ECBA STATEMENT ON MUTUAL RECOGNITION OF EXTRADITION DECISIONS

1 INTRODUCTION

1.1 The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers, with members from European Union and Council of Europe Member States, and beyond, founded in 1997.

1.2 The association is wholly independent and free from outside interference.

1.3 The primary purpose of ECBA is to be a leading group of independent criminal defence lawyers and criminal law experts in Europe promoting the fundamental rights of persons under criminal investigation, suspects, accused and convicted persons. For more information, please refer to our website www.ecba.org.

1.4 In 2017, the ECBA presented a new roadmap, building on the Directives which followed the 2009 Stockholm Programme. This roadmap ("Agenda 2020") seeks to promote further procedural safeguards in criminal proceedings across the EU, thereby strengthening the principle and application of mutual trust and recognition. Proposed Measure A of the roadmap relates to Detention and the European Arrest while Measure F deals with Remedies and Appeals. This statement looks at a specific issue falling within the remit of both of these measures, that of the lack of mutual recognition of extradition decisions.

1.5 Deprivation of liberty across borders, by means of extradition requests or European Arrest Warrants (EAW), and the rights of those affected by such measures, have been the focus of the ECBA for decades. ECBA members deal with persons affected by such measures on a daily basis. The rights of such persons are very limited in an area of law that was historically deemed to be an affair between states. Although the requested person's fundamental rights have been subject to increasing recognition, this change has been very gradual, and in practice the rights of such persons are still extremely limited. This is the case even within the European Union (EU), where natural persons benefit from rights enshrined in the Charter of Fundamental Rights (CFR) and the European Convention on Human Rights (ECHR) which are directly effective in the legal orders of the Member States.

1.6 An example of this problem is the situation faced by those persons, including, but not limited to, EU citizens, who have been subject to arrest and detention pursuant to INTERPOL red notices, extradition requests or EAW proceedings in one of the EU Member States and,

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despite having won their cases by obtaining a court decision refusing extradition or surrender, find themselves confined within the territory of that Member State, lacking access to effective remedies to avoid repeated arrest and detention throughout the EU. As a result, individuals having successfully defended themselves against extradition in one Member State nevertheless face potential extradition in all remaining countries and are therefore deprived of their right to freedom of movement within the EU.

1.7 This statement outlines the relevant issues and advocates for the establishment of legal remedies and rights in EU law to address this problem. In order to give effect to the right to freedom of movement, we call on EU Member States to consider certain categories of extradition decisions to be binding and to introduce procedural safeguards to determine this certainty. In addition, we encourage Members States of the Council of Europe to reflect on our recommendations and consider the possibility of recognizing the binding effect of the above-mentioned decisions by judicial authorities of any Council of Europe Member State as a matter of priority.

2 LACK OF EFFECTIVE ACCESS TO SIS AND INTERPOL'S SYSTEMS

2.1 The right to access to both SIS (see 2.2ff) and to INTERPOL (see 2.8) is limited.

SIS

2.2 After issuing an EAW, an issuing Member State may seek the diffusion of an alert for persons wanted for arrest for surrender or extradition purposes (see Articles 26 to 31 SIS II Regulation) in the Schengen Information System ("SIS"). SIS constitutes one of the world's largest and most developed instruments for the dissemination of arrest warrants and extradition requests. It is live amongst the EU, EEA and Switzerland.

2.3 An alert in SIS is equivalent to an EAW and may form the basis of an arrest, even when the EAW is not in the possession of the arresting officers, or the EAW is not translated into the language of the executing State.

2.4 Regulation (EC) No 1987/2006 of 20 December 2006 (establishing SIS II) allows persons access to data relating to them by way of Art. 41. The more recent SIS Regulation 2018/1862 of 28 November 2018 (which reflects recommendations made by the Commission following a Report on the Evaluation of SIS II of 21 December 2016) allows data subjects

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access to the SIS database for the limited purposes set out in Arts. 15, 16 and 17 of Regulation (EU) 2016/679 and Art. 14 and Art.16(1) and (2) of Directive(EU) 2016/680.

