



Procedural Rights in Light of the European Arrest Warrant and Detention

Online seminar, 13-14 October 2020

**UP
GRADE**
YOUR LEGAL
EXPERTISE

**Criminal
Law**



Speakers and chairs

Ingrid-Gertrude Breit, Team Leader – Procedural Rights and Confiscation, Procedural Criminal Law, DG Justice and Consumers, European Commission, Brussels

Christoph Burchard, Professor of Law, Goethe University Frankfurt

Vânia Costa Ramos, Criminal Lawyer, Partner, Carlos Pinto de Abreu e Associados, Lisbon

Wendy De Bondt, Professor of Criminal Law, Institute for International Research on Criminal Policy (IRCP), University of Ghent

Bärbel Heinkelmann, Legal Officer, Procedural Criminal Law, DG Justice and Consumers, European Commission, Brussels

Fabien Le Bot, Administrator, Procedural Criminal Law, DG Justice and Consumers, European Commission, Brussels

Daniel Motoi, Judge, Court of First Instance, 4th District, Bucharest Tribunal, Bucharest

Cornelia Riehle, Deputy Head of Section for European Criminal Law, ERA, Trier

Florentino-Gregorio Ruiz Yamuza, Senior Judge, Appeal Court of Huelva

Key topics

- Evaluation of the EAW over the past 15 years, its interpretation by the CJEU and its application today
- Enforcement of foreign criminal sentences: the EU Directives for pre-trial detention, custodial sentences, supervision of probation measures and alternative sanctions
- Update on the state of play regarding the EU Directives on procedural rights, i.e. the right to information, legal aid and access to a lawyer, presumption of innocence and the position of children in criminal proceedings
- Practical experiences with the application of the Directives from different Member States
- The need for further measures in the EU

Language
English

Event number
320SDT29

Organisers
ERA (Cornelia Riehle) in cooperation with CEJ, ECBA, EJTN, EULITA

Procedural Rights in Light of the EAW and Detention

Tuesday, 13 October 2020

- 09:00 Connecting to the videoconference platform
- 09:15 **Welcome and introduction to the programme**
Cornelia Riehle

PART I: 15 YEARS' EXPERIENCE WITH THE EAW: AN EVALUATION

Chair: Cornelia Riehle

- 09:20 **Operating the EAW: an overview**
- Best practices and experience with issuing and executing an EAW
 - Support offered by Eurojust and the EJN
- Florentino-Gregorio Ruiz Yamuza*
- 10:00 **The development of the EAW in the case law of the CJEU**
Christoph Burchard
- 11:00 Break
- 11:15 **Workshop on applying the EAW by means of case studies**
Christoph Burchard and Florentino-Gregorio Ruiz Yamuza
- 12:15 **Discussion**
- 12:30 Break

PART II: ENFORCEMENT OF FOREIGN CRIMINAL SENTENCES

Chair: Cornelia Riehle

- 14:00 **Enforcement of foreign criminal sentences: the Directives for pre-trial detention, custodial sentences, supervision of probation measures and alternative sanctions**
Wendy de Bondt
- 14:45 **Framework Decision 2009/829/JHA on the application of supervision measures as an alternative to provisional detention: An alternative to the EAW? Pros and cons**
Daniel Motoi
- 15:15 **Discussion**
- 15:30 End of first online seminar day

Wednesday, 14 October 2020

- 09:00 Connecting to the videoconference platform

PART III: PROCEDURAL SAFEGUARDS IN THE EU

Chair: Cornelia Riehle

- 09:15 **The position of children in criminal proceedings in the EU**
Wendy de Bondt
- 09:40 **State of play regarding the transposition of Directive EU 2016/343 on the presumption of innocence**
Fabien Le Bot
- 10:05 Break

Objective

This seminar will take a detailed look at procedural rights in the context of the European Arrest Warrant as well as pre- and post-trial detention.

About the Project

This seminar is part of a large-scale project sponsored by the European Commission entitled "Applying procedural rights in the EU – State of play".

For more information, see:

<https://procedural-rights.legal-training.eu>

Who should attend?

This seminar is targeted at judges, prosecutors, defence lawyers, court interpreters as well as prison and probation staff from all over the EU (UK and Denmark do not participate in the Justice Programme 2014-2020).

Interactive online seminar

The online seminar will be hosted on ERA's own online platform. You will be able to interact immediately and directly with our top-level speakers and other participants. We will make the most of the technical tools available to deliver an intensive, interactive experience. As the platform is hosted on our own server, the highest security settings will be applied to ensure that you can participate safely in this high-quality online conference.

CPD

ERA's programmes meet the standard requirements for recognition as Continuing Professional Development (CPD). This event corresponds to **8 CPD hours**.

Your contact persons



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- 10:20 **State of play regarding the transposition of Directive 2012/13 on the right to information**
Ingrid Breit
- 10:45 **The right to interpretation and translation: the objectives of the Directive and its transposition in the Member States**
Fabien Le Bot
- 11:05 Break
- 11:20 **Access to a lawyer in criminal proceedings: status quo of Directive EU 2013/48**
Bärbel Heinkelmann
- 11:45 **Legal aid for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings (Directive EU 2016/1919)**
Bärbel Heinkelmann
- 12:15 **Future procedural rights in the context of the European Arrest Warrant, pre-trial detention and detention**
Vânia Costa Ramos
- 12:45 Discussion
- 13:15 End of the online seminar

For programme updates: www.era.int
Programme may be subject to amendment.

Apply online for
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www.era.int/?129400&en

e-Presentations

Cyber Risks in Financial Institutions: Lessons Learned in Responding to Them

Liviu Chirita

Approaches to Prepare Proactively for Cybercrime Incidents

Dave O'Reilly

Cyber Menaces and Different Types of Cybercrime Offences

Cormac Callanan

Specialised e-Courses

Fighting Child Pornography Online: 10 Key Questions

Alisdair Gillespie

www.era.int/elearning

Save the date

Annual Conference on EU Border Management 2020

Online conference, 22-23 October 2020

Artificial Intelligence (AI) and the Criminal Justice System

Online conference, 5-6 November 2020

Annual Conference on EU Criminal Justice 2020

Online conference, 12-13 November 2020

Applying Procedural Rights in the Case Law of the CJEU

Trier, 1-2 February 2021



This programme has been produced with the financial support of the Justice Programme 2014-2020 of the European Union.

The content of this programme reflects only ERA's view and the Commission is not responsible for any use that may be made of the information it contains.

***Operating the EAW: an overview
Best practices and experience with issuing and
executing an EAW
Support offered by Eurojust and the EJC***

**Dr. Florentino-Gregorio Ruiz Yamuza, Senior
Judge, Spain**

**Procedural Rights in Light of the European
Arrest Warrant and Detention
ERA. Academy of European Law.
Online seminar, 13-14 October 2020**

**Co-funded by the Justice
Programme of the European Union 2014-2020**



- ➔ **The DNA of the cooperation based on mutual trust.**
- ➔ **A powerful and efficient instrument...**
- ➔ **Requiring a deep comprehension of the mutual trust and mutual recognition principles.**

What is the cooperation within the AFSJ like?

Broad and restricted conceptions

- Grounds for refusal and guarantees (Arts. 3, 4, 4 bis and 5 EAW FD)
- European public order (CFREU and ECHR) (Art. 1.3 EAW FD)
- Reconciliation of criminal systems not fully harmonised
- Procedural guarantees of each Member State

Old challenges

European Arrest Warrant (EAW)

Features

- a. Single form
- b. Direct contact between judicial Authorities
- c. Short time limits
- d. Surrender of nationals
- e. Double criminality
- f. Limited grounds for refusal
- g. Mutual recognition/trust based scheme

Common problems

- a. Differences between Criminal Justice systems.
- b. Language barriers.
- c. Lack of cooperation training
- d. Attitude towards ICTs
- e. Need to build, preserve and increase mutual trust
- f. Fundamental Rights protection
- g. *The X factor*

5

New horizon

Implementation

Harmonisation

Proportionality

Double criminality

Ne bis in idem

Interplay EAW FD-909 FD

Preservation of Fundamental Rights

3. Best practices and experience with issuing and executing an EAW

- ➡ EC Handbook on how to issue and execute an EAW, October 2017
- ➡ EAW. European Implementation Assessment. European Parliament, June 2020
- ➡ Eurojust, EJM, EJTN
- ➡ ECJ
- ➡ Professional experience

4. Issuance of an EAW. Key points.



Issuing Authorities

Art. 1(1) Judicial decision

Art. 6(1) Judicial authority
(autonomous concept)

OG-PI, XD, JD...saga

Independence

Double level of protection
fundamental and procedural rights,
national and at the issuance level.

Proportionality check

Proportionality

Proportionality, ECJ



Resort to alternative measures

FD on Probation and Alternative Measures

FD Transfer of sentenced persons

CoE Convention Transfer of Proceedings

FD Financial Penalties

EIO Directive, Article 1 (1) b) and certificate

EAW FD, Article 2(1)

Spanish example



5. Execution of an EAW. Key points

Hearings and time limits

Time limit 60 days (Art. 17 EAW FD) vs. length of the proceedings.
Jeremy F, appeals. *Lanigan* obligation to take a decisión.

Double criminality

Arts. 2(2), 2(4) and 4(1) EAW FD. Harmonisation. Transposition models.
Puigdemont case. *The Grundza-Piotrowski* paradox?

Nationals and residents

Arts. 4(6) and 5(3) EAW FD and 909 FD
Poplaswski case

Ne bis in idem

Arts. 3(2) and 4(3) EAW FD. Art. 54 SCIA
AY case

Fundamental rights

Art. 1.3 EAW FD.
From *Aranyosi-Caldararu* to *LM* cases.

EAW FD

In absentia trials, Art. 4 bis. Right to be informed, Art. 11 (1), Legal counsel and interpreter, Art. 11(2). Provisional release, Art. 14. Hearing of the case by judicial Authority, Arts. 14 and 19

Directive 2010/64/EU

Interpretation and translation

Directive 2012/13/EU

Information

Directive 2013/48/EU

Access to a Lawyer

Directive 2016/800/EU

Rights of Children suspect or accused

Directive 2016/1919/EU

Legal Aid

7. The role of Eurjoust and EJN

EUROJUST. Regulation 2018/1727/EU

Competences. Assist and coordinate (Serious crimes, affecting 2 or more MS)

Optional competences. Related offences. ! MS and 3rd country. 1 MS.



EJN

Decision 2008/976/JHA

Contact points. Intermediate, assist, training

Information



National networks

SLIDE 3

European Commission Handbook on how to issue and execute an European Arrest Warrant.

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006(02)&from=EN)

EAW. European Implementation Assessment. European Parliament, June 2020.

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU\(2020\)642839_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU(2020)642839_EN.pdf)

Eurojust. European Arrest Warrant ECJ's case-law.

[http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Case%20law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the%20European%20Arrest%20Warrant%20\(March%202020\)/2020-03_Case-law-by-CJEU-on-EAW_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Case%20law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the%20European%20Arrest%20Warrant%20(March%202020)/2020-03_Case-law-by-CJEU-on-EAW_EN.pdf)

SLIDE 4

Spanish Act on Mutual Recognition of Judicial Decisions in Criminal Matters in the EU.

<https://www.ejn-crimjust.europa.eu/ejnupload/InfoAbout/English%20version%20LAW%2023%20of%202014.pdf>

ECJ Press Release 156/19 The Court finds that the French, Swedish and Belgian public prosecutor's offices satisfy the requirements for issuing a European arrest warrant, and clarifies the scope of the judicial protection afforded to persons referred to in such warrants.

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-12/cp190156en.pdf>

SLIDE 7

EURJOUST website.

<http://eurojust.europa.eu/about/background/Pages/History.aspx>

EJN website.

https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx



Procedural Rights in Light of the EAW and Detention

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Co-funded by the Justice Programme of the European Union 2014-2020





Procedural Rights in “extradition” cases

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Procedural Rights in “extradition” cases → in the “requested” state

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— What should we cover?

Detention and surrender under the EAW

**Fundamental Rights, as
protected by the executing
authority**

*Aranyosi und Căldăraru ... and
beyond*

**Fundamental Rights, as
guaranteed by the issuing
(judicial) authority**

OG and PI ... and beyond

Detention for and extradition to non- EU-Member States

**A revolution in traditional
extradition law**

Petruhhin ... and beyond

?



— What should we cover?

Detention and surrender under the EAW

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Detention for and extradition to non- EU-Member States

A revolution in traditional
extradition law

Petruhhin ... and beyond

?



— Where do we stand?

Detention and surrender under the EAW

Fundamental Rights, as protected by the executing authority

- (1) Concurrence of fundamental rights regimes; no imminent general conflict
- (2) Case-specific conflicts are possible
- (3) No legislative guidance
- (4) Practice has to resolve factual + legal uncertainties

Detention for and extradition to non-EU-Member States

A revolution in traditional extradition law

- (1) Neither legislative nor jurisprudential guidance
- (2) Practice has to resolve esp. legal uncertainties



Possible general conflict **up until ...**

Radu C-396/11,
29 January 2013

Opinion 2/13,
18 December 2014

Aranyosi und Căldăraru C-404/15,
5 April 2016

Since ..., no imminent general conflict

LM C-216/18 PPU,
25 July 2018

Dorobanto C-128/18,
15 October 2019

Detention and surrender under the EAW

Fundamental Rights, as
protected by the executing
authority

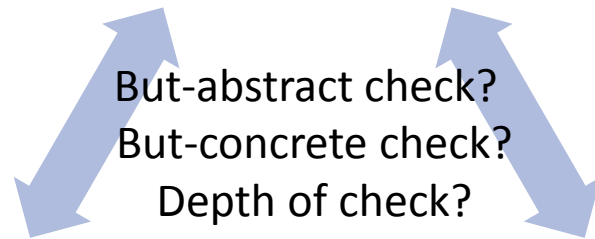
(1) **Concurrence of
fundamental rights regimes;
no imminent general conflict**

(2) Case-specific conflicts are
possible

(3) No legislative guidance

(4) Practice has to resolve
factual + legal uncertainties

Union law / ECJ



National identity ...
Contro-limiti ...
...

