

European arrest warrant defence toolkit

The right to judicial review

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Introduction

The European arrest warrant (EAW) is arguably the most problematic cross-border cooperation instrument in the European Union (EU). The EAW Framework Decision was adopted in 2004, before the Charter of Fundamental Rights of the European Union (the Charter) became a binding instrument equal in its force to the EU treaties.

Based on the presumption of mutual trust, the EAW provides very few safeguards to guarantee proportional use of the instrument and prevent potential abuses.

Some essential procedural rights such as access to a lawyer and legal aid in both the executing and issuing state, the right to interpretation and translation and the right to information (letter of rights in EAW proceedings) as well as the presumption of innocence and protection of rights of a child in criminal proceedings were introduced by EU Procedural Rights Directives.¹

The Court of Justice of the European Union (CJEU) has also specified safeguards around the use of the EAW, where a central safeguard is judicial review both in the issuing state and the executing state.

The principle of mutual trust presumes that the legality and proportionality of arrest, detention and subsequent transfer of the requested person across state borders is reviewed by a judicial body at two levels – first, at the issuing of the national arrest warrant and then, separately, at the issuing of the EAW.

At both levels of judicial review in the issuing state, judicial authorities are required to assess the legality and proportionality of detention and subsequent transfer and whether any other, less intrusive measures could be used to secure the objectives sought by the EAW request.

However, a major flaw in the current EAW system is the fact that, with the exception of very few Member States, the issuing of both the national and the European arrest warrant happens in an essentially one-sided judicial process with no involvement of the defence.

¹ 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](#)); 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](#)); 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](#)); 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](#)); 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](#)); 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).

A defence is neither required nor in practice able to be present at any of these stages, which undermines the effectiveness of judicial review, not allowing judicial authorities to seek the evidence required to fully assess the necessity and proportionality of the arrest requested by the prosecution. The CJEU is also increasingly endorsing a system where effective adversarial review of the EAW based on equality of arms is not possible until the requested person has already been surrendered to the issuing state.²

In the executing state, judicial review involves the presence of the requested person and their lawyer. However, the scope of judicial review in the executing state is limited to the legality of the EAW and a strictly limited number of grounds for non-execution of the EAW, none of which address a potentially disproportional use of an EAW.

In recent years, the CJEU has filled some gaps in fundamental rights protection within the Council Framework Decision of 13 June 2002 on the European arrest warrant, and the surrender procedures between Member States 2002/584/JHA (FD EAW) by adding potential violations of the prohibition of torture and inhuman and degrading treatment³ and flagrant violations of the right to a fair trial to grounds for non-execution of the EAW.⁴

The CJEU derived these additional grounds for non-execution of the EAW from the general obligation to “respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union” in Article 1(3) of the FD EAW.

However, in these cases, it is difficult to prove the existence of the conditions required to refuse an execution of the EAW. This is particularly true in the case of flagrant denial of justice as it practically requires the requested person to present evidence of a future violation of the right to a fair trial in an individual case that has not yet been tried. Meaningful review of the EAW is also undermined by the inability of the defence to access case materials in the issuing state.

This makes the role of defence lawyers in protecting their client’s rights in EAW proceedings challenging but critical, requiring active engagement at all available levels of judicial review. It also requires lawyers to advocate for effective access to procedural rights such as access to a lawyer and case file in the issuing state. Recent successful examples include cases where executing judicial authorities have rejected an EAW issued for purely investigative reasons⁵ or over concerns about the independence of the judiciary in the issuing Member State.⁶

² CJEU, Case [C-396/11](#), *Ciprian Vasile Radu*, 29.01.2013, paras. 39–40; CJEU, [Case C-105/21](#), *IR*, 30.06.2022.

³ CJEU, [Joined Cases C-404/15 and C-659/15 PPU](#), *Aranyosi and Căldăraru* 05.04.2016; CJEU, [Case C-220/18](#), *ML*, 25.07.2018.

⁴ See e.g., CJEU, [Case C-699/21](#), *E.D.L.*, judgment pending.

⁵ Court of Cassation of Italy, Section VI, No. 14937/2022, 14.04.2022; an unofficial translation available [here](#).

⁶ Fair Trials, [Amsterdam court rejects Polish European Arrest Warrant request over rule of law concerns](#), 2021.

This section of the defence toolkit provides a brief legal analysis of the nature and scope of judicial review of the EAW in both the issuing and executing states. It does not attempt to represent a comprehensive, in depth analysis of all legal and practical issues concerning the protection of the requested person's rights in EAW proceedings. Instead, it provides brief guidance on understanding the nature and scope of judicial review and the challenges likely faced by the defence, as well as tools based on the Charter and the Directives to support lawyers to organise an effective defence. This toolkit also provides useful in-depth reference material to more detailed legal analysis and practice reports that will assist in building a defence in individual EAW cases.

