



*Directorate-General for  
Library, Research and  
Documentation*

**RESEARCH NOTE**

**European arrest  
warrant  
Undertakings to execute a foreign  
sentence**

[...]

**Subject:** Examination of the implementation of Article 4(6) of Framework Decision 2002/584/JHA in so far as concerns undertakings, given by Member States refusing to execute a European arrest warrant, to execute a custodial sentence handed down in another Member State in accordance with its own domestic law

[...]

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[...]

## SUMMARY

### I. PRELIMINARY REMARKS

1. Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States<sup>1</sup> provides that *‘the executing judicial authority may refuse to execute the European arrest warrant ... 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’*.
2. The implementation, under national law, of undertakings to execute on national territory a custodial sentence handed down in another country, in the event of refusal to execute a European arrest warrant, may prove problematic if the assumption of responsibility for the sentence is not a direct consequence of the refusal of surrender. That is the case, in particular, where an executing judicial authority is required, under national law, to refuse to surrender the person in question, while the decision concerning execution of the sentence, taken after that refusal, is subject to certain conditions. Included among those conditions may be a requirement for a request to be made by the issuing Member State in order for the sentence to be executed.<sup>2</sup>
3. It is in that context that this research note, which covers a sample number of 11 of the Member States that have implemented Article 4(6) of Framework Decision 2002/584/JHA,<sup>3</sup> examines the issue of undertakings, given by Member States refusing to execute a European arrest warrant, to execute a custodial sentence or

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<sup>1</sup> OJ 2002 L 190, p. 1.

<sup>2</sup> [... T]he issuing State may choose not to make such a request, or may be prevented from doing so by its own internal law, as was the case with Polish law prior to 1 January 2012, under which the transfer of a sentence to another country, in particular to a Member State, for the purpose of its execution was prohibited where the convicted individual was a Polish national or had a right of asylum in Poland (see Articles 611b(2)(3) and 604(1)(1) of the *kodeks postępowania karnego* (the Polish Penal Code)).

<sup>3</sup> Namely Germany, Belgium, Croatia, Spain, France, Greece, Italy, the Netherlands, Portugal, the Czech Republic and Sweden. Of the other Member States, Ireland, the United Kingdom and Slovakia are the only Member States not to have implemented the provision.

detention order in accordance with their own domestic law.<sup>4</sup>

4. Although the great majority of Member States have chosen to implement Article 4(6) of Framework Decision 2002/584/JHA in national law, there are many differences in the manner in which it has been implemented, as regards both the scope of application *ratione personae* and the nature of the grounds for non-execution, that is to say, whether they are optional or mandatory.<sup>5</sup> The same is true of the conditions under which European arrest warrants are executed.<sup>6</sup> However, those aspects are not addressed in this summary.

## II. IMPLEMENTATION OF THE REQUIREMENT FOR AN 'UNDERTAKING'

5. It must immediately be noted that the majority of the Member States considered make no express reference in their legislation to 'undertakings' to execute a foreign sentence in the event of a refusal of surrender. However, the requirement of an undertaking, within the meaning of Article 4(6) of Framework Decision 2002/584/JHA, may be inferred from the connection between the refusal to execute a European arrest warrant and the execution of the foreign sentence, inasmuch as such a requirement is linked to the actual execution of the sentence on national territory.
6. It is also important to note that the implementation of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union<sup>7</sup> has had an effect on national rules governing the execution of criminal sentences handed down in other Member States. Indeed, in some Member States there are different sets of rules, and the determination of which of those sets of rules applies depends on the period under consideration and whether or not the abovementioned framework decision has been implemented in the Member State that

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<sup>4</sup> [...]

<sup>5</sup> [...]

<sup>6</sup> By way of example, some Member States require double criminality of the act in question in order for a European arrest warrant to be refused (in particular, Greece. Moreover, surrender procedures may involve one or more phases.

<sup>7</sup> OJ 2008 L 327, p. 27.

has issued the judgment that is to be enforced (**Italy** and the **Netherlands** are examples).<sup>8</sup>

7. In examining the connection between refusal of surrender and execution of a foreign sentence, this research note assesses the requirement for an undertaking by reference to the question of whether the executing judicial authority verifies whether the sentence to be executed is consistent with its own national law (A) and, more specifically, the question of whether it is necessary for a request to be made by the issuing State in order for the sentence to be executed (B).

