

Portuguese procedural aspects of EAW cases

Portugal as the Executing State (Law 65/2003, of 23.08)

- The competent jurisdiction for EAW proceedings in first instance in Portugal is the Court of Appeals of the residence of the person sought, or the place where the person was arrested (Guimarães, Porto, Coimbra, Lisboa, Évora).
- Once the person is arrested, she is brought before a Judge of the Court of Appeals within 48h where she is informed on the contents of the EAW, on the right to consent or to oppose execution, as well as on the right not to waive speciality.
- During this hearing, the Judge will also decide on bail. If bail is not granted, this decision can be appealed within 5 days.
- The arrested person can consent to his transfer to the IS and waive the speciality rule. If there is consent to surrender, the Judge has to pronounce the decision on the execution of the EAW within 10 days from consent.
- The consent to transfer by the arrested person is irrevocable and the decision of the Judge validating consent becomes final and may not be appealed.
- If the person opposes, the law states that the whole proceedings are held in this hearing and the defence should be presented immediately, as well as the evidence. However, the normal case is that, should the person oppose surrender, time will be given to lodge the defence arguments and indicate request for evidence in writing, typically between 5 and 10 days.
- There is usually no oral hearing, unless testimonial evidence is heard, which is seldom. There is however case law indicating that there should be an oral hearing for final pleadings.
- The presence of a lawyer is mandatory and, if no lawyer is privately instructed, one will be appointed by the Court. There is no right for the person to choose her lawyer, if the person is not able to afford one. Legal Aid fees are very low.
- Any kind of evidence may be accepted in theory, but the Courts tend not to accept evidence that is not documentary, arguing that it is irrelevant. It is also difficult to collect relevant evidence within the short deadlines provided.
- If the arrested person sought did not consent to surrender and the Court of Appeals rules that the EAW should be executed, the decision can be appealed within 5 days to the Supreme Court of Justice.
- The decisions of the Court of Appeals and the Supreme Court of Justice may be appealed to the Constitutional Court within 10 days. However, a matter of

unconstitutionality must have been raised beforehand in the regular jurisdictions. The percentage of appeals that are decided on the merits by the Constitutional Court is very low.

- A request for preliminary ruling is possible but quite rare in practice (I am not aware of any requests in the framework of EAW proceedings lodged by Portugal).
- The maximum deadlines for detention during EAW proceedings are: 60 days until the decision of the Court of Appeals; 90 days until the decision of the Supreme Court of Justice; 150 days until the decision of the Constitutional Court.
- The Code of Criminal Procedure and the Constitutional Procedural Safeguards in Criminal proceedings are applicable in EAW proceedings, *mutatis mutandis*.

Portugal as the Issuing State / Avenues to try to challenge an EAW

- Law 65/2003 has only 2 provisions on the issuing of EAW: Article 36 (competent authorities) and Article 37 (provisions concerning the execution of the EAW are applicable).
- The competent authority is generally a court of a judge, depending on the stage of proceedings or type of warrant:
 - Conviction EAW:
 - Judge rapporteur of the trial Court.
 - Judge of the Court of Execution of Sanctions, if absconded from prison.
 - EAW for criminal proceedings:
 - Trial stage: Judge rapporteur of the trial Court.
 - Pre-trial investigative stage (screening stage post indictment): investigative judge
 - Investigative stage (pre-indictment): public prosecutor in charge of the investigation. *Note: there is discussion, but no case law to my knowledge on whether the competence of the public prosecutor to issue EAW is in conformity with the Constitution.*
- Formal grounds: mandatory details and translation - Art. 3, Law 65/2003.
- Substantive conditions: the law does not state any substantive conditions and therefore in theory it could be said that it may be issued for any offense punishable with prison for at least 1 year. However, if an EAW is issued for criminal proceedings, it should only be possible to issue an EAW if pre-trial detention is applicable, otherwise would be disproportionate, since in Portugal the person could not be held in pre-trial detention and therefore would have to be released after 48h.

- Any person who has been indicted will have a legal aid lawyer randomly appointed. If there is no lawyer yet, a legal aid lawyer will also be appointed, once the person enters Portugal after surrender. It is possible to request the appointment of a legal aid lawyer in Portugal during the proceedings for execution of a Portuguese EAW in another MS. However, legal aid fees are very low and are exactly the same as in criminal proceedings where no EAW was issued.

- Portugal holds many trials *in absentia* based on service of papers by means of a simplified procedure. However, the defendant has to be served in person on the judgment and has 30 days to appeal such judgment. EAW issued before service of EAW are technically EAW for criminal proceedings and therefore, in my view, should not be issued if pre-trial detention is not applied. Service of the judgment should be sought beforehand by means of a rogatory letter.

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