Use this chapter of the defence toolkit together with other chapters on: access to a lawyer and legal aid, the right to information and translation, and access to case file. **Click here to find them all on the Fair Trials website.**

As part of this project, Fair Trials produced an accompanying film for each chapter, **click here to watch them on YouTube.**

Right to effective judicial protection

Effective judicial review of any decision or action which restricts the fundamental rights of a person is a fundamental principle of human rights, a distinct fundamental right, and a general principle of EU law.

In its importance, it is equal to that of the right to a fair trial i.e., the right to effective judicial protection preserves all other rights by giving people the ability to seek to prevent and remedy potential violations of their rights. In the context of cross-border cooperation mechanisms such as the EAW, which involve arrest, detention, and subsequent transfer of the requested person across state borders, effective judicial protection is particularly important. At present, however, as will be explained in the sections below, under EU law as it currently stands, an effective remedy is available to the requested person only after their surrender, at which point it can only be compensatory.⁷

Arrest, detention, and transfer across borders does not only affect a person's right to liberty, but also has serious implications on their private life, work, education, health, and can even threaten their life.⁸

In the EU, these rights also include the fundamental freedoms of all EU citizens – the freedom to move, reside, work, and study anywhere within the EU. Effective protection of these rights requires an independent and adversarial review of any decision that severely restricts them. Such a review must be effective in law and practice which means, crucially, that it should be able to prevent unlawful, disproportional, or otherwise unjustified transfers of persons across state borders before they happen.

Article 47 of the Charter spells out the right to effective judicial protection:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”

Effective judicial protection is therefore a right protected under primary EU law, having the same legal force as the founding Treaties⁹ and must be taken into account when interpreting and applying the FD EAW.

The CJEU interprets effective judicial protection as a general principle under the EU law and one that is shared among Member States in their constitutional traditions:

“[t]he principle of the effective judicial protection of individuals' rights under EU law [...] is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human

⁷ See CJEU, Case C-105/21, IR, 30.06.2022, para. 52.

⁸ See e.g., CJEU, Case C-699/21, E.D.L., [Summary of request for preliminary ruling](#) pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, 22 November 2021.

⁹ Article 6(1) of Treaty on the European Union (Lisbon Treaty), OJ C 326, 26.10.2012.

Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter.”¹⁰

Article 47 of the Charter on the right to effective remedy and to a fair trial can be invoked directly in disputes falling within the scope of EU law. The CJEU ruled in *Egenberger* that Article 47 of the Charter can produce direct effect:

“Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.”¹¹

This means that Article 47 of the Charter can and should be invoked in EAW proceedings on a national level, arguing for effective and adversarial review of proportionality when issuing and executing an EAW as well as for full and effective access to procedural rights.¹²

Features of an effective remedy

Generally, the minimum level of protection of fundamental rights in the EU should be interpreted in harmony with the standards set by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹³ However, Article 47 of the Charter sets a higher standard for the authority tasked with effective judicial protection than Article 13 of the ECHR. The ECHR does not necessarily require the remedy to be ‘judicial’ meaning that a review can also be entrusted to authorities who do not necessarily qualify as ‘courts’ or ‘tribunals’ under the right to a fair trial.

The Charter, on the other hand, requires a higher standard in that regard. Article 47(1) guarantees the “*right to an effective remedy before a tribunal tribunal in compliance with the conditions laid down in this Article,*” which are, according to paragraph two, “*an independent and impartial tribunal previously established by law.*” This means that a “judicial authority” must comply with strict standards of independence and impartiality on an institutional level and while examining individual cases.

For a process providing effective judicial protection (remedy) to satisfy the requirements of Article 47 of the Charter, it must be effective in law and in practice. In particular, the remedy has to offer an opportunity to examine the applicant’s complaint on its merits before an independent court or tribunal capable of reviewing both the relevant facts and law. It must also be able to offer an appropriate preventive or at least compensatory remedy.

¹⁰ CJEU, C-64/16, Associação Sindical dos Juizes Portugueses, 28 February 2018, para. 35.

¹¹ CJEU, C-414/16 Egenberger, 17 April 2018, para. 78, see more on the general principles of application of the Charter in Fair Trials’ [“Practitioners’ Tools on EU law. EU Charter of Fundamental Rights”](#), 2020.

¹² On how to use the Charter in domestic litigation see Fair Trials, “Practitioner’s tools on EU law. EU Charter of Fundamental Rights”, 2020.

¹³ See Article 52(3) of the Charter.

