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SAFEGUARDS AND GUARANTEES IN EUROPEAN ARREST WARRANT PROCEDURES: LEGAL AND COMPARATIVE ANALYSIS

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Abstract

The European Union has progressively fostered high-level cooperation among its Member States across various sectors. However, cooperation in the field of criminal justice has evolved more slowly compared to other communitized areas. As part of efforts to enhance collaboration in this domain, the European Arrest Warrant (EAW) was introduced as a legal tool for the mutual surrender of individuals between Member States, aimed at enforcing custodial sentences or detention orders. This instrument facilitates the mutual recognition of judicial decisions, thereby promoting the principle of mutual trust, which is fundamental to achieving such levels of cooperation. The Council Framework Decision 2002/584/JHA, adopted on 13 June 2002, simplifies the surrender process between Member States, while still mandating certain guarantees from the issuing state. This paper focuses on the prerequisites and safeguards that underpin EAW procedures, drawing on a qualitative analysis of the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR). The research adopts a qualitative approach, combining doctrinal legal analysis with a comparative methodology. Through an examination of landmark cases from the European courts, the study explores judicial interpretations of EAW procedures and the associated guarantees, offering recommendations for addressing challenges in the practical application and verification of guarantees aimed at upholding fundamental human rights. A comparative analysis is also undertaken to evaluate Albania's legal provisions on extradition against EU law standards. This approach provides insight into the compatibility of Albania's legal framework with EU requirements, identifying potential challenges in the law approximation and transposition processes required for EU integration. The recommendations presented in this paper are intended to contribute to both EU legislation and Albania's legal framework, particularly in the context of the EU integration process.

Keywords: *European Arrest Warrant, Mutual Trust, Executing State, Issuing State, Surrender Procedure, Prerequisites, Guarantees, Human Rights.*

INTRODUCTION

Within the framework of the Council of Europe, with the purpose of regulating the mutual surrender of persons wanted by criminal justice, the European Convention on Extradition was enacted in 1957[1]. This

[1] European Convention on Extradition (ETS No. 024) [1957].

convention has been amended and enriched with 4 additional protocols,[2] which essentially aim to improve and, in some case, increase the level of mutual trust between contracting parties.[3]

Simultaneously the European Union has always aspired for a higher level of cooperation and trust between its member states. Pursuing this goal, in July 2000, preparatory work began [4] for the adoption of a new legal instrument that would create the premises for the mutual recognition of criminal judgments between member states. This project was preceded by the adoption of the Tampere Council Conclusions in 1999,[5] which laid the foundations and affirmed the need for the adoption of instruments and measures based on the principle of mutual trust and mutual recognition. The attacks of September 11th, 2001, accelerated the procedure of adopting the Council Framework Decision 2002/584/JHA of June 13th, 2002 on the European Arrest Warrant and surrender procedures between Member States (*hereinafter referred to as the "EAW"*)[6].

The modern and contemporary cooperation of EU Member States in the field of criminal justice is based on the principle of mutual recognition of court decisions. In 1997, through the Treaty of Amsterdam, Member States committed to the creation of an area of freedom, security and justice[7]. The EAW is the first step that implements the principle of mutual recognition of judicial decisions in the criminal law of the European Union, which has been called the '*cornerstone*' of judicial cooperation in the European Union[8]. In its essence, this instrument fulfils the same function as extradition, but naturally with significant improvements in terms of increasing judicial cooperation and mutual trust [9] between the Member States of the European Union.

The objective set for the Union to become an area of freedom, security and justice led to the abolition of the instrument of extradition between Member States and its replacement by a system of surrender between judicial authorities. Furthermore, the adoption of a new simplified system of surrender of convicted or suspected persons, for the purposes of execution of criminal sentences or criminal prosecution, made it possible to remove complexity and the potential for excruciating delays[10] from extradition proceedings. The traditional cooperative relations that prevailed until 2002 between the Member States were replaced by a system of free movement of judicial decisions in criminal cases within an area of freedom, security and justice, which includes both decisions related to the deprivation of liberty before sentencing, as well

[2] Additional Protocol of European Convention on Extradition (ETS No. 086) [1975].
Second Additional Protocol of European Convention on Extradition (ETS No. 98) [1978].
Third Additional Protocol of European Convention on Extradition (CETS No. 209) [2010].
Fourth Additional Protocol of European Convention on Extradition (CETS No. 212) [2012].

[3] For example, by means of the fourth additional protocol, now the limitation period according to the law of the requesting state is irrelevant to reject the request for extradition.
Erik Bakker and Mark M. Tushnet, eds., *The European Union and the European Arrest Warrant: A Model for Judicial Cooperation in Criminal Matters* (Leiden: Brill | Nijhoff, 2017) , 12-15.

[4] Pradel Jean, Corstens Geert and Vermeulem Gert, *European Criminal Law* (Dalloz 2009), p. 549.

[5] Presidency Conclusions, Tampere European Council 15-16 October 1999 [1999].

[6] *OJ L 190, 18.7.2002, p. 1–20.*

[7] Krisztina Karsai and Liane Wörner, European Union and European Council (in) Ambos Kai and Rackow Peter, *The Cambridge Companion to European Criminal Law*, (Cambridge University Press, 2023), p. 3-29.

