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OPTIONAL GROUNDS FOR REFUSAL IN THE EUROPEAN ARREST WARRANT INSTRUMENT: A JURISPRUDENTIAL ANALYSIS

ABSTRACT

The instrument of the European Arrest Warrant represents a 'cornerstone' of judicial cooperation in criminal matters within the European Union, as built upon the principle of mutual recognition of criminal judgments. Enshrined in the Council Framework Decision 2002/584/JHA on June 13, 2002, it establishes procedures for the arrest and surrender of individuals between Member States. This study examines key optional grounds for refusal under the Framework Decision of the European Arrest Warrant, including dual criminality, territoriality, the statute of limitations, and the nationality or residence of the requested person, with particular emphasis on the ne bis in idem principle, which is mandatory within the European Union but discretionary for third-country judgments. While the optional grounds largely mirror those in traditional extradition, the Framework Decision of the European Arrest Warrant grants Member States full discretion in their transposition. This study employs qualitative legal analysis, conducting a literature review of the current debates, followed by an in-depth assessment of the jurisprudence of the European Court of Justice. This paper argues that while the Framework Decision of the European Arrest Warrant aims to foster mutual trust and judicial cooperation, the discretion vested to Member States in implementing optional grounds has led to fragmentation in practice. The European Court of Justice has attempted to mitigate these inconsistencies by establishing uniform interpretations, reinforcing the principles of equality and non-discrimination, and ensuring that discretionary refusals align with broader European Union legal principles.

Keywords: *European Arrest Warrant, optional grounds, mutual trust, judicial cooperation.*

1. INTRODUCTION

Following the adoption of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between

Member States,¹ the 1957 European Convention on Extradition² was repealed within the European Union's (hereinafter: EU) territorial scope. A key shift compared to traditional extradition lies in the removal of administrative or political authorities from the decision-making process concerning the surrender of individuals. Under the ECE, political authorities still had a role, whereas the FD EAW grants exclusive decision-making power to judicial authorities of the Member States (hereinafter: MS), free from political interference. This new framework, based on the principle of mutual recognition of criminal judgments, was anticipated to establish an automatic mechanism for the surrender of individuals sought by the criminal justice systems of MS. While the legal grounds for non-execution have been narrowed, it is important to note that despite the FD EAW's reliance on mutual recognition, there is no absolute obligation for the executing state³ to carry out an arrest warrant.⁴

The reduction or modification of refusal grounds is intended to signal mutual trust among the MS in their respective judicial systems.⁵ However, the grounds for non-execution appear almost identical to those under the ECE, indicating that there remains some level of mistrust between the jurisdictions of the MS.⁶ Nevertheless, the crucial difference between these two instruments of the surrender of individuals lies in the exclusive decision-making power of the judicial authorities in the EAW procedures, thus excluding political authorities from the possibility of enforcing political mistrust as a legal ground for the refusal of surrender.⁷ The optional grounds for refusal under the FD EAW have been widely debated in legal

¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, as amended by Framework Decision 2009/299/JHA. Official Journal of the European Union L 81, 27 March 2009, 24–36 (hereinafter: FD EAW).

² *European Convention on Extradition* (ETS No. 024) [1957], Council of Europe Treaty Series (hereinafter: ECE).

³ The EAW FD has also changed the terminology of the states participating in the extradition procedure. The FD EAW now refers to the “issuing state” (the requesting state in extradition procedures) and the “executing state” (the requested state in extradition procedures).

⁴ C-306/09, I.B., Judgment of the Court of Justice of the European Union of 21st October 2010, par. 50.; Case C-192/12 PPU Melvin West, Judgment of the Court of Justice of the European Union of 28th June 2012 par. 64; Case C-42/11, João Pedro Lopes Da Silva Jorge, Judgment of the Court of Justice of the European Union of 5th September 2012 — par. 30-36.

⁵ Łazowski, A.; Nash, S., *Detention*. In *The European Arrest Warrant in Practice*, edited by N. Keijzer, N.; Van Sliedregt E., The Hague, p. T. M. C. Asser Press, 2009, p. 33–50.

⁶ For more information, see articles 6, 7, 8, 9, 10, 10/a, 10/b of the European Convention on Extradition.

⁷ Van Sliedregt, E., *The European Arrest Warrant, p. Between Trust, Democracy and the Rule of Law. Introduction, The European Arrest Warrant: Extradition in Transition*. *Eur. Const. Law Rev.* 3, 2007, p. 244–252.

academia. Legal scholars Vernimmen-Van Tiggelen and Surano⁸ argue that they serve as a safeguard for national sovereignty and fundamental rights, allowing MS discretion in cases where the execution of an EAW might conflict with constitutional principles or legal traditions. However, Mitsilegas⁹ highlights that the discretionary nature of these grounds can create inconsistencies in EAW implementation, undermining mutual trust among MS and weakening the effectiveness of judicial cooperation. Similarly, Peers¹⁰ discusses how the fragmented application of optional refusal grounds contributes to legal uncertainty, as different national courts may interpret them in divergent ways, leading to potential delays and challenges in the surrender process.

