

European Added Value Assessment The EU Arrest Warrant

ANNEX I

Critical Assessment of the Existing European Arrest Warrant Framework Decision

**Research paper
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Abstract

After ten years of practical implementation of the European Arrest Warrant Framework Decision, this research paper aims to analyse its strengths and weaknesses, and reflect on its future. Twelve main issues are reflected upon. Following a description of each of these issues, including concrete examples, the main arguments for and against action at EU level are presented. Specific solutions are eventually suggested.

AUTHOR

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Abbreviations

CCBE	Council of Bars and Law Societies of Europe
CMLR	Common Market Law Review
CoE	Council of Europe
EAW / EAWs	European Arrest Warrant /s
ECBA	European Criminal Bar Association
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EEW	European Evidence Warrant
EIO	European Investigation Order
EP	European Parliament
ESO	European Supervision Order
EU	European Union
EuCLR	European Criminal Law Review
FTI	Fair Trials International
FD	Framework Decision
FRA	EU Agency for Fundamental Rights
FTI	Fair Trials International
HJIL	Heidelberg Journal of International Law
JHA	Justice and Home Affairs
JORF	Journal Officiel de la République Française
NJECL	New Journal of European Criminal Law
MB	Moniteur Belge
MS / MSs	Member State /s
MLA	Mutual legal assistance
MR	Mutual Recognition
NAW	Nordic Arrest Warrant
NGO	Non-Governmental Organisation
SIS	Schengen Information System
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
VIS	Visa Information System

Introduction

1. The context: the principle of Mutual Recognition (MR) in criminal matters and its implementation

The principle of MR in criminal matters was launched during the UK Presidency at the Cardiff European Council of 15 and 16 June 1998¹. Its importance was confirmed at the Tampere European Council of October 1999, during which it was described as the “cornerstone” of judicial cooperation². It was subsequently developed in a Programme of measures adopted in 2000³. The Hague Programme of November 2004⁴ and the Programme of Stockholm of December 2009⁵ also confirmed its importance in the EU area of criminal justice. The principle is now enshrined in the Treaty⁶.

MR is designed not only to strengthen cooperation between Member States, but also to enhance judicial protection of individual’s rights and freedoms⁷. Its implementation presupposes that MSs have trust in each other’s criminal justice systems and that this trust is grounded in particular on their shared commitment to the principles of freedom, democracy, respect for human rights, fundamental freedoms and the rule of law.

Among the philosophical elements underlying MR, the definition provided for by the European Commission in its Communication of 26 July 2000 on MR of final decisions in criminal matters are made particularly clear:

« MR is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one’s own state, the results will be such that they are accepted as equivalent to decisions by one’s own state. Mutual trust is an important element, not only trust in the adequacy of one’s partners rules, but also trust that these rules are correctly applied. Based on this idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one’s own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case. Recognising a foreign decision in criminal matters could be understood as giving it effect outside of the state in which it has been rendered, be it by according it the legal effects foreseen for it by the foreign criminal law, or be it by taking it into account in order to make it have the effects foreseen by the criminal law of the recognising state. »⁸.

¹ Cardiff European Summit - Presidency Conclusions, 15 and 16 June 1998, SN 150/98, para. 39.

² Tampere European Summit - Presidency Conclusions, 15 and 16 Oct. 1999, SN 200/99, para. 33 and f.

³ Programme of measures to implement the principle of MR of decisions in criminal matters, *OJ C* 12, 15 Jan. 2001, p. 10.

⁴ *The Hague Programme*, Brussels European Council - Presidency Conclusions, 4 and 5 Nov. 2004, *OJ C* 53, 3 March 2005, p. 1.

⁵ *The Stockholm Programme*, Stockholm European Council - Presidency conclusions, 11 Dec. 2009, *OJ C* 115, 4 May 2010, p. 1.

⁶ See especially Art. 67 and Art. 82 para 1 TFEU.

⁷ Programme of measures to implement the principle of MR of decisions in criminal matters, *supra* note 3, p. 1. See also Tampere Conclusions, *supra* note 2, para 33: “Enhanced MR of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights”.

⁸ Commission, COM (2000) 495, 26 July 2000.

The Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between MSs⁹ (hereafter EAW FD) is the first achievement of the principle of MR. Negotiated in the aftermath of the 9/11 attacks, the Council adopted the FD barely nine months after the introduction of the Commission's proposal¹⁰.

The EAW FD does not stand alone, as it was followed by 9 other MR instruments, namely 8 FDs adopted under the ex-3rd pillar of the Treaty on the European Union and one Directive adopted since the entry into force of the Treaty on the functioning of the European Union:

- FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence¹¹ (hereafter freezing FD)
- FD 2005/214/JAI of 24 February 2005 on the application of the principle of MR to financial penalties¹² (hereafter financial penalties FD)
- FD 2006/783/JHA of 6 October 2006 on the application of the principle of MR to confiscation orders¹³ (hereafter confiscation orders FD)
- FD 2008/675/JHA of 24 July 2008 on taking account of convictions in the MSs of the European Union in the course of new criminal proceedings¹⁴,
- FD 2008/947/JHA of 27 November 2008 on the application of the principle of MR to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions¹⁵ (hereafter probation decisions FD)
- FD 2008/909/JHA of 27 November 2008 on the application of the principle of MR to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty¹⁶ (hereafter custodial sentences FD)
- FD 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters¹⁷ (hereafter the EEW FD),
- FD 2009/829/JHA of 23 October 2009 on the application, between MSs of the European Union, of the principle of MR to decisions on supervision measures as an alternative to provisional detention (here after the ESO FD)¹⁸;
- Directive 2011/99/EU of the European Parliament and of the Council on the European Protection Order¹⁹.

A second Directive should be adopted soon, namely the Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (hereafter the EIO Directive). Submitted on 21 May 2010²⁰ by a group of seven MSs, this initiative was the object of a Council's general approach on 14 December 2011

⁹ OJ L 190, 18 July 2002, p. 1.

¹⁰ Commission, Proposal for a Council FD on the EAW and the surrender procedures between MSs, COM (2001) 522, 19 Sept. 2001. On this context of adoption, see for instance Bannelier, Th. Christakis, Corten, and Delcourt (éd.), *Le droit international face au terrorisme*, Paris, Pedone, 2002, p. 279 and f.; Weyembergh, "L'impact du 11 septembre sur l'équilibre sécurité/liberté dans l'espace pénal européen", in Bribosia and Weyembergh (éd.), *Lutte contre le terrorisme et droits fondamentaux*, Bruxelles, Bruylant, collection Droit et Justice, 2002, p. 153 and f.

¹¹ OJ L 196, 2 Aug. 2005, p. 45.

¹² OJ L 76, 22 March 2005, p. 16.

¹³ OJ L 328, 24 Nov. 2006, p. 59.

¹⁴ OJ L 220, 15 Aug. 2008, p. 32.

¹⁵ OJ L 337, 16 Dec. 2008, p. 102.

¹⁶ OJ L 327, 5 Dec. 2008, p. 27.

¹⁷ OJ L 350, 30 Dec. 2008, p. 72.

¹⁸ OJ L 294, 11 Dec. 2009, p. 20.

¹⁹ OJ L 338, 21 Dec. 2011, p.2.

²⁰ Council, Doc. No 9288/10, 22 Dec. 2011.

and a compromise on some essential elements was reached at the trilogue on 23 October 2013²¹.

2. Assessment of the EAW FD ten years after its entry into force and reflection on its future

Ten years after the date for the transposition of the EAW FD²² is particularly appropriate to assess its functioning and reflect on its future. It is all the more adequate in view of the Stockholm Programme²³, which especially invited the Commission to “explore the result of the evaluation of the EAW, and, where appropriate make proposals to increase efficiency and legal protection for individuals in the process of surrender (...)”.

Numerous assessments have already been carried out, especially at EU level²⁴. In this regard, the successive Commission’s evaluation reports²⁵, the fourth round of mutual evaluations on the practical application of the EAW and corresponding surrender procedures²⁶ are worth mentioning²⁷.

From all these assessments, it appears that the EAW FD is the “*success story*” of the EU area of criminal justice. The final report on the fourth round of mutual evaluations especially underlined the practitioners’ positive opinion: “In general terms, the practitioners who were interviewed in the different MSs had a very positive view of the EAW and its application. A very large majority of the authorities involved in the operation of the EAW are of the view that it has significant advantages compared with the traditional extradition system (...). Among others, significant shortening of the time limits for the surrender of the person should be mentioned as one of the most important added values of the new instrument (...). The information gathered during the exercise shows that, in general, the EAW is operating efficiently (...)”²⁸. According to the

²¹ Council, Doc. No 15196/13, 25 Oct. 2013.

²² Namely 31 Dec. 2003 (Art. 34 EAW FD).

²³ Official Journal C 115 of 4.5.2010

²⁴ See also assessments performed by national public authorities (for UK for example see House of Lords, European Union Committee, “European Arrest Warrant – Recent Developments”, 30th Report of Session 2005-2006, 4 April 2006, House of Lords, EU Committee, “EU police and criminal justice measures: the UK’s 2014 opt-out”, 13th Report of Session 2012-2013, 23 April 2013, p. 56 – 67) and doctrinal assessments (see for instance Albers, Beauvais, Bohnert, Böse, Langbroek, Renier and Wahl, *Towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters*, [final report](#), March 2013; Vernimmen-Van Tiggelen, Surano and Weyembergh (eds), *The future of MR in criminal matters in the EU*, Bruxelles, éd. de l’Université de Bruxelles, 2009; Mitsilegas, “The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights, General Report”, in Laffranque (ed.), *The Area of Freedom, Security and Justice, Including Information Society Issues. Reports of the XXV FIDE Congress, Tallinn 2012*, vol.3, pp. 21-142).

²⁵ The first report is COM (2005) 63 and SEC (2005) 267, dated 23 Feb. 2005. It was completed in 2006 (COM (2006) 8 and SEC (2006) 79, dated 24 Jan. 2006). Another report concerning the implementation from 2005 until June 2007 was issued in July 2007 (COM (2007) 407 and SEC (2007) 979, dated 11 July 2007). The last report was issued in April 2011 (COM (2011) 175 final and SEC (2011) 430 final, dated 11 April 2011).

²⁶ See Council, national reports and Council, Final report on the fourth round of mutual evaluations, Doc. No. 8302/4/09, 28 May 2009.

²⁷ Interesting assessments of the practical implementation of the EAW are also carried out by Eurojust, who identifies the encountered problems (Eurojust [Annual Reports](#)). See for instance 2011 and 2012 Annual Reports).

²⁸ Council, Final Report, *supra note 26*, p. 6.

Commission's 2011 implementation report, the success is especially demonstrated by the acceleration of the proceedings, which contrasts with the pre-EAW situation. In comparison with the one-year average under the extradition regime, the average is now 48 days when the person does not consent to surrender and from 14 to 17 days in case of consent²⁹. These positive assessments have been confirmed by other studies³⁰ and almost unanimously by the practitioners we interviewed in the context of this research paper³¹. Some of them underlined that the EAW is the "flagship", in the area of freedom, security and justice. Many practitioners who have known both the "old" extradition system and the EAW mechanism speak about a "revolution"³².

However the EAW has also been subject to strong criticism, especially by the CoE High Commissioner for Human Rights³³, NGOs³⁴ and some authors³⁵. It is true that the situation is far from perfect. As it was underlined by the Commission in its last assessment report³⁶ and in the final report of the fourth round of mutual evaluation³⁷, there is still room for improvement. Problems and difficulties remain and need to be addressed.

3. Focus, methodology and structure

Concerning the scope of this research paper, an important difference must be established between two categories of problems and difficulties concerning the EAW mechanism.

The first category is made of the problems that arise from a bad implementation of the EAW FD³⁸. Many shortcomings have been identified by the Commission in its successive evaluation reports³⁹. Whereas some national transposing laws are rather faithful to the EAW FD – such as the laws from France⁴⁰, Belgium⁴¹, or Luxembourg⁴² –, others depart

²⁹ Commission, 2011 Evaluation Report, *supra note 25*, p. 3.

³⁰ See for instance the various national reports in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*: for instance Kert, "The implementation and application of MR instruments in Austria", p. 39; Weyembergh and Santamaria, "La reconnaissance mutuelle en matière pénale en Belgique", p. 61; Chinova and Assenova, "L'application du principe de la reconnaissance mutuelle en matière pénale en Bulgarie", p. 91, etc.

³¹ See for instance interviews of V. Jamin (FR), K. van der Schaft (NL), S. Casale (BE), M. Van Steenbrugge and E. Clavie (BE), J. Van Gaever (BE), etc – see list of interviews in annex.

³² On such revolution see also Bot, *Le mandat d'arrêt européen*, Bruxelles, Larquier, 2009, p. 194. For a more nuanced approach, see Plachta, "EAW: Revolution in Extradition?" (*European Journal of Crime, Criminal Law and Criminal Justice* (11:2, 2003)), pp.178 -194.

³³ Hammarberg, "[Overuse of the EAW – A Threat to Human Rights](#)", 15 March 2011.

³⁴ See especially the position of JUSTICE, and FTI developed in the documents later referred to.

³⁵ See for instance B. Schünemann (ed), *A program for European criminal justice*, Köln, Berlin, München, Carl Heymanns Verlag GmbH, 2006; B. Schüneman, *Fortschritte und Fehlritte in der Strafrechtspflege der EU*, GA, 2004; S. Braum, *Das Prinzip der Gegenseitigen Anerkennung – Historische Grundlagen und Perspektiven europäischer Strafrechtsentwicklung*, GA, 2005; Carrera, Guild and Hernanz, "Europe's most wanted - Recalibrating Trust in the European Arrest Warrant System" ([CEPS 2013 special report](#)); European Criminal Policy Initiative (hereafter ECPI), *A Manifesto on European Criminal Procedure Law*, published in [ZIS 2013](#), 430 and f.

³⁶ Commission, 2011 Evaluation Report, *supra note 25*, p. 3.

³⁷ Council, Final Report, *supra note 26*, p. 6.

³⁸ It should also be borne in mind that problems may also arise from the bad implementation of EAW-related provisions, as for instance those of the SIS II Decision (see below I. 3 and I. 4).

³⁹ Commission, Evaluation Reports, *supra note 25*.

⁴⁰ See Law Perben II n°2004-204 "portant adaptation de la justice aux évolutions de la criminalité" of 9 March 2004, JORF n°59, 10 March 2004, p. 4657 and Law n° 2009-526 de simplification et de

from its requirements in many respects – such as Italy⁴³ and UK⁴⁴. One could mention the lack of judicialisation and the recourse to central authorities, the multiplication of grounds for refusal, the non-respect of time-limits, etc. Although some shortcomings have been corrected by internal legislative reforms⁴⁵ or nuanced by the national case law⁴⁶, many of them remain. These problems are to be addressed by the Commission, eventually through enforcement proceedings after the end of the transitional period (i.e. 1 December 2014)⁴⁷, and this research paper will thus not cover them.

The second category is made of all other types of problems and difficulties. On the one hand, there are those that are due to the EAW FD or to the EAW mechanism itself (I), and, on the other hand, those that arise because of the incompleteness and imbalances of the EU Area of Criminal Justice (II). This category, and its two sub-divisions, will be the focus of the present research paper, as they are the most suitable to analyse in the context of a reflection on a potential EU legislative initiative. However, as it will be shown later on, the difference between both categories of problems and difficulties (i.e. those related to the bad implementation of the EAW FD and the other ones) is not always clear or straightforward⁴⁸.

It is important to stress that the list of problems and difficulties analysed in the present research paper is not exhaustive. Beyond the space and time constraints to which this

clarification du droit et d'allègement des procédures of 12 May 2009, JORF n°110, 13 May 2009, p. 7920.

⁴¹ See the Belgian transposing law of 19 Dec. 2003, MB 22 Dec. 2003 (for an analysis, see especially Dejemeppe, "La loi du 19 décembre 2003 relative au mandat d'arrêt européen" (*Journal des tribunaux*, 2004, p.112 and f); Stessens, "Het Europees aanhoudingsbevel: de wet van 19 Dec. 2003", *Rechtskundig Weekblad* 2004-2005, nr 15), etc. This law should be soon amended (See Title 9 of *projet de loi portant des dispositions diverses en matière de justice*, 26 Nov. 2013, Chambre des représentants de Belgique, Doc. 53 3149/001, Art. 75 and f.).

⁴² See Law of 17 March 2004 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres de l'Union européenne (amended by a law dated 3 Aug. 2011, *Mémorial*, A No 175 12 Aug. 2011).

⁴³ See for instance the Italian transposing law: Legge, 22 April 2005, n. 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, *Gazzetta Ufficiale* No. 98, 29 April 2005 (see especially its Art. 18 listing about 20 binding refusal grounds). In this regard, see COM (2006) 8 and SEC (2006) 79, 24 Jan. 2006; Barletta and Sotis, "L'intégration européenne et le droit pénal italien", in Manacorda (ed), *L'intégration pénale indirecte*, Paris, Société de législation comparée, 2005, pp. 331 - 354; Impala, "The EAW in the Italian legal system, Between MR and mutual fear within the European area of Freedom, Security and Justice" (*Utrecht Law Review*, Volume 1, Issue 2, 2005), pp. 56 - 78. .

⁴⁴ See Part I of the Extradition Act 2003, Chapter 41, 20 Nov. 2003. For a comment see for instance Spencer, "Implementing the European Arrest Warrant: a tale of how not to do it" (*Statute Law Review*, 30(3), 2009), p. 184 and f. This Act is currently in the process of being amended ([Anti-social Behaviour, Crime and Policing Bill](#), HL Bill 052 2013-2014, Part 11, Extradition).

⁴⁵ In this regard see especially Commission, Staff Working doc. accompanying 2011 Evaluation Report, *supra note 25*, p. 3 and f.

⁴⁶ See for instance House of Lords, 28 Feb. 2007, *Dabas v. High Court of Justice, Madrid* (see especially Lord Bingham of Cornhill, Lord Hope of Craighead et Lord Brown of Eaton-under-Heywood, House of Lords), Session 2006- 2007 [2007] UKHL6, which restricted the requirement provided for in the Extradition Act 2003 of a certification or preliminary acceptance of the warrant by the central authority

⁴⁷ See Art. 10, Protocol 36 on transitional provisions.

⁴⁸ See for instance the issue of additional information that may be requested by the executing authority (I. 4).

research paper was subject to, the selection of issues addressed by this research paper has been determined by a desire to remain scientific while remaining realistic and pragmatic. In this regard, difficulties or problems specific to one MS have not been taken into consideration. Similarly, difficulties or problems for which previous EU actions have been undertaken have not been developed either, such as problems relating to *in absentia* proceedings. Whereas they are still mentioned by practitioners⁴⁹, the adoption of the FD of 26 February 2009 concerning decisions rendered in the absence of the person concerned at trial (hereafter the *in absentia* FD)⁵⁰ should – at least partially – solve them. Indeed, for this type of problems, the analysis should focus on correct transposition, and more generally on the impact of previous EU actions rather than reflecting on the adoption of new EU instruments.

For each problem or difficulty selected, the same structure applies. They are firstly defined on the basis of the information collected in official or non-official documents, or through interviews. Where possible, concrete illustrations or examples are given. Then the main arguments for and against EU action are presented. To conclude, specific solution(s) are recommended.

In selecting the problems and difficulties and in choosing the best solutions, the EU instruments of criminal justice should be considered as a whole. The interactions between the different aspects and instruments of the EU area of criminal justice are especially taken into account, as some solutions or part of the solutions will have already been found or are on their way. They may consist of EU legislative initiatives. Besides the instruments on procedural guarantees⁵¹, the 2007 SIS II Decision⁵², and other MR instruments such as; the probation decisions FD⁵³, the custodial sentences FD, the ESO FD or the future EIO Directive must be taken into account. Solutions to some problems and difficulties may also be found in the jurisprudence of European courts, either the ECJ or the ECtHR. Thus far, the ECtHR's case-law on the EAW is limited⁵⁴. The ECJ has answered to 12 preliminary rulings concerning the EAW FD⁵⁵, some of which are particularly relevant for this research paper. The added value of soft law measures, such

⁴⁹ See for instance Eurojust, *supra note 27*, 2011 Annual Report, p. 26 and 2012 Annual Report, p. 23.

⁵⁰ OJ L 81, 27 March 2009.

⁵¹ See particularly EU instruments implementing the roadmap on procedural guarantees, which all containing specific provisions on the EAW: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (OJ L 280, 26 Oct. 2010) (hereafter interpretation and translation Directive); Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1 June 2012, p. 1) (hereafter right to information Directive); Directive 2013/48/EU of 22 Oct. 2013, on the right of access to a lawyer in criminal proceedings and in EAW 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 Nov. 2013, p. 1) (hereafter access to a lawyer Directive).

⁵² Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (hereafter the SIS II Decision) (OJ L 205, 7 Aug. 2007, p. 63).

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⁵⁴ See however ECtHR, Decision of non-admissibility, *Stapleton v. Ireland*, 4 May 2010, Appl. No 56588/07.

⁵⁵ ECJ, Case C-303/05, *ASBL Advocaten voor de wereld* [2007]; Case C-66/08, *Szymon Kozłowski* [2008]; Case C-296/08 PPU, *Santesteban Goicoechea* [2008]; Case C-388/08 PPU, *Leymann et Pustovarov* [2008]; Case C-123/08, *Wolzemburg* [2009]; Case C-306/09, *I.B* [2010]; Case C-261/09, *Mantello* [2010]; Case C-192/12 PPU, *Melvin West* [2012]; Case C-42/11, *Lopes Da Silva Jorge* [2012]; Case C-396/11, *Radu* [2013]; Case C-399/11, *Melloni* [2013]; Case C-168/13 PPU, *Jeremy F* [2013].

as the EU Council's handbook on the EAW (hereafter the Council's Handbook)⁵⁶, and practical tools, like training, also deserve consideration. Finally, national legislative reforms⁵⁷, national case law⁵⁸ and other national measures⁵⁹ are also part of the landscape and must not be ignored. Nevertheless this report will focus on the need and content of EU actions, and will only exceptionally address national measures.

The challenge is therefore to assess whether each of selected problems and difficulties has found or will soon find its solution in the abovementioned measures and/or whether a legislative reform at EU level is necessary. In this respect, two essential observations need to be made:

- First, assessing whether every identified problem or difficulty has found a remedy is a difficult task: many of the possible solutions are too recent or are not yet transposed. Moreover some of them are still under negotiations. This explains why some experts consider this exercise premature. For the time being, "a clear assessment" remains an ambitious objective, and the present research paper will focus on "projections" into the future. In this regard, this research paper could provide guidance as to the important aspects to be monitored in the future.
- Second, the reflection on a potential EU *legislative* initiative must be handled extremely carefully because of the real risk of regress in the event that the negotiations on the EAW were re-opened⁶⁰. The dangers of taking a step backward and departing from the philosophy of the principle of MR must be taken very seriously. The consequences of a regress would be highly regrettable both symbolically and practically. Consequently, the necessity of EU legislative action must be carefully weighed against this risk.

⁵⁶ Council, *Revised version of the European handbook on how to issue a EAW*, Doc. No 17195/1/10, 17 Dec. 2010.

⁵⁷ Such as the one conducted in Poland to solve the issue of proportionality (see below II. 1).

⁵⁸ For example the national courts' decisions sanctioning misuses of EAW (see below II. 2).

⁵⁹ Such as the adoption of national handbooks or vade-mecums.

⁶⁰ See among others the interviews of S. Guenter (BE), D. Flore (BE) or E. Selvaggi (IT) – see list of interviews in annex.

I. Problems due to the Framework Decision or the European Arrest Warrant mechanism itself

Absence of an explicit ground for refusal based on the infringement or risk of infringement of fundamental rights

Description of the problem

In the current version of the FD, fundamental rights are not ignored. Indeed they are cited both in the Preamble⁶¹ and in Art. 1 para 3 EAW FD⁶², recalling MSs of their obligations under the EU Treaties to respect fundamental rights. After the adoption of the Lisbon Treaty, the elevation of the Charter of Fundamental rights to the rank of EU primary law⁶³, and the future EU's accession to the ECHR⁶⁴, fundamental rights are more relevant than ever.

In the context of the EAWs proceedings, several fundamental rights are at stake. Possible violations could concern the following rights⁶⁵: the right not to be subjected to torture and inhuman or degrading treatment (Art. 3 ECHR / Art. 4 Charter), the right to liberty (Art. 5 ECHR / Art. 6 Charter), the right to a fair trial (Art. 6 ECHR / Art. 47 Charter), the right not to be punished without law (Art. 7 ECHR / Art. 49 Charter), the right to a family and private life (Art. 8 ECHR / Art. 7 Charter), and finally the right to an effective remedy (Art. 13 ECHR / Art. 47 Charter). Indeed, accordingly to ECtHR's case law⁶⁶, a certain number of Members States have breached fundamental rights.

However, whereas the initial Commission's proposal contemplates fundamental rights' violations as a potential bar to surrendering the subject of the EAW⁶⁷, no express grounds

⁶¹ See Recital 12 "This FD respects fundamental rights and observes the principles recognised by Art. 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (1), in particular Chapter VI thereof. Nothing in this FD may be interpreted as prohibiting refusal to surrender a person for whom a EAW has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. This FD does not prevent a MS from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media".

⁶² "This FD shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 TEU".

⁶³ Dougan, "The Treaty of Lisbon 2007: Winning Minds, Not Hearts." (*CMLR*, vol. 45, issue 3, 2008), p. 662.

⁶⁴ On this issue see Jacobs, "The European Convention on Human Rights, the EU Charter and the European Court of Justice", in Pernice, Stöbener, Kokott, Mall, Saunders (eds), *The future of the European judicial system in a comparative perspective*, Nomos Verlag, 2006, pp. 291 - 296.

⁶⁵ Alegre and Leaf, "MR in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the EAW" (*European Law Journal*, Vol. 10, No. 2, 2004), pp. 206 - 209.

⁶⁶ ECHR, Statistical Information, quoted in Smith, "Running before we can walk? MR at the expense of fair trials in Europe's Area of Freedom, Justice and Security" (*NJECL*, Vol. 4, Issue 1 - 2, 2013), p. 83: Between 2007 and 2011, the ECtHR found that EU MSs violated Art. 6 rights in 1996 cases.

