

## **EUROPEAN ARREST WARRANT (EAW)**

### **1. What is the implementing legislation of the Member State for the Framework Decision on the European Arrest Warrant and surrender procedures between Member States (the Framework Decision)?**

1. The Act of 19 December 2003 (published 22 December 2003) concerning the European Arrest Warrant (**EAW Act**) incorporates the Framework Decision into Belgian law.

The EAW Act replaces the Extradition Act of 15 March 1874 and a number of arrest and/or extradition treaties which were applicable between member states of the European Union.

### **2. What are the circumstances of arrest set out in the implementing legislation?**

2. Under Article 10 of the EAW Act, an arrest can be made upon the presentation of (i) a EAW, or (ii) a signalisation in conformity with Article 95 of the Convention Implementing the Schengen Agreement of 19 June 1990.

With respect to arrests based on a Schengen signalisation, Article 9 of the EAW Act provides that, for a transitional period, until the Schengen information system is capable of transmitting all the information which is required for a EAW to be valid, an original EAW or certified copy has to be transferred to the Belgian authorities. It is only upon the reception of the EAW that the judicial authorities will be able to reach a decision on the validity of the request.

3. The arrest itself is subject to the requirements of Article 2 of the Act of 20 July 1990 concerning Preliminary Detention. According to this provision, the public prosecutor is in charge of the arrest of the person subject to the EAW. If the case is already pending with an investigating judge, the investigating judge will exercise the competences which are normally entrusted to the public prosecutor in case of arrest. No one can be detained for longer than 24 hours after his or her arrest unless a judge formally intervenes. Furthermore, the following rules have to be observed in case of arrest:

1. the person involved is immediately notified of the decision of the arrest. This notification consists in the oral communication of the decision in the language of the proceedings;
2. an official report is made of the arrest. This official report contains:
  - the decision of the public prosecutor, the measures which have been ordered by the public prosecutor, and the manner in which these have been notified to the person involved;
  - the exact time of the arrest, with detailed mention of the circumstances in which the arrest took place;
  - the exact time of the notification to the person involved of the decision of arrest;

### **3. What is the procedure for the extradition hearing?**

(a) Initial hearing and initial decision by the investigating judge within 24 hours of arrest

4. The person subject to the EAW will be heard by an investigating judge within 24 hours of the arrest (initial hearing). Pursuant to Article 11 of the EAW Act the investigating judge will inform the person subject to the EAW of:

1. the EAW and its contents;
2. the possibility of consenting to surrender to the issuing judicial authority;
3. right to be assisted by a legal counsel and by an interpreter in accordance with Belgian national law.

During the initial hearing the person subject to the EAW can comment on the EAW and explain the factual circumstances of the case, after which the investigating judge will decide to either (i) keep the person detained until a final decision<sup>1</sup> is reached with respect to the execution of the EAW, or (ii) release the person from detention until a final decision is reached with respect to the execution of the EAW.

If the investigating judge decides to release the person subject to the EAW, this decision has to be accompanied with a set of measures ensuring that the person involved (i) will not commit any new crimes or offences, (ii) will not flee from the judicial system, (iii) will not collide with third parties, and (iv) cannot tamper with evidence. One of the measures the investigating judge can order is the payment of a deposit. This deposit will be returned after a final decision on the execution of the EAW is reached, on the condition that the person subject to the EAW remained on Belgian territory during the investigation.

5. The decision taken by the investigating judge in conformity with Article 11 EAW Act (an **Article 11 Decision**) to either (i) keep the person subject to the EAW detained, or (ii) release the person subject to the EAW, provided certain measures are taken, has to be notified to the person subject to the EAW. As a general rule, this Article 11 Decision will remain in force until a final decision is reached with respect to the execution of the EAW, as no appeal can be made against an Article 11 Decision.

(b) Insufficient information or mandatory non-execution of the EAW

6. If, after the initial hearing, the investigating judge is of the opinion that the contents of the EAW do not allow the executing authorities to reach a final decision with respect to the EAW, the investigating judge has to request additional information with the issuing authority (Article 15 EAW Act). The investigating judge can determine the date by which this information has to be obtained.

7. Within 24 hours of the arrest and after having heard the person involved, the investigating judge might be of the opinion that there are grounds for mandatory non-execution of the EAW. If this is the case, the investigating judge immediately takes a motivated decision ordering non-execution (Article 14 EAW Act).

If the public ministry wishes to appeal this decision it has to do so within 24 hours from the date of the decision ordering non-execution. The appeal is lodged with the "*chambre d'accusation - kamer van inbeschuldigingstelling*"<sup>2</sup> which has to reach a decision within 15 days after the appeal, after having heard the public prosecutor and the person subject to the EAW. Pending the decision in appeal, the person subject to the EAW will remain subject to the Article 11 Decision previously taken by the investigating judge (see 4).

