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3 List of Acronyms

AJ pénal : Actualité juridique (review)

Cass., crim.: chambre criminelle de la Cour de cassation

CJEU: Court of Justice of the European Union

CPP: Code of criminal procedure

EAW: European arrest warrant

EIO: European investigation order

JORF: Journal officiel de la République française

RSC : Revue de science criminelle et de droit pénal comparé (review)

4 Executive Summary

This report aims to analyze the implementation of three cooperation instruments based on the principle of mutual recognition—the European Arrest Warrant (EAW), the European Investigation Order (EIO), and the Freezing and Confiscation Order—within French national law. It will then examine the transposition measures adopted by the French legislature, their evolution over time, and, most importantly, the critical issues that arise from comparing national and European legislation. Although the French legislature has implemented these instruments, national legislation diverges in some respects from European requirements, thereby compromising the effectiveness of judicial cooperation, and this will be addressed in the report by following up on the implementation and application of the three judicial cooperation instruments, including through an in-depth look at some case law.

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5 The implementation of criminal mutual recognition instruments in France

5.1 Introduction

5.1.1 Overview of the criminal procedural system

The French code of criminal procedure has been adopted by a Law of 31 December 1957 and has been changed frequently since 1957 under the influence of the European Convention of Human Rights and the Law of the European Union.

Historically, the French criminal system is inquisitorial. The French criminal law procedure is traditionally presented as written, secret and non-adversarial. This has changed for a long time; now the preliminary article of the code of criminal procedure provides that « *Criminal procedure should be fair and adversarial and preserve a balance between the rights of the parties*». Now the trial is without doubt oral, public and adversarial (even if probably not at the level of the American procedure). But these remarks apply only to the trial strictly understood. On the contrary, the pre-trial is ever written[709], secret[710] and rather not adversarial. But concerning this last point, it is necessary to distinguish between the two possible frames of the investigation in the French criminal procedure:

- On one hand, **the inquiry** (*enquête*) is the investigation made by judicial police officers under the supervision of the district prosecutor (*procureur de la République*), who has a judicial role (he is a magistrate in France) without a judicial status (he is not an independent magistrate: he works under the supervision of the general prosecutor – *procureur general* – which in turn is under the supervision of the Minister of Justice[711])[712]. The inquiry is actually the common frame of the investigation in France.

[709] Each act of the investigation must be written in an official report.

[710] Art. 11 Code of criminal procedure: « *Except where the law provides otherwise and subject to the defendant's rights, the inquiry and investigation proceedings are secret* ».

[711] Art. 5 Ordonnance of the 22th December 1958: « *Les magistrats du parquet sont placés sous la direction et le contrôle de leurs chefs hiérarchiques et sous l'autorité du garde des sceaux, ministre de la justice. A l'audience, leur parole est libre* ».

[712] The European Court of Human Rights has taken the view that owing to their status, public prosecutors in

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- On the other hand, **the judicial investigation** (*instruction*) is made by an investigating judge (*juge d'instruction*), who is an independent magistrate. The judicial investigation is required for the most serious offences (criminal offences) and possible for other offences, especially for complex cases.

Historically, the judicial investigation was the only possible frame to investigate. Prosecutors have developed the use of an inquiry before applying to an investigating judge. This practice was finally recognized in the code of criminal procedure and became the common frame.

Anyway, for every person suspected, the choice of the investigation frame has important effects. If the person is suspected in a judicial investigation, he is considered a party and he has complete defense rights. If the person is suspected in an inquiry, he is not considered a party; for that reason, for a long time, the code of criminal procedure denied these persons defense rights. This, even if the person was under police custody[713] during the inquiry (custody which can last until 48 hours in case of common offences)[714]. For that reason too, the person didn't have and doesn't yet have remedies at his disposal to contest this phase of the procedure.

The national authorities involved in criminal proceedings are first of all the **district prosecutor** for the inquiry and the **investigating judge** for the judicial investigation. To strengthen the judicial control during this pre-trial stage, the Law of 15 June 2000 for the protection of the presumption of innocence created a new judicial institution: **the liberties**

France did not satisfy the requirement of independence from the executive which, according to its well-established case law, was, like impartiality, one of the guarantees inherent in the autonomous notion of "officer" within the meaning of Article 5 § 3 (ECtHR, Moulin v. France, 23 November 2010, §. 57; ECtHR (Gd. ch.), Medvedyev v. France, 29 March 2010). But the Constitutional Council has expressed disagreement with Strasbourg in a line of cases. In an important judgment published on the 8th of December 2017 (Cons. const., n°2017-680 QPC, 8 December 2017), the Council held that, regarding the public prosecutor, the principle of independence of the judicial authority (no individual instruction, the principle of the opportunity of the prosecution…) was compatible with the powers given to the Government by the article 20 of the Constitution (« *the Government shall determine and conduct the policy of the Nation* », which includes the power to determine the prosecution policy). This is also the position of the CJEU in the context of the European arrest warrant (CJUE, 12 December 2019, C-566/19 PPU and C-626/19 PPU).

[713] The art. 62-2 Code of criminal procedure provides that « *the custody is a coercive measure decided by a judicial police officer, under the supervision of the judicial authority, with which a person against whom there exist one or more plausible reasons to suspect that they have committed or attempted to commit a crime or an offence punished with an imprisonment remains at the disposal of the investigators* ».

[714] Duration that can be extended until 6 days in case of terrorism.

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and custody judge (*juge des libertés et de la detention, JLD*), considered as "*the Judicial Authority, [which acts as a] guardian of the freedom of the individual*". This Judge takes all decisions relating to the deprivation of liberty in the context of judicial investigations: the JLD has responsibility for ordering and extending pre-trial detention (*détention provisoire*) (art. 137-1 c. proc. pén.). During the inquiry, the "common" police custody (i.e. the police custody until 48 hours) is undertaken by the police officer under the supervision of the district prosecutor; the exceptional police custody (over 48 hours and until 144 hours in case of terrorism) is undertaken by the JLD. In addition to these "first-level" judicial authorities, there is the **investigating chamber,** which oversees all questions concerning the legality or proportionality of the acts of the pre-trial stage in case of a judicial investigation (judicial investigation without preliminary inquiry or judicial investigation after a preliminary inquiry). If there is no judicial investigation, there is no remedy provided regarding the pre-trial stage and the contestation of a breach of rights during the pre-trial stage should be presented before **the trial judge.**

5.1.2 Overview of the implementation roadmap

1) <u>European arrest warrant</u>

The Law of 9 March 2004[715] introduced a new chapter in the Code of Criminal Procedure relating to the European Arrest Warrant[716], in application of the Framework Decision of 13 June 2002. France was a bit late on the roadmap laid down by the Union (the new European arrest warrant system should have been operational by 1 January 2004), but it tried to make up for it by making the Law of 9 March 2004 immediately applicable. This law was only made possible by a constitutional reform[717], which inserted the following sentence into Article 88-

[715] Law n° 2004-204 of 9 March 2004 *portant adaptation de la justice aux évolutions de la criminalité*, JORF n°59 of 10 March 2004.
[716] Chapter IV of Title X, Book IV (articles 695-11 to 695-58).
[717] In its ruling n° 368-282 of 26 September 2002, the *Council of State* (the highest administrative court) held that the Framework Decision was contrary to the Constitution in that it did not include grounds for non-execution relating to political offences. This absence would have required France to surrender to EU Member States persons to whom it nevertheless owed protection pursuant to a "fundamental principle recognized by the laws of the Republic, having constitutional value by virtue of the Preamble to the 1946 Constitution". To remedy this situation, the Constitutional Law n° 2003-267 of 25 March 2003 on the European arrest warrant added an article 88-2 to Title XV of the Constitution on the European Union, according to which "the law shall lay down the rules relating to the European arrest warrant in application of the acts adopted pursuant to the Treaty on European Union".

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2 of the French Constitution: "The law shall lay down the rules relating to the European arrest warrant in application of the acts adopted on the basis of the Treaty on European Union"[718].

The European arrest warrant rules set out in the Code of Criminal Procedure has undergone several changes over the years: Law no. 2013-711 of 5 August 2013 [719] introduces adaptations resulting from Framework Decision no. 2009/299/JHA (amending Framework Decision no. 2002/584/JHA), from the case law of the CJEU on the interpretation of Framework Decision no. 2002/584/JHA [720] and from the Constitutional Council on the conformity of national provisions relating to the European arrest warrant with the Constitution[721]. Further changes to legislation were made by Law n° 2021/1729 of 22 December 2021[722].

2) <u>European investigation order</u>

Directive no. 2014/41/EU of 3 April 2014 was transposed into French law by the *Ordonnance* of 1 December 2016, in accordance with the authorization given to the government[723] by Article 118 of Law no. 2016-731 of 3 June 2016[724]. The *Ordonnance* inserts a new section 1 dedicated to the European investigation order (articles 694-15 to 694-50) into the part of the Code of Criminal Procedure relating to mutual assistance in criminal matters between the States of the European Union (Chapter II, Title X, Book IV). France is thus one of the first countries to transpose the directive, meeting the deadline set by Parliament and the Council (22 May 2017).

Decree no. 2017-511 of 7 April 2017 on the European Investigation Order in criminal matters completes the transposition of the Directive, by creating Articles D. 47-1-1 to D. 47-1-20. The purpose of the decree is to specify the procedures for applying the provisions

[718] Law nº 2003-267, 25 March 2003 *relative au mandat d'arrêt européen*, JORF, 26 March, p. 5344.
[719] Law n° 2013-711 of August 5, 2013, *portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France,* JORF n°0181*,* 6 August.
[720] CJEU 5 Sept. 2012, aff. C-42/11 and 30 May 2013, aff. C-168/13 PPU.
[721] Constitutional Council, 14 June 2013, n° 2013/314 QPC.
[722] Law n°2021-1729 of December 22, 2021, pour la confiance dans l'institution judiciaire, JORF, n°0298 of 23 December 2021.
[723] Under French constitutional law, an *Ordonnance* is a measure taken by the government in matters that normally fall within the scope of the law. The government receives legislative authorization from Parliament to adopt regulations in this field.
[724] Law n°2016-731 du 3 juin 2016 *renforçant la lutte contre le crime organisé, le terrorisme et leur financement et améliorant l'efficacité et les garanties de la procédure pénale, JORF* n°0129, 4 June 2016.

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relating to the EIO, in particular the procedures for transmitting the decision, the procedure to be followed in the event of notification by a European authority of a telephone interception decision executed in France, and the specific rules applicable to specific investigative measures, such as the seizure of evidence, the transit or transfer of a person, the interception of telecommunications, or the use of telecommunications facilities.

Both the provisions transposing the Framework Decision 2002/584 and the Directive 2014/41 are codified "in one block", in a specific title or section of the Code of Criminal Procedure, in a progression that is faithful to the European text[725].

3) Mutual recognition of freezing orders and confiscation orders

Prior to the entry into force of the Freezing and Confiscation Regulation 2018/1805, the French legislator had transposed into national law the existing European cooperation instruments relating to freezing orders and confiscation of assets.

Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence was transposed into French law in Articles **695-9-1 to 695-9-30** of the Code of Criminal Procedure by Law 2005-750 of 4 July 2005[726]. In 2016, with the transposition of the directive creating the European Investigation Order, articles 695-9-1 to 695-9-30 of the Code of Criminal Procedure now only concern the freezing of assets liable to confiscation, since the European Investigation Order has become the only framework for requests for cooperation for probatory purposes. The 2016 Ordonnance transposing Directive 2014/41 therefore amended the version of most of Articles 695-9-1 et seq. of the Code of Criminal Procedure to take account of this change.

Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders was transposed into French law by the Law of 9 July 2010[727]. This law enshrines in domestic law the principle of mutual recognition of confiscation orders in the EU judicial area, by introducing into the Code of

[725] RUBI CAVAGNA Eliette, "La transposition des directives de l'Union européenne en droit pénal français", *Archives de politique criminelle*, 2019/1 n°41, p. 147 to 171.
[726] Law n° 2005-750 of 4 July 2005 *portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la justice*, JORF n°156 6 July 2005.
[727] Law n° 2010-768 of 9 July 2010 *visant à faciliter la saisie et la confiscation en matière penale*, CUJATAR Chantal, «Commentaire des dispositions de droit interne de la loi du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale », Dalloz, 14 oct. 2010, n°35, p.2305 ; CAMOUS Eric «Les saisies en procédure pénale : un régime juridique modernisé, commentaire des dispositions pénales de droit interne de la loi n°2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale», Dr. pén. n°1, janvier 2011, étude 1.

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Criminal Procedure a Chapter III Title I Book V of the Code of Criminal Procedure entitled "On the transmission and enforcement of confiscation orders pursuant to the Framework Decision of the Council of the European Union of 6 October 2006" (articles **713 to 713-35**).

Pursuant to the Regulation, Law no. 202-1729 of 22 December 2021 introduces two new sections into the Code of Criminal Procedure specifying the competent transmission authorities and the remedies available for freezing orders[728] and for confiscation orders[729].

5.2 The implementation of Framework decision 2002/584

5.2.1 Scope

The **scope** of the European arrest warrant is defined in article 695-11 of the Code of Criminal Procedure in the same terms as the Framework Decision of 13 June 2002 (art. 1-1). The arrest warrant is "a judicial decision issued by a Member State of the European Union, called the issuing Member State, with a view to the arrest and surrender by another Member State, called the executing Member State, of a person sought for the purposes of a criminal prosecution or the execution of a custodial sentence or detention order". A European arrest warrant may therefore be issued for the purposes of prosecution for offences punishable by a custodial sentence or detention order, and for the purposes of execution of a custodial sentence or detention order.

As regards the **thresholds for penalties** that may justify the issue of a European arrest warrant, the thresholds set out in Article 695-12 of the Code of Criminal Procedure are the same as those set out in Article 2 of the Framework Decision. Only offences punishable by a custodial sentence or a detention order of at least one year may give rise to a European arrest warrant. Where a custodial sentence or a detention order has been issued, the threshold is lowered to four months' deprivation of liberty[730]. The length of

[728] Section 5bis Chapter II of Title X Book IV, entitled "On the transmission and execution of freezing orders pursuant to Regulation EU 2018/1805 of the European Parliament and of the Council of 14 November 2018, on the mutual recognition of freezing orders and confiscation orders".
[729] Section 1bis in Chapter III of Title I of Book V of the Code of Criminal Procedure, entitled "On the transmission and enforcement of confiscation orders pursuant to Regulation EU 2018/1805 of the European Parliament and of the Council of 14 November 2018, on the mutual recognition of freezing orders and confiscation orders".
[730] Therefore, if the wanted person has served only a portion of his sentence and the remaining sentence to be served is more than four months, execution of the arrest warrant is justified under article 695-12 of the Code of Criminal Procedure (Crim. 24 Nov. 2004, n° 04-86.314).

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deprivation of liberty is therefore the same whether the prosecution or execution concerns a sentence or a detention order. When the arrest warrant is issued with a view to enforcing a custodial security measure, questions may arise as to which measure qualifies as a detention order. The Court of cassation has ruled on this point on several occasions: a pre-trial detention measure that accompanies the national arrest decision cannot be classified as a detention order[731]. The same applies to home detention ordered to ensure the person's presence before the inquiry phase[732].

As regards the **nature of the offence** for which the European arrest warrant may be executed, Article 2(4) of the Framework Decision states that surrender may be subject to the condition that the offence for which the warrant is issued constitutes an offence under the law of the executing Member State. In 2004, the French legislator, manifesting his "nationalism"[733], made double criminality a necessary condition for the execution of the measure (695-23 paragraph 1). So, France was not going to cooperate with another State for an act that it could not prosecute under French law[734]. Thus, in the original version of the article, the first paragraph provided for the obligation to refuse to execute a European arrest warrant if the offence for which the warrant was issued did not constitute an offence under French law. Law no. 2021-1729 of 22 December 2021[735] replaced the word "must" with "may", thereby removing the mandatory nature of the principle of double criminality[736].

It should also be noted that the Court of cassation has always interpreted in a flexible way the concept of double criminality. For this condition to be met, it suffices that the facts can be classified as criminal offences under French law, even if the legal definition is not identical in the two countries[737]. In accordance with Article 4(1) of the Framework Decision, Article 695-23(4) provides a further clarification relating to tax offences: "In matters of taxes, customs and exchange, the execution of a European arrest warrant may not be refused on the ground that French law does not impose the same type of tax or does not

[731] Cass. Crim., 7 March 2007, nº 07-80.899.
[732] Cass. Crim., 27 January 2021, nº 20-87.242.
[733] PRADEL Jean, « Le mandat d'arrêt européen. Un premier pas vers une révolution copernicienne dans le droit français de l'extradition », *Recueil Dalloz*, 2004, chron. 1392 et seq.
[734] Cass. crim. 5 August 2004, nº 04-84.511.
[735] Law n° 2021-1729 of 22 Dec. 2021 pour la confiance dans l'institution judiciaire, JORF n°0298, 23 Dec. 2021.
[736] This optional nature has been confirmed by the Court of cassation, Cass. Crim. 12 July 2022, n° 22-83.646.
[737] Cass. Crim. 5 April 2018, nº 18-81.528.

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contain the same type of regulation in respect of taxes, customs and exchange as the law of the issuing Member State". It is therefore sufficient, to satisfy the requirement of double criminality, that there exists in the legal system of the issuing State an offence incriminating the behavior complained of, regardless of whether the French tax law differs from the foreign law.

In accordance with Article 2(2) of the Framework Decision, **32 categories of offences** are exempt from the double criminality rule (695-23(2)). There are two conditions for the exclusion of double criminality: firstly, the offences must be punishable by the issuing State by a custodial sentence of at least three years' imprisonment; secondly, the offences must fall within one of the offences listed in Article 695-32, to which Article 695-23 refers, which faithfully reproduces the list of offences in the Framework Decision.

Paragraph 3 of Article 695-23 provides a clarification that does not appear in the Framework Decision and which makes the automatic execution of the European arrest warrant effective when it concerns offences not covered by double criminality: "Where the provisions of the preceding paragraph are applicable, the legal classification of the offences and the determination of the penalty incurred shall be a matter for the exclusive assessment of the judicial authority of the issuing Member State". This means that once the issuing judicial authority has considered that the facts fall within a national classification and within one of the thirty-two categories of offence, the issuing judicial authority must decide to execute the European arrest warrant, **without the executing authority having to carry out its own assessment of the legal classification of the facts**[738]. Furthermore, the Court of cassation specifies that it is sufficient that one of the circumstances referred to in the EAW allows the facts to be included in one of the 32 categories[739]. This **removes the potential risks arising from a discretionary and excessively restricted interpretation of the categories** set out in the Framework Decision. However, the Court of cassation has tempered this rigorous provision by holding that it is not for the investigating chamber to assess the merits of the classification given by the issuing authority, unless there is a "manifest mismatch" between the facts and the decision taken by the issuing authority[740].