2.5 Such access is ultimately controlled by the issuing Member State (Art. 67(2) Regulation 2018/1862 and Art. 34(2) Regulation 1987/2006).

2.6 Under Art. 67 of the same Regulation, the requested State may grant request for access to data, but it must first give "*the issuing Member State an opportunity to state its position*". As a result, information about the subsistence of a SIS alert can only be provided with the knowledge of the issuing Member State.

2.7 Whilst there is a recognition of the importance of general data protection principles within the legal framework which underpins SIS II[1] there is a fundamental and structural problem with regard to the practical application of such principles. The delegation of the right of access and deletion to the issuing state means that there is no recourse for persons who are unable to obtain a proper remedy from the issuing state (see below). There is a significant number of such persons whose extradition has been refused by an executing judicial authority. In such cases, as we describe below, a request to the issuing state for removal of the data is very unlikely to be granted. This statement goes on to look at the problems which arise from the lack of mutual recognition of decisions on surrender or extradition, and the absence of an effective legal remedy.

INTERPOL

2.8 While Art. 29 of the Statute of the Commission for the Control of INTERPOL's Files (SCCIF) provides a right to request access to the information processed by INTERPOL, the exercise of this right is subject to similar limitations to the SIS both with regard to the consultation of the requesting state as well as the content of the information received from INTERPOL, see Art. 35 SSCIF.

3 LACK OF MUTUAL RECOGNITION OF DECISIONS ON SURRENDER OR EXTRADITION

[1] See for example recital 18 of Regulation 1987/2006. The Guide for Exercising the Right of Access states that the right of access "is a fundamental principle of data protection which enables data subjects to exercise control over personal data kept by third parties."

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3.1 As mentioned above, a SIS alert may trigger EAW proceedings in any EU Member State; INTERPOL warrants or diffusions regularly trigger arrest and extradition proceedings. The alerts in SIS and INTERPOL systems may constitute the basis for EAW or extradition requests or proceedings, however, they are technically independent from EAW and extradition procedures. As a consequence, a national judicial decision denying surrender pursuant to an EAW or refusing extradition does not in itself affect the subsistence of the alert, and the person sought could therefore be re-arrested in another state.

No Binding Effect of Extradition Decisions

3.2 There is currently no law explicitly stating that extradition or surrender decisions have binding effect within the EU. Individuals subject to an alert – by an EU Member State or a non-EU Member State– may obtain a decision from an executing judicial authority holding that their extradition is unlawful. However, under the governing laws and principles, this decision confers no binding effect on other Member States since the reasons for the non-execution of an EAW largely depend on national law or only relate to individual executing Member States. The reasons enshrined in EAW-FD Art. 3(1) (amnesty) and Art. 3(3) (under the age of criminal responsibility) relate to the national legal order within individual executing Member States or depend on national law and cannot *per se* create a binding effect on all other Member States. The grounds provided for in EAW-FD Art. 4 are, by their nature, optional (as compared to mandatory grounds for non-execution of an EAW) and not capable of binding other Member States. In addition, some grounds depend on substantive national law (Art. 4(1): lack of double criminality; Art. 4(4): statute-bar; Art. 4(7): extraterritoriality) or are not permanent by their nature (Art. 4(2), Art. 4(3)). The same applies in the context of extradition to third states (see e.g. the refusal grounds in the Council of Europe Convention on Extradition, based on the requested person's nationality, pending proceedings or lapse of time - Articles 6, 8 and 10).

3.3 As a result, even if requested persons successfully defend extradition in Member State A, they may be arrested and detained on the basis of the same request for extradition or surrender when they enter Member State B.

3.4 Additionally, any time that a requested person has spent in detention or otherwise deprived of liberty in Member State A will not automatically be discounted from the time spent in detention in Member State B or, indeed, taken into account if ultimately surrendered to the issuing Member State. The same applies if the extradition request is made by a third state.