If no appeal is lodged, the decision of non-execution of the EAW will take immediate effect and the person who was arrested will be released. In this case, the previous Article 11 Decision taken by the investigating judge will cease to have effect.

(c) Hearing and judgement by the "*chambre de conseil - raadkamer*"<sup>3</sup>

8. Pursuant to Article 16 of the EAW Act, the "*chambre de conseil - raadkamer*" has to render a judgement on the execution or non-execution of the EAW within 15 days of the arrest of the person subject to the EAW. The person involved and his lawyer will be notified of the day and time of the hearing. They can consult the file of the person subject of the EAW on the day before the hearing.

The "*chambre de conseil - raadkamer*" will ascertain whether:

1. the conditions on the scope of the EAW are fulfilled;
2. one of the grounds for (mandatory) non-execution has to be applied;

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<sup>1</sup> The final decision is generally made by the "*chambre de conseil - raadkamer*" (see 8).

<sup>2</sup> The criminal court's indictment division (in the UK task performed by the Magistrates Bench)

<sup>3</sup> Magistrates at the level of the criminal court who decide upon the release of a person under remand or the extension of the warrant for his arrest.

3. certain guarantees have to be given by the issuing member state

▪ **Scope of the EAW: Article 3 EAW Act**

9. Article 3 of the EAW Act repeats Article 2.1 of the Framework Decision and states that "*A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months*".

▪ **Grounds for (mandatory) non-execution: Article 4 to 6 EAW Act**

10. The "*chambre de conseil - raadkamer*" will have to investigate if there are bars to extradition, pursuant to Article 4 to 6 of the EAW Act.

Under the EAW Act the following are mandatory bars for extradition:

- The offence is covered by amnesty in Belgium (and Belgium has jurisdiction).
- The requested person has been finally judged by a Member State in respect of the same acts and the sentence has been served, is being served or can no longer be executed.
- Person's age does not allow the person to be held criminally responsible for the crime or offence under Belgian law.
- The criminal prosecution or punishment is statute-barred according to Belgian law (and Belgium has jurisdiction)
- There are serious grounds to believe that the execution of the EAW would infringe the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union.
- The act is not punishable in Belgium (double criminality requirement), with the exceptions provided for in Article 2.2 of the Framework Decision.

Under the EAW Act the extradition can be denied (non-mandatory non-execution) in the following cases:

- The person subject to the EAW is being prosecuted in Belgium for the same act as that on which the EAW is based.
- The Belgian authorities have decided not to prosecute for the offence on which the EAW is based, or have decided to halt proceedings for the act on which the EAW is based.
- The person subject to the EAW 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.
- If the EAW has been issued for the purposes of execution of a custodial sentence or detention order, if the Belgian authorities undertake to execute the sentence or detention order (on the condition that the requested person is staying in, or is a national or a resident of Belgium).
- Where the EAW relates to offences which (i) have been committed in whole or in part on Belgian territory, or (ii) have been committed outside the territory of the issuing member state, and Belgian law does not allow prosecution for the same offences when committed outside of its territory.

▪ **Guarantees to be given by the issuing state: Article 7 and 8 of the EAW Act**

11. Article 7 and Article 8 of the EAW Act contain the possibility for the Belgian authorities to make the execution of the EAW dependant on either (i) the condition that the issuing judicial authority gives an assurance to guarantee that a person convicted in absentia will have the right to apply for re-trial, either (ii) the condition that the persons who is the subject of the EAW is returned to Belgium to serve his or her sentence after being convicted in the issuing state.

**4. Are there any other grounds for ordering a discharge?**

12. Yes, in a number of "conflict" situations:

- Article 27 EAW Act: if the person who is the subject of an EAW has been previously extradited to Belgium and is protected by the specialty provisions of the extradition treaty between Belgium and the State by which he or she was extradited, the Minister of Justice has to be informed. The Minister of Justice will then ask permission to the extraditing State.
- Article 29 EAW Act: if multiple EAW's are issued by multiple Member States, the "*chambre de conseil - raadkamer*" will decide which EAW will be executed.
- Article 30: if there is a conflicting situation between an EAW and an extradition request from a third State, the federal prosecutor and the government will be informed. The government will then decide whether the EAW or the extradition request will be executed.

**5. What success has there been in defendants' reliance on human rights as grounds for refusal to be extradited?**

13. As set out above (see 10), the EAW will not be executed if there are serious grounds to believe that the execution of the EAW would infringe the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union.

This ground for non-execution is not mentioned in the Framework Decision. The Framework Decision does however, in Article 1.3 state that "*This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union*".