⁶⁷ See in this regard, Art. 26 of the initial Commission's Proposal (*supra note 10*, p. 15), which provided that "the grounds for refusing to execute a EAW in a MS are listed exhaustively in this FD. Subject, of course, to the general rules for the protection of fundamental rights, and particularly

for refusal based on fundamental rights are foreseen in the EAW FD. Such silence has been subject to diverse interpretations⁶⁸. Assuming that all MSs are contracting parties to the ECHR, some MSs relied particularly on mutual trust and did not provide for an express ground for refusal based on fundamental rights (for example Portugal or Spain). On the contrary, other MSs followed an opposite reading. Understanding that they are in any event bound by their fundamental rights' obligations⁶⁹, some MSs have used Art. 1 para 3 EAW FD⁷⁰ or Recital 12 as a basis to include, albeit with different formulations, a ground/grounds for refusal based on fundamental rights⁷¹. These differences are not without significance. In those MSs, that do not foresee any such ground, it seems significantly more difficult not only to invoke fundamental rights' violations, but also to bar the execution of an EAW on such grounds⁷².

Even in those MS where an explicit ground for refusal based on fundamental right exists, in practice it is difficult for the defendant to establish the infringement or risk of infringement of fundamental right⁷³.

[the ECHR and the EU Charter], it will not be possible for the judicial authority of a MS to refuse to execute a EAW on a ground not provided for here". See also Art. 49 Safeguard of the Commission's proposal under which it is possible for a MS to unilaterally decide to suspend recognition of EAWs issued by another MS when it is suspected of serious and repeated violations of fundamental rights within the meaning of Art. 6 TEU.

⁶⁸ Neither the Commission's reports nor the ECJ case-law have clarified the situation.

⁶⁹ See in this regard the reasoning in *De Schutter & Tulkens*, "Confiance mutuelle et droits de l'homme: la CEDH et la transformation de l'intégration européenne", in *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme*, Liber Amicorum Michel Melchior, Limal, Anthémis, p. 962.

⁷⁰ It has been argued that Art. 1 para 3 EAW FD indirectly allows MSs to introduce an additional ground for refusal based on fundamental rights; see Flore, "Le mandat d'arrêt européen: Première mise en oeuvre d'un nouveau paradigme de la justice pénale européenne" (*Journal des Tribunaux* 121, 2002), p. 278.

⁷¹ See in this regard, the 2006 Commission Evaluation Report (*supra note 25*, p. 5). The list of MSs contained therein should however be updated.

⁷² See in this regard the discussions concerning Spain and Portugal during the ALDE Hearing "the EAW: Issues and solutions", organised on 17 Oct. 2013. See also interviews of T. Ostropolski (PL) and P. Caiero (PT) - see list of interviews in annex.

⁷³ In the Netherlands for instance, if in the first years of implementation, some claims were successful (RB Amsterdam, 1 July 2005, ECLI:NL:RBAMS:2005:AT8580, and RB Amsterdam, 19 Aug. 2005, ECLI:NL:RBAMS:2005:AU1314), since then no refusals have been based on fundamental rights concerns (see for instance ECLI:NL:RBAMS:2013:5374, ECLI:NL:RBAMS:2013:7540 or ECLI:NL:RBAMS:2011:BV0505) - interview of K. van der Schaft (NL - see list of interviews in annex). In the UK, the defendant faces difficulties as well, as illustrated by *Krolak v Regional Court in Czestochowa*, Poland [2012] EWHC 2357, [2013] 1 W.L.R. 490, cited in Spencer, "Extradition, the EAW and human rights" (*Cambridge Law Journal*, vol. 72, no. 2, 2013), p. 252. In that case, when faced to a possible violation of Art. 3 ECHR if the appellants were surrendered to Poland because of the poor prison conditions, the Divisional Court relied on the presumption of FRs compliance and required « clear, cogent and compelling evidence to the contrary » to have the presumption rebutted. In Belgium defendants also face important difficulties in this regard (for an analysis of Belgian case-law in this field, see Van Gaever, *Het Europees aanhoudingsbevel in de praktijk*, Kluwer, Mechelen, 2013, pp. 92 - 104). See also Vernimmen-Van Tiggelen and Surano, "Analyse transversale", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 558; Heard and Mansell, "The EAW: The role of Judges when Human Rights are at risk" (*NJECL*, Vol. 2, Issue 2, 2011), pp. 133 - 147; or Alegre and Leaf, "MR in European Judicial Cooperation: A Step Too Far Too Soon?", *supra note 65*, pp. 211- 213.

Arguments

The question thus arises as to whether the introduction of an explicit ground for refusal based on the infringement or risk of infringement of fundamental rights at EU level is desirable.

If one considers that respect of fundamental rights flows from norms of the highest rank, i.e. national constitutions, ECHR and/or Charter, and is thus compulsory in any case⁷⁴, it might seem unnecessary and even undesirable to repeat the obligation in a secondary legislative instrument. Following this reasoning, a fundamental obligation is applicable even when it is not explicitly stated⁷⁵. Thus repeating it in a lower text may be considered not only useless, but also dangerous as it creates the risk of it being perceived as a minor obligation. However, as seen previously, practice has shown that in those MSs that have no ground for refusal relating to fundamental rights, judicial authorities are more reluctant to disregard their express MR obligations, by taking fundamental rights concerns into consideration and to apply directly norms of a higher rank. Consequently, introducing an explicit ground for refusal based on fundamental rights would not appear superfluous. It would indeed increase the visibility of fundamental rights and improve the legal certainty both for practitioners and for the persons concerned⁷⁶.

Opponents to the introduction of this ground also claim that it would be contrary to the spirit of MR, it would affect the smooth functioning of the EAW and open the door to abuses by the defence, who will systematically invoke this ground to escape surrender (or at least postpone it). Whereas these are legitimate concerns, they are not convincing.

Firstly, MR was never conceived to allow derogations to the duty to respect fundamental rights⁷⁷. On the contrary, numerous official texts underline that MR will not affect fundamental rights⁷⁸. Even if the ECJ stated in *Radu* that “according to the provisions of FD 2002/584, the MSs may refuse to execute such a warrant *only* in the cases of mandatory non-execution provided for in Art. 3 thereof and in the cases of optional non-execution listed in Art. 4 and 4a”⁷⁹, it also said that “before deciding on the surrender of the requested person for the purposes of prosecution, the executing judicial authority must subject the European Arrest Warrant to a degree of scrutiny”⁸⁰.

⁷⁴ Or, *a sensu contrario*, “if the FD obliges MSs to surrender a person, although the surrender is incompatible with the human rights protected by Art. 6 TEU, the FD violates treaty law and can be declared invalid [...]” in Vennemann, “The EAW and its Human Rights Implications” (*HJIL*, Vol. 2003, Issue 1), pp.114 - 115.

⁷⁵ For instance in Romania, the absence of an explicit fundamental rights’ ground for refusal in national law did not impede some national courts to refuse the execution of EAWs on that basis, such as the Brasov Court of Appeal which stated that “it appears, without any doubt, that the execution of the EAW shall be done under the condition that fundamental rights and liberties (...) are respected” (Decision No. 30/F/N/24 March 2008, 2 Aug. 2010, cited in [The European Arrest Warrant and the Necessary Balance Between Mutual Recognition and Fundamental Rights in the EU](#), *Institutul National Al Magistraturii*, p. 11).

⁷⁶ See for instance Ouwerkerk, “Mutual Trust in the area of criminal law”, in Meijers Committee, *The principle of mutual trust in European Asylum, migration and criminal law*, Utrecht, Dec. 2011, p. 42.

⁷⁷ EAW FD, Preamble, para. 12.

⁷⁸ Commission, Communication, MR of final decisions in criminal matters, *supra* note 8. Programme of measures to implement the principle of MR of decisions in criminal matters, *supra* note 3.

⁷⁹ ECJ, *Ciprian Vasile Radu*, *supra* note 55, para. 36.

⁸⁰ ECJ, *ibidem*, para 42.

This last statement of the Court may be interpreted as opening a backdoor to integrate fundamental rights' considerations, as defined in the Charter, in the functioning of the EAW system. Furthermore, this judgment cannot be considered to settle the debate, as to whether a ground for refusal based on fundamental rights must be ruled out, given the specific facts of the case. One may wonder if presented with different facts and arguments, the ECJ would have reached the same conclusion⁸¹.

Secondly, with regard to the risk of abusing the clause (which has introduced a fundamental rights-based ground for refusal), its practical application in the MSs demonstrates that, even where fundamental rights violations are alleged, judicial authorities rarely refuse execution⁸², implying that much more than mere allegations is needed. Thus it appears that the use of this ground for refusal by judicial authorities remains marginal, refusals are until now limited, and no abuses have been identified⁸³. It is worth mentioning the fact that guidelines have been issued in some MSs inviting to use the clause in moderation⁸⁴. Those promoting the insertion of a ground for refusal in the event of a violation or a risk of violation of fundamental rights seem also to be reasonable in this respect. With regards to these arguments the European Parliament stated that it should be ensured "that the MSs, when transposing the Framework Decision, do not require the judicial authority executing a European Arrest Warrant systematically to check whether the warrant complies with fundamental rights, since this would entail the risk of discrimination, whereas the system is based on the principle of MR and the issuing MS carries out that check"⁸⁵.

An additional argument against the inclusion of the discussed ground for refusal relates to the EU's efforts in the field of approximating procedural guarantees⁸⁶. It is argued that the more procedural rights that are harmonised, the more mutual trust in respect of fundamental rights' compliance is justified⁸⁷. In spite of the logic in this argument and of the considerable improvement brought by the EU instruments in the field⁸⁸, it must be recalled that the flanking measures adopted do not ensure that fundamental rights will always be respected in practice. In any event, these flanking measures are not comprehensive and do not solve the ambiguities resulting from the absence of a clear fundamental rights ground for refusal.

⁸¹ On the interpretation of this ECJ ruling, see especially Thunber Schunke, *Whose responsibility? A study of transnational defence rights and MR of judicial decisions within the EU*, Cambridge, Anvers, Portland, Intersentia, 2013, p. 65 and f.

⁸² Interview of Tricia Harkin and J. Beneder (Commission – see list of interviews in annex).

⁸³ See *supra* note 733.

⁸⁴ See for Belgium the precisions provided for by the ministerial circular relating to the EAW of 8 Aug. 2005, p. 11, para 3.2.1.5, and by the Vade-mecum – mandat d'arrêt européen (remise passive), p. 29 and f.

⁸⁵ See the European Parliament, Recommendation to the Council on the evaluation of the EAW, 15 March 2006, (2005/2175(INI), point k). See also the position of the FRA, in Opinion on the draft Directive regarding the EIO 14 Feb. 2011, p. 12-13; Meijers Committee, "Reconciling trust and fundamental rights: recommendations", *supra* note 76, p. 53.

⁸⁶ The *in absentia* FD, *supra* note 50, and measures implementing the Roadmap on procedural rights, *supra* note 51. Interview of V. Jamin (FR – see list of interviews in annex).

⁸⁷ See in this regard De Schutter and Tulkens, "Confiance mutuelle et droits de l'homme: la CEDH et la transformation de l'intégration européenne", in *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme*, Liber Amicorum Michel Melchior, Limal, Anthémis, p. 966.

⁸⁸ See *infra*, II. 4).

Besides, the abovementioned arguments against the introduction of an explicit ground for refusal based on fundamental rights are considered less important when looking at the importance of improving consistency between national legislations and of ensuring consistency among MR instruments, in particular with the EIO Directive currently under negotiation⁸⁹. The compromise text agreed in October 2013, contains an express ground for refusal based on fundamental rights⁹⁰. Having a ground for refusal based on fundamental rights considerations in an instrument dealing with investigative measures, and not having it in the EAW mechanism where deprivation of liberty is hardly justifiable from a legal point of view.

Solution

Arguments pleading for the inclusion of a ground for refusal based on fundamental rights outweigh those against it. Furthermore, other MR instruments would equally benefit from this clause, and further enhancing coherence. The best solution would be to insert this clause into a horizontal instrument, which would apply to other MR texts as well.

However two main issues must be reflected upon:

- The first one relates to the need to find a balanced formulation, namely one which does not impair the MR principle while avoiding abuses. Such issue seems to have been solved by the compromise found between the European Parliament and the Council on the wording of a fundamental rights clause in the EIO Directive. According to Art. 10 para 1 (g) of the draft, "Without prejudice to Art. 1 para 4, recognition or execution of an EIO may be refused in the executing State where [...] there are substantial grounds to believe that the execution of the investigative measure contained in the EIO would be incompatible with the executing MS's obligations under Article 6 TEU and the Charter of Fundamental Rights of the European Union".
- Secondly, one should think about the practical application of the burden of proof. There should be a presumption of respect of fundamental rights in line with the MR principle but this presumption should be rebuttable⁹¹. Other questions are to be considered such as; what is the standard of proof to have the presumption rebutted; whether there is any difference to be made between past violations and potential future ones⁹², between infringements of absolute rights and derogable ones or between structural and individual violations of human rights⁹³. The wording agreed upon in the EIO Directive leaves these very important and relevant issues unanswered, calling for future clarification from the ECJ. In spite of the missed opportunity in the *Radu* case, the future case-law of the ECJ will be of help.

⁸⁹ Council, EIO compromise text, *supra* note 21. See for instance interviews of V. Jamin and S. Petit-Leclair (FR).

⁹⁰ Art. 10 para 1 (g), EIO compromise text, *supra* note 21. See also Recital 12 aaa).

⁹¹ Several authors and practitioners plead for an extension of the *NS* solution to criminal matters. Whereas such approach is very attractive, some underlined (interviews of J. van Gaever (BE) and G. Vernimmen-Van Tiggelen (BE) – see list of interviews in annex) the need to handle it carefully because of the differences that exist between the Dublin and the EAW system.

⁹² See here the considerations of AG E. Sharpston, in her Opinion delivered on 18 Oct. 2012, on case *Ciprian Vasule Radu*, *supra* note 55, paras 63 – 97.

⁹³ Meijers Committee, *Reconciling trust and fundamental rights: recommendations*, *supra* note 76, p. 52.

While the insertion of a fundamental rights' ground for refusal is advisable, it should be coupled with additional measures. The Council's Handbook should be amended in order to guide judicial authorities on how to implement this clause in line with the MRs philosophy. Such revision should be accompanied by appropriate training measures, aimed at judges, prosecuting and defending lawyers. Finally the issue of fundamental rights should be also addressed in relation to defence rights and detention conditions (see sections II. 4 and 5 below).

Silence about legal remedies

Description of the problem⁹⁴

During the negotiations of the EAW FD, the question of the insertion of specific provisions on the legal remedies available to the requested person, was heavily debated. At that time, the negotiators opted for the silence of the FD, leaving MSs a margin of discretion on this issue⁹⁵. As a consequence of this silence, important variations among the MSs' legislations exist⁹⁶. For example, whereas in Belgium the decision on the execution of a EAW is subject to the whole set of legal remedies (*Chambre du Conseil*, *Chambre des mises en accusation* and *pourvoi en cassation*)⁹⁷, it is not the case in other MSs such as Spain, where no right of appeal is explicitly provided for⁹⁸; or the Netherlands, where a very restricted right of appeal exists⁹⁹. Such diversity is linked with the divergent nature of competent authorities in the MSs, and the related judicial control on the proceedings. Even though the EAW is defined as a "judicial decision"¹⁰⁰ and both the issuing¹⁰¹ and executing authorities¹⁰² are referred to as being of a judicial nature, the different interpretations of the notion of judicial authority¹⁰³ across the MS leads to confusion. Depending on the MS, it is indeed interpreted more or less extensively.

⁹⁴ See Weyembergh, "Judicial control in cooperation in criminal matters: the evolution from traditional judicial cooperation to MR" in Ligeti (ed), *The Future of Prosecution in Europe*, vol. 1, Oxford, Hart Publishing, 2012, p. 945 and f..

⁹⁵ See for instance ECJ, *Jeremy F.*, *supra note 55*, para 37 and 38: "37. As regards the possibility of bringing an appeal with suspensive effect against a decision to execute a EAW or a decision giving consent to an extension of the warrant or to an onward surrender, it is clear that the FD makes no express provision for such a possibility. 38. However, that absence of express provision does not mean that the FD prevents the MSs from providing for such an appeal or requires them to do so".

⁹⁶ Bot, *op. cit.*, p. 500.

⁹⁷ See Law of 19 Dec. 2003, published in MB, 22 Dec. 2003.

⁹⁸ Art. 18 para 2 Law 3/2003, quoted in Council, Report on Spain, 6 June 2007, Doc. No 5085/2/07, p. 32. It is important to note that it may be possible to refer the case to the Spanish Constitutional Court on the ground of an infringement of the requested person's fundamental rights, under the so-called *Recurso de amparo* used for instance in the *Melloni* case (*supra note 55*).

⁹⁹ There is no appeal against the decision of the Amsterdam District Court in this kind of procedures. However, a "recours en cassation" is possible in the interest of law ("in het belang van de wet") - see Wet van 29 April 2004 tot implementatie van het kaderbesluit van de Raad van de EU betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de EU, Staatsblad, 2004, 195, and Council, Report on the Netherlands, 27 Feb. 2007, Doc. No 15370/2/08REV 2, p. 6 and p. 32.

¹⁰⁰ Art. 1 EAW FD.

¹⁰¹ See Art. 6 para 1 FD.

¹⁰² See for example Art. 3 EAW FD.

¹⁰³ Such variety was already underlined in the explanatory reports of the 1957 and 1959 Extradition and MLA Conventions of the CoE. In the context of the EAW, it was also highlighted by the High Court of Justice in its judgment in the *Assange* case (see Queen's Bench Division judgment of 2 Nov. 2011, *Julian Assange v Swedish Prosecution Authority* (2011) EWHC 2849 (Admin), paras 36ff).

Besides the diversity amongst MSs, a lack of consistency concerning legal remedies also affects EU MR instruments¹⁰⁴. While the EAW FD is silent, the subsequent MR instruments do contain provisions on legal remedies, albeit with very different formulations. With the exception of the ESO FD, the other FDs allow the reasons for issuing the order/decision may only be challenged in the issuing state¹⁰⁵. The ESO FD is less clear, although it cannot be ruled out that it also aims at avoiding a review of the basic decisions at the executing state¹⁰⁶. The freezing FD and the EEW FD both require the organisation of a legal remedy in order to preserve the rights of interested parties, but their final result differs¹⁰⁷. Consistency is further complicated if one considers the compromise text of Directive on the EIO¹⁰⁸. Whereas the compromise text is in line with the other FD (i.e. the substantive reasons for issuing the EIO may only be brought in the issuing state¹⁰⁹), it is more detailed in other aspects¹¹⁰ and thus adds asymmetry to the EU area.

Arguments

The aforementioned divergences between national legislations lead to differences in treatment regarding access to a judge and judicial review. Even if the MS are not compelled to set up a second degree of jurisdiction¹¹¹, such differences are all the more problematic in view of their link to the applicability of grounds for refusal, including an eventual assessment of the infringement or risk of infringement of fundamental rights¹¹².

Moreover, the lack of coherence among MR instruments affects the good functioning and credibility of the MR principle. It obfuscates the national legislator's task, who is left alone in its quest for consistency when transposing the different MR instruments¹¹³. Practitioners are also prejudicial of the fragmentation of the legal remedies' regime, which obliges them to apply a different logic to rather similar situations.

Against this background, the idea of bringing the EAW's legal remedies' regime closer together has been proposed, for instance by recognising the right to appeal against the

¹⁰⁴ See for instance J. Ouwerkerk, "Mutual Trust in the area of criminal law", in Meijers Committee, *supra note 76*, p. 46.

¹⁰⁵ For instance, according to Art. 9 para 2 of the confiscation FD, 'Only the issuing state may determine any application for review of the confiscation order.' The six other FDs containing a similar provision are the financial penalties FD (Art 8 para 2), the taking account of convictions FD (Art. 3), the custodial sentences FD (Art 19 para 2) and the probation decisions FD (Art 19 para 2), the FD on freezing property and evidence (Art. 11 para 2), and the EEW FD (Art. 18 para 2)..

¹⁰⁶ Art. 18 ESO FD, *supra note 18*.

¹⁰⁷ For example, whereas Art. 11 of the freezing FD, *supra note 11*, mentions an action which shall be brought before a court in the issuing state or in the executing state in accordance with the national law of each of them, Art. 18 EEW FD, *supra note 17*, only mentions an action which shall be brought before a court in the executing state in accordance with the law of that state.

¹⁰⁸ Council, Compromise text EIO Directive, *supra note 21*.

¹⁰⁹ Art. 13 para 3, Compromise text EIO Directive.

¹¹⁰ As the one contained in Art. 13 para 1 Compromise text EIO Directive: "MSs shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures contained in the EIO". Or the new duties of the issuing and executing authorities to exchange information about legal remedies (Art. 13, para 5), and to provide information to the persons concerned on the available remedies in due time (Art. 13, para 4).

¹¹¹ See in this regard ECtHR, *Martunara v. Italy*, 4 March 2008, Appl. No 63154/00, para 110 and ECJ, Case C 69/10, *Samba Diouf* [2011], para 69.

¹¹² See *supra*. I. 1.

¹¹³ Such difficulties have especially been underlined by F. Zeder (AT).

decision on the (non-) execution of a EAW. This approximation of national regimes could be extended to other MR instruments or be inserted in a horizontal instrument in order to attain better coherence.

Such a proposal could raise opposition. Among the arguments against, some can easily be set aside. This is for instance the case of the argument that a more effective legal remedies' regime would represent a return to extradition, where successive appeals slowed down the process. The strengthening of judicial control would be especially difficult to reconcile with the acceleration of proceedings nature of MR and must be dismissed in the light of the ECJ case-law. In *Jeremy F*, the ECJ did not consider the provision of legal remedies incompatible with MR, but merely stated that the FD's deadlines are remedy-included¹¹⁴. The Belgian example shows that it is possible to provide a full set of legal remedies within the FD's time-limits. It is however true that it might require a partial reform of some MSs' criminal justice systems.

Other arguments against a horizontal instrument are however much more convincing. First, it could be argued that respect for MS's national identities and the diversity between criminal justice systems is expressly protected by the Treaties¹¹⁵. The national margin of discretion granted by the FD and recognised by the ECJ in *Jeremy F*¹¹⁶ are therefore nothing but the natural consequence of this respect. A second argument is the foreseeable reluctance of MSs vis-à-vis this initiative. If an agreement on the insertion of a provision on legal remedies could not be reached among the fifteen MSs who initially negotiated the EAW FD, it is hard to see how it could in an enlarged EU counting twenty-eight MSs¹¹⁷. Inserting a provision on legal remedies in a horizontal instrument addressing problems common to MR instruments could further complicate an agreement.

Solution

Ensuring effective legal remedies and judicial control is crucial. It is true that in *Jeremy F*. the ECJ did not impose MSs the obligation to provide legal remedies, but rather underlined their margin of discretion in this regard. However, it particularly insisted on the importance of judicial control and on the fact that, while the FD does not provide a right of appeal with suspensive effect against the decision on the execution of a EAW, it does not prevent MSs from providing such a right either¹¹⁸. It is on this basis that in June 2013 the French Constitutional Court¹¹⁹ declared¹²⁰ a provision that did not provide a

¹¹⁴ See ECJ, *Jeremy F.*, *supra* note 55, especially para 65: "Consequently, any appeal with suspensive effect against a decision executing a EAW provided for by the national legislation of a MS cannot, in any event, unless the competent court decides to make a reference to the Court for a preliminary ruling, intervene such as to disregard the time-limits for the adoption of a final decision mentioned in the preceding paragraph".

¹¹⁵ Art. 4 TEU and Art. 67 para 1 TFEU.

¹¹⁶ ECJ, *Jeremy F.*, *supra* note 55, para 37-38 (see *supra*) and para. 52: "In the absence of further detail in the actual provisions of the FD, and having regard to Art. 34 EU [...], it must be concluded that the FD leaves the national authorities a discretion as to the specific manner of implementation of the objectives it pursues, with respect inter alia to the possibility of providing for an appeal with suspensive effect against decisions relating to a EAW".

¹¹⁷ Interview of D. Flore (BE - see list of interviews in annex).

¹¹⁸ See ECJ, *Jeremy F.*, *supra* note 55, para 51 and particularly para 54 and 55.

¹¹⁹ Conseil Constitutionnel, *Jeremy F*, Decision No 2013-314 QPC, 14 June 2013, JORF, 16 June 2013, p. 10024. Labayle and Mehdi, "Le Conseil Constitutionnel, le mandat d'arrêt européen et le renvoi préjudicial" (*Revue Française de Droit Administratif*, May-June 2013, p. 461 and f).

¹²⁰ I.e. contrary to the right to an effective remedy, as protected under French Constitutional law.

right to appeal against a decision authorising the extension of prosecution for other offences committed prior to the person's surrender unconstitutional¹²¹. The French example is not the only one. One of the reasons why the German Constitutional Court dismissed the legality of the first German implementing legislation was because it excluded the possibility to appeal the decision to surrender the requested person, thus violating Art. 19 para 4 of the German Constitution, which guarantees access to a court¹²². However such precedents are insufficient to address the lack of consistency within the EU area of criminal justice in this regard.

As a first step, a clause, bringing the legal remedy regimes of the different MR instruments closer together, must be inserted in a horizontal legislative instrument. According to such clause, an appeal against the substantive reasons for issuing a warrant/decision/order should be brought in the issuing state. Guided by the desire to strengthen the position of the individual, it should also contain a general principle inviting the MSs to establish an appeal procedure against the decision to execute/not to execute the warrant/decision/order, thus enhancing judicial control in the field of MR. It is true that in certain cases, the boundaries between both appeals (the one in the issuing state against the decision to issue and the one in the executing state against the execution decision) are blurred¹²³. This is, for instance, the case where fundamental rights are at stake, as the decision not to execute might take into account basic considerations of the proceedings taking place in the issuing state. As such a fundamental rights ground for refusal should be narrowly drafted. This solution would have the advantage of improving consistency among MR instruments while guaranteeing EU citizens a more equal access to a judge and a similar degree of judicial control in cases of a transnational nature.

