

Social Fieldwork Research (FRANET)

European Arrest Warrant proceedings – safeguards for requested persons

Belgium

2022

Contractors: Fundamental Rights Centre, Vrije Universiteit
Brussel

Authors: Dr. Mathias Holvoet, Júlia Zomignani Barboza

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EXECUTIVE SUMMARY

Right to information

In Belgium, requested persons are duly informed about their rights after having been arrested upon an EAW. The requested person is informed through a Letter of Rights, which is provided to them by the police upon arrest.

The requested person is informed about the contents of the EAW, first by the police and subsequently by the investigative judge. In the majority of cases, this happens orally. The information provided is generic and includes information about the charges laid down against the requested person and whether it constitutes an EAW for the purpose of prosecution or for the execution of a sentence. Moreover, the requested person is duly informed about the specialty rule and the implications of renouncing the specialty rule.

Yet, it is less clear whether judicial authorities ensure that the information provided is understood by the requested persons, and this is especially true for as concerns the specialty rule and the renunciation of the specialty rule. Indeed, it could be questioned whether the Belgian judicial authorities' practice is always in compliance with Article 13 paragraph 2 of the Belgian EAW Act, which specifically states that the prosecutor in charge has to draft a police report (*proces-verbaal*) in which it is stated that the requested person has to be "fully aware" of the consequences of the renunciation of the specialty rule. From the research, it could not be concluded that prosecutors ensure and report that the requested persons are "fully aware" of consequences of the renunciation of the specialty rule, because i) at times the prosecutors in charge do not seem to verify whether the requested person has understood the information provided, as they assume this is the role of the requested person's lawyer; and ii) several prosecutors interviewed acknowledged that they cannot be certain whether the requested person understands the information provided, such as information about the consequences of the renunciation of the specialty rule.

Right to interpretation and translation

Requested persons in EAW proceedings can generally rely on interpretation and translation at all stages of the proceedings and no major deficiencies or problems have been identified throughout the research.

However, the fact that the EAW and other potential essential pieces of the case file are not necessarily translated in a written form in a language the person understands but only through oral interpretation could raise some concerns. Article 10/2 of the Belgian EAW law provides that the fact that only an oral translation or oral summary of the case file is provided cannot negatively impact the fair conduct of the proceedings and that it should be laid down in the police report that such a translation has been provided. In practice however, it is not at all clear whether it is sufficiently ensured that the requested person fully understands the oral interpretation and that it does not affect the fair conduct of proceedings.

In addition, the legal professionals interviewed had differing views about whether the state provided interpretation for consultations between the lawyer and requested person, indicating some lack of clarity regarding this. Since consultations are not very useful if the requested person and their lawyer cannot understand each other, this may pose a problem for the defence.

Right to access to a lawyer

The system put in place guaranteeing legal representation for requested persons arrested on the basis of an EAW in Belgium is generally considered to be working very well. Yet, some areas of concern could be identified.

First of all, requested persons in Belgium do not have much leeway to choose or contact a lawyer of their choice in case they do not already know a lawyer themselves. Where they do not have their own lawyer, requested persons are assigned a state-funded lawyer but have no say in the assignment.

Second, while the right to legal representation in the issuing state is explicitly provided for in Article 10/1 of the Belgian EAW law and mentioned in the Letter of Rights provided to the requested person, it can be based on the research be concluded that legal professionals are barely aware of this right. Moreover, requested persons are rarely informed of this right, and there is no system in place to facilitate the exercise of this right, nor is there any specific remedy available in case the requested person is not informed of the right.

Third, lawyers representing requested persons in EAW procedures in Belgium often lack the technical legal expertise on EAW proceedings. Therefore some lawyers do not take their task of providing legal representation in EAW proceedings very seriously and treat it as a formality, which could potentially negatively affect the legal representation of requested persons.

Issuing and execution of the EAW – factors considered

When issuing and executing EAWs, the research found that the individual and personal situation of the requested person, such as illness or pregnancy, is taken into account by judicial authorities, and may lead to the suspension of the procedure to issue or execute an EAW.

Moreover, judicial authorities were of the view that they consider proportionality when issuing EAWs, for example by looking at the seriousness of the facts for which the EAW is to be issued or by considering less intrusive measures than EAWs. However, the lawyers interviewed felt that this was not the case. The interviewees agreed that the EAWs that Belgium is asked to execute are often disproportionate and that a solution to this could be contacting the issuing authority to ask them to withdraw the EAW in question or to propose an alternative measure. Yet, some of the lawyers interviewed stated that Belgian judicial authorities would be reluctant to take such steps, which was confirmed by the judicial authorities, who referred to needing to be mindful of the principle of mutual recognition.

The same divergence can also be detected when it comes to taking into account detention conditions or the right to fair trial in the execution of EAWs. While judicial authorities state that arguments on these bases will in general be considered, the lawyers are much more sceptical in this regard and do not detect much openness and willingness among the respective judicial authorities to engage with arguments on these bases. Even judicial authorities concede that arguments on the basis of detention conditions and the right to fair trial in favour of the non-execution of EAWs rarely succeed. Thus, the limited instances in which Belgian judicial authorities have recognised detention conditions and the right to a fair trial as a ground for refusing to execute EAWs should be considered as the exception to the rule. Most judicial authorities will be deferential to the issuing authorities and rely on the principle of mutual recognition. Here, the lack of knowledge of the relevant ECJ jurisprudence also seems relevant. Most judicial authorities do not seem aware of jurisprudence on fair trial and detention

conditions or do not have a thorough understanding of it, which is why they are reluctant to engage with arguments on these bases.

INTRODUCTION

The following eight interviews have been conducted in the framework of this project:

- Four interviews with lawyers, all conducted in the interviewee's office.
- Four interviews with members of the judiciary (three prosecutors and one judge), of which two were conducted face-to-face in the interviewee's office, one was conducted online via Zoom and one was conducted partly at the interviewee's office and partly via Zoom. Regarding the latter interview, part of the face-to-face interview was not recorded due to technological issues, which is why the interviewee was reinterviewed through Zoom.

The Covid-19 pandemic did not impact the interviews as there were no restrictions to meetings in place when the fieldwork was conducted.

○ PREPARATION OF FIELDWORK, IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS

The identification and selection of interviewees was carried out according to a few fundamental criteria aiming to have a balanced set of interviewees: gender, regional representativeness (interviewees from Flanders, Brussels Capital Region and Wallonia) and experience (identification and selection of both experienced and more junior interviewees already having considerable experience in EAW proceedings). To identify and select judicial authorities as interviewees, the interviewer (Dr. Mathias Holvoet) relied mainly on his own network, established when he was working as a lawyer at the Federal Prosecutor's Office. The selection and identification of lawyers as interviewees was done through online research, by searching websites of law firms for specialisation in EAW procedures. While it was challenging to identify lawyers who matched all requirements and responded positively to an interview request, the first lawyers who accepted to be interviewed were able to share the contacts of suitable persons to be interviewed (snowballing), which enabled the identification and selection of the remaining interviewees.

○ SAMPLE AND DESCRIPTION OF FIELDWORK

Defence lawyers:

Requested: 4, completed: 4

Judges/prosecutors:

Requested: 4, completed: 4

Table 1: Sample professionals

	Group	Expertise in EAW proceedings	Gender
1	Defence lawyer	Considerable EAW expertise, evidenced for example by publication on new EAW legislation on personal website.	Female
2	Defence lawyer	Considerable EAW expertise, was appointed this year to act as lawyer in high-profile EAW cases.	Male
3	Defence lawyer	Considerable EAW practice, has published pieces on EAW proceedings on law firm's website and social media.	Male

4	Defence lawyer	Considerable EAW practice, represented suspects in transnational terrorism cases.	Female
5	Prosecutor/Judge	Great deal of expertise in EAW proceedings and experience in international judicial cooperation for the Antwerp region.	Female
6	Prosecutor/Judge	Considerable expertise in EAW proceedings, experience in international judicial cooperation for the Liege region.	Female
7	Prosecutor/Judge	Good amount of expertise in EAW proceedings, competent prosecutor in charge of EAW cases for the Charleroi region.	Female
8	Prosecutor/Judge	Considerable expertise in EAW proceedings, responsible for issuing and executing EAWs as an investigative judge for the Antwerp region.	Male

Overall, the interviews went well, there were no major incidents and all interviewees agreed without hesitation to be recorded, were open and in general showed interested when answering the questions. Four interviews lasted around one hour, with two interviews (one with a lawyer and one with a judicial authority) lasting considerably longer. Despite the lengthier interviews, these interviewees provided interesting and pertinent answers, without unnecessarily elaborating their answers. Two interviews (one with a lawyer and one with a judicial authority) were also considerably shorter, lasting about 45 minutes. At times, these interviewees seemed uninterested or gave the impression to be in a hurry. Yet, their answers were relevant, to the point and useful for the purpose of the research project.

○ DATA ANALYSIS

The interviews were based on questions sent by the European Union Agency for Fundamental Rights (FRA) and addressed procedural rights of requested persons in EAW proceedings in Belgium by focusing on the following themes: the right to information, right to interpretation and translation, right to a lawyer, the issuing and execution of an EAW and the digitalisation of EAW proceedings. When needed, follow-up or clarifying questions would be posed to the interviewees. After the interviews were held, interview reports of all interviews were completed based on the interviewer's notes and the recordings of the interviews.

After all interview reports were completed, the answers of each interviewee for each question were compared and analysed in light of the findings of the desk research. Similarities and divergences between each question were identified. The main recurring themes were distilled from this comparing exercise and were presented as main findings in relation to the themes of the research.

○ BRIEF OVERVIEW OF THE REPORT'S CONTENTS

This report summarises the legal framework regulating the EAW in Belgium and presents the findings of eight interviews held with lawyers and members of the judiciary on the practical application of this

framework. More specifically, the report focuses on the right to information, right to interpretation and translation, right to a lawyer, the issuing and execution of an EAW and the digitalisation of EAW proceedings. Challenges and best practices identified during the interviews are also reported.

RESEARCH FINDINGS

1. Right to information

a. Legal overview

Article 10/1 of the Belgian European Arrest Warrant Act (hereafter EAW Act),¹ which implements the EAW Framework Decision, provides that, the requested person is to be provided with a written declaration (or Letter of Rights) which outlines their rights without undue delay, after the effective deprivation of liberty and before the interrogation before the investigative judge. In the articles' paragraphs, it is specified that this declaration should inform the requested person of:

Paragraph 1°: Their right to be notified of the existence and content of the European Arrest Warrant or signalisation.²

Paragraph 2°: Their right to be assisted by a lawyer and an interpreter, and of their right to inform a third person that they have been deprived of their liberty. As concerns the right to be assisted by a lawyer, the relevant rules of Belgian criminal procedure apply.

Paragraph 2°/1: The right to appoint a lawyer in the issuing state. The lawyer in the issuing state provides assistance to the lawyer in Belgium, by providing them with assistance or advice which would enable the requested person to effectively fulfil their rights under Framework Decision on the European Arrest Warrant.

Paragraph 3°: That they will be brought before the investigative judge within 48 hours after they have been deprived of their liberty.

