FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

EUROPEAN ARREST WARRANT PROCEEDINGS

ROOM FOR IMPROVEMENT TO GUARANTEE RIGHTS IN PRACTICE

REPORT

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Contents

Glossary

Accused person	Any natural person who is formally charged by the competent authorities (i.e. a prosecutor, an investigative judge or even the police) with allegedly having committed a criminal offence. The term commonly refers to a person subject to the more advanced stages of pre-trial proceedings and/or a person committed to trial.
Arrest	An action involving the apprehension of a person suspected of being involved in a crime by the law enforcement authorities and their being placed in police custody.
Charge	An official notification given to an individual by the competent authority of an allegation that they are suspected or accused of having committed a crime; also referred to as 'accusation'.
Child	Any natural person below the age of 18 years.
Defendant	Any natural person subject to criminal proceedings initiated by the relevant authorities due to suspicion or charge of having committed a crime. The term is also used in this report to mean 'suspect', 'accused person' or 'requested person' (see separate definitions of these terms in this glossary).
Deprivation of liberty	Arrest or any type of confinement in a restricted space by the authorities, including when the police apprehend and question a person without a judicial decision or a warrant. That person may be set free after questioning; however, deprivation of liberty has taken place if, for some period of time, the person was not allowed to leave police custody.
European Arrest Warrant	An arrest warrant based on Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, valid throughout all Member States of the EU. Once issued by one Member State (the 'issuing Member State'), it requires another Member State (the 'executing Member State') to arrest a criminal suspect or sentenced person and transfer them to the issuing state so that the person can be put on trial or complete a detention period.
Executing Member State	The Member State responsible for the execution of a European Arrest Warrant.
Issuing Member State	The Member State issuing a European Arrest Warrant for acts punishable by the law of that Member State by a custodial sentence or a detention order.
Judge	Any public official with the authority and responsibility to decide on criminal cases in a court or make decisions on legal matters.
Judicial authority	A judicial authority of a Member State that is independent and competent to issue or execute European Arrest Warrants by virtue of the law of that state.
Law enforcement authority	National police, customs or other authority that is authorised to detect, prevent and investigate offences and to exercise authority and coercive force.
Lawyer	Any person who is authorised to pursue professional legal activities, including to advise people about the law and to represent them in court and other legal proceedings. More specifically, in the context of this report, this includes defence lawyers, as persons authorised to advise and represent defendants.
Legal aid	System of funding accessible to people with insufficient or no means to cover professional legal help and the costs of the proceedings themselves.
Pre-trial detention	Deprivation of a defendant's liberty imposed before the conclusion of a criminal case in the context of judicial proceedings by a judicial authority (i.e. a judge, an investigative judge, a court). Not to be confused with police detention, which takes place prior to bringing a suspected person before a judge.

Prosecutor	A public official, who, inter alia, institutes and conducts legal proceedings against a defendant in respect of a criminal charge, representing the state.
Questioning	Any oral interview or interrogation of a person by the police, a prosecutor or a judge during which they are asked questions about their knowledge of or possible involvement in a criminal offence.
Requested person	An individual who is the subject of an arrest warrant issued by any of the 27 Member States of the EU. A European Arrest Warrant is issued to request the person's arrest and extradition back to the issuing state to serve a sentence or to face criminal charges.
Speciality rule	The speciality rule entails that a requested person is generally surrendered in respect only of the offences specified in the European Arrest Warrant, and it can therefore block prosecution or punishment for offences not listed in the EAW.
Suspect	Any natural person who has been thought of as having committed a criminal offence, even before that person is made aware, by official notification or otherwise, that they are a suspect. The term commonly refers to the initial stages of criminal investigations / pre-trial proceedings.
Witness	Any natural person who has been summoned to give testimony. Unlike a suspect, such a person can be compelled to take an oath during the procedure to ensure that any statement made to the judge is truthful. However, a witness can refuse to give a statement in evidence if there is a possibility of self-incrimination.

Abbreviations

Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union, formerly the European Court of Justice
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
SIS	Schengen information system

Country codes

Code	EU Member State
AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czechia
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia

Key findings and FRA opinions

Building on previous research by the European Union Agency for Fundamental Rights (FRA) on criminal procedural rights and cross-border cooperation in criminal matters, undertaken at the specific request of the European Commission, this report presents the findings of the most recent project carried out by FRA on selected fundamental rights of persons subject to European Arrest Warrant (EAW) proceedings. The report deals with proportionality in the application of EAWs, fundamental rights-based grounds for non-execution and the rights to access to a lawyer, to information and to translation and interpretation during EAW proceedings.

The main objective of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (the EAW framework decision) is to address impunity and to bring those who have fled the country in which their crime was committed to justice. To achieve that, an issuing Member State issues an arrest warrant, which must be swiftly executed by the executing Member State, without examining the substance of the warrant, in the spirit of mutual trust and mutual recognition. Requested persons have limited opportunities to challenge the warrant; however, during the proceedings they have certain rights as guaranteed by the Charter of Fundamental Rights of the European Union (the Charter) and secondary law instruments, such as the EAW framework decision and the criminal procedural rights framework. Relevant international human rights instruments, such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights, also apply, addressing in particular the prohibition of torture and inhuman or degrading treatment in the event of extradition.

An EAW – like any measure leading to deprivation of liberty – should be proportionate and narrowly tailored to its objective. The principle of proportionality is one of the guiding principles of the EU legal order. It restricts the authorities in exercising their powers by requiring them to strike a balance between the means used and the expected aim to be achieved. An arrest warrant, being a measure restricting an individual's right to liberty and right to respect for private and family life, should always be proportionate to the aim it seeks to achieve.

Relying on principles of mutual trust and mutual recognition, the executing authorities should in principle surrender the requested persons swiftly. However, in recent years, the Court of Justice of the European Union has confirmed that surrender should be postponed or even refused when respect for certain fundamental rights, such as the right to dignity or to freedom from inhuman or degrading treatment, is at stake. In short, whenever there is a risk that a requested person will be subjected to inhuman or degrading treatment upon surrender, the executing authority has a duty to assess this risk and, if necessary, postpone or refuse surrender. The same principle also applies to the risk of denial of justice.

Requested persons also have procedural rights during EAW proceedings. The European legislator has recognised their right to legal assistance both in the country issuing the EAW and in the country executing it. They have the right to understand what is happening to them; therefore, they have the right to information about their rights and the EAW procedure, including the

consequences of their decisions. They also have the right to interpretation and translation during the proceedings.

This report examines how these principles and rights are upheld in practice, based on desk research and interviews with professionals in 19 Member States and requested persons in 6 Member States. The research does not cover the full scope of the EAW framework decision and the criminal procedural rights legal framework but focuses on **specific rights of requested persons** as specified in the various sections of the report, including the right to freedom from torture and inhuman or degrading treatment or punishment and the right to access to a lawyer and information, interpretation and translation during the proceedings. FRA's evidence indicates that, while the practical implementation of the rights of requested persons varies across the Member States covered, some common challenges exist.

The research covers the 19 Member States that were not covered by FRA's previous published research on the EAW (which covered 8 Member States), namely Belgium, Croatia, Cyprus, Czechia, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Spain and Sweden. The report draws on the experiences of between 5 and 15 interviewees per country (161 professionals and 21 requested persons were interviewed in total). In light of this, the findings do not claim to be representative of the situation in each Member State or the EU as a whole. Nevertheless, they provide a unique comparative insight into the views of the professionals involved and of people who have experienced at first hand how EAW proceedings are conducted in practice. This helps us to understand the fundamental rights challenges they have encountered and provides evidence to enable a critical assessment of the practical implementation of this legislative instrument 20 years after its entry into force. The report also provides – in the Introduction – examples of notable developments with respect to the application of the EAW in those Member States that FRA researched previously.

ASSESSING AND RESPECTING FUNDAMENTAL RIGHTS WHEN EXECUTING A EUROPEAN ARREST WARRANT

The EAW framework decision does not contain any provision on non-execution on the basis of a breach of the requested person's fundamental rights in the issuing Member State. However, Article 1(3) of the EAW framework decision, read together with recitals 12 and 13, clarifies that fundamental rights and fundamental legal principles should be respected when implementing the EAW.

The jurisprudence of the Court of Justice of the European Union confirms this. In cases in which the possibility of violation of fundamental rights in the issuing state was raised by the requested person or their representatives, the court introduced a two-step test to examine whether the execution of the EAW would lead to a violation of a fundamental right such as the prohibition of inhuman or degrading treatment, for example in cases involving inhuman detention conditions, or the right to a fair trial. In addition, the court found that the executing authority must take a serious health condition into consideration when deciding on the surrender of an individual who is ill.

The research finds that judicial authorities in the Member States covered do not always consider the fundamental rights implications of surrendering individuals when executing an EAW. For example, interviewed lawyers pointed to examples of inhuman and degrading detention conditions in the issuing state and of disregard for the health and family situations of requested persons. They referred to cases involving the surrender of people who were seriously ill, despite the fact that the particular situation of the individual had been raised before the judicial authorities.

With regard to the risk of denial of justice owing to violation of the right to a fair trial in the issuing state, the research findings show that this is very rarely examined.

Some interviewed judicial authorities consider that the principles of mutual trust and mutual recognition prevent them from examining the individual situations of requested persons, detention conditions and access to justice in the issuing Member State. They also argue that these factors are to be considered only when dealing with requests for extradition to non-EU countries. In addition, some interviewed lawyers and judicial authorities consider that all EU Member States respect fundamental rights to the same extent and that therefore there is no need to examine these aspects.

FRA OPINION 1

Member States should ensure that the fundamental rights implications of cross-border transfers are duly considered in individual cases, in line with the evolving jurisprudence of the Court of Justice of the European Union and with their obligations under EU and international law. Accordingly, their national courts should properly assess the real risk of fundamental rights violations, in particular any violation of the prohibition of inhuman or degrading treatment in criminal detention facilities, and take action to prevent them. Executing judicial authorities should also examine the risk of denial of justice in the issuing state if the issue is raised by the requested person or their legal representative.

Executing authorities are encouraged to assess the impact of surrendering an individual on their fundamental rights with regard to individual aspects such as their health when there is a risk of a possible violation of fundamental rights.

FRA reiterates its opinion, previously presented in the report *Criminal Detention and Alternatives: Fundamental rights aspects in EU cross-border transfers*, that it is particularly important that individual situations are strictly evaluated when the issue of inhuman conditions of detention is raised. This applies in particular when there is objective evidence of systemic shortcomings in a Member State's detention facilities.

ENSURING THAT LEGAL REPRESENTATION IN THE EXECUTING STATE IS REAL AND EFFECTIVE

FRA OPINION 2

While Member States continue to fulfil their obligations to provide a requested person with access to a lawyer and to secure a public defender for them if necessary in the executing state, they are encouraged also to develop a mechanism, in collaboration with bar associations, enabling requested persons to hire their own lawyer if they wish to do so. Lists of lawyers with experience in EAWs, detailing the languages that they speak, could be provided to requested persons to facilitate their hiring a lawyer of their choice if they do not wish to benefit from the assistance of a public defender. Member States should also ensure that sufficient time and adequate facilities are available to enable requested persons to consult with their lawyers before the first hearing. This could be achieved, for example, by having dedicated rooms in courthouses and making sure that the relevant procedures allow sufficient time.

In accordance with Article 11(2) of the EAW framework decision, a requested person has the right to be assisted by a legal counsel for the purpose of the execution of the EAW. In line with Article 47 of the Charter, Article 10 of Directive 2013/48/EU 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, reiterates and further elaborates on the requested person's right to a lawyer in the executing state. Accordingly, requested persons have the right to access to a lawyer in such time and in such a manner as to allow the requested persons to exercise their rights effectively and in any event without undue delay from the moment of deprivation of liberty. In addition, a requested person has the right to meet their lawyer and communicate with them confidentially. Recital 45 specifies that executing Member States should make the necessary arrangements to ensure that requested persons are in a position to exercise effectively their right of access to a lawyer in the executing Member State, including by arranging the assistance of a lawyer when requested persons do not have one, unless they have waived that right. Such arrangements, including those on legal aid if applicable, should be governed by national law. They could entail, inter alia, the competent authorities arranging the assistance of a lawyer on the basis of a list of available lawyers from which requested persons could choose.

The research shows that the right to access to a lawyer in the executing state is overall generally complied with. Interviewees agree that in general requested persons receive legal assistance from public defenders. However, the research also shows that requested persons receive little to no help from the authorities when hiring a private lawyer. Since requested persons do not always have connections in the executing state, they may face difficulties in finding a lawyer of their choice.

In addition, it appears from the interviews that, while in general a requested person has the opportunity to meet their lawyer before the hearing, consultations between a requested person and their lawyer are sometimes rushed or held in a space that is not suitable, such as a courthouse corridor.

ENSURING ACCESS TO LEGAL REPRESENTATION IN THE ISSUING STATE

In accordance with Article 10(4) of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, a requested person has the right to access to a lawyer in the issuing Member State (so-called dual legal representation). This provision introduced an additional safeguard to strengthen the procedural rights of requested persons during EAW proceedings. The competent authority in the executing Member State must inform requested persons, without delay, that they have the right to appoint a lawyer in the issuing Member State. The lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing them with information and advice with a view to the effective exercise of the rights of requested persons under the EAW framework decision.

The research shows that, in practice, dual legal representation is a rare occurrence. The authorities do not systematically inform requested persons about this right and do not provide any assistance with the appointment of a lawyer in the issuing state. Only a handful of Member States provide in the EAW form that has to be completed by the issuing state authorities and forwarded to the executing state the name of the lawyer representing the requested person in the issuing state or a list of lawyers potentially able to do so. Judicial authorities interviewed for the research emphasised that they do not feel competent to elaborate on the right to legal representation in another jurisdiction; therefore, when executing an EAW, they do not inform the requested person about their right to a lawyer in the issuing state. Interviewed lawyers highlighted that legal representation in the issuing state very often depends on the willingness of the lawyer representing the requested person in the executing state to use their professional and private contacts.

The research findings also show that the role of the lawyer in the issuing state is not always understood by judges, prosecutors and lawyers. Several interviewees from all professional groups questioned the need for dual legal representation and were unable to see how this right could contribute to safeguarding the right to a fair trial in EAW proceedings. In contrast, other judges, prosecutors and lawyers, especially those with experience as legal representatives in the issuing state, could see the added value of dual legal representation in ensuring the overall fairness of proceedings. Those interviewees highlighted instances in which the assistance of a lawyer in the issuing state led to the withdrawal of an EAW that had been issued erroneously (against the wrong person or in connection with a trivial offence) or to negotiations with the issuing authorities that secured certain outcomes, such as agreeing on a penalty before surrender, which in turn led to voluntary surrender. However, the interviewees also emphasised difficulties in communication between lawyers in two states, mainly because of tight deadlines and differences between jurisdictions.

FRA OPINION 3

Member States should ensure effective access to dual legal representation in practice in line with their obligations under Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings. National authorities responsible for the administration of justice should develop guidance for police and judicial authorities highlighting the need to inform requested persons about this right without delay. Judicial authorities should verify at the first questioning whether a requested person is indeed aware of this right and whether they want to exercise it.

Issuing Member States are encouraged to follow the good practice of including the name of the lawyer representing the requested person in the issuing state in the EAW form. If a person does not have a lawyer appointed to represent them in the issuing state, Member States are encouraged, in cooperation with bar associations, to attach to the EAW form a list of lawyers specialising in EAW proceedings practising in the issuing state, specifying the languages that they speak.

Member States, in cooperation with EU bodies, are encouraged to take measures to improve cooperation among lawyers and help them gain a deeper understanding of the EAW.

PROVIDING INFORMATION TO REQUESTED PERSONS IN AN EFFECTIVE AND RIGHTS-COMPLIANT WAY

FRA OPINION 4

Member States should consider developing materials for police officers responsible for arresting requested persons in EAW proceedings. Such materials could include a simple checklist to facilitate the prompt provision of information to requested persons and emphasise the need to orally explain crucial information. In addition, national authorities could consider developing materials to assist police officers, judges and prosecutors in providing information to requested persons in a simple way. For example, they could produce leaflets or other explanatory materials that could be translated into the most commonly spoken languages.

National authorities are encouraged to ensure that all documents provided to requested persons are written in simple and accessible language, avoiding legal jargon as far as possible. Member States could develop additional materials and briefings for police officers and legal professionals on the various factors that can compromise an individual's ability to understand the procedure and the consequences of various decisions.

Member States are encouraged to cooperate with the European Judicial Training Network and national bar associations to develop training modules and materials, such as checklists to help professionals dealing with EAW proceedings to ensure that requested persons are better informed.

In accordance with Article 47 of the Charter and Article 11(1) of the EAW framework decision, the executing competent judicial authority should inform the requested person about the EAW and its content, as well as the possibility of consenting to surrender to the issuing judicial authority. According to Article 5 of Directive 2012/13/EU on the right to information in criminal proceedings, persons arrested under the EAW should be provided promptly with an appropriate letter of rights containing information about their rights. The letter of rights must be drafted in simple and accessible language. Furthermore, in accordance with Article 6(2) of Directive 2012/13/EU, all arrested persons should be informed about the reasons for their arrest.

As a general principle of the right to information, all information should be provided in simple and accessible language, taking into account the particular needs of a given person.

The research shows that, in general, requested persons are informed about their rights, the reasons for their arrest and the content of the EAW. Interviewed lawyers nevertheless emphasise that, when an EAW is entered into the Schengen information system , the information about the reasons for arrest and the content of the EAW is often delayed by several days. In general, with respect to EAWs, interviewed lawyers suggest that the information about rights is not always provided promptly after a person's arrest. They suggest that in some Member States police officers do not explain any rights orally but, instead, hand a letter of rights to the requested person. There are also reported instances of requested persons being provided with a letter of rights applicable to general criminal proceedings and not to EAW proceedings, without the differences being explained to them. Judicial authorities interviewed in a few Member States referred in this context to manuals or checklists for officers dealing with EAWs, which help them to inform requested persons about their rights and specific aspects of EAW proceedings.

Interviewed lawyers suggest that requested persons do not always understand the information provided to them by judicial authorities, in particular regarding the possibility of consenting to surrender and its consequences (e.g. that this means waiving the principle of speciality, which could prevent them from being prosecuted for offences not mentioned in the EAW framework decision). Therefore, in some of the Member States covered, to facilitate provision of information and help to ensure that requested persons fully understand the information provided, the authorities have developed special checklists for police officers and judicial authorities that include all the information that needs to be provided to requested persons.

The research does indicate that requested persons do not fully understand all the information provided. This seems to be a problem due to a myriad of factors, such as the fast pace of proceedings, a person's state of shock upon arrest, individuals' characteristics – such as the language that they speak or their level of education – and the provision of documents containing lengthy lists of rights, often written in complex legal language.

In the context of providing information to requested persons, interviewed judges, prosecutors and lawyers highlighted that all professionals dealing with EAWs would benefit from specialised training on EAW proceedings, as they differ from criminal proceedings and many professionals lack experience in them.

ENSURING ADEQUATE INTERPRETATION AND TRANSLATION

Under Article 47 of the Charter and Article 11(2) of the EAW framework decision, a requested person has the right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State. Moreover, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings sets forth additional legal provisions on a requested person's right to access translation and interpretation services during EAW proceedings.

In accordance with Article 2(7) of Directive 2010/64/EU, executing Member States should ensure that the relevant authorities provide requested persons who do not speak or understand the language of the proceedings with interpretation without delay during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

Under Article 3(6) of Directive 2010/64/EU, in proceedings for the execution of an EAW, the executing Member State must ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the EAW is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document. An oral translation or oral summary of the EAW may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.

The research shows that, in general, requested persons are provided with interpretation services and translations during EAW proceedings.

However, the quality of interpretation services received much criticism, with most interviewees from all groups noting that it was poor. Interviewees, for example, stated that anyone who spoke the language could be hired as an interpreter, without their necessarily having any relevant training or experience. The findings also highlight challenges encountered in providing interpretation services for non-EU languages or less widely

FRA OPINION 5

Member States should ensure, in every case where it is necessary, the availability of qualified interpreters and translators. If there is a lack of suitable interpreters and translators, Member States are encouraged to cooperate with relevant national and European professional associations of legal translators and interpreters to develop ways of sharing the pool of available interpreters and translators between Member States.

Moreover, to ensure that interpretation and translation are of an adequate standard, Member States are encouraged to introduce mechanisms for verifying interpreters' and translators' actual ability to understand, interpret and translate legal terms and concepts. FRA reiterates its opinion, previously presented in the report ***Rights of suspected and accused persons across the EU: Translation, interpretation and information***, that Member States should consider introducing relevant safeguards to maximise the quality of translation and interpretation.

spoken EU languages. In such cases, it seems that identifying and quickly hiring interpreters is not always possible.

When it comes to the translation of the EAW, the findings show that providing requested persons with an orally summarised translation of the document is very common and often done instead of providing a full written translation. Interviewees attribute this to the fast pace and short deadlines of the proceedings, which leave insufficient time to employ translators.

Introduction

WHY THIS REPORT?

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (the EAW framework decision) reflects the principle of mutual recognition in criminal matters ([1]). Based on the principle of mutual recognition, the European Arrest Warrant (EAW) allows a judicial decision issued in one EU Member State – with a view to the arrest and surrender for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order – to be carried out in another Member State ([2]).

The year 2022 saw the 20th anniversary of the adoption of the EAW framework decision. To mark that occasion, the Council invited the European Union Agency for Fundamental Rights (FRA) to consider continuing its research on the right to access a lawyer and other procedural rights in criminal and EAW proceedings. It suggested extending the research to cover the Member States that had not been covered previously ([3]) and placing a special emphasis on the experiences of lawyers involved in surrender proceedings ([4]). This research responds to that call. The opinions deriving from the research seek to contribute to the better implementation of the current framework at the EU and national levels.

This report is addressed primarily to the EU institutions and Member State authorities, including their national police and criminal justice authorities. It sets out to assist the European Commission in assessing the practical application of the rights and safeguards enshrined in the EAW framework decision and relevant procedural rights directives. The report also seeks to produce evidence that can assist Member States in their efforts to enhance their legal and institutional responses in EAW proceedings and proceedings involving other cross-border judicial instruments. For more details regarding particular Member States covered in this report, please see the relevant **country studies** prepared by FRA's multidisciplinary research network, Franet ([5]).

Mutual recognition and mutual trust

Mutual recognition and mutual trust are the cornerstone principles of European cooperation in criminal matters. This means that EU Member States are bound to recognise and enforce judicial decisions delivered in other Member States. Although legal systems may differ, the decisions reached by judicial authorities across the EU should be accepted as equally valid. Mutual recognition strengthens cooperation between Member States, accelerates proceedings, has the potential to enhance the protection of individual rights and, all in all, strengthens legal certainty across the EU by ensuring that a ruling delivered in one Member State is not challenged in another. This is justified by the requirement that all Member States must meet the standards of human rights protection set out in the Charter of Fundamental Rights of the European Union (the Charter).

SCOPE AND PURPOSE

The main objective of the research is to examine how national authorities apply selected procedural rights and safeguards guaranteed by EU law in EAW proceedings, with a special emphasis on the experiences of lawyers involved in surrender proceedings. The Council reiterated the need to respect the right to a fair trial in surrender proceedings and considered it useful for FRA to continue to research respect for procedural rights in surrender proceedings. Responding to the Council conclusions of 23 November 2020, this report will serve as a valuable contribution to the proper implementation and execution of the EAW framework decision and the body of law adopted as part of the roadmap for strengthening procedural rights in criminal procedures, taking into due account fundamental rights safeguards and standards.

FRA ACTIVITY

This report is the latest in a series published by FRA on criminal justice procedural rights, which to date includes the following.

- ***Underpinning Victims' Rights – Support services, reporting and protection*** (2023).
- ***Children as suspects or accused persons in criminal proceedings – Procedural safeguards*** (2022).
- ***Presumption of Innocence and Related Rights – Professional perspectives*** (2021).
- ***Rights in Practice: Access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings*** (2019).
- ***Victims' Rights as Standards of Criminal Justice*** (2019). This is Part I of a series of four reports entitled *Justice for Victims of Violent Crime*; it outlines the development of victims' rights in Europe and sets out the applicable human rights standards.
- ***Proceedings That Do Justice*** (2019). Part II of the series *Justice for Victims of Violent Crime* focuses on procedural justice and on whether or not criminal proceedings are effective, including in terms of giving a voice to victims of violent crime.
- ***Sanctions That Do Justice*** (2019). Part III of the series *Justice for Victims of Violent Crime* focuses on sanctions and scrutinises whether or not the outcomes of proceedings deliver on the promise of justice for victims of violent crime.
- ***Women as Victims of Partner Violence*** (2019). Part IV of the series *Justice for Victims of Violent Crime* focuses on the experiences of one particular group of victims, namely women who have endured partner violence.
- ***Children deprived of parental care found in an EU Member State other than their own – A guide to enhance child protection focusing on victims of trafficking*** (2019). This guide sets out the relevant legal framework that governs the protection of children who are deprived of parental care and/or are found in need of protection in an EU Member State other than their own, including child victims of trafficking, and their treatment in criminal proceedings.
- ***Children's Rights and Justice – Minimum age requirements in the EU*** (2018). This report outlines Member States' approaches to age requirements and limits regarding child participation in judicial proceedings, procedural safeguards and the rights of children involved in criminal proceedings, as well as issues related to depriving children of their liberty.
- ***Child-friendly Justice – Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*** (2017). This report is based on interviews with justice professionals and police and with several hundred children involved as victims, witnesses or parties in criminal and civil judicial proceedings to learn about their treatment, with a focus on cases involving sexual abuse, domestic violence, neglect and severe custody conflicts.

— ***Criminal Detention and Alternatives: Fundamental rights aspects in EU cross-border transfers*** (2016). This report provides an overview of Member States' legal regulations in respect of framework decisions on transferring prison sentences, probation measures and alternative sanctions, as well as pre-trial supervision measures, to other Member States.
— ***Rights of suspected and accused persons across the EU: Translation, interpretation and information*** (2016). This report reviews Member States' legal frameworks, policies and practices regarding the rights to information, translation and interpretation in criminal proceedings.
— ***Handbook on European law relating to access to justice*** *(2016).* This publication summarises the key European legal principles in the area of access to justice, focusing on civil and criminal law.

The report builds on previous FRA research on procedural rights published between 2016 and 2022. Importantly, the current report adds value in that it includes the results of research on those Member States that were not covered in the 2019 report on right to access to a lawyer in criminal and EAW proceedings. The report focuses on rights and safeguards introduced by the jurisprudence of the Court of Justice of the European Union (CJEU), the EAW framework decision and the criminal procedural rights directives outlining the rights to interpretation and translation ([6]), to information ([7]), to access to a lawyer ([8]) and to legal aid ([9]). The report aims to highlight new findings and to avoid repeating those from the previous research or duplicating other existing research, although at times it refers back to issues discussed in previous work.

As requested by the Council in its conclusions ([10]), the report covers 19 EU Member States (Belgium, Croatia, Cyprus, Czechia, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Spain and Sweden). However, at times there are references to other Member States not covered by the research (e.g. Austria and France) or non-EU countries (e.g. Türkiye and the United Kingdom). The EAW framework decision is applied in the entire EU in respect of any person being sought by the justice authorities, not only EU citizens, and therefore some cases referred to are connected to non-EU countries and their citizens. The United Kingdom applied the EAW framework decision until 31 December 2020; therefore, the experiences of requested persons from that country are included in the analysis.

The eight countries covered in the 2019 report are not included in this research ([11]). However, it should be noted that there have been developments in the Member States covered in the 2019 report since its publication. This is true in particular of the Netherlands and Poland, where a dialogue between the Rechtbank Amsterdam (the District Court of Amsterdam) and the Polish courts on the question of the application of the rule of law in the execution of an EAW has taken place following the numerous preliminary ruling questions sent by the Dutch and German courts to the CJEU ([12]).

How to interpret the research findings

The findings are based on information provided during interviews with professionals (defence lawyers, judges and prosecutors), as well as interviews with persons who were requested by a Member State for surrender under the EAW ('requested persons') and their representatives. In light of the qualitative nature of this research and the limited number of interviews conducted in each Member State covered (see Table 1), with 182 interviews in total, the findings cannot be considered representative, nor can they be generalised with respect to other Member States. Nevertheless, they serve to illuminate some challenges and highlight promising practices in the implementation of the EAW framework decision and the criminal procedural legal framework. The report provides policymakers and professionals with examples of initiatives in different Member States that variously address a number of common challenges identified in the research, elements of which could be adapted for use in their own national contexts.