In the long term, special focus should be placed on ensuring consistency between the provisions relating to legal remedies. This exercise should be the occasion to reflect on several aspects such as the harmonisation of the grounds of appeal, or of the locus standi¹²⁴. The judicial control of the execution should not be neglected either. However this aspect needs further reflection, and perhaps a mechanism-by-mechanism approach.

Maintaining SIS alerts following a refusal decision

Description of the problem

The Schengen Information System (SIS), initially established under the Schengen Convention and now integrated in the EU framework, is the largest information system for public security in Europe¹²⁵.

¹²¹ See Art. 695-46 of the French Code of Criminal Procedure.

¹²² *Bundesverfassungsgericht*, 18 July 2005, 2 BvR 2236/04 or in *Neue Juristische Wochenschrift* (NJW), 58 (2005), 2296 (about this decision, see for instance Mackareel, "The EAW –the Early Years: Implementing and Using the Warrant" (*European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 15, Issue 1, 2007), p. 56; Molders, "Case Note – the EAW in the German Federal Constitutional Court" (*German Law Review*, Vol. 7, 2006), or Geyer, "The EAW in Germany", in Guild (ed), *Constitutional challenges to the EAW*, Wolf Legal Publishers, Nijmegen, 2006, pp. 101 – 123.

¹²³ Interviews of V. Jamin (FR) and G. Vernimmen-Van Tiggelen (BE) – see list of interviews in annex.

¹²⁴ Interview of R. Roth (CH – see list of interviews in annex).

¹²⁵ As stated by the Commission: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index_en.htm

It has significantly contributed to the efficiency of the EAW system¹²⁶, even more since the entry into operation¹²⁷ of the second generation Schengen Information System (hereafter SIS II), established by the 2007 SIS II Decision and which came into force on the 9th April 2013. All EU MSs participate in the new system, with the exception of UK, Ireland, Cyprus and Croatia for which the entry into the system is pending. Art. 9 para 2 FD allows the transmission of EAWs via an alert in SIS II¹²⁸. Such insertion can only be made at the request of the issuing judicial authority¹²⁹ and on the condition that it enters a copy of the original EAW¹³⁰ in the system.

However, several problems relating to the use of SIS alerts have been identified.

A first one relates to the lack of a regular review of SIS alerts leading to "sleeping" and/or out-dated alerts. Criminal proceedings are dynamic by nature, characterised by changing circumstances e.g. the disappearance of the need for the arrest over time or the decision of the issuing authority to dismiss the case. Furthermore problems may arise after arrest when the executing authority realises that the person under detention is not the one subject to the EAW¹³¹. It is therefore crucial to ensure a regular review of SIS alerts, since law enforcement authorities continue, as long as the SIS alerts are in the system, to search, locate and arrest the persons they refer to.

The absence of withdrawal of out-dated alerts and the unjustified arrests conducted on their basis¹³² are of course detrimental to the persons concerned, and should give rise to compensation¹³³. They also adversely impact on the executing state¹³⁴, which will have to deploy its law enforcement authorities and incur in useless expenses. A solution to this problem is provided for in the SIS II Decision, where it is explicitly stated that alerts on persons "shall be kept only for the time required to achieve the purposes for which they were entered"¹³⁵ and MSs issuing an alert shall within three years of its entry into SIS II review the need to keep it¹³⁶. To avoid an automatic withdrawal of the alert after three years, MSs are obliged to conduct a comprehensive individual assessment¹³⁷.

Such mechanism appears to be an acceptable solution, thus explaining why this research paper will not further reflect on this issue. That being said, when carrying out an assessment of the SIS II decision, the Commission should have a particular focus on the implementation of this provision, because of its implications for citizens' rights. If this

¹²⁶ Art. 9 para 3 EAW FD: "For a transitional period, until the SIS is capable of transmitting all the information described in Art. 8, the alert shall be equivalent to a EAW pending receipt of the original in due and proper form by the executing judicial authority".

¹²⁷ Council, 3228th Council meeting, Justice and Home Affairs, Brussels, 7-8 March 2013, Doc. No 7215/13, p. 10 - adoption of two decisions organising the application of Decision 2007/533/JHA and Regulation 1987/2006 as from 9 April 2013.

¹²⁸ Art. 9 para 2 EAW FD; see also Art. 27 SIS II Decision.

¹²⁹ Art. 26 para 1 SIS II Decision.

¹³⁰ Art. 27 para 1 SIS II Decision.

¹³¹ FTI, *The European Arrest Warrant seven years on – the case for reform*, May 2011, p. 6, para. 20.

¹³² Interview of H. Sørensen (DK – see list of interviews in annex) (and case he mentioned - see infra, II. 3), and S. Casale, M. Van Steenbrugge and E. Clavie (BE – see list of interviews in annex).

¹³³ See infra II. 3).

¹³⁴ Art. 30 para 1 EAW FD.

¹³⁵ Art. 44 para 1 SIS II Decision.

¹³⁶ Art. 44 para 2 SIS II Decision: MSs are even allowed, where appropriate to set shorter periods in accordance with their national law.

¹³⁷ Art. 44 para 4 SIS II Decision.

assessment revealed regular problems linked to sleeping alerts, they could be due either to a bad implementation of the SIS II decision by the MSs, or to the weak protection afforded by the current provision. In the latter case, Art. 44 of SIS II Decision could be strengthened either by reinforcing the obligation to withdraw alerts as soon as they become unnecessary/irrelevant/etc¹³⁸, or by shortening the three-years limit for review¹³⁹.

The uncertain impact of refusals to surrender in a previous MS is also problematic. In that regard, the EAW FD is silent. Under the current regime, the decision to refuse to execute a EAW is only valid in the executing state's territory, meaning that no subsequent arrest will be effected there. In contrast, as long as the issuing authority does not withdraw the EAW, the person subject to the warrant risks re-arrest in other MSs¹⁴⁰. The cases of *Deborah Dark*¹⁴¹ or *Jacek Jaskolski*¹⁴² illustrate that this results in the persons being *de facto* prevented from exercising their freedom of movement for fear of arrest in another jurisdiction.

Arguments

It has been advocated that the principle of MR should not be one-sided, and that its application should be extended to decisions taken by other MSs not to execute the EAW. According to such view, an EAW together with the SIS alert should be withdrawn once execution has been refused in one MS¹⁴³. In this line of reasoning, action at EU level is presented as desirable, in particular the amendment of the FD so that issuing authorities are required to withdraw EAWs whenever an executing authority refuses surrender.

However such extension of MR in favour of persons subject to EAWs should be handled extremely carefully. Firstly, the basis for such an extension is nowhere to be found and secondly, the impact of such extension could amount to allowing the requested persons to escape justice.

Solution

The idea of extending MR to refusal decisions should not be altogether ruled out, but a clear difference must however be made between the different grounds for refusal.

It would be acceptable only in cases involving the mandatory grounds for refusal that are applicable independently of national legislations and are of "universal application" namely; refusals based on the *ne bis in idem* ground as interpreted by the ECJ¹⁴⁴ (i.e. provided for in Art. 3 para 2 EAW FD and partially in Art. 4 para 3 EAW FD) and

¹³⁸ Interview of O. Lofgren (SE – see list of interviews in annex).

¹³⁹ Interview of V. Jamin (FR – see list of interviews in annex).

¹⁴⁰ Facing further hearings and additional legal costs each time he or she crosses a national border. See JUSTICE, [European Arrest Warrants, Ensuring an effective defence](#), Oct. 2012, p. 46.

¹⁴¹ FTI, *supra note 131*, p. 7, para. 20 and mentioned by L. Mc Veigh during the ALDE Hearing.

¹⁴² FTI, [Document](#) *Jacek Jaskolski*.

¹⁴³ FTI, *supra note 131*, p. 7, para. 20 and 22 and intervention of J. Blackstock (JUSTICE) at the ALDE Hearing.

¹⁴⁴ See mainly ECJ, Case C-187/01 and C-385/01, *Hüsein Gözütok and Klaus Brügge* [2003]; Case C-469/03, *Miraglia* [2005]; Case C-436/04, *Van Esbroeck* [2006]; Case C-150/05, *Van Straaten* [2006]; Case C-467/04, *Gasparini* [2006]; Case C-288/05, *Kretzinger* [2007]; Case C-367/05, *Kraaijenbrink* [2007]; Case C-297/07, *Klaus Bourquain* [2008]; Case C-491/07, *Vladimir Turansky* [2008]; Case C-261/09, *Mantello* [2010].

refusals based on the infringement or the risk of infringement of fundamental rights as enshrined in Art. 6 TEU¹⁴⁵. In these cases, a first refusal decision may give rise to the withdrawal of the alert and of the EAW.

In contrast, the MR of refusals based on the other mandatory grounds for refusal provided for in Art. 3 FD, i.e. amnesty and age of criminal liability, should be rejected since they depend on the national law of the executing MS¹⁴⁶. Concerning the optional grounds for refusal¹⁴⁷, their MR is even less acceptable. These grounds are by definition optional, and they have been, in accordance with the FD, subject to different implementation in MSs. Finally, the MR of refusals based on grounds for refusal, which are not provided for in the FD but have nevertheless been introduced in national legislations, should *a fortiori* be excluded¹⁴⁸.

Executing authorities taking a decision on an EAW must have a clear interest in knowing whether the EAW in question has previously been refused in another MS, and if so what grounds of refusal formed the basis of their decision¹⁴⁹. Under SIS II, a refusal decision may lead to the flagging of the alert for arrest, only valid in the territory of the executing state. Thus as a result of the flag, the law enforcement authorities of the executing state will communicate the whereabouts of the requested person, but will not arrest him/her¹⁵⁰. The flag is however not visible in other MSs, where the alert remains intact, and no information can be found concerning a previous refusal. A pragmatic solution would be to annex to the SIS II alert any previous refusal decision, leaving this information at the disposal of the SIRENE bureaux. It would then be for the subsequent executing authority to evaluate the opportunity to uphold the previous refusal decision.

Difficulties relating to multiple requests concerning the same person

Description of the problem

Individuals can be subject to several EAWs. As a consequence, once these persons are arrested in one state, the executing authority may face the existence of multiple requests. The coordination of incoming requests and the need to be aware of all of them is a *conditio sine qua non* for an informed decision on the execution.

¹⁴⁵ See *supra* I. 1). FTI also draws a distinction: MR should accordingly not apply to refusals based for instance on a technical problem with the EAW form, but should be reserved to refusals based on grounds of principle (*supra note 131*, p. 7, para. 24).

¹⁴⁶ With regard to amnesty, the recognition of refusals based on such ground must be excluded in view of the wording of Art. 3 para 1 EAW FD, as amnesty may only be granted by MSs which have jurisdiction to prosecute the offence in accordance with their national law. Besides, the issue of amnesty is quite sensitive and is dealt with very differently among the MSs. The MR of a refusal based on the age of criminal liability is also quite difficult to accept because of the quite important differences among MSs regarding the age of criminal liability (see Sénat français, Service des études juridiques, *Etudes de législations comparées* n° 173, June 2007 - [La majorité pénale](#); CoE, *Annual Penal Statistics, SPACE I*, Survey 2011, Strasbourg, 3 May 2013, Table 2.1: Age and criminal responsibility, p. 70; see also interview of J. Van Gaever (BE - see list of interviews in annex)).

¹⁴⁷ Art. 4 EAW FD.

¹⁴⁸ See for instance the numerous grounds for refusals introduced by Italy - Annex C, List of Grounds of Refusal - Council, Report on Italy, March 2009, Doc. 5832/2/09 REV 2, p. 83 - 86.

¹⁴⁹ Interview of T. Harkin and J. Beneder (Commission - see list of interviews in annex).

¹⁵⁰ See Commission Implementing Decision, *OJ L 71*, 14 March 2013, p. 27.

To provide more insight on the complexity of this situation, a preliminary double distinction needs to be made¹⁵¹. On the one hand, one should draw a distinction in light of the facts underlying the multiple requests. As a starting point, it must be determined whether they concern the same or different facts. In the former case, a conflict of jurisdiction may arise¹⁵² and due consideration must be given to the *ne bis in idem* principle¹⁵³. Such concerns do not however enter into play if the requests relate to different facts. On the other hand, multiple requests may come from one single MS or from different ones (or of a combination of both¹⁵⁴). With respect to the former, the FD is totally silent¹⁵⁵, whereas Art. 16 does address EAWs issued by different MSs.

Several problems have been identified. When different EAWs are issued against the same person the executing authority should be aware of all of them to take an informed surrender decision. In this regard, the new SIS II system seems to offer a solution to past problems¹⁵⁶. Concerning EAWs issued by the same MS, and contrary to the situation under SIS I¹⁵⁷, it is now possible to include several EAWs in one sole alert¹⁵⁸, by annexing them to the first one¹⁵⁹. This enables the “SIRENE Bureaux” to forward to the executing authority all EAWs concerning the same person issued in their territory. In turn, alerts issued by different MSs against the same person are “compatible” alerts¹⁶⁰ and are all

¹⁵¹ See also the distinction made by Eurojust (Eurojust Annual Report 2004, p. 83).

¹⁵² See in this regard Council FD 2009/948/JHA of 30 Nov. 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328, 15 Dec. 2009, p. 42.

¹⁵³ See Art. 3 para 2, Art. 4 para 3, and Art. 4 para 5 EAW FD. See also the aforementioned ECJ case-law on *ne bis in idem*, *supra* note 144.

¹⁵⁴ Interview of J. Van Gaever (BE – see list of interviews in annex), where reference was made to a case where five EAWs had been issued, four from Greece and one from Cyprus.

¹⁵⁵ However, the lack of coordination of EAW issued by one MS could be problematic in the sense that, where the executing state is not aware of all of them, it will execute one and the rest, issued perhaps for more serious offences, will have to be treated under the speciality rule contained in Art. 27 FD.

¹⁵⁶ Interview S. Casale (BE – see list of interviews in annex).

¹⁵⁷ Under SIS I, the issuing authorities of one MS were supposed to take all necessary steps to ensure that the only EAW they were allowed to introduce in the system covered all offences for which the person might be sought. In this regard, national practices were quite different. Whereas some practices were efficient (see Council, Report on France, Council Doc. No 9972/2/07, of 20 July 2007, p. 8 – 9; Report on Greece, Doc. 13416/2/08, 3 Dec. 2008, p. 10; Report on Hungary, Doc. No 15317/2/07, 14 Jan. 2008, p. 11; or Report on Germany, Doc. No 7058/2/09, 31 March 2009, p. 10), they should not hide the diversity among MSs’ practices before SIS II (see for instance the practice in Finland, Council, Report on Finland, Council Doc. No 11787/2/07, 16 Nov. 2007, p. 10; Report on Romania, Doc. No 8267/2/09, 20 May 2009, p. 8; Report on Estonia, Doc. 5301/1/07, of 19 March 2007, p. 10 or Report on Slovak Republic, Doc. No 7060/2/09, 31 March 2009, p. 8).

¹⁵⁸ Only one alert per MS may be entered in SIS II for any one person or object. See Commission Implementing Decision, OJ L 71, 14 March 2013, p. 16.

¹⁵⁹ See Commission Implementing Decision, *supra* note 150, p. 26. One sole alert will be entered into the system, and the different EAWs will be “attached” to it. These annexed EAWs are not to be mistaken with the possibility offered by Art. 52 para 1 SIS II Decision, which allows a MS to create a link between the different alerts, such as, for example, alerts concerning different persons who are sought in the context of the same criminal proceedings, or an alert on a person and his car.

¹⁶⁰ See Commission Implementing Decision, *supra* note 150, p. 16. In this regard none should note that Art. 49 para 6 SIS II Decision applies only to non-compatible alerts, such as an alert for arrest and an alert for discreet surveillance. However, as the action required by EAWs is always arrest, those alerts are compatible and may be inserted without communicating with the other issuing authorities (interview of S. Casale, M. Van Steenbrugge and E. Clavie (BE – see list of interviews in annex)).

visible to the executing authorities¹⁶¹. Because the recent entry into operation of SIS II has the potential to ensure that the executing authority is aware of all issued EAWs, it is for the Commission to evaluate whether that is indeed the case. This problem will thus not be further analysed in this research paper.

However, other problems arise from the application of Art. 16 of the FD, dealing with the problem of several EAWs issued in different MSs and concerning the same person. Art. 16 para 1 FD lists the circumstances to be taken into account by the executing authority when deciding which of the EAWs to execute, namely “the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order”. Such list is a non-exhaustive one, and so different practices have been identified among MSs (e.g. “first hit, first out”, priority to the most serious EAW, etc.) giving rise to uncertainty as to the fate that awaits concurrent requests¹⁶². An interesting example is to be found in the Dutch practice. Whenever the IRC Amsterdam is handling concurrent EAWs, contacts are established with both countries for them to try to work out the priority together¹⁶³. A different but related difficulty arises in relation to the procedure to be followed in case of multiple requests. Art. 16 para 1 FD refers to the “decision on which of the EAWs shall be executed”, suggesting that only one of the requests will be considered, neglecting the others¹⁶⁴.

Arguments

Article 16 para 1 of the FD lists the criteria to be considered in the event of multiple request. It may be argued that its flexibility may result in the final decision by the executing authority being contrary to the best interests of criminal justice. It would thus seem necessary to better define the criteria to be considered, to establish a binding priority order and/or to provide Eurojust with a stronger role in such cases. In 2004, Eurojust adopted its Guidelines for deciding on competing EAWs¹⁶⁵, which, if generally applied, could lead to a more consistent practice of the criteria to be considered when facing multiple requests. But, according to Art. 16, para 2 EAW FD Eurojust only has a consultative role in case of competing EAWs. There is thus no duty to consult Eurojust¹⁶⁶, and even where consulted, its decision has no binding force.

In contrast, one could argue that the flexibility of Art. 16 FD is appropriate, as it gives the executing authority the necessary margin of discretion to accommodate the differences

¹⁶¹ Interview of S. Casale, M. Van Steenbrugge and E. Clavie (BE – see list of interviews in annex).

¹⁶² For example, see national reports of the fourth round of mutual evaluations, for instance Council, Report on Greece, *supra note 157*, p. 27.

¹⁶³ Interview of K. van der Schaft (NL – see list of interviews in annex). For a concrete example, see IRC Amsterdam, 5 July 2011 where the executing authority granted priority to a EAW following an agreement between the two issuing authorities.

¹⁶⁴ Interview of V. Jamin (FR – see list of interviews in annex).

¹⁶⁵ See Eurojust, 2004 Annual Report, p. 83 – 86. In June 2011, Eurojust adopted its “Guidelines for internal proceedings on the provision of Eurojust’s opinion in case of competing EAWs”. The latter are not public, and are really intended for internal use. Two examples of their application can be found in the “Memoria Anual del Miembro Nacional de Eurojust correspondiente al año 2012”, p. 42 (in Spanish).

¹⁶⁶ Art. 16 para 2 reads “the executing judicial authority may seek the advice of Eurojust when making the choice referred to in paragraph 1”. In 2011, Eurojust was officially asked to give advice only in four cases, and in six occasions in 2012 (see Eurojust, 2011 Annual Report, p. 24 and 2012 Annual Report, p. 21).

between competing EAWs' cases. In support of such a view, Eurojust acknowledged that "each situation where warrants compete will be unique. The decision on which competing arrest warrant should be executed must be considered on a case by case basis taking into account all the facts, circumstances and merits in each individual case, weighing and considering all relevant issues"¹⁶⁷.

Art. 16 para 1 FD, in its current wording leaves an important margin of discretion to the MSs on how to deal with multiple requests. Some MSs interpret it as meaning that a decision on the "executability" is necessary only for one of the requests¹⁶⁸. Others proceed to a thorough examination of all requests in order to first determine whether or not they are "executable", i.e., no ground for refusal applies to them. Following this examination, they decide which state the person will be *surrendered* to in priority, conditioning this surrender to the subsequent surrender of the person to the other issuing authority.

Illustration of the divergent approaches can be found in the facts of the *Melvin West*¹⁶⁹ case. The United Kingdom had to decide whether to surrender Mr West to the French Republic, the Republic of Finland or Hungary. Mr West's surrender to Hungary was not made subject to any condition¹⁷⁰. In contrast in deciding whether to surrender Mr West to France or Finland, Hungary found that conditions for Mr West's surrender were fulfilled in both cases, and then decided to surrender him to Finland under the condition that "once the Finnish criminal proceedings were concluded, the person concerned would have to be surrendered to the French authorities"¹⁷¹. However the preliminary reference did not concern Art. 16 FD, but focused on the interpretation of Art. 28 FD, and more particularly on which state shall give its consent to the onward surrender of the person¹⁷². Even if the Court's answer does not address the divergent approaches among the MSs, it is interesting to note that had the UK applied the same approach as Hungary, i.e., examining all requests and subjecting the surrender to the subsequent transfer of the person to the remaining issuing states, the problem would never have arisen.

The need for EU action in order to clarify the procedure to be followed in cases of multiple requests is quite clearly highlighted by the French *Cour de Cassation's* literal reading of the provision in the *Karrer* case¹⁷³. In that case, it decided to quash the decision taken by the *chambre d'instruction de la Cour d'appel de Colmar*, who had ordered the surrender of the requested person to Italy under the condition that he would be subsequently surrendered to Germany once his presence in Italy was no longer required, on the grounds that "*lorsque plusieurs États membres de l'UE ont émis un mandat d'arrêt européen à l'encontre de la même personne, la chambre de l'instruction peut uniquement choisir celui des mandats à exécuter*".

¹⁶⁷ Eurojust, 2004 Annual Report, p. 83.

¹⁶⁸ Interview of V. Jamin (FR – see list of interviews in annex): the article refers to the decision on execution, when it should refer to the decision on surrender.

¹⁶⁹ ECJ, Case C-192/12 PPU, *Melvin West* [2012].

¹⁷⁰ See AG Cruz Villalon, *View*, para 63: "the Court has very little information as to what reasons the two MSs may have had for the choices they made, and that, in any event, the present case does not raise any questions relating to Art. 16 FD 2002/584".

¹⁷¹ ECJ, Case C-192/12 PPU, *Melvin West* [2012], para 21.

¹⁷² ECJ, *ibid*, para 30.

¹⁷³ *Cour de Cassation française, Chambre criminelle*, 24 Aug. 2012, [12-85.244](#).

Solution

Against this background, EU legislative action could be advisable; Eurojust's intervention could be rendered compulsory and its decision on the basis of the 2004 Guidelines could be given a binding force, only in the event that Art. 85 TFEU is interpreted as allowing such a conferral. However, the difficulties faced for the adoption of the FD 2009/948/JHA and the current climate with regards to the Commission's proposal for a new Eurojust Regulation, which does not recognize Eurojust's decisions as binding despite the possibility offered by Art. 85 TFEU¹⁷⁴, show just how illusory it would be to suggest such reforms in the near future.

A plausible alternative would thus be to adopt soft-law measures, like a revision of the Council's Handbook in order to recommend the use of the 2004 Guidelines. Soft-law can indeed help raise awareness of the problems that multiple requests give rise to, may promote better communication between competent authorities and foster greater recourse to Eurojust. Such initiative should be accompanied by appropriate training measures.

With regard to the problems that arise because of the imprecise wording of Art. 16 para 1 EAW FD, concerning the procedure to be followed, it is for the time being unclear whether the restrictive and problematic interpretation given by the French *Cour de cassation* in the *Karrer* case is generalized or not, and thus it is advisable to await future assessments of this particular issue. Before envisaging an amendment of the wording of Art. 16 EAW FD, a preliminary study of MSs' practices should be carried out. In the event that the outcome reveals a need to amend Art. 16 EAW FD, the alternative wording should make clear that all competing requests should be examined and, a decision has to be made as to where to surrender the person first, the other EAWs deemed valid being executed once the first is enforced.

An essential and general remark must be made which is linked to the issue of multiple requests. In spite of the adoption of the current FD 2009/948/JHA¹⁷⁵, the issue of conflicts of jurisdiction remains one of the biggest gaps in the EU area of criminal justice, affecting mutual trust, MR and the protection of fundamental rights. A reinforcement of this FD is necessary, together with legislative initiatives on the strengthening of the *ne bis in idem* principle¹⁷⁶ and on the transfer of proceedings¹⁷⁷. These three elements are closely linked to the MR principle, including the EAW, and thus require flanking measures to guarantee its smooth functioning¹⁷⁸.

¹⁷⁴ Under the proposal recently submitted (COM (2013) 535 final, 17 July 2013), when MS cannot reach an agreement in cases of conflict of jurisdiction for investigation and prosecution purposes, Eurojust shall issue a written opinion on the case, which shall be promptly forwarded to the MSs concerned (Art. 4 para 4).

¹⁷⁵ Council, FD 2009/948/JHA of 30 Nov. 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, *OJ L* 328, 15 Dec. 2009, p. 42.

¹⁷⁶ Independently from the ECJ's case-law on the *ne bis in idem* principle (see note 144), legislative action is needed notably to strengthen its protection and its uniform application or to precise its articulation with Art. of the Charter - Weyembergh, "La jurisprudence de la Cour de Justice relative au principe *ne bis in idem*: une contribution essentielle à la reconnaissance mutuelle à la matière pénale", in ECJ (ed.), *La Cour de Justice et la construction de l'Europe: analyses et perspectives de 60 ans de jurisprudence*, T.M.C. Asser Press Springer, The Hague, 2013, p. 558.

¹⁷⁷ In this regard, see the European Convention on the Transfer of Proceedings in Criminal Matters, signed in 1972, and the initiative presented by some MSs in 2009, *OJ C* 219, 12 Sept. 2009, p. 7, which has never led to the adoption of an EU instrument.