[8] Klimek Libor, *European Arrest Warrant*, (Springer, 2015), p. 1.
Laurent Pech and Steven Blockmans, *The European Union's Area of Freedom, Security, and Justice: The Legal Framework of EU Criminal Law and the Mutual Recognition of Judgments* (London: Routledge, 2013), 25-30.

9 Massimo Fichera, "The Foundations of the EU as a Polity" (2019).

[10] In fact, the European Convention on Extradition has not established time limits within which the requested state must take a final decision on the surrender of the requested person. Referring to the Code of Criminal Procedure of the Republic of Albania, article 493 provides only that the personal freedom of the requested person cannot be limited for a maximum period of 10 months during extradition procedures.

as the final ones on the basis of the case.[11] Unlike extradition, where the role of administrative/diplomatic authorities has the discretionary power to decide on requests for extradition, this link has now become only an auxiliary role,[12] abolishing the decision-making role previously provided for in the extradition treaties.[13]

RESULTS & DISCUSSION

General Considerations on Guarantees

From a general and concrete interpretation of the provisions of the FD EAW, it is concluded that the objective of the Union has almost been achieved. But on the other hand, as long as criminal justice involves important constitutional principles, there are still provisions which essentially aim to: i) *guarantee due process*; ii) *preservation of sovereign rights related to the administration of criminal justice*; as well as iii) *achieving the objectives of the Union without compromising the goals of the criminal sanction, mainly the rehabilitation and reintegration of convicts*. In this context, *inter alia*, the FD of the EAW, through Article 5, has imposed that in certain legal circumstances, the issuing state must effectively provide certain guarantees to the executing state. Before the amendments brought by Council Framework Decision 2009/299/JHA of February 26th, 2009, the original version of the European Arrest Warrant provided for three guarantees.

First, if the European Arrest Warrant was issued to execute a sentence or a detention order imposed by a decision *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the EAW that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment.[14]

Secondly, if the offense based on which the EAW was issued is punishable by a custodial life sentence or lifetime detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure.[15]

Lastly, in the event that a person who is the subject of a EAW for the purposes of criminal prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State to serve there the custodial sentence or detention order passed against him in the issuing Member State.[16]

Following the amendments of the Framework Decision of the Council in 2009[17], there are now only two guarantees that fall under Article 5. The guarantee related to the judgment *in absentia* has been

[11] Point 5 of the preamble of the Council Framework Decision 2002/584/JHA of June 13th, 2002 on the European Arrest Warrant and the surrender procedures between Member States.
[12] Point 9 of the preamble of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.
[13] R. Burgess and N. E. L. Laskos, "The European Convention on Extradition: A Study of the Impact of the Amendments and Protocols," *European Law Journal* 22, no. 5 (2016): 657-678.
[14] FD EAW 2002, article 5 § 1.
[15] FD EAW 2002, article 5 § 2.
[16] FD EAW 2002, article 5 § 3.
[17] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA [2009] OJ L81.

abolished, and the cases when the decision should be considered as a judgment in absentia have been narrowed through the provisions of a new article, specifically Article 4a.

Judgment in Absentia a Never-ending Debate

A. ECtHR Standards Related to Trial in Absentia

Foremost, it is crucial to clarify that within the framework of a criminal proceeding, the standards established by the European Court of Human Rights (*hereafter referred to as "ECtHR"*) impose on the contracting parties what are to be considered as minimum guarantees regarding the presense and participation of the defendant in the trial conducted against him. This establishes that contracting parties are free to provide further guarantees in their national legislation. Article 6 of the European Convention on Human Rights (*hereinafter referred to as "ECHR"*), provides that anyone accused of a criminal offense enjoys the right to defend himself in person or through legal assistance of his choosing; to have adequate time and facilities for the preparation of his defense; to have the free assistance of an interpreter if he cannot understand or speak the language used in court, as well as the right to actively participate in the questioning of the witnesses against him.[18] As concluded by the ECtHR, it is unrealistic to assume that the defendant can exercise all these rights without being present at the court session.[19] In principle, the trial *in absentia* is not incompatible with the ECHR, but the violation of this principle is established if, after the notification of the accused about the trial in his absence, he is not provided with a legal remedy through which he will able to obtain a new determination of the merits of the charge.[20]

ECtHR has further concluded[21] that the duty to guarantee the defendant's right to be present at the trial or retrial is listed as one of the essential requirements of Article 6.[22] In this regard, the refusal by the court to reopen proceedings conducted in the absence of the accused, without any convincing evidence that the accused has waived his right to be present during the trial, has been found to be a “flagrant denial of justice” making the proceedings “manifestly contrary to the provisions of Article 6 or the principles embodied therein”.[23] As above, the ECtHR is categorical in its assessments. There is no room left for interpretation, guaranteeing that the defendant can effectively exercise all other rights derived from the provisions of Article 6 of the ECtHR.

