Research Brief

Belgium

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Introduction

This STREAM Research Brief on Belgium offers an overview of the latest questions faced by the country's judicial authorities under the European Arrest Warrant (EAW) regime.

The seven cases examined provide an up-to-date picture of how Belgian courts have recently addressed issues arising from the implementation of the European Arrest Warrant (EAW). Paying special attention to conflicts of the Rule of Law and EU fundamental rights, the cases reveal key insights into tensions between the Belgian national law and the need for cooperation under the Council Framework Decision on the European Arrest Warrant 2002/584/JHA (EAW FD)[2] through surrender procedures between Member States.

Three of the cases are on the issuing of EAWs by Belgian authorities (two national judgments and a preliminary ruling). Their examination allows us to report on the core principles of case readiness and the right to a fair trial, and on the competence of Belgian public prosecutors to issue EAWs. The other four cases are on the execution of EAWs. Through them we explored the role of Belgian executing authorities as monitors and enforcers of mutual trust and mutual recognition. The cases, which are highly political, offer a test of the reality of how fundamental rights and mutual recognition interact under the EAW system.

We based our observations on translations from the original decisions and where possible, tried to accurately report on the arguments put forward by the Belgian issuing authorities, defence parties, and the Belgian executing authorities to decide upon the EAW.

2 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L 190, 18.7.2002, p. 1.*

Section I – Fundamental rights: primarily a matter for the issuing state?

The Belgian rules and safeguards governing the EAW are laid down in the 2003 Belgian EAW Act,[3] the Belgian Law of 20 July 1990[4] on pre-trial detention, and the Belgian Code of Criminal Procedure.[5]

The cases examined in the report identify two practical questions raised by the executing authorities regarding effective judicial protection in the issuing phase: (1) the authority of the Belgian public prosecutor as a non-judicial authority to issue an EAW for the execution of custodial sentences, and (2) the trial readiness of an EAW issued for prosecution purposes. In both cases the absence of an ex-ante judicial decision motivating the issuance of an EAW cast doubts on whether the requirement of the assessment of proportionality was met.

In Belgium the competent authority to issue an EAW is the investigation judge, who is authorised to request coercive measures to carry out the investigation. Whenever suspects are not located in Belgium, such investigatory measures include the issuance of an EAW for prosecution purposes. In three circumstances, however, the public prosecutor, who is not a judicial authority, might be competent to issue an EAW: (i) where a minor is the subject of the EAW (individuals under 18 years old); (ii) where execution of sentences or security measures already decided by a judge are the purpose of the EAW; and (iii) when based on arrest warrants issued by courts in the trial phase.

It follows that the decision to charge a suspect depends on the investigating judge, who is entrusted with the task of gathering evidence both for and against the suspect. But when the investigating judge considers that sufficient evidence has been obtained, the case is sent to the public prosecutor, who might either request further investigations and refer the case back to the investigating judge or if satisfied, forward an opinion to the Court in Chambers. In the latter case, the Court in Chambers (*Raadkamer*) evaluates the results of the judicial investigation and verifies whether it has indeed provided sufficient grounds to summon and try the suspect before the criminal courts. In that scenario, there are three possible outcomes: (i) the Court in Chambers might dismiss the case, (ii) the accused person might accept the charges, or (iii) the Court in Chambers might send the case for trial to the Court of Appeal (Kamer van Inbeschuldigingstelling, KI – the 'Indictment Chamber').[6] It follows that while a decision to

3 Wet betreffende het Europees aanhoudingsbevel of 19 December 2003.

4 Law of 20 July 1990 on pre-trial detention, coordinated by the Law of October 31, 2017, BS 29.11.2017.

5 Criminal Procedure Code of the Kingdom of Belgium. Amended in 2019.

6 The *Kamer van Inbeschuldigingstelling* (KI) is a chamber of a Court of Appeal that rules by way of a judgment. As a supervisor of judicial investigations it has the authority to declare a certain investigative act null. The KI acts as an appeal authority against the decisions of the Court in Chambers, including those relating to the EAW.

charge is taken by the investigating judge, the decision to try is only adopted after the Court in Chambers' examination.