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Risk of Arrest and Duration of Deprivation of Liberty

3.5 An individual moving between Member States within the EU is thus at risk of repeated arrest, with a risk of deprivation of liberty for several months in each Member State on the basis of the same request for extradition or EAW.

3.6 For example, under Art. 16(4) of the European Convention on Extradition 13 December 1957 (ETS No. 24), the extradition documents which form the basis of an extradition decision must be provided by the requesting state within a maximum of 40 days; in practice, the requested person will be detained for that period as a minimum, and generally speaking for longer periods. That period starts to run anew in every Member State that a requested person enters. Consequently, with 27 EU Member States, the requested person could theoretically face a total of almost three years in prison until extradition has been refused by all Member States.

3.7 The same applies in the case of an EAW: the most recent statistics (2019) show that the average time for a decision to be taken where the person does not consent to surrender is 55.75 days, but it may take up to 90 days, or even longer.[2] This means that the person sought could theoretically face a total of almost four years in prison until surrender has been refused by all Member States.

No EU-Wide or Pre-Emptive Mechanism

3.8 Under the governing laws, the requested person has no opportunity to contest a request for extradition or an EAW at EU-level with binding effect on all Member States. Further, they have no opportunity to obtain a decision prior to entering another Member State, nor can they trigger pre-emptive proceedings in another Member State.

3.9 EAW-FD Art. 22 requires the executing judicial authority to notify the issuing judicial authority immediately of the decision on the action to be taken on the EAW. Under EAW-FD Art 26, information concerning the duration of the detention of the requested person on the basis of the EAW shall be transmitted by the executing judicial authority at the time of surrender. Currently, however, there is no requirement to exchange information on detention or other circumstances amounting to a significant restriction of liberty where surrender is

[2] https://ec.europa.eu/info/sites/default/files/law/search_law/documents/eaw_statistics_2019_swd_2021_227_final_08_2021_en.pdf

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refused. Theoretically, if a requested person's surrender is refused since (s)he has served almost the entire term of detention, then (s)he could be re-arrested and detained for a term which exceeds the entire term of detention that a national court imposed.

Risk of Arrest and Defense Costs Prevent Freedom of Movement

3.10 Even if a requested person chooses to risk arrest and enter other Member States, they require specialised legal counsel in each and every Member State to defend themselves against extradition or surrender. This will incur significant costs and effectively make it impossible to successfully fight the request in all Member States. As a result, the requested person is limited in their freedom of movement under Art. 21 TFEU.

Examples

3.11 The current situation can be shown in two practical examples:

3.12 A Portuguese citizen is subject to an extradition request from Argentina. Portugal refuses extradition on account of a nationality bar but the Portuguese investigation into the alleged criminality is terminated on the grounds of insufficient evidence. When entering Spain, the *Audiencia Nacional* in Madrid (case no. 70/2018) on 11 April 2019 and on 13 May 2019 rules that the Portuguese decision bars further prosecution and extradition according to Art. 54 of the Convention implementing the Schengen Agreement of 14 June 1985 (CISA)[3] and Art. 50 of the CFR and thus refuses extradition. When entering Germany, the same man is arrested and detained for several months under the same extradition request from Argentina. The Bremen Higher Regional Court (case no. 3 Ausl A 77/19) refused to accept that it was bound by the Spanish decision and failed to make a preliminary reference to the CJEU under Art. 267 of the Treaty on the Functioning of the European Union.

3.13 The case set out in C-505/19 *WS* (ECLI:EU:C:2021:376) provides a further example. WS is a German citizen. Criminal proceedings against him were terminated in Germany triggering *ne bis in idem* under Art. 50 of the CFR and Art. 54 of the CISA. The CJEU accepts that in this scenario, WS may not be wanted, arrested or extradited to a non-EU-Member State if a judicial decision exists confirming that the request for extradition from that third country

[3] The Convention implementing the Schengen Agreement of 14 June 1985 (CISA) between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 19 June 1990 and which entered into force on 26 March 1995 (OJ 2000 L 239, p. 19)

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relates to the same facts. However, to date, no procedure exists allowing WS to obtain such a decision which binds all Member States. As a result, WS can not leave Germany without the risk of arrest.

