

Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant ('EAW') proceedings



Table of contents

Executive Summary	2
Introduction	5
Priority #1: Strictly limit the use of EAWs to a measure of last resort.....	6
The problem.....	6
Recommendations	11
Priority #2: Adopt new legislation on pre-trial detention	11
The problem.....	11
Recommendations	12
Priority #3: The protection of fundamental rights	13
The problem.....	13
Recommendations	16
Priority #4: Ensure the implementation of procedural safeguards	17
The problem.....	17
Recommendations	22
Priority #5: Transparency and oversight	23
The problem.....	23
Recommendations	25
Endnotes	27



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Executive summary

The European Arrest Warrant ('EAW') is a powerful tool that allows authorities in one country (the 'issuing country') to have people living in another country (the 'executing country') arrested, detained, and transferred by force. This has serious implications for the affected person.

The EAW is regarded as the "flagship" EU judicial cooperation measure. It was adopted in the wake of the 9/11 attacks in the US amid concerns that existing extradition laws were too cumbersome to effectively tackle serious cross-border crimes. In the last year, the European Commission (EC) and the European Parliament respectively assessed the implementation of the EAW by Member States and identified areas to improve functionality of the EAW.

Fair Trials recognises the need for effective law enforcement cooperation between EU Member States but has long raised concerns about the need to ensure the operation of the EAW does not undermine human rights and the rule of law. Over the past years, we have been collating information from members of our Legal and Experts Advisory Panel (LEAP) who continue to raise these concerns – and highlight that they are exacerbated by threats to the rule of law and the worsening prison overcrowding crisis that the EU is facing.

The COVID-19 pandemic meant that digital solutions were necessary to keep criminal proceedings moving forward. The European Commission is now preparing a toolbox of measures to promote the digitalization of justice, including criminal justice, on a long-term basis. These developments present opportunities to enhance the functionality of the EAW, grounded in fundamental rights.

We call on the European Commission to recognise that the EAW is not only about judicial cooperation – it is also about the person who is sought, arrested and surrendered. The fundamental rights of that person must be placed at the heart of the mechanism.

This paper identifies five key priority areas for EU action to bring the EAW system within the framework of the EU Charter of Fundamental Rights and rule of law:

Strictly limit the use of EAWs to a measure of last resort

EAW legislation does not specifically require the decision to issue an EAW to be based on a proportionality assessment. Although EAWs were designed primarily to fight serious, complex cross-border crimes, they are often used to investigate and prosecute minor offences including those that will not result in prison sentences. EAWs also continue to be misused for questioning, rather than for criminal prosecution. As a result, EAWs can be issued too early in the proceedings, before charges are ready to be brought to trial, which can result in lengthy pre-trial detention. Despite the existence of less restrictive alternatives to the EAW, the absence of an explicit requirement to take such measures into account as part of a proportionality assessment results in incoherent implementation and use of the various instruments available to judicial authorities when cooperating in cross-border proceedings.

Recommendations: The EU must set a common threshold for issuing EAWs, which includes a requirement for judicial authorities to take the principle of proportionality into consideration when determining whether to issue an EAW. A common threshold for issuing an EAW is all the more important because of the fragmented institutional set-up across Member States, where the

competence of issuing EAWs is entrusted to courts and prosecutors. Digital solutions can also be implemented to support an enhanced use of alternative, less restrictive measures to the EAW.

Adoption of new legislation on pre-trial detention

The EAW typically involves the arrest and detention of a person, potentially all the way until and after surrender to the issuing country. But in the absence of common EU standards on pre-trial detention, judicial authorities need to rely on domestic legislation to determine whether to place someone in detention pending surrender in the context of cross-border proceedings. Moreover, the decision to issue an EAW appears to be an automatic response where a person is not a national or a resident of the issuing state, even where there is no evidence that the person is at risk of absconding.

National laws on pre-trial detention are failing to prevent its overuse at domestic level. This problem is potentially worse at the cross-border level where a person situated abroad or with a foreign nationality is considered to be a “flight risk” justifying an EAW and pre-trial detention.

This prejudicial treatment clearly contradicts the idea of Europe as an area of freedom of movement and residence, where Member States have trust in each other’s criminal justice systems. It also conflicts with the EU’s commitment to non-discrimination.

Recommendations: The European Commission must urgently adopt long overdue common standards on pre-trial detention aimed at protecting the fundamental right to liberty. The EC must also initiate a consultation with a wide group of stakeholders to identify solutions that help prevent the discriminatory use of EAWs.

Protection of fundamental rights in the execution of EAWs

Litigation has revealed concerns related to fundamental rights and the EAW. Particularly regarding inhumane and degrading prison conditions as well as the right to a fair trial, which is under threat as a result of the rule of law crisis.

The current legislative framework does not contain sufficiently robust safeguards to enable judicial authorities across the EU to uphold their duty of ensuring the effective judicial protection of people’s rights, and actively making sure people’s fundamental rights are protected before a person is surrendered. Many authorities assume that the principle of mutual trust means that they must turn a blind eye to potential violations, ignore arguments that the defence puts forward, and surrender the person. The Court of Justice of the EU has clarified that judicial authorities must conduct an assessment in relation to fundamental rights violations, but the approach remains restrictive and insufficient to guarantee effective judicial protection. This is particularly concerning where there are calls to extend the EAW to new categories of broadly defined and vague offences, that could be used against political activists and civil society at a time where the rule of law is under threat across many European countries.

Recommendations: We call on the European Commission to clarify the role and duty of executing authorities in protecting fundamental rights in the context of EAW proceedings and make mandatory the refusal to surrender where there are fundamental rights concerns.

Effective implementation of existing procedural safeguards and judicial protection

Since the implementation of the EAW, the EU has adopted fundamental legal protections aimed at addressing the imbalance that people face when investigated and prosecuted by state authorities. The EU adopted legislation in relation to the procedural safeguards of suspects and accused persons, that apply in domestic and in cross-border proceedings. These include, crucially, the right to legal assistance. However, we continue to see gaps in the EU legal framework and ineffective implementation at domestic level.

Recommendations: The European Commission must actively monitor and enforce the effective implementation by Member States of the system of safeguards that underpin the EAW. The three key priority areas for EU action are first, to ensure that requested persons have access to effective legal assistance in both the executing and issuing member states. Second, to implement a condition of timing on access to case file: without access to the case file prior to surrender, the right to access the case file becomes illusory and theoretical. The person will have already been surrendered and it is too late to exercise their right to challenge the EAW or the refusal to access the case file. Third, Member States need to provide access to interpretation services of a sufficient quality to ensure that the person can effectively participate in the proceedings. In this context, we encourage the European Commission to consider the benefits that digital solutions can bring. It is also necessary to adopt a more robust right to challenge and common effective remedies, to ensure that people across the EU benefit from an equal level of protection, which is currently not the case.

Transparency and oversight

Each national court has the fundamental role (and duty) of checking the legality of the use of coercive instruments, such as the EAW, by investigating authorities. This is a key function embedded in the operation of the rule of law, to prevent the misuse of state powers and to uphold people's fundamental rights. To exercise meaningful oversight and protection, courts require access to information to make an informed decision about the risks of fundamental rights violations. In the current political context, with the EU facing threats to the rule of law in several Member States, and fundamental rights including procedural safeguards undercut for efficiency purposes, courts cannot be asked to resort to blind trust. Mutual trust must be based on informed trust.

Courts continue to face difficulties in obtaining the necessary information to make informed decisions relating to fundamental rights concerns. Too much reliance is placed on assurances by issuing authorities. Informational imbalances need to be addressed to give effect to the principle of equality of arms and enable effective judicial protection of people's rights.

Recommendations: The EU should set up a mechanism to monitor assurances made by issuing states post-surrender. More broadly, the EU has a responsibility to implement robust monitoring and oversight systems over the use of EU law instruments, including the EAW, through meaningful data collection.

1. Introduction

- 1.1 **The European arrest warrant ('EAW') is a powerful tool that allows authorities in one country (the 'issuing country') to have people living in another country (the 'executing country') arrested, detained and deported by force.** This has serious implications for the affected person. They may have no attachments nor speak the language of the country they are taken to. They will be deprived of their liberty and detained in one of Europe's prisons, many of which do not meet the most basic fundamental right to be free from inhumane and degrading treatment. They may also lose their job and home and be separated from their family and friends.
- 1.2 **The EAW is regarded as the 'flagship' EU judicial cooperation measure.** It was adopted in the wake of the 9/11 attacks in the US amid concerns that existing extradition laws were too cumbersome to effectively tackle serious cross-border crimes. In 2004, the EAW started to operate in the EU as a fast-track system for the arrest and extradition (or 'surrender') of a person to stand trial or serve a prison sentence. It is used in thousands of cases each year (17,471 EAWs issued in 2018) and reported as being a valuable tool for law enforcement.¹ The underlying principle behind the EAW (and other cooperation measures that have followed it) is mutual recognition: it allows for faster and simpler cooperation by requiring one Member State to recognise decisions issued by judicial authorities in another.
- 1.3 **The operation of the EAW has not been without its challenges.** In 2020, the European Commission and the European Parliament respectively assessed the implementation of the EAW by Member States and identified areas to improve the functionality of the EAW.² Our research and monitoring through the members of our Legal Experts Advisory Panel ('LEAP')³ also reveal that the operation of the EAW has serious and disproportionate impact on the lives and rights of ordinary people.
- 1.4 **The EAW is being used for all types of offences despite the availability of less restrictive measures.** This raises serious concerns about how it is being used by authorities and the robustness of the checks and balances necessary to protect people's fundamental rights. Judicial independence and the rule of law are under attack in different EU Member States⁴ and efficiency is driving domestic reforms. This makes the need for a clear and coherent EU approach towards criminal justice, grounded in fundamental rights and in particular the principle of fairness, more urgent than ever. This urgency has recently been recognised by the European Parliament, which says the EU is "at this historic and crucial juncture."⁵
- 1.5 **In this briefing, we call on the EU to recognise that the EAW is not only about judicial cooperation.** It has a huge impact on the person who is sought, arrested and surrendered. The rights of that person must be placed at the heart of the mechanism. For this to happen, the EU must ensure that the EAW is not looked at in isolation, as the flagship measure of cross-border cooperation. The EU (in particular, the European Commission) must actively encourage and enforce a comprehensive and coherent approach towards cross-border cooperation, looking at EU law and instruments as a whole, implemented within the overarching framework of the Charter of Fundamental Rights of the European Union ('the Charter').⁶ The EU's common values mean that the prevailing consideration for any cross-border cooperation must be the protection of people's fundamental rights. This starts with action on the five priority areas outlined in this briefing.