STRUCTURE OF THE REPORT

The report is divided into four thematic chapters. Each chapter considers – in law and in practice – a different aspect of EAW proceedings and the corresponding procedural rights of requested persons at stake. **Chapter 1** outlines the fundamental rights implications of issuing and executing EAWs, in particular the proportionality aspects of issuing an EAW and the risks of possible human rights violations – mainly violations of the prohibition of torture and inhuman or degrading treatment and the right to a fair trial – upon surrender to the executing Member State. **Chapter 2** examines the right to access to a lawyer in EAW proceedings and the role it plays in ensuring respect for other procedural rights. **Chapter 3** addresses the right to information in EAW proceedings. **Chapter 4** considers the right to interpretation and translation. The report ends with a conclusion summarising the main findings.

METHODOLOGY AND CHALLENGES

The research aimed to gain insights into the implementation and practical application of selected fundamental rights of requested persons as enshrined in the EAW framework decision.

It involved desk research and fieldwork (interviews), as well as an experts' meeting organised by FRA in October 2022. The research covers the 19 Member States (Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Spain and Sweden) that were not covered in FRA's previous report *Rights in Practice: Access to a lawyer and procedural rights in criminal and EAW proceedings*.

Desk research

The desk research was conducted by Franet. It involved an in-depth review of the legal framework and provisions in place in each Member State regarding selected fundamental rights of requested persons (right to access to a lawyer, right to information and right to interpretation and translation) as enshrined in the EAW framework decision, as well as legal provisions governing the issuing and execution of an EAW. The research covered legislative acts, case-law, explanatory reports, parliamentary discussions, guidelines, policy documents – where necessary to understand the legal context – academic articles and similar resources.

Fieldwork (interviews)

The fieldwork was also conducted by Franet. To ensure that the information and data gathered were recent, interviews covered arrests carried out between 27 November 2016 and 31 December 2021 (31 December 2022 in the case of Sweden , as the Swedish researchers were contracted at a later date). The requested persons interviewed included requested persons who had been subject to EAW proceedings in the Member State where the interview took place (at least two out of the five interviews conducted in each country) or in any other EU Member State.

A total of 182 respondents were interviewed. These interviewees from the 19 selected Member States were made up of 75 lawyers, 77 judges or prosecutors, 21 requested persons and 9 lawyers speaking on behalf of requested persons (Table 1).

TABLE 1: NUMBERS OF INTERVIEWEES BY MEMBER STATE AND TARGET GROUP

Member State	Lawyers	Judges/ prosecutors	Requested persons	Lawyers speaking on behalf of requested persons	Total number of interviewees
BE	4	4	–	–	**8**
CY	3	3	3	2	**11**
CZ	5	4	–	–	**9**
DE	5	5	–	–	**10**
EE	3	3	–	–	**6**
ES	5	5	3	2	**15**
FI	4	4	5	–	**13**
HR	4	5	–	–	**9**
HU	4	4	–	–	**8**
IE	4	4	–	–	**8**
IT	5	5	5	–	**15**
LT	4	4	–	5	**13**
LU	3	3	–	–	**6**
LV	4	4	–	–	**8**
MT	4	3	–	–	**7**
PT	4	5	5	–	**14**
SI	4	4	–	–	**8**
SK	4	5	–	–	**9**
SE	2	3	–	–	**5**
Total	75	77	21	9	**182**

Source: FRA, 2022

The first stage of the project – covering the interviews with lawyers, judges and prosecutors – was carried out between April 2022 and March 2023. Requested persons (and their representatives) were interviewed during the second stage, between February 2023 and April 2023. Due to resource constraints, interviews with persons requested for surrender through EAWs were conducted in only six Member States (Cyprus, Finland, Italy, Lithuania, Portugal and Spain), and the interviews focused on their experiences of and opinions about whether and how their fundamental rights were respected in the EAW proceedings against them. It should be noted that lawyers interviewed on behalf of requested persons during the second stage of the fieldwork were asked to reflect on the specific experiences of their clients and not on general practice in their Member States.

All interviewees – lawyers, judges, prosecutors and requested persons, or their representatives when they were interviewed on their behalf – responded to a questionnaire in a structured qualitative interview that covered their experiences of and opinions on how selected fundamental rights of requested persons had been respected and upheld during EAW proceedings and how this had been achieved.

As noted, requested persons and their representatives were interviewed in only 6 Member States of the 19 covered by this research. These Member States were selected taking into account budgetary and human resource constraints and the availability of requested persons. Securing interviews with the requested persons was the most challenging aspect of the research, as they were either very difficult to identify or not available for interview. Therefore, as mentioned above, in some cases their representatives were interviewed on their behalf.

The interviewers did not share the questionnaire with respondents in advance, except for judges and prosecutors in Hungary; this was a formal requirement for interviews with Hungarian judicial authorities. The interviewers encouraged respondents to speak freely and draw on their personal experiences. Most interviews were audio- or video-recorded, and all were documented using a reporting template.

Experts' meeting

The experts' meeting took place at FRA's premises in October 2022. FRA invited 14 experts with experience of EAW proceedings: defence lawyers, prosecutors, judges and representatives of Eurojust and the European Judicial Network. The experts shared their experiences of and views on issuing and executing EAWs and the procedural rights of requested persons.

Consultations

Given that, in its conclusions, the Council requested that FRA focus on lawyers' experiences, FRA consulted professionals associated with the Council of Bars and Law Societies of Europe when developing the research design and methodology ([13]).

Endnotes

(1) S. Alegre and M. Leaf, **'Mutual recognition in European judicial cooperation: A step too far too soon?'**, *European Law Journal*, Vol. 10, No 2, pp. 200–217, 2004.
(2) **Council Framework Decision 2002/584/JHA** of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.
(3) FRA's previous research had been published in FRA, ***Rights in Practice: Access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings***, Publications Office of the European Union, Luxembourg, 2019.
(4) **Council conclusions 'The European Arrest Warrant and extradition procedures – Current challenges and the way forward'**, Brussels, 23 November 2020, para. 29.
(5) For more information, see **FRA's webpage on Franet**.
(6) **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 L 280, 26.10.2010, p. 1).
(7) **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 L 142, 1.6.2012, p. 1).
(8) **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 L 294, 6.11.2013, p. 1).
(9) **Directive (EU) 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).
(10) **Council conclusions 'The European Arrest Warrant and extradition procedures – Current challenges and the way forward'**, Brussels, 23 November 2020, para. 29.
(11) Having previously undertaken research on the EAW in eight Member States, and given the agency's available budget, FRA was not in a position to extend the research to cover all the remaining Member States and – at the same time – to undertake research again in those eight Member States already covered by the previous EAW study.
(12) See, for instance, two preliminary rulings requested by the Netherlands: CJEU, joined cases C-354/20 PPU and C-412/20 PPU, ***L and P***, 17 December 2020, in which the CJEU confirms that a case-by-case examination of the risk of fundamental rights violations affecting the requested person is necessary (see also the **related news post**); and CJEU, joined cases C-562/22 PPU and C-563/21 PPU, ***X and Y v Openbaar Ministerie***, 22 February 2022, in which the CJEU clarifies its case-law on refusal to execute an EAW on fundamental rights grounds (see also the **related press release**). See also P. Bard, *Rule of Law – Sustainability and mutual trust in a transforming Europe*, Eleven International Publishing, The Hague, 2023, p. 55 et seq.
(13) See **the council's website** for more information.

1

ISSUING AND EXECUTING A EUROPEAN ARREST WARRANT – FOCUSING ON PROPORTIONALITY AND FUNDAMENTAL RIGHTS-BASED GROUNDS FOR NON-EXECUTION

This chapter examines selected fundamental rights implications of issuing and executing EAWs. It does not deal in detail with all the applicable rules and principles – for instance, questions of double criminality or *ne bis in idem* – as these have been discussed elsewhere ([1]).

The aim of the chapter is to examine whether specific fundamental rights are properly considered by Member States when issuing and executing an EAW. Therefore, it focuses mainly on the proportionality of the measure, consideration of the individual situations of requested persons, detention conditions and the right to a fair trial.

The chapter does not deal with grounds for non-execution of an EAW explicitly listed in the EAW framework decision ([2]), but, rather, focuses on the jurisprudence of the CJEU.

A. LEGAL OVERVIEW

Issuing a European Arrest Warrant

The EAW is issued by a judicial authority (an independent authority such as a court or an independent prosecutor) ([3]) in one Member State (the issuing Member State) to a judicial authority in another Member State (the executing Member State), or – when the location of the requested individual is unknown – it is entered into the Schengen information system (SIS) as an alert directed to all Member States, for the purpose of criminal prosecution or the execution of a custodial sentence ([4]). In either case, the executing Member State can make surrender conditional on the crime being punishable under its law (known as the double criminality requirement) ([5]). An EAW may not, however, be subject to this requirement if the offence is included in the list of 32 offences set out in the EAW framework decision ([6]). The EAW framework decision abolished the political offence exemption. Therefore, an EAW may be issued for a political offence, although this is rare and very much debated ([7]).

The EAW framework decision does not refer to the application of the principle of proportionality when issuing an arrest warrant. However, as **the EAW must always be based on a national arrest warrant**, the principle of proportionality, applicable to national warrants, extends to EAWs ([8]).

According to the CJEU, the issuing of an EAW rests on a two-level system of protection of fundamental rights: at the level of issuing the national arrest warrant and at the level of issuing the EAW ([9]). Both these tasks should be entrusted to a 'judicial authority' ([10]).

According to the CJEU, Article 47 of the Charter requires that an EAW against a person charged with a crime, or the national arrest warrant on which it is based, be subject to review by a court in the issuing Member State ([11]). This is not required when the warrant is based on a final conviction passed by a court ([12]). The review should ensure that the fundamental rights, such as legal and factual bases for deprivation of liberty, of the person whose arrest is requested are respected ([13]). It can take place before or at the time of the issuing of the EAW, but also thereafter at any time before the surrender of the requested person ([14]). During this review, all available evidence, as well as the conditions for and proportionality of issuing the EAW, should be examined ([15]).

CJEU case-law has not yet established clear criteria for proportionality when issuing an EAW. What is certain is that the issuing judicial authority should assess the proportionality of an EAW and this should be subject to effective judicial review ([16]). This approach is also recommended in the General Secretariat of the Council's *Final report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty*, delivered to the Council delegations in March 2023 ([17]). The executing authority cannot refuse to execute an EAW based on proportionality concerns ([18]).

In its handbook on the EAW ([19]), the European Commission stresses that any EAW should be proportionate to its aim and justified in each particular case based on its circumstances ([20]). Accordingly, it proposes a list of factors that judicial authorities should assess when considering whether to issue an EAW, namely (a) the seriousness of the offence, (b) the severity of the penalty likely to be imposed, (c) the likelihood of detention of the requested person in the issuing Member State after surrender and (d) the interests of the victims of the offence ([21]). The handbook also encourages issuing judicial authorities to consider whether another judicial cooperation measure that is less restrictive could be used instead of an EAW, by giving examples of such measures ([22]). For instance, a suspect located in another Member State could be examined via video link or by the authorities of that state, and if considered necessary those authorities could execute a non-custodial supervision measure against the suspect. The relevant instruments discussed in the handbook are the European Investigation Order ([23]), transfer of prisoners ([24]), the European Supervision Order ([25]), transfer of probation decisions and alternative sanctions ([26]), mutual recognition of financial penalties ([27]) and transfer of criminal proceedings ([28]).

National laws

National laws govern the procedures for issuing an EAW and rule on whether or not the national (judicial) authorities have the capacity to issue such warrants ([29]). Most Member States covered by this research permit the issuing of warrants for the purpose of prosecution of a criminal offence punishable with a maximum sentence of imprisonment of **at least 12 months** or execution of a custodial sentence if the term of imprisonment imposed or the remainder of it is **at least 4 months** (Croatia ([30]), Cyprus ([31]), Czechia ([32]), Estonia ([33]), Finland ([34]), Hungary ([35]), Ireland ([36]), Latvia ([37]), Lithuania ([38]), Malta ([39]), Portugal ([40]), Slovakia ([41]), Slovenia ([42]), Spain ([43]) and Sweden ([44]). Luxembourg has slightly different conditions. For example, to issue a warrant for the purpose of prosecuting a criminal offence, the offence must be punishable by at least 2 years of imprisonment, with certain exceptions ([45]). In addition, in Belgium, to avoid problems in practice with EAWs issued for trivial offences, for the purpose of executing a sentence no EAW is to be issued if the sentence remaining to be served is less than 2 years ([46]). Certain exceptions exist, for example if the nature of the crime is very grave, such as a crime against a child, a sexual offence or a terrorist offence ([47]) .

The national laws of some Member States explicitly refer to the principle of proportionality as a guiding principle for national judicial authorities, which should ensure that EAWs are proportionate to their objectives (Belgium ([48]), Croatia ([49]), Czechia ([50]), Hungary ([51]), Latvia ([52]), Lithuania ([53]), Slovakia ([54]) and Sweden ([55]). Other Member States derive the obligation to have recourse to the principle of proportionality from their constitutional orders (Germany ([56]), Portugal ([57]), Slovenia ([58]) and Spain ([59]). Some laws also refer to other conditions that in practice serve to ensure that the proportionality of the measure is assessed, for example:

- 'serious indications of guilt' (Belgium ([60]) and Luxembourg ([61]);
- grounds for suspecting that the requested person will not arrive voluntarily for the consideration of the charges, based on the personal circumstances of the requested person, the number and nature of the offences on which the request for extradition is based or other relevant circumstances (Finland ([62]);
- reasonable grounds for believing believe that a person has either (a) committed an extraditable offence or (b) unlawfully fled the country after being convicted of an extraditable offence (Malta ([63]).

National case-law on the principle of proportionality

Spain

The Constitutional Court has established that proportionality should be considered when adopting any measure restricting fundamental rights. The court has ruled that 'the constitutionality of any measure restricting fundamental rights is determined by **strict observance of the principle of proportionality**'. The court has provided guidance on how to apply it; accordingly, the national authorities must consider:

— whether the measure is likely to achieve the proposed objective (assessment of suitability);
— whether, in addition, it is necessary, in the sense that there is no other more moderate measure that could achieve the intended purpose with equal effectiveness (assessment of necessity);
— whether, finally, it is weighted or balanced, in that it is likely to create more benefits or advantages in the general interest than harm to other goods or values in conflict with it (proportionality assessment in the strict sense).

Although not an EAW-specific ruling, the above proportionality criteria make it possible to determine whether the issuance of an EAW is justified on a case-by-case basis, given the consequences that its execution has for the fundamental rights of the defendant.

Source: Judgment of the Constitutional Court of 3 March 2016 in Case 39/2016 (***Sentencia 39/2016, de 3 de marzo***), *Official State Gazette*, No 85, 8 April 2016.

Portugal

The Porto Court of Appeal has explained that, since the execution of an EAW constitutes a major restriction on a fundamental right, namely the right to liberty, and bearing in mind the length of time that detention might last without a final decision being taken, the decision to issue an EAW has to comply with, among other things, the principle of proportionality. This means that the EAW must comply with three subprinciples.

— **Adequacy.** Is this measure the most appropriate for the case?
— **Necessity.** Is this measure that which will create the smallest burden?
— **Proportionality in the strict sense.** Is the measure the fairest available?

Source: Decision of the Porto Court of Appeal in Case 612/08.4GBOBR-A.P1 (***Acórdão do Tribunal da Relação do Porto – Processo 612/08.4GBOBR-A.P1***), 18 March 2015.

Laws in the vast majority of Member States covered do not allow for the possibility of a requested person or their lawyer challenging the issuance of an EAW. Only in Croatia ([64]), Slovakia ([65]) and Spain ([66]) do laws provide for legal avenues to challenge the issuance of an EAW.

Executing a European Arrest Warrant

When a person is arrested based on an EAW, the authorities of the arresting Member States decide whether to execute the warrant by surrendering the requested person to the authorities of the issuing Member State. First, the executing authorities should examine whether the conditions and requirements for issuing the EAW have been complied with (e.g. whether it has been issued for one of the offences for which it can be used, whether it has been issued by a judicial authority subject to judicial review). If not, the executing authorities should refuse to execute it ([67]). The CJEU has further clarified that an EAW should be executed only by a 'judicial authority'; what constitutes such an authority is determined based on the same criteria used for issuing authorities ([68]). Moreover, for the detention of a requested person to be lawful, the deprivation of their liberty must follow a procedure prescribed by law, as required by Article 5(1) of the European Convention on Human Rights (ECHR) and reflected in Article 6 of the Charter. The European Court of Human Rights (ECtHR) has pointed out that Member States' judicial authorities must comply with substantive and procedural national law for detention to be lawful under Article 5(1)(f) of the ECHR, which specifies the

arrest or detention of a person with a view to extraditing the individual as a lawful ground for deprivation of liberty ([69]).

A person arrested based on an EAW may consent to be surrendered after being properly informed about this possibility and having had the opportunity to exercise their right to access a lawyer ([70]). If it is done 'voluntarily' and while the requested person is 'fully aware of its consequences', the requested person may also waive the application of the speciality rule before the executing judicial authority ([71]).

Consent to surrender and the speciality rule

The **speciality rule** entails that a requested person is generally surrendered in respect only of the offences specified in the EAW, and it can therefore block prosecution or punishment for other offences not listed in the EAW (*). The requested person may, however, waive the application of the speciality rule. This may take place either automatically when they consent to their surrender or separately. The waiver of the speciality rule follows automatically from consent to surrender where the executing Member State has notified the General Secretariat of the Council that it will, in its relations with other Member States that have given the same notification, apply a presumption of speciality rule waiver. This applies unless in a particular case the executing judicial authority states otherwise in its decision to surrender (**). Where no such notification has been made, the speciality rule must be renounced separately. The executing Member State should, in accordance with Article 13(2) of the EAW framework decision, ensure that any consent to surrender and, where this is a separate legal act, any renunciation of the speciality rule are voluntary and have been expressed in full awareness of the consequences. The requested person must therefore be fully informed about the meaning and consequences of consent and waiver (***). The requested person's consent and waiver of the speciality rule must also be formally recorded.

(*) Council Framework Decision 2002/584/JHA, Article 27(2). See, however, the applicable exceptions set out in Article 27(3).
(**) Council Framework Decision 2002/584/JHA, Articles 13 and 27(1).
(***) Council Framework Decision 2002/584/JHA, Article 27(3)(f).

In principle, consent to surrender may not be revoked, but Member States are allowed to have different laws on that issue ([72]). If the requested person consents to their surrender, the proceedings should be concluded within 10 days with the person's surrender to the issuing state ([73]). In certain cases, giving consent may mean that the requested person automatically renounces the application of the speciality rule; that is, the requested person could also be prosecuted in connection with offences not mentioned in the EAW. This circumstance arises when the relevant executing Member State has notified the General Secretariat of the Council about such interplay between consent to surrender and the speciality rule ([74]). For more details on informed consent and information on the speciality rule, see **Chapter 3**.

The EAW framework decision includes lists of mandatory and optional grounds on which the executing judicial authority should or may refuse to surrender the requested person ([75]). The CJEU has clarified that, in principle, Member States are not allowed to invoke other reasons for not executing an EAW ([76]), and a potential violation of the fundamental rights of the requested person is not listed as a ground for refusal to execute an EAW ([77]).

Nevertheless, the CJEU has ruled that, exceptionally, the execution of an EAW should not proceed if fundamental rights issues, such as freedom from inhuman or degrading treatment and right to a fair trial, are at stake. Examples would include the requested person being at real risk of a fundamental rights violation in light of the detention conditions in the issuing Member State or being at risk of a breach of essential aspects of the fundamental right to a fair trial ([78]). The existence of a legal remedy in the issuing Member State

does not rule out the existence of such a real risk ([79]). National courts should apply a two-fold test in this regard: (1) assess whether systemic or general deficiencies exist in the issuing Member State with regard to prison conditions or the independence of the judiciary and (2) determine whether such deficiencies are likely to have or have had an impact on the requested person's case ([80]).

In addition, the CJEU also recently clarified how to handle a situation in which a seriously ill person is to be surrendered to a state in which the required medical treatment may not be available ([81]). This jurisprudence is in line with ECtHR case-law ([82]).

FRA's work on detention conditions

Report: *Criminal Detention Conditions in the European Union: Rules and reality*, 2019

This report focuses on five core aspects: the size of cells; the amount of time detainees can spend outside their cells, including outdoors; sanitary conditions, including from a privacy perspective; access to healthcare; and whether detainees are protected from violence. This report covered all Member States and the United Kingdom.

The Criminal Detention Database 2015–2022 (https://fra.europa.eu/en/databases/criminal-detention/)

The database contains information on detention conditions in all 27 EU Member States and the United Kingdom. It provides information – drawing on national, European and international standards, case-law and monitoring reports – on selected core aspects of detention conditions, which are relevant to the assessment of detention conditions when executing an EAW.

As noted previously, the executing authority cannot refuse the execution of an EAW based on proportionality concerns, including concerns about the possible disproportionality of the sentence that might be handed down in the issuing state ([83]). One exception is if the offence with which the requested person is charged is punishable with a custodial life sentence or lifetime detention order ([84]). In such an instance, the executing authority may condition the execution of the EAW on a review of the life sentence or lifetime detention order after 20 years, or on the requested person being able to apply for measures of clemency (e.g. provisional release) ([85]).

National laws

National laws determine the course of EAW proceedings, including the application of detention and possibilities for release pending proceedings ([86]). In general, the Member States covered have adopted the grounds for refusal listed in the EAW framework decision. Laws in some states refer to additional factors to be considered when executing an EAW, including the following.

- Proportionality must be taken into account in Germany ([87]), Latvia ([88]) and Spain ([89]), and general principles of national law with proportionality considered one of them are to be considered in Estonia ([90]). In Slovenia, proportionality is a constitutional principle that must always be considered when depriving a person of their liberty ([91]).
- Provisions in some national laws refer to compatibility with fundamental rights (Belgium ([92]), Finland ([93]), Hungary ([94]), Italy ([95]) and Lithuania ([96]) or with the ECHR and its protocols (Ireland ([97]) and Sweden ([98]), or, more specifically, state that the prohibition of discrimination is to be taken into account (Estonia ([99]). Portugal derives the obligation to consider fundamental rights from its constitution ([100]).
- In Finland, humanitarian concerns (e.g. the individual situation of a requested person, including their health and age) are a relevant factor ([101]).

— The age of the requested person (whether or not they are a minor) is to be taken into account in Luxembourg ([102]) and Malta ([103]).
— Security and the essential interest of the state are relevant factors to be considered in Estonia ([104]).

B. FINDINGS: ISSUING AND EXECUTING A EUROPEAN ARREST WARRANT IN PRACTICE

This section focuses on fieldwork findings concerning selected fundamental rights of requested persons during the process of issuing and executing an EAW.

The research finds that, when issuing an EAW, the authorities do tend to consider the proportionality of the measure – meaning that the intended objective is weighed against the measures necessary to achieve it. This is, however, not done systematically.

When executing an EAW, national authorities tend to rely on the principles of mutual trust and mutual recognition and only exceptionally do they consider whether and how the execution and then surrender of the requested person will affect their fundamental rights.

Issuing a European Arrest Warrant

By issuing an EAW, the authorities indicate that the requested person is sought either for prosecution for a crime or for execution of an existing sentence of imprisonment and therefore should be arrested in another Member State and brought to the issuing Member State.

Assessment of proportionality when issuing the European Arrest Warrant in practice

Professionals from all groups across Member States agreed that the legal requirements on issuing an EAW are very clear and always adhered to. The assessment of proportionality (that is, of whether it is necessary in the particular circumstances to resort to arrest and surrender) does, however, inevitably involve some margin of appreciation resting on the relevant judicial authorities.

> *Proportionality should be a key element, but it is not always. It should be a preponderant factor because, in fact, when fundamental rights are involved, proportionality and adequacy are criteria that must necessarily be considered. This is what is being discussed and sometimes it does not happen.* Lawyer, Portugal.

> *It is certainly one of the principles that must be kept in mind. So … one does not issue a European Arrest Warrant for a theft of 50 euro at the supermarket.* Judge, Italy.

Professionals in the Member States covered by the research were divided on whether proportionality is indeed generally properly considered when issuing an EAW. Judges and prosecutors from Czechia, Finland, Malta and Slovakia explained that an EAW should not be issued if the case could be resolved in any other manner. This is based on proportionality considerations, given that **an EAW typically results in the requested person's liberty being restricted for weeks or even months in the executing state**. A prosecutor from Finland had estimated that it takes approximately 70 days after arrest (during which time the person may be detained) until a requested person is surrendered to Finland.

> *Proportionality … is a key factor. So, it depends on the severity of the case …. We do not really issue EAWs frivolously because we understand what it entails. We understand we are restricting another person's liberty in another country to be returned to Malta. Therefore, even if a considerable amount of time passes and we do not deem it to be proportional together with the crime, we would not issue any EAW.* Prosecutor, Malta.

A judge interviewed in Luxembourg specified that the proportionality assessment takes into consideration factors such as:

- the severity of the facts;
- the systematic refusal or otherwise of the requested person to present themselves to the authorities;
- the time that has elapsed since the offence was committed;
- the number of victims.

Judges and prosecutors interviewed in Estonia, Finland, Ireland and Italy added that they also look at:

- whether potential future punishment for a person is sufficiently severe that it is worth issuing an EAW;
- the amount of damage caused;
- the number of victims;
- the requested person's personal situation;
- the public interest.

A judge from Slovakia mentioned that proportionality can also play a role in situations in which there are several suspects and one of them has fled the country. The court can assess whether, in pursuing the public interest, the presence of the accused person who has fled is necessary, and whether the proceedings can be concluded without them.

> *If I come to the conclusion that I will undoubtedly propose a prison sentence that is longer than 4 months, then I can initiate the EAW. Should I come to the conclusion that I won't [propose such a sentence], then I should not make a motion to initiate an EAW. And, of course, I must include this reasoning in the materials submitted to the court, because in any case it's the judge who issues the EAW, and the judge should do the same kind of reasoning.* Prosecutor, Czechia.

Commenting on the severity of the facts, a prosecutor from Ireland stated that, in general, an EAW would be issued in Ireland only for serious crimes, but it might be considered for some less serious crimes if they seemed to be part of a wider pattern of offending.

> *In some cases, we can't look at the effects in isolation. If you take, for example, a credit card fraud case, that might seem quite minor on its own, but there might be a background which shows that it's part of a greater scheme of offending which is detrimental to the interests of society, and also to the European public, if we have forum shopping for credit card offences.* National judicial authority, Ireland.

Interviewees also added that serious indications of guilt play a role in the proportionality assessment. A judge from Luxembourg explained that there must be several indications of guilt (e.g. results of a preliminary investigation, fingerprints or DNA evidence) to establish grounds for believing that the requested person has committed the offence in question.

Judges and prosecutors interviewed in Czechia, Finland and Slovenia pointed out that **proportionality is assessed as part of the decision on remand upon which the EAW is based**. The interviewees agreed that an EAW is issued only in cases where it is necessary.

Echoing this, a prosecutor from Portugal added that, since an EAW is issued with the purpose of arresting a person, it is only for those situations in which a coercive measure of pre-trial detention can be applied and there is a likelihood that it will be applied. If a request for pre-trial detention would be likely to be denied, an EAW should not be issued.

> *If the proportionality criteria are not met, I will never be able to justify a pre-trial detention, there is no sense in issuing an arrest warrant. We usually follow … good rules. There are materials that explain to public prosecutors how to fill in warrants, materials from Eurojust [the European Union Agency for Criminal Justice Cooperation] and Sirene [supplementary information request at the national entries]. If the evidence is not strong, if it is mere … suspicion, it is not enough to issue the arrest warrant for that person …. There must be strong evidence of a crime, and then we have to apply the criteria of proportionality, subsidiarity and exceptionality.* Prosecutor, Portugal.

Several interviewees expressed concerns regarding the frequent issuing of EAWs for minor offences. This practice can result in instances of deprivation of an individual's liberty that are disproportionate to the gravity of the offence.

> *Sometimes I find that EAWs are issued for trivialities, and I find this incomprehensible. In our practice, when we make an EAW, it really concerns serious facts, and you get the impression that this is not the case with other countries and that it is more some sort of bureaucracy that makes a selection …. In my view, the thresholds of punishment are too low. It really should be used as an exception …. I really think it is an important point to work on.* Judge, Belgium.

Professionals and requested persons highlighted that imprisonment and extradition also affect other individuals, such as the requested person's children and other family members.