Article 695-23 therefore provides for two regimes. Paragraph 1 provides that failure to incriminate the acts under French law *may* result in a prohibition on executing the

[738] Cass. Crim., 26 May 2004, nº 04-82.795.
[739] For example, possessing a weapon during a robbery is sufficient to classify the act as "organized or armed robbery", the other circumstances referred to in the EAW being irrelevant, Crim. 25 June 2013, n°13-84.149.
[740] Cass. Crim., 21 Nov. 2007, nº 07-87.540.

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European arrest warrant; paragraph 2 provides that, for the offences listed in article 695-32, execution *may not* be refused even in the absence of double criminality.

5.2.2 Grounds for non-recognition and non-execution

- **Mandatory grounds for refusal**

Article 3 of Framework Decision 2002/584/JHA lists the mandatory grounds for non-execution of the European arrest warrant. The transposition of this provision into French law is not faithful to the text of the Framework Decision, since Article 695-22 of the Code of Criminal Procedure lists **four grounds for non-execution**[741], whereas Article 3 of the Framework Decision contains only three. In fact, in addition to the three grounds that correspond to the grounds set out in the Framework Decision (amnesty of the acts under French law; ne bis in idem rule; young age of the person sought), Article 695-22 adds another mandatory ground for non-execution of the European arrest warrant that is not provided for as either a mandatory or an optional ground for non-execution in the Framework Decision, relating to **discrimination of the person sought**: article 695-22 5° provides that "If it is established that the arrest warrant was issued for the purpose of prosecuting or convicting a person on account of that person's sex, race, religion, ethnic origin, nationality, language, political opinions, sexual orientation or gender identity, or that that person's position may be prejudiced for any of these reasons". This provision, which is based on the preamble to the Framework Decision[742], has been applied extensively in case law, particularly regarding discrimination on grounds of political opinion[743]. While the Court of cassation generally prohibits refusal of the European arrest warrant on the grounds of

[741] There were five mandatory grounds for refusal before 2021. The 4th paragraph of the article included, among the mandatory grounds for refusal, the case where the acts for which it was issued could be prosecuted and judged by the French courts and the statute of limitations had expired on the prosecution or the sentence. The Law of 2021 abolished this provision and transferred it to the optional grounds for refusal (art. 695-24 6°).

[742] To find a reference to the issue of discrimination, it is necessary to refer to point 12 of the preamble of the Framework Decision, where it is stated that "nothing in this Framework Decision may be interpreted as prohibiting the refusal to surrender a person" where the arrest warrant has been issued for the purpose of prosecuting or punishing that person "on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation [...]". The list of grounds for discrimination in Article 695-22 5° is almost identical to that in point 12 of the preamble to the Framework Decision, except that the Code of Criminal Procedure adds discrimination on grounds of gender identity.

[743] In particular, it has been used by political refugees in France, members of the Marxist-Leninist Communist Party of Turkey (TKPML) and the Kurdistan Workers' Party (PKK), as well as by people belonging to organization campaigning for Basque independence.

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political opinion[744], it nevertheless requires the trial courts to ensure, under article 695-33 of the Code of Criminal Procedure, that the person is not at risk of serious violations of his or her fundamental rights, in particular of being detained for purely political reasons, following surrender[745].

- **Optional grounds for refusal**

The optional grounds for refusal are set out in Articles 695-24, 695-23(1) and 695-22-1 of the French Code of Criminal Procedure. In the original version of Article 695-24 resulting from the 2004 transposition law, there were only **four grounds** for optional refusal:

1) existence of a French decision on the prosecution of the facts (Art. 4 §§ 2,3 Framework Decision): under Article 695-24 1° of the Code of Criminal Procedure, execution of the European arrest warrant may be refused by the investigating chamber if "the requested person is being prosecuted [for the same acts] before the French courts or if the French courts have decided not to prosecute or to end the prosecution". It is understandable that the French courts would prefer to allow French proceedings to be concluded or to avoid a French decision not to prosecute being challenged in another EU Member State, rather than handing over to that State a person who is on French territory.

2) execution of the sentence on French territory (art. 4 § 6 Framework Decision): Article 695-24 2° of the Code of Criminal Procedure authorizes the Investigating Chambers to refuse to execute a European arrest warrant if the person sought for the execution of a custodial sentence or detention order is a French national, has established his or her residence on French territory or lives on French territory, and if the sentencing decision is enforceable on French territory pursuant to article 728-31. The application of article 695-24 2° of the Code of Criminal Procedure is subject to the condition that the requested person asserts the application of this provision before the Investigating Chamber. According to the Court of cassation, this court is not required to determine whether the sentence can be enforced on national

[744] Cass. Crim., 30 March 2005, nº 05-81.221
[745] Cass. Crim., 26 Sept. 2007, nº 07-86.099; Cass. Crim., 21 nov. 2007, nº 07-87.499; Cass. Crim., 9 June 2015, nº 15-82.750. LELIEUR Juliette, "Réfugiés politiques : la protection des droits fondamentaux s'articule sur la confiance mutuelle", *AJ pénal* 2016. 92.

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territory[746]. In its initial version, article 695-24 2° of the Code of Criminal Procedure did not apply to foreign nationals who had been resident in France for at least five years. Following a warning from the Court of Justice[747], Law no. 2013-711 of 5 August 2013 amended article 695-24 2° of the Code of Criminal Procedure. It now covers all foreign nationals (and not just European Union nationals) provided that they have been "lawfully and continuously resident in France for at least five years"[748]. The condition relating to length of time of residence was removed by law no. 2021-1729 of 22 December 2021[749].

3) commission of all or part of the offences on French territory (Article 4 § 7a of the Framework Decision): Article 695-24 3° of the French Code of Criminal Procedure thus allows the investigating chamber to refuse to surrender a person if all or part of the offences with which the person is charged have been committed on French territory, even if no investigation or prosecution has been initiated in France[750].

4) incompetence of the issuing judicial authority under French law (art. 4 § 7b Framework Decision): Article 695-24 4° authorizes refusal of enforcement where the issuing authority bases its international jurisdiction broader than a French judicial authority could do. Thus, if the offence was committed outside the territory of the issuing Member State and French law does not authorize prosecution of the offence on the basis of an extraterritorial ground of jurisdiction, the investigating chamber is justified in refusing enforcement.

5) existence of a final decision by a third State (art. 4 § 5 Framework Decision) : Article 695-22 5° authorizes refusal of enforcement where the requested person has been finally judged by a third State for the same acts as those which are the subject of the European arrest warrant, provided, in the case of a sentence, that the sentence has been enforced or is in the process of being enforced or can no longer be enforced under the laws of the sentencing State. This ground for refusal was originally included among the mandatory grounds for refusal, until the 2021 law moved it

[746] Cass. Crim. 5 August 2004, nº 04-84.511; Cass. Crim. 23 November 2004, nº 04-86.131 Bull. crim. nº 293.
[747] CJEU, 5 Sept. 2012, Lopez Da Silva Jorge, aff. C-42/11.
[748] Cass. Crim. 5 Nov. 2014, nº 14-86.553, Bull. crim. nº 229.
[749] Law n°2021-1729 of December 22, 2021, *pour la confiance dans l'institution judiciaire*, JORF, n°0298 of 23 December 2021.
[750] Cass. Crim. 8 July 2004, nº 04-83.662, Bull. crim. nº 181.

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among the optional grounds for refusal[751].

6) existence of a statute bar (art. 4 § 4 Framework Decision): Article 695-22 5° authorizes refusal of enforcement where the acts for which the European arrest warrant was issued could be prosecuted and judged by the French courts, and whether the statute barred prosecution or sentence has expired. This ground for refusal was originally included among the mandatory grounds for refusal, until the 2021 law moved it among the optional grounds for refusal[752].

Finally, another optional ground for refusal is set out in Article 695-22-1 of the Code of Criminal Procedure. This article transposes, two years late[753], the new Article 4a of the Framework Decision introduced by Framework Decision 2009/299/JHA (Decisions rendered following a trial at which the person did not appear in person). The first version introduced by the French legislator did not faithfully transpose the Framework Decision. Whereas Article 4a of the Framework Decision provides for an optional ground for refusal where the person who is the subject of the EAW issued for the purpose of enforcing a custodial sentence or detention order did not appear in person at the trial, Article 695-22-1 of the Code of Criminal Procedure considered this to be a mandatory ground for refusal[754]. Law no. 2021/1729 of 22 December 2021 amended article 695-22-1, transforming the mandatory ground for refusal into optional ground. The decision to refuse delivery is therefore no longer automatic but depends on the sovereign appreciation of the trial judges[755]. The four exceptions to the possibility of refusing surrender faithfully reproduce the exceptions set out in the Framework Decision (art. 695-22-1 n° 1-4 of the Code of Criminal Procedure and article 4a lett. a) - d) of the Framework Decision).

[751] Law n°2021-1729 of December 22, 2021, *pour la confiance dans l'institution judiciaire*, JORF, n°0298 of 23 December 2021.
[752] Law n°2021-1729 of December 22, 2021, *pour la confiance dans l'institution judiciaire*, JORF, n°0298 of 23 December 2021.
[753] Law n° 2013-711 du 5 August 2013 *portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France, JORF n°0181* of 6 August.
[754] Cass. Crim., 19 Jan. 2021, nº 20-87.149.
[755] "Whether or not to refuse to surrender [...] falls within the sovereign assessment of the trial judges", Cass. Crim. 8 Nov. 2022, nº 22-85.929; Cass. Crim. 10 May 2022, nº 22-82.379.

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7.1.1.1 Fundamental rights and proportionality issues

1) <u>Respect for fundamental rights</u>

With the exception of the previously mentioned article 695-22 5° of the Code of Criminal Procedure, by which the French legislator introduced a mandatory ground for refusal based on discrimination of the person sought, that is not provided for in the Framework Decision, national legislation does not indicate, nor does the European text, how the French jurisdictions should behave in the event of a violation of fundamental rights by the issuing State[756]. The Court of cassation strives to implement the principle of mutual recognition as far as possible, as shown by the many decisions stating that, **in the absence of grounds for refusing to execute the European arrest warrant, the investigating chambers are not justified in rejecting requests for the surrender of persons from other EU Member States**. In the early years of the European Arrest Warrant, the Court of cassation applied this principle even when the argument raised concerned the violation of fundamental rights[757].

The Court of cassation has **progressively extended its control over the risks of violation of a fundamental right of the person surrendered** by the executing State. In a 2010 decision, the Court of cassation annulled the decision of the Investigating Chamber, which had decided to execute a European arrest warrant without verifying whether the surrendered person had been subjected to torture, as she had claimed (claim based on the violation of article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment signed in New York on 10 December 1984).

Furthermore, since 2012, the Court of cassation has accepted that a **violation of fundamental rights constitutes a general ground for refusing enforcement** that may prevent France from surrendering a person covered by an EAW, even when there are no legal grounds for refusing enforcement[758]. The Court of Cassation bases this general exception on Article[1](3) of the Framework Decision of 13 June 2002, which requires respect for "the fundamental rights of the person sought, and the fundamental legal principles

[756] LELIEUR Juliette, FAUCHON Chloé, Mandat d'arrêt européen, Répertoire de droit pénal et de procédure pénale, Dalloz, 2023 (actualisation 2024).
[757] Cass. Crim. 5 April 2006, nº 06-81.835; Crim. 8 August 2007, nº 07-84.621.
[758] Cass. Crim. 28 February 2012, n° 12-80.744.

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enshrined in Article 6 of the Treaty on European Union". Since 2016 the Court of Cassation, in several decisions, has approved the refusal to execute the EAW in the absence of legal grounds for refusal, based on respect for fundamental rights[759]. The European Court of Justice, in the *Aranyosi and Caldararu* case[760], has also tempered the principle of mutual recognition in the context of the execution of a European arrest warrant, by allowing the executing authorities to refuse to execute the arrest warrant where this is justified by the protection of the fundamental rights of the person subject to the measure. However, the Court of Justice has set strict conditions for this exception to the principle of automatic surrender: the executing judicial authority must establish that the person has failed to comply with the warrant on the basis of objective, reliable, precise and up-to-date information; and it must check, on the basis of serious and proven grounds, whether there is a concrete and precise risk to the individual covered by the arrest warrant. These checks therefore require dialogue between the executing authority and the issuing authority. The clause introduced by the French Court of Cassation in the event of a risk of violation of fundamental rights is similar in principle and basis to the judgment of the Court of Justice. Whereas the Court of Justice set out particularly strict conditions for this exception, the French **Court of Cassation simply created a new ground for refusal justified by the risk of violation of the fundamental rights of the person surrendered, without imposing any further conditions**[761].

2) <u>Proportionality of the infringement</u>

An overview of national case law on the European arrest warrant shows that the proportionality check concerns the proportionality of the breach of the right to liberty in relation to the seriousness of the offence, as well as the breach of respect for private and family life.

[759] Cass. Crim. 12 April 2016, nº 16-82.175. TAUPIAC-NOUVEL Guillaume, "La protection du droit au respect de la vie privée et familiale dans la procédure du mandat d'arrêt européen : la chambre criminelle aurait-elle délié l'outre des vents contraires", *Les Petites Affiches*, 2016, nº 213, p. 6.
[760] CJEU, 5 April 2016, C-404/15 and C-659/15 PPU.
[761] Cass. Crim. 28 Feb. 2012, n°. 12-80.744: " Considering that, subject to respect, as guaranteed by article 1 § 3 of the Framework Decision of 13 June 2002, of the fundamental rights of the person sought and of the fundamental legal principles enshrined in article 6 of the Treaty on European Union, the execution of a European arrest warrant may not be refused on grounds other than those provided for in the Framework Decision and the texts adopted for its application".

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a. Proportionality of the infringement of the right to liberty

The question has arisen as to whether the French judicial authority may refuse to surrender the person against whom the arrest warrant has been issued subject of the EAW on the grounds that the sentence handed down by the issuing State is disproportionate to the acts committed, even though there is no legal condition for refusal.

In a decision of 26 January 2021, the question of the proportionality of an arrest warrant by the executing Member State was raised before the French Court of Cassation, on the grounds that the sentence handed down by the issuing State (Italy) appeared disproportionate to the seriousness of the offences committed[762]. In the present case, the applicant, who now lived in France, had been sentenced in Italy to 12 years and six months' imprisonment for robbery with a weapon in a group, devastation and looting, possession of a weapon and explosion of devices. The Italian authorities issued an EAW to enforce this sentence. The French Court of Appeal twice refused to recognize the European Arrest Warrant[763] on the grounds that there was no double criminality (the offence of devastation and looting had no equivalent in French law) and that **the sentence was disproportionate**. The Court of Cassation referred a question to the Court of Justice for a preliminary ruling on two points. On the one hand, since under French law it is not a specific criminal offence to endanger the public safety by destroying movable or immovable property on a massive scale (only destruction, damage or theft with damage likely to cause harm to the owners of the property is), the question arises as to whether the absence of this condition of endangering the public safety in the French criminal law can undermine the principle of double criminality. On the other hand, while it is in principle for the issuing State to check the proportionality of the European arrest warrant before issuing it, Article 49(3) of the Charter of Fundamental Rights states that the severity of penalties must not be disproportionate to the offence. As this is a fundamental principle contained in the Charter of Fundamental Rights of the European Union, the Court of Cassation wondered whether it could constitute a ground for refusing to execute the EAW under Article 1 § 3 of the Framework Decision. The Court of Justice, to which these questions were referred, pointed out, firstly, that a perfect match was not required between the constituent elements of the offence concerned in the issuing Member State and in the executing Member State "where

[762] Cass. Crim., 26 January 2021, n°20-86.216.
[763] Rennes Court of Appeal and Angers Court of Appeal.

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such acts are also the subject of a criminal offence under the law of the executing Member State for which the infringement of that protected legal interest is not a constituent element" and, secondly, that it is not for the executing State to assess the proportionality of the penalty handed down by the issuing State[764].

Following the Court of Justice's ruling, the Court of Cassation annulled the decision of the Court of Appeal refusing the arrest warrant. Taking up the answer given by the Court of Justice, the Court of Cassation specified that it was sufficient that part of the acts referred to under the classification given by the issuing State constituted a criminal offence in France; the Court also **excluded the possibility that the disproportionality of the sentence handed down by the issuing State could constitute a reason for non-execution of the European arrest warrant. The assessment of whether the sentence is proportionate to the acts committed is not a matter for the executing State, but solely for the issuing State**[765]. This ruling clearly shows the Court of Cassation's support for judicial cooperation. The reasons given by the Court of Justice are taken up in full by the national court, and there is no resistance either to the question of double criminality or to the question of proportionality.

b. <u>Proportionality of the infringement of the right to respect for private and family life</u>

The question has also arisen as to whether the French judicial authority may refuse to surrender the person requested under a European arrest warrant on the grounds that the **interference with the right to respect for private and family life resulting from the surrender is disproportionate**. In extradition cases, and therefore by extension in the case of European arrest warrants, the disproportionate interference with the right to respect for private and family life is reviewed in accordance with the conditions set out in Article 8§2 of the European Convention on Human Rights[766]. The French Court of Cassation requires trial judges to ensure that the surrender of the wanted person does not disproportionately affect respect for his or her private and family life within the meaning of article 8 of the European Convention. In a 2010 ruling, the Court of cassation overturned a decision by the investigating chamber that had agreed to the surrender[767]. The case concerned the

[764] CJEU, 14 July 2022, C-168/21.
[765] NICAUD Baptiste, "Contrôle limité de la double incrimination en matière de mandat d'arrêt européen", *Dalloz actualité*, 17 Jan. 2023.
[766] GIANNOULIS Vissarion, Le principe de reconnaissance mutuelle des décisions judiciaires pénales et les droits fondamentaux, Thèse, Paris Nanterre, 2021.
[767] Cass. Crim. 12 May 2010, n°10-82.746.

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surrender of a person who had been living in France for several years, with her five school-going children, for the theft of a wallet worth €40. The Court of Cassation pointed out that **any interference by the public authorities in a person's private life must be proportionate to the legitimate aim pursued**, and criticized the judges for approving the execution of the arrest warrant without checking whether the surrender did not entail a disproportionate breach of respect for the private and family life of the person sought.