Even so, in full compliance with the ECHR, the defendant is also provided with the right to waive his right to be present at the trial being conducted against him. However, this waiver cannot be inferred solely from the fact that the defendant does not attend court hearings. As an objective and justifiable reason for the continuation of trial *in absentia* based on the waiver of the defendant it must be proven that the latter has received effective knowledge of the date and time of the trial sessions. The ECtHR has found that the defendant cannot be considered a "*latinante*" (that is, in evasion of justice, a fugitive), if he has not been effectively notified of the date and time of the trial.[24] Additionally the court assesses that the defendant

[18] European Convention on Human Rights [1957], article 6.
[19] *Colozza v. Italy,* Application no 9024/80 (ECtHR, 12 February 1985), par. 27.
[20] *ibid*, par. 29.
Einhorn v. France, Application no 71555/01 (ECtHR, 16 October 2001), par. 33.
Krombach v. France, Application no 29731/96 (ECtHR, 13 February 2001), par. 85.
Somogyi v. Italy, Application no 67972/01 (ECTHR, 18 May 2004), par. 66.
[21] Evelien Brouwer, "Mutual Trust and the Dublin System: Interpreting Asylum Law in the Light of Fundamental Rights" (2022).
[22] *Stoichkov v. Bulgaria,* Application no 9808/02 (ECtHR, 24 March 2005), par. 56.
[23] *ibid,* par. 54-58.
[24] *Colozza* (n 18), par. 29.

must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.[25]

In case the defendant is not personally present at the trial but has appointed a representative to act on his behalf and on his defense, the judgment resulting from such proceedings complies with the *ratio* of Article 6. The ECtHR has emphasized that the state is not to be held responsible for any weaknesses in the defense exercised by the defendant's representative,[26] however, the national authorities are forced to intervene if the behaviour and defense conducted by the representative is ineffective.[27]

Notably, the ECtHR strives for balance and safeguards a standard of effective justice when reasoning about the representation of the defendant in his absence. On one hand, it states that the relationship between the representative and the defendant is a legal relationship of a private nature and with a financial character, yet on the other hand, the ECtHR still allows room for state liability when the representation of the defendant is unproportionally ineffective and damaging to the defendants' position and interests, stating that in trials rendered in absentia, the judges are required to treat an accused's interest with "*scrupulous care*".[28]

The ECtHR deepens its analysis, enriching its jurisprudence and furtherly clarifying that the notification of the defendant regarding the charge against him is a legal act of great importance, since only the fulfilment of this guarantee creates the premises for him to effectively exercise his procedural rights.[29] However, in certain circumstances, the court may continue the proceedings in his absence without prejudice to the abovementioned rights. Such circumstances may include when the accused declares publicly or in writing that he does not want to respond to the summons of the court, or when he manages to escape and, in this way, actively evades justice.[30]

In this manner, the ECtHR sets precise boundaries between procedural guarantees to enable the defendant's effective protection, but simultaneously indicates circumstances, such as public statements acknowledging the trial or the active evasion of justice, which do not constitute a violation of due process regarding judgments rendered *in absentia*.

Concluding on all the above, the trial in the absence of effective notification of the defendant can be considered in compliance with the ECHR, but on the prerequisite that the defendant is provided the right to retrial on the merits of the case and enjoys the explicit procedural guarantee to exercise this right unconditioned and free form the burden to prove his absence as justifiable. This standard has been set by the *Sejdovic v. Italy* case, where the court assesses that, by its case law, a person convicted *in absentia* who cannot be deemed to have unequivocally waived his right to appear must in all cases be able to obtain a new determination by a court of the merits of the charge. The mere possibility that there might have been a waiver, subject to the submission of evidence by the prosecuting authorities or by the convicted person regarding the circumstances in which he was declared to be a fugitive, cannot satisfy the requirements of Article 6 of the ECHR.[31]

B. Jurisprudence of the Court of Justice of the European Union Regarding the Trial in Absentia

Article 4a of the FD EAW envisages that the executing Member State can refuse the execution of the EWA on the grounds that the requested subject was not present in person at the hearings of the trial from

[25] *ibid,* par. 30.
[26] *Cuscani v. United Kingdom,* Application no 32771/96 (ECtHR, 24 September 2002), par. 39.
[27] *Daud v. Portugal,* Application no 11/1997/795/997 (ECtHR, 21 April 1998), par. 38.
[28] *Cuscani v. United Kingdom* (n 24)*,* par. 39.
[29] *T.v. Italy,* Application no. 14104/88 (ECTHR, 12 October 1992), par. 28.
[30] *Iavarazzo v. Italy,* Application no 50489/99 (ECtHR, 4 December 2001), par. 46.
[31] *Sejdovic v. Italy,* Application no 56581/00 (ECtHR, 1 March 2006), par. 39.

which the judgment on his culpability was rendered and consequently he was tried *in absentia*. However, as we have emphasized in the second chapter of this paper, the FD EAW additionally provides that if certain exhaustive procedural guarantees relating to the principle of due process have been respected throughout the trial *in absentia*, there are no grounds for the executing state to refuse the surrender of the requested person to the issuing state.

Specifically, Article 4a (a) of the FD EAW provides that the trial is not considered *in absentia* if, in compliance with the procedural provisions of the issuing state and in due time, the person was personally summoned and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial. Additionally to the person's awareness on the scheduled trial the provision sets a second cumulative prerequisite, providing that the requested person must have also been informed on the legal consequences of his absence and the possibility of the continuation of the trial *in absentia*.

Article 4a (b) of the FD EAW provides that the trial is not considered *in absentia* if, in accordance with the procedural provisions of the issuing state, although the person was aware of the scheduled trial and he was still not present in person, he was regularly and effectively represented by a legal counsellor, either appointed by the person concerned or by the State.