A requested person arrested in Italy based on an EAW issued by Greece complained about **disproportionate use of the measure. Apparently, the warrant was issued erroneously and was later revoked; however, the interviewee was arrested and spent some time in detention.**

> *There are countries who abuse … this system [the EAW]. They issue warrants for whatever. And the burden of proof falls on you. … there should be checks and balances on how they issue these warrants, on what grounds and how they even revoke them, because they never explain. They just sent, you know, two lines to the ministry saying that it's been revoked. On what ground did you issue it? On what grounds you revoked it? It was almost like a joke because I spent two nights in the highest security prison and my kids had to go to social services during that period. They were traumatised. You can't just joke around with people's lives like that, and now there's a risk that they might do it again.* Requested person, Italy.

Another issue highlighted by the interviewees – especially defence lawyers – is how formalised EAW proceedings are once the EAW has been issued. Lawyers from Spain and Malta referred to cases in which the EAW could not be withdrawn even though it was clear that it should have been, for example because it had been issued to enforce a penalty such as a fine or suspended sentence.

> *In practice, a person is arrested and pulled out of their job, which they will potentially lose because they will [be] completely absent for 2 to 6 weeks, if all goes well. I had a situation where there was a child, a man and a wife who was going to give birth in 8 weeks. There was another one where a woman was requested, but she was heavily pregnant and could not physically withstand it. In all these cases, most of those were suspended sentences of imprisonment. They were not serious crimes.* Lawyer, Malta.

A lawyer from Belgium elaborated on the example of a client who was requested by Germany. The client insisted on his innocence and proposed to cooperate fully with the German authorities by voluntarily going to Germany to be interrogated. The German authorities declined and insisted on the surrender of the individual pursuant to an EAW. For the lawyer, this represented a good example of a disproportionate and unnecessary use of an EAW. The same lawyer also mentioned that it should be possible for an executing state to propose alternatives to surrender, such as serving the sentence in the executing state (as an alternative to serving it in the issuing state).

Some lawyers and judicial authorities have noted a change in approach; in their view, proportionality is increasingly assessed more carefully than it was in the past. A lawyer from Estonia believes that no country has enough money to issue and pursue arrest warrants for petty crimes, so most EAWs today are probably justified, if only for that reason. A couple of other interviewees mentioned that Poland had in the past been an example of a country that had issued disproportionate EAWs, stating that it had issued EAWs on very questionable grounds and that it had taken considerable resources, time and money, to process such EAWs. A prosecutor from Slovakia referred to EAWs issued for evading an alimony obligation, which in many countries is not even a criminal offence. These types of EAWs from Slovakia were routinely refused by the United Kingdom. Now Slovakia would not issue an EAW for a person who had allegedly committed the criminal offence of neglecting payment of alimony.

> *We have been very [strongly] criticised by the European Union institutions for slowing down the whole process, so basically, yes, these factors are being taken into consideration, but we have adapted the process itself to speed up the whole proceedings.* Prosecutor, Slovakia.

Some interviewees added that, when issuing an EAW, the courts should also evaluate the individual situation of the requested person. However, other interviewees pointed out that individual characteristics are very often not considered because the issuing authorities are not aware of them, and the matter is only assessed if the issue is specifically raised, as explained by a prosecutor in Portugal.

> *Usually, we don't even know. … We don't know if they are married, if they have children, what kind of life they lead, we don't have that information and therefore we don't consider it. But, even if we did, it would be difficult for their personal situation to change all the reasoning of proportionality and seriousness of the crime and [for us then to] not issue the warrant. But information about the person, usually, we don't have much.* Prosecutor, Portugal.

When proportionality is not assessed

It should be noted that there is no agreement among the interviewed professionals as to whether proportionality is always considered when issuing EAWs.

> *When issuing an EAW, what is taken into account is just that there is a person who has evaded justice and who must be arrested and brought to justice. I don't think anything else is considered.* Lawyer, Spain.

> *Spain is a country prone to imprison[ing] individuals. The first reaction is to issue the EAW, have a person arrested and then taken to the airport, with all the costs and inconvenience that entails. In most cases, this can be arranged in a more civilised manner.* Lawyer, Spain.

A lawyer interviewed in Portugal pointed out that it is difficult to know if national authorities actually consider this principle, because there is no decision or document in which that information must be recorded.

> *When there is no EAW, it [may be] because they took the principle of proportionality into account, but there is no decision to say this. I have situations where it is clearly admissible to issue an EAW and the judges did not. Maybe because they thought it wasn't justified, but there's no decision to say that.* Lawyer, Portugal.

A judge from Luxembourg admitted that, in cases involving certain crimes, an EAW is always issued if the legal requirements are fulfilled, and judicial authorities do not look at proportionality. Such a 'zero tolerance' approach applies to, among other crimes, the crime of theft with break-in. There is, furthermore, zero tolerance for child abuse, homicide or severe assault.

Use of other instruments

Defence lawyers from a number of Member States consider that the EAW is overused because it is issued very often in cases in which other instruments – such as a European Investigation Order, the transfer of prisoners framework decision or a European Supervision Order – could be used.

There is an abuse of the issuance of EAW[s] to the detriment of the European Investigation Order. Lawyer, Spain.

Lawyers from Italy also believe that the European Investigation Order should be used more frequently in cases involving ongoing investigations, rather than issuing an EAW for the mere purpose of questioning a defendant.

Additional instruments

The **European Investigation Order** is a judicial decision issued or validated by a judicial authority in one Member State in order to request the authorities in another Member State to conduct investigative measures to gather or use evidence in criminal matters.

The **European Supervision Order** establishes a system whereby the decision of a judicial authority in one Member State (the issuing state) imposing supervision measures on a non-resident defendant as an alternative to pre-trial detention can be forwarded to the defendant's state of residence (the executing state), which then has to recognise the decision and supervise the defendant itself.

I think there is still a bit of unpreparedness, in the sense that I have noticed that sometimes … the other tools available are not sufficiently known. This obviously depends on the training provided to the various categories. Certainly, the situation has improved, because I know that in the last few years there has been a very important increase both in the training of lawyers and in the training for judges and prosecutors, in relation to all the European directives and framework decisions, therefore also those relating to procedural rights in general. … And here I would like to hope that recourse is made to the EAW instrument only when it is actually necessary. Lawyer, Italy.

The experts who participated in FRA's experts' meeting on the EAW in October 2022 noted that, in an ideal world, less coercive measures than the EAW would always be considered first. Some pointed out that the extent to which the various alternatives to the EAW are used varies. While the framework decision on the European Supervision Order ([105]) is not used at all and the framework decision on probation measures ([106]) is used quite rarely, the framework decision on the transfer of sentenced persons ([107]) is used quite regularly.

Views on the usefulness of the European Investigation Order as an alternative to the EAW differed somewhat, but the experts concluded that such orders could be used to replace EAWs, for instance where the person was sought only for questioning. The experts admitted, however, that the EAW is the instrument most often used, as judicial authorities have experience with it, whereas they may not have experience with other (less coercive) instruments.

Challenging the issuing of a European Arrest Warrant on the ground of failure to consider proportionality

When asked to reflect on whether a EAW could be challenged by the requested person or their lawyer on grounds of proportionality, professionals across all Member States agreed that in general challenging the issuing of an EAW is very difficult and that it would be particularly difficult to challenge it on the basis that the measure was disproportionate.

While not completely dismissing such a possibility, lawyers from Finland, Portugal and Spain pointed to practical difficulties, such as, first of all, being aware that the EAW has been issued and then establishing which court issued it, which can be difficult given the large number of courts. Once this has been

done, however, the issuance can be challenged on proportionality or other grounds.

> *We can use that reason to challenge it. If Portugal is [the] issuing state, we can challenge it when we know there is an EAW. When we are [the] executing state, we cannot use these grounds. We can try, but it is usually refused because these grounds have to be invoked in the issuing state.* Lawyer, Portugal.

However, the majority of participating lawyers considered that the issuance of the EAW cannot be challenged.

> *I would like to meet the lawyer who will obtain this nullity. I would like to congratulate them. I am not saying that it is not possible.* Lawyer, Luxembourg.

As highlighted by a lawyer from Malta, this gap became apparent in the case of *Police* v *George Clayton*, in which the Maltese authorities issued an EAW against Mr Clayton for fraud. Faced with possible surrender and prosecution, Mr Clayton repaid the money owed to the victims. In light of this, the victims expressed to the Maltese authorities that they no longer wished Mr Clayton to face criminal proceedings. The repayment of the funds also meant that, according to Maltese precedent, Mr Clayton would face significantly reduced penalties upon return. The Maltese authorities refused to withdraw the warrant despite the victims' wishes and the limited likelihood that Mr Clayton would receive a custodial sentence. With no official legal means of challenging the EAW, and informal discussions having failed, Mr Clayton was surrendered to Malta from the United Kingdom and brought to court ([108]).

Some interviewees from Czechia, Germany and Ireland (lawyers, judges and prosecutors) concluded that indeed there is no procedure and no precedent, but it does not mean that this is impossible.

> *There is no set procedure, but, yes, I think in Ireland everything is capable of challenge.* National judicial authority, Ireland.

Executing a European Arrest Warrant

In executing an EAW, the authority in the executing state has to decide whether and under which conditions to surrender the requested person to the issuing state.

Executing a European Arrest Warrant in practice

The interviewees in all the Member States covered stated that the execution of an EAW is a quick, almost automated process. The refusal grounds (both mandatory and optional) listed in the EAW framework decision are always considered. However, so-called new grounds for refusal, introduced by the CJEU case-law based on the fundamental rights of requested persons, are emerging, and professionals have witnessed the gradual process of their becoming more widely used in practice.

These fundamental rights considerations include, for example, the conditions of detention in the issuing state, the right to a fair trial in the issuing state and the individual situation of the requested person.

Conditions of detention

Judges, prosecutors and lawyers from several Member States agreed that the conditions of detention in the issuing state are the factor most commonly used to challenge the execution of an EAW. However, whether conditions of detention are actually taken into consideration when executing an EAW

varies among Member States. Interviewees from Belgium, Finland, Germany, Ireland, Italy, Luxembourg and Sweden stated that, in general, conditions of detention in the issuing Member State are considered when executing an EAW, in particular one issued by Hungary or Romania. In contrast, fieldwork findings from other Member States, such as Croatia, Lithuania, Portugal, Slovenia and Spain, show that detention conditions are not always automatically considered by the relevant authorities. Instead, detention conditions are considered only when the requested person or their lawyer claims that surrender would result in a risk to the requested person.

Interviewed lawyers from several Member States said that, when considering the detention conditions in the issuing state, they rely on data from reliable institutions and supranational bodies ([109]). However, lawyers from Malta felt that they were not able to access sufficient reliable data concerning detention conditions.

> *From my point of view, the United Kingdom system is the best system to check vis-a-vis the detention conditions and facilities in every jurisdiction. Why? Because in the British system they issue a report per prison facility, which is publicly available, because the supervisor is an officer of parliament. Other states do not have this model. Here, we are working on the basis of a status report for a whole jurisdiction, which is on average 1 to 2 years late, and not specific to the place of confinement where the individual will be when extradited.* Lawyer, Malta.

However, interviewees from various Member States noted that, even in situations in which the lawyer successfully presents evidence that detention conditions are inadequate, diplomatic assurances provided by the issuing state can reduce the impact of this evidence.

> *Detention conditions in the issuing state are one of the most often victorious grounds for appeals in Italy because there is now a strong influence of European and Italian jurisprudence prohibiting surrender when there are undignified standards of detention. Bear in mind that this is mitigated by so-called diplomatic assurances or additional information, because, if Italy asks Belgium what the standard of detention is like and Belgium replies that it is fine, Italy is still obliged to execute the EAW.* Lawyer, Italy.

There is also a general shared belief among the interviewees from all groups that standards of detention conditions remain high across the EU, and authorities tend to rely on the principle of mutual trust and on the assumption that common standards are met.

> *I would find it extremely hard ever to conceive that within the European Union there is someone who can legitimately claim that there's a prison which doesn't respect human rights. Regardless of the facts, I find it hard to prove it.* Lawyer, Malta.

However, some lawyers, judges and prosecutors from Czechia, Lithuania and Latvia highlighted unsatisfactory conditions within their own Member State, giving this as a reason for remaining silent on conditions in the issuing state.

> *Many arrested persons first say that they most definitely do not agree with being handed over, but after 14 days in our custody they ask us to be handed over [to the issuing state] as soon as possible. They say, 'I've served time in various places, but there are few places where the space is so small and the conditions as horrible as here.' So*

> *everyone wants to be handed over to Germany immediately, because they know that at the Pankrác prison there are barely 3 square metres per person. … And you see eleven of them sleeping on six cots, and you see a table there with three chairs. And they have the right to shower [only] twice a week even though they work.* Judge, Czechia.

Meanwhile, several of the requested persons interviewed during the fieldwork highlighted the poor conditions of detention that they had experienced in either the issuing or the executing state.

> *It was shameful and inhumane … I have terrible things to say about Greece. Not only they issued an absurd accusation against me, a warrant on completely baseless things, when I was arrested there, I was arrested actually with three of my children. They put us in detention in conditions that I cannot begin to explain. There was human excrement on the floor. They literally treated us like dogs. I was afraid of my life and my children's safety. We were put without food, without any facilities for 48 hours in a hole, in a dark hole. Being a mother with three kids, I did not sleep for 48 hours because I didn't know what would happen there, both from the people with whom we were sharing the cell and from the guards themselves. The policemen, they called me bitch. They questioned me in Greek, which I did not understand. They kept accusing me of things, and [they made] me and my 12-year-old son sign some papers that we have not, to this day, understood. They arrested us at 4 a.m., and then they just threw us in a hole and locked the door for 48 hours.* Requested person, Italy.

Individual situation

When issued with an EAW, the executing authorities may invoke fundamental rights and consider the individual situation of the requested person to suspend or refuse the execution of the EAW. When it comes to what these 'individual situations' actually are, the interviewees identified an array of factors that can often influence the decision-making process when executing an EAW. These include but are not limited to humanitarian grounds, health issues, pregnancy, disability and family reasons. However, the interviewed professionals provided diverging responses as to whether the individual situation of the requested person is in fact considered when executing an EAW.

Interviewees from Croatia and Estonia suggest that, in practice, the individual situation of the requested person is not examined. For example, in Estonia, apart from one prosecutor, all interviewees argued that the individual situation is usually not considered because of the formalised procedure. In Croatia, interviewees referred to the notion of mutual trust among EU Member States as a reason for not factoring the individual situation into the decision-making process. However, a prosecutor from Croatia noted that the individual situation of a requested person is considered when dealing with an extradition request from a non-EU country.

There is a consensus among the interviewed professionals that health reasons are the aspect of the individual situation that would be most likely to affect the execution of the EAW. As one defence lawyer in Lithuania commented, 'It is natural that no one would put a sick person in handcuffs on a plane.' Moreover, in Cyprus, for instance, it was noted that it would be rare for the court to consider any issues other than health. However, even health reasons will not always successfully impact the execution of an EAW.

> *We have cases when the [requested person] is [fatally] ill and still we have to hand them over if the other side does not understand the*

> *seriousness of the situation and does not take the EAW back. … We have an EAW now – the previous warrant was withdrawn, and a new EAW was issued. The [issuing authorities] knew already that the person in question has terminal cancer and needs constant care. But still [the person's health] was not considered.* Prosecutor, Czechia.

The interviewees also identified pregnancy as a common reason for postponing the execution of an EAW. Moreover, some interviewees raised more nuanced reasons, such as mental health issues (Slovakia) or the advanced age of the requested person (Slovenia). Family reasons and humanitarian grounds were also mentioned by most of the interviewees as factors that the authorities will consider when executing an EAW. In some Member States, including Italy and Luxembourg, family ties and length of residency in the Member State appear to be important factors when considering the execution of the EAW.

> *So, if someone lives here, is married or not, has children, or other family members here, a job for several months or even several years, this is taken into account, and this may result in … refusal to surrender. However, the initiative must still come from the arrested person or the lawyer. But I guarantee you that the Public Prosecutor's Office also make every effort to provoke [such a] request. The person provides sufficient evidence of their stable situation to serve the sentence in Luxembourg rather than in the issuing country.* Judge, Luxembourg.

A lawyer from Malta added that courts should look at a combination of factors: the individual situation in connection with the seriousness of the crime and the time that has elapsed since it was committed.

However, the research finds that family connections will not always successfully impact the execution of the EAW, as Member States assess this on a case-by-case basis.

> *The family situation [of the requested person] has not been considered. I have had a case in which the requested person had many small children [and was nevertheless surrendered].* Lawyer, Finland.

Humanitarian reasons were also found to be a factor commonly taken into account, with several interviewees noting that surrender may be denied or suspended for such reasons. However, one Lithuanian judge noted that exceptional humanitarian considerations rarely exist within the EU. In addition, findings from Finland indicated that the threshold for refusal to surrender based on humanitarian grounds is very high.

The findings appear to show that, when the individual situation of a requested person is considered, this is more likely to result in the postponement or suspension of the execution of the EAW than refusal to execute it. However, refusal to execute the EAW does occur. For instance, in Ireland interviewees noted that, while it is rare for the court to refuse to surrender a requested person altogether on humanitarian grounds, it has happened. Interviewees from other Member States, such as Slovakia, made similar remarks.

Some defence lawyers in Malta criticised courts for failing to factor in the severe consequences that the execution of the EAW has on the requested person's family life and liberty. One of the interviewees suggested that, to improve the situation, a proportionality bar could be introduced for EAW cases that would set out specific parameters and limits to be respected when deciding on issuing an EAW.

The way our legislation handles the EAW procedure reflects the mentality that any EAW is believed to be a 'DHL package' procedure, where they arrest, bind, gag and send them over as fast as possible. This is wrong and against the spirit of the law. As defence lawyers, we strongly contest the way Malta has implemented the framework decision because truly Malta has made a mess of it. Lawyer, Malta.

Right to a fair trial

Interviewees provided varying responses as to whether the executing state considers whether the fair trial rights of requested persons have been or will be complied with in the issuing state. While there is a well-established practice requiring the executing state to verify whether numerous safeguards were in place if the requested person was tried *in absentia* ([110]), other issues related to the right to a fair trial before a tribunal established by law are still treated in varying ways.

While professionals in Finland agreed that the right to a fair trial is considered before executing an EAW, interviewees in other Member States, such as Belgium, Lithuania and Slovenia, provided diverging responses. However, the most common position among interviewees from other states was that, when executing an EAW, the authorities do not automatically consider the requested person's right to a fair trial in the issuing state.

Once again, interviewees referred to the principle of mutual trust and common minimum standards within the EU. As noted by one Portuguese judge, 'the principle of trust is the basis of the European Arrest Warrant'. The findings show that there is an assumption that a requested person will receive a fair trial in the issuing state. One Estonian judge even noted that raising concerns about another Member State's respect for rule of law could result in diplomatic tensions.

However, that is not to say that the requested person's right to a fair trial will never be looked at. As noted by several of the interviewees from Cyprus, Czechia, Estonia, Malta, Slovenia, Spain and Sweden, it is up to the defence to raise violations of procedural rights in the issuing state.

It would come into question if the defence lawyer brought it up as an argument, but we are talking about EU Member States – in which state can we say that there is no fair trial? This is a very complicated problem. How can the Estonian law enforcement agency say about another Member State that, in our opinion, they do not have a fair

> *trial? We are not talking about third countries that we know nothing about. The principle of mutual trust applies in the EU.* Prosecutor, Estonia.

Professionals from several Member States, such as Belgium, Finland, Germany, Lithuania, Malta, Portugal, Slovenia, Spain and Sweden, agreed that the requested person's right to a fair trial in the issuing state would be considered if that person was tried *in absentia*. The findings highlighted that in that situation the relevant authorities will assess whether all necessary safeguards were complied with in the issuing state. Interviewees also emphasised that the authorities in the executing state will examine whether there is a legal remedy available against the judgment before executing the EAW.

> *If a requested person was tried* in absentia*, we examine whether they have the right to an appeal or retrial. We only examine the requirements explicitly mentioned in the law: if they were summoned to appear in court, if they were aware that they would be judged* in absentia*, if their lawyer was present, etc. The requirements contained in the law are very specific. The guarantee which we ask to see is whether they can appeal the judgment or if they can be tried afresh. If the answer is yes, then we will execute the EAW.* Prosecutor, Cyprus.

The findings also show divergences in how Member States deal with trials *in absentia* and interact in relation to them. For instance, one Spanish judge noted that in Spain it is not possible to try *in absentia* crimes punishable with sentences of more than 2 years' imprisonment, while in other Member States it is possible. Similarly, Malta does not admit or accept trials *in absentia*, and therefore an EAW could successfully be contested on the ground that the requested person had received such a trial ([111]).

Professionals from Hungary, Slovenia and Spain all agreed that sometimes guarantees may be requested from the issuing state to ensure that the requested person's right to a fair trial will be respected. For example, the issuing state might be asked to offer an assurance that the requested person will be able to ask for a retrial or be able to appeal. However, some interviewees questioned the effectiveness of such assurances, noting that there is no mechanism for following them up. For instance, one lawyer in Spain recalled a case in which a person was surrendered to Romania and, afterwards, the guarantee given by the issuing state was not upheld.

Interviewees from Ireland, Latvia, Slovakia and Spain referred to possible violations of the right to a fair trial due to lack of independence of the judiciary and the possible influence of the executive over the judiciary. Some interviewees mentioned Poland as a country where such a risk might exist. One prosecutor in Slovenia noted that the jurisprudence of the CJEU calls on Member States to consider the issue of respect for procedural rights in Poland. Other interviewees raised concerns about violations of the right to a fair trial due to the alleged lack of independence of judges in Poland following the reorganisation of the Polish judicial system.

Proportionality

The general position of interviewees from Belgium, Croatia, Cyprus, Finland, Germany, Ireland, Italy, Malta, Portugal, Slovakia, Slovenia and Sweden was that they do not make judgements on the proportionality of a request to execute an EAW issued by another Member State. Interviewees largely agreed that proportionality is something that should have been considered by the issuing state.

> *I had a case where Romania requested a man who cut down some spruce tree; the damages were 300 euro. It is not for me to judge now; it is up to them to do it. It is my task to assess if all the conditions are there. The condition of minimum sentence has been met, and if they consider that it is reasonable to issue an arrest warrant, then so be it.* Judge, Slovenia.

However, interviewees from Cyprus, Czechia, Estonia, Hungary and Luxembourg agreed that, when concerns are raised about proportionality by the requested person or their lawyer, the authorities will examine the issue. In fact, two judges in Hungary noted that proportionality is the main factor that should be analysed during this process. However, the overwhelming belief among the interviewed professionals is that, while it is not impossible for the execution of an EAW to be prevented due to proportionality concerns, it is extremely rare.

> *For example, one Spanish case, a very old episode: the person was an Estonian citizen, established his life here, obeyed the law, had a family, a home, a job. And Spain asks [for the person to be sent] to Spain for the crime 8 years later. The judge looked for an option not to comply with the EAW and found it to be a second-degree felony, time-barred under our law, and decided not to surrender the requested person. Strictly speaking, this statute of limitations is worded a little differently. We should not look at it according to our law. If it has not expired according to the Spanish law, then we should surrender them. This is where the question of proportionality arises. That 7 years later it is necessary to send a person to Spain, where the conditions of imprisonment are really difficult, normal interpreter assistance is not provided there, as far as we know, etc. In this case, the court shifted a bit and found a way not to surrender them. But, in fact, we don't have too many opportunities to assess proportionality – we have to look at these formal conditions.* Prosecutor, Estonia.

Some interviewees in Belgium, Finland, Ireland, Lithuania, Spain and Sweden highlighted that in certain instances the executing authorities may contact the issuing authorities to discuss the possibility of withdrawing the EAW or using other measures if they have reasonable concerns regarding proportionality. However, the findings show that, in general, such inquiries are rare and are done only in exceptional circumstances.

> *Sometimes what [the court] has done is to write to [the issuing state] and say, here are the circumstances, and just to confirm, you do want this person back? Do you really want this, this is a matter going back 20 years? And the answer is inevitably yes.* National authority, Ireland.

> *It doesn't look good on the requesting state that it withdraws it after all this hassle and cost. And therefore the processing state would say, 'Now it's too late,' for instance, 'too messy to withdraw,' which is wrong. This process and feeling of embarrassment should be discouraged. But they would never say it officially.* Defence lawyer, Malta.

Endnotes

(1) See, for example, L. Klimek, *European Arrest Warrant,* Springer, Cham, Switzerland, 2015; General Secretariat of the Council, ***Final report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty***, Brussels, 2023; European Commission, ***Handbook on how to issue and execute a European Arrest Warrant***, Brussels, 2023; European Union Agency for Criminal Justice Cooperation, ***Report on Eurojust's casework in the field of the European Arrest Warrant***, The Hague, 2021; European Judicial Network, **Judicial Library relating to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States**; European Criminal Bar Association, ***How to Defend a European Arrest Warrant Case – ECBA handbook on the EAW for defence lawyers***, London, 2017; **Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlined Application of the European Arrest Warrant (STREAM) website**; Ludwig Boltzmann Institute, **'Justice for all: Enhancing the rights of defendants and detainees with intellectual and/or psychosocial disabilities. EU cross-border transfers, detention and alternatives'**.

(2) **Council Framework Decision 2002/584/JHA**, Arts 3 and 4. Mandatory non-execution grounds: (1) amnesty in the executing Member State, (2) *ne bis in idem*, (3) subject beneath age of criminal liability at the time of the offence under the law of the executing Member State. Optional non-execution grounds: (1) lack of dual criminality, (2) precedence of domestic prosecution, (3) domestic decision not to prosecute, (4) statute of limitations, (5) *ne bis in idem* in non-EU countries, (6) subject is a national or resident of the executing Member State, (7) offence is within the territorial jurisdiction of the executing Member State.

(3) See the CJEU **judgment of 27 May 2019 in C-509/18 and joined cases C-508/18 and C-82/19 PPU** for the concept of 'judicial authority' for the purpose of issuing the EAW.

(4) According to responses submitted to the European Commission, the 27 Member States issued a total of 17 789 EAWs in 2021. Commission staff working document, **Statistics on the practical operation of the European Arrest Warrant – 2021**, SWD(2023) 262 final, Brussels, 20 July 2023.

(5) **Council Framework Decision 2002/584/JHA**, Art. 2(4).

(6) **Council Framework Decision 2002/584/JHA**, Art. 2(2); CJEU, C-303/05, ***Advocaten voor de Wereld*** [GC], 3 May 2007; CJEU, C-717/18, ***Procureur-generaal v X*** [GC], 3 March 2020.

(7) For more details on the (un)suitability of EAW proceedings for political offences, see J. König, P. Meichelbeck and M. Puchta, **'The curious case of Carles Puigdemont: The European Arrest Warrant as an inadequate means with regard to political offenses'**, *German Law Journal*, Vol. 22, pp. 256–275, 2021.

(8) For guidance on applying pre-trial detention as a measure of last resort, see **Commission Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions**, C(2022) 8987 final, Brussels, 8 December 2022.

(9) CJEU, C-241/15, ***Bob-Dogi***, 1 June 2016, para. 56; CJEU, C-477/16 PPU, ***Ruslanas Kovalkovas***, 10 November 2016, para. 37; CJEU, C-509/18, ***PF***, 27 May 2019, para. 45; CJEU, C-625/19 PPU, ***Openbaar Ministerie (Swedish Public Prosecutor's Office)***, 12 December 2019, para. 38; CJEU, C-648/20 PPU, ***Svishtov Regional Prosecutor's Office***, 10 March 2021, paras 42 and 45.
For more details on the dual level of protection required by the CJEU in EAW proceedings and the assessment of the proportionality of issuing a national arrest warrant and an EAW, see A. Klip, **'A next level model for the European Arrest Warrant'**, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 30, No 2, pp. 107–126, 2022.

(10) This could be a prosecutor, a judge or a court enjoying the necessary guarantees of independence. Police services, ministries and their central authorities and prosecutors, all of which may be – directly or indirectly – exposed to influence by the executive, are excluded. CJEU, joined cases C-508/18 and C-82/19 PPU, ***OG and PI*** [GC], 27 May 2019, paras 74 and 88 and operative part (oper. part); CJEU, C-509/18, ***PF*** [GC], 27 May 2019, paras 52 and 55–57 and oper. part.; CJEU, joined cases C-566/19 PPU and C-626/19 PPU, ***Parquet général du Grand-Duché de Luxembourg and de Tours***, 12 December 2019, paras 50–58 and oper. part; CJEU, C-489/19 PPU, ***NJ***, 9 October 2019, oper. part; CJEU, C-453/16 PPU, ***Halil Ibrahim Özçelik***, 10 November 2016, oper. part; CJEU, C-648/20 PPU, ***Svishtov Regional Prosecutor's Office***, 10 March 2021, para. 38 and oper. part; CJEU, C-452/16 PPU, ***Krzystof Marek Poltorak***, 10 November 2016, oper. part; CJEU, C-477/16 PPU, ***Ruslanas Kovalkovas***, 10 November 2016, oper. part.