The procedure of this review must comply with minimum guarantees of fairness, similar to those required by the right to a fair trial. Namely, an adversarial process based on equality of arms, the right to be heard, the right to present a defence, the right to a lawyer and other essential procedural rights, and a duly reasoned decision on any restrictions of fundamental rights. Case-law of the European Court of Human Rights (ECtHR) sets several criteria for the process and competence of a 'remedy' to be considered effective under the ECHR:

- the remedy must be accessible, prompt¹⁴ and offer minimum guarantees of fairness by ensuring conditions that enable the applicant to challenge a decision that restricts their rights (e.g., equality of arms;¹⁵ access to information, legal assistance and interpretation services);¹⁶
- the complaint must be addressed on its substance (merits);¹⁷
- the remedy must be capable of directly remedying the situation by granting appropriate relief,¹⁸ i.e., the remedy must be capable of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred.¹⁹

A requirement that the remedy offers minimum guarantees of fairness also requires that the requested person be granted an opportunity to effectively exercise essential rights such as timely and confidential access to a lawyer. In EAW proceedings, that means both a lawyer in the issuing state and in the executing state, as guaranteed by Article 10 of the Directive 2013/48/EU.²⁰ It also requires that the requested person be presented with all case materials that are necessary to enable meaningful review of the issues relating to the arrest before the judicial authority. This might require the assistance of a qualified interpreter or translator.

For further analysis on procedural rights in EAW proceedings, see the other chapters of this defence toolkit on the **Fair Trials website**.

Please also refer to the **case-law analysis repository** which contains legal analysis of the latest CJEU jurisprudence.

¹⁴ ECtHR, *Çelik and İmret v. Turkey*, [No. 44093/98](#), 26 October 2004, para. 59.

¹⁵ ECtHR, *Csüllög v. Hungary*, [No. 30042/08](#), 7 June 2011, para. 46.

¹⁶ ECtHR, *Abdolkhani and Karimnia v. Turkey*, [No. 30471/08](#), 22.09.2009, para. 114 and ECtHR, *M.S.S. v. Belgium and Greece*, [No. 30696/09](#), 21.01.2011, para. 301.

¹⁷ ECtHR, *Hasan and Chaush v. Bulgaria*, [No. 30985/96](#), 26 October 2000, para. 96.

¹⁸ ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, [No. 12742/87](#), 29 November 1991.

¹⁹ ECtHR, *Kudla v. Poland*, [No. 30210/96](#), 26 October 2000, para. 158.

²⁰ 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.

Dual judicial protection in the issuing state

Article 8(1) of the FD EAW envisages a system of dual judicial protection in EAW cases in the issuing state. This means that Member States are under an obligation to guarantee careful consideration of a person's fundamental and procedural rights in at least two distinct procedures. Firstly, at the issuing of a distinct national arrest warrant or a final judgement ordering a custodial sentence.²¹ Secondly, the requested person's rights must be protected at the issuing of the EAW (which is based on the national arrest warrant or final sentence).

The CJEU has clarified dual judicial protection as follows:

The European arrest warrant system therefore entails, in view of the requirement laid down in Article 8(1)(c) of the Framework Decision, a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision.²²

Dual legal protection envisaged under the FD EAW means that the EAW procedure is based on the assumption that the issuing state is primarily responsible for the protection of requested persons fundamental and procedural rights and has to provide an effective judicial protection on two levels. The issuing state's judicial authorities are the only institutions where the proportionality of the national arrest warrant or the EAW can be verified, therefore they carry the primary responsibility for the legality of the entire proceedings and should be the primary focus for the defence where a disproportional EAW is issued.

However, a major flaw in the current EAW system is the fact that, aside from very few Member States, the issuing of both the national and European arrest warrant happens in an essentially one-sided judicial process with no involvement of the defence. In these circumstances, the suspect, accused or convicted person cannot be protected as required by the presumption of effective judicial protection. Procedural rights such as the right to a lawyer, access to case materials, the right to submit evidence and to be heard cannot be protected in the absence of defence from the proceedings at this level.

²¹ CJEU, Case C-241/15, *Bob-Dogi*, 01.06.2016, para. 23.

²² CJEU, Case C-241/15, *Bob-Dogi*, 01.06.2016, para. 56.

Thus, under EU law, the basic guarantees of fairness – adversarial process and equality of arms – are not assured in the issuing Member State until the requested person is already surrendered²³ and the impact on their fundamental rights is irreversible.

This was most recently confirmed and endorsed by the CJEU in a line of cases concerning criminal proceedings against IR.²⁴ The court interpreted Article 47, narrowly stating that *“Articles 6 and 47 of the Charter do not require the issuing judicial authority to forward to the person who is the subject of a European arrest warrant within the meaning of Framework Decision 2002/584, before his or her surrender to the competent authorities of the issuing Member State, the national decision on the arrest of that person and information on the possibilities of challenging that decision.”*²⁵ Thus according to the CJEU, the requested person is entitled neither to an adversarial procedure of challenging the national arrest warrant or the EAW in the issuing state nor to the right to information about such possibility. This makes the function of a defence lawyer in the issuing state extremely difficult to fulfil.