Article 4a (c) of the FD EAW provides that the executing state must execute the warrant if, in accordance with the procedural provisions of the issuing state, even though the person has not been regularly notified of the trial against him/her, he/she has been served with the court's decision and further has been expressly informed about the right to a retrial or an appeal on the merits of the case, while enjoying the right to participate on the hearings, but it turns out that concerned person has expressly stated on having no contestations on the decision or he/she has simply not exercised his right within the applicable time frame.

Article 4a (d) provides that the executing state must execute the warrant, even though the subject of the surrender has not been effectively notified of the trial and the rendered judgment against him/her, conditioning that the issuing state has offered an indivualised guarantee, that after the surrender the requested person will be personally served with the decision without delay and will also be expressly informed of his/her right to a retrial, or an appeal concerning the merits of the case.

During the assessment of requests for the approval of the EAW, regarding the meaning and interpretation of certain words/concepts of Article 4a of the FD EAW, the national courts of the Member States have often found themselves in a state of legal ambiguity on the eventual conflict between the Community legislation (supranational law) and the national law. Even though the EU has already taken important steps towards the harmonization of criminal law in both the substantive and procedural aspects, there still remain divergences between the national provisions of the Member States.

In the *Taricco II* judgment,[32] the CJEU has introduced a balancing approach for the interpretation of the hierarchy between supranational EU law and national law. Contrary to its previous practice,[33] the CJEU reasoned that the principle of primacy of EU law cannot be applied if its application violates aspects of national constitutional identity. This can be interpreted that in cases where the application of EU law as supreme conflicts national provisions and leads to the infringement of the principles of legality, legal certainty, or retroactivity *in mitius*, the national courts are challenged to reassess the application of EU law precedence. In this reassessment the national courts remain obliged to comply and apply the national provisions aiming to safeguard constitutional values.

As an introduction to the analysis of CJEU's jurisprudence regarding the interpretation of Article 4a of the EAW, we can primary pinpoint that the Court's approach regarding the principle of primacy of EU

[32] Case C-42/17, *MA and MB (Taricco I),* Judgment of 8 September 2015.
[33] Case C-42/17, *MA and MB, (Taricco II)*, Judgment of 5 December 2017.

law has changed. In the *Melloni* judgment,[34] the CJEU emphasized that the enacted amendments of 2009 were aimed at creating a uniform application regarding the interpretation of the phrase "judgment *in absentia*". Hence the adoption of Article 4a and the repeal of the guarantee previously provided by Article 5 (1) of the FD EAW, intended to facilitate judicial cooperation in criminal matters by improving mutual recognition of judicial decisions between Member States through harmonisation of the grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person.[35] Through the amendments of 2009, Member States can now refuse to execute a request for extradition, only on the grounds that issuing state has not complied by the guarantees provided by Article 4a. *A contrario*, if the issuing state guarantees the executing state that the warrant complies by the prerequisites of article 4a, the latter cannot request additional guarantees. This stance was also held by the CJEU in the *Melloni* judgment, where the reasoning of the Court clarifies that the issuing state "*cannot be obliged to offer more guarantees*" than those provided by Article 4a, applying the principle of primacy of EU law and the principle of effectiveness.

In the *Dworzecki judgment,*[36] the CJEU interpreted the phrase "was *summoned in person or by other means actually received official information"*. In this ruling the CJEU appears to have maintained a standard previously established by the ECtHR. Just as in the case of *Sejdovic v. Italy*,[37] the CJEU re-emphasized that the notice on the accusation must be made directly to the accused, finding the notice directed to the family members cohabiting with the accused as ineffective and in infringement of the guarantees provided by the Article 4a. By means of this decision the CJEU basically establishes that in EWA procedures, the issuing state must priorly specify and clarify the notice of the accused on the trial, in order to request his surrender. Conversely, if the issuing state fails to prove the effective notification, based on Article 4a (1) (d) (i), it must guarantee that after surrender the requested person will be granted and personally informed on his right to retrial or appeal on the merits of the case.

In the *Tupikas judgment*,[38] the CJEU clarified that the phrase "*trial resulting in the decision*" also includes the trial in the court of appeal. Meaning that in case the trial process in the first instance was held in compliance with the guarantees of Article 4a, but a violation of these guarantees occurred throughout the trial in the court of appeal, the entirety of the trial which resulted in the final judgment will be considered *in absentia*. This interpretation of the guarantees of Article 4a must be understood as applicable on the appellate proceedings concerning the culpability of the requested person and his/hers eventual conviction. This stance was also confirmed in the *Zdziaszek judgment.*

Referring to the jurisprudence of the CJEU, the prerequisites and guarantees on the trial *in absentia* seem to be applicable only on the judicial proceedings concerning the merits of the case and hence the culpability of the requested person. In its caselaw the CJEU states that Article 4a does not provide protection through its guarantees for the trial *in absentia* concerning proceeding on matters of the execution of a criminal decision. Specifically, in the *Ardic judgment*,[39] the CJEU states that a trial which results in the revocation of a previous decision on the suspension of the custodial sentence is not included in the phrase "*trial resulting in the decision*", with the sole condition that the judgment which revoked the suspension of the custodial sentence has not changed the nature and extent of the initial suspended conviction. We consider through this interpretation the CJEU seems to have lowered the level of protection provided by Article 4a. In our assessment, although the judgment to revoke the suspension of the execution of the sentence does not constitute a substantial decision on the culpability of the convicted, it still heavily affects the procedural guarantees of due process, as in the event of an effective notice of the convict and his

[34] Case C-399/11, *Melloni,* Judgment of 26 February 2013.
[35] *ibid*, par. 43
[36] Case C-108/16 PPU, *Dworzecki*, Judgment of 24 May 2016.
[37] *ibid.*
[38] Case C-270/17, PPU, *Tupikas*, Judgment of 10 August 2017.
[39] Case C-571/17 PPU, *Ardic*, Judgment of 22 December 2017.

presence in the trial, the court could rule the dismissal of the request for revocation of the decision on the suspension of the custodial sentence.

