received by the issuing judicial authority, but also on other information that it might acquire on its own volition or through the defence.

The request for supplementary information may take three forms depending on what the *in abstracto*-risk test has shown:

- A request whether the person can be kept in a specifically named prison facility that the executing judicial authority has evidence that it complies with the ECHR standards. This option is a form of **guarantee** and can accelerate the procedure significantly. This can be used when the *in-abstracto* test has proven that a specific facility is in line with the conditions of the ECHR.
- A request that the person will *not* be kept in a specifically named prison facility. This is also a form of **guarantee** that can accelerate the procedure. To use this efficiently, it should be employed only when the in *abstracto risk* is proven for a specific prison facility (or more specific ones). In that case, the executing judicial authority requests the guarantee that the person will not be held in those prison(s). Such a possibility can accelerate proceedings immensely.
- Request for information on which detention facilities the person will likely be detained, including on a temporary or transitional basis and a description of the conditions in those facilities. This extensive information can be requested when the *in-abstracto* test shows that the problems are across the prison facilities or when it is not clear which facilities are problematic. The questions posed in this option should reflect the aspects of ECHR standards on detention conditions (see below).

[25] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 116.

Please find below a draft template that could be used to request supplementary information regarding the detention conditions of the facilities that the requested person will likely be detained[26]:

Draft template

"Please provide supplementary information on the conditions in which it is envisaged that the requested person will be detained in relation to the ticked boxes below:

1. Prison cells:
   - o Minimum personal space for single-occupancy and multi-occupancy cells (in m2)
   - o Cell's measurements (height and width)
   - o Equipment (heating, ventilation) and facilities (lighting, windows, washbasin, toilet, shower, furniture) in cell
   - o Cleanliness and hygienic conditions in cell
   - o Video-surveillance of cells

2. Sanitary conditions:
   - o Access to sanitary facilities (frequency)
   - o Structural separation requirements for in-cell sanitary facilities
   - o Hygienic conditions (disinfection and cleaning, provision of sanitary products to detainees)
   - o Access to shower/bathing facilities and hot water

3. Time out of cell
   - o Time per day/week spent by detainees outdoors in open air
   - o Sport facilities outdoors and indoors
   - o Time per day/week spent by detainees in common areas

[26] The draft template has been provided by the Belgian partner, Jan van Gaever, and it is reportedly a template in the making by EU institutions, not yet published.

- Activities/programmes available to detainees outside of their cells (education and recreational activities)

4. Solitary confinement
   - Standards for the application of solitary confinement
   - Monitoring of detainees while in solitary confinement

5. Access to healthcare
   - Access to medical services and emergency care in prison
   - Timing on medical intervention
   - Availability of qualified medical and nursing personnel in prison facilities
   - Availability of specialist care (*e.g.* for long-term diseases, for sick and elderly detainees, mental illnesses, drug addictions)
   - Medical examination upon arrival in detention facilities
   - Medical treatment of own choosing

6. Vulnerable prisoners
   - Special measures for young detainees
   - Special measures for women in detention
   - Special measures for pregnant women
   - Special measures for LGBTI prisoners

7. Special measures in place to protect detainees from violence
   - Staff supervision
   - Facility arrangements to prevent inter-prisoner violence (emergency button in cells, video-monitoring,…)
   - Guards trainings

8. Nutrition
   - Frequency of provision of meals
   - General nutrition standards

9. Legal remedies

   - Legal remedies available to the detainee in case of violation of national standards on detention conditions

Please also provide additional information on the above-mentioned topics: …"

Standards of detention conditions

Currently, there are no EU harmonised standards on detention conditions based on EU legislation. The standards of detention conditions within the EU are those followed by the ECtHR. If the executing Member State has higher standards of conditions regarding detention, those cannot be demanded.

All relevant physical aspects should be taken into account (*e.g.* personal space, sanitary conditions, freedom to move within prison) and thus follow the ECtHR case law in all respects (*e.g.* 3m² minimum with certain exemptions, duration plays a role but is not decisive, other aspects of inappropriate conditions).[27] In calculating that available space, the area occupied by sanitary facilities should not be taken into account, but the calculation should include space occupied by furniture. Detainees should still have the possibility of moving around normally within the cell.

A legal remedy to challenge detention conditions does not suffice to exclude a real risk of violation.

Weighing detention conditions with considerations relating to the impunity or efficacy of judicial cooperation and principles of mutual trust and recognition cannot be accepted.

Should the application of the test be unclear in any way, a preliminary reference procedure should be considered.

[27] ECtHR, 20 October 2016, *Muršić v. Croatia*, CE:ECHR:2016:1020JUD000733413, § 139. For a collection of the ECtHR case law that instructs the ECJ see ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraphs 97 and 98 and the case-law cited.

Conclusion of the test

If the *in-concreto risk* cannot be dispelled within reasonable time even after the supplementary information the procedure can be ended.

In that case, the executing judicial authority should look into further steps to assess the impact of impunity and whether alternatives can be used. These could be the use of FD 2008/909/JHA or the FD 2008/947/JHA in execution-EAWs.

Time limits of executing judicial authority

The executing judicial authority must make efforts to stay within the time limits of Art. 17 of FD 2002/584/JHA and ensure that those matters are triggered as early as possible. Please add a realistic deadline to the request of Art. 15 (2) of FD 2002/584/JHA that complies with Art. 17 of FD 2002/584/JHA.