(11) CJEU, joined cases C-508/18 and C-82/19 PPU, ***OG and PI*** [GC], 27 May 2019, para. 70; CJEU, C-489/19 PPU, ***NJ***, 9 October 2019, para. 36; CJEU, joined cases C-566/19 PPU and C-626/19 PPU, ***Parquet général du Grand-Duché de Luxembourg and de Tours***, 12 December 2019, paras 60 and 62 and oper. part; CJEU, C-625/19 PPU, ***Openbaar Ministerie (Swedish Public Prosecutor's Office)***, 12 December 2019, para. 39 and oper. part; CJEU, C-648/20 PPU, ***Svishtov Regional Prosecutor's Office***, 10 March 2021, paras 38 and 43.

(12) CJEU, C-627/19 PPU, ***Openbaar Ministerie (Public Prosecutor, Brussels)***, 12 December 2019, oper. part.

(13) CJEU, joined cases C-508/18 and C-82/19 PPU, ***OG and PI*** [GC], 27 May 2019, para. 70; CJEU, joined cases C-566/19 PPU and C-626/19 PPU, ***Parquet général du Grand-Duché de Luxembourg and de Tours***, 12 December 2019, para. 60; CJEU, C-489/19 PPU, ***NJ***, 9 October 2019, para. 36.

(14) CJEU, C-625/19 PPU, ***Openbaar Ministerie (Swedish Public Prosecutor's Office)***, 12 December 2019, para. 52; CJEU, C-648/20 PPU, ***Svishtov Regional Prosecutor's Office***, 10 March 2021, paras 56 and 57.

(15) CJEU, joined cases C-508/18 and C-82/19 PPU, ***OG and PI*** [GC], 27 May 2019, para. 71 ; CJEU, C-489/19 PPU, ***NJ***, 9 October 2019, para. 37; CJEU, joined cases C-566/19 PPU and C-626/19 PPU, ***Parquet général du Grand-Duché de Luxembourg and de Tours***, 12 December 2019, para. 61; CJEU, C-625/19 PPU, ***Openbaar Ministerie (Swedish Public Prosecutor's Office)***, 12 December 2019, para. 40 ; CJEU, C-168/21, ***Procureur général près la cour d'appel d'Angers***, 14 July 2022, para. 28 ; CJEU, C-510/19, ***Openbaar Ministerie (Faux en écritures)*** [GC], 24 November 2020, paras 54 and 56 and oper. part (1).

(16) CJEU, C-168/21, ***Procureur général près la cour d'appel d'Angers***, 14 July 2022, para. 28; see also General Secretariat of the Council, ***Final report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty***, Brussels, 2023, p. 14.

(17) General Secretariat of the Council, ***Final report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty***, Brussels, 2023, p. 15.

(18) CJEU, C-168/21, ***Procureur général près la cour d'appel d'Angers***, 14 July 2022, paras 26, 28 and 66.

(19) European Commission, ***Handbook on how to issue and execute a European Arrest Warrant***, Brussels, 2023, p. 23.

(20) European Commission, ***Handbook on how to issue and execute a European Arrest Warrant***, Brussels, 2023, p. 23.

(21) European Commission, ***Handbook on how to issue and execute a European Arrest Warrant***, Brussels, 2023, p. 24.

(22) European Commission, ***Handbook on how to issue and execute a European Arrest Warrant***, Brussels, 2023, p. 24 et seq.; the **'Judicial Library'** section of the European Judicial Network website contains further practical information on such instruments.

(23) **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).

(24) **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).
(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).
(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).
(27) **Council Framework Decision 2005/214/JHA** of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, 22.3.2005, p. 16).
(28) This can be achieved either through the use of the Council of Europe **European Convention on the Transfer of Proceedings in Criminal Matters** of 15 May 1972, ETS No 73, or through the opening of new criminal proceedings in the receiving Member State where the alleged offender is found using Article 21 of the Council of Europe **Convention on Mutual Assistance in Criminal Matters** of 20 April 1959, ETS No 30.
(29) For a detailed overview of relevant national authorities, see the **European Judicial Network's resources on the EAW**.
(30) Croatia, Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (***Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske Unije***), Art. 17.
(31) Cyprus, Law on the European Arrest Warrant and the Procedures for the Surrender of Wanted Persons between the Member States of the European Union Law of 2004 (***Ο περί Ευρωπαϊκού Εντάλματος Σύλληψης και των Διαδικασιών Παράδοσης Εκζητουμένων Μεταξύ των Κρατών Μελών της Ευρωπαϊκής Ένωσης Νόμος του 2004***), Art. 7(1).
(32) Czechia, Act No 105/2013 Coll., on International Judicial Cooperation in Criminal Matters (***Zákon o mezinárodní justiční spolupráci ve věcech trestních***), Section 193.
(33) Estonia, **Code of Criminal Procedure** (***Kriminaalmenetluse seadustik***), 12 February 2003, § 508.
(34) Finland, Government Bill No 88/2003 (***Hallituksen esitys Eduskunnalle laiksi rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä sekä eräiksi siihen liittyviksi laeiksi*** / ***Regeringens proposition till Riksdagen med förslag till lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen samt till vissa lagar som har samband med den***), p. 52.
(35) Hungary, Act CLXXX of 2012 on Criminal Cooperation Conducted with the Member States of the European Union (***2012. évi CLXXX. törvény az Európai Unió tagállamaival folytatott bűnügyi együttműködésről***), 8 December 2012, Art. 25(2).
(36) Ireland, **European Arrest Warrant Act 2003** (Act 45 of 2003), Section 33(1)(b)(i)–(ii).
(37) Latvia, **Criminal Procedure Law** (*Kriminālprocesa likums*), 21 April 2005, Art. 682(1) subpara. 1.
(38) Lithuania, Minister of Justice and Prosecutor General, Order on adoption of rules for issuing a European Arrest Warrant and receiving a person under a European Arrest Warrant (***Įsakymas dėl Europos arešto orderio išdavimo ir asmens perėmimo pagal Europos arešto orderį taisyklių patvirtinimo***), No 1R-195/I-114, 26 August 2004, with subsequent amendments, point 4.
(39) Malta, **Extradition (Designated Foreign Countries) Order**, 7 June 2004, Art. 68(1)(b).
(40) Portugal, Law 65/2003 Approving the Legal Framework of the European Arrest Warrant (***Lei No 65/2003, que aprova o regime jurídico do mandado de detenção europeu***), 23 August 2003.
(41) Slovakia, European Arrest Warrant Act (***Zákon o európskom zatýkacom rozkaze***), Act No 154/2010 Coll. as amended, 9 March 2010, Section 4(1)(a–b).
(42) Slovenia, Cooperation in Criminal Matters with the Member States of the European Union Act (***Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije***), 23 May 2013.
(43) Spain, Law 23/2014 of 20 November on Mutual Recognition of Criminal Resolutions in the European Union (***Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea***), Art. 37a–b.
(44) Sweden, Ordinance (2003:1178) on Surrender to Sweden Pursuant to a European Arrest Warrant (***Förordning [2003:1178] om överlämnande till Sverige enligt en europeisk arresteringsorder***), 19 December 2016, Section 3.
(45) Luxembourg, Code of Criminal Procedure (***Code de procédure pénale***), Art. 94.
(46) S. Bekaert, 'De actieve overlevering', in X., *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Wolters Kluwer Belgium, Mechelen, 2021, p. 104; S. Vazquez Maymir and P. de Hert, ***First Periodic Country Report: Belgium***, STREAM project.
(47) S. Vazquez Maymir and P. de Hert, ***First Periodic Country Report: Belgium***, STREAM project, p. 3.
(48) Belgium, Law of 20 July 1990 on Preventive Detention (***Wet van 20 juli 1990 betreffende voorlopige hechtenis*** / ***Loi du 20 juillet 1990 relative à la détention préventive***), Art. 16, para. 1. Publication in the *Belgian Official Gazette* 14 August 1990.
(49) Croatia, Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (***Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske Unije***), Art. 3a, para. 1.
(50) Czechia, Act No 105/2013 Coll., on International Judicial Cooperation in Criminal Matters (***Zákon o mezinárodní justiční spolupráci ve věcech trestních***), Section 79(2)d.
(51) Hungary, Act CLXXX of 2012 on criminal cooperation conducted with the Member States of the European Union (***2012. évi CLXXX. törvény az Európai Unió tagállamaival folytatott bűnügyi együttműködésről***), 8 December 2012, Art. 25(3a).
(52) Latvia, **Criminal Procedure Law** (*Kriminālprocesa likums*), 21 April 2005, Art. 682(1) and (3) and Art. 692(1).
(53) Lithuania, Code of Criminal Procedure (***Baudžiamojo proceso kodeksas***), No IX-785, 14 March 2002, with subsequent amendments, Art. 69^{1}.
(54) Slovakia, European Arrest Warrant Act (***Zákon o európskom zatýkacom rozkaze***), Act No 154/2010 Coll. as amended, 9 March 2010, Section 5(3).
(55) Sweden, Ordinance (2003:1178) on Surrender to Sweden Pursuant to a European Arrest Warrant (***Förordning [2003:1178] om överlämnande till Sverige enligt en europeisk arresteringsorder***), 18 December 2003, Section 5.
(56) Germany, Ministerial Guidelines for Criminal Proceedings (***Richtlinien für Straf- und Bussgeldverfahren***), No 39, § 162, para. 1 StPO.
(57) Portugal, Constitution of the Portuguese Republic (***Constituição da República Portuguesa***), 10 April 1976.
(58) Slovenia, Constitution of the Republic of Slovenia (***Ustava Republike Slovenije***), 23 December 1991, Art. 2.
(59) Spain, Constitutional Court, **STC 39/2016cr**, 3 March 2016.
(60) Belgium, Law of 20 July 1990 on Preventive Detention (***Wet van 20 juli 1990 betreffende voorlopige hechtenis*** / ***Loi du 20 juillet 1990 relative à la détention préventive***), Art. 16, para. 5. Publication in the *Belgian Official Gazette* 14 August 1990.
(61) Luxembourg, Code of Criminal Procedure (***Code de procédure pénale***), Art. 94.
(62) Finland, **Act on Surrender Procedures between Finland and Other Member States of the European Union** (***Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä*** / ***Lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen***), Act No 1286/2003, 1 January 2004, Section 53, subsection 1.
(63) Malta, **Extradition (Designated Foreign Countries) Order**, 7 June 2004, Art. 62(2).

(64) Croatia, Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (***Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske Unije***), entered into force in 19 December 2020, Art. 24b, para. 6.
(65) Slovakia, European Arrest Warrant Act (***Zákon o európskom zatýkacom rozkaze***), Act No 154/2010 Coll. as amended, 9 March 2010, Sections 4(1) and 5(2).
(66) Spain, Law 23/2014 of 20 November on Mutual Recognition of Criminal Resolutions in the European Union (***Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea***), Art. 24.3.
(67) CJEU, C-241/15, ***Bob-Dogi***, 1 June 2016, paras 63, 66 and 67 and oper. part (2).
(68) CJEU, C-510/19, ***Openbaar Ministerie (Faux en écritures)*** [GC], 24 November 2020, paras 40–42, 47, 54 and 56 and oper. part (1).
(69) ECtHR, ***Guide on Article 5 of the European Convention on Human Rights: Right to liberty and security***, paras 29 and 149.
(70) **Council Framework Decision 2002/584/JHA**, Art. 11(1) and Art. 13. From figures provided by 26 Member States on consent by requested persons, it can be concluded that 49.48 % of requested persons effectively surrendered in 2021 consented to their surrender (2 449 out of 4 949 persons surrendered by the 26 Member States). 50.52 % of requested persons effectively surrendered in 2021 did not consent to their surrender. Commission staff working document, **Statistics on the practical operation of the European Arrest Warrant – 2021**, SWD(2023) 262 final, Brussels, 2023.
(71) **Council Framework Decision 2002/584/JHA**, Art. 13(1)(2).
(72) **Council Framework Decision 2002/584/JHA**, Art. 13(4).
(73) In 2021, among the 23 Member States that provided data to the Commission, the procedure took an average of 20.14 days after arrest with the consent of the requested person. When a requested person did not consent to their surrender, the procedure lasted on average 53.72 days in the 21 Member States that provided figures. Commission staff working document, **Statistics on the practical operation of the European Arrest Warrant – 2021**, SWD(2023) 262 final, Brussels, 2023.
(74) **Council Framework Decision 2002/584/JHA**, Art. 28(1).
(75) **Council Framework Decision 2002/584/JHA**, Arts 3, 4 and 4a.
(76) See, for example, CJEU, joined cases C-508/18 and C-82/19 PPU, ***OG and PI*** [GC], 27 May 2019, para. 45; CJEU, C-216/18 PPU, ***Minister for Justice and Equality (Deficiencies in the system of justice)*** [GC], 25 July 2018, para. 41; CJEU, C-270/17 PPU, ***Tadas Tupikas***, 10 August 2017, paras 49 and 50.
(77) In 2021, the execution of an EAW was refused in 1 034 cases in all 27 Member States. Commission staff working document, **Statistics on the practical operation of the European Arrest Warrant – 2021**, SWD(2023) 262 final, Brussels, 2023.
(78) CJEU, C-128/18, ***Dumitru-Tudor Dorobantu*** [GC], 15 October 2019; CJEU, C-220/18 PPU, ***Generalstaatsanwaltschaft (Conditions of detention in Hungary)***, 25 July 2018; CJEU, C-216/18 PPU, ***LM*** [GC], 25 July 2018; CJEU, joined cases C-404/15 and C-659/15 PPU, ***Aranyosi and Căldăraru*** [GC], 5 April 2016; CJEU, joined cases C-562/21 PPU and C-563/21 PPU, ***Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*** [GC], 22 February 2022; CJEU, joined cases C-354/20 PPU and C-412/20 PPU, ***Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission*** [GC], 17 December 2020; CJEU, C-216/18 PPU, ***Minister for Justice and Equality (Deficiencies in the System of Justice)*** [GC], 25 July 2018; CJEU, C-480/21, ***Minister for Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission – II)*** (Order), 12 July 2022. See also the ECtHR standard on the real risk of a flagrant denial of justice in ***Soering*** **v** ***The United Kingdom***, 1989, and the EAW-relevant case ***Pirozzi*** **v** ***Belgium***, 2018, para. 62. For more details, see P. Bárd, *Rule of Law – Sustainability and mutual trust in a transforming Europe*, Eleven International Publishing, The Hague, 2023, p. 47 et seq; L. Mancano, **'Everything must remain the same for everything can change – Judicial subsidiarity as a way to address rule of law deficiencies in the European Arrest Warrant mechanism'**, Verfassungsblog, 2 August 2022. In 2021, fundamental rights issues led to a total of 86 refusals reported by 10 of the 25 Member States providing information. Of these refusals, 64 were registered in Germany alone. Commission staff working document, **Statistics on the practical operation of the European Arrest Warrant – 2021**, SWD(2023) 262 final, Brussels, 2023.
(79) CJEU, C-220/18 PPU, ***Generalstaatsanwaltschaft (Conditions of detention in Hungary)***, 25 July 2018, paras 72–76 and 117 and oper. part.
(80) See, for example, CJEU, joined cases C-562/21 PPU and C-563/21 PPU, ***Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*** [GC], 22 February 2022, paras 52 and 81 and oper. part; CJEU, C-220/18 PPU, ***Generalstaatsanwaltschaft (Conditions of detention in Hungary)***, 25 July 2018, paras 59 and 60 and oper. part; CJEU, joined cases C-404/15 and C-659/15 PPU, ***Aranyosi and Căldăraru*** [GC], 5 April 2016, para. 88 and oper. part.
(81) CJEU, ***E.D.L.***, C-699/21, 18 April 2023.
(82) For an overview of ECtHR case-law reviewing national measures implementing the EAW framework decision, see ***Guide on the case-law of the European Convention on Human Rights – European Union law in the court's case-law***, 31 August 2022, Section E(2)(b)(i)–(v), pp. 14–17.
(83) CJEU, C-168/21, ***Procureur général près la cour d'appel d'Angers***, 14 July 2022, paras 26, 28 and 66.
(84) CJEU, C-168/21, ***Procureur général près la cour d'appel d'Angers***, 14 July 2022, para. 27.
(85) **Council Framework Decision 2002/584/JHA**, Art. 5.
(86) For a detailed overview of applicable national provisions, see the **Franet country studies**.
(87) Germany, Act on International Mutual Assistance in Criminal Matters (***Gesetz über die internationale Rechtshilfe in Strafsachen IRG***), § 83c IRG.
(88) Latvia, **Criminal Procedure Law** (*Kriminālprocesa likums*), 21 April 2005, Art. 682(3).
(89) Spain, Law 23/2014 of 20 November on Mutual Recognition of Criminal Resolutions in the European Union (***Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea***), Art. 47.
(90) Estonia, **Code of Criminal Procedure** (***Kriminaalmenetluse seadustik***), 12 February 2003, § 436.
(91) Slovenia, Constitution of the Republic of Slovenia (***Ustava Republike Slovenije***), 23 December 1991.
(92) Belgium, European Arrest Warrant Act (***Wet betreffende het Europees Aanhoudingsbevel*** / ***Loi relative au mandat d'arrêt européen***), 19 December 2003, Art. 4, para. 5. Publication in the *Belgian Official Gazette* 22 December 2003.
(93) Finland, **Act on Surrender Procedures between Finland and Other Member States of the European Union** (***Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä*** / ***Lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen***), Act No 1286/2003, 1 January 2004, Section 5, subsection 1, para. 6.
(94) Hungary, Act CLXXX of 2012 on Criminal Cooperation conducted with the Member States of the European Union (***2012. évi CLXXX. törvény az Európai Unió tagállamaival folytatott bűnügyi együttműködésről***), 8 December 2012, Art. 5(f).
(95) Italy, Law of 22 April 2005, No 69, Provisions to bring national law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (***Legge 22 aprile 2005, No 69***, *Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri*), Art. 2.
(96) Lithuania, Criminal Code (***Baudžiamasis kodeksas***), No VIII-1968, 26 September 2000, with subsequent amendments, Art. 9[1].
(97) Ireland, Houses of the Oireachtas, **European Arrest Warrant Act** (Act 45 of 2003), Part 3.

(98) Sweden, Ordinance (2003:1156) on Surrender from Sweden Pursuant to a European Arrest Warrant (***Lag [2003:1156] om överlämnande från Sverige enligt en europeisk arresteringsorder***), 18 December 2003, Chapter 2, Section 4.2. This explicit provision was included on the recommendation of the Council on Legislation; see Sweden, Ministry of Justice, *Lag om överlämnande från Sverige enligt en europeisk arresteringsorder*, government bill, 25 September 2003, p. 348.
(99) Estonia, **Code of Criminal Procedure** (***Kriminaalmenetluse seadustik***), § 436, 12 February 2003.
(100) Portugal, Constitution of the Portuguese Republic (***Constituição da República Portuguesa***), 10 April 1976, last amended by Constitutional Law 1/2005 – Seventh constitutional review (***Lei Constitucional No 1/2005 – Sétima revisão constitucional***), 12 August 2005.
(101) Finland, **Act on Surrender Procedures between Finland and Other Member States of the European Union** (***Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä*** / ***Lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen***), Act No 1286/2003, 1 January 2004, Section 5.
(102) Luxembourg, Act of 17 March 2004 on the European Arrest Warrant and the Surrender Procedures between Member States of the European Union (***Loi du 17 mars 2004*** *relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres de l'Union européenne*), which transposed Council Framework Decision 2002/584/JHA, Art. 4 para. 3.
(103) Malta, **Extradition (Designated Foreign Countries) Order**, 7 June 2004, Art. 13(1).
(104) Estonia, **Code of Criminal Procedure** (***Kriminaalmenetluse seadustik***), § 436, 12 February 2003.
(105) **Council Framework Decision 2009/829/JHA**.
(106) **Council Framework Decision 2008/947/JHA**.
(107) **Council Framework Decision 2008/909/JHA**.
(108) S. Filletti, 'The implementation of EU criminal law in the Maltese legal order', in I. Sammut and J. Agranovska (eds), *The implementation and enforcement of European Union law in small Member States*, Springer Nature, Cham, Switzerland, 2021, pp. 248–249.
(109) For example, case-law of the ECtHR and the CJEU, United Nations resolutions, FRA reports and reports from internationally recognised non-governmental organisations and human rights watchdogs.
(110) For more details regarding the right to be present at the trial and the right to a new trial, see FRA, ***Presumption of Innocence and Related Rights – Professional perspective***, Publications Office of the European Union, Luxembourg, 2021.
(111) Malta, **Extradition (Designated Foreign Countries) Order**, 7 June 2004, Art. 23(3).

2

RIGHT TO ACCESS TO A LAWYER

This chapter examines the right to access to a lawyer in EAW proceedings. The right to access to a lawyer plays a significant role in facilitating the fulfilment of other procedural rights, such as the right to information ([1]). It is also recognised as a crucial right in protecting against ill treatment of persons deprived of their liberty ([2]).

FRA findings from this and previous research ([3]) clearly demonstrate the pivotal role of defence lawyers in safeguarding procedural rights in criminal and EAW proceedings. The findings show that defence lawyers are the people who inform defendants about their rights and the conduct of the proceedings and make sure that the proceedings are conducted in accordance with the law. In addition, in EAW proceedings lawyers explain to requested persons what consenting to surrender implies and ensure that they are fully aware of the consequences of waiving their rights ([4]).

A. LEGAL OVERVIEW

The right to access to a lawyer is an essential procedural right of suspected and accused persons in criminal proceedings that is guaranteed by both international and EU law. The Charter guarantees this right in Article 48(2), the ECHR in Article 6(3)(c) and the International Covenant on Civil and Political Rights (ICCPR) in Article 14(3)(b) and (d) and paragraphs 10, 32, 34, 37 and 38 of General Comment No 32 ([5]).

With regard specifically to EAW proceedings, according to Article 11 of the EAW framework decision, a requested person has the right to be assisted by a legal counsel in EAW proceedings in accordance with the national law of the executing Member State. Directive 2013/48/EU on the right of access to a lawyer, which applies to both criminal and EAW proceedings, includes more detailed standards on the right to access to a lawyer ([6]). Requested persons have the right to access to a lawyer in the executing Member State, at such a time and in such a manner as to allow them to exercise their rights under the EAW framework decision ([7]).

The requested person has the right to meet and communicate with their lawyer in private and to have their lawyer be present at and participate in hearings with the judicial authorities, in accordance with the procedures set out in national law ([8]). In addition, the rights set out in the directive in relation to criminal proceedings and deprivation of liberty – namely confidentiality of communications with a lawyer, the right to inform and communicate with third persons and consular authorities, the conditions for temporarily derogating from the right to access to a lawyer and the possibility of waiving the right – apply also in EAW proceedings ([9]). The executing state should make necessary arrangements to ensure that requested persons can effectively exercise their right to access to a lawyer, including by arranging for necessary support and providing legal aid, where applicable, in accordance with national law ([10]).

The requested person also has the right to access to a lawyer in the issuing Member State (so-called dual legal representation). The role of the lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing them with information and advice with a view to the effective exercise of the rights of requested persons under the EAW framework decision ([11]). Where the requested person wishes to exercise this right and does not already have a lawyer in the issuing Member State, the executing Member State should promptly inform the competent authority in the issuing Member State, which in turn, without undue delay, should provide the requested person with information to help them in appointing a lawyer there ([12]). The right is, however, without prejudice to the short time limits applicable to the EAW procedure set out in the EAW framework decision (10 or 60 days for the execution of the EAW, depending on whether the requested person consents to their surrender or not) ([13]).

The executing Member State must ensure that the requested person has the right to legal aid during the entirety of EAW proceedings. The issuing state in turn must provide legal aid to a requested person who is subject to an EAW for the purpose of criminal prosecution where it is necessary to ensure effective access to justice. Both states may, however, subject legal aid to a means test to determine whether the person has sufficient resources to pay for legal assistance themselves ([14]). Decisions regarding legal aid and assignment of lawyers must be made diligently, respecting the right of defence and without undue delay. Refusals must be notified in writing ([15]). In addition, legal aid services must be effective and of adequate quality to safeguard the fairness of proceedings, and the requested person has the right to have their legal aid lawyer replaced where specific circumstances justify it ([16]). The particular needs of vulnerable persons must be taken into account both in guaranteeing the right to access to a lawyer and in the provision of legal aid ([17]).

National laws

The findings show that, when it comes to legal representation in the executing state, the right to access to a lawyer is very well regulated. In all the Member States covered by this research, relevant laws provide that the authorities arresting a person based on an EAW should inform them about their right to be represented by a lawyer. In addition, in the vast majority of the Member States researched, legal representation is mandatory in the event of deprivation of liberty. However, practices differ (e.g. in Finland a requested person can waive the right to legal representation in the executing state ([18]).

The provision of state legal aid in the event that a requested person cannot afford to hire a lawyer privately is equally common practice. In Finland, the state is always responsible for paying for the legal assistance provided to requested persons ([19]).

In all Member States, the right to access to a lawyer includes the right to consult a lawyer confidentially and to have a lawyer present at procedural acts.

The situation is not as straightforward when it comes to the right to legal assistance in the issuing state.

Some Member States have legal provisions regulating access to a lawyer for the requested person when they issue an EAW. Such a right is explicitly provided for in Belgium ([20]), Cyprus ([21]), Czechia ([22]), Finland ([23]), Hungary ([24]), Lithuania ([25]), Malta ([26]), Slovakia ([27]), Spain ([28]) and Sweden ([29]). Other Member States apply general rules on access to a lawyer in domestic criminal proceedings. The logic is that, for the state to issue an EAW, there must be

either criminal proceedings or execution of sentence proceedings pending. Therefore, the requested person should benefit from all the rights that suspects or convicted persons have, including the right to legal assistance. However, the laws invoked in such cases do not specify that the right to legal assistance includes assistance in cases involving the execution of an EAW by another state and do not set out any procedure for appointing a lawyer.

Only a handful of Member States (Czechia ([30]), Finland ([31]), Italy ([32]), Latvia ([33]), Malta ([34]), Slovenia ([35]) and Spain ([36]) explicitly specify in their laws that, when these states execute an EAW, the requested person has to be informed about their right to access to a lawyer in the issuing state. Then, if the requested person wishes to benefit from legal assistance in the issuing state, the executing authorities inform the issuing authorities and leave it up to them to appoint a lawyer in accordance with their national laws.

B. FINDINGS: RIGHT TO ACCESS TO A LAWYER IN PRACTICE

To safeguard the exercise of their rights, requested persons need legal representation throughout; without a lawyer, it will be practically impossible to have their rights safeguarded. Lawyer, Cyprus.

The findings show that the right to a lawyer in the executing state is in general respected, with, however, some shortcomings identified when it comes to appointment of a lawyer of the requested person's choice and effective representation, due to tight deadlines and the very formalised nature of the surrender proceedings.

The right to a lawyer in the issuing state, on the other hand, seems still not to be adequately safeguarded. The authorities provide very little assistance or none at all to the requested person in the process of identifying, appointing and staying in touch with a lawyer in the issuing state, and effective exercise of this right seems to depend on the determination of requested persons and on the personal and professional contacts of lawyers representing them in executing states.

Legal assistance in the executing state

Information about the right to a lawyer

Professionals from all groups interviewed in all the Member States covered by the research stated that the relevant authorities in the executing Member State inform the requested person about their right to a lawyer in that state. It seems that this information is usually conveyed first by the police and then reiterated by prosecutors and judges.

Just over half of requested persons participating in this research (or their lawyers participating on their behalf) knew about the right to a lawyer as a part of their general knowledge. Out of 30 of them, 17 remembered being explicitly informed about this right, while some (8 out of 30) did not remember being informed. Nonetheless, all of them were able to exercise this right. However, requested persons who did not speak the language of the executing state reported having experienced some initial problems. A Dutch citizen arrested in Italy based on a Greek EAW reported that he became aware that he was entitled to appoint a private lawyer entrusted to his case only thanks to information provided to him by other inmates in detention. At the moment of his arrest, he did not understand the extent of the right, allegedly due to the language barrier. This was echoed by a requested person arrested in Cyprus.