Paragraph 4°: That they have the possibility to consent to their surrender to the issuing judicial authority.

The written declaration (or Letter of Rights) can be consulted in multiple languages on the website of the Ministry of Justice.³

In the Letter of Rights, the consequences of consenting to surrender are not explicitly explained, but it is stated that the prosecutor will further explain the consequences.

Article 13, paragraph 1 of the EAW Act prescribes that the competent prosecutor can offer the possibility to the requested person to consent to the renunciation of the speciality rule.⁴ In addition,

¹ Art. 10/1 European Arrest Warrant Act ([Wet betreffende het Europees Aanhoudingsbevel / Loi relative au mandat d'arrêt européen](#)), 19 december 2003. Publication on the Belgian Official Gazette 22 December 2003 (hereafter EAW Act).

² The EAW Act uses the term signalisation to refer to an alert from the Schengen Information System (SIS). This is explicitly specified in Article 9 of the EAW Act.

³ Federale Overheidsdienst Justitie, 'Uw rechten als u van uw vrijheid bent benomen op grond van een Europees aanhoudingsbevel of een signalering / Your rights when being detained following a European warrant for arrest or alert', available online at [Uw rechten als u van uw vrijheid bent benomen op grond van een Europees aanhoudingsbevel of een signalering / Your rights when being detained following a European warrant for arrest or alert - Federale overheidsdienst justitie \(belgium.be\)](#).

⁴ Art. 13 paragraph 1, EAW Act.

the Letter of Rights also states that the renunciation of the speciality rule has to be explicitly consented to.⁵

With regards to the consent to surrender and the renunciation of the specialty rule, Article 13 paragraph 2 of the EAW Act specifically states that the prosecutor in charge has to draft a police report (*proces-verbaal*) in which it is stated that the requested person has to be “fully aware” of the consequences of the renunciation of the specialty rule.⁶ This requires that the competent prosecutor ensures that the requested person fully understands the information about the content and consequences of renouncing the specialty rule.

b. Right to information in practice

- Provision of information (when, how by whom)

7 out of 8 interviewees (all but one lawyer) affirmed that requested persons are informed about their rights, such as the right to remain silent, the right not to incriminate oneself and the right to be assisted by a lawyer, upon arrest by the police. They are informed about these rights in writing through the Letter of Rights. However, one lawyer stated that it is either the prosecutor or the requested person’s lawyer who will inform requested persons about their rights and they will do so orally, not by handing out a Letter of Rights.

- Information about rights

Table 2: Are persons arrested on an EAW informed about their procedural rights?

	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Judicial authority 1	Judicial authority 2	Judicial Authority 3	Judicial authority 4	Total
YES	X	X	X	X	X	X	X	X	8
In writing (letter of rights)	X	X	X		X	X	X	X	7
Orally	-			X	-				1
In writing (letter of rights) and orally									0
NO	-				-				0
Don't know/remember	-				-				0
Did not answer	-				-				0

⁵ Federale Overheidsdienst Justitie, ‘Uw rechten als u van uw vrijheid bent benomen op grond van een Europees aanhoudingsbevel of een signalering / Your rights when being detained following a European warrant for arrest or alert’, available online at

[Uw rechten als u van uw vrijheid bent benomen op grond van een Europees aanhoudingsbevel of een signalering / Your rights when being detained following a European warrant for arrest or alert - Federale overheidsdienst justitie \(belgium.be\)](#).

⁶ Art. 13 paragraph 2, EAW Act.

- Information about the EAW – content and procedure

Table 3: Are persons arrested informed of the contents of the EAW against them?

	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Judicial authority 1	Judicial authority 2	Judicial authority 3	Judicial authority 4	Total
YES	X	X	X	X	X	X	X	X	2
In writing	-								
Orally	X		X	X		X	X	X	6
In writing and orally		X ⁷			X ⁸				2
NO	-							-	0
Don't know/remember	-							-	0
Did not answer	-							-	0

All interviewees confirmed that arrested persons are orally informed of the contents of the EAW against them. First, in a very generic way, by the police upon arrest, and afterwards by the investigative judge who will provide more details, for example on whether it consists of an EAW for the purpose of prosecution or executing a sentence and will specify the charges against the requested person. Only one prosecutor and one lawyer held that at least parts of the EAW will be available upon arrest by the police and before in the investigative judge. The other interviewees held that the EAW will only be available during hearings before the Pre-Trial Chamber.

- Information on consenting to surrender

Table 4: Are the requested persons informed about what consenting to their surrender entails?

	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Judicial authority 1	Judicial authority 2	Judicial authority 3	Judicial authority 4	Total
YES	X	X	X	X	X	X	X	X	8
NO	-								0
Don't know/remember	-							-	0
Did not answer	-							-	0

⁷ One lawyer stated, although admitting not being not fully sure about this – that requested persons also get handed over at least part of the EAW by the police upon arrest.

⁸ One prosecutor stated that 'A copy of the EAW or a translation thereof is at all times available for the requested person (...)`.

Belgium, Judicial Authority

Question 3: Are the requested persons informed about what consenting to their surrender entails?

A: Yes, then we notify that there will be no judicial procedure. (...) That it is an advantage, (...) or could be an advantage, because they will be extradited quicker because oftentimes, they will merely be *in transit here*.

Q: Question 3: Wordt de persoon waarvoor de overlevering wordt gevraagd geïnformeerd over wat het toestemmen met hun overgave inhoudt?

A: Ja, dan geven wij ter kennis dat er dan geen gerechtsprocedure aan te pas zal komen. (...) Dat dat voor hen een voordeel is, (...) een voordeel kan zijn, dat ze dan rapper worden uitgeleverd omdat ze dikwijls hier maar in transit zitten.

- Understanding of information

When it comes to understanding the information provided to the requested person, especially related to the consent to surrender and the renunciation of the specialty rule, the answers given by the interviewees diverge to a certain degree.

With regards the judicial authorities, one investigative judge stated that in general requested persons understand the information provided, but that it is the duty of the lawyer to ensure that the requested person understands the information. The other judicial authorities, however, have different views. One prosecutor mentioned personally going to great lengths “to ensure that the requested person fully understands the EAW and his or her rights, for example with regards the specialty rule” (Belgium, Prosecutor). For another prosecutor, it varies on a case-by-case basis. Some requested persons will clearly understand the information provided, while others, also owing to their state of mental health, will not. Lastly, one prosecutor confirms examining whether requested persons understand the information, but acknowledges that this sometimes takes time.

With regards the lawyers interviewed, one lawyer is of the view that requested persons in general understand the information provided, but says it will ultimately be on the lawyer of the requested person to ensure information is well understood. In the view of this lawyer, judicial authorities do not examine whether requested persons have understood the information provided, except when it comes to the specialty rule, which is cited as a specific example whereby relevant judicial authorities clearly examine whether the requested person has understood the information provided. Beyond this, the requested person’s understanding will depend on their lawyer and their knowledge and experience in EAW procedures. Another lawyer states that requested persons in general understand the information provided, but that it depends on their mental state and intellectual capacities. More specifically, this lawyer stated “(...) I have the impression that in the majority of cases they understand the principles. I will not say they understand every detail. It depends a bit from person to person and also how stressed and agitated people are if they suddenly get arrested for something like that and if they knew it would be coming (...). (...) the stress that goes together with has an impact as well as the intellectual capacities off course but in my experience, they understand what the extradition procedure entails” (Belgium, Lawyer). This lawyer is of the view, however, that judicial authorities pay great efforts to ensure that the requested person understands the information provided. To the contrary, a third lawyer is of the view that is up to the lawyer to make the requested person understand the information provided, such as the specialty rule. In this lawyer’s view, relevant judicial authorities provide the information but do not really examine whether requested persons understand

the information about the EAW and about their rights. The same view is held by another lawyer, who also holds that the requested person's understanding will depend on his or her lawyer's assistance.

c. Discussion of findings

Requested persons are duly informed about their rights after having been arrested upon an EAW. With the exception of one lawyer, who stated that the requested person is informed orally by their lawyer or by the prosecutor in charge, all interviewees have affirmed that the requested person is informed through a Letter of Rights, which is provided to them by the police.

All interviewees affirmed that the requested person is informed about the contents of the EAW first by the police and subsequently by the investigative judge. Most of the interviewees stated that this happens orally, with the exception of one prosecutor, who stated that the requested person has at all times a copy of the EAW at his or her disposal, and one lawyer, who stated that the police hands at least parts of the EAW over to the requested person in writing. Almost all interviewees, with the exception of one prosecutor and one lawyer, stated that the information provided is generic, and includes information about the charges laid down against the requested person and whether it constitutes an EAW for the purpose of prosecution or for the execution of a sentence. All interviewees affirmed that the requested person is duly informed about the specialty rule and the implications of renouncing the specialty rule.

Yet, the interviewees disagreed about the degree of efforts paid by judicial authorities to ensure that the information provided is understood by the requested persons and to check their understanding. Three prosecutors and two lawyers affirmed that significant efforts are undertaken to explain the information provided, such as and most notably the specialty rule. An investigative judge and two lawyers stated that, in general, requested persons understand the information provided, but one lawyer also specified that this will depend on the knowledge and experience of the lawyer who is assisting the requested person. An investigative judge and two lawyers stated that judicial authorities provide relevant information, most notably about the specialty rule, but that it will be up to the lawyer to ensure that the requested person comprehends the information provided.

Given these findings, it could be questioned whether the Belgian judicial authorities' practice is always in compliance with the abovementioned obligation under Article 13 paragraph 2 of the Belgian EAW Act. Indeed, from the interviews, it cannot be concluded that prosecutors ensure and report that the requested persons are "fully aware" of consequences of the renunciation of the specialty rule, because i) at times the prosecutors in charge do not seem to verify whether the requested person has understood the information provided, as they assume this is the role of the requested person's lawyer; and ii) several prosecutors interviewed acknowledged that they do not know for sure whether the requested person understands the information provided, such as information about the consequences of the renunciation of the specialty rule.

2. Right to interpretation and translation

a. Legal overview

Article 10/2 of the EAW Act provides that a requested person who cannot understand the language of the originally drafted EAW or the language of the translation of the EAW (one of Belgium's national languages) has the right to receive a translation. This translation can either be a written translation, an oral translation, or an oral summary of the "essential pieces of the procedure" (*essentiële processtukken*) to a language the requested person understands. It is explicitly stated that the oral translation or the oral summary cannot negatively impact the fair conduct of the proceedings and that it should be laid down in the police report. The translation has to be provided before the pre-trial chamber decides on the execution of the EAW and at the very latest before the final decision concerning the execution of the EAW has been taken.⁹

The translations of the Letter of Rights for requested persons in EAW proceedings are available on the website of the Ministry of Justice.¹⁰ The Letter of Rights is available in a wide variety of languages, but not necessarily always a language the requested person understands. In the Letter of Rights, it is stated that in case a requested person does not understand or speak the language or their lawyer does not understand or speak their language, the requested person has a right to a certified and free translator during their private consultation with the lawyer. The requested person has the same right when being interrogated.¹¹

As can be distilled from the Letter of Rights available on the website of the Ministry of Justice, requested persons have the right to be assisted by a sworn interpreter.¹² Also on the website of the Ministry of Justice, it is stated that candidates to become sworn interpreters have to be able to demonstrate legal knowledge by providing a certificate, which is awarded after having followed a course which fulfils the conditions established by the government.¹³

There are no other legal provisions in place governing other aspects of translation and interpretation in EAW proceedings, such as provisions regulating by whom or how the need for interpretation or translation is determined or provisions on remedies in case the translation/interpretation turns out to have been of insufficient quality.