¹⁷⁸ Surano and Vernimmen-Van Tiggelen, "Analyse transversale", in G. Vernimmen-Van Tiggelen, L. Surano and A. Weyembergh (eds), *op. cit.*, pp. 575 - 577

Absence of precision relating to the transmission of a translated European Arrest Warrant

Description of the problem

According to Art. 8 para 2 FD, the EAW should be sent together with a translation into the language of the executing state or into another language accepted by that state. The law is silent on the deadlines to be respected for the transmission of the language-compliant EAW as well as on the consequences attached to the non-respecting of such deadlines. The practical implementation of Art. 8 para 2 is further complicated by the fact that most of the EAWs are transmitted via the SIS system¹⁷⁹ (as opposed to direct transmission) because the exact location of the requested person is often unknown. This entails that the translation into the executing state's appropriate language only takes place after arrest. As a consequence, the imprecision of Art. 8 leads to a wide variable geometry¹⁸⁰:

- 1) As to the languages accepted¹⁸¹: some MSs accept their national language only (e.g. Bulgaria¹⁸², France¹⁸³ or Poland¹⁸⁴), while others accept others in addition, particularly English¹⁸⁵).
- 2) As to the deadlines to transmit the language-compliant EAW: they vary from 24 hours in Bulgaria to 40 days in Germany or Austria¹⁸⁶. As acknowledged by the Council, "the evaluation exercise reveals that the provision of language-compliant EAWs within the strict deadlines imposed by some MSs has frequently led to difficulties [...] add[ing] to the complexity of the EAW procedure and mak[ing] errors on the part of the issuing authority more likely"¹⁸⁷.
- 3) As to the consequences attached to the non-respect of these requirements: whereas flexibility characterises certain MSs' practice in this regard¹⁸⁸, in a number of MSs the non-respect of the deadline results in the release of the person¹⁸⁹. As an example, a person

¹⁷⁹ For example, in 2009, an 82,5% of all the EAWs issued by Schengen participating states were transmitted via the SIS - Commission Staff Working Doc. accompanying 2011 Evaluation Report, *supra note 25*, p. 14.

¹⁸⁰ Council, Handbook, *supra note 56*, p. 16 and 17.

¹⁸¹ For an overall picture of the languages accepted by the different MSs, see COPEN training, [Module 8](#), section 3.2.3.

¹⁸² Council, Report on Bulgaria, Doc. No 8265/2/09, 20 May 2009, p. 18.

¹⁸³ Council, Report on France, *supra note 157*, p. 44.

¹⁸⁴ Council, Report on Poland, Doc. No 14240/2/07, 7 Feb. 2008, p. 20.

¹⁸⁵ According to the revised version of the Council's Handbook, the following states accept EAW in English: Cyprus, Denmark, Estonia, Finland, Hungary (subject to reciprocity), Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Romania, Slovenia, Sweden and the UK (*supra note 56*, p. 78 and 79). Such flexible approach seems to inspire other MSs, as it is shown by the on-going legislative reform in Belgium (See Title 9 of *projet de loi portant des dispositions diverses en matière de justice*, 26 Nov. 2013, *Chambre des représentants de Belgique*, Doc. 53 3149/001, Art. 75 and f.).

¹⁸⁶ For a general overview of the time limits set for the receipt of the EAW following the arrest of the person sought in the different MSs, see Annex V of the Council's Handbook, *supra note 56*, pp. 80 and 81.

¹⁸⁷ Council, Final report, *supra note 26*, p. 12.

¹⁸⁸ For instance in Poland, the Court will set a new time limit for the transmission of the necessary documents and the examination of the execution of the EAW. See Council, Report on Poland, *supra note 184*, p. 20.

¹⁸⁹ This is for instance the case in Bulgaria or Greece. See respectively, Council, Report on Bulgaria, *supra note 182*, p. 18; and Report on Greece, *supra note 157*, p. 18.

arrested in Latvia at 20:00 on a Friday evening was released because the Estonian authorities provided the Latvian translation of the EAW only on Tuesday morning, failing thus to comply with the requirement to supply a translation within 72 hours¹⁹⁰.

These very significant differences among national implementing laws result in multiple difficulties: shortage of translation facilities in some MSs, associated costs, difficulty in producing translations into the less common languages within a short period of time and poor-quality translations are among the problems often referred¹⁹¹. Confusion created by the disparity of time limits and the risk of the non-compliance with them preventing execution of the EAW is an additional matter of concern¹⁹².

Arguments

This situation deserves attention. With regard to the diverse language regime, some practitioners¹⁹³ suggested that the acceptance of certain vehicular languages, such as English, French, Spanish or German for instance, should be promoted, as that would not only significantly reduce the practical problems encountered, but also the associated costs. They support their claim by referring to Interpol and its linguistic regime, under which notices can be issued in any of the four official languages of Interpol among which English, French, Spanish¹⁹⁴.

Opponents to this measure argue that in a plural EU there is a need to maintain MSs' margin of discretion, enabling them to require translation into their own national language if they so wish. One of the arguments relied upon to sustain this position is national judicial authorities' limited knowledge of foreign languages¹⁹⁵. Moreover, they are of the view that the Council has already tackled the problem in its final report on the fourth round of mutual evaluations, where it "encourages MSs that have not yet done so to consider adopting a flexible approach to language requirements [...], so that EAWs and additional information in languages other than the MS's own official language(s) are accepted"¹⁹⁶. A more intrusive initiative with regard to the language regime could be considered a lack of respect for national identities, as protected by the Treaties¹⁹⁷.

As to the differences regarding the time limits for submitting language-compliant EAWs, the Council "deemed that such a disparity stems from the absence of any provision in the FD setting a time limit for the receipt of the EAW following the arrest of the requested person and the subsequent application of internal arrangements concerning the procedural safeguards for detainees. The evaluation teams were largely of the opinion that this matter should be addressed at EU level, with a view to finding a common

¹⁹⁰ Council, Report on Estonia, *supra note 157*, p. 11.

¹⁹¹ Council, Final report, *supra note 26*, p. 11. On the poor-quality of translations, see for instance Eurojust, 2012 Annual Report, p. 22; 2011 Annual Report, p. 25.

¹⁹² Council, *Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the EAW*, Doc. 7361/10 of 16 March 2010, p. 3.

¹⁹³ Interview of V. Jamin (FR – see list of interviews in annex) and J. van Gaever (BE – see list of interviews in annex).

¹⁹⁴ Art. 54, General Regulations, Interpol.

¹⁹⁵ Interview of J. E. Guerra (PT – see list of interviews in annex).

¹⁹⁶ Council, Final report, *supra note 26*, p. 11, Recommendation 5.

¹⁹⁷ Art. 4 TEU, and Art. 67 TFEU.

solution bearing in mind the objective of the EAW”¹⁹⁸. In this line of reasoning, practitioners call for the approximation of the time limits set in national legislations¹⁹⁹. This would indeed reduce practical problems and would help building a mutual trust climate among judicial authorities. However, under the Swedish Presidency, the Co-operation in Criminal Matters (EAW experts) Working party decided “not to amend the FD but to issue recommendations and relax time limits by extending them in MSs where they are too short”²⁰⁰. Considering that a minimum period to be observed by all MSs could be an avenue leading to a solution for the practical problems experienced in the past, the Presidency proposed MSs to modify their implementing legislations to encourage a six working-day time limit²⁰¹. Nevertheless, the very soft nature of a working-party’s recommendation prevented it of having any significant impact. According to the Commission²⁰², diversity among MSs persists and some keep their shorter time limits²⁰³. In any case, the interviewed practitioners underlined that a six working-day time limit is not long enough, and suggested it should be extended to ten working days at least²⁰⁴.

Solution

In view of the Council’s working group decision not to revise the FD, a more pragmatic solution would be to strengthen the limit recommended by the Presidency by extending it to ten days at least and including it in the Council’s Handbook, thus significantly improving its visibility and the political commitment to implement it. This measure should be coupled with the reinforcement of language-training programmes for judicial authorities, with a special focus on those languages that are most useful for making direct contact with other MSs’ competent authorities²⁰⁵.

Driven by a concern to remain realistic, the possibility to solve the language regime problem by imposing a unique vehicular language was dismissed²⁰⁶. As recognised by the expert team dealing with Poland, in spite of the practical advantages that would result from an amendment of the FD to render the acceptance of EAWs in English mandatory²⁰⁷, language is one of the most politically sensitive issues within the EU. In the long run, a more pragmatic and balanced solution would be to compel MSs to choose, besides their national language, at least one among a few preselected vehicular

¹⁹⁸ Council, Final report, *supra* note 26, p. 12. See also Recommendation 7 (p. 13), where the Council agrees “that the possibility of setting up common manageable time limits for the receipt of language-compliant EAWs be addressed by its appropriate preparatory bodies”.

¹⁹⁹ Interview of J. E. Guerra (PT – see list of interviews in annex).

²⁰⁰ Council, Follow-up to the recommendations in the final report, *supra* note 192, p. 4.

²⁰¹ *Ibidem*.

²⁰² Commission Staff Working Document, *Accompanying 2011 Evaluation Report*, *supra* note 25, pp. 33 - 184

²⁰³ For instance, Romania - as soon as possible, 48 hours after the arrest of the sought person; Bulgaria - transmission extended from 24 to 72 hours; Estonia - 3 working days; or Ireland - reception of the translated EAW at the same time as the original language EAW.

²⁰⁴ Interview of S. Casale, M. Van Steenbrugge and E. Clavie (BE- see list of interviews in annex). According to K. van der Schaft (NL – see list of interviews in annex), “10 days may even be too short”.

²⁰⁵ Council, Final report, *supra* note 26, p. 10, Recommendation 3.

²⁰⁶ In spite of the fact that forms (see especially the A form) used under the SIS II “contain basically the same information as a EAW and that provisional translations will have been carried out into English” (Council’s Handbook, *supra* note 56, p. 16).

²⁰⁷ Council, Report on Poland, *supra* note 184, p. 54.

languages. The issuing authority would only have to translate the EAW into the selected vehicular language. It would then be for the executing authority to translate the EAW from the vehicular language to its national language. Thus, judicial authorities would not be compelled to understand the chosen vehicular language. This way, MSs would only have to provide translation services from and into the vehicular language/s, a clear improvement if compared to the current regime where translation needs to be available to and into twenty-four languages. This would reduce translation-related costs and improve the quality of the translations. The adoption of vehicular languages would not prejudice the requested persons' situation since they must anyway benefit from the rights guaranteed in the Directive on the right to interpretation and translation in criminal proceedings²⁰⁸. However, whereas in the field of patent law²⁰⁹ a similar arrangement was agreed, the difficulties faced in that context show that it will be difficult to achieve²¹⁰.

Ambiguity concerning the additional information that may be requested by the executing authority

Description of the problem

As it is well known, not all executing authorities apply the same level of mutual confidence. They are more or less demanding with regards to the formal requirements, especially the precision and clarity of the information needed to execute the EAW. The executing authorities thus exercise a more or less deep control of incoming EAWs. Such differences were clearly highlighted in the Commission's reports²¹¹ and on the occasion of the fourth round for mutual evaluation.

Numerous national reports underlined that some executing authorities regularly request detailed additional information²¹². The attitude of Irish and British authorities has been especially singled out. They tend to require, regularly, even systematically, additional information to that mentioned in Art. 8 para 1 EAW FD (even information concerning the legal classification of the acts), and to request the transmission of additional documents (evidence, judgments, etc.), thus proceeding to a deep control²¹³. This situation is all the more problematic as such practices often lead to the need of issuing a new EAW²¹⁴. An interesting example concerns Spain, which had to prepare five EAWs concerning the same individual as required by the Irish authorities. Requests for further information encompassed:

- Confirmation that the street number preceded rather than followed a street address;
- Confirmation (undertakings) that the requested person was to be charged with the stated offence;
- Confirmation as to why a single word was typed in lower case in the address section of the EAW whereas the translated version was all in lower case;

²⁰⁸ See Art. 3 para 6, which reads: "In proceedings for the execution of a EAW, the executing MS shall 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 MS, with a written translation of that document ».

²⁰⁹ See the three official languages for EU unitary patents (French, English and German).

²¹⁰ See for instance Spain's resistance.

²¹¹ Commission, 2007 Evaluation report, *supra note 25*, p. 9.

²¹² See Council, Final report, *supra note 26*, p. 20.

²¹³ See Council, Report on the UK, doc. 9974/2/07, 7 Dec. 2007, p. 32 and f. and Report on Ireland, doc. 11843/2/06, 11 July 2007, p. 24.

²¹⁴ See *ibidem* but also for instance Council, Report on France, *supra note 157*, p. 14.

- Copies of requests made by defence counsel enquiring into the facts and evidence of the stated offence (requiring that responses be provided);
- Confirmation concerning the objective competence of the issuing judicial authority,
- Confirmation as to the appropriateness of Spanish homicide investigative procedures²¹⁵.

Such cases can of course be interpreted as a clear sign of mistrust towards the issuing authority. They can also considerably delay the proceedings. Of greater concern is the fact that this borderline practice has been somehow formalised by MSs themselves. For example the French authorities have produced a model form for the UK to anticipate the additional requests systematically made by the UK²¹⁶. Pushed to its extreme, this practice could lead to the use of twenty-eight different forms, in clear violation of the principle of MR.

By contrast, although not reported as such on the occasion of the fourth round of MR, practice, and defence-lawyers' experience reveal cases of "blind trust". In some situations, the executing authorities failed to request additional information leading to mistakes, such as misidentifications or errors on the requested person. Whereas such cases do not seem numerous, they nevertheless exist as illustrated by the so-called *Praczijk* case. An Italian judicial authority issued an EAW against a person called Praczijk. On that basis, a Belgian national called Praczijk was arrested by the Belgian authorities and placed in detention. In spite of doubts concerning his identity, no additional information was requested to Italy. The person was then surrendered, where the competent authorities soon realized that he was not the suspect and released him²¹⁷.

Arguments

Regular or systematic requests for additional information could be considered to be in direct contradiction with the spirit of MR, which was the reading of the experts involved in the fourth round of mutual evaluation. Furthermore, they pointed out that this practice is linked to the previous extradition procedure, which has no place in the EAW procedure²¹⁸.

If such practice may be considered contrary to the EAW FD, and thus fall outside the scope of this research paper, the issue is not clear-cut. Indeed such a reading may be considered too strict. If the problems linked to systematic requests for additional information were left to the Commission, through the infringement proceedings, the other side of the coin, the « blind trust » phenomenon, would remain. In fact, two readings of the EAW FD are possible depending on the provision on which the executing authorities rely on.

- One can rely on Art. 8 para 1 FD and pleads for a restrictive reading, according to which the EAW common form contains all information required and is self-sufficient²¹⁹.

²¹⁵ Council, Report on Spain, see *supra* note 98, p. 17.

²¹⁶ Council, Report on France, *supra* note 157, p. 9.

²¹⁷ See Decision of 19 May 2006 of the *Chambre du Conseil de Tongres* (not published) and the decision by the *Chambre des mises en accusation d'Anvers* of 2 June 2006, *T. Strafr.* 2006, p. 346 and f. (Note De Hert and Millen, "Ontvankelijkheidstoetsing en onschuldverweer bij het Europees aanhoudingsbevel", p. 347-348).

²¹⁸ Council, Final report, *supra* note 26, p. 20-21.

²¹⁹ In favour of such an approach, see *ibidem*, p. 21.

- A broader reading is based on Art. 15 para 2, allowing the executing authorities to request additional information if they find “the information communicated by “the issuing MS to be insufficient to allow it to decide on surrender (...)”²²⁰.

It appears necessary to clarify the relationship between these two articles and to limit the recourse to Art. 15 para 2 EAW FD so as to keep it in line with the principle of MR and avoid abuses. It also appears necessary to develop consultations between the executing and issuing authorities.

Solution

A first possible solution is of a non-legislative nature. The Council’s Handbook could be amended to clarify the articulation between Articles 8 para 1 and 15 para 2 EAW FD, specifying the circumstances under which Art. 15 para 2 FD can be resorted to. Training of the competent authorities on this particular issue could be also pursued. It is worth mentioning that Art. 15 para 2 FD should be used in a balanced and proportionate way, for it to be fully consistent with the MR philosophy. This means avoiding abuses by circumscribing its use for instance to cases where there are reasonable doubts concerning the identity of the person requested, or when there are reasonable grounds to believe that the person sought is the victim of mistaken or stolen identity²²¹. Such initiative should be accompanied by appropriate training measure.

EU legislative action is also advisable. Some MR instruments provide for consultation between the issuing and executing authorities²²². The future Directive on the EIO reinforces direct contacts by inserting consultations in several provisions²²³. In contrast, the EAW FD does not contain any provision for such consultation. This gap should be corrected, as consultation between competent authorities is essential for building mutual trust and ensuring a smooth operation of the EAW system²²⁴. The proposed horizontal legislative instrument should explicitly provide for a consultation procedure, extending its application to the MR instruments that do not yet foresee it²²⁵. Once again, consistency within the EU area of criminal justice would be improved.

²²⁰ Some authors seem to interpret this provision as an implicit ground for refusal, see Suominen, *The principle of MR in cooperation in criminal matters*, Universitetet I Bergen, 2010, p. 112.

²²¹ It indeed results from several interviews that such cases are not only theoretical but more frequent than one could expect.

²²² According to Art. 15 probation decisions FD for example “Where and whenever it is felt appropriate, competent authorities of the issuing state and of the executing state may consult each other with a view to facilitating the smooth and efficient application of this FD ». See also Art. 22 ESO FD and Art. 15 EPO Directive.

²²³ See particularly Art. 8 para 4 Compromise text EIO Directive: “The issuing and executing authorities may consult each other, by any appropriate means, with a view to facilitating the efficient application of this Article”.

²²⁴ As it has been argued, “in reality, trust is not absolute and it is both the product and the condition of a regularly sustained communication”. Van Sliedregt, “The EAW: Between Trust, Democracy and the Rule of Law. Introduction. The EAW: Extradition in transition” (*European Constitutional Law Review*, Vol. 3, 2007), p. 247. Concerning the need for consultation between competent authorities, interview of S. Guenter (BE – see list of interviews in annex) and on its usefulness in order to avoid misidentifications cases see also interview of S. Petit-Leclair (FR – see list of interviews in annex).

²²⁵ Some other EU MR instruments contain more limited provisions relating to consultation. See in this regard for instance Art. 6 para 2 of the freezing FD; Art. 8 and 12 of the confiscation FD; Art. 4, 9 and 10 of the custodial sentences FD.

Oversight of a clause on accessory surrender

Description of the problem

Accessory surrender enables surrender for one or several offences punishable by a lower sanction than the thresholds set out in Art. 2 para 1 FD when they are «accessory» to another offence which does comply with one of the set thresholds²²⁶. This possibility is explicitly foreseen in the CoE's 1957 extradition Convention²²⁷. Unfortunately, due to an oversight, no similar clause was inserted in the EAW FD. The situation is problematic for both kinds of EAWs, i.e. those issued for prosecution purposes and those issued for enforcement purposes.

This absence was considered a serious and non-understandable regress by many practitioners, and was especially highlighted on the occasion of the fourth round of mutual evaluations. The final report underlined that such gap “gives rise to divergent legislations and practices in the MSs (...). Some MSs have incorporated specific arrangements on this issue into their implementing law, while others (the majority) have not; within the latter group, there are countries in which the absence of relevant provisions does not necessarily prevent the executing judicial authorities from authorising such surrenders, while in others the absence of any provision means that surrender with regard to these offences is not permissible and there is no judicial discretion”²²⁸. The diversity among MSs can be illustrated with three examples²²⁹. Whereas, in Sweden accessory surrender is explicitly provided for in national law both for issuance and execution of EAW²³⁰, in Portugal, it is for the courts to decide whether such surrender is possible on a case-by-case basis, since the law is silent on accessory surrender²³¹. In Belgium, accessory surrender is simply not possible²³². Variations between MSs' implementing legislations may result in the invalidity of the EAW, in particular in conviction cases where a cumulative prison sentence is the objective of an EAW and parts of the offences are not covered by the threshold²³³.

Arguments

The final report of the fourth round of mutual evaluation mentioned that, in a significant number of visits, national authorities suggested amending the FD to ensure a common approach. An amendment of the EAW FD could be advisable in order to make it clear that the EAW includes accessory offences so that the executing authority may consider executing such EAWs. Such a move would follow the precedent set by the Nordic Arrest

²²⁶ It is provided that: “A EAW may be issued for acts punishable by the law of the issuing MS by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months”.

²²⁷ Art. 2 para 2 CoE 1957 Extradition Convention according to which: « If the request for extradition includes several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences ».

²²⁸ Council, Final Report, *supra note 26*, p. 16.

²²⁹ On such diversity, see examples contained Commission Staff Working doc. accompanying 2011 Evaluation Report, *supra note 25*, Part VIII, Tables of all MSs, p. 33 – 184. See also Commission, Staff Working doc. accompanying 2007 Evaluation Report, *supra note 25*, p. 27.

²³⁰ Interview of O. Lofgren (SE – see list of interviews in annex).

²³¹ Commission, Staff Working doc. accompanying 2011 Evaluation Report, *supra note 25*, p. 143.

²³² Interview of D. Flore (BE), J. Van Gaever (BE – see list of interviews in annex) and Belgian vademecum.

²³³ In this regard, see Council's Handbook, *supra note 56*, p. 18 and 69.

Warrant; which besides applying considerably lower penalty thresholds, specifically foresees a clause on accessory surrender²³⁴. This would fill-in the involuntary gap in the FD, and would also improve legal certainty²³⁵ and consistency among national legal systems.

According to Recommendation 10 of the aforementioned final report, the issue was examined by the preparatory bodies of the Council. In this context, the Working Party on Co-operation in Criminal Matters (EAW experts) once again considered it a lacuna and a drawback compared with the 1957 European Convention on Extradition. It nevertheless concluded that it is of relative minor importance as it does not create excessive practical problems. At that time, the Swedish Presidency supported the recommendation that the matter be addressed by each MS, or on a bilateral basis²³⁶. This was confirmed by the JHA Council in June 2010: « In respect of Recommendation 10 of the final report, regarding the issue of surrender in respect of accessory offences, MSs should endeavour to take action at *national* level, if need be, in order to solve any difficulties that the absence of a rule in the FD might cause »²³⁷. Such conclusion is of course a strong argument against the amendment of the FD.

Another element points in the same direction. The thresholds provided for in Art. 2 para 1 FD are already considered low²³⁸ (especially regarding enforcement EAWs, i.e. sentences of at least 4 months). It might somehow appear contradictory to promote a proportionality test to avoid the issuance of EAWs for petty offences while at the same time encouraging accessory surrender for offences that do not reach the threshold²³⁹. Despite its logic, this argument is not convincing²⁴⁰. Indeed already at the time of the explanatory report to the 1957 European Extradition Convention, it was adduced that:

“(…) In this connection a delegation pointed out that the reasons for non-extradition in respect of certain minor offences (excessive hardship for the accused, difficulties and expense of extradition procedure) are no longer valid when the person claimed has to be extradited for a serious offence. In this case the person in question ought not to escape prosecution for lesser offences which he has also committed. Moreover, accessory extradition would enable the courts of the requesting country to take into consideration all the offences of which the extradited person was accused, so that a comprehensive judgment could be passed on him. The penalty thus inflicted would, in several countries, be less than the sum of the penalties which might be imposed for each offence separately”²⁴¹.

Solution

In light of the above arguments, it is not advisable to recommend legislative action at EU level. Considering the limited dimension of the problem, it would be disproportionate to risk reopening the negotiations of the EAW FD in order to introduce a provision on accessory surrender. It would be more adequate to advise MSs to address the issue at internal level or at multilateral level. Art. 31 para 2 EAW FD indeed allows the MSs which wish to do so to conclude agreements in this regard.

²³⁴ See Mathisen, “Nordic cooperation and the EAW: intra-Nordic extradition, the NAW and beyond”, *Nordic Journal of International Law* 79 (2010), pp. 18 – 19. See also Art. 2 NAW Convention.

²³⁵ Fichera, *The implementation of the European Arrest Warrant in the European Union: law, policy and practice*, PhD thesis University of Edinburgh, School of Law, 2009, p. 222.

²³⁶ Council, Follow up to the recommendations in the final report, *supra* note 192.

²³⁷ *Ibidem*, p. 7.

²³⁸ Interviews of V. Jamin (FR) and S. Guenter (BE) – see list of interviews in annex.

²³⁹ Interview of J. E. Guerra (PT – see list of interviews in annex).

²⁴⁰ See Mathisen, “Nordic cooperation and the EAW: intra-Nordic extradition, the NAW and beyond”, *supra* note 234, pp. 28 – 29.

²⁴¹ CoE, [Explanatory report](#), Commentaries on Art. 2 para 2.

II. Problems and difficulties due to incompleteness and imbalances of the EU Area of Criminal Justice

Disproportionate European Arrest Warrants

Description of the problem

Several reports mention the disproportionate use of EAWs, either issued at a very early stage of the procedure or issued for petty offences²⁴². One hypothesis is part of the question of trial-readiness discussed in the next section²⁴³. This section will focus on the hypothesis which deserves a detailed analysis as it crystallises a lot of the discussions around the revision of the EAW system.

Numerous cases in which EAWs were issued for the enforcement of sentences or the prosecution of petty offences can be presented. The list is long and includes cases where EAWs were issued for the theft of two tyres²⁴⁴, the possession of 0,15 grams of heroin, the stealing of piglets²⁴⁵ or for counterfeiting 100 euros²⁴⁶. Some countries, such as Poland²⁴⁷ or Romania²⁴⁸, have been singled out for issuing too many EAWs for petty offences.

The seriousness of the problem is illustrated by the fact that since 2005, the European institutions and MSs regularly address the issue of disproportionate EAWs. Already in 2005 the problem was raised by the Netherlands in their comments²⁴⁹ to the first evaluation report of the Commission²⁵⁰, where they estimated that the “sole requirement of a four month custodial sentence would mean that very minor punishable acts not qualifying as offences could also give rise to surrender”²⁵¹. This fear was confirmed in the conclusions to the fourth round of mutual evaluations, as the national evaluation reports repeatedly called for renewed efforts to reach a unified approach in this regard²⁵².

In reaction, the Council decided to amend its Handbook²⁵³: the competent authorities are now invited, before deciding to issue a warrant, to consider proportionality by assessing a number of important factors²⁵⁴, and not to resort to the EAW “where the coercive

²⁴² FTI, [The European Arrest Warrant eight years on- time to amend the FD?](#), Feb. 2012, p. 3, para 4 – 6.

²⁴³ See II. 1.