The competence of the Belgian public prosecutor to issue an EAW for the execution of a custodial sentence was addressed by the Court of Justice of the European Union (the Court of Justice), following a preliminary question raised in the *ZB* case.[7] The Court of Justice found that the existence of a previous enforceable judgment imposing a custodial sentence justified a presumption of compliance with procedural rights of the defendant.[8] Distinguishing between EAWs issued for prosecution of crimes from those issued for seeking the execution of a custodial sentence, the Court of Justice concluded that '(…) the FD EAW does not preclude legislation of a Member State conferring the power to issue an EAW for the purpose of executing a custodial sentence on an authority which, while participating in the administration of justice in that Member State, is not itself a judicial authority, and that does not provide for a separate legal remedy against that authority's decision to issue such an EAW' (para. 39). In that way, the Court of Justice backed the competence of the Belgian public prosecutor to issue EAWs pursuing the execution of custodial sentences.

With regard to the trial readiness of an EAW issued for prosecution purposes, the judicial authorities have come to opposite outcomes in the cases of *McPhillips and Hatherley*[9] and *Killoran*.[10] While in *McPhillips and Hatherley* the executing judicial authorities refused to surrender further to the EAW requested by the Belgian issuing judicial authorities, they did not refuse in *Killoran*. The explanations offered by the Belgian issuing authority to the questions posed by the executing authority were critical in determining the different results.

In *McPhillips and Hatherley*, when the executing authority requested clarifications on whether a decision had been taken to put the respondents on trial for specific charges, the Belgian investigating judge limited herself to explaining that the decision to try would be taken at a later stage by the public prosecutor once the investigation was closed. The lack of specificity led the executing authority to state that '(t)he information provided by the issuing judicial authority in response to the request for further information constitutes cogent evidence that no decision has been made to charge and try the respondent with the offences referred to in the EAWs' (*McPhillips* and *Hatherley*, para. 18). Alternatively in the more recent *Killoran* case, when facing the same question, the Belgian public prosecutor reaffirmed its determination to proceed with the criminal trial stating that '(i)n light of the existing evidence in this case, I have already decided that once the Examining Magistrate refers the case back to me, I will refer it to the Court in Chamber so that the case may go to a full criminal trial' (*Killoran* para. 7). This

7 Judgment of the Court of Justice of 12 December 2019, *ZB,* C-627/19 PPU, ECLI:EU:C:2019:1079, ZB.

8 Judgment of the Court of Justice, *ZB,* C-627/19 PPU, paras. 34 to 36.

9 High Court of Ireland Decisions, (08 April 2020), *Minister for Justice and Equality v McPhillips and Minister for Justice and Equality v Hatherley* [2020] IEHC 414.

10 England and Wales High Court, (12 August 2021), *Jemma Killoran v Investigative Judge*, Antwerp Court of First Instance, Belgium, [2021] EWHC 2290, paras. 48-50.

response was sufficient for the executing authority to conclude that a 'decision to try' had been made by the issuing authority (*Killoran*, para. 52).

It follows that the observation of effective judicial safeguards by Belgian issuing authorities needs to be assessed on a case-by-case basis. The national particularities of the Belgian criminal procedure might lead to the rejection of the EAW if insufficient safeguards are provided to the executing authority. When doubts are cast, the clarifications and explanations given can be the determining factor.

Section II - Protecting fundamental rights in the executing state?

The national legislation (the Belgian EAW Act) transposing the EAW FD includes a 'fundamental rights' clause in its Article 4(5).11 Pursuant to this provision, Belgian executing authorities are obliged to refuse to surrender a person subject to an EAW whenever they find 'serious reasons to believe that the execution of the surrender mandate would infringe the fundamental rights of the person concerned, as enshrined in Article 6 of the Treaty on European Union'.12 For this clause to be triggered, the defence must oppose the EAW based on the risks surrender represents to the rights of the requested person. When considering the arguments and information provided by the parties, if the executing authority reaches the conclusion that there are objective reasons to believe that the requested person would have their rights infringed, it must refuse the warrant.

As a result, Belgian procedure not only allows but requires a refusal to surrender when the relevant authority has serious reasons to believe that fundamental rights violations are potentially at stake. Mutual trust and the presumption of compliance with fundamental rights in the EU do not necessarily prevail over fundamental rights interferences. Trust is therefore not absolute, but contingent. This mandatory ground for refusal for fundamental rights reasons strongly defines Belgian cooperation under the EAW system.

Three cases have been selected to examine how the fundamental rights clause has been used in Belgium to challenge the execution of an EAW.