Our credentials

Fair Trials recognises the need for effective law enforcement cooperation between EU Member States but has long raised concerns about also ensuring that the operation of the EAW does not undermine human rights and the rule of law. Our work in this area has involved:

- a. proposing legislative changes to the EU Framework Decision 2002/584/JHA of 13 June 2002 on European arrest warrant ('EAW Framework Decision')⁷ and in Member States' implementing the legislation;
- b. advocating for the adoption and effective implementation of existing EU-wide minimum defence rights standards including in cross-border proceedings;
- c. sharing information with the European Commission and Parliament about the operation of the EAW in practice from a defence rights perspective and through human stories;
- d. developing practical guidance and training tools for defence lawyers; and
- e. supporting and engaging in strategic litigation to establish safeguards.

2. Priority #1: Strictly limit the use of EAWs to a measure of last resort

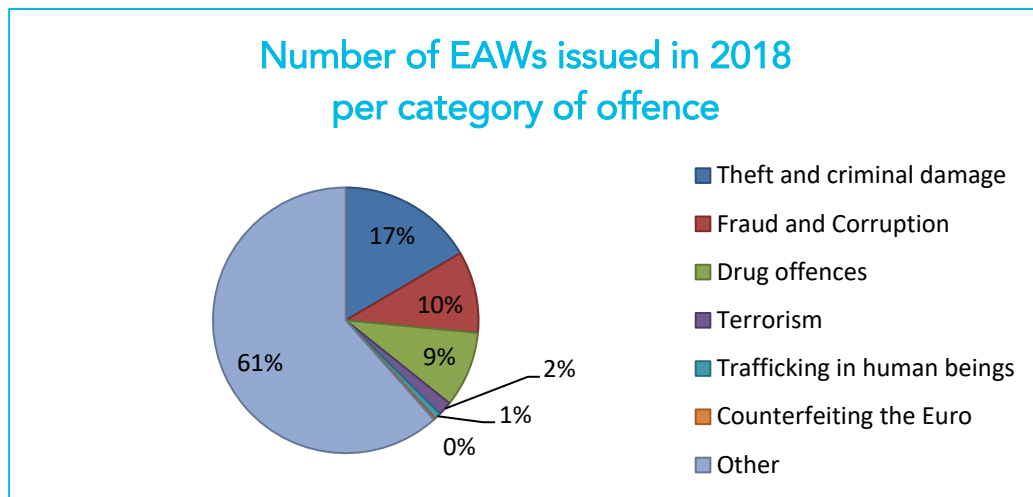
The problem

- 2.1 At present, the EAW Framework Decision links the issuing threshold to the sentence in domestic law but does not refer to proportionality.⁸ In practice, issuing authorities are failing to apply a meaningful proportionality assessment when issuing EAWs; and executing authorities are refusing to consider arguments relating to proportionality when deciding whether to surrender. In effect, persons subject to EAWs have no option to challenge surrender on the grounds of lack of proportionality. This means that people continue to be surrendered for minor offences even though other, less restrictive measures than the EAW may be available.
- 2.2 A recent example from Portugal illustrates this gap in legal protection: "[...] no matter how pertinent the considerations made in the opposition about the lack of proportionality and adequacy of the European Arrest Warrant issued by the Court of Criminal Instruction of Bordeaux may be, by virtue that the intended purpose of subjection of the defendant to a criminal procedure running in that Court may be achieved through a European Investigation Order, that is a choice that does not fall to this Court and about which no judgment can or should be issued, in accordance with the aforementioned principles of mutual recognition and mutual trust between EU Member States, for the simple reason that it is the exclusive responsibility of the issuing judicial authority (...)."⁹
- 2.3 The issue of proportionality is a long-standing area of concern for the European Parliament: "the disproportionate use of the EAW for minor offences or in circumstances where less intrusive alternatives might be used, leading to ... disproportionate interference with the fundamental rights of suspects and accused persons as well as burdens on the resources of

Member States".¹⁰ The issue of proportionality has again recently been highlighted by the Parliament.¹¹ Interestingly, the EU-UK Trade and Cooperation Agreement (TCA), which is provisionally applicable from 1 January 2021, contains a proportionality test: "Cooperation on surrender must be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person, particularly with a view to avoiding unnecessarily long periods of pre-trial detention."¹²

- 2.4** Despite the absence of a proportionality test in the EAW Framework Decision itself, the Court of Justice of the EU ('CJEU') recognises that the issuing judicial authority must examine proportionality as part of the conditions for issuing an EAW.¹³ This is consistent with the Charter, which enshrines the principle of proportionality, and applies to authorities applying EU law.¹⁴ The CJEU also recognises that it must be possible to challenge the decision to issue an EAW including its proportionality¹⁵ but because of the principle of procedural autonomy, leaves it up to Member States to organise their legal order: "introducing a separate right of appeal against the decision to issue a European arrest warrant taken by a judicial authority other than a court is just one possibility in that regard."¹⁶
- 2.5** The European Commission recommended in its guidance on issuing EAWs that an assessment of proportionality must be conducted before issuing an EAW, checking whether using the EAW is truly necessary and that there are no other less harmful options that could be used instead.¹⁷ However, LEAP members with experience of representing people subject to EAWs have continued to raise proportionality as a key issue of concern.
- 2.6** In particular, the absence of such a requirement results in numerous difficulties in the implementation of the EAW.
- (a) **Use for minor offences:** EAWs were designed primarily to fight serious, complex cross-border crimes but they continue to be used to investigate and prosecute minor offences. The figure below shows that the most common offences for which EAWs were issued in 2018 were theft and criminal damage. People can also be surrendered to countries where minor crimes lead to much stiffer penalties than in the country they live in. A Fair Trials study documented cases where individuals were surrendered for the theft of a Christmas tree, a finding of fraud (in absentia) in relation to a used car, and minor drink driving offences, leading to the separation of families and the closure of businesses.¹⁸ There is no consideration of the impact that the surrender will have on the person's livelihood, family and mental or physical health.

Figure 1: EAWs issued in 2018 by category of offence



- (b) **Use for investigative purposes:** In principle, EAWs may only be issued for the purposes of conducting criminal prosecutions or for executing a custodial sentence.¹⁹ In practice however, EAWs continue to be issued for investigative purposes (for questioning a suspect) before a case is ready to go to trial. Issuing authorities opt for the 'ease' of the EAW which provides them with the certainty that the person will be rapidly presented before them for questioning, despite this involving detention, failing to consider the implications for the person (deprivation of liberty and surrender to another country) and whether the case is ready to go to trial. The decision often does not consider the disproportionate impact of being detained in the country where the person lives and being transferred to a prison in another country.
- (c) **Use before a case is trial-ready:** There is no common understanding of 'trial-readiness' across EU Member States and no standard is set in the EAW legislation itself. Our research shows that people continue to be surrendered under EAWs, often because the EAW has been issued to investigate the person rather than to bring them to trial when the case is "trial-ready".²⁰ Where EAWs are issued too early in the process, the affected person may be arrested and surrendered to the issuing state, and required to await trial (typically in pre-trial detention) for long, often excessive and unnecessary periods of time.²¹
- (d) **Limited take-up of alternative measures to the EAW:** An element of proportionality is required to consider whether other less harmful options than the EAW could be used instead. Particularly, non-custodial measures to prevent unjustified interferences with a person's rights including their fundamental right to liberty. Judicial authorities have at their disposal a range of investigative and enforcement tools including alternatives to detention in a domestic context as well as in cross-border cooperation. It may also be the case that there is no need for any coercive measure at all, where a person consents to their surrender.

CASE STUDY: EAW issued for stealing a toothbrush

In January 2020, the French judicial authorities agreed to surrender a person to Germany for the 2017 theft of a video game, some razor heads and toothbrushes from a supermarket. The proportionality of the EAW was not considered in the French court’s ruling, despite the argument having been raised by the person’s lawyer.²²

This approach echoes the many cases identified by Fair Trials in its ‘Beyond Surrender’ study, in Lithuania, Romania and Spain, such as the surrender to Spain of someone alleged to have stolen two radio CD players.²³

Table 1: Non-custodial alternatives to the EAW

The EU has enacted tools which offer more proportionate alternatives to EAWs (issued both for prosecution of crimes and for execution of sentences).

Measure		Description
European Investigation Order 2014/41/EU ²⁴ ('EIO')	pre-trial stage	Allows police in one Member State to collect and transfer evidence to another Member State . This means states can gather evidence across borders without having to request that individuals be physically transferred. This allows people to be questioned via video link, so they don't have to be transferred for investigative purposes.
European Supervision Order 2009/829/JHA ²⁵ ('ESO')	pre-trial stage	Allows a judicial authority in one Member State, where a person is accused of a crime, to impose pre-trial supervision measures on that person when they are living in another Member State. Therefore, instead of facing surrender under an EAW and pre-trial detention in another Member State, defendants could remain in their state of residence, under pre-trial supervision.
European Probation Order 2008/947/JHA ²⁶ ('EPO')	post-trial stage	Allows the transfer of a convicted person to a different Member State to serve a non-custodial measure imposed by the original issuing state. This could also serve as an incentive to judges to use non-custodial sentences.

