The need for a new roadmap of procedural safeguards: a lawyer's perspective

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Abstract

The aim of this article is to discuss the need for new EU legislation on minimum standards in order to strengthen procedural rights and mutual trust in cross-border cases. It describes the need to change procedural legislation so as to render it possible to challenge effectively European Arrest Warrants issued and the disproportionate use of pre-trial detention. Recommendations made by the European Parliament in 2014 did not lead to the desired results. The new ‘digital’ world now provides the opportunity to create remedies against overuse of pre-trial detention. New legislation will bring about progress, though change from within at courtroom level has to date proven to be equally important.

Keywords Procedural rights · European Arrest Warrant · Roadmap 2020

1 Introduction

Since the Amsterdam Treaty and the Tampere European Council in 1999, the legal principle of mutual recognition of judicial decisions has been established in a continual process, ultimately being inserted by the Lisbon Treaty into Articles 67 and 82 of the Treaty on European Union (TEU). Mutual recognition as a generally recognised legal principle in the field of criminal matters requires mutual trust. This was clearly expressed in 2009 by the Stockholm Programme and the “first” Roadmap on procedural safeguards (the ‘Roadmap’).

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The Roadmap has now been completed and the deadline for implementation of the Procedural Rights Directives¹ and Directive 2016/343² has passed. All will agree that the adoption of the Roadmap has been a political success story. It is up to the European Commission to monitor whether or not these Directives have been well implemented by the Member States. This will be a matter of time as some of the reports are due next year. The current reports show that not all Member States have implemented the directives properly. As can be read in the report on the implementation of Directive 2013/48/EU, which concerns access to a lawyer,³ the assessment of national implementing measures has raised certain compliance issues in several Member States.

Finishing this legislative process should not be the end of the road and action should continue to be taken at European Union level in order to strengthen the rights of suspected or accused persons in criminal proceedings and thus to strengthen the principle of mutual recognition and the mutual trust which underlies it. Especially in these times, mutual trust is not at all obvious, as can be seen in the growing jurisprudence of the Court of Justice of the European Union: many questions have been raised before the Court of Justice, concerning *e.g.*, trial in absentia,⁴ prison conditions or fundamental rights⁵ and the rule of law^{6,7} but also concerning more technical subjects related to—by definition—national procedural legislation *e.g.*, the meaning of judicial authority in the issuing State and the right to judicial review of the Euro-

¹Directive 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 [2010] OJ L280/1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1; 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 [2016] OJ L 297/1.

²Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1.

³Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty COM(2019) 560.

⁴Case C-270/17 PPU *Tadas Tupikas*, EU:C:2017:628.

⁵Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198 and Case C-128/18 *Dorobantu*, EU:C:2019:857.

⁶Case C-216/18 PPU *LM*, EU:C:2018:586.

⁷The jurisprudence of the European Court of Justice on the Rule of Law in Poland, lead recently to a refusal of an European Arrest Warrant to Poland by the Amsterdam Court (*Rechtbank Amsterdam* 10-02-2021NL:RBAMS:2021:420).

pean Arrest Warrant in the issuing State.⁸ This jurisprudence has led to new national legislation in some Member States, *e.g.*, in the Netherlands, where the competence to issue an European Arrest Warrant (European Arrest Warrant) has been transferred from prosecutors to investigating judges. The increasing number of cases at the European Court of Justice indicates that more questions will be raised, affecting in turn mutual trust.

This is why, *inter alia*, in 2017, the former chair of the European Criminal Bar Association, Holger Matt, took the stage and introduced, on behalf of the ECBA, “*Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards (Roadmap 2020)*,”⁹ so as to put a model for further procedural safeguards in criminal proceedings on the political agenda of EU institutions and politicians. With the election of the new European Parliament (Parliament) in view, it was time to open the discussion again.

2 Roadmap 2020

Roadmap 2020 is a good starting point for this article as it underlines the need for new minimum standards on different procedural rights and the reasons for this need. New minimum standards not only strengthen mutual trust in European Arrest Warrant proceedings, they are also necessary after the establishment of the European Public Prosecutor’s Office (EPPO), as Regulation 2017/1939¹⁰ failed to set certain standards for procedural safeguards. Strengthening mutual trust might also lead to more frequent use of other EU instruments, such as the European Supervision Order (ESO)¹¹ or the European Investigation Order (EIO).¹²

Roadmap 2020 proposes seven new measures:

- Measure A: Pre-Trial-Detention (pre-trial detention), including the European Arrest Warrant
- Measure B: Certain Procedural Rights in Trials
- Measure C: Witnesses’ Rights and Confiscatory Bans
- Measure D: Admissibility and Exclusion of Evidence and other Evidentiary Issues

⁸Case C-453/16 PPU *Özçelik*, EU:C:2016:860; Case C-452/16 PPU *Poltorak* EU:C:2016:858; Case C-477/16 PPU *Kovalkovas*, EU:C:2016:861; Joined Cases C-508/18 and C-82/19 PPU *OG and PI*, EU:C:2019:456; Case C-509/18 *PF*, EU:C:2019:457; case C-625/19 PPU *XD*, EU:C:2019:1078; joined cases C-566/19 PPU and C-626/19 PPU *JR and YC*, EU:C:2019:1077; case C-414/20 PPU *MM*, EU:C:2021:4.

⁹ECBA Initiative 2017/2018: *Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards*. Available at: https://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf.

¹⁰Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’) [2017] OJ L283/1.

¹¹Council 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 [2009] OJ L 294/20.

¹²Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.

- Measure E: Conflicts of Jurisdiction and *ne bis in idem*
- Measure F: Remedies and Appeal
- Measure G: Compensation

It is scarcely necessary to say that the proposal for Roadmap 2020 is just a little seed which was planted and now has to be taken care of for a long time before it can bloom. It will probably take a lot of time before we are at a point where new legislation can be proposed as this needs to be preceded by thorough comparative studies of best practices, green papers and a lot of discussion. But Roadmap 2020 opens the floor for discussion and it creates awareness. It is good to see that since its publication, research has been done and articles are being written concerning various measures proposed.

In this article, I will discuss the substance of proposed Measure A, based on recent developments and on my own experiences in European Arrest Warrant cases. I will discuss the need for changes in the European Arrest Warrant legislation (particularly the need for a proportionality check and how to make this possible); dual legal assistance in the issuing and executing Member State; prison conditions and the use of pre-trial detention; and the need for (minimum) standards in the new “digital” world. The COVID-19 pandemic and lockdown have accelerated developments in the digitalisation of the justice system and the use of video conferencing, which has grown exponentially. This shows the opportunities, but also the need for regulation.

An interesting article to read about the other proposed measures is “*Improving Defence Rights. Including Available Remedies in and (or as a Consequence of) Cross-Border Criminal Proceedings*”.¹³

3 New procedural safeguards

3.1 European Arrest Warrant

Next year, we will celebrate the twentieth anniversary of the European Arrest Warrant. It is a story of success, but also a story of learning.

In these twenty years, the European Arrest Warrant has been analysed by different institutions. Theses analyses show the weaknesses in European Arrest Warrant proceedings. The case-law of the European Court of Justice and the national courts shows that mutual trust is not a given fact.

It is good to take note of two resolutions of the Parliament in which the European Arrest Warrant was evaluated and in which assessments and recommendations were given: first, the resolution of February 2014;¹⁴ secondly, the resolution of January 2021.¹⁵ Combined, these show that, even though some improvements have made in

¹³Costa Ramos, V., Luchtman, M., Muntaunu, G.: *Improving Defence Rights. Including Available Remedies in and (or as a Consequence of) Cross-Border Criminal Proceedings*. Published in Eucrim, issue 3/2020, p. 230-248. Available at: <https://eucrim.eu/articles/improving-defence-rights/>.

¹⁴European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) [2017] OJ C 285/135.

¹⁵European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)) P9_TA-PROV(2021)0006.

e.g., soft law and training programmes, not all problems that were identified in 2014 have led to proposals for new legislation and therefore not all such problems have been solved. It is generally understood that the measures that have been proposed are politically too sensitive to render an agreement possible as they would be regarded as further intervention with national sovereignty.

In 2014 the Parliament requested the Commission to submit legislative proposals and to provide for, *inter alia*:

- a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate and less intrusive alternative measure;
- a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligations in accordance with Article 6 of the TEU and with the Charter of Fundamental Rights of the European Union, notably Article 52(1) thereof with its reference to the principle of proportionality;
- the right to an effective legal remedy in compliance with Article 47(1) of the Charter of Fundamental Rights and Article 13 of the European Convention on Human Rights (ECHR), such as the right to appeal in the executing Member State against the requested execution of a mutual recognition instrument and the right for the requested person to challenge before a tribunal any failure by the issuing Member State to comply with assurances given to the executing Member State;

