

In AbsentiEAW E-bulletin

1. The research project

The InAbsentieAW research project is a comparative legal study into European Arrest Warrants (EAW) relating to persons who were not present in the proceedings leading to their conviction (*in absentia* proceedings). Practice shows that it often comes to problems in issuing and executing such EAWs, mainly because the respective European rules are unclear and because national practice differs considerably in the member states of the European Union. The goal of the research project was to formulate common standards for issuing such EAWs in order to ensure their smooth and fair execution.

By means of case studies from Belgium, Hungary, Ireland, the Netherlands, Poland, and Romania, and on the basis of a comprehensive questionnaire, the problems that these countries experience in issuing and executing EAWs after *in absentia* proceedings were analysed.

The research project, which is led by prof. André Klip from Maastricht University, is implemented jointly by the Amsterdam District Court and Maastricht University, and conducted in collaboration with practitioners from the case studies countries:

- Mr Jan Van Gaever, Advocate General at the Court of Appeal of Brussels, Belgium
- Mr Dr. Szabolcs Hornyák, Judge at the National Office of the Judiciary, Hungary
- Mr Justice John Edwards, Judge of the Court of Appeal of Ireland and Adjunct Professor of Law at the University of Limerick, Ireland
- Mr Prof. Vincent Glerum, Professor of International and European Criminal Law, University of Groningen, and Legal Advisor to the Extradition Chamber of the District Court of Amsterdam, The Netherlands
- Mrs Prof. Małgorzata Wąsek-Wiaderek, Judge at the Supreme Court of Poland and Professor of Criminal Procedure at Catholic University of Lublin, Poland
- Mrs Dr. Mariana Radu, Eurojust and Ministry of Justice, Romania
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The lead researcher was Vincent Glerum. Hannah Brodersen, PhD candidate at Maastricht University, served as the project manager and judge Hans Kijlstra from the Amsterdam District Court as an advisor to the research group. In addition to that, interns from each country supported the research project. Practitioners from Bulgaria (Mr. Atanas Atanasov, judge at Sofia Appellate Court), France (Mr. Patrice Amar, prosecutor), Germany (Mr. Hans-Holger Herrnfeld, Federal Ministry of Justice and Consumer Protection), Italy (Mr. dr. Salvatore Tesoriero, defence counsel), Portugal (Mrs Joana Ferreira, public prosecutor), and Sweden (Mr. Per Hedvall, Swedish Prosecution Authority) acted on the InAbsentieAW Sounding Board. The members of the sounding board mainly assessed the relevance of the research group's findings and their validity beyond the case study countries.

2. Research results

Several problems leading to delays or the refusal to execute EAWs after *in absentia* proceedings have been identified.

Some can be summarised as 'practical matters', such as the failure to use the correct EAW form, language problems, notably in the translation of EAWs, continuous requests for

supplementary information, or a general lack of understanding of the national legal system of the issuing Member State that lead to exceeding the time limits for EAWs. These practical issues are presented in Chapter 2 of the Report.

The most striking finding of the research is, however, that there is no common understanding amongst Member States of legal terms that are relevant for issuing and executing EAWs. This is so, although most of these terms by now have an autonomous Union law meaning and many have been defined by the Court of Justice of the European Union in its case law. Several Chapters of the Report are therefore devoted to identifying the divergences in understanding and in clarifying these terms: Chapter 4 relates to the ‘trial *in absentia*’, Chapter 5 to the ‘trial resulting in the decision’ that led to the EAW, Chapter 6 to the concepts of summons, mandated legal counsellor, right to a retrial, and decision already served. Chapter 7 is on the right to a retrial, with the decision being served after surrender.

Problems in executing EAWs are often caused or exacerbated by a lack of knowledge or understanding of the case law of the Court of Justice. In addition, though, the facts of the case leading to the EAW are often not described in factual terms by the issuing judicial authority, but with reference to legal concepts – which are understood by both issuing and executing authorities through the lenses of national law, which leads to misunderstandings. What does not help is that section (d) of the EAW-form is inappropriately structured and formulated, in particular, in order to enable the issuing judicial authority to illustrate all the different possible trial situations (e.g. for cases of multiple decisions) that may give rise to the EAW at stake.