The jurisprudence of the ECtHR could be helpful in this regard. The ECtHR places the responsibility for the legality of an extradition request and subsequent proceedings on the requesting (issuing) state.²⁶ As the source of the proceedings is the request of the issuing state, any subsequent arrest or detention of the requested person can be seen as an extension of that request. Even though the person is arrested in the executing state, for the issuing state this deprivation of liberty must be seen as falling under Article 5(1)(c) of the ECHR (detention on the basis of criminal suspicion), which means the requested person should be entitled to an adversarial review of the legality and proportionality of the request as soon as possible. Where there are serious concerns raised regarding the legality or proportionality of the national arrest warrant or EAW, the issuing state is under an obligation to review them in order to guarantee the legality of the requested person’s detention and other restrictions of their fundamental rights, and prevent further violations as soon as possible.

As mentioned above, the FD EAW and the jurisprudence of the CJEU deny such review until after surrender. Therefore, it falls on the lawyer in the issuing state to proactively seek a possibility to challenge the EAW or national arrest warrant under national law. They must work independently of the EAW proceedings in the executing state to challenge the proportionality of the EAW before surrender is carried out.

For more practical suggestions, see **What to do?** on page 16.

²³ CJEU, [Case C-105/21](#), IR, 30.06.2022, para. 52.

²⁴ CJEU, [Case C-105/21](#), IR, 30.06.2022; CJEU, [Case C-649/19](#), IR, 28.01.2021.

²⁵ CJEU, [Case C-105/21](#), IR, 30.06.2022, para. 60.

²⁶ ECtHR, *Vasiliciuc v Republic of Moldova*, [No. 15944/11](#), 02.05.2017, para. 24.

The issuing judicial authority

Article 6(1) of the FD EAW requires that the EAW be issued by the issuing judicial authority. This term has an autonomous meaning under EU law. First and foremost, it requires a sufficient degree of independence to guarantee protection from undue pressure from the executive in order to be able to conduct objective and impartial proportionality assessment in a particular case. The CJEU has clarified that ‘issuing judicial authority’ within the meaning of Article 6(1) of the FD EAW:

*“[I]s capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State and act independently in the execution of those of their responsibilities which are inherent in the issuing of a European arrest warrant, that independence requiring that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive”.*²⁷

This is particularly problematic where an EAW is issued by an authority other than a court (judge). For example, the CJEU has already examined whether prosecutors can be considered ‘judicial authorities’ for the purposes of issuing an EAW in several Member States, including Lithuania,²⁸ Germany,²⁹ Sweden,³⁰ France,³¹ Austria³² and Belgium.³³ While authorities such as public prosecutors are considered to belong to the justice system, and in some contexts fulfil the role of guarantor of rights, their ability to be sufficiently impartial and independent in EAW proceedings should be questioned. Even where they are sufficiently independent, it is questionable that, as party to the subsequent criminal proceedings, they are impartial enough to make a balanced decision on severe restrictions of rights such as the EAW.

According to the CJEU, a public prosecutor may issue an EAW only where:

- he/she participates in the administration of justice in the issuing Member State,
- he/she acts independently, or
- their decision to issue an EAW (including asking whether an EAW is proportionate) may be the subject of separate court proceedings.³⁴

²⁷ CJEU, Joined cases C-508/18 and C-82/19 PPU, OG and PI, 27.05.2019, paras. 51 and 74.

²⁸ CJEU, Case C-509/18, PF, 27.05.2019.

²⁹ CJEU, Joined cases C-508/18 and C-82/19 PPU, OG and PI, 27.05.2019.

³⁰ CJEU, Joined cases C-566/19 PPU and 626/19 PPU, JR and YC, 12.12.2019.

³¹ CJEU, Case C-625/19 PPU, XD, 12.12.2019.

³² CJEU, Case C-489/19 PPU, NJ, 9.10.2019.

³³ CJEU Case C-627/19 PPU, ZB, 12.12.2019.

³⁴ CJEU, Joined Cases C-566/19 PPU and C-626/19 PPU, JR and YC, 12.12.2019.

Thus, where an EAW is issued by a prosecutor of any rank and such decision is not subject to a review by an independent court (judge), this should be brought to the attention of the executing judicial authority, urging it to file a preliminary reference request to the CJEU to review its compatibility with the requirements of the FD EAW.

For more practical suggestions, see ***What to do?*** on page 16.

For an in-depth analysis of law and practice, see ***Useful sources*** on page 22 for reference material.

Scope of judicial review at the issuing of the national arrest warrant

Protection of fundamental rights of the requested person lies with the judicial authorities of the issuing state, which are required to provide effective judicial protection at the issuing of the national arrest warrant or the EAW. In the majority of cases, unless there is a provision requiring mandatory presence of a lawyer in any proceedings concerning deprivation of liberty, a defence lawyer will not be present at the issuing of the national arrest warrant. Therefore, it might not be possible to present any evidence or arguments to counter the prosecutorial request and challenge the assumptions made in the request at this stage.