To realise this, the Parliament called, *inter alia*:

- on Member States, as either issuing or executing Member States, to provide for legal mechanisms to compensate for damage arising from miscarriages of justice relating to the operation of mutual recognition instruments, in accordance with the standards laid down in the European Court of Human Rights and in the well-established case-law of the European Court of Justice.
- on the Commission to explore the legal and financial means available at Union level for improving standards of detention including legislative proposals on the conditions of pre-trial detention;

When one reads the 2014 resolution seven years later, not much has changed, and indeed the situation has perhaps even worsened. In 2021, the Parliament has produced, *inter alia*, the following assessments and recommendations:

- particular problems show that the European Arrest Warrant has to be improved and updated to strengthen the overall system and safeguard compliance with the rule of law and fundamental rights in all Member States. Such problems relate to detention and prison conditions, proportionality, implementation in European Arrest Warrant proceedings of the procedural safeguards enshrined in EU law, in particular dual legal representation, training, specific rule of law issues, the execution of custodial sentences, time limits and *in absentia* decisions;
- attempts are being made to solve some issues by a combination of soft law (European Arrest Warrant handbook), mutual assessments, the assistance of Eurojust,

European Court of Justice case-law and supplementing legislation (Framework Decision 2009/299/JHA¹⁶ and Directive 2013/48/EU);”

- the Parliament underlines that the European Arrest Warrant should not be misused for minor offences; recalls that use of the European Arrest Warrant should be limited to serious offences where it is strictly necessary and proportionate; stresses that instruments such as Framework Decision 2008/909/JHA on the transfer of prisoners,¹⁷ Framework Decision 2008/947/JHA on probation and alternative sanctions,¹⁸ the European Investigation Order, the European Supervision Order, the European Convention on the Transfer of Proceedings in Criminal Matters complement the European Arrest Warrant and also provide useful and less intrusive alternatives to it; stresses that the European Arrest Warrant should only be used if all other alternative options have been exhausted and that states should not have recourse to the European Arrest Warrant in situations where a less intrusive measure would lead to the same results, for example hearings by videoconference or related tools; urges Member States’ authorities, where possible, to use such alternative instruments instead of issuing an European Arrest Warrant;
- the Parliament notes the Commission’s worrisome report on the implementation of Directive 2013/48/EU; urges the Commission to step up efforts to ensure the full implementation of all directives on procedural safeguards in order to make sure that requested persons have recourse to effective defence in cross- border proceedings;
- the Parliament calls on the Commission to study the feasibility of supplementing instruments on procedural rights, such as those on admissibility of evidence and prison conditions in pre-trial detention; believes that the absence of minimum standards on prison conditions and pre-trial detention at EU level, of the limitation of the use of pre-trial detention to being a measure of last resort and of the consideration of alternatives, coupled with the lack of a proper assessment of whether the cases are trial-ready, can lead to unjustified and excessive periods being spent by suspects and accused persons in pre-trial detention; calls on the Commission to achieve EU minimum standards, particularly on criminal procedural safeguards and on prison and detention conditions, as well as to strengthen the information tools for national executing authorities on the conditions of pre-trial detention and imprisonment in each Member State;
- the Parliament underlines that there is no mechanism in place to ensure a proper follow-up to the assurances provided by the issuing judicial authorities after surrender;

¹⁶Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L 81/24.

¹⁷Council 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 [2008] OJ L 327/27.

¹⁸Council 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 [2008] OJ L 337/102.

The recent European Parliamentary Research Service study on the implementation of the European Arrest Warrant by Wouter van Ballegooij is also interesting to read on this matter.¹⁹

The present writer embraces the recommendations in the resolutions of 2014 and 2021, but as has been noted, the earlier recommendations did not lead to the desired result. Is it now to be expected that the same recommendations will be followed with legislation at short notice? In the meantime, how can the problems given rise to by the current EU and national legislation be solved? How can the European Arrest Warrant being misused for minor offences be prevented?

