

Executive Summary: Portugal

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Executive Summary

Issuing Procedures

- The competent authorities to issue an EAW are both the prosecutors (at the investigation stage of the criminal procedure) and the judges (in all other stages of the criminal procedure).
- Portuguese prosecutors meet the criteria set by the CJEU on the independence of “issuing authorities”.
- The courts assess the proportionality of the issuance of an EAW: it was soon established that it would be disproportionate to issue an EAW with the sole purpose of putting an end to a situation of procedural default.
- As a rule, the possibility of subjecting the concerned individual to pre-trial detention once he/she has been surrendered is an important factor for the issuance of an EAW.
- The person concerned has the rights accorded to the suspect/defendant (*arguido*) in domestic criminal procedure and he/she can challenge the issuance of an EAW on appeal.
- Time spent in detention (abroad) in compliance with the EAW procedure does not count for the time limits of pre-trial detention; instead, it is deducted from the actual sentence (if there is a conviction).

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Executing Procedures

- Portuguese courts execute EAWs issued either by foreign prosecutors or judges. The independence of foreign prosecutors is seldom challenged. In the few cases where such a challenge arose, the courts explicitly resorted to the jurisprudence of CJEU and ruled accordingly.
- On the one hand, Portuguese courts decline to examine, as executing authorities, the proportionality of the issuance of an EAW.
- On the other hand, the disproportionality of the sentence applied by the issuing MS can be relevant for refusing the execution of an EAW in cases where an optional ground for refusal (such as the absence of dual criminality) applies.
- Decisions regarding the EAW can be appealed, in order to guarantee a double degree of jurisdiction, which is a constitutional guarantee of the criminal procedure.
- The obligation to ensure effective cooperation adds weight in favour of detention, which is routinely applied in cooperation procedures (including classic extradition). Exceptionally, the courts can apply less intrusive coercive measures when they are fairly certain that it will not prevent them from fulfilling said duty.
- The purpose of the EAW also plays an important role regarding the decision on detention: when it is issued for the execution of a sentence, detention in Portugal pending the procedure is practically regarded as being already part of the enforcement of the penalty.
- Even though the Portuguese legislator has not transposed art. 23(5) FD EAW, the time limits for detention set out in this provision are not contentious and are, in general, respected by the courts. When detention goes beyond those maximum limits it configures a case of illegal detention, and it can be contested in courts as such (*habeas corpus*).
- Most cases of trials *in absentia* do not meet the legal requirements for refusing surrender. However, when they do, it is not clear what kind of guarantees should be provided by the issuing MS: some decisions regard as sufficient that the person will be able to exert the rights as provided for in the law of the issuing MS; others evaluate the actual legal possibilities and refuse surrender when they are found to be conditional or uncertain.
- Issues with the translation of the EAW are always regarded as mere irregularities, irrespective of the stage of the EAW proceedings or procedural deadlines.
- The right to be heard with respect to all findings and information during the procedure is assured.
- There is no consensus on whether the 4 months threshold indicated in art. 2(1) FD EAW refers to the sentence applied or to the time yet to be served.
- So far, humanitarian concerns have not been taken as autonomous grounds for refusal of cooperation: they can be taken into account if some other obstacle also exists.
- There is a presumption that the other MS respect fundamental rights. Allegations of possible breaches of fundamental rights in the issuing MS have to be proved in the actual case, and not just generally alleged.
- When assessing dual criminality the courts usually assess whether or not the acts described in the EAW actually match one of the offences listed in art 2(2) FD EAW, regardless of the “box” checked in the warrant. This assessment is of particular relevance after the legislator has clarified, in 2019, that surrender for offences not included in the catalogue is mandatorily subject to dual criminality.

- Regarding life sentences, Portuguese courts seem to be satisfied that there are provisions in the legal system of the issuing MS for its review and do not request assurances of actual non-application or enforcement. Only where the sentence is mandatory and cannot be reviewed (including through measures of clemency) may surrender be refused.

Key interpretation and implementation challenges

- It is unclear whether the competence to issue an EAW for the purpose of executing a sentence uttered by a Portuguese court belongs to the sentencing court or the execution court.
- Regarding the cases where the sought person has been tried *in absentia* and was not personally served with the decision (art. 4a(1)(d) FD EAW), surrender shall take place if the issuing MS asserts, in the warrant, that he/she will be informed of the rights indicated in that provision. However, there are divergent decisions on the precise contents of such rights. In some decisions, the courts consider that it suffices that the legal order of the issuing MS provides for a right to apply for a new judgment (or appeal); in other cases, they demand that the right to a new judgment (or appeal) is unconditionally granted.
- The approach to the right to translation can pose a threat to an effective defence of the person sought: if the defendant understands the language in which the EAW is issued, the courts deem it irrelevant whether or not his/her lawyer (also) understands it. This can hamper on the right to an effective defence because the procedural deadlines to react to the EAW are counted from the notification of the EAW and not from the reception of the translated version.
- The burden of proof for allegations of breaches of fundamental rights seems to be very high, with the courts relying heavily on the presumption of compliance with the European standards in all MS. Reports describing the general situation in a given MS are not deemed enough to refuse surrender of the individual.
- It remains unclear whether the conditions set in art. 5(2) FD EAW are met, in the Portuguese courts' view, with the sheer existence of measures of clemency in the legal order of the issuing MS, even when there is no guarantee that they will be actually applied.