

New horizons for defence rights after 2020: which “steps” of the Roadmap still need to be taken?

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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>

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.”)

EAW Reform Proposals?

▶ EP

- ▶ [European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant \(2013/2109\(INL\)\)](#)
- ▶ [European Arrest Warrant - European Implementation Assessment a Study of the EPRS, author Wouter van Ballegooij, June 2020](#)
- ▶ [European Arrest Warrant and surrender procedures between Member States - European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States \(2019/2207\(INI\)\)](#)

▶

▶ 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](#)
 - ▶ [Briefing Paper on the Communication on digitalization of Justice in the European Union, January 2021](#)
- ▶ 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.](#)

[...]

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>

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 needsbasis 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
- ▶ **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.

European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI))

1. “Points out that the EAW is a **major achievement** and an effective, useful and **indispensable** instrument; recognises 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 **detention and prison conditions, proportionality, implementation in EAW proceedings of the procedural safeguards enshrined in EU law, in particular dual legal representation, training, specific rule of law issues, the execution of custodial sentences, time limits and in absentia decisions**; acknowledges that certain cases raised the issue of **double criminality**; perceives, in other cases, **an inconsistency in the application of grounds for refusing to execute EAWs**; highlights further the **absence of a comprehensive data system enabling the establishment of reliable qualitative and quantitative statistics on the issue, execution or refusal of EAWs**”
4. “Notes that **attempts are being made to solve some issues** 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; recalls that use of the EAW should be limited to serious offences where it is strictly necessary and proportionate**; urges the **use of less intrusive legal instruments, such as the EIO**; 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**”

[European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States \(2019/2207\(INI\)\) \(2\)](#)

- Recommendation to improve the functioning of the EAW (10-30)
- Recommendations on Fundamental rights (31-43)
- For a Coherent EAW legal framework (44-48)
- (Brexit)

[European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States \(2019/2207\(INI\)\) \(3\)](#)

Recommendations (selected):

- ▶ Recalls the importance of **implementing the procedural rights directives** with a view to guaranteeing the right to a fair trial;
- ▶ Stresses that instruments such as **Framework Decision 2008/909/JHA on the transfer of prisoners, Framework Decision 2008/947/JHA on probation and alternative sanctions, the EIO, the European Supervision Order, the European Convention on the Transfer of Proceedings in Criminal Matters**, both complement the EAW and provide useful and less intrusive alternatives to it; stresses that the EAW should **only be used if all other alternative options have been exhausted** and that states should not have recourse to the EAW in situations where a less intrusive measure would lead to the same results, for example hearings by videoconference or related tools;
- ▶ Calls on the Member States to ensure that judicial authorities are able to order available **alternatives to detention** and coercive measures in EAW proceedings, particularly where a person consents to their surrender, unless a refusal is necessary and justified;
- ▶ Calls on the Commission and the Member States to provide **appropriate funding for legal aid** to persons concerned by EAW proceedings, including for legal assistance in both the issuing and executing Member States before surrender is ordered, funding for suitably qualified interpreters and translators, **specific training on the EAW** for practitioners

[European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States \(2019/2207\(INI\)\) \(4\)](#)

Recommendations (selected):

- ▶ Calls on the Commission to **study the feasibility of supplementing instruments** on procedural rights, such as those on **admissibility of evidence** and **prison conditions in pre-trial detention**; believes that the absence of minimum standards on prison conditions and pre-trial detention at EU level, of the limitation of the use of pre-trial detention to being a measure of last resort and of the consideration of alternatives, coupled with the lack of a proper assessment of whether the cases are trial-ready, can lead to unjustified and excessive periods being spent by suspects and accused persons in pre-trial detention; **calls on the Commission to achieve EU minimum standards, particularly on criminal procedural safeguards and on prison and detention conditions, as well as to strengthen the information tools for national executing authorities on the conditions of pre-trial detention and imprisonment in each Member State**;
- ▶ Underlines that **there is no mechanism in place to ensure a proper follow-up to the assurances** provided by the issuing judicial authorities after surrender;

Measure D of the ECBA Roadmap Agenda 2020 - Procedural rights in the context of evidence-gathering

- ▶ This area has not been regulated, without prejudice to some sparse provisions in the various instruments.
- ▶ For example:
 - ▶ the right of the lawyer to be present at questionings and some evidence gathering acts (Directive 2013/48);
 - ▶ the right to request an EIO (Directive 2014/41);
 - ▶ European Public Prosecutor's Office - art. 41, no. 3;
 - ▶ Exclusion of evidence / valuation - art. 14, no. 7, Directive 2014/41 and 37 European Public Prosecutor's Office Regulation;
 - ▶ Legal remedies / judicial review (art. 42 and 14 of Directive 2014/41)
- ▶ However, these are very limited and refer in most cases to national law.

Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

Problems:

- a) highly divergent interpretation of the various rights at domestic level, which creates relevant differences, for example in the role of legal assistance and access to the file at the pre-trial stage, which creates a very disparate situation between MS, calling into question the uniform guarantee of established rights.
- b) particularly serious situation in the area of cross-border evidence gathering, whether horizontal or in European Public Prosecutor's Office proceedings, as the accused will not have a sufficiently consistent and high minimum level of procedural rights at the investigation (or trial) stage. Even domestic protection and compensation mechanisms lose their effectiveness because of the cross-border combination of legal systems.
- c) legal fragmentation which makes it very difficult to determine the applicable law and makes the rules of several countries incompatible in the field of measures of gathering evidence, something particularly relevant in the field of special investigative measures, or intrusive measures.
- d) lack of appropriate remedies, either procedural or substantive.

Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

What proposals are under discussion?

- a) monitoring, and assessing the need for additional legislative measures, defining the role of the lawyer, the rules of access to the file in relation to the different procedures for gathering evidence and exercising means of protection
- b) the establishment of specific cross-border rights, including assistance by a lawyer and special provisions guaranteeing the defendant's right to participate actively in the taking of evidence and the possibility of taking evidence.
- c) harmonisation of procedural "guarantees" regarding the gathering of evidence, in particular intrusive measures.
- d) the establishment of European law remedies, access to the CJEU, and sanctions for violations in relation to the taking of evidence.

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

CONTENTS

A. INTRODUCTION	3
B. CROSS-BORDER CASES.....	4
B.1. INTERVIEW OF THE SUSPECT OR ACCUSED BY VIDEO IN CROSS-BORDER CASES IN THE PRE-TRIAL STAGE – IS IT APPROPRIATE?.....	4
B.2. PARTICIPATION OF THE ACCUSED BY VIDEOCONFERENCE IS HIS OR HER TRIAL IN CROSS-BORDER CASES – IS IT APPROPRIATE?	7
B.3. ACTION TO BE TAKEN	9
B.4. WHAT ARE THE REQUISITE LEGAL SAFEGUARDS IN CROSS-BORDER CASES?	10
C. DOMESTIC CASES	12
C.1. INTERVIEW OF THE SUSPECT OR ACCUSED BY VIDEO IN DOMESTIC CASES IN THE PRE-TRIAL STAGE – IS IT APPROPRIATE?	12
A) INTERVIEWS WITH THE PURPOSE OF ADVANCING THE INVESTIGATION:.....	12
B) INTERVIEWS WITH THE AIM OF DECIDING ON PRE-TRIAL DETENTION AND INTERVIEWS IN THE SCOPE OF A PRE-TRIAL SCREENING STAGE, AFTER A FORMAL INDICTMENT HAS BEEN BROUGHT, WITH A VIEW OF AVOIDING TRIAL.....	13
C.2. PARTICIPATION OF THE ACCUSED BY VIDEOCONFERENCE IS HIS OR HER TRIAL IN DOMESTIC CASES – IS IT APPROPRIATE?	13
C.3. ACTION TO BE TAKEN	15
C.4. WHAT ARE THE REQUISITE LEGAL SAFEGUARDS IN DOMESTIC CASES?	15
D. WHAT SHOULD BE THE REQUISITE TECHNICAL SAFEGUARDS FOR VIDEOCONFERRING IN CRIMINAL PROCEEDINGS?.....	17
E. VIDEO-LINK IN CRIMINAL TRIALS AND THE OPEN /TRANSPARENCY ISSUE AND THE PRIVACY ISSUE	18
F. ACKNOWLEDGMENTS AND CONTACT DETAILS	20

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>

Thank you !
Dank je wel!

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