²⁴⁴ Council, Report on France, *supra note 157*, p. 23.

²⁴⁵ Council, Report on Italy, *supra note 148*, p. 11, FN 1.

²⁴⁶ Case of Patrick Connor, presented in FTI, *The European Arrest Warrant eight years on*, *supra note 242*, p. 4.

²⁴⁷ Council, Report on Poland, *supra note 184*, pp. 37 - 38.

²⁴⁸ See in this regard the British High Court of Justice ruling in the case *Sandru v. Romania* concerning a case where the requested person had been convicted in Romania to 3 years imprisonment for stealing and killing 10 chickens, presented in Haggemüller, “The Principle of Proportionality and the European Arrest Warrant” (Oñati Socio-legal Series, Vol. 3, No 1, 2013), p. 100. Council, Report on Romania, 20 May 2009, Doc. No 8267/2/09, pp. 34 – 35.

²⁴⁹ Council, MSs’ comments to the Report from the 2005 Commission Evaluation Report, 2 Sept. 2005, Doc. No 11528/05.

²⁵⁰ Commission, 2005 Evaluation Report, *supra note 25*.

²⁵¹ *ib idem*, p. 70.

²⁵² Council, Final report, *supra note 26*, p. 15.

²⁵³ Council, *Follow-up to the recommendations in the final report on the fourth round of mutual evaluations*, *Council Conclusions*, 28 May 2010, Doc. No 8436/2/10 REV 2, pp. 3 – 5.

²⁵⁴ These factors are the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Ensuring the

measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention”²⁵⁵. In its most recent report the Commission expressed serious concerns as “confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences”²⁵⁶. Finally, some MSs have highlighted this problem in their internal evaluations of the EAW system²⁵⁷.

Among the various reasons that explain the proportionality problem are the deep differences between national criminal justice systems. These differences concern for instance the competent authorities’ discretion on whether or not to prosecute. In this regard, the difference between those MSs bound by the legality principle and those that apply the opportunity principle are essential²⁵⁸. Within the EU, nineteen MSs apply the principle of legality²⁵⁹, which in principle requires prosecutors to prosecute every offence, regardless its gravity, seriousness or consequences. However, MSs implement the legality principle more or less rigorously, for instance Poland applies it quite strictly, while other MSs have introduced exceptions or corrective measures. The remaining nine MSs apply the opportunity principle²⁶⁰, according to which prosecutors can exercise their discretionary power to decide what offences to prosecute, leading to a more pragmatic approach of the enforcement of criminal law²⁶¹.

The huge divergence among national substantive criminal laws concerning penalties should also be underlined, as it bears a link with the proportionality issue too. The type (i.e. imprisonment, fine, etc.) and level of penalties (i.e. foreseen years of imprisonment) determine whether or not the thresholds prescribed in the EAW FD are met. Resort to suspended penalties and the non-compliance with the probation measures attached to them also explain why some countries issue more EAWs than others. Indeed, whenever the probation measures are not complied with (e.g. the person leaves the country and does not inform the Court), the convicted person breaches the suspended sentence. Consequently the prison penalty is given effect, and an EAW is issued²⁶².

Arguments

Action at EU level has been proposed to address this problematic situation. In order to justify such action, two main arguments have been put forward.

Firstly, the disproportionate use of EAWs challenges mutual trust between EU MSs and puts the good functioning of the EAW system and MR in jeopardy. It thus creates the risk that national legislators autonomously decide to introduce a ground for refusal. In the

effective protection of the public and the interests of the victims of the offence are also to be considered.

²⁵⁵ Council, Handbook, *supra note 56*, p. 14.

²⁵⁶ Commission, 2011 Evaluation Report, *supra note 25*, p. 7.

²⁵⁷ See for instance House of Lords, EU Committee, [Follow-up report on EU police and criminal justice measures: The UK’s 2014 opt-out decision](#), 5th Report of Session 2013-14, April 2013, p. 58, para 149.

²⁵⁸ See for instance the national reports on Slovenia, Poland and Lithuania in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*

²⁵⁹ Austria, Bulgaria, Czech Republic, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden and Croatia.

²⁶⁰ Belgium, Cyprus, Denmark, Estonia, France, Ireland, Luxembourg, The Netherlands, and The United Kingdom.

²⁶¹ UK Home Secretary, [A review of the United Kingdom’s extradition arrangements](#), Sept. 2011, p. 162, FN 121.

²⁶² See in this regard the intervention of T. Ostropolski, during the ALDE Hearing.

UK for instance, the introduction of a ground for refusal based on proportionality is currently being discussed²⁶³. Another danger is that, in the absence of an explicit ground for refusal, the executing authority exploits another refusal ground whenever they face what they deem to be a disproportionate EAW²⁶⁴. Several examples show that this is not only a theoretical danger. In Germany, the executing authorities in practice perform a proportionality test, as a judgment of the Higher Regional Court of Stuttgart shows²⁶⁵. Similarly, in Estonia the expert group established that in each instance, judges would consider “the justice of the case and the proportionality of the application (over and above the facts of the case) before ordering surrender”²⁶⁶.

Second, the use of disproportionate EAWs may in some cases constitute an infringement of the requested person’s fundamental rights²⁶⁷. From a practical point of view, it also constitutes an unjustified burden on public funds, both for the executing and issuing states. The latter must support all expenses that did not arise in the territory of the executing MS²⁶⁸, like the travel costs for surrendering the person²⁶⁹. In turn, the former must bear important costs in terms of police time, court time, legal representation of the arrested person, plus the interpretation costs. In the end, the average cost of executing a EAW to the point of surrender is estimated in 25.000 € per case²⁷⁰.

As for conceivable solutions, there are three possible options.

A first solution would consist of acting upon the thresholds provided for in Art. 2 para 1 EAW FD, which some consider too low²⁷¹: “in order to address the proportionality problem, [they] should be raised beyond those currently defined for a maximum period of at least three years”²⁷². Some MS have raised this threshold for issuing EAWs, if not directly in their transposing laws, at least through national handbooks or circulars²⁷³. However, the possibility of raising the thresholds at EU level should be handled very

²⁶³ See amendment proposed by the House of Commons, *Anti-social behaviour, Crime and Policing Bill*, *supra* note 44, Part 11, Extradition, point 131.

²⁶⁴ Commission, 2011 Evaluation Report, *supra* note 25, p. 8.

²⁶⁵ Vogel, “Introduction to the ruling of the Higher Regional Court of Stuttgart of 25 Feb. 2010 – The proportionality of a European arrest warrant” (*NJECL*, 2010, vol. 2), p. 145 and f. See also Council, Report on Germany, *supra* note 157, p. 25.

²⁶⁶ Council, Report on Estonia, *supra* note 157, p. 37. However, the same report points, at page 24 that “notwithstanding the additional and unforeseen levels of scrutiny that Estonia’s judicial authorities applied to incoming EAWs no surrender decisions had, at the time of the evaluation visit, in fact been refused over the entirety of Estonia’s EAW experiences”.

²⁶⁷ See *supra* I. 1.

²⁶⁸ Art. 30 EAW FD.

²⁶⁹ Interview of T. Ostropolski (PL – see list of interviews in annex) indicated that PL used to send to the UK more than a plane per month in order to collect the surrendered persons, thus incurring in huge costs.

²⁷⁰ Intervention of M. Peart, Judge in the High Court of Ireland, at the Commission Meeting of Experts, on 5 Nov. 2009. The same amount is mentioned in a European Parliament’s press release of June 2011, but it is important to note that no official statistics on this issue have been released.

²⁷¹ See for instance the “Manifesto on European Criminal Procedure Law”, which states that “in the vast majority of national criminal justice systems, a maximum penalty of one year is a threshold that is crossed even by minor offences. It would (besides introducing a compulsory proportionality test in the issuing state) be preferable to make the issuing of a EAW dependent upon the sanction that is to be envisaged in the particular case or at least to increase the threshold significantly”. See *supra* note 35, p. 438.

²⁷² Carrera, Guild and Hernanz, “Europe’s most wanted?”, *supra* note 35, p. 28.

²⁷³ In Belgium for example this threshold has been raised to two years (see in this regard *Vade-Mecum – Mandat d’arrêt européen (remise active)*, p. 4 and *Circ. 40/2007 PG Gand*).

carefully. It would significantly reduce the scope of the FD²⁷⁴, especially in comparison with the 1957 CoE Convention on extradition. As a result of such an amendment, the thresholds for issuing a EAW would be higher than those set for extradition requests between an EU MS and a third state²⁷⁵. Furthermore, an elevation of the thresholds could disadvantage those MSs that provide for lower penalties²⁷⁶, what might have the perverse effect of triggering an elevation of penalties in those MSs. Another adverse effect concerns accessory surrender. The higher the thresholds are, the more offences fall under the regime of accessory surrender²⁷⁷. As a consequence, the problem of accessory surrender grows in importance²⁷⁸. For all these reasons, this solution does not appear convincing.

Another extensively discussed solution²⁷⁹ consists in the introduction of a proportionality test by the issuing authority²⁸⁰. Art. 2 could be amended so that “an EAW may not be issued unless the requesting state is satisfied that the person’s extradition from another MS is necessary and proportionate”²⁸¹. This proposal has been contested because the principle of proportionality is enshrined in EU primary law²⁸², especially in Art. 52 (1) of the Charter, in the ECHR²⁸³ and protected by national constitutional laws²⁸⁴. Thus, it is of general application. This high-ranking norm applies even if it is not explicitly mentioned, and national judges should invoke it²⁸⁵. The importance of respecting the proportionality principle is also re-stated in EU secondary law, for instance in Art. 21 SIS II Decision²⁸⁶. As a consequence, the proportionality check is supposed to be performed by the issuing authorities in any case, rendering its insertion in the FD unnecessary. Indeed, such checks take place, as EAWs are often based on national arrest warrants²⁸⁷ for which

²⁷⁴ Interview of J. E. Guerra (PT) and O. Lofgren (SE) – see list of interviews in annex.

²⁷⁵ Interview of G. Vernimmen – Van Tiggelen (BE) – see list of interviews in annex).

²⁷⁶ Interview of S. Petit-Leclair (FR) – see list of interviews in annex).

²⁷⁷ Interview of J. E. Guerra (PT) – see list of interviews in annex).

²⁷⁸ See I. 7.

²⁷⁹ For instance Haggenmüller, “The Principle of Proportionality and the European Arrest Warrant” *supra note 248*, p. 103; House of Lords, House of Commons, Joint Committee on Human Rights, [The Human Rights Implications of UK Extradition Policy](#), 15th Report of Session 2010-12, 22 June 2011, quoted in Heard and Mansell, “The EAW: the role of judges when Human Rights are at risk”, *supra note 73*, p. 146.

²⁸⁰ Some practitioners support this idea, for instance interview of F. Zeder (AT) – see list of interviews in annex).

²⁸¹ FTI, *The European Arrest Warrant eight years on*, *supra note 242*, para 7, p. 4.

²⁸² Many treaty provision refer explicitly to the principle (Art. 5 (4) TEU, Art. 69 and 296 (1) TFEU, Art. 49 (3) CFR, Art. 52 (1) CFR) or to one of its elements such as necessity (Art. 21 (2), Art. 43 (2), Art. 48 (1), Art. 66, Art. 67 (3), Art. 75, Art. 77 (3), Art. 80 (2), Art. 81 (2), Art. 82 (2), Art. 113, Art. 114 (4) TFEU) as quoted in Albers and others, *supra note 24*, p. 335, FN 685 & 686.

²⁸³ See in this regard the requirement under Art. 5 para 1 ECHR under which no one shall be deprived of his liberty save in the situation where “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

²⁸⁴ The principle is for instance found in Art. 8 of 1789 Declaration of Human and Civic Rights, part of the 1958 French constitution, and in Germany it is one of the most important principles of constitutional law (see judgment of the Federal Constitutional Court of 11 June 1958, official court reports (BVerfGE), vol. 7, p. 377 (404 and f.)). See also Albers and others, *supra note 24*, p. 343 – 344.

²⁸⁵ Interview of T. Ostropolski (PL) – see list of interviews in annex).

²⁸⁶ Art. 21 SIS II Decision, Proportionality: Before issuing an alert, MSs shall determine whether the case is adequate, relevant and important enough to warrant the entry of the alert in SIS II.

²⁸⁷ See the EAW Form annexed to the FD, especially the point b) “decision on which the EAW is based: arrest warrant or judicial decision having the same effect”. See also intervention of H. Nilsson at the ALDE Hearing.

proportionality is likely to have been assessed²⁸⁸. Moreover, some MSs have introduced a proportionality test before issuing a EAW in their transposing law. The national reports of the fourth round of mutual evaluation indicate that this is for example the case in Germany²⁸⁹, Italy²⁹⁰, the United Kingdom²⁹¹, Estonia²⁹² or Belgium²⁹³. The Commission considers this test compatible with the FD because of the wording of Art. 2 para 1 EAW FD: "(...) a EAW *may* be issued for acts (...)"²⁹⁴. The FD's current wording thus, leaves MSs a margin of discretion. However, while the EAW FD does not forbid the insertion of a proportionality test in the issuing state, it does not impose it either²⁹⁵. Proportionality checks are thus not always carried out. Therefore, the introduction of a proportionality test at EU level does not seem superfluous.

The need to introduce a binding proportionality test in the issuing state can be opposed on other grounds. One of the most important arguments relates to the efficiency of soft law measures. Since the fourth round of mutual evaluations, first the Council's Handbook and more recently the 2011 Commission's Evaluation Report have invited MSs to modify their national laws. These soft law measures are not deprived of effect as is demonstrated by the Polish case. This country, often stigmatised for the issuance of disproportionate EAWs, has recently introduced a series of measures such as the publication of a revised national handbook; training for judges and prosecutors; notes to the courts specifically addressing the issue, or the organisation of bilateral meetings with the most concerned MSs (UK, ES)²⁹⁶. Figures show that these measures have had a real effect²⁹⁷. More importantly, legislative reforms at national level have been introduced or are envisaged on Poland's own initiative. Having identified the sources of the problem, namely the domestic principle of legality and its structure of penalties²⁹⁸, the amendment of Art. 607a of the Polish Code of Criminal Procedure was proposed. It introduces the prohibition to issue an EAW "if it is not required by the interests of justice"²⁹⁹. This amendment was adopted by the Parliament in September 2013, and will enter into force in 2015 as a part of a general reform of the Polish criminal procedure³⁰⁰. Another reform proposed by the Criminal Law Codification Commission will address the structure of penalties in order to promote a wider use of financial penalties and probation measures for less serious offences. Furthermore, some behaviours currently considered crimes, like cycling under the influence of alcohol, or the theft of an item which value does not exceed ¼ of the minimal remuneration (around 100 €), should be relegated to the category of

²⁸⁸ Example of Italy in which the issue of a EAW requires the existence of a domestic arrest warrant – Art. 28 (1) under a) of Law 69/2005, see Council, Report on Italy, *supra note 148*, p. 10. See also interview of E. Selvaggi (IT – see list of interviews in annex).

²⁸⁹ Council, Report on Germany, *supra note 157*, p. 8 – proportionality test applied when issuing a domestic arrest warrant or a EAW.

²⁹⁰ Council, Report on Italy, *supra note 148*, p. 11.

²⁹¹ Council, Report on the UK, doc. 9974/2/07, 7 Dec. 2007, p. 12.

²⁹² Council, Report on Estonia, *supra note 157*, p. 8 – 9.

²⁹³ Council, Report on Belgium, Doc. No 16454/2/06, 19 March 2007, p. 9- 10.

²⁹⁴ Commission, 2011 Evaluation Report, *supra note 25*, p. 8.

²⁹⁵ Council's Handbook, *supra note 56*, p. 14.

²⁹⁶ *Ibidem*.

²⁹⁷ See figures presented by T. Ostropolski (PL) during the ALDE Hearing: in particular on the number of EAWs issued: after a peak in 2009 with 4844 EAWs issued, the numbers reduced in 2010, 2011 and 2012 (only 3497 EAWs issued in 2012).

²⁹⁸ Intervention of T. Ostropolski (PL) during the ALDE Hearing.

²⁹⁹ *Ibidem*.

³⁰⁰ Interview of T. Ostropolski (PL– see list of interviews in annex).

petty offences to which the EAW does not apply³⁰¹. The Polish case thus illustrates that, in certain cases, the problem of disproportionate EAWs is self-regulatory.

Finally, some of the interviewed practitioners have promoted the insertion of a double proportionality test, not only by the issuing authority but also by the executing authority³⁰². Art. 3 EAW FD would in that event have to be amended to allow the executing authority to refuse surrender where the EAW is deemed disproportionate. It is argued that this would allow to take into consideration elements that may be unknown to the issuing authority (i.e. family circumstances or health conditions of the requested person), and place the issuing authority under pressure to issue proportionate EAWs³⁰³. However, such proposal should be excluded³⁰⁴. First, the philosophy of MR, which aims at simplifying and accelerating the proceedings, implies that most controls are performed in the issuing state so as to avoid to the largest extent controls in both states, thus trusting the checks performed in the issuing state³⁰⁵. Indeed, it “is primarily a matter of the issuing state to assess whether recourse to this instrument is necessary and proportionate”³⁰⁶. Moreover, the assessment of proportionality by the executing authority is difficult to accept since proportionality is partially subjective³⁰⁷ and largely depends on the facts and circumstances of the case. It also supposes a certain familiarity, if not knowledge, of the criminal justice system of the issuing state³⁰⁸. The practical implementation of the test would thus be difficult to reconcile with the MR logic. Finally, one should not forget the fundamental rights ground for refusal, which may be resorted to when disproportionate EAWs amount to a violation of fundamental rights³⁰⁹. In the light of these considerations, the introduction of a proportionality test in the executing state appears unjustified.

Solution

Against this background the elevation of the threshold of Art. 2 para 1 EAW FD is not desirable. The introduction of a double proportionality test should also be excluded, as it contradicts the philosophy of MR, and it is difficult to implement. In contrast, even though the problem of disproportionate use of EAWs has proven self-regulatory in countries like Poland, the introduction of a binding proportionality test in the issuing state cannot be altogether rejected.

³⁰¹ Interview of T. Ostropolski (PL – see list of interviews in annex).

³⁰² Interview J. MacGuill and P. Mc Namee (CCBE – see list of interviews in annex).

³⁰³ FTI, *The EAW seven years on*, *supra* note 131, p. 7, para 17.

³⁰⁴ See most of the interviewed practitioners, for instance J. Van Gaever (BE - see list of interviews in annex).

³⁰⁵ About the MR philosophy, see Weyembergh, “Judicial control in cooperation in criminal matters: the evolution from traditional judicial cooperation to MR” in Ligeti (ed), *op.cit.*, p. 945 and f. See also the ECJ and the ECtHR’s case-law, which seem to confirm that controls must be entrusted to the issuing state in accordance with the MR philosophy. See especially ECJ, Case C-261/09, *Mantello* [2010] and ECtHR, *Stapleton v. Ireland*, *supra* note 54.

³⁰⁶ P. Albers and others, *supra* note 24, p. 351.

³⁰⁷ Interview of K. van der Schaft (NL – see list of interviews in annex).

³⁰⁸ It depends on the national legislation and criminal justice system (principle of opportunity or legality), and on national criminal justice policy (systematic prosecution of all offences, and systematic enforcement of all sanctions, as soon as the thresholds set out in the FD are met). And according to J. E. Guerra (PT – see list of interviews in annex) “A control of proportionality in the executing state entails a review of the whole issuing MS’s criminal justice system”.

³⁰⁹ See *supra* I. 1.

As stated before, proportionality touches upon two issues: on the one hand, the EAWs issued for petty crimes and, on the other hand, the issue of not trial/prosecution readiness³¹⁰. The introduction of the obligation to perform a proportionality test in the issuing state would benefit both situations and moreover could be extended to other MR instruments, via its inclusion in an EU horizontal instrument. The proportionality test in the compromise text of the EIO Directive could serve as inspiration, thus fostering coherence in the MR landscape. It would require the issuing authority to be satisfied that the EAW is necessary and proportionate for the purpose of the proceedings, taking into account the rights of the suspected or accused person³¹¹. The proportionality test would be coupled with a consultation procedure to be activated in the event that the executing authority had reasons to believe that the necessity and proportionality requirements are not met. In the course of such consultations, alternatives to EAWs could be suggested, and eventually lead to the withdrawal of the EAW.

A revision of the Council's handbook, together with appropriate training measures should accompany the introduction of a proportionality test in an EU horizontal instrument, in order to raise judicial authorities' awareness of available alternatives³¹², such as the probation decisions FD³¹³ or the custodial sentences FD. These non-legislative measures should further develop the criteria to be taken into account when applying the proportionality test³¹⁴, with special attention to the specificities of enforcement EAWs. Indeed, regarding the latter, specific criteria might be needed, as for example consideration must be given to the time remaining to be served³¹⁵. For some practitioners it is unclear whether the four-month threshold in Art. 2 para 1 EAW FD refers to the sentence passed, or rather to the period that remains to be served. This question is closely linked to proportionality, as subjecting a person to a EAW when he/she has only one month of imprisonment to serve may prove disproportionate. In such situations, the issuing authority could envisage having recourse to the custodial sentences FD, thus allowing the convicted person to serve the sentence in the executing MS. A further remark concerns suspended penalties to which probation measures are attached (e.g. obligation to report at specified times to a specific authority or obligation to carry out community service). In these cases, it might be advisable to make use of the probation decisions FD³¹⁶. This would allow the convicted person to comply with the probation measure in the executing state, possibly reducing the risk of non-compliance. The subsequent activation of the suspended imprisonment sentence would thus be less likely, decreasing the need to have recourse to the EAW.

Issuance of European Arrest Warrants in cases that are not prosecution/trial ready

Description of the problem

According to Art. 1 para 1 FD, these EAWs are judicial decisions "issued by a MS (...) for the purposes of conducting a criminal prosecution". Such wording clearly excludes the

³¹⁰ See section below.

³¹¹ Art. 5a para 1 (a) compromise text EIO Directive.

³¹² See for instance interview of J. Van Gaever (BE - see list of interviews in annex).

³¹³ see in this regard Flore, Bolsy, Honhon and Maggio (eds), *Probation Measures and Alternative Sanctions in the EU*, Intersentia, 2012, pp. 537-538

³¹⁴ See in this regard the criteria already contained in the Council's Handbook, *supra* note 56, p. 14.

³¹⁵ Interview of S. Casale, M. Van Steenbrugge and E. Clavie (BE - see list of interviews in annex), etc.

³¹⁶ *Supra* note 15.

possibility of issuing a EAW in order to hear a witness for example. Cases where the issuing authority circumvents MLA and uses a EAW nevertheless occur, as is illustrated by a ruling of the Italian *Corte de Cassazione*, that quashed a surrender decision to Belgium on the ground that the EAW was intended to oblige the persons concerned to participate in the taking of evidence (“actes d’instruction”), namely to question them in relation to a preliminary investigation concerning other suspects³¹⁷. This diversion constitutes a real misuse of the EAW FD. Subjecting someone to arrest and surrender for the sole purpose of hearing him in the course of an investigation is an abuse that clearly falls outside the scope of the FD and must be excluded. There is thus no need to further analyse this matter in this research paper.

Another issue is the variable interpretations of the term “for the purposes of conducting a criminal prosecution”.

On the one hand, common-law countries have indeed interpreted it *sensu stricto*, as meaning that a EAW should only be issued for the purposes of a trial on the charge specified in the warrant, as opposed to the continuation of a fact-finding investigation of the offence³¹⁸. The underlying rationale for this safeguard is multifaceted³¹⁹. Firstly, it seeks to avoid any mutation of the arrest warrant into an instrument for obtaining evidence³²⁰. Secondly, the trial/prosecution-readiness safeguard seeks to ensure that the person’s suspicion of guilt is sufficiently supported³²¹. In this sense, the requirement intends to impose a sort of evidential threshold which would “require investigatory authorities to assess the available evidence before issuing a request for extradition, particularly within the EU, thus reducing the likelihood that a person could be extradited on speculative charges or for an alleged offence which they could not have committed”³²².

On the other hand, “some MSs will seek a EAW for questioning to aid a decision on whether to charge, or long before the relevant court is ready to try the individual concerned”³²³. Such different interpretations of Art. 1 para 1 FD are linked to the procedural differences among the MSs. In some of them, as in Latvia, EAWs may indeed be issued early on³²⁴. In Greece, “it seems that the EAW might be used for the sole

³¹⁷ Italian Court of Cassation, Section VI, *Piras e Stori*, 17-19 April 2007, No. 15970. See for instance Marin, “The EAW in the Italian Republic”, (*European Constitutional Law Review*, Vol. 4, 2008), pp. 265 - 266.

³¹⁸ Irish Supreme Court, *The Minister for Justice, Equality & Law Reform v. McArdle*, [2005] IESC 76 (2005).

³¹⁹ According to J. MacGuill, it has led to inconsistent case-law and result-oriented decisions (interview of J. MacGuill and P. Mc Namee (CCBE – see list of interviews in annex)).

³²⁰ Irish Supreme Court, *Minister for Justice Equality and Law Reform v. Olsson*, [2011] IESC 1 (2011): “A warrant issued for the purposes of an investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution, would be insufficient”.

³²¹ “It means that the decision to prosecute is not dependant on further investigation producing sufficient evidence to justify putting a person on trial”, Irish Supreme Court, *Olsson*, *ibidem*.

³²² Home Secretary, *supra note 261*, p. 278.

³²³ House of Lords, Home Affairs Committee, [Pre-Lisbon Treaty EU police and criminal justice measure: The UK’s opt-in decision](#), 9th session of 2013-14, 29 Oct. 2013, point 15.

³²⁴ In Latvian law, a EAW may be issued in any of the two phases into which the pre-trial investigation is divided: investigation and criminal prosecution. In the former case there is a risk that the public prosecutor will decide not to initiate prosecution, with the consequence that the individual is subject to a EAW, is surrendered to another MS and must then be released. It seems however that this situation never or seldom occurs in practice; see Council, Report on Latvia, Council Doc. 17220/1/08, of 23 Jan. 2009, p. 29.

purpose of attendance at a hearing before the court”³²⁵. In Portugal, “the request can be sought in order for the person to appear before the examining magistrate”³²⁶. In turn, Spain's domestic criminal code provides that, once the identity of the suspect is established, the individual must be brought before an investigating magistrate and given the opportunity to comment on the case against him. This mandatory obligation arises prior to a formal charge decision being taken³²⁷. These procedural and interpretative differences are sometimes difficult to accommodate and practice has shown that in some cases surrender has been challenged/refused by common law countries on the ground that the case was not trial ready³²⁸.