Article 6 of the Treaty on the European explicitly refers to the European Convention on Human Rights (E.C.H.R.). However, consistent jurisprudence of the Belgian "*Cour de Cassation - Hof van Cassatie*"<sup>4</sup> states that Article 6 E.C.H.R. does not apply to the procedure before the "*chambre de conseil - raadkamer*" and the "*chambre d'accusation - kamer van inbeschuldigingstelling*".

14. It is unclear how this ground for refusal to be extradited will be applied in practice. The parliamentary preparatory works to the EAW Act specify that the Belgian authorities cannot make a political assessment of the situation in another member state. The assessment of this ground for refusal thus has to be limited to the specific circumstances of the case. Moreover, there is a presumption in favour of the issuing state, in the sense that the issuing state is presumed to respect human rights<sup>5</sup>. This ground of refusal will thus only be used if the person subject to the EAW can seriously allege, based on factual elements, that the extradition to the issuing state would jeopardize his or her human rights<sup>6</sup>.

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<sup>4</sup> Cour de Cassation - Hof van Cassatie, 25 January 2005, P050065N

<sup>5</sup> A. WINANTS, "De doorwerking van het EU-Kaderbesluit inzake overlevering", *N.C.* 2006, 90

<sup>6</sup> *Ibid.*

In the case of *Ugarte Lopez*<sup>7</sup>, an alleged Bask separatist, the defence lawyer made it an argument before the "*chambre d'accusation - kamer van inbeschuldigingstelling*" that the situation in Spanish prisons constituted a ground for refusing the execution of the EAW on the basis of the fundamental rights provision in the EAW Act. The allegation with respect to the Spanish prisons was based on a report of a UN Rapporteur (van Boven) which was not endorsed nor upheld by the UN Commission of Human Rights. The "*chambre d'accusation - kamer van inbeschuldigingstelling*" therefore held that there were insufficient grounds to refuse the execution of the EAW, as the report brought forward did not have moral value nor general validity. The EAW was executed.

**6. Are there any cases of the courts/judicial authorities refusing to issue and/or execute EAWs on the grounds that extradition would be disproportionate in the light of the offence or other circumstances?**

15. Unknown.

**7. What effect does the significant passage of time have on whether an EAW is issued or executed? What is the relevant provision in the implementing legislation and how is it being applied (if at all) in actual issue/execution decisions?**

16. Article 19.1 of the EAW Act provides that: "*Where in specific cases the European arrest warrant cannot be executed within the 60 days after the arrest of the requested person, the public ministry shall immediately inform the person subject of the EAW and the issuing judicial authority thereof, giving the reasons for the delay. In such a case, the time limits may be extended by a further 30 days*".

It then continues to say in Article 19.2. of the EAW Act that: "*Where in exceptional circumstances a Member State cannot observe the time limit of 90 days after the arrest of the requested person, the public ministry shall inform the federal prosecutor, who will in turn inform Eurojust, giving the reasons for the delay*".

17. The Act thus largely refers to the same, unbinding time limits as the Framework Decision. It does not make these time limits binding. Thus, the significant passage of time does not seem to have a significant influence on decisions with respect to the execution of an EAW.

**8. Does Belgium make it a condition of executing an EAW that the requesting State agree that if convicted and sentences the defendant will be granted a transfer to serve his sentence in the home State?**

18. No, not as a general rule. In specific cases however, this might be a condition that is imposed on the issuing state before the EAW is executed (see 11).

**9. What effect (if any) have the provisions of Member States' constitutions had on decisions whether to execute EAW requests? Do constitutional provisions on the rule of law or fundamental rights and freedoms tend to prevail over the provisions of the EAW implementing legislation where there is a conflict?**

19. Unknown.

**10. To what extent are judicial authorities in Member States deciding EAW cases in the light of fundamental principles of European law including respect for fundamental rights and freedoms and the free movement of people?**

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<sup>7</sup> *Chambre d'accusation - kamer van inbeschuldigingstelling* Bergen, 13 mei 2004, unpublished (referred to in: G. STESSSENS, "Het Europees aanhoudingsbevel", *R.W.* 2004-2005, 561

20. Belgian courts are obliged to interpret domestic law in line with EU law, and EU law must be treated as part of domestic Belgian law. This includes the fundamental rights and freedoms as well as the free movement of people. As set out above, the EAW Act specifically contains a provision ordering Belgian courts to refuse the execution of the EAW if there are serious grounds to believe that the execution of the EAW would infringe the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union (see 10).