The resolution does not provide answers to these questions and it is not without reason that the NGO Fair Trials,²⁰ in reaction to the proposals, stated that the resolution will not prevent abuse of the European Arrest Warrant.²¹

3.2 Prison conditions

A prominent topic in the discussion of mutual trust is the overuse of pre-trial detention and the alarming prison conditions in some Member States. In the case of *Aranyosi and Căldăraru*²² the European Court of Justice allowed a limitation to the principle of mutual trust and recognition when there is a real risk of inhuman and degrading treatment. In the case of *Dorobantu*²³ the European Court of Justice took a further step towards a more detailed explanation of what factors are important for this assessment. If one looks at the case-law of the *internationale rechtskamer*²⁴ of the Amsterdam Court, it can be seen that the issue of prison conditions leads to mutual distrust. Numerous court decisions on European Arrest Warrant requests have been postponed in order to give the requesting state the opportunity to provide more information about prison conditions or guarantees of treatment in accordance with Article 3 of the European Convention on Human Rights. For example, at the moment, no European Arrest Warrant from Romania is being granted.²⁵

This underlines more than ever that minimum standards are needed to strengthen mutual trust, as stressed by the Parliament.

The “problem” of pre-trial detention and prison conditions is – unfortunately – not new. In its 2009 resolution on the Roadmap,²⁶ the Council of the European Union proposed as ‘Measure F’ a Green Paper on the examination of appropriate measures

¹⁹Van Ballegooij, W.: *European Arrest Warrant. European Implementation Assessment* (2020). Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU\(2020\)642839_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU(2020)642839_EN.pdf).

²⁰<https://www.fairtrials.org>.

²¹Fair Trials: *European Parliament’s proposals will not prevent abuse of European Arrest Warrants* (2021). Available at: <https://www.fairtrials.org/news/european-parliament%E2%80%99s-proposals-will-not-prevent-abuse-european-arrest-warrants>.

²²Joint cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198.

²³Case C-128/18 *Dorobantu*, EU:C:2019:857.

²⁴In the Netherlands the IRK is the only competent court to deal with European Arrest Warrant-requests.

²⁵IRK 20-08-2020, NL:RBAMS:2020:4112; IRK 01-10-2020, NL:RBAMS:2020:6098.

²⁶Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/01, p. 3.

regarding pre-trial detention.²⁷ In 2011, the Parliament asked the Commission to define minimum standards of detention, to be applied in all Member states.²⁸ The Commission completed this Green paper on 14 June 2011.²⁹

However, the Green Paper was not followed up upon.

In 2016 Fair Trials published³⁰ an eye-opening report about their research on the use of pre-trial detention, which shows overuse and overcrowding in pre-trial detention in the member states: a report that is still valuable today.

But sadly, as discussion on pre-trial detention is still a sensitive matter, up until now, no new legislation has been proposed by the Commission.

Like the Parliament, the present writer wants to stress the need for minimum standards in prison conditions as the lack of these undermines mutual trust in European Arrest Warrant proceedings. This need exists not only in order to strengthen mutual trust, but also for the benefit of individuals across the Union. When such minimum standards are not put in place, then throughout the Union, unfair and unexplainable contradictions will arise between members of the Union, which is undesirable. To underline this, three examples are given here.

Example 1 Due to COVID-19, a general agreement between the Belgian and Dutch authorities exists implying that people who are to be extradited from the Netherlands, will not be placed in a multi-person cell to prevent possible infection. This rule does not exist for Belgian prisoners. It is a well-known fact that Belgium prisons have a problem with overcrowding. This means that people from other Member States are more protected than are prisoners from Belgium.

Example 2 Some Hungarian and Bulgarian prisons are known not to comply with Article 3 of the European Convention on Human Rights. People who are arrested in the Netherlands will only be transferred after a given guarantee from the requesting authorities that the requested person will not be imprisoned in a cell that does not comply with Article 3 of the Convention. This will not change anything for the prison conditions for the population that is already detained in these prisons. They will stay in the same degrading and humiliating situation, which creates unfair contradictions.

Example 3 Forum-shopping in reverse. The present writer was once consulted by a client who wanted to travel to the Netherlands to be arrested in the Netherlands to prevent pre-trial detention in his own country (the UK) and to minimise the time he had

²⁷ Short explanation: the time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a Green Paper (p. 3).

²⁸ Written declaration pursuant to Rule 123 of the Rules of Procedure on infringement of the fundamental rights of detainees in the European Union [2011] 0006/2011, p. 2.

²⁹ Green Paper *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention* COM(2011) 327 final.

³⁰ *Fair Trials: A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU* (2016). Available at: https://www.fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf.

to stay in a Belgian prison. It is known that the prison conditions in the Netherlands are far better than the conditions in other Member States.