Articles 3, 4, and 4a of the FD EAW set out the grounds for mandatory or optional refusal of surrender. There are three mandatory grounds for refusal, which obligate the executing state to deny surrender in the following situations: i) where the requested person has been granted amnesty by the executing state for the same conduct; ii) where a *ne bis in idem* decision has been made by a MS concerning the same facts; or iii) where the requested person has not reached the age of criminal responsibility in the issuing state.¹¹ The optional grounds for refusal, in summary, include: i) dual criminality; ii) concurrent proceedings in the executing state; iii) a decision to discontinue proceedings within the EU; iv) the statute of limitations for prosecution or enforcement of the sentence in the executing state; v) *ne bis in idem* with third countries; vi) the principle of nationality or residence; and vii) the principle of territoriality.¹²

The 2009 amendment to the FD EAW introduced Article 4a, which expands the optional grounds for refusal by making the requested person's surrender conditional upon the verification of compliance with the judgment with the right of the defendant to due process. This provision intersects with the protections stipulated in Article 5 of the FD EAW, and as such, its detailed analysis falls outside the scope of this paper.¹³

⁸ Vernimmen-Van Tiggelen, G.; Surano, L., *The Future of Mutual Recognition in Criminal Matters in the European Union*, Brussels: Editions de l'Université de Bruxelles, 2009, p. 31-40.

⁹ Mitsilegas, V., *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Oxford, p. Hart Publishing, 2016, p. 210-216.

¹⁰ Peers, S., *EU Justice and Home Affairs Law*, 4th ed. Oxford; Oxford University Press, 2016, p. 60-66.

¹¹ Article 3 of the FD EAW.

¹² Article 4 of the FD EAW.

¹³ Barjamemaj, L.; Karsai, K.; Muçollari, O., *Safeguards and Guarantees in European Arrest Warrant Procedures*, *Legal and Comparative Analysis*, Balkans Legal, Economic and Social Studies (BLESS), Vol. 1, No. 1, 2024, p. 85-99. <https://www.americanajournal.hu/index.php/bless/article/view/46154>.

Given that the EAW was adopted through a framework decision under the legal basis of the former third pillar of the EU before the Lisbon Treaty, framework decisions are comparable to directives.¹⁴ They are binding in terms of the outcome to be achieved but allow MS discretion in determining the means of transposition. In this regard, the mandatory grounds must be incorporated into national legislation as prescribed by the framework decision, thereby achieving the Union's objectives of safeguarding the principles of *ne bis in idem*, legality, and the protection of minors. MS are not permitted to alter these grounds, as the intent behind these provisions is clear. Conversely, the optional grounds are subject to the discretion of the MS, as the FD EAW uses the term 'may' concerning their transposition.¹⁵ As Gworys¹⁶ explains, due to the principle of mutual recognition, the arrest warrant must be executed, except in the exceptional cases provided for in Articles 3, 4, and 4a. This paper addresses the challenges surrounding the implementation of the optional grounds, particularly as these issues have arisen in the national courts of MS when adjudicating requests for surrender based on the issuance of an arrest warrant.

2. THE PRINCIPLE OF *NE BIS IN IDEM* AND ITS APPLICATION IN EAW PROCEDURES

As we will discuss further in this paper, the FD EAW applies the narrow interpretation of the principle of *ne bis in idem* exclusively within the territorial scope of the EU, where it constitutes a mandatory ground for non-execution. Conversely, the FD EAW allows for the application of the broader interpretation of the principle, as well as its scope, to judicial decisions made outside the EU, which serve as optional grounds. To fully understand the essence of this principle, we must first provide a brief overview of its origin and narrow interpretation.

2.1. The Principle of *Ne Bis in Idem*: A Jurisprudential Examination of Its Narrow Interpretation by the European Court of Justice

In its narrow interpretation, the principle of *ne bis in idem* under Article 3 (2) of the FD EAW stipulates that the executing state must refuse to surrender the

¹⁴ Case C-105/03, Maria Pupino, Judgment of 16 June 2005, paras. 33-49.

¹⁵ Case C-42/11, *Opinion of Advocate General Mengozzi — João Pedro Lopes Da Silva Jorge*, par. 31.

¹⁶ Gworys, G., *Grounds for Optional Non-Execution of the European Arrest Warrant*, p. *Their Nature and Issues*, Journal of Criminal Law and Penal Studies, Vol. 27, Issue 4, 2023, p. 39-60.

requested person if they have already been definitively judged by an MS for the same criminal conduct, provided that any sentence imposed has been served, is currently being served, or can no longer be enforced under the law of the MS that issued the sentence. The principle of double jeopardy, which prevents an individual from being punished twice for the same act, is rooted in British law. Over time, this provision has evolved and no longer fully reflects its original content. British colonization played a key role in advancing the prohibition of double jeopardy worldwide. In the United States, this protection is enshrined in the U.S. Constitution; specifically, the Fifth Amendment of the Constitution states that no person shall be subject to trial twice for the same offense. The purpose of this provision was explained by the U.S. Supreme Court in the case *Green v. United States*,¹⁷ where the Court emphasized that the underlying principle, deeply embedded in the Anglo-American legal system, is that the state, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for the same criminal act, subjecting him to stress, expense, and ordeal, and forcing him to live in a state of continuous anxiety and insecurity, while also increasing the possibility that, even if innocent, he may be found guilty.¹⁸

The principle of *ne bis in idem* prohibits further criminal prosecution or trial for the same criminal act against the same person if a final judgment on the merits has already been rendered.¹⁹ This principle is inherently linked to the principle of *res judicata*, which ensures that an individual who has ‘paid their debt to society’ should not face further prosecution or trial for the same act, as any such action would violate the finality of the judgment.²⁰ At the European level, this principle has been codified in legal instruments for the protection of human rights²¹, that have at their foundation the principle of legal certainty.²² In the context of applying the principle of *ne bis in idem* at the European level, discrepancies have arisen regarding the interpretation of the terms ‘same act’ and ‘final judgment’. In the Mantello case,²³ the European Court of Justice (hereinafter: ECJ) clarified in its

¹⁷ *Green v. United States*, 355 U.S. 184 (1957).