A. VERIFICATION OF THE CONSISTENCY OF THE SENTENCE TO  
BE EXECUTED WITH NATIONAL LAW

8. In some Member States, before surrender may be refused, it is necessary for the executing judicial authority to verify whether the sentence may actually be executed under national law (**Germany, Belgium, Croatia, France** and the **Czech Republic**).<sup>9</sup>
9. It is also possible that no such verification is carried out and that execution of the sentence may be refused even after surrender has been refused on the ground, for example, that there is no appropriate legal basis or that there is no dual criminality (the **Netherlands**).
10. It is also important to note that, in the legal systems examined, there may be peculiarities in so far as concerns the manner in which foreign sentences are executed. In some Member States, foreign sentences are adjusted when they exceed a certain limit laid down by national law (Germany, Belgium and Sweden), and this may result in only partial execution of sentences handed down in other Member States.

B. THE NECESSITY OF A REQUEST FROM THE ISSUING STATE IN  
ORDER FOR A FOREIGN SENTENCE TO BE EXECUTED

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<sup>8</sup> Article 9 of Framework Decision 2008/909 sets out a number of grounds for non-recognition and non-enforcement, which include the situation where the sentence is statute-barred and the principle *ne bis in idem*.

<sup>9</sup> By way of example, the sentence may be unenforceable because it is time-barred under the law of the executing Member State.

11. In most of the legal systems examined, a refusal of surrender entails recognition of the sentence in question with a view to its execution without the issuing State being required to take further action (1). In other Member States, on the other hand, in order for a foreign sentence to be executed, it is necessary for the issuing State to make a request to that effect (2).

1. EXECUTION OF A FOREIGN SENTENCE WITHOUT A  
REQUEST FROM THE ISSUING STATE

12. In the majority of Member States examined, a decision to refuse to execute a European arrest warrant has immediate consequences for the execution of the sentence, either rendering its execution mandatory (a) or limiting the grounds for opposing its execution (b).

a. Refusal of surrender rendering execution of the foreign  
sentence mandatory

13. In most of the legal systems examined, a refusal to execute a European arrest warrant renders the execution of the foreign sentence on the national territory mandatory.

14. Thus, in **Belgium**, prior to the implementation of Framework Decision 2008/909/JHA, national law expressly provided that a sentence handed down abroad was directly and immediately enforceable. Without any substantial change being made, the relevant legislation has since been reformulated, so that it now provides that a decision to refuse to execute a European arrest warrant entails the recognition and execution of the sentence referred to in the judicial decision which is the subject of the European arrest warrant.

15. In **Spain**, following the same logic, but in less explicit fashion, national law provides that, in the event that execution of a European arrest warrant is refused, the person convicted must serve his sentence in Spain. To that end, the procedure for the execution of European arrest warrants is automatically converted into the procedure for the enforcement of foreign judgments, without there being any need formally to

recognise the foreign judgment in question.

16. In **Portugal**, a decision to refuse to execute a warrant entails an undertaking to execute the sentence in Portugal and renders the foreign judgment enforceable.
17. Prior to the implementation of Framework Decision 2008/909/JHA, it was possible in **France** to refuse to execute a European arrest warrant provided that the Public Prosecutor's Office gave a prior undertaking to execute the sentence, without there being any need for further intervention by the issuing State. Execution of the foreign sentence was put in hand on the basis of the refusal to execute the European arrest warrant, following a formal procedure for recognition and execution, the foreign sentence nevertheless remaining directly and immediately enforceable on the national territory.
18. Moreover, in **Italy**, the executing judicial authority orders, in its decision to refuse to execute a warrant, the immediate execution of the foreign sentence on national territory. Indeed, it is clear from the case-law that, where the State refuses a surrender, its undertaking to execute the sentence in accordance with its national law constitutes an obligation immediately to execute the sentence, which amounts to automatic recognition of the foreign judgment in the national legal system, without there being any need for a prior recognition procedure to be conducted in Italy.
19. The same approach is taken in **Greece** and **Croatia**, where the executing judicial authority refusing to execute a European arrest warrant simultaneously orders the execution of the foreign sentence on national territory.
  - b. Decision to execute the foreign sentence determined by the decision refusing surrender
20. **Sweden** has a different system, inasmuch as, if a refusal to execute a European arrest warrant and an undertaking to execute a foreign sentence are both contained in the same decision of the competent judicial authority, the subsequent decision of the Swedish prison authority to recognise the judgment handed down in the issuing State and to execute the sentence is not covered by the undertaking. However, the only

grounds on which execution of the sentence in Sweden may be opposed are grounds put forward by the issuing State. If such opposition is made, the procedure is terminated and, if necessary, the convicted person is released.