> *The police did not help me; they just gave me a phone to call [somebody] and [tell them] I was arrested. There was no interpretation at the time; I did not understand much. No list of legal aid lawyers was given to me, nor was legal aid explained. I did not have an interpreter then. I was not given the chance to search on the internet for a lawyer. I chose my lawyer myself through my friends and I was allowed to contact him. When I mentioned the lawyer's name, the police contacted him – there was no problem there. I met my lawyer outside the courtroom; no statement was taken from me at the police station. At the first hearing, I was given 30 minutes with my lawyer to discuss the case.* Requested person, Cyprus.

Appointment of a lawyer

When it comes to the appointment of a lawyer, professionals from most Member States agreed that the common practice is that the police inform the person that they are arrested under an EAW issued by another Member State and that they are therefore entitled to appoint a lawyer. The police then ask them whether they want to appoint a lawyer or whether they want a lawyer to be appointed *ex officio* and 'with this, they complete the formalities', as a lawyer from Spain explained. The interviewee stated that 'they do not help to contact private lawyers'. It appears from the interviews that the situation is similar in almost all other countries (with some exceptions, in that requested persons might be handed a list of lawyers), and the police do not assist requested persons in any way in finding and contacting a private lawyer. That is why, at least at the beginning of the proceedings, the appointment of a lawyer *ex officio* is very common.

> *I wouldn't say they have much assistance from the authorities; they would tell them where to find the contact information, nothing more. The authority does its job if it appoints an* ex officio *lawyer, but if someone wants to retain their own … That is a bit of a guess, but I think that the system, the authority, does not bother with that, because the* ex officio *lawyer has been provided.* Lawyer, Slovenia.

> *As I managed to speak [by phone] with my girlfriend, my cousin, who was aware of the case, managed to contact someone in London who*

knew that lawyer and that lawyer went there. He was a lawyer for the state. That's what I didn't know. Because we really wanted a lawyer who wasn't from the state; we wanted to pay and do everything right. But we got a good lawyer. He was recommended to us by someone who had a good experience with him. And I also had a good experience with him. He was always very attentive, always tried everything I asked him to do, always went after it, and that's the reason why I'm with him nowadays. Requested person, Portugal.

However, the interviewed requested persons who did manage to hire private lawyers reported that these lawyers were crucial in their representation and in some cases in the EAW not being executed.

> *If I had been a person who did not have the financial resources to pay the lawyer, I would have been in prison for 4 years. A person who didn't have the funds would do it and shut up. … Without money you cannot have a good lawyer. A public defender would have never got me out.* Requested person, Italy.

> *I'm extremely lucky because I have a quite good lawyer that I knew I could rely on when the time came. He had already known that this could [happen]. He had already prepared a memorandum for the prosecutor. He had already prepared to go and get me out of prison. And still it took him two days. So, I really don't know, for people who don't have the means to have legal assistance.* Requested person, Italy.

The main takeaway is that legal representation in EAW cases is in general provided. The professionals agreed that a court hearing would never go ahead without the requested person having a lawyer.

> *Nothing happens in court [in EAW proceedings] without a lawyer. If the person is already brought to court and the lawyer is not there yet, I do not even approach the person. I think it is correct that any communication with the requested person takes place only when their lawyer is present.* Prosecutor, Slovenia.

Legal aid

It appears from the interviews that it is common for requested persons to make use of a legal aid scheme (i.e. a mechanism whereby the state pays for the legal assistance provided either by a privately hired lawyer or by a state-appointed lawyer) in EAW proceedings in the executing state. The procedure for the appointment of a lawyer through legal aid is always governed by the national law of the state in question.

Some of the interviewed lawyers in Germany, Hungary and Slovenia made the criticism that the legal aid fees for EAW proceedings are too low for effective representation to be conducted. For example, a lawyer in Germany would be awarded an approximate maximum of EUR 400 for the whole proceedings, which in the view of the majority of the interviewed lawyers (four out of five) would not be sufficient for a fairly compensated legal defence.

> *The state-appointed lawyer does not receive any compensation for the client consultations or for drafting the pleadings, so in fact he is only paid to be present at the court hearing. But what is needed for the substantive work of the defence is not paid at all, and even if it was, it would only be this pitiful hourly rate of 6 000 forints [approximately EUR 15].* Lawyer, Hungary.

> *The lawyer is always present; in practice, I do not see problems. What is not fair is that the fee that the* ex officio *lawyer receives from the state is half of the regular lawyer's fee. But I do not even do many of these cases. I am on the duty list more through a combination of certain circumstances. I see it as paying a debt to society.* Lawyer, Slovenia.

Some interviewees argued that low fees for legal aid for EAWs result in poor-quality assistance. Furthermore, a prosecutor interviewed in Estonia expressed some doubts regarding the quality of state-financed legal defence.

> *The quality of state legal aid is a separate issue altogether. Sometimes they misunderstand and give wrong information to the client. In this case, my role as a prosecutor in these processes is also to look at the circumstances objectively, and if I see that there are any circumstances preventing the [surrender] according to the law, I will immediately point them out. My role as a prosecutor is not to shut up when the defence is stupid. I can point out all the circumstances in the same way and cover the shortcomings.* Prosecutor, Estonia.

Role of the lawyer in the executing state

> *Lawyers [should not] confuse the defence to be presented [in relation to] the European Arrest Warrant with the defence they must present in the main proceedings. Lawyers should only focus on grounds for refusing execution.* Judge, Portugal.

It appears from the interviews that most professionals perceive the role of a lawyer in the executing state very similarly. The lawyer should first secure bail and make sure that the person is released from custody and then assist the requested person by providing them with information, explaining the person's legal situation and the legal consequences of the EAW. They should also explain the speciality rule and discuss whether the arrested person should consent to their surrender or not. In addition, defence lawyers see it as their role to get in touch with the requested person's lawyer in the issuing state.

A defence lawyer from Lithuania explained that, being led by the principle of 'doing everything in the best interests of the client', the lawyer assesses whether their client's human rights will be ensured in the issuing state. The lawyer makes sure that during the proceedings the authorities respect the client's rights and do not just 'give a document and point the finger where to sign', that they invite an interpreter and that the person's rights are not treated as a mere formality. Sometimes just the presence of a defence counsel instils discipline in law enforcement officials and in general ensures respect for a requested person's fundamental rights.

> *As a defence lawyer, I am interested in what the client wants. If he objects to surrender, then it is a relatively technical task to fight the surrender. There are not that many facts that I have to clarify with my client. The most important thing is to inform them of their rights and the course of the procedure, to get basic information about the procedure for which the surrender is sought and what it is that the client wants. If they do not want to be surrendered, you try to get that result, if possible.* Lawyer, Slovenia.

In addition, another lawyer highlighted the importance of creating a support network, since requested persons tend to be alone in the executing state when they are arrested. Therefore, it is important to visit a person in detention and supply them with hygiene products, newspapers and other basic items,

as well as to contact family members or a lawyer that the requested person knows in the issuing state.

> *We have to support these persons. We have to do our legal work and we have to make sure that this person is stable within the situation they are in. And we usually have to arrange a second contact, which is either the family or a lawyer who knows the person from the issuing country and knows me or is part of a network of contacts of an associate of mine. So we always have to have a network of contacts in case something is needed, things as basic as clothes. It has happened that I [have] had to go and buy clothes for them to wear or give them money.* Lawyer, Portugal.

Consultations with a lawyer

It is commonly agreed that requested persons have the right to consult their lawyers confidentially. However, the exercise of this right in practice can sometimes be challenging.

The first consultation takes place either in the detention facility or in the court before the hearing. The majority of professionals from all groups see the process of consultation as rather straightforward, and most of the interviewed lawyers had never experienced any challenges in communicating with their clients and were never obliged to consult their clients in the presence of someone else. It is not uncommon for the judge to pause the hearing to allow for consultation to occur.

> *I have never experienced a situation in which someone told me [to stop consulting with a requested person], even at the police or in the detention facility or at the court. I've never been told, 'That's enough, let's go on.' This has never happened to me.* Defence lawyer, Czechia.

> *If the requested person requests, the court will adjourn the proceedings to give the requested person the possibility to consult with their lawyer. The lawyer is present at all stages and at all hearings.* Prosecutor, Cyprus.

However, several lawyers from Ireland and Italy mentioned **delays in obtaining consultations with persons in custody**, which was a problem given the tight EAW timelines.

> *EAW proceedings should be given priority … because, you know, it's a forcible rendition on a flight, not just a district court hearing or whatever else. So, there's a problem with facilitation of timely consultations. Sometimes it can take 2 or 3 weeks to get a consultation, depending on the prison.* Lawyer, Ireland.

Lawyers from Slovenia and Spain added that sometimes the time scheduled for the consultation is too short.

> *The length of the lawyer–client conversation will depend on the position of the case on the courtroom docket. If you are first, you will have little time; if you are fourth, you will be able to go to the cells of the court and talk longer.* Lawyer, Spain.

In particular, when *ex officio* lawyers are on duty, they may be assigned an EAW case while also having several other clients assigned to them, and they may not given enough time in court to talk to the requested person before the hearing. Sometimes they have to meet their client in a corridor in the court to get a chance to speak to them before the hearing. The lawyer from

Spain highlighted that 'one of the main problems in EAW proceedings is the lack of time'.

Another challenge identified was a lack of special rooms in police stations or courthouses for private consultations. A lawyer from Slovenia stated that they had meetings with their clients in the corridor outside the courtroom, a situation that is confirmed by a judge from Slovenia.

> *The first consultation usually takes place in the hallway in front of the courtroom. The police bring him there .... It has happened before that they have asked to have the consultation inside the courtroom, because there is a table there, so they could have a look at the documents in peace, and the rest of us have left the room.* Judge, Slovenia.

A requested person interviewed in Spain reported not having the opportunity to consult with their *ex officio* lawyer in private before being questioned. They were able to speak at the police station, but in the presence of the police, and subsequently they did not see the lawyer again until they were in the courtroom at the courthouse. The interviewee does not recall being alone with the lawyer until they left the courtroom. They did not speak in private, and the requested person did not ask why, as they were not aware of having the right to a private consultation.

One of the major challenges reported by some requested persons was **the impossibility of contacting a lawyer by phone from Italian detention facilities**. This is a major shortcoming of the Italian detention system; the prison administrations require detainees to pay for phone calls using phonecards. Some defendants reported not having money with them, thus making it impossible to communicate with their lawyers.

> *I spent two nights in prison, and I couldn't contact my lawyer because I couldn't make phone calls. I had to get a card to make a phone call. I had no idea what was going on. I didn't know that my lawyer was trying to get me out. But because it was on Friday, I had to wait until Monday because the judge was not there.* Requested person, Italy.

> *To have any contact with the outside world from prison, I needed to have money with me so I could make a phone call or anything. I didn't have any money, and it was like the ongoing circle: I needed to call to get money, I had no money so I couldn't call. And at some point, I got a lawyer from the Italian government. But of course, I wasn't happy about it. So I asked the inmates if they knew a good lawyer, a private lawyer. And so I started that procedure. But also, my wife, she started her procedure from her side and arranged a private lawyer for me. So I think after a good week of detention the lawyer came to visit me for the first time.* Requested person, Italy.

Two requested persons interviewed in Finland were not given an opportunity to consult with a lawyer in private. They met their lawyers for the first time at their court hearings.

> *Such an opportunity [to consult with my lawyer in private] was not given at any stage. When I had my court hearing ... my interpreter and lawyer were already sitting there. I was just brought to the hearing room, and then the session began.* Requested person, Finland.

A lawyer interviewed in Spain noted that, while it is now common for the requested person and their lawyer to have a meeting prior to the hearing,

this was not always the case. This practice is considered a positive development by lawyers. However, in the past it was common for the arrested individual to go to their hearing without having spoken to their lawyer. Now, lawyers no longer experience problems meeting with clients to explain the situation and develop a strategy according to the circumstances of the case.

Legal assistance in the issuing state

Information about the right to a lawyer

When it comes to providing information about legal assistance in the issuing state, the professionals' accounts differ. Most professionals interviewed in Belgium, Finland, Germany and Slovakia stated that requested persons arrested in their country are informed about the right to have legal assistance in the issuing state as well as in the executing state. Croatian, Cypriot, Czech and Spanish professionals are divided on the issue. One lawyer from Spain stated that, recently, requested persons have been informed of this right more often than they were in the past, as the authorities are getting more used to the idea. There is no mechanism, however, to safeguard the exercise of this right.

However, professionals from Estonia, Ireland ([37]), Italy, Malta, Portugal and Slovenia agreed that the authorities do not inform the requested persons that they can benefit from the assistance of a lawyer in the Member State that issued the EAW.

> *From what I know, [requested persons] are never informed of this. I have to inform them of this need. This information is not in our law and no judge has time to read the directive.* Lawyer, Portugal.

> *Maltese authorities do not provide assistance or information about legal aid with the appointment of a lawyer in the issuing Member State. Prosecutors are not obliged to inform the requested person about the right to be legally assisted in the state where the EAW was issued.* Prosecutor, Malta.

The requested persons in general (with some exceptions) do not remember being informed about this right by the authorities; rather, their lawyers informed them about it. Their lawyers also arranged for the appointments of a lawyer in the issuing state.

> *After the process advanced, the lawyer had to contact a colleague in Spain, to represent me in something, I can't remember, or to consult [on] the process there.* Requested person, Portugal.

> *No one informed me that I had the right to have a lawyer in the issuing state or helped me to contact one.* Requested person, Spain.

Appointment of a lawyer in the issuing state

It appears that the appointment of a lawyer in the issuing state is not straightforward and no mechanism to facilitate the exercise of this right exists.

The Swedish example stands out as exceptional. When Sweden issues an EAW for prosecution, the requested person usually has a lawyer appointed to them. A prosecutor interviewed in Sweden explained that, when an EAW is issued for prosecution, the court has to first issue a detention order *in absentia*. There is always a hearing, for which the person is appointed a public defence counsel, and this lawyer continues to represent the person in the issuing state. However, the same prosecutor highlighted that the most

recent requests for a public defence counsel in cases of EAWs issued for the execution of a sentence have been denied by the district court. The court has denied requests for a public defence counsel because the requested person is being returned to Sweden to serve a sentence that has already been decided on by the courts, in a trial at which they had legal representation. The prosecutor reported that some district courts have continued to appoint a public defence counsel in these cases, but some have decided that this should not be the case.

In the rest of the Member States covered, it seems that a lawyer in the issuing state is contacted either by the lawyer in the executing state or by family members of requested persons. If a person has no family or social ties in the issuing state, lawyers use their contacts or search the internet to find a lawyer in the Member State in question who specialises in EAW proceedings.

> *I had a lawyer in Germany, but he was located by my Cypriot lawyer. He was not identified by the court. No one told me that I was entitled to help to locate a lawyer in Germany. My lawyer tried hard to locate one. No one told me I was entitled to legal aid for the lawyer in Germany. The lawyer in Germany was very helpful.* Requested person, Cyprus.

Another interviewee reported that they had tried to hire a lawyer in the issuing state, but the lawyer refused to represent them because there was nothing to be done.

> *I didn't have a lawyer in the country of issue. I tried to hire a lawyer who was recommended to me. He looked at the case file and said there was nothing he could do any more because too much time had passed. As I already had a warrant for my arrest, he said he didn't want to collect my money to make appeals … that he knew would be denied.* Requested person, Portugal.

Prosecutors and judges explained that the authorities in the executing state do not want to get involved in facilitating the appointment of a lawyer in the issuing state because the matter concerns another jurisdiction, and they are not sure about the rules there.

> *I am not sure about whether we have such a duty. The procedure takes place in Cyprus; I don't know what happens in the issuing Member State. The identification and selection of a lawyer in the issuing state is one of the duties of the lawyer in Cyprus. … If the lawyers in Cyprus cannot help their clients locate and instruct a lawyer in the issuing state and the person asks for a list of lawyers, then we might be able to help. This has never happened in my experience. I don't know if any facilitation is offered to locate a legal aid lawyer in the issuing Member State either. I assume that what applies to non-legal aid lawyers also applies to legal aid lawyers.* Prosecutor, Cyprus.

However, interviewees were able to point to a few examples of the appointment of a lawyer in the issuing state facilitated by the executing state. A prosecutor from Belgium remembered being contacted by the executing authorities about legal assistance in Belgium for a requested person. A prosecutor interviewed in Czechia mentioned that the Austrian and German authorities send well-written notes informing requested persons about appointing a lawyer in these states.

> *Austrians have a beautiful template for this, that's what they send, and I also saw this with the ones the Germans send. It is my duty to inform*

the requested person that I am obliged to help them choose a defence lawyer in the country where the EAW was issued. Prosecutor, Czechia.

Three lawyers interviewed in Germany declared that they regularly cooperate with colleagues in the issuing Member State. They pointed out that no support is provided by the authorities and that the appointment of a lawyer in the issuing state mainly comes down to their personal efforts. A lawyer based in Berlin with significant expertise in extradition cases all over Germany highlighted the importance of cooperation.

> *Of course, with the increasing networking of the investigative authorities, the defence also has to be increasingly linked with each other. So I assume that many colleagues who are often active in this field have a corresponding network and can also recommend colleagues in different countries for the respective subject areas. Alternatively, of course, there are things like the associations, such as the ECBA [European Criminal Bar Association], which also provides the network of defenders, and recommends colleagues. And I have to say that it is now quite possible to find qualified colleagues quickly.* Lawyer, Germany.

A lawyer from Hamburg provided an example of a case in which the executing authority in the Netherlands actively asked the court in Hamburg for contact details of lawyers in Germany to defend a German citizen in an EAW proceeding.

However, some interviewees expressed the opinion that the EU law should be more precise. A prosecutor from Spain was of the opinion that dual representation is not well regulated at the European level and that, if a requested person wants to appoint a lawyer in the issuing state, the court can do nothing; it is up to the person or their relatives to do so.

> *Perhaps we could think about a solution: as soon as I have news here that the person was found in another Member State, I suggest to the investigating judge to appoint a lawyer. … It would be possible to provide an additional guarantee to the future defendant that there is already someone here who is defending them.* Prosecutor, Portugal.

Many interviewees suggested that having a centralised database would be helpful. The European Criminal Bar Association does provide such a list of defence lawyers ([38]), but one lawyer from Ireland pointed out that it would be more helpful if the list could be vetted in some way, to ensure that the lawyers listed had sufficient expertise and qualifications.

In this respect, one of the requested persons stressed that it is not enough to be a good criminal lawyer to deal adequately with EAW cases: it is necessary for the lawyer to have specific expertise in the international judicial cooperation field.

> *You can't just be a criminal lawyer. I think you have to know exactly this field and what you're doing. And I chose my lawyer in Italy exactly for that purpose, because he's quite a known person who helps people in this kind of procedures.* Requested person, Italy.

Legal aid

The vast majority of interviewees stated that it is extremely rare for requested persons to make use of a legal aid scheme when it comes to appointing a lawyer in the issuing state. The Irish and Swedish systems seem to be exceptional in this respect. The Swedish system is discussed above; in short, most requested persons have an *ex officio* lawyer appointed to them shortly after Sweden issues an EAW.

Ireland, as an executing state, will cover the cost of expert statements from an issuing state lawyer through legal aid. National authorities seemed to feel that this was straightforward enough.

> *[Although there is no automatic right to the lawyer in the issuing state] any lawyer who feels that they need assistance from the issuing state simply comes to the court and says, 'Can I have an extension of the legal aid … scheme to cover the cost of getting a lawyer?', and the answer is always yes.* National authority, Ireland.

Except in Ireland and Sweden, interviewed professionals did not know of any instances of legal assistance in an issuing state during EAW proceedings being financed through legal aid. Therefore, it seems that this option is available only to defendants who can afford it.

Role of the lawyer in the issuing state

> *In all such proceedings, it is important for the lawyer [in the executing state] to have the assistance of a lawyer from the jurisdiction requesting surrender. In my experience, whenever I have been able to work with someone from that country, the results have been better.* Lawyer, Slovenia.

Dual legal representation appears to be rare in general, and many interviewed lawyers did not have any experience of it at all. There were some, however, who did, and it had changed their way of thinking about the benefits of dual legal representation.

> *At first, I was sceptical about the benefits of taking on a lawyer in the issuing country, but experience has shown that it is very useful. Why? Because that lawyer had the opportunity to get in touch with the issuing authority and to agree on the course of action in the issuing country. They practically agreed on a penalty. … Once there was a certain degree of likelihood that their agreement would be accepted, my client informed me that he now consents to surrender. After that, it went rather fast. The man sat in our custody for 2 months, only to be surrendered and brought before a judge [in the issuing country], where the prosecutor then requested that he be punished with a fine.* Lawyer, Slovenia.

The lawyer in the issuing state is the one who has access to the file that the EAW arises from, the one who knows the procedural system and, consequently, the one who advises the lawyer in the executing state on whether there may have been a breach of any procedural or substantive rule and thus can substantiate the argument in the case.

> *For example, there were several cases of default in which an automatic warrant had been issued and then an EAW based on a national warrant in cases that did not even admit pre-trial detention. This was illegal in my understanding. … the lawyer in the issuing state can provide the attorney in the executing state with information that may be pertinent to the defence there. They can check the possibility of changing the EAW, for example, bringing some evidence about the person's situation and getting a change, in which case either the EAW is revoked, or replaced by a request for a questioning … it depends on the case.* Lawyer, Portugal.

Experts participating in the experts' meeting organised by FRA referred to promising practices involving an EAW being withdrawn as a result of the work of a lawyer in the issuing Member State. Lawyers in issuing Member

States have, for example, been able to establish that an EAW was issued against the wrong person or in a situation that should not lead to detention. This could be accomplished only because the lawyers in the issuing states had access to the original case files.

Interviewed lawyers also referred to **expert statements** obtained from lawyers in issuing states. These would include, for example, statements on conditions of detention. They might also cover points of law specific to the case itself, for example whether the requested person would have been aware that their case had been tried *in absentia*, and, more specifically, whether the person was aware of the judgment rendered against them and whether they were defended in the proceedings by an appointed lawyer. A lawyer from Spain stated that, when acting in Spain as a lawyer in the issuing state, their task was to communicate with the lawyer in the executing state to find a reason to refuse surrender, whether a mandatory reason such as *res judicata* or minority of age, or an optional reason such as a pending case or lack of dual criminality.

Another lawyer highlighted that, in the relatively rare cases in which surrender was refused, the EAW remained in place, and the requested person was liable to be arrested again if they went to their home country or any other EU Member State. In such cases, the role of the issuing state lawyer was key in getting the warrant revoked.

> *Try and use the lawyer in their home state to get the warrant cancelled. That's the way to get the warrant cancelled … and it does seem to be possible to do that. We've had cases where we've gotten warrants withdrawn, or an agreement that if the person goes back voluntarily, it can be dealt with …. That's why having a lawyer in the home state is vitally important, I think, because they can make representations.* Lawyer, Ireland.

Some interviewed requested persons had lawyers in the issuing state. A requested person interviewed in Portugal recalled that their lawyer in the issuing state was contacted only to gather information regarding the detention conditions in the issuing state (in this case, Portugal) to strengthen the argument that the interviewee should not be handed over due to their health problems.

A judge from Portugal added that in practice it is very difficult for the lawyer in the issuing state to act in such a case. The interviewee explained that the deadlines for compliance with an EAW are very strict and that the requested person may not even have any connection with the issuing state.

> *It is also difficult for a lawyer from the issuing state to be able to come immediately to exercise their functions. It is much more complicated given the very tight deadlines we have to comply with [in EAW cases]. … To my knowledge, it is not stated that they can choose a lawyer from the [issuing] state. In fact, they may not even have any connection with the state that issued the European Arrest Warrant, they only committed the acts there and [then left].* Judge, Portugal.

Some professionals interviewed in Spain expressed the view that the lawyer in the issuing state does not provide any assistance at all. In fact, one lawyer pointed out that it is difficult to see how assistance can be provided in practice in view of the speed of the procedure. Given the short deadlines, it is not easy for the lawyer in the executing state to locate a lawyer in the other country to gather information about the case.

> *The EAW is merely a cooperation mechanism to surrender the requested person to the issuing state.* Lawyer, Spain.

The same view was echoed by some interviewees from Estonia. A prosecutor explained that lawyers in the issuing state can be helpful only in some specific cases, not in the majority of EAW cases.

> *[A] lawyer's assistance can be provided if there are any [reasons] why the EAW should not be executed, for example if the lawyer in Romania could produce some documents showing that the conditions of detention are very poor and under no circumstances should a person be sent there. In practice, lawyers in the issuing state do not participate in the proceedings in the executing state in any way. I do not see a very practical need for them. The surrender procedure is a specific procedure with very short deadlines – I do not see how a lawyer elsewhere could help.* Prosecutor, Estonia.

Consultations with a lawyer

It appears that, in cases involving dual defence, most consultations happen between the lawyers, as the requested person is not always able to communicate with their lawyer in the issuing state.

However, a lawyer from Lithuania recalled being contacted by a requested person and then communicating directly with her. The interviewee was approached by a person convicted in Lithuania, who later fled to another EU state. The Lithuanian authorities issued an EAW to execute the remainder of the sentence due to violation of parole. The interviewee was hired and asked to organise everything so that the person could return to Lithuania with her children to serve the sentence. However, it was not possible because the only detention facility for women in Lithuania, which has a limited number of places for women who can serve their sentences with their children, was fully occupied. The interviewee argued that a woman with a 1-year-old child should not be separated from her child just so that she could serve some part of her sentence in Lithuania for a year or less. The courts gave a very formal answer to the interviewee's appeals, saying that the proceedings were in accordance with the law. The rights and interests of the child were not considered. On the advice of the interviewee, the lawyer in the executing state started a procedure to prevent the EAW from being executed, which was successful.

However, the interviews provided far more examples of requested persons not being able to remain in touch with their lawyers in the issuing state. A requested person interviewed in Italy stated that, during his detention in Italy, he was not allowed to contact his lawyer in France. The prison administration told him that, although his French lawyer would be allowed to visit him in prison, they would not allow the defendant to phone a French number because they could not be sure that he was actually contacting his lawyer. According to the interviewee, this decision was a violation of his rights. The French lawyer was therefore contacted directly by the defendant's Italian lawyers.

> *One thing that unfortunately has not been possible is to contact my lawyer in France. They wouldn't let me do that. In prison [in Turin], they told me it wasn't possible to call him because he's a French lawyer. But excuse me if I have several lawyers and I have a lawyer in France. Why can't I have the right to call him? They told me it was a French number that they couldn't be sure was really the lawyer's number and that they needed authorisation from the public prosecutor's*

office. That he could visit me in prison, though. A mess. Requested person, Italy.

A judge and a lawyer from Estonia confirmed that communication between the requested person and their lawyer in the issuing state is often difficult, and the lawyer referred to a case in which their client detained in Hungary was not allowed to communicate with them directly but had to communicate through their Hungarian lawyer. Therefore, how well the client was represented depended on how well the lawyers were able to exchange information.

I have had this situation … a few times – a lawyer appointed in Estonia has contacted the lawyer of the issuing country at the request of the client to clarify the legal situation in another country. So the person can contact a lawyer in another country through their own lawyer in Estonia. Judge, Estonia.

It appears from the research that communication and cooperation between lawyers in the issuing and executing states are not facilitated by public authorities; they primarily depend on the expertise (including the language skills), will and personal connection of the lawyers themselves.

In some cases, this communication has proved to be crucial in effectively assisting the defendant, as in the case of an Italian citizen arrested in France based on an Italian EAW. As reported by one of his lawyers, cooperation with Italian colleagues was key: they provided information on and interpretation of the original Italian judicial case, helping the French lawyers to understand the specific case in its cultural and political context. Moreover, they explained to the French lawyers the origin and meaning of the particular criminal charge in Italy (which does not exist in France), helping them to find a parallel in the history of the French criminal system and to understand the scope of the offence.

Most interviewed lawyers referred to tight deadlines and therefore difficulties faced by lawyers in the issuing state. A lawyer interviewed in Cyprus recalled a case that made it to the Supreme Court: a requested person asked the Cypriot court for an adjournment in order for his lawyer in the issuing state to have time to study the case file provided by the Ministry of Justice and advise the requested person accordingly. The court rejected the request for adjournment and the requested person appealed the decision and won ([39]). The Court of Appeal ruled that the requested person had been deprived of their right to a fair trial, annulled the trial court decision executing the EAW and ordered a retrial.

The biggest problem we face for effective protection of procedural rights and [in] particular the right to appoint a lawyer in the issuing state is the tight deadlines foreseen in the regulations for issuing a decision on EAW executions. In Cyprus, trial courts must issue a decision within 35 days, which is far too tight. By the time we identify lawyers in the issuing states, by the time we instruct them, by the time they need to contact the competent authorities and obtain the case file, the timeline of 35 days expires. The court needs at least a week to study the submissions and issue a decision. The process is far too long and time-consuming to be completed in 35 days. Lawyer, Cyprus.