3. Recommendations (see Chapter 9 of the Report)

3.3.1 Judicial authorities

3.3.1.1 Issuing judicial authorities

Issuing judicial authorities are recommended to:

- 1) always fill in section (d) of the EAW-form;
- 2) use the correct EAW-form/use the prescribed standard text of section (d);
- 3) use the consolidated language versions of section (d) and not to prepare ad hoc translations;
- 4) provide information in a clear, correct, comprehensive and factual manner and avoid legal qualifications on the basis of their own national law when providing information;
- 5) explain why Art. 4a(1) is not applicable to a particular decision, if that is the opinion of the issuing judicial authority;
- 6) ensure that the cause of a refusal is addressed in a subsequent EAW so as to repair it and prevent that a subsequent EAW to the same or another Member State will be refused again on the same grounds;

3.3.1.2 Executing judicial authorities

Executing judicial authorities are recommended to:

- 7) request supplementary information only when needed on specific issues applicable in the case at hand;
- 8) refrain from sending standard questionnaires;
- 9) formulate their requests for supplementary information in an abundantly clear manner;
- 10) apply the autonomous categories of Article 4a(1) on the basis of factual descriptions and not according to national legal classifications;
- 11) consider, before deciding on an EAW, whether the issue at stake is a matter that needs to be clarified by the Court of Justice;
- 12) clearly explain the reasons for their decision, when refusing to execute an EAW on the basis of Art. 4a(1);

3.3.1.3 Both issuing and executing judicial authorities

Both issuing and executing judicial authorities are recommended to:

- 13) use a common language when communicating with each other (e.g. English);
- 14) recognise that the issues addressed in Article 4a(1) FD relate to autonomous concepts of Union law and that attaching a national legal meaning to them may give rise to misunderstandings;
- 15) be mindful of the fact that, in principle, a refusal should be prevented;
- 16) be mindful of the fact that a refusal to execute the EAW can result in de facto impunity;

3.3.2 *Member States*

3.3.2.1 All Member States

All Member States are recommended:

- 17) to recognise that the issues addressed in Article 4a(1) FD relate to autonomous concepts of Union law and that attaching a national legal meaning to them may give rise to misunderstandings;
- 18) to change the mandatory ground for refusal into an optional one (if applicable);
- 19) to amend their legislation on summoning an accused in all proceedings so as to meet the requirements of the Dworzecki judgment;
- 20) Do the utmost to ensure that the accused has an effective opportunity to exercise the right to be present at the trial;
- 21) to pay specific attention to the fact that a summons abroad should meet the same high standards as a domestic summons, but that the factual and legal circumstances are quite different;
- 22) to explore the possibilities for a virtual presence of the accused;
- 23) not to substitute delivery of the summons to the legal counsellor of the accused for summons in person;
- 24) to make abundantly clear what the ambit of a legal counsellor's mandate is under the national legal system;

- 25) to provide for a legal basis for a transfer of proceedings when the execution of an EAW is refused on the basis of Art. 4a(1);
- 26) to organise the attribution of the competence to issue EAWs and the competence to execute EAWs in such a way that it is prevented that judicial authorities only have occasion to issue or to execute an EAW on an incidental basis;
- 27) to set up training programs for issuing and executing judicial authorities with a view to regularly updating them on the case-law of the Court of Justice and the ECtHR;
- 28) to register data on issuing and executing EAWs;

3.3.2.2 Project Member States

Ireland is recommended to:

- 29) review its case management procedures in execution cases;
- 30) take steps to expedite its execution court procedures so as to ensure greater compliance with the 60-day and 90-day time limits and in any case to reduce the time taken to process surrender requests;

3.3.3 *European Union*

The European Union is recommended to:

- 31) adopt legislation on the international judicial assistance to be delivered to summoning accused who reside (or is detained) abroad;
- 32) adopt legislation on the presence of the accused who resides (or is detained) abroad at the trial via videoconference;
- 33) adopt legislation on the temporary transfer of the accused who is detained abroad in order to be present at the trial;
- 34) adopt legislation to amend and clarify the wording and structure of the relevant parts of the EAW-form;
- 35) adopt legislation on the transfer of proceedings when the execution of an EAW is refused on the basis of Art. 4a(1);
- 36) publish all declarations concerning translation of the EAW in the Official Journal;
- 37) further develop and maintain the Manual and the Guide set up by this project;
- 38) develop and implement the proposal for e-learning delivered by this project and set up a digital interactive version of the Manual;
- 39) specifically investigate the causes of exceeding time limits and see whether legal remedies against EAW decisions are one of the explanations;
- 40) adopt legislation on automatically providing the requested person in the executing Member State with the full judgment and its translation in a language s/he understands, if that judgment that has not yet been served on the requested person in person (see Art. 4a(1)(d) of FD 2002/584/JHA).



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