
# First Periodic Country Report: France

*Pr Karine Gilberg*[*]

## Introduction

Since the early implementation of the EAW Framework Decision (EAW FD) in France, the French case law has evolved towards a stronger focus on fundamental rights in the execution of EAWs issued by other Member States.

Along with the evolution of the ECHR case law and more recently of the ECJ case law, French courts have progressively strengthened their control over EAWs taking into account the fundamental rights issue, reconsidering thus the prevalence of the mutual trust and recognition principles. The Cour de cassation (the highest French criminal court) deepened its control over Chambre de l'instruction decisions to execute EAW.

From the very beginning of the EAW, requested persons who did not consent to their surrender quasi-systematically raised the issue of fundamental rights before the Chambre de l'instruction ("investigating chamber", i.e appellate court of decisions regarding the execution and issuance of EAW). Apart from the ECJ case law, there is few French court decisions on the issuance of an EAW by French public prosecutors as his/her decision is generally challenged in the executing country. However, pursuant to Article 170 of the French Criminal Procedure Code, the issuance of an EAW by a French Prosecutor is an act procedure which can be challenged before a judge (chambre de l'instruction – Investigative Chamber)[1].

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[*] Associate Professor at Paris 10, University of Nanterre ; Member of the Centre de droit public (CRDP, Paris Nanterre University) ; Associate Member of the Centre d'études et de recherches de sciences administratives et politiques (CERSA, University of Paris 2, Panthéon-Assas).

[1] "The decision to issue a European arrest warrant may, as a procedural step, be the subject of an action for a declaration of invalidity on the basis of Article 170 of the CCP. Such an action, which is available as long as the criminal investigation is ongoing, enables the parties to the proceedings to enforce their rights. If the European arrest warrant is issued in respect of a person who is not yet a party to the proceedings, that person may bring an action for a declaration of invalidity after his actual surrender and appearance before the investigating judge", ECJ, 12 December 2019, JR and YC, ECLI:EU:C:2019:1077, https://curia.europa.eu/juris/document/document.jsf?text=&docid=221509&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=285828point 69.

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Between 2008 and 2011 (Aubert, 2013), the requested person raised the issue of fundamental rights based on the EU Charter but in rare cases do a Chambre de l'instruction examined the argument (e.g. Cour de cassation, 25 November 2009, case no 09-85.785[2], in that particular case the Chambre de l'instruction had ruled that the Charter was not legally binding at the time). Even after 1rst December 2009, the chance of success has been higher when the argument was raised on the basis the ECHR and UN Conventions rather that the EU Charter.

For that very reason, most of the time, requested persons who did not consent to their surrender have raised a fundamental rights issue based on the ECHR. Such arguments based on Article 8 (right to respect for private and family life)[3], Articles 5 (right to liberty and security), Article 6 (right to a fair trial), and Article 3 (prohibition of torture) have been examined by French courts to consider the non-execution of an EAW. In numerous cases, the Cour de cassation ruled that a violation of those Articles is an admissible ground for non-execution of an EAW. Over time, the Court has deepened its control over Chambres de l'instruction's decisions to execute or not execute the EAW issued by another Member State on the basis of a violation or risk of violation of the ECHR by the issuing country.

The landmark decision of 2012[4] was a turning point in French case law as, for the first time, the Cour de cassation gave a direct interpretation of Article 1§3 EAW FD. With an explicit reference to this Article, the Court examined the allegations of torture which led, in first place, the Chambre de l'instruction to refuse the execution of an EAW.

> Interpreting Article 1§3 of the EAW FD together with Article 6 TEU, the French Court of cassation clearly ruled that a violation of fundamental rights is an admissible ground ("autonomous ground", Thellier de Poncheville, 2013) for non-execution of an EAW, going beyond the list of admissible grounds enshrined in Article 3 and 4 of the EAW FD[5]. In previous cases, the Cour de cassation admitted that fundamental rights could be a ground for non-execution but referred to the ECHR or other international conventions.
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> Moreover, in 2014, the Cour de cassation underlined that the Chambre de l'instruction was right not to refer a preliminary ruling in interpretation of article 1§3 EAW FD and to refuse the surrender as in the present case the confessions had clearly been obtained under torture in violation of Article 3 ECHR. The Cour de cassation ruled that "this violation of fundamental rights shall prevail over mutual trust and recognition principles and is an admissible ground for non-execution" (Crim., 20 mai 2014[6]).

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[2] Not all decisions of the Cour de cassation have an ECLI number, a reference to the number of the considered case is included whenever there is no ECLI available.

[3] The right to remain silent was not considered applicable to the hearing before the Chambre de l'instruction, so the absence of notification of this right does not violate Article 6 ECHR right to a fair trial (Cour de cassation, 24 March 2021, ECLI:FR:CCAS:2021:CR00529, https://www.legifrance.gouv.fr/juri/id/JURITEXT000043351634?init=true&page=1&query=21-81.361&searchField=ALL&tab_selection=all)

[4] 28 February 2012, case no 12-80.744, https://www.legifrance.gouv.fr/juri/id/JURITEXT000025470943?tab_selection=all&searchField=ALL&query=12-80.744&page=1&init=true)

[5] ECLI:FR:CCASS:2014:CR03092, Article 1§3 EAW FD was referred to in previous case law, generally together with reference to other international laws e.g. Cour d'appel de Pau, 7 March 2008, case 94/2008, https://www.legifrance.gouv.fr/juri/id/JURITEXT000019577089?init=true&page=1&query=%22article+1+paragraphe+3%22+%22mandat+d%27arrêt%22&searchField=ALL&tab_selection=all (issuing country: Spain; Article 3 ECHR; Article 15 of the 1984 New York Convention against torture, decision to surrender for lack of evidence of torture)

[6] ECLI:FR:CCASS:2019:CR02709, https://www.legifrance.gouv.fr/juri/id/JURITEXT000029056138?init=true&page=1&query=14-83.138&searchField=ALL&tab_selection=all

More recently, the Cour de cassation (19 November 2019[7]) directly quoted[8] the ECJ guidance (i.e. ECJ PPU LM, 25 July 2018 C-216/18) and examined whether, on top of the existence of systemic and generalized deficiencies, the Chambre de l'instruction ascertained the risk that the execution of an EAW violates fundamental rights. The Chamber should have assessed such risk taking into account the information given by the issuing Member State, especially as regards to the personal situation of the requested person, the nature of the offences for which he/she is being prosecuted and the context that forms the basis of the EAW. In an earlier decision, the Cour de cassation underlined that the execution of an EAW could not be refused on the basis of a general questioning of the judicial model of the issuing Member State (Crim, 2 May 2018[9]). The requested person was arguing that the very existence of a guilty-plea procedure before British courts was likely to violate his right to a fair trial.

Over time, French courts sought for a balance between mutual trust and recognition principles and the necessary respect of fundamental rights of the requested person. To ensure that balance the Cour de cassation has intensified its control over the Chambre de l'instruction decision (to execute or not to execute an EAW). More broadly, French courts and authorities have intensified their control over the situation of the issuing country, especially on the basis of ECHR. However, as shown in this report, it is only very recently that the Court gave very precise reasoning with explicit reference to ECJ guidance on the use of the EAW. As mentioned in this report, by reason of the admissibility criteria before the ECHR (Article 35§1 ECHR), claimants bring up more systematically ECHR's rights to challenge the EAW to secure a potential future case before the Court.

In terms of methodology, one should be aware that, for technical reasons, Chambre de l'instruction (before which the issued or executed EAW can be challenged) decisions are difficult to access to. Moreover, in France, there are less available case law on the issuance of EAW than on its execution. This makes sense as the requested person is generally challenging the EAW at its execution stage, as by construction he/she has become a direct party to the procedure. At the issuance stage, the requested person may not always be located and has not been arrested yet and may even not be aware of the very existence of the EAW.

[7] https://www.legifrance.gouv.fr/juri/id/JURITEXT000039437781?page=1&pageSize=10&query=%22article+1%2C+§+3%22+%22mandat+d%27arrêt%22&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT

[8] "When an executing authority have to decide on the surrender of a requested person for prosecution purposes and has evidence – such as a decision of the European Commission issued in application of Article 7 par. 1 TEU, that there is a real risk of a violation of the fundamental rights to a fair trial (Article 47 of the Charter) by reason of a systemic or generalized deficiencies concerning judicial independence of the issuing country, the executing authority must determine, specifically and precisely, whether there are substantial grounds for believing that the requested person will, if surrendered, be exposed to the risk of suffering a breach of the right conferred on him by Article 47 of the Charter" "it should verify the reality of that risk taking into consideration the personal situation of the requested person, the nature of the offences for which he/she is being prosecuted and the context that forms the basis of the EAW, taking into account the information handed over by the issuing Member State".

