

System of Grounds for Refusal

European Arrest Warrant



Funded by
the European Union

Agenda

Intro

System of grounds for refusal of an European Arrest Warrant on the framework decision

Substance

Mandatory grounds for refusal

Optional grounds for refusal

Other grounds for refusal

Court of Justice of the European Union

General Rule

The CJEU holds that the executing judicial authority may only refuse to execute an EAW in cases of **mandatory non-execution in Article 3** of the EAW Framework Decision or cases of optional non-execution in Article 4 of EAW FD. These are an exhaustive list

Exceptional Situations

- In the context of the validity of the EAW
- In the context of human rights issues

e.g., Bob Dogi

e.g., Aranyosi and Căldăraru

When should executing authorities refrain from executing EAWs

Framework decision 2002/584

Grounds for mandatory non-execution of the European arrest warrant

Article 3

The judicial authority of the
Member State of execution
(*hereinafter 'executing judicial
authority'*)

shall refuse to execute the
European arrest warrant in the
following cases:

- 1 if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
- 2 if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
- 3 if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Framework decision 2002/584

Grounds for optional non-execution of the European arrest warrant

Article 4

The executing judicial authority may refuse to execute the European arrest warrant:

- 1 if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;
- 2 where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;
- 3 where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

Framework decision 2002/584

Grounds for optional non-execution of the European arrest warrant

Article 4

The executing judicial authority may refuse to execute the European arrest warrant:

- ④ where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;
- ⑤ if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;
- ⑥ if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

Framework decision 2002/584

Grounds for optional non-execution of the European arrest warrant

Article 4

The executing judicial authority may refuse to execute the European arrest warrant:

⑦ where the European arrest warrant relates to offences which:

A

Are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such

B

Have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory

Mandatory Grounds for refusal

1. the relevant offence is covered by an amnesty in the executing Member State;
2. Ne bis in idem pursuant to Article 54 CISA; or
3. the person is not criminally responsible, due to their age at the time of the offence.

Mandatory Grounds for refusal

Amnesty

1. the relevant offence is covered by an amnesty in the executing Member State;

Article 3(1) will be applicable if the executing Member State has the jurisdiction to prosecute the offence under its own criminal law. Should the offence be covered by amnesty according to national law, then this refusal must be invoked

Mandatory Grounds for refusal

Ne bis in Idem

2. Ne bis in idem pursuant to Article 54 CISA

This provision is applicable when the executing judicial authority is informed that the requested person already has been judged to a final decision in criminal proceedings by a Member State in respect of the same acts. As a result, surrender must be refused pursuant to Article 54 CISA jo. Article 50 of the Charter

The rule is subject to the proviso that, where there has been a sentence, the sentence has been served or is currently being served, or may no longer be executed under the law of the sentencing Member State

Mandatory Grounds for refusal

Ne bis in Idem

What a practitioner must do when faced with this in order to invoke this refusal ground

Verify if:

1. The case relates to your client
2. The case relates to the same offence
3. A final decision has been made in an EU Member State
4. Where there is a conviction, the 'execution condition' has been fulfilled

Mandatory Grounds for refusal

Ne bis in Idem

Verify if:

1. The case relates to your client
2. The case relates to the same offence

“same person”

- Same individual person
- Same legal person (e.g., may have subsidiaries and other entities)

“same acts”

Mantello case law citing Van Esboreck and Van Straaten

CJEU has established an autonomous definition as “*referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected*”

Mandatory Grounds for refusal

Ne bis in Idem

Verify if:

3. A final decision has been made in an EU Member State
4. Where there is a conviction, the 'execution condition' has been fulfilled

"final decision"

- Two or more criminal proceedings at stake (aka in the issuing MS and in another MS)
- Need not necessarily be a court decision but must constitute the exercise of the 'ius puniendi' or right to punish of a MS
- the decision must follow a determination of the merits of the case *strictu sensu*, on lack of evidence, statute limitation or *imposed in absentia*

C-150/05 Van Straaten)

C-467/04 Gasparini and Others

"execution condition"

1. The sentence has been served. If full served, it is considered to have been enforced.
2. The sentence is currently being served. The sentence commences as soon as it becomes enforceable, including any probation period (C-288/05 Kretzinger)
3. The sentence may no longer be executed under the law of the sentencing MS. This includes pardon, amnesty and statute limitations (C-297/07 Bourquain)

Mandatory Grounds for refusal

3. the person is not criminally responsible, due to their age at the time of the offence.

MS define the minimum age for criminal responsibility differently, such as when the age operates per case-to-case basis. However, the provision above applies irrespective of whether the executing state has jurisdiction over the circumstances underlying the EAW.