ECHR / ECtHR



National law /
National Courts

Detention and surrender under the EAW

**Fundamental Rights, as
protected by the executing
authority**

(1) Concurrence of
fundamental rights regimes;
no imminent general conflict

**(2) Case-specific conflicts are
possible**

(3) No legislative guidance

(4) Practice has to resolve
factual + legal uncertainties

Petruhhin C-182/15, 6 September 2016



Requesting State
Russia



Requested person
Aleksei Petruhhin
Estonian national



Requested State
Latvia

Detention for and extradition to non-EU-Member States

A revolution in traditional extradition law

- (1) Neither legislative nor jurisprudential guidance
- (2) Practice has to resolve esp. legal uncertainties

Petruhhin C-182/15, 6 September 2016

1. Article 18 TFEU and Article 21 TFEU must be interpreted as meaning that, when a Member State to which a Union citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory.

2. Where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter of Fundamental Rights of the European Union.

Detention for and extradition to non-EU-Member States

A revolution in traditional extradition law

- (1) Neither legislative nor jurisprudential guidance
- (2) Practice has to resolve esp. legal uncertainties

Petruhhin C-182/15, 6 September 2016



Home state
Estonia



①



Requested State
Latvia

② CFR
applies



Requested person
Aleksei Petruhhin
Estonian national



Requesting State
Russia



Co-funded by the Justice Programme of the European Union 2014-2020

Enforcement of foreign sentences

ERA Online seminar 12 October 2020
Procedural Rights in Light of the EAW and Detention



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Double
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ality

How would you rate your knowledge of the cross-border enforcement of sentences in the EU?

- A. I have **no** knowledge
- B. I have **basic** knowledge
- C. I have **advanced** knowledge

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ality**Principle of mutual recognition****- 1970 European Convention on the International Validity of Criminal Judgments**

Art. 5 - The sentencing State may request another Contracting State to enforce the sanction [...] if the other State is the State of origin of the person sentenced and has declared itself willing to accept responsibility for the enforcement of that sanction

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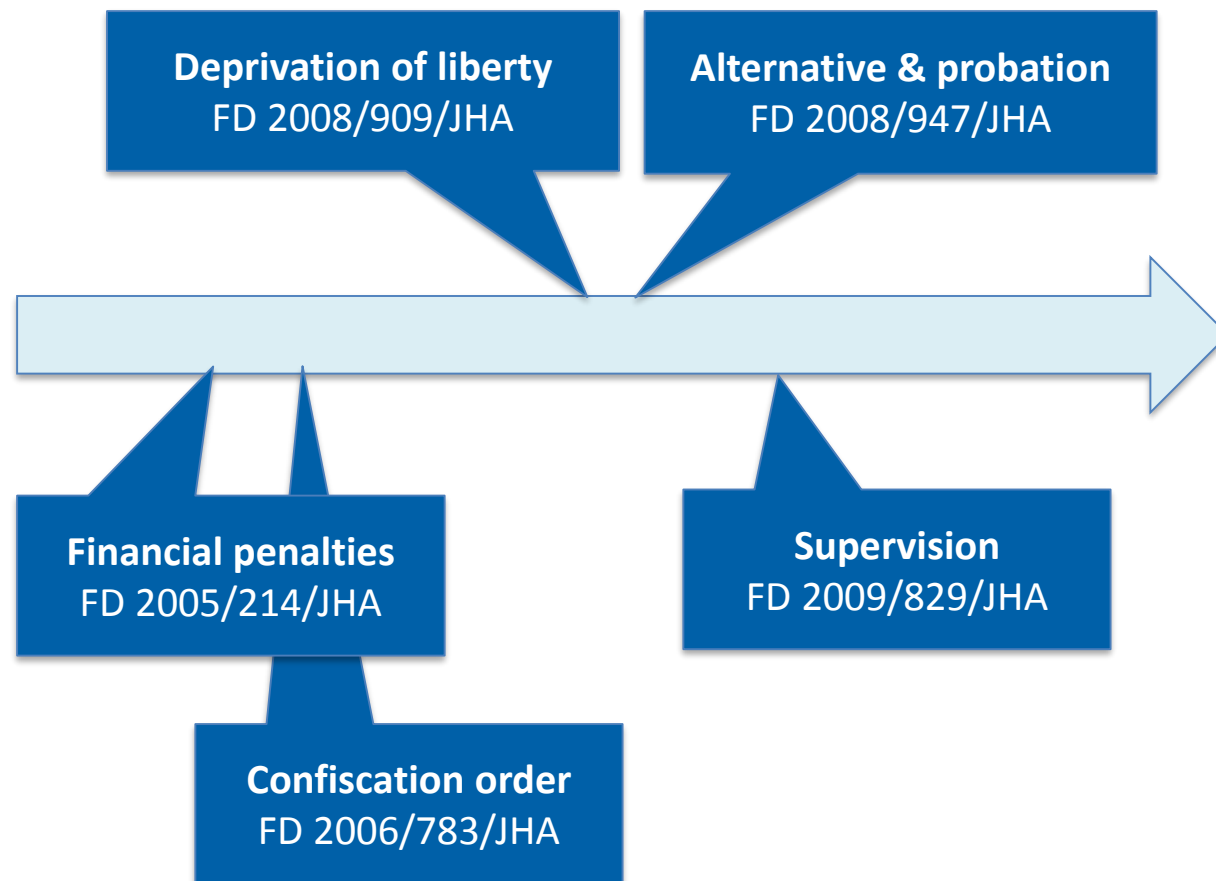
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Principle of mutual recognition



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How would you rate your knowledge of the consent requirement?

- A. I have no knowledge
- B. I have basic knowledge
- C. I have advanced knowledge

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Lenient Council of Europe regime

- 1983 Convention on the Transfer of Sentenced Persons
 - Art 3.1.d transfer is only possible if the transfer is consented to by the sentenced person
- 1997 Additional protocol
 - Art 2 persons having fled from the sentencing state
 - Art 3 persons subject to expulsion or deportation order

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Stringent EU regime

- Framework Decision 2008/909/JHA
 - Art 4.1 (a) and (b) – obligation for MS of nationality and residence.
 - Art 6.2 – no consent required if transferred to/executed in MS of nationality and residence, to where he will be deported, to where he has fed or otherwise returned

Ratio legis: Social Rehabilitation prospects

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How do you feel about the lack of consent requirement?

- A. A convicted person has no right to choose his prison
- B. Social rehabilitation is not possible without the consent of the prisoner

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How do you feel about the validity of consent of the person in the first place?

- A. Consent should be linked to **the country** involved
- B. Consent should be linked to **the facility** involved

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Mutual recognition of the EU diversity

- Framework Decision 2005/214/JHA
 - Art 1 - 'decision' shall mean a final decision requiring a financial penalty to be paid by a natural or legal person
 - Art 9.3 - A financial penalty imposed on a legal person shall be enforced even if the executing State does not recognise the principle of criminal liability of legal persons

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How do you feel about how the mutual recognition principle plays out on this point?

- A. This is OK – MS should recognize each other's choices and execute sentences also with respect to legal persons
- B. This is not OK – MS should not be obliged to execute sentences that conflict with their choices regarding e.g. criminal liability of legal persons

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Compatibility with the law of the executing MS

- Framework Decision 2005/214/JHA
 - Art 8.1 - Where it is established that the decision is related to acts which were not carried out within the territory of the issuing State, the executing State **may decide to reduce** the amount of the penalty enforced to **the maximum amount provided for** acts of the same kind under the national law of the executing State, when the acts fall within the jurisdiction of that State.

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Compatibility with the law of the executing MS

- Framework Decision 2008/909/JHA
 - Art 8.2 - Where the sentence is incompatible with the law of the executing State **in terms of its duration**, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State

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Compatibility with the law of the executing MS

- Framework Decision 2008/909/JHA
 - Art 8.3 - Where the sentence is incompatible with the law of the executing State **in terms of its nature**, the competent authority of the executing State may adapt it to the punishment or measure provided for under its own law for similar offences. Such a punishment or measure shall **correspond as closely as possible** to the sentence imposed in the issuing State and therefore the sentence shall not be converted into a pecuniary punishment

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Overcoming double criminality issues

Case abortion / euthanasia / ...

- A. We would refuse cooperation and would not execute that sentence
- B. We would recognise the sentence and execute it, because we have to

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Overcoming double criminality issues

What is the best option?

- A. Have the person stay abroad, unable to return because of the double criminality issue
- B. Have the person return home and serve a sentence for an act not considered an offence in his home country?

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Avoiding disproportionate moving a persons

- Art 7.2.(h) Framework Decision 2005/214/JHA - The competent authority in the executing State may also **refuse** to recognise and execute the decision if it is established that the financial penalty is **below EUR 70** or the equivalent to that amount
- Art 9.1.(h) Framework Decision 2008/909/JHA - The competent authority of the executing State may **refuse** to recognise the judgment and enforce the sentence, if at the time the judgment was received by the competent authority of the executing State, **less than six months** of the sentence remain to be served

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Usability

The European Criminal Records Information System

- Framework Decision 2009/315/JHA – ECRIS principles
- Decision 2009.3016/JHA – ECRIS architecture

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Enforcement

Criminal Records

Taking Account of

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Introduction

Legal
PersonsThird
Country
Nationals

Usability



How would you rate your knowledge of ECRIS?

- A. I have **no** knowledge on this specific instrument
- B. I have **basic** knowledge on this instrument
- C. I have **advanced** knowledge on this instrument

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Parameters

Level of completion:	Completed act	C
	Attempt or preparation	A
	Non-transmitted element	Ø
Level of participation:	Perpetrator	M
	Aider and abettor or instigator/ organiser, conspirator	H
	Non-transmitted element	Ø
Exemption from criminal responsibility:	Insanity or diminished responsibility	S
Recidivism		R

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Code	Categories and sub-categories of offences
0703 00	Aiding or inciting others to use narcotic drugs or psychotropic substances illicitly
0704 00	Manufacture or production of narcotic drugs not exclusively for personal consumption
0800 00 open category	Crimes against the person
0801 00	Intentional killing
0802 00	Aggravated cases of intentional killing (*)
0803 00	Unintentional killing
0804 00	Intentional killing of a new-born by his/her mother
0805 00	Illegal abortion
0806 00	Illegal euthanasia
0807 00	Offences related to committing suicide
0808 00	Violence causing death
0809 00	Causing grievous bodily injury, disfigurement or permanent disability
0810 00	Unintentionally causing grievous bodily injury, disfigurement or permanent disability
0811 00	Causing minor bodily injury
0812 00	Unintentionally causing minor bodily injury
0813 00	Exposing to danger of loss of life or grievous bodily injury
0814 00	Torture
0815 00	Failure to offer aid or assistance
0816 00	Offences related to organ or tissue removal without authorisation or consent
0817 00	Offences related to illicit trafficking (†) in human organs and tissue
0818 00	Domestic violence or threat
0900 00 open category	Offences against personal liberty, dignity and other protected interests, including racism and xenophobia
0901 00	Kidnapping, kidnapping for ransom, illegal restraint
0902 00	Unlawful arrest or deprivation of liberty by public authority
0903 00	Hostage-taking
0904 00	Unlawful seizure of an aircraft or ship
0905 00	Insults, slander, defamation, contempt

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0800 00 open category	Crimes against the person
0801 00	Intentional killing
0300 00 open category	Terrorism
0301 00	Directing a terrorist group
0302 00	Knowingly participating in the activities of a terrorist group
0303 00	Financing of terrorism
0304 00	Public provocation to commit a terrorist offence
0305 00	Recruitment or training for terrorism
0900 00 open category	Offences against personal liberty, dignity and other protected interests, including racism and xenophobia
0901 00	Kidnapping, kidnapping for ransom, illegal restraint
0902 00	Unlawful arrest or deprivation of liberty by public authority
0903 00	Hostage-taking
0904 00	Unlawful seizure of an aircraft or ship
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Possible inconsistency?

- Art 9.3 FD 2005/214/JHA - A financial penalty imposed on a **legal person** shall be enforced **even if** the executing State **does not recognise** the principle of criminal liability of legal persons
- Art 2 (a) FD 2009/316/JHA - 'conviction' means any final decision of a criminal court against **a natural person** in respect of a criminal offence, to the extent these decisions are entered in the criminal record of the convicting Member State;

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How do you feel about this possible inconsistency?