Observations

3.14 The result is striking. A decision including a final disposition of the case has binding effect and creates a bar to further proceedings for the same acts per Art. 50 of the CFR and Art. 54 of the CISA. The binding effect is based on the principles of mutual trust and recognition between EU Member States. One Member State trusts the assessment of the judicial authority of another Member State finally disposing of a matter (see Joined Cases C-187/01 and C-385/01 Gözütok and Brügge (ECLI:EU:C:2003:87); Case C-150/05 Van Straaten (ECLI:EU:C:2006:614); Case C-467/04 Gasparini (ECLI:EU:C:2006:610) and Case C-398/12 M. (ECLI:EU:C:2014:1057)).

3.15 However, extradition decisions are generally not considered to be the final disposition of a case. They are not decisions on the merits/substance of the case but determine whether the (often very formal) requirements of extradition are met and whether obstacles to extradition exist.

3.16 As illustrated by these examples, EU citizens are prevented from effectively exercising their right to freedom of movement.

4 LACK OF AN EFFECTIVE LEGAL REMEDY

4.1 Within the current legal framework, the legal remedies against SIS- and INTERPOL-alerts are very limited. On paper, the individual who has defeated an extradition request in one Member State has several ways to challenge an alert. Requested persons can challenge the underlying arrest warrant in the country seeking their arrest. Often, this requires their presence in the respective country. From a practical perspective, ECBA members' clients have encountered great difficulty in making use of the right to instruct a lawyer in the issuing Member State whilst in the executing Member State.[4] Consequently, the person is obliged to seek a

4 See Art. 10 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

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legal remedy with INTERPOL (see 4.1 below) or against the SIS alert (see 4.2. below) to avoid further arrest.

INTERPOL

4.2 To allow freedom of movement to be exercised, a requested person can seek the deletion of an alert with INTERPOL if he or she is subject to an INTERPOL notice or diffusion.

4.3 As for the request for access to the files, the right to request deletion of the information (and alerts) stored with INTERPOL is provided for in Art. 29 SCCIF. In substance, however, the grounds for deletion are very limited. In addition, despite various efforts to increase transparency,[5] the grounds for deletion of a notice remain unpredictable.

4.4 In addition, even if an extradition decision by a judicial authority of one Member State were binding on the authorities of other Member States, INTERPOL as a non-EU institution does not currently provide for regional limitation of its alerts. Further, INTERPOL's systems are not harmonised with SIS, so an entry or a limitation in SIS would not lead to a limitation within INTERPOL's systems. Under current practice, INTERPOL only applies flags or addendums to certain notices if a Member State requests such notification. However, even these flags or addendums are not binding on Member States. As a consequence, the processing or enforcement of an INTERPOL notice can only be limited or even barred at a national level, i.e. within Member States. To provide a practical example: if a non-EU state enters an alert with INTERPOL and Member State A refuses extradition pursuant to that alert, Member State A is not able to circulate this finding in SIS. Its decision is not binding on all INTERPOL members, and the limiting effect of its decision may currently only be communicated via an addendum or flag in the INTERPOL systems. The consequence of such addendum or flag would need to be considered at national level on a case by case basis. The ECBA argues that, in substance, Member States should be barred from processing an alert if they are informed – via INTERPOL (or otherwise) – that another Member State has refused extradition.

SIS

4.5 Unfortunately, nothing allows a person subject to an EAW and a SIS alert to bring a request for removal of data from the SIS or to challenge the EAW directly before an

5 See INTERPOL's "REPOSITORY OF PRACTICE: Application of Art.3 of INTERPOL's Constitution in the context of the processing of information via INTERPOL's channel" and the 45 "Decision Excerpts" published on their website for 2017 through 2019.