[9] ECLI:FR:CCASS:2018:CR01234, https://www.legifrance.gouv.fr/juri/id/JURITEXT000036900182?page=1&pageSize=10&query=%22article+1%2C+§+3%22+%22mandat+d%27arrêt%22&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT

# Section I – Issuing of EAWs: rule of law and fundamental rights considerations

According to Article 695-16 of the French Criminal Procedure Code, the public prosecution office of the investigating court, of the judgement court or of the sentence enforcement court (juge d'application des peines) is the competent authority to issue an EAW for prosecution purposes, in relation to acts punishable under domestic law by a custodial sentence or a detention order of a maximum period of at least 12 months (Article 695-12, 1° CPP). The public prosecutor issues the EAW either on its own motion or at the request of one of the above-mentioned court, and only on the basis of a prior enforceable court decision (Article 695-16 CPP, generally a domestic arrest warrant issued by the investigating judge, by a judgement court following a sentence, or by a sentence enforcement court). The Cour de cassation recalled that to request the issuance of an EAW, the investigating judge examines the necessity and proportionality of such a measure in consideration of the given case[10].

If he/she deems necessary, the public prosecutor may also issue an EAW for the execution of a custodial sentence or a detention of at least 4 months (Article 695-12, 1° CPP). When no domestic arrest warrant was issued, the public prosecutor is entitled to examine the opportunity of issuing an EAW. General instruction of 11 March 2004 (CRIM 04-02[11]) recommends to issue an EAW only for custody or detention that exceeds 12 months.

## I.1. Independence of the issuing judicial authority in France

Rubi-Cavagna (2019) underlined that the status of public prosecutors has been a longstanding and controversial issue in the issuance of EAWs in the EU.

In France, the issue was even more challenging that the status of public prosecutors has been at the heart of a vibrant political and legal controversy[12] for many years. First raised before French courts and the ECHR, it was recently raised again before the ECJ to question the degree of independence of French public prosecutors and their qualification of EAW issuing authority.

Before the French courts and the CJEU, the issue at stake was whether public prosecutors, by reason of their status (i.e receiving general instructions from the French Minister of Justice and being part of hierarchical structure), may qualify as 'issuing judicial authorities' (pursuant to Article 6 of Framework Decision (FD) 2002/584/JHA on the European Arrest Warrant). The ECHR also ruled on the qualification of the French public prosecutor as "judicial authority" under Article 5§3, c) of the European Convention on Human Rights (detention on remand and the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power).

[10] 11 July 2018, no 18-90.016.

[11] http://www.textes.justice.gouv.fr/art_pix/circulaire020904crimorg.pdf

[12] See for instance a recent National Assembly's report (National Assembly, 2020) advocating for a reform of the prosecutors' office, including a reference to the ECHR's doctrine of appearances especially regarding independence and objective impartiality. The report is based on auditions of prominent French judges and prosecutors.

### *I.1.1. The public prosecutors' office meets the judicial independence standards*

#### *I.1.1.1. ECJ's ruling and guidance on independence standards for issuing an EAW.*

It is worth recalling the recent ECJ guidance and its conclusions on the status of the issuing authority.

In its OG and PI judgement (27 May 2019)[13], the Court ruled that a public prosecutor's office could not qualify as an 'issuing judicial authority' under Article 6(1) of the EAW FD if it could be subject to directions or instructions from the executive in the specific case in which the European arrest warrant is issued.

In this judgement, the ECJ identifies two levels of guarantee of an effective judicial protection (point 68):

- "the decision to issue a European arrest warrant for the purpose of criminal prosecution is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584" (point 70) ;
- "the judicial authority competent to issue a European arrest warrant by virtue of domestic law must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant" (point 71), "even where the European arrest warrant is based on a national decision delivered by a judge or a court" (point 72); the issuing authority must be in a position to give assurances to the executing judicial authority that (…) it acts independently; that "independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive" (point 74).

Pursuant to this Grand Chamber ruling, the ECJ (12 December 2019, Joined Cases C-566/19 PPU and C-626/19 PPU, Parquet général du Grand-Duché de Luxembourg et Openbaar Ministerie (procureurs de Lyon et de Tours[14]) further ruled that the French Prosecutor is sufficiently independent to be considered as a judicial issuing authority under Article 6(1) of Framework Decision 2002/584 EAW.

According to the ECJ, the statutory rules and institutional framework guarantees that the public prosecutor is not exposed to any risk of being subject to an instruction in a specific case. Indeed, both the French Constitution (in particular its Article 64, which guarantees the independence of the 'judicial authority'[15]) and the criminal procedure code guarantee the independence of French public prosecutors. The ECJ especially underlines that under Article 30 of the criminal procedure code, when carrying out its duties, the Public Prosecutor's Office is free from any instruction from the Executive in a specific case[16]. Moreover, under no circumstances can the general instructions issued by the French Minister of Justice might prevent a public prosecutor from exercising his discretion as to the proportionality of issuing a European Arrest Warrant. According to the ECJ, this two

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[13] 27 May 2019, *Public Prosecutor's Offices of Lübeck and Zwickau*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456.

[14] ECLI:EU:C:2019:1077

[15] This interpretation of Article 64 has been the one of French Constitutional Court, see the landmark decision of 11 August 1993, case no 93-326 DC, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000530533?init=true&page=1&query=n°+93-326+DC+du+&searchField=ALL&tab_selection=all ; and its Decision of 8 December 2017, case no 2017-680 QPC (independence of the prosecutors' office), ECLI:FR:CC:2017:2017.680.QPC, https://www.legifrance.gouv.fr/cons/id/CONSTEXT000036192792?page=1&pageSize=10&query=n°+2017-680+QPC&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT

[16] See Article 30 of the CPP as amended by the Law no 2013-669 of 25 July 2013.

considerations are sufficient to demonstrate that, in France, public prosecutors assess independently the necessity and proportionality of a decision to issue a European arrest warrant and exercise that power objectively, taking into account all incriminatory and exculpatory evidence.

The ECJ further analyses the hierarchical structure of the Prosecutor's office[17] and recalls its established case law according to which the requirement of independence does not prohibit any internal instructions. Such instructions may be given to public prosecutors by their hierarchical superiors, who are themselves public prosecutors, on the basis of the hierarchical relationship underpinning the functioning of the Public Prosecutor's Office[18].

The given ECJ's guidance and the French Constitutional Court case law converge towards the same standards.

### *I.1.1.2. The French constitutional court case law in the debate over the independence of the public prosecutor.*

The independence of prosecutors issue was already raised before the French constitutional Court to challenge Article 5 of the Ordonnance of 22 December 1958 on the Status of Magistrates[19]. In a landmark preliminary constitutional decision, the Court ruled that Article 64 of the Constitution guarantees the independence of the judicial authorities (8 December 2017, n° 2017-680 QPC[20]), "which comprises judges and public prosecutors" (this confirms a previous case law, Cons. const. 2 March 2004, n° 2004-492 DC, Loi portant adaptation de la justice aux évolutions de la criminalité, §98[21]). The constitutional Court further ruled that there is a correct balance between, on the one hand, the hierarchical nature of the prosecutors' Office as well as the Minister of Justice power to issue general criminal policy instructions and, on the other hand, the prosecutors ability to carry out their duties objectively and free from any instruction in specific cases (2017-680 QPC, §10-14).

Indeed, a 2013 legislative reform[22] enshrined a general prohibition for the Minister of Justice to issue instructions in specific cases. The Law no 2013-669 of 25 July 2013[23] amended Article 30 of the Criminal Procedure Code to provide that the Minister for Justice shall not issue instructions to prosecutors in individual cases. This was already the case in practice but was not enshrined in the law. More than 7 years after this reform, the debate is still vibrant as the situation is still considered by some as not satisfactory. A recent report was issued by the National Assembly in 2020, to discuss the remaining obstacles to the complete independence of the prosecution office (the status of the Parquet national financier was at the heart of the debate). On 9 June 2021[24], the Conseil d'Etat referred a preliminary constitutional question to the constitutional Court on "information transmission on ongoing cases" from prosecutors to the Ministry of Justice. The LDH (Ligue des

[17] The hierarchical structure of the prosecutors' office is enshrined in Article 5 of the Ordonnance of 22 December 1958 "Magistrates' Status".