¹⁸ Klimek, L., *European Arrest Warrant*, Cham, p. Springer International Publishing, 2015, p. 152.

¹⁹ Bravo, T., *Ne Bis in Idem as a Defence Right and Procedural Safeguard in the EU*, *New Journal of European Criminal Law*, 2 2011, p. 393–410.

²⁰ Case C-261/09, *Judgment of the Court of Justice of 16 November 2010 — Gaetano Mantello*, paras. 26 and 27.

²¹ Verveale, J., *The Transnational Ne Bis in Idem Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights*, *Utrecht Law Review*, 1, 2005, p. 100–120.

²² Lelieur, J., *Transnationalising Ne Bis in Idem, p. How the Rule of Ne Bis in Idem Reveals the Principle of Personal Legal Certainty*, *Utrecht Law Review*, 9, 2013, p. 198–215.

²³ Case C-261/09, *Judgment of the Court of Justice of 16 November 2010 — Gaetano Mantello*, paras. 26 and 27.

interpretation that the term ‘same act’ is an autonomous concept under EU law, as outlined in Article 3(1) of the FD EAW. As further specified in Article 54 of the Schengen Convention,²⁴ the term ‘same act’ refers to the nature and connection of the facts, which is to be regarded as a set of circumstances that are inextricably linked in time and space, regardless of the legal classification by each MS.²⁵ As for the concept ‘final judgment’, the ECJ stated that it is for the issuing state to determine whether there is another final judgment for the same facts that prevents the execution of the arrest warrant.²⁶

Another issue of debate before the national courts of MS, and subsequently addressed by the ECJ, concerns the relationship between an amnesty granted in the issuing state for the criminal facts subject to the request and the potential revocation of such an amnesty, concerning the principle of *ne bis in idem*. In the case of AB and Others,²⁷ the ECJ reaffirmed that the principle of *ne bis in idem* only applies when a person has been ‘convicted’ or ‘acquitted’ for the same criminal act, meaning the matter has been adjudicated on the merits.²⁸ The ECJ emphasized that, in the case at hand, the amnesty initially granted for the criminal act had prevented further criminal prosecution for a certain period, however, the revocation of this amnesty allowed for the resumption of criminal prosecution without violating the principle of *ne bis in idem*, as the amnesty did not constitute a final judgment on the merits.²⁹

As argued above, the differing interpretations of legal-penal concepts among MS have led to uncertainties in the application of grounds for non-execution under the FD EAW. Another case in which the ECJ interpreted the meaning of the terms forming the mandatory grounds due to a violation of the principle of *ne bis in idem* involved the partial overlap of a criminal act in the territories of two MS. In the case of Juan,³⁰ the ECJ ruled that, when determining whether the criminal act is the same, the executing state must not rely on its national definition, reinforcing that the concept of the ‘same act’ is an autonomous concept under EU law.³¹ The ECJ further clarified that a partial overlap of the criminal act between the

²⁴ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders, 14 June 1985, Official Journal of the European Union, L 239, 22 September 2000.

²⁵ Case C-261/09, *Mantello*, Judgment of 16 November 2010, paras. 39 and 40.

²⁶ *Ibid.*, paras. 49 dhe 50.

²⁷ Case C-203/20, AB and Others (Révocation d’une amnistie), Judgment of 16 December 2021.

²⁸ *Ibid.*, par. 57.

²⁹ *Ibid.*, par. 60.

³⁰ Case C-164/22, Juan, Judgment of 21 September 2023.

³¹ *Ibid.*, paras. 29-30.

jurisdictions of the issuing state and the executing state does not constitute a ground for non-execution, as the facts must be inextricably linked in time and space, irrespective of whether the act is classified as a continuing crime under the law of the executing state.³²

2.2. The Principle of *Ne Bis in Idem*: A Jurisprudential Examination of Its Broad Interpretation by the ECJ

In paragraphs 2, 3, and 5 of Article 4 of the FD EAW, various legal situations are addressed that broaden the scope of the *ne bis in idem* principle. Article 4 (2) of the FD EAW stipulates that the executing judicial authority may refuse surrender if, for the same facts underlying the arrest warrant, the executing state is prosecuting the requested person. Furthermore, Article 4 (3) of the FD EAW states that surrender may be refused if, for the same facts on which the arrest warrant is based, either the executing state or another MS has decided not to prosecute or has discontinued the prosecution, thereby preventing further legal action. Additionally, Article 4 (5) of the FD EAW extends the application of the *ne bis in idem* principle beyond the EU territory. Specifically, this provision allows the executing judicial authority to refuse surrender if a third country has issued a final judgment on the same facts for the requested person, provided that, if a sentence was imposed, it has been served, is currently being served, or can no longer be enforced under the law of the sentencing country.