The legality and judicial reasoning of the national arrest warrant may, however, be challenged when the requested person is arrested in the executing state and the information about the national arrest warrant and the EAW becomes known to them. EU law does not require that the requested person be granted an opportunity to challenge the arrest warrant at this stage, nor allow the issuing judicial authority to inform the requested person about such possibility.³⁵ Therefore, a defence lawyer in the issuing state might need to proactively seek such possibility under national law independently from EAW proceedings. Alternatively, the possibility to review the legality and proportionality of a national arrest warrant should be provided at the latest, after the surrender of the requested person. Any violations of rights and lack of proper assessment should be challenged at the earliest stage, where such challenge becomes possible.

The judicial authority issuing the national arrest warrant must first and foremost verify that the legal requirements and procedures for issuing an arrest warrant are complied with. This means that the national judge must generally verify the existence of a reasonable suspicion that a person has committed a criminal offence and the validity of the reasons their arrest is sought for. A judge is also required to consider whether in the circumstances of the case and for the person in question, deprivation of liberty (an

³⁵ See CJEU, [Case C-105/21](#), IR, 30.06.2022.

arrest) would be proportional or whether there are other, less restrictive means to secure the objectives indicated in the prosecutorial request.

In cases involving a subsequent EAW, it is likely that a person who cannot be located will be considered to have fled the criminal proceedings. In those cases, in addition to verifying the general requirements for effecting a lawful arrest (e.g., existence of a reasonable suspicion, compliance with procedural law), a judge should also verify whether law enforcement authorities have demonstrated sufficient diligence in their attempts to find the suspect. In other words, whether a person has been notified about the criminal proceedings against them and what they are required to do. Also, whether law enforcement authorities have taken all reasonable steps to locate the person even if they are abroad, e.g., trying to reach the person at the address indicated on file (including address abroad), checking all available state registers where their factual address could be found, where possible contacting family members, and other reasonable steps.

For an in-depth analysis of law and practice, see **Useful sources** on page 22 for reference material.

Scope of judicial review at the issuing of the EAW

Proportionality assessment at the issuing of an EAW is not a repetition of the assessment carried out at the issuing of the national arrest warrant. Here a judge must look at the broader impact of deprivation of liberty abroad and the impact of forceful transfer of the person across state borders. This is one of the harshest measures applicable against a person and has enormous, long-lasting impact on all aspects of their life and that of their family.³⁶ Therefore, the judicial authority issuing the EAW is obliged to look at all relevant circumstances of the case to determine whether issuing of an EAW would be lawful, necessary, and proportional.

While assessing the independence of the issuing judicial authority, the CJEU stated:

“In particular, the second level of protection of the rights of the person concerned, requires that the issuing judicial authority review observance of the conditions to be met when issuing the European arrest warrant and examine objectively – taking into account all incriminatory and exculpatory evidence, without being exposed to the risk of being subject to external instructions, in particular from the executive – whether it is proportionate to issue that warrant.”³⁷

³⁶ Fair Trials, [“Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?”](#), 2021, p.6

³⁷ CJEU, Joined cases C-508/18 and C-82/19 PPU, OG and PI, 27.05.2019, paras. 71 and 73.

As in national arrest warrant proceedings, in the majority of EAW cases, unless there is a provision in national law requiring mandatory presence of a lawyer at the issuing of the EAW, a defence lawyer will not be able to participate in these proceedings. Therefore, it might not be possible to present any evidence or challenge presumptions made in the EAW request or demonstrate the disproportionality of the EAW. Latest case law of the CJEU³⁸ also suggests that Member States are prevented from offering a review of the EAW before the person is surrendered. Nevertheless, defence lawyers should proactively seek the opportunity to review the proportionality of the EAW before the surrender of the requested person. Any violations of rights and lack of proper assessment should be challenged at the earliest stage, where such challenge becomes possible.

A crucial aspect of issuing an EAW is its proportionality. Even where the circumstances of the case fall within the scope of Article 2(1) of the FD EAW, the issuing judicial authorities must consider whether issuing an EAW is justified and proportional in a particular case. This assessment needs to involve that of not only the request presented by the prosecutor or other competent authority, but also a review of all exculpatory evidence and circumstances that could sway the judicial decision in favour of a less restrictive measure. In particular, the issuing judicial authorities must assess:

- the seriousness of the offence (for example, the harm or danger it has caused)
- the likely penalty imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence)
- the likelihood of detention of the person in the issuing Member State after surrender
- the interests of the victims of the offence
- whether other judicial cooperation measures such as and European Investigation Order or European Supervision Order could be used instead of issuing an EAW³⁹

Any gaps or mistakes in judicial reasoning regarding these aspects should be raised before the issuing judicial authority as early as possible. In particular, with regard to the last point above, practice shows that EAWs are often issued for reasons other than bringing a person before the trial. Those reasons include needing to conduct a suspect interview or generally to guarantee the presence of the suspect or accused person in the issuing state while they await trial.⁴⁰ These are not valid reasons for issuing an EAW, and more appropriate measures exist to fulfil those objectives.