- A. It should be recommended to extend the requirement to store conviction data to encompass convictions of legal persons
- B. It is not opportune to extend the requirement to store conviction data to encompass convictions of legal persons

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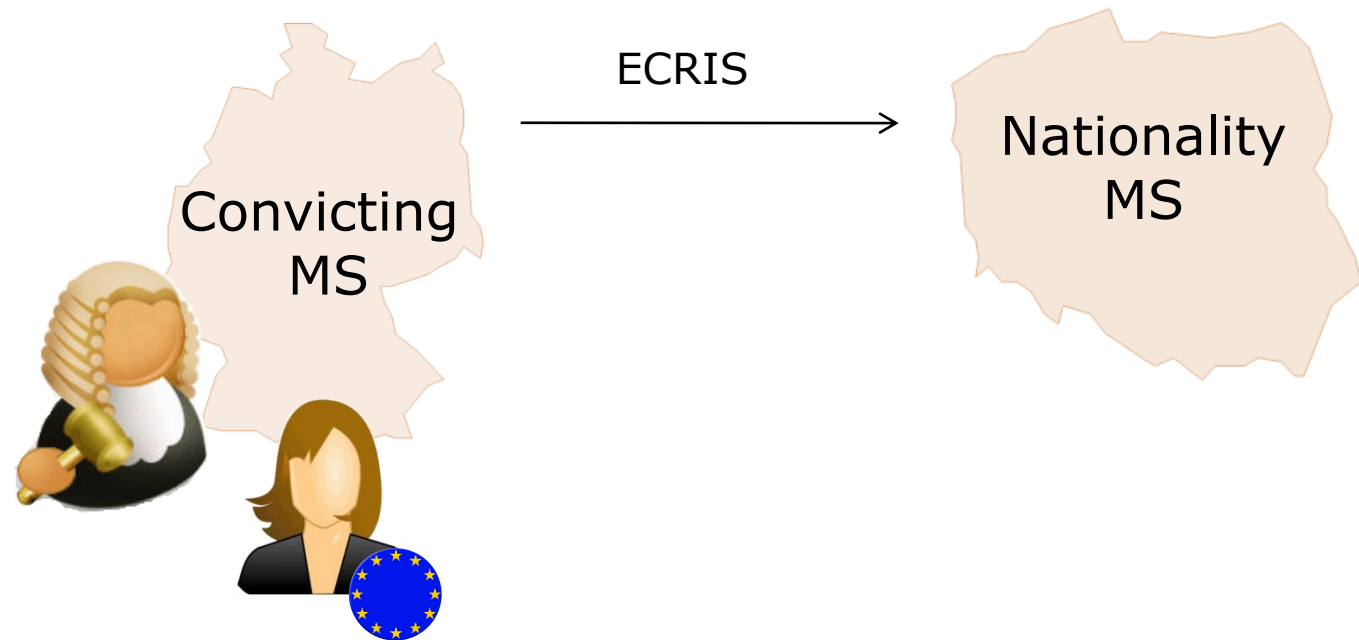
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Differentiating between foreign and EU decisions rather than foreign and EU nationals


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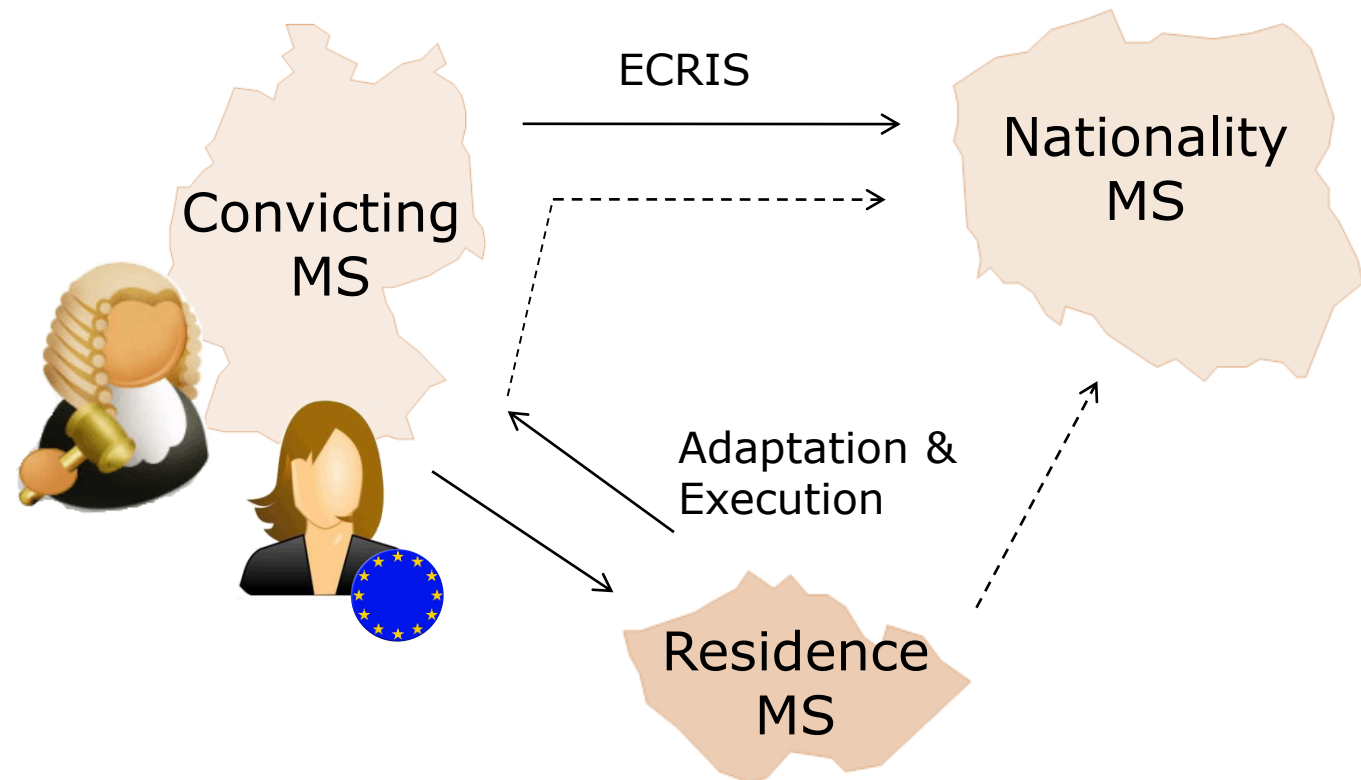
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Third country national

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Differentiating between foreign and EU decisions rather than foreign and EU nationals

“In 2017, the European Commission presented a proposal for a Regulation to establish a centralised ECRIS-TCN system that will be operated by the EU Agency for large-scale IT-systems (eu-LISA). An agreement on this Regulation was reached in the spring of 2019. The system is currently in development, and expected to be operational in 2022.”

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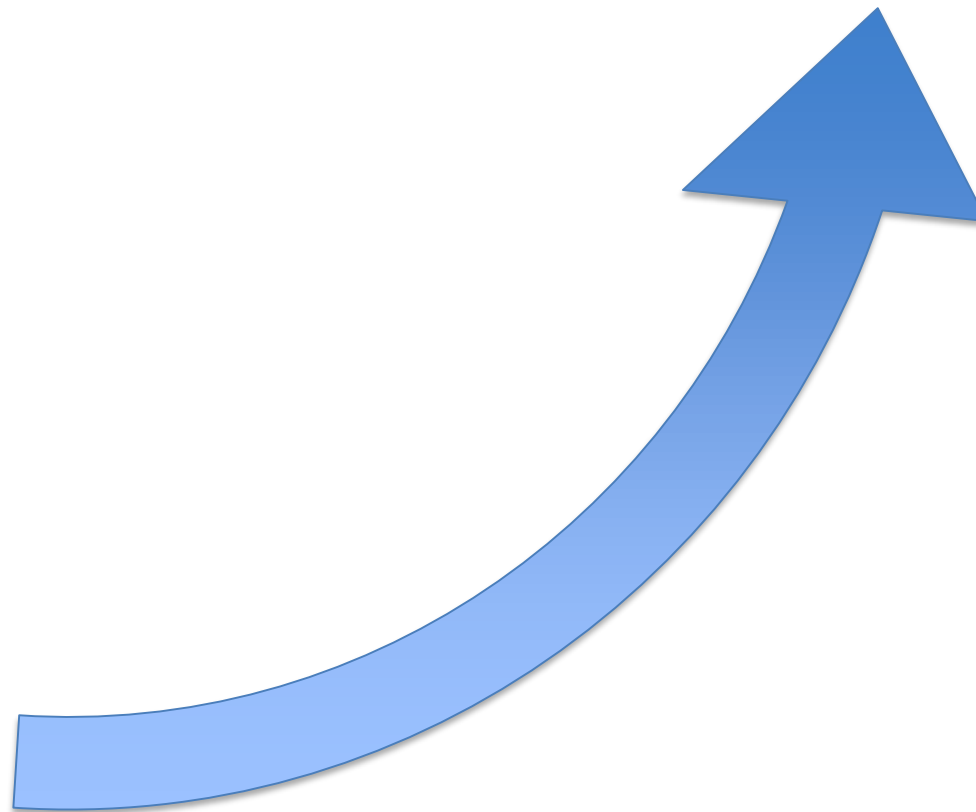
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Introduction

Information

Double
criminality &
AdaptationMitigating
effect

Lenient Council of Europe regime

Art 56 IVCJ - Each Contracting State shall legislate **as it deems appropriate** to **enable** its courts **when rendering a judgment** to take into consideration any previous European criminal judgment rendered for another offence after a hearing of the accused with a view to attaching to this judgment **all or some of the effects** which its law attaches to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration.

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effect

Stringent EU regime

Art 3.2. Framework Decision 2008/675/JHA - Each Member State **shall ensure** that in the course of **criminal proceedings** against a person, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that **equivalent legal effects** are attached to them as to previous national convictions, in accordance with national law

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Stringent EU regime

Art 3.2 – [...] at the **pre-trial** stage, at the **trial** stage itself and at the time of **execution** of the conviction, in particular with regard to the **applicable rules** of procedure, including those relating to **provisional detention**, the **definition of the offence**, the type and level of the **sentence**, and the rules governing the execution of the decision.

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Intricate complexities in national law

- Sanction levels
- Sanction types
- Typology of offences
- Specificities of constitutive elements
- Identical qualification of offences
-

Is ECRIS-information informative enough to be able to attribute the required equivalent national effect?

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Information

Double
criminality &
AdaptationMitigating
effect

What is the equivalent effect in light of ...

... the double criminality requirement?

- No double criminality allowed for 32 offence list
- Is the equivalent effect 'zero' in absence of double criminality requirement?
- Difference between rules linked to behavior / sanction / typology of the offence

... the adapted version of the sentence imposed?

- No legal link between adapted version of the sentence and equivalent effect
- Consistency or different finality?

Introduction

Information

Double
criminality &
AdaptationMitigating
effect

Ignore prior convictions which can be beneficial for the person involved

- Art 3.5 FD 2008/675/JHA - If the offence for which the new proceedings being conducted was **committed before the previous conviction had been handed** down or fully executed, paragraphs 1 and 2 shall **not have the effect of requiring** Member States to apply their national rules on imposing sentences, **where the application** of those rules to foreign convictions would **limit the judge in imposing a sentence** in the new proceedings.

→ Ongoing doctoral research Ms. Nele Audenaert

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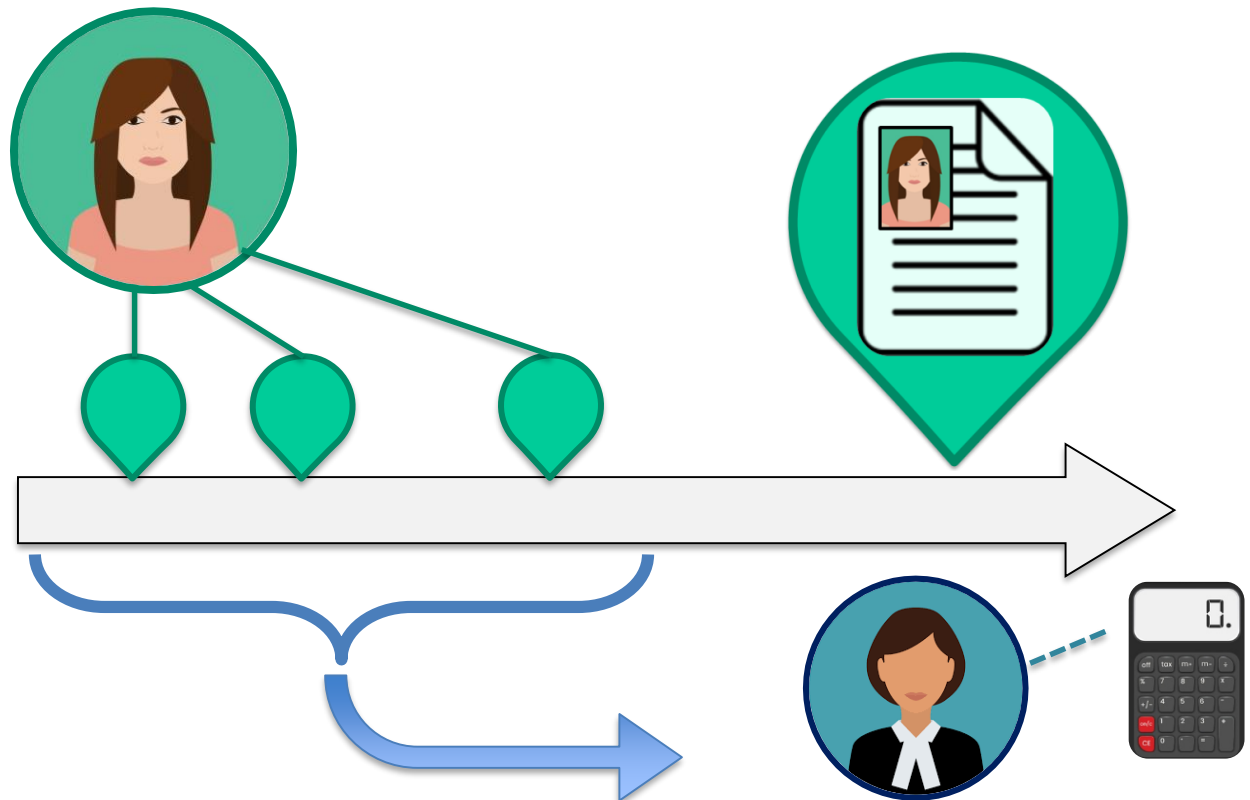
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Ignore prior convictions which can be beneficial for the person involved