⁹ Art. 10/2., EAW Act.

¹⁰ See [Uw rechten als u van uw vrijheid bent benomen op grond van een Europees aanhoudingsbevel of een signalering / Your rights when being detained following a European warrant for arrest or alert - Federale overheidsdienst justitie \(belgium.be\)](#).

¹¹ Federale Overheidsdienst Justitie, 'Uw rechten als u van uw vrijheid bent benomen op grond van een Europees aanhoudingsbevel of een signalering / Your rights when being detained following a European warrant for arrest or alert', available online at [Uw rechten als u van uw vrijheid bent benomen op grond van een Europees aanhoudingsbevel of een signalering / Your rights when being detained following a European warrant for arrest or alert - Federale overheidsdienst justitie \(belgium.be\)](#).

¹² Federale Overheidsdienst Justitie, 'Uw rechten als u van uw vrijheid bent benomen op grond van een Europees aanhoudingsbevel of een signalering / Your rights when being detained following a European warrant for arrest or alert', available online at [Uw rechten als u van uw vrijheid bent benomen op grond van een Europees aanhoudingsbevel of een signalering / Your rights when being detained following a European warrant for arrest or alert - Federale overheidsdienst justitie \(belgium.be\)](#).

¹³ See the website of the Ministry of Justice: [Aanvraag tot opname en registratiemodaliteiten - Federale overheidsdienst justitie \(belgium.be\)](#).

b. Interpretation and translation in practice

- Provision of interpretation (decision and means)

All four interviewed lawyers and all four interviewed judicial authorities mentioned that translation is always provided when the requested person cannot understand the language of the procedure, both at the police station and in hearings before a judge. Two lawyers and one prosecutor also said that interpretation is offered free of charge, while one lawyer and an investigative judge mentioned free interpretation is only provided in official proceedings (e.g. hearings) but are not offered for private meetings between lawyer and client, for example when the lawyer is visiting the client in prison (in these cases, private interpretation, paid by the client, is needed). More specifically, this lawyer stated, when being asked whether the consultations with a lawyer are interpreted by a state-appointed interpreter, that "There are differences. If we're in the context of the interrogation with the investigative judge, then it will be paid by the State. If it concerns subsequent consultations with the client, it will be most of the times up to the client to pay for the costs of interpretation" (Belgium, Lawyer).

One lawyer, in turn, said interpretation will always be free for those detained and those who are not in detention will have free interpretation if they cannot afford it (thus, it is dependent on their income).

Belgium, Lawyer

Question 5: Follow-up question: Who assesses whether interpretation is necessary and under what criteria?

A: `In first instance (...) they will ask requested persons themselves if they require an interpreter and if somebody says that they don't require one but it becomes clear throughout the interrogation or whatever that they do require one, then an interpreter will be called for. I assume it will then be the investigative judge who will establish that on that moment (...) this does not work, and an interpreter is after all still necessary. (...) now, if I sense it myself during a private consultation, I would bring it up myself that it does not work without an interpreter, but I have not experienced it yet`.)

Question 5: Wie bepaalt of vertaling nodig is en gebaseerd op welke criteria?

A: `In eerste instantie (...) is dat ze aan die mensen zelf vragen of dat ze een tolk nodig hebben en als iemand zegt dat hij het niet nodig heeft maar het blijkt in de loop van het verhoor of *whatever* dat hij die toch nodig heeft dan zal er toch wel een tolk gehaald worden. Ik neem aan dat dat dan de onderzoeksrechter is die dat op dat moment vaststelt (...) dit marcheert niet ik heb er toch een tolk bij nodig. (...) nu, als ik het zelf aanvoel bij een vertrouwelijk overleg zou ik het zelf ook wel zeggen van sorry dit gaat niet zonder tolk maar ik heb het nog niet aan de hand gehad had.`

Belgium, Judicial Authority

Question 7: Worden de consultaties met een advocaat vertaald door een tolk die is aangeduid door de Staat? Are the consultations with a lawyer interpreted by a state-appointed interpreter?

`Yes, here yes. With us yes. (...) before we interrogate the person or record that he consents (with the surrender), then the confidential consultation here is with an interpreter that we have provided. But I don't know how it is with consultations afterwards. If we arrest him for example, and there was no renunciation, there is no consent, if there are consultations in prison, I assume that if the lawyer is pro deo, one can appeal to assistance of a state-appointed interpreter. But if it is a private client, the costs will be borne by themselves, I assume.`

Question 7: Worden de consultaties met een advocaat vertaald door een tolk die is aangeduid door de Staat?

A: `Ja, hier wel. Bij ons wel. (...) voor dat wij die man ondervragen of akte van nemen dat hij instemt, dan is het vertrouwelijk overleg hier met een tolk die wij hebben voorzien. Maar ik weet niet hoe dat het zit met consultaties achteraf. Als wij hem bijvoorbeeld aanhouden en men heeft (...) geen afstand gedaan, men is niet akkoord, als er dan nog consultaties zijn in de gevangenis, ik vermoed dat als er dan pro deo wordt opgetreden, dat er ook wel beroep kan gedaan worden op (...) bijstand van een tolk door de overheid. Maar als dat bijvoorbeeld een prive-client is zal dat op eigen kosten zijn, veronderstel ik.`

- Interpretation of consultations with lawyers

All four interviewed lawyers, a prosecutor¹⁴ and an investigative judge said interpreters are available for requested persons when they consult with their lawyers (some mentioned free interpretation, others paid – see above) and noted that in their experience interpretation is always done in person. The four judicial authorities interviewed also said that interpretation is always done in person.

- Translation of documents

Three lawyers and three judicial authorities (two prosecutors and an investigative judge) mentioned that the requested person receives a “Letter of Rights” in a language they understand but three lawyers noted requested persons do not receive translated case files. According to two lawyers and a prosecutor, case files such as the EAW are available in the language of the issuing state and translated to the language of the procedure in Belgium. All the judicial authorities also mentioned that documents are not always translated into a language the person understands, but will be explained to the requested person via an interpreter. For example, the investigative judge stated, when being asked whether certain documents are always provided in a language a requested person can understand during the EAW proceedings “No, that is not the case. (...) the documents will be interpreted, there is an interpreter that can interpret the documents, but it is not the case that the documents will be translated in the mother tongue of the requested person, that is certainly not the case” (Belgium, Investigative Judge).

c. Additional best practices or challenges

In general, the right to interpretation and translation in EAW proceedings is well guaranteed in Belgium.

Yet, a main challenge could be that often times the requested person will not get a written translation of essential documents – more in particular the EAW itself – in a language the requested person

¹⁴ The prosecutor said in principle consultations with a lawyer are interpreted by a state-appointed interpreter, but that lawyers would know more about the practice.

understands, but only in one of the official languages of the criminal procedure in Belgium. Still, this challenge should not be overstated, because, as stated above, the Belgian EAW law prescribes that an oral translation of the EAW or the essential pieces of the case file are to be translated in a language the requested person understands. Several interviewees have also affirmed that the requested person's lawyer and/or the interpreter should in principle be sufficient to help the requested person understand the EAW and essential pieces of the case file.¹⁵

d. Discussion of findings

The practice of interpretation and translation in EAW proceedings seems to be in accordance with what the Belgian EAW Act prescribes. It could however validly be questioned whether the requested person who does not understand one of the official languages of criminal procedure in Belgium is not put at a disadvantage compared with requested persons who do. While Article 10/2 of the EAW Act explicitly states that oral translation of the EAW or the oral summary of essential pieces of the case file such as the EAW cannot negatively impact the fair conduct of the proceedings and that it should be laid down in the police report, from the interviews it could not be deduced whether it is effectively guaranteed that an oral translation does not negatively impact the fair conduct of the proceedings for a requested person who does not understand one of the official languages of criminal procedure in Belgium. In addition, not all the consultations between the requested person and his or her lawyer will necessarily be interpreted by a state-funded interpreter. As became clear from the interviews, when it comes to private consultations between the lawyer and the requested person in detention for example, the requested person may have to pay for the interpretation themselves.

3. Right to access to a lawyer

a. Legal overview

When Belgium is the executing state, the requested person is notified through a "Letter of Rights" of their right to be assisted by a lawyer in Belgium and of their right to appoint a lawyer in the issuing state. It is explicitly stated that the lawyer in the issuing state assists the lawyer in Belgium, by providing them with assistance or advice which would enable the requested person to effectively fulfil their rights under Framework Decision on the European Arrest Warrant.¹⁶

Furthermore, Article 10/3 of the EAW Act prescribes that in case the requested person does not have a lawyer in the issuing State but wishes to exercise their right to appoint one, the prosecution service will inform the issuing State about this without delay.¹⁷

When Belgium is the issuing State, Article 34(1) of the EAW Act prescribes that in case the requested person does not have a lawyer in the issuing State (Belgium) but invokes their right to appoint one, the prosecution service is bound to contact the permanent service organised by the Flemish bar (*Orde van Vlaamse Balies*) or the Francophone and German-speaking bar (*Ordre des barreaux francophones et germanophones*). The prosecution service must hand over the information about the lawyer

¹⁵ This was mentioned by three prosecutors.

¹⁶ Art. 10/1., EAW Act.

¹⁷ Art. 10/3., EAW Act.

assigned by either the Flemish Bar or the Francophone and Germanophone bar without delay to the executing authority.¹⁸

Table 5: Dual representation (in law)

Does the law of the executing MS foresee that the person arrested has a right to have the assistance of a lawyer in the issuing Member State and informed of this right?		
Belgium	YES X ¹⁹	NO

Table 6: Cost-free legal assistance (in law)

Free of cost lawyer provided in law	When your country is an executing state	When your country is an issuing state (e.g. to assist the lawyer in the executing state)
Belgium	YES	YES

All interviewees confirmed that requested persons have a right to state-funded legal assistance when they do not have a lawyer yet. A lawyer will be assigned to them through the so-called *Salduz* application.

When Belgium is an issuing state, the above explained Article 34(1) of the EAW Act is the relevant provision.

- b. Right to access to a lawyer in practice
 - Information about legal assistance (including on dual representation)

Table 7: Are persons informed of their right to access a lawyer?

	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Prosecutor 1	Prosecutor 2	Prosecutor 3	Investigative Judge	Total
YES	X	X		X ²⁰	X	X	X	X	7
In writing	X	X			X		X	X	5
Orally						X			1
In writing and orally									
NO									
Don't know/remember			X						1
Did not answer									

Almost all interviewees stated that requested persons are informed about the right to access a lawyer through the Letter of Rights. One prosecutor declared that the police informs the requested person

¹⁸ Art. 34/1., EAW Act.