[18] See Article 36 of the Criminal Procedure Code.

[19] « Les magistrats du parquet sont placés sous la direction et le contrôle de leurs chefs hiérarchiques et sous l'autorité du garde des sceaux, ministre de la justice. À l'audience, leur parole est libre ».

[20] https://www.conseil-constitutionnel.fr/decision/2017/2017680QPC.htm

[21] https://www.conseil-constitutionnel.fr/decision/2004/2004492DC.htm

[22] See for instance, Opinion of the Commission nationale consultative des droits de l'Homme, 27 June 2013, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000027778844.

[23] See, for the implementation of the reform: Ministry of Justice instruction of 31 January 2014 « de présentation et d'application de la loi n°2013-669 du 25 juillet 2013 relative aux attributions du garde des sceaux et des magistrats du ministère public en matière de politique pénale et de mise en oeuvre de l'action publique », https://www.legifrance.gouv.fr/circulaire/id/37952.

[24] https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-06-09/450789

droits de l'Homme) was challenging the constitutionality of Articles 35 and 39-1 of the Criminal Procedure Code. In its 2021-927 QPC ruling of 14 September 2021[25] confirmed its previous case law considering that the information of the Government is necessary to the definition and implementation of public policy. This ruling does not affect the qualification of prosecutors as "issuing judicial authority" of EAW as recently interpreted by the ECJ.

### *I.1.1.3. Debate over the qualification of the French public prosecutor as "judicial authority" : the precedents of the ECHR*

There has been a vibrant public debate in France over the independence of public prosecutors especially on whether they can qualify as judicial authority mostly when interpreting **Article 5§3 ECHR**. In comparison, this issue of independence has rarely been raised in relation with the issuance or validation of EAWs.

The ECHR's Medvedyev decision was a landmark decision and a turning point in this debate. In this decision, the ECHR underlined that Article 5§3 aimed at ensuring that "arrested persons are physically brought before a *judicial officer* promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behavior, incommunicado detention and ill-treatment" (ECHR, 29 March 2010, Medvedyev v France[26]). According to the ECHR, "the *judicial officer* must offer the requisite guarantees of independence from the executive and the parties, *which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority*, and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention" (§124) [emphasis added]. In the Medvedyev case, the applicants were not brought before the French investigating judge until 13 days after their arrest. In 2008, the ECHR (Chamber, 5th section, 10 July 2008[27]) held that public prosecutors do not meet the criteria of independence and cannot therefore qualify as "judicial authority" under Article 5§3 ECHR and, thus the procedure was not compliant with Article 5§1 ECHR: "the public prosecutor is not a "competent legal authority" within the meaning the Court's case-law gives to that notion: as the applicants pointed out, he lacks the independence in respect of the executive to qualify as such" (§61). In 2010, the Grand Chamber did not issue such a clear statement on the status of public prosecutors. This case law was later confirmed by the ECHR in Moulin v France (23 November 2010[28]) and Vassis v France (27/09/2013).

This ECHR's case law led to some confusions in the public debate and was interpreted by some as requiring a general reform of the prosecutors' status in France, where the ECHR's case law had a more limited scope. The ECHR actually pointed out that prosecutors cannot qualify as "judicial authority" "according to the autonomous meaning of the provisions of Article 5§3 of the Convention" (ECHR, Moulin v France, §57) and that it is not up to the Court to make a stand in a national debate over the independence of the public prosecutor.

[25] https://www.conseil-constitutionnel.fr/decision/2021/2021927QPC.htm

[26] http://hudoc.echr.coe.int/eng?i=001-97979, §118.

[27] http://hudoc.echr.coe.int/eng?i=001-87369.

[28] http://hudoc.echr.coe.int/eng?i=002-708

### *I.1.2. Guarantee of effective judicial protection in the issuing phase of the different types of EAWs*

Pursuant to its OG and PI judgement, the ECJ also ruled (ECJ, 12 December 2019, JR and YC[29]) that the procedure followed by the public prosecutor office when issuing an EAW shall be subject to review by a court. Moreover, the person in respect of whom the national arrest warrant was issued shall have the benefit of all safeguards appropriate to the adoption of that type of decision.

Actually, pursuant to Article 170 of the French Criminal Procedure Code, the issuance of an EAW by a French Prosecutor is an act procedure which can be challenged for review before a judge[30]. According to the ECJ, this system meets the requirement of an effective judicial protection, as the "proportionality of the decision of the [French] Public Prosecutor's Office to issue a European arrest warrant may be subject to judicial review before or almost at the same time as it is issued and, in any event, after the European arrest warrant has been issued, since such scrutiny may take place, depending on the circumstances, before or after the actual surrender of the requested person" (ECJ, 12 December 2019, JR and YC[31]).

In 2018[32], the Cour de cassation recalled that once subject to a criminal investigation order issued by a French investigative judge (*mise en examen*), the requested person qualifies as a party and is entitled to access the materials of the case and to challenge the EAW procedure and materials before the investigative Chamber (chambre de l'instruction).

### *I.1.3. Rights of the defence in the issuing phase*

- Pursuant to Article 27 of the EAW FD, in accordance to the rule of speciality, the person surrendered to France shall not be prosecuted, sentenced or otherwise deprived of his/her liberty for an offence committed prior to the surrender other than the ones that justified the EAW (Article 695-18 CPP). The only exceptions are those laid down in Article 27(3) of the EAW FD. The Cour de cassation recently ruled (5 October 2021[33]) on specific offences preceding the surrender when different from the ones that justified the EAW. It recalled the necessity for the issuing authority to submit a request for consent (under Article 27(4) EAW FD) to the executing judicial authority. However, in the same case, referring to ECJ case law (Case C-388/08 PPU[34]), the Cour de cassation ruled that the person could be prosecuted and sentenced, before his/her consent is obtained, in so far as he/she is not detained during the

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29 ECLI:EU:C:2019:1077, https://curia.europa.eu/juris/document/document.jsf?text=&docid=221509&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=285828, point 69-71.

30 "The decision to issue a European arrest warrant may, as a procedural step, be the subject of an action for a declaration of invalidity on the basis of Article 170 of the CCP. Such an action, which is available as long as the criminal investigation is ongoing, enables the parties to the proceedings to enforce their rights. If the European arrest warrant is issued in respect of a person who is not yet a party to the proceedings, that person may bring an action for a declaration of invalidity after his actual surrender and appearance before the investigating judge", ECJ, 12 December 2019, JR and YC, ECLI:EU:C:2019:1077, https://curia.europa.eu/juris/document/document.jsf?text=&docid=221509&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=285828point 69.

31 ECLI:EU:C:2019:1077, https://curia.europa.eu/juris/document/document.jsf?text=&docid=221509&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=285828, point 69-71.

32 11 July 2018, no 18-90.016.

33 ECLI:FR:CCASS:2021:CR01316, https://www.courdecassation.fr/en/decision/6160ac8a1a8ea07c4065f2f4

34 1 December 2008, ECLI:EU:C:2008:669, https://curia.europa.eu/juris/document/document.jsf;jsessionid=5C53CEDB2BA93645E1BA6B2BE1478BE2?text=&docid=66639&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1655825, point 72 ff.

prosecution or trial phase. Pursuant to Article 27(3)(c), that restriction of liberty is lawful on the basis of other charges which appear in the EAW. Thus, when such argument is raised, the investigating court[35] shall make sure that the rule of speciality was complied with. In the present case, the investigating court should have requested (from Portuguese judicial executing authorities) a formal decision to surrender and ascertain that pre-trial detention was justified by the charges which appear in the EAW.

- Concerning the right to appoint a lawyer in the issuing Member State (including before the surrender), when informed by the executing judicial authority of a request from the person to appoint a lawyer in France, the public prosecutor shall give him/her all the necessary information to do so or shall take all the necessary measures to ensure that an ex-officio lawyer is appointed by the Bar Chairperson (bâtonnier) (Article 695-17-1 CPP introduced by Article 63 of the Law no 2016-731 of 3 June 2016[36]).