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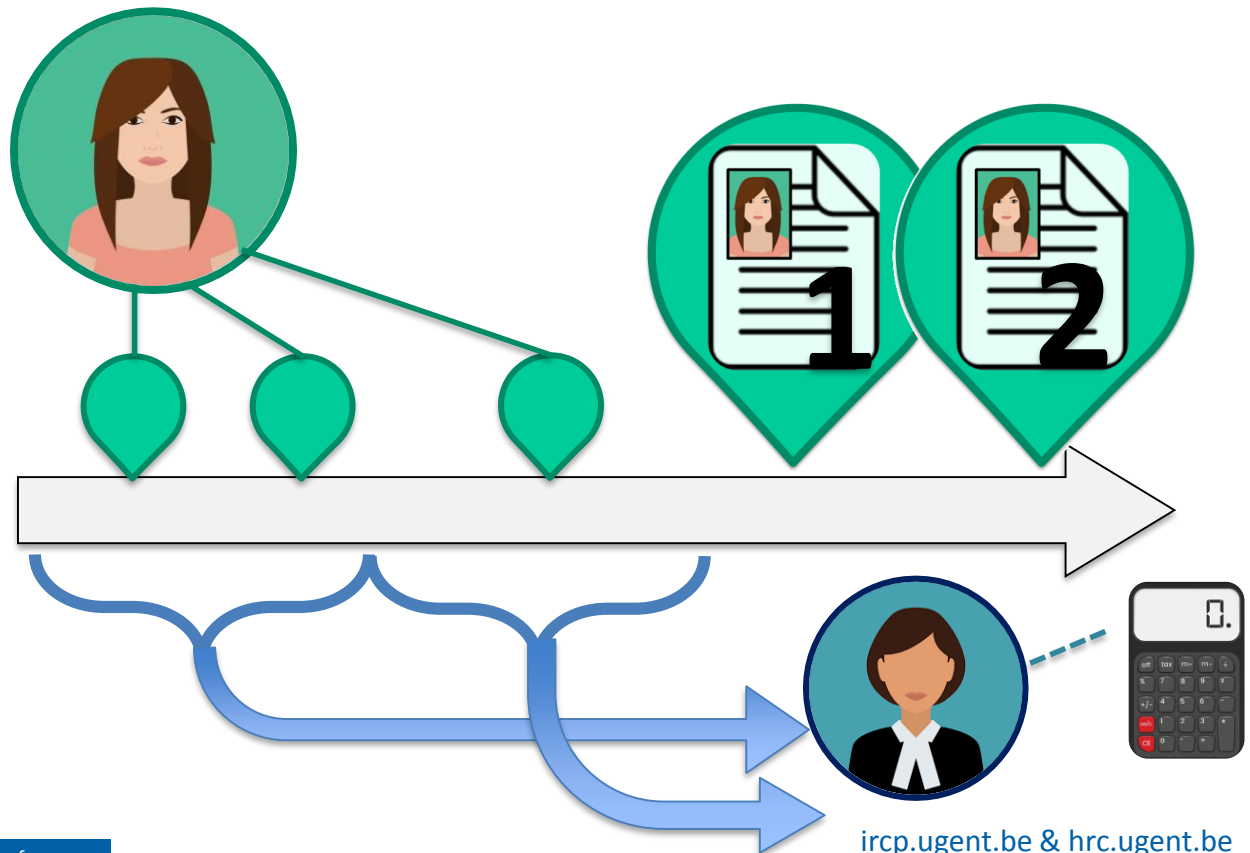
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Ignore prior convictions which can be beneficial for the person involved



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How do you feel about the advantage being lost?

- A. The offender has no right to demand the advantage in a cross-border context
- B. Loss of the advantage would run counter the proportionality and/or equal treatment principle

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Questions and discussion



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Framework Decision 2009/829/JHA on the application of supervision measures as an alternative to provisional detention: An alternative to the EAW? PROS and CONS

Daniel Constantin MOTOI

13.10.2020



FACT SHEET – FD 2009/829

- According to the Conclusions of the European Council meeting in Tampere on 15 and 16 October 1999 **the principle of mutual recognition should apply to pre-trial orders**
- **FD 2009/829/JHA – had to be transposed until 01.12.2012**
- **27 MS** have implemented it, **Ireland** – still process ongoing
- FD has as its objective **the promotion, where appropriate, of the use of non-custodial measures as an alternative to provisional detention**, even where, according to the law of the Member State concerned, a provisional detention could not be imposed ab initio (Recital 4 FD)
- FD states that there is **a risk of different treatment** between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not (Recital 5 FD)

General principles – FD 2009/829

- The adoption of a provisional detention, **which is not based on a specific danger of escape, but on a purely abstract criteria based on the person's non-residence**, constitutes an unlawful deprivation of liberty under article 5 of the ECHR.
- **Alternative measures to PTD** should be the **first resort**, and detention only used where strictly necessary, and **for as limited a length of time as needed**
- **FD 2009/829** provides a mechanism under which one Member State (MS X) **recognises** a decision on supervision measures issued in another Member State (MS Y) as an alternative to provisional detention, **monitors** the supervision measures imposed on a natural person and **surrenders** the person concerned to the issuing State in case of breach of these measures where he is normally resident.

Situations – FD 2009/829

1. The accused person **is in the territory of the issuing MS** – article 9 par. 1 FD - having been informed about the measures concerned, **consents to return to that State** in which the person **is lawfully and ordinarily residing** (here the competent authority will decide whether to issue an arrest warrant or to impose supervision measures – EAW not at stake).
2. The accused person **is already back in his home country** – situation not regulated by the FD but not excluded in practice.
 - *How will the competent authority proceed? Should it issue an arrest warrant and later an EAW on the ground that the person is absconding? Should it impose supervision measures and then issue and forward an ESO? What about the consent from article 9 par. 1 in this case?*

Situations cont. – FD 2009/829

FD provides for **consultations** between the CA (art. 22 par. 1 let. a)) - Unless impracticable, the competent authorities of the IS and of the ES shall consult each other **during the preparation**, or, at least, before forwarding **a decision on supervision measures** together with the certificate referred to in Article 10. **The consent of the accused person can be obtained in this phase!**

The competent authorities of the IS and of the ES **shall exchange all useful information** and the CA in the IS **shall take due account** of any indications communicated by the CA of the ES **on the risk that the person concerned might pose to victims and to the general public** (art. 22 par. 2).

IS THE ESO AN ALTERNATIVE TO THE EAW? - *PROS*

- Using the PTD should not be default practice in the MS and **the authorities are obliged to consider alternative measures of ensuring his appearance at trial**. PTD should only be used strictly necessary, justified and for as limited a length of time as needed (*see ECHR case Jablonski v. Poland, no. 33492/96, case Khudobin v. Russia, no. 59696/00*)
- Observing the **presumption of innocence** during the investigative phase (*see ECHR case McKay v. the United Kingdom [GC], no. 543/03*)
- In some MS - PTD puts more and more pressure on the **overcrowding of the prison systems** and the **questions related to a real risk of inhuman or degrading treatment appeared in practice**. Transfers based on EAW are put more and more in questions by the national courts before the CJEU for this reason (*see CJEU judgements Aranyosi and Căldăraru, ML, Dorobantu...*)
- ESO better **respects the fundamental rights** of the concerned person (*see per a contrario the decisions of the ECHR regarding right to liberty, right to a fair trial, the right to respect for private and family life or the decision PPU Minister for Justice and Equality of the CJEU*)

IS THE ESO AN ALTERNATIVE TO THE EAW? - *PROS*

- **Lack of maximum length on PTD** in some MS or **different systems of periodic review of the PTD** in the MS can be challenged later in the execution of a EAW for the investigative phase (although not expressly mentioned as a ground for refusal in the FD 2002/584 on EAW)
- Using the ESO at an early stage of the investigation will **prevent excessive and unjustified pre-trial detention** like in the case of EAW
- **ESO contains a lot of restrictions and limitations** for the accused person
- **Avoid the disproportionate use of an EAW** in practice for the investigation phase (EAW issued for small offences above the limit in article 2 par. 1 of the FD 2002/584)

IS THE ESO AN ALTERNATIVE TO THE EAW? - *PROS*

- The competent authority from the **IS** still has the competence to **renewal, review and withdrawal** of the decision on supervision measures or **issuing an arrest warrant or any other enforceable judicial decision having the same effect** (article 18 par. 1 let. a) and c) and then issue an EAW if it the case (art. 18 & 21 FD)
- In case the person concerned **does not return to the issuing State voluntarily for trial**, he or she may be surrendered to the issuing State in accordance with FD 2002/584 (Recital 12 FD)
- **Any breach of a supervision measure** (art. 18 FD) may result in issuing by the **IS** of an arrest warrant or any other enforceable judicial decision having the same effect and the person shall be surrendered in accordance with the FD on the EAW (!! threshold from art. 2 par. 1 of the FD on EAW may not be invoked by the competent authority of the executing State to refuse to surrender the person !!)
- ESO could also improve the **social rehabilitation** of the accused person in his home country (although not expressly mentioned in the FD 2009/829 as an objective)

IS THE ESO AN ALTERNATIVE TO THE EAW? - *CONS*

- **Existing of different legal systems and/or cultural traditions of responding to alternatives to PTD** in the MS (in some MS the PTD is still considered *prima facie* in the criminal investigation, whereas in other MS the PTD is the last resort)
- **Alternative measures to PTD** available under national law **differ very much** from a MS to another MS
- Problems related to the **adaptation of the supervision measures** in the other MS (adaptation is provided in the FD 2009/829 except for aggravating the situation of the accused person)

IS THE ESO AN ALTERNATIVE TO THE EAW? - *CONS*

- Although FD is an instrument of mutual trust, still in practice, questions **related to sovereignty** arise
- Many practitioners **rely the EAW FD** as an instrument that it is working in practice
- **Disproportionate use of the EAW** by the competent authorities (EAW can be issued for minor crimes)

Thank you!

Daniel Constantin MOTOI

Judge, Court of First Instance, 4th District, Bucharest



Co-funded by the Justice Programme of the European Union 2014-2020

Reflections on the position of children in criminal proceedings in the European Union

14 October 2020, online ERA seminar - Procedural Rights in Light of the European Arrest Warrant and Detention

CHILDREN & EU CRIMINAL LAW



Prof. dr. Wendy De Bondt



Do you have experience working with children who are confronted with criminal procedures?

- A. I have no practical experience
- B. I have very little practical experience
- C. I have quite a lot of practical experience
- D. My professional activities focus predominantly on children

CHILDREN & EU CRIMINAL LAW



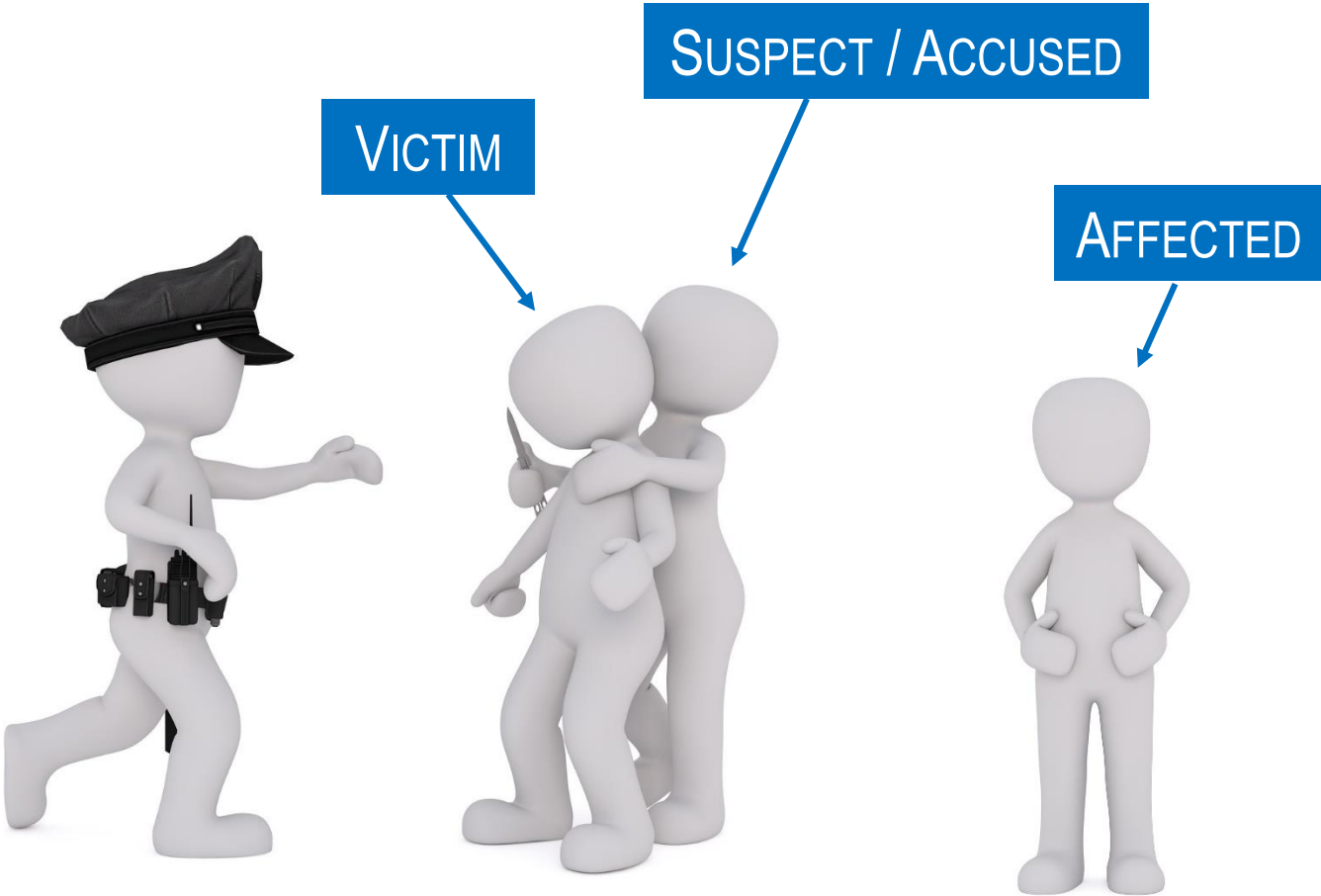
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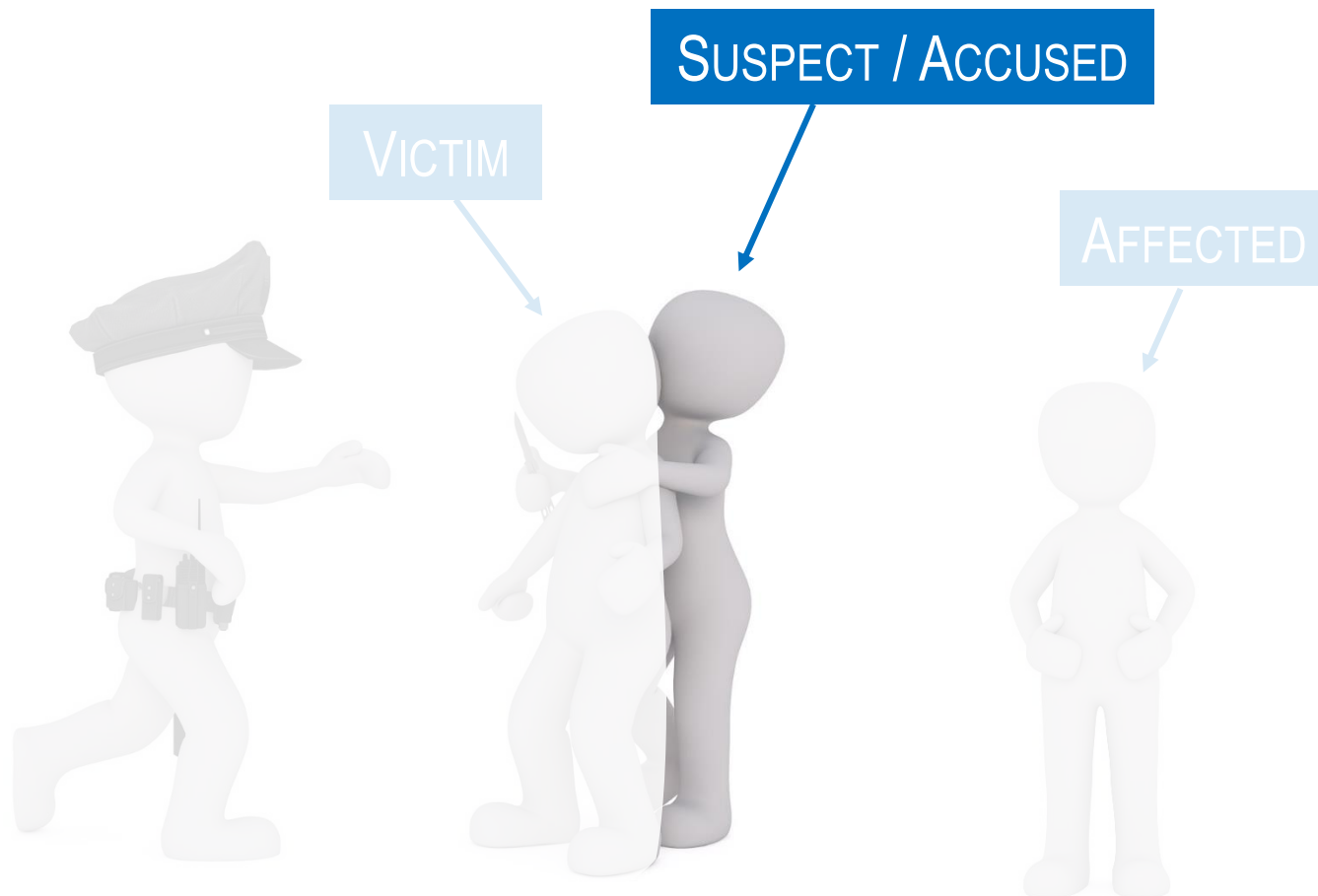
CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