Equally, in the *Minister for Justice and Equality judgment*[40] the CJEU analyzes and reiterates that the judgment/decision which revokes a decision on the suspension of a prison sentence is not included in the phrase "*trial resulting in the decision*", with the sole condition that this judgment has not changed the nature and extent of the initial suspended conviction. Yet this case holds a notable specific, as a EAW was issued on the grounds of a second criminal decision rendered *in absentia,* and which additionally had automatically revoked the suspension of the custodial sentence imposed by a prior judgment, based on the applicable national provisions of the issuing state.

Contrary, in the *Zdziaszek judgment*[41] the CJEU takes a different approach on the execution phase of a judgment. Unlike the *Adric judgment,* in which the Court emphasized that the trial on matters of the execution of a criminal decision, and more specifically the judicial process on the suspension of a prison sentence, is not covered by the provisions of Article 4a, in the *Zdziaszek judgment***,** which concerned a trial aimed at ruling an aggregated sentence, the CJEU emphasized that this proceeding holds a certain importance, as the court can change the extent of the conviction. In this light, the CJEU reasoned, as we quote: *"the concept of 'trial resulting in the decision', within the meaning of Article 4a(1) must be interpreted as referring not only to the proceedings which gave rise to the decision on appeal, where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those that led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard.".*

In the *Generalstaatsanwaltschaft Hamburg judgment* [42] the CJEU concluded that Article 4a FD EAW must be interpreted as meaning that the executing judicial authorities cannot refuse to execute an EAW issued for the purpose of executing a custodial sentence or detention order, where the person concerned has prevented the service of a summons on him in person and did not appear in person at the trial because he had absconded to the executing member state. The Court further clarifies, recalling its previous practice[43] that Article 4a (1) of the FD EAW harmonizes the conditions of execution of an EAW in case of a judgment rendered *in absentia.* It limits the grounds of refusal to execute the EAW, listing in a precise and uniform manner[44] the conditions under which the recognition and enforcement of a decision taken in the absence of the person concerned, cannot be refused. Hence in the circumstances where the person subject to the warrant has not appeared in person at the trial, as he was actively avoiding justice by absconding during the proceedings, the executing state cannot condition the surrender of the person to the guarantee of a retrial on the merits of the case. The harmonization of the legal situations in which it is considered that the trial was conducted in accordance with the right of defence according to Article 47 and 48 (2) of the Charter of Fundamental Rights of the European Union,[45] makes it impossible for the executing state to refuse the surrender of the requested person or request additional guarantees from the issuing state.

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[40] Cases C-514/21 and C-515/21, *Minister for Justice and Equality (Levée du sursis),* Judgment of 23 March 2023
[41] Case C-271/17 PPU, *Zdziaszek,* Judgment of 10 August 2017.
[42] Case C-416/20 PPU, *Generalstaatsanwaltschaft Hamburg*, Judgment of 17 December 2020
[43] (paragraphs 36 and 37, with reference to *Tupikas* and *Melloni*).
[44] *idem*.
[45] *Article 47 Right to an effective remedy and to a fair trial*
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Analyzing the above-mentioned decisions, it seems that the CJEU maintains a supranational and community-centered approach, emphasizing that the legal instrument of EAW is a value which must be respected within the area of freedom, security and justice. The CJEU highlights that now, by means of the FD EAW there exist a certain harmonisation between the principle of due process with respet to the trial *in absentia* and the procedural guarantees related to the personal attendance in judicial proeedings, leaving no more room for Member States to mistrust each other.

In almost all the above decisions, the ECJ has followed the interpretation of the ECtHR regarding the respect of the right to be heard as part of the principle of due process, but, in the *Adric* judgment, the ECJ seems to have taken a step back for the guarantee of due process. As we have explained above, even though the decision to revoke the suspension of the execution of the sentence does not constitute a merit judgment, it affects the procedural guarantees on the due process, since in the event of its effective notification, the court could have on the dismissal of the prosecution's request for revoking the decision to suspend the execution of the sentence.

Meanwhile, as regards the provisions of Albanian legislation in extradition procedures, Article 491 of the Code of Criminal Procedure provides that the Albanian state refuses extradition when the requested person has been convicted *in absentia*, except when the requesting state provides a guarantee for the review of the decision. To define the phrase "convicted in absentia", we need to emphasize that the Albanian procedural legislation and the practice of the Supreme Court of the Republic of Albania directly apply the decisions of the ECtHR in the case of the protection of fundamental human rights and freedoms.[46] In this sense, Albania formally guarantees mutatis mutandis as the ECtHR reasons in the decisions cited in chapter 3.1 of the paper.