One lawyer from Finland suggested that it would be useful to establish a database for the exchange of documents ([40]). If this were available, documents would no longer have to be sent between individual lawyers.

Dual legal representation

The experts who participated in the experts' meeting organised by FRA highlighted that the right to dual legal representation is very rarely exercised in practice. This is a key issue in relation to the procedural rights of requested persons, particularly as dual legal representation affects the enjoyment of other rights, such as the right to information, and can be an effective tool for the defence. The lack of dual legal representation appears to result from a number of factors, including a lack of knowledge about the right among lawyers and judicial authorities in executing Member States, requested persons not being informed about the right and barriers to getting in contact with lawyers in the issuing state, for example due to a lack of contacts with such lawyers, the tight deadlines applicable in EAW proceedings or language barriers between lawyers. Some experts considered that the role of the lawyer in EAW proceedings is a matter of form, reduced to explaining the formalities to the requested person, while others noted problems relating to access to legal aid in certain Member States.

Representing requested persons – lawyers' experiences

When asked to reflect on challenges, best practices and ways forward regarding the legal representation of requested persons in EAW proceedings, the interviewees from all states covered mentioned some aspects of their work that could be improved and some that work well.

Specialisation of lawyers

One recurring theme was the question of the expertise of lawyers. The vast majority of interviewed professionals and requested persons pointed out that ideally lawyers representing requested persons in both executing and issuing states should specialise in EAW proceedings and be able to speak foreign languages. A lawyer who brought two time-intensive cases to the Constitutional Court in Germany emphasised that these cases differ significantly from ordinary criminal cases.

> *When selecting legal representation in extradition proceedings, no consideration is given to professional expertise. As a result, colleagues who accept such a mandate first have to familiarise themselves with the legal matter. This is very time-consuming, since international criminal law is not taught during the course or during the legal clerkship. In addition, there is time-consuming research into the respective prison conditions or procedural rights, and in foreign languages, which represents an additional burden.* Lawyer, Germany.

Moreover, lawyers who are experienced in cross-border proceedings can generally count on a network of criminal lawyers in EU Member States, thus facilitating the cooperation between lawyers that is crucial in EAW proceedings.

> *I know many colleagues who are public defenders in international judicial cooperation who do not speak a foreign language and therefore have no contact with their client except for a very brief contact with the interpreter just before the hearing. And that is effectively denying an effective defence.* Lawyer, Italy.

> *We have a circle of lawyers who do [EAW proceedings] and, I confess, I would rather take a lawyer whom I know to have already been involved in some proceedings and I see that they also have some overview compared to someone completely unknown, for whom I have no guarantee that they will provide the legal assistance to a requested person as it should be. When an unknown lawyer comes, they have no idea, because in such a short time from when I reach out to them until when the [hearing] takes place – sometimes the [hearing] is taking place the next day – they will not have time to study [the case].* Judge, Slovakia.

Lawyers in a number of countries suggest that it would be good to establish a specialised unit/pool of lawyers with knowledge about the EAW procedure, to guarantee the rights of requested persons more effectively.

> *States would do well to provide lists of lawyers with some expertise in the EAW, not just any lawyer who wants to join. This information should be made available to third parties, to make it easier to find a specialised lawyer in a given country.* Lawyer, Spain.

An interesting practice was reported by a defendant arrested in France based on an Italian EAW. He reported that it is possible to search for criminal lawyers in France – both public defenders and private lawyers – by field of expertise ([41]). Thanks to this organisational approach, the defendant can benefit from the very beginning of proceedings from the assistance of a public defender with solid expertise in EAW cases.

To facilitate specialisation in EAW cases, interviewed lawyers and experts participating in the meeting organised by FRA noted the need to provide more training courses on the EAW so that these proceedings are taken more seriously and not treated as a formality, as some believe they are at present. Interviewees added that other professionals involved in EAW proceedings would also benefit from specialisation. Interviewed lawyers from Italy referred in this context to the EAW specialised section at the Court of Appeals of Rome, formed of judges with specific expertise in this field who are aware of national and international jurisprudence. This specialisation of judges contributes to better conduct of the proceedings with greater respect for the fundamental rights of requested persons.

However, it is worth noting that all interviewees from Ireland agreed that the **standard of legal representation** provided to requested persons is exceptionally high. This is in part because all EAWs in Ireland are processed through the High Court, rather than the lower courts. While one professional questioned whether this is the best use of the High Court's time, all agreed that it contributed to a high standard of legal representation.

Promising practice – Slovakia

The General Prosecutor's office holds regular meetings and prepares a regular overview of the most recent developments in the jurisprudence of the Supreme Court, the ECtHR and the CJEU that are relevant for EAW cases or the implementation of international arrest warrants in Slovakia. This enables all prosecutors dealing with the EAW to have up-to-date information and ensures a relatively consistent approach.

Tight deadlines

Another common challenge identified by the majority of interviewees and experts participating in the meeting organised by FRA is the very tight deadlines in EAW proceedings. According to the EAW framework decision, an EAW should be executed within 10 or 60 days, depending on whether the requested person consents to be surrendered or not ([42]).

> *I have to defend the client in a very short time. The normal deadline for defence is … 5 to 10 days. It is normal for the courts to give 10 days, but 10 days is nothing.* Lawyer, Portugal.

A lawyer interviewed in Spain elaborated on the lack of time for the lawyer to review the case file in depth, prepare a strategy and talk to their client, stating that usually everything is done in court quickly on the day of the hearing. For this reason, the practitioner considers that the rights of the

individual are not fully guaranteed in the EAW procedure, because requested persons are not allowed an adequate defence due to the lack of time lawyers have to prepare.

A lawyer from Cyprus added that often the court timelines are so tight that there is not sufficient time to locate and instruct a lawyer. If the requested person is not happy with the lawyer initially instructed, they will need time to identify and instruct a new one, who will in turn require time to study the file. Because of the strict timelines, this is often impossible. The courts tend to forget that preparation is needed and set hearing dates even before a lawyer has been identified. The same sentiment was echoed by a lawyer from Estonia.

> *But the pace of the proceedings is so fast that all these rights in my opinion are superficial, not real. I have the right for my lawyer to be present, but I have not been provided reasonable time to search for them.* Lawyer, Estonia.

> *There is a lack of time to participate in the proceedings, which removes even those few options to [argue] something. It is currently built in a way that, when there has not been a mistake in identifying the person and the crime has been described with enough severity, then the requested person is extradited. The defence lawyer's participation is rather pointless. To [look on] and shrug.* Lawyer, Estonia.

Very limited role of the lawyer under the rules governing the European Arrest Warrant

Another challenge mentioned by interviewees is the very limited role of the defence lawyer in EAW cases.

A lawyer from Malta explained that, since the EAW is a tool for mutual assistance between Member States and its primary scope is to simplify the extradition process without the need to go into the merits of the case, **the role of the lawyer is very limited**. It is hard to defend a person without going into the merits of the case. A lawyer from Hungary pointed out that, since the EAW is considered to only be a 'formality', lawyers do not really have a way to 'win' their cases. The possibilities are very narrow: either the requested person consents to be surrendered and is transferred to the issuing state within 10 days or they remain in Hungary for months before anything happens. Furthermore, due to the time frame and the structure of EAW proceedings, there is no room to examine the substance of the case, only its formal/procedural aspects.

> *So the problem I had in one case was that the requested person said that they had not committed anything …. And then I said that we cannot take a position on this before the court. You can discuss it there [in the issuing state]. But they felt completely innocent in this, and I cannot go into the merits of their case. That is the rule, so I can only plead on normal [i.e. formal] grounds, on procedural grounds which could possibly be grounds for refusal.* Lawyer, Hungary.

Echoing this, a lawyer from Sweden added that the very limited role of the defence lawyer makes them feel helpless.

> *In essence, there is very little a public defence counsel can do and that is the point. But it can be quite frustrating as a person's legal counsel not being able to do more. You realise that this is completely wrong, but there is no point in [discussing] it, … it is just to play the game, sort of*. Lawyer, Sweden.

A lawyer from Portugal added that, because there are very few grounds for the non-execution of an EAW, justifying refusal requires a very careful and thorough analysis of the EAW and collaboration with the lawyer in the issuing state. If this is not successful, the next step is to try to find a way, also with the collaboration of the lawyer in the issuing state, to reopen the proceedings in the issuing state to ensure that the requested person has the opportunity to present themselves voluntarily.

> *A very careful and thorough analysis of the EAW and whether we have any way of ensuring that the EAW is not executed [is required]. To that end, once again, from my own experience, collaboration with the issuing state lawyer is fundamental. That is the great challenge. As a lawyer in the issuing state, the challenge is, first of all, to find a way of being able to reopen the case by means of a review appeal.* Lawyer, Portugal.

Difficulties in communication between lawyers in the two states

Elaborating on communication between the lawyers, the interviewees stated that it is difficult first to find a partner in the issuing state and second to maintain communication with them within the strict time limits. In this respect, personal and professional connections are deemed to be pivotal. A lack of cooperation between professionals could compromise the requested person's ability to challenge the content of the judicial act on which the EAW is based.

> *The person who, for example, wants to contest the grounds on the merits, must do so in the state that issued the arrest warrant. There is no system to connect the defender in Italy with a defender outside Italy. My impression is that it is still very much based on individual ability. So, if a person appoints a lawyer in Italy who perhaps belongs to a firm that has networks or contacts with other colleagues in the other state, it is fine; otherwise, I have the impression that it is a problematic situation.* Judge, Italy.

A prosecutor from Estonia admitted that, in theory, it should be possible to get in contact with one's counterpart in a foreign country, but in practice this does not happen very often.

> *Now, we are completely lacking possible legal assistance from an issuing state – we basically do not deal with it. We do not inform the person about this possibility, we do not organise contact opportunities, etc. This should perhaps be improved.* Prosecutor, Estonia.

Interviewed public defence counsels from Sweden, who have experience in acting as a lawyer in the issuing state, report that they are not usually in contact with their clients or the lawyers in the executing state and can only make an informed guess as to the wishes of the requested person.

Many lawyers from several Member States and experts participating in the meeting organised by FRA suggested that it would be useful always to include the name of the lawyer assisting the requested person in the issuing country, including any contact details, in the EAW form shared with the executing authorities. In this way, the lawyer in the executing state could immediately and easily get in contact with the colleague in the issuing country.

Promising practice

A prosecutor interviewed in Czechia mentioned that, when Germany or Austria is the issuing state, it sends a special template to the Czech authorities that contains information on the right to legal counsel in the issuing country. The Czech authorities give this information, in German, to the person.

At least in some cases when Czechia is the issuing state and the person already has a defence lawyer in the country, the defence lawyer's contact details are included in the EAW when it is issued. If the person does not have a defence lawyer in Czechia, a link to the bar association's public search engine is included in the EAW to assist the person in choosing a lawyer from the issuing state. The search engine (**https://vyhledavac.cak.cz/**) is available in English, Czech, French and German, and it can be used to search for, among other things, a lawyer specialising in a particular area (the EAW is not included as a category of specialisation, but criminal law is, as is international judicial cooperation in criminal proceedings) or speaking a certain language.

Limited access to information

Interviewees and experts also pointed out that a lack of correct and complete information in the issuing or the executing state, or both, is a challenge in representing requested persons. For instance, the issuing state is not obliged to share with the executing authorities all the details included in the investigative files. A defence lawyer may therefore miss certain aspects relevant to building an effective defence.

> ***The question is how effective your lawyer is in protecting your interest in terms of the EAW.*** *If the lawyer does not have access to certain basic information from the requesting state, it is useless sending a lawyer that does not have all the information.* Defence lawyer, Malta.

A lawyer from Italy stated that having access to the case file would allow the lawyer to better shape the defence strategy. He mentioned the case of a French requested person who had received a definitive sentence from a French court and was arrested in Italy. The interviewee did not fully understand the functioning of the French legal and judicial system, and he could understand the case only because the requested person had the judicial documents concerning his case in France with him. Otherwise, the interviewee would have had only the French definitive sentence and the EAW form to go on.

> *More information would be needed, as sometimes it is an oversimplified procedure, and there may be cases where there may be a* res judicata *exception or the matter may have some open proceedings in Spain, and with the data that is transmitted it is sometimes difficult to identify these circumstances that could lead to the denial of the EAW.* Judge, Spain.

Lawyers also highlighted that when an arrest results from an SIS alert, even less information is provided to them. The only thing they know at the beginning is that the issuing state has issued an arrest warrant and that their client has been arrested based on that warrant. No other details are available.

> *It is actually difficult to advise the court as to whether there are good grounds for bail or not … if you don't have the warrant … it's only a couple of days, but a couple of days in prison is a couple of days in prison.* Lawyer, Ireland.

Another issue identified by lawyers is lack of easy access to information in general about the rules and conduct of proceedings in other Member States.

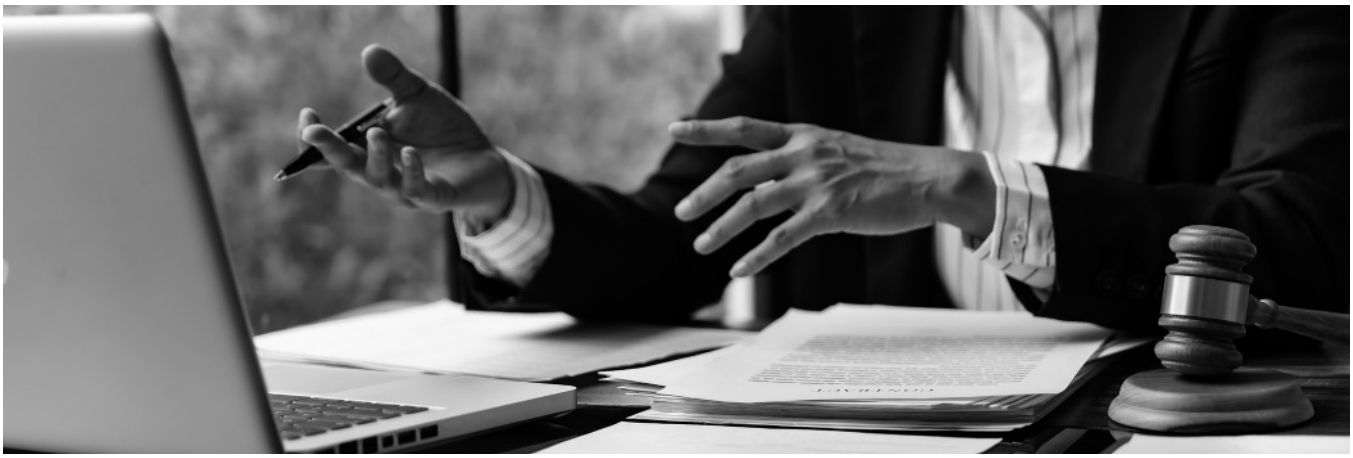
Several lawyers from different Member States suggested the creation of an **official database of criminal lawyers specialising in the EAW based in different EU Member States**. A lawyer from Italy added that this database could also include all EAW-related case-law.

> *Another useful thing would be a European database on European Arrest Warrant jurisprudence, both national and supranational. Something like a big database would be very useful for all professionals. It should be accessible, for lawyers, for judges, for interested parties. I think this would be a very, very useful thing, as we move more and more towards a regime of public accessibility of judicial affairs.* Lawyer, Italy.

Moreover, some of the lawyers stressed that the fact that legal and judicial systems remain unharmonised makes cooperation in criminal matters between EU Member States more difficult. Sometimes even accessing information as to the nature of the alleged offence is difficult. A lawyer from Czechia pointed out that it is challenging and time-consuming to study the criminal codes of the issuing states to verify that the crime for which the EAW was issued counts as a punishable crime in both the issuing and the executing state, due to language barriers and foreign criminal codes often not being easily accessible. The lawyer suggested that the EU could collect the codes on a single website. The website could include either the full texts of the national laws or at least hyperlinks to the relevant pages of the government sites of the Member States, to make it easier for defence lawyers to compare the criminal codes of the executing and the issuing Member State.

Positive impact of digital tools

Some interviewed judges and prosecutors from Lithuania mentioned the positive impact that digital tools have had in ensuring legal representation of a requested person's interests. The interviewees mentioned examples such as online correspondence or offering the option of interviewing the person remotely before issuing an EAW. In addition, digital tools have had some positive impact on enabling access to information on the appointment of a lawyer in the issuing state and on legal aid schemes. Moreover, online meetings have facilitated proceedings in cases in which the requested person resided in a town other than Vilnius (because EAWs are processed by the Vilnius court only), making matters easier for the requested persons and lawyers in terms of logistics (there was no need for them to travel to Vilnius and there were no transportation costs, online meetings could be scheduled early in the morning or at any other convenient time and it was easier to coordinate the schedules of the lawyers).



In a similar vein, a prosecutor from Italy would like to see greater use of digital tools during EAW proceedings.

> *The digitalisation of the file is always a useful thing: think of European Arrest Warrants in execution of pre-trial custody measures relating to very complex proceedings in the issuing country where there is cooperation between the Italian lawyer and the [other] lawyer. Let's … take the Spanish example, with an exchange of information that is fundamental, for example, in the judicial phase of recognition of the sentence: the fact of having the digital file in the country issuing the EAW is very useful in the sense that if, by chance, the Spanish lawyer is already in possession of some of the [relevant documents], the fact of being able to transmit them digitally to the Italian lawyer is always a great convenience.* Public prosecutor, Italy.

However, other professionals from various Member States also underlined the challenges involved in using digital tools, such as a lack of direct contact, which can compromise the confidentiality of client–lawyer consultations and create misunderstandings due to disruptions in connection.

Endnotes

(1) FRA, ***Rights in Practice: Access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings***, Publications Office of the European Union, Luxembourg, 2019.
(2) Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's Activities*, Strasbourg, 13 April 1992, para. 36; Council of Europe, CPT, *28th General Report of the CPT*, Strasbourg, 26 April 2019, para. 66; **Directive 2013/48/EU**, recital 52.
(3) For more details regarding the right to access to a lawyer and presumption of innocence, see FRA, ***Children as suspects or accused persons in criminal proceedings – Procedural safeguards***, Publications Office of the European Union, Luxembourg, 2022, Chapter 3, pp. 51–64.
(4) See also **Council Framework Decision 2002/584/JHA**, Art. 13(2), Art. 27(3)(f) and Art. 28(2)(b).
(5) ICCPR, ***General Comment No 32: Article 14, Right to equality before courts and tribunals and to a fair trial***, Geneva, 2007.
(6) For a more detailed overview of the right to access to a lawyer in general, see FRA, ***Rights in Practice: Access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings***, Publications Office of the European Union, Luxembourg,,2019, Section 3.1.
(7) **Directive 2013/48/EU**, recital 42 and Art. 10(2)(a).
(8) **Directive 2013/48/EU**, recitals 43 and 44 and Art. 10(2)(b) and (c).
(9) **Directive 2013/48/EU**, Art. 10(3). See also Arts 4, 5, 6, 7 and 9, and, where a temporary derogation under Art. 5(3) is applied, Art. 8. For a more detailed overview of these general provisions, see FRA, ***Rights in Practice: Access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings***, Publications Office of the European Union, Luxembourg, 2019, Section 3.1.
(10) **Directive 2013/48/EU**, recital 45.
(11) **Directive 2013/48/EU**, Art. 10(4).
(12) **Directive 2013/48/EU**, recital 46 and Art. 10(5).
(13) **Directive 2013/48/EU**, Art. 10(6).
(14) **Directive (EU) 2016/1919**, Art. 5.
(15) **Directive (EU) 2016/1919**, Art. 6.
(16) **Directive (EU) 2016/1919**, Art. 7(1) and (4).
(17) **Directive 2013/48/EU**, Art. 13; **Directive (EU) 2016/1919**, Art. 9.
(18) Finland, Government Bill No 99/2016 (***Hallituksen esitys eduskunnalle laiksi esitutkintalain muuttamisesta ja eräiksi siihen liittyviksi laeiksi***), p. 32.
(19) Finland, Government Bill No 88/2003 (***Hallituksen esitys Eduskunnalle laiksi rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä sekä eräiksi siihen liittyviksi laeiksi / Regeringens proposition till Riksdagen med förslag till lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen samt till vissa lagar som har samband med den***), p. 37.
(20) Belgium, European Arrest Warrant Act (***Wet betreffende het Europees Aanhoudingsbevel / Loi relative au mandat d'arrêt européen***), 19 December 2003, Art. 10.1. Publication in the *Belgian Official Gazette* 22 December 2003.
(21) Cyprus, Law on Legal Aid (***Ο περί Νομικής Αρωγής Νόμος του 2002***), Art. 4A(2).
(22) Croatia, Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (***Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske Unije***), Art. 24
(23) Finland, Government Bill No 99/2016 (***Hallituksen esitys eduskunnalle laiksi esitutkintalain muuttamisesta ja eräiksi siihen liittyviksi laeiksi / Regeringens proposition till riksdagen med förslag till lag om ändring av förundersökningslagen och till vissa lagar som har samband med den***), p. 33.
(24) Hungary, Act CLXXX of 2012 on Criminal Cooperation Conducted with the Member States of the European Union (***2012. évi CLXXX. törvény az Európai Unió tagállamaival folytatott bűnügyi együttműködésről***), 8 December 2012, Art. 26(2).
(25) Lithuania, Minister of Justice and Prosecutor General, Order on adoption of rules for issuing a European Arrest Warrant and receiving a person under a European Arrest Warrant, (***Įsakymas dėl Europos arešto orderio išdavimo ir asmens perėmimo pagal Europos arešto orderį taisyklių patvirtinimo***), No 1R-195/I-114, 26 August 2004, with subsequent amendments, point 24[1].
(26) Malta, **Criminal Code** (Act No LI of 2016), Chapter 9 of the Laws of Malta, 10 June 1854, Art. 355AUH(6).
(27) Slovakia, European Arrest Warrant Act (***Zákon o európskom zatýkacom rozkaze***), Act No 154/2010 Coll. as amended, 9 March 2010, Section 14(3).
(28) Spain, Criminal Procedure Act (***Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal***), Art. 50.3.
(29) Sweden, Ordinance (2003:1178) on Surrender to Sweden Pursuant to a European Arrest Warrant (***Förordning [2003:1178] om överlämnande till Sverige enligt en europeisk arresteringsorder***), 19 December 2016, Section 11a.
(30) Croatia, Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (***Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske Unije***), entered into force on 19 December 2020 (only when the EAW is executed by the Member State does the directive apply).
(31) Finland, **Act on Surrender Procedures between Finland and Other Member States of the European Union** (***Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä / Lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen***), Act No 1286/2003, 1 January 2004, Art. 21(b).
(32) Italy, Law of 22 April 2005, No 69, Provisions to bring national law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (***Legge 22 aprile 2005, No 69***, *Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri*), Art. 9, para. 5*bis*.
(33) Latvia, **Criminal Procedure Law** (*Kriminālprocesa likums*), 21 April 2005, Art. 698(2), subpara. 9.
(34) Malta, **Criminal Code** (Act No XVIII of 2020), Chapter 9 of the Laws of Malta, 10 June 1854, Art. 355AUH (4).
(35) Slovenia, Cooperation in Criminal Matters with the Member States of the European Union Act (***Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije***), 23 May 2013, Art. 19(1).
(36) Spain, **Act 3/2003 on the European Arrest Warrant** (*Ley 3/2003 de la orden de Detencion Europea*), Art. 10/3.
(37) It should be noted that there is no automatic right to a lawyer in the issuing state in Ireland, as Ireland opted out of Directive 2013/48/EU, citing 'substantive legal concerns' around the admissibility of evidence and other factors. See recital 58 of the directive and Minister for Justice and Equality, **Answer to Parliamentary Question 265**, 17 September 2019.
(38) The Criminal Defence Lawyers in Europe database is available at **the European Criminal Bar Association's website**.

(39) Cyprus, Supreme Court, Appeal Jurisdiction, ***Y.B.L. v Attorney General of the Republic***, Ref. E.E.E.S No 1/2022, 4 November 2022, ECLI:CY:AD:2022:A494.
(40) The **e-Codex** project, which has been developing decentralised platforms for safe exchange of judicial documents, already covers several EU instruments and is continually expanding. It does not currently cover EAW proceedings.
(41) See **'Annuaire des avocats de français'** on the website of the French national bar association for more details on how French lawyers are organised and classified according to their specialisation.
(42) **Council Framework Decision 2002/584/JHA**, Art. 17.

3

RIGHT TO INFORMATION IN EUROPEAN ARREST WARRANT PROCEEDINGS

This chapter examines the legal rules on the right to information in EAW proceedings and how this right is exercised in practice, taking into account the views and experiences of legal professionals and requested persons subject to EAW proceedings.

The right to information on one's rights and the right to translation and interpretation are the so-called enabling rights, constituting the preconditions for exercising other rights of defence. The right to information seeks to ensure that requested persons are effectively informed about their rights in EAW proceedings and the options available to them and that they have a full understanding of the consequences of their choices.

FRA has been studying the application of these rights for some time now and the findings to date confirm the critical importance of rights awareness and a good understanding of the conduct of the proceedings on the part of the defendant ([1]). FRA research findings from 2019 on eight Member States suggested that requested persons had difficulty understanding the specificities of the EAW proceedings and the consequences of giving their consent to being surrendered ([2]).

A. LEGAL OVERVIEW

The right to information in criminal proceedings is based on Article 5(2) and Article 6(3)(a) of the ECHR, which are reflected in Articles 6, 47 and 49 of the Charter, and in Article 9(2) and Article 14(3)(a) and (d) of the ICCPR, paragraphs 31, 33 and 36 of General Comment No 32 ([3]) and paragraphs 24–30 of General Comment No 35 ([4]). Article 5(2) of the ECHR provides that anyone who is arrested must be informed of the reasons for the arrest, while Article 6(3)(a) specifies that anyone charged with a criminal offence must be informed about the nature and cause of the accusation against them. Although the ECHR does not specifically set out the right to information about procedural rights, the ECtHR has ruled that the authorities must ensure that the accused has sufficient knowledge of, inter alia, their right to legal assistance and legal aid ([5]). The rights under the Charter have the same meaning and scope as the corresponding rights under the ECHR but may also extend their protections beyond them ([6]). It should be noted that, although EAW proceedings do not fall under the scope of Article 6 of the ECHR ([7]), the European legislator has explicitly included these proceedings in the criminal procedural rights framework. EU law goes beyond the ECHR requirements in the context of the right to information of requested persons.

Information rights in European Union law

At the EU level, Directive 2012/13/EU on the right to information in criminal proceedings establishes common minimum rules governing the right to

information in both criminal and EAW proceedings, building on and promoting the general rights established in Articles 47 and 48 of the Charter ([8]).

Defendants who are deprived of their liberty, which will result from the execution of an EAW, must be provided with a written letter of rights ([9]). The letter of rights applicable to EAW proceedings lists information on the rights of the requested person according to the national law implementing the EAW framework decision in the executing Member State, including the right to legal counsel and interpretation ([10]). The letter of rights must be provided promptly, in simple and accessible language and in a language that the requested person understands. Models showing how a letter of rights should be formulated in criminal and EAW proceedings are provided in Annexes 1 and 2 to Directive 2012/13/EU respectively ([11]).

The requested person must also be informed of the EAW brought against them and its content ([12]). Under the EAW framework decision, EAWs must include information on, inter alia, the issuing authority, evidence of an enforceable judgment, the arrest warrant or other judicial decision in the issuing country that the EAW is based on, the nature and legal classification of the offence, and a description of the circumstances in which the offence was committed, including the time, place and degree of participation by the requested person ([13]).

A requested person has the right to be informed about the possibility of consenting to being surrendered to the issuing state, as well as the meaning and consequences of such consent, including the fact that it entails renunciation of the speciality rule ([14]).

Although the requirements for the information to be provided in criminal and EAW proceedings are similar and exist in parallel, the CJEU has clarified that Directive 2012/13/EU does not require that the requested person be provided with the national arrest warrant forming a basis for the EAW or the materials of the case brought against them in the issuing state during the execution proceedings. The requested person also does not have to be informed of their procedural rights in relation to the national arrest warrant or how to challenge that warrant until after they are surrendered to the issuing state. Instead, the CJEU holds that the requirement that a requested person be provided with the EAW under Article 8(1)(d) and (e) of the EAW framework decision is sufficient to fulfil the demands of Article 6 of the Charter and Article 5 of the ECHR, as the information is sufficient to allow the requested person to understand the reasons for their arrest and to challenge it ([15]).