The control required by the Court of cassation is **an *in concreto* control, in that it requires the trial judges to consider all the circumstances making it possible to assess the proportionality of the interference with the right to respect for private and family life**. For example, the Court of cassation agreed with an investigating chamber's refusal to surrender a wanted person to the German courts for driving without a license, on the grounds that surrender would cause a disproportionate breach of the right to respect for private and family life under article 8 of the European Convention. The person concerned had worked regularly on French territory for several years, shared his life with a French woman and was the father of two children [768]. Similarly, the Court also approves the decision of an investigating chamber that authorized the surrender to the Portuguese authorities, having fully justified the reasons for ruling out a disproportionate infringement of private and family life[769].

Article 695-24 2° of the Code of Criminal Procedure, as does the Directive, provides that execution of the arrest warrant may be refused "if the person sought for the enforcement of a custodial sentence or detention order is of French nationality, has established his or her residence on French territory or remains on French territory and if the conviction is enforceable on French territory pursuant to Article 728-31". In its original version, this article provided that enforcement could be refused only where the person sought for the purposes of enforcing the sentence was of French nationality; in 2013, the case was also added where the foreign national had established his or her residence on French territory for an uninterrupted period; in 2021, the temporal condition (5 years) of residence was removed, and the case where the person sought simply lives in France was also added. This article is certainly **intended to protect respect for family life in the context of the European arrest warrant, by providing an optional ground for refusal when the**

[768] Cass. crim., 5 May 2015, n°15-82.108. CORDIER François, "Le refus de remise suite à l'émission d'un mandat d'arrêt européen pour atteinte disproportionnée au droit au respect de la vie privée et familiale", *Revue de Science Criminelle,* 2015. 906.
[769] Cass. Crim., 22 February 2011, n°11-80.428; Cass. Crim., 8 June 2011, n°11-83.622.

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individual sought has close connections with France, and this effect is amplified by the reforms that broaden the persons concerned. This is why an Investigating Chamber, in a 2016 ruling, authorized the execution of the arrest warrant on the grounds that the conditions set out in Article 695-24 2° had not been met. If these conditions are not met, the connection with France cannot be sufficiently strong to affect, in the event of surrender, the family ties that the person maintains there. However, the Court of Cassation overturned the ruling, on the grounds that the trial judges had not sufficiently verified whether the surrender would have a disproportionate impact on the right to respect for private and family life. This decision by the Court of Cassation clarifies that **the absence of the conditions set out in article 695-24 2° does not absolve the trial judges from checking the proportionality of the infringement**[770]. It is therefore possible that the infringement caused by the surrender may appear disproportionate even beyond the cases for which an optional ground for refusal is explicitly provided, thus confirming the existence of an **autonomous ground for refusal** such as to justify refusal to execute the European arrest warrant that would create a disproportionate infringement of the right to private and family life[771].

5.2.3 Execution procedure

Article 695-13 of the Code of Criminal Procedure lists the information that must be provided by the issuing Member State:

- the identity and nationality of the requested person
- the precise designation and full contact details of the judicial authority from which it emanates
- an indication of the existence of an enforceable judgement, an arrest warrant or any other judicial decision having the same force under the law of the issuing Member State
- the nature and legal classification of the offence
- the date, place and circumstances in which the offence was committed and the degree of participation in it by the requested person

[770] Cass. Crim., 12 April 2016, n°16-82.175.
[771] GOETZ Dorothée, "Mandat d'arrêt européen et droit au respect de la vie privée et familiale", *Dalloz actualité*, 2 May 2016.

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- the penalty imposed if the national decision is a sentencing decision or the penalties incurred if it is an arrest decision and, as far as possible, the other consequences of the offence).

Such information, established in Article 8 of the Framework Decision and included in the Code of Criminal Procedure, are set out in the **standard form annexed** to the Framework Decision. The issuing French authorities must duly complete the standard form annexed to the Framework Decision, which can be completed and printed on the European Judicial Network website or on the website of the Directorate of Criminal Affairs and Pardons (section dedicated to international mutual assistance in criminal matters). Likewise, when France is the executing authority, the information provided on the form by the issuing authority is essential for the execution of the European warrant. It can happen that the issuing authority does not fill in the standard form correctly, and so there is a gap as regards Article 695-13. The Court of Cassation is **flexible** on this point, accepting that certain information missing from the form (e.g. the date of the national decision justifying the issuing of the arrest warrant, the date, place and circumstances of the offence and the degree of involvement of the wanted person) may be provided in a subsequent, supplementary document[772]. The Court of Cassation also accepts that the information supplementing the European arrest warrant should be taken from the national arrest warrant, translated into French[773]. What is essential is that the European arrest warrant **makes it possible to determine the nature of the national judicial decision** (enforceable judgment, arrest warrant, or any other judicial decision having the same force under the law of the issuing Member State) which forms the support for it[774]. In accordance with the Framework Decision, the European arrest warrant must be translated into an official language of the executing Member State or into an official language of the European Union accepted by the State. As only French is accepted in France, the issuing authorities must have the information contained in the form translated into French[775].

[772] Cass. Crim. 30 March 2005, nº 05-81.221; Cass. Crim. 31 March 2005, nº 05-81.260.
[773] Cass. Crim. 8 June 2005, nº 05-82.800, Bull. crim. nº 176.
[774] Cass. Crim. 21 August 2019, nº 19-85.152.
[775] The claim for nullity arising from the absence of a translation or from an incorrect translation into French, and therefore from a breach of article 695-14 of the Code of Criminal Procedure, must be raised before the Examining Chamber. Failing this, the plea will be inadmissible before the Court of Cassation, Cass. Crim. 18 Dec. 2013, n°13-87.755.

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The procedure for execution of the EAW by the French authorities is structured in **three phases**: presentation to the public prosecutor after arrest (a), presentation before the investigating chamber (b), and surrender of the person to the issuing authority (c).

a) <u>Presentation to the public prosecutor</u>

When the wanted person is in a known place on national territory, the European arrest warrant issued by another Member State is **sent directly to the public prosecutor** with territorial jurisdiction, who orders the judicial police to arrest the wanted person after ensuring that the inquiry is regular (art. 695-26 of the Code of Criminal Procedure). Article 695-28-1 of the Code of Criminal Procedure specifies that in terrorism cases, the authorities of the Paris Court of Appeal (First President of the Public Prosecutor's Office and the Investigating Chamber) have concurrent jurisdiction to that resulting from the territorial jurisdiction under article 695-26. Where the public prosecutor who receives the European arrest warrant does not consider himself competent, he forwards it to his territorially competent prosecutor and informs the issuing authority (art. 625-26 par. 3).

An assessment of the legality of the EAW is already made at this stage of the procedure, with regard to the information provided by the issuing authority on the EAW form. The public prosecutor must check that all the information on the standard form has been duly entered before ordering the police to arrest the wanted person (art. 695-26). If the information appears to be incomplete, he must contact the issuing authority so that it can complete the request. If investigative measures are necessary to apprehend the fugitive, article 625-26 paragraph 2 refers to article 74-2 of the Code of Criminal Procedure, which empowers the public prosecutor to authorize the judicial police to use one of the measures provided for in articles 56 to 62 of the Code of Criminal Procedure (seizures, searches, access to a computer system, technical/scientific investigations or examinations, requisitions).

However, when the **person's location is unknown**, the European arrest warrant is issued via the Schengen Information System (art. 695-15 para. 2 of the Code of Criminal Procedure); an alert in the SIS is equivalent to a European arrest warrant (art. 695-15 para. 3). In this case, the judicial police can arrest the person on their own initiative, without the need for the European arrest warrant to be issued to the executing judicial authority before

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the person is arrested[776]. The official European arrest order must, however, be received by the public prosecutor within six days of the date of arrest (art. 695-26 paragraph 4). Nevertheless, the Court of Cassation has ruled that this six-day time limit is not provided for under penalty of nullity; failure to comply with the time limit does not therefore prevent the surrender of the wanted person[777].

Once the wanted person has been arrested, he or she must be **presented to the public prosecutor within 48 hours** (article 695-27 paragraph 1)[778]. Under the terms of Article 706-71 of the Code of Criminal Procedure, the presentation to the public prosecutor provided for in Article 695-27 may take place by videoconference, without the need to justify the use of this measure by the needs of the inquiry and judicial investigation[779]. Since Law n°2016-731 of June 3, the public prosecutor must inform the person of his or her right to be assisted by a lawyer in the issuing state of the European arrest warrant. If the person makes use of this right, the request for assistance is forwarded to the competent issuing authority. The Court of Cassation has ruled that failure to transmit the request for legal assistance in the issuing state necessarily infringes the rights of the defense[780]. However, the French authorities are not obliged to ensure that the lawyer in the issuing state is appointed[781].

If, following notification of the European arrest warrant, the Public Prosecutor considers it necessary to request the person's **incarceration**, he presents him to the First President of the Court of Appeal or to a judge designated by him. If this magistrate considers that the person's participation in the proceedings is not guaranteed, he or she orders the person's incarceration (art. 695-28). If no appeal is possible against this decision, the incarcerated person may at any time ask to be released before the investigating chamber. The hearing must take place as soon as possible, and at the latest **within fifteen days of receipt of the request** (art. 695-34). If the person is not incarcerated, he or she is either

[776] Thus, the Court of Cassation rejects a refusal to execute a European Arrest Warrant on the grounds that it has not been issued to the executing judicial authority when an alert has been validly issued to the SIS, Cass. Crim. 5 Oct. 2004, n° 04-85.385; Crim. 19 Apr. 2005, n°05 81.677; Cass. Crim. 27 May 2015, n°15-82.503
[777] Cass. Crim. 25 Jan. 2006, nº 05-87.718; Cass. Crim. 1er Sept. 2004, nº 04-84.987; Cass. Crim. 9 August 2017, nº 17-84.448.
[778] This time limit does not apply when the person was already deprived of his or her liberty due to the execution of other European arrest warrants, Crim. Jan. 24, 2012, n°11-89.177.
[779] Cass. Crim. 11 April 2012, nº 12-81.804, Bull. Crim. n°90.
[780] Cass. Crim. 24 May 2017, nº 17-82.655, *Dalloz actualité* 6 juin 2017, obs. Goetz.
[781] Cass. Crim. 15 Jan. 2019, nº 18-86.968; Cass. Crim. 3 Nov. 2021, nº 21-85.726.

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released, placed under judicial supervision [782] or under house arrest with electronic surveillance[783]. The removal or modification of judicial supervision or house arrest is also a matter for the investigating chamber, which must rule within fifteen days of the matter being referred to it (art. 695-35). If it emerges that the **person is not complying with the obligations imposed by judicial supervision or house arrest, or if it appears that he or she is trying to evade the execution of the European arrest warrant**, the public prosecutor may ask the investigating chamber to issue a warrant for his or her arrest, which will lead to his or her imprisonment (art. 695-36 paragraph 1 on reference from article 695-28). The public prosecutor immediately notifies the Minister of Justice. The arrest of the person obliges the investigating chamber to rule on the European arrest warrant as soon as possible (ten days after the arrest), otherwise the person is released (art. 695-36).

b) <u>Appearance before the Investigating Chamber</u>

After being presented to the public prosecutor, the **requested person appears before the investigating chamber within 5 working days** [784]. This deadline, which is generally a minimal deadline for summonses to appear before the investigating chamber, is a **maximal deadline** when the chamber is seized of a European arrest warrant[785], to meet the requirement of procedural urgency imposed by the Framework Decision[786].

Article 695-30 of the Code of Criminal Procedure governs the conduct of hearings before the Investigating Chamber. Whereas the Framework Decision provides for the right

[782] Provided for in article 138 of the Code of Criminal Procedure, judicial supervision is a measure that restricts a person's freedom by requiring them to comply with obligations set by the judge (e.g. not to leave specific territorial limits, obligation to sign in at the police station, etc.).
[783] Under article 142-5 of the French Code of Criminal Procedure, electronically monitored house arrest obliges a person to remain at home or at a residence set by the judge. Compliance with this obligation is monitored by means of remote detection of the person's presence or absence at the set location.
[784] The definition of a working day in article 801 of the same code excludes public holidays, non-working days, Saturdays and Sundays (Cass. Crim. June 25, 2013, n°13-84.355).
[785] article 197, paragraph 2, of the Code of Criminal Procedure, which provides for a minimal deadline of five days (and not a maximal deadline, as prescribed by art. 695-29) between the date of the summons and the date of the hearing, is not applicable when the investigating chamber rules on a European arrest warrant (Cass. Crim. 14 sept. 2005 n°05-84.551). This very short deadline could have raised doubts as to the person's right to the time and facilities needed to prepare his or her defense. However, the French Court of Cassation has ruled that this 5-day period does not affect the effective exercise of the wanted person's rights of defense (Crim. 29 sept. 2010, n°10-84.995).
[786] GIANNOULIS Vissarion, « La CJUE et les délais d'exécution du mandat d'arrêt européen », *Revue de science criminelle et de droit pénal comparé*, 2016/2 (N° 2), p. 237-254.

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of the person to be heard only if he or she does not consent to surrender (art. 14 Framework Decision), article 695-30 of the Code of Criminal Procedure provides for the public prosecutor and the person sought to be heard at the hearing, as well as his or her lawyer if assisted, without distinguishing between consent or non-consent to surrender.

Although there is no general provision in the Code of Criminal Procedure requiring European arrest warrants to be processed and executed "as a matter of urgency" (art. 17 §1 Framework Decision), the very short deadlines set by the French legislator meet this requirement. The time limits for proceedings before the investigating chamber depend on whether or not the wanted person has expressed his or her consent to surrender during the hearing [787] .

- When the person **consents** to surrender, the investigating chamber must rule "within **seven days** following the person's hearing". The Framework Decision, on the other hand, stipulates that the final decision on the execution of the arrest warrant must be taken within 10 days of the person's consent to surrender (art. 17 §2). The time limit laid down in the French Code of Criminal Procedure is therefore shorter than that provided for in the Directive.

- On the other hand, if the person does **not consent to surrender**, article 695-31, paragraph 4, extends the period within which the investigating chamber must deliver its ruling to **twenty days** from the date of the hearing. In case of appeal, the decision must be taken within **sixty days** from the arrest, in accordance with article 17 § 3 of the Framework Decision.

Pending the decision of the investigating chamber on the execution of the European arrest warrant, articles 18 and 19 of the Framework Decision require the investigating chamber to grant the person a hearing, as well as a temporary transfer, if the issuing state so requests. While these provisions have been transposed by the French legislator in articles 695-44 and 695-45, it should be pointed out that, as regards temporary transfer pending the decision, French law does not require the investigating chamber to accede to the request of the issuing authority, but only **allows it to do so** (art. 695-44).

Respect for the principle of mutual recognition between the judicial authorities of EU member states, which is the essence of the European arrest warrant, means that the judicial authority's control over execution is limited to the existence of a ground for non-

[787] The investigating chamber again informs the person of the legal consequences of consent and its irrevocable nature (art. 695-31 Code of Criminal Procedure).

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execution, as set out in articles 695-22 to 694-24 of the French Code of Criminal Procedure. It is therefore not for the investigating chamber "to assess the merits of the prosecution carried out by the judicial authorities of the issuing Member State" [788]. Thus, the investigating chamber is not required to verify the existence of serious or concordant evidence against the person sought for prosecution[789].

When the French investigating chamber, which is competent to rule on the execution of the European arrest warrant, **does not have all the information needed to verify the conditions for surrender, it may refer the matter to the issuing authority, asking it to send, within a maximum of ten days, the additional information needed to complete the standard form** (art. 695-33 of the French Code of Criminal Procedure). The Court of cassation ensures that this procedure is effectively respected. Indeed, the Court has rejected decisions by the investigating chambers refusing to execute a European arrest warrant on the grounds of lack of information on the standard form, without first applying article 695-33 [790]. The **mandatory use** of the article 695-33 procedure encourages communication between national authorities and is intended to limit refusals to execute warrants on the grounds of lack of information in the standard form.

c) Surrender of the person

If the execution of the EAW is authorized by the Investigating Chamber, the person is handed over to the issuing authority, in accordance with articles 695-37 to 695-40 of the Code of Criminal Procedure, which transpose articles 23 and 24 of the Framework Decision. The national provisions faithfully reproduce the European norms on surrender procedures, deadlines and conditions for deferring surrender.

Surrender is carried out by the public prosecutor. If the person is free at the time of surrender, his or her arrest may be ordered by the public prosecutor, in accordance with the provisions of article 74-2 of the CPP, and the issuing judicial authority is informed of the arrest by the public prosecutor without delay. **The date of surrender is agreed with the issuing authority, at the latest within ten days of the date of the final decision of the**

[788] Cass. Crim. Apr. 19, 2005, n° 05-81.677; Cass. Crim. Apr. 5, 2006, n°06-81.835.
[789] Cass. Crim. March 30, 2021, n° 21-81.554
[790] Cass. Crim. 27 June 2007, nº 07-83.957; Cass. Crim. 22 March 2016, nº 16-81.186.

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investigating chamber. If, in cases of absolute necessity[791], this deadline **cannot be met**, the public prosecutor agrees a new surrender date with the issuing judicial authority. Delivery may not then be delayed beyond ten days following the new agreed date (art. 695-37). These deadlines are particularly important, since on their expiry the wanted person must be released[792] (art. 695-37).

However, there may be **serious humanitarian reasons for deferring surrender**. When the surrender of the person may have serious consequences for him or her, due in particular to his or her age or state of health, the investigating chamber may, after deciding on the execution of the EAW, defer the surrender, also indicating the period during which the warrant may not be executed, which may also be quite long[793], since article 695-38 of the Code of Criminal Procedure does not set any limits to this postponement[794]. Depending on the length of the suspension indicated by the investigating chamber, the public prosecutor agrees with the issuing judicial authority on a new date for surrender; surrender must then take place within ten days of the new date (695-38). In a ruling handed down in application of article 695-38, the Court of Cassation shows that the **postponement of surrender can be based not only on a temporal condition (pending the disappearance of the humanitarian risk), but also on a material condition (implementation of the means to ensure that the surrender is carried out without risk)**. In the case in point, the investigating chamber had authorized the surrender but ordered a medical examination of the person concerned and stayed the execution until the expert's report. The latter noted that transporting the person from France to Austria did not present any risk to his state of health when, as proposed by the Austrian authorities, it was carried out by air ambulance[795]. The suspension can therefore be lifted if special arrangements are made with the issuing authority to enable the transfer to take place without risk.

When the wanted person is being prosecuted in France or is serving a sentence for which he or she has been convicted, the French authorities will be reluctant to hand him or her over to another country. In such cases, the investigating judge may defer surrender (art.