The moment in time in which the EAW may be issued is essential. If the investigation phase is over and the person is charged with an offence, the risk of making a “mistake” is reduced, and the risk of spending a long time in pre-trial detention is consequently reduced. *A sensu contrario*, EAWs issued at an early stage of the investigation might be evidentially premature, and encompass higher risks that the person will be arrested, surrendered and then released or that he/she will spend a long time in pre-trial detention awaiting trial³²⁹. When the EAW is issued at a very early stage of the investigation, frequently less coercive measures pertaining to MLA are available alternatives (summons, hearing by video or telephone conference, etc.)³³⁰. The EAW is in such cases a victim of its own success³³¹.

Arguments

Concerning the differences between MSs as to the stage of the proceedings from which a EAW may be issued, it has been argued that no one should be surrendered when their

³²⁵ Council, Report on Greece, *supra* note 157, p. 36

³²⁶ It is argued that “whilst this is part of the trial procedure, it is a pre-trial stage which may reveal further areas in need of investigation prior to the trial being ready”. JUSTICE, *supra* note 140, p. 38.

³²⁷ Similarly, in Sweden “no formal charges can be laid until the conclusion of the investigation as the prosecutor is legally incapable of arriving at a final decision to prosecute until they meet the accused and hear his objections and perhaps obtain additional evidence (...) The [appellant's] surrender is therefore sought for the purposes of conducting a criminal prosecution in respect of the above serious offences, although by Swedish law any final decision to prosecute can only be taken if the above procedure is followed and the [appellant's] right protected. I understand that the system which operates in Sweden is analogous to that which operates in many other countries, for example Finland, Denmark, Germany, the Netherlands, Spain, Estonia and Austria”. Irish Supreme Court, *Olsson*, *supra* note 320.

³²⁸ See Council, Report on Spain, see *supra* note 98, pp. 12 and 13. See also the case where the Irish High Court refused to surrender a person to Lithuania arguing that the information contained in the EAW rebutted the general presumption that a decision had been taken to charge and try the person for the offences listed on the EAW (Council, Report on Ireland, *supra* note 213, p. 30). See also interview of K. van der Schaft (NL – see list of interviews in annex).

³²⁹ “The Netherlands authorities provided the experts team with statistical information showing that a significant number of own nationals surrendered following a EAW were released or conditionally released shortly after the surrender –for instance, in Belgium in 50% of the cases the surrendered Dutch national was released shortly after the surrender without a verdict or conditionally released without any follow up – or spent more than one year (some even more than three years) in pre-trial detention after the surrender. The Netherlands authorities expressed great concern at such situations, and observed that they might wipe out support in the Netherlands society for the FD”. Council, Report on The Netherlands, *supra* note 99, p. 35.

³³⁰ Interviews of L. Mc Veigh (FTI), J. MacGuill and P. Mc Namee (CCBE) – see list of interviews in annex.

³³¹ Weis, “The European Arrest Warrant – A victim of its own success?” (*NJECL*, Vol. 2, Issue 2, 2011), pp. 124 - 132.

case is not trial ready³³². To ensure that, it might appear appropriate to approximate national legislations so as to guarantee that the person will stand trial soon after surrender. This approximation would ensure that release following surrender is not due to the EAW being evidentially premature³³³, while positively affecting the duration of pre-trial detention³³⁴. However, the approximation of the precise timing in which an EAW can be issued is extremely sensitive, as such timing is closely linked to the organisation of national criminal procedures and the different legal systems and traditions expressly protected by the treaties³³⁵.

As to the link with proportionality, the unwillingness of judicial authorities to turn to MLA seems to lie mainly in its lengthiness and unpredictable outcome³³⁶. This is why, in order to tackle misuses of the EAW system, practitioners have urged for an improvement of the efficiency of MLA tools³³⁷. Such demands are expected to be met once the EIO is operational if (and only if) it proves efficient. In this regard, it is appropriate to note that the compromise text of the EIO Directive recalls precisely that “with a view to the proportionate use of European Arrest Warrants for the purpose of prosecution, judicial authorities should consider whether issuing an EIO for the hearing of a suspected or accused person via videoconferencing could serve as an effective alternative”³³⁸.

Solution

Differences between national legislations as to the moment in which the EAW may be issued should not be addressed by approximating national laws. Such approach seems to be excessive in comparison to the aim pursued. However, EAWs issued as fishing expeditions or where less coercive measures are available must be avoided. Some argue that further information should be requested wherever there are doubts as to the stage of

³³² Interview of L. McVeigh (FTI – see list of interviews in annex). See also the JUSTICE Report, *supra note 140*, p. 146 that refers to ensuring “that proceedings are brought without unreasonable delay” and even puts forward “a more radical solution requiring an amendment of the FD (...) of including a system of postponed surrender, so that the requested person is retained on bail in the executing MS until his or her appearance is required in the issuing state”. Note in this regard the UK’s Government’s plan to amend the Extradition Act 2003 so that people in the UK can only be extradited under the EAW when the requesting MS has already made a decision to charge and try them. *Anti-social behaviour, Crime and Policing Bill*, *supra note 44*, pp. 108 -127 and see in particular Clause 144 Extradition barred if no prosecution decision in requesting territory, pp. 108 - 109.

³³³ It is important to note that the release of the person in the executing state pending trial does not always demonstrate that the EAW was disproportionate or inappropriate. According to the ECtHR’s case-law, “continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Art. 5 of the Convention” – ECtHR, *Kudla v. Poland* (GC), 26 Oct. 2000, Appl. No 30210/96, para. 110 f.

³³⁴ “Although recognising that once a charge is made there could still be further delays in the proceedings, this should help reduce the number of incidences where an individual is held in detention for significant periods before their trial”. *House of Commons, Home Affairs Committee, “Pre-Lisbon Treaty EU police and criminal justice measures: the UK’s opt-in decision”*, 9th Report of Session 2013-2014, 29 Oct. 2013, p. 13.

³³⁵ See Art. 4 para 2 TEU and Art. 67 para 1 TFEU.

³³⁶ About the limits to MLA, see for instance Commission, Communication on the protection of the financial interests of the European Union, COM (2011) 293, 26 May 2011, para 3.2.1.

³³⁷ See for instance interviews of T. Ostropolski (PL) and S. Petit-Leclair (FR) – see list of interviews in annex.

³³⁸ Recital 14c compromise text EIO Directive. In this context it is interesting to note that Art. 34 of the SIS II Decision allows to insert in the system “location alerts” for persons sought to assist with a judicial procedure.

the proceedings reached in the requesting state or as to the proper use of the EAW³³⁹. A better alternative would be ensuring the proportionality of the EAW (see Section II.1.).

The proportionality test in the compromise text of the EIO³⁴⁰ could serve as inspiration. It would require the issuing authority to be satisfied that the EAW is necessary and proportionate for the purpose of the proceedings, taking into account the rights of the suspected or accused person. A proportionate EAW must be supported by sufficient prosecution evidence, as otherwise the arrest would be arbitrary. It is difficult to argue that the EAW is proportionate when less coercive measures are valid alternatives. The test in the issuing state would be coupled with a consultation procedure to be activated in the event that the executing authority has reason to believe that the this condition is not met. In this context, the executing authority could enquire about the stage of the proceedings and the purpose pursued by the EAW. Following such consultations, the issuing authority could decide to withdraw the EAW³⁴¹.

As suggested in the previous section, the proportionality should be strengthened and complemented with MLA, eventually under the form of an efficient EIO, so that suitable alternative measures are not purely theoretical but truly available measures³⁴². This would allow the executing authority to suggest alternative measures in the course of the consultation procedure. It must however be borne in mind that the EIO is not a panacea, and shortcomings are apparent in the provisions regarding the hearing of the suspect by videoconference³⁴³. Once the EIO Directive is adopted and implemented, particular focus should be placed on assessing its impact as an alternative measure to EAWs.

Concerning the possible consequence of EAWs being issued too early in the proceedings, (i.e. the overuse of pre-trial detention) reference is made to section II. 5. where alternatives to pre-trial detention are discussed, especially the ESO FD³⁴⁴. Furthermore, a future proposal on pre-trial detention should address the exceptional nature of this measure and somehow limit its use³⁴⁵.

Compensation

Description of the problem

Practice shows that cases of unjustified detention for the purpose of executing the EAW do take place. Unjustified detentions may be the consequence of different circumstances, i.e. clear mistakes of the issuing or executing states (or both), or errors on the person,

³³⁹ House of Lords, House of Commons, Joint Committee on Human Rights, [The Human Rights Implications of UK Extradition Policy](#), 15th Report of Session 2010-12, 22 June 2011, p. 34, point 115.

³⁴⁰ Art. 5a para 1 a) compromise text EIO Directive.

³⁴¹ See *mutatis mutandis*, Art. 5a para 3 compromise text EIO Directive.

³⁴² See in this regard the Council's Handbook, *supra note 56*, pp. 14 - 15.

³⁴³ See Art. 21 para 1 a) compromise text EIO Directive: "1a. An EIO may also be issued for the purpose of the hearing of a suspected or accused person by videoconference or other audio - visual transmission. In addition to the grounds for non- recognition or non-execution referred to in [Art. 10], the execution of the EIO may also be refused if: a) the suspected or accused person does not consent; or b) the execution of such a measure in a particular case would be contrary to the fundamental principles of the law of the executing state".

³⁴⁴ JUSTICE, *supra note 140*, p. 39.

³⁴⁵ on this exceptional nature, see Commission, 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, 14 June 2011, p. 8.

following for instance the theft or selling of identity cards³⁴⁶.

The concerned persons sometimes receive compensation, as illustrated by the example of José Vicente Piera, who received 85 000 € in compensation for having spent 248 days in prison due to a case of mistaken identity³⁴⁷.

However, as it emerges from the three following examples, the risk of being deprived of compensation exists. A first example is the *Praczijsk* case mentioned above³⁴⁸: when questioned by a member of the Belgian Parliament on the compensation to be paid to Mr Praczijsk, the Belgian Minister of Justice at the time, L. Onkelynx, declared that the Belgian authorities did not have to pay any compensation since they had not made any mistake but merely satisfied their duty of mutual trust³⁴⁹. A second example concerns the case where a person was provisionally arrested upon arrival in Germany on the basis of a SIS alert introduced by the Austrian authorities. Once informed of the arrest, the issuing authorities notified Germany that the SIS alert had been revoked. When the arrested person claimed compensation in Germany, he was denied such a right, on the ground that, at the time of the arrest, it was not apparent that the alert had been revoked³⁵⁰. A third example relates to the case of a Slovak citizen arrested on the basis of a EAW issued by the Netherlands. The only evidence held against him was a DNA sample found on the crime scene. Despite the fact that the person could prove that he was not in the Netherlands at the time the offence was committed, the Slovak Court consented to his surrender considering that the EAW was formally valid and that his claims should be dealt with in the issuing state. After the person's surrender, the Dutch Court realised that the evidence was insufficient and released him, leaving him with no money or assistance, and without even notifying his release to the Slovak embassy. Despite the endured sufferings (bad reputation, economic loss and psychological damage), he declined to lodge proceedings in the Netherlands, and did not receive any compensation³⁵¹.

It is reasonable to expect that in such situations, compensation should be granted to the persons who suffered the unjustified arrest, detention and surrender. These few cases illustrate the diversity of situations giving rise to compensation, the difficulties the persons may face, as well as the way responsibility may shift between the issuing and executing states.

The exercise of the right to compensation suffers from two main problems.

Firstly there are important differences among compensation mechanisms at national level. These differences have been underlined in the context of extradition in the framework of

³⁴⁶ For example a Spanish citizen, [Oscar Sanchez](#), was sentenced to 14 years as a collaborator of the *Camorra* as a result of the real criminal having taken over his identity. He had previously handed his ID and a prepaid credit card in change of 1400 €, believing that the documents would be used by an illegal immigrant. Interview of L. Mc Veigh (FTI – see list of interviews in annex).

³⁴⁷ See http://elpais.com/elpais/2013/08/14/inenglish/1376484100_663219.html.

³⁴⁸ See supra I.6. See Weyembergh and Santamaria, "La reconnaissance mutuelle en matière pénale en Belgique, in Vernimmen, Surano and Weyembergh (eds), *The future of MR in criminal matters in the European Union, op. cit.*, p. 67.

³⁴⁹ See question of Annemie Roppe on the *incarcération abusive de Pascal Praczijsk* (no 12334), *Chambre des Représentants de Belgique*, CRIV 51 COM 1041.

³⁵⁰ [OLG Köln](#) Beschluss vom 4. Juli 2005 · Az. 6 Ausl 53/05 - 24/05. Interview of H. Sørensen (DK – see list of interviews in annex).

³⁵¹ Case mentioned by L. Hamran and M. Ernest (SK – see list of interviews in annex).

the CoE PC-OC³⁵². They concern time limits for claiming compensation³⁵³ and amounts awarded³⁵⁴. This study also revealed that national compensation mechanisms are not necessarily adapted to transnational cases and that compensation is not always awarded for detention suffered abroad in extradition cases³⁵⁵. Moreover, not all states provide for compensation when they withdraw an extradition request³⁵⁶, or when they arrest and detain a person at the request of another state without extradition taking place³⁵⁷.

Secondly, EU rules establishing the duty to ensure fair compensation in EAWs cases and organising the allocation of liability between the issuing and executing states do not exist. The aforementioned discussions in the CoE PC-OC Committee led to the conclusion that “compensation of persons is a very important question, in particular as it affects human rights, which would deserve further consideration by the PC-OC at a later stage”³⁵⁸, but no recommendation or initiative followed. Interestingly, the EU has intervened in the field of compensation for *victims* of crime³⁵⁹ but has not yet addressed the issue of compensation for unjustified detention on the basis of EAWs. The lack of coherence among MR instruments is again to be noticed since at least one of them, i.e. the freezing FD, contains a provision allocating liability, although it does so in a limited way³⁶⁰.

Arguments

Against the idea of EU legislation in the field of compensation, it can be argued that compensation mechanisms are already in place in most of the MSs and that examples like the one of José Vicente Piera show that they are sufficient. However such an argument is not convincing if one refers to the other examples mentioned above.

³⁵² CoE, European Committee on Crime Problems (CDPC), Committee of experts on the operation of European Conventions on co-operation in criminal matters (PC-OC), Replies concerning compensation issues related to the European Convention on Extradition, PC-OC (2008) 03 Rev 3, 2 Nov. 2008.

³⁵³ Whereas in Germany the compensation claim should be brought while the criminal proceedings are still pending, in Denmark it can be introduced within two-months of the final judgment being rendered. In Sweden it is possible to bring a claim up to ten years after the final judgement (interview of H. Sørensen (DK – see list of interviews in annex)).

³⁵⁴ These amounts are calculated on the basis of national economic indicators, and change also depending on the country where the claim is brought. Thus for 50 days spent in custody, a person will receive 5748 EUR in Denmark or 5788 EUR in Sweden. Only 1250 EUR would however be awarded as compensation in Germany (interview of H. Sørensen (DK – see list of interviews in annex)).

³⁵⁵ PC-OC, Summary of the replies to the questionnaire on compensation issues related to the European Convention on Extradition, PC-OC (2008) 21, 24 Sept. 2008, p. 3.

³⁵⁶ *Ibidem*.

³⁵⁷ *Ibidem*.

³⁵⁸ PC-OC, List of decisions taken at the 6th meeting of the restricted Group of experts on international co-operation (PC-OC Mod) enlarged to all PC-OC members, 30 Sept. – 2 Oct. 2008, point 1, b), compensation of persons, p. 1.

³⁵⁹ See ECJ, Case 186/87, *Ian William Cowan and le Trésor Public* [1989], para 17: the ECJ ruled that “when Community law guarantees a natural person the freedom to go to another MS, the protection of that person from harm in the MS in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement”; prohibition of discrimination is therefore applicable with regards to the right to obtain financial compensation provided for by national law when the risk of assault materializes. See also the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6 Aug. 2004, p. 15.

³⁶⁰ See Art. 12 freezing FD.

There are other arguments in favour of EU action on the right to compensation.

Firstly, EU action is necessary to address the differences among national compensation mechanisms on various matters. These may indeed be considered as impairing the achievement of an EU area of criminal justice where EU citizens can equally enjoy their rights.

Secondly, in promoting MR and mutual trust, the EU should ensure that reinforced judicial cooperation is not detrimental to individuals' fundamental rights. It follows that in order to counter-balance the "prosecutorial effect" of the EAW, the EU has a responsibility to ensure that the individual who suffers from unjustified detention receives a fair compensation, as provided for by Art. 6 of the Charter read together with Art. 53 para 2. This EU obligation would mirror the one provided for in Art. 5 para 5 ECHR³⁶¹ as interpreted by the ECtHR³⁶².

The EU interventions on compensation for victims of crime could serve as a source of inspiration. The directive 2004/80/EC sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations, ensuring that a victim has a right to submit an application in his/her MS of residence. Similarly, persons who suffer unjustified detention on the basis of the EAW should be allowed to bring their compensation claim in the MS where they reside, sparing them the need to do so in a foreign jurisdiction. This is essential considering that, as shown by the abovementioned Slovak - Dutch case, and as underlined by Henning Sørensen, the procedural costs, the procedural risks, the language problems and the problems of understanding the legal system of another MS will often exceed the amount of the financial compensation that may be awarded. MSs could to a certain degree avoid liability simply because the citizen gives up before the case is started³⁶³.

Finally, EU action is especially required to avoid a person being caught in a situation in which both the issuing and the executing states deny responsibility. Following an unjustified detention, the person should not have to suffer from the lack of agreement between the two MSs. The EU should consequently set up a mechanism allocating liability between them, limiting as much as possible any adverse consequence for the person.

Nevertheless one must be aware that the most important difficulty that EU action would encounter relates to its financial impact. An agreement among MSs in a time of crisis will indeed be difficult to reach³⁶⁴.

Solution

EU legislative action is advisable, and should ideally:

³⁶¹ The ECHR provides in its Art. 5 para 5 that "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Art. shall have an enforceable right to compensation", and several judgments have already dealt with this issue. Under EU law a right to compensation may be deduced from Art. 6 of the Charter read together with Art. 53 para 2.

³⁶² For more detail see CoE, [A guide to the implementation of Art. 5 of the ECHR](#), Human rights handbook No. 5, Compensation, pp. 67 - 68.

³⁶³ H. Sørensen, "[The European Arrest Warrant and MS Liability - a legal black hole?](#)".

³⁶⁴ Interview of E. Selvaggi (IT - see list of interviews in annex).

- ensure that national compensation mechanisms are applicable to EAWs cases³⁶⁵;
- ensure that the person concerned can bring an action in the MS of residence. Such a right would diminish the risk that the person does not claim compensation because of the burden of lodging an action in another state. The solution would mirror the right granted to victims of crime³⁶⁶. However, certain adaptations will be necessary in order to account for the EAW specificities.
- in relation to the previous point, introduce specific rules allocating responsibility between MSs. An EU dispute settlement mechanism should be envisaged for cases where no agreement is reached between the concerned states. Such a mechanism is necessary, even though in most cases responsibility will primarily lie with the issuing state. This covers, for example, cases where the issued EAW was unlawful (e.g. when the EAW is adopted in non-compliance of domestic legislation³⁶⁷), where unverified data about the person was transmitted³⁶⁸ or, where following surrender, the person was acquitted of the offence that gave rise to the EAW. The period of detention spent in the executing MS awaiting surrender should, in these cases, be considered for calculating the compensation due³⁶⁹. This approach is in line with the ECtHR's case-law, in which it has been stated that "in the context of an extradition procedure, the requested state should be able to presume the validity of the legal documents issued by the requesting state and on the basis of which a deprivation of liberty is required"³⁷⁰, and that it seems clear that detention and arrest "having been instigated by a requesting country on the basis of its own domestic law, and followed-up by the requested country in response to its treaty obligations, can be attributed to the requesting country notwithstanding that the act was executed by the requested country"³⁷¹. However, in other less frequent cases, responsibility may lie with the executing state³⁷². This covers, for example, cases where the national authorities do not diligently verify the identity of the person they arrest, or where the person has already been judged for the same offence, thus infringing the *ne bis in idem* principle³⁷³. In some MSs, such cases might not give rise to compensation because the assimilation with a purely national case is not granted. A last category of

³⁶⁵ See in this regard the European Parliament call on the Commission and EU institutions to develop uniform standards for compensation for persons unjustly detained (Resolution on detention conditions in the EU, 15 Dec. 2011, 2011/2897(RSP), point 4).

³⁶⁶ Art. 1 Directive 2004/80/EC.

³⁶⁷ See for instance ECtHR, *Stephens v. Malta* (no. 1), 21 April 2009, Appl. No. 11956/07, para 79: a period of detention is unlawful and not in accordance with Art 5 para 1 ECHR when the arrest warrant lacks of legal basis.

³⁶⁸ See in this regard the "problems where a person being sought was not the person who was the actual culprit because of false identity documents, inaccurate work by law enforcement agencies, lack of information allowing the person to be identified" mentioned by Švedas and Mickevičius, "Future of MR in criminal matters in the EU: Lithuania", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 355.

³⁶⁹ The period of detention spent in the executing state should be added to the period of detention spent in the issuing state. The total number of days should be the basis to calculate the compensation due (parallel with Art. 26 EAW FD)

³⁷⁰ ECHR, *Stephens v. Malta* (no. 1), *supra note 367*, para 52.

³⁷¹ ECHR, *Toniolo v. San Marino and Italy*, 26 June 2012, Appl. No. 44853/10, para 56.

³⁷² Whereas in the *Stephens* case the unlawfulness arose from the non-compliance with Maltese domestic legislation (requesting state – para 79), in the *Toniolo* case, it arose as a result of the quality of San Marino law on the matter (requested state – para 51)

³⁷³ Interview of H. Sørensen (DK – see list of interviews in annex).

cases covers situations of joint responsibility³⁷⁴ or situations in which neither of the two states takes responsibility. These are perhaps the most complex, and underlie the need for an EU dispute-settlement mechanism. In order to guarantee that the person receives compensation without delay, an EU fund could be set up³⁷⁵. This fund would grant compensation to the person, then turning to the MS/MSs held responsible for reimbursement. Criteria should be developed to determine the amounts to be awarded, ensuring a fair compensation which does not lead to unjust enrichment³⁷⁶.

In view of the financial difficulty linked to such rules, a two-step approach could be followed. In a first stage, in which consideration is given to whether other MR instruments could also give rise to unjustified damages³⁷⁷, the abovementioned rules could be detailed and inserted into an EU horizontal instrument. As mentioned earlier, limited provisions already exist in some MR instruments – i.e. the freezing FD³⁷⁸ – but they are incomplete and show a regrettable lack of coherence among MR instruments. Considering the sensitivity of the financial considerations of such an ambitious proposal, it might be advisable to limit the scope of these rules to misidentification cases, which are the most unfair, and remain marginal³⁷⁹. The costs they give rise to are thus not significant. Extension to other cases, eventually including prosecution EAWs that end up in acquittal, could follow as a second stage³⁸⁰. Another possibility to circumvent MSs' reluctance would be to insert a general principle consecrating the right to compensation, to be later developed in an EU independent horizontal instrument.

Insufficient consideration of the defendant's interests and resulting imbalance between prosecution and defence

Description of the problem

Since the beginning, the principle of MR has been presented as facilitating the judicial protection of individual rights³⁸¹. As stated by the Commission, it must be guaranteed that “the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the principle, but that the safeguards would even be improved through the process”³⁸².

After more than ten years of practical implementation, several assessments have however highlighted the adverse effects of MR on the protection of fundamental rights, and in

³⁷⁴ Joint responsibility cases cover for instance situations where inaccurate/insufficient data is provided by the issuing state and the executing state fails to request additional information.

³⁷⁵ Interview of P. Caeiro (PT – see list of interviews in annex).

³⁷⁶ Living costs are not similar in EU MSs. Thus, the amount considered a fair compensation in one MS may be considered disproportionate in MSs where living costs are lower.

³⁷⁷ This is the case for example of damages arising from misidentification, which indeed could arise in the application of other MR instruments (for instance, when investigation techniques or freezing assets measures target the wrong individual).

³⁷⁸ Art. 12 Freezing FD.

³⁷⁹ Interview of T. Harkin and J. Beneder (Commission – see list of interviews in annex).

³⁸⁰ The differences between MSs concerning the right to receive compensation in cases of detention followed by acquittal seem more significant than in unlawful detention *stricto sensu*.

³⁸¹ In this regard, Tampere European Council, Presidency conclusions, point 33, and Programme of measures to implement MR, *supra note 7*.

³⁸² Commission, Communication, MR of Final Decisions in Criminal Matters, *supra note 78*, p. 16.

particular on defence rights³⁸³. The EU legal framework has been criticised for being “almost exclusively preoccupied with measures designed to facilitate the investigation, prosecution, and sentencing of offenders”³⁸⁴, while assuming that the rights of suspects or accused persons are adequately protected through the MSs’ adherence to the ECHR³⁸⁵. The perceived imbalance between prosecution and defence³⁸⁶ is problematic from the point of view of the equality of arms³⁸⁷ and endangers mutual trust within the EU area of criminal justice.

A person surrendered on the basis of an EAW may face difficulties arising from the fact that the criminal proceedings are conducted in more than one jurisdiction, and that different national rules apply³⁸⁸. Important differences exist both regarding national substantive and procedural criminal laws, and as regard legal cultures. Differences are not limited to the protection of suspects and accused persons, but include differences in the organisation of criminal investigations or the role of prosecutors, judges, defence lawyers³⁸⁹, etc.

For these reasons, requested persons should particularly benefit from timely and quality legal representation, but they are not always able to afford it themselves. Access to legal aid³⁹⁰, both in the executing and the issuing states, is crucial to ensure their effective representation. However, national rules and practices “still display such divergences so that there are considerable shortcomings in the protection of the right to legal aid”³⁹¹.