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independent European judge or an impartial and independent body. EU law currently only provides for limited and somewhat ineffective avenues of redress against abusive EAW and SIS alerts.

4.6 While a person subject to a SIS alert has the right to seek the correction or deletion of the data, such a request can only be addressed to the issuing state (see 4.8 below). There are also a limited number of actions the executing state may consider, but none of them are sufficient to enable the requested person to completely recover their freedom of movement (see 4.10ff below).

Personal Data Rights of a Person Subject to a SIS Alert

4.7 A person subject to a SIS alert can seek the deletion of such data from the SIS on the basis of their personal data rights.

4.8 Under Art. 59(3) of Regulation 2018/1862 of 28 November 2018, "*only the issuing Member State shall be authorised to modify, add to, correct, update or delete data which it has entered into SIS*". Thus, the issuing Member State has exclusive jurisdiction over the removal of the alert from the whole information sharing system.

4.9 If the requested person submits a request for the removal of the alert in the issuing Member State under Art. 59(3) of the Regulation, it is highly unlikely that the issuing Member State will remove its SIS alert based on the finding by a foreign judge that in case of surrender, the requested person would face a risk of inhumane or degrading treatment or a flagrant denial of justice in the issuing state. These provisions therefore provide the requested person with limited and arguably ineffective possibilities of redress.

The Possible Intervention of a Member State other than the Issuing Member State

4.10 There are steps a Member State other than the issuing Member State may take, in the event that its judicial authority has denied surrender, in order to enable the requested person to recover their freedom of movement.

4.11 Regulation 2018/1862 provides the executing Member State with two singular means of action to challenge certain data in the SIS: it can request the addition of a flag in the SIS and/or refer the matter to the European Data Protection Supervisor.

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The addition of a flag next to the alert in the SIS

4.12 Under Art. 24 of Regulation 2018/1862, if a Member State considers that to give effect to an alert issued by another Member State is "*incompatible with its national law, its international obligations or essential national interests*", it may request that a flag be added to the alert in the SIS, thereby neutralizing the effect of the alert on its territory.[6] "Art. 24 flags" thus provide a warning to foreign authorities that the authorities of a particular Member State will not take action on the basis of the alert. Whilst this is an interesting provision for the data subject, Art. 24 flags are an entirely discretionary prerogative of the state, and their effects are in any case limited to the territory of the state which decides to issue such a flag.

4.13 The Regulation also contains a provision specific to EAWs. Art. 25 of the Regulation, entitled "*flagging related to alerts for arrest for surrender purposes*", provides that where the EAW FD applies, "*a Member State shall request the issuing Member State to add a flag preventing arrest as a follow-up to an alert for arrest for surrender purposes where the competent judicial authority under national law for the execution of a European Arrest Warrant has* refused its execution on the basis of a ground for non-execution and where the addition of the flag has been required". Using rather ambiguous language, this provision seems to suggest that the executing Member State must ask the issuing Member State to add a flag preventing arrest next to the alert in the SIS when, first, its domestic judicial authority has refused surrender based on a ground for non-execution, and, second, where "the addition of the flag has been required".

4.14 Unfortunately, it is not clear what this second condition entails, as the text does not specify who can require the addition of a flag, and there is no literature on this issue. A possible interpretation is that the requested person or the judicial authority which has refused execution of the EAW is entitled to request the addition of a flag and may therefore compel the executing state to make use of this provision. Such an interpretation is, however, uncertain in the absence of an express provision conferring upon the requested person or the judge a specific ability to request the addition of a flag. Another possible interpretation is that the flag referred to in the second condition is that of Art. 24, which would mean that Art. 25 may only be used where the

[6] *"Where a Member State considers that to give effect to an alert entered in accordance with Art.26, 32 or 36 is incompatible with its national law, its international obligations or essential national interests, it may require that a flag be added to the alert to the effect that the action to be taken on the basis of the alert will not be taken in its territory. The flag shall be added by the SIRENE Bureau of the issuing Member State"* (Art. 24(4)); see Attorney General Priit Pikamäe in C-520/20, ECLI:EU:C:2022:12.