Understand

Adult



Prof. dr. Wendy De Bondt

CHILDREN SUSPECTED OR ACCUSED

Scope

1

Directive (EU) 2016/800 – procedural safeguards for children

- Children labelled as suspected or accused
- Children as requested persons in an EAW
- Not extended to the execution phase

Criminal proceeding

Criminally Responsible *Protective*
Corrective
Educative

Effective
Understanding

Adult

Prof. dr. Wendy De Bondt

CHILDREN SUSPECTED OR ACCUSED

Scope

1

Directive (EU) 2016/800 – procedural safeguards for children

Clause 17 - Directive should apply only to criminal proceedings. It should not apply to other types of proceedings, in particular proceedings which are specially designed for children and which could lead to protective, corrective or educative measures.

Framework Decision 2002/584/JHA – EAW

Article 3 (3) - shall refuse if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Effective

Understanding

Adult

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CHILDREN SUSPECTED OR ACCUSED

Scope

1

Effective

Understanding

Adult



How would your juvenile delinquency system need to be interpreted in light of the reference to 'criminal responsibility' in the EAW?

- A. It would not qualify as a form of criminal responsibility
- B. Although it is a form of criminal responsibility, we refuse incoming EAWs
- C. It is a form of criminal responsibility and we execute incoming EAWs
- D. I have no idea

Prof. dr. Wendy De Bondt



CHILDREN SUSPECTED OR ACCUSED

Scope

1

Directive (EU) 2016/800 – procedural safeguards for children

- Children labelled as suspected or accused
- Children as requested persons in an EAW
- Not extended to the execution phase

- Need for autonomous interpretation of the scope of the directive
- Suggested scope : “criminal matters” as interpreted by ECtHR

Effective

Understanding

Adult

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CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

2

Directive (EU) 2016/800 – procedural safeguards for children

- Merit of European Parliament amendments
- Present, participate effectively, opportunity to be heard, express their views, right to new trial
- Individual assessment vulnerabilities
- Audio-recorded where appropriate

- No guidance on interpretation and application of 'effective'
- No specific procedural safeguards established (despite mentioned in Directive (EU) 2016/343 PIO)

Understanding

Adult

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CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

Understand **3**

Adult

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Directive (EU) 2016/800 – procedural safeguards for children

- Informed promptly about their (child-tailored) rights
 - Right to have adaptations to the proceedings
 - Information about how to complain
 - Written and/or orally
- Why not mirror CoE Guidelines: *“information and advice should be provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture-sensitive”.*

CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

Understand **3**

Adult

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Directive (EU) 2016/800 – procedural safeguards for children

- General aspects of the conduct of the procedure

(19) Children should receive information about general aspects of the conduct of the proceedings. To that end, they should, in particular, be given a brief explanation about the next procedural steps in the proceedings in so far as this is possible in the light of the interest of the criminal proceedings, and about the role of the authorities involved. The information to be given should depend on the circumstances of the case

→ Why in the preamble only?

CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

Understand

Adult

4

Directive (EU) 2016/800 – procedural safeguards for children

- Right to inform appropriate adult + be accompanied by them
- Automatic involvement of holder parental responsibility (linked to civil liability principles)
- Limited to court hearings unless decided otherwise

→ Quid discussion right to privacy?

→ Quid discussion gradually recognising competence of children to make their own decisions?

→ Why not align with the presence of a lawyer?

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CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

Understand

Adult

Criminal Responsibility *Participation* Criminal **Adaptation** Proceeding **Privacy**

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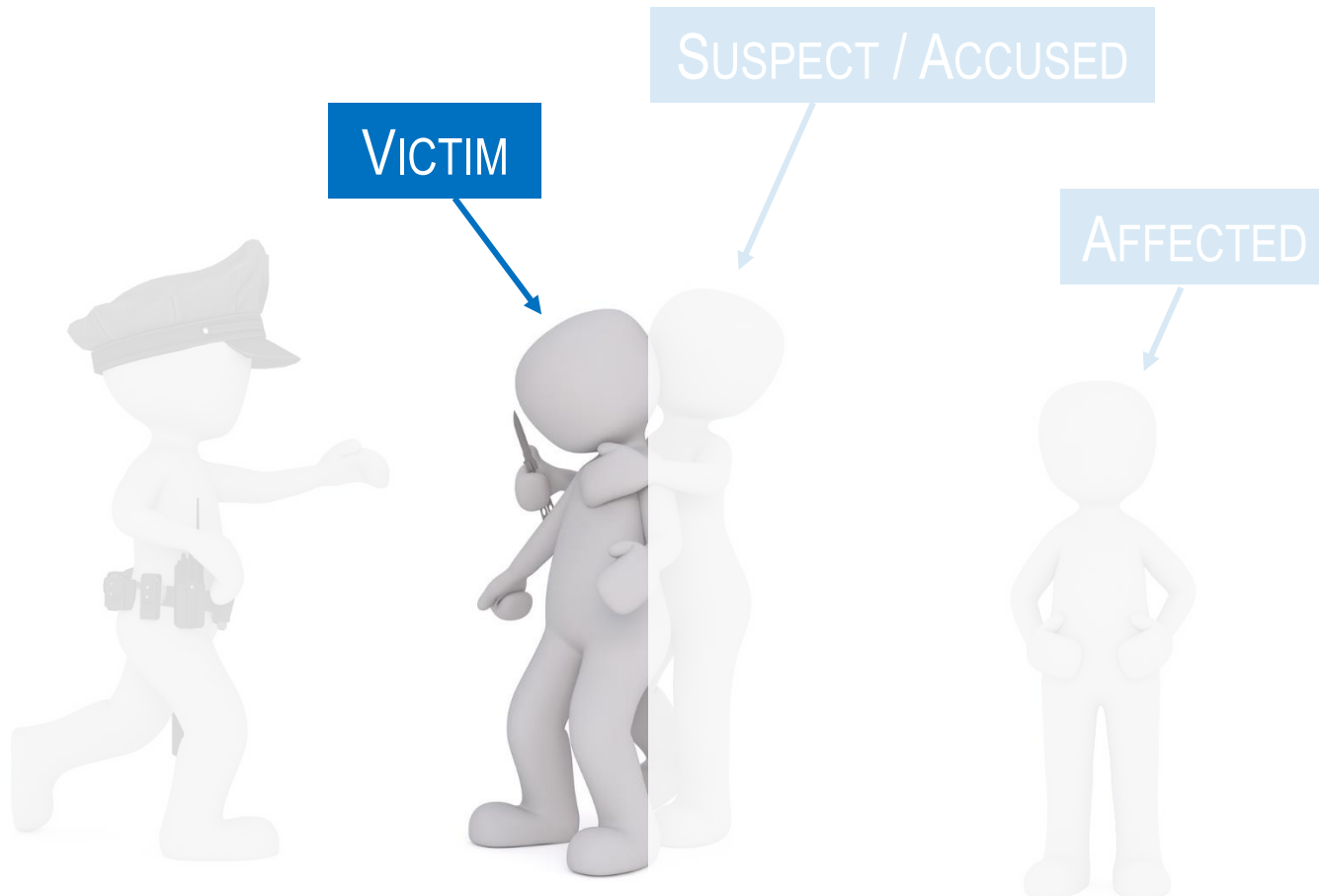
CHILD VICTIMS OF A CRIME

Scope

Complaint

Company

Represented



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CHILD VICTIMS OF A CRIME

Scope

1

Directive 2012/29/EU – victim of a crime

- No explicit provision in the CRC
- Significant national diversity

(42) The right of child victims to be heard in criminal proceedings should not be precluded solely on the basis that the victim is a child or on the basis of that victim's age

Art 10 – 1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity.

2. The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law.

Complaint

Company

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CHILD VICTIMS OF A CRIME

Scope

1

Directive 2012/29/EU – victim of a crime

- Adaptation to the procedure

Art 22 (4) For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.

Art 24 - Right to protection of child victims during criminal proceedings (audiovisually recorded) (appoint a special representative for child victims)(the right to legal advice and representation, in his or her own name)

→ Child victims to child accused?

Complaint

Company

Represented

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CHILD VICTIMS OF A CRIME

Scope

Complaint 2

Company

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Directive 2012/29/EU – victim of a crime

- 2011 Agenda on the Rights of the Child
- No amendment of statutory limitations
- No amendment of formalities

Art 5 - 1. Member States shall ensure that victims receive written acknowledgement of their formal complaint made by them to the competent authority of a Member State, stating the basic elements of the criminal offence concerned.

→ Why not real transcript (added later-on)?
Cfr. Audio-visual recording.

CHILD VICTIMS OF A CRIME

Scope

Complaint

Company **3**

Represented

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Directive 2012/29/EU – victim of a crime

- Person of their choice (best friend, school teacher, ...)
 - Article 3 – understand / be understood during first contact
 - Article 20 – during criminal investigations
- No legal guarantee for children
 - “where the victim requires assistance”
 - Effect presumption Article 22 (4) ?
- No automatic information sharing
 - Link with diversity in legal positions
 - Link with right to legal representation
 - In contrast to Directive (EU) 2016/800 on child suspects

CHILD VICTIMS OF A CRIME

Scope

Complaint

Company

Represented **4**

Directive 2012/29/EU – victim of a crime

- Dependent on the role of victims in the relevant national criminal justice system
- Parents as holders of parental responsibility

→ No guidance on the meaning and effect of Art. 12 CRC in the appointment and instruction of legal representative