The requested person therefore does not have the right to access the issuing state's case file on them during the EAW proceedings. However, considering the requirements of Article 6 of the Charter and Article 5 of the ECHR, the information about the circumstances forming the basis of the EAW must be sufficiently detailed to allow the requested person to understand the reasons for their arrest and to potentially challenge it. Similarly, for the requested person to be able to exercise their rights effectively – including, for instance, their right to legal assistance and interpretation and translation services, as set out in the EAW framework decision, as well as the rights of persons deprived of their liberty – they must be informed of these rights and of how they can be exercised.

In conclusion, European law requires that the requested person in proceedings relating to the execution of an EAW be provided with information about:

- their rights under the national law implementing the EAW framework decision, including their right to be assisted by a legal counsel and by an interpreter;
- the possibility, meaning and consequences of consenting to being surrendered to the issuing state and of waiving the speciality rule;
- the EAW issued against them and its content, including the circumstances forming the basis for the EAW in sufficient detail, allowing the requested person to understand and potentially challenge the basis of their arrest;
- their rights as a person deprived of their liberty, including the right to challenge the deprivation of liberty, the right to urgent medical assistance, etc., under European and national law.

The CJEU has clarified that the right to information applies in both criminal and EAW proceedings. There are, however, important differences between the two. In its case-law, the CJEU has stated that, while the information rights in criminal and EAW proceedings rest on the same principles, the rights applicable to criminal proceedings do not apply fully to EAW proceedings, which are based on the principle of mutual recognition among EU Member States ([16]).

National laws

Most Member States covered (Belgium ([17]), Croatia ([18]), Cyprus ([19]), Estonia ([20]), Finland ([21]), Germany ([22]), Italy ([23]), Latvia ([24]), Lithuania ([25]), Luxembourg ([26]), Malta ([27]) and Sweden ([28]) have relevant laws on the EAW-specific letter of rights that must be provided to the requested person in a language that they can understand.

In contrast, in Czechia ([29]), Hungary ([30]), Ireland ([31]), Portugal ([32]), Spain ([33]), Slovakia ([34]) and Slovenia ([35]), the arrest of a requested person under an EAW is carried out in the manner and with the requirements and guarantees provided for by the respective country's code of criminal procedure. Although no indicative models of the letter of rights for persons arrested based on an EAW exist, a written document must still be provided setting out the defendant's procedural rights; however, this document is a generic list applicable to national criminal proceedings and not specific to EAW proceedings.

In addition, while most domestic legal frameworks require authorities to inform requested persons of their right to a lawyer, often this does not explicitly include the right to appoint a lawyer in the issuing state too. This aspect is discussed in more detail in **Chapter 2**.

B. FINDINGS: RIGHT TO INFORMATION IN PRACTICE

This section discusses the fieldwork findings on provision of information about rights and conduct of proceedings in practice.

Overall, the main takeaway is that the police provide requested persons with very basic information. The nuances of the EAW proceedings are explained by defence lawyers or judicial authorities (judges/prosecutors) and not arresting police officers. Many professionals see the central role in providing information that the law in some Member States affords to the police as too onerous, given the gaps in police training and the divergent and unmonitored practices followed at different police stations.

Information about rights and reason for arrest in practice

Information about rights

In more than half of the Member States covered (Belgium, Croatia, Czechia, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Malta, Portugal and

Sweden), all interviewed professionals agreed that requested persons are in practice informed of their basic rights, including the right to interpretation and the right to legal assistance in the executing Member State.

Overall, interviewees from the majority of Member States covered by the research reported that the first source of information is the police. Typically, at the moment of arrest or shortly after, the police will provide general information about the person's rights and the reason for arrest. Where a letter of rights exists, the police typically hand this to the requested person immediately upon their arrest. Professionals from Czechia, Estonia, Italy and Malta reported that in their countries the form is also available in other languages to ensure a sufficient level of comprehension.

> *There is a clear form, that lists what [requested persons] should always be informed of when they are arrested – that is to say, their fundamental rights, their right to a lawyer … It's in there, and it should always be served in connection with their arrest and [their] hearings.* Prosecutor, Sweden.

Since legal professionals and judicial authorities are not present at the time of arrest, they can only make assumptions based on the case file regarding what information was provided when and how. However, multiple interviews with professionals from all groups in Cyprus, Czechia, Hungary and Slovakia revealed that at times police officers hand out standard forms on procedural rights in criminal proceedings instead of an EAW-specific form, without providing any explanation. A prosecutor interviewed in Slovakia, recognising the need to support the police in this task, had prepared a form on their own initiative to inform the requested person about the EAW procedure and their rights.

The professionals' replies varied when discussing how the relevant information is provided. Some interviewees representing all professional groups in Czechia, Estonia, Ireland, Italy, Malta, Portugal, Slovenia, Spain and Sweden reported that both a written information form – comparable to the letter of rights – and oral information are provided to the requested person at the moment of arrest.

On the other hand, interviewees from all professional groups in Belgium, Cyprus, Germany, Hungary, Finland and Latvia stated that, upon arrest, requested persons are only handed written information, and later in the proceedings either the judicial authority or the requested person's lawyer will inform them about their rights orally.

Requested persons interviewed in Cyprus reported that the police handed them a document of rights in their mother tongue or in a language they understood. However, the police provided no oral explanation at that time.

Most interviewees confirmed that the information about rights is reiterated and better explained later in the proceedings by lawyers and judicial authorities.

Ensuring that all information is provided

Acknowledging that judges dealing with the EAW may occasionally lack the necessary experience to inform requested persons of all relevant rights, the Munich Higher Regional Court has developed a checklist for judges that contains the pieces of information that need to be made known.

> *At the Munich Higher Regional Court, we have a form … for the judges, so that they have a kind of roadmap of everything that needs to be done and what needs to be announced to the requested persons, even if they have never done [an EAW proceeding] before, which sometimes happens when the courts are on call at the weekend*. Prosecutor, Germany.

Requested persons interviewed in Italy confirmed that information about fundamental procedural rights was generally provided at the moment of arrest. However, in at least two cases such information was provided in a language that the defendant could not understand. For more details on interpretation and translation during EAW proceedings, see **Chapter 4**.

A very negative experience was reported by a Dutch defendant arrested in Italy based on an EAW issued by the Greek authorities. The interviewee reported that the officers who arrested them did not explain the reasons for the arrest: none of them could speak any language other than Italian, which the interviewee does not speak nor understand. A similar experience was also reported by a German defendant arrested in Italy based on an EAW issued by the Greek authorities.

> *They gave me documents to sign, but they were not written in my language. So I could not read the documents. It was probably an explanation of my rights, I suppose, but not in German. And I only know German.* Requested person, Italy.

Information about reason for arrest

There is general agreement among all the interviewed professionals in all the Member States covered on the importance and indeed necessity of providing information about the reasons for arrest – that is, about the EAW and its content.

> *Of course, this is one of the conditions for the legality of the procedure. The requested persons must be informed of the content of the entire act on the basis of which they were arrested. They must know clearly whether the arrest is for the purpose of conducting proceedings or executing a sentence. If it is to serve a sentence, which sentence. If it is for the purpose of conducting [a] procedure, which procedure. Therefore, they have to know all these details.* Judge, Croatia.

It appears from the fieldwork in all the Member States covered that typically general information on the content of the EAW is provided by the police upon arrest and more detailed information, for instance on the specific charges and the purpose of the EAW, is given later by the lawyer or the judicial authority. At the very minimum, the police inform the requested person that an EAW has been issued against them. Later in the proceedings, lawyers and/or judicial authorities (judges/prosecutors) explain the content of the arrest warrant and whether it has been issued for the purpose of prosecution or execution of a sentence.

Interviewed requested persons in general confirmed that they had been informed of the content of the EAW against them not by the police but by either their lawyers or by a judge during the hearing. Some requested persons interviewed in Cyprus and Italy complained that the arresting officer had not explained anything to them, typically due to language problems.

> *The Italian police or anybody else in the police office doesn't speak English or doesn't want to speak English. They didn't want to explain to me why I got arrested. After a little bit of [confusion] between the officers and someone in command, I overheard a word that's similar to an English word. I don't remember exactly any more, but at that point I knew it had something to do with the case I had in Greece.* Requested person, Italy.

> *When I was presented in court, the police gave me a document of rights in Polish which they asked me to sign. There was an interpreter present in the court who merely read out the document to me and told me there is an EAW issued against me relating to a conviction for theft in 2005. No one explained anything else to me.* Requested person, Cyprus.

A person subject to an EAW may be arrested on the basis of an SIS alert, without the EAW itself being available to the authorities. For instance, this is the norm in Ireland, where most arrests are made on this basis. As the information provided in SIS alerts is generally very brief and does not necessarily clarify whether the warrant is for the purpose of prosecution or execution of a sentence, the system raises some challenges as regards the requested person's right to information.

> *If it's an SIS arrest … the Garda [police] might not have the warrant, so all they will know is what's in the SIS alert and oftentimes, that's … a very perfunctory piece of information … I saw one recently that said 'offence against property' and when the warrant came through later it was actually a much more complicated series of events relating to fraud and theft.* Lawyer, Ireland.

Several interviewees in Ireland made suggestions on how to improve the situation in future, such as always attaching the warrant to the SIS alert or at least including a minimum level of information, such as the purpose of the warrant, in the alert.

Information on consent to surrender and the speciality rule

The interviewed legal professionals generally held that requested persons are informed of the possibility and consequences of consenting to surrender – and, where applicable, of renouncing the speciality rule – in a thorough manner and by various actors involved in the procedure: their lawyer, the prosecutor and the judge. This happens, however, later in the proceedings and not upon arrest by police.

> *Even where the police attempt to explain the consequences of consent, the communication of the information is definitely not done correctly or in detail. To consent to surrender, the requested persons must discuss their options with their lawyers and not with the police officers.* Lawyer, Cyprus.

These findings were also confirmed by interviewed requested persons in Cyprus, Finland, Italy, Lithuania and Spain, who confirmed that consent to surrender and the speciality rule are not only the most technical aspect of information provision, but also that, when such information has been provided by the police, it is often too generic and always needs further clarification. All interviewees confirmed that they had been not informed by the police but by several other actors, including judges, but mainly lawyers.

> *Nothing was explained to me either at the point of my arrest or at any other point. No one informed me about my right to be tried only for the offence mentioned in the arrest warrant, except for my lawyer.* Requested person, Cyprus.

> *I was told about the possibility to waive the principle of speciality and the consequences of doing so by my lawyer.* Requested person, Spain.

Interviewed lawyers emphasised that consent to surrender may result in the automatic renunciation of the application of the speciality rule and that therefore it should be properly explained, and the consequences carefully considered. Typically, the arresting officers lack the required information and competences to provide sufficient explanation.

In addition, some lawyers from Cyprus, Estonia and Italy suggest that, at times, judicial authorities treat the EAW proceedings as a mere formality and do not even consider it necessary to inform requested persons properly about their right to consent to their surrender or not and the consequences of their decision. This information is consistent with findings from interviews with requested persons in Spain, who claimed that they had been informed by the judicial authorities only that if they consented to their surrender they would be handed over, with no further explanation. Then the judicial authorities would ask the defendant whether or not they waived the principle of speciality.

> *The level of communication with the requested person is totally inadequate, because the idea is that the judge can't wait to get rid of this package. For example, you are on holiday at Lake Garda, you are arrested at four o'clock in the morning because your name appears in the SIS II database, and in the meantime you are put in prison, where no one understands you, where you are unable to ask how to take a shower because no one speaks English. You are brought in your stinking shirt from two days before in front of a judge, who is in a beastly hurry, who does not speak English. The interpreter is often another prisoner or, at best, a guy who has been a pizza maker in Germany, France or England. The interview is conducted in a very bureaucratic manner. And legitimate questions – like 'What happened to me?', 'What can I do?', 'How can I contact my family?' – are simply seen as a nuisance.* Lawyer, Italy.

A lawyer from Estonia added that judges and prosecutors sometimes push the requested person to consent to their surrender, explaining that there is nothing the executing authority can do and that it is in their own interest to consent, be transported to the issuing state and, only once there, pursue their legal defence.

The message to both me and the requested person is that the extradition will happen regardless and the sooner you go there the sooner you can start discussing the particulars of the case. They are advised and nudged to take that option. … The message is that we do not deal with the content of the case – we only extradite and that is all. It is an exceptionally formal procedure. Lawyer, Estonia.

Promising practice – how to explain consent to surrender and the speciality rule

Sweden

Swedish prosecutors reported that a specific consent form created by the Swedish Prosecution Authority is used during the consent hearing, at which a police officer, a public defender and an interpreter are present. If the requested person would like to consent to their surrender, a prosecutor is also present.

> *There is a specific consent form that the [prosecution] authority has created. This is then gone through by the police officer and the public defence counsel and maybe also if there is an interpreter present [by them]. And then if there is a will of the requested person to consent to surrender … a prosecutor is also present, either via video link or by telephone, and goes through [the consent form] even more carefully before the form is signed by the requested person, and [the prosecutor] explains what it means to actually consent to surrender.* Prosecutor, Sweden.

France

The lawyer of a requested person arrested in France based on an Italian EAW reported on how well the French prosecutor had informed them about the functioning of consent to surrender and the speciality rule in EAW cases. The prosecutor used specific visual information materials to help the defendant understand these technical aspects of the procedure.

> *The information is very detailed. There are four, five, six slides explaining it very clearly. I'm sure that my client was able to understand OK. He had a lawyer, and he also had the interpreter in Italian.* Defence lawyer on behalf of a requested person, Italy.

Understanding the information

When it comes to the understanding of the information provided, legal professionals generally consider that most requested persons understand their rights. There are, however, some exceptions in this regard, for instance in Estonia, where all interviewees held that there is room for improvement to ensure that the language used is accessible and that requested persons do not sign documents stating that they have understood the information provided when in reality they have not. In some other states, such as Germany and Italy, clear difference emerged in the responses of interviewed lawyers and judicial authorities. Whereas the latter tend to assume that requested persons understand their rights without too much difficulty, lawyers disagree.

> *My spontaneous answer would be that it is asked formally, 'Did you understand that?' and a client who is usually quite overwhelmed in that situation will say, 'Yes, yes.' Daring to say to a judge in a foreign country, 'No, I don't understand what you're saying,' requires [a] certain courage and a certain level of reflection that I don't think everyone in the situation has.* Lawyer, Germany.

Interviewees also highlighted that the procedure for provision of information is itself not 'user-friendly'. They described it as 'a formalistic procedure' involving the handing over to the requested person of a document specifying their rights, which may appear satisfactory as regards the letter of the law, but not the spirit of the law. The information may be incomprehensible because it is in a language that the person does not understand, or it may be difficult for them to understand it because they are in a state of shock. This was confirmed by interviews with requested persons or their defence lawyers in Cyprus, Italy and Spain, which highlighted that documents specifying the rights of requested persons tend to be rather long and in complex legal language that is not readily understood by requested persons, especially when they are in a state of shock.

> *Inside the holding cell of the court building, the police handed [my client] for the first time the document of rights in Greek and in Slovak. It was a lengthy document of about 10 pages in legal language, which is impossible for a non-lawyer to understand, especially for a person who was taken to court without explanation.* Defence lawyer on behalf of a requested person, Cyprus.

> *The letter of rights can be made shorter and more concise, to be better understood. The long list of rights may not be so helpful and easily understood by a person upon arrest, given the confusion that is natural for a person under those circumstances. Some issues must be explained orally upon request. In the case of the speciality rule, we often remind the court to explain it well and we explain it to the requested person ourselves in advance if the person appears without a lawyer, as we believe it is highly crucial that we do not surrender anyone for the purpose of being tried for offences other than those mentioned in the EAW.* Prosecutor, Cyprus.

Judicial authorities interviewed in Croatia, Czechia, Ireland and Sweden emphasised that they give special attention to ensuring that the requested person understands the scope of their rights and the information given.

> *I will not proceed any further until I am convinced that the parties have indeed understood their rights.* Judge, Croatia.

However, when it comes to assessing whether requested persons understand the speciality rule, professionals interviewed across all the Member States have some doubts. Interviewees highlighted that requested persons may struggle to fully understand the consequences of consenting to their surrender, and especially of waiving the speciality rule, due to the complexity of the law. Most professionals see it as the lawyer's task to explain the situation properly. Requested persons also emphasised the crucial role of lawyers. Interviewees in Cyprus, Italy, Lithuania, Portugal and Spain stated that their lawyers had clarified certain aspects of the EAW procedure and requested persons' rights and that they could not have achieved a sufficient level of comprehension of their situation without the support of their lawyers.

> *[The speciality rule] must be explained to them. This is my work as the defence lawyer. I try to explain to them what the [rule] means, I try to explain the risks involved [in] being prosecuted for all crimes [not just the one for which the EAW was issued].* Lawyer, Czechia.

Two lawyers interviewed in Hungary considered that, due to the pace of EAW proceedings, there is not enough time for the lawyer to make sure that the requested person understands everything. They argued that the time pressure in EAW cases means that understanding depends less on the linguistic skills of the requested persons and more on their ability to cope mentally with the situation. Judicial authorities interviewed in Hungary, however, highlighted the educational, cultural, economic and social background and the cognitive skills of requested persons, as well as cultural differences, as potential challenges to ensuring full understanding. As one way of ensuring consistent practice and that all parties involved have sufficient experience, the interviewees from Hungary referred to the specialisation of lawyers and judicial authorities working on EAW cases, which are dealt with exclusively in the Budapest-Capital Regional Court.

There is, however, usually no systematic method of verifying that requested persons fully understand the information provided to them and the consequences of their choices.

> *I don't want to blame the state prosecution or the courts, but the truth is that from their point of view their [role] is rather static. They basically need to make sure, to put it bluntly, that it is recorded in the minutes that the [requested person] understands [what consent to surrender means]. But they are not very concerned about the extent to which the person truly understands this issue. … They do not verify it in any way. Another question is how they could actually do that. Because, if the requested person tells you that they understand, of course you're going to be content. Obviously, if the requested person shows any signs of mental illness, then [the authorities] would dig a little deeper, but let's just say openly that most requested persons do not have the intellectual capacity to understand such a subtle thing as the speciality rule.* Lawyer, Czechia.

Another issue often cited when discussing requested persons' understanding of information is the effectiveness of interpretation and translation, which will be discussed in **Chapter 4**.

Endnotes

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(11) **Directive 2012/13/EU**, Art. 4 and Art. 5(2).
(12) **Council Framework Decision 2002/584/JHA**, Art. 11.
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(14) **Council Framework Decision 2002/584/JHA**, Art. 11.
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(19) Cyprus, Law on the European Arrest Warrant and the Procedures for Surrender of Wanted Persons between Member States of the European Union of 2004 (***Ο περί Ευρωπαϊκού Εντάλματος Σύλληψης και των Διαδικασιών Παράδοσης Εκζητουμένων Μεταξύ των Κρατών Μελών της Ευρωπαϊκής Ένωσης Νόμος του 2004***), N.133(I)/2004, Art. 17(1A).
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(21) Finland, **Act on Surrender Procedures between Finland and Other Member States of the European Union** (***Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä*** / ***Lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen***), Act No 1286/2003, 1 January 2004.
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(26) Luxembourg, Act of 17 March 2004 (***Loi du 17 mars 2004 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres de l'Union européenne***), Art. 7.
(27) Malta, **Criminal Code**, Chapter 9 of the Laws of Malta, 10 June 1854, Schedule E, Part II.
(28) Sweden, Swedish Prosecution Authority, *Legal Guidance* (***Misstänktas rätt till insyn vid frihetsberövande m.m.***), 2014:1, November 2019, Annex 2; Sweden, Swedish Prosecution Authority, *Legal Guidance: Surrender according to a European Arrest Warrant* (*Rättslig vägledning, Överlämnande enligt en europeisk arresteringsorder*), 2021:16, November 2021, Annex 13.
(29) Czechia, Act No 141/1961 Coll., Code of Criminal Procedure (***Zákon o trestním řízení soudním***), Section 33(6).
(30) Hungary, Act CCXL of 2013 on the Enforcement of Penalties, Measures, Certain Coercive Measures and Misdemeanour Custody (***2013. évi CCXL törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról***), 1 January 2015, Art. 12(4).
(31) Ireland, **S.I. No 119/1987**, Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.
(32) Portugal, Decree-Law 78/87 Approving the Code of Criminal Procedure (***Decreto-Lei No 78/87, aprova o Código de Processo Penal***), 17 February 1987.
(33) Spain, Organic Law 5/2015 (***Ley Orgánica 5/2015***, *de 27 de abril, por la que se modifican la Ley de Enjuiciamiento Criminal y la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, para transponer la Directiva 2010/64/UE, de 20 de octubre de 2010, relativa al derecho a interpretación y a traducción en los procesos penales y la Directiva 2012/13/UE, de 22 de mayo de 2012, relativa al derecho a la información en los procesos penales*).
(34) Slovakia, European Arrest Warrant Act (***Zákon o európskom zatýkacom rozkaze***), Act No 154/2010 Coll. as amended, 9 March 2010, Section 14.
(35) Slovenia, Cooperation in Criminal Matters with the Member States of the European Union Act (***Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije***), 23 May 2013.

4

RIGHT TO INTERPRETATION AND TRANSLATION

This chapter discusses the legal framework, and the views of legal professionals and requested persons with experience in EAW proceedings, relating to the application of the right to interpretation and translation in such proceedings.

Like the right to information (discussed in **Chapter 3**), the right to interpretation and translation is a precondition for exercising other rights of defence effectively. FRA findings from two research projects concluded in 2016 and 2019 suggested that not all EU Member States had measures in place to ensure the quality of legal interpretation and translation (e.g. not all Member States had established requirements for interpreters and translators to have a specific level of education or experience, or an official qualification), and quality remained questionable with respect to less commonly spoken languages (both EU and non-EU) ([1]).

A. LEGAL OVERVIEW

The right to interpretation and translation, in criminal proceedings and EAW proceedings, aims to ensure that defendants, including requested persons, who do not speak or understand the language of the proceedings are provided with interpretation during the proceedings and with translations of essential documents. This is to enable them to efficiently exercise their rights of defence and to safeguard the fairness of proceedings.

The right to interpretation is based on Articles 5(2) and 6(3)(e) of the ECHR, which introduced the rules that everyone deprived of their liberty should be informed in a language they understand about the reasons for their arrest and that everyone charged with a criminal offence has the right to free assistance from an interpreter if they cannot understand or speak the language used in court. This right is reflected in Articles 47 and 48(2) of the Charter, providing for the right to an effective remedy and fair trial and for the right of defence respectively, and in Article 14(3)(f) of the ICCPR and paragraphs 33 and 40 of General Comment No 32 ([2]). The guarantees set out in Article 5 of the ECHR apply to all instances of arrest, including under an EAW. The guarantees set out in Article 6, on the other hand, are not applicable to extradition and EAW proceedings directly through the ECHR ([3]); however, they are applicable to EAW proceedings through EU secondary law, as EU law goes beyond the minimum ECHR standards and explicitly extends fair trial guarantees to EAW proceedings.

In secondary EU law, the right to be assisted by an interpreter is included in Article 11(2) of the EAW framework decision ([4]) and further specified in Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings ([5]).

The relationship between these two legal instruments is clarified in recital 15 of Directive 2010/64/EU, which stipulates that the rights provided for in the directive should also apply, as necessary accompanying measures, to the execution of an EAW. Executing Member States should bear the costs of interpretation and translation into the language spoken and understood by the requested person to enable them to fully exercise their right of defence, and to safeguard the fairness of the proceedings. Accordingly, the requested person should be provided with interpretation of adequate quality, and they should be able to challenge the non-appointment of an interpreter or complain about the quality of the interpretation provided.

In relation to the right to translation in EAW proceedings, requested persons should receive from the executing authorities a translation of the EAW, or, exceptionally, on condition that it does not prejudice the fairness of the proceedings, an oral translation or a summary translation might be provided ([6]). In addition, that translation should be of a quality sufficient to safeguard the fairness of the proceedings ([7]).

According to the case-law of the CJEU, Member States 'must take concrete measures to ensure that the quality of the interpretation and translations provided is sufficient to enable the suspect or accused person to understand the accusation against them' ([8]). The CJEU decided this matter with reference to the landmark judgment by the ECtHR in the case of *Hermi* v *Italy* ([9]).

While the CJEU has clarified the notion of 'essential documents' in criminal proceedings on several occasions ([10]), it has yet to do so in the context of EAW proceedings.

National laws

All the Member States covered by this research guarantee in their national laws the right to interpretation and translation in criminal and EAW proceedings. The right to interpretation and translation in EAW proceedings is derived either from general laws covering the entire criminal proceedings – such as a code of criminal procedure – or from laws adopted to transpose Directive 2010/64/EU (Belgium ([11]), Croatia ([12]), Cyprus ([13]), Czechia ([14]), Estonia ([15]), Finland ([16]), Germany ([17]), Hungary ([18]), Ireland ([19]), Italy ([20]), Latvia ([21]), Lithuania ([22]), Luxembourg ([23]), Malta ([24]), Portugal ([25]), Slovenia ([26]), Slovakia ([27]), Spain ([28]) and Sweden ([29]). Croatia ([30]) has adopted a law

regulating cooperation with EU Member States on criminal matters, covering EAW proceedings and access to interpretation and translation.

The national laws of several Member States, such as Lithuania ([31]), Luxembourg ([32]) and Spain ([33]), specifically refer to the use of digital tools and technology for interpretation during proceedings. In contrast, national laws in other Member States, such as Czechia, Malta and Slovenia, do not specifically refer to the use of digital tools when providing interpretation ([34]).

In some Member States, such as Germany ([35]), Latvia ([36]), Malta ([37]), Slovenia ([38]) and Sweden ([39]), legal measures are in place to help ensure the quality of interpretation. For instance, in Germany, as of 2023, the new Court Interpreters Act (*Gerichtsdolmetschergesetz*) sets forth a new regulatory framework at the federal level that requires interpreters to pass a state-recognised interpretation examination. Similarly, in Slovenia interpreters must satisfy legally prescribed conditions relating to their education, work experience and legal knowledge ([40]). In Belgium, sworn interpreters must also demonstrate their legal knowledge by providing a certificate ([41]). Malta's Criminal Code requires that the list of interpreters (and translators) provided to legal counsel and the relevant authorities includes professionals who are 'appropriately qualified' ([42]).

B. FINDINGS: INTERPRETATION AND TRANSLATION IN NATIONAL LAWS AND PRACTICE

Provision of interpretation in practice

In all Member States, interviewed professionals agreed that, when a requested person cannot understand the language of the proceedings, they are in practice provided with interpretation. However, the stage at which interpretation is provided varies. The findings show that interpretation is provided in most Member States from the moment of detention at the police station. The need for interpretation is, then, initially assessed by the police. According to some lawyers interviewed in Italy, however, police officers and the judiciary tend to carry out only a basic rough assessment of a person's need for interpretation.

Professionals from Luxembourg and Slovenia stated that there is no need for an assessment of whether a person requires interpretation and translation, as an interpreter is always appointed whenever a person does not speak the language of the proceedings.

> *There is no need [for a special assessment] because we stick strictly to this [always appointing an interpreter]. There have been some Supreme Court decisions regarding interpretation, so nobody is playing with this.* Judge, Slovenia.

Interviewees from Croatia, Czechia, Latvia, Portugal, Slovenia and Spain explained that interpretation is also provided in cases in which the requested person can speak a similar language or has some knowledge of the language in which the proceedings are taking place, to reduce procedural mistakes.

> *I admit that, even if other authorities involved tell me that the arrested person understands Czech both in speech and writing, I still request an interpreter to be present for the court proceeding. In the worst case, I send the interpreter home if I can see that the requested person speaks perfectly fluent Czech.* Judge, Czechia.

> *Nobody asked if I needed interpretation, but [it] was automatically provided.* Requested person, Spain.

However, there are also accounts of interpretation being provided not from the moment of detention but later in the proceedings. A lawyer from Cyprus argued that this practice should change, as the hours immediately after apprehension are usually the most critical in terms of respect for fundamental rights and the most difficult for the requested person. It appears from the interviews in several Member States that interpretation is often provided at a later stage, after the initial detention – for example, for meetings with the judicial authorities or consultations with lawyers.

> *Yes, I did need interpretation, but this was only provided inside the courtroom. Nothing was interpreted for me whilst I was in prison, at the time when I was told that I had to appear before the court. In the court there was a Cypriot interpreter for Polish; however, he did not speak Polish well and I did not understand much of what he was saying … I told the judge I did not understand everything from the interpretation and the judge adjourned the proceedings for another date, for me to appear in court with my lawyer. I am not aware whether there will be another Polish interpreter in court on that date or whether I will rely on my lawyer to explain to me.* Requested person, Cyprus.