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executing Member State has first made a finding, pursuant to Art. 24, that the alert is incompatible with its national law, its international obligations or its essential interests. In that case, this provision appears overly complex and hardly workable in practice, as Art. 25 does not oblige the issuing state to add the purported flag preventing arrest if it is requested to do so by another Member State. Unfortunately, no public data can be found about whether Art.24 and 25 of the Regulation are actually being used.

4.15 Thus, whilst these provisions attempt to bring a solution to the issue identified in this statement, they are quite unsatisfactory. In both cases, it appears that the flag added to an alert at the request of a Member State does not create any obligation for other Member States, which are not bound by such a flag. As a result, even if the executing state has decided not to give effect to the alert, the requested person's freedom of movement is effectively impaired within the rest of the EU, until the issuing authority decides, if it so wishes, that the alert in the SIS should be removed.

Referring the matter to the European Data Protection Supervisor

4.16 A second step that a Member State other than the issuing Member State might take is to bring a dispute with the issuing Member State before the European Data Protection Supervisor (EDPS). In the event of disagreement on the lawfulness of data stored in the SIS between two states, the state which did not enter the alert must submit the matter to the EDPS for a decision, in accordance with Art. 59(5) and 59(6) of Regulation (EU) 2018/1862 on data quality in the SIS.[7] Again, this provision is dependent on state action and it does not confer upon the requested person an individual right to file a complaint before the EDPS. It is also unclear whether the EDPS actually has the power to compel a Member State to modify or remove data entered in the SIS.

5 PROPOSED SOLUTIONS

[7] Art.59(5): *"Where a Member State other than the issuing Member State has evidence suggesting that an item of data is factually incorrect or has been unlawfully stored, it shall, through the exchange of supplementary information, inform the issuing Member State as soon as possible and not later than two working days after that evidence has come to its attention. The issuing Member State shall check the information and, if necessary, correct or delete the item in question without delay".*
Art.59(6): *"Where the Member States are unable to reach an agreement within two months of the time when evidence first came to light as referred to in paragraph 5 of this Article, the Member State which did not enter the alert shall submit the matter to the supervisory authorities concerned and to the European Data Protection Supervisor for a decision, by means of cooperation in accordance with Art.71".*

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Substantive Law

5.1 In *WS*, the CJEU may have indicated a solution to the problem an individual is facing:

> *"In order to ensure, in such a situation, the effectiveness of Art.54 of the CISA and of Art.21(1) TFEU, read in the light of Art. 50 of the Charter, the Member States and the Contracting States must ensure the availability of legal remedies enabling the persons concerned to obtain a final judicial decision establishing that the* ne bis in idem *principle applies, as referred to in paragraph 89 above."*

5.2 The court implies that the final judicial decision by one Member State on *ne bis in idem* can be binding on other Member States and prevent arrest and extradition in that other Member State.

5.3 If one accepts this as a general principle, certain extradition decisions should have binding effect within the European Union and the Schengen area in order to ensure the effective exercise of the right to freedom of movement. However, not every decision can have such binding effect since national law is not harmonised within the EU and further, the grounds for refusal of extradition can vary significantly in nature. Further, certain reasons for refusal are temporary by nature; the requested person cannot trust that he/she is no longer sought following such a decision. As a consequence, in our view, only the reasons falling under the suggested Category 1 below should be binding upon other Member States and create a permanent bar to further extradition proceedings.

Category 1 - Permanent Reasons for Refusal

5.4 The first suggested category includes permanent reasons for refusal that are independent of national laws such as:

- **Ne bis in idem**: As stated by the CJEU in *WS*, Art. 54 of the CISA and Art. 21(1) TFEU preclude authorities from making a provisional arrest or from keeping a person in custody if the Member State is aware of the fact that a final judicial decision has been taken in another Member State establishing that the *ne bis in idem* principle applies with regard to the acts covered by a notice.