The interpretation of Article 4 (3) of the FD EAW has sparked debate due to its somewhat ambiguous wording.³³ In the case of AY (Mandat d'arrêt – Témoin),³⁴ the ECJ addressed the question of whether, under Article 4 (3) of the FD EAW, a decision to discontinue proceedings (rather than a judgment on the merits), in which the requested person was only a witness and not an accused party, constitutes an obstacle to the execution of the EAW. In its interpretation, the ECJ clarified that the *ne bis in idem* principle protects the requested person only if the prior proceedings were specifically initiated against them³⁵ and the fact that they were questioned as a witness in those proceedings does not engage this principle.³⁶ However, pursuant to Article 4 (3) of the FD EAW, it can be argued that the European legislator intended to further extend the protection provided by the principle of *ne bis in idem*, i.e., to prevent the execution of an arrest warrant even in cases where the decision to discontinue proceedings previously issued by an

³² Ibid., par. 33.

³³ Author's note as we will discuss below.

³⁴ Case C-268/17, AY (Mandat d'arrêt – Témoin), Judgment of 25 July 2018.

³⁵ Ibid., par. 43.

³⁶ Ibid., par. 44.

MS was made for the criminal act as a whole and not exclusively for the requested person in particular. Nevertheless, the ECJ's interpretation emphasized that the core purpose of this principle is related to legal certainty. Therefore, the discontinuation of criminal proceedings in which the requested person was merely a witness does not create a legitimate expectation of protection, as no charges were ever brought against them. In other words, the requested person, due to their procedural status as a witness, was never subjected to the stress or burden of criminal proceedings.

In the case of PPU, X (*Mandat d'arrêt européen - Ne bis in idem*),³⁷ the ECJ was tasked with determining whether MS, has discretion, during the transposition of Article 4 (5) of the FD EAW, to assess the appropriateness of surrendering a person covered by this provision. Additionally, the referring court sought clarification on whether the condition regarding the execution of the sentence under Article 4(5) of the FD EAW is satisfied when the requested individual has served part of their sentence in a third country, while the remaining portion of the sentence has been waived by a non-judicial authority of that country as part of a general amnesty that also applies to individuals convicted of serious crimes, irrespective of any objective criminal policy considerations.

In its ruling, the ECJ affirmed that the judicial authority of the executing state is vested with the discretion and retains the authority to assess, on a case-by-case basis, whether the refusal to surrender the requested person would undermine the legitimate interests of MS in preventing crime within the area of freedom, security, and justice.³⁸ Regarding the interpretation of the condition for the execution of a sentence, the ECJ clarified that, as stipulated in Article 4 (5) of the FD EAW, all amnesty measures must be recognized, regardless of the severity of the offenses involved or the authority granting the amnesty. The ECJ further emphasized that the principle of legal certainty must be weighed against the need to prevent impunity.³⁹ In conclusion, the ECJ suggests that judicial authorities in the executing state must carefully balance these considerations when determining whether to surrender a requested person.⁴⁰

This decision introduces a heightened level of uncertainty for judicial authorities tasked with adjudicating similar cases. While the ECJ has, in principle, affirmed the broad discretion of MS in transposing the optional grounds for non-surrender, permitting a case-by-case evaluation, it has also refrained from providing explicit

³⁷ Case C-665/20 PPU, X (*Mandat d'arrêt européen - Ne bis in idem*), Judgment of 29 April 2021.

³⁸ *Ibid.*, par. 60.

³⁹ *Ibid.*, par. 86-87.

⁴⁰ *Ibid.*, par. 101-103.

criteria to guide national courts in striking the delicate balance between preventing impunity and upholding legal certainty. The case at hand involves a final judgment issued by the state of Iran, which could lead to a more cautious or distrustful approach, given the divergent policies between the EU and Iran. However, this article also applies to decisions made by authorities from established democracies or non-MS that are undergoing EU accession procedures. Consequently, the ECJ's interpretation of Article 4 (5) of the FD EAW appears to grant MS significant discretion, contingent upon the particular non-MS that has determined the guilt, innocence, and sentencing of the requested individual.

3. DUAL CRIMINALITY, THE PRINCIPLE OF TERRITORIALITY, AND THE STATUTE OF LIMITATIONS AS OPTIONAL GROUNDS

3.1. Dual Criminality

As previously discussed, the FD EAW has significantly reshaped the legal framework governing the mutual surrender of individuals sought by criminal justice authorities within the EU MS. Notably, it has removed the decision-making role of political institutions from the process. Additionally, it has provided that the principle of dual criminality will only apply to criminal acts not explicitly listed in Article 2 (2) of the FD EAW.⁴¹ Regarding the crimes enumerated in this article, the executing state must ensure that, under the law of the issuing state, these acts are punishable by a minimum of three years' imprisonment. Article 4 (1) of the FD EAW further stipulates that, without prejudice to Article 2 (2), which outlines the list of crimes exempt from the dual criminality test, the executing state may

⁴¹ List, p. participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.

refuse surrender if the criminal act underlying the arrest warrant does not constitute a criminal offense under its legislation. Moreover, as stipulated by the ECE, for crimes related to taxation, fiscal obligations, customs, or currency exchange, the execution of the arrest warrant cannot be refused on the grounds that the laws of the executing state do not impose the same type of tax or contain identical regulations concerning taxes, fiscal obligations, customs, or currency exchange as those of the issuing state.