[791] According to the Court of cassation, the existence of a multitude of EAWs issued against the same person can constitute an event of absolute necessity, making it impossible to know which would be the last European arrest warrant issued and the date of its issue, Cass. Crim. 20 mars 2012, n° 12-81.284.
[792] Unless, of course, his detention is justified for some other reason.
[793] Cass. Crim. 29 Nov. 2006, n° 06-88.142, in this case, the suspension lasted one year.
[794] PRADEL Jean, « Le mandat d'arrêt européen. Un premier pas vers une révolution copernicienne dans le droit français de l'extradition », *Recueil Dalloz*, 2004, chron. 1392.
[795] Cass. Crim., 28 Nov. 2006, nº 06-87.917.

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695-39 paragraph 1) or may decide to surrender the person only temporarily (art. 695-39 paragraph 2). This second solution is commonly referred to as "prisoner lending".

7.1.1.2 Issues for the rights of the suspect, accused and other parties

The French legislator applied to the execution of the European arrest warrant the same rules applicable at domestic level concerning the deprivation of personal liberty and the rights of persons deprived of their liberty. Other rights, specific to the European arrest warrant, are also recognized.

The protection of rights applicable to the deprivation of liberty to which the person is subject until he or she is brought before the public prosecutor is that of **police custody**, to which article 695-27 refers[796]. Police custody is a measure involving deprivation of liberty taken during a judicial investigation against a person suspected of having committed an offence. It is important to point out that the French police custody system was challenged by the European Court of Human Rights in 2008-2009 for its incompatibility with the rights of defense guaranteed by Articles 5 and 6 of the Convention, notably due to the absence of a lawyer from the outset of the measure and during interrogations[797]. Through a control of compliance with the Convention, the Court of Cassation directly controlled the respect for the rights of the defense during police custody, **where necessary disapplying domestic law and directly applying the requirements of the Convention**. This control therefore also concerned the procedure carried out in France with a view to executing the European arrest warrant. In a 2010 decision, the requested person challenged the violation of his rights of defense during the surrender procedure by the French authorities to the Polish authorities. At the time, there was no provision in the Code of Criminal Procedure giving the president of the investigating chamber the power to appoint an interpreter to enable the lawyer who did not understand or speak the language of the person sought to speak to him or her in order to prepare the defense. The person subject to the arrest warrant contested the violation of the rights of defense. The Court of Cassation, applying articles 5 and 6 of the European Convention on Human Rights, affirmed that **any person sought for the purposes**

[796] The art. 62-2 Code of criminal procedure provides that « the custody is a coercive measure decided by a judicial police officer, under the supervision of the judicial authority, with which a person against whom there exist one or more plausible reasons to suspect that they have committed or attempted to commit a crime, or an offence punished with an imprisonment remains at the disposal of the investigators ».
[797] ECHR *Salduz* v. Turkey, 27 Nov. 2008, n°36391/02; ECHR, *Dayanan* v. Turkey, 13 Oct. 2009, n°7377/03; ECHR *Brusco* v. France, 14 Oct. 2010, n°1466/07.

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of executing a European arrest warrant and benefiting from legal aid, has the right to be assisted free of charge by an interpreter in order to speak, in a language he or she understands, with the lawyer appointed to prepare his or her defense. The guarantees provided by the Convention, even in the absence of any legislative recognition, are granted by the Court of Cassation to persons arrested under a European arrest warrant[798]. The fundamental rights of suspects deprived of their liberty have been considerably strengthened[799] by three successive laws, in 2011[800], 2014[801] and 2016[802]. The rules governing police custody applied by article 695-27, which refers to articles 63-1 to 63-7, are now in line with conventional expectations. The Court of Cassation has nevertheless specified that any annulment of the deprivation of liberty on the grounds of delayed or incomplete notification of these rights cannot affect the validity of the procedure for executing the European arrest warrant[803].

According to article 695-27, when the requested person is presented to the public prosecutor, he or she shall, in accordance with the provisions of article 11 of the Framework Decision, inform him or her of the existence and content of the European arrest warrant; of the possibility of consenting to his or her surrender and of the legal consequences thereof; and of the right to be assisted by a lawyer. The right to be assisted by an interpreter is not expressly mentioned in article 695-27. However, the prosecutor's obligation to inform the arrested person of his or her rights "in a language he or she understands" **implicitly implies the support of an interpreter** if required.

[798] Cass. Crim., 8 Dec. 2010, nº 10-87.818.
[799] PELLE Sébastien, « Garde à vue et audition libre : acte final ? Bilan d'un cycle de réformes (lois du 14 avril 2011, 27 mai 2014 et 3 juin 2016) », *Recueil Dalloz* 2017, p. 359 et s.
[800] Law n° 2011-392 *relative à la garde à vue*, JORF n°0089 of 15 April 2011. CHAVENT-LECLERE Anne-Sophie, "La garde à vue est morte, vive la garde à vue ! À propos de la loi n° 2011-392 du 14 avril 2011", *Procédures* 2011. Étude 7.
[801] Law n° 2014-535, of mai 27, 2014 *portant transposition de la Directive 2012/13/UE du Parlement et du Conseil du 22 mai 2012 relative au droit à l'information dans le cadre des procédures pénales*, JORF, n°0123 of 28 May 2014.
[802] Law n° 2016-731, June 3, 2016 *renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale*, JORF, n°0129 of 4 June 2016.
[803] Cass. Crim., 30 Jan. 2018, nº 17-87.563.

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5.2.4 Cooperation issues between executing and issuing authorities

A tricky point in terms of cooperation between the executing and issuing authorities concerns the taking of guarantees from the issuing state by the French courts. The Framework Decision does not allow the surrender of a person to the issuing authority to be conditioned in any way whatsoever. Article 15 paragraph 2, transposed into article 695-33 of the Code of Criminal Procedure, only authorizes the executing State to request **additional information enabling it to rule on the surrender.** Thus, article 695-33 of the French Code of Criminal Procedure allows the investigating chamber to request additional information from the issuing State, when the information provided is insufficient to enable the chamber to rule on the surrender. Although article 695-33 refers to a simple possibility for judges executing arrest warrants, the Court of Cassation has in fact imposed an **obligation to provide information** on trial judges on the basis of this article, when there is a suspicion that the person handed over may suffer serious violations of fundamental rights. The Court of cassation is particularly strict in cases involving wanted persons with political refugee status in France, for whom there is a risk of extradition after surrender to the issuing state. Under article 695-33, the Court of cassation requires the investigating chambers to check with the issuing judicial authority that the wanted person will not subsequently be extradited or handed over to a State where he or she could risk his or her life or liberty[804]. This article, as interpreted by the Court of Cassation - as a means of obtaining additional guarantees to those which already naturally found mutual recognition - may therefore constitute an obstacle to cooperation.

The implementation of this article also has an **impact on the speed** of execution of the European arrest warrant. The time limits of seven days (if there is agreement to surrender) or twenty days (if there is no agreement to surrender) within which the investigating chamber must rule on the surrender, may be extended when the chamber applies article 695-33. The investigating chamber must ask the issuing judicial authority to provide the requested information within ten days. Although the French legislator has set a time limit of ten days for the provision of additional information, the request made under article 695-33 justifies the decision of the investigating chamber not to rule within the time limits set out in article 695-31, paragraphs 3 and 4.

[804] Cass. crim., 7 Feb. 2007, n°07-80.762, *AJ penal*, 2007, p. 188; Cass. Crim. 21 Nov. 2007, n° 07-87.499; Cass. Crim., 9 June 2015, n° 15-82.750.

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5.2.5 Remedies

The Framework Decision is not explicit on the question of appeals against decisions taken by the executing authorities. The French law does, however, provide for the possibility of a second level of jurisdiction in the event of non-consent to surrender**.** When the person has consented to surrender, the decision of the investigating chamber is not subject to remedy, either before the court of appeal or before the court of cassation (art. 695-31 paragraph 3 of the code of criminal procedure). On the other hand, **where the person sought has not consented to surrender, the decision of the investigating chamber may be appealed by the person sought or by the public prosecutor, within three days of the decision**. The Court of Cassation must rule within forty days of the date of submission of the appeal (art. 568-1 and 574-2).

A specific question concerns the situation envisaged by articles 27 and 28 of the Framework Decision and transposed into French law in article 695-46 of the Code of Criminal Procedure. This is the case where a person who has been surrendered is subsequently sought, by the same State that issued the EAW or by another State, for an offence other than that justifying surrender by the executing French authority. The investigating chamber is the competent authority to rule on the extension of the initial EAW. However, the **French law does not provide for the possibility of appealing against a decision by the investigating chamber to extend the surrender to offences other than those covered by the initial warrant**. Article 695-46 of the French Code of Criminal Procedure provided that the investigating chamber's decision was "without appeal". The Court of cassation then referred a QPC (*question prioritaire de constitutionnalité*) to the Constitutional Council[805], considering the risk of violation of the right to an effective remedy. The Court of Cassation noted that "while a decision to hand over to foreign judicial authorities a person who has not consented to the execution of a European arrest warrant may be appealed to the Court of Cassation, this is not the case for a decision of the investigating chamber, which rules without appeal on the request of the issuing Member State to consent to prosecution or to the enforcement of a sentence or security measure imposed for offences other than those for which the person was surrendered", and asks the Constitutional Council whether the absence of such an appeal is contrary to the

[805] A *question prioritaire de constitutionnalité* (*QPC*) consists, in the course of a trial before an administrative or judicial court, in questioning the Constitutional Council as to the compatibility with the Constitution of the law that should apply during the trial.

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Constitution, in particular to the principle of equality before the law and to the principle of the right to an effective judicial remedy[806]. Requested by the Constitutional Council to give a preliminary ruling, the CJEU considered that the **Framework Decision, while not explicitly providing for a remedy, did not preclude Member States from providing for one**, as long as the time limit laid down in Article 17 was respected[807]. The Constitutional Council then carried out a constitutionality review and concluded that the domestic law not providing for a remedy constitutes an "unjustified restriction on the right to an effective remedy". It therefore **declared the words "without appeal" in article 695-46 to be unconstitutional**[808]. The article was then **amended** by the law of August 5, 2013, giving access to an appeal to the Court of Cassation against the decision of the Investigating Chamber authorizing the extension of the arrest warrant to other offenses.

5.3 The implementation of Directive 2014/41

5.3.1 Scope

The French government has proposed a very **faithful** transposition of the directive. The transposition is revealed by a near "copy and paste" of the provisions in the French Code of Criminal Procedure[809].

The section of the French Code of Criminal Procedure concerning the European Investigation Order opens with article 694-15, which states that, except where the Code provides otherwise, requests for mutual legal assistance between France and other EU member states are made via European Investigation Orders. The European Investigation Order (EIO) thus replaces other forms of evidence cooperation between member states. The European Investigation Order is defined in article 694-16 of the French Code of Criminal Procedure as a judicial decision issued by a Member State of the European Union requesting another Member State, using a common form, either to carry out within certain time limits on its territory investigations aimed at obtaining, communicating or safeguarding evidence,

[806] Cass. crim., 19 février 2013, n°13-80.491.
[807] CJEU, 30 May 2013, *Jeremy F*, aff. C-168/13.
[808] QPC n° 2013-314, 14 June 2013.
[809] ROUX-DEMARE François-Xavier, "La décision d'enquête européenne ou l'adoption d'un instrument inédit de l'Europe penale", *AJ pénal*, 2017, p. 115.

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or to temporarily transfer a detained person to enable his or her participation in investigative acts.

The article is also to be commended for its clarity, grouping together in its various paragraphs all the measures that can be the subject of a European investigation order, which are scattered throughout the directive (art. 1 § 1, art. 32 § 1, art. 22 and 23 of the directive). Thus, the first three paragraphs of article 694-16 set out the three purposes of a European investigation order:

- To carry out investigations aimed at **obtaining** evidence relating to a criminal offence or at **communicating** evidence already in the possession of the authorities.

- Provisionally prevent, on the territory of the executing State, any **destruction, transformation, displacement, transfer, or alienation** of items likely to be used as evidence.

- Temporarily transfer to the issuing State a person detained in the executing State, in order to enable procedural acts requiring that person's presence to be carried out in the issuing State, or the **temporary transfer** to the executing State of a person detained in the issuing State for the purpose of participating on that territory in investigations requested.

The last paragraph of article 694-16 specifies that an EIO aimed at obtaining evidence under the first two paragraphs is also possible if it concerns evidence relating to a person's violation of obligations resulting from a criminal conviction, even if this **violation does not constitute an offence**. These provisions concern violations of obligations under a suspended sentence (*sursis avec mise à l'épreuve*), a criminal restraint order (*contrainte pénale*), a socio-judicial monitoring order (*suivi socio-judiciaire*), a managed sentence (*aménagement de peine*), a conditional release (*libération conditionnelle*) or a release under restraint (*libération sous contrainte*). These violations enable the offender to be punished by imprisonment, but do not constitute new offences. Proof of such violations, if committed abroad, can be obtained through the issuance of EIO by the enforcement judge.

5.3.2 Grounds for non-recognition and non-execution

Article 694-17 of the French Code of Criminal Procedure extends the principle of mutual recognition to the European Investigation Order, providing that "Member States shall recognize a European Investigation Order without any formality, and shall execute it

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in the same way and under the same conditions as if the request had come from a national judicial authority, unless a valid reason provided for in this section for non-recognition, non-execution or postponement of the decision applies, and subject to the application of formalities expressly requested by the issuing authority which are not contrary to the fundamental principles of the law of the executing State", echoing the provisions of article 9 § 1 of the Directive.

In accordance with Article 11 of the Directive**, grounds for non-recognition and non-execution** of the decision are set out in Article 694-31 of the Code of Criminal Procedure:

1° the EIO must be refused if a **privilege or immunity** prevents its execution. Where such privilege or immunity may be lifted by a French authority[810], the investigative decision shall be refused only after the French magistrate to whom the matter has been referred has immediately sent the competent French authority a request for the privilege or immunity to be lifted, which has been refused. If the French authorities are not competent[811], the request for waiver is left to the issuing State.

2° The EIO must be refused if it is **contrary to the rules of criminal liability** laid down for press offences by articles 42 et seq. of the law of July 29, 1881, on freedom of the press and by articles 93-3 and 93-4 of law no. 82-652 of July 29, 1982, on audiovisual communication.

3° The EIO must be refused if it concerns **classified information**.

4° The EIO must be refused when the request concerns a procedure mentioned in article 694-29 of the present code which does not relate to a criminal offence, when the requested measure would **not be authorized** by French law in the context of a similar national procedure[812].

5° The EIO must be refused if its execution or the evidence likely to be transferred following its execution could lead to the prosecution or punishment again of a **person who has already been finally judged** for these acts in a Member State, provided however that the

[810] Such as the immunity of a member of the National Assembly or Senate, which can be lifted by the office of the National Assembly or Senate
[811] For example, in the case of diplomatic immunity for a foreign diplomat.
[812] The law of March 23, 2019 amended article le n°4 of article 694-31: whereas in the previous version of the article the request was refused when it concerned a procedure mentioned in article 694-29, when the requested measure would not be authorized by French law in the context of a similar national procedure, the new version allows refusal only when the request which would not be authorized in the context of a national procedure concerns a procedure mentioned in article 649-29 AND which does not relate to a criminal offence.

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sentence passed has been executed, is in the process of being executed or is time-barred according to the laws of the convicting State.

6° The EIO must be refused if the acts on which it is based **do not constitute a criminal offence under French law**, even though they were committed in whole or in part on French territory and there are serious grounds for believing that they were not committed on the territory of the issuing State.

7° The EIO must be refused if there are serious grounds for believing that **execution of the investigative measure would be incompatible with France's respect for the rights and freedoms** guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union.

8° The EIO must be refused if the facts on which it is based **do not constitute a criminal offence under French law, unless they concern a category of offences mentioned in article 694-32** and punishable in the issuing State by a custodial sentence or security measure of at least three years' duration, or unless the requested measure is one of those mentioned in article 694-33.

9° The EIO must be refused if the requested **measure is not authorized** by the Code of Criminal Procedure for the offence justifying the investigation decision, unless it is one of the measures mentioned in article 694-33.

While the grounds for refusal set out in the Code of Criminal Procedure are similar in content to those set out in the Directive, there is one major difference. Whereas the directive provides for refusal to be optional (the executing State "may" refuse), article 694-31 provides for refusal to be **mandatory** (the magistrate to whom the case is referred "refuses" to recognize or execute the decision).
In line with the directive, the French Code of Criminal Procedure provides for situations in which **refusal is not possible**.

- Article 694-33 of the Code of Criminal Procedure provides that the investigative decision may not be refused in the **cases mentioned in n° 8 and 9 of article 694-31** (the facts on which the investigative decision is based do not constitute a criminal offence under French law; the measure requested is not authorized by the present code for the offence on which the investigative decision is based), **when it concerns the measures mentioned in article 694-33 of the Code of Criminal Procedure**. The

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measures referred to in article 694-33 are as follows:

- obtaining information or evidence which is already in the possession of the French authorities and which could have been obtained under French law in the context of criminal proceedings;

- obtaining information contained in judicial, police or gendarmerie files which are accessible in the context of criminal proceedings;

- any hearing of witnesses, experts, victims, suspects or third parties;

- the identification of holders of a specific telephone number or IP address;

- and in general, any other non-intrusive investigative measure that does not infringe individual rights or freedoms.

- Article 694-32 provides that the European Investigation Order **may not be refused, in the case mentioned in n°8 of article 694-31** (the facts giving rise to the investigation order do not constitute an offence within the meaning of French law), **for the 32 categories of offence mentioned**, when they are punishable under French law by a custodial sentence or a detention order of at least three years. The condition of reciprocity is thus excluded for these offences, even if in practice these categories correspond to acts which, because of their nature and/or gravity, are effectively punishable under French law.

Among the grounds for non-recognition and non-execution by the executing judicial authority, Article 11 § 1 letter b) of the Directive lists cases in which execution of the European Investigation Order **risks harming essential national security interests, jeopardizing the source of information or involving the use of classified information relating to specific intelligence activities.** Article 694-34 3° of the French Code of Criminal Procedure transposes this article and provides that "if the execution of the European investigation order risks harming essential national security interests, jeopardize the source of the information or involve the use of information that has been classified in accordance with the provisions of article 413-9 of the Criminal Code and relates to intelligence activities, articles 694-4 and 694-4-1 of the same code shall apply, and recognition or execution of the European investigation order may be refused by the Minister of Justice".

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Where the request for a European investigation could be damaging to these interests, **articles 694-4 and 694-4-1 which require the intervention of the Minister of Justice, apply, in derogation of the principle of mutual recognition**.