As it is not known if legislation on this matter will exist on short notice—as the Parliament recommended—it is important to share knowledge between legal practitioners, *e.g.*, lawyers, prosecutors and judges. It is due to that advice that I point out two sources of information on prison conditions. One is the website³¹ of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, a website that most practitioners with knowledge of EU law are able to find. The second source of information is, however, less known. This is the Criminal Detention Database of the EU Agency for Fundamental Rights.³²

A centralised database containing national case-law on European Arrest Warrant applications does not yet exist. To get more information on national court decisions in a specific Member state it is always wise to consult the lists of national criminal defence lawyers on the website of bodies such as the European Criminal Bar Association.³³

3.3 Proportionality / length pre-trial detention

Prison conditions are not the only point requiring attention when it comes to pre-trial detention. The imposition of and length of pre-trial detention are also a great source of concern in national cases and in European Arrest Warrant-cases.³⁴ Recently the European Court of Human Rights convicted the Netherlands in three (national) cases for the lack of reasoning when extending the pre-trial detention.³⁵

When it comes to pre-trial detention in European Arrest Warrant-cases, disproportionate use of pre-trial detention can be divided in two main groups: 1) pre-trial detention where a less intrusive measure (such as a European Investigation Order) should/could be used; and 2) pre-trial detention after transfer to the requesting state due to a presumed flight risk. Both raise the question of the necessity and proportionality of the European Arrest Warrant, how to challenge Warrants on these grounds and how to diminish the apparent distrust regarding the use of European Supervision Orders and European Investigation Orders.

To prevent the disproportionate use of the European Arrest Warrant, the European Court of Justice ruled recently that, where the law of the issuing Member State confers competence to issue a European Arrest Warrant on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, *inter alia*, the proportionality of such a decision must be capable of being the subject, in the Member State, of

³¹<https://www.coe.int/en/web/cpt>.

³²<https://fra.europa.eu/en/databases/criminal-detention/criminal-detention>.

³³<https://www.ecba.org/contactslist/contacts-search-country.php>.

³⁴See *A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU*, footnote 30.

³⁵*Zohlandt v. the Netherlands*, 09-02-2021 (Application no. 69491/16); *Hasselbaink v. the Netherlands*, 09-02-2021 (Application no. 73329/16); *Maassen v. the Netherlands*, 09-02-2021, (Application no. 10982/15).

court proceedings which meet in full the requirements inherent in effective judicial protection.³⁶ Due to this (and following) decisions of the European Court of Justice, a court in a requested state has the competence to investigate the extent of legal remedies in an issuing state when the authority that issued the EAW is not a court in the first place. Referring to this jurisprudence, the *IRK* declared the European Arrest Warrant inadmissible due to the lack of judicial remedy of the European Arrest Warrant issued by a Greek prosecutor.³⁷

These judgments are a big step forward, but are not enough to solve the pre-trial detention problems mentioned in this article. In the cases of *JR* and *YC* the European Court of Justice ruled that a judicial review by a judge after actual surrender suffices.³⁸

Apart from new EU legislation including new minimum standards for imposing/continuing pre-trial detention and procedures to challenge (the proportionality of) an European Arrest Warrant, one should welcome also the use of video-conferencing in European Arrest Warrant procedures and, doing so, create more possibilities for dual defence.

3.3.1 Dual defence

As was mentioned in the reports discussed above, one of the most recognised problems/failures in the implementation of the European Arrest Warrant has been the lack of a proper dual defence. In its report on the implementation of Directive 2013/48/EU the Commission concluded that one of the most prominent issues of compliance with Directive 2013/48/EU is the right of access to a lawyer in the Member State issuing an European Arrest Warrant.³⁹ This needs further implementation and regulation, e.g., on the appointment of a lawyer but also the possibility of legal aid.

But getting access to a lawyer is only the first step to take.

Having actual access to dual defence does not automatically lead to a proper defence or reduction in the use of pre-trial detention. Due to Article 10(4) of Directive 2013/48/EU, the role of the lawyer in the issuing Member State is *to assist* the lawyer in the executing Member State by providing that lawyer with *information and advice* with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA. Going by the strict wording of Article 10(4), therefore, the lawyer in the issuing Member state does not have much legal competence in the issuing state itself.

This limited role is unfortunately confirmed by practice due to the differing legal systems and the way legal proceedings start. In some member states access to the case file or discussing the pre-trial detention in the requesting state is only possible when

³⁶E.g. Joint Cases C-508/18 and C-82/19 PPU *OG* and *PI*, par. 75.

³⁷*IRK* 23-02-2021, NL:RBAMS:2021:731.