Prof. dr. Wendy De Bondt

CHILD VICTIMS OF A CRIME

Scope

Complaint

Company

Represented

Presumed Vulnerability

Participation Appropriate
Legal representation Adult
Privacy

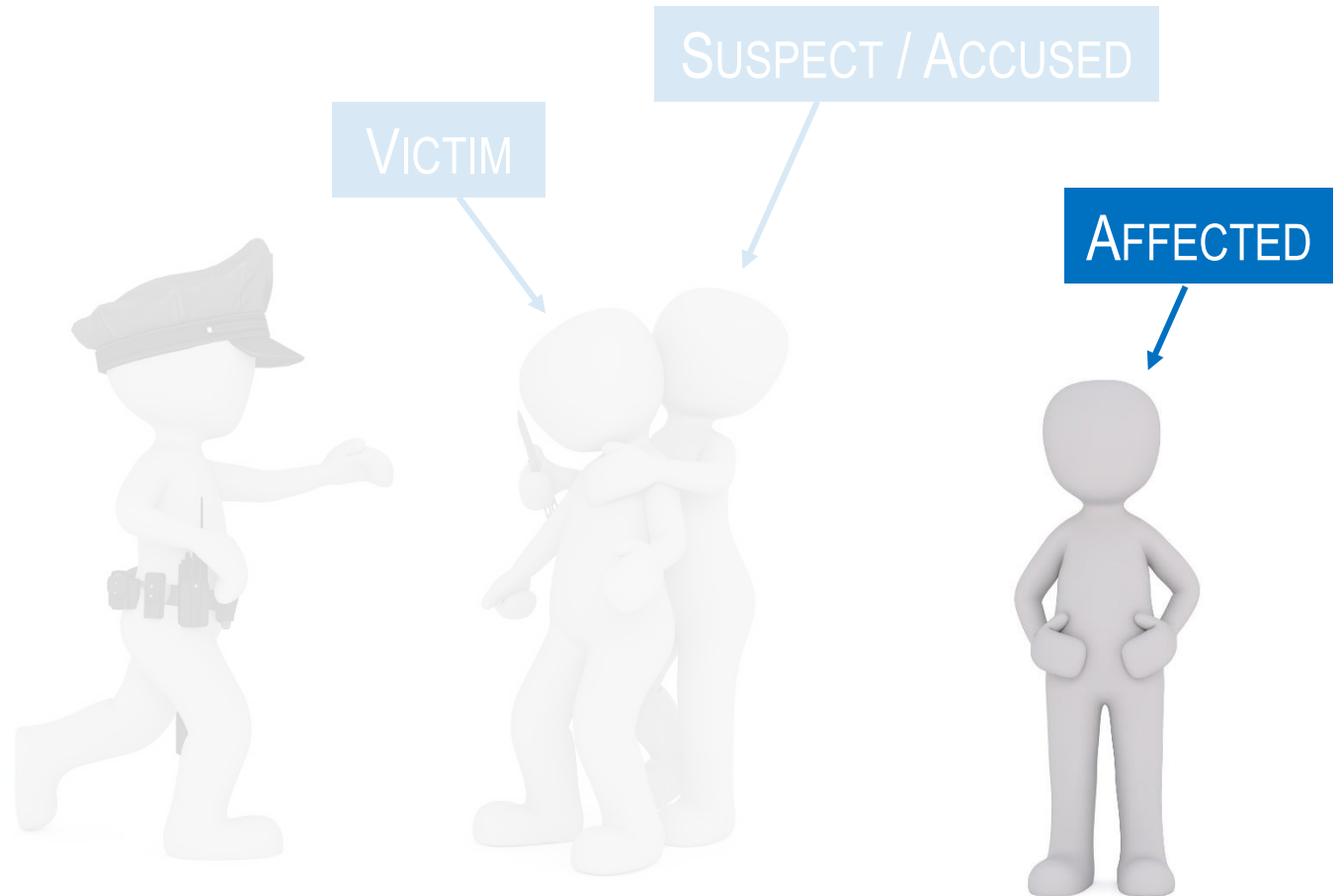
Prof. dr. Wendy De Bondt

CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

Organisation



Prof. dr. Wendy De Bondt

CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

Organisation



Did you ever consider the rights of a child that is effected by a criminal procedure targetting its primary caregivers?

- A. Yes, we have a legally binding obligation to do so
- B. Yes, we consider it a best practice to do so
- C. Yes, but I must admit that is rather exceptional
- D. No, never thought of it

Prof. dr. Wendy De Bondt

CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

1

No general awareness of the international legal framework

- Emotional, psychological and financial impact
- Article 3 CRC – best interest of the child as a primary consideration
- 2013 General Comment 14 CRC

“Without prejudice to the independence of the judiciary, before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures”

Prof. dr. Wendy De Bondt

CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

1

No general awareness of the international legal framework

- Emotional, psychological and financial impact
 - Article 3 CRC – best interest of the child as a primary consideration
 - 2013 General Comment 14 CRC
- No children's rights approach in the criminal proceedings of most Member States

Scope

Organisation

Prof. dr. Wendy De Bondt

CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

2

Organisation

For which offenders?

- Parents vs primary caregivers
- Women vs men

For which sanctions?

“In sentencing parent(s) and primary caregivers, noncustodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase.

Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren)”

Prof. dr. Wendy De Bondt

CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

2

Organisation

For which offenders?

- Parents vs primary caregivers
- Women vs men

For which sanctions?

- Alternative sanctions not always better for the child
- E.g. financial penalty vs clothing/summer camp

Prof. dr. Wendy De Bondt

CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

Organisation **3**

Who should see to this?

- Ex officio: lack of information
- Prosecution via Child & Family impact statements?
- Defense council: Conflict of interest
- Child participation and representation

→ Youth lawyer appointed with this particular task?

Prof. dr. Wendy De Bondt

CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

Organisation **3**

What weight should be attributed to this?

- Primary consideration vs overruling consideration
- Alternative if the same objective can be achieved?

→ Need for CRC guidance on the implications in practice

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CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

Organisation

Best interest
of the child

Equality

Participation

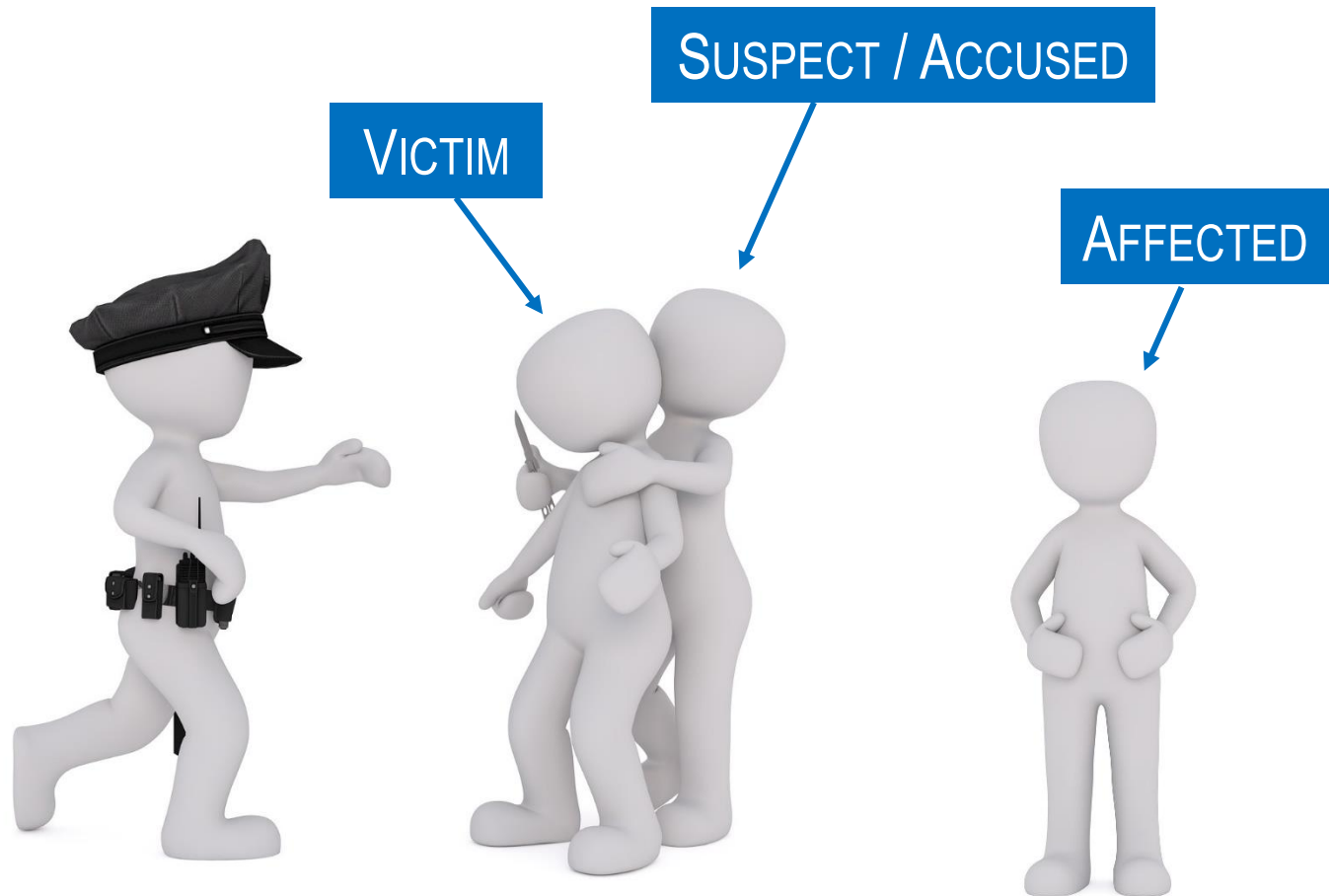
Motivation

**Primary
Care
Giver**

Representation

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CHILDREN & EU CRIMINAL LAW



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State of play regarding the transposition of Directive 2016/343 on the presumption of innocence

ERA Online Seminar
“Procedural Rights
in light of the EAW and Detention”
14 October 2020



Co-funded by the Justice
Programme of the European
Union 2014-2020

Introduction

- **Fourth instrument** adopted for strengthening the procedural rights of suspects and accused persons
- Referred to in the Stockholm Programme (section 2.4)
- Directive (EU) 2016/343 adopted on **9 March 2016** - Transposition period ended on **1 April 2018**

Main elements of the Directive (1)

- Scope of the Directive
- Content of the Directive
 - ✓ No public references to guilt before proved guilty (public statements made by public authorities and judicial decisions)
 - ✓ Presentation of suspects and accused persons: measures of physical restraint

Main elements of the Directive (2)

- Content of the Directive
 - ✓ Burden of proof and *in dubio pro reo*
 - ✓ Right to remain silent and right not to incriminate oneself
 - ✓ Right to be present at the trial and right to a new trial
 - ✓ Remedies (art. 4(2), 7(5) and 10)

State of play regarding transposition

- Notifications to the Commission :
Complete transposition: now all Member States except one partial transposition
- Infringement proceedings for non-communication
- Completeness and conformity check together with external contractor

Preliminary conclusions

The Directive is not fully implemented in all Member States – it is not only about the principle of presumption of innocence but about rights deriving from the principle

Issues: Scope of the rights; Public references to guilt; Presentation of suspects and accused; Right to be present at the trial (*in absentia* judgments)

Thank you for your attention!

European Commission
DG Justice and Consumers
Unit Criminal Procedural Law

Dr. Fabien Le Bot

State of play regarding the transposition of Directive 2012/13/EU on the right to information

ERA Online Seminar

“Procedural Rights
in light of the EAW and Detention”

14 October 2020



**Co-funded by the Justice
Programme of the
European Union 2014-
2020**

Introduction

- **Second instrument** adopted pursuant to the **Roadmap** for strengthening the procedural rights of suspects and accused persons
- Directive 2012/13/EU adopted on **22 May 2012**
- Transposition period ended on **2 June 2014**
- COM **Infringement proceedings** for non-transposition against 7 Member States (*CY, CZ, ES, LU, MT, SI, SK*), last proceedings closed in January 2018.

Main elements of the Directive

The Directive establishes the right to information in criminal proceedings and EAW proceedings. It lays down the **following rights**:

The right to information about procedural rights orally or in writing if the person is deprived of liberty or subject to a European arrest warrant;

The right to information about the accusation

The right of access to materials of the case.

Conformity Assessment

Compliance assessment by COM together with external contractor

Implementation Report by COM, 18.12.2018

COM(2018) 858 final

Report by FRA , 9.11.2016

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf

Several projects funded by EU, e.g. *inside Police Custody, Trainac Report, Fair Project, ...*

State of Play

Assessment of national implementing measures have raised **certain issues of compliance** in several Member States.

Main issues:

- **Scope** of the rights;
- **Letter of Rights** in criminal and EAW proceedings;
- **Right to information about the accusation;**
- Right of **access to the case file.**

Scope of application of the Directive

- National legislations do not necessarily specify the moment of being 'made aware', but conformity often inferred, e.g. from provisions applying at any stage of the proceedings.
- Certain discrepancies of the terms "suspects" and "accused"; problematic where the notion of suspect does not exist.
- Issues with regard to MS where rights apply only when persons are deprived of liberty.

Right to information about procedural rights

- Correctly transposed in most Member States.
- Conformity issues have been found initially with regard to legal aid and conditions/evolved with entry into application of legal aid directive.
- Sometimes right to information about interpretation and translation not clearly regulated.
- Information not always provided in “simple and accessible” language.
- Certain discrepancies/gaps with regard to vulnerable persons.

Letter of Rights in criminal proceedings

- All Member States have national rules on a Letter of Rights.
- Sometimes different templates are used; not always clear whether these templates contain all relevant rights.
- Not all suspects/accused have the possibility to read and keep the Letter of Rights. Not always drafted in simple and accessible language.
- Certain issues arise also with regard to translations.

Letter of Rights in EAW proceedings

- A large majority of Member States transposed this provision adequately.
- In some Member States there are no separate provisions but so called "*bridge provisions*", meaning the rules applicable in criminal proceedings apply also to EAW proceedings.
- This might raise concerns as the content of the Letter of Rights in criminal proceedings differs from the one required under EAW proceedings.

Right to information about the accusation

- A large majority of Member States comply with the obligation to provide promptly information about the criminal act and the reasons for arrest or detention; certain issues arise linked to the scope.
- In all Member States the suspect or accused person is informed about the accusation, meaning the nature and legal classification of the criminal offence and the nature of participation.
- Disparities, notably with regard to the timing and the content of the information.
- Judgment of CJEU, 5 June 2018, C-612/15, *Kolev*.

Right of access to materials of the case

- **Right of access to essential documents for challenging the arrest or detention**
 - Only few Member States specify "essential documents".
 - Issues arise with regard to the timing and possible restrictions.
- **Right of access to all material evidence**
 - Access to the case file is granted in all Member States.
 - Issues arise with regard to the timing and derogations.

Conclusions

- **Considerable EU added value** by strengthening the rights of suspects and accused persons in criminal proceedings and EAW proceedings.
- **Extent of impact varies** according to the national criminal system in place.
- **Certain conformity issues** with regard to key provisions persist. Important to ensure also application in practice!
- **Efforts to be continued:** Member States (to ensure conform legislation and application in practice), COM (dialogue, guidance, infringements), Practitioners (awareness raising, training) and stakeholders (awareness raising, information).

Thank you for your attention!

Questions and Answers?

**Ingrid Breit, Team-leader
European Commission
DG JUST
Unit B2 – Criminal Procedural Law**

The right to interpretation and translation: objectives of Directive 2010/64 and its transposition in the Member States

ERA Online Seminar
“Procedural Rights
in light of the EAW and Detention”
14 October 2020



Co-funded by the Justice
Programme of the European
Union 2014-2020

Introduction

- **First instrument** adopted pursuant to the **Roadmap** for strengthening the procedural rights of suspects and accused persons
- Directive 2010/64/EU adopted on **20 October 2010** - Transposition period ended on **27 October 2013**
- COM **Infringement proceedings** for non-transposition against 16 Member States, last proceedings closed in January 2018.