¹⁹ Art. 10/1., EAW Act.

²⁰ In principle, yes, but one lawyer said it does not always happen in practice. This lawyer did not specify whether this happens in writing or orally.

orally, while one lawyer stated that not knowing for sure whether requested persons are informed of this right, as they are not present when this is meant to happen.

Table 8: Information on dual representation, interview findings

Are persons arrested on an EAW informed by authorities on their right to have the assistance of a lawyer in the issuing Member State?									
Interviewee	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Prosecutor 1	Prosecutor 2	Prosecutor 3	Investigative judge 1	Total
YES						X ²¹		X ²²	2
NO	X	X	X	X	X		X		6
Don't know/remember									
Did not answer									

Belgium, Lawyer

Question 12: When a person is arrested in Belgium on an EAW issued by another state, is this person informed that they can benefit from the assistance of a lawyer in the Member State that **issued the** European Arrest Warrant?

A: `I don't think so. I don't think so. I know it's in the law, that while you're in Belgium you can get legal assistance from a lawyer (in the issuing State), but I have never seen it being applied in practice.`

Question 12: Wanneer een persoon in België wordt gearresteerd op basis van een EAB uitgevaardigd door een andere Staat, wordt deze persoon geïnformeerd over het feit dat hij of zij kan genieten van bijstand van een advocaat in de lidstaat die het EAB heeft uitgevaardigd?

A: `Dat denk ik niet. Dat denk ik niet dat dat gebeurt. Ik weet nu zelf wel dat daar instaat, dat je inderdaad zelf terwijl je in België zijt al bijstand kunt krijgen van een advocaat, maar ik heb dat nooit in de praktijk toegepast geweten.`

Belgium, Lawyer

Question 16: What (if any) remedies are available in Belgium when a requested person is not informed about their right to dual legal representation, i.e. to be assisted by a lawyer in both the executing and issuing member states during the EAW procedure?

²¹ This prosecutor stated that they do this on their own initiative, there is no common standard procedure to be followed which obliges Belgian judicial authorities to inform requested person of this right or to take steps which the interviewee undertook to effectuate this particular right

²² The investigative judge states that as an investigative judge, they do not inform requested persons of this right during interrogation, but that this right is included in the Letter of Rights given by the police upon arrest.

A: 'I can't think of a specific remedy. The only thing I could think of is indeed raising it before the Pre-Trial Chamber. (...) then I think it will be related primarily to the pre-trial detention in Belgium, if it will be extended. I think it will maybe be concerned with the violation of rights, that you have to release in the meanwhile, I don't think it will prevent the issuance of your EAW.'

Question 16: Welke rechtsmiddelen zijn beschikbaar in België wanneer een verzochte persoon niet wordt geïnformeerd over het recht op dubbele juridische vertegenwoordiging, meer specifiek het recht om bijgestaan te worden door een advocaat in zowel de uitvoerende als de uitvaardigende lidstaten tijdens de EAB-procedure?

A: 'Nog niet specifiek waar ik op een rechtsmiddel kan komen. Het enige waar ik mee bezig ben is inderdaad bij die Raadkamer komen. (...) dan denk ik dat het vooral gaat gaan over eerder de voorlopige hechtenis in België, of die verlengd wordt of niet. Ik denk dat het dan eventueel daar over zou gaan dat er dan ergens rechten zijn geschonden, dat je dan vrijgelaten moet worden in afwachting, ik denk niet dat het de uitvaardiging van uw EAB gaat kunnen tegenhouden (...).'

- Legal assistance in executing state (access, consultations, lawyer's tasks)

Table 9: Facilitating dual legal representation, interview findings (executing MS)

Is assistance provided in appointing a lawyer in the issuing Member State when execution proceedings are ongoing? (When your country is an executing state)			
Interviewees	YES	NO	Didn't know/answer/remember
Lawyer 1		X	
Lawyer 2		X ²³	
Lawyer 3		X	
Lawyer 4		X ²⁴	
Prosecutor 1		X	
Prosecutor 2	X		
Prosecutor 3		X	
Investigative judge 1		X	
Total	1	7	

²³ As a general rule, no, but in some specific cases, upon request of the client, this lawyer assists clients in appointing a lawyer in the issuing state by his own initiative.

²⁴ As a general rule, no, but this lawyer mentioned that for countries that lawyers often work with, they may have contacts they can reach out to that can already start looking at the file in the issuing country. She also mentioned that the bar has a list of foreign lawyers, but that when you do not know them, it is difficult to indicate them and they also do not know how legal aid work in other countries, so it is challenging for lawyers to assist the person to appoint a lawyer in the issuing country.

All four interviewed lawyers and all four judicial authorities mentioned that requested persons are automatically appointed a state-funded lawyer upon arrest. All four lawyers and four judicial authorities also noted that the requested person does not have access to a list of available lawyers and so have very limited possibilities to choose their own lawyers, unless they already know a specific lawyer they would like to contact. One lawyer, however, mentioned that the French-speaking bar of Belgium allows those who benefit of legal aid to easily change lawyers (e.g. if they are later recommended a specific lawyer by someone). According to this lawyer, “the [requested] person who does not want to take the lawyer assigned to them, if they hear of someone either from a fellow prisoner or from a [prison] staff [or] a worker providing assistance to the detainees who gives them the name of a lawyer or whatever, they can very easily call that lawyer and the lawyer will come, it is not complicated at all” (Belgium, Lawyer). This is not the case with the Flemish-speaking bar, as in that case a lawyer can only be changed if there are significant problems between the lawyer and the client.

All four interviewed lawyers and three prosecutors said requested persons have the right to meet with their lawyers in private at all times and to have their lawyers present during hearings.

When it comes to the lawyer’s tasks in Belgium as the executing state, one lawyer stated they do “(...) everything that is necessary. (...) you first explain the procedure, you explain the purpose of the EAW, you explain why you go to the investigative judge, you explain why you go to the prosecutor, you try to ensure, if there’s a possibility that the requested person will not get arrested by the investigative judge, so he can stay free during the procedure if he opts for the long procedure, you try to ensure that everything is communicated clearly to the court and the prosecutor what your client wants to say, if you have possible grounds for refusal, you try to substantiate them before the Pre-Trial Chamber or the Indictment Chamber” (Belgium, Lawyer).

- Legal assistance in issuing state (access, consultations, lawyer’s tasks)

All four interviewed lawyers and all four judicial authorities mentioned that there is little to no information on the right to legal assistance in the issuing state. One lawyer stated: “That’s something I don’t focus on as a lawyer. (...) I have never paid attention whether it is in the documents they receive (...) so I wouldn’t know” (Belgium, Lawyer). An investigative judge mentioned that this right is included in the Letter of Rights handed to the requested person by the police, but also acknowledged not informing the requested person of this right during interrogation. More specifically, the investigative judge stated “(...) to be fair, I know it is prescribed somewhere: I don’t mention it (...) that I must admit. But I think, but you’ll have to ask this to the prosecutor, that it is included within the Letter of Rights he is provided for by the police, it is mentioned in there” (Belgium, Investigative Judge). Similarly, there is no facilitation in the appointment of a lawyer in the issuing state. One prosecutor said she informs requested persons of this right and has assisted requested persons in appointing a lawyer in the issuing state, but notes she does this on her own initiative, as there is no standard procedure obliging Belgian judicial authorities to inform a requested person of this right or to assist them in appointing a lawyer in the issuing country. In the same vein, one prosecutor said this is not proactively facilitated by Belgian authorities. However, the other way around, when Belgium is the issuing state, one prosecutor has been contacted by the executing authorities to provide a lawyer for the requested person in Belgium. Two lawyers said they sometimes assisted their clients in appointing a lawyer in the issuing state of their own initiative. In this regard, one lawyer said the internet has facilitated the identification of lawyers that specialise in EAW procedures in other countries.

All four interviewed lawyers and all four judicial authorities said they were not aware of any remedies available when a requested person in Belgium is not informed about their right to dual legal representation. One lawyer, however, said that this could potentially be raised before either the Pre-Trial Chamber or the Indictment Chamber. This lawyer said that this could not lead to the non-execution of the EAW, but could potentially lead to a finding that the arrest in Belgium was carried out in an irregular way. One prosecutor, in turn, mentioned the possibility of filing an appeal before the Indictment Chamber, before which irregularities in the EAW procedure can be contested.

One lawyer and one prosecutor, however, noted that often requested persons already have a lawyer in the issuing country and thus the lack of information/assistance in this regard may not be a problem.

Table 10: Providing dual legal representation, interview findings (issuing MS)

Is assistance provided in appointing a lawyer in the issuing Member State when execution proceedings are ongoing in another MS? (When your country is an issuing state)			
Interviewees	YES	NO	Didn't know/answer/remember
Lawyer 1			X
Lawyer 2			X
Lawyer 3			X
Lawyer 4			X
Prosecutor 1	X ²⁵		
Prosecutor 2			X
Prosecutor 3			X
Investigative Judge 1			X
Total	1		7

- Communication between the lawyers in both states

While all four interviewed lawyers mentioned that there is little to no cooperation or communication between lawyers, they also mentioned that should there be any cooperation, the lawyer in the issuing state will not be involved in gathering additional evidence as to the merits of the case, as, this is not of concern for the executing state. Instead, one lawyer said the lawyer in the issuing state will only provide information which allows the lawyer in Belgium (as the executing state) to assess whether EAW should be executed. In this regard, one lawyer and one prosecutor said that lawyers in the issuing state may gather information about why the EAW should not be executed (e.g. human rights concerns, prison conditions...).

Three lawyers said communications between lawyers may also assist the lawyer in the issuing state to prepare for the procedures (that gave rise to the EAW) in the issuing country.

One prosecutor noted that the lawyer in the issuing state will usually be involved in trying to negotiate the withdrawal of the EAW in the issuing state.

- Free of cost access to a lawyer (or legal aid)

²⁵ This prosecutor states having been contacted by the executing authorities to provide for a lawyer for the requested person in Belgium.

Table 11: Cost-free legal assistance, interview findings

Free of cost lawyer provided	When your country is an executing state		When your country is an issuing state for the purposes of procedures in the executing MS (e.g. to assist the lawyer in the executing state) ²⁶		
	YES	NO	YES	NO	DON'T KNOW
Interviewee					
LAWYER 1	X				X
LAWYER 2	X				X
LAWYER 3	X				X
LAWYER 4	X				X
PROSECUTOR 1	X				X
PROSECUTOR 2	X				X
PROSECUTOR 3	X				X
INVESTIGATIVE JUDGE 1	X				X
TOTAL	8				8

As mentioned above, all interviewees mentioned that requested persons are automatically appointed a state-funded lawyer upon arrest in case they do not have a lawyer yet or do not want to appoint a lawyer they know themselves.

c. Additional best practices or challenges

One lawyer said the main challenge to legal representation in an EAW case is the lack of cooperation and openness of judicial authorities in other Member States. He mentions the example of a client who was requested pursuant to an EAW issued by Germany. The client insisted on his innocence and proposed to cooperate fully with German authorities by voluntarily going to Germany to be interrogated. The German authorities declined the proposal and insisted on the surrender of the individual pursuant to an EAW. For the lawyer, this represented a good example of a disproportionate and unnecessary use of EAWs. The same lawyer also mentioned that it should be possible for an executing state to propose alternatives for surrender, such as serving the sentence in the executing state (as an alternative to serving the sentence in the issuing state).