**11. What rights of appeal exist in the implementing legislation or practice of judicial authorities? Are there examples of a failure to grant an appeal to extradition decisions?**

21. Article 17 of the EAW Act provides for the possibility of appeal against the decision of the "*chambre de conseil - raadkamer*". Within 24 hours of this decision an appeal can be lodged with the "*chambre d'accusation - kamer van inbeschuldigingstelling*". Within 15 days the "*chambre d'accusation - kamer van inbeschuldigingstelling*" will then have to reach a motivated decision on the appeal. The person subject to the EAW and his lawyer will be heard after having been notified of the day and time of the hearing. They will be enabled to consult the file of the person subject of the EAW on the day before the hearing.

If the *chambre d'accusation - kamer van inbeschuldigingstelling* fails to reach a decision within 15 days of the appeal, the person subject to the EAW will be immediately released. Against this decision no appeal can be made.

22. Article 18 of the EAW Act provides for the possibility of appeal to the "*Cour de Cassation - Hof van Cassatie*". This appeal has to be lodged within 24 hours of the decision of the "*chambre d'accusation - kamer van inbeschuldigingstelling*". The "*Cour de Cassation - Hof van Cassatie*" then has to render a judgement within 15 days of the appeal. If the judgement confirms the "*chambre d'accusation*" the decision reached by the "*Cour de Cassation - Hof van Cassatie*" becomes immediately enforceable. If the judgement does not confirm the decision reached by the first "*chambre d'accusation - kamer van inbeschuldigingstelling*" the case will be referred to another "*chambre d'accusation - kamer van inbeschuldigingstelling*" which will again decide on the case. After this second decision a new appeal to the "*Cour de Cassation - Hof van Cassatie*" is possible.

**12. To what extent is legal aid available to persons subject to EAW?**

23. If the person subject to the EAW does not choose a lawyer after the initial hearing, the investigating judge will notify the president of the Belgian Bar Council who will then appoint a lawyer to act on behalf of the person subject to the EAW (Article 12.2 of the EAW Act).

**13. What do statistics show about the charge and conviction rates for individuals whose extradition is ordered?**

24. The Council of the European Union collates annual statistics on the practical operation of the EAW but these do not include data for Belgium. No other statistical data with respect to the EAW are available for Belgium.

**14. What media coverage has there been of the use of the EAW in Belgium?**

25. The EAW got extensive coverage in the Belgian press in 2004 as a result of the EAW issued by Spain against the Spanish-Bask couple Moreno-Garcia<sup>8</sup>. After an extradition request of 1993 had been denied by Belgium, the Spanish authorities issued an EAW in 2004, after the introduction of the EAW Act in Belgian law. This EAW led to a true procedural quest, eventually leading Belgian authorities to deny the execution of the EAW (but not until after the decision of the investigative judge had been appealed before

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<sup>8</sup> C. RYNGAERT, "Het Europees aanhoudingsbevel lastens Moreno-Garcia: de aanhouder wint", Working Paper KUL, available at: [www.kuleuven.ac.be](http://www.kuleuven.ac.be) (last consulted 26 May 2010)

the "*chambre d'accusation - kamer van inbeschuldigingstelling*", and appealed up to two times before the "*Cour de Cassation - Hof van Cassatie*" which each time referred the case back to the "*chambre d'accusation - kamer van inbeschuldigingstelling* ")

26. More recently, the EAW again made the press in the case of Adam Giza. Adam Giza had been extradited by Poland to the Belgian authorities, who issued an EAW against him. The Polish authorities had explicitly made the execution of the EAW dependant upon the return that Adam Giza would be returned to Poland to serve his sentence after being convicted in Belgium. Giza got extradited to Belgium in August 2006 and got sentenced to 20 years on 23 September 2008. After having stayed in Belgium for two years Giza did not want to return to Poland. He had learned French and was working in prison. Giza feared that, as a gipsy, he would be the subject of abuse in Polish prisons. He filed a request with a Brussels judge, asking not to be returned to Poland. In his request he referred to Article 3 of the E.C.R.M. The Belgian judge granted his request not to be returned, not on the ground of Article 3 of the E.C.R.M. but on the ground that Poland had granted the right of return as a favour to Giza, who could therefore waive this right and stay in Belgium<sup>9</sup>. This decision got appealed, and the Court of Appeal overruled the decision by the first judge, stating that Giza had to be returned to Poland<sup>10</sup>. No appeal before the "*Cour de Cassation - Hof van Cassatie*" was made against the decision of the appellate court and Giza has been returned to Poland .

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<sup>9</sup> See "Gazet van Antwerpen" at <http://www.gva.be/dekrant/experts/johndewit/de-zaak-giza-stelt-probleem-van-europees-aanhoudingsbevel.aspx> (last consulted 26 May 2010)

<sup>10</sup> See "De Standaard" at [http://www.standaard.be/artikel/detail.aspx?artikelid=DMF20100421\\_012](http://www.standaard.be/artikel/detail.aspx?artikelid=DMF20100421_012) (last consulted: 26 May 2010)