³⁸ CJEU, [Case C-105/21](#), IR, 30.06.2022.

³⁹ Notices from European Union Institutions, Bodies, Offices and Agencies Commission Notice – [Handbook on how to issue and execute a European arrest warrant](#) (2017/C 335/01), 6 October 2017, Section 2.4.

⁴⁰ Fair Trials, [“Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?”](#), 2021, p.19.

In particular, investigative activities involving the suspect can be carried out under the European Investigation Order⁴¹ without transferring the suspect or accused person to the issuing state. Probational supervision in another EU Member State can also be exercised through the European Supervision Order.⁴²

Some aspects of issuing the EAW, especially those concerning its legality, the independence of the issuing judicial authority and the reasons for issuing the EAW in relation to trial-readiness of the case in the issuing state⁴³ can be raised before the executing authority and could potentially serve as grounds to refuse the execution. Defence lawyers in the issuing state should work closely with the lawyers in the executing state to share information on these aspects and to present it to the executing authority.

For more practical suggestions, see *What to do?* below.

For an in-depth analysis of law and practice, see **Useful sources** on page 22 for reference material.

What to do?

In an individual case

In most countries, lawyers may not have an opportunity to be present and file submissions at the issuing of the national arrest warrant or the EAW. The requested person and their lawyer in the executing state may only be informed about the EAW when the person is already arrested in the executing state. In most cases, this is the earliest point in the proceedings that a lawyer in the issuing state may be appointed.

The CJEU has recently confirmed that EU law does not require that the requested person be afforded a possibility to challenge the EAW in the issuing state and, what is more, the issuing judicial authority is banned from forwarding such information.⁴⁴ However, that does not prevent a lawyer in the issuing state to proactively seek the opportunity to access as complete information on the underlying criminal case as possible and to challenge the issuing of the EAW or national arrest warrant. Therefore, as a lawyer in the issuing state you should:

- proactively seek legal avenues to challenge the issuing of the EAW or national arrest warrant

⁴¹ [Directive 2014/41/EU](#) of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

⁴² [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.

⁴³ On substantive grounds for non-execution see Section E of the European Criminal Bar Association's [Handbook on the EAW for Defence Lawyers](#) "How to Defend a European Arrest Warrant", Part I: Understanding the EAW Framework Decision, 2017.

⁴⁴ CJEU, [Case C-105/21](#), IR, 30.06.2022.

- verify whether the issuing of the national arrest warrant or the EAW complies with the national law and FD EAW, including:
 - appropriate judicial authority
 - trial-readiness of the case (for EAWs issued for criminal prosecution)
 - gravity of the charge (potential sentence)
 - reasons for arrest
 - whether the investigative authorities have made reasonable efforts to locate your client, including checking the available databases or even case records
 - whether your client has been duly notified of pending criminal charges or conviction
 - whether there are any grounds for non-execution of the EAW on account of the proceedings in the issuing state
- underline in your submissions any gaps in proportionality analysis, including:
 - lack of assessment of individual circumstances of the requested person and impact of surrender on their rights
 - assessment of less coercive alternative measures, including the European Investigation Order or the European Supervision Order
- work closely with the lawyer in the executing state to bring any reasons why the EAW is illegal, disproportional, its execution could result in serious violations of the requested person's fundamental rights or should otherwise not be executed to the attention of the executing judicial authorities.

On a systemic level

Lawyers play an enormous role in advancing the law and putting in place mechanisms that allow for effective exercise of rights protected under national and EU law. Therefore, local Bar Associations and other similar organisations should actively participate in the judicial policy making advocating for more effective protection of defendant's rights.

In terms of judicial review of the national arrest warrant, there are two immediate changes that could have a substantive positive impact on protection of the requested person's fundamental rights. Therefore, you should advocate for:

- mandatory appointment and presence of a lawyer in all proceedings involving deprivation of liberty, including the issuing of the national arrest warrant and an EAW
- creating effective and available judicial avenues to challenge the legality and proportionality of the national arrest warrant or the EAW before the surrender of the requested person, if necessary, by using remote hearing technology and other digital tools.

Judicial review in the executing state

Executing judicial authority in EAW proceedings is tasked with two essential functions. According to Article 12 of the FD EAW it must first apply its national law to decide whether the requested person should be placed in detention during the EAW proceedings. This means that the executing judicial authority is under an obligation to carry out an individual assessment of all the relevant circumstances of the requested person and decide whether he or she needs to be further detained. This assessment involves the proportionality of the detention, including assessment of any other available non-custodial alternatives to ensure that the requested person does not abscond.