One lawyer said the main challenges to legal representation in EAW cases are the short deadlines and associated limited time for lawyers to prepare; the difficulty in proving that the requested person's procedural rights will not be respected in the issuing state; and the fact that an EAW may relate to a very old conviction that may be subjected to the statute of limitation. More specifically, the interviewee mentioned that oftentimes EAWs are issued to execute judgments which have been rendered several years ago, even up to 19 years. This made the interviewee question whether the issuance of the EAW had not surpassed reasonable time limits and whether the sentence imposed in the issuing state was not statute-barred. However, more generally, this interviewee also mentioned that the right to be represented by a lawyer is fully guaranteed in Belgium and works well.

Lastly, one lawyer said collaboration between lawyers in the different countries involved is the main challenge. She also mentioned that if there is no return clause, referring to the guarantee which may

²⁶ None of the interviewees specifically touched upon this matter in their answers, as it was not explicitly part of the questions in the interview templates, which is why it was decided to keep it blank.

be requested by executing authorities under Article 5(3) of the EAW Framework Decision, it can also be challenging to get requested people back to Belgium (e.g. to serve the sentence after conviction).

One prosecutor noted that legal representation in EAW cases in both executing and issuing states could be improved, stating that lawyers oftentimes treat EAW proceedings in a mechanical and procedural way, without being constructive and fully taking into account the client's best interests. Two lawyers have identified similar challenges. One lawyer stated "(...) the challenge is indeed to take the procedure more seriously (...) it often feels like a formality, as something that is taken on in addition to the daily case load, while in my eyes the procedure is as important and certainly for the people concerned" (Belgium, Lawyer). Another lawyer noted that there are not many lawyers who specialise in the EAW procedure, which may be the main challenge to providing legal assistance to requested persons. They therefore proposed the establishment of a specialised unit/pool of lawyers with knowledge about the EAW procedure, in order to guarantee the rights of persons subjected to EAW proceedings more effectively. In a similar vein, the other lawyer noted the need to provide more education and courses on the EAW so that EAW proceedings are taken more seriously and treated more professionally by legal professionals, and are not treated as a formality, as some believe they are at present.

d. Discussion of findings

With regards the right to access to a lawyer, three main issues deserve closer attention.

First, with regards to the right to access to a lawyer in Belgium when a requested person is arrested due to an EAW issued by another State, from the interviews it can be concluded that this right is duly respected, but that requested persons do not have much leeway to choose a lawyer themselves in case they do not already know a lawyer from before. They will be assigned a state-funded criminal lawyer. However, lawyers appointed do not necessarily have any expertise or experience in EAW proceedings, and requested persons have no say in the procedure of assignment. This does not imply however that requested persons cannot change their lawyers at a later stage.

Secondly, regarding the appointment of a lawyer in the issuing state, it is explicitly provided for in Article 10/1 of the Belgian EAW Act and mentioned in the Letter of Rights provided to the requested person. However, from the interviews, it can be concluded that both judicial authorities and lawyers are not aware of these provisions, which has a consequence that that the requested persons are barely informed of this right. In addition, there currently is no system in place to facilitate the exercise of this right, nor is there any specific remedy available in case the requested person is not informed of this right. Moreover, from the interviews it could be concluded that both judicial authorities and lawyers do not always seem to be aware of the right to dual representation or that requested persons should be informed of this right. In addition, the interviewees gave the impression that they felt that it is unnecessary to inform the requested person of this right because a lot of the times they will already have a lawyer in the issuing State. The interviewees did not acknowledge however that this is likely to be the case mainly where the EAW relates to an already issued sentence, and that having a lawyer and having one working on the case together with the lawyer in the issuing state are not the same thing. Also, some interviewees felt that it is the role of the lawyer in the executing state to provide the requested person with a lawyer in the issuing state.

Thirdly, lawyers representing requested persons in EAW procedures in Belgium oftentimes lack either a specific interest and motivation for to represent requested persons in EAW proceedings or the required technical legal expertise on EAW proceedings, especially when they are assigned by the state, reason why some lawyers do not take legal representation very seriously and treat it as a formality. This of course negatively affects the effective legal representation of requested persons. In this regard, several lawyers suggest that training courses on EAW proceedings should be provided and that a specialised pool of lawyers with knowledge, experience and interest in EAW proceedings should be established.

4. Issuing and Execution of the EAW

a. Legal overview

When it comes to an EAW issued *for the purpose of prosecution*, Article 32 paragraph 1 of the EAW Act prescribes that such EAW can only be issued by an investigative judge if the conditions under the law of 20th of July 1990 on temporary custody, which regulates the Belgian procedure for arrests, are fulfilled.²⁷ More concretely, this entails that the facts that lie at the basis of issuing an EAW will have to be punishable with a prison sentence of at least 1 year.²⁸ In addition, the issuing of the EAW will have to be “fully necessary for the public order”.²⁹ Lastly, for an EAW to be issued, the existence of “serious indications of guilt” needs to be demonstrated.³⁰

The issuance of EAWs *for the purpose of executing a sentence* is under Belgian law the responsibility of the prosecution. Article 32 paragraph 2 EAW Act prescribes that in case the sentence was pronounced in absentia, and the requested person was not summoned or notified of the date and time of the pronouncement of the sentence in any other way, the prosecutor is bound to mention in the EAW that the requested person has the right to contest the decision and they have the right to be tried in their presence.³¹

In principle, the actual sentence pronounced has to be a sentence of at least 4 months, irrespective of whether the crime was punishable with a sentence of at least 12 months.³² Because this threshold is very low and is considered to give rise to problems in practice, the board of the Prosecutors General has adopted and applied an alternative regulation. In principle, no EAW for the purpose of executing sentence will be issued if the remaining sentence to be served is less than 2 years.³³ Certain exceptions exist to this general principle, for example if the facts are of a very grave nature, the EAW concerns crimes that are a matter of priority or the EAW has a correlation with other EAWs issued against the

²⁷ Art. 32, paragraph 1, EAW Act.

²⁸ Art. 16, paragraph 1, Law of 20 July 1990 on preventive detention ([Wet van 20 juli 1990 betreffende voorlopige hechtenis / Loi du 20 juillet 1990 relative à la détention préventive](#)). Publication in the Official Belgian Gazette (hereafter Preventive Detention Law)

²⁹ Art. 16, paragraph 1, Preventive Detention Law.

³⁰ Art. 16, paragraph 5, Preventive Detention Law.

³¹ Art. 32, paragraph 2, EAW Act.

³² Art. 3, EAW Act. S. Bekaert, ‘De actieve overlevering’, in X., *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Mechelen, Wolters Kluwer Belgium, 2021, p. 104.

³³ S. Bekaert, ‘De actieve overlevering’, in X., *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Mechelen, Wolters Kluwer Belgium, 2021, p. 104; S. Vazquez Maymir and P. de Hert, ‘First Periodic Country Report: Belgium’, *Stream Project*, available online at: [STREAM_Country-Report_Belgium.pdf \(stream-eaw.eu\)](#), p. 3.

same requested person.³⁴ Examples of crimes for which an EAW could be issued, even if the remaining sentence to be served is less than 2 years, are crimes against minors, sexual offences and terrorism.³⁵

With regards to the right to a fair trial and conditions of criminal detention, it is crucial to note that Article 4(5) of the EAW law obliges Belgian executing authorities to reject an EAW whenever they find “serious reasons to believe that the execution of the surrender mandate would infringe the fundamental rights of the person concerned”.³⁶ Article 4(5) further specifies that the fundamental rights are those recognised under Article 6 of the Treaty on the European Union.³⁷ Article 6 of the Treaty of the European Union refers to the Charter of Fundamental Rights and the European Convention on Human Rights. Consequently, all fundamental rights could in principle be invoked as a ground for non-execution of the EAW.³⁸

Given the principle of mutual recognition, the non-execution of the EAW on the basis of fundamental rights can only be justified by providing a set of data that indicates that there is a tangible danger for the requested person that can rebut the presumption of compliance with fundamental rights, which the issuing state can be said to enjoy.³⁹ The requested person has to demonstrate that there are concrete and serious reasons that demonstrate that he or she could fear that one or more of their fundamental rights will be violated.⁴⁰ It is not necessary, however, to show that there is complete certainty that fundamental rights will be violated.⁴¹

The court that is competent to adjudicate on the execution of the EAW does not have to limit itself to pieces of information that have been brought forward by the requested person; it can also rely on publicly available information.⁴² As an example, the execution of the EAW will be refused if there are serious reasons to consider that it would lead to a denial of the presumption of innocence of the requested person.⁴³

Furthermore, Belgian courts have relied on the two step test laid down by the CJEU in the Aranyosi case to enable the refusal of EAWs based on the prohibition of torture and inhuman or degrading treatment or punishment, as enshrined in Art. 4 of the Charter of Fundamental Rights.⁴⁴ In the *N.J.E.* case for instance, the Belgian judicial authorities refused to execute the EAW against N.J.E.⁴⁵ by relying on information that, in their view, showed a risk (in abstracto) that the execution of the EAW against N.J.E. could lead to an infringement of the prohibition of torture (first step). Moreover, based on the

³⁴ S. Bekaert, ‘De actieve overlevering’, in X., *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Mechelen, Wolters Kluwer Belgium, 2021, p. 104.

³⁵ S. Vazquez Maymir and P. de Hert, ‘First Periodic Country Report: Belgium’, *Stream Project*, available online at: [STREAM Country-Report Belgium.pdf \(stream-eaw.eu\)](https://stream-eaw.eu), p. 3.

³⁶ Art. 4, paragraph 5, EAW Act.

³⁷ Art. 4, paragraph 5, EAW Act.

³⁸ S. Bekaert, ‘De passieve overlevering’, in X., *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Mechelen, Wolters Kluwer Belgium, 2021, p. 25.

³⁹ Cass. 4 November 2009, P.09.1524.F, <http://juportal.be>; Cass. 25 November 2009, P.09.1624.F, <http://juportal.be>; Cass. 23 januari 2013, P.13.0087.F, RDPC 2013, 551 en <http://juportal.be>.

⁴⁰ S. Bekaert, ‘De actieve overlevering’, in X., *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Mechelen, Wolters Kluwer Belgium, 2021, p. 25.

⁴¹ KI Gent 31 oktober 2013, NC 2014, afl. 3, 221 en <http://www.nullumcrimen.be/> (3 juli 2014), noot DEWULF, S.; TGR-TWVR 2014, afl. 2, 146, noot.

⁴² Cass. (2e k.) AR P.20.0320.N, 24 maart 2020 (B.S.) <http://juportal.be>.

⁴³ Cass. AR P.13.1311.N, 30 Juli 2013, Arr.Cass. 2013, afl. 6-7-8, 1682; Pas. 2013, afl. 6-8, 1527.