Article 694-4 states that, when the execution of a request for judicial cooperation is likely to harm public order or the essential interests of the country, the Public Prosecutor will forward the request to the General Prosecutor, who may, if necessary, refer the matter to the Minister of Justice. In turn, the Minister of Justice will inform the requesting authority, if necessary, of the total or partial impossibility of acting on the request. Article 694-4-1 provides that when the execution of a request for mutual assistance interferes with the mission of the special intelligence service to defend and promote the fundamental interests of the Nation, the Public Prosecutor forwards it to the General Prosecutor, who must refer the matter to the Minister of Justice[813]. The Minister of Justice then informs the Minister responsible for the special intelligence service concerned, who must give an opinion within one month as to whether the request can be executed. In the event of a negative response, the Minister of Justice will inform the requesting authority, if necessary, of the total or partial impossibility of carrying out the request. Article 694-34 clearly represents an **obstacle to mutual recognition: jurisdiction for enforcement is transferred from the judicial authority to the government, and recognition or enforcement of the investigative decision may be refused by the Minister of Justice**.

In accordance with articles 22-29 of the directive, articles 694-43 to 694-49 lay down special provisions for specific investigative measures. Grounds for refusal specific to these measures are added to the grounds for refusal set out in article 694-31. Moreover, unlike the grounds for refusal referred to in article 694-31, which are mandatory under domestic law, the **specific grounds for refusal for these investigative measures are optional**, in line with the Directive. For example, the magistrate hearing the case may refuse to implement an undercover measure on national territory if an agreement has not been reached with the competent authority of the issuing State on how the measure is to be carried out (art. 694-47). Furthermore, the person who is to be interviewed by means of audiovisual

[813] The investigating magistrate to whom the EIO decision is addressed must inform the public prosecutor, since the latter may inform the general prosecutor, who will in turn refer the matter to the Minister of Justice. The investigating magistrate must therefore obviously refrain from any recognition of the EIO until the Minister's decision.

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communication may refuse to comply with the request if he or she is a suspect or is being prosecuted and he or she objects (art. 694-48).

7.1.1.3 Fundamental rights and proportionality issues

The French legislator has faithfully transposed the provisions of the Directive, which introduces a clause relating to failure to respect fundamental rights.

Article 694-36 of the Code of Criminal Procedure provides that "The investigation decision shall be executed in accordance with the formalities and procedures expressly indicated by the issuing authority, unless the law provides otherwise and provided, on pain of nullity, that these rules do not reduce the rights of the parties and the procedural guarantees applying the fundamental principles laid down in the preliminary article of this Code" (Article 9(2) of the Directive).

Article 694-39 provides that "The judge hearing the case may refuse to allow the authorities of the issuing State to assist in the execution of the investigation decision on national territory only if it appears likely to reduce the rights of the parties and the procedural safeguards applying the fundamental principles laid down in the Preliminary Article or likely to harm the fundamental interests of the Nation" (Article 9(4) of the Directive).

While in the case of the European arrest warrant, as mentioned above, there are many rulings by the Court of cassation limiting cooperation in the event of a violation of the fundamental rights of the person sought, this does not seem to be the case in the case of the European investigation order. Although a basis for refusal of the investigation decision is explicitly provided for both in the European instrument and at domestic level, **there are no rulings whatsoever on this ground**.

5.3.3 Execution procedure

A. Ordinary procedure

- The **competent authority to receive** an investigation order depends on the act to be carried out. It is sent to and recognized by the **investigating judge** when it relates to acts that cannot be ordered or carried out other than in the course of a judicial investigation, or which can only be carried out in the course of an inquiry with the authorization of the liberty and custody judge. In all other cases, the decision is

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addressed to and recognized by the **public prosecutor**. If the magistrate to whom the request is addressed does not have jurisdiction, he will immediately forward the investigation decision to the competent public prosecutor or investigating judge and immediately inform the issuing State (art. 694-30 of the Code of Criminal Procedure).

- As for the **recognition of investigation decisions**, the magistrate hearing the case takes the decision on the recognition or execution of the European investigation decision with the **same speed and priority as in similar national proceedings and no later than thirty days after receipt of the European investigation decision** (art. 695-35 CPP), unless the issuing authority has expressly requested a shorter period or a specific date. In this case, the magistrate hearing the case will take this requirement into account as fully as possible (art. D. 47-1-15). If it is not possible to comply with the thirty-day time limit, or with specific time limits, he or she shall inform the competent authority of the issuing State without delay by any available means, stating the reasons for the delay and an estimate of the time needed to reach a decision. In such cases, this period may be extended by a maximum of thirty days. In full compliance with the principle of mutual recognition, no formalities are required for the recognition of a European decision (art. 694-17 and D. 47-1-13). The simple instruction ordering the execution of the requested measure is considered as recognition of the investigation decision, without the need to notify the issuing authority. On the other hand, if the French magistrate refuses to recognize the EIO, he must inform the foreign issuing authority without delay and by any means that leaves a written record (art. 694-31 last paragraph).
- As for the **execution of the investigation decision**, article 694-17 of the Code of Criminal Procedure provides that the EIO issued by a foreign authority **is executed in France in accordance with the provisions of French law.** However, the French magistrate must comply with the formalities and procedures expressly indicated by the foreign authority, if French law does not provide otherwise, and provided that these rules preserve the rights of the parties and the procedural guarantees provided by the French Code of Criminal Procedure (art. 694-36 CPP). In such cases, the French magistrate must inform the issuing authority without delay by any means that leaves a written record. The issuing State may participate in the execution of the investigation decision on the national territory of the executing State, and the

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executing State is only entitled to object if such assistance would be likely to reduce the rights of the parties and the procedural guarantees provided by the French Code of Criminal Procedure or to harm the fundamental interests of the Nation (art. 694-39). In principle, the measure is executed **no later than ninety days following the date of recognition** (art. 694-37 CPP). The time limit may also be shorter if the issuing authority requests that the measure be executed within a shorter time limit for reasons of urgency (art. D. 47-1-15). In accordance with the provisions of the Directive, the Magistrate hearing the case may resort to another similar measure where the measure requested cannot be executed in a similar national procedure, or where it achieves the same result in a less intrusive manner (Article 694-38). The investigating judge shall inform the issuing authority without delay of the decisions taken pursuant to this Article, including where no measure can be substituted for the measure requested (Article 694-38). New measures may be requested by the issuing authority if the executing authority informs it that they seem to be necessary (art. 694-40).

- Reports, seized objects and evidence gathered in execution of the investigation decision are in principle **handed over as soon as possible**. However, delivery is **suspended** if an appeal is lodged against the measures taken, unless immediate delivery is essential for the investigation to be carried out properly or for individual rights to be preserved. Suspension is automatic if the handing over of the information is likely to cause serious and irreversible harm to the person concerned. Lastly, the handover may only be temporary, so that the French authorities may request the return of the items handed over, when they are useful for domestic proceedings (art. 694-42).

The provisions relating to the enforcement procedure very faithfully reproduce, almost word by word, the provisions of the directive. The domestic provisions are perfectly in line with the European instrument[814].

B. Specific rules for certain measures

[814] ROUX-DEMARE François-Xavier, "La décision d'enquête européenne ou l'adoption d'un instrument inédit de l'Europe penale", *AJ pénal*, 2017, p. 115.

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In line with the Directive, specific provisions are laid down for **specific investigative measures**. The provisions laid down in the Directive have generally been transposed into French law, even if the transposition is, on certain points, less precise and complete than the general provisions.

- The rules for the **temporary transfer of detainees from the issuing foreign State to French territory** are the same whether France is the executing or issuing State, due to the reference made by article 694-44 to article 694-26 of the Code of Criminal Procedure. The release of the detained person can only be ordered at the request of the foreign State. Articles D.47-1-6 and D. 47-1-7 introduced by the 2017 decree complete the regulation by specifying, in accordance with the directive, that the transfer's practical arrangements are fixed by mutual agreement between the French magistrate who issued the European Investigation Order together with the prison administration directorate and the issuing authority.
- When the EIO concerns the **transfer of a person detained on French territory to another Member State**, article 694-45 of the Code of Criminal Procedure states that the French judge may refuse to recognize and enforce it if the detainee opposes his transfer or if his transfer is likely to prolong the length of his detention. If the judge recognizes the decision, he must set a deadline by which the detainee must be returned to France and specify how his rights and safety are to be safeguarded during the transfer.
- As regards **hearings by videoconference or other means of audiovisual transmission** (art. 24 of the Directive), the possibility that the hearing or questioning of a witness, an expert or the suspected or accused person may be conducted by videoconference is provided for in article 694-48, which refers to the procedure in article 706-71. Article D47-1-20 specifies that the practical arrangements for the hearing shall be determined in advance by mutual agreement between the French authority and the foreign executing authority (time, date, identifying details of the person heard, conditions for guaranteeing the rights of the defense). However, the transposition of the directive is imprecise on certain points, particularly regarding the procedures for conducting the hearing. Several points of Article 24(5) have not been transposed into national law (a) (c) (d).
- As regards the **hearing by teleconference**, there are no provisions transposing this

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into domestic law.

- As regards **information relating to bank accounts and other financial accounts** (Article 26 of the Directive) and **information relating to banking and other financial transactions** (Article 27 of the Directive), Article 694-27 transposes both Articles very briefly. The transposition can be considered satisfactory overall, although certain points are missing from the transposition. For example, article 694-27 does not provide that information relating to bank or financial accounts may also concern accounts over which the person who is the subject of the criminal proceedings concerned has power of attorney.

- As regards **investigative measures involving the obtaining of evidence in real time, continuously and over a certain period of time**, Article 694-49 of the Code of Criminal Procedure provides that the practical arrangements for such investigative measures shall be determined by mutual agreement between the French magistrate and the issuing authority. Failing agreement, the French magistrate may refuse to execute the request.

- As regards **undercover measures**, Article 694-47 transposes Article 29 of the Directive in a succinct but comprehensive manner. The terms and conditions of the undercover measure carried out on national territory, in particular its duration and the legal status of the undercover agents, are determined by mutual agreement between the French magistrate to whom the case is referred and the competent foreign authority. If no agreement is reached, the public prosecutor or investigating judge may refuse to enforce the decision. Pursuant to the general provisions of article 694-17, the infiltration requested under an EIO must be carried out in the *same way* and according to the *same procedures* as if the request had come from a French magistrate, and therefore pursuant to the rules set out in the Code of Criminal Procedure, including article 706-81, which requires in particular the involvement of "specially authorized" agents. It is important to stress that in the context of an EIO, the French magistrate to whom the request is made will only be able to give his agreement if the foreign agents are appointed in their State to a specialized department and carry out police duties similar to those of national police officers or agents specially authorized for this type of operation under articles 706-81 et seq. To determine whether these two conditions have been met, it will

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therefore be necessary to consult the "*Service interministériel d'assistance technique*" (SIAT) of the Central Criminal Investigation Department, in accordance with article D.15-1-4[815].

- As regards **telecommunications interception**, interception requiring technical assistance from another Member State has been transposed into article 694-48, in the section of the Code of Criminal Procedure relating to the European investigation order. On the other hand, notification of the Member State in which the interception target is located and whose technical assistance is not required has been transposed into article 100-8 of the Code of Criminal Procedure[816], created by Order no. 2016, which transposes the directive. The provisions set out in articles 694-48 and 100-8 are completed by provisions resulting from the 2017 decree, which specify the application procedures[817].

It should be pointed out that the Directive provides, for each specific measure, another ground for refusal in addition to the grounds provided for in Article 11, in cases where **the execution of the measure would not be provided for in a similar national procedure**. The French law, on the other hand, did not consider it necessary to specify such a ground for refusal in each measure. Article 694-38 already provides, more generally, that the judge to whom the case is referred may not carry out the requested measure if it is not provided for in the Code of Criminal Procedure or could not be carried out in the context of a national procedure, and no alternative measure may be substituted for the one requested.

5.3.4 Issues for the rights of the suspect or accused person

One of the main difficulties that may arise when executing the European Investigation Order concerns the status of the French public prosecutor's office. Under the terms of Arts 694-20 and 694-30 of the Code of criminal procedure, the EIO is issued, when France is the issuing State, or received, when France is the executing State, by the authority competent at national level to order or carry out the measure which is the subject of the EIO.

[815] *Circulaire du 16 mai 2017 présentant les dispositions de l'ordonnance n°2016-1636 du 1er décembre 2016 et du décret n°2017-511 du 7 avril 2017, portant transposition de la directive 2014/41/UE du Parlement européen et du Conseil du 3 avril 2014 relative à la décision d'enquête européenne en matière pénale*.
[816] Articles 100 et seq. of the Code of Criminal Procedure deal with phone interception.
[817] Art. D32-2 and art. D32-2-1 Code of criminal Procedure.

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When the investigation order relates to acts which, in national proceedings, can only be ordered or carried out in the course of a judicial investigation, or which can only be ordered or carried out in the course of an investigation with the authorization of the liberty and custody judge, the EIO is issued by the investigating judge when France is the issuing State. It is recognized by the investigating judge and is carried out by the latter or by officers or agents of the judicial police acting on a rogatory commission from this judge, when France is the executing State. Where the investigative act covered by the European Investigation Order falls within the competence, under national law, of the public prosecutor, it is the latter who can issue or execute a European Investigation Order.[818] Under French law, during the inquiry phase, several acts may be carried out by the police under the supervision of the public prosecutor: house searches, deprivation of personal liberty (police custody), requisitioning of any private or public establishment or public authority likely to hold information relevant to the inquiry. As regards measures carried out by the public prosecutor, a potential issue of compliance with the ECHR could arise. Indeed, the French public prosecutor is placed under the authority of the Minister of Justice,[819] and thus operates under the influence of the executive. As the European Court of Human Rights has ruled on several occasions, the French public prosecutor's office is not a judicial authority as required by the Convention, since it lacks the necessary guarantees of independence.[820] As a result, he cannot ensure that the guarantees set out in the ECHR are respected during the execution of an inquiry (guarantees relating to the deprivation of personal liberty, guarantees relating to respect for the right to privacy, etc.). This can clearly

[818] Cf. Introduction of the French national report.

[819] Art. 5 Ordonnance of the 22th December 1958 : "*Les magistrats du parquet sont placés sous la direction et le contrôle de leurs chefs hiérarchiques et sous l'autorité du garde des sceaux, ministre de la justice. A l'audience, leur parole est libre".*

[820] The European Court of Human Rights has taken the view that owing to their status, public prosecutors in France did not satisfy the requirement of independence from the executive which, according to its well-established case law, was, like impartiality, one of the guarantees inherent in the autonomous notion of "officer" within the meaning of Art 5 (3) (*Moulin v France*, App no 37104/06 (ECHR, 23 November 2010) § 57; *Medvedyev v France*, App no 3394/03 (ECHR, GC, 29 March 2010)). But the Constitutional Council has expressed disagreement with Strasbourg in a line of cases. In an important judgment published on the 8th of December 2017 (Cons. const., no. 2017-680 QPC, 8 December 2017), the Council held that, regarding the public prosecutor, the principle of independence of the judicial authority (no individual instruction, the principle of the opportunity of the prosecution…) was compatible with the powers given to the Government by the Art 20 of the Constitution ("*the Government shall determine and conduct the policy of the Nation*", which includes the power to determine the prosecution policy). This is also the position of the CJEU in the context of the European arrest warrant, see joint cases C-566/19 PPU and C-626/19 PPU *JR and YC* [2019] ECLI:EU:C:2019:1077

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also raise issues within the European Union as regards the guarantees that underpin mutual trust between Member States.

The question of the public prosecutor's jurisdiction to issue a EIO has arisen on several occasions before the Court of Justice. The Court has generally accepted that the public prosecutor is competent to issue an investigation order, ruling that Art 1(1) and Art 2(c) of the Directive must be interpreted as meaning that the public prosecutor's office of a Member State falls within the concepts of "judicial authority" and "issuing authority", regardless of the subordinate relationship that may exist between members of the public prosecutor's office and the executive.[821] The French Public Prosecutor's Office can therefore issue a EIO without being independent of the executive. The Court of Justice of the European Union has provided further clarification on the competence of the public prosecutor to issue a EIO in the *Encrochat* case.[822] This case, which has transnational dimensions, sees France in the front line: during an investigation, the French authorities discovered an encrypted communication system used from various countries to commit drug trafficking offences. The data collected was transmitted by the French authorities to the Member States concerned via European investigation orders. Beyond the question raised at both national and supranational level as to the legality of the procedure followed in France to collect this connection data,[823] a major issue concerns the authority responsible for issuing a EIO to obtain the data collected from the French authorities. Indeed, the German judge asked the Court of Justice whether the German public prosecutor was competent to request the transmission of interceptions carried out by the French authorities, or whether respect for fundamental rights required the authorization of a court judge for such intrusive measures. The question of the breach of the right to a fair trial arises all the more since the technical system set up by the French authorities to collect the data is covered by national defense secret, making it impossible to verify the data transmitted.[824] According to the Court of Justice, Art 6(1) of the Directive does not preclude a public prosecutor from adopting an EIO for the transmission of evidence already in the possession

[821] Case C-584/19 [2020] ECLI:EU:C:2020:1002; *Dr. pénal*, 2021, comm. 35, A. Gogorza ; *AJ pénal* 2021. 95, obs. M. Lassalle.
[822] Case C-670/22 *Encrochat* [2024] ECLI:EU:C:2024:372
[823] Maxime Lassalle, "L'affaire Encrochat", Recueil Dalloz 2023, 1833.
[824] This procedure allows the public prosecutor to use means covered by national defense secrecy at his or her own discretion, thereby excluding the procedures used to capture computer data from the adversarial debate (art. 706-102-1 CPP). The French Constitutional Council has validated the possibility of using these means of national defense secrecy (Cons. const. no. 2022-987 QPC, 8 April 2022).

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of the competent authorities of the executing State, where such evidence has been acquired as a result of interception by those authorities on the territory of the issuing State, provided that the decision complies with all the conditions laid out by the law of that State for the transmission of such evidence in a domestic case. The Court of Justice has thus reduced mistrust of the Public Prosecutor, allowing him to control the issuing of a EIO with a view to the transmission of evidence already collected by the executing State, if the law of the executing State so provides.

