

Detention Pending Execution of the European Arrest Warrant – Dutch and Polish Experience. Some Reflection from the Human Rights Perspective

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Keywords:

European Arrest Warrant, detention pending surrender, Article 5 ECHR, the executing judicial authority

Abstract: This article focuses on detention pending surrender, i.e. detention of the requested person in the executing Member State on the basis of the European Arrest Warrant (EAW). It defines the scope of application of Article 5 of the European Convention on Human Rights to such detention and analyses the case-law of the Court of Justice of the European Union on time limits of keeping the requested person in detention in the executing MS as well as on the notion of “the executing judicial authority” entitled to decide on detention pending surrender. Both issues are explored with reference to national law and practice of the Netherlands and Poland. The article provides the answer to the question whether national provisions which limit the duration of detention pending surrender properly reflect the normative content of the framework decision on the EAW. The answer to this question is given with due regard to the standard of protection of the requested person stemming from Article 5 § 1 ECHR and Article 6 of the Charter of Fundamental Rights. Furthermore, the analyses focus on Dutch and Polish provisions concerning the authority entitled to decide on detention pending surrender and their compliance with

the CJEU's jurisprudence on the notion of "the executing judicial authority." Recognising that detention is the basic measure for ensuring the effectiveness of surrender, we try to define the limits of its use in the EAW procedure, stemming from the requirements of protection of human rights.

1. Introduction

Pursuant to Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States,¹ the executing judicial authorities applying detention pending surrender rely on a detention order issued by the judicial authority of another Member State (MS). Unlike in an ordinary extradition procedure, a core issue in this case is mutual trust and mutual recognition of a foreign decision. The FD EAW is primarily conceived as a tool regulating a speedy, informal procedure of surrender of suspects and convicts between Member States of the European Union. At the same time, it does not pretend to harmonise time limits or the procedure for detention of a requested person in the executing MS in order to safeguard effective surrender. The FD EAW contains only fragmentary rules on detention pending surrender and, for this reason, detention of a requested person is (mostly) governed by the law of the executing MS. In general, no harmonisation of detention rules at the EU level is provided in the framework of mutual recognition of judicial decisions.²

The aim of this article is to analyse whether in the absence of comprehensive regulation concerning these issues in the FD EAW, the right to liberty of the requested person is sufficiently protected within the EAW procedure, which is primarily focused on the efficiency of mutual recognition. The problem must be approached with due regard to the limited application to detention pending surrender of Article 5 of the European Convention

¹ OJ L 190, 18.7.2002, p. 1–20, as amended by FD 2009/299/JHA, OJ L 81, 27.3.2009, p. 24–36. Hereafter referred to as "FD EAW".

² See: Adriano Martufi and Christina Peristeridou, "Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation within the Existing Legal Framework," *European Papers* 5, no. 3 (2020): 1489–1490.

on Human Rights³ in the MS executing an EAW. In this article, we look at this problem from the national perspective of two Member States, the Netherlands and Poland, and we intend to answer the question of whether national provisions which limit the time of detention pending surrender properly reflect the normative content of FD EAW and its focus on effective and speedy surrender of suspects and convicts within the European Union (EU). The answer to this question is given with due regard to the standard of protection of the requested person stemming from Article 5 § 1 ECHR and Article 6 of the Charter of Fundamental Rights. Furthermore, we analyse Dutch and Polish provisions concerning the authority entitled to decide on detention pending surrender from the perspective of the Court of Justice of the European Union's (CJEU) jurisprudence on the notion of "executing judicial authority" and the standard of Article 5 ECHR. Recognising that detention is the basic measure for ensuring the effectiveness of surrender, we try to define the limits of its use in the EAW procedure stemming from the requirements of protection of human rights, taking due account of the differences between the standards of the ECHR and the Charter of Fundamental Rights concerning detention pending surrender.

The indicated issues determine the structure of the article. First, we focus on protection of a requested person stemming from Article 5 of the ECHR and Article 6 of the Charter on Fundamental Rights. The second part of the article provides insight into the FD EAW provisions concerning detention pending surrender and their interpretation by the CJEU. Two subsequent parts are devoted to the law and practice of detention pending surrender in the Netherlands and in Poland. In the last, concluding chapter, we present the outcomes of our analyses and the answers to the questions we have raised.

³ Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome 4 November 1950, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 2, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177; hereafter referred to as "ECHR".

2. Article 5 ECHR/Article 6 Charter and Detention Pending Execution of an EAW

As was mentioned in the *Introduction*, the FD EAW replaces extradition between the Member States of the European Union with surrender on the basis of an EAW transmitted between judicial authorities of the MS. The system of the EAW inherently entails the possibility of arrest and detention of the requested person in the executing MS. If the requested person is found in the territory of the executing MS, the person must in principle be arrested on the basis of the EAW. Pursuant to Article 12 FD EAW, the executing judicial authority (JA) must then decide whether to keep the arrested person in detention. If the executing JA decides to execute the EAW, the requested person will be surrendered to the issuing MS. The person's arrest and subsequent detention in that MS are based not on the EAW but either on the national arrest warrant (NAW) or on the Judgement of conviction on which the EAW was based (see Article 8(1)(c) FD EAW).⁴

In short, the requested person's right to liberty is at stake both in the executing and issuing MS. This article focusses on detention pending surrender, that is, detention in the executing MS on the basis of an EAW.

The requested person's right to liberty is guaranteed by, *inter alia*, Article 5 of the European Convention on Human Rights. Article 5 § 1 ECHR contains an exhaustive list of cases in which a person can be deprived of his or her liberty in accordance with a procedure prescribed by law. In order to determine whether arrest and detention in the executing MS on the basis of an EAW are lawful, one must first establish which of those listed cases, if any, is applicable. Given that the EAW replaces extradition between the MS of the EU, it seems logical to turn to Article 5 § 1 (f) ECHR. That provision contains an explicit ground "for the lawful arrest or detention of a person (...) against whom action is being taken with a view to (...) extradition." Does "extradition" also encompass "surrender on the basis of an EAW"? Although the move from extradition to the EAW has been described as "a complete change of direction"⁵, it is clear that both instruments serve

⁴ CJEU Judgement of 6 December 2018, IK (Enforcement of an additional sentence), Case 551/18 PPU, ECLI:EU:C:2018:991, para. 56.

⁵ Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 12 September 2006 in the Case 303/05 *Advocaten voor de Wereld*, ECLI:EU:C:2007:552, para. 41.

the same purpose of transferring a person from one state to another for prosecution or to enforce a sentence that has been imposed. Furthermore, the provisions of the ECHR contain autonomous concepts, that is, concepts with an interpretation that is not determined by the interpretation of the same or similar terms in domestic legal orders. All of this militates against interpreting the concept of “extradition” as only referring to extradition in its technical legal sense. Apparently, this is also the opinion of the European Court of Human Rights (ECtHR). In its case-law on Article 5 § 1 (f) ECHR, it does not distinguish between extradition in the technical legal sense and surrender on the basis of an EAW. Rather, it deals with complaints about detention pending surrender under the heading of Article 5 § 1 (f) ECHR, without devoting any attention to the applicability of this provision.⁶

Because the ECtHR regards detention with a view to surrender as coming within the ambit of Article 5 § 1 (f) ECHR, it follows that in case of a *prosecution* EAW, Article 5 § 1 (c) ECHR – which allows for “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence (...)” – is not applicable to arrest and detention on the basis of an EAW in the executing MS.⁷ As a consequence, Article 5 § 1 (f) ECHR does not require that information about a reasonable suspicion is provided to the requested State or that there is a *prima facie* case before a requested person can be arrested and detained with a view to “extradition,”⁸

⁶ See, e.g., ECtHR Decision of 7 October 2008, Case Monedero Angora v. Spain, application no. 41138/05; ECtHR Judgement of 17 April 2018, Case Pirozzi v. Belgium, application no. 21055/11, para. 45; ECtHR Decision of 25 June 2019, Case West v. Hungary, application no. 5380/12, para. 42; ECtHR Decision of 7 December 2021, Case De Sousa v. Portugal, application no. 28/17, para. 69.

⁷ See, e.g., ECtHR Decision of 16 November 2004, Case McDonald and Others v. Slovakia, application no. 72812/01; ECtHR Decision of 3 May 2005, Case Gordyeyev v. Poland, application nos. 43369/98 and 51777/99; ECtHR Decision of 26 May 2005, Case Parlanti v. Germany, application no. 45097/04; ECtHR Judgement of 24 July 2014, Case Čalovskis v. Latvia, application no. 22205/13, para. 180.