Besides, quality legal representation is further compromised because of insufficient training and expertise of defence lawyers in EAWs cases³⁹². Transnational cases are more complex than purely domestic ones and require understanding not only of the executing

³⁸³ See for instance the FTI cases presented in Heard and Shaeffer, “Making Defence rights practical and effective: towards an EU directive on the right to legal advice”, *supra note 73*, pp. 274 – 276; in Smith, “Running before we can walk?”, *supra note 66*, p. 92 – 93; or referred to in T. Hammarberg, “Overuse of the EAW – a threat to Human Rights”, *supra note 33*.

³⁸⁴ Hodgson, “Safeguarding suspects’ right in Europe: a comparative perspective” (*New Criminal Law Review*, Vol. 14, 2011), p. 616.

³⁸⁵ Hodgson, *ibidem*, p. 612.

³⁸⁶ Imbalance acknowledged by the Council itself, in para. 10, Preamble of the Council, Resolution of 30 Nov. 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, *OJ C 295*, 4 Dec. 2009, p. 10. See also Vernimmen –Van Tiggelen and Surano, “Analyse transversale”, in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 559.

³⁸⁷ Under ECHR law, the right to a fair trial (Art. 6 para 1 ECHR) incorporate the principle of equality of arms (see e.g. ECHR, *De Haes and Gijssels v. Belgium*, 24 Feb. 2007, Appl. No 19983/92, para. 53). In EU law, Art. 47 of the Charter, also protecting the right to a fair trial, provides in particular that “everyone shall have the possibility of being advised, defended and represented”.

³⁸⁸ In this regard see ECPI, Manifesto on European Criminal Procedural Law, *supra note 35*.

³⁸⁹ Hodgson, *supra note 384*, p. 618.

³⁹⁰ Right to legal aid, i.e. meaning that you can benefit from the assistance of a lawyer in criminal proceedings fully or partially free of charge, is explicitly recognised as an integral part of the right to a fair trial and defence rights. It is explicitly protected by Art. 47 para 3 of the Charter and Art. 6 para 3 c) ECHR.

³⁹¹ Commission, Impact Assessment accompanying the proposal on Legal Aid for Suspects or Accused Persons in Criminal Proceedings, SWD (2013) 476 final, 27 Nov. 2013, p. 6.

³⁹² Interviews of J. MacGuill and P. Mc Namee (CCBE), or also V. Jamin (FR) and S. Petit-Leclair (FR) – see list of interviews in annex. see also Vernimmen-Van Tiggelen and Surano, “Analyse transversale”, in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 560.

state's legal system but also of the law of the issuing state³⁹³, as well as of the EAW FD³⁹⁴. However, as most MSs have a decentralised system for the execution of EAWs, any defence lawyer may be confronted to a EAW, without being a specialist in this particular area of law. Furthermore, following surrender the persons are often deprived of the possibility to complain about this unsatisfactory legal assistance to the appropriate disciplinary bodies, and thus poor skills remain undetected³⁹⁵.

Concerns cover not only the insufficient approximation of defence rights, but also the absence of mechanisms to forge connections between defence lawyers. Demands for an effective EU defence system to be applied to transnational cases have been expressed³⁹⁶.

Arguments

Some may argue that the protection of fundamental rights in the issuing MS is sufficient to guarantee respect of the requested persons' rights, and that the principle of MR does not put individuals' rights at risk. However, ten years of implementation of the MR principle have revealed that it must be complemented by flanking measures building up and promoting mutual trust³⁹⁷. Indeed, the relationship between the level of harmonisation of procedural law and procedural safeguards, on the one hand, and the level of mutual trust as a condition for successful MR on the other, is not in dispute³⁹⁸. If they are not addressed, differences between national criminal justice systems may endanger the protection of individual's rights, as well as the efficiency of the EAW system³⁹⁹.

Important efforts have already been made in order to harmonise national procedural laws and to ensure the effective representation of the suspect and accused persons. The *in absentia* FD⁴⁰⁰ is a good example of this effort. Concerning individuals' rights, and following MSs' failure to reach a consensus on the proposal⁴⁰¹ for a FD on procedural rights⁴⁰², a step-by-step approach was adopted in the "Roadmap for strengthening

³⁹³ JUSTICE, *supra* note 140, p. 11. See also Albers and others, *supra* note 24, p. 39.

³⁹⁴ JUSTICE, *supra* note 140, p. 11.

³⁹⁵ *Ibidem*.

³⁹⁶ See for instance Wahl, "The perception of the principle of MR of judicial decisions in criminal matters in Germany", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 143-144.

³⁹⁷ 1999 Tampere European Council, presidency conclusions, Point No 37; 2004 Hague Programme, Point III, 3. 3.1.; 2009 Stockholm Programme – An open and secure Europe serving and protecting citizens, point 2.4., p. 10, *supra* notes 2, 4 and 5.

³⁹⁸ Vernimmen-Van Tigelen, Surano, "Analyse transversale", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 560. See also A. Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles, éd. de l'Université de Bruxelles, 2004.

³⁹⁹ Alegre and Leaf, "European Arrest Warrant: a solution ahead of its time," 2003, JUSTICE, p. 73; JUSTICE, *supra* note 140, p. 7 – 8. See also Erbeznik, "The principle of MR as a utilitarian solution, and the way forward" (*EuCLR*, Vol. 2, Number 1, March 2012), p. 3 and f.

⁴⁰⁰ See *supra* note 50.

⁴⁰¹ Commission, Proposal for a Council FD on certain procedural rights in criminal proceedings throughout the EU, 28 April 2004, COM (2004) 328 final.

⁴⁰² JHA Council, 2807th meeting, 12 - 13 June 2007, Doc. No 10267/07, p. 37: the Council concluded that work should be pursued in order to reach consensus on the scope of the instrument. The dividing line was the question whether the Union was competent to legislate on purely domestic proceedings (at least 21 MSs share this view) or whether the legislation should be devoted solely to cross-border cases.

procedural rights of suspected or accused persons in criminal proceedings”⁴⁰³. So far three Directives have been adopted, i.e. the Right to Interpretation and Translation Directive⁴⁰⁴, the Right to Information Directive⁴⁰⁵ and the Right to Access to a Lawyer Directive⁴⁰⁶. All contain provisions specifically dealing with EAW proceedings, which significantly improve the situation of requested persons. This is especially demonstrated by the newly adopted provision on dual representation, which ensures the person has access to a lawyer in the executing state and is informed of his/her right to appoint a lawyer in the issuing state⁴⁰⁷. Several commentators have welcomed this provision and underlined its importance⁴⁰⁸, but its final wording has also been subject to criticism⁴⁰⁹. In any case, dual representation is not self-sufficient, and should be coupled with flanking measures concerning legal aid and ensuring efficient coordination between defence lawyers across the EU. In this regard, the importance of the initiative on legal aid⁴¹⁰, recently proposed together with two others texts⁴¹¹, must be underlined. The EU should nevertheless pursue its efforts on the approximation of procedural rights⁴¹².

Solution

The implementation of the adopted and future texts on procedural rights must be carefully assessed, with special attention to their impact on the functioning of the EAW⁴¹³. For instance, the provision on dual representation enshrined in the Access to a Lawyer Directive will be seriously compromised if not coupled with strong provisions on legal aid⁴¹⁴. In this regard, MSs must be careful not to deprive it of its *effet utile*.

In addition, non-legislative measures should be adopted to further enhance the protection of defendants’ rights. In this regard, training of defence-lawyers is essential⁴¹⁵.

⁴⁰³ Council, Roadmap for strengthening procedural rights, *supra note 386*.

⁴⁰⁴ OJ L 280, 26 Oct. 2010, p. 1.

⁴⁰⁵ OJ L 142, 1 June 2010, p. 1.

⁴⁰⁶ OJ L 294, 6 Nov. 2013, pp. 1 - 12.

⁴⁰⁷ Art. 10 Access to a lawyer Directive.

⁴⁰⁸ Interviews of C. Marchand (BE), J. Blackstock (JUSTICE) and L. Mc Veigh (FTI) – see list of interviews in annex. See also JUSTICE, *supra note 140*, p. 13 and ECPI, Manifesto on European Criminal Procedural Law, *supra note 35*, p. 435.

⁴⁰⁹ Interview of J. MacGuill and P. Mc Namee (CCBE – see list of interviews in annex) who stated that Specifically an earlier proposal made clear that the responsibility for ensuring the availability of legal representation in the requesting state, publicly funded if necessary, lay on that State. Not only is this a logical follow on given that the MS made the request, but it will also contribute to a more focused consideration of what is a proportionate use of an EAW”. For criticism addressing the consequences of such clause, interview of J. Van Gaever (BE – see list of interviews in annex).

⁴¹⁰ Commission, Proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in EAW proceedings, COM (2013) 824, 27 Nov. 2013.

⁴¹¹ Commission, Proposal for a Directive on procedural safeguards for children suspected and accused in criminal proceedings, COM (2013) 822/2, 27 Nov. 2013, and Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, COM (2013) 821/2, 27 Nov. 2013.

⁴¹² ECPI, Manifesto on European Criminal Procedural Law, *supra note 35*, p. 435.

⁴¹³ For instance the impact on EAWs proceedings of Art. 7 of the right to information Directive should be further investigated.

⁴¹⁴ See in particular the obligations introduced by Art. 4 - Access to provisional legal aid and Art. 5 - legal aid for requested persons.

⁴¹⁵ See Commission, Communication, Building up trust in EU-wide justice, a new dimension to European Judicial, COM (2011) 551, 13 Sept. 2011. For an evaluation, see European Judicial training 2012, [Final report](#).

On-going training opportunities⁴¹⁶ should be further promoted and possibly be funded by the EU, as is the case with judicial/prosecution training⁴¹⁷. Incentives to ensure defence lawyers' participation in training programs are needed and must be reflected upon⁴¹⁸. Such training programs should be complemented by a practical EU handbook especially designed for defence lawyers, ensuring that it is understandable and readily accessible to the lawyers who may be less familiar with the EAW FD⁴¹⁹.

Furthermore, the creation of an institutionalised network of defence lawyers⁴²⁰ is desirable⁴²¹. It will ensure an effective operation of the provision on dual representation, allowing defence lawyers in the executing state to identify and coordinate with experienced lawyers in the issuing state⁴²². This network should be coupled with a secured system for exchanging information in cross-border cases. In this regard, the pilot-project "PenalNet - Secure E-Communications in Criminal Law Practice" is worth mentioning⁴²³.

Finally, the creation of an EU-funded database collecting all national case-law relating to the EAW and more generally to MR instruments, is advisable⁴²⁴. The benefits of this initiative are multiple. Firstly, national case-law would be more easily accessible to both local and foreign lawyers, who need information on the national practice of other MSs. Secondly, a national case-law database would also benefit other practitioners. Finally, it would allow a better assessment of the practical implementation of the EAW and the other MR instruments. It could, for instance, result in an analysis of the grounds for refusal most frequently invoked by executing authorities, and thus help identifying the problematic issues eventually requiring EU action⁴²⁵.

⁴¹⁶ As an example of initiatives to be sustained, FTI offered in Autumn 2013 a [defence rights training programme](#), or ERA and ECBA organised a [seminar](#) in Nov. 2013.

⁴¹⁷ Interview of J. MacGuill (CCBE - see list of interviews in annex), who argued that to ensure an adequate supply of properly trained lawyers, the EU must provide access to high standard training programmes accessible in all Member States.

⁴¹⁸ Interview of J. MacGuill (CCBE - see list of interviews in annex).

⁴¹⁹ JUSTICE, *supra note 140*, p. 12. This recommendation starts to be concretised through an ECBA initiative to draft a "EU wide defence handbook, which should be available in EN and in the official language of each state (commenced for Portugal, Greece, Netherlands - See [presentation](#) of J. Blackstock at ECBA Conference in April 2013).

⁴²⁰ See for instance, Wahl, "The perception of the principle of MR of judicial decisions in criminal matters in Germany", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit* p. 143; Vernimmen-Van Tigelen and Surano, "Analyse transversale", *ibidem*, p. 560; JUSTICE, *supra note 140*, p. 14 or ECPI, Manifesto on European Criminal Procedural Law, *supra note 35*, p. 435.

⁴²¹ It is to be noted that more ambitious proposals have in the past been put forward (i.e. the Eurodefensor - see especially S. Schüneman, in *ibidem* (ed), *Ein Gesamtkonzept für die europäische Strafrechtspflege (A European Programme of Criminal Law and Procedure)*, 2006, p. 93 and previously already in *ibidem* (ed), *Alternativentwurf europäische Strafverfolgung (Alternative Project of Penal European Prosecution)*, 2004, p. 5, and in depth Wohlers *ibidem*, p. 51 ff).

⁴²² *Ibidem*.

⁴²³ [PenalNet](#) was an initiative developed from 2007 to 2013, supported and co-financed by the European Commission, and involving the Spanish, French, Hungarian, Italian and Romanian bar associations.

⁴²⁴ Interview of J. Van Gaever (BE - see list of interviews in annex).

⁴²⁵ In this regard the work currently realised by the IRC Amsterdam, which every year produces a report, can be mentioned as an example of good practice (IRC, [Europees Aanhoudingsbevel, Managementgegevens over de periode: 2011](#), p. 9 - 14). Interview of K. van der Schaft (NL - see list of interviews in annex).

Overuse of pre-trial detention and detention conditions

Description of the problem

In the course of the EAW proceedings, two separate decisions concerning the detention of the requested person take place, first in the executing state and then in the issuing state following surrender. The executing authority must decide, in accordance with its national law, whether the person must remain in detention while the decision on surrender is taken⁴²⁶. It remains thus free to decide to provisionally release the requested person, as long as it takes all necessary measures to avoid the person from absconding⁴²⁷. If the person is then surrendered, the issuing authority will have to take an independent decision on the issue of detention once the person arrives to the issuing state, in accordance with the law of that MS⁴²⁸. The link between these two decisions is made by Art. 26 para 1 EAW FD, which imposes the issuing authority to deduct all periods of detention spent in the executing state from the total period of detention to be served.

Several problems arising from detention have been identified. Firstly, problems relating to the practical application of Art. 26 EAW FD have to be mentioned. On the one hand, it seems that executing authorities often forget to forward the information concerning the time spent in detention, in violation of Art. 26 para 2 EAW FD⁴²⁹. On the other hand, there seem to be cases where periods spent in pre-trial detention in the executing state are not deducted from the sentence passed in the issuing state⁴³⁰. In this regard the wording of Art. 26 para 1 EAW FD *in fine* is confusing⁴³¹, as it is not clear if the reference to a “detention order” includes an order for pre-trial detention. This issue arises if a person is surrendered after a long period of pre-surrender detention in the executing state. He/she is then subject to more pre-trial detention in the issuing state post-surrender pending trial. Where there is a maximum period of pre-trial detention in the issuing state, it is not clear from the FD if he/she should be entitled to release if the combined periods exceed this maximum. This issue is ultimately for the Court to decide⁴³².

⁴²⁶ See Art. 12 EAW FD.

⁴²⁷ Interview of F. Zeder (AT – see list of interviews in annex).

⁴²⁸ The only provision dealing with the issue of detention in the issuing state is Art. 4a para 3 EAW FD, a specific provision that applies to *in absentia* custodial sentences or detention orders. In the event that the person requests retrial or appeal in conformity with art. 4a para 1 d) EAW FD, his or her detention while awaiting such retrial or appeal will shall be reviewed in accordance with the law of the issuing state.

⁴²⁹ Despite this obligation, recalled in the Council’s Final Report (*supra note 26*, p. 20) and in national texts (for example, Belgian vade-mecum, remise passive, p. 20), practice shows that “there is a lack of accurate information regarding the period of time a person may have spent in custody in the executing state awaiting surrender, and consequently uncertainties about the remaining sentence to be served in the issuing state” (Eurojust Annual Report 2011, p. 25 – 26). Nevertheless, this is a problem of bad implementation of the EAW FD, and will thus not be covered by the present research paper.

⁴³⁰ See intervention V. Costa Ramos at the ALDE Hearing. In this regard, several practitioners have denounced that executing MSs do not always provide clear and detailed information concerning the time the person has spent in detention following the EAW and awaiting surrender. In reaction, the Council proposed to introduce a standard executing form (see Council’s Handbook, *supra note 56*, p. 127).

⁴³¹ See for instance the English version “as a result of a custodial sentence or detention order being passed” and the French version “par suite de la condamnation à une peine ou mesure de sûreté privatives de liberté”.

⁴³² Interview of T. Harkin and J. Benerer (Commission – see list of interviews in annex).

Two other main problems will be further analysed in this research paper, namely the overuse of pre-trial detention and detention conditions⁴³³, particularly in the issuing state. These are crucial for the purpose of this paper as the anticipation by the executing authority of the risk of overuse of pre-trial detention and/or of the risk of bad detention conditions in the issuing state not only prejudices the persons concerned but may also hinder mutual trust and consequently jeopardise the smooth functioning of the EAW.

Concerning overuse of pre-trial detention, it is to be recalled that from a fundamental rights' perspective and as a deprivation of liberty measure, detention may infringe Art. 5 ECHR. Detention in enforcement EAWs is less problematic because a final judgement will in those cases have declared the requested person guilty of a criminal offence⁴³⁴. In contrast, pre-trial detention is especially sensitive because no trial has yet taken place and the person still enjoys the presumption of innocence. Pre-trial detention, which by definition can only be ordered in the context of prosecution EAWs, must remain an exceptional measure. As stated above its overuse may compromise trust between judicial authorities and affect the practical implementation of the EAW.

It must be noted that pre-trial detention in the executing and in the issuing states is governed by different subparagraphs of Art. 5 ECHR. Whereas detention in the executing state falls under the scope of Art. 5 para 1 f) ECHR⁴³⁵, detention in the issuing state is governed by Art. 5 para 1 c) ECHR⁴³⁶. A comparison between these two provisions shows that Art. 5 para 1 c) ECHR provides a higher level of protection. This has been confirmed by the Strasbourg's Court which has consistently held that Art. 5 para 1 f) "does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or absconding, (...) all that is required under subparagraph f) is that 'action is being taken with a view to deportation or extradition'"⁴³⁷. Detention in the executing state must be in accordance with the law, but it is more difficult to claim that detention awaiting surrender violates the Convention.

Pre-trial detention in the issuing state is more problematic, as it is governed by the stricter rules of Art. 5 para 1 (c) ECHR. It is indeed abuse of pre-trial detention in the issuing state that has posed the most problems for functioning of the EAW. Pre-trial

⁴³³ For example, "The experts are concerned that early surrender may lead to lengthy periods of pre-trial detention in the issuing state and that once surrendered, defendants are held in prison establishments that fall far short of UK", JUSTICE, *supra note 140*, p. 146.

⁴³⁴ It cannot be ruled out that that sentence might have followed a trial which infringes Art. 6 ECHR. Those concerns indeed arise in relation to trials *in absentia*: "Where a person has been tried in their absence and does not know what the allegations against them are, it is particularly concerning that concepts differ amongst MSs as to what a re-trial actually requires, notwithstanding the only amendment to the FD so far concerns trials *in absentia*". JUSTICE, *supra note 140*, p. 33.

⁴³⁵ Which reads: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

⁴³⁶ Which reads "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so".

⁴³⁷ ECtHR, *Nasrulloev v. Russia*, 11 Oct. 2007, Appl. No 656/06, para. 69; and ECtHR, *Soldatenko v. Ukraine*, 23 Oct. 2008, Appl. No 2440/07, para. 109.

detention is linked with proportionality⁴³⁸, and in particular with the issue of trial readiness⁴³⁹, both discussed above. One of the main issues of concern is the different approach MSs take with regard to pre-trial detention⁴⁴⁰, for instance with regard to its duration⁴⁴¹. Another one relates to the difference in treatment between nationals and non-nationals, the latter seeming to have bigger chances to be remanded in custody⁴⁴². Such difference in treatment is particularly problematic in the context of the EAW where transnational proceedings are at stake and where it is likely that the surrendered person is a non-national of the issuing state⁴⁴³.

The second main problem concerns detention conditions which, according to the ECHR's case-law, may give rise to violations of the prohibition of torture and inhuman and degrading treatment (Art. 3 ECHR)⁴⁴⁴. Such violation can also arise in the context of extradition proceedings as a surrender may constitute a violation "par ricochet"⁴⁴⁵. As the ECtHR made clear in its *Soering* judgement, "the decision by a Contracting state to extradite a fugitive may give rise to an issue under Art. 3, and hence engage the responsibility of that state under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country"⁴⁴⁶. Thus executing authorities must take into account the detention conditions in the issuing state both for prosecution and enforcement EAWs. Indeed, the Commission acknowledged that the EAW "does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions"⁴⁴⁷. It is stated that poor detention conditions undermine the trust needed for MR instruments to work effectively⁴⁴⁸, and

⁴³⁸ See above II. 1)

⁴³⁹ See above II. 2)

⁴⁴⁰ "A number of International Organisations, NGOs, and Professional Associations supported the adoption of minimum rules at EU level to establish a more uniform system of pre-trial detention across MSs. Indeed, differences between national legislations and practices were seen as an obstacle to mutual trust. A reduction in the use of pre-trial detention is a shared priority for these organizations in lowering the overall prison population". Commission, *Analysis of the replies to the Green Paper on the application of EU criminal justice legislation in the field of detention*, p. 11.

⁴⁴¹ See for instance FTI, *Detained without trial: FTI's response to the European Commission's Green Paper on detention*, Oct. 2011, p. 24.

⁴⁴² "A large proportion of the EU's pre-trial prison population is made up of non-national defendants. Non-nationals are often at a disadvantage in obtaining release pending trial because they are seen as a greater flight risk than national defendants". FTI, *Detained without trial*, *ibidem*, p. 9.

⁴⁴³ "Residents and nationals of the executing state were requested in 36 per cent of cases". JUSTICE, *supra* note 140, p. 33. FTI asserts that pre-trial detention is detrimental to fair trial rights (FTI, *The EAW - eight years on*, *supra* note 242, p. 8).

⁴⁴⁴ For recent examples, see ECtHR, *Torreggiani and others v. Italy*, 8 Jan. 2013, Appl. No 43517/09 (overcrowded prisons) and *Canali v. France*, 25 April 2013, Appl. No 40119/09 (hygienic conditions of cells).

⁴⁴⁵ ECtHR, *Chahal v. the UK*, 15 Nov. 1996, Appl. No 22414/93.

⁴⁴⁶ ECtHR, *Soering v. the UK*, 7 July 1989, Appl. No 14038/88, para 91.

⁴⁴⁷ Commission, 2011 Evaluation Report, *supra* note 25, p. 7.

⁴⁴⁸ As recalled by the European Parliament: «detention conditions are of central importance for the application of the principle of MR of judicial decisions in the area of freedom, security and justice, and considers a common basis of trust between judicial authorities, as well as a better knowledge of national criminal justice systems, to be of critical importance in this respect»; Resolution of 15 Dec. 2011 on detention conditions in the EU (2011/2897(RSP)), point 2.

may lead to refusals based on a risk of violation of fundamental rights⁴⁴⁹.

Arguments

First, coming back to the problem of the overuse of pre-trial detention, as mentioned above, pre-trial detention in the executing state is governed by Art. 5 para 1 f) ECHR, which justifies detention where the decision is taken with a view to extradition. Detention must however be in accordance with the law, and will only be justified “for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Art. 5 para 1 f) ECHR”⁴⁵⁰. One must remember that Art. 12 EAW FD recalls that the requested person may be provisionally released, and that that provision is coupled with the short time limits for deciding on surrender and the obligation to release the person if such deadlines are not met⁴⁵¹. On this basis, it is difficult to argue that further EU legislative action is needed. However, further reflection could be envisaged on the development of effective alternatives to pre-trial detention, as those covered by the ESO FD.

As to the problem of overuse of pre-trial detention in the issuing state and the related differences with regard to its duration, it is interesting to note that, back in 2010, the Council stated that “the time that a person can spend in detention before being tried in court and during the court proceedings varies a lot between the MSs. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the MSs and do not represent the values for which the EU stands”⁴⁵². Following the Commission’s Green Paper on pre-trial detention, which sought to explore the extent to which detention issues impact on mutual trust, several organisations supported the approximation of MSs’ legislations in this regard⁴⁵³. These demands have been subscribed by other organisations and MEP’s in a letter addressed to Vice President Reding⁴⁵⁴, as well as by the European Parliament⁴⁵⁵.

Despite this call for action, several arguments against EU legislation in this field are to be mentioned, among which the reluctance of some MSs to approximate pre-trial detention’s timings⁴⁵⁶ or the need to assess the impact this action might have on the

⁴⁴⁹ For examples of refusals on this basis, see the Irish Supreme Court decision in *The Minister for Justice, Equality and Law Reform vs. Robert Rettinger*, 2010, IESC 45 or see High Court of Justice in Northern Ireland *Lithuania v Liam Campbell*, No: [2013] NIQB 19 where the UK refused the surrender of a person to Lithuania on the grounds of its prison conditions.

⁴⁵⁰ ECtHR, *A. and Others v. the UK*, 19 Feb. 2009, Appl. No 3455/05, para 164.

⁴⁵¹ Art. 23 para 5 EAW FD.

⁴⁵² Council, Roadmap for strengthening procedural rights, *supra note 386*.

⁴⁵³ Among others, FTI, ECBA, ENCJ, AEDH or the UN. For the complete list see Analysis of the replies to the Green Paper, *supra note 440*, p. 12, footnote 79. See for instance FTI, Detained without trial: □ FTI’s response to the European Commission’s Green Paper on detention, Oct. 2011, p. 6.

⁴⁵⁴ ECBA, [Open letter regarding pre-trial detention](#).

⁴⁵⁵ European Parliament, Resolution on detention conditions in the EU, 15 Dec. 2011, (2011/2897(RSP)), point 2.