The *N.J.E* case13 dealt with the assessment of the risk of torture and inhuman treatment or punishment of a member of Basque resistance and separatist movement ETA (*Euskadi ta Askatasuna*). Throughout the 18 years of proceedings (2004-2022), the case resulted in the issuance of four EAWs and six judicial decisions, including one ruling of the European Court

11 *Wet betreffende het Europees aanhoudingsbevel* of 19 December 2003, Belgian EAW Act.

12 Belgian EAW Act, Art. 4. The execution of a European Arrest Warrant shall be refused in the following cases: (5) if there are serious reasons for believing that the execution of the European arrest warrant would have the effect of infringing the fundamental rights of the person concerned, as enshrined in Article 6 of the Treaty on European Union.

13 Court of Appeal, East Flanders, Ghent section, Kamer van Inbeschuldigingstelling, 31 October 2013; Court of Cassation, 19 November 2013, AR P. 13.1765.N ; Court of Appeal, East Flanders, Ghent section, Kamer van Inbeschuldigingstelling, 14 July 2016; Court of Appeal, East Flanders, Ghent section, Kamer van Inbeschuldigingstelling, 5 November 2020; Court of Cassation, 17 November 2020, P.20.1127.N.

of Human Rights (ECtHR) - *Romeo Castaño*.[14] The Belgian courts repeatedly refused to surrender the person in question, observing a serious risk that the execution of the EAW would infringe the prohibition of torture under Article 3 of the European Convention on Human Rights (ECHR). The refusal was based on the observations of the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment on the incommunicado regime applied in Spain. In 2022, following the ECtHR's ruling in *Romeo Castaño*, a fourth EAW was submitted and finally executed. The analysis of the different decisions in *N.J.E* provide a good picture of how Belgian authorities have assessed, over time, the detention conditions in the issuing country as a reason to refuse the execution of EAW.

In *Puig*,[15] the Belgian courts examined the lack of competence of the issuing authority to refuse the execution of an EAW. Following up on the Court of Justice's *LM*[16] case and its re-interpretation of the two-step test introduced in *Aranyosi and Căldăraru*,[17] the *Puig* case offers a novel contribution to assessment of an EAW under the lenses of fair trial and the presumption of innocence.[18] In reaching its decision, the Belgian magistrate rejected the explanations offered by the Spanish Supreme Court and accepted instead the defence's plea on the lack of jurisdiction of the issuing authority and the risk to Puig's right to a hearing by a competent and impartial tribunal. That claim was supported by a report from the Working Group on Arbitrary Detention (WGAD).[19]

Disregarding the defence's allegations on the systematic or generalised lack of independence and impartiality of the Spanish judicial system, the Belgian magistrate observed that, in the specific prosecution of Catalan politicians, statements made by high-ranking officials could have an impact on their presumption of innocence. The Belgian magistrate thus departed from claims about systemic or generalised deficiencies in the Spanish judiciary and focused instead on the existence of grievances affecting a certain group of people to which Puig belonged. This circumstance separates *Puig* from cases linked to sanctioning mechanisms under Article 7(1) Treaty of the European Union.

14 Judgment of the European Court of Human Rights of 9 July 2019, application no. 8351/17, *Romeo Castaño v. Belgium.*

15 Dutch-speaking Court in Chambers, Raadkamer, 7 August 2020.; Court of Appeal, Brussels, Kamer van Inbeschuldigingstelling, 7 January 2021.

16 Judgment of the Court of Justice of 25 July 2018, *LM (or Minister for Justice and Equality)*, C-216/18 PPU, ECLI:EU:C:2018:586.

17 Judgment of the Court of Justice of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU,ECLI:EU:C:2016:198.

18 Judgment of the Court of Justice, *LM,* C-216/18 PPU. For an analysis of this case, see T. Wahl (2020) Refusal of European Arrest Warrants Due to Fair Trial Infringements.