⁸ ECtHR Judgement of 6 July 2010, Case Babar Ahmad and Others v. United Kingdom, application nos. 24027/07, 11949/08 and 36742/08, par., 180.

unless domestic law states otherwise.⁹ After all, any detention must be “lawful” and must comply with a “procedure prescribed by law,” which means that in the first place, any detention must comply with domestic law. In this context, domestic law comprises not only national law but also international or EU law.¹⁰

Nevertheless, it has been suggested that detention on the basis of an EAW should be dealt with under Article 5 § 1 (c) rather than under Article 5 § 1 (f) ECHR.¹¹ According to this line of reasoning, in an area of freedom, security and justice without internal borders, the proceedings in the executing MS must be regarded as forming a part of the prosecution being conducted in the issuing MS. Therefore, arrest and detention in the executing MS are to be considered as pre-trial arrest and detention in the sense of Article 5 § 1 (c) ECHR. This argument is at odds with the principle of mutual recognition that is at the heart of the entire EAW system. If Article 5 § 1 (c) ECHR were to apply to detention pending surrender, then the courts of the executing MS would have to check whether there is a reasonable suspicion against the requested person. However, that check was already performed by the authorities of the issuing MS at the time of issuance of the NAW, and it is not up to the authorities of the executing MS to take any decision on the merits of the case against the requested person.¹² Moreover, the regulatory scheme of the EAW proves that the courts in the executing MS are not meant to assess whether there is a reasonable suspicion against the requested person. The “minimum official information” that the EAW must contain to enable the executing JA to take a swift decision

⁹ ECtHR Judgement of 24 July 2014, Case Čalovskis v. Latvia, application no. 22205/13, para. 190.

¹⁰ See, e.g., ECtHR Judgement of 17 April 2018, Case Paci v. Belgium, application no. 45597/09, para. 64; ECtHR Judgement of 25 June 2019, Case West v. Hungary, application no. 5380/12, para. 47.

¹¹ Theodor Schilling, „Europäischer Haftbefehl und europäisches Verfassungsrecht,“ in *Probleme des Rahmenbeschlusses am Beispiel des Europäischen Haftbefehls. Ein neues Instrument der europäischen Integration aus Sicht von Europarecht, Strafrecht, Verfassungsrecht und Völkerrecht*, eds. Otto Lagodny, Ewald Wiederin, and Roland Winkler (Neue Wissenschaftlicher: Verlag, 2007), 97–123.

¹² Compare opinion of AG Ruiz-Jarabo Colomer delivered on 12 September 2006, ECLI:EU:C:2006:552, para 105; CJEU Judgement of 31 January 2023, Puig Gordi and Others, Case 158/21, ECLI:EU:C:2023:57, para 88.

on the execution of the EAW¹³ does not include information about whether there is a reasonable suspicion against the requested person. What is required is that the EAW describe the offence for which surrender is sought by detailing the pertinent factual and legal elements of that offence (Article 8(1)(e) FD EAW).

Because Article 5 § 1 (c) ECHR is not applicable to detention pending surrender, Article 5 § 3 ECHR – which states that “(e)veryone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power (...)” – is not applicable either. Of course, under Article 5 § 4 ECHR, the requested person does have the right to have the lawfulness of the detention pending surrender reviewed by a court of the executing MS.

Article 5 § 1 (f) ECHR requires that “action is being taken with a view to (...) extradition,” which means that extradition proceedings must be in progress. Regarding the length of detention pending “extradition,” the ECtHR has repeatedly held that fixed time limits for detention are not a requirement of Article 5 § 1 (f) ECHR and that it will decide whether detention has become unlawful on a case-by-case basis.¹⁴ However, the ECtHR distinguishes between extradition for the purpose of enforcing a sentence and extradition for the purpose of conducting a prosecution. When a request for extradition is for the purpose of prosecution, the authorities of the requested state must act “with particular expedition” because the requested person must be presumed innocent and cannot exercise any defence rights pending extradition since the requested State is not entitled to consider the merits of the case against the requested person.¹⁵ It should be noted that neither Article 5 ECHR nor any other provision of the ECHR creates a general obligation for the requesting State to take into account

¹³ CJEU Judgement of 23 January 2018, Piotrowski, Case 367/16, ECLI:EU:C:2018:27, para. 59.

¹⁴ See, e.g., ECtHR Judgement of 2 February 2022, Case Kommissarov v. the Czech Republic, application no. 20611/17, para. 47.

¹⁵ ECtHR Judgement of 24 March 2015, Case Gallardo Sanchez v. Italy, application no. 11620/07, para. 42.

time served in the requested State.¹⁶ In this respect, EU law offers more protection. After all, the issuing MS must deduct “all periods of detention arising from the execution of [an EAW] from the total period of detention to be served in the issuing [MS] as a result of a custodial sentence or detention order being passed” (Article 26(1) FD EAW). This provision is designed to meet the objective of preserving the right to liberty of the requested person and to ensure the effect of the principle of proportionality of penalties (Article 49(3) of the Charter).¹⁷

In accordance with its distinction between Article 5 § 1 (c) and Article 5 § 1 (f) ECHR, the ECtHR distinguishes between the responsibility of the requesting State and that of the requested State. Only the requesting state is responsible for the lawfulness of detention in the requested State as it relates to the validity as a matter of national law of the NAW and the extradition request. This is because in the context of extradition proceedings, the requested State should be able to presume the validity of the NAW and the extradition request.¹⁸

The distinction between Article 5 § 1(c) ECHR and Article 5 § 1(f) ECHR is mirrored in the case law on Article 5 § 2 ECHR.¹⁹ The requirement to inform an arrested person of the reasons for arrest and the charges that have been brought is meant to enable the person to challenge the lawfulness of detention in accordance with Article 5 § 4 ECHR. As to the information to be provided, Article 5 § 2 “neither requires that the necessary information be given in a particular form, nor that it consists of a complete list of the charges held against the arrested person (...). *When a person is arrested with a view to extradition, the information given may be even less*

¹⁶ ECtHR Judgement of 20 December 2011, Case Zandbergs v. Latvia, application no. 71092/01, paras. 61–63.

¹⁷ CJEU Judgement of 28 July 2016, JZ, Case 294/16 PPU, ECLI:EU:C:2016:610, para. 42.

¹⁸ ECtHR Judgement of 21 April 2009, Case Stephens v. Malta (nr. 1), application no. 11956/07, para. 52. See also ECtHR Judgement of 26 June 2012, Case Toniolo v. San Marino and Italy, application no. 44853/10, para. 56; ECtHR Judgement of 2 May 2017, Case Vasiliciuc v. the Republic of Moldova, application no. 15944/11, para. 37; ECtHR Judgement of 26 March 2019, Case B.A.A. v. Romania, application no. 70621/16, para. 19.

¹⁹ This provision states that once the requested person is arrested with a view to “extradition” he must be “informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

complete” [emphasis added].²⁰ Although insufficiency of the information about the charges could be relevant to the right to a fair trial under Article 6 ECHR for persons arrested *pursuant to Art. 5 § 1(c)*, “extradition” proceedings do not concern the determination of a criminal charge,²¹ and, consequently, Article 6 does not apply to those proceedings.²² The bare minimum seems to be that the requested person is told that he or she is wanted for “extradition” by another state.²³ Nevertheless, the ECtHR suggests that providing the requested person with a copy – if need be, a translation of a copy – of the arrest warrant issued by the authorities of the requesting State, even though not required under Article 5 § 2 ECHR, is a more adequate way of complying with that provision.²⁴

Having established the scope of Article 5 of the ECHR as regards detention pending surrender, it is now time to turn to Article 6 of the Charter, which reads as follows: “Everyone has the right to liberty and security of person.” Like Article 5 ECHR, this provision guarantees the right to liberty. Indeed, according to the *Explanations relating to the Charter of Fundamental Rights*, Article 6 of the Charter corresponds to Article 5 of the ECHR.²⁵ Consequently, the former provision has the same meaning and scope as the latter (Article 52(3) of the Charter), which means that the Court of Justice has to take into account (the case law of the ECtHR on) Article 5 for the purpose of interpreting Article 6 of the Charter, “as the minimum

²⁰ ECtHR Judgement of 8 February 2005, Case *Bordovskiy v. Russia*, application no. 49491/99, para. 56; see also ECtHR Judgement of 23 July 2013, Case *Suso Musa v. Malta*, application no. 42337/12, para. 113: “(...) less detailed reasons are required to be given than in Article 5 § 1 (c) cases (...)”

²¹ ECtHR Judgement of 8 February 2005, Case *Bordovskiy v. Russia*, application no. 49491/99, para. 55.

²² Specifically with regard to surrender: Case *Monedero Angora v. Spain*; ECtHR Decision of 24 March 2015, Case *Martuzevičius v. the United Kingdom*, application no. 13566/13, paras. 32–33; Case *West v. Hungary*, para. 65.

²³ ECtHR Judgement of 8 February 2005, Case *Bordovskiy v. Russia*, application no. 49491/99, para. 57; ECtHR Judgement of 26 February 2009, Case *Eminbeyli v. Russia*, application no. 42443/02, para. 57.

²⁴ Case *Eminbeyli v. Russia*, para. 57.