Given that dual criminality requires separate consideration, this paper focuses solely on a general overview. When addressing the phrase '*does not constitute a criminal act under the law of the executing state*', it is essential to understand that this encompasses not only acts or omissions (*actus rea*) defined as criminal under the criminal law of the executing state but also an analysis of the subjective elements of the act (*mens rea*) and the circumstances that may exclude criminal liability. In other words, an act that has resulted in criminal liability in the issuing state must, in principle, give rise to criminal liability in the executing state, provided that all the requisite elements of criminal liability are present. Hypothetically, the criminal facts must be construed as if they had occurred within the jurisdiction of the executing state, and it is from this perspective that the question of whether the dual criminality principle is satisfied should be answered. In this regard, the ECJ in the case of Grundza⁴² stated that, in assessing the condition of dual criminality, the competent authority of the executing state must verify whether the factual elements underlying the alleged criminal act, as described by the competent authority of the issuing state, would be subject to criminal punishment in the executing state if those facts had occurred there. In evaluating dual criminality, the competent authority of the executing state must not focus on whether a protected interest of the issuing state has been violated but instead must examine whether had the act been committed within the territory of the executing state, it would have resulted in the violation of a similar interest protected by that state's national legislation.⁴³

3.2. The Principle of Territoriality

To safeguard the principle of territoriality, Article 4 (7) of the FD EAW stipulates that the executing state may refuse the surrender of a requested person if the act underlying the arrest warrant is considered, under its law, to have been committed wholly or partly within its territory, or in any other place deemed as such by its national legislation. Furthermore, the article provides that the executing state may

⁴² Case C-289/15, Grundza, Judgment of 11 January 2017.

⁴³ Ibid., par. 49.

refuse surrender if the act on which the arrest warrant is based was committed outside the territory of the issuing state and if the law of the issuing state does not permit criminal prosecution for analogous situations.

In practice, challenges have emerged in cases where the issuing state has issued an arrest warrant for the execution of a criminal judgment that recognizes and enforces a judgment rendered by a third country. In the case of Minister for Justice and Equality (*Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE*)⁴⁴, the ECJ unequivocally ruled that, for the purposes of Article 4 (7) of FD EAW, the territorial analysis must be carried out to the state that has adjudicated the case on the merits, rather than the issuing state that has merely recognized and converted the judgment of another state.

3.3. The Statute of Limitations and its Application as an Optional Ground

The statute of limitations is inherently tied to the principle of legal certainty, which dictates that the state, in the abstract sense, must enforce criminal judgments within a specified time frame⁴⁵, depending on the gravity of the offense. Consequently, the FD EAW retains the statute of limitations as one of the optional grounds for refusing the execution of the arrest warrant. However, unlike the original provision in the ECE⁴⁶, the expiration of the statute of limitations under the law of the executing state constitutes an optional ground for refusal only if the criminal conduct in question was simultaneously subject to the criminal jurisdiction of both the executing and the issuing state. In other words, this ground for refusal is applicable only in cases where the criminal act falls within the jurisdiction of both the issuing and executing states. This extension of strictly territorial jurisdiction arises as a consequence of the application of extraterritorial jurisdiction (*active personality, passive personality, universal jurisdiction, etc.*).

⁴⁴ Case C-488/19, Minister for Justice and Equality (*Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE*), Judgment of 17 March 2021.

⁴⁵ Brilmayer, L. et al., *Conflicts of Law (Cases and Law): Traditional Approaches to Choice of Law* (New York: Wolters Kluwer, 2019, p. 142.

⁴⁶ Article 10 of the European Convention on Extradition, prior to the 2012 amendments, which have almost the same provisions as the FD EAW, provided that extradition should be refused if the statute of limitations had expired for either the requesting or the requested party, regardless of whether or not the requested state had jurisdiction to prosecute the criminal act that was the subject of the request.

4. NATIONALITY, RESIDENCE, OR STAY AS OPTIONAL GROUNDS

Under the ECE⁴⁷, the requested state is not obliged to extradite its nationals. With this provision of the ECE, the contracting parties (states) of the convention continue to retain their sovereign rights regarding their nationals. This provision reflects the contracting parties' retention of sovereign rights regarding their nationals. However, ECE does allow for the possibility that states may enter into special agreements with each other, permitting derogation from this rule and facilitating the mutual extradition of their nationals. Meanwhile, Article 4 (6) of the FD EAW provides that the judicial authority of the executing state may refuse the execution of the arrest warrant if the latter has been issued to execute a final judgment, or a pre-trial detention order, against a person who is staying in its territory, or who is a national or resident of that state. In principle, the objective of this provision is to create and increase the possibilities of reintegration and rehabilitation of the requested person by the criminal justice system.⁴⁸ Thus, by not surrendering the requested person to the issuing state with which he has no economic, family, or social ties, but by executing the sentence imposed on him in the territory of the executing state, where he is staying, has residence, or nationality, it becomes possible to increase the chances of reintegration into society. However, the terms used in this provision have caused some difficulty for the judicial authorities of executing states in terms of their definition. Drawing on the existing jurisprudence of the ECJ, the following questions have been subjected to debate:

- i. What do the terms 'resident' and 'staying' mean?
- ii. To define the concepts 'resident' and 'staying', can the application of Article 4 (6) of the FD EAW be restricted to individuals holding a residence permit or those who have resided for more than five years in the executing state?
- iii. Can the executing state, in transposing Article 4 (6) of the FD EAW into its domestic law, restrict its application to nationals of its state, excluding nationals of other MS from a case-by-case assessment regarding reintegration?
- iv. If the executing state determines that the requested person meets the conditions of Article 4(6) of the FD EAW, can it impose additional conditions, such as requiring a formal request from the issuing state based on a convention prior to recognizing a foreign criminal judgment?
- v. Does the opinion of the Minister of Justice bind the executing state?