Custodial Sentences 2008/909/JHA ²⁷	post-trial stage	Allows Member States to transfer prison sentences without the need for the physical transfer of the sentenced prisoner. This means that individuals can apply to serve their sentence in their home country without being surrendered first to the requesting state under an EAW.
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- 2.7 Compared to the EAW which has been increasingly used since 2005, most of the mutual recognition measures in Table 1 appear to be used very rarely as an alternative. There is a dearth of information and data on their use and take-up by practitioners. However, Fair Trials’ research and surveys of domestic lawyers widely confirm a lack of knowledge and lack of use of these alternative, less restrictive tools.²⁸ A 2018 study by the DETOUR academic consortium found that ESOs are “almost never used”.²⁹ This was further confirmed in a recent study.³⁰
- 2.8 **Fragmented system of judicial protection:** Where EAWs are not proportionate, people will not necessarily be able to obtain a remedy, even though Article 47 of the Charter enshrines the right to effective judicial protection and is binding on all national authorities when implementing the EAW. In the context of the EAW, the CJEU has issued several rulings which create some confusion. To start with, the EAW system involves a dual level of protection of fundamental rights: first, at the level at which a national decision, such as a national arrest warrant, is adopted; and second, at the level at which an EAW is issued.³¹ There must be the involvement of a judge or court (as opposed to a public prosecutor) in respect of at least one of these levels (which includes the assessment of the proportionality of issuing an EAW).³²
- 2.9 However, it is up to Member States to organise effective judicial protection in respect of EAWs and such protection varies from one national system to another. In some cases, it is ensured by an *ex officio* court review (such as in Austria)³³ and in others, by an investigating judge when issuing the national arrest warrant (despite being also in charge of the investigation) (as in France)³⁴ or a court decision to order pre-trial detention (as in Sweden).³⁵ As a result, the level of judicial protection varies across Member States.
- 2.10 The CJEU recently confirmed that such judicial oversight must take place *before* the EAW is transmitted and executed.³⁶ However, the CJEU also indicated that Member States may provide for a separate legal remedy allowing a court to review the conditions under which the EAW was issued and its proportionality at any point before or after its adoption.³⁷ The principle of effective judicial protection does not require the right to challenge the decision to issue an EAW before surrender.³⁸ Although the CJEU specifies that Member States must ensure that “they do not frustrate the requirements (...) in particular regarding the judicial protection which underlies the EAW Framework Decision”,³⁹ the fact is that the level of protection and availability of remedies in respect of unlawfully issued or disproportionate EAWs varies widely across the EU. As a result, we are seeing fragmented legal protection across the EU.⁴⁰ In some cases, courts are refraining from assessing the proportionality and legality of decisions to issue EAWs by authorities in other jurisdictions based on the principle of mutual trust. Many courts focus only on what has happened on their territory and not on what has happened in other Member States. This situation creates legal uncertainty and must be urgently addressed.

Recommendations

2.11 We call on the European Commission to:

- Adopt supplementing legislation setting an obligatory common threshold for issuing EAWs.⁴¹ These must expressly include a compulsory *ex-ante* assessment by a court of its proportionality in the light of all the relevant factors and circumstances of the case at hand.^{42,43}
- Conduct a qualitative assessment on the different judicial systems in place to enable the issuing of EAWs, and determine whether they are sufficiently robust, in practice, to meet the standard for effective judicial protection.
- Produce implementation reports and practical handbooks on the alternative measures to the EAW.
- Include in legislative proposals relating to the digitalisation of justice the use of video-links in the context of EAW proceedings, to enable issuing authorities to question a person before surrender and for the person to be heard in respect of any challenge of the decision to issue the EAW before surrender.⁴⁴

3. Priority #2: Adopt new legislation on pre-trial detention

The problem

- 3.1 The EAW typically involves the arrest and detention of a person, potentially all the way up to and after surrender to the issuing country. When issued for prosecution, the EAW is inextricably linked to pre-trial detention. But in the absence of common EU standards on pre-trial detention, judicial authorities need to rely on domestic legislation to determine whether to place someone in detention pending surrender in the context of cross-border proceedings. It is well documented that national laws on pre-trial detention are failing to prevent the problem of overuse of pre-trial detention at domestic level,⁴⁵ this problem is potentially worse at the cross-border level using the EAW.
- 3.2 The quasi-automatic detention of people who are subject to an EAW is notably due to the EAW Framework Decision itself. While this does include alternative measures to prevent people from absconding before surrender (for example, obligations to report to the police, travel bans, probation orders, bail, house arrest), its relevant legal provisions are framed as a presumption of detention rather than release.⁴⁶ This conflicts with international and regional standards, which limit detention as a measure of last resort.
- 3.3 Moreover, the decision to issue an EAW appears to be an automatic response where a person is not a national or a resident of the issuing state, even where there is no evidence that the person is at risk of absconding.⁴⁷ The unequal treatment that people face in criminal proceedings in the EU depending on their place of residence or nationality is not a new issue – it has long been known and recognised by the EU.

In practice, a place of residence outside the country of investigation and trial will justify the need for a national arrest warrant meaning that the flight risk in such cases will simply be presumed. That national arrest warrant is then automatically translated into an EAW. Alternatives or the possibility that the person may not require any restrictive measures whatsoever are not considered.

- 3.4** In the EU Area of Freedom, Security and Justice, people can move freely across borders. However, people in Europe will not be treated equally if they are more likely to be arrested and detained in criminal proceedings because they have chosen to live and work in another Member State. The fact that they exercised their right to free movement within the EU is used against them to justify the necessity for arrest and detention under the EAW.
- 3.5** This difference of treatment is in clear contradiction with the idea of Europe as an area of freedom of movement and residence, where Member States have trust in each other's criminal justice systems. It also conflicts with the EU's commitment to non-discrimination.⁴⁸ Statistics show the extent to which pre-trial detention disproportionately affects non-nationals. For instance, in 2018, 1,768 persons were held in pre-trial detention in Austria. Among these, more than 65% were not Austrian nationals.⁴⁹ In France, a recent study indicates that persons born abroad are five times more likely to be placed in pre-trial detention.⁵⁰ These countries are far from being the exception – Belgium, Luxembourg, Greece and Malta also have disproportionately high rates of non-nationals in pre-trial detention.⁵¹

France: Differential treatment for residents and non-residents

According to the French Code of Criminal Procedure, the fact that a person resides outside France is a ground to issue a French national arrest warrant, in the same way as a person on the run.⁵² The French Constitutional Court confirmed that the difference in treatment between resident and non-resident is justified by the difference in situation and that the investigative judge assesses the necessity and proportionality of the arrest warrant.⁵³

However, by way of example, in a recent ruling in relation to a Dutch national suspected of drug trafficking offences, the judicial authority rejected release despite the suspect's accommodation certificate in France and commitment to a professional training program, on the grounds that: "nevertheless, the suspect is a national of another EU Member State and nothing guarantees that she will not return home."⁵⁴

Recommendations

- 3.6** In 2009, the EU Council committed to address "excessively long periods of pre-trial detention" as these "are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands".⁵⁵ The European Parliament has repeatedly called for action on pre-trial detention, most recently stating that supplementary legislation is needed as a priority.⁵⁶

As expressed by the Attorney General Pitruzella of the CJEU: “the EU legislature must urgently address the question of harmonisation, however minimal, of pre-trial detention as it is ultimately the European area of criminal justice that is under threat. There can be judicial cooperation in criminal matters only if mutual trust between Member States is strengthened and that trust cannot be soundly established if such contrasting standards are applied by Member States, especially in respect of pre-trial detention, which, I repeat, constitutes an exception, which must remain as limited as possible, to the keystone of our legal civilisation that is the right to liberty.”⁵⁷

3.7 We call on the European Commission to:

- Amend Article 12 of the EAW Framework Decision and adopt a presumption of release, unless a risk such as flight cannot be addressed by any measures other than custody.
- Initiate a wide stakeholder consultation (involving judicial authorities, prosecutors, lawyers, probation services, civil society) to identify solutions and prevent the discriminatory use of EAWs.
- Adopt new legislation on the use of pre-trial detention, based on a presumption of release pending trial as a starting point.⁵⁸

4. Priority #3: The protection of fundamental rights

The problem

- 4.1 The EAW Framework Decision does not contain robust human rights safeguards. In particular, and unlike other EU criminal justice instruments,⁵⁹ the EAW Framework Decision does not expressly allow countries to refuse to execute an EAW when a person’s human rights are at risk. This affects the functioning of the EAW: in 2017, it is reported that 109 EAWs were refused as a result of fundamental rights concerns.⁶⁰ Despite the fact that several countries have created such rights in their own laws to prevent these violations, many authorities assume that the principle of mutual trust means that they must turn a blind eye to potential violations, ignore the arguments that the defence put forward, and surrender the person. As a result, the EAW is engendering human rights violations that may go unchecked, undermining the fundamental values of the European Area of Freedom, Security and Justice.

CASE STUDY: Germany protects fundamental rights

The extent to which the functioning of the EAW is affected by fundamental rights concerns is revealed in the decision of 1 December 2020 of the German Federal Constitutional Court which overruled the decisions of lower courts to surrender persons to Romania pursuant to two EAWs.⁶¹ The decision to surrender was considered to violate the persons’ fundamental right under Article 4 of the Charter which prohibits inhumane and degrading treatment.

The lower courts failed to recognise the significance and scope of the fundamental right under Article 4 of the Charter and did not have sufficient regard to the duty to investigate whether there is a specific risk that the persons concerned will be subject to inhuman or degrading detention conditions in Romania once they are surrendered.

- 4.2** The risk of human rights violations has led to litigation, initially on the basis that the detention conditions in which the persons would be held if surrendered were inhuman and degrading. The CJEU ruled in April 2016 that people should not be extradited if they are at risk of ill-treatment,⁶² recognising that the EAW operates within the framework of the Charter and the European Convention on Human Rights ('ECHR'). The CJEU confirmed that the prohibition of inhuman or degrading treatment or punishment is binding for Member States and their courts when they are implementing EU law, including when issuing or executing an EAW. Accordingly, the CJEU held that the extradition of a person should be discounted if there are substantial grounds to believe that following surrender, they will run a real risk of being subject to inhuman or degrading treatment, as protected by Article 4 of the Charter.⁶³
- 4.3** While we welcome the CJEU's approach, a case-by-case approach is not sufficient in the light of the systemic violations of Article 4 of the Charter throughout the EU. Conditions in prisons in countries such as Belgium, France, Hungary, Italy, Lithuania, Poland, and Romania have been found to violate the right not to be subjected to inhuman treatment by the European Court of Human Rights ('ECtHR') and the Council of Europe's Committee for the Prevention of Torture. The COVID-19 pandemic has made the situation in prisons across Europe worse, creating an urgency for action. Imprisonment has posed a deadly risk to people who are detained and who work in prisons during the pandemic. Imprisoned people are vulnerable to infectious disease because detention facilities often provide limited access to sanitation and health facilities, have unsanitary conditions, and are overcrowded, making physical distance and isolation impossible.
- 4.4** The EU is facing a long-standing crisis in prison overcrowding, which is fuelled by the excessive use of pre-trial detention. The effects of detention, even if on a short-term basis, are devastating. The CJEU has recognised, for instance, that the relative brevity of a detention period does not automatically mean that the treatment at issue falls outside the scope of Article 3 of the ECHR.⁶⁴ Where the EAW typically involves the detention of the requested person, even for short periods of time, courts must be able to ensure that surrendered people are not being placed at risk of a violation of their fundamental rights.
- 4.5** CJEU case law on prison conditions was subsequently extended to cover situations in which surrender would lead to a breach of the right to a fair trial as protected by Article 47 of the Charter.⁶⁵ This risk was brought to the fore by the attacks on judicial independence in Poland. But pending a formal political decision at the EU level, surrenders to Poland are meant to continue, unless the person concerned can show on a case-by-case basis: (1) generalised deficiencies to judicial independence; (2) that these deficiencies will impact the individual court and judges that will oversee the case; and (3) that there are specific elements that indicate that they are themselves are at risk of receiving an unfair trial.