²⁵ OJ C 30, 14 December 2007, p. 33.

threshold of protection.”²⁶ In the context of surrender, the Court of Justice has held that Article 5 § 1(f) of the ECHR applies to detention pending surrender (not Article 5(1)(c)).²⁷ In interpreting FD 2002/584/JHA in the light of Article 6 Charter, it has aligned its interpretation with the case law of the ECtHR.²⁸

3. EU Law on Detention Applied Prior to Decision on Execution of an EAW and Pending Actual Surrender

The FD EAW does not contain comprehensive regulations concerning detention pending surrender proceedings in the executing MS. The only express provisions on this issue may be found in Articles 12, 23(5) and 26 FD EAW. It is clear from the wording of Article 12 FD EAW that keeping a requested person in detention in the executing MS is not mandatory and that a decision on whether the requested person should remain in detention should be taken by “the executing judicial authority,” which, in accordance with standing CJEU jurisprudence, should be independent *vis-à-vis* the executive.²⁹ Additionally, and not surprisingly, the application of detention pending surrender as well as the release of a requested person shall be governed by the law of the executing MS. Pursuant to Article 12 FD EAW, a requested person may be provisionally released at any time provided that the competent authority of the executing MS takes all the measures it deems necessary to prevent the person from absconding. Since detention pending surrender proceedings is applied in accordance with the law of

²⁶ CJEU Judgement of 12 February 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para 57. Of course, EU law may afford *more* protection (Article 52(3) *in fine* of the Charter).

²⁷ See: CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, paras. 56–57; CJEU Judgement of 28 January 2021, Spetsializirana prokuratura (Letter of rights), Case C-649/19, ECLI:EU:C:2021:75, para 55; CJEU Judgement of 30 June 2022, Spetsializirana prokuratura (Information on the national arrest decision), Case 105/21, ECLI:EU:C:2022:511, para 56.

²⁸ CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, paras. 57–58; CJEU Judgement of 12 February 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, paras. 58–60; Spetsializirana prokuratura (Information on the national arrest decision), paras. 56–60.

²⁹ On autonomous concept of “executing judicial authority”: CJEU Judgement of 24 November 2020, Openbaar Ministerie, criminal proceedings against AZ, C-510/19, ECLI:EU:C:2020:953.

the executing MS, the protection of the right to liberty of a requested person depends in principle on the classification of such deprivation of liberty under national law of that MS.

Article 12 FD EAW differs from Article 5 § 4 ECHR in two respects. First, under the former provision, the executing JA must take a decision *ex officio* on whether the arrested requested person should remain in detention, whereas under the latter, the proceedings must be initiated by the requested person. Second, Article 12 FD EAW requires a decision by an “executing judicial authority,” whereas Article 5 § 4 ECHR requires a decision by a “court.” However, even if the executing MS has designated public prosecutors as executing JAs, their decisions must be capable of being subject to an effective judicial remedy in that MS, that is, a remedy before a court.³⁰

The detention of the requested person in the executing MS is no doubt applied to secure effective surrender. Thus, its duration is closely connected with the time limits for taking a decision on the execution of the EAW, as provided in Article 17(3) and (4) FD EAW (altogether 90 days for adopting a final decision) and, subsequently, with the time limit of 10 days stipulated in Article 23(2) FD EAW for surrender of a requested person. As transpires from the CJEU’s jurisprudence, the executing JAs are required to adopt the decision on the execution of the EAW even after expiry of the time limits indicated in Article 17 FD EAW. They are also allowed to keep a requested person in detention after expiry of the aforementioned time limits (60 and an additional 30 days, if applicable). The CJEU underlines that unlike Article 23(5) FD EAW, Article 17 FD EAW does not provide for mandatory release of a requested person due to expiry of the time limits for taking the decision on the execution of an EAW. If necessary to secure effective execution of an EAW, detention may still be applied after expiry of the time limit of 90 days provided that its duration “is not excessive in the light of the characteristics of the procedure followed in the case in the main proceedings, which is a matter to be ascertained by the national court.”³¹ The Court of Justice also underlines that in such a case, a decision

³⁰ CJEU Judgement of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, Case 510/19, ECLI:EU:C:2020:953, para. 54.

³¹ CJEU Judgement of 16 July 2015, *Lanigan*, Case 237/15 PPU, ECLI:EU:C:2015:474, para. 63.

on release of a requested person shall be accompanied by the application of measures necessary to prevent absconding and to ensure that the material conditions necessary for effective surrender remain fulfilled until a final decision on the execution of the EAW has been taken.³² Moreover, in the *TC* case, the CJEU stated that if there is a very serious risk of that person absconding and that risk cannot be reduced to an acceptable level by the imposition of appropriate measures, then a national provision imposing an obligation to release a requested person as soon as a period of 90 days from that person's arrest has elapsed is contrary to the FD EAW.³³

A different view was expressed by the CJEU with reference to “detention pending surrender” *sensu stricto*, that is, detention applied after taking a final decision on the execution of an EAW. In accordance with Article 23(2) FD EAW, surrender shall take place within 10 days after the final decision on the execution of the EAW. Although surrender may be adjourned due to *force majeure* (Article 23(3) FD EAW) or postponed for serious humanitarian reasons mentioned in Article 23(4) FD EAW, it shall take place within 10 days of the new date agreed upon by the judicial authorities. Article 23(5) FD EAW clearly states that upon expiry of the time limits referred to in its paragraphs 2 to 4, a person who is still being held in custody shall be released. In the *Vilkas* case, the CJEU ruled that under Article 23(3) FD EAW, the executing and issuing JAs may agree on a new surrender date (the third one) when the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision proved impossible due to exceptional circumstances not foreseeable for these authorities (*force majeure*). In setting the new date of surrender in the circumstances just described, the executing JA can decide to hold the requested person in custody despite expiry of the time limit of 10 days agreed upon in accordance with Article 23(3) FD EAW. In such a case, detention pending surrender shall be applied “only in so far as the surrender procedure has been carried out in a sufficiently diligent manner and in so

³² Ibid.; see also Marta Bargis, “Personal Freedom and Surrender,” in *Handbook of European Criminal Procedure*, ed. Roberto Kostoris (Springer, 2018), 323.

³³ CJEU Judgement of 12 February 2019, *TC*, Case 492/18 PPU, ECLI:EU:C:2019:108, paras. 63, 77.

far as, consequently, the duration of the custody is not excessive.”³⁴ It is also for the executing JA to carry out a concrete review of the need to keep a requested person in detention, taking into account all the relevant factors indicated by the CJEU.³⁵

As confirmed by recent jurisprudence, *force majeure* does not extend to legal obstacles to surrender which arise from legal actions brought by the requested person based on the law of the executing MS, such as a request for asylum. Article 23(3) FD EAW requires intervention of an “executing judicial authority” that meets the requirements of independence *vis-à-vis* the executive. Thus, the assessment of the existence of *force majeure* and the verification of whether the necessary conditions for the continued detention of the requested person are satisfied cannot be left within the competence of police services. As indicated by the CJEU, the time limits referred to in Article 23(2) to (4) must be regarded as having expired, with the result that the person must be released when the requirement of intervention on the part of independent judicial authority has not been met.³⁶ Article 23(5) of the FD EAW is also applicable in case of postponement of surrender for the reasons indicated in Article 23(4) FD EAW.

Another position was adopted by the CJEU with reference to the postponement of surrender based on Article 24(1) FD EAW, that is, with regard to the requested person prosecuted in the executing MS for an act other than that referred to in the EAW or serving a sentence imposed in the executing MS for such an act. Pursuant to the CJEU jurisprudence, such a postponement of surrender constitutes a decision on the execution of the EAW. This entails two consequences: first, such a decision must be taken by an “executing judicial authority” within the meaning of Article 6(2) FD EAW. If a decision on postponement was taken by an independent executing JA, the obligation to release the requested person stipulated in Article 23(5) FD EAW does not apply. Hence, detention once surrender is postponed under Article 24(1) FD EAW is governed by the rules provided

³⁴ CJEU Judgement of 25 January 2017, Vilkas, Case of C-640/15, ECLI:EU:C:2017:39, para. 43.

³⁵ Ibid.

³⁶ CJEU Judgement of 28 April 2022, C and CD, Case of C-804/21 PPU, ECLI:EU:C:2022:307, paras. 58, 76.

in Article 12 FD EAW.³⁷ However, if such a decision has not been taken by an “executing judicial authority,” the time limits referred to in Article 23(2) to (4) FD EAW must be considered to have expired, and the requested person must be released in accordance with Article 23(5) FD EAW. The decision taken by an authority that does not fulfil the requirements of independence *vis-à-vis* the executive is treated by the CJEU as unlawful.

In case of the postponement of surrender due to prosecution of a requested person in another case in the executing MS, the question arises whether the EAW itself forms a sufficient legal basis for keeping a requested person in detention even if the prosecution does not require application of such a severe preventive measure. In the *CJ* case, the CJEU ruled that the EAW may constitute a sufficient legal basis for keeping a person in detention for the whole period of postponed surrender applied under Article 24(1) FD EAW. Article 6 of the Charter is seen as not precluding a requested person whose surrender has been postponed for the purposes of a criminal prosecution instituted against him in the executing MS from being kept in detention on the basis of the EAW whilst the criminal prosecution is being conducted (but only in so far as the surrender procedure has been conducted in a sufficiently diligent manner and the duration of detention is accordingly not excessive). Moreover, postponement of surrender and accompanying detention may be justified “solely on the ground that that person has not waived their right to appear in person before the courts seised in connection with that prosecution.”³⁸ The executing JA deciding on postponed surrender and accompanying detention of the requested person shall take into consideration all relevant factors, in particular, the interest of the executing MS in completing the criminal proceedings against that person, the interest of the issuing MS in obtaining that person’s surrender without delay and the seriousness of the offences committed in those MSs.³⁹

Summarising, despite the firm and definite wording of Article 23(5) of the FD EAW, it does not provide maximum time limits for detention pending surrender. The time limit fixed in Article 23(5) FD EAW is closely connected with the possibility of extending the date of surrender. Keeping

³⁷ CJEU Judgement of 8 December 2022, *CJ*, C-492/22 PPU, ECLI:EU:C:2022:964, para. 73.