## I.2. The definition and understanding of 'proportionality' in the context of French EAW issuance procedures

The proportionality test has been "understood as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing an EAW in the light of the circumstances of the case", especially "the possibility of achieving the objective sought by other less troublesome means"[37]. It has been enshrined in the Ministry of Justice General Instruction of 11 March 2004 "presenting the provisions of the Law no 2004-204 9 March 2004 (adapting justice to the evolution of criminality concerning the EAW)"[38]: the instruction recommends the systematic issuance of an EAW for a sentence over 1 year of imprisonment and to assess the opportunity of this issuance in other cases for sentence over 4 months of imprisonment. For instance, it appears from interviews performed for the present report that a French public prosecutor issued an EAW, for a remaining 3-week detention period, against a perpetrator of domestic violence considering he was still uttering death threats against his wife. The risk of re-offending was high as his wife was benefiting from an "emergency mobile phone" to prevent new assaults (téléphone grave danger) (Article 41-3-1 CPP[39]). Portugal refused the surrender on the basis of proportionality.

Since the early implementation of the EAW FD in France, the proportionality argument has been raised regularly by requested persons to challenge an EAW before the investigative Court (chambre de l'instruction). But, until 2019, in rare cases was the argument thoroughly analyzed by the French Cour de cassation. Still, there is no explicit definition of the concept of proportionality by French judicial authorities and no explicit reference to the ECJ guidance (such as ECJ, 10 November 2016, Kovalkovas, C-477/16 PPU[40]: the judicial authority competent to issue a European arrest warrant by virtue of domestic law must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant)[41].

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35 The Chambre de l'instruction is competent to review the EAW issuing procedure.

36 https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000032627735. Aligning the French criminal procedure code to the Directive 2013/48/UE of 22 October 2013. The rule was just mentioned once by the Cour de cassation in a decision by which the court decided not to address a preliminary request for constitutional ruling (11 July 2018, no 18-90.016).

37 Council of the European Union (2009), Final report on the fourth round of mutual evaluations – The practical application of the EAW and corresponding surrender procedures between Member States, doc. no 8302/09, p. 12.

38 http://www.textes.justice.gouv.fr/art_pix/circulaire11032004.pdf, p. 9

39 The emergency mobile phone is allocated by a public prosecutor especially in case of imminent and proven threat especially when the perpetrator flee or has not been arrested yet.

40 ECLI:EU:C:2016:861, par. 42 and 47.

41 Or even, ECJ, 12 December 2019, JR and YC, ECLI:EU:C:2019:1077 (https://curia.europa.eu/juris/document/document.jsf;jsessionid=3743EE414629C9284522C41B88488162?text=&docid=221509&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7912666), §61: The issuing judicial authority shall "examine objectively — taking into account all incriminatory and exculpatory evidence, without being exposed to the risk of being subject to external instructions, in particular from the executive — whether it is proportionate to issue that warrant"

## I.3. Case readiness issue and recourse to pre-trial detention

There are few identified court decisions dealing with the issue of case-readiness. No clear-cut conclusion can be drawn as only few chambres de l'instruction's decisions are accessible online. However, it appears from interviews performed for the present report, that French authorities will not issue an EAW for prosecution purposes prematurely, and at least not until the investigating judge, the judgement court or the sentence enforcement court has serious and consistent evidence against the requested person.

In its general case law on pre-trial detention, the Cour de cassation considers that when ordering pre-trial detention, the judge should identify serious and consistent evidence against the person concerned (Crim. 14 October 2020[42]). However, according to the Court (Crim. 30 March 2021, FP[43]), such requirement does not apply when pre-trial detention is decided in view of the execution of an EAW for prosecution purposes. The reasoning of the Court was based on Article 5§1, f) ECHR (detention in view of extradition or deportation) rather than Article 5§1 c) ECHR (detention for the purpose of bringing him/her to competent legal authority on reasonable suspicion of having committed an offence…). Such a parallel between the EAW and the extradition procedures is weakening the control of the executing authority over EAWs that were issued to investigate the person rather than to bring them to trial when the case is "trial-ready".

This decision was criticized by French academics (Fucini, 2021) who considered that the execution of the EAW is not similar to an extradition procedure. Conversely to extradition, the EAW is by nature a judicial procedure and should be interpreted in light of Article 5§1 c) ECHR as the EAW actually aims at "bringing [the person concerned] before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

- The French case law also considered the indemnification of unnecessary pre-trial detention in the context of EAW procedures. For instance, the National Commission for the indemnification of pre-trial detention (8 November 2016, no 16C-RD.008)[44] decided to indemnify a person requested by German authorities who was already held in pre-trial detention by reason of a French criminal procedure against him (mise en examen). When examining the EAW issued by Germany, the Chambre de l'instruction ordered that the person concerned should be surrendered to German authorities but not until the end of the judicial procedure in France. A French court eventually decided to discharge him. Considering his discharge, the National Commission considered that he should benefit from an indemnification for the duration of his pre-trial detention in France. The National Commission also took into account that with no such pre-trial detention period the interested person could have been surrendered without unnecessary delay to German authorities.

(see, to that effect, judgment of 27 May 2019, OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau), EU:C:2019:456, §§71 and 73, https://curia.europa.eu/juris/document/document.jsf?text=&docid=214466&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=7913469).

42 ECLI:FR:CCASS:2020:CR02194, https://www.legifrance.gouv.fr/juri/id/JURITEXT000042464364?init=true&page=1&query=20-82.961&searchField=ALL&tab_selection=all

43 ECLI:FR:CCAS:2021:CR00543, https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/543_30_46799.html

44 https://www.courdecassation.fr/autres_juridictions_commissions_juridictionnelles_3/commission_nationale_reparation_detentions_620/decisions_621/2016_8358/8_novembre_37556.html

# Section II – The execution of EAWs: national judicial authorities as monitors of trust

The execution of EAWs issued by other Member States is regularly challenged before French Chambre de l'instruction on the basis of fundamental rights and, more broadly, rule of law issues.

## II.1. Assessment of issuing authorities' independence by French executing authorities

Over the last few years, the French Cour de cassation has aligned its jurisprudence with the ECJ's guidance on the analysis of the independence of prosecutors as issuing judicial authority.

In a 2020 ruling, the Cour de cassation followed the reasoning of the ECJ when interpreting Article 6(1) EAW FD and expressly referred to ECJ "C-508/18 and C-82/19, C-509/18, C-566/19 and C-626/19 (Cassation crim., 7 January 2020[45]).

In 2019, a chambre de l'instruction (executing authority of EAWs in France) authorized the surrender of a requested person to Croatian authorities. The person challenged this decision and argued that prosecutors in Croatia are under the hierarchical authority of the General Prosecutor and, thus, could not be regarded as a judicial authority under Article 6(1) of the EAW FD. The claimant held that the chambre de l'instruction should have verified that the prosecutor who issued the EAW was not subject of instructions from the executive or legislative authorities in specific cases. According to the requested person, the sole statement of the independence of the General Prosecutor was not sufficient to guarantee the independence of the prosecutor in this specific case. In 2020, the French Cour de cassation ruled[46] that the General Prosecutor of Croatia has a sufficient degree of independence to qualify as a judicial issuing authority. The Cour de cassation held that pursuant to Article 125(1) of the Constitution of Croatia, and as explained by a note of the General Prosecutor, the independence of the latter is guaranteed. Even though the prosecutor's office is subject to the hierarchical authority of the General prosecutor and by reason of this constitutional guarantee, the prosecutor's office should be considered as independent enough to qualify as a judicial issuing authority.

On the same note, the Cour de cassation referred to the ECJ's C-508/18 and C-82/19 rulings to determine whether a judge of Hannover in Germany was a judicial issuing authority. Following ECJ's reasoning, the Cour de cassation ruled that this judge was not exposed to any hierarchical order or external instructions from the Executive and, thus, qualifies as a judicial authority (Crim., 24 July 2019[47]). In some other case, on the basis of ECJ's rulings C-619/18 (24 June 2019 Commission/Poland) and C-192/18 (5 November 2021, Commission/Poland), the requested person argued that the issuing authority of Poland was not independent. The French investigating chamber ruled that the present case deals with family law issues and current deficiencies of judicial independence in Poland where not affecting the person's right to a fair trial (as

[45] ECLI:FR:CCASS:2020:CR00002, https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/2_7_44184.html

[46] Cour de cassation, Criminal Chamber, judgement of 7 January 2020, case no 19-87741, ECLI:FR:CCASS:2020:CR00002. Independence of the Croatian prosecutor and its qualification as 'judicial authority' under Article 6(1) EAW FD.