Issuing judicial authority: answering a request for supplementary information on detention conditions

Upon receiving a request for supplementary information on detention conditions, the issuing authority should treat it as a matter of urgency. If the deadline cannot be respected, please contact the executing judicial authority.

If it is possible to suggest specific prison facilities that comply with the ECHR standards, suggesting this to the executing judicial authority can speed up the process of execution, even if this was not requested. This can be done:

- either when answering the supplementary information of Art. 15(2) of FD 2002/584/JHA request;
- or already in advance as *proprio motu* information of Art. 15(3) of FD 2002/584/JHA if this is a known problem in the issuing Member State. In that case, the EAW is issued with additional information under *section (f)* that the requested person will likely be detained in a named specific facility that complies with the ECHR standards. With this option the lengthy process described above (on the basis of Art. 15(2) of FD 2002/584/JHA) can be avoided altogether. To achieve the efficiency of that option, it

must be clear or known already that that the proposed facility complies with the ECHR standards. This can be included in the EAW-form.

Attention! When a guarantee for a specific detention facility is given (*e.g.* that the requested person will be likely detained at a specific facility that fulfils the ECHR standards), an endorsement of this guarantee by the issuing judicial authority is important, to give to this guarantee its full effect! If this guarantee is not given by the judicial authority, acquiring an endorsement, or consent or agreement or approval by the judicial authority increases the reliability and strength of that guarantee. Such endorsement should be mentioned in the response.

Deficiencies in the system of justice

Most aspects mentioned above apply also to risks regarding the independence and impartiality of tribunals in the issuing Member State, or a failure to comply with the requirement for a tribunal established by law. Additional attention should be paid to the following particularities:

The second step of *in-concreto risk* requires two subtests: first, the executing judicial authority must, in particular, '*examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, (…) are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject'*. Here the focus is on whether the deficiencies can affect the relevant courts of the ad hoc case. Second, if the answer is affirmative, it must also '*assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the [EAW]'*.[28] Here the executing judicial authority is expected to zoom in on the procedure of the

[28] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, paragraphs 60-61 and 68-78.

requested person and see whether the pending case will be affected by the alleged deficiencies potentially affecting the said courts with jurisdiction over these proceedings.

The obligation of the executing judicial authority to request supplementary information (on the basis of Art. 15(2) of FD 2002/584/JHA) in order to assess the *in-concreto risk* in the case of deficiencies of in the system of justice exists only after *'…the evidence put forward by the person concerned, although suggesting that those systemic and generalised deficiencies have had, or are liable to have, a tangible influence in that person's particular case, is not sufficient to demonstrate the existence, in such a case, of a real risk of breach of the fundamental right to a tribunal previously established by law, and thus to refuse to execute the European arrest warrant in question,…'*.[29]

When making that *in concreto* assessment the executing judicial authority must look into various specific factors: for example, in execution-EAWs, information regarding the composition of the panel of judges that heard the requested person's criminal case and whether there was a real breach of fair trial rights.[30] In prosecution-EAWs, the factors to be taken into account could be the personal situation of the requested person, the nature of the offence, the factual context surrounding that European arrest warrant or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person, the latter, if surrendered, runs a real risk of breach of that fundamental right.[31]

This possibility for postponing surrender is currently applicable only as far as Poland is concerned and concerns aspects of the independence of courts. However, developments within Europe are dynamic. Please note, that even if the issuing Member State in question has been the subject of a reasoned proposal adopted by the Commission pursuant to Art. 7(1) TEU (in this case Poland), the complete assessment must be followed. Yet if the Council were to adopt

[29] ECJ, judgment of 22 February 2022, *X& Y*, (C-562/21 PPU and C-563/21 PPU), ECLI:EU:C:2022:100, paragraph 84.
[30] ECJ, judgment of 22 February 2022, *X& Y*, (C-562/21 PPU and C-563/21 PPU), ECLI:EU:C:2022:100, paragraph 102.
[31] ECJ, judgment of 22 February 2022, *X& Y*, (C-562/21 PPU and C-563/21 PPU), ECLI:EU:C:2022:100, paragraph 102.

a decision based on Art. 7 (2) TEU in respect to a Member State and the Council were to suspend the FD 2002/584/JHA for that Member, then and only then, the executing judicial authorities of other Member States would be entitled to refuse automatically surrender (thus forgo the two-step test) to that Member State.

Rule of speciality

The renunciation of the speciality differs from the consent to the surrender.

It is important that the issuing judicial authorities become aware of (whether) or not the surrender was allowed under the condition of the speciality rule. Additionally, the issuing Member State should be aware of the declaration made by the requested person in this respect. This is because it is the issuing Member State that needs to comply with this rule.

Thus, the executing judicial authority should ensure that:

- The judgement includes specific reference as to whether or not the speciality rule was renounced.
- A copy of the judgment should be sent to the issuing authorities to verify for which facts surrender was allowed.
- It is highly recommended that the authorities in the executing Member State use this template from the Handbook (Annex III) when communicating their decision to the authorities of the issuing Member State, which summarises all key aspects of the surrender.

Conversely, mechanisms should be in place at the issuing Member State to prevent the violation of the speciality rule due to miscommunication amongst the various authorities in charge of the execution of sentences. For instance, when the issuing judicial authority becomes aware that the surrender is allowed under the condition of the speciality rule, this fact should be

communicated to the relevant authorities at the issuing Member State in charge of executing sentences.

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