CASE STUDY: The Amsterdam court protects right to a fair trial

When an EAW issued by Poland was challenged last year, the Amsterdam Court took the opportunity to ask the CJEU whether, in the light of the severity of the general and systemic deficiencies in Poland, it was safe to assume no one will in fact receive a fair trial. In effect, this would lead to abandoning the individualised limb of the test established by the CJEU in the case of Artur Celmer (the so-called 'LM test') in the light of further deterioration of the rule of law in Poland since 2018.

In practice, the individualised limb of the test has so far proven practically impossible to meet. The person must show that they themselves are individually at risk of being treated unfairly. This is a predictive test, and the burden is on the individual concerned to make their case even though it can be very difficult to get hold of relevant information or legal assistance in the country that is requesting their extradition.⁶⁶ But the CJEU was not convinced and maintained its two-step approach.⁶⁷ Nevertheless, in the light of all the evidence presented, The Amsterdam Court determined that there is a real risk that a fair trial in Poland would not be possible, making a surrender to Poland impossible.⁶⁸

- 4.6** The absence of robust fundamental rights protection is more concerning when there are calls to extend the use of the EAW to new offences and make it even more "automatic". Traditionally in cross-border cooperation, double criminality is a mechanism that relieves states from cooperating in respect of behaviour that they do not consider to be criminally reprehensible. The EAW Framework Decision departs from this and sets out 32 categories of offences for which the verification of double criminality does not apply.⁶⁹ This means that the executing authority can only verify double criminality in respect of offences that are not included in this list.⁷⁰ To date, double criminality can operate to protect people from political persecution.
- 4.7** On 20 January 2021, the European Parliament adopted a Resolution calling for an extension of the EAW to new categories of offences, including "a serious threat against public order of the Member States" and "crimes against the constitutional integrity of the Member States committed by using violence."⁷¹ Without appropriate safeguards protecting fundamental rights, an extension to such broad and vague offences would give huge discretion to issuing Member State authorities to qualify any form of political activism as a "criminal" offence. Governments across Europe are increasingly resorting to criminal powers to undermine activists.⁷² For example, laws criminalising humanitarian support to migrants⁷³ and more recently the use of criminal powers in the context of the COVID-19 pandemic,⁷⁴ including the restriction of freedom of assembly.⁷⁵

CASE STUDY: Rejection of EAW against Carles Puigdemont

A high-profile example of how double criminality operates is the 2018 EAW issued for the surrender of former Catalan Regional President Carles Puigdemont to Spain. The German court held that extradition for prosecution in relation to the act of “rebellion” was inadmissible since the requirement of double criminality was not fulfilled.⁷⁶

The court argued that the acts that Puigdemont was accused of fulfilled neither the requirements of the crime of “high treason”⁷⁷ as the use of force was not demonstrated, nor those of the crime of “rioting”,⁷⁸ as Puigdemont was not demonstrated to be the “intellectual leader” of acts of violence. In contrast, the second accusation of embezzlement of public funds which was classed as “corruption” therefore did not require a double criminality verification.

- 4.8** Political activists and civil society, including journalists and lawyers, are increasingly threatened across Europe. The EAW must be shielded from abusive use for political persecution. At a time when the rule of law is under threat in several EU countries (prompting the launch of the Commission’s rule of law monitoring mechanism),⁷⁹ protection must be ensured by judicial authorities to hold all governments to account on the rule of law and ensure that the use of criminal justice instruments such as the EAW is strictly restricted to its stated purpose – fighting serious cross-border criminality – and that law enforcement authorities (including issuing authorities empowered to issue EAWs) operate strictly within the remit of the legal framework within which they are allowed to operate. Reform of the EAW cannot make it easier for authorities to resort to the EAW or prevent courts across the EU from exercising their duty of ensuring effective judicial protection and preventing injustice.

Recommendations

- 4.9** While highly welcome, the case law of the CJEU has not been sufficient to protect people’s fundamental rights during EAW proceedings. Member States’ courts are continuing to grapple with questions relating to the EAW and questions continue to be referred to the CJEU. In the light of proposals to further extend the EAW, there is an urgent need to clarify and reinforce the role of executing judicial authorities in protecting fundamental rights. The EAW Framework Decision operates within the broader context of the Treaty on European Union and the Charter, which set out the common values and principles, including the protection of fundamental rights, on which mutual recognition must be based to effectively operate.
- 4.10** Every person in the EU benefits from the right to effective judicial protection,⁸⁰ it is a shared duty of all national courts and tribunals to ensure the full application of EU law in all Member States and the effective judicial protection of the rights of individuals. The only way to ensure this is to adopt an explicit human rights ground to refuse surrender where this would involve clear restrictions on a person’s fundamental rights. These would include, beyond the case law of the CJEU, the right to liberty (protected by Article 6 of the Charter), the right to private and family life (protected by Article 7 of the Charter) and the right to health (protected by Article 35 of the Charter), which is particularly crucial in the ongoing COVID-19 pandemic.
- 4.11** **The European Commission must:**

- Adopt supplementing legislation establishing a mandatory refusal ground where there are substantial reasons to believe that the execution of the EAW would be incompatible with the executing Member State's obligations *inter alia* under the Charter.
- Adopt guidance for executing authorities on their role to ensure effective judicial protection of fundamental rights in the context of EAW proceedings.
- Support strategic litigation initiatives by lawyers and civil society organisations to raise fundamental rights concerns about prison conditions, judicial independence, and privacy and family life.
- Reject any extension of the EAW to broadly defined and vague offences.

5. Priority #4: Ensure the implementation of procedural safeguards

The problem

- 5.1 The adoption of the EAW led to increased judicial cooperation between EU Member States to facilitate prosecution. However, action was needed to improve the imbalance between the powers of authorities and the protection of people's procedural rights. In 2009, the European Council adopted the Stockholm Roadmap to focus and protect the interests and needs of citizens in the Area of Freedom, Security and Justice, recognising: "the paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law, international protection rules go hand in hand in the same direction and are mutually reinforced."⁸¹
- 5.2 The EU enacted six directives on procedural safeguards in domestic criminal proceedings, including EAW proceedings. The directives cover: the right to interpretation and translation;⁸² the right to information;⁸³ the right of access to a lawyer;⁸⁴ procedural safeguards for children;⁸⁵ the right to the presumption of innocence and to be present at trial;⁸⁶ and the right to legal aid⁸⁷ (together, the 'Procedural Rights Directives'). The CJEU recently recognised the importance of this system of safeguards in the context of EAW proceedings: "Framework Decision 2002/584 forms part of a comprehensive system of safeguards relating to effective judicial protection provided for by other EU rules, adopted in the field of judicial cooperation in criminal matters, which contribute to helping a person requested on the basis of a European arrest warrant to exercise his rights, even before his surrender to the issuing Member State."⁸⁸
- 5.3 However, we continue to see the impact of both legislative gaps and ineffective implementation of existing standards across the EU. The Procedural Rights Directives require better and effective implementation but most essentially, their ground-breaking standards do not address the key problems with the EAW outlined above. As recently recognised by the European Parliament: "the six directives on procedural safeguards have not been fully and correctly implemented, which remains a matter of concern".⁸⁹ We outline below three key areas of concern in relation to the implementation of the Procedural Rights Directives in EAW proceedings.
- 5.4 **Access to a lawyer in both states:** The first key implementation challenge is ensuring effective access to a lawyer and to legal aid in both the executing and issuing states.⁹⁰ Typically an

arrested person will have access to a lawyer in the executing state (although that lawyer may not be familiar with EAW proceedings and not in a position to provide effective legal assistance). However, it remains a huge challenge for the arrested person also to have access to a lawyer in the state that issued the EAW. Yet the role of the lawyer in the issuing state is crucial. They can assist the lawyer in the executing state by providing information about the procedure for issuing an EAW and the possibilities for challenging the EAW before surrender is ordered. In some cases (where surrender would be disproportionate), it is possible for the lawyer in the issuing Member State to encourage the withdrawal of the EAW and suggest alternative measures (if they are necessary). They will also play an invaluable role in gathering information about fundamental rights concerns attached to surrender, such as in relation to the right to a fair trial and prison conditions in the issuing Member State. This information is necessary to enable the court in the executing state to examine any fundamental rights challenges to the execution of the EAW.

- 5.5** In practice, however, practitioners (including our LEAP network members) continue to report how difficult it is for a requested person to access a lawyer in the issuing state before surrender (i.e., when they are still in the executing Member State),⁹¹ due to a lack of access to information about how to appoint a lawyer in another state and in respect of availability of legal aid. These difficulties are also reported by the EU Fundamental Rights Agency ('FRA'). Their findings show that access to a lawyer in the issuing state is "problematic", as authorities simply inform the requested persons of their right to access a lawyer but provide no practical assistance. This means that requested persons, their relatives or the lawyer of the executing state are expected to make the necessary arrangements, which is not always possible. In Bulgaria and Greece, for instance, no information is provided as the appointment of a lawyer is considered to be a matter of the issuing state only.⁹² The Commission's report on the implementation of the Access to a Lawyer Directive recognises that legislation in four Member States does not reflect the right of requested persons to appoint a lawyer in the issuing Member State.⁹³ The Commission's report does not name the Member States (undermining transparency about these issues). Some five Member States do not clearly ensure that requested persons receive information about this right without undue delay⁹⁴ and the legislation in ten Member States does not transpose the obligation to inform the requested person to help them appoint a lawyer in the issuing state.⁹⁵

CASE STUDY: The key role of lawyers in preventing unnecessary detention

On 15 June 2020, a young man in his early 20's was arrested in Portugal pursuant to a German EAW. The charge – attempted armed robbery – was serious and could lead to a maximum sentence of 15 years' imprisonment in Germany. But when Portuguese LEAP member Vania Costa Ramos was contacted by the young man's family, she understood that there was more to the case than it first seemed and that in the circumstances, detention was completely disproportionate and unnecessary.