[47] ECLI:FR:CCASS:2019:CR01749, https://www.courdecassation.fr/decision/5fca693a84d92b531a29436b?search_api_fulltext=ECLI%3AFR%3ACCASS%3A2019%3ACR01749&sort=&items_per_page=&judilibre_chambre=&judilibre_type=&judilibre_matiere=&judilibre_publication=&judilibre_solution=&op=&date_du=&date_au=&previousdecisionpage=&previousdecisionindex=&nextdecisionpage=&nextdecisionindex=

guaranteed by Article 47 §2 Charter of Fundamental rights). The judgment was confirmed by the Cour de cassation[48]. More generally, the Cour de cassation ruled[49] that the judge shall ensure, in presence of such deficiencies of the judicial system of the issuing Member State, that there is no evidence that the situation has changed. The judge shall verify "precisely and in a concrete manner", in consideration of information given by the issuing authority and of the personal situation of the requested person, that such deficiencies have a direct impact on the judicial authorities before which the requested person appears.

In some previous cases, French courts seemed more reluctant to investigate the independent nature of the issuing authority. For instance, in 2019[50], an EAW was issued by a Greek prosecutor for the surrender of a bi-national from Algeria and Switzerland, who did not consent to his surrender. The requested person argued that the French chambre de l'instruction did not perform the necessary investigations to ascertain the independence of the Greek prosecutor who issued the EAW. He challenged this decision before the Cour de cassation. The Court ruled that the EAW was valid, as it indicates the necessary information on the issuing authority. Furthermore, the chambre de l'instruction did not have to perform further investigation as the claimant did not clearly challenged the independence of the Greek Prosecutor's Office. However, this Cour de cassation's decision was not a landmark decision as evidenced by the above mentioned later judgements.

## II.2. French authorities' assessment of proportionality of EAWs issued by other MS

From 2005 and 2012, the Cour de cassation had very rarely ruled on the proportionality argument even when it was raised by the requested person.

> For instance, In a 2005 case (Crim., 16 March 2005, case no 05-81.229)51, the claimant argued that when the execution of the EAW for prosecution purposes leads to custodial detention in France, the executing authority shall ensure that such execution measures are proportionate to the public interest objectives pursued. According to him, in the present case, there was no evidence that he would flee so this measure clearly violates his right to be presumed innocent and his right to liberty. Neither the chambre de l'instruction nor the Cour de cassation in appeal examined this argument.

[48] Crim., 3 March 2021, 21-80.793, ECLI:FR:CCASS:2021:CR00417, https://www.legifrance.gouv.fr/juri/id/JURITEXT000043301989?fonds=CIRC&fonds=JURI&page=1&pageSize=100&query=%22mandat+d%27arrêt+européen%22+charte&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT

[49] Crim. 12 January 2021, 20-87.140, https://www.legifrance.gouv.fr/juri/id/JURITEXT000043045876?fonds=CIRC&fonds=JURI&page=1&pageSize=100&query=%22mandat+d%27arrêt+européen%22+charte&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT

[50] Cour de cassation, Criminal Chamber, 23 October 2019, case no 19-86.166, ECLI:FR:CCASS:2019:CR02470, https://www.legifrance.gouv.fr/juri/id/JURITEXT000039307207?init=true&page=1&query=19.86-166&searchField=ALL&tab_selection=all.

[51] https://www.legifrance.gouv.fr/juri/id/JURITEXT000007641023?dateDecision=&isAdvancedResult=&page=2&pageSize=10&query=%22mandat+d%27arrêt+européen%22+proportionnalité&searchField=ALL&searchProximity=&searchType=ALL&sortValue=DATE_DESC&tab_selection=juri&typePagination=DEFAULT

> Again, in 2012 (Crim. 24 October 2012, case no 12-86.278)[52], the claimant argued that the executing authority shall carry out a proportionality check to ensure that the EAW is proportionate to its aim, in particular as regards the seriousness of the offence. The chambre de l'instruction, in the present case, considered that it could only check the validity of the EAW and not its substance. Moreover, it considers that mutual trust shall prevail as Italy, "as a founding member of the EU, is presumed to respect the rule of law". The Cour de cassation confirmed the chambre de l'instruction decision.

However, in a few cases, Chambres de l'instruction[53] and the Cour de cassation ruled on the "proportionality argument".

> For instance, in 2010, both courts held that 'participation in the activities of a terrorist group' (offence on the basis of which the EAW was issued) was not a manifestly wrongful legal characterization of the criminal acts54. The requested person argued that this qualification was inadequate as she was simply an active member of a political party, Batasuna (which was banned in Spain but legal in France). Conversely, the issuing authority took into consideration the link between that party (Batasuna) and a terrorist organisation (ETA, Basque separatist group)55. The surrender was thus confirmed.
>
> In a 2007 case, the Cour de cassation overturned a decision by which the Chambre de l'instruction did not consent to the surrender of a requested person holding that the EAW mentioned a pre-trial detention of 3 months. According to the Chamber, the EAW was not proportionate as the pre-trial detention should be over 4 months. For the Cour de cassation, the criminal act was punishable by five years of imprisonment under the Polish law (issuing country)[56]. The warrant was considered compliant with the EAW FD.

From 2015, French courts have proceeded to a more systematic analysis of the EAW proportionality (see 19 August 2015, 15-84.363)[57]. In this particular case, the requested person argued that the EAW was not proportionate as his acts constituted a minor offence. The Chambre de l'instruction held that the person was requested for "armed robbery" "which is a serious offence under the EAW FD". The Chamber underlined that

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[52] https://www.legifrance.gouv.fr/juri/id/JURITEXT000026540195?dateDecision=&isAdvancedResult=&page=2&pageSize=10&query=%22mandat+d%27arrêt+européen%22+proportionnalité&searchField=ALL&searchProximity=&searchType=ALL&sortValue=DATE_DESC&tab_selection=juri&typePagination=DEFAULT

[53] 23 November 2010, http://www.gdr-elsj.eu/wp-content/uploads/2012/11/Aurore-Martin.pdf

[54] Cass crim, 15 December 2010, case no 10-88204, http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000023297550&fastReqId=1683869203&fastPos=1

[55] « La qualification de participation à une organisation terroriste, retenue au mandat d'arrêt européen, ne saurait être considérée comme en inadéquation manifeste avec la nature des faits reprochés en raison des liens existants, selon l'autorité requérante, entre le parti Batasuna et l'ETA ».

[56] 7 March 2007,07-80.899, https://www.legifrance.gouv.fr/juri/id/JURITEXT000017825983?init=true&page=1&query=l%27article+695-12&searchField=ALL&tab_selection=all

[57] ECLI:FR:CCASS:2015:CR04013, https://www.legifrance.gouv.fr/juri/id/JURITEXT000031116808?dateDecision=&isAdvancedResult=&page=1&pageSize=10&query=%22mandat+d%27arrêt+européen%22+proportionnalité&searchField=ALL&searchProximity=&searchType=ALL&sortValue=DATE_DESC&tab_selection=juri&typePagination=DEFAULT

two employees were threatened, robbed and suffer from serious psychological distress. The decision to surrender the requested person was confirmed by the Cour de cassation.

More recently, over 14 paragraphs, the Cour de cassation initiated a more in-depth analysis of the proportionality argument including a clear reference of the ECJ case law (Crim., 26 January 2021[58]). Even though the double criminality requirement is fulfilled, the Court considered the proportionality of the sentence by which the issuing authority justified its EAW. The Court recalled the ECJ's interpretation of Article 1§3 EAW FD and grounds for non-execution[59]. For the Court, the excessive severity of a sentence is not a non-execution ground under Article 3, 4 and 4a of the EAW FD. Thus, the Cour de cassation decided to follow a different reasoning and analyzed the proportionality of the sentence on the basis of Article 49§3 of the European Charter on Fundamental Rights together with Article 1§3 and Recital 12[60] of the EAW FD. Indeed, in compliance with Article 49§3, "the severity of penalties must not be disproportionate to the criminal offence". As no interpretation has been given yet by the ECJ, the Cour de cassation concluded that a preliminary referral should be submitted to the ECJ. The question referred to the ECJ (C-168/21[61]) is broader though than the sole interpretation of proportionality as it concerns the condition of double criminality and partial execution of an EAW[62]. The question is still pending. This is the second time the Cour de cassation had to rule on this case[63].