³⁸ *Ibid.*, para. 94.

³⁹ *Ibid.*, para. 92.

a person in detention is permissible under certain conditions as long as the surrender procedure is carried out in a diligent manner under Article 23(3) or (4) FD EAW.

4. The Law and Practice on Detention in Surrender Proceedings in the Netherlands⁴⁰

4.1. Time Limit of 90 Days

Until 1 April 2021, Article 22(4) of the Law on Surrender (*Overleveringswet*, [LoS])⁴¹ directed the District Court of Amsterdam (DCA)⁴² to release the requested person and to attach conditions to that release to prevent absconding if the court was unable to reach a final decision on the execution of the EAW within 90 days of the requested person's arrest. The legislature had assumed that FD EAW did not allow keeping the requested person in detention beyond that limit.⁴³ Article 22(4) did not allow for any exceptions, not even if the requested person presented a very serious risk of flight that could not be contained adequately by setting conditions to prevent absconding.

From *Lanigan* on, it was clear that this provision – which seemed to impose a “general and unconditional obligation to release the requested person provisionally”⁴⁴ – was, to say the least, at odds with the FD EAW. Indeed, the provision proved particularly problematic if the court was acting in accordance with a duty imposed by *primary* EU law. Two such situations could occur. The first situation relates to the fact that there is no ordinary remedy against a Judgement of the DCA on the execution of an EAW (Article 29(2) LoS), which means that in principle, the DCA is under a duty

⁴⁰ This paragraph presents only a selection of problems concerning detention pending surrender in Dutch law. For further examples see: Vincent Glerum, “Commentaar op Overleveringswet,” in *T&C Internationaal strafrecht*, eds. Jannemieke Ouwerkerk, Vincent Glerum, and Lachezar Yanev (Deventer: Wolters Kluwer, 2021; online updated to 1 July 2023).

⁴¹ On the implementation of the FD EAW in the Netherlands see: Vincent Glerum and Hans Kijlstra, “The Practice in the Netherlands,” in *European Arrest Warrant. Practice in Greece, the Netherlands, and Poland*, Maastricht Law Series 23 (The Hague: Eleven, 2022), 93–236; Jaap Van der Hulst, “Extradition and the European Arrest Warrant in the Netherlands,” *Eucrium*, no. 2 (2014): 64–68.

⁴² The DCA is the Dutch executing JA.

⁴³ *Kamerstukken II* 2002/03, 29042, 3, p. 22.

⁴⁴ CJEU Judgement of 16 July 2015, *Lanigan*, Case 237/15 PPU, ECLI:EU:C:2015:474, para. 50.

to request the CJEU to give a preliminary ruling on the interpretation of the FD EAW when that interpretation is at issue (Article 267(3) of the Treaty on the functioning of the European Union).⁴⁵ As the CJEU has held, the decision to request a preliminary ruling justifies exceeding the time limit of 90 days.⁴⁶ The second situation concerns the duty of the DCA to examine whether there is a real risk that the requested person, if surrendered, would suffer a violation of his or her fundamental rights. The CJEU has recognised that complying with that duty can also result in exceeding the 90-day time limit.⁴⁷

In the circumstances described, the DCA gave a conforming interpretation to the LoS: if the flight risk was so serious that it could not be adequately managed by setting conditions to prevent absconding and if the court could not reach a final decision in those two situations within 90 days, that time limit was *interrupted*, thereby preventing the time limit from reaching the 90-day mark and, consequently, pre-empting the duty to conditionally release the requested person.⁴⁸ According to the DCA, its bold and creative interpretation was not *contra legem* because nothing in the wording of the applicable provision explicitly excluded interruption of the time limit. The Court of Appeal of Amsterdam (CAA) disagreed: the interpretation given by the lower court was *contra legem*.⁴⁹ However, the CAA did agree that the duty to conditionally release the requested person was not in accordance with EU law. On the basis of balancing legal certainty and the interests of the requested person, on the one hand, against the duty to comply with EU law, on the other hand, the CAA concluded that EU law had to prevail over the national legal order and that the provision should be interpreted in such a way that the time limit was interrupted in the two situations

⁴⁵ CJEU Judgement of 6 October 2021, Consorzio Italian Management en Catania Multiservizi, Case 561/19 ECLI:EU:C:2021:799, paras. 32–33.

⁴⁶ CJEU Judgement of 30 May 2013, Jeremy F., Case 168/13 PPU, ECLI:EU:C:2013:358, para. 65; CJEU Judgement of 12 December 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para. 43.

⁴⁷ CJEU Judgement of 12 December 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para. 43.

⁴⁸ DCA Judgement of 5 April 2016, ECLI:NL:RBAMS:2016:1995; DCA Judgement of 28 April 2016, ECLI:NL:RBAMS:2016:2630.

⁴⁹ On *contra legem* see also footnote 93.

that could occur.⁵⁰ A battle between the courts ensued: the DCA repeatedly refused to follow the reasoning of the CAA, which it did not find convincing, and stuck to its own reasoning, and the CAA acted *vice versa*. Meanwhile, defence counsel argued that both courts' interpretations of Article 22(4) were contrary to Article 6 of the Charter, in particular, the principle of legal certainty.

Against this background, the DCA decided to make a reference to the CJEU for a preliminary ruling. The CJEU's Judgement in the *TC* case yielded two important points.⁵¹ First, the CJEU confirmed that a national provision such as Article 22(4) LoS is incompatible with the FD EAW,⁵² as was to be expected in light of *Lanigan*. The importance of the second point transcends the particular case at hand. It concerns the relationship between the requirement of legal certainty, which is inherent in the right to liberty, and the duty of national courts to interpret national law in conformity with EU law, particularly with regard to the role of national case law as a sufficiently accessible, precise and predictable legal basis for detention.

The CJEU established that EU law and national law laid down clear and predictable rules but pointed out that the national rule was not in accordance with the FD EAW. For that reason, it was clear and predictable “long before the main proceedings were initiated” – that is, at least from *Lanigan* on – that national courts were “required to do whatever lay within their jurisdiction with a view to ensuring that [FD EAW] is fully effective” by giving a conforming interpretation to Article 22(4) LoS.⁵³ However, there were two problems with the national case law. First, the conforming interpretation did not resolve the incompatibility with the FD EAW in *all* circumstances. In other words, national courts had not *fully* done “whatever

⁵⁰ CAA, Judgement of 3 May 2016, ECLI:NL:GHAMS:2016:1838; CAA, Judgement of 4 July 2016, ECLI:NL:GHAMS:2016:4900; CAA, Judgement of 30 January 2017, ECLI:NL:GHAMS:2017:220.

⁵¹ See on this Judgement Vincent Glerum, “Dura lex, sed lex? Divergerende nationale rechtspraak, de verplichting tot kaderbesluitconforme uitleg en de eis van een duidelijke en voorzienbare wettelijke grondslag voor vrijheidsbeneming,” *SEW* 67, no. 12 (December 2019): 562–567.

⁵² CJEU Judgement of 12 December 2019, *TC*, Case 492/18 PPU, ECLI:EU:C:2019:108, para 50.

⁵³ CJEU Judgement of 12 December 2019, *TC*, Case 492/18 PPU, ECLI:EU:C:2019:108, para 69.

[lay] within their jurisdiction” to remedy the situation. Second, the reasoning of both courts diverged, particularly with regard to the calculation of the period of suspension, potentially resulting in varying outcomes as to expiry of the 90-day period. Consequently, it was not possible “to determine with the clarity and predictability required (...) the period for which the requested person (...) is to be kept in detention in the Netherlands.”⁵⁴

The *TC* Judgement makes clear what the ECtHR had already recognised,⁵⁵ which is that case law can satisfy the requirement of an accessible, precise and predictable legal basis for detention but only in so far as that case-law is *consistent*.⁵⁶ *TC* also clarifies how to apply the requirement of a clear and predictable legal basis if national law is not in accordance with EU law. If it is clear that national law is not in conformity with EU law – for example, the CJEU has already given an interpretation to an EU norm that clearly precludes the relevant national norm (as it did in *Lanigan*) – the discrepancy between national law and EU law is not, in itself, enough to conclude that there is no clear and predictable legal basis for detention. In the multi-layered legal order of the EU, the requirement of a clear and predictable legal basis is intertwined with the duty of national authorities to give a conforming interpretation to national law: an interpretation by a national court that does not *fully* ensure that national law is interpreted in conformity with FD EAW does not meet the requirement of a clear and predictable legal basis (or at least contributes to the conclusion that such a basis is absent). As a result, the person concerned – if need be, after taking appropriate legal advice – should expect national courts to do all they can to give a conforming interpretation to national law. Thus, the requirement of a clear and predictable legal basis that is intended to afford

⁵⁴ CJEU Judgement of 12 December 2019, *TC*, Case 492/18 PPU, ECLI:EU:C:2019:108, para 76.