As regards French law, Art 694-20 of the Code of criminal procedure states that where the measure requires the authorization of a judge, the EIO may only be issued by the public prosecutor with the prior authorization of that judge. It should be noted that, under the influence of the ECHR, the French legislator has progressively restricted the powers of the public prosecutor, by requiring that a magistrate with guarantees of impartiality and independence authorizes acts carried out during an enquiry. For example, until 2014, the public prosecutor could authorize the implementation of geolocation measures (geographical location of mobile phones), on the basis of his general power to establish offences and gather evidence before opening a judicial investigation.[825] The power of the public prosecutor to authorize such measures was challenged before the Court of cassation as being contrary to Art 8 ECHR.[826] According to the Court, geolocation constitutes an interference with private life, whose seriousness requires that it be carried out under the supervision of a judge. In line with the case law of the Court of cassation, in 2014 the French legislator subjected geolocation to a new legal framework which requires the authorization of the liberty and custody judge.[827]

5.3.6 Remedies

As regards the appeals that may be lodged against measures carried out under an EIO, article 694-41 of the Code of Criminal Procedure provides, in accordance with the directive, that **measures carried out on national territory may be challenged in the same way and under the same conditions as if they had been carried out under a national procedure**. The persons concerned shall be informed of their right to lodge such appeals where such information is provided for by the provisions of the Code of Criminal Procedure. Article D.

[825] Arts 12,13, 14 CPP.
[826] Cass. crim.,22 Oct. 2013, no. 13-81.949.
[827] The public prosecutor may only use geolocation for a limited period, after which authorization from a trial judge (liberty and custody judge or investigating judge) is required. Art 230-32 et seq. CPP.

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47-1-4 of the Code of Criminal Procedure specifies that when an appeal is lodged against the investigation decision, the magistrate must inform the issuing authority of the existence of the appeal as well as its outcome, but the absence of this information does not constitute a ground for nullity.

Although the provisions of the directive relating to remedies have been faithfully transposed into domestic law, it should be noted that under French procedural law, the right to appeal against investigative acts is limited. **Under French law, no appeal is possible against investigative measures carried out during the police inquiry phase. The person suspected during the inquiry is not considered to be a party to the proceedings. An appeal against these measures can only be lodged when the person becomes a party to the proceedings, during a judicial investigation** (in this case, an appeal against the investigative measures can be lodged with the investigating chamber) or during the trial (in this case, the appeal against the investigative measures can be lodged directly with the trial court). The absence of any means of appeal during the judicial investigation phase poses even more difficulties since most acts are carried out by the judicial police under the supervision of the public prosecutor, who is not considered to be an independent judicial authority within the meaning of the ECHR.

5.4 The coordination with Regulation 2018/1805

5.4.1 Legal basis in the national system and scope

1) <u>Overview of developments in the domestic law of seizure and confiscation</u>

First of all, we need to define the concepts of confiscation and seizure in French law and give an overview of their discipline.

*__Confiscation__: confiscation is an additional penalty provided for in article 131-21 of the Criminal Code. When it becomes final, it results in the permanent deprivation of property and its definitive transfer to the State.

*__Seizure__: seizure, under criminal procedure law, is a measure taken during the proceedings, resulting in the temporary deprivation of property. A measure making property temporarily unavailable may be adopted for two reasons. Firstly, relating to the need to preserve evidence ("probatory seizures") and, secondly, for reasons relating to the

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need to guarantee subsequent confiscation ("seizures for confiscation"). In domestic law, the general term "seizure" therefore refers to seizures for probatory purposes as well as seizures for the purpose of confiscation.

The discipline of seizures and confiscations has evolved considerably over the last decade[828].

1) **Extension of the scope of confiscation**. In the past, the additional penalty of confiscation only concerned dangerous or harmful objects, as well as objects that had been used to commit the offence or that were the product of the offence. A major innovation was introduced by Law 2007-297 of 5 March 2007, which transposed Council Framework Decision 2005/212/JHA of 24 April 2005 on the confiscation of crime-related proceeds, instrumentalities, and property by amending Article 131-21 of the Criminal Code. The law **considerably extends the powers of the judge in confiscation matters.**

   It is now possible for the judge to confiscate: - all or part of the property belonging to the convicted person **without any link to the offences** prosecuted[829]; - property whose illegal origin is only **presumed** since neither the convicted person nor the owner of the property of which the convicted person is the holder is able to justify its origin[830]; - the instrument, object or proceeds of an offence may also be confiscated **in value**, i.e. by equivalent, from any property in the convicted person's assets[831].

   It was thus necessary to bring the seizure provisions into line with the broader scope of confiscation, in order to guarantee the enforcement of confiscation sentences.

2) **The scope of seizure has therefore been extended.** The provisions of the Code of Criminal Procedure only provided for the seizure for probatory purposes, without providing that seizure could be a preventive measure aimed at facilitating

[828] ASCENSI Lionel, *Droit et pratique des saisies et confiscations pénales*, Dalloz, 2023, 728 p.
[829] Art 131-21 par. 6. Cass. crim., 8 July 2015, n°14-86.938.
[830] Paragraph 5 of article 131-21 is the most innovative provision. It now makes it possible, when a person is convicted of an offence punishable by five years' imprisonment or more and has directly or indirectly enriched himself, to confiscate assets for which he has not been able to justify their origin. This provision therefore reverses the burden of proof, since it requires proof that the assets are legal.
[831] Art 131-21 par. 9.

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confiscation. Law no. 2010-768 of 9 July 2010[832] authorizes the seizure of assets subject to confiscation under article 131-21 of the Criminal Code. There are two main innovations in the 2010 law.

Firstly, the **scope of existing seizures, "ordinary seizures" has been extended**. Seizures made during searches, carried out by the public prosecutor[833] or by the investigating judge[834] in the course of an inquiry or a judicial investigation, can be now carried out not only on property for which evidence must be preserved, but also on property for which confiscation is provided for under article 131-21 of the Criminal Code[835].

Secondly, **new seizures are created in a new twenty-ninth title of the Book Four of the Code of Criminal Procedure, entitled "special seizures"**. The special nature of these seizures, which distinguishes them from ordinary seizures, is due either to the particular nature of the property being seized (immovable property or intangible property), or to the legal basis for the seizure (seizure of assets), or to the methods of seizure (seizure without dispossession). These seizures are subject to authorization by a trial judge: the liberty and custody judge during an inquiry, and the investigating judge during a judicial investigation, after consulting the public prosecutor.

The Law of 9 July 2010 also created the **Agency for the Management and Recovery of Seized and Confiscated Assets (AGRASC)**[836], whose operation and missions are specified by decree[837]. Its missions are to improve the seizure, management, confiscation and sale of criminal assets. AGRASC plays a fundamental role in international cooperation. It **advises** the courts, helping them to draw up freezing and confiscation certificates, and **manages** the sums seized in France on foreign

[832] Law n° 2010-768 of 9 July 2010 *visant à faciliter la saisie et la confiscation en matière penale,* JORF, n°0158, 10 July 2010.
[833] Art 56 and 76 Code of criminal procedure.
[834] Art. 97 Code of criminal procedure.
[835] Art. 56, 76 et 97 Code of criminal procedure.
[836] A. Fournier, « La nouvelle Agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC). À propos du décret du 1er février 2011 » *JCP éd. N., 2011, act. 334.*
[837] Décret nº 2011-134 du 1er février 2011 relatif à l'Agence de gestion et de recouvrement des avoirs saisis et confisqués, JORF, n°0028, 3 Feb., 2011.

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request, which are centralized in the AGRASC account.

Extending the scope of seizures and confiscations has a considerable **impact on the effectiveness of cooperation in the recovery of criminal assets**. The expansion of the possibilities for seizure and confiscation under national law increases the number of cases in which France can request enforcement of a freezing or confiscation order for assets located in another Member State.

2) National transposition of European instruments on freezing and confiscation orders

In French law, the rules governing the procedures for recognizing and enforcing freezing and confiscation orders between Member States are respectively contained in Articles **695-9-1** et seq. and **713** et seq. of the Code of Criminal Procedure. As mentioned above in the roadmap, these rules result from the transposition of the two framework decisions on freezing and confiscation.

- With regard to **freezing orders**, Article 695-9-1 of the Code of Criminal Procedure states that a freezing order is an order issued by a judicial authority of a Member State of the European Union, known as the issuing State, to prevent the destruction, transformation, movement, transfer or disposal of property that may be subject to confiscation and that is on the territory of another Member State, known as the executing State. The property that may be subject to a freezing order, as provided for in Article 695-9-2, is any movable or immovable, tangible or intangible property, as well as any legal instrument or document evidencing title to or interest in such property, which the judicial authority of the issuing State considers to be the **proceeds** of an offence or to be wholly or partly equivalent to the value of such proceeds, or to be the **instrument** or **object** of an offence.

  While the scope of the freezing order as set out in Article 695-9-1 was in line with the 2003 Framework Decision, which limited the freezing order to property that was the proceeds, instrument or object of the offence, it no longer appears to be in line with the 2018 Regulation. Indeed, the Regulation extends the freezing order to property that is liable to confiscation pursuant to "any other provision relating to confiscation powers (...) under the law of the issuing State following proceedings related to a criminal offence". **The freezing order must therefore now also extend to other assets that may be confiscated under French law, which do not constitute**

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the instrument, the object or the proceeds of an offence, as provided for in paragraphs 5, 6 and 9 of article 131-21 of the Criminal Code.

The French legislator faithfully reproduces the expression used in the Framework Decision, using the term *gel* (freeze) instead of *saisie* (seizure). In domestic law, the term *saisie* is used indistinctly for the temporary unavailability of property for both probatory and confiscation purposes. In EU law, on the other hand, the term "freezing" is used only for a measure of temporary unavailability for confiscation purposes, and not for probatory purposes. The Court of Cassation stated that it follows from Article 2 of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders that the freezing order constitutes an autonomous concept of European Union law. In domestic law, a freezing order corresponds to a decision to seize assets for which confiscation is provided for in Article 131-21 of the Criminal Code[838]. The concept of freezing therefore now refers to seizure for the purpose of confiscation in the context of European cooperation.

- With regard to **confiscation orders**, article 713 of the Criminal Procedure Code states that a confiscation order is a penalty, or a definitive measure ordered by a court in a Member State of the European Union, known as the issuing State, following proceedings relating to one or more criminal offences, resulting in the permanent deprivation of one or more items of property. Property that may be subject to a confiscation order is, in accordance with article 713-1, movable or immovable, tangible or intangible, as well as any legal act or document attesting to a title to or right over this property, on the grounds : 1° they constitute the instrument or object of an offence; 2° they constitute the proceeds of an offence or correspond wholly or in part to the value of such proceeds; 3° they are liable to confiscation under any other provision of the law of the issuing State even though they are not the instrument, object or proceeds of the offence. The scope of property that may be subject to a confiscation order is therefore broader than that provided for in Article 695-9-1 in respect of freezing, in accordance with the Framework Decision of 6 October 2006 on confiscation, which Articles 713 et seq. transpose.

[838] Cass. Crim., 13 Dec. 2023, n°22-87.237.

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5.4.2 Grounds for non-recognition and non-execution

The grounds for refusing recognition and enforcement depend on whether the order concerns seizure or confiscation.

- **Refusal of a seizure order**

The grounds for refusal of a seizure order are set out in articles **695-9-17 and 695-9-16**. Article 695-9-17 of the Code of Criminal Procedure provides 4 grounds for refusal:

1° If **immunity** is an obstacle or if the property or evidence cannot be seized under French law;

2° If it appears from the certificate that the freezing order is based on offences for which the person referred to in the said order has already been **finally judged by the French judicial authorities or by those of a State other than the issuing State**, provided, in the case of a conviction, that the sentence has been served, is being served or can no longer be enforced under the laws of the convicting State;

3° If it is established that the freezing order has been issued for the purpose of prosecuting or convicting a person on the grounds of his or her **sex, race, religion, ethnic origin, nationality, language, political opinions, sexual orientation or gender identity**, or that the execution of the said order may adversely affect the position of this person for one of these reasons;

4° If the freezing order has been made for the purpose of subsequent confiscation of property and the acts on which it is based **do not constitute an offence that would, under French law, allow the seizure of that property to be ordered**.

Article 695-9-16 provides for the possibility of refusing to enforce a freezing order if the certificate is not produced, is incomplete or clearly does not correspond to the freezing order. However, the investigating judge may set a **deadline** for the issuer of the order to produce, complete or rectify the certificate, accept an equivalent document or, if he considers that he has sufficient information, dispense the judicial authority of the issuing State from any further production.

On several points, domestic law **differs** from the Regulation.

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First of all, whereas the Regulation provides that the enforcement authority "may" not recognize or execute an attachment order on the grounds indicated, French law provides, for the grounds referred to in Article 695-9-17, that the order "**is refused**". Mandatory grounds for refusal remain in French law, which means that domestic legislation is **not in line** with the Regulation, which does not provide any mandatory grounds

Secondly, **no general clause relating to the risk of a manifest breach of a fundamental right** provided for in the Charter that could result from the execution of the freezing order, in particular the right to an effective remedy, the right to a fair trial or the rights of the defense, is provided for in domestic law. On the other hand, a ground for refusal not provided for in the Regulation is set out in Article 695-9-17, No. 3, where the freezing order was made for a discriminatory purpose.

Thirdly, Article 695-9-17 opens with the clause "Without prejudice to the application of Article 694-4, execution of a freezing order shall be refused in any of the following cases". Pursuant to article 694-4 of the Code of Criminal Procedure, where the freezing order is likely to harm public order or the essential interests of the Nation, the Public Prosecutor will forward the request to the General Prosecutor, who will decide if there are grounds to refer the matter to the Minister of Justice, who will then decide whether or not to execute the request. It is therefore clear that article 694-4 is an **obstacle to mutual recognition**: in this case, jurisdiction for enforcement is transferred from the judicial authority to the government, and recognition or enforcement of the order may be refused by the Minister of Justice.

- **<u>Refusal of a confiscation order</u>**

Article 713-20 provides **8 grounds for refusing** to enforce a confiscation order:

1° the **certificate** has not been produced, is incomplete or does not correspond to the confiscation order

2° **immunity** is an obstacle to, or cannot be the subject of, confiscation under French law;
3° the confiscation order would be contrary to the principle of ne bis in idem

4° the confiscation order has been issued for the purpose of prosecuting or convicting a person on the grounds of his or her **sex, race, religion, ethnic origin, nationality, language,**

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political opinions, sexual orientation or gender identity, or that the execution of the said order may adversely affect the position of this person for one of these reasons;

5° the confiscation order has been issued for **acts that do not constitute offences** which, under French law, allow such a measure to be ordered

6° the **rights of a third party acting in good faith** make it impossible, under French law, to enforce the confiscation order

7° according to the information given in the certificate, the person concerned **did not appear in person** at the trial leading to the confiscation order unless, according to this information, he is in one of the cases provided for in 1° to 3° of Article 695-22-1[839]

8° the facts on which the decision is based fall within the jurisdiction of the French courts and the confiscation order is **time-barred** under French law.

Although the content of most of the grounds for refusal is the same as those set out in the Regulation, there are some **critical points**.

Firstly, as was seen above for the freezing order, whereas the Regulation provides that the executing authority "may" not recognize or execute a confiscation order on the grounds indicated, French law provides, for the grounds referred to in Article 695-9-17, that the order "**is refused**". Mandatory grounds for refusal remain in French law, which means that domestic legislation is **not in line** with the Regulation, which does not provide any mandatory grounds.

Secondly, as seen above for the freezing order**, no general clause relating to the risk of a manifest breach of a fundamental right** under the Charter that could result from the execution of the freezing order, in particular the right to an effective remedy, the right to a fair trial or the rights of the defense, is provided for in domestic law. On the other hand, a

[839] 1° The defendant was informed in accordance with the law and effectively, unequivocally and in due time, by summons or by any other means, of the date and place fixed for the trial and of the possibility that a decision could be handed down against him if he did not appear;
2° Having been informed of the date and place of the trial, he was defended during the trial by counsel, appointed either by himself or at the request of the public authority, to whom he had given a mandate for this purpose;
3° Having been served with the decision and having been expressly informed of his right to appeal against it in order to obtain a re-examination of the merits of the case, in his presence, by a court empowered to take a decision quashing the initial decision or replacing it, he expressly indicated that he did not contest the initial decision or did not exercise the right of appeal available to him within the time allowed;

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ground for refusal not provided for in the Regulation is provided for in Article 4, where the freezing order was issued for a discriminatory purpose.

Thirdly, as seen above for the freezing order, Article 713-20 opens with the clause "Without prejudice to the application of Article 694-4, execution of a freezing order shall be refused in any of the following cases". Pursuant to article 694-4 of the Code of Criminal Procedure, where the freezing order is likely to harm public order or the essential interests of the Nation, the Public Prosecutor will forward the request to the General Prosecutor, who will decide if there are grounds to refer the matter to the Minister of Justice, who will then decide whether or not to execute the request. It is therefore clear that article 694-4 is an **obstacle to mutual recognition**: in this case, jurisdiction for enforcement is transferred from the judicial authority to the government, and recognition or enforcement of the order may be refused by the Minister of Justice.

7.4.2.1 Impossibility to execute the freezing or confiscation orders

The reasons that make it impossible to execute a freezing or confiscation order are the same as those set out in the Regulation.

- **Impossibility of executing a freezing order**

Article 695-9-19 provides for the situation in which the freezing order cannot be executed because it is impossible to carry out the measure **for four reasons**, which correspond perfectly to those set out in the Regulation: the property has *disappeared*, it has been *destroyed*, it has *not been found* in the place indicated in the certificate or it *has not been possible to locate* it, even after consultation with the judicial authority of the issuing State. On the other hand, there is no provision in national law for the situation provided for by the Regulation in which, where the property has disappeared, cannot be found in the place indicated by the certificate, or cannot be found because its location is not indicated with sufficient precision, the executing authority obtains information enabling it to locate the property and execute the freezing order without a new certificate being transmitted (Article 13(4)). Nor is there any provision in national law for the situation where the issuing authority has indicated that property of equivalent value could be frozen, but one of the circumstances relating to the impossibility of executing the order exists and no property of equivalent value can be frozen (Article 13(5)).

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- **Impossibility of executing a confiscation order**

Article 713-26 provides for the situation in which the confiscation order is not executed because it is impossible to execute the measure for **four reasons** that comply with the reasons given in the regulation: the property has *already been confiscated*, it has *disappeared*, it has been *destroyed*, it *has not been found* at the location indicated in the certificate or when the *amount cannot be recovered* and the person has no property on the territory of the Republic[840] .