In spite of this interesting step in the Cour de cassation reasoning, in later rulings, the Court still remains cautious in using the proportionality test (see for instance, 11 May 2021 ruling[64], France: issuing authority ; Belgium: executing authority). In that case, the defendant argued that the Chambre de l'instruction did not justify its decision when it just mentioned that the EAW was a necessary and proportionate measure. The Cour de cassation rejected the argument and concluded that the Chambre de l'instruction decision was duly justified considering the seriousness and multiple offences, "the criminals were still in action when being arrested in Belgium".

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58 ECLI:FR:CCASS:2021:CR00089, https://www.legifrance.gouv.fr/juri/id/JURITEXT000043106032?dateDecision=&isAdvancedResult=&page=1&pageSize=10&query=%22mandat+d%27arrêt+européen%22+proportionnalité&searchField=ALL&searchProximity=&searchType=ALL&sortValue=DATE_DESC&tab_selection=juri&typePagination=DEFAULT

59 C-123/08, Dominic Wolzenburg, 6 October 2009, ECLI:EU:C:2009:616, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CJ0123&from=FR; C-237/15, Minister for Justice and Equality v Francis Lanigan, 16 July 2015, ECLI:EU:C:2015:474, https://curia.europa.eu/juris/document/document.jsf?text=&docid=165908&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1310016)

60 "This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (8), in particular Chapter VI thereof".

61 https://curia.europa.eu/juris/document/document.jsf?text=&docid=242753&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1426955

62 "Does Article 49(3) of the Charter of Fundamental Rights require the judicial authorities in the executing Member State to refuse to execute a European arrest warrant where, first, that warrant was issued in order to enforce a single sentence imposed for a single offence and, second, where, given that some of the acts for which that sentence was imposed do not constitute an offence under the law of the executing Member State, a surrender can only be ordered in relation to some of those acts?"

63 « Affaire Vincenzo Vecchi. La Cour de cassation saisit la Cour de justice de l'Union européenne », Ouest France, 26 janvier 2021. He was sentenced by Italy to 10 years of imprisonment after a riot at the G8 in Genova in 2001.

64 ECLI:FR:CCASS:2021:CR00680, https://www.legifrance.gouv.fr/juri/id/JURITEXT000043565900?dateDecision=&init=true&page=1&query=%22mandat+d%27arrêt+européen%22+proportionnalité&searchField=ALL&tab_selection=juri

## II.3. Fundamental rights assessment in the EAWs execution phase

Along with the evolution of the ECJ and ECHR's case law, French judicial authorities have been taking into account and examined fundamental rights issues considering the general situation of the issuing country and the risk of violation of the requested person's rights (rights of the defence, risk of inhumane and degrading treatment, rights to private and family life, fair trial…).

In most cases, the requested person invokes a violation of the ECHR together with (but not systematically) the violation of the Charter of Fundamental rights (since 2004[65], around 50 Cour de cassation's decisions refer to the Charter)[66]. French chambre de l'instruction and the Cour de cassation rule on whatever legal grounds was invoked before them. According to the European Court of Human Rights interpretation of Article 35§1 ECHR (admissibility), it is not necessary for the ECHR right to be explicitly raised in domestic proceedings but the complaint should have been raised "at least in substance" before the national authorities[67]. However, to secure the admissibility of a potential future case before the ECHR, litigants tend to invoke explicitly ECHR rights. Moreover, pursuant to Article 52§3 of the Charter, the interpretation of ECJ also rely on ECHR's interpretation: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".

### *II.3.1. Safeguarding the family life of the requested person (Article 8 ECHR)*

According to the Cour de cassation[68], the chambre de l'instruction should have verified whether the surrender would not disproportionally harm the requested person's right to family life (Article 8 ECHR). Most of the time, the Cour de cassation does not overturn the chambre de l'instruction's decision as long as the latter provides sufficient reasoning that the surrender would not amount to disproportionate interference with the person's rights to family life (e.g. Crim. 15 April 2015[69], more recently: Crim., 31 October 2018[70]). Conversely, according the Cour de cassation, the chambre de l'instruction's decision not to surrender is valid when it is established that a national has been working in France for 7 years, is the father of two French nationals, and lives with a French national (Crim. 5 May 2015, 15-82.108[71]).

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[65] Crim., 26 May 2004, no 04-82.795, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007071661?fonds=CIRC&fonds=JURI&page=1&pageSize=100&query=%22mandat+d%27arrêt+européen%22+charte&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT

[66] In some cases the Charter is a stand-alone argument, see Crim., 25 June 2013, no 13-84.149, ECLI:FR:CCASS:2013:CR03552, https://www.legifrance.gouv.fr/juri/id/JURITEXT000028034464?fonds=CIRC&fonds=JURI&page=1&pageSize=100&query=%22mandat+d%27arrêt+européen%22+charte&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT: interpretation of Article 2§2 of the EAW FD by the ECJ ruling C-303/05, Advocaten voor de Wereld VZW, 3 May 2007 (ECLI:EU/C:2007:261) in light of Article 6 of the TEU and Article 6 CFR (right to liberty and security) (nullum crimen, nulla poena, sine lege principle).

[67] ECHR Grand Chamber, Fressoz And Roire v. France, 21 January 1999, point 37, https://hudoc.echr.coe.int/eng?i=001-58906

[68] 3 cases: Crim., 12 May 2010, n° 10-82.746 ; Crim., *M.* Piotr *X.*, 22 September 2010, n° 10-86.237 ; Crim., *M. Walerij X*, 10 November 2010, n° 10-87.282.

[69] ECLI:FR:CCASS:2015:CR02421, https://www.legifrance.gouv.fr/juri/id/JURITEXT000030520801?init=true&page=1&query=15-81.953&searchField=ALL&tab_selection=all

[70] ECLI:FR:CCASS:2018:CR02922, https://www.legifrance.gouv.fr/juri/id/JURITEXT000037602034?init=true&page=1&query=18-86.010&searchField=ALL&tab_selection=all

[71] ECLI:FR:CCASS:2015:CR02515, https://www.legifrance.gouv.fr/juri/id/JURITEXT000030600431?init=true&page=1&query=15-82.108&searchField=ALL&tab_selection=all

### *II.3.2. Rights of the defence and security rights (Articles 5 and 6 ECHR and 47 CFR)*

In 2009, the Cour de cassation ruled that procedural rights of the requested person, especially rights of the defence, shall be protected: see for instance, sufficient and adequate time to prepare one's defence (Crim., 22 July 2009, no 09-84.775[72]); right to be assisted by an interpreter, free of charge, to discuss his/her defence with a lawyer (Crim., 8 December 2010, no 10-87.818[73], on the basis of Article 5 and 6 ECHR, issuing authority: Poland)[74]. In the 2009 case, on the basis of Articles 5 of the ECHR, the Cour de cassation held that even though the EAW procedure is enshrined in tight time limits – 48 hours to appear before the general public prosecutor and 5 days before the chambre de l'instruction, the requested person's lawyer shall have sufficient time to prepare his/her client's defence.

In 2019, the Cour de cassation overturned a chambre de l'instruction's decision which decided not to execute an EAW issued by Italy even though the requested person consent to his surrender. When the requested person appeared before the French general prosecutor, he asked for the assistance of a lawyer in the issuing country. Such demand was not shared in writing with Italian authorities. On its own motion, the Chambre de l'instruction argued that this demand should have been shared with Italy, its absence in the requested person's file was in breach of the rights of defence (Article 6§1 ECHR). The Chamber concluded that the EAW procedure was void. The Cour de cassation overturned the Chamber's decision, underlining that this issue was raised by the Chamber on its own motion without any opportunity for the parties to submit their observations (18 December 2019[75]).

Conversely, the right to remain silent was not considered applicable to the hearing before the Chambre de l'instruction, so the absence of notification of this right does not violate Article 6 ECHR right to a fair trial (Cour de cassation, 24 March 2021[76]).