⁵⁵ See, e.g., ECtHR Judgement of 28 March 2000, *Case Baranowski v. Poland*, application no. 28358/95, para. 54 (“The Court observes that the domestic practice of keeping a person in detention under a bill of indictment was not based on any specific legislative provision or case-law (...); ECtHR Judgement of 21 March 2017, *Case Porowski v. Poland*, application no. 34458/03, para. 112 (“(...) In sum, the “law” is the provision in force as the competent courts have interpreted it (...).” See also ECtHR Judgement of 8 November 2011, *Case Laumont v. France*, application no. 43626/98, paras. 50–51.

⁵⁶ See, e.g., ECtHR Judgement of 11 October 2007, *Case Nasrullojev v. Russia*, application no. 656/06, para. 77.

protection against detention seems to be employed as an argument to deny the requested person's entitlement under national law to conditional release. But it must be remembered that this entitlement is not in accordance with EU law, as was clear to the person concerned. The fact that a conforming interpretation of national law does not benefit the person concerned does not preclude that interpretation,⁵⁷ at least when substantive criminal law is not concerned.⁵⁸

The CJEU's answer in *TC*⁵⁹ exhorted the national courts to get on the same page. And that is what they did. The CAA made a complete U-turn in holding that a conforming interpretation of Article 22(4) LoS was "by no means" *contra legem*. That interpretation entailed that when there is a very serious risk of absconding that cannot be reduced to an acceptable level by the imposition of appropriate measures, there is no duty to conditionally release the requested person if the 90-day limit is exceeded.⁶⁰ The DCA followed suit.⁶¹ Thus, the conditions for a clear and predictable legal basis that resolved the incompatibility with EU law in all circumstances had now been met, and the "battle between the courts" was over.⁶² Unfortunately, it took the legislature another two years to amend Article 22(4) LoS.

However, the legislature introduced a new problem when it abolished the fixed time limit because it introduced *exhaustively* listed possibilities for extending the time limit for deciding on the execution of the EAW

⁵⁷ See, e.g., CJEU Judgement of 5 July 2007, Kofoed, Case 321/05, ECLI:EU:C:2007:408, para. 45 (concerning taxation).

⁵⁸ See, e.g., CJEU Judgement of 29 June 2017, Popławski, Case 579/15 ECLI:EU:C:2017:503, paras. 32 and 37.

⁵⁹ "Article 6 of the [Charter] must be interpreted as precluding national case-law which allows the requested person to be kept in detention beyond that 90-day period (...) in so far as that case-law does not ensure that that national provision is interpreted in conformity with Framework Decision 2002/584 and entails variations that could result in different periods of continued detention"; CJEU Judgement of 12 December 2019, *TC*, Case 492/18 PPU, ECLI:EU:C:2019:108, para 77.

⁶⁰ CAA, 5 March 2019, ECLI:NL:GHAMS:2019:729.

⁶¹ DCA Judgement of 7 May 2019, ECLI:NL:RBAMS:2019:3221.

⁶² *TC* had lodged a complaint with the ECtHR concerning his detention beyond the 90-days limit. After a friendly settlement was reached, the ECtHR decided to strike the case out of the list: ECtHR Decision of 20 January 2022, *B.T. v. the Netherlands*, application no. 45257/19.

– and thus, on detention pending surrender – beyond 90 days. According to the new provisions, the time limits may only be extended if the DCA, *within the time of limit of 90 days*, has requested the Court of Justice to give a preliminary ruling (Article 22(4) new LoS), if the DCA is in the process of examining an *in abstracto* real risk of a violation of the requested person's Charter rights (Article 22(5) new) or if the DCA has established that there is an *in concreto* real risk of such a violation (Article 22(6) new). The TC Judgement designates such cases as “exceptional circumstances” that justify exceeding the time limit of 90 days (Article 17(7) FD EAW), but it does not *limit* those “exceptional circumstances” to those three cases. The limitation of the possibilities for extending the time limits can in effect force the DCA to take a decision on the execution of an EAW even if it does not yet have the necessary information to do so, which can lead to a refusal of surrender that could have been avoided. Moreover, limiting the right and the duty of the DCA to request preliminary rulings seems at odds with EU law.⁶³

4.2. Conditional Release

Pursuant to Article 64(1) LoS, the competent authority can conditionally suspend detention whenever it may or must take a decision on the requested person's detention. A suspension is only valid “until the moment when the court pronounces its Judgement ordering the execution of the EAW.” The rationale of this provision is that once surrender has been ordered, the risk of absconding significantly increases and conditional suspension of detention would, therefore, be contrary to the objective of surrendering the requested person.⁶⁴

The exclusion of conditional suspension of detention *post sententiam* is incompatible with Article 12 FD EAW interpreted in conformity with Article 6 of the Charter. The executing JA's duty to carry out a concrete review in order to ensure that the duration of the detention is not excessive⁶⁵ does not end once it has ordered the execution of an EAW but applies as

⁶³ See further Glerum and Kijlstra, “The Practice in the Netherlands,” 178–181.

⁶⁴ Cf. *Kamerstukken II* 1998/99, 26697, nr. 3, p. 23.

⁶⁵ CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, paras. 58–59.

long as the requested person is held in detention on the basis of that EAW, for example, if surrender could not be effected on account of *force majeure* (Article 23(2) FD EAW)⁶⁶ or because surrender was postponed in order to conduct a prosecution against the requested person in the executing MS (Article 24(1) FD EAW).⁶⁷ If the executing JA finds that the duration of detention has indeed become excessive, it must provisionally release the requested person and take “*any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled*” [emphasis added].⁶⁸ In Dutch law, such measures can only be taken in the context of a conditional suspension of detention: the court can set conditions to prevent the requested person from absconding. Inasmuch as Article 64(1) LoS limits the possibility of conditional release to detention *prior* to the Judgement on the execution of the EAW, it is not in conformity with Article 6 of the Charter in cases in which *after* that decision, the duration of detention is found to be excessive. As Article 6 of the Charter has direct effect, the DCA has recognised that in those cases, it would have to disapply the “offending” part of Article 64(1) LoS and to conditionally release the requested person.⁶⁹ In any case, if the risk of flight can adequately be managed by setting conditions to prevent absconding, keeping the requested person in detention would not be “necessary” (Article 52(1) of the Charter) and would, therefore, constitute an unjustified limitation on the exercise of the right to liberty.⁷⁰

Incidentally, the exclusion of the possibility of conditional suspension *post sententiam* is also incompatible with Article 23(5) FD EAW. Release under that provision must be accompanied by “*any measures (...) necessary to prevent that person from absconding, with the exception of measures*

⁶⁶ CJEU Judgement of 25 January 2017, Vilkas, Case 640/15 ECLI:EU:C:2017:39, para. 43.

⁶⁷ CJEU Judgement of 8 December 2022, CJ (Décision de remise différée en raison de poursuites pénales), Case 492/22 PPU, ECLI:EU:C:2022:964, para. 82.

⁶⁸ CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, para. 61; CJ (Décision de remise différée en raison de poursuites pénales), para. 60.

⁶⁹ DCA Judgement of 3 September 2020, ECLI:NL:RBAMS:2020:4332; DCA Judgement of 22 July 2021, ECLI:NL:RBAMS:2021:3873.

⁷⁰ DCA Judgement of 11 January 2019, ECLI:NL:RBAMS:2019:207.

involving deprivation of liberty”⁷¹ [emphasis added]; but as said before, Article 64(1) LoS excludes taking such measures *post sententiam*. Disapplying the incompatible part of Article 64(1) is not an option in this case. In contrast to Article 6 of the Charter, the provisions of FD EAW do not have direct effect.⁷² A conforming interpretation would probably be *contra legem*, given the clear and precise wording of Article 64(1) LoS.

In the context of infringement proceedings against the Netherlands for non-conformity of the Dutch measures transposing FD EAW,⁷³ the Ministry of Justice and Security is preparing a bill to amend Article 64(1) LoS.

4.3. Role of the Prosecutor

The national legislature assumed that a Dutch prosecutor would qualify as an “executing judicial authority” within the meaning of Article 6(2) FD EAW.⁷⁴ That assumption was wrong: Dutch prosecutors do not satisfy the necessary conditions to be characterised as executing JAs because they may be subject to instructions in specific cases from the Ministry of Justice and Security.⁷⁵ This makes their role concerning detention pending surrender problematic.

In the early stages of surrender proceedings, the (assistant)⁷⁶ prosecutor of the region in which the requested person was arrested can order that the person remain in police custody for three days, counting from the time of arrest. Within that period, the Amsterdam prosecutor can order that the requested person remain in police custody until the DCA takes a decision on the detention (Article 21(8) LoS) at the hearing on the execution of the EAW (Article 27(1)–(2) LoS). That hearing is usually held within 60

⁷¹ CJEU Judgement of 28 April 2022, C and CD (Legal obstacles to the execution of a decision on surrender), Case 804/21 PPU, ECLI:EU:C:2022:307, para. 75.