The grounds for non-execution applies if, in the executing MS, the requested person might only face civil or administrative proceedings, but not criminal, due to his or her age

Optional Grounds for refusal

1. the acts do not constitute an offence in the executing Member State;
2. the person is being or has been prosecuted in the executing Member State for the same acts;
3. further proceedings in relation to the same acts are prevented, e.g. because final judgement has been passed or because the executing Member State has decided not to prosecute for the same offence;
4. criminal prosecution or punishment is statute-barred in the executing Member State;
5. the person has been finally judged in a third State in respect of the same acts and the sentence (where relevant) has been or is being served or may no longer be enforced;
6. the executing Member State undertakes to execute the sentence or detention order in accordance with its national laws;
7. the offence is regarded by the executing Member State as having taken place in its territory or, having been committed outside its territory, the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

The executing judicial authority may refuse to execute the EAW depending on the circumstances of the case

Optional Ground 1

Lack of double criminality

If the conduct on which the EAW is based does not constitute an offence in the executing state, then the MS should refuse to execute the EAW

This concerns offence which are not mentioned in the list of offences in Article 2(2) of the FD

This ground may apply if the act corresponds to one of those listed but is punishable by:

- A custodial sentence or
- A detention order for max. period of less than three years in the law of the issuing MS

And that act does not constitute an offence under the law of the executing MS

C-289/15 Jozsef Grundza

Optional Ground 2

Prosecution pending in the executing Member State

This provision may be invoked if it concerns the person who is the subject of the EAW and is being prosecuted in the executing Member State for the same act as that on which the EAW is based.

Optional Ground 3

Prosecution for the same offence precluded in the executing Member State

This provision applies in case where despite there being proceedings for the same acts in the Executing State, there is:

- No final decision
- There is a final decision, but it does not fall under Art. 3(2)

This provision may be invoked to refuse surrender where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the EAW is based or to stop proceedings, or a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings.

Optional Ground 4

Prosecution or punishment statute-barred

This provision may be invoked where criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law.

Optional Ground 5

Final judgment in a third state

This provision may be invoked if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been a sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country

Optional Ground 6

The executing Member State undertakes the execution of the sentence

This ground may be invoked by an Executing State to refuse the execution of an EAW which has been issued for the purpose of enforcing a custodial sentence or detention order and the requested person is a national or resident of the executing MS. See Article 25 FD on the enforcement of custodial sentence in conjunction with this provision

The term 'resident' and 'staying'

- Must be defined uniformly
- Cover the situations where the requested person either
 - Established actual place of residence in executing MS or
 - Acquired certain connections with that State following a stable period of presence (e.g., family, employment)

C-123/08 Wolzenburg



- 'staying' requires an overall assessment of objective factors (e.g., length, nature & conditions of presence, family and economic connections)
- It is permissible for MS to restrict the availability of Article 4(6) to:
 - Nationals
 - Lawfully resident in MS for at least 5 years

C-66/08 Kozłowski

Optional Ground 7

Offences committed outside the territory of the issuing Member State

The EAW relates to offences which:

1. are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
2. have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

refusal on the grounds of trial in absentia

Article 4(a) on decisions rendered in absentia

This provision may be invoked where the EAW issued for the purpose of executing a custodial sentence or detention order may be refused if the person did not appear at the trial resulting in a decision *rendered in absentia*.

exceptions

This cannot be refused where the person, in accordance with further procedural requirements defined in the national law of the issuing MS

a. In due time

- Was summoned in person and informed of the date and place of the trial or received official information of the date and place (is unequivocally aware)
- Was informed that a decision may be handed down if they don't appear for trial

b. Is aware of the trial and gave mandate to a legal counsellor to defend them at the trial

c. After being served with the decision and being expressly informed about the right to a retrial or an appeal where they did not contest the decision or request retrial or appeal w/in the applicable time frame

d. Was not personally served with the decision but

- Will be personally served with it without delay after surrender and will be expressly informed of their right to retrial or appeal
- Will be informed of the time frame which they request a retrial or appeal

refusal on the grounds of fundamental rights

Article 13 EAW FD

This provision makes it clear that the MS obligation to respect fundamental rights are not modified by anything contained the FD.

Recital 12

Clarifies that it respects and observes the fundamental rights pursuant to Art. 6 of the TEU and Charter of Fundamental Rights

Surrender may be refused where it is shown that the RAW will cause discrimination on the grounds of:

- Sex
- Race
- Religion
- Ethnic origin
- Nationality
- Language
- Political opinions
- Sexual orientation

In EAW proceedings, there are three relevant charter rights to be considered in the event whether surrender will be violating such rights:

- Article 4 of the Charter on the prohibition of torture and inhuman and degrading treatment or punishment,
- Article 7 of the Charter on the right to respect for private and family life
- Article 47-50 on the right to a fair trial

Article 4 of the Charter

The prohibition on inhuman or degrading treatment

... where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.’ (Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Caldaru*)

Article 4 of the Charter

Procedural steps

1. Verify whether there is a real risk of inhuman or degrading treatment of the requested person because of general detention conditions
2. If the existence of such a risk is identified based on the general detention conditions, verification whether there are substantial grounds to believe that such a real risk of inhuman and degrading treatment exists in the particular circumstances of the case for the requested person:
 - obligation to request
 - possibility to request information
 - possibility to fix a time limit for the reply,
3. If the existence of a real risk of inhuman or degrading treatment for the requested person is identified, based on information received from the issuing judicial authority and any other information that may be available to the executing judicial authority (and pending a final decision on the EAW):
 - obligation to postpone the execution of the EAW in question.
 - possibility to hold the person concerned in custody
 - possibility or even obligation to provisionally release the person concerned
4. Final decision:
 - If the executing judicial authority can discount the existence of a real risk, it must decide on the execution of the EAW
 - If the executing judicial authority cannot discount the existence of a real risk, it must decide whether the surrender procedure should be brought to an end