⁴⁴ S. Vazquez Maymir and P. de Hert, ‘First Periodic Country Report: Belgium’, *Stream Project*, available online at: [STREAM Country-Report Belgium.pdf \(stream-eaw.eu\)](https://stream-eaw.eu), p. 10.

⁴⁵ S. Vazquez Maymir and P. de Hert, ‘First Periodic Country Report: Belgium’, *Stream Project*, available online at: [STREAM Country-Report Belgium.pdf \(stream-eaw.eu\)](https://stream-eaw.eu), p. 9.

available information surrounding the personal circumstances of N.J.E, the Courts were also convinced (in concreto) that the surrender could lead to an infringement of N.J.E.'s human rights (second step).⁴⁶

A Belgian landmark case concerning the right to fair trial in EAW proceedings, which is currently the subject of a case before the ECJ, is the *Puig* case.⁴⁷ In the *Puig* case, Belgian executing judicial authorities in Brussels, the Pre-Trial Chamber (*Raadkamer* in Dutch) or Indictment Chamber (Kamer van Inbeschuldigingstelling in Dutch), verified the competence of the Spanish Supreme Court as issuing authority in light of the right to fair trial. Both judicial authorities accepted the defence's claim that the Spanish Supreme Court was an incompetent issuing authority and that his surrender would entail a risk for Mr. Puig's right to a hearing by a competent and impartial tribunal.⁴⁸ To come to this conclusion, the judicial authorities relied on opinions of the UN Working Group on Arbitrary Detention (UNWGAD). The UNWGAD rejected the competence of the Spanish Supreme Court to hear the case based on the organisation of the Catalan referendum, stating that "the territorial, personal and material jurisdiction to investigate and adjudicate on possible criminal acts fell to the Catalan courts, since the offences were allegedly committed in Catalan territory by officials of the Catalan government and parliament."⁴⁹ Provided that the Instructing Magistrate of the Spanish Supreme Court lacked jurisdiction to hear the merits of the case, it could not, considering the FD EAW, be regarded as a competent authority to issue an EAW against Puig. As a result, the Court in Chambers found that the essential precondition for the issuance of an EAW had been infringed (Article 6.1 FD EAW) and the EAW was to be rejected.⁵⁰ Furthermore, the Belgian courts also acknowledged that, in relation to the prosecution of Catalan politicians specifically, statements made by high ranking officials regarding the culpability of the persons concerned affected the presumption of innocence of the requested person and constituted an undue interference which undermined the independence and impartiality of the Spanish Supreme Court.⁵¹ As a consequence, the surrender of Puig to Spain has been denied until now.

It has to be noted that, by deviating from the ECJ jurisprudence in the *LM* case, Belgian judicial authorities did not examine the existence of systemic deficiencies in the Spanish judiciary. As a matter of fact, they even dismissed such claims. Rather, they focused specifically on Puig's role as a former

⁴⁶ S. Vazquez Maymir and P. de Hert, 'First Periodic Country Report: Belgium', *Stream Project*, available online at: [STREAM_Country-Report_Belgium.pdf \(stream-eaw.eu\)](https://stream-eaw.eu/STREAM_Country-Report_Belgium.pdf), p. 10.

⁴⁷ For an extensive discussion of the *Puig* jurisprudence, see S. Vazquez Maymir and P. de Hert, 'First Periodic Country Report: Belgium', *Stream Project*, available online at: [STREAM_Country-Report_Belgium.pdf \(stream-eaw.eu\)](https://stream-eaw.eu/STREAM_Country-Report_Belgium.pdf), pp. 12-18.

⁴⁸ Brussels Court in Chamber, *Raadkamer*, 7 August 2020. Puig Gordi .2019/1020, The decision is not public; Brussels Court of Appeal, *Kamer van Inbeschuldigingstelling (KI)*, 7 January 2021. Puig Gordi 2021/79, The decision is not public.

⁴⁹ Human Rights Council Working Group on Arbitrary Detention, 13 June 2019, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019; Opinion No. 6/2019 concerning Jordi Cuixart I Navarro, Jordi Sánchez I Picanyol and Oriol Junqueras i Vies (Spain); Human Rights Council Working Group on Arbitrary Detention, 10 July 2019, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019; Opinion No. 12/2019 concerning Joaquín Forn I Chiariello, Josep Rull I Andreu, Raúl Romeva I Rueda and Dolores Bassa I Coll (Spain).

⁵⁰ S. Vazquez Maymir and P. de Hert, 'First Periodic Country Report: Belgium', *Stream Project*, available online at: [STREAM_Country-Report_Belgium.pdf \(stream-eaw.eu\)](https://stream-eaw.eu/STREAM_Country-Report_Belgium.pdf), p. 15.

⁵¹ Brussels Court in Chamber, *Raadkamer*, 7 August 2020. Puig Gordi .2019/1020, The decision is not public; Brussels Court of Appeal, *Kamer van Inbeschuldigingstelling (KI)*, 7 January 2021. Puig Gordi 2021/79, The decision is not public.

member of the Catalan government when assessing the independence and impartiality of the Spanish Supreme Court to rule on issues related to the Catalan referendum events.⁵²

Lastly, the Belgian Supreme Court (*Cour de Cassation*) has held explicitly that if the sentences which an EAW aim to execute cannot be executed in Belgium because the sentence is statute-barred according to Belgian law, that means that Belgium lacks the possibility to execute the sentence itself. In that situation, the High Court considers that Belgium has the obligation to surrender the person targeted by the EAW, even it concerns a sentence that has been pronounced several years ago.⁵³

a. Issuing and Execution of the EAW in practice

- Factors considered when issuing the EAW

One prosecutor noted that there are differences between an EAW issued for prosecution and one issued for execution. When it comes to prosecution, the prosecutor noted that the threshold is definitely higher compared to national arrest warrants and that alternatives will be sought before resorting to an EAW. In a similar vein, one investigative judge noted that especially the seriousness of the facts will be considered before issuing an EAW. Furthermore, two judicial authorities (a prosecutor and an investigative judge) stated that there should be a real prospect of the arrested/requested person being sentenced to imprisonment after a trial. As for executions, an EAW will be issued as a last resort. In this regard, two prosecutors said that the prosecutor will first check whether the requested person cannot be found in Belgium as well as whether the sentence cannot be executed in the country where the concerned person resides, in application of the EU Framework Decision of 2008/909. In this regard, one prosecutor said: "I always consider the possibility of sending a certificate instead... a certificate of execution of the sentence abroad (...). The certificate is [for] a person who is not serving [their sentence] but who can be located abroad. So we ask the foreign [country] to take back our sentence and execute it." (Belgium, Prosecutor).

Three judicial authorities (two prosecutors and an investigative judge) said that proportionality is always taken into account by prosecutors and judges before issuing an EAW. Two lawyers, however, noted that this is not always the case. More specifically, one lawyer said this was not the case in cases which involves the internment of perpetrators suffering from a mental illness.

Three judicial authorities noted that Belgian law does not foresee the possibility of challenging an EAW specifically on proportionality concerns. In that regard, one prosecutor does not see this as a problem since the concerned person can contest the national arrest warrant or the criminal judgment which lies at the basis of the EAW. Another prosecutor further specified that a requested person can always challenge the issuing of an EAW because of proportionality concerns, for example with the investigative judge, by claiming that an EIO could have been issued instead of an EAW, but this is done purely informally, as the investigative judge is under no obligation to consider and approve this challenge, and it has no formal legal consequences. According to an interviewed investigative judge, the requested person is not able to challenge the proportionality of the EAW, but in most cases, this will be irrelevant because the requested person will not even be aware of the existence of the EAW.

⁵² S. Vazquez Maymir and P. de Hert, 'First Periodic Country Report: Belgium', *Stream Project*, available online at: [STREAM_Country-Report_Belgium.pdf \(stream-eaw.eu\)](#), p. 18.

⁵³ Belgian Court of Cassation 15 February 2017, No. P.17.0129.F; see for a detailed analysis: F. Verbruggen and K. Verhesschen, 'European arrest warrants and time-barred enforcement in the state of residence of the convicted person: Too much, too late!', available online at: [European arrest warrants and time-barred enforcement in the state of residence of the convicted person: Too much, too late! - F. Verbruggen, K. Verhesschen, 2020 \(sagepub.com\)](#).

Similarly, three lawyers said they were not aware of a formal way to challenge an EAW on proportionality, at least not beyond the thresholds explicitly foreseen in the Framework Decision or in the Belgian EAW Act, for instance the fact that EAWs can only be issued for certain – more serious – crimes and the fact that only crimes which could give rise to a minimum prison sentence could lead to the issuing of an EAW. In this regard, a lawyer also mentioned the optional ground for refusal under Article 6(4) of the Belgian EAW law, which allows for the refusal of the execution of the EAW because the requested person has Belgian nationality or resides in Belgium. According to the interviewee, judges will accept this argument and will refuse to execute the EAW. One lawyer stated however stated that there is a possibility to get in contact with the investigative judge who issued the EAW, in order to ask for its withdrawal, for instance because the requested person has agreed to be interrogated on a voluntary basis. More specifically, the lawyer stated: “That is an example of something I obtained in practice, but it does not really consist of a procedure. It consists more of a conversation with the investigative judge” (Belgium, Lawyer).

Two lawyers said they do not know which factors are taken into account by Belgian authorities when issuing an EAW.

Belgium, Judicial Authority

Question 17: When deciding on the issuing of an EAW, what factors do your national authorities (you as an issuing authority) take into account before issuing one?

‘In the first place, the seriousness of the facts will be considered, for trivialities we won’t request extradition. Subsequently, we’ll see in which phase we are, and we’ll consider whether it could complicate or delay the procedure and whether it would make sense, and we’ll consider whether the person could be interrogated instead of asking for extradition (...) or we can try to obtain a judgment in absentia and then subsequently we ask for extradition to enforce a sentence, these are all factors that play.’

Question 17: wordt beslist over het uitvaardigen van een EAB, welke factoren nemen uw nationale autoriteiten in overweging vooraleer het uitvaardigen ervan?

A: ‘In de eerste plaats gaat dat eerder de zwaarwichtigheid van de feiten zijn, voor prullen zullen wij niemand een uitlevering vragen. En dan zullen wij zien in welke fase zitten we en gaat dat de procedure bemoeilijken, vertragen, heeft het dan wel zin, kunnen we niet beter die man gewoon gaan laten ondervragen ginder en misschien niet de uitlevering vragen (...) en bij verstek laten veroordelen en dan dat er achteraf een uitlevering wordt gevraagd voor strafuitvoering of, ja dat zijn allemaal factoren die meespelen (...).’

- Factors considered when executing the EAW

Proportionality

Two prosecutors noted that assessing proportionality when executing an EAW is a sensitive matter and that, in practice, the principle of mutual recognition prevents the denial of the execution of an EAW despite the fact that, from the perspective of Belgian judicial authorities, the EAW is definitely disproportional. For example, one prosecutor said “as an executing country, we have no power to assess whether or not what a state is requesting is proportional. I had a European arrest warrant for a Romanian, he was condemned - therefore for a European execution warrant - for one year of imprisonment, because he drove without a licence. You wouldn't have that here. It's true that we questioned [the warrant], but it's the Romanian decision, that's it” (Belgium, Prosecutor).