As in the case of the freezing order, there is no provision in national law for the situation provided for in the Regulation in which, where the property has disappeared, cannot be found at the place indicated in the certificate, or cannot be found because its location is not indicated with sufficient precision, the executing authority obtains information enabling it to locate the property and execute the confiscation order without a new certificate being transmitted (Article 22(4)). Nor is there any provision in national law for the situation in which the issuing authority has indicated that property of equivalent value could be confiscated, but one of the circumstances relating to the impossibility of executing the order exists and no property of equivalent value can be frozen (Article 22(5)).

7.4.2.2 Fundamental rights and proportionality issues

The regulation expressly refers to the need for the issuing authority to respect the principle of necessity and proportionality when issuing a freezing or confiscation order[841]. French law on freezing and confiscation orders makes no express reference to these principles. However, it should be noted that **one of the main advances in French case law on criminal seizures and confiscation is the definition of the scope of the proportionality control for these measures.** These case law solutions do not specifically concern freezing and confiscation orders issued by the French authorities on property located in another Member State, but concern, in general, any seizure and confiscation order decided by the

[840] The fifth ground e) indicated by the regulation (the property cannot be found because the location has not been precisely indicated, even after consultation with the issuing authority) does not appear in domestic law, but as the ground is almost identical to that provided for in letter d) (the property has not been found at the location indicated on the certificate), no problem of compatibility arises.
[841] CASSUTO Thomas, « Le règlement européen gel et confiscation : un instrument orienté vers l'efficacité et le respect des droits fondamentaux », *AJ pénal* 2019, p. 368.

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French judicial authority. It is therefore reasonable to **apply these solutions to freezing and confiscation orders issued in the framework of mutual recognition**

- With regard to **seizures**, the Court of Cassation has established the principle, based on Article 1 of Protocol No. 1 of the ECHR, that "the judge ordering the seizure of all or part of a person's property must assess whether the infringement of that person's rights is proportionate" [842]. However, this **proportionality control is limited to seizures of assets**, i.e. seizures that have no direct link with the offence[843], whereas it is **excluded when the seizure, whether in kind or in value, constitutes the object or the proceeds of the offence**: "except in the case where the seizure, whether in kind or in value, relates to property which, as a whole, constitutes the object or proceeds of the offence, the judge, when authorizing or ordering such a measure, must assess the proportionate nature of the prejudice to the right of property of the concerned person, with regard to the latter's personal situation and the concrete seriousness of the facts, when such a guarantee is invoked"[844]. However, the Court of cassation has **recently limited this exclusion from the proportionality check on the proceeds of the offence**. It specified that where there is more than one perpetrator or accomplice, the person subject to seizure who has not benefited from the entire proceeds of the offence may claim that the seizure is disproportionate to the part from which he has not profited. The Court of Cassation is therefore softening its position on the total exclusion of proportionality control in the event of seizure of the object or proceeds of the offence[845]
- As regards **confiscation**, the Court of Cassation recalls that confiscation is a penalty and that any penalty must be justified, considering the seriousness of the offence,

[842] Cass. crim. 4 May 2017, n° 16-87.330.
[843] This concerns paragraphs 5 and 6 of article 131-21 of the French penal code. According to paragraph 5, in the case of a felony or misdemeanor punishable by at least five years' imprisonment and having procured a direct or indirect profit, confiscation may concern movable or immovable property of any kind, divided or undivided, belonging to the convicted offender when the latter, given the opportunity to explain the property for which confiscation is envisaged, is unable to justify its origin. Under the terms of paragraph 6, confiscation may be applied, where the law punishing the crime or offence so provides, to all or part of the property belonging to the convicted person, whatever its nature, whether movable or immovable, divided or undivided.
[844] Cass. crim, January 5, 2017, n° 16-80.275; Cass. crim. June 13, 2018, n° 17-83.893; Cass. crim. June 13, 2018, n°17-83. 894; Cass. crim., September 25, 2019, n° 18-85.211; Cass. crim., September 25, 2019, n° 18-85.216.
[845] Cass. crim., 24 Oct. 2018, n° 18-80.834

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the personality of the perpetrator and his/her personal situation [846] . The proportionality test for confiscation applies under the same conditions as for seizure: it does **not apply when the whole property, in value or in nature, constitutes the object or proceeds of the offence** (for example, when the confiscated property is entirely financed by the offences charged...)[847].

On the other hand, when the **property has no direct link with the offence and has been confiscated on the basis of provisions authorizing the confiscation of all or part of the convicted person's assets** (for example, the confiscated property was financed before the offence was committed, but its confiscation is ordered because of the size of the drug proceeds and the disproportion between the convicted person's assets and his income), the trial judges must carry out a proportionality check. In this case, trial judges will not be able to simply refer to the seriousness of the criminal offence or the convicted person's past record: on the contrary, they will have to assess the **actual seriousness of the offences**, according to the evidence in the file, in order to justify the necessity and proportionality of the infringement of property rights in relation to the issues involved in the case, taking into account the convicted person's personal situation[848].

In the case of **confiscation in nature or in value of the object or proceeds of the offence**, the Court of cassation refuses to apply the principle of proportionality to the infringement of property rights. This seems logical since property rights cannot be protected over an asset that the offender should not possess[849]. The approach is different when it comes to ensuring the **proportionality of the measure with regard to the infringement of respect for private and family life**. In a case brought before the Court of Cassation in 2023, the Court specified that the confiscation of the value of the proceeds of the offence must be justified in terms of the proportionality "of

[846] Cass. crim, 27 June 2018, no. 16-87.009; Cass. crim. 16 January 2019, no. 17-86.581; Cass. crim. 24 June 2020, no. 19-85.074; Cass. crim. 3 March 2021, no. 19-87.093; Cass. crim. 23 March 2021, no. 20-81.479
[847] Crim. 7 déc. 2016, n° 16-80.879, Dalloz actualité, 11 janv. 2017, obs. D. Aubert ; AJ pénal 2017. 142, obs. O. Violeau
[848] Crim. 7 déc. 2016, n° 16-80.879, Dalloz actualité, 11 janv. 2017, obs. D. Aubert ; AJ pénal 2017. 142, obs. O. Violeau; Cass. crim., 29 January 2020, no. 17-83.577)
[849] Crim. 19 avril 2023, n°22-82.994. PIDOUX Jérémy, "La nécessité et l'étendue de la motivation de la confiscation en valeur du produit de l'infraction", *Dalloz actualité*, 8 juin 2023.

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the infringement of the respect for the private and family life of the owner of the confiscated property, with regard to the personal situation of the person concerned and the specific seriousness of the facts, when this guarantee is invoked". According to the Court, the origin of the confiscated property is irrelevant to any infringement of the right to respect for private and family life, which depends on the use made of the property[850]. In a ruling handed down on 1st March 2024, the Court of Cassation reiterated this position with regard to seizures, specifying that the same control of proportionality of the infringement of private and family life (article 8 of the European Convention on Human Rights) must be applied when refusing to return an object seized in the course of a judicial investigation (in this case, a tablet)[851].

The principle of proportionality not only applies to the convicted person, but also to any **third party acting in bad faith.** For example, in a case involving drug trafficking, the defendant was sentenced to confiscation of a property. Although the property was jointly owned by the convicted person and his wife, the convicted person was the real economic owner, since the funds used to purchase the property came exclusively from his illegal activities. The Criminal Chamber of the Court of Cassation, while noting the wife's bad faith in that she had full knowledge of her husband's hidden activities, considers that the proportionality of the infringement of property rights must be assessed in light of the seriousness of the facts and the personal situation of the joint owners. The trial judges were therefore right to carry out this review, noting that the confiscation was not disproportionate because another asset belonging entirely to the wife had not been confiscated[852].

5.4.3 Execution procedure

A. Freeze order

1) <u>Enforcement procedure</u>

Article 695-9-30-1 provides that the French authority competent to **recognize and execute** a freezing order issued by the jurisdiction of another Member State of the

[850] Cass, Crim. 19 April 2023, n° 22-82.994, *Dalloz actualité*, 8 juin 2023, J. Pidoux.
[851] Cass. Crim., 7 Feb. 2024, n° 23-81.336.
[852] Cass. crim., 25 Nov. 2020, n° 19-86.979.

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European Union is the investigating judge with territorial jurisdiction, where appropriate through the Public Prosecutor or the General Prosecutor. The territorially competent investigating judge is that of the place where one of the frozen assets is located or, failing that, the Paris investigating judge. The authorities competent to **issue** a freezing order are the public prosecutor, the investigating judge, the liberty and custody judge and the trial courts competent under the code of criminal procedure. Article 695-9-30-1, introduced by Law no. 2021-1729 of December 22, 2021[853] therefore specifies the competent authorities under national law to issue and execute a freezing order as defined by article 2, nos. 8 and 9 of the regulation.

Before ruling on a freeze request, the investigating judge to whom the freeze request has been referred shall forward it to the public prosecutor for an opinion; if the public prosecutor receives the freeze request directly, he shall forward it to the investigating judge for execution together with his opinion, except where he is required to refer the matter to the public prosecutor pursuant to article 694-4 of the Code of Criminal Procedure (art. 695-9-12). The investigating judge decides on the execution of the request, executes the freezing order or orders it to be executed, and informs the issuing authority without delay (695-9-11). If the examining judge decides to refuse the freezing order because a ground for refusal still exists[854], he must give reasons for his decision and notify it without delay to the issuing judicial authority (art. 695-9-19).

As regards **enforcement procedures**, article 695-9-15 provides that "asset freezing orders issued for the purpose of subsequent confiscation shall be enforced, at the advanced expense of the Treasury, in accordance with the procedures set out in this code". However, doubt has arisen as to the meaning of this provision. In a 2013 case, the French judge ordered the seizure of a credit account, as requested by the Dutch authorities. However, the bank appealed against this decision, but the investigating chamber dismissed the appeal on the grounds that article 695-9-22 on the mutual recognition of freezing orders does not allow an appeal to challenge the substantive grounds for the freezing order. The bank appealed to the Court of Cassation, arguing that its appeal should be assessed according to article 706-148, relating to the seizure of assets, and not article 695-9-22. The doubt raised by the appeal was entirely legitimate, since article 695-9-15 provides that decisions to

[853] Law n°2021-1729 of December 22, 2021, *pour la confiance dans l'institution judiciaire*, JORF, n°0298 of 23 December 2021.
[854] See above (7.4.2)

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freeze assets ordered for the purposes of subsequent confiscation are executed in accordance with the procedures laid down in the Code of Criminal Procedure. Since this order corresponded to a seizure of assets, the rules set out in article 706-148 of the French Code of Criminal Procedure on the seizure of assets could be considered applicable. The Court of Cassation rejected this interpretation. **The Court pointed out the specific nature of the rules governing the enforcement of freezing orders issued by another Member State, specifying that a French judge whose task it is to enforce a freezing order issued by a foreign court under articles 695-9-1 et seq. does not have the same powers as those conferred by the Code of Criminal Procedure when he orders a freezing order.** The applicable provisions are therefore not those relating to seizures resulting from articles 706-141 et seq., but those specifically relating to the issuance and enforcement of asset freezing orders issued by another Member State (articles 695-9-1 to 695-9-30)[855].

Regarding the **confidentiality clause** in article 11 of the regulation, the secrecy of inquiries and judicial investigation is an essential principle of French criminal procedure, ensuring efficiency and fairness in legal proceedings. Article 11 of the Code of Criminal Procedure states that, except in cases where the law provides otherwise and without prejudice to the rights of the defense, proceedings during inquiries and investigations are secret. Only the public prosecutor may decide to disclose specific elements of the proceedings, in order to prevent the diffusion of incomplete or inaccurate information, or to stop a public order disturbance (article 11 paragraph 3). Since Law no. 2021-1729 of December 22, 2021, disclosures made by the public prosecutor may also be justified by "any other reason of public order". Apart from the exceptional cases in which such information is disclosed by the public prosecutor, confidentiality ceases at the end of the inquiry or the judicial investigation.

2) <u>Time limits for recognition/enforcement, and postponement</u>

One aspect on which domestic law differs from the regulations concerns the **deadlines** for recognizing and enforcing a freeze order. Article 695-9-13 provides that the investigating judge, after verifying the legality of the request, "shall decide on the execution of the freezing order as soon as possible and, if possible, within twenty-four hours of receipt of the order. He immediately executes or orders the execution of the freezing order. He shall inform without delay the judicial authority of the issuing State of the execution of the

[855] The Court of Cassation recently reiterated its position on this point, Cass. crim., April 1, 2020, n°19-81.760.

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freezing order by any means which leaves a written record". Domestic law makes no provision for cases where the issuing authority has indicated in the freezing certificate that execution must take place on a specific date (article 9 § 2 of the regulation), nor for cases where the issuing authority has indicated in the certificate that immediate freezing is necessary, due to the risk of destruction of the property or the needs of the investigation (article 9 § 3 of the regulation). In the latter case, the regulation stipulates that the executing authority must decide whether to recognize the freezing order no later than 48 hours after receiving it and must execute it within 48 hours of the decision. **Domestic law provides, as a general rule, that the decision must be taken as soon as possible and, if possible, within 24 hours of receipt of the order, but does not lay down any mandatory time limit for urgent cases.**

The regulation also provides for situations in which the executing authority may postpone the execution of a freezing order: where its execution could harm an ongoing criminal investigation; where the property has been the subject of an existing freezing order; where the property has been the subject of a freezing order issued in the context of other proceedings in the executing state, if the existing order under national law would have priority, under domestic law, over subsequent national freezing orders. Article 695-9-20 provides for these grounds for postponement, and also provides for another case of postponement in addition to those provided for by the regulation, where the assets concerned are documents or media protected under national defense, as long as the decision to declassify has not been notified by the competent administrative authority to the investigating judge responsible for executing the freezing order (4° 695-9-20).

B. Confiscation order

1) <u>Enforcement procedure</u>

Article 713-35-1 provides that the French authority competent to recognize and enforce a confiscation order issued by the authorities of another Member State of the European Union is the territorially competent **correctional court, seized at the request of the public prosecutor.** The competent correctional court is that of the place where one of the confiscated assets is located or, failing that, the Paris correctional court. The competent authority to issue a freeze order is the public prosecutor's office of the court that ordered the confiscation. Article 713-35-1, introduced by Law no. 2021-1729 of December 22,

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2021[856] in application of the 2018 regulation, therefore specifies which authorities are competent under national law to issue and enforce a confiscation order, as referred to in article 2, nos. 8 and 9 of the regulation.

Under articles 713-12 to 713-35, the confiscation order is recognized and enforced in **two steps**.

Firstly, the public prosecutor at the territorially competent correctional court who has received the confiscation order and certificate submits the request, together with his opinion, to the **correctional court**, which rules on the enforcement of the confiscation order. To adopt its decision, the court may hear any person with rights to the property that is the subject of the confiscation order. If it does not have to refuse enforcement of the measure on the grounds set out in articles 713-20 and 713-22 (see above), the correctional court authorizes the execution of the decision. In accordance with the regulations, the correctional court may neither apply measures that would replace the confiscation order, nor modify the nature of the confiscated property or the amount subject to the confiscation order.

However, specific provisions are set out in the following paragraphs of the same article:

- Where the person concerned is able to provide proof of total or partial confiscation in another State, the correctional court, after consulting the competent authority of the issuing State, shall deduct from the amount to be confiscated in France any fraction already recovered in that other State pursuant to the confiscation order;
- where the competent authority of the issuing State consents, the correctional court may order payment of a sum of money corresponding to the value of the property in lieu of confiscation thereof;
- where the confiscation order relates to a sum of money which cannot be recovered, the criminal court may order the confiscation of any other available property up to the amount of that sum of money;
- where the confiscation order relates to property which could not be confiscated in France in respect of the acts committed, the criminal court shall order that it be

[856] Law n° 2021-1729 of 22 Dec. 2021 pour la confiance dans l'institution judiciaire, JORF n°0298, 23 Dec. 2021.

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enforced within the limits provided by French law for similar acts.

Then, **the public prosecutor at the correctional court which has authorized the confiscation, carries out its execution** and informs the competent issuing authority (713-30). Where the person against whom the order has been issued is able to justify total or partial execution of the confiscation in another State, the portion of the amount recovered in application of the confiscation order in another State is deducted in fully deducted from the amount to be recovered.

2) <u>Time limits for recognition/enforcement and postponement</u>

One aspect on which domestic law differs from the regulation concerns the **time limits** for recognizing and enforcing a confiscation order. The regulation provides that the enforcement authority must adopt its decision on the recognition and enforcement of the confiscation order without delay and no later than 45 days after receipt of the certificate of confiscation (art. 20 § 1). **Under national law, on the other hand, article 713-15 provides only that the correctional court shall rule "without delay" on the enforcement of the confiscation order, without setting any mandatory time limit**. As regards the time limits for enforcing the decision that has already been recognized by the court, while the regulation provides that the executing authority shall take the necessary measures to enforce the confiscation order without delay and, at the very least, with the same speed and the same degree of priority as for a similar domestic case, nothing is provided for in national law. Article 713-30 only states that the Public Prosecutor's Office of the court that has issued the ruling "shall continue the execution of the authorization decision", without further specifying the timeframe for execution.

In line with the regulation (art. 21), the Code of Criminal Procedure provides for situations in which enforcement may be delayed, either at recognition stage or at execution stage.

At the **recognition stage**, the correctional court may stay proceedings if it deems it necessary to translate the order, or if the property is already subject to a seizure or freezing order, or to a final confiscation order in other proceedings. When it stays the proceedings, the correctional court may order seizure measures in accordance with article 484-1 (art. 713-17).

At the **execution stage** of the order, the public prosecutor may defer execution of the measure where the confiscation order relates to a sum of money and the amount recovered

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is likely to exceed the amount specified in the confiscation order due to its execution in several States, or where execution of the confiscation order is likely to harm an ongoing criminal investigation or proceeding (713-31).

In both cases, the public prosecutor immediately **informs** the issuing authority, specifying the reasons and, if possible, the duration of the stay (713-18) or of the alternative (713-31). As soon as the reason for the stay or deferral no longer exists, the criminal court rules on enforcement, and the public prosecutor carries out the confiscation order.

C) General provisions

The regulation contains general provisions for freezing and confiscation orders (art. 23 et seq.). A cross-analysis of national provisions concerning the execution of freezing and confiscation orders reveals that the provisions concerning confiscation are in line with the regulation, whereas national legislation is silent on several points concerning freezing.

- As for the impossibility of substituting a freezing or confiscation measure without the consent of the issuing state, article 713-24 of the Code of Criminal Procedure provides, in line with the regulation, that the correctional court may in principle not apply measures that would replace the confiscation order, or modify the nature of the confiscated property or the amount subject to the confiscation order, except in the cases provided for in the following paragraphs of the same article. In contrast, there is no provision for freezing.