## 2. EXECUTION OF A FOREIGN SENTENCE CONDITIONAL ON A REQUEST FROM THE ISSUING STATE

21. In four legal systems examined, a decision to refuse to execute a European arrest warrant does not automatically lead to the recognition and execution of the custodial sentence on the territory of the State in question. Execution of the sentence is conditional in those States on a request from the issuing State.
22. More specifically a refusal to execute a European arrest warrant may be preceded or accompanied by the express statement of a position in the executing State pending a request from the issuing State, without that however having any immediate effect on the execution of the foreign sentence (a). It is also possible that the executing State may give no express undertaking prior to the refusal (b).
- a. Express statement of a position in the executing State having no immediate effect on the execution of the foreign sentence
23. In the **Netherlands** — and this was also true before implementation of Framework Decision 2008/909 — the Public Prosecutor's Office informs the issuing judicial authority that it is minded to take responsibility for the execution of the judgment in question. Before the framework decision was implemented, execution of the judgment was conditional on the existence of a legal basis in a convention or treaty, the terms of which, including a request, needed to be fulfilled in order for the sentence to be executed.
24. In **France**, under the rules resulting from the implementation of Framework Decision 2009/909/JHA, and as is borne out by very recent case-law, the executing judicial authority must first verify whether the issuing State proposes to make a request for the recognition and execution of the custodial sentence on French territory, or whether the

French Public Prosecutor's Office intends to invite such a request. Execution of a European arrest warrant may nevertheless be refused before any such request has actually been made.

25. In the **Czech Republic**, following a decision to refuse surrender, the executing judicial authority must invite the competent authority of the issuing State to inform it if it wishes the judgment which forms the basis of the European arrest warrant to be recognised and enforced. If the issuing State does not make such a request, or waives recognition and enforcement of the judgment, the procedure is terminated and, if necessary, the convicted person is freed.

b. Absence of any express undertaking to execute the foreign sentence

26. Lastly, in **Germany**, the rules implementing Article 4(6) of Framework Decision 2002/584/JHA contain no reference to any undertaking, to be given prior to a refusal of surrender, to execute the foreign sentence under German law. Prior to implementation of Framework Decision 2008/909/JHA, execution of the sentence was conditional on a request being made to that effect by the issuing State, for the purposes of an execution procedure, pursuant to the general provisions governing judicial cooperation.

27. That requirement for a request to be made by the issuing State was abandoned with the implementation of Framework Decision 2008/909/JHA, and the German authorities may now themselves make a request to the State which has handed down the judgment. It is apparent from the explanatory notes to the new legislation that the amendment was designed, having regard to Article 4(6) of Framework Decision 2002/584/JHA, to avoid the situation arising where the State issuing a European arrest warrant will not or cannot make a request for the sentence to be executed in Germany

### III. CONCLUSION

28. The giving of an undertaking by a State refusing to execute a European arrest



warrant to execute the foreign sentence arises, in essence, from the connection between the refusal to execute a European arrest warrant and the execution of the foreign sentence.

29. In seven of the legal systems examined, a refusal of surrender directly or indirectly leads to recognition of the sentence in question with a view to its execution, without the issuing State being required to take further action. On the other hand, in four of the legal systems examined, a refusal of surrender has no immediate effect on the execution of the foreign custodial sentence, which is conditional on a request being made to that effect by the issuing State.
30. In only five of the legal systems examined is a refusal of surrender subject to prior verification of the possibility of the foreign sentence being executed in accordance with national law. The lack of such verification appears to be problematic where a refusal of surrender is not accompanied by a concomitant decision on the execution of the foreign sentence. Indeed, a State may, notwithstanding a refusal of surrender, refuse to execute the sentence on the ground that its execution would be inconsistent with national law. However, that situation arises only in the Netherlands.
31. Three of the Member States provide for the possibility of adjusting the foreign sentence in accordance with national criteria, which may lead to only partial execution of the foreign sentence.
32. Finally, it is important to note that Framework Decision 2008/909/JHA had an effect on undertakings within the meaning of Article 4(6) of Framework Decision 2002/584/JHA in that it brought about some approximation of the procedures for judicial cooperation in the enforcement of foreign judgments.

[...]