Secondly, according to Article 14 of the FD EAW, the executing judicial authority must hold a hearing on the execution of the EAW. Judicial review in the executing state is the only instance where the requested person and their lawyer is entitled to be heard by a judicial authority before their surrender under an EAW. However, the scope of judicial review in the executing state is very limited. The executing authority must verify whether the EAW has been issued in accordance with FD EAW, including whether the issuing authority complies with the necessary requirements of independence to issue an EAW, whether an EAW is issued for the criminal offence of sufficient gravity, whether reasons for issuing the EAW are compatible with the FD EAW (e.g., the EAW is not issued for purely investigative reasons) and other basic aspects of legality of the EAW.⁴⁵

The executing judicial authority has the duty to exercise some procedural diligence in verifying whether the information mentioned in the EAW form are correct. A case from Belgium⁴⁶ highlights that point. In this case, the Spanish judicial authorities had issued an EAW seeking the surrender of a musician who was convicted for “terrorist offences”. The lyrics of one of his rap songs were deemed to be defamatory to the Royal Family and perceived as containing threats, glorifying terrorism, and humiliating the victims of terrorist offences. These offences were marked in the EAW form by the Spanish judicial authorities as “terrorist offences” under the FD EAW. In this case, the Belgian courts independently verified whether the acts the requested person was accused of committing qualified as “terrorist offences” under EU law and concluded that the Spanish judicial authorities had interpreted the definition of terrorism too broadly. The Belgian courts distinguished an “opinion offence” from the general active terrorist offences and refused the execution of the EAW in this case. As a result, the Court in Chambers concluded that the issuing authority had wrongly identified the case as terrorism under the FD EAW. Noting that the glorification of terrorism did not exist as a crime in Belgian law, and that the facts could not fall under the offence of incitement to terrorism, which did have an equivalent

⁴⁵ See e.g. CJEU, Case C-717/18, X, 3 March 2020.

⁴⁶ Ghent Court in Chambers, 17 September 2018, Valtonyc, N1569 P. 18/43. The decision is not public; analysed in Sergi Vazquez Maymir, Paul de Hert, First Periodic Country Report: Belgium, 2022, pp. 18-22.

in Belgian law, the magistrate determined that the offences were not covered by dual criminality. The execution of the EAW was thus refused.⁴⁷

The executing judicial authority must also consider whether there are any grounds for a mandatory refusal to execute an EAW under Article 3 of the FD EAW or optional non-execution of the EAW under Article 4 of the FD EAW.⁴⁸

Although unwritten in the FD EAW, grounds for refusal to execute an EAW also include potential violations of fundamental rights such as the prohibition of torture and inhuman and degrading treatment and flagrant denial of justice. So far, the CJEU has assessed a potential violation of these rights in relation to detention conditions in the issuing state and the lack of independence of judiciary.⁴⁹ However, defence lawyers have alerted the national courts about other situations liable to result in a violation of the prohibition of inhuman and degrading treatment such as serious mental condition of the requested person. The issues raised in the execution hearing have resulted in a preliminary request before the CJEU and could potentially expand the grounds for non-execution based on fundamental rights.⁵⁰

Proportionality assessment

The executing judicial authority is not authorised to review the proportionality of the EAW. This is presumably because the executing judicial authority is not entitled to review the decision of the issuing judicial authorities or to invalidate it. Secondly, only the issuing judicial authority is in possession of information allowing for detailed assessment of all circumstances surrounding the criminal proceedings in the issuing state. This assumption has serious flaws in practice, where the issuing judicial authorities often issue both national arrest warrants and EAWs solely based on the information provided by prosecutors.⁵¹ Even where the proceedings in the issuing state are entirely one-sided until after the requested person is surrendered, the responsibility to ensure the proportionality of the EAW rests entirely with the judicial authorities of the issuing state.

However, in some limited respects, issues of proportionality in the issuing state could be raised in the executing state while questioning the legality of the EAW. They relate, for example, to the reasons for which an EAW is issued. A recent example includes a case where the executing judicial authority

⁴⁷ The case was appealed and is still pending before Belgian courts (as of Oct 2022).

⁴⁸ On substantive grounds for non-execution see Section E of the European Criminal Bar Association's [Handbook on the EAW for Defence Lawyers](#) "How to Defend a European Arrest Warrant", Part I: Understanding the EAW Framework Decision, 2017.

⁴⁹ CJEU, [Joined Cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru](#) 05.04.2016; CJEU, [Case C-220/18](#), ML, 25.07.2018. For more on fundamental rights assessment see Notices from European Union Institutions, Bodies, Offices and Agencies Commission Notice – [Handbook on how to issue and execute a European arrest warrant](#) (2017/C 335/01), 6 October 2017, Section 5.6., see also Thomas Wahl, "[Refusal of European Arrest Warrants Due to Fair Trial Infringements. Review of the CJEU's Judgment in "LM" by National Courts in Europe](#)", EUCRIM, 21.03.2021

⁵⁰ CJEU, [Case C-699/21](#), E.D.L., judgment pending.