⁷² CJEU Judgement of 29 June 2017, Popławski, Case 579/15 ECLI:EU:C:2017:503, paras. 26–28. On direct effect see also footnote 91.

⁷³ (INFR(2021)2004).

⁷⁴ On the Dutch prosecution service in general: Peter Tak, “The Dutch Prosecution Service,” in *Task and Powers of the Prosecution Services in the EU Member States*, ed. Peter Tak (Nijmegen: Wolf Legal Publishers, 2004), 16 ff.

⁷⁵ CJEU Judgement of 24 November 2020, Openbaar Ministerie (Forgery of documents), Case 510/19, ECLI:EU:C:2020:953, para. 67; CJ (Décision de remise différée en raison de poursuites pénales), para. 55.

⁷⁶ An assistant prosecutor is not a member of the Public Prosecutor’s Office but a ranking police officer.

days after the arrest. All in all, the duration of police custody can be quite significant.

Pursuant to Article 12 FD EAW, “the executing judicial authority shall take a decision on whether the requested person should remain in detention.” Therefore, the role of (assistant) prosecutors is at odds with the FD EAW. Under Article 6 of the Charter and Article 5(4) of the ECHR the requested person is entitled to take proceedings to have the lawfulness of his or her detention reviewed by a court. Article 21(9) LoS implements those provisions: the court may end police custody at any time, either *ex officio* or at the request of the requested person. However, Article 12 FD EAW goes beyond the Charter and the ECHR in requiring that the executing JA take a decision on continuation of detention *whether or not the requested person requested a review of the lawfulness of his detention*. To remedy the situation, the DCA gave a conforming interpretation to Article 21(9) LoS: under EU law, the court is *obliged* to review *ex officio* each decision of the Amsterdam prosecutor that orders the requested person to remain in police custody. This ensures that soon after the arrest of the requested person, the executing JA takes a decision after all on whether he or she is to remain in detention.⁷⁷

In the final stages of surrender proceedings, the Amsterdam prosecutor is tasked with enforcing the Judgement of the DCA ordering the execution of the EAW. In that context, the Amsterdam prosecutor decides whether actual surrender should be deferred on account of *force majeure* (Article 35(3) LoS) or serious humanitarian reasons (Article 35(4) LoS) and whether to postpone actual surrender so that the requested person may be prosecuted in the Netherlands or may serve a sentence there (Article 36(1) LoS). However, Article 23(3)(4) and 24(1) FD EAW clearly allocate the competence to take such decisions to the executing JA. Pursuant to the CJEU’s case law, the time limits for actual surrender cannot be validly extended absent any intervention on the part of the executing JA. As a result, those time limits must be regarded as expired, which triggers the duty to release the requested person under Article 23(5).⁷⁸ The same applies, *mutatis mutandis*,

⁷⁷ DCA Judgement of 25 November 2020, ECLI:NL:RBAMS:2020:5778.

⁷⁸ *C and CD (Legal obstacles to the execution of a decision on surrender)*, para. 69.

to decisions on postponement of actual surrender absent any intervention by the executing JA.⁷⁹

The DCA gave a conforming interpretation to the relevant national provisions, which ensures intervention on the part of the executing JA.⁸⁰ When deciding on a request by the Amsterdam prosecutor to extend the requested person's detention in cases in which actual surrender cannot take place (Article 34(2)(b) LoS), the court will review whether *force majeure* or serious humanitarian reasons exist or whether or not to postpone actual surrender. The prosecutor's (unlawful) decision on these issues is then replaced by the court's own decision.⁸¹

The bill to amend Article 64(1) LoS (supra, para. 4.2 in fine) will also remedy the defects mentioned in this paragraph. Pursuant to this bill, the DCA will decide within three days from the arrest of the requested person whether he or she is to remain in police custody until the DCA takes a decision on the detention at the hearing on the execution of the EAW. And the DCA will decide, upon motion by the public prosecutor, whether to defer or to postpone actual surrender.

5. The Law and Practice on Detention in Surrender Proceedings in Poland

5.1. Exclusive Competence of Courts to Act as “Executing Judicial Authorities”

In Poland, the FD EAW was implemented in Chapters 65a and 65b of the Code of Criminal Procedure. Since the law on EAW forms part of the Code of Criminal Procedure, all general provisions concerning a suspect and a defendant in criminal proceedings are applicable *mutatis mutandis* to the requested person in proceedings concerning the execution of an EAW. The procedural status of the requested person is similar to a suspect or a defendant in criminal proceedings, both with regard to a right of defence and other procedural guarantees.⁸²

⁷⁹ *CJ (Décision de remise différée en raison de poursuites pénales)*, para. 60.

⁸⁰ Suggested by AG Kokott: opinion delivered on 27 October 2022, ECLI:EU:C:2022:845, paras. 40–41.

⁸¹ See, e.g., DCA Judgement of 9 December 2022, ECLI:NL:RBAMS:2022:7460; DCA Judgement of 20 December 2022, ECLI:NL:RBAMS:2022:7855.

⁸² See: Małgorzata Wąsek-Wiaderek, “»Dual Legal Representation« of a Requested Person in European Arrest Warrant Proceedings – Remarks from the Polish Perspective,” *Review of*

With regard to requirements concerning the notion of “executing judicial authority” enshrined in the CJEU jurisprudence, only courts have competences to decide on issuing and executing an EAW as well as applying detention pending surrender.⁸³ As transpires from Article 607k § 2 CCP, a decision on the execution of an EAW is taken by the competent regional court and may be subject to appeal to the competent appellate court (Article 607l § 3 CCP). Furthermore, also a decision to postpone surrender due to prosecution pending in another case or execution of the sentence imposed in Poland for an act other than the one covered by an EAW is taken by a competent regional court (Article 607o §§ 1 and 2 CCP). Certain doubts could be voiced with reference to a procedural organ competent to decide on a new date of surrender in the circumstances described in Article 23 (3) and (4) FD EAW. Article 607n CCP does not mention “a court” as an organ responsible for agreeing upon the new date of surrender with procedural authorities of the issuing MS. However, as long as surrender proceedings are pending, they are within the competence of the regional court acting as the executing JA. The court should act in cooperation with the police services with reference to all technical aspects of transfer of the requested person to the issuing MS.⁸⁴ Moreover, as rightly argued by a majority of commentators,⁸⁵ a decision on a new date of surrender should have the form of an order of a competent court (*postanowienie*) acting as

European and Comparative Law 41, no. 2 (June 2020): 37–38, <https://doi.org/10.31743/recl.8673>. The Ordinance of the Minister of Justice of 11 June 2015, regulating the form of instruction on the rights of a person arrested upon the European Arrest Warrant (Journal of Laws of 2015, item 874), clearly states that the requested person has a right to be represented by “a defense counsel,” including the right to apply for defence counsel appointed by a court in the framework of legal aid.

⁸³ On implementation of FD EAW in Poland, see: Małgorzata Wąsek-Wiaderek and Adrian Zbiciak, “The Practice of Poland on the European Arrest Warrant,” in *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Hague: Eleven, 2022), 237–321.

⁸⁴ Barbara Augustyniak, „Komentarz do art. 607n kodeksu postępowania karnego,” in *Kodeks postępowania karnego. Komentarz, tom II*, ed. Dariusz Świecki (Warsaw: Wolters Kluwer Polska 2022), 1202.

⁸⁵ See: Andrzej Sakowicz and Adam Górski, „Komentarz do art. 607n kodeksu postępowania karnego,” in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (Warsaw: C.H. Beck, 2023), 1772.

the executing JA. This court is also obliged to release a requested person if the issuing MS does not receive him within the time limits indicated in Article 607n § 2 and 3 CCP.

As already pointed out, only regional courts have jurisdiction to apply detention pending surrender. As terms of procedural requirements, such detention is treated similarly to ordinary pre-trial detention of a suspect for the purpose of being brought to trial. The procedural guarantees of Article 5 § 3 ECHR are applied *mutatis mutandis* to detention of the requested person as a result of that classification. If the requested person is found in the territory of Poland, a public prosecutor may request the regional court that has territorial jurisdiction in the case to decide on detention of the requested person for the period necessary to issue a decision on the execution of an EAW and subsequent surrender. The requested person who is arrested on the basis of an EAW or an alert in SIS must be promptly brought, that is, within 48 hours, before the competent regional court, which should decide on his/her detention within the subsequent 24 hours.⁸⁶ Despite the fact that arrest of the requested person is based on the EAW, he or she is treated in the same manner as a suspected person arrested in the framework of Polish criminal proceedings, which is to be “brought promptly before a judge” within the meaning of Article 5 § 3 ECHR. A different approach is taken with reference to substantive grounds for detention pending surrender. It is assumed that these grounds do not have to be checked by the executing JA since they were already verified at the stage of issuing the EAW.⁸⁷ Such an interpretation is supported by the wording of Article 607k § 3 CCP (its third sentence) providing that a final conviction or another decision on deprivation of liberty of the requested person issued in another MS should be an independent basis for the application of detention pending surrender.