This young man, a German citizen, had moved to Portugal with his girlfriend in March 2019. He had a stable job and no criminal or police record in Portugal. He had left Germany because, by his own admission, he had got caught up with the wrong crowd and got himself into trouble, but in Portugal he had been able to get his life back on track. As the investigation progressed in Germany, the young man's status switched from witness to suspect.

Rather than contact the young man in Portugal, the prosecutor issued an EAW on 2 April 2020 even though no trial date had been set and no indictment had been issued. It was clear he had not escaped prosecution or trial, having had instructed a lawyer who gave his updated address to the prosecutor in charge of the investigation and informed he was available to come to Germany if needed. In the meantime, an indictment was issued and served to him in Portugal. But no summons was sent, nor was a trial date scheduled.

Shortly afterwards, to his great surprise, the young man was arrested. His family put Vania in touch with his German lawyer. While Vania and her colleague Diana Silva Pereira challenged the need for pre-trial detention in Portugal pending the decision on surrender, the German lawyer applied to the German court to withdraw the EAW and accept, instead, a financial security of EUR 5,000. The young man (with the help of friends and family) was in a fortunate position to be able to offer that – which is not the case for many people who are accused of crimes. He was also fortunate that Vania was fluent in German, too, which hugely helped the cooperation with the German lawyer and client-lawyer communication. Interpretation is far from readily available in Portugal.

The challenges initiated in both executing and issuing countries were based on information relating to the young man's personal situation, that the lawyers gathered from the young man and his family – information that the German prosecutor (who is in principle considered to be 'impartial') sought to gather. The information related to the young man's personal situation, which clearly showed how disproportionate the EAW was and that he was not a flight risk – which is automatically presumed in Portugal in the context of an EAW. The young man had simply exercised his right to free movement in the EU to rebuild his life in Portugal. On 17 June 2020, Vania and Diana obtained bail for their client in Portugal which meant that their client was released shortly after arrest. The court imposed certain conditions, such as a prohibition to leave the country and to attend a police station.

This was an important first win, which allowed the young man to be released after two days and to keep his job. However, the EAW proceedings were still ongoing, and he was facing surrender. Vania and Diana sought to challenge the lack of proportionality of the EAW in the Portuguese court, but this had little chance of succeeding as it is not recognised by law as a formal ground to refuse to surrender. It was key that the German lawyer, in parallel to Vania and Diana's effort, challenge the decision to issue the EAW back in Germany. And this meant getting access to the case file of the German court, to understand the basis for the national arrest warrant, on which the EAW was based. This is how the German lawyer discovered that a trial date had not even been set and was able to argue that there were no grounds in German law for detention. Armed with this information, the lawyer made a formal application against the decision to issue the EAW in the German court on 8 July 2020. He used the information that Vania and Diana had collected to obtain the client's release in Portugal to prove that the mere fact that the young man was in Portugal did not mean that there was a flight risk. On 8 July 2020, the German court decided to suspend the national arrest warrant and to withdraw the EAW, which happened on the 14 July 2020 after bail had been posted.

The young man managed to keep his job, his relationship and continue his new life in Portugal. A few months later he was eventually given a suspended two-year sentence for his part in the attempted armed robbery – meaning the German court did not consider it necessary for him to end up in prison for his actions. Had it not been for the swift and engaged action of both his lawyers in Portugal and in Germany, he may have spent months in pre-trial detention pending trial, losing everything he had managed to rebuild.

- 5.6 Access to case files:** The second key implementation challenge is around access to the case file. Access to the case materials gathered by investigating authorities is crucial to enable an effective defence. Access to the file is enshrined in EU law on the context of domestic proceedings.⁹⁶ The CJEU states that the defence must be granted “a genuine opportunity to have access to the case materials” to ensure respect for the rights of defence and the fairness of the proceedings.⁹⁷ In the context of EAW proceedings, there is the added complexity that a person who is arrested in one country pursuant to an EAW will need to have access to: (1) the information that the executing Member State has (i.e. typically not more than the EAW form)⁹⁸ and (2) the file in the issuing country. This is because EAWs are based on national arrest warrants and a person needs to understand the grounds of the underlying national arrest warrant. Without this information, the ability to challenge the surrender is drastically impaired. In particular, the proportionality of the EAW can only be challenged if the person knows the grounds on which the decision to issue the EAW is based. However, in recent case-law, the CJEU has opted not to recognise the right to access the case file to persons who are arrested for the purposes of execution of an EAW. In other words, the right of access to the materials of the case does not apply in EAW proceedings.⁹⁹ Therefore, a requested person only has the right to information about the EAW and its contents, and information relating to the offence (legal classification, circumstances, penalty imposed).¹⁰⁰
- 5.7** Access to the case file in the issuing country is closely linked to the ability to access legal assistance in the issuing country, because it requires cooperation with the lawyer in the issuing state to access and review the case file. However, many issuing Member States do not recognise a right of access to the case file upon arrest in the executing Member State on the foot of an EAW issued by that Member State. Instead, access to the case file held by the issuing state is only permitted after surrender and the person is in the issuing country. This means in practice that the requested person will be detained and transferred to the issuing Member State, where they will be detained again for days or weeks, before being able to seek access to the case file and challenge the detention and the EAW on which surrender is based. This practice renders illusory the concept of “effective judicial protection”.
- 5.8** This is problematic in many Member States. For instance where France issues an EAW, there is no legal avenue to enable access to the case file until after the requested person is surrendered to France.¹⁰¹ In fact, the requested person is not considered to be a party to the proceedings until the person is interrogated by the judge who issued the national arrest warrant in the judge's office (therefore, only after surrender to France) even if the person appointed a lawyer to represent them in France prior to their surrender.¹⁰² This results in an unequal treatment between persons depending on whether they are located in France or in another EU Member State. By preventing people from exercising their right to access their case file until after surrender, they are prevented from the right to challenge the issuing of the EAW and obtain an effective remedy. In effect, people are being penalised for exercising their right to free movement within the EU.
- 5.9** In contrast, in Germany the court in Karlsruhe refused to surrender a person to Poland, highlighting not only rule of law concerns but also the fact that the person’s lawyer had been denied access to the case files in Poland. This is a welcome approach, and it is hoped that it will be extended beyond this case, which was characterised by a specific set of facts (the requested person had dual Polish and German nationalities and was also prosecuted in Germany, where he expressed a preference to stand trial).¹⁰³

- 5.10 Interpretation and translation:** A third key problematic area of implementation is access to interpretation and translation for people who do not speak the language of the country in which they are arrested, including pursuant to an EAW. Where needed, translation and interpretation services must be provided so that lawyers are able to communicate with their clients. This right is protected under EU law,¹⁰⁴ however, in a Fair Trials study on the effectiveness of legal assistance in pre-trial detention,¹⁰⁵ our partners reported many practical obstacles to accessing interpretation services. In Greece, for instance, lawyers reported relying on other detainees to help with interpretation due to the severe shortage of interpreters at the pre-trial stage of the criminal proceedings. Other practical issues included an inadequate assessment of the detained person's knowledge of the national language and issues regarding the quality of translation and interpretations services (for example, in Bulgaria, Greece and Italy there is no guarantee of a minimum standard of quality of interpretation).
- 5.11 Right to challenge:** Taken as a whole, ineffective defence rights mean that there is limited scope to challenge an EAW before surrender, and obtain an effective remedy. In our view, Article 47(1) of the Charter and Article 13 of the ECHR, which guarantee the right to an effective judicial remedy, require that a person subject to an EAW must enjoy effective judicial protection *before* they are surrendered: "given the risk of impingement on the right to liberty that is inherent in the issuing of an EAW, the option to challenge it by way of court proceedings should be available as soon as the decision to issue it has been adopted."¹⁰⁶ The CJEU recently indicated that a person must be afforded effective judicial protection before being surrendered, which "presupposes, therefore, that judicial review of either the European arrest warrant or the judicial decision on which it is based is possible before that warrant is executed."¹⁰⁷ But the CJEU subsequently suggested that this does not require a right to challenge the decision to issue an EAW before surrender.¹⁰⁸

CASE STUDY: Sentenced to prison in a case of mistaken identity

In 2015, a French court tried, convicted and sentenced British citizen, Bilal Choudhary to three years imprisonment for offences of fraud. However, Mr. Choudhary knew nothing of the case or the allegations as his identity had been stolen and his details used to commit the offences.¹⁰⁹

Mr. Choudhary only learned about the case when he was arrested on a European Arrest Warrant at home in the UK in February 2018. He immediately protested his innocence and adduced evidence of the theft of his identity; his passport was lost and cancelled 5 years before the offences even took place.

The French authorities relied upon this cancelled passport but did not supply a copy of it for over a year after his arrest. When they did, it revealed that his photograph had been replaced with that of someone else. Undeterred, the French authorities then provided the photograph and fingerprints of 'Bilal Choudhary' whom they claim had been arrested in France in 2013.

However, neither that photograph, nor the fingerprints matched Mr. Choudhary. Yet the French authorities refused either to review their case, interview Mr. Choudhary or otherwise withdraw their extradition request.

Their position, maintained on appeal, was that he must be extradited and held in prison for their case to be reviewed. The French authorities only relented when faced with a challenge to the legality of his arrest in the UK and evidence emerged linking the man arrested in France under Mr. Choudhary's name to the offences.¹¹⁰

- 5.12** The absence of a right to challenge in the EAW Framework Decision means that the right is left to national legal frameworks. As the European Parliament noted, this leads to uncertainty and inconsistent practices.¹¹¹

Recommendations

- 5.13** EU law standards cannot fall below ECHR standards and must be interpreted in the light of the jurisprudence of the ECtHR.¹¹² The ECtHR has, in relation to Article 6 of the ECHR (right to a fair trial) said that ECHR standards are not “theoretical or illusory” but “concrete and effective”. The European Commission has the role of enforcing EU law, and must ensure that Member States implement the EU standards enshrined in the Procedural Rights Directives in a way that makes them concrete and effective.¹¹³ It is necessary to ensure greater coherence across the EAW and the Procedural Rights Directives, in law and in practice.