In 2020, an EAW was issued by Swedish authorities, to refuse his surrender the requested person argued that his right to a fair trial has been violated by Swedish authorities as he was not able to appear before the Court of appeal. Referring to ECJ's case law, the chambre de l'instruction ruled that there is no specific right of appeal under **Article 47 of the EU Charter of Fundamental Rights** and that the requested person appeared before the first instance criminal court. So his fundamental right to fair trial has not been violated. The Cour de cassation confirmed the chambre de l'instruction's decision[77]. Article 695-32 of the Criminal procedure code provides

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[72] https://www.legifrance.gouv.fr/juri/id/JURITEXT000020903675?init=true&page=1&query=09-84.775&searchField=ALL&tab_selection=all, EAW issue by the Netherlands informed the requested person that she shall appear before the chambre de l'instruction the next morning, her lawyer was notified of the hearing in the evening

[73] https://www.legifrance.gouv.fr/juri/id/JURITEXT000023296817

[74] On the same issue, see: Crim. 20 May 2015, no 15-82.469, ECLI:FR:CCASS:2015:CR02729, https://www.legifrance.gouv.fr/juri/id/JURITEXT000030635110?init=true&page=1&query=15-82.469&searchField=ALL&tab_selection=all

[75] ECLI:FR:CCASS:2019:CR03064, https://www.legifrance.gouv.fr/juri/id/JURITEXT000039692113?init=true&page=1&query=19-87.395&searchField=ALL&tab_selection=all

[76] ECLI:FR:CCAS:2021:CR00529, https://www.legifrance.gouv.fr/juri/id/JURITEXT000043351634?init=true&page=1&query=21-81.361&searchField=ALL&tab_selection=all

[77] Crim. 22 July 2020, 20-82.379, ECLI:FR:CCASS:2020:CR01597, https://www.legifrance.gouv.fr/juri/id/JURITEXT000042195775?fonds=CIRC&fonds=JURI&page=1&pageSize=100&query=%22mandat+d%27arrêt+européen%22+charte&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT

that public prosecutors may subject the execution of an EAW to a guarantee that the requested person is enabled to challenge a judgment issued *in abstentia*.

### *II.3.3. Ill-treatment and conditions of detention (Article 3 ECHR and 4 of the Charter)*

#### *II.3.3.1. Risk of ill-treatment and torture:*

In 2010, the Cour de cassation ruled (Crim. 18 August 2010, n° 10-85.717[78]) that the Chamber de l'instruction did not justify its decision when it did not seek for more evidence that the requested person's confession were not obtained under torture (Article 3 ECHR, Article 15 of the 1984 New York Convention against torture). In other judgements, the Cour de cassation ruled on the violation of Article 3 ECHR together with the 1951 Geneva Convention: for instance (Crim. 7 February 2007, no 07-80.162[79]), dealing with an EAW issued by Portugal which concerned a person benefiting from the status of refugee in France (Iranian national), the Cour identified a risk of further surrender to Iran. Based on article 32 and 33 of the Geneva Convention and Article 695-33 CPP (together with Articles 3, 6 and 8 ECHR), judges should have asked for further information on the fate of the person concerned after he served his sentence in prison. In a similar case dealing with an EAW issued by Germany, the Court (Crim. 9 June 2015[80]) ruled that the Chambre de l'instruction should have verified that the surrender to Germany would not lead to further surrender to Turkey as the requested person had a refugee status in France. Based on Article 3 ECHR, Article 33 of the Geneva Convention, the Court recalled that when the information given in the EAW are not precise enough to ensure that fundamental rights of the requested person are not at stake, judges shall ask the issuing authority for further information. In that particular case it is not enough to rely on mutual trust and recognition.

#### *II.3.3.2. Detention conditions: taking into account the ECHR case law on the issuing country situation.*

On different occasions (e.g. Crim, 26 March 2019[81]), the Cour de cassation ruled that, on the basis of Article 3 ECHR and 4 of the European Charter on Fundamental Rights, when an EAW provides insufficient information to ascertain that surrender will not lead to a violation of fundamental rights of the requested person, the Chambre de l'instruction shall seek for further information from the issuing country. In the 2019 case, on the basis of Article 3 ECHR and Article 4, 47 and 52 of the Charter, the requested person argued that he was exposed to inhumane treatment due to the detention conditions in Slovenia. The Cour de cassation underlined that the EAW had not been issued for detention purposes, moreover the requested person provided no evidence that he would be exposed to such risk of inhumane treatment. However, the Cour de cassation overturned the Chambre de l'instruction decision and ruled that it should have taken into account the ECHR case law and other Council of Europe reports on a systematic deficiency of detention conditions in Slovenia.

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78 https://www.legifrance.gouv.fr/juri/id/JURITEXT000022795540, issuing authority: Spain, an inquiry was undertaken in Spain for torture.

79 ECLI:FR:CCASS:2007:CR00972, https://www.courdecassation.fr/decision/61403621cefb30e32ba2afd7?search_api_fulltext=ECLI%3AFR%3ACCASS%3A2007%3ACR00972&sort=&items_per_page=&judilibre_chambre=&judilibre_type=&judilibre_matiere=&judilibre_publication=&judilibre_solution=&op=&date_du=&date_au=&previousdecisionpage=&previousdecisionindex=&nextdecisionpage=&nextdecisionindex=

80 ECLI:FR:CCASS:2015:CR03121, https://www.legifrance.gouv.fr/juri/id/JURITEXT000030717756?init=true&page=1&query=15-82.750&searchField=ALL&tab_selection=all

81 ECLI:FR:CCASS:2019:CR00757, https://www.legifrance.gouv.fr/juri/id/JURITEXT000038373184?tab_selection=all&searchField=ALL&query=19-81-731&page=1&init=true

The Chamber should have assessed whether the information provided by Council of Europe was still up to date, reliable, objective and sufficiently precise, and if not, it should have sought for further information from the issuing authority. This Cour de cassation's judgment is congruent with the first step identified in the Aranyosi and Căldăraru ruling (5 April 2016, nos C-404/15 et C-659/15 PPU) according to which "the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State". As underlined by the ECJ, and evidenced by the Cour de cassation's case law, "that information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN"[82].

French authorities' decision to execute an EAW, without taking into account a systematic deficiency in detention conditions in the issuing country, was recently challenged before the ECHR.

In a 2021 ruling (ECHR, 21 March 2021, Bivolaru and Moldovan v France[83]), the ECHR held that French executing authority had sufficient evidence to establish a real risk of degrading and inhumane treatment for the requested person. According to the ECHR, French courts should have taken into account the ECHR's caselaw regarding the considered prison and not overlooked it.

Moreover, for the ECHR, the information given by Romanian authorities was formulated in a standardized way and not enough taken into account by the executing authority of the EAW. The recommendation from French authorities to Romania, that the claimant should be detained in a prison with similar or better detention conditions was not sufficient to exclude any risk.

The ECHR concluded that the protection of fundamental rights was manifestly deficient in the considered case in such way that the presumption of equivalent protection of fundamental rights was rebutted (see established case law on equivalent protection of rights: Bosphorus v Ireland, 30 June 2005[84], or Avotins v Latvia, 23 May 2016[85]). It concluded to a violation by French authorities of Article 3 ECHR.

As for the second step identified in the Aranyosi and Căldăraru ruling (point 92), the judicial executing authority should ascertain that there are "substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State". Even though the Cour de cassation may have taken into consideration such individual risk[86], in the existing case law on systemic deficiencies, the Cour de cassation overturned the Chambre de l'instruction judgments at the first stage of the analysis[87] (evidence of a persisting general deficiencies). Thus, the second step was unnecessary and not performed.

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82 point 89.

83 http://hudoc.echr.coe.int/eng?i=001-208760

84 http://hudoc.echr.coe.int/eng?i=001-69564

85 http://hudoc.echr.coe.int/eng?i=001-163114

86 e.g. Crim., 10 August 2016, 16-84.725, ECLI:FR:CCASS:2016:CR04161, https://www.legifrance.gouv.fr/juri/id/JURITEXT000033054475?fonds=CIRC&fonds=JURI&isAdvancedResult=&page=1&pageSize=10&query=%22conditions+de+détention%22+%22mandat+d%27arrêt+européen%22&searchField=ALL&searchProximity=&searchType=ALL&tab_selection=all&typePagination=DEFAULT In that particular case, the Cour de cassation examines the foreseen individual conditions of detention of the requested person in a specific prison in Romania to conclude to a non-violation of Article 3 ECHR.