C. The Guarantee for Review of the Penalty or Measure Imposed in Cases of Custodial Life Sentence or Life-time Detention

Life imprisonment is the most severe punishment provided by the Criminal Codes of the European Union Member States. In the Criminal Code of the Republic of Albania, life imprisonment is provided mainly for crimes commited against the right to life.[47] As for the possibility of early conditional release, the Criminal Code of the Republic of Albania provides it to be generally inapplicable in cases of imprisonment.[48] Even so, in exceptional circumstances, when the convict has served 35 years of imprisonment and during this time has presented an exemplary behavior and it is estimated/assessed that the objective of rehabilitation has been achieved, the convict can be released on parole.[49] On the other hand, Article 65 (3) of the Criminal Code of the Republic of Albania provides that for certain very serious criminal offenses, the convicted person enjoys no legal remedies which enable him to be subject to conditional released. The offenses for which release on parole is categorically prohibited are: i) murder for blood feud, ii) murder of public officials (deputy, judge, prosecutor, lawyer, military or other public officials), iii) murder of state police officers, iv) murder due to family relations, v) sexual or homosexual relations with a minor when the consequence of the act is the death or suicide of the minor.

The caselaw of the ECtHR favors the enactment of legal remedies which enable the release on parole after a period of the conviction has been served. In the judgment of *Nivette v. France,*[50] the ECtHR

Article 48 Presumption of innocence and right of defense
1. Everyone who has been charged shall be presumed innocent until proven guilty according to law.
2. Respect for the rights of the defense of anyone who has been charged shall be guaranteed.

[46] Decision (Unitary) Nr. 00-2021- 1317 113), date 22.07.2021 of Supreme Court of Albania, par 150.

[47] See Articles 73, 74, 75, 78, 78/a, 79, 79/a, 79/b, 79/c, 100, 109, 109/b, 109/c, 110/a, 128/b, 141, 208, 209, 219, 230, etc,

[48] Article 65 (1) of the Criminal Code of the Republic of Albania.

[49] Article 62 (2) of the Criminal Code of the Republic of Albania.

[50] *Nivette v. France*, Application no. 44190/98 (ECtHR, 2 July 2001).

dismissed the applicant's claim on the violation of Article 3 of the Convention, since the circumstances of the case showed that the United States of America, through the competent Prosecutor, had guaranteed the requested state that the applicant would not be sentenced to life imprisonment without the possibility of conditional release.

In the case of *Babar Ahmad and others v. the United Kingdom*[51], the ECtHR slightly reversed its earlier stance, reasoning that since the applicants had not yet been sentenced to life imprisonment, it could not be presumed that the remedies on conditional release or reduction of punishment severity would not apply to them. Contrary to its previous caselaw, the ECtHR concluded that there is no violation of Article 3, solely based on the general provisions of the national law on the possibility of conditional release or review of the penalty or measure imposed, without verifying or requiring a specific guarantee that said provisions were applicable on the circumstances of the applicant.

The most important case in this context is the *Trabelsi v. Belgium*[52] In this case, the ECtHR concluded that the extradition of the applicant to the United States of America was in violation of Article 3 of the Convention, reasoning as follows: "*... the sentence of life imprisonment against an adult, provided that it is not disproportionate, is not prohibited in itself by any provision of the Convention. On the other hand, if it were to be in accordance with Article 3, such punishment should not be irreducible de jure and de facto. In order to assess this request, the Court had to ascertain whether a life-sentenced prisoner had any possibility of release and whether national law offered the possibility of a review of this sentence with a view to commuting, pardoning, terminating or paroling the prisoner. Furthermore, the prisoner had to be informed of the terms and conditions of this review opportunity at the beginning of his sentence. The Court also reiterated that Article 3 implied an obligation on contracting states not to extradite a person to a state where he or she would be in real danger of being subjected to ill-treatment. In the present case, the Court considered that, given the gravity of the terrorist offenses with which the applicant was charged and the fact that a sentence could only be imposed after the trial court had considered all relevant mitigating and aggravating factors, the discretionary life sentence would not be grossly disproportionate. However, it was stated that the American authorities at no time had given any concrete assurance that the applicant would not be sentenced to non-reducible life imprisonment."* It is interesting to highlight that in this case, the applicant was surrendered through extradition procedures even though the ECtHR had issued *an interim measure*.

Reflecting on all the above, it is notable that the enactment and provision of legal remedies aimed at the review or non-execution of custodial life sentences constitutes an obligation for Member States of the Council of Europe. Therefore, in Article 5 of the FD of the EAW, it is provided that if the offence on the basis of which the EAW has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years. Undoubtly, the provision of this article is in line with the above-cited decisions of the ECtHR. That is because the issuing state is presumed to have guaranteed the executing state solely by proving that in its legislation there exist certain applicable legal remedies and not by offering additional guarantees that enable safe early parole after 20 years.