- 5.14** The European Commission must:

- Where necessary, initiate infringement proceedings against Member States who fail to implement effectively and in practice (notwithstanding the legal transposition) aspects of the Procedural Rights Directives.
- Continuously monitor the implementation of the Procedural Rights Directives, particularly the implementation of a mechanism to ensure access to legal assistance in both issuing and executing Member States and access to interpretation and translation services in EAW proceedings. Digital solutions should be considered to facilitate access to a lawyer in the issuing Member State and cooperation between lawyers.
- Adopt digital solutions to promote early access to the case file in both the executing and issuing Member States (with guidance that such access must be made available before surrender to enable the effective exercise of defence rights).
- Ensure that Member States provide appropriate funding for legal aid to people requested under EAWs, including to cover legal assistance in both the issuing and executing Member States before surrender is ordered, and to cover interpretation and translation costs.
- Adopt supplementary legislation on the right to challenge a decision to issue an EAW prior to surrender.

6. Priority #5: Transparency and oversight

The problem

- 6.1** Each national court has the fundamental role (and duty) of checking the legality of the use of coercive instruments, such as the EAW, by investigating authorities. This is a key function embedded in the operation of the rule of law, to prevent the misuse of state powers and to uphold people's fundamental rights. And to be able to exercise meaningful oversight and protection, courts require access to information to make an informed decision about the risks of fundamental rights violations. When deciding whether to execute an EAW, courts must assess whether there are substantial grounds for believing that, following surrender, the person will run the risk of having their fundamental rights violated. The two-stage test developed by the CJEU (to date, in respect of the right to be free from inhuman and degrading treatment, and the right to a fair trial) requires executing authorities to verify:
- (a) general and systemic deficiencies in the issuing state; and
 - (b) whether there is a real individualised risk of violation of the fundamental rights of the person concerned.¹¹⁴
- 6.2** The primary source of information comes from the issuing authorities themselves. The CJEU requires executing authorities to request the additional information required from issuing authorities. However, this can be a slow process and may lead to increased periods of pre-trial detention for the person waiting for the result of their challenge to surrender.¹¹⁵ The CJEU has indicated that executing authorities must not surrender someone under an EAW until the requesting Member State has provided sufficient information to demonstrate that the requested person is not at risk of a fundamental rights violation.¹¹⁶ If sufficient information is not forthcoming within a "reasonable period", the judge may decide to end the surrender proceedings.
- 6.3** The approach developed by the CJEU requires executing authorities to place significant weight on the information provided by issuing states, but that information may not fully accurate, sincere, complete, or up to date. Executing authorities cannot rely exclusively on information provided by the issuing authorities. Principles of fairness require that the requested person also has an opportunity to put forward their own information. The sources of information however remain limited. As a result, courts and lawyers report that it is difficult to obtain up-to-date, accurate information about the situation in the issuing Member State, on which to base an informed decision on surrender.
- 6.4** It is well established that courts have a positive obligation to ensure that prison conditions are consistent with human dignity and that thorough, effective investigations are carried out in the event of rights violations.¹¹⁷
- 6.5** In this respect, there have been developments in relation to detention conditions, but challenges remain:
- (a) Some courts collate information about prison conditions, but it is hard to make sure this remains up to date. Often this is presented by the defence but sometimes by the Court on its own motion (where there is not a specialist lawyer).

- (b) Requests for further information from issuing Member States can take a long time and sometimes these do not answer the questions raised.
- (c) Requesting further information can result in long periods of detention for requested persons. There are regular reviews and proceedings which may be suspended if information is not given.
- (d) Some lawyers cite case law from other Member States about the approach to prison condition challenges but there is no process for direct exchange between courts.
- (e) At the end of 2019, the FRA launched a database on detention conditions,¹¹⁸ which provides information on selected aspects of detention in all Member States, such as cell space, sanitary conditions, access to healthcare and protection from violence, but the database remains limited in scope (in particular, it does not include any information from civil society).

6.6 The problematic functioning of such a test is particularly striking regarding risks to the right to a fair trial. When assessing whether the surrender of the requested person would lead to a breach of their fundamental right to a fair trial, the executing authority must undertake both a generic assessment of the system of justice in the issuing Member State, and a specific assessment of the impact that any identified deficiencies will have on the requested person.¹¹⁹ The assessment of the EAW conducted by the European Parliamentary Research Service¹²⁰ also included the views of one practitioner that despite the CJEU two-stage test, there continued to be a "disappointing lack of engagement with the realities of fair trials infringements" which seems to reflect a traditional "high level of confidence" in other Member States even if it was unwarranted.

6.7 The CJEU's two-stage approach is particularly challenging to apply in practice:

- (a) Even where it is accepted that there are systemic rule of law problems, the need to demonstrate their likely impact on individual cases is almost impossible to apply.
- (b) While the situation in Poland is relatively well known, there is less information on the situation in Hungary and other Member States.
- (c) It is still unclear how CJEU case law requiring structural independence to qualify as a 'judicial authority' applies in the context of Member States with systemic rule of law problems.
- (d) In effect, the second stage of the CJEU's required assessment carries an extremely high burden of proof for the requested person, which does not consider the practical difficulties and potential ramifications of seeking additional, detailed information.
- (e) Many of the issues with respect to the application of the two-stage test require expertise on the issuing Member State; legal aid in the executing Member State does not always fund lawyers in the issuing Member States to provide this expertise.

6.8 In the current system, too much reliance is placed on assurances by the issuing authorities. This is problematic from the perspective of fundamental rights protection. Fair Trials is not aware of any national court or body which systematically monitors compliance with assurances (for example, to ensure that suspects are not moved to facilities with worse conditions than those promised in the assurance). The lack of systematic monitoring of assurances makes it impossible to know how often these are used, what the content of the assurances is, and

whether they are complied with. The ECtHR has provided guidance on safeguards in the use of assurances,¹²¹ but without sufficient monitoring, it is difficult to see how these are being respected in practice in the context of EAW cases.

- 6.9** Where courts are not in a position to identify risks to violations to fundamental rights and requested persons not able to make their case about the existence of such a risks, violations post-surrender are more than likely to be entirely overlooked and left unremedied. This is because at post-surrender stage, there is no mechanism in place to monitor compliance with assurances provided by issuing authorities (for example, to ensure that suspects are not moved to facilities with worse conditions than those promised in the assurance). The CJEU has recognised that the issuing authority may give assurances that the person, for instance, would not be subject to inhuman or degrading treatment, irrespective of the prison. In such a case, the executing judicial authority must rely on the assurance by virtue of the principle of mutual trust, at least in the absence of any specific indications that the conditions in a detention centre violate Article 4 of the Charter.¹²²
- 6.10** In practice, the executing Member State has no visibility of what happens post surrender, i.e., whether the person has access to a lawyer or whether “assurances” are complied with. There is no systematic mechanism for ensuring that the information is accurate and that any assurances made by the issuing Member State are respected post-surrender. Input from LEAP members suggests that assurances are often breached, with no challenge possible post-surrender.
- 6.11** Moreover, The European Commission is failing to systematically collect data regarding the use of EU law instruments, which is necessary to ensure meaningful oversight. The European Parliament highlights “the absence of a comprehensive data system enabling the establishment of reliable qualitative and quantitative statistics on the issue, execution or refusal of EAWs”.¹²³ The absence of meaningful data collection restricts the Commission’s key role to oversee and monitor the use of EU law instruments by Member States authorities, leaving abuses unchecked.

In parallel, the growing rule of law crisis is increasingly undermining judicial cooperation, including the functioning of the EAW. Recently, there have been cases in both the Netherlands and Germany suspending extraditions to Poland, which give indications that some courts are moving away from the traditional level of confidence and rejecting the application of the two-stage test.¹²⁴ This approach is not surprising in the light of the challenges to the rule of law in the EU.

Recommendations

- 6.12** In September 2020, the European Commission identified in its first report on rule of law, “cases where the resilience of rule of law safeguards is being tested and where shortcomings become more evident”.¹²⁵ Arguably the most pressing issue is whether it is appropriate to permit EAWs at all from authorities in countries where there are questions over the independence of the judiciary. There is a need for EU intervention to guide judicial authorities and support mutual trust between member states.
- 6.13** Courts and lawyers must be placed in a position to apply the CJEU’s fundamental rights risk assessment, and this means quick access to up-to-date, specific information about fundamental rights in issuing states. Access to information is fundamental to ensure a meaningful fundamental rights check before surrender is ordered. Where safeguards,

including the right to effective judicial protection, cannot be guaranteed due to rule of law concerns in a Member State, it may be appropriate to suspend judicial cooperation mechanisms such as the EAW with that Member State altogether pending the outcome of a political process. The CJEU could be equipped with a clear possibility to enforce a 'freezing mechanism'.¹²⁶ The EU should not expect courts in individual Member States to remedy systemic breaches of EU values, even if they are obliged to secure the rights of individuals appearing before them.¹²⁷

6.14 A key part of establishing trust in the EAW is to create transparency over its use and ensure effective oversight.

6.15 Recommendations for the European Commission:

- **Adopt a legal obligation for Member States to collect and share with the European Commission reliable and comparable quantitative data (for instance, through a common digital platform) regarding the use of the EAW (including by type of offence, length of pre-trial detention).**
- **Set an obligation to put an end to EAW proceedings within a reasonable time limit where information necessary to decide whether to surrender is not available.**
- **Adopt a suspension mechanism where there are established generalised rule of law deficiencies in a Member State affecting judicial independence and therefore the right to a fair trial.**
- **Initiate a study and a consultation on setting up a system to monitor assurances given by issuing states post-surrender.**

Endnotes

¹ European Commission, [Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018](#), Commission staff working document, SWD (2020) 127 final, 2 July 2020.

² [REPORT](#) from the Commission to the EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States COM/2020/270 final, 3 July 2020; European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant, European Implementation Assessment](#), June 2020.

³ [LEAP](#) is an EU-wide network of legal experts which includes criminal defence practitioners, civil society and academic institutions.

⁴ See European Commission, [2020 Rule of Law Report – the rule of law situation in the European Union](#), 30 September 2020.