- As for the existence of several confiscation orders, article 713-28 provides, in accordance with the regulations, that if several confiscation orders issued against the same person relate either to a sum of money, and this person does not have sufficient assets in France to enable the execution of all the orders, the criminal court determines which confiscation order(s) should be executed. In doing so, it considers all the circumstances, in particular the existence of any freezing measures relating to the property in question, the degree of seriousness and the place where the offences were committed, as well as the dates on which the various decisions were handed down and transmitted[857]. However, there is no similar provision for

[857] Contrary to the Regulation (Article 26(2)), domestic law does not refer to the priority that the executing authority must give to the interests of victims. However, it is explicitly provided that the correctional court

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freezing.

- As regards the termination of enforcement of a freezing or confiscation order (Article 27 of the Regulation), domestic law on confiscation orders provides, in accordance with the Regulation, that the public prosecutor shall terminate enforcement of the confiscation order if he is informed of any decision or measure that has the effect of depriving the order of its enforceability or of removing enforcement of the order from the French judicial authorities (Article 713-34). In addition to this ground for cassation provided for by the Regulation, domestic law also provides that the public prosecutor shall cease to enforce the confiscation order if it is amnestied under French law or is the subject of a pardon granted in France. (art. 713-35). However, there is no such provision for freezing.

- As for the management and transfer of frozen and confiscated assets, the Regulation states that this falls under the legislation of the executing State (art. 28 Regulation). In France, the Agency for the Management and Recovery of Seized and Confiscated Assets (AGRASC) plays a fundamental role in the management of seized and confiscated assets. Article 706-160, 1° of the Code of Criminal Procedure states, in general terms, that the Agency is responsible for "the management of all assets, whatever their nature, seized, confiscated or subject to a protective measure in the course of criminal proceedings, which are entrusted to it because they require administrative measures for their conservation or recovery". The agency is responsible for centralizing and managing the sums seized in criminal proceedings, managing the assets entrusted to it and ensuring payment of the proceeds of sale once the assets have been confiscated, managing and selling the seized assets and also distributing the proceeds of sale when the request comes from foreign judicial authorities[858].

shall take into account "all the circumstances", including the possible existence of measures freezing such assets in the case, the relative seriousness and place of commission of the offences, and the dates on which the various decisions were handed down and transmitted.

[858] Circulaire du 3 février 2011 relative à la présentation de l'Agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC) et de ses missions, https://www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/JUSD1103707C.pdf .

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As regards **frozen property**, article 695-9-27 provides that "Where the request has been made with a view to the subsequent confiscation of the property, it shall be kept on French territory in accordance with the rules of this Code". In the case of ordinary seizures (tangible movable property), the property is placed under seal (articles 56, 76 and 97 of the Code of Criminal Procedure). In the case of movable property whose retention is no longer necessary to establish the truth and whose confiscation is provided for by law, the public prosecutor or investigating judge may, where maintaining the seizure would have the effect of diminishing the value of the property or where restitution is impossible[859], order it to be handed over to the AGRASC with a view to its disposal (art. 41-5 and 99-2 of the Code of Criminal Procedure). In the case of special seizures, article 706-143 specifies that the owner of the property or, failing that, its holder, is responsible for its preservation and maintenance. Where the owner or keeper is unable to do so or is unavailable, custody of the property may be entrusted to the AGRASC[860].

With regard to **confiscated property**, article 713-32 provides that property other than sums of money, confiscated pursuant to the confiscation order, may be sold in accordance with the provisions of the *Code du domaine de l'État*. The sums of money recovered and the proceeds of the sale of confiscated property are vested in the French State where the amount recovered is less than €10,000, and half in the French State and half in the issuing State in other cases. The costs of enforcing the confiscation order are not deducted from the amount allocated to the issuing State. However, where high or exceptional costs have had to be incurred, details of such costs may be communicated to the issuing State in order to obtain a share of them. Confiscated property that is not sold shall devolve to the French State unless otherwise agreed with the issuing State.

7.4.3.1 Issues for the rights of the suspect, accused and other parties

A tricky point in confiscation matters concerns **the rights of third parties, other than the person concerned by the freezing or confiscation measure, who are affected by it**. The measure may affect not only the person prosecuted or convicted, but also the person who

[859] Either because the owner cannot be identified, or because the owner does not claim the item within two months of formal notice sent to his last known address in the case of a judicial investigation (art. 99 al. 1) or within one month in the case of a preliminary inquiry (art. 41-5 al. 1).
[860] Direction des affaires criminelles et des grâces, Guide des saisies et confiscations, 2016, https://www.herveguichaoua.fr/IMG/pdf/2016_guide_des_saisies_et_confiscations.pdf.

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has rights over the property subject to freezing or confiscation. Under the Regulation, these persons fall into the very broad category of "person concerned", which includes not only the natural or legal person against whom a freezing order or confiscation order is issued, but also the natural or legal person who owns the property that is the subject of the order, as well as any third party whose rights in respect of that property are directly affected by the order in accordance with the law of the executing State. In French law, the concept of **third parties acting in good faith in relation to freezing or confiscation refers to the person who is subject to these coercive measures due to the fact that he is the owner of the property, for offences that he did not commit.**

Under certain conditions, **French law limits the possibility of implementing a seizure or confiscation measure to protect its interests**. Article 713-20 paragraph 6 provides, in accordance with Article 19 of the Regulation, that the impossibility under French law of enforcing a confiscation order issued by another Member State because of the rights of third parties acting in good faith constitutes **a ground for refusing** a confiscation order[861]. It is therefore French law, the law of the executing State, which must determine, in accordance with its national law, whether a confiscation order affects the interests of third parties. It is therefore appropriate to give an overview of the state of French law on this point.

The issue of defending the rights of third parties in seizure and confiscation proceedings is far from clear[862]. Both the legislator and the judges try to find a balance between the aim of hitting criminal assets as hard as possible and protecting the fundamental rights of those who own the property. Thus, while the property liable to be seized or confiscated is constantly expanding, the protection afforded to owners acting in good faith is also being extended.

- Where the confiscated object is **dangerous or harmful or its possession is unlawful**, there is no exception to confiscation: there are no provisions protecting the rights of the third-party owner[863].

[861] Refusal is mandatory under French law, whereas it is optional under the regulation.
[862] PRADEL Jean, Droit pénal général, 22 ed, Cujas, 2019, p. 611, n°690, describes it as "tenebrous".
[863] Art. 131-21 paragraph 7 of the Criminal Code specifies that such property may be confiscated from whomever it belongs, even if the convicted person is not the owner.

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- When it comes to the **object or direct or indirect proceeds of the offence**, Article 131-21 paragraph 3 of the Criminal Code mentions as the only exception to confiscation only property liable to restitution to the victim, without making any mention of the rights of the third party in good faith. However, the Court of Cassation has **extended the protection of the owner in good faith** by recognizing that, in accordance with the provisions of Article 6§2 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, the rights of the owner in good faith must be preserved even where the property constitutes the direct or indirect proceeds of the offence[864]. Applying European Union law, the Court of Cassation therefore extends the reservation of the rights of a third party in good faith to a situation not provided for in the text.
- In **other forms of confiscation** (when the confiscated property is the instrument of the offence[865], when it is a confiscation of property for which the convicted person cannot justify the origin[866], when it is a confiscation of property from the convicted person's assets that has no connection with the offence[867], or when it is a value confiscation[868]), the property that may be confiscated must belong to the convicted person or be at his or her free disposal, subject to the "rights of the owner in good faith", or in the case of value confiscation), the property liable to be confiscated must belong to the convicted person or be at his or her free disposal, subject to the "rights of the owner in good faith". In order to prevent offenders from hiding their assets and to ensure that the confiscation penalty is effective, the law authorizes the confiscation of property owned by the convicted offender, as well as that which is freely at the convicted offender's disposal. **The only limit set is respect for the rights of third-party owners acting in good faith. This means that confiscation cannot be ordered against property of which the convicted person has free disposal when the property belongs to a third party who has no knowledge of its unlawful use.** The concept of good faith is assessed on a case-by-case basis by the trial judges[869].

[864] Cass. crim., 7 November 2018, n°17-87.424.
[865] Art. 131-21 paragraph 2.
[866] Art. 131-21 paragraph 5.
[867] Art. 131-21 paragraph 6.
[868] Art. 131-21 paragraph 9.
[869] Cass. crim., 15 Jan. 2014, n°13-81.874.

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During the inquiry and judicial investigation, the **seizure decision is communicated to the third-party owner**, who may have access to the documents relating to the seizure in order to challenge it or request the return of the property (art. 99, 706-148, 706-150, 706-153). This ensures a balance between respect for the adversarial process and the confidentiality of the investigation with regard to third parties. The Investigating Chamber may only uphold the seizure after ensuring that the third party has had access to all the documents on which it is basing its decision[870]. In the case of **a confiscation ordered at trial**, although the third-party owner may voluntarily attend the hearing, he is not summoned or notified of the hearing, which rules, among other matters, on the confiscation of the property of which he is the owner. The Constitutional Council has twice held that the fact that an owner whose ownership is recognized or who has claimed ownership during the proceedings is unable to present his observations on the proposed confiscation is contrary to article 16 of the French *Déclaration des droits de l'Homme et du citoyen*, which guarantees the right of interested parties to an **effective legal remedy and respect for the rights of the defense**[871].

One of the key points handled by the Regulation is that of **restitution to the victim** (Article 29 of the Regulation), which allows the issuing authority to inform the executing authority when it has taken a decision to return frozen property to the victim, so that the latter can take the necessary measures to implement the decision as quickly as possible. The decision to return the seized property to the victim is taken by the public prosecutor, pursuant to article 41-4 of the Code of Criminal Procedure (during the inquiry) or by an order of the investigating judge, pursuant to article 99 (during the judicial investigation). The decision to make restitution to the victim taken on these grounds and sent to the foreign courts must state that the funds shall be transferred to the agency's account at the *Caisse des Dépôts et Consignations*. The funds must pass through the agency and not be returned directly by the foreign authorities to the victim. The AGRASC report of 2022 clearly shows that the French courts have taken up this possibility offered by the Regulation since it came into force. In 2020, only 6 restitutions were executed by foreign authorities at the request of the French authorities; in 2021, they doubled to 12; in 2022, they doubled again to 23 (for a total of 7,498,008.24 euros returned to victims only in 2022)[872]

[870] Cass. Crim., 13 juin 2018; Cass. Crim. 23 oct. 2019.
[871] QPC n° 2021-899 of 23 April 2021; QPC n° 2021-932 of 23 September 2021.
[872] Rapport activité AGRASC 2022, p 192, https://crimhalt.org/2023/07/21/rapport-dactivite-de-lagrasc-2022-

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5.4.4 Cooperation issues between executing and issuing authorities

5.4.5 Remedies

As regards remedies, Law 2021-1729 of 22 December 2021 **creates two new articles**, 695-9-30-2 (concerning freezing orders) and 713-35-2 (concerning confiscation orders), which specify the procedures for applying Article 33 of the Regulation. Together with Articles 695-9-30-1 and 713-35-1, which specify the competent French authorities referred to in Article 2(8) and (9) of the Regulation, these are the only articles that have been adopted in domestic law in application of the Regulation. The provisions concerning appeals appear to be perfectly in line with the regulation, both for the freezing order and the confiscation order:

- With regard to **freezing orders**, article 695-9-30-2 provides that for the application of article 33 of the regulation concerning appeals, the conditions set out in articles 695-9-22 and 695-9-24 of the Code of Criminal Procedure shall apply. Article 695-9-22 provides that the appeal is **open to the person who holds the property that is the subject of the freezing order or any other person who claims to have a right to that property.** The competent authority to rule on the appeal is the Investigating Chamber of the Court of Appeal with territorial jurisdiction, within ten days of the date of enforcement of the order, in accordance with the procedures set out in article 173. The appeal does not have suspensive effect and cannot be used to challenge the substantive reasons for the freezing order. Article 695-9-24 also provides that the person concerned by the freezing order may also contact the office of the investigating judge to find out about the legal remedies available against the freezing order in the issuing State that are mentioned in the certificate. Article 695-9-25 requires the public prosecutor to inform the issuing judicial authority of the appeal lodged and the grounds raised, so that it can submit its observations. The public prosecutor then informs the issuing authority of the outcome of the appeal.
- With regard to **confiscation orders**, Article 713-35-2 provides that for the application of Article 33 of the Regulation concerning appeals, the conditions set out in Article 713-29 shall apply. This article provides that appeals against the decision

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authorizing enforcement of confiscation in France **may be lodged by the offender, the holder of the property and any other person claiming to have a right to the property.** The appeal, which is decided by the Criminal Appeals Chamber, has suspensive effect but is limited in that it cannot relate to the substantive reasons for the confiscation order. This appeal allows the judicial authority to refuse enforcement on the basis of article 713-20 paragraph 6 of the Criminal Procedure Code, which provides a mandatory ground for refusal where the rights of a third party acting in good faith make it impossible, under French law, to enforce the confiscation order[873]. In the event of an appeal against the confiscation order, the Public Prosecutor informs the competent authority of the issuing State of the appeal by any means that leaves a written record.

6 Conclusions

An overall analysis and confrontation of French national law with European cooperation instruments reveals that, on the whole, national law is in line with European expectations. France is formally a 'good performer' in the development and implementation of its legislation on European cooperation in criminal matters. The Framework Decision on the European Arrest Warrant and the Directive on the European Investigation Order have been explicitly transposed into national law. As for the provisions of the Regulation, they are well coordinated with the national rules already existing before their entry into force, since the French legislator had carefully transposed instruments relating to the freezing and confiscation of criminal assets existing before the Regulation.

The transposition of the cooperation instrument on the **European arrest warrant** into national law can be considered satisfactory overall and in line with the expectations of the Framework Decision. The analysis of national law reveals two interesting aspects, which point in the opposite direction.

On the one hand, as regards the **grounds for refusal**, the legislator who transposed the Framework Decision in 2004 extended the list of mandatory grounds for refusal compared with European provisions. But in 2021, certain grounds for mandatory refusal were transferred to the list of grounds for optional refusal. For example, the absence of the condition of double criminality, formerly a mandatory ground for refusal under French law,

[873] See above (§ 7.4.2).

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has become an optional ground for refusal, in accordance with the Framework Decision. This trend towards transforming mandatory grounds for refusal into optional grounds contributes to bringing national law more into line with the Framework Decision and promotes cooperation in that execution of the EAW is not automatically refused but is assessed on a case-by-case basis by the judicial authority.

On the other hand, the French courts that have to execute the EAW are increasingly careful about the **risks of violating the fundamental rights** of the person surrendered. Since 2012, the Court of cassation has recognized a general ground for refusal to execute that may prevent France from surrendering a European arrest warrant in the absence of any legal ground for refusal to execute, where it finds that there is a risk of a violation of the fundamental rights of the person surrendered in the issuing State. Such a condition inevitably puts a brake on cooperation, especially as the Court of cassation, contrary to the position of the Court of Justice, does not attach any specific conditions or limits to this general ground for refusal.

The transposition of the **directive on the European Investigation Order** is particularly faithful to the text of the directive; the domestic provisions are almost a copy-paste of the European text. However, a number of critical points have been raised.

The first point of criticism concerns the **grounds for refusal** of a European Investigation Order submitted to the French authorities. While the directive only provides for optional grounds for refusal, the French legislature has a long list of mandatory grounds for refusal, which severely restricts cooperation between States in matters of evidence. In addition, where the execution of the investigative decision is likely to harm national interests, recognition or execution of the investigative decision may be refused by the Minister of Justice. We are therefore seeing the return of the government's power, which the 2014 directive was intended to remove.

A second critical point arises from the **status of the French public prosecutor**. Difficulties in cooperation may arise when the Public Prosecutor is the executing authority, and in particular when the issuing State asks France to hand over evidence that has already been acquired by the French authorities. If this evidence has been collected during the enquiry by the public prosecutor's office, the issuing authority may receive evidence which, according to its national law, cannot be used since it has been acquired by a body which does not offer guarantees of independence as defined in the European Convention.

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A third and final point of criticism concerns the **surprising absence of rulings** by national courts on European investigation decisions. This lack raises doubts about the reasons behind it. Does this mean that the instrument of cooperation is rarely used, evidence still being a field in which national control is sought? Or does it mean that, while it is used, it generates few contentious cases? This latter option, while appealing, seems unlikely, given the abundance of decisions handed down in other fields of cooperation (European Arrest Warrant).

Domestic law that already existed before the entry into force of the 2018 **Regulation on the freezing and confiscation** of criminal assets is broadly in line with the Regulation. This is due both to the direct transposition into French law of the cooperation instruments that precede the Regulation, and to the progressive broadening in national law of the scope of seizure and confiscation measures. The situations justifying the issue of a freezing or confiscation order by the French authorities have multiplied over the last 15 years; at the same time, the situations in which the freezing or confiscation order is refused by the French authorities on the grounds that the measure would not be authorized under national law have been considerably reduced. It has also been noted that seizure and confiscation measures have generated a considerable amount of case law at domestic level in recent years[874]. Although these decisions do not specifically concern freezing or confiscation measures involving cooperation between States, they do contribute to the recognition of certain principles referred to in the Regulation (in particular the principle of proportionality and necessity of freezing and confiscation measures, as well as the protection of the rights of third parties affected by the measure). It is clear that the recovery of criminal assets is a major priority of national criminal justice[875].

However, an analysis of French law has revealed a **critical issue that could act as a brake on cooperation between States on this matter, which relates to the evident complexity of the rules on seizure and confiscation.** The issuing and execution of freezing and confiscation orders requested to or by another Member State follow the rules laid down in the sections of the Code of Criminal Procedure concerning cooperation between France and other Member States on freezing and confiscation. These provisions refer to the terms and conditions under which freezing and confiscation orders are adopted or executed under

[874] ASCENSI Lionel, BEAUVAIS Pascal, PARIZOT Raphaële, La confiscation des avoirs criminels, LGDJ, 2021.
[875] ASCENSI Lionel, BEAUVAIS Pascal, PARIZOT Raphaële, La confiscation des avoirs criminels, LGDJ, 2021.

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national law. The domestic rules, which are highly complex in this matter (different forms of seizure and confiscation depending on the nature, purpose and methods of enforcement), must therefore be coordinated with the specific provisions that must be applied when the freezing or confiscation order concerns property located in another Member State or property located in France that the foreign authorities request to be frozen or confiscated. Despite the formal compliance of domestic legislation with the Regulation, the effectiveness of cooperation under French law must contend with a scattered and overlapping discipline that is constantly evolving and whose complexity is still beyond the knowledge of the courts.

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