The decision on detention of the requested person is subject to appeal to the competent appellate court. Thus, the Code of Criminal Procedure provides for exclusive competence of judicial organs (regional courts,

⁸⁶ Sławomir Steinborn, „Komentarz do art. 607k kodeksu postępowania karnego,” in *Kodeks postępowania karnego. Komentarz, tom III*, ed. Lech Krzysztof Paprzycki (Warsaw: Wolters Kluwer Polska, 2013), 871–872.

⁸⁷ Resolution of the Supreme Court of 26 June 2014, I KZP 9/14, OSNKW 2014, no. 8, item, 60.

appellate courts) to take any decision on detention of the requested person in the course of the proceedings aimed at deciding on the execution of the EAW and subsequent surrender.

5.2. Time Limit for Detention Pending Execution of an Eaw and Surrender

Pursuant to Article 607k § 3 CCP, the entire period of detention applied in the EAW proceedings should not exceed 100 days.⁸⁸ This provision reflects the time limits indicated in Article 17 and 23 FD EAW and is conceived as a sum of maximum time limits of 60 and a further 30 days for deciding on execution of an EAW plus an additional 10 days for surrender *sensu stricto*. The time limit of 100 days provided in Article 607k § 3 CCP is not linked to the particular stage of surrender proceedings. If the final decision on execution of an EAW is taken within 60 days, the requested person may be kept in detention for a subsequent 40 days pending surrender *sensu stricto*, provided the time limits for arranging surrender indicated in Article 607n § 2 CCP (reflecting the wording of Article 23(3) and (4) FD EAW) have not expired. On the other hand, if the proceedings concerning execution of an EAW are prolonged beyond 90 days for whatever reasons, the requested person may be kept in detention only for the remaining days, that is, no longer than 10 days.

Unfortunately, while implementing Article 23(3) and (4) FD EAW in Article 607n § 2 CCP, the Polish legislature completely disregarded that surrender adjourned due to *force majeure* or “danger to the life or health of the requested person” may require keeping the requested person in detention beyond the time limit of 100 days. Article 607n § 2 CCP stipulates that in case of exceptional obstacles classified as *force majeure*, surrender shall take place within 10 days from the new date agreed upon by the judicial organs of the issuing and executing MSs. With regard to the CJEU jurisprudence referred to in the previous sections of this article, attempts to surrender the requested person – if necessary, secured by detention

⁸⁸ The original text of the Act implementing FD EAW did not provide for such time-limit. It was introduced by the Act of 5 November 2009, in force since 8 June 2010 (Journal of Laws 2009, No. 206, item 1589). No specific reasons supporting this time-limit were provided in the written reasons to the draft law. It was approved by experts evaluating the draft law (see: Andrzej Sakowicz, *Opinion on the Draft Law*, 34, <https://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=1394>).

– shall continue after expiry of the second date of surrender agreed upon by the competent judicial authorities. Under Polish law, application of detention in the course of such prolonged surrender proceedings is possible only if the entire time limit of 100 days has not yet expired.

The discussed time limit of 100 days is surprising and exceptional when seen in the context of the general rules governing application of detention in Poland. The CCP does not limit the time of detention applied in criminal proceedings. The only time limits are linked to particular stages of criminal proceedings (12 months at the pre-trial stage; two years of detention applied prior to issuing a first instance Judgement for the first time) and may be prolonged.⁸⁹

In its *TC* Judgement, the CJEU ruled that an obligation to release the requested person once a certain period of detention has elapsed (90 days in that case) if there is a very serious risk of that person absconding and that risk cannot be reduced to an acceptable level by the imposition of appropriate measures, is contrary to the FD EAW.⁹⁰ This ruling is no doubt fully applicable to the Polish law. Since provisions of the FD EAW do not have direct effect, the principle of supremacy of EU law cannot be understood as requiring disapplication of Article 607k § 3 CCP even if the latter provision is contrary to the FD EAW.⁹¹ The only possible way of solving this contravention is to interpret domestic law to the greatest extent possible as in conformity with EU law in order to ensure an outcome that is compatible with the objective pursued by the FD EAW.⁹² However, as is constantly

⁸⁹ Jerzy Skorupka, “The Limits of Interference with the Personal Liberty of an Individual and with the Privilege against Self-Incrimination in Criminal Proceedings,” in *The Model of Acceptable Interference with the Rights and Freedoms of an Individual in the Criminal Process*, ed. Jerzy Skorupka (Warsaw: C.H. Beck, 2019), 509–512.

⁹⁰ CJEU Judgement of 12 December 2019, *TC*, Case 492/18 PPU, ECLI:EU:C:2019:108, paras. 63 and 77.

⁹¹ CJEU Judgement of 24 June 2019, *Popławski*, C-573/17, ECLI:EU:C:2019:530, para. 109; CJEU Judgement of 8 December 2022, *CJ*, C-492/22 PPU, ECLI:EU:C:2022:964, para. 62. See also: Dawid Miąsik and Monika Szwarc, “Primacy and Direct Effect – Still Together: *Popławski II*,” *Common Market Law Review* 58, no. 2 (April 2021): 578–589.

⁹² See, *inter alia*, CJEU Judgement of 8 November 2016, *Ognyanov*, C-554/14, ECLI:EU:C:2016:835, para. 71.

stressed by the CJEU, no *contra legem* interpretation of domestic law is required to reach full implementation of the framework decision.⁹³

For this reason, it is important to analyse whether Article 607k § 3 CCP may be interpreted in conformity with the relevant provisions of the FD EAW concerning detention pending surrender. In accordance with the prevailing opinion of commentators and the case law of Polish courts, the firm wording of Article 607k § 3 CCP does not leave any space for flexible interpretation. This means that the time limit of 100 days of detention cannot be extended in any circumstances,⁹⁴ not even if surrender is postponed because of a pending prosecution of the requested person in another case.⁹⁵ It is difficult to argue that another interpretation is permissible and acceptable in not only this situation but also with reference to cases in which detention is applied in the circumstances described in Articles 23(3) and (4) FD EAW. Article 607k § 3 CCP firmly states that “upon the motion of a public prosecutor, the regional court may impose detention on the requested person for the time indispensable for surrender of this person. The entire duration of detention cannot exceed 100 days.” Thus, the CCP clearly indicates that this time limit applies to the proceedings concerning taking a final decision on the execution of an EAW as well as to the subsequent surrender proceedings *sensu stricto*.⁹⁶

Sławomir Steinborn argues that there is some space for flexible interpretation of this provision but only in one specific situation: if surrender is

⁹³ Nothing has changed with regard to this issue since famous CJEU Judgement of 16 June 2005, Pupino, C105/03, EU:C:2005:386, para. 47. See also: CJEU Judgement of 5 September 2012, Lopes Da Silva Jorge, C42/11, EU:C:2012:517, paras. 55 and 56. On the limits of interpretation of national law in conformity with EU law – see also: André Klip, *European Criminal Law. An Integrative Approach* (Cambridge–Antwerp–Chicago: Intersentia, 2021), 173–178.

⁹⁴ See, *inter alia*, Steinborn, „Komentarz do art. 607k kodeksu postępowania karnego,” 880; Sakowicz and Górski, „Komentarz do art. 607k kodeksu postępowania karnego,” 1637; Augustyniak, „Komentarz do art. 607k kodeksu postępowania karnego,” 1191.

⁹⁵ Appellate Court in Katowice, Decision of 30 June 2010, AKz 408/10, Ref. No. 1017306; Appellate Court in Wrocław, Decision of 5 January 2012, II AKz 3/12, Ref. No. 1110777; Appellate Court in Rzeszów, Decision of 4 March 2014, II AKz 26/14, Ref. No. 1444806.

⁹⁶ See: Bartosz Baran, „Ograniczenia temporalne tymczasowego aresztowania w toku postępowania w przedmiocie wykonania ENA – glosa do postanowienia Sądu Apelacyjnego w Katowicach z 30.06.2010 r.,” *Europejski Przegląd Sądowy*, no. 6 (June 2011): 48.

postponed due to pending prosecution of the requested person for another criminal act in Poland or execution in Poland of a sentence imposed in other proceedings (Article 24(1) FD EAW, implemented in Article 607o § 1 CCP⁹⁷). He maintains that the time limit indicated in Article 607k § 3 CCP does not apply to postponed surrender since the aim of the latter provision is to speed up proceedings concerning execution of an EAW. Once the decision to surrender the requested person is final, the reasons for limiting the time of detention lose their importance. According to this author, when surrender is postponed, the date of future transfer of the requested person to the issuing MS is no longer dependent on a decision of the executing JA. For this reason, strict time limits for detention should not apply.⁹⁸

While S. Steinborn's reasoning should be fully endorsed, it is in contravention of the precise wording of Article 607k § 3 CCP. What he proposes is in line with recent jurisprudence of the CJEU, but regarding the current regulations of the CCP, this may only be considered as a *de lege ferenda* postulate. The legal basis for prolonged detention must be unambiguous and precise. Otherwise the requested person could reasonably argue that such detention is contrary to Article 5 § 1 of the ECHR. This provision requires that detention justified under Article 5 § 1(f) ECHR must also be applied "in accordance with a procedure prescribed by law." Moreover, the detention pending extradition (i.e., also pending surrender) must be "lawful."⁹⁹ It has been emphasised many times by the ECtHR that, in general, reference is made in this provision to national law and the basis for deprivation of liberty regulated in national law.¹⁰⁰ Since Polish law firmly states that the time limit of 100 days for detention applies until surrender, no

⁹⁷ This provision reads as follows: "If criminal proceedings are conducted in Poland against a requested person for an offence other than that indicated in the EAW or this person is to serve the penalty of imprisonment for such an offence in Poland, the court, while issuing a decision on surrender, may postpone its execution until criminal proceedings in Poland are concluded or penalty of imprisonment is served."