⁵ See 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)), 20 January 2021.

⁶ The Charter of Fundamental Rights of the European Union ([OJ C 326, 26.10.2012, p. 391](#)) is binding on Member States (and their courts) when implementing EU law, including the EAW Framework Decision, in accordance with Article 51(1) of the Charter. See CJEU, [Case C-414/30 MM](#), judgment of 13 January 2021, paragraph 71.

⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, ([OJ L 190, 18.7.2002, p. 1–20](#)).

⁸ Article 2(1) of the EAW Framework Decision states: “A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months”.

⁹ Unofficial translation from Portuguese, Portuguese Supreme Court, Case 739/20.9YRLSB-S1, ruling of 3 June 2020.

¹⁰ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), ([OJ C 285, 29.8.2017, p. 135–140](#)), para F (5).

¹¹ See 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)), paragraph 7: “Underlines that the EAW should not be misused for minor offences, where grounds for pre-trial detention do not exist; recalls that use of the EAW should be limited to serious offences where it is strictly necessary and proportionate”.

¹² Article LAW.SURR.77, [Trade and Cooperation Agreement](#) between the EU and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.

¹³ CJEU, [Joined Cases C-508/18 OG and C-82/19 PPU PI and Case C-82/19 PPU](#), Judgment of 27 May 2019, ECLI:EU:C:2019:456, para. 71 and 73; CJEU, [Case C-509/18 PF](#), Judgment of 27 May 2019 (GC), ECLI:EU:C:2019:457; CJEU, [Case C-489/19 PPU, NJ](#), Judgment of 9 October 2019, ECLI:EU:C:2019:849.

¹⁴ Article 52(1) of the Charter: “Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

¹⁵ CJEU, [Joined Cases C-566/19 PPU JR and C-626/19 PPU YC](#), Judgment of 12 December 2019, ECLI:EU:C:2019:1077, para. 63.

¹⁶ *Ibid.*, para. 65.

¹⁷ European Commission, [Handbook on how to issue and execute a European Arrest Warrant](#), (OJ C 335, 6.10.2017, p. 1–83), 6 October 2017, p. 13.

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- ¹⁸ Fair Trials, [Beyond Surrender: Putting human rights at the heart of the European Arrest Warrant](#), 28 June 2018.
- ¹⁹ Article 1(1) of the EAW Framework Decision.
- ²⁰ Fair Trials, [Beyond the emergency of the COVID-19 pandemic - Lessons for defence rights in Europe](#), June 2020.
- ²¹ Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#), Report, p. 33, May 2016.
- ²² Cour d'Appel de Paris, Dossier No. 2019/02894, Arrêt du 8 Janvier 2020.
- ²³ Fair Trials, [Beyond Surrender: Putting human rights at the heart of the European Arrest Warrant](#), 28 June 2018.
- ²⁴ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, ([OJ L 130, 1.5.2014, p. 1–36](#)).
- ²⁵ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, ([OJ L 294, 11.11.2009, p. 20–40](#)).
- ²⁶ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, ([OJ L 337, 16.12.2008, p. 102–122](#)).
- ²⁷ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, ([OJ L 327, 5.12.2008, p. 27–46](#)).
- ²⁸ Fair Trials, [Overuse of Detention in Cross-Border Proceedings](#), February 2021.
- ²⁹ DETOUR - Towards Pre-trial Detention as Ultima Ratio, [Comparative Report](#), December 2017.
- ³⁰ Stefano Montaldo, European Forum, Special focus on pre-trial detention and its alternatives under EU law: an introduction, 4 November 2020, pp. 1-4.
- ³¹ CJEU, [Case C-241/15 Bob-Dogi](#), Judgment of 1 June 2016, ECLI:EU:C:2016:385.
- ³² CJEU, [Case C-414/20 PPU, MM](#), Judgment of 13 January 2021, paragraph 65: “where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection”.
- ³³ CJEU, [Case C-489/19 PPU, NJ](#), Judgment of 9 October 2019, ECLI:EU:C:2019:849.
- ³⁴ CJEU, [Joined Cases C-566/19 PPU JR and C-626/19 PPU YC](#), Judgment of 12 December 2019, ECLI:EU:C:2019:1077. The CJEU found that the French system provides effective judicial protection. This system provides that EAWs for the purposes of criminal investigations can only be issued after a judge has issued a national arrest warrant. The CJEU considered that the proportionality of the EAW may be assessed at the time the national arrest warrant is issued (i.e. prior to or at the time of issuing the EAW) and the decision to issue an EAW can be subject to an annulment challenge. These factors satisfy the requirements of effective judicial protection.
- ³⁵ CJEU, [Case C-625/19 PPU XD](#), Judgment of 12 December 2019, ECLI:EU:C:2019:1078. The CJEU found that the Swedish system, which requires that a decision to issue an EAW be preceded by a court decision to order pre-trial detention, is sufficient to ensure effective judicial protection where the court verifies the conditions and proportionality of the EAW during the hearing in relation to pre-trial detention. This is despite the lack of a standalone appeal procedure in relation the decision to issue the EAW.
- ³⁶ CJEU, [Case C-648/20 PPU, PI](#), Judgment of 10 March 2021.
- ³⁷ CJEU, [Case C-414/20 PPU, MM](#), Judgment of 13 January 2021, paragraph 69.

³⁸ CJEU, [Case C-649/19 PPU, IR](#), Judgment of 28 January 2021, paragraph 79: “the right to effective judicial protection does not require that the right, provided for in the legislation of the issuing Member State, to challenge the decision to issue a European arrest warrant for the purposes of criminal prosecution can be exercised before the surrender of the person concerned to the competent authorities of that Member State.”

³⁹ CJEU, [Case C-414/20 PPU, MM](#), Judgment of 13 January 2021, paragraph 70.

⁴⁰ Improving Defence Rights, <https://eucrim.eu/articles/improving-defence-rights/#docx-to-html-fn20>.

⁴¹ For instance, the European Investigation Order includes a proportionality assessment in Article 6(1) of Directive 2014/41/EU.

⁴² European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), ([OJ C 285, 29.8.2017, p. 135–140](#)).

⁴³ In this respect, it is interesting to note that the CJEU emphasized the detailed proportionality test conducted (in principle) by Austrian courts when assessing the proportionality of the EAW: “the review of proportionality carried out by that court relates, in the context of the endorsement of a national arrest warrant, to the effects of the deprivation of liberty alone caused by it and, in the context of the endorsement of a European arrest warrant, to the impinging on the rights of the person concerned which goes beyond the infringements of his right to freedom already examined. The court responsible for the endorsement of a European arrest warrant is required to take into account, in particular, the effects of the surrender procedure and the transfer of the person concerned residing in a Member State other than the Republic of Austria on that person’s social and family relationships”, paragraph 44, CJEU, [Case C-489/19 PPU](#), Judgement of 9 October 2019, ECLI:EU:C:2019:849.

⁴⁴ European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant, European Implementation Assessment](#), June 2020. See also European Criminal Bar Association (ECBA), [Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World](#), 6 September 2020; Fair Trials, [Beyond the emergency of the COVID-19 pandemic - Lessons for defence rights in Europe](#), June 2020. We are not referring here to a general use of video hearings, see in this respect our recommendations in our report.

⁴⁵ Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#), Report, p. 33, May 2016.

⁴⁶ See Article 12 of the EAW Framework Decision titled ‘Keeping the person in detention’ which states that: “When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding”.

⁴⁷ In some legal frameworks, a national arrest warrant may be issued on the only ground that the person is located abroad, e.g. Article 131 of the French Code of Criminal Procedure (although case-law specifies that flight risk needs to be demonstrated).

⁴⁸ Articles 2 and 3 of the Treaty on European Union and Article 10 of Treaty on the Functioning of the European Union and Article 21 of the Charter.

⁴⁹ Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, [Safety Report 2018 - Report on the activities of the criminal justice system](#), December 2019, pp. 113 and following.

⁵⁰ Observatoire International des Prisons – Section Française, [Qui sont les personnes incarcérées?](#), 16 February 2020.

⁵¹ See Institute For Criminal Policy Research (ICPR), Birkbeck College, University of London, [World Prison Brief database](#).

⁵² Article 131 of the French Code of Criminal Procedure.

⁵³ Decision 2014-452 QPC of 27 February 2015.

⁵⁴ Ruling of 13 February 2021, Tribunal Judiciaire de Pontoise (non-published).

- ⁵⁵ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, ([OJ C 295, 4.12.2009, p. 1–3](#)).
- ⁵⁶ See European Parliament, Report on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI), page 6, 8 December 2020.
- ⁵⁷ Opinion of Advocate General Pitruzella, [Case C-653/19 PPU - DK](#), 19 November 2019, paragraph 22.
- ⁵⁸ We note the call from the European Parliament in paragraph 37 of its [resolution of 20 January 2021](#) to impose time limits on pre-trial detention duration. In our view, a much more comprehensive set of standards is necessary.
- ⁵⁹ Such as Directive 2014/41/EU regarding the European Investigation Order, which in Article 9(2) provides that: “[t]he executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State”.
- ⁶⁰ European Parliament, [resolution](#) of 20 January 2021 on the implementation of the EAW and the surrender procedures between Member States, 2019/2207(INI), paragraph T.
- ⁶¹ BVerfG, [decision](#) of the Second Senate of December 1, 2020, 2 BvR 1845/18 , Rn. 1-85.
- ⁶² CJEU, [Joined Cases C-404/15 Aranyosi and Căldăraru and C-659/15 PPU](#), Judgment of 5 April 2016 (GC), ECLI:EU:C:2016:198; CJEU, [Case C-128/18 Doronbatu](#), Judgment of 15 October 2019, ECLI:EU:C:2019:857.
- ⁶³ CJEU, [Joined Cases C-404/15 Aranyosi and Căldăraru and C-659/15 PPU](#), Judgment of 5 April 2016 (GC), ECLI:EU:C:2016:198.
- ⁶⁴ CJEU, [Case C-220/18 PPU, ML](#), Judgment of 25 July 2018, ECLI:EU:C:2018:589, paragraph 98: “the relative brevity of a detention period does not automatically mean that the treatment at issue falls outside the scope of Article 3 of the ECHR when other factors are sufficient to mean that it is caught by that provision.”
- ⁶⁵ CJEU, [Case C-216/18 PPU, LM](#), Judgment of 25 July 2018 (GC), ECLI:EU:C:2018:586.
- ⁶⁶ Fair Trials, [The case of Artur Celmer: An analysis of the latest developments](#), 21 December 2018.
- ⁶⁷ CJEU, [Joined Cases C-354/20 PPU and C-412/20 PPU](#), Judgment of 17 December 2020.
- ⁶⁸ Fair Trials, [Amsterdam court rejects Polish European Arrest Warrant request over rule of law concerns](#), 18 February 2021.
- ⁶⁹ Article 2.2 of the EAW Framework Decision.
- ⁷⁰ Article 2.4 of the EAW Framework Decision.
- ⁷¹ Paragraph 14, 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), 20 January 2021.
- ⁷² For instance, in October 2020 it was [reported](#) that for the first time in more than 30 years, Norway granted asylum to a Polish man who was facing persecution as a result of criminal activity.
- ⁷³ See, e.g. the [report](#) from the EU Agency for Fundamental Rights on the criminalization of migrants in an irregular situation and of persons engaging with them.
- ⁷⁴ See JUSTICIA [call](#) for action against disproportionate COVID-19 criminalisation, 29 May 2020.
- ⁷⁵ See, e.g. the EU Agency for Fundamental Rights, Bulletin #4, [Coronavirus pandemic in the EU – Fundamental Rights Implications](#), June 2020 and Fair Trials’ Covid19 Justice Campaign: <https://www.fairtrials.org/covid19justice>.
- ⁷⁶ Ruling of July 12, 2018, the First Senate for Criminal Matters of the Higher Regional Court of the State of Schleswig-Holstein, <https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201806Puiqdemontenglis.html>.
- ⁷⁷ Sec. 81 of the German Criminal Code.
- ⁷⁸ Art. 125 of the German Criminal Code.