⁴⁷ Article 6 of the European Convention on Extradition.

⁴⁸ Case C-700/21 O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers), Judgment of 6 June 2023, par. 59.

- vi. If the executing state finds that the requested person qualifies under Article 4 (6) (i.e., is a national, resident, or staying in its territory), but the imposed prison sentence cannot be converted following its national law (e.g., the law only provides for a fine for the offense), can the executing state refuse to recognize the judgment of the issuing state?
- vii. In transposing Article 4 (6) of the FD EAW, can the executing state exclude nationals of non-MS from the case-by-case reintegration assessment, while applying it only to nationals of MS?

In the case of *Kozłowski*,⁴⁹ the ECJ clarifies that the terms ‘resident’ and ‘staying’ should not be interpreted independently by each MS. These concepts are autonomous and must be interpreted uniformly by all the MS courts of the Union.⁵⁰ According to the ECJ, a person is a resident of an MS when he has established his actual residence in that state and is considered to be staying in that state when he has established ties with that state that are comparable to residence. To assess whether the person has created sufficient ties to establish that he is staying in an MS, the court of the executing state must make an overall assessment of the objective factors characterizing his legal situation. Such circumstances include: the duration, nature, and grounds of the stay, along with their familial and economic connections to the executing state.⁵¹

In the case of *Wolzenburg*,⁵² the ECJ clearly stated that MS, during the transposition of Article 4 (6) of the FD EAW, have the right to provide in their domestic law that for persons with the nationality of another MS (i.e., not their nationals), to be considered as staying in their territory, they must have a lawful stay for a continuous period of at least 5 years. According to the ECJ, this criterion follows a legitimate objective related precisely to the possibilities of reintegration of the requested person into society.⁵³ On the other hand, the ECJ clarified that the imposition of administrative formalities, i.e., the possession of a residence permit of indefinite duration, as a condition to be considered as staying in that MS, is incompatible with the purpose of Article 4 (6) of the FD EAW, as the residence permit has only declarative force and not probative force of the fact whether the person is staying *de facto* or not.⁵⁴

⁴⁹ Case C-66/08, *Kozłowski*, Judgment of 17 July 2008.

⁵⁰ *Ibid.*, par. 41-43.

⁵¹ *Ibid.*, par. 49.

⁵² Case C-123/08, *Wolzenburg*, Judgment of 6 October 2009.

⁵³ *Ibid.*, par. 67-73.

⁵⁴ Case C-123/08, *Wolzenburg*, Judgment of 6 October 2009, par. 50-51.

Returning once again to the debate on the definition of the concepts ‘resident’ and ‘staying’, the ECJ in the case of Lopes da Silva Jorge⁵⁵ clarified once more that these concepts are autonomous and that MS has limited discretion when applying Article 4 (6) of the FD EAW. That said, MS must be guided by the purpose of this article, i.e., they must assess the possibility of reintegration of the requested person into society, and therefore, the national legislation cannot automatically exclude nationals of other MS from the scope of this article.⁵⁶ This decision seems to create an obligation for MS, as it does not leave the possibility to transpose or not this optional condition into their national legislation. Thus, from an optional condition, the ECJ creates a ‘new’ mandatory condition. The ECJ justifies this reasoning by relying on Article 18 of the *Treaty on the Functioning of the European Union* (hereinafter: TFEU), which affirms the principle of non-discrimination on the grounds of nationality. This approach of the ECJ is also supported by the case of Pupino,⁵⁷ where it is clarified that the courts of MS must ensure the effectiveness of the entire body of EU law by interpreting national law in compliance with EU law, with the only limitation that the general principles of criminal law are not violated and the interpretation does not go *contra legem*.

In the case of Popławski I,⁵⁸ the ECJ reaffirmed the principle of *aut dedere aut judicare*, which originated with the institution of extradition. The essence of the ECJ’s reasoning, in this case, relates to the obligation of the executing state to enforce the sentence imposed by the issuing state if it finds that the requested person falls under the grounds of Article 4 (6) of the FD EAW.⁵⁹ Thus, the executing state must not merely express ‘will’ to enforce the judgment but must do so effectively, without justifying itself by the fact that, according to its domestic law, this procedure must be preceded by the existence of a special convention. After the referred case was returned for adjudication to the referring court, the latter encountered a disagreement with the Minister of Justice. This fact forced the referring court to refer the case back to the ECJ. In the case of Popławski II⁶⁰, the ECJ particularly emphasized that the Minister of Justice is not a judicial authority, and therefore, his opinion cannot constitute an obstacle⁶¹ to how the national court must interpret the entire body of national legislation concerning EU law. Also, the ECJ reiterated that the correct interpretation of the law by the referring court in the specific case must follow the objective of the FD EAW, which requires that, if the executing state refuses to surrender the requested person, it must ensure that the

⁵⁵ Case C-42/11, Lopes Da Silva Jorge, Judgment of 5 September 2012.

⁵⁶ *Ibid.*, par. 33.

⁵⁷ Case C-105/03, Maria Pupino, Judgment of 16 June 2005.

⁵⁸ Case C-579/15, Popławski, Judgment of 29 June 2017 (Popławski I).

⁵⁹ *Ibid.*, par. 43.