⁹⁸ See: Steinborn, „Komentarz do art. 607o kodeksu postępowania karnego,” 910, and the case-law referred therein.

⁹⁹ Stefan Trechsel with the assistance of Sarah J. Summers, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2009), 420–421.

¹⁰⁰ ECtHR Judgement of 6 October 2022, Case Liu v. Poland, application no. 37610/18, para. 97.

extensive interpretation of this provision to the detriment of the requested person is possible.

Summarising, if detention pending surrender (also postponed surrender) exceeds 100 days, its application is contrary to Article 607k § 3 CCP. As a rule, such detention cannot be considered as “lawful” and applied “in accordance with the law” within the meaning of Article 5 § 1 of the Convention. It would also be contrary to Article 6 of the Charter of Fundamental Rights understood in accordance with the interpretation provided by the CJEU in its *TC* Judgement. Unlike in the Netherlands, there is no extensive and constant interpretation by the courts of Article 607k § 3 CCP in Poland that would allow keeping the requested person in detention beyond the 100-day period in the circumstances indicated in this Judgement. As rightly argued in section 4.1. of this article, the CJEU admitted in the *TC* Judgement that domestic case law could form the appropriate legal basis for detention prolonged beyond the 90-day period provided by the law of the Netherlands at that time, in so far as that case-law does ensure that the national provision is interpreted in conformity with FD EAW and is stable and consistent. Moreover, Dutch courts applied suspension of detention, and, consequently, its prolongation only in two well-defined situations: 1) referring questions for a preliminary ruling to the CJEU in the course of the execution of an EAW or awaiting the reply to a request for a preliminary ruling made in another case; 2) assessing whether there is a real risk of inhuman or degrading treatment of the requested person or of a violation of the right to a fair trial in the issuing MS in case of surrender. None of these circumstances were subject to in-depth analysis by Polish courts in the context of time limits of detention pending surrender. Up until now, Polish courts have only once referred to the CJEU for a preliminary ruling seeking interpretation of the FD EAW.¹⁰¹ Recent research has also proved that as a rule, the EAWs are executed by Polish judicial authorities within the time limits provided in FD EAW.¹⁰² Furthermore, unlike in the Netherlands, no constant practice was revealed proving systematic verification by Polish courts of the risk of fundamental rights violations in

¹⁰¹ Case C294/16 PPU, JZ.

¹⁰² Wąsek-Wiaderek and Zbiciak, “The Practice of Poland on the European Arrest Warrant,” 291.

the issuing MS in case of surrender.¹⁰³ In any case, it cannot be concluded that such verification caused prolongation of execution of EAWs and, consequently, influenced the application of detention pending surrender in Poland.

Returning to the interpretation of Article 607k § 3 CCP, it cannot convincingly be argued that the requested person is able to foresee the possibility of being kept in detention pending surrender for longer than 100 days even with the assistance of defence counsel and even if the requested person takes into consideration all provisions of the Polish law and its interpretation provided by the courts. For this reason, detention pending surrender exceeding 100 days must be assessed as lacking any legal basis under Polish law and, consequently, contrary to Article 5 § 1 ECHR. One exception to this rule may be found, which relates to the application of detention on remand in criminal proceedings that were the cause for postponement of surrender. In such a case, deprivation of liberty is simultaneously justified under Article 5 § 1 (c) of the ECHR, that is, an EAW is no longer the sole legal basis for such deprivation of liberty. The same applies in the case of surrender postponed for the purpose of execution of the sentence of deprivation of liberty in Poland; detention pending surrender is not the only legal basis for deprivation of liberty of the requested person. It is justified as well under Article 5 § 1 (a) ECHR.

6. Conclusions

Although the FD EAW does not intend to harmonise the law on detention pending surrender, such harmonising effect is provided by other sources of EU law, in particular, Article 6 of the Charter of Fundamental Rights, CJEU jurisprudence and the package of directives on the rights of suspects in criminal proceedings.¹⁰⁴ Thus, EU law seems to offer more protection in a number of ways to the requested person than does Article 5 ECHR.

¹⁰³ Ibid., 298–299.

¹⁰⁴ In particular, one should mention the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1–12). In Poland this

First, Article 5 § 1(f) ECHR does not specify the authority that decides on putting and keeping the requested person in detention pending surrender. EU law requires that such decisions are taken by a “judicial authority” (Article 12 FD EAW). This can either be a court or a public prosecutor but the latter only if his or her independence *vis-à-vis* the executive is guaranteed. Moreover, under Article 12 FD EAW, the decision whether to keep in detention or release the requested person must be taken *ex officio*, whereas under Article 5 § 4 ECHR, the requested person must request such a decision.

Second, EU law specifies the minimum information an arrested requested person must be given, that is, the information contained in the EAW. According to the CJEU, this information corresponds to the information that must be given to a person who is arrested on suspicion of having committed an offence (Article 5 § 1(c) ECHR). Consequently, it seems that in surrender cases, EU law affords more protection than does Article 5 § 2 ECHR.

Third, EU law dictates that the requested person must be released if the time limits for surrender have expired, and he or she is still being held in custody (Article 23(5) FD EAW). The same rule applies if a decision on extension of those time limits was taken without any intervention by an “executing judicial authority” that is independent *vis-à-vis* the executive. In this respect, EU law offers more protection than Article 5 ECHR because there is a duty to release the requested person irrespective of whether the duration of detention is “excessive.”

The right to recourse to a court in EU law is fully compatible with Article 5 § 4 ECHR: if the executing MS has designated a prosecutor as an “executing judicial authority,” its decision on the execution of the EAW and detention pending surrender “must be capable of being subject, in that Member State, to an effective judicial remedy,” that is, review by a court.

Neither EU law nor Article 5 ECHR pose a fixed time limit for detention pending surrender. In fact, the CJEU excludes a fixed limit for such detention. Despite this, both the Netherlands and Poland have introduced fixed time limits for detention pending surrender, evidently in the desire

Directive was implemented, *inter alia*, by the Ordinance of the Minister of Justice mentioned in footnote 82.

to limit the duration of the deprivation of liberty of the requested person in the executing MS. However, this impedes the effectiveness of the EAW system. While the legislature in the Netherlands reacted to the CJEU's jurisprudence on time limits and changed the national law in this respect, the Polish legislature did not undertake such an initiative. It has been argued in this paper that Article 607k § 3 CCP is contrary to the EU law insofar as it provides for the maximum period of 100 days of detention pending surrender. Furthermore, due to the clear and precise wording of this provision, its interpretation in conformity with EU law would be *contra legem*. Detention pending surrender prolonged beyond this time limit should also not be assessed as lawful within the meaning of Article 5 § 1 ECHR. With regard to the case-law of the ECtHR on Article 5 § 1 (f) ECHR, removing this time limit from the Polish Code of Criminal Procedure would not be contrary to the protection of the right to liberty of the requested person. Since the provisions of FD EAW are not directly effective, it will be the responsibility of the Polish legislature and not national courts to bring national law into conformity with EU law in this regard.¹⁰⁵

Polish law provides for exclusive competence of courts to decide on detention pending surrender. It is thus fully compatible with the requirements stemming from CJEU jurisprudence.

The analysis of the law in the Netherlands brings several conclusions. Although the amendments to Article 64(1) LoS removed the fixed time limit of 90 days, they introduced a new problem: the limitation of the possibilities to extend the time limit of 90 days, no doubt in order to limit the duration of surrender proceedings and, consequently, the duration of detention. However, the result is actually a limitation on the effectiveness of the EAW. By excluding the possibility of conditionally releasing the requested person once the DCA has ordered the execution of the EAW, the law seeks to safeguard the effectiveness of the EAW. But this runs counter to Article 6 of the Charter and the FD EAW. The DCA can disapply that provision but only to the extent that excluding the possibility of conditional release is not in accordance with Article 6 of the Charter. Finally, the role of the prosecutor concerning detention is problematic since Dutch public prosecutors cannot be regarded as “executing judicial authorities”.

¹⁰⁵ See: Miąsik and Szwarc, “Primacy,” 588–589.

The DCA has introduced a conforming interpretation of various provisions to ensure as far as possible that decisions are taken by the “executing judicial authority”. At any rate, it is the duty of the legislature to bring all of these provisions into line with EU law. Partly as a reaction to infringement proceedings, the legislature is in the process of preparing new amendments to the LoS to remedy the defects identified in this article.

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