In the analysis of the Albanian procedural legislation, the provision of a guarantee for the possibility of revising the life sentence by the requesting state (the state that requests the surrender of the subject of the extradition request), is not a condition for the approval of the extradition request. Eventually, referring to the above-mentioned jurisprudence of the ECtHR, Albania risks being found in violation of Article 3 of the ECtHR, since the approval of requests for extradition with the object of handing over subjects sentenced to life imprisonment is a common practice for Albanian courts. As far as the community legal framework

[51] *Babar Ahmad and others v. United States,* Application no. 24027/07*,* 11949/08*,* 36742/08*,* 66911/09 and 67354/09*,* (ECtHR,10 April 2012).
[52] *Trabelsi v Belgium,* Application no. 140/10, (ECtHR, 4 September 2014).

is concerned, conformity with Article 3 of the ECtHR has been regulated by providing in Article 5 of the FD EWA the provision of a guarantee for the possibility of revising the measure of life imprisonment

D. Guarantees Providing Protection for the Citizen or Resident of the Executing Member State

As we have elaborated in the introduction of this paper, the enactment of the FD EAW has strengthened the cooperation and mutual trust between Member States, establishing the mechanism of mutual recognition of criminal decisions within an area oof freedom, security and justice without internal borders.[53] On the other hand, the provisions of the FD EAW were envisaged in harmony with other legal instruments of the European Union in the criminal field, specifically with the Council Framework Decision 2008/909/JHA of November 27th 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, amended by Framework Decision 2009/299/JHA of February 26th 2009. The above-mentioned Framework Decision establishes the appropriate mechanisms for the transfer of convicts to their country of origin, since the aim of the European legislator is the rehabilitation of the convict and not his severe punishment.

Article 5 (3) of the FD EAW, provides that, in the event that the subject of the request for the EAW for the purposes of criminal prosecution is a citizen or resident of the executing state, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

By means of this guarantee, the executing state puts its trust to the judicial jurisdiction of the issuing state with regard to the final judgment, but on the other hand, in order to ensure an the effective rehabilitation of the person concerned, it requires for the sentence to be served under its jurisdiction, where the most imprtant factor is deemed to be the closeness of the convicted to his/her family and the social and cultural circumstances of his/her origin.

The rightful identification of citizenship can be easily achieved by means of legal documentation of identity such as the ID card or a passport, while regarding the phrase status of a resident and the phrase "*the state where he lives"*, the objective connections of the sentenced person with this state should be assessed. The phrase "*the state in which the sentenced person lives"* is clarified in paragraph 17 of the preamble of *the Framework Decision*. According to this provision, the state of residence is the state to which the person is connected based on habitual residence and elements such as, for example, family, social or professional ties. The CJEU has clarified that the determination of a person's connection with an executing state must be based on an overall assessment of "*various objective factors characterizing the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State"*.[54] Furthermore, the CJEU clarified that the term "*resident"* is to be interpreted as meaning that the person must have established his residence in the executing member state and additionally after a sustained period of presence in that State he/she has demonstrates a certain degree of integration in the society of the member state.[55]

In the *I.B judgment*, which belongs to the period before the changes related to the reconceptualization of the guarantee for judgment *in absentia*, the CJEU has reasoned as follows: "*Articles 4(6) and 5(3) EAW FD should be interpreted as meaning that the execution of an EAW issued for the purpose of executing a sentence imposed in absentia within the meaning of Article 5(1) of the EAW FD may be subject to the condition that the person concerned, a national or resident of the executing Member State, must return to*

[53] C-128/18, *Dorobantu,* Judgment of 15 October 2019, par. 36, and C-216/18, PPU *Minister for Justice and Equality (Deficiencies in the justice system)*, Judgments of 25 July 2018, par. 46.
[54] C-66/08, *Kozłowski,* Judgments of 17 July 2008, par. 48.
[55] Case C-123/08,*Wolzenburg*, Judgment of 6 October 2009), par. 70.

the executing Member State, as the case may be, to serve there the sentence given to him, after a new trial carried out in the presence of the person in the issuing Member State. An executing Member State may make the surrender of a person in a situation such as that of I.B subject to the joint application of the conditions set out in Articles 5(1) and 5(3) EAW FD."

In this case, the CJEU clarified that the execution of the EAW can be subject to a double guarantee. More specifically if the requested person is a citizen of the executing state and, on the other hand, the sentence against him was rendered *in absentia*, the issuing state must provide two guarantees, firstly, the guarantee relating to the right of a retrial or appeal on the merits of the case in respect to the right of the surrendered person to participate in trial, and secondly, it will guarantee that after being tried, the surrendered person will be returned to the issuing state to serve the sentence there.

In the *SF judgment*[56] a preliminary ruling was requested from the CJEU to answer the question, whether the guarantee of return to the state of citizenship or residence must be interpreted that the return may be postponed by the issuing state until a definitive decision has been taken on a penalty or an additional measure such as a confiscation order. The CJEU clarifies that such return may be delayed until a final decision is reached on a penalty or an additional measure, such as a confiscation order, provided that such a measure or order is imposed in the context of criminal proceedings and that that procedural stage relates to the same offence as that giving rise to the EAW at issue.[57]

However, as it occurred in the above judgment, the United Kingdom (issuing state), in the reply transmitted to the Netherlands (the executing state), clarified that it would return the requested person to the Netherlands as soon as the decision had become final and after all other proceedings relating to the offence issued in the EAW had been completed. Regarding the parallel proceedings, the United Kingdom clarified that it was a matter of assessing the eventual measure of confiscation.[58] The United Kingdom also requested that the Netherlands made no changes or adaptions to the sentence rendered by the British court.