⁶⁰ Case C-573/17, Popławski, Judgment of 24 June 2019 (Popławski II).

⁶¹ *Ibid.*, par. 95-98.

sentence imposed in the issuing state will be effectively enforced in the executing state.⁶²

Within the meaning of the assessed jurisprudence, we can conclude that the interpretation of Article 4 (6) of the FD EAW has been exhausted. However, in fact, in the case of *Sut*,⁶³ the ECJ was presented with an even more complicated question than the previous cases. Nevertheless, in its reasoning on this case, the ECJ clarified that the fact that the prison sentence imposed in the issuing state can only be converted into a fine under the law of the executing state is not a determining factor for the application of Article 4(6) of the FD EAW. Therefore, it is for the referring court to assess whether it is possible to enforce the judgment imposed by the court of the issuing state.⁶⁴ The latest case so far adjudicated by the ECJ and interpreting Article 4 (6) of the FD EAW relates to the relationship that nationals of third countries have with this provision. Specifically, in the case of *O.G.*,⁶⁵ the ECJ once again emphasized the purpose of this article, i.e., the rehabilitative function and the reintegration of the requested person into society. According to the ECJ, MS cannot transpose Article 4 (6) of the FD EAW into their national legislation by automatically and excluding from the application of the test whether the national of a non-MS has established sufficient ties with the executing state. In such a case, the executing state must treat the nationals of the non-MS following the principle of equality under Article 20 of the Charter of Fundamental Rights of the EU.⁶⁶ This means that the executing state must take into account the level of integration of the person in the executing state by making an overall assessment of their family, linguistic, cultural, social, and economic ties with the executing state.⁶⁷

In light of the foregoing jurisprudence, it can be concluded that in nearly all the analyzed cases, the ECJ affirms that Article 4(6) of the FD EAW aims to ensure the best possible reintegration and rehabilitation of convicted individuals. Furthermore, if the executing state refuses to surrender the requested person to the issuing state, it must ensure that the imposed sentence is enforced within its territory, leaving no room for impunity. It is also worth noting that the ECJ has interpreted the FD EAW by taking into account the entire body of EU law, in particular by referring to the principle of non-discrimination and equality,

⁶² *Ibid.*, par. 107.

⁶³ Case C-514/17, *Sut*, Judgment of 13 December 2018.

⁶⁴ *Ibid.*, par. 49.

⁶⁵ Case C-700/21 *O.G.* (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers), Judgment of 6 June 2023.

⁶⁶ Charter of Fundamental Rights of the European Union (2000/C 364/01).

⁶⁷ *Ibid.*, par. 51.

provided respectively by Article 18 of the TFEU⁶⁸ and Article 20 of the Charter of Fundamental Rights of the EU.⁶⁹

5. CONCLUSION

The Framework Decision of the European Arrest Warrant has provided for a new legal regime regarding the procedures for the mutual surrender of persons sought by the criminal justice systems of Member States. In essence, through the creation of the European Arrest Warrant instrument, the Member States of the European Union aim to introduce a deeper mutual trust among themselves. On the other hand, although this mechanism has made it possible to completely abolish the power of political authorities, it can be said that the Member States have retained a significant part of their sovereignty through the provisions regarding mandatory grounds, optional grounds, and guarantees. The optional grounds provided by the Framework Decision of the European Arrest Warrant are almost the same as the analogous grounds in the classical extradition instrument. However, as we have discussed in detail in this paper, Member States have full discretion regarding their transposition. This means more flexibility and more new avenues of cooperation, which naturally depend on the level of trust among them.

As we explained in the section on the '*ne bis in idem*' principle, through the decisions of the European Court of Justice, the phrase 'same act' has now been defined as an autonomous European Union's law concept, while the notion of 'final judgment' remains to be assessed at the discretion of the issuing state. Regarding the *res judicata* force of a judicial decision rendered by a non-member State, the courts of the Member States have the discretion to balance the need to combat impunity within the area of freedom, security, and justice with the principle of legal certainty. The most debated optional condition throughout the paper relates to the relationship between 'resident' or 'staying' and the possibilities of rehabilitation of the requested person to be surrendered. The European Court of Justice has set clear limits on the discretion of MS regarding the interpretation of this condition. In essence, the European Court of Justice has emphasized in almost all its decisions that the purpose of this optional condition is to create the possibilities for the requested person to be rehabilitated and reintegrated into society. The European Court of Justice interprets this optional condition by referring to the principle of non-discrimination and equality before

⁶⁸ Article 18 (ex Article 12 TEC) - Within the scope of application of the Treaties and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

⁶⁹ Article 20 (Equality before the law) - Everyone is equal before the law.

the law, i.e., in the entirety of the European Union's law. This means that all European Union nationals must be treated equally, even including nationals of third countries who have established sufficient family, linguistic, cultural, social, and economic ties with the executing state.

Finally, the new legal regime created through the Framework Decision of the European Arrest Warrant is being consolidated day by day, although by analyzing the decisions and interpretations of the European Court of Justice as a whole, it is evident that there is uncertainty in the understanding of how the optional grounds can be transposed into the national legislation of Member States.