³⁸Joined cases C-566/19 PPU and C-626/19 PPU *JR* and *YC*, EU:C:2019:1077, par. 69-71.

³⁹*Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty* (COM(2019) 560).

the requested person is actually transferred to the requesting state. The following are two examples from my practice:

Example 1 Germany issues an prosecution European Arrest Warrant for two minor fraud cases for a Dutch national with a registered address in the Netherlands. One of the aims of the European Arrest Warrant was to hear my client as a suspect. The pre-trial detention in the Netherlands was postponed as there was no flight risk. We approached a German lawyer to challenge the German arrest warrant and to make an appointment for my client to come to Germany to make a statement. The German lawyer was not able to get access to the case file (in time) to judge the merits of the case but, more importantly, he was not able to challenge the arrest warrant as my client had to be in Germany to get access to the judicial authority. After the Amsterdam Court confirmed the extradition, my client did not report to the police as he did not want to be imprisoned. One could say that at that moment there was a real flight risk. Some time later, my client drove to Germany to be heard by the police. After the interrogation my client was allowed to leave and the European Arrest Warrant was withdrawn. He was not arrested.

Luckily for my client the use of pre-trial detention was limited, but it was not necessary at all, when Germany chose for a lighter measure, *e.g.*, a European Investigation Order.

A year later, the same client was suspected to be involved in a more serious case, an attempt to commit a burglary on a bank with an improvised explosive device. In that case, however, a European Investigation Order was issued and my client was interrogated by the Dutch police in the matter.

Example 2 A Belgium national, who was equated to a Dutch national due to his residence in the Netherlands, was arrested in the Netherlands for a brutal home robbery. As there was no risk of flight in the Netherlands, he was released on bail for five months. He complied with the suspension conditions. When the Amsterdam Court admitted the European Arrest Warrant, he reported himself to the police. He was transferred to Belgium and since then has remained in pre-trial detention for more than three months now, awaiting his trial. The court date is not yet known. In this case, we contacted a Belgium lawyer to challenge the pre-trial detention in Belgium before the extradition, to plead for a conditional suspension under the European Supervision Order and to plead for a lighter measure, such as a European Supervision Order. But in Belgium access to the casefile is only possible once you are arrested, and the judiciary is not “open” to lighter measures.

Above all, the two examples show the need to be able to challenge the (European) Arrest Warrant without undue delay after the arrest and the need for a proportionality check as underlined by the European Parliament.

These two examples also show, that even if dual defence is available at the beginning of an European Arrest Warrant procedure, procedural safeguards (such as the ability to challenge effectively a disproportionately-issued European Arrest Warrant or to prevent unnecessary pre-trial detention) are not guaranteed when the lawyer in the issuing state can not effectively represent his client.

The examples given show the need for new (EU) legislation, as challenging the European Arrest Warrant on proportionality grounds is not possible in all member states due to national procedural law. Because the executing state is also not allowed to decide on this matter, this leads to a possible breach of fundamental rights of the requested person. One can think of new EU legislation or minimum standards including access to the case file from the moment the European Arrest Warrant is issued/becomes known to the requested person and the possibility of challenging the (proportionality) of the national arrest warrant and the European Arrest Warrant/pre-trial detention before a judicial authority by a lawyer without the requested person being present in the requesting state (of course only with consent of the requested person). At the latest, these measures should be accessible when the requested person is arrested. Only then can one adequately challenge the proportionality of a European Arrest Warrant and plead for the use of lighter measures such as a European Supervision Order or a European Investigation Order. This legislation, however, would have a major effect on national legislation, which few Member States would willingly accept.

In order to regulate the proportionality of an European Arrest Warrant and to strengthen mutual trust, it is also necessary to formulate new minimum standards on pre-trial detention such as a presumption of release pending trial, the use of less intrusive measures or a maximum period of pre-trial detention.⁴⁰ Standards should be made for access to the case file in prison, especially in digital proceedings.⁴¹ It is also necessary to introduce a proportionality check by creating a checklist that must be followed before proceeding to a European Arrest Warrant. This check should be executed in the issuing state, as stated above. If, however, it is not legally possible to challenge the proportionality of a European Arrest Warrant in the requesting state due to legal barriers in existing national legislation, one could ask if the judicial authority in the requested state should be given the competence to execute the proportionality check on the basis of this list, which list should be accessible in the requested state after the arrest. It could be argued that doing this would go against the principle of mutual trust—but without such a possibility, the requested person would not have an effective remedy against unjust pre-trial detention.