⁷⁹ [Communication](#) from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union (COM/2020/580 final), 30 September 2020.

⁸⁰ See CJEU, [Case C-216/18 PPU, LM](#), Judgement of 25 July 2018 (GC), ECLI:EU:C:2018:586, para. 50. See also CJEU, [Case C-64/16 Associação Sindical dos Juizes Portugueses](#), Judgement of 27 February 2018, ECLI:EU:C:2018:117, para. 33: “national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed”.

⁸¹ Council of the European Union, [The Stockholm Programme – An open and secure Europe serving and protecting the citizens](#), 2 December 2009, p. 3.

⁸² Directive 2010/64/EU of the European parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, ([OJ 2010 L 280, p. 1](#)).

⁸³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, ([OJ 2012 L 142, p. 1](#)).

⁸⁴ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, ([OJ 2013 L 290, p. 1](#)).

⁸⁵ Directive 2016/800 of the European parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused in criminal proceedings, ([OJ L 132, 21.5.2016, p. 1](#)).

⁸⁶ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, ([OJ L 65, 11.3.2016, p. 1](#)).

⁸⁷ Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, ([OJ L 297, 4.11.2016 p. 1](#); [corrigendum OJ L91 5.4.2017, p. 40](#)).

⁸⁸ CJEU, [Joined Cases C-566/19 PPU JR and C-626/19 PPU YC](#), Judgment of 12 December 2019, ECLI:EU:C:2019:1077, para. 72.

⁸⁹ European Parliament, Report on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)), p. 12, 8 December 2020.

⁹⁰ Articles 10(1) and (2) of the Directive on Access to a Lawyer state that persons subject to EAWs have the right of access to a lawyer in the executing Member State upon arrest pursuant to a warrant. Further, Articles 10(4) and (5) recognise the right of the requested person also to appoint a lawyer in the issuing Member State.

⁹¹ See also Vania Costa Ramos, Prof. Dr. Michiel Luchtman, Geanina Munteanu, [Improving Defence Rights](#), eucrim, Issue 3/2020, pp 230-248: “the impact of mutual distrust as well as of lack of procedural safeguards in practice is much deeper and is felt by practitioners and citizens in their daily practice and life”.

⁹² European Union Agency for Fundamental Rights (FRA), [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#), Report, 2019, p. 65.

⁹³ European Commission, [Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with the third persons and with consular authorities while deprived of liberty](#), 26 September 2019.

⁹⁴ This is required by Article 10(4) of the Access to a Lawyer Directive.

⁹⁵ As required by Article 10(5) of the Access to a Lawyer Directive.

⁹⁶ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, ([OJ 2012 L 142, p. 1](#)). See Article 1 of the Directive: “This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights.” In particular, Article 7(2) of the Directive obliges Member States to ensure that suspects or accused persons or their lawyers are granted access to all material evidence in the possession of the competent authorities in order to safeguard the fairness of the proceedings and to prepare the defence.

⁹⁷ CJEU, [Case C-612/15 Kolev and Others](#), Judgement of 5 June 2018, ECLI:EU:C:2018:392.

⁹⁸ For instance in France, it is recognised that suspects are sufficiently informed of the charged even if they are only provided with the EAW decision (Cour de Cassation, Chambre Criminelle, Case 14.80,484, 18 February 2014).

⁹⁹ CJEU,

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=237088&pageIndex=0&doclang=EN&mode=lst&dir=&oc=c:first&part=1&cid=97024> " [Case C-649/19 IR](#), Judgment of 28 January 2021, ECLI:EU:C:2021:75, paragraph 62.

¹⁰⁰ Articles 8 and 11 of the EAW Framework Decision.

¹⁰¹ Article 114 of the French Code of Criminal Procedure

¹⁰² Article 80-1 of the French Code of Criminal Procedure.

¹⁰³ Karlsruhe Court, Decision in case *Ausl 301 AR 104/19* dated 27 November 2020.

¹⁰⁴ Article 2(1) of the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings provides that “Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.” Further, Article 2(8) provides that interpretation provided must be of sufficient quality to safeguard the fairness of proceedings.

¹⁰⁵ Fair Trials, [Where’s my layer: Making legal assistance in pre-trial detention effective](#), Report, October 2019, p. 23.

¹⁰⁶ CJEU, [Joined Cases C-566/19 PPU JR and C-626/19 PPU YC](#), Opinion of Advocate General Campos Sánchez-Bordona delivered on 26 November 2019, ECLI:EU:C:2019:1012, paragraph 87.

¹⁰⁷ CJEU, [Case C-648/20 PPU, PI](#), Judgment of 10 March 2021, paragraphs 47-48.

¹⁰⁸ CJEU, [Case C-649/19 PPU, IR](#), Judgment of 28 January 2021, paragraph 79: “the right to effective judicial protection does not require that the right, provided for in the legislation of the issuing Member State, to challenge the decision to issue a European arrest warrant for the purposes of criminal prosecution can be exercised before the surrender of the person concerned to the competent authorities of that Member State.”

¹⁰⁹ Doughty Street Chambers, [Flagrant miscarriage of justice overturned: victim of identity theft finally discharged on appeal in French extradition request](#), 3 November 2020.

¹¹⁰ England and Wales High Court, [Choudhary v. Prosecutor at the Creteil Tgi, France](#), 26 October 2020.

¹¹¹ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)).

¹¹² Article 10 of the Directive states: “Nothing in this Directive shall be construed as limiting or derogating from any of the rights or procedural safeguards that are ensured under the Charter, the ECHR, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.”

¹¹³ ECtHR, [Airey v. Ireland](#), App. no. 6289/73, Judgement of 9 October 1979, para. 24.

¹¹⁴ CJEU, [Joined Cases C-404/15 Aranyosi and Căldăraru and C-659/15 PPU](#), Judgement of 5 April 2016 (GC), ECLI:EU:C:2016:198; CJEU, [Case C-216/18 PPU, LM](#), Judgement of 25 July 2018 (GC), ECLI:EU:C:2018:586.

¹¹⁵ Pursuant to Articles 15(2) and (3) of the EAW Framework Decision. CJEU, [Joined Cases C-404/15 Aranyosi and Căldăraru and C-659/15 PPU](#), Judgement of 5 April 2016 (GC), ECLI:EU:C:2016:198, para. 95.

¹¹⁶ *Ibid.*

¹¹⁷ “In that regard, it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected (see judgment of the ECtHR in *Torreggiani and Others v. Italy*, Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10, of 8 January 2013, § 65)” CJEU, [Joined Cases C-404/15 Aranyosi and Căldăraru and C-659/15 PPU](#), paragraph 90, judgment of 5 April 2016 (GC), ECLI:EU:C:2016:198.

¹¹⁸ FRA Criminal Detention Database 2015-2019, <https://fra.europa.eu/en/databases/criminaldetention/criminaldetention/Home>.

¹¹⁹ CJEU, [Case C-216/18 PPU, LM](#), Judgement of 25 July 2018 (GC), ECLI:EU:C:2018:586.

¹²⁰ European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant, European Implementation Assessment](#), June 2020, pp. 52-53.

¹²¹ ECtHR, [Othman \(Abu Qatada\) v. The United Kingdom](#), App. no. 8139/09, Judgement of 17 January 2012, para. 189.

¹²² CJEU, [Case C-220/18 PPU, ML](#), Judgement of 25 July 2018, ECLI:EU:C:2018:589.

¹²³ 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)), p. 14.

¹²⁴ In particular, see the pending request for a preliminary ruling in CJEU, [Case C-412/20 PPU - Openbaar Ministerie](#), lodged on 3 September 2020: “Do Framework Decision 2002/584/JHA, 1 the second subparagraph of Article 19(1) of the Treaty on European Union and/or the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union indeed preclude an executing judicial authority from executing an EAW issued by a court in the case where that court does not meet the requirements of effective judicial protection/actual judicial protection, and at the time of issuing the EAW already no longer met those requirements, because the legislation in the issuing Member State does not guarantee the independence of that court, and at the time of issuing the EAW already no longer guaranteed that independence?”.

¹²⁵ European Commission, [2020 Rule of Law Report – the rule of law situation in the European Union](#), 30 September 2020.

¹²⁶ [Sergio Carrera](#), Valsamis Mitsilegas, [Upholding the Rule of Law by Scrutinising Judicial Independence -The Irish Court’s request for a preliminary ruling on the European Arrest Warrant](#), Centre for European Policy Studies (CEPS), 11 April 2018.

¹²⁷ Petra Bárd, Wouter van Ballegooij, [Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM](#), *New Journal of European Criminal Law*, 2018/3, pp. 353–365.