Similarly, one lawyer said that proportionality concerns were almost never raised. Three prosecutors, however, said that in certain situations they will engage with the issuing state to ask that the EAW be withdrawn when there are concerns, or try to find alternative solutions, such as, on prosecutor said, interrogation of the requested person in Belgium or the temporary surrender of the requested person. The investigative judge interviewed was quite regularly asked to execute EAWs which could raise proportionality concerns and stated that when faced with a disproportional EAW, this would impact the decision on whether or not to arrest the requested person. More specifically, the investigative judge answered, when being asked how they react when having to execute an EAW that raises proportionality concerns, in the following way: “That is certainly a useful question. (...) at times I have the impression that in some countries they are merely ticking boxes. And it concerns matters where we under no circumstance would ever request the surrender for, often it concerns traffic offences or shoplifting. But they fulfil the legal criteria. And then the question, who has to assess this actually? Can we say, this is actually an EAW that does not to be taken seriously? No, because they are in compliance with the legal criteria. But, on a personal level, it will play a role in the sense that I will be reluctant to arrest such a person (who is sought pursuant to a disproportional EAW)” (Belgium, Investigative Judge). On this particular matter, the investigative judge furthermore stated the following: “(...) sometimes I find that EAWs are issued for trivialities and I find this incomprehensible. In our practice, when we make an EAW, it really concerns serious facts, and you get the impression that this is not the case with other countries and that it more some sort of a bureaucracy that makes a selection (...). In my view, the thresholds of punishment are too low. It really should be used as an exception (...), I really think it is an important point to work on” (Belgium, Investigative Judge).

One lawyer also mentioned the possibility of asking for a withdrawal while another lawyer specifically confirmed prosecutors will sometimes engage with issuing states in certain cases to ask them to withdraw the EAW, but not always. For example, this lawyer mentioned a case in which a prosecutor refused to engage with the issuing member state. Similarly, another lawyer said that in their experience judicial authorities do not get in touch with the authorities of the issuing Member State to discuss the possibilities to withdraw the EAW.

Conditions of detention

Three prosecutors noted that conditions of detention are taken into account when executing an EAW and one prosecutor also mentioned that Belgium, as a requesting state, is often asked to give assurances about its detention conditions. One prosecutor clarified, however, that general claims

about detention conditions are not taken into account; instead, claims should be based on existing jurisprudence. In this regard, another prosecutor specified that, following the *Aranyosi* judgment,⁵⁴ the convict and their lawyer will have to provide clear and documented information that the detention conditions in the issuing state risk violating the fundamental rights of the requested person.

Three lawyers noted that while detention conditions are taken into account, Belgian authorities are very reluctant to accept it as a ground for not executing the EAW and may only apply it to very specific cases. For example, one lawyer stated that “If you raise it, most of the times, it will be discussed, yes. I have had the experience in the Netherlands that they were indeed very reluctant, and rightly so, to extradite people to Belgium because of detention conditions and Belgium had to provide certain guarantees to the Dutch judicial authorities as a condition for extradition. Conversely, I have not experienced yet that Belgium has asked for any guarantees. Maybe it happened (...) but in my experience the general framework is very quickly referred to, along the lines of ‘yes, but is also an ECHR Member State, you can handle it there’, in my experience there is a lot of shifting of responsibility while in the Netherlands they take it more seriously” (Belgium, Lawyer). As another example, when asked whether conditions of detention were taken into account in EAW cases, another lawyer said that: “Yes, in principle, but in reality, it is really complicated. We [lawyers] are going to use the reports of the CPT, of the Committee for the Prevention of Torture of the Council of Europe [to make an argument about conditions of detention], but as in Belgium we do not have a good report either, there you are, the argument is not strong. (...) We will have to aim for specific arguments, where [for example, there are] certain types of health care [required by the requested person] that we may not find in a country, but we cannot just say in Spain the prisons are not good, that does not work” (Belgium, Lawyer).

Two lawyers went further and claimed conditions of detention were not taken into account due to the mutual recognition principle. One lawyer stated that in particular that “ (...), to convince a court that fundamental rights will possibly be violated abroad, that is very reluctant. I think it has to do in part with mutual trust” (Belgium, Lawyer). Another lawyer also stated that the fact that Belgium itself has been condemned by the European Court of Human Rights for detention conditions in its prisons is used by Belgian judicial authorities to refute the argument that detention conditions can be invoked to deny execution of the EAW “as it is not worse elsewhere compared to Belgium” (Belgium, Lawyer).

Rights to a fair trial (rule of law)

Regarding the right to a fair trial, three prosecutors said that fair trial is considered and more specifically, two prosecutors said Belgian authorities will look into the criteria developed by the CJEU, whereby a requested person will have to demonstrate that in their individual right to fair trial by an independent court cannot be guaranteed to stop the execution of the EAW.

Three lawyers, in turn, said fair trial is not generally taken into account due to the principle of mutual recognition. Similarly, another lawyer said considering fair trial is limited to the practice of certain judicial authorities in Belgium.

When it comes to trials in absentia, all judicial authorities interviewed said Belgian authorities will especially inquire whether there are still legal remedies available against the judgment before

⁵⁴ CJEU (Grand Chamber), Judgement April 2016, *Aranyosi and Caldaru*, Joined Cases C- 404/15 and C-659/15 PPU/ Judgement.

executing the EAW and that not much else is taken into account. Two lawyers concurred with this statement.

Individual situation

Lastly, all judicial authorities interviewed noted that the individual situation of the concerned person (e.g. pregnancy, illness, humanitarian considerations) will also be taken into account and may prevent/suspend the issuing and execution of an EAW. The three prosecutors interviewed specifically mentioned pregnancy and illness as personal situations of individuals which have led them to postpone or suspend the issuing of EAWs against the individuals in question. Two lawyers concurred with this statement, while another said that in their experience the individual situation is not considered. One lawyer stated not having any experience in this regard.

b. Additional best practices or challenges

One prosecutor said communication can be a challenge to the execution of EAWs (e.g. countries that only wish to communicate via fax and not email) and that EAWs issued to execute in absentia judgments very often remain unexecuted. Similarly, one lawyer said the exchange of information between the different actors in the EAW proceedings ought to improve.

Two judicial authorities (a prosecutor and an investigative judge) noted that the disproportional use of EAWs is a challenge. In this regard, the prosecutor stated that there are many judicial cooperation instruments and that the right instrument should be used for the right purpose. The investigative judge, in turn, argued in favour of raising the thresholds for issuing EAWs, because in their view EAWs are often issued for relatively minor offences.

As for best practices, one lawyer and one prosecutor have highlighted Article 6(4) of the Belgian EAW implementation law, which allows Belgium to refuse the execution of the EAW issued for the purpose of executing a sentence if the requested person is Belgian or is residing or staying in Belgium. In this case, the Belgian authorities will execute the sentence according to Belgian law.

c. Discussion of findings

From all the themes covered in this report, the issuing and executing of the EAW is probably the one where most divergence in perspectives can be identified between judicial authorities and lawyers.

According to the judicial authorities interviewed, proportionality is always taken into consideration when an EAW is issued, while several of the lawyers are more doubtful in this regard and they do not know which factors judicial authorities consider when issuing an EAW. There seems to be more consensus that oftentimes the EAWs that Belgium is asked to execute are disproportionate and that a solution could be that the issuing authority is contacted to ask for the withdrawal of the EAW or propose an alternative measure. Yet, some of the lawyers interviewed stated that Belgian judicial authorities tend to be reluctant to take such steps, and from the judicial authorities' interviews it can be concluded that they are hesitant in this regard because they are mindful of recognising the principle of mutual recognition.

The same divergence can also be detected when it comes to taking into account detention conditions or the right to fair trial when executing EAWs. While judicial authorities state that arguments on these bases will in general be considered, the lawyers are much more sceptical in this regard and do not detect much openness and willingness among the respective judicial authorities to engage with such arguments. Even judicial authorities concede, however, that arguments against the execution of EAWs based on detention conditions or the right to fair trial rarely succeed. Thus, the cases discussed under the legal overview of this section should be considered as the exception to the rule that most judicial authorities will be deferential to the issuing authorities by relying on the principle of mutual recognition.

To conclude, almost all interviewees have acknowledged that the individual situation of the requested person is taken into consideration when issuing or executing an EAW.

5. Use of digital and technological tools in EAW proceedings

a. Legal overview

No legal standards governing the use of digital tools during EAW proceedings are in place in Belgian law.

Table 12: Use of technological tools (in law)

As became clear from the desk research, no specific rules for the use of technological tools in EAW proceedings are available in Belgian law. This concerns all aspects of EAW proceedings such as conducting EAW hearings (when an executing state), facilitating the provision of interpretation, remote examination of witnesses or the person arrested (when an issuing state), communication with involved foreign authorities (both executing – issuing states), facilitating transmission of documents (issuing - executing), facilitating access to a lawyer in the issuing Member State (when an executing state) and facilitating access to a lawyer in the executing Member State (when an issuing state).

a. Interview findings

Table 13: Use of digital tools, interview findings.⁵⁵

Interviewees per Country	Conducting EAW hearings (when an executing state)	Facilitating the provision of interpretation	Remote examination of witnesses or the person arrested (when an issuing state).	Communication with involved foreign authorities (both executing – issuing states).	Facilitating transmission of documents (issuing – executing)	Facilitating access to a lawyer in the issuing Member State (when an executing state)	Facilitating access to a lawyer in the executing Member State (when an issuing state)
LAWYER 1						NO	NO
LAWYER 2						YES ⁵⁶	
LAWYER 3						NO	NO
JUDICIAL AUTHORITY 2	YES ⁵⁷					YES ⁵⁸	
TOTAL	(e.g.) 4/3						

One prosecutor noted that all communication around an EAW is done by email, which speeds up the procedure and thus can benefit the concerned person. In this regard, one lawyer said that digitalisation could have the role of giving lawyers access to EAW's more rapidly and at an earlier stage, while another lawyer said that digitalisation could assist in making case files available across borders. Another lawyer noted that digitalisation could facilitate the sharing of information (e.g. the creation of a repository of jurisprudence on EAW, as well as provide access to reports on prison conditions in different states, facilitate access to lawyers in other countries).

One prosecutor did not believe that digitalisation could lead to a reduction in the issuing of EAWs, as digital technologies are already in use and have not had that result. Similarly, two lawyers did not believe digitalisation could lead to fewer EAWs because states tend to 'overuse' EAWs even if they have ample opportunities to use alternatives. Three judicial authorities and two lawyers, in turn,

⁵⁵ This table is only completed to provide the specific answers which certain interviewees have provided on the use of digital tools.

⁵⁶ BE_L_2 stated that that 'internet has greatly facilitated the work of lawyers working in EAW procedures, allowing them to find lawyers specializing in EAW procedures and facilitating the contacting of the lawyer's network. The internet is mainly used to search for specialized lawyers in EAW proceedings, and the interviewee gives the example of searching for such lawyers on the website of the Dutch, French and German bar association'.