3.3.2 The use of remote video hearings

Before new legislation is established, the use of remote video hearings might be a good (perhaps temporary) solution, and might even be the final answer to a lot of problems summarised above. It could also be a possible way to strengthen mutual trust, especially in using the possibilities of a European Supervision Order. Introducing video-conferencing should be already possible in some Member States without the need to change their national law, as video-conferencing is already used in remote court hearings.

⁴⁰See e.g., ECBA, *Strengthening mutual trust in the European judicial area – a Green Paper on the application of EU criminal justice legislation in the field of detention* (2011). Available at: https://www.ecba.org/extdocserv/projects/ps/GPonDetention_ECBAresp20111130.pdf and Roadmap 2020.

⁴¹E.g., access to a private computer or laptop, other requirements if access to a public computer or laptop such as sufficient time of access, privacy etc.

The current legal climate makes it possible to start with remote court hearings, creating a good opportunity to experiment with possibilities, best practices and solutions to current problems.

The importance of the use of remote video court hearings in European Arrest Warrant cases was acknowledged in project 20 of the “2019-2023 Action Plan European e-Justice”.⁴² In its Communication of 2 December 2020,⁴³ the Commission underlined that the COVID-19 pandemic had highlighted the need for the EU to accelerate national reforms to digitalise judicial institutions’ handling of cases, parties’ and lawyers’ exchange of information and documents, and continued easy access to justice for all. A toolbox was proposed, including financial support for Member States, legislative initiatives, IT tools and the promotion of national coordination and monitoring instruments, which would allow regular monitoring, coordination, evaluation and exchange of experiences and best practices. The toolbox comprised binding and non-binding measures. The Commission opined that mandatory digitalisation seemed necessary, for example, in the area of cross-border judicial cooperation procedures, so as to enable effective and swift cross-border communication. Other tools that might not be binding included opportunities for information-sharing and the exchange of best practices.

The Commission advised Member States to resort to the use of videoconferencing, where this was permissible by law, as it substantially reduced the need for burdensome and cost-intensive travel, and might facilitate proceedings. The Commission labelled videoconferencing in cross-border proceedings a priority which would involve developing national systems in close coordination at EU level, *in order to ensure mutual trust*, interoperability and security.

What should a remote hearing look like after an arrest on basis of a European Arrest Warrant?

After arrest, the requested person will be brought before a judge in the requested state, without undue delay. In that hearing, there will be a video connection with the issuing state. At one site we would have the requested person, his lawyer and the judicial authority of the requested state. At the other site, we would have the lawyer in the issuing state and the judicial authority of the issuing state, competent to decide on the continuation of the pre-trial detention in the issuing state and/or the withdrawal of the European Arrest Warrant. An interpreter would also be present.

If the European Arrest Warrant was issued, then, in order to give the requested person the possibility of making a statement, he or she should be able to make this statement during this hearing or to make an appointment for an interrogation by video-link by the investigative service of the issuing state or carried out by the investigative service of the executing state in the case of a European Investigation Order. A condition for making a statement before the judicial authority would be prior access to the case file.

When it comes to challenging the need for pre-trial detention and the question of whether a lesser coercive measure suffices, the benefit of this hearing would be the

⁴²2019-2023 Action Plan European e-Justice [2019] OJ C 96/05.

⁴³Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Digitalisation of Justice in the European Union: A toolbox of opportunities* (COM(2020) 710 final).

dual defence and the presence of the judicial authority of the requested state. In this hearing one should be able to challenge the need of pre-trial detention and to discuss the personal circumstances (such as work, study, but also vulnerability), conditional release and bail. As the professional attendees of this hearing could inform the judicial authority of the possibilities of conditional release in the requested state on of the problems discussed before, distrust in the European Supervision Order due to lack of knowledge on the possibilities of suspension and guidance in the requested state, would disappear. Due to the personal/live contact, this should also create more trust in the judicial system of the requested state.

If the judicial authority of the issuing state came to the conclusion that the European Arrest Warrant should not be withdrawn, the judicial authority of the requested state would decide on the pre-trial detention in the requested state before the final court hearing on the execution of the European Arrest Warrant.

The possibility of assuring the attendance of the requested person at the final court hearing on the merits through a remote video connection might make it easier for the issuing state to withdraw the European Arrest Warrant.

That being said, even though the possibility of a remote pre-trial detention- and court hearing might be a reason not to impose pre-trial detention, which would be a great advance for the rights of the accused, a remote court hearing can and should only take place with certain minimum standards.