REFERENCES

BOOKS AND ARTICLES

1. Barjamemaj, L.; Karsai, K.; Muçollari, O., *Safeguards and Guarantees in European Arrest Warrant Procedures: Legal and Comparative Analysis, Balkans Legal, Economic and Social Studies (BLESS)* 1, no. 1, 2024, p. 85–99. <https://www.americanajournal.hu/index.php/bless/article/view/46154>.
2. Bravo, T., *Ne Bis in Idem as a Defence Right and Procedural Safeguard in the EU*, *New Journal of European Criminal Law*, 2, 2011, p. 393–410.
3. Brilmayer, L.; Goldsmith, J.; O'Hara O'Connor, E.; dhe Carlos Vázquez, *Conflicts of Law (Cases and Law): Traditional Approaches to Choice of Law*, New York: Wolters Kluwer, 2019, p. 142.
4. Gworys, G., *Grounds for Optional Non-Execution of the European Arrest Warrant: Their Nature and Issues*, *Journal of Criminal Law and Penal Studies*, Vol. 27, Issue 4, 2023, p. 39–60.
5. Klimek, L., *European Arrest Warrant*, Cham: Springer International Publishing, 2015, p. 152.
6. Łazowski, A.; Nash, S., "Detention." In *The European Arrest Warrant in Practice*, edited by Keijzer, N.; Van Sliedregt, E., The Hague: T. M. C. Asser Press, (2009): 33–50.
7. Lelieur, J., *Transnationalising Ne Bis in Idem: How the Rule of Ne Bis in Idem Reveals the Principle of Personal Legal Certainty*, *Utrecht Law Review*, 9, 2013, p. 198–215.
8. Mitsilegas, V., *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Oxford: Hart Publishing, 2016, p. 210–216.
9. Peers, S., *EU Justice and Home Affairs Law*, 4th ed. Oxford: Oxford University Press, 2016, p. 60–66.

10. Van Sliedregt, E., *The European Arrest Warrant: Between Trust, Democracy and the Rule of Law. Introduction*, European Constitutional Law Review, 3, 2007, p. 244–252.
11. Vernimmen-Van Tiggelen, G.; Surano, L., *The Future of Mutual Recognition in Criminal Matters in the European Union*, Brussels: Editions de l'Université de Bruxelles, 2009, p. 31-40.
12. Verveale, J., *The Transnational Ne Bis in Idem Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights*, Utrecht Law Review, 1 2005, p. 100–120.

LEGAL ACTS

1. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, as amended by Framework Decision 2009/299/JHA, Official Journal of the European Union L 81, 27 March 2009, p. 24–36.
2. Charter of Fundamental Rights of the European Union (2000/C 364/01), Official Journal of the European Communities C 364, 18 December 2000, p. 1–22.
3. Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders, Official Journal of the European Union L 239, 22 September 2000, p. 19–62.
4. European Convention on Extradition (ETS No. 024), 1957. Council of Europe Treaty Series.

COURT DECISIONS

1. Case C-42/11, João Pedro Lopes Da Silva Jorge, Judgment of 5 September 2012, Official Journal of the European Union C 206, 6 July 2012, 1–2.
2. Case C-66/08, Kozłowski, Judgment of 17 July 2008, Official Journal of the European Union C 212, 19 August 2008, 1–2.
3. Case C-105/03, Maria Pupino, Judgment of 16 June 2005. Official Journal of the European Union C 215, 12 July 2005, 1–2.
4. Case C-123/08, Wolzenburg, Judgment of 6 October 2009, Official Journal of the European Union C 306, 9 December 2009, 1–2.
5. Case C-192/12 PPU, Melvin West, Judgment of 28 June 2012, Official Journal of the European Union C 191, 18 July 2012, 1–2.

6. Case C-203/20, AB and Others (Révocation d'une amnistie), Judgment of 16 December 2021. Official Journal of the European Union C 28, 29 January 2022, 1–3.
7. Case C-261/09, Gaetano Mantello, Judgment of 16 November 2010, Official Journal of the European Union C 311, 6 December 2010, 1–2.
8. Case C-268/17, AY (Mandat d'arrêt – Témoin), Judgment of 25 July 2018, Official Journal of the European Union C 323, 20 September 2018, 1–2.
9. Case C-289/15, Grundza, Judgment of 11 January 2017, Official Journal of the European Union C 132, 18 April 2017, 1–2.
10. Case C-306/09, I.B., Judgment of 21 October 2010. Official Journal of the European Union C 332, 30 November 2010, 1–2.
11. Case C-488/19, Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE), Judgment of 17 March 2021.
12. Case C-514/17, Sut, Judgment of 13 December 2018, Official Journal of the European Union C 44, 14 February 2019, 1–2.
13. Case C-573/17, Popławski II, Judgment of 24 June 2019, Official Journal of the European Union C 312, 18 October 2019, 1–2.
14. Case C-579/15, Popławski I, Judgment of 29 June 2017, Official Journal of the European Union C 235, 21 July 2017, 1–2.
15. Case C-588/19, Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE), Judgment of 17 March 2021, Official Journal of the European Union C 169, 18 May 2021, 1–2.
16. Case C-665/20 PPU, X (Mandat d'arrêt européen - Ne bis in idem), Judgment of 29 April 2021, Official Journal of the European Union C 267, 17 June 2021, 1–2.
17. Case C-700/21, O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers), Judgment of 6 June 2023, Official Journal of the European Union C 236, 12 July 2023, 1–2.
18. Case C-164/22, Juan, Judgment of 21 September 2023, Official Journal of the European Union C 220, 15 October 2023, 1–2.
19. Green v. United States, 355 U.S. 184 (1957).