87 The Cour de cassation does not exclude the possibility to examine the individual risk see, Crim., 12 July 2016, 16-84.000, ECLI:FR:CCASS:2016:CR04082, https://www.legifrance.gouv.fr/juri/id/JURITEXT000032900214?fonds=CIRC&fonds=JURI&isAdvancedResult=&page=1&page

## II.4. Challenges of EAWs in light of French constitutional law

There are no identified cases where constitutional law may have been an obstacle to the execution of an EAW, the decision of non-execution or confirmation of such decisions are based on EU, ECHR or International Law on fundamental rights.

The only known case that raised a constitutional issue was the Jeremy F. case on the right to an effective remedy. In this case, the Chambre de l'instruction consents to the UK's request to extend the surrender with a view to new criminal proceedings being brought against the applicant in the main proceedings. The requested person challenged this decision before the Cour de cassation which referred a preliminary question to the Constitutional Court. The constitutional Court referred a preliminary question to the ECJ on the interpretation of Articles 27 and 28 EAW FD: as there is no express provisions in the EAW FD, should these articles be interpreted as precluding Member States from providing an appeal with suspending effect against a decision to execute an EAW?

The ECJ, 30 May 2013[88], recalled the special importance of the right to an effective remedy (Article 13 ECHR, Article 47 European Charter on fundamental rights) and concluded that "Articles 27(4) and 28(3)(c) of the Framework Decision must be interpreted as not precluding Member States from providing for an appeal suspending execution of the decision of the judicial authority which rules, within 30 days from receipt of the request, on giving consent either to the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order of a person for an offence committed prior to his surrender pursuant to a European arrest warrant, other than that for which he was surrendered, or to the surrender of a person to a Member State other than the executing Member State, pursuant to a European arrest warrant issued for an offence committed prior to his surrender, provided that the final decision is adopted within the time-limits laid down in Article 17 of the Framework Decision" (§55 and 75).

Taking stock of that decision, the French constitutional court (14 June 2013, case no 2013-314 QPC[89]) concluded to the unconstitutionality of Article 695-46§4 of the Criminal procedure code which was later amended by the law no 2013-711 of 5 August 2013 to include the right to appeal the Chambre de l'instruction decision.

## II.5. Execution of EAWs in light of the French criminal law and justice systems specificities

Some of the French legal specificities have already led to legislative amendments in line with the ECJ case law.

*In the early time of implementation of the EAW FD, some Academics (Achaintre, 2007) considered that the French legislator had an extensive approach to non-execution grounds. They argued that Article 695-23 of the criminal procedure code sets as a principle that the executing authority verify dual criminality, except when the considered criminal acts are punished by at least 3 years of detention and is an offence belonging to one

Size=10&query=%22conditions+de+détention%22+%22mandat+d%27arrêt+européen%22&searchField=ALL&searchProximity=&searchType=ALL&tab_selection=all&typePagination=DEFAULT.

88 ECLI:EU:C:2013:358, https://curia.europa.eu/juris/document/document.jsf;jsessionid=D11BCFAAE49EDD55934AA1BF8B3138EA?text=&docid=137836&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1591128

89 https://www.conseil-constitutionnel.fr/decision/2013/2013314QPC.htm

of the 32 listed in Article 2(2) of the EAW FD. In the latter case, Article 695-23 provides that the characterisation of the offence and the seriousness of the sentence is a matter for the issuing country alone.

Moreover, they underlined that Article 695-22 of the Criminal Procedure Code provides for 2 more mandatory grounds of non-execution than provided by Article 3 of the EAW FD: when the prosecution for the same offence is precluded in France (executing State) (corresponding to the optional grounds for non-execution enshrined in Article 4(3) EAW FD); when the EAW is issued on the basis of race, religion, ethnic origin, nationality, language, political opinions, or sexual orientation or whenever the situation of the person may be prejudiced for any of these reasons (corresponding to Recital 12 of the EAW FD). This Article also includes EAW issued on the basis of gender identity.

*Before 2013, Article 695-24(2) of the French Code of Criminal Procedure set out non-execution grounds in providing that '[t]he execution of a European arrest warrant may be refused (…) If the person requested for the purposes of executing a custodial sentence or a measure involving deprivation of liberty is of French nationality and the competent French authorities undertake to execute that sentence or measure'. A General Advocate (ECJ, 5 September 2012, Lopes Da Silva Jorge[90]) held that this Article was disproportionate as it "purely and simply" excludes "all European Union citizens who do not hold French nationality from the benefit of the ground for non-execution provided for in Article 4(6) of Framework Decision 2002/584[91]". The ECJ concluded that "if Member States transpose Article 4(6) of Framework Decision 2002/584 into their domestic law, they cannot, without undermining the principle that there should be no discrimination on the grounds of nationality, limit that ground for optional non-execution solely to their own nationals, by excluding automatically and absolutely the nationals of other Member States who are staying or resident in the territory of the Member State of execution irrespective of their connections with that Member State" (§50). So, "in so far as that person demonstrates a degree of integration in the society of that Member State comparable to that of a national thereof, the executing judicial authority must be able to assess whether there is a legitimate interest which would justify the sentence imposed in the issuing Member State being enforced within the territory of the executing Member State" (§51).

In consequence, Article 695-24 of the French Criminal Procedure Code was amended by the Law no 2013-711 of 5 August 2013 (Art. 17) to include a residency condition: the execution of an EAW can be refused when the requested person is a French national, or if not, his/her residence in France has been legal and continuous for at least 5 years. The new law was shortly implemented by the Cour de cassation (23 September 2014[92]). In a 2014 ruling, the Chambre de l'instruction held that the residency condition should be appreciated against the seriousness of the sentence. The claimant argued that this seriousness of the sentence was not a legal criteria to appreciate the residency condition. The Cour de cassation ruled against this argument and concluded that the Chambre de l'instruction had duly justified its decision and was not bound to by a ground for optional non-execution.

[90] ECLI:EU:C:2012:517, https://curia.europa.eu/juris/document/document.jsf?text=&docid=126361&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1855879

[91] "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"

[92] ECLI:FR:CCASS:2014:CR05393, https://www.legifrance.gouv.fr/juri/id/JURITEXT000029508907/

# Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in France

## III.1. Key issues surrounding the execution of the EAW in France.

One of the main issue raised by the case law is about the relationship between the necessary efficiency of the EAW (through mutual trust and recognition principles) and the protection of the requested person's fundamental rights. Indeed, the Cour de cassation and Chambres de l'instruction case law has evolved towards a better protection of these rights in assessing more systematically the risk that the requested person would be exposed to: violation of his/her right to a fair trial, family life, or the risk of inhumane treatment as regards detention conditions in the issuing country. The evolution has led to a more in-depth control over the chambre de l'instruction decisions to surrender or to refuse the execution of individual EAW.

The situation is still evolving under the influence of the ECJ and ECHR's case law. As mentioned above, the ECHR has pushed for a more systematic consideration of detention conditions in the issuing country (ECHR, 21 March 2021, Bivolaru and Moldovan v France http://hudoc.echr.coe.int/eng?i=001-208760) when it concluded to a violation of Article 3 ECHR, holding that France should have taken into account ECHR previous rulings and Council of reports on the detention conditions in Romania when executing an EAW. It is worth noting that detention conditions had been taken into account by France in previous cases to refuse the execution of EAW. As regards the fundamental rights issue, ECJ guidance and the Cour de cassation case law converge and French courts referred several preliminary question for the interpretation of the EAW FD (one is still pending, C-168/21).

French NGOs are active around individual cases (e.g. ongoing case of Vincenzo Vecchi, C-168/21, France is the executing authority, Italy the issuing one) for the improvement and generalisation of the proportionality test in consideration of fundamental rights.

## III.2. Key issues surrounding the issuance of EAWs in France

Two reasons explains the apparent scarcity of the case law on issuance of EAWs. The first one is Chambres de l'instruction's case law is not always available online, so one could only rely on the Cour de cassation case law. Even though decision to issue an EAW can be challenged on the basis of Article 170 of the Criminal Procedure Code, only few seem to have been challenged before the Cour de cassation. One can assume that it is very likely that FR EAWs are more challenged at the execution stage. Indeed at the issuance stage, the requested person has not been arrested yet, is sometimes even not located, and is generally and by construction not aware the existence of an EAW against him/her.

The level of communication between the executing and issuing country would also require further investigations in the second phase of this research project.

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