As the Commission underlines in its report, any action relating to the digitalisation of justice must be implemented in full compliance with fundamental rights, such as the rights to the protection of personal data, to a fair trial and to an effective remedy, and the principles of proportionality and subsidiarity.⁴⁴ In particular, in criminal proceedings in a digital environment, care should be taken to avoid any interference with the rights of defence, including the right of access to a lawyer, the right of access to material evidence,⁴⁵ the right to attend one's trial, to communicate confidentially with one's lawyer, to put questions to witnesses and to challenge evidence.⁴⁶

What minimum standards need to be given in this field?

The present writer would like to echo the European Criminal Bar Association statement on this point, because it describes in detail what conditions should be met and in terms which this writer agrees with.⁴⁷ For the benefit of this article, a selection suffices. The writer would also like to refer to the briefing paper of Fair Trials on this subject.⁴⁸

⁴⁴*Ibid.*, p. 5.

⁴⁵*Ibid.*, p. 5-6.

⁴⁶*Ibid.*, p. 14.

⁴⁷ECBA: European Criminal Bar Association *Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World* (2020). Available at: https://ecba.org/extdocserv/20200906_ECBAStatement_videolink.pdf.

⁴⁸Fair Trials: *Briefing Paper on the Communication on digitalisation of Justice in the European Union* (2021). Available at: https://www.fairtrials.org/sites/default/files/publication_pdf/BRIEFING-PAPER-ON-THE-COMMUNICATION-ON-DIGITALISATION-OF-JUSTICE-IN-THE-EUROPEAN-UNION.pdf.

When it comes to developing appropriate and compatible legal standards for remote participation where that is permitted and appropriate in European Arrest Warrant procedures, at least the following standards should be met:

- a. The use of videoconferencing must always be subject to the suspected or accused person's consent and to the consent of his or her defence lawyers. Consent must be given in a free and informed manner, after having received legal advice in the issuing state.
- b. If the suspect or accused is a vulnerable person, this should be taken into account when evaluating whether the use of video-conferencing is appropriate, and consent must also be sought from the legal representative or a person entrusted with safeguarding the interests of the vulnerable suspect or accused;
- c. The facilitation of dual defence in cross-border cases is essential. Should the suspect or accused person be interviewed by the authorities of a state other than of his residence, there should be mandatory assistance by defence counsel in both states before and during the interview, in the pre-trial stages, and throughout the proceedings during the trial stage before, during and after the trial hearing.
- d. If the suspect or accused person lacks the financial means to hire a lawyer, he or she should be eligible for free legal aid in both jurisdictions.
- e. The lawyer in the executing state should be physically present in the same room as the suspect or accused. The lawyer in the issuing State should be physically present in the same room as the authorities conducting the hearing or where the trial is taking place;
- f. The suspect or accused should always be heard in the physical presence of a judicial authority of the executing state, or another independent public authority, in order to prevent undue interference with the statements of the accused, and also to guarantee the respect for his or her rights according to the executing state's law, as well as the authenticity of the evidence;
- g. Access to the case file should be granted to the suspect or accused and to lawyers in both issuing and executing state and any documents to be examined during the interview or the trial should be made available to the suspect or accused and to his lawyers in both states before and during the interview or trial (see in this regard Recital 30 and Article 7 (3) Directive 2012/13/EU);
- h. The right of the suspect or accused person to speak confidentially with his or her defence team (in both issuing and executing states) must be guaranteed at all times (before and during the hearings);
- i. In cross-border videoconferencing, there may be a need to have an interpreter either at the issuing authority or at the executing authority's premises, if the suspect or accused or one of the participants does not speak the language of the issuing state.

It is hoped to contribute with this article to the required discussion on the need for new minimum standards on procedural rights and to make this discussion visible. In order to be successful in strengthening procedural safeguards, we should start with awareness. If difficulties are to be foreseen regarding political distrust among the Member States, or regarding fear of further interference on the part of the EU in the national laws of the member states, we should try to start the change in the

courtrooms. It is due to lawyers and judges, who made their way to the European Court of Justice, that today more procedural safeguards exist, even without legislation having been adopted. I call for these lawyers, judges and prosecutors to use their competence to further expand. To bring more cases to the European Court of Justice, by finding ways in national law (*e.g.*, remote hearings), by using their connections and by sharing knowledge (*e.g.*, of judgments of other Member States). Once jurisdictions become more familiar with the possibilities that exist in practice, perhaps governments will follow.

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