The CJEU answered the questions submitted by the referring court (the Dutch court), concluding that the issuing Member State must return the surrended person as soon as the sentencing decision against him has become final, unless there are concrete grounds related to the rights of the protection of the person or with the proper administration of justice, which make his presence essential in the issuing Member State pending a final decision on any procedural step that is included within the scope of criminal proceedings related to the offense that is the basis of the EAW. On the other hand, the CJEU concluded that the executing Member State must adjust the length of the sentence imposed by the issuing State only within the strict conditions set out in Article 8, paragraph 2 of Framework Decision 2008/909/JHA, as amended by Framework Decision 2009/299/JHA.[59]

In this judgment, the CJEU attempted to preserve a balance between the guarantee and right to rehabilitation in the country of citizenship or residence and the principle of good administration of criminal justice. The CJEU seems to have prioritized criminal justice, clarifying that any judicial proceeding (mainly confiscation procedures) related to the judgment that resulted in the person's sentence must be completed, in order to then carry out his return to the country of citizenship/residence. Also, the CJEU strictly adhered to the provisions of the Framework Decision 2008/909/JHA, instructing the issuing state that it is not under its jurisdiction to adapt or change the measure or extent of the rendered sentence in such a way as to make it correspond to the sentence that would have been imposed in that Member State for the offence in question.

[56] Case C-314/18, *SF (Mandat d'arrêt européen – Garantie de renvoi dans l'État d'exécution),* Judgment of 11 March 2020.
[57] ibid, par. 91.
[58] ibid, par. 18.
[59] The conclusions of the ECJU in the case C-314/18, *SF (Mandat d'arrêt européen – Garantie de renvoi dans l'État d'exécution),* Judgment of 11 March 2020.

The conversion of the sentence must be carried out in accordance with the Framework Decision 2008/909/JHA without the need to provide a special guarantee.

Meanwhile, in principle, the Albanian legislation provides that the Albanian citizenship of the requested person is one of the reasons for the rejection of the request for extradition.[60] However, in cases where Albania has bilateral or multilateral agreements, this condition does not apply, so Albania also surrenders its citizens. In this context, we can mention the bilateral agreements with Italy[61], Great Britain[62], the United States of America[63], Spain[64] and Kosovo[65]. These international agreements provide that the parties will mutually hand over their citizens to each other.

CONCLUSION

The adoption of the FD EAW has brought significant improvements regarding the surrender of persons wanted by criminal justice for the purpose of non-execution of sentencing decisions or detention orders.[66] However, it should be noted that mutual handover is not automatic. Executing States retain the right to verify the mandatory conditions, optional conditions and guarantees that the framework decision provides. In terms of the principle of due process and more specifically regarding the right of the accused to be effectively notified of the trial against him and to participate personally in the judicial session, the FD EWA has harmonized all legal situations which are considered that they fulfil the above guarantees, leaving no possibility of interpretation by the courts of the Member States. Regarding the meaning of the accused's guarantees to be personally and effectively notified of the judgment against him, the ECtHR has already taken the same position as the ECtHR, with the exception of one case. The CJEU has considered that it is not included in the term "trial", the case in which this trial had as its purpose only the trial of the request of the prosecution for the revocation of the suspension of the execution of the prison sentence. The ECtHR clarifies in this case that it is enough for the court not to change the measure of punishment to consider that this judgment did not violate the judgment of the merits/sentence against him.

As we have expressed inside the paper, we think that in this case, the accused should be guaranteed a retrial of the prosecution's request for the revocation of the suspension of the prison sentence and conditional release, since he, in this trial, can to present evidence, which, if it had been examined by the court before the decision-making, is considered to be essential to overturn the prosecutor's request and would eventually make it possible for the decision on the suspension of the prison sentence (conditional release) to remain in force). As for the other two conditions, we think that the ECtHR has already given an exhaustive understanding of the meaning of the relevant legal provisions, stressing that the purpose of criminal justice is the reintegration and rehabilitation of convicted persons as best as possible.

[60] Article 491 (e) of the Code of Criminal Procedure.
[61] Law No. 9871, dated February 11, 2008 for the Ratification of the Agreement between the Republic of Albania and the Republic of Italy as an Addendum to the European Convention on Extradition of December 13, 1957 and the European Convention on Legal Assistance in Criminal Matters of April 20, 1959, which aims to facilitate their implementation [2008] OJ 26.
[62] Law No. 93, dated September 29, 2017 on the Ratification of the Agreement between the Republic of Albania and the United Kingdom of Great Britain and Northern Ireland supplementing the European Convention on Extradition of 1957 [2017] OJ 179.
[63] Law No. 67, dated May 20, 2021 for the Ratification of the Extradition Treaty between the Government of the Republic of Albania and the Government of the United States of America [2021] OJ 90.
[64] Law No. 17, dated February 17, 2022 for the Ratification of the Agreement between the Republic of Albania and the Kingdom of Spain as an addition to the European Convention on Extradition of 1957 [2022] OJ 33.
[65] Law No. 2, dated January 31, 2013 for the Ratification of the Agreement between the Council of Ministers of the Republic of Albania and the Government of the Republic of Kosovo on Extradition [2013] OJ 11.
[66] Wouter van Ballegooij, "The Nature of Mutual Recognition in European Law" (2016).

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