

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

14 October 2020



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



Vânia Costa Ramos

[vaniacostaramos@carlospintodeabreu.com](mailto:vaniacostaramos@carlospintodeabreu.com)

## 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"

Matt, Holger, 2017 - <https://eucrim.eu/articles/guest-editorial-eucrim;12017/>

## 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><sup>4/10/20</sup>

3

## 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](#);<sup>14/10/20</sup>

4

## 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 EPPD 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 EPPD 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

14/10/20

5

## 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](#)

[...]

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.**

14/10/20

## 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. In 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.

14/10/20

12

- ▶ **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\(INI\)\)](#) 14/10/20 15
- ▶ [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

<http://www.ecba.org/content/index.php/publications/statements-and-press-releases/587-ecba-response-on-a-green-paper-on-detention> 14/10/20 16



## 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*)

<http://ecba.org/content/index.php/124-featured/783-ecba-statement-on-video-conferencing-in-criminal-cases>

14/10/20

17

## 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/specialty\\_distribution/public/documents/CRIMINAL\\_LAW/CRM18projects/EN\\_CRM\\_20161117\\_Study-on-the-European-Arrest-Warrant.pdf](https://www.ccbe.eu/fileadmin/specialty_distribution/public/documents/CRIMINAL_LAW/CRM18projects/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**.

<https://www.fairtrials.org/publication/measure-last-resort>

14/10/20

19

## 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.

14/10/20

21

# Thank you ! Obrigada!

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