19 Human Rights Council Working Group on Arbitrary Detention Opinion No 6/2019.

Two days after the rejection of the EAW against Puig,[20] the Spanish issuing authority requested a preliminary ruling from the Court of Justice.[21] Among other matters, the Spanish Supreme Court questioned the power of the executing authority to interpret Spanish law and review the jurisdiction of the issuing authority. Validating the decision and logic followed by the Belgian courts, the Grand Chamber of the Court of Justice acknowledged the competence of an executing authority to refuse the surrender when the requested person is at risk of being tried by a court lacking jurisdiction (paras. 101 and 147 (3)). To that end the Court of Justice identified two requisites in its reasoning: First, the existence of objective, reliable, specific, and properly updated information showing the existence of systemic or generalised deficiencies in the operation of the judicial system of the issuing Member State affecting an 'objectively identifiable group of persons' (paras. 102 and 147(3)). Second, that the executing authority finds, based on the information provided by the requested person, that in the particular circumstances of the case, there are substantial grounds for believing that the court supposed to hear the proceedings in the issuing Member State manifestly lacks jurisdiction. Importantly, the Court of Justice recognised for the first time the validity of a UN WGAD report as a factor that can be taken into account by executing authorities in their first step of examinations (para. 147 (4).

Finally, the case of *Valtonyc* offered an example of the procedural limits of mutual recognition and of the prevalence of the executing State's constitutional order. From a strictly procedural perspective, the case highlighted 'the duty of care' of the executing authority in verifying the accuracy of the information in the EAW form. Before addressing the requirement of dual criminality, and at the request of the defence, the Court in Chambers observed that the offences motivating the EAW did not reach the custodial sentencing threshold of three years required to exclude the dual criminality verification. This circumstance led to a preliminary ruling being requested from the Court of Justice.[22] In a second case, under freedom of speech grounds the proceedings resulted in the abolition by the Belgian Constitutional Court of a 19th century Law prosecuting crimes against the Crown.[23] As a result of it, the absence of the dual criminality requirement was upheld by the Court of Cassation in May 2022, and the surrender of the person in question was refused.

20 The rejection by the KI was formalised on the 7 January 2021 and the request of the Spanish Supreme Court for a preliminary ruling was submitted on 9 January 2021.

21 Judgement of the Court of Justice of 31 January 2023, *Puig Gordi and Others*, C-158/21, ECLI:EU:C:2023:57. The other Catalan politicians who are subjects in the case are Carles Puigdemont, Antoni Comín, Meritxell Serret Aleu, Marta Rovira Vergés, Anna Gabriel Sabaté.

22 Judgment of the Court of Justice of 3 March 2020, *X*, Case C-717/18, EU:C:2020: 142.

23 Belgian Constitutional Court.

Section III Protecting fundamental rights through horizontal and vertical cooperation?

Requests for and the sharing of further information are common practice for the Belgian authorities involved in EAW procedures. Nevertheless, from the cases examined, we observe that the crucial aspect is not so much if a reply or a request takes place, but instead on whether the clarifications provided or received are deemed sufficient to the authority requiring them.

Based on Article 15 of the Belgian EAW Act, Belgian executing authorities might make an urgent request to the issuing authority for additional information if '(…) the investigating judge deems the information provided by the issuing Member State in the European arrest warrant to be insufficient to enable a decision to be taken on the person's surrender (….)'.[24]

When acting as an issuing authority, it is observed that to dispel doubts on trial readiness, simple references to the Belgian criminal procedure are insufficient to convince the executing authority. Alternatively, clear statements on the intent to bring the case to trial upon execution can be decisive in persuading the executing authority to cooperate in the surrender of the person subject to the EAW.

Overall, Belgian courts show willingness to engage in dialogue with their issuing-authority counterparts. However, whenever opposition is raised against the automatic recognition of an EAW, the exchange of information between authorities appears to be one among different sources used by the Belgian courts to decide upon the execution. In those cases where the ground of refusal in Article 4(5) of the Belgian EAW Act is invoked, the results of the clarifications offered by the issuing authority are considered together with the arguments and documentation lodged by the defence, the Belgian Public Prosecutor's assessment, and the court's research ex officio on the matter. From the cases examined we infer that the lack of a dialogue does not in itself, represent a problem in the Belgian EAW procedure.

24 Wet betreffende het Europees aanhoudingsbevel of 19 December 2003, the Belgian EAW Act.

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Availability of EAW-related jurisprudence

Judgments relating to the issuing and executing of EAWs are not publicly available in Belgium. A decision might be published on the internet but there is no reliable repository. It is more likely that cases before the Court of Cassation or the Constitutional Court can be found online. In any event, not all decisions are published.

There are implications to the lack of accessibility to case law. It seriously hinders the study of the Belgian authorities' solutions and interpretation of the EAW. Not having a centralised repository of publicly accessible EAW case law is an important obstacle to researching Belgium's EAW implementation.