⁵⁷ BE_J_2 states having assisted in and attended the questioning of defendants in the framework of EAW proceedings through videoconference.

⁵⁸ BE_J_2 states that 'apart from classic e-mail, digital tools have not played a major role in enabling access to information on the appointment of a lawyer in the issuing State and legal aid schemes.'

expressed the opposite opinion and affirmed that digitalisation leads or may lead to fewer EAWs being issued because, for example, videoconference is increasingly used to question defendants in other states. One lawyer, however, noted that in many instances the EAW has another purpose, such as avoiding collusion between suspects, which cannot be substituted by the use of digital tools.

One prosecutor noted that there may be risks to privacy associated with digitalisation and the need to ensure measures comply with the GDPR. Another prosecutor also mentioned confidentiality as a potential risk. One lawyer and one prosecutor, in turn, noted the risk of hacking. Lastly, as investigative judge noted that when proceedings are conducted digitally, it is more difficult to assess the fairness and integrity of the proceedings. For example, it is difficult to assess whether the person being interrogated has chosen a lawyer of their own choosing or whether they are not forced to make certain statements.

With the exception of one prosecutor, who stated that “since the pandemic there has been an increasing use of videoconference during EAW proceedings” (Belgium, Prosecutor), all interviewees said that the Covid-19 pandemic has had no major effect on the digitalisation of EAW proceedings in Belgium.

One prosecutor and one lawyer were of the view that digitalisation can play a bigger role in EAW proceedings than it currently does. The prosecutor proposed to create “a platform which could serve as a channel for transmitting information between practitioners” (Belgium, Prosecutor). The lawyer, in turn, argued that digitalisation could play a role in making case files available across borders as well as in the creation of information databases, such as the FRA database on detention conditions.

Belgium, Lawyer

Question 24: Can you highlight some challenges but also practices that work well from your daily work in regard to any of the issues that we have discussed during this interview?

A: `The exchange of information will be a very important one. I am of the opinion that there should be more focus on it, so that we have more access to local data. That database on detention conditions (FRA database) is a very good one, but I think we also need it when it comes to the guarantee of other fundamental rights.`

Question 24: Kunt u enkele uitdagingen noemen, maar ook praktijken die goed werken vanuit uw dagelijkse werk met betrekking tot de kwesties die we tijdens dit interview hebben besproken?

A: `Informatie-uitwisseling gaat een heel belangrijke zijn. Daar moet meer op gefocust worden vind ik, dat wij meer toegang hebben tot lokale data. Dan is die database over detentieomstandigheden wel al een hele goeie, maar ik denk dat we ook meer nodig hebben op vlak van andere grondrechten die al dan niet gewaarborgd gaan worden.`

d. Discussion of findings

In many ways, digitalisation in EAW proceedings in Belgium is still very much in its infancy. It is not specifically regulated under Belgian law and, as became clear from the interviews, apart from classic internet and e-mail, no specific digital tools are in place. The pandemic has not changed much in this

regard; apart from one interviewee, all interviewees have stated that the pandemic has not led to the increasing digitalisation of EAW proceedings. However, it must be stressed that none of the interviewees viewed this as a major problem. For the most part, they felt they were able to get access to the information they needed through the use of internet and e-mail. Nevertheless, some interviewees stated that digitalisation could further increase the efficiency of EAW proceedings and exchange of information such as case files, by establishing platforms for practitioners or databases containing relevant information.

CONCLUSION

In general, it can be concluded from both the desk and field research that procedural rights of requested persons in EAW proceedings are guaranteed. The practitioners interviewed in general gave the sense that they were satisfied with the way EAW proceedings are conducted in Belgium. None of the interviewees pointed to or identified a major problem or deficiency with regards the procedural rights of requested persons in Belgium.

Yet, some general issues and potential problems were identified throughout the research, which will be presented according to the different themes, and possible ways forward.

Requested persons are duly **informed about their rights** after having been arrested based on an EAW. There are however two potential points of concern. First, according to most interviewees, requested persons will only have access to the full EAW relatively late, during the proceedings before the Pre-Trial Chamber, after having been arrested by the police and having been interrogated by the investigative judge. It would be good practice if the requested person was able to consult the EAW at an earlier stage, after having been arrested by the police or at the very latest before the interrogation by the investigative judge. Second, all interviewees affirmed that the requested person is duly informed about the specialty rule and the implications of renouncing the specialty rule. However, the interviewees disagree about the degree of efforts paid by the judicial authorities to ensure that the information provided is understood and, about whether requested persons actually understand the information provided. It cannot be concluded that prosecutors ensure and report that the requested persons are 'fully aware' of the consequences of the renunciation of the specialty rule, because i) at times the prosecutors in charge do not seem to verify whether the requested person has understood the information provided, as they assume this is the role of the requested person's lawyer; and ii) several prosecutors interviewed acknowledged that they cannot be certain whether the requested person understands the information provided, such as information about the consequences of the renunciation of the specialty rule. This practice seems difficult to reconcile with Article 13 paragraph 2 of the Belgian EAW law, which specifically states that the prosecutor in charge has to draft a police report (*proces-verbaal*) in which it is stated that the requested person has to be 'fully aware' of the consequences of the renunciation of the specialty rule.⁵⁹ Thus, as they are under the legal obligation to do so, more efforts should be paid by the competent prosecutor to ensure that the requested person understands the consequences of renouncing the specialty rule, before putting down in the police report that the requested person is 'fully aware' of these consequences. This is especially true in light of the fact that not all lawyers representing requested persons possess the necessary expertise and experience in EAW proceedings to provide effective legal representation.

⁵⁹ Art. 13 paragraph 2, Wet betreffende het Europees Aanhoudingsbevel, 19 december 2003.

Requested persons in EAW proceedings can generally speaking rely on **interpretation and translation** at all stages of the proceedings and no major deficiencies or problems have been identified throughout the research. However, the fact that the EAW and other potential essential pieces of the case file are not necessarily translated in a written form in a language the person understands but only through oral interpretation could raise some concerns. Article 10/2 of the Belgian EAW law provides that the fact that only an oral translation or oral summary of the case file is provided cannot negatively impact the fair conduct of the proceedings and that it should be laid down in the police report that such a translation has been provided. In practice however, it is not at all clear whether is sufficiently guaranteed and safeguarded that the requested person fully understands the oral interpretation in a way that does not affect the fair conduct of proceedings. As is the case for the Letter of Rights, it would therefore be advisable to, to the extent possible, provide a written translation of the EAW and other pieces of the case file. In case this is not possible, it should be assessed whether the requested person has fully understood the oral translation, which should be put down in the police report. In addition, the responses above seemed to indicate that the legal professionals interviewed had differing views about whether the state provided interpretation for consultations between the lawyer and requested person, indicating some lack of clarity regarding this. Since consultations are not worth much if the requested person and their lawyer cannot understand each other, this may pose a problem for the defence.

The system put in place guaranteeing **legal representation** for requested persons arrested upon an EAW in Belgium is generally considered to be working very well. Yet, some areas of concern could be identified.

First of all, requested persons in Belgium do not have much leeway to choose or contact a lawyer of their choice in case they do not already know a lawyer themselves. They will in such a situation be assigned a state-funded lawyer but have no say in the procedure of assignment.

Second, while the right to legal representation in the issuing state is explicitly provided for in Article 10/1 of the Belgian EAW law and mentioned in the Letter of Rights provided to the requested person, from the interviews it can be concluded that the requested persons are barely informed of this right, that there is no system in place to facilitate the exercise of this right, nor is there any specific remedy available in case the requested person is not informed of this right. It would be advisable that, first, the requested person is duly and systematically informed by either the investigative judge or prosecutor in charge. Second, a system should be put in place which guarantees and facilitates the appointment of a lawyer in the issuing State. Lastly, the consequences of not informing the requested person of this right should be more clearly established.

Third, oftentimes lawyers representing requested persons in EAW procedures in Belgium lack interest, motivation, and the required technical legal expertise on EAW proceedings, which leads to some lawyers not taking their task to provide legal representation very seriously and treat the procedure as a formality. This of course negatively affects the effective legal representation of requested persons. In this regard, several lawyers suggest that training courses on EAW proceedings should be provided and that a specialised pool of lawyers with knowledge experience and interest in EAW proceedings should be established.

With regards to **issuing and executing EAWs**, there was a consensus among interviewees that the individual situation of the requested person is taken into account. Beyond that, there was less consensus. Judicial authorities were of the view that they consider proportionality when issuing EAWs, for example by looking at the seriousness of the facts for which the EAW has been issued or by considering less intrusive measures than EAWs. However, the lawyers interviewed felt that this was

not the case. There was however more agreement among the interviewees that the EAWs Belgium is asked to execute are often disproportionate and that a solution to this could be contacting the issuing authority to ask them to withdraw the EAW or to propose an alternative measure. Yet, some of the lawyers interviewed stated that Belgian judicial authorities would be reluctant to take such steps, and, as can be concluded from the interviews judicial authorities, they are in fact hesitant in this regard, mainly because they are mindful of the principle of mutual recognition. The solution therefore seems to lie at the European level, where, in addition to the Commission Handbook, clear rules and higher thresholds for issuing EAWs ought to be established.

The same divergence can also be detected when it comes to taking into account detention conditions or the right to fair trial when executing EAWs. While judicial authorities state that arguments on these bases will in general be considered, the lawyers are much more sceptical in this regard and do not detect much openness and willingness among the respective judicial authorities to engage with arguments on these bases. Most concerningly, one lawyer stated that the fact that Belgium itself has been condemned by the European Court of Human Rights for detention conditions in its prisons is used by Belgian judicial authorities to refute the argument that detention conditions can be invoked to deny execution of the EAW “as it is not worse elsewhere compared to Belgium”. While the other lawyers did not say it this explicitly, their answers echoed the sentiment. Even judicial authorities concede that arguments on the basis of detention conditions and the right to fair trial in favour of the non-execution of EAWs rarely succeed. Thus, the cases discussed under the legal overview where the right to a fair trial has been recognised as a ground for not executing an EAW should be considered as the exception to the rule. Most judicial authorities will be deferential to the issuing authorities and rely on the principle of mutual recognition. Here, the lack of knowledge of the relevant ECJ jurisprudence also seems relevant. Most judicial authorities do not seem aware of jurisprudence on fair trial and detention conditions or do not have a thorough understanding of it, which is why they are reluctant to engage with arguments on these bases. Therefore, it seems essential to provide continued education for judicial authorities on the law applicable in EAW proceedings.

In many ways, **digitalisation in EAW proceedings** in Belgium is still very much in its infancy. It is not specifically regulated under Belgian law and as became clear from the interviews, apart from classic internet and e-mail, no specific digital tools are in place. The pandemic has not changed much in this regard; apart from one interviewee, all interviewees affirmed that the pandemic has not led to an increase in the digitalisation of EAW proceedings. However, it must be stressed that none of the interviewees viewed this as a major problem. For the most part, they felt that they were able to get access to the information they needed using internet and e-mail. Still, some interviewees argued that digitalisation could further increase the efficiency of EAW proceedings and exchange of information such as case files, by establishing platforms for practitioners or databases containing relevant information.