⁵¹ Fair Trials, "[Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?](#)", 2021, p.23.

rejected an EAW which appeared to have been issued for purely investigative purposes, namely, to conduct an in-person suspect interview.⁵² This is incompatible with Article 1(1) of the FD EAW which states that EAWs can only be issued “for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”. This is also clearly in violation of the principle of proportionality as a less restrictive measure – a European Investigation Order – should be issued for the purpose of evidence gathering. This instrument allows to conduct suspect interviews via videoconference without the need to forcefully transfer the requested person to the issuing state. The issue of proportionality of the EAW can and should be raised before the executing judicial authorities to oppose the execution of unjustified EAWs.

Although the executing judicial authority may not overturn the decision to issue an EAW nor reject it explicitly because it considers the EAW wholly or partially disproportional,⁵³ according to the European Commission:

should serious concerns on the proportionality of the received EAW arise in the executing Member State, the issuing and executing judicial authorities are encouraged to enter into direct communication. [...] With consultation, the competent judicial authorities may be able to find a more suitable solution [...]. For example, depending on the circumstances of the case, it might be possible to withdraw the EAW and use other measures provided under national law or Union law.⁵⁴

This was done in the aforementioned case of an EAW issued for investigative purposes, where in order to make a final decision on the surrender of the requested person, the Italian judicial authorities requested further information as to why an EAW is an instrument that, for the purposes of continuing proceedings in the particular case, cannot be substituted by another cross-border instrument.⁵⁵ Thus, where the proportionality of the EAW is in question, lawyers in the executing state should alert the executing judicial authorities and encourage them to use this opportunity.

For more practical suggestions, see **What to do?** below.

For an in-depth analysis of law and practice, see **Useful sources** on page 22 for reference material.

⁵² Court of Cassation of Italy, Section VI, No. 14937/2022, 14.04.2022; an unofficial translation available [here](#).

⁵³ On disproportionate charges and sentence see, for example, CJEU, Case [C-168/21](#), KL, 14.07.2022

⁵⁴ Notices from European Union Institutions, Bodies, Offices and Agencies Commission Notice – [Handbook on how to issue and execute a European arrest warrant](#) (2017/C 335/01), 6 October 2017, Section 5.7.

⁵⁵ Court of Cassation of Italy, Section VI, No. 14937/2022, 14.04.2022; an unofficial translation available [here](#).

What to do?

A hearing by the executing judicial authority is the only hearing in the entire EAW proceedings where the presence and right to be heard is guaranteed for the requested person. Although the scope of the judicial review in the executing state is limited, essential aspects of the legality and proportionality of the EAW can be reviewed at this stage. For example, an EAW issued for purely investigative purposes does not correspond to the reasons for which an EAW can be sought under Article 1(1) of the FD EAW and could therefore potentially be rejected as illegal.

The executing judicial authority can also raise concerns about obvious gaps in fundamental rights protection such as potential violations of torture or inhuman and degrading treatment on account of detention condition or deterioration requested person's mental health in those conditions. Lawyers can collect information regarding the detention conditions from the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, non-governmental organisations, European Union Agency for Fundamental Rights database on detention conditions in EU⁵⁶ and other sources. Any new circumstances, such as the requested person's mental health, which might be liable to lead to a violation of prohibition of torture, inhuman or degrading treatment, grossly disproportional sentences or other serious violations of fundamental rights should be raised before the executing judicial authorities.

As a lawyer in the executing state, you should:

- verify whether the issuing of the national arrest warrant or the EAW complies with the national law and FD EAW, including:
 - appropriate judicial authority
 - gravity of the charge (potential sentence)
 - reasons for issuing the EAW (e.g., and EAW is not issued for investigative purposes)
 - trial-readiness of the case (for EAWs issued for criminal prosecution)
 - whether there are any grounds for non-execution of the EAW
 - whether there are any fundamental rights concerns that may prevent a person from being surrendered to the issuing state (conditions of detention and transfer liable to violate the prohibition of torture, inhuman and degrading treatment or systemic deficiencies in criminal justice system liable to result in an unfair trial in your client's case etc.).

⁵⁶ See European Union Agency for Fundamental Rights (FRA) Criminal Detention Database on [FRA Website](#).

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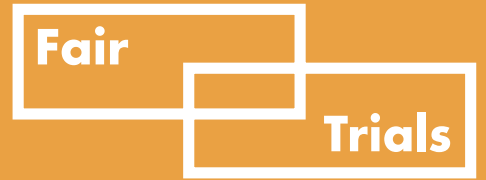
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