In addition, a requested person interviewed in Italy highlighted major issues with the availability of interpretation during detention, when they needed to discuss pressing medical needs.

> *At the prison, I had asked for someone who would speak my language, because I am chronically ill. And the doctors and nurses, they all did not know German or English to the extent that they could communicate about medical technicalities. One doctor knew a little English, and I could communicate with her when she was there. And, of the staff, only one guard knew German. … And because I could not communicate, they sent me other prisoners who were multilingual to help translate. But that is no reliable help either, if another prisoner tells me what the police officer or the nurse wants from me. Of course, that is not reliable. … and my health was bad.* Requested person, Italy.

Interviewees also identified other challenges, such as the quality of interpretation and lack of availability of interpreters, especially for less widely spoken languages.

Quality of interpretation

One of the most pressing issues, raised by interviewees from most of the Member States covered, is the quality of the interpretation provided during EAW proceedings. Professionals from all groups pointed out that several Member States (e.g. Czechia, Ireland, Italy and Portugal) have no rules, guidelines or monitoring mechanisms available for assessing the quality of interpretation.

One of the interviewed lawyers from Italy regarded the poor quality of interpretation as one of the most critical issues in EAW proceedings, something that could ultimately compromise the procedural rights of the requested person. Moreover, in Italy other detainees or individuals who possess a general knowledge of the language are sometimes used as the interpreters, but, understandably, they often cannot explain technical legal terms and concepts.

> *Also keep in mind that language assistance is a problem that threatens to blow up this entire system. I hope that eventually Italy will really end up under infringement proceedings, because we have never seriously implemented Directive 2010/64/EU, which is [an enabling right]. If the judge doesn't take the time to explain, if the interpreter is not qualified … if the interpreter doesn't know what the principle of speciality is, how can they translate it to the person?* Lawyer, Italy.

A lawyer from Ireland echoed these concerns, adding that there should be some regulations in place.

> *Training [of interpreters] is a massive issue … It would almost take legally qualified people to act as interpreters, and we don't live in that kind of utopia … Some kind of a legal criminology training, I think, would be very helpful. But … the quality of training and the levels of qualifications and experience required in Ireland seem to be quite low.* Lawyer, Ireland.

Promising practice

In Hungary, when executing an EAW, all the professionals involved – including state-appointed interpreters – are members of a specialised EAW team at the Budapest-Capital Regional Court (Budapesti Törvényszék). This means that the judges usually work with the same interpreters, who know the EAW process well. This ensures the quality of the interpretation services provided. All the judges interviewed in Hungary underlined the importance of working with specialised professionals, which improves the effectiveness and quality of EAW procedures.

A lawyer from Croatia, however, points to some seemingly positive effects of interpretation being provided by people lacking formal training or the status of legal interpreters. 'The authorities are inviting native speakers regardless of their education' (e.g. salespeople from the nearby shops); while these people may not possess the necessary qualifications, the lawyer argued, this practice ensures that requested persons receive interpretation quickly, allowing the procedure to progress more quickly and easily.

While some interviewees from Croatia and Ireland noted that interpreters who do not have any qualifications may be used in proceedings, in Portugal there is a practice of seeking assistance from embassies.

> *We often contact embassies to get an interpreter, especially for complicated languages, such as Chinese. In this way, we are sure that the translation is reliable. Chinese is a language where we can't know if the translation is faithful or not and, for that reason, I can't [get] the man from the Chinese shop to do a translation – there has to be a minimum of trust. Sometimes we don't have official translators, so we ask embassies to refer them to us.* Judge, Portugal.

In general, professionals emphasise that legal interpretation is difficult and interpretation of cross-border proceedings, such as EAW procedures, is even more challenging. A judge interviewed in Finland pointed out that there are certain limitations relating to the knowledge of interpreters, dealing with the complicated terminology in EAW matters. Being aware of this, the judges attempt to use as plain language as possible; however, this is not always helpful.

Availability of interpreters

Lack of availability of interpreters working in less commonly spoken languages seems to be a problem in most of the Member States covered. However, in

a few Member States, there are difficulties in securing interpretation even for commonly spoken languages.

Concerns relating to the availability of interpreters in general, for all languages, were raised by several professionals interviewed in Croatia, Estonia, Latvia, Malta, Slovenia and Sweden. In Estonia, almost all interviewees had examples of situations in which an interpreter was needed for a certain language and they had to put excessive effort into finding someone. It was mentioned that larger Member States might not experience this problem to such an extent, given their larger populations.

> *Estonia has the biggest problem with interpreters. We have a relatively small number of minorities, and we have a very difficult situation with some interpreters. We have situations where even a Lithuanian interpreter cannot be found.* Judge, Estonia.

Legal professionals in Malta raised similar concerns. Given that there is a limited number of interpreters who are qualified to interpret between Maltese and other languages, finding a suitable interpreter is not always possible. In these situations, two interpreters may be needed, with English usually as a relay language.

In Latvia, the engagement of English and Russian interpreters and translators as permanent full-time employees in some of Latvia's courts can be viewed as a positive step to ensure that interpretation and translation services are always available as soon as they are needed.

It seems that lack of availability of interpreters in general is a problem in smaller countries. However, professionals from all the Member States covered identify challenges when it is necessary to interpret into less commonly spoken languages, even some official languages of the EU. At times, there can be major difficulties in finding legal interpreters who are available for EAW proceedings, which must be concluded quickly in accordance with the applicable deadlines.

Interviewed professionals from Spain commented that, while languages such as English or French pose no issues, ensuring the availability of interpreters, and the quality of the services, can be difficult for some EU languages, such as Bulgarian. The experiences of requested persons confirm this difficulty.

> *I told him [the police officer] at the beginning, when they ask me if I need somebody to interpret for me, and I told them yes. So, they asked me for which language. I told them English. For me, it's fine. If they can arrange somebody in Dutch, it would be better. But OK. English is fine for me.* Requested person, Italy.

> *I'm Danish, but it didn't come up that I could have a Danish interpreter. At that time, I was happy with English.* Requested person, Portugal.

Interviewees from Lithuania mentioned the challenge of interpreting and translating from or into less commonly spoken languages, such as Arabic, Chinese, and Indian and Pakistani languages. One lawyer added that problems occur even with Russian, as many police officers have no knowledge of the language. In addition, one defence lawyer added that the quality of translation services in less commonly spoken languages is problematic. Professionals from Italy also noted challenges where local languages or dialects are concerned.

> *In some cases, police officers proceed directly at the time of arrest to appoint an interpreter, but certainly their indications provide us [as*

> *judges] with elements [of what we need] to select an interpreter of that particular language. This is not always easy to do. Especially for some African dialects, it is a bit complicated to find an interpreter immediately. However, there is a list of interpreters available in all courts of appeal from which we can choose.* Judge, Italy.

A requested person interviewed in Portugal, but who had been arrested in another Member State, raised concerns about the use of interpreters of Brazilian nationality. They speak Brazilian Portuguese as opposed to European Portuguese, and the interviewee believed that this had an impact on the quality of interpretation.

Another requested person, interviewed in Cyprus, complained that interpretation was not provided in their native language. However, it should be noted that the law requires that the requested person understands the language of interpretation; it does not need to be their native language.

> *In the court, I said I wanted to speak in Kurdish, but they said only Turkish interpretation was available.* Requested person, Cyprus.

Online tools

It is evident from the findings that the use of web technology and online tools for translation and interpretation purposes varies significantly between Member States.

For example, in Finland two lawyers and a judge noted that if an interpreter is not available in person, interpretation can be arranged by videoconference or by phone. One lawyer also indicated that remote interpretation is used in particular in cases involving less widely spoken languages. Other Member States do not seem to have embraced the use of digital tools to this extent. In Slovakia, the interviewees noted that online interpretation is not used in practice, to ensure the privacy of the consultations between the requested person and their lawyer. Moreover, the Slovak courts are not adequately equipped with technical devices to provide online interpretation.

Interviewees from a number of Member States, such as Estonia, Hungary, Italy, Latvia, Lithuania, Malta and Spain, specifically referred to the use of

digital technologies for interpretation and translation services during the COVID-19 pandemic.

In Italy, all interviewees reported that during the COVID-19 pandemic technologies in this field were introduced, but also that they were quickly abandoned when ordinary judicial activities were resumed. Most interviewees welcomed the abandonment of digital tools, considering that in-person services could better assist requested persons and help to protect their procedural rights. In Estonia, while video tools were often used during the pandemic, interviewees had noticed misinterpretation or low-quality interpretation services due to connection problems. Similarly, in Malta one of the defence lawyers and one of the prosecutors found interpretation through video link to be impractical.

The use of new technologies in the criminal justice system and fundamental rights

The development and use of new technologies, including artificial intelligence (AI), has increased considerably in the past decades. Following this trend, judicial administrations are looking into the greater use of advanced technologies. This may include automated transcription, translation, document search, anonymisation, prediction of litigation outcomes and decision support.

The increased use of AI in many different areas has led to concerns about its interference with fundamental rights, such as people's right to privacy, non-discrimination and access to a fair trial (*). Such concerns have led to several initiatives at the national and international levels to regulate the use of AI. These include efforts by the Council of Europe (**) and the EU, including the AI Act (***).

The risk of AI interfering with fundamental rights depends on the context of its use. The use of AI intended to assist a judicial authority in researching and interpreting facts and the law was considered a high-risk area in the EU regulation on AI proposed by the European Commission. Following the proposed legislation, high-risk AI will be subject to certain requirements, such as transparency and documentation.

Translation tools as such are currently not considered high-risk AI, although some research warns that automated translation can be subject to certain biases and errors that need to be assessed and corrected (****).

(*) FRA, ***Getting the Future Right – Artificial intelligence and fundamental rights***, 2020.
(**) See **'Council of Europe and Artificial Intelligence'** and **'Resource Centre Cyberjustice and AI'**.
(***) See European Commission, **'A European approach to artificial intelligence'**. At the time of writing this report, the AI Act was being negotiated by the co-legislators.
(****) See M. Prates, P. Avelar and L. Lamb, '**Assessing gender bias in machine translation – A case study with Google Translate**', 11 March 2019, and, more generally on bias and algorithms, FRA, ***Bias in Algorithms – Artificial intelligence and discrimination***, 2022.

According to interviewees from Hungary, courts have not been as quick to let go of the new digital tools adopted during the pandemic. According to one judge, requested persons usually prefer online hearings, but they can ask for a personal hearing too, or the judge can decide on such a hearing. However, there may be some practical obstacles to ensuring an in-person hearing of the defendant.

> *In June 2022, the COVID-19 restrictions were lifted; until then [since March 2020], only online hearings were allowed. Since the restrictions were lifted, the requested person can insist on a personal hearing. Even in the 2 months since [June 2022], 80 % of the hearings have still been online, as the process is faster, and the requested persons prefer this. If there is a second hearing because the requested person did not agree to the simplified procedure, we try to hold it in person. The problem here is usually with the detention facility, because there*

are not enough guards to transport the prisoners [to the court]. Judge, Hungary.

Translation of documents

Interviewees from most Member States agree that some of the most important documents are usually translated and provided to the requested person in a language they can understand, such as the letter of rights or the EAW. However, professionals see a number of challenges related to the means of translation (oral or written), the quality of such translations and availability of translators for less frequently spoken languages. For instance, while all interviewees from each of the Member States agreed that requested persons are provided with a translation of notice of their procedural rights (the letter of rights) and the content of the EAW against them, how this is provided by the Member States varies.

Based on the findings, having interpreters translate documents orally, instead of providing a written translation, is common practice in a number of Member States (Belgium, Croatia, Czechia, Estonia, Germany, Hungary, Italy, Malta, Latvia, Lithuania, Portugal, Spain and Sweden).

According to two lawyers and a prosecutor interviewed in Belgium, case files such as the EAW are available in the language of the issuing state and translated into the language of the proceedings in Belgium, which might not necessarily be a language that the requested person understands. All the judicial authorities also mentioned that documents are not always translated into a language the person understands, but that they are explained to the requested person later by an interpreter.

> *No, that is not the case. … the documents will be interpreted; there is an interpreter that can interpret the documents, but it is not the case that the documents will be translated in the mother tongue of the requested person, that is certainly not the case.* Investigative judge, Belgium.

Most of the interviewees from Germany confirmed that the practice of translating documents only orally is common. Some believed that, according to German law, a translation is not required if a lawyer can communicate with the requested person with the help of an interpreter and that only the EAW needs to be handed over in the language of the requested person.

> *Translations of documents tend not to take place, given that German law generally does not require a translation if someone has legal counsel, and this legal counsel can then communicate with him with the help of an interpreter.* Judge, Germany.

In addition, professionals from Spain noted that, although according to law the written translation of documents may be replaced with an oral summary of their content only exceptionally, this seems to be rather common in practice. It appears, in fact, that oral translation of documents has been commonly applied as standard.

In confirming that the use of oral translations is common practice, interviewees from Estonia once again came back to the general lack of interpreters and translators, especially for less frequently spoken languages. Estonia does not always have the capacity to translate documents into less widely spoken languages due to a lack of suitable translators. Instead, the translation is provided in English or another language that the requested person understands.

> *The letter of rights is provided in a language that they understand. Regarding other documents, such as court orders, we ask whether a person wants a translation or whether an interpretation at the hearing is sufficient. And if they want a translation, they get it*. Prosecutor, Estonia.

The tight time frame of EAW proceedings was commonly cited as a reason for proving only oral translation. Professionals have found that translation of documents before hearings is not possible, as the deadlines in EAW proceedings are too short.

> *The requested person's rights were sacrificed for the sake of keeping the deadlines.* Lawyer, Cyprus.

While oral translation can speed up the EAW procedure, one lawyer from Latvia emphasised that oral translation of documents can compromise the actual understanding of their content and means that it is impossible for the requested person to consult the documents again later.

> *I think that when a document is translated orally, it is difficult to understand. … There were a lot of episodes when documents were very long, and you could see that they [the requested persons] didn't really understand what was being said to them any more while it was being translated. For example, judging by myself, it would be very important for me to have a document to look at. If I haven't heard or understood it, it's much more comfortable to read it over than to ask again.* Lawyer, Latvia.

Furthermore, a judge from Lithuania pointed out that the translation has to be accurate and understandable, because if there are any concerns that the requested individual does not understand something about the EAW, procedural obstacles may ensue, which could result in defence lawyers looking for loopholes in the EAW process.

Some interviewees across the Member States covered expressed their dissatisfaction with the quality of the translation services provided to requested persons.

> *In court, my experience is that the interpreters, as a rule, are good. These persons speak the language very well, [but] then, when it comes to translating the procedural documents, it's a disaster.* Lawyer, Portugal.

A judge from Finland mentioned that the EAW can become ambiguous when it is translated, as its content might change because of the translation. A requested person interviewed in Finland criticised the quality of documents passed to them.

> *It was as if the documents had been made by using Google Translate. … they were in Russian, but the wording was strange*. Requested person, Finland.

The need for quality translation was also noted by another requested person, interviewed in Italy.

> *You need good communication and good translation of documents, emails, certified emails sent to other countries, so that things are clear and you don't put people in trouble … a person who works and*

has a life [can end up] in jail because there is a prosecutor or a judge who sent the wrong email. Requested person, Italy.

Interpretation of consultations with lawyers

While all the interviewed legal professionals agreed that the requested person can receive interpretation during consultations with lawyers, many had differing views about whether the state provided interpretation services for consultations between the lawyer and requested person, including covering the costs of such interpretation. For instance, interviewees in Italy pointed out that the costs of interpretation for consultations with a lawyer must be paid for by the requested person. In contrast, in Germany, Ireland and Sweden, interviewees appeared to agree that the cost of the interpretation of consultations with lawyers falls on the state.

One of the Croatian judges shared their opinion that not providing state-funded interpreters during consultations, due to a lack of financial means, violates the right of defence, as this requirement is explicitly spelled out in the directive on the right to interpretation and translation.

If the person does not have the interpretation available, all that we teach, all their rights, lose content, real effect and meaning. Judge, Croatia.

However, while the interpretation of consultations with a lawyer are supposed to be covered by the state budget in Croatia, several defence lawyers stressed challenges in practice, with one lawyer adding, 'If you want to do your job right, you are going to hire an interpreter by yourself.'

Interviewed lawyers from Spain noted that, although they are offered interpretation by a state-appointed interpreter, it is not uncommon for them to use private interpreters or even their own linguistic skills to communicate with the requested person. All interviewees in Italy noted that they must often organise interpreters for client–lawyer consultations themselves and that the requested person must pay for such interpretation.

The presence of the interpreter is guaranteed before the judicial body, in this case before the court of appeal. But if I then go to prison to talk to the requested person and this person does not speak my language, unfortunately it is very complicated because either the conditions for legal aid are met and at that point I can appoint an interpreter, but otherwise the person has to pay for the interpreter. Lawyer, Italy.

On the other hand, interviewees in some other Member States (Germany, Ireland, Latvia, Luxembourg, Portugal and Slovenia) noted that the system of state-funded interpretation for consultations between the lawyer and requested person works well and is used quite often.

In Ireland, lawyers appoint their own interpreters for consultations, but this is covered under the legal aid scheme. In practice, such arrangements tend to be rather ad hoc. Furthermore, a lawyer would not usually appoint their own interpreter, but might use the court interpreter for consultations immediately before or after the court hearing. This sometimes causes delays, as the lawyer might require an interpreter for a consultation at the same time as that interpreter is needed in court for another matter.

It is evident from the findings that, in certain situations, lawyers may still use their own interpreters despite court- or state-appointed interpreters being available. In Slovenia, while court-appointed interpreters are provided

for the interpretation of private consultations with lawyers, this does not appear to be well communicated to all lawyers, as some were not aware that they could gain access to a court-paid interpreter for visits with their clients in detention. Moreover, while there is consensus among professionals in Spain that lawyers can request that consultations with their client be interpreted by a state-appointed interpreter, findings show that the use of private interpreters is not uncommon, and some lawyers simply do not use such services, given that they speak the language of their clients.

Some lawyers and requested persons raised concerns related to the use of state-appointed lawyers for client–lawyer consultations and noted the potential conflict of interest that may ensue. Possible breach of the client–lawyer confidentiality principle was referenced as being a potential area to be aware of. Discussing this ethical dilemma that could arise, one lawyer from Luxembourg noted:

> *The big problem is that the interpreter is paid by the state, appointed by the state, and works for the state. On the one hand, when the procedure is started, the same interpreter works for the state prosecutor and the investigating judge, who is then present in the context of the private conversation between the person to be handed over and the lawyer. This gives a questionable appearance, because on the other hand, the interpreter interprets the conversation between the client and the lawyer. The latter is protected by confidentiality. The interpreter thus jumps from one side to the other.* Lawyer, Luxembourg.

A requested person interviewed in Cyprus recalled not using the only available interpreter for their language, as the interpreter was working with the police and there were confidentiality concerns, as advised by their lawyer.

> *I communicated with my lawyer in English. I would have preferred to have a Polish interpreter to assist me with my communications with my lawyer. However, the only interpreter available was a Cypriot who seemed to be working for the police and did not speak Polish very well. My lawyer advised me that, in the interests of confidentiality, it was better not to use the services of this particular interpreter and I therefore decided to use English to communicate with my lawyer.* Requested person, Cyprus.

Endnotes

(1) FRA, ***Rights of suspected and accused persons across the EU: Translation, interpretation and information***, Publications Office of the European Union, Luxembourg, 2016; FRA, ***Rights in Practice: Access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings***, Publications Office of the European Union, Luxembourg, 2019.
(2) ICCPR, ***General Comment No 32: Article 14, Right to equality before courts and tribunals and to a fair trial***, Geneva, 2007.
(3) ECtHR, ***Monedero Angora v Spain*** (dec.), No 41138/05, 7 October 2008, para. 2.
(4) **Council Framework Decision 2002/584/JHA**.
(5) **Directive 2010/64/EU**.
(6) **Directive 2010/64/EU**, Art. 3(6) and (7).
(7) Art. 3(9) stipulates: 'Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.'
(8) CJEU, C-564/19, ***Criminal proceedings against IS***, 23 November 2021, para. 138.
(9) ECtHR, ***Hermi v Italy***, No 18114/02, 18 October 2006, para. 59.
(10) See, for example, CJEU, C-216/14, ***Gavril Covaci***, 15 October 2015; CJEU, C-242/22 PPU, ***TL***, 1 August 2022.
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(21) Latvia, **Criminal Procedure Law** (*Kriminālprocesa likums*), 21 April 2005, Art. 715(1) and Art. 698(2), subpara. 2.
(22) Lithuania, Code of Criminal Procedure (***Baudžiamojo proceso kodeksas***), 14 March 2002, No IX-785, with subsequent amendments.
(23) Luxembourg, Act of 8 March 2017 (***Loi du 8 mars 2017***) transposing Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings, Directive 2013/48/EU on the right to access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings and amending the Act of 17 March 2004 that transposed Council Framework Decision 2002/584/JHA. This law has been codified in the Luxembourg Code of Criminal Procedure (***Code de procédure pénale***).
(24) Malta, **Criminal Code**, Chapter 9 of the Laws of Malta, 10 June 1854; Malta, **Extradition (Designated Foreign Countries) Order**, 7 June 2004.
(25) Portugal, Law 65/2003 Approving the Legal Framework of the European Arrest Warrant (***Lei No 65/2003, que aprova o regime jurídico do mandado de detenção europeu***), 23 August 2003.
(26) Slovenia, Criminal Procedure Act (***Zakon o kazenskem postopku***), 29 September 1994, Article 8.
(27) Slovakia, European Arrest Warrant Act (***Zákon o európskom zatýkacom rozkaze***), Act No 154/2010 Coll. as amended, 9 March 2010, Section 14(2); Slovakia, Criminal Procedural Code (***Trestný poriadok***), Act No.301/2005 Coll. as amended, 24 May 2005, Section 2(20).
(28) Spain, Organic Law 5/2015 (***Ley Orgánica 5/2015***, *de 27 de abril, por la que se modifican la Ley de Enjuiciamiento Criminal y la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, para transponer la Directiva 2010/64/UE, de 20 de octubre de 2010, relativa al derecho a interpretación y a traducción en los procesos penales y la Directiva 2012/13/UE, de 22 de mayo de 2012, relativa al derecho a la información en los procesos penales*).
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(33) Spain, Criminal Procedure Law (*Ley de Enjuiciamento Penal*), 14 September 1882, Art. 123.5.
(34) For more information relating to the national laws of the Member States, see the **Franet country studies**.
(35) Germany, Court Interpreter Law (*Gerichtsdolmetschergesetz)*, 10 December 2019.
(36) Latvia, **Criminal Procedure Law** (*Kriminālprocesa likums*), 21 April 2005, Art. 114(3).
(37) Malta, **Criminal Code** (Act No IV of 2014), Chapter 9 of the Laws of Malta, 10 June 1854, Art. 534A.
(38) Slovenia, *Rules on court experts, certified appraisers and court interpreters* (***Pravilnik o sodnih izvedencih, sodnih cenilcih in sodnih tolmačih***), 20 December 2018.
(39) Sweden, Ministry of Justice, ***Tolkning och översättning i brottmål***, government bill, 21 March 2013, p. 50.
(40) Slovenia, *Rules on court experts, certified appraisers and court interpreters* (***Pravilnik o sodnih izvedencih, sodnih cenilcih in sodnih tolmačih***), 20 December 2018, Art. 5(1) and Art. 10(1).
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5
CONCLUSION

Mutual trust among Member States is often regarded as the backbone of EAW proceedings. However, although CJEU jurisprudence and EU law reiterate that fundamental rights must prevail over mutual trust, the research findings suggest that, when issuing an EAW, the authorities do not systematically consider the principle of proportionality. Similarly, when executing an EAW, they do not systematically consider the fundamental rights implications of surrendering the individual. One possible way forward could be a greater reliance on other EU instruments aiming to achieve the same objective of avoiding impunity without employing the severe measure of issuing an arrest warrant.

There are still major gaps in law and in practice concerning implementation of the procedural rights and safeguards guaranteed by EU law in EAW proceedings. This corroborates previous FRA findings on the criminal procedural rights applicable to requested persons, which identified shortcomings as well as good practices.

Overall, the research finds that Member States must increase their efforts to ensure that requested persons can effectively participate in criminal proceedings and benefit from a fair trial, in accordance with the EAW framework decision and the procedural rights legal framework.

Requested persons have certain rights, as granted by the Charter and secondary law instruments such as the EAW framework decision and the criminal procedural rights framework directives. Requested persons have the right to legal representation in both issuing and executing states, as well as to understand what is happening to them. Therefore, they have the right to information about their rights and the EAW procedure, including the consequences of their decisions. They also have the right to interpretation and translation during the proceedings.

However, these rights are not always fulfilled in practice. This calls for efforts to address possible shortcomings. On a positive note, the findings indicate that the right to legal representation in the executing state is generally respected, with requested persons being informed about it and public defenders being assigned. However, the research identified shortcomings when it comes to facilitating the selection and appointment of privately hired lawyers. Moreover, rights of defence – such as having enough time to consult with a lawyer in an appropriate setting to prepare a line of defence – are often compromised because of the fast pace of and very short deadlines in EAW proceedings.

Furthermore, the right to legal representation in the issuing state appears not to be fully respected. Requested persons are not systematically informed about this right by the relevant authorities, and the authorities do not systematically facilitate the identification and appointment of a lawyer in the issuing state. In addition, some professionals seem not to be aware of

the role of the lawyer in the issuing state. Therefore, the fulfilment of this right depends on the professional networks and personal contacts of the requested person's lawyer in the executing state, which means that in practice this right is available only to some requested persons. Specific measures aiming to ensure better implementation of the right to legal defence in the issuing state appear to be required.

The findings show that, at various stages of the proceedings, requested persons are generally informed of their rights, the content of the EAW against them and the rules governing the EAW proceedings. However, some shortcomings were identified in the research, such as failure to provide information to requested persons about EAW-specific aspects of their situation, in particular the rule of speciality and the right to dual legal representation in the issuing country and in the executing country. In addition, ensuring that requested persons understand their rights and the consequences of their choices, including as regards consent to surrender and renunciation of the speciality rule, emerges as a challenge due to the complexity of legal norms, linguistic and cultural barriers, and practical difficulties such as a lack of specialised knowledge on the EAW among judicial authorities and lawyers or a lack of time for consultation with a lawyer prior to a court hearing. As a way forward, the creation of specific and accessible information materials listing all relevant aspects could be considered.

Overall, professionals dealing with EAW proceedings indicate that they could benefit from EAW-specific training sessions and more accessible information being available to them, such as lists of lawyers specialising in EAW proceedings, up-to-date databases of national legislation and case-law relevant to the EAW, and opportunities to communicate with professionals from other Member States.

There are some positive findings regarding respect for the right to translation and interpretation during EAW proceedings. Interviewees from all the Member States covered agreed that requested persons who do not speak the language of the proceedings are systematically provided with interpretation services. However, the quality of interpretation services received criticism, with some interviewees considering that the interpretation provided is often of a poor standard. The findings also highlight challenges encountered when providing interpretation in non-EU languages or less commonly spoken EU languages. In addition, the findings indicate that providing summary oral translations instead of full written translations of documents is a common practice. Professionals explain that short deadlines often make it impossible to order and receive a full translation. Therefore, greater efforts should be made to ensure the effective exercise of the right to interpretation and translation. These could include partnering with other Member States, with the assistance of relevant national and European professional associations, to share a pool of qualified, available interpreters able to assist requested persons in various Member States depending on the language combinations with which they work; introducing mechanisms for verifying an interpreter's actual ability to understand, interpret and translate legal concepts; and engaging in greater use of technology and digital tools for interpretation and translation during EAW proceedings, including potentially AI-based tools, where appropriate and in compliance with fundamental rights safeguards aligned with the EU's forthcoming AI Act.

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The European Arrest Warrant (EAW) allows Member States to implement judicial decisions issued in another Member State. It applies to decisions such as arrests, criminal prosecutions, and custodial sentences. After being in force for over 20 years, this report provides evidence for an assessment of the legislation in practice.

FRA's report looks at the fundamental rights challenges that people face who are subject to an EAW. They have a right to freedom from inhuman or degrading treatment and punishment. They also have a right to access to a lawyer, information, translation, and interpretation. It examines how these rights are upheld in practice. The report explores the experiences of people and professionals involved.

The report indicates that shared challenges exist across Member States. Authorities do not always consider the fundamental rights implications of surrendering the individual. Member States must increase efforts to ensure that people are able to take part in criminal proceedings and receive a fair trial.

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