Main elements of the Directive

The Directive establishes the right to interpretation and translation in criminal proceedings and EAW proceedings. It lays down the **following rights**:

- The right to interpretation during criminal proceedings before investigative and judicial authorities

- The right to interpretation for communication between suspect and legal counsel

- The right to translation of essential documents

Conformity Assessment

Compliance assessment by COM together with external contractor

Implementation Report by COM, 18.12.2018

COM(2018) 857 final

Report by FRA , 9.11.2016

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf

Several projects funded by EU, notably on quality of interpretation and translation

State of Play

Assessment of national implementing measures have raised **certain issues of compliance** in several Member States.

Main issues:

- **Scope** of the rights;
- Interpretation for **communication between suspect and legal counsel**
- **Translation** of essential documents
- **Costs** of interpretation and translation
- **Quality** of interpretation and translation

Lessons from Directive 2010/64/EU

- Has Directive 2010/64/EU improved the situation in Member States?
- How to ensure the quality of interpretation and translation?

Thank you for your attention!

European Commission
DG Justice and Consumers
Unit Criminal Procedural Law

Dr. Fabien Le Bot

Access to a lawyer in criminal proceedings: status quo of Directive 2013/48/EU

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in Light of the European Arrest
Warrant and Detention'
14 October 2020



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Main elements of the Directive

The Directive lays down the **following rights**:

- the **right of access to a lawyer** irrespective of whether a person is deprived of liberty
- the **right to have a third party informed of deprivation of liberty**
- the **right to communicate while deprived of liberty with third persons**
- the **right to communicate with consular authorities.**

(Initially 2 separate measures C+D put forward in the Roadmap – implementation period ended 27/11/2016)

State of Play

Implementation Report by COM, 26/09/2019
COM(2019) 560 final

Assessment of national implementing measures has raised **certain issues of compliance** in several Member States.

Main issues:

- **Scope** of the rights;
- Extent of **derogations**;
- **Waiver** of the right of access to a lawyer;
- Right of access to a lawyer in the **issuing State** (EAW proceedings).

Scope of application of the Directive

- **Criminal proceedings**

- National legislations do not necessarily specify the moment of being 'made aware', but conformity often inferred.
- Issues arise where scope of application remains unclear or is linked to formal acts at a later stage of the proceedings or where rules apply only to persons deprived of liberty.

- **EAW proceedings**

- *Mutatis mutandis* application of rules on criminal proceedings; need to ensure all rights provided for by the Directive.

Starting point and content of the right of access to a lawyer

- In most MS before questioning, sometimes only during questioning or unclear.
- Without undue delay after deprivation of liberty: legislation compliant in the large majority of the Member States.
- Certain issues with regard to the duration of consultation prior to questioning and the “effective participation” of the lawyer during questioning.

Temporary derogations

- Possibility to derogate based on **geographical remoteness** used in 5 Member States – certain issues with regard to the temporary and exceptional nature.
- Possibility to derogate based on **risks for persons or investigation needs** exist in 4/5 of the Member States.
- Issues related to the legal conditions allowing for derogations.
- Time limits for lawyers to show up.

Confidentiality of communication and Waiver

- **Confidentiality of communication:**
 - Strong statement of principle.
 - Certain compliance issues with regard to temporal/personal scope and derogations.
- **Waiver**
 - Subject to legislation in most Member States
 - Issues arise with regard to the information about the right of access to a lawyer, the consequences of a waiver and the possibility to revoke a waiver.

European arrest warrant proceedings

- **Executing Member State**

- *Mutatis mutandis* application of rules concerning criminal proceeding in many Member States.
- In several Member States transposition based on specific rules regulating EAW proceedings.

- **Issuing Member State**

- Cooperation mechanism often not subject to specific rules.

Right to have a third party informed about deprivation of liberty

- Without undue delay: restriction to certain situations of deprivation of liberty or certain categories of person
- Sometimes independent of the wish of the person
- Issues related to possible derogations

Right to communicate with third persons/consular authorities

- **Right to communicate with third persons**
 - Legislation in all Member States: rules on criminal proceedings; rules concerning the administration of penitentiary facilities
 - In respect to certain Member States: doubts as regards the assurance of the right without undue delay
- **Right to communicate with consular authorities**
 - Issues arise with regard to potential derogations
 - Sometimes independent of the wish of the person

Conclusions

- **Considerable EU added value** by strengthening the rights of suspects and accused persons in criminal proceedings and EAW proceedings
- **Extent of impact varies** according to the national criminal system in place
- **Still conformity issues** with regard to key provisions in several Member States
- **Efforts to be continued:** Member States (to ensure conform legislation and application in practice), COM (dialogue, guidance, infringements), Practitioners (awareness raising, training) and stakeholders (awareness raising, information).

Thank you!

European Commission
DG Justice and Consumers
Unit Criminal Procedural Law

Bärbel Heinkelmann

Legal aid for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings (Directive EU 2016/1919)

ERA Online Seminar 'Procedural Rights
in Light of the European Arrest
Warrant and Detention'
14 October 2020



Co-funded by the Justice
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2014-2020

Introduction

Measure C of 2009 Roadmap: Legal Advice and Legal Aid

'The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.'

Directive 2016/1919 adopted on **26 October 2016** - Transposition period ended on 05/05/2019

Directive on legal aid - overview

- Scope, Article 2;
- Legal aid in criminal proceedings, Article 4;
- Legal aid in European arrest warrant proceedings, Article 5;
- Decisions regarding the granting of legal aid, competent authority, Article 6;
- Quality and training, Article 7.

The right of access to a lawyer and legal aid

- Directive (EU) 2016/1919 (legal aid) builds upon Directive 2013/48/EU (access to lawyer);
- Article 1(2) and 2(1) and (2) of Directive (EU) 2016/1919;
- Both Directives need to be correctly transposed to ensure effective legal assistance.

Legal aid in criminal proceedings

- Means or merits test or combination of both, Article 4(2)+(2);
- Means test, criteria of ECHR case law Article 4(3)
- Merits test, Articles 4(4) and 9:
 - Proportionality test – criteria of ECHR case law;
 - In any event, when
 - ✓ being brought before a competent court or judge in order to decide on detention;
 - ✓ during detention.
- Legal aid to be granted without undue delay, Article 4(5) (Recital 19).

Legal aid in EAW proceedings

- Legal aid upon arrest in the executing Member State, Article 5(1);
- Legal aid the issuing Member State (EAW for purpose of conducting criminal prosecution), Article 5(2);
- Means testing (only), Article 5(3).

Decision making and quality

- Article 6: Decisions – Recital 24: in principle by independent authority;
- Article 7: Quality and training – rather strong provisions on training (in particular Art. 7(2));
- Further guidance: Points 14 to 26 of the Commission Recommendation on legal aid, 2013/C 378/03.

Added value of the legal aid Directive?

- Refers to criteria used by ECtHR, but the text will be interpreted by CJEU (preliminary rulings and infringement proceedings);
- Legal aid to be granted without undue delay;
- Legal aid in the executing Member State and in the issuing Member State (EAW for purpose of conducting criminal prosecution) – means test only;
- Provisions on decision making and quality.

Directive on legal aid – state of play concerning transposition

- Notifications to the Commission (Article 12 of the Directive):
Complete transposition: 22 Member States
Partial transposition: 3 Member States
- Infringement proceedings for non-communication (4 Member States)
- Completeness and conformity check

Thank you!

European Commission
DG Justice and Consumers
Unit Criminal Procedural Law

Bärbel Heinkelmann

Future procedural rights in the context of the European Arrest Warrant, pre-trial detention and detention

14 October 2020

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Co funded by the Justice Programme 2014-2020 of the European Union



Agenda 2020 ECBA – a New Roadmap on Procedural Rights

- ▶ Amsterdam Treaty / Tampere Council 1999 → principle of mutual recognition → Lisbon Treaty Art. 67, 82 TFEU.
- ▶ Mutual recognition requires mutual trust.
- ▶ 2009 Roadmap on procedural safeguards.
- ▶ Mission to achieve mutual trust has not been completed; partial distrust still exists (e.g. Measure F 2009 Roadmap - [Detention Green Paper](#) - no follow up)
- ▶ Need to monitor implementation of Procedural Rights' Directives and Directive (EU) 2016/343.
- ▶ Action should continue to be taken at the EU level in order to strengthen the rights of suspected or accused persons in criminal proceedings and thus the principle of mutual recognition and its underlying mutual trust.
- ▶ ECBA Proposal - “Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards”

Agenda 2020 ECBA – a New Roadmap on Procedural Rights (2)

- ▶ Measure A: Pre-Trial-Detention, including the European Arrest Warrant
- ▶ Measure B: Certain Procedural Rights in Trials
- ▶ Measure C: Witnesses' Rights and Confiscatory Bans
- ▶ Measure D: Admissibility and Exclusion of Evidence and other Evidentiary Issues
- ▶ Measure E: Conflicts of Jurisdiction and *ne bis in idem*
- ▶ Measure F: Remedies and Appeal
- ▶ Measure G: Compensation

ECBA Agenda 2020 available at: <http://www.ecba.org/content/index.php/124-featured/751-ecba-roadmap-2020>;
<https://journals.sagepub.com/doi/pdf/10.1177/2032284418788760>

Measure A of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Detention and European Arrest Warrant

- ▶ European Arrest Warrant (see ECBA Handbook defending an EAW: <http://handbook.ecba-eaw.org>):
 - ▶ Improve / modernize / “lisbonise” the existing mutual recognition instrument FD 2002/584/JHA (FD EAW)
 - ▶ Proportionality
 - ▶ Fundamental rights’ refusals (detention conditions, etc.)
 - ▶ Pre-trial detention
 - ▶ Consultation procedures
 - ▶ Consequence of refusal
 - ▶ Improving dual defence / legal aid
- ▶ Detention Conditions:
 - ▶ Certain minimum rights of prisoners
 - ▶ Differences of standards in prison conditions infringe partly the principle of human dignity and have become obstacles to EAW proceedings (cf. [EC Handbook on issuing and executing EAW, 28/09/2017](#);

Measure A of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Detention and European Arrest Warrant (2)

- ▶ Pre-Trial Detention - need for minimum standards
 - ▶ **Legal and factual requirements** for both a national arrest warrant and an EAW; Art. 33 of the EPPO Regulation 2017/1939 refers to national law (only) → fundamental problems, for instance in cases which clearly lack proportionality (no provision on proportionality, contrary to the EIO, cf Art 6 Directive 2014/14/EU);
 - ▶ **Time-limits** for pre-trial detention (including taking into account detention in other MS)
 - ▶ Specific **remedies and/or regular judicial control** by the responsible authorities
 - ▶ Use of **less intrusive measures**: European Supervision Order is actually not used in practice and FD 2009/829/JHA is still not (or not properly) implemented in many Member States (cf [FRA report 2016](#) p. 30 ff).

An arrest warrant should always be a measure of last resort in Europe → need for clear rules on proportionality.

- ▶ Practical issues arise repeatedly regarding **access to the file and intentional non-disclosure of (exculpatory) information by the state authorities throughout Europe including where pre-trial detention is imposed**. Regulation 2017/1939 on EPPO refers in Art 45 par 2 to national law (only) and to Directive 2012/13/EU in Article 41(2)(c) - see Art. 7(1) Directive 2012/13

EAW Reform Proposals?

► EC

- **No proposals for reform currently** (but.... The new Commissioner said the following to the Parliament back in November “Concerning the European Arrest Warrant, I will continue to monitor its application and work closely with you and with the Member States to continue to improve it ... We will consider whether infringement proceedings are necessary in light of the compliance assessment. I will also seriously consider whether to bring forward a proposal to revise the European Arrest Warrant.” .

► EP

- European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL))
- DRAFT REPORT on the implementation of the European Arrest Warrant and the Surrender Procedures between Member States (2019/2207(INI)) (to be discussed this week)

EAW Reform Proposals? (2)

- ▶ ECBA / CCBE / Fair Trials and many others are pushing for reform since many years:
 - ▶ E.g. Fair Trials:
 - ▶ A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU
 - ▶ Upcoming briefing on the EAW (to be published)
 - ▶ E.g. CCBE
 - ▶ EAW-Rights - Analysis of the implementation of the European Arrest Warrant from the point of view of defence practitioners
 - ▶ E.g. ECBA:
 - ▶ ECBA response on a Green Paper on detention
 - ▶ European Criminal Bar Association Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World

14/10/20

7

[...]

European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL))

- ▶ Procedure for **validation** on a needs basis of MR measure in the **issuing MS** by a judge, court, investigating magistrate or public prosecutor, in order to overcome the differing interpretations of the term “judicial authority”.
- ▶ **Proportionality check when issuing MR** decisions, based on all the relevant factors and circumstances (e.g. as the seriousness of the offence, trial-readiness, impact on the rights of the requested person, including the protection of private and family life, cost implications, availability of an appropriate less intrusive alternative measure)
- ▶ **Standardised consultation procedure** for exchange of information regarding the execution of judicial decisions (e.g. assessment of proportionality, trial-readiness)
- ▶ **Mandatory refusal ground** where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing MS obligation in accordance with **Article 6 of the TEU** and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality
- ▶ **Effective legal remedies** - Article 47(1) of the Charter and Article 13 of the ECHR (e.g. right to appeal in the executing MS against the requested execution of a mutual recognition instrument; right for the requested person to challenge before a tribunal any failure by the issuing MS to comply with assurances given to the executing MS)
- ▶ **Improve definition of the crimes** where the EAW should apply in order to facilitate the application of the proportionality test
- ▶ **EAW Judicial Network and a network of defence lawyers** working on EU criminal justice and extradition matters
- ▶ Revising the Schengen Information System
- ▶ **Legal mechanisms to compensate damage** arising from miscarriage of justice relating to the operation of mutual recognition instruments
- ▶ Improve **standards of detention conditions**, including conditions of pre-trial detention.