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- **Grounds of refusal under recital 12 of EAW-FD**:[8] prosecution based on the grounds of sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation is a permanent reason for the refusal of extradition accepted by all Member States. If a court of one Member State finds such reasons, the courts of other Member States should be bound under the principles of mutual trust and recognition.

- **Proportionality:** The concept of proportionality of an EAW is widely recognised in the case-law of the CJEU (most recently in Case C-648/20 PPU *PI* (ECLI:EU:C:2021:187)) and must be assessed with regard to each EAW. As such, the finding by a court on disproportionality should be binding on other Member States' courts. Proportionality is a general principle of EU law under Art. 52 of the CFR.[9]

Category 2 – Non-Permanent but Fundamental Reasons for Refusal

5.5 While the reasons outlined in Category 1 are permanent in nature, other reasons for refusal of an EAW are non-permanent by their nature. However, the finding by a court of a Member State of such a ground for refusal which is fundamental in its nature (i.e. where it relates to a risk of violation of the CFR (or ECHR) fundamental rights of the requested person) should be recognised across the EU, enabling the requested person to exercise his or her right to freedom of movement without risk of arrest and extradition unless the requesting state has proven that the risk found by the court no longer exists. These grounds are as follows:

- **Risk of ill-treatment:** Art.19 of the Charter provides that "no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." (See also Case C-897/19 PPU *Ruska*

[8] Recital 12 reads (excerpt): *"Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons."*

[9] Further, the EU has recognised this concept in other analogous measures to the EAW. See, for example, the surrender arrangements in the EU/UK Trade and Cooperation Agreement 2020 in particular, Art. 597 which creates a free-standing principle of proportionality.

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Federacija v I.N. (ECLI:EU:C:2020:262)) A finding that this fundamental right is at risk by a court of one Member State should be binding on others.

- **Risk of flagrant denial of justice; fair trial**: In the *Soering* (ECtHR, 7 July 1989, *Soering v United Kingdom*, Applic. no. 14038/88) decision as well as in the Case C-216/18 PPU *LM* (ECLI:EU:C:2018:586), the ECtHR as well as the CJEU developed and confirmed the concept that extradition can be refused "*where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country*" (*Soering*) or where there is "*a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial*" (*LM*). Where a court of a Member State finds such risk, the courts of other Member States should be bound by such a finding.

5.6 In this category of cases, one could find concerns such as prison conditions (see *Aranyosi* C-404/15 and C-659/15 PPU (ECLI:EU:C:2016:198); *ML* C-220/18 PPU (ECLI:EU:C:2018:589); *Dorobantu* C-128/18 (ECLI:EU:C:2019:857)) or the rule of law (see *LM*). These reasons are considered non-permanent since a change of government of the requesting state or the prison conditions in that country could change the underlying reasons for refusal.

5.7 Knowing about these circumstances, the requested individual cannot rely on the initial decision on extradition indefinitely. If circumstances change, the requested person may face extradition.

5.8 The difficulty in this category is that there cannot be a permanent binding ruling on the court of other Member States. However, if the circumstances remain unchanged, the requested individual should not be at risk of divergent decisions between Member States. For these reasons, we suggest that a decision refusing extradition for these non-permanent reasons shall have a binding effect upon the courts of another Member State until there is evidence that such risk no longer exists.

5.9 We are aware that the current legal framework does not provide for a procedure allowing for a requesting state to prove that no such risk exists. However, such a procedure would have two benefits: first, it would allow the effective exercise of the right to freedom of

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movement, and secondly, it would prevent impunity should the grounds for refusal of the EAW cease to exist. Member States could consider the introduction of such a procedure before the courts of the Member State that first refused extradition.

Category 3 – procedural reasons

5.10 Procedural reasons such as a lack of formalities (e.g. EAW-FD Art. 8), or the failure to meet deadlines (e.g. EAW-FD Art. 17, 23) should not be binding on other Member States.