DRAFT REPORT on the implementation of the European Arrest Warrant and the Surrender Procedures between Member States (2019/2207(INI)) (to be discussed this week)

1. “Points out that the EAW is a **major achievement** and an effective and **indispensable** instrument; states that the EAW has substantially improved cooperation on surrenders”
2. “Notes the existence of **particular problems**; finds that these **do not call the system into question**”
3. “Notes that such problems relate to **prison conditions, proportionality, the execution of custodial sentences, time limits and in absentia decisions**; acknowledges that certain cases raised the issue of **double criminality**”
4. “Notes that **issues were solved** by a combination of soft law (EAW handbook), mutual assessments, the assistance of Eurojust, CJEU case law and supplementing legislation (Framework Decision 2009/299/JHA and Directive 2013/48/EU)”
7. “Underlines that the EAW **should not be misused for minor offences**; urges the **use of less intrusive legal instruments**; points out that issuing authorities should carry out **proportionality checks**”
8. “Highlights that according to the CJEU, the **refusal to execute an EAW** is an exception to mutual recognition and **must be interpreted strictly**”

DRAFT REPORT on the implementation of the European Arrest Warrant and the Surrender Procedures between Member States (2019/2207(INI)) (to be discussed this week) (2)

Proposal of measures to tackle issues

- Improve how the EAW functions
- Fundamental rights
- Coherent EAW legal framework
- **Brexit**

Proposal of measures to tackle issues (selected):

- ▶ Double criminality / assessment of offences outside the list
 - ▶ “possible **enlargement of the list of 32 offences** should be considered (for example hate crime or offences against public order and constitutional integrity of Member States) **or** even a different approach within the Framework Decision on the European Arrest Warrant on the matter with a so-called “**negative list**”” (list of offences where there is no cooperation, including decriminalised actions, such as abortion, euthanasia, drugs use, age of criminal liability)
- ▶ Coherence with other instruments, such as re rights of the suspect (e.g. Directive 2010/64/EU, 2012/13/EU, 2013/48/EU), other MR instruments (FD 2008/909/JHA, Directive 2014/41/EU)
 - ▶ **Practical measures** (training of practitioners), soft-law (manuals and recommendations),
 - ▶ **Possibly very targeted legislation** (definition of judicial authority, ne bis in idem, fundamental rights, etc.,) and
 - ▶ **Supplementing legislation (pre-trial detention).**
 - ▶ In the **medium and long term also an EU code in criminal matters shall be established.**

Proposal of measures to tackle issues (selected) (2):

- ▶ Harmonisation of Procedural Rights and Guarantees and Mutual Trust
 - ▶ Priority:
 - ▶ “supplementing legislation shall be assessed in the field of **admissibility of evidence** (the importance of common standards as regards final judgments and their mutual recognition)” AND
 - ▶ **pre-trial detention** “For **prison conditions** in the phase of pre-trial detention a legal basis in Article 82(2) TFEU exists”. Such standards should aim for the highest possible standards and not the lowest common denominator. It should be avoided, as in the past in some directives, that unclear exceptions are provided furthering Member States to use them in a broad way (like limitations to a right to a lawyer in the pre-trial phase). In that regard as a matter of urgency the Commission should warn Member States that did not transpose common standards and start infringement proceedings, if necessary. Only a full adherence to commonly agreed standards can foster mutual trust.

- ▶ **Infringement proceedings** against MS that have incorrectly or deficiently transposed the FD EAW and the related provisions of the procedural rights directives.
- ▶ **Centralised database containing the national jurisprudence on the EAW** (as is the case in other areas of EU law).
- ▶ Involving judicial authorities in the development of Commission, European Parliament and Council mechanisms monitoring compliance with EU values (Art. 2 TEU) in the Member States.
- ▶ MS could be reminded of the need to **comply with international obligations** by properly executing European Court of Human Rights judgments and Council of Europe recommendations, notably related to **prison conditions**. In this regard, all EU Member States could be encouraged to ratify the relevant international conventions.
- ▶ Cooperation within the AFSJ based on the principle of MR requires a specific level of fundamental rights protection for MS to comply with:
 - ▶ FRA could be requested to conduct a **comparative study on the follow-up of assurances** given by issuing judicial authorities on detention conditions in their MS, in the context of EAW procedures.
 - ▶ EU **funding to modernise detention facilities** in the Member States could be further exploited.
 - ▶ Commission could propose EU legislation in the area of detention conditions.
 - ▶ **Further stimulating the use of alternatives to an EAW, the proportionality test to be conducted by judicial authorities could be revised and further clarified in the light of CJEU case law and comparable provisions in the EIO.**
 - ▶ **Enforcement action against MS that have not (properly) implemented the relevant provisions of the Access to a Lawyer Directive.** Such enforcement action should also be taken against Member States that do not grant lawyers **access to the case file prior to the surrender**, as without such access this lawyer (in the issuing Member State) would not be able to effectively assist the lawyer in the executing Member State.

- ▶ EC Communication discussing the list of the 32 “serious crimes” referred to in Art. 2(2) FD EAW, relevant EU harmonisation measures and their national transposition. This communication could also assess the need for adopting or revising the definitions and sanctions of these offences at EU level to ensure mutual trust. Where deemed appropriate, the Commission should suggest updates to the list.
- ▶ **Technological advancement (e.g. videolinks)** could be used to improve the efficiency and fundamental rights compliance of the EAW procedure.
- ▶ In the medium term, for reasons of democratic legitimacy, legal certainty and coherence with other judicial cooperation and procedural rights measures, a **‘Lisbonisation’ of the FD EAW is recommended**. This process could be part of a proposal on an **“EU judicial cooperation code in criminal matters”**. Such an initiative could also contain legislative proposals on the prevention and resolution of conflicts of exercise of criminal jurisdiction and the transfer of proceedings. The final decision on embarking on such a comprehensive review should take into account the implementation report that has recently been issued by the European Commission and the mutual evaluations that the Member States are currently conducting in the Council.
- ▶ In addition, the European Parliament could also consider requesting the Commission to conduct a **“fitness check” evaluating and identifying gaps and inconsistencies, and considering possible ways of simplifying and streamlining the current EU framework in the area of judicial cooperation in criminal matters**.
- ▶ Finally, the European Parliament **could conduct further implementation reports on related judicial cooperation instruments, notably the EIO and the FD on transfer of prisoners**.

EU Initiatives' on Prison Conditions?

▶ EC

- ▶ No proposals for reform currently ?
- ▶ Commissioned [study to FRA - published end 2019](#) - summarises the minimum standards at international and European levels / looks at how these standards are translated into national laws and other rules of the EU Member States - focus on:
 - ▶ size of cells;
 - ▶ amount of time detainees can spend outside of these cells, including outdoors;
 - ▶ sanitary conditions;
 - ▶ access to healthcare;
 - ▶ whether detainees are protected from violence.
- ▶ **Database on detention conditions:**
 - ▶ comparative table comparing the basic conditions of detention in all Member States against international standards
 - ▶ practitioners guide (in the form of a checklist or flow chart) to assist judges with the execute European Arrest Warrant in line with jurisprudence from the EU's Court of Justice;
 - ▶ database of relevant jurisprudence and reports by relevant bodies.

▶ EP

- ▶ [European Parliament resolution of 5 October 2017 on prison systems and conditions \(2015/2062\(INI\)\)](#)
- ▶ [Procedural rights and detention conditions - Cost of Non-Europe Report, 2017](#)

Proposals in academic studies / others

ECBA (2011) - reply to Green Paper on Detention:

- ▶ Legislation to set **minimum standards for the use and review** of PTD detention in the EU;
- ▶ More effective information-gathering to monitor how PTD is used throughout the EU, to include the immediate addition of questions in this area to the annual review of EAW cases;
- ▶ Ensuring **facilities are available to enable a suspect to defend themselves at trial**, with the absence of such facilities to be a reason not to allow surrender under an EAW;
- ▶ A **presumption of release pending trial**;
- ▶ A **maximum period of pre-trial detention** should be introduced;
- ▶ **Legal aid** to be provided in the issuing and executing states to enable legal advisers to make submissions for **alternatives to immediate surrender**, appropriate use of the European Supervision Order (ESO), **alternatives to detention** on conviction and transfer of prisoners between member states post conviction

Proposals in academic studies / others (2)

ECBA (2020) - European Criminal Bar Association Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World.

- ▶ Proportionality - the use of video-link and other alternatives to EAW §§ 12-43.
- ▶ ECBA urges the European Union institutions and Member States' institutions and judicial authorities, as well as the Council of Europe and its Member States, to take practical and, if needed, legislative steps to enhance the use of video-conferencing in cross-border cases, namely:
 - ▶ Consolidating the existing data from previous studies and organizing a **comprehensive assessment of the reasons for the under-use of remote video-technology**;
 - ▶ Establishing explicitly the **right of the accused to participate by video-link**, at **least in the cases in which this is the most proportionate solution**, as referred to above;
 - ▶ Developing **appropriate and compatible legal standards for remote participation** where that is permitted and appropriate (*see Chapter B.4*);
 - ▶ **Promoting the development of appropriate and compatible technical infrastructures and solutions** (which allow for **true-to-life remote participation**, and **exercising of the procedural rights** in this context - *see Chapter D*).
 - ▶ Considering the issues relating to the **transparency and privacy** in the use of remote technology in criminal trials (*see Chapter E*)

Proposals in academic studies / others (3)

CCBE - EAW-Rights - Analysis of the implementation of the European Arrest Warrant from the point of view of defence practitioners

- ▶ Dual Representation
- ▶ Legal Aid
- ▶ Proportionality
- ▶ Trial-Readiness
- ▶ Detention Conditions
- ▶ Relationship with Existing Fundamental Rights
- ▶ Right of Appeal Against EAW Decision
- ▶ Additional Information Requested
- ▶ SIS Alerts Remaining Active

https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_projects/EN_CRM_20161117_Study-on-the-European-Arrest-Warrant.pdf

Proposals in academic studies / others (4)

FTI - A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU

- ▶ **Binding legislative instrument** codify existing ECHR standards which are currently inaccessibly buried in an ever-growing corpus of ECtHR case law.
- ▶ Added value by setting out procedural guidelines to ensure that domestic legislation adequately assists judges to give effect to those standards in practice.
- ▶ Greater financial investment in prisons is not the answer to the problems presented by overcrowding, which will continue to grow in the absence **of clear and effective legal frameworks to prevent excessive pre-trial detention over the long term.**
- ▶ Member States are experiencing significant tension in balancing the importance of mutual recognition measures like the European Arrest Warrant (EAW) with their obligation to protect the fundamental rights of individuals subject to them. Repeated cases of injustice have demonstrated that regional action on **pre-trial detention reform is necessary to support the EU legal order, achieve economic efficiency in the administration of criminal justice, and to protect public safety.**

Proposals in academic studies / others (5)

Sellier / Weyembergh (2018), pp. 102-105, 118-122, 128-130:

PRE-TRIAL DETENTION REGIMES AND ALTERNATIVES TO DETENTION

- ▶ **Legislative option:**
 - ▶ Adopting **rules on time-limits**
 - ▶ Adopting **rules on judicial review**
- ▶ **Non-legislative option:**
 - ▶ Initiating infringement procedures
 - ▶ Monitoring of PTD regimes in the Member States
 - ▶ Encouraging dialogue and consultation among national authorities
 - ▶ Developing training and support tools
 - ▶ Promoting alternative measures to pre-trial and post-trial detention through soft law
 - ▶ Mapping and monitoring existing compensation frameworks
 - ▶ Considering EU financial support

[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)604977](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604977)

PROCEDURES TO ASSESS DETENTION CONDITIONS AND SURRENDER FOLLOWING ARANYOSI AND CALDARARU

- ▶ **Legislative option:**
 - ▶ Adopting **minimum standards on detention conditions**
 - ▶ Revising Article 4(6) FD EAW: a superficial solution?
- ▶ **Non-legislative option:**
 - ▶ Financial support to Member States: an EU Fund dedicated to prison conditions
 - ▶ Clarifying the ground for postponement/refusal surrender under *Aranyosi and Caldaru*
 - ▶ Enhancing dialogue
 - ▶ Enhancing dialogue

COMPENSATION SCHEMES FOR UNJUSTIFIED DETENTION

- ▶ **Legislative option:**
 - ▶ A new **legislative instrument on compensation for unjustified detention in cross-border cases**
- ▶ **Non-legislative option:**
 - ▶ Mapping and monitoring existing compensation frameworks
 - ▶ Considering EU financial support

Possible Steps to Consider?

▶ EAW Reform

- ▶ Proportionality
- ▶ Use of Video-Links
- ▶ Access to the Case Files in the Issuing State
- ▶ Improving dual defence / legal aid
- ▶ Right to Appeal
- ▶ Exchange of information
- ▶ Fundamental Rights refusal
- ▶ Consequences of refusals
- ▶ Rules on Cross-Border Time-Limit for PTD, including EAW detention period
- ▶ Coherence / Articulation with other instruments (ESO, EPO, EIO, Conflicts of Jurisdiction, Transfer of Proceedings,...) and Lisbonisation / modernisation (also of other instruments)
- ▶ Minimum rules for compensation for unjustified PTD in EAW cases?

(...)

+ soft law / training / monitoring. Etc.

▶ Pre-Trial Detention (minimum rules)

- ▶ Maximum time-limits, including EAW detention period
- ▶ Factual and legal requirements, duty to give reasons, also bearing in mind implications of EU Law and cross-border dimension
- ▶ Legal remedies and (regular and meaningful) judicial review, also bearing in mind implications of EU Law and cross-border dimension
- ▶ Procedural Rights of Detainees, including legal aid, right to challenge, right to attend hearings, also bearing in mind implications of EU Law and cross-border dimension
- ▶ “Right to release pending trial” / alternative measures
- ▶ Set-off of PTD (and other measures?) towards sentence
- ▶ Special rules for vulnerable groups
- ▶ Prison conditions
- ▶ Prisoners’ rights of pre-trial detainees
- ▶ Minimum rules for compensation for unjustified PTD (and poor prison conditions)?

(...)

+ soft law / training / monitoring. Etc.

Thank you ! Obrigada!

Check out www.ecba.org
and <http://handbook.ecba-eaw.org/> (update coming soon)