Required Procedural Safeguards

5.11 The solution must not be limited to substantive law only. Procedural safeguards are necessary as well as a change in the processing of alerts pertaining to an extradition request, an EAW and INTERPOL alerts.

5.12 In *WS* (para. 120), the CJEU held that the processing of personal data is inadmissible if the *ne bis in idem* principle applies. One interpretation of the decision could be that the processing of data is inadmissible if the underlying extradition or EAW request is inadmissible for reasons that extend to all Member States.

5.13 If, as suggested above, certain extradition decisions have binding effect in the future, not only would the arrest and extradition be unlawful but also the processing of data including the processing of an alert or wanted notice.

5.14 Both above mechanisms described in section 4 are largely unhelpful for a person seeking removal of a SIS or INTERPOL alert. It is hard to see why a Member State would have an interest in initiating a dispute with another Member State regarding a SIS alert (unless, perhaps, the said alert concerns a national of that Member State, which is often not the case; further, looking at the lack of active use of the ability to issue an EAW in respect of their own nationals according to C-505/19 *Petruhhin*, ECLI:EU:C:2016:630, case law[10], it is safe to assume that states will not actively seek to protect their nationals in most cases). The CJEU would be in a much better position to assess whether a SIS alert should subsist (or whether an INTERPOL alert should be executed within the EU) in cases where the judicial authority of

10 See https://www.eurojust.europa.eu/sites/default/files/assets/2020_11_eurojust_ejn_report_on_extradition_of_eu_citizens.pdf (p. 16, Section 4.2.7., and p. 21, Section 5.1).

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a Member State has found that the execution of the EAW or extradition request would violate the requested person's human rights, or where there is a concern that the alert was issued by a judicial authority that lacks the necessary independence.

5.15 In light of the extremely limited rights of the person subject to a SIS or INTERPOL alert and the relatively inadequate prerogatives of other Member States to limit the impact of such alerts, we take the view that an independent, harmonised mechanism should be created at the EU level in order to regulate the issuance and subsistence of an alert in the SIS (and the execution and continued effects of an INTERPOL within the EU), in consideration not only of the principles of mutual trust and mutual recognition in criminal matters, but also the right to liberty, freedom of movement and the rule of law.

5.16 A mechanism to resolve the problem set out at paragraph 3.9 above already exists within the EAW-FD. Under EAW-FD Art. 26, the issuing Member State shall deduct all periods of detention arising from the execution of an EAW from the total period of detention to be served in the issuing member state as a result of a custodial sentence of detention order being passed. Those periods should also be communicated in the event of a refusal to surrender, together with the notification of the decision under EAW-FD Art. 22.

6 CONCLUSION

6.1 As a result, we call for Member States to **give effect to the principles of mutual trust and mutual recognition, the right to liberty, and right to freedom of movement within the EU by agreeing:**

- That a decision by a judicial authority of a Member State is binding upon the authorities of another Member State and as such prevents arrest and extradition or surrender if the court has found the request for extradition to violate the principle of *ne bis in idem* or to be disproportionate.

- That a decision by a judicial authority of a Member State is binding upon the authorities of another Member State and as such prevents arrest and extradition or surrender if the court has found a risk of a violation of fundamental rights, as long as it has not been established that the requesting state has taken steps to remediate this risk.

- To the creation of an independent, harmonised mechanism at the EU level in order to regulate the issuance and subsistence of alerts in the SIS (and the execution and continued

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effects of an INTERPOL alert within the EU) and to provide effective procedural safeguards on national and European-level with regard to the access and effective remedies against alerts.

6.2. We encourage Members States of the Council of Europe to reflect on our recommendations and consider the possibility of recognizing the binding effect of the above-mentioned decisions by judicial authorities of any Council of Europe Member State as a matter of priority.

7 ACKNOWLEDGMENTS AND CONTACT DETAILS

7.1 For further information, please contact the ECBA at secretariat@ecba.org

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