⁴⁵⁶ In their replies to the Commission’s Green Paper on detention, some MSs’ indeed argued that “adopting maximum time periods of pre-trial detention would not guarantee short detention times. On the contrary, the authorities may decide to make full use of the maximum time available, thus extending pre-trial detention periods. Moreover, the duration of provisional detention would depend on many other parameters such as the judicial system, the crime rate and the national penalties applying to the relevant criminal offences. The importance of avoiding automatic release where the absolute maximum period of detention has been exceeded was also highlighted” - Analysis of the replies to the Green Paper, *supra note 440*, p. 10.

criminal justice systems of the MSs⁴⁵⁷.

Turning to the problem of prison conditions and the attached risk of violating Art. 3 ECHR if the executing authority surrenders the person to a MS in which he/she faces a real risk of inhuman and degrading treatment or punishment, it must be underlined that these issues have been recognised as a potential ground for refusal⁴⁵⁸. It could thus be argued that a fundamental rights' ground for refusal is sufficient to face these concerns, and that no further action is needed⁴⁵⁹. Other arguments against the EU harmonisation of MSs' detention conditions are the high costs of such measures in a time of crisis and the absence of a legal basis in the Treaties⁴⁶⁰. In spite of these arguments, the Commission acknowledged that "it could be difficult to develop closer judicial cooperation between MSs unless further efforts are made to improve detention conditions and to promote alternatives to custody"⁴⁶¹. Detention conditions may not only affect the functioning of the EAW, but also of other EU instruments such as the transfer of prisoners FD⁴⁶².

However, attempts to invoke bad detention conditions as a fundamental right bar to surrender have proved very difficult⁴⁶³ and have thus been generally unsuccessful⁴⁶⁴. For example, a British court held that there "is no sound evidence that the appellant is at a real risk of being subjected to treatment which would breach Art. 3 ECHR, even if there is evidence that some police do sometimes inflict such treatment on those in detention. Regrettably, that is a sometime feature of police behaviour in all EU countries"⁴⁶⁵. Establishing that the person would be subject to ill treatment if surrendered to the issuing state remains a difficult legal issue. Poor detention conditions are a common problem, and thus it might be delicate for a judicial authority in one MS to condemn the prison conditions in a different MS⁴⁶⁶. Furthermore, poor prison conditions are often a question of fact and practice that must be established on a case-by-case basis⁴⁶⁷. Thus the question of proof arises: in cases where the requested person claims that, if surrendered, he risks

⁴⁵⁷ According to the ECtHR's case-law, the question whether or not a period of detention is reasonable must be assessed in each case according to its special features. The particular circumstances of each case explain why several months of pre-trial detention can amount to a violation of Art. 5, whereas a period exceeding five years can still be considered reasonable. See the [CoE's response](#) to the Commission's Green Paper on detention p. 10.

⁴⁵⁸ See *supra* note 449.

⁴⁵⁹ Furthermore, the existence of a ground for refusal based on FR and the possibility to have EAWs refused on the grounds of Art. 3 ECHR violations could encourage MSs to improve their prison conditions. In this regard, see Spencer, "Extradition, the EAW and human rights", *supra* note 73, p. 253.

⁴⁶⁰ This is the position of Poland and Denmark at least; see Analysis of the replies to the Green Paper, *supra* note 440, p.11, note 73.

⁴⁶¹ Analysis of the replies to the Green Paper, *supra* note 440, p. 4.

⁴⁶² Council custodial sentences FD, *supra* note 16.

⁴⁶³ See for instance interviews of D. Flore (BE), and T. Ostropolski (PL) – see list of interviews in annex.

⁴⁶⁴ See for instance the situation in the Netherlands where to our knowledge, no refusal based on detention grounds is known (interview of K. van der Schaft (NL – see list of interviews in annex)). One of the most recent decisions in this field concerns Polish prisons, and the judge considered that a 2,5 % chance of suffering degrading treatment and having less than 3 square meters in the cell is not a real risk (ECLI:NL:RBAMS:2010:BO1448).

⁴⁶⁵ High Court of Justice (UK), *Symeou v Public Prosecutor's Office at Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin), para. 65, cited in FTI, *supra* note 131, p. 18.

⁴⁶⁶ Interview of R. Roth (CH) and D. Flore (BE) – see list of interviews in annex.

⁴⁶⁷ Interview of F. Zeder (AT – see list of interviews in annex), who rightly pointed out that prison conditions change not only from one state to another, but also within one single state.

being subject to inhuman or degrading treatment, what concrete elements should judicial authorities take into account in order to assess this risk and eventually refuse cooperation?

Solution

The overuse of pre-trial detention is crucial and constitutes one of the best examples of how the complementarity and interactions between all EU criminal justice instruments may solve common problems. Some recently adopted measures, such as the ESO FD, or measures which should be soon adopted as the EIO Directive, should logically have an impact on this problem. The Commission should carefully monitor their correct implementation as well as the impact on the functioning of the EAW. The practical interaction between the different instruments should also be addressed. In that context, a clause that makes explicit their interrelations and guide judicial authorities accordingly, could be inserted in an EU horizontal legislative instrument. Such a clause should be reinforced with an adaptation of the Council's Handbook and appropriate training measures.

Other measures that have been previously recommended in this research paper should also improve the situation, and limit the overuse of pre-trial detention, such as the introduction of a binding proportionality test in the issuing state⁴⁶⁸, together with a reinforced consultation procedure between competent authorities. Nevertheless, while EU legislative action targeting pre-trial detention seems to be in stand-by, promotion of alternative measures to pre-trial detention should in any case be further pursued, for instance through raising awareness of their existence among practitioners.

With regard to detention conditions, information on prison conditions should be more easily accessible, so as to assist courts in deciding whether or not to surrender the requested person⁴⁶⁹. In this regard, the consultation procedure between judicial authorities could be used to obtain information regarding the precise conditions awaiting the person after surrender⁴⁷⁰. It must however be noted that this information might not be available to judicial authorities and thus there might be a need to involve central/administrative authorities⁴⁷¹.

In the long run, the best option would be to establish EU minimum standards on prison conditions, both pre- and post-trial, that guarantee adequate treatment of individuals. Such developments would help build mutual trust and significantly improve the practical application of the EAW system. Executing judicial authorities would be better equipped to examine this type of claim as they would have clear guidance on the applicable standards. While the existence of a legal basis allowing EU action in this field is debated, Art. 82 TFEU might be sufficient⁴⁷² under the condition that poor detention conditions concretely hamper the functioning of the EAW⁴⁷³.

⁴⁶⁸ "The proportionality principle in criminal matters requires of course measures, such as pre-trial detention or alternatives to such detention, are only used when this is only necessary and only for as long as required" Commission, Green Paper, *supra* note 345, p. 9.

⁴⁶⁹ Analysis of the replies to the Green Paper, *supra* note 440, p. 9.

⁴⁷⁰ Interview of R. Riegel (DE - see list of interviews in annex).

⁴⁷¹ Interview of T. Ostropolski (PL - see list of interviews in annex)

⁴⁷² No express reference to Art. 82 and no legal opinion that it could be a legal basis for action but by virtue of the issue being discussed in this context, it is perhaps implicitly a possibility.

⁴⁷³ See Lööf, "Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU" (*European Law Journal*, Vol. 12, No. 3, 2006), p. 426. He argued that if refusals were often based on poor detention conditions, EU action would be more justified.

Conclusion

After ten years of practical implementation of the EAW FD, this research paper aimed to pinpoint and analyse its strengths and weaknesses.

As outlined in the introduction, this paper is not exhaustive; it focuses on twelve main problems: absence of an express ground for refusal based on infringement or risk of infringement of fundamental rights, silence about legal remedies, maintaining SIS alerts following a refusal decision, difficulties relating to multiple requests concerning the same person, absence of precision relating to the transmission of a translated EAW, ambiguity concerning the additional information that may be requested by the executing authority, oversight of a clause on accessory surrender, disproportionate EAWs, issuance of EAWs in cases that are not prosecution/trial-ready, compensation, insufficient consideration of the defendant's interests and resulting imbalance between prosecution and defence and the overuse of pre-trial detention and detention conditions.

Many of the interviewed experts, academics and practitioners identified other limitations. They suggested other possible improvements, either in the sense of a more efficient tool⁴⁷⁴ or in the direction of a more restricted one⁴⁷⁵. Among the non-covered problems of this research paper one in particular would have deserved attention, i.e. the classical principle of speciality, which prohibits a person being prosecuted, sentenced or otherwise deprived of liberty in the requesting state for offences other than those for which surrender was granted⁴⁷⁶. Whereas some practitioners did not consider it problematic⁴⁷⁷, others underlined the difficulties that arise from its partial preservation⁴⁷⁸, somehow echoing one of the conclusions of the fourth round of mutual evaluations⁴⁷⁹. Those practitioners plead for the abolition of the speciality rule, a move they consider in line with the establishment of an EU area of criminal justice as the logic of such a rule, namely the protection of national sovereignty⁴⁸⁰, is considered out-dated⁴⁸¹. In this regard, the path followed by the Nordic arrest warrant (NAW) Convention, which combines the

⁴⁷⁴ For instance removing double criminality controls altogether (for all offences) or the specific rules applicable to nationals (considering that residence is the relevant criteria in EU law rather than nationality).

⁴⁷⁵ For instance limiting the application of the EAW to serious crime, or revising the list of 32 offences in order to reduce the scope of application of the abolition of the double criminality requirement.

⁴⁷⁶ See Art. 27 EAW FD.

⁴⁷⁷ See for instance interview of R. Riegel (DE – see list of interviews in annex).

⁴⁷⁸ According to Art.13 and Art. 27 para 1 EAW FD, there is a possibility to renounce to the application of the speciality rule, either by the person concerned, or by bilateral agreement between MSs. For instance interviews of L. Hamran and M. Ernest (SK – see list of interviews in annex); or of Ministry of Public Administration and Justice, Hungary (see list of interviews in annex).

⁴⁷⁹ Council, Final Report, supra note 26, p. 16: “the operation of the speciality rule is problematic in practice. Problems originate mainly from deficiencies in the regular flow of information and the absence of mechanisms that enable authorities active in criminal proceedings to check the conditions of surrender in good time”.

⁴⁸⁰ As stated by the ECJ in its *Leymann and Pustarov* case (ECJ, Case C 388/08 PPU [2008], para 44): “That rule is linked to the sovereignty of the executing MS and confers on the person requested the right not to be prosecuted, sentenced or otherwise deprived of liberty except for the offence for which he or she was surrendered”.

⁴⁸¹ Some defence lawyers even seem to consider that such abolition would be in line with the establishment of an EU area of criminal justice (interview of C. Marchand – see list of interviews in annex).

non-application of the principle with limited exceptions, is worth mentioning and could serve as inspiration⁴⁸². However, the consequences of the abolition of the speciality principle should be carefully assessed. It should be kept in mind that the level of approximation of legal norms and mutual trust between the Nordic states is more developed than within the EU⁴⁸³. Therefore, the question arises as to whether the attained level of trust in the EU area is mature enough for such a move⁴⁸⁴.

I. Main recommendations

This research paper suggests various solutions for each of the twelve main problems that have been identified and discussed. The detailed solutions are to be found in each of the independent sections. They will be presented now in a synthesized way. To that end, three types of EU action can be distinguished, namely practical tools, soft law measures and legislative action.

I. 1. Practical tools

The main practical tool consists of training measures, which are of fundamental importance, as stressed by all interviewed practitioners. In view of the fact that in many MSs issuance and/or execution of EAWs is decentralised, it is of key importance that actors are familiar with the specificities of this instrument of judicial cooperation. This includes, not only judges, prosecutors or law enforcement authorities, but also defence lawyers, who play a key role. Training has been specifically suggested in two regards. Firstly, in order to smooth the functioning of the EAW, language training is strongly recommended⁴⁸⁵. Indeed, even if the EAW must be translated into one of the languages accepted by the executing state, training in the languages that are most useful for direct contacts between judicial authorities would prove advantageous. Secondly and more importantly, training is necessary in order to raise awareness of the "EU criminal toolbox". The EAW is no longer alone, and both disproportionate EAWs⁴⁸⁶ and abuses of pre-trial detention⁴⁸⁷ would be significantly reduced, if the authorities concerned had more recourse to alternative EU instruments at their disposal, such as the ESO FD, the probation decisions FD or the future EIO. Training would also be an appropriate measure to help competent national authorities, for instance when dealing with multiple requests⁴⁸⁸, or to make a proportionate use of Art. 15 para 2 of the EAW FD, compatible with the MR philosophy⁴⁸⁹. Another suggested practical tool, especially useful to ensure an effective defence would consist in setting up a specialised network of defence lawyers across the EU⁴⁹⁰, which should be coupled with a secured system for exchanging information in cross-border cases.

I.2 Soft law measures

⁴⁸² See Art. 23 of the NAW Convention. For comments, see Mathisen, "Nordic cooperation and the EAW: intra-Nordic extradition, the NAW and beyond", *supra note 234*, p. 22-23.

⁴⁸³ on the different levels of mutual trust: Toltila, "The Nordic Arrest warrant: what makes for even higher mutual trust?" (*NJECL*, vol. 2, issue 4, 2011), pp. 368 -377; Suominen, *op. cit.*, p. 64.

⁴⁸⁴ Interview of K. Van der Schaft (NL - see list of interviews in annex).

⁴⁸⁵ See I. 5 (transmission of a translated EAW).

⁴⁸⁶ See II. 1 (disproportionate EAWs); II. 2 (EAW not trial-ready).

⁴⁸⁷ See II. 5 (overuse of pre-trial detention and detention conditions).

⁴⁸⁸ See I.4 (multiple requests).

⁴⁸⁹ See I.6. (ambiguity concerning additional information).

⁴⁹⁰ See II. 4 (defendants' interests).

Turning now to soft law measures, one must keep in mind that recommendations allow MSs to keep their margin of discretion, while nevertheless bringing national practices closer together. The main suggested soft law measure consists in the revision of the Council's Handbook, in order to introduce a series of recommendations specific to the EAW. For instance, in relation to problems arising from multiple requests, the inclusion of Eurojust's Guidelines,⁴⁹¹ coupled with better communication between authorities and a reinforcement of the role of Eurojust has been suggested. A common and realistic deadline (of at least 10 days) for the transmission of language-compliant EAWs should also be included⁴⁹², as well as a clarification of the scope of Art. 15 para 2 EAW FD concerning requests for additional information⁴⁹³. The Handbook should also remind the interconnections between different EU instruments⁴⁹⁴. For these recommendations to be effective, it is important to ensure that the revised version of the Handbook is well disseminated. Practitioners have complained that the Handbook is not sufficiently well known, and also stressed the need to make it more user-friendly⁴⁹⁵. Besides, in order to address the specificities of the defence, a parallel Handbook dedicated to defence lawyers should be developed⁴⁹⁶.

I.3 Legislative action

Concerning legislative action, several EU instruments should be put forward.

I.3.i) EU horizontal instrument of general application to MR

First, the adoption of an EU horizontal instrument of general application to MR is recommended. It would address the EAW problems common to other MR instruments, thus improving the coherence that is currently lacking in the field. The current situation affects the functioning, legitimacy and credibility of the MR principle and complicates the task of national legislators⁴⁹⁷. Such a horizontal legislative instrument would tackle the five following issues. An express ground for refusal based on fundamental rights⁴⁹⁸ should be inserted, as well as a reinforced consultation procedure between issuing and executing authorities⁴⁹⁹. A binding proportionality test should be conducted, by the issuing authority, before issuing a decision/order/warrant⁵⁰⁰, together with an explicit invitation/obligation to take into account the alternatives offered by the "EU MR toolbox". Due consideration to available alternative measures, is not merely an aspect of proportionality, but helps raising awareness of the overall picture of the EU area of criminal justice. For these elements, inspiration may be drawn from the clauses agreed upon in the compromise text on the EIO. Two other problems should also be addressed in this instrument: legal remedies and compensation. Concerning the former, and as a first step, a general principle encouraging MSs to provide for an effective legal remedy

⁴⁹¹ See I. 4. (multiple requests).

⁴⁹² See I. 5 (transmission of a translated EAW).

⁴⁹³ See I.6. (ambiguity concerning additional information).

⁴⁹⁴ See below for more details.

⁴⁹⁵ Interview of K. Van der Schaft (NL – see list of interviews in annex)

⁴⁹⁶ See II. 4. (defendants' interests).

⁴⁹⁷ Interview of F. Zeder (AT – see list of interviews in annex).

⁴⁹⁸ See I.1. (ground for refusal based on fundamental rights).

⁴⁹⁹ See I.6. (ambiguity concerning additional information). ; II. 1. (disproportionate EAWs).

⁵⁰⁰ See II. 1 (disproportionate EAWs); II. 2. (EAWs not trial-ready).

against the decision of (non-)execution should be inserted⁵⁰¹. In order to ensure compensation is awarded in cases of unjustified damages arising from the application of the MR principle, two options are conceivable. The most ambitious one would consist of inserting in this same EU horizontal instrument specific and detailed provisions (that were suggested in the previous sections⁵⁰²). However, considering the current difficulty of reaching an agreement on financial issues, it might be wiser to either limit the scope of the right to compensation to misidentification cases or to insert a general principle consecrating the right to compensation, to be later developed in an independent EU horizontal instrument⁵⁰³.

Besides the content of this instrument, its scope, nature, and legal basis all need further attention. An EU legislative instrument of a horizontal scope presents the advantage of reducing the risk of reopening the negotiations of the EAW FD. As regards the nature of the text, it should take the form of a directive. As the proposed content will need national transposing measures As to whether or not this directive would amend the existing instruments, three options are available to the EU legislator.

- First, it could decide to formally amend the relevant instruments, including the EAW FD. A formal amendment does not necessarily imply a reopening of the negotiations if one considers the precedent set by the *in absentia* FD. This text explicitly amended several MR instruments, including the EAW FD and it did not lead to a reopening of negotiations.
- Second, another option would be to follow the path set by the procedural rights directives which, while not formally amending the EAW FD, nevertheless contain provisions which substantially adding to it. If this were the preferred option, the horizontal instrument would not amend the MR FDs individually, but would instead co-exist with them. As a result, and taking as an example the EAW FD, the fundamental rights ground for refusal would not be inserted in the EAW FD itself, but would nevertheless be applicable to it via this parallel instrument.
- Lastly, the EU legislator could decide to adopt a horizontal instrument merely clarifying the MR instruments. This option might be valid for some of the reforms proposed. For instance it could be argued that the introduction of an express ground for refusal based on fundamental rights merely constitutes a clarification of Art. 1 para 3 EAW FD to be read together with Recital 12. A similar reasoning could also be applied to the insertion of a binding proportionality test in the issuing state⁵⁰⁴, to the reinforcement of the consultation procedure⁵⁰⁵ and maybe even for a general principle on legal remedies⁵⁰⁶.

⁵⁰¹ See I. 2. (legal remedies).

⁵⁰² It should ensure that national compensation mechanisms are applicable to EAWs cases and other MR mechanisms; it should provide that the person concerned can bring an action in the MS where he/she resides; rules allocating responsibility between MSs should be developed and a dispute settlement mechanism should be envisaged in case no agreement can be reached between the states concerned. See II. 3 Compensation.

⁵⁰³ See II. 3. (compensation).

⁵⁰⁴ Commission, 2011 Evaluation Report, *supra* note 25, p. 3: a EAW “may be issued(...)”.

⁵⁰⁵ The new provision could be seen as reinforcing Art. 10 para 5 EAW FD, which provides that “all difficulties (...) shall be dealt with by direct contacts between the judicial authorities involved”.

⁵⁰⁶ Although the ruling of the ECJ in *Jeremy F* (*supra* note 55, para 51: the FD neither imposes nor forbids an appeal) could maybe constitute an alternative argument.

However, the clarification option might not be applicable to compensation, as there is no provision in the current FD to clarify.

Finally, the legal basis of this horizontal text could be Art. 82 para 1 TFEU. Further reflection may however be needed if compensation was included in the text, as it may encompass civil procedural aspects that might require an additional legal basis⁵⁰⁷.

I.3.ii) Other proposed legislative instruments

The adoption of other EU legislative instruments is also recommended. As it was underlined by many authors and commentators, the issue of conflicts of jurisdiction⁵⁰⁸, the principle of *ne bis in idem* and the transfer of proceedings in criminal matters need to be further developed at EU level, as they are indispensable to ensure the good and smooth functioning of the EAW mechanism and more generally of the MR principle⁵⁰⁹.

Besides, the work on the approximation of procedural guarantees of suspects and accused persons, although welcome, needs to be further pursued. Besides the three directives already adopted⁵¹⁰, three new proposals have been put forward by the Commission⁵¹¹. Particularly important for the good functioning of the EAW is the proposal on legal aid. Attention should be placed on ensuring its rapid adoption and the quality of its provisions, as it is vitally important to an effective dual representation⁵¹². Anyhow, the EU should go further and other initiatives should follow, relating for instance to pre-trial detention and detention conditions. The need to pursue the efforts that were initiated with the publication of the Green Paper in the field of detention in 2011 is of crucial importance to the functioning of the EAW⁵¹³.

II. Some challenges ahead

II.1 Lack of reliable data

While conducting our research, the lack of reliable statistics and data on the functioning of the EAW system was an important obstacle. For example, whereas in MSs like the Netherlands, where proceedings are centralised, reliable figures are available⁵¹⁴, this is not the case in most of the other MSs⁵¹⁵. Moreover, access to the basic materials, i.e. national judicial decisions relating to the EAW also proved difficult⁵¹⁶. Thus, a preliminary suggestion relates to the need to develop better tools for data gathering. In this regard, the EU should fund the establishment of an EU national case-law database concerning the EAW and other MR instruments would constitute a clear improvement facilitating the identification of recurring, common problems. Such a tool would also help bring national practices closer together and provide useful information and source of

⁵⁰⁷ i.e. the one in Chapter 3, Title V, Part III of the TFEU relating to judicial cooperation in civil matters, or like in Directive 2004/80/EC based on Art. 303 EC (now Art. 352 TFEU).

⁵⁰⁸ Kert, "The implementation and application of MR instruments in Austria", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 45.

⁵⁰⁹ See I. 4. (Multiple requests).

⁵¹⁰ (Interpretation and translation, letter of rights and access to a lawyer)

⁵¹¹ (i.e. presumption of innocence, legal aid and protection of children, see supra notes 410 and 411).

⁵¹² See II. 4. (Defendants' rights).

⁵¹³ See II. 5. (overuse of pre-trial detention and detention conditions).

⁵¹⁴ IRC, Annual Report, *Europees Aanhoudingsbevel, Managementgegevens over de periode: 2011*, supra note 425. The existence of such reports is based on Art. 70 of the Dutch Surrender Act.

⁵¹⁵ See for instance the case of Belgium.

⁵¹⁶ See again the case of Belgium for instance

inspiration for defence lawyers⁵¹⁷. The collected data should be regularly updated and thoroughly analysed. Such analysis could for instance concern the grounds for refusal used by national authorities. A better and objective assessment of such a use is indeed crucial to highlight the main obstacles and difficulties encountered in the EAW's practical application. An EU national case-law database would also be interesting in the context of an assessment of MR in general and give food for thought for a reflection on its future.

The best would be to entrust the implementation of this project to a group of independent academic experts throughout the EU, who would collect, update and analyse the information with a special focus on the main common difficulties encountered in the practical application of MR instruments. Such a project should be complemented by regular evaluation reports by Eurojust, who should issue recommendations on the basis of the difficulties encountered in its operational activities⁵¹⁸.

II.2 Variable geometry

One of the ideas that kept coming up during the drafting of this research paper was the establishment of the EU area of criminal justice as a coherent and consistent system with weights and counterweights. The complementarity among the different instruments of the EU area of criminal justice, among the various MR instruments on the one hand and, on the other hand, among MR and approximation of procedural guarantees, is essential. Variable geometry constitutes one of the main challenges for the establishment of a consistent EU area of criminal justice. Allowing MSs to « escape » from some parts of a consistent system creates risks and entails the danger of severe imbalances, compromising the establishment of a true area of criminal justice.

Such risk appears clearly when considering the links and interactions between MR instruments. For instance this research paper has pointed at the complementary relationship between the EAW FD and the probation measures FD⁵¹⁹ (see especially II.1). If correctly transposed and implemented, probation measures could constitute an alternative to EAWs. However, the UK government did not include this FD in the list of instruments⁵²⁰ to which it would like to opt back into⁵²¹. This non-inclusion is all the more paradoxical as the UK is one of the most critical vis-à-vis the overuse of EAWs. Similarly, the EIO has the potential to reduce recourse to EAW⁵²². However, the measure may also

⁵¹⁷ See I.4.

⁵¹⁸ Interview of L. Hamran and M. Ernest (SK – see list of interviews in annex). The methodology can be similar to the one followed in the study concerning Eurojust's action against Trafficking in Human Beings, in which it notably “highlights the main problems encountered by the national authorities in prosecuting THB and attempts to present solutions for addressing these difficulties” (Eurojust, *Strategic Project on Eurojust's action against THB*, Oct. 2012, p. i).

⁵¹⁹ See especially II.1

⁵²⁰ Commons Library Standard Note, *In brief: the 2014 bloc opt-out and selective opt-back-ins*, 15 July 2013, [SN06684](#).

⁵²¹ According to Art. 10 para 4 Protocol 36, the UK notified on July 24th 2013 that it does not accept, with respect to the acts in the field of police cooperation and judicial cooperation adopted before the entry into force of the Lisbon Treaty, the powers of the institutions (Commission, Court of Justice). By virtue of Art. 10 para 5 of the same Protocol, the UK authorities have then indicated that the UK would seek to opt back into 35 measures. Council Doc. No 12750/13, 26 July 2013). This list of 35 measures is currently debated before both Houses of Parliament.

⁵²² See II.1. (disproportionate EAWs), p...

lead to variable application. Whereas the UK opted-in before its adoption⁵²³, Ireland has not⁵²⁴, and it remains to be seen whether it will once the text is adopted. Moreover, according to Protocol No 22, Denmark does not take part in the adoption of any proposed AFSJ measures.

The danger of imbalance also appears when considering the link between MR and approximation of national procedural laws. This link is clearly established in Art. 82 TFEU which explicitly subordinates the approximation of procedural laws to the facilitation of MR and judicial cooperation. It was the UK itself who insisted in including this link in the Treaties⁵²⁵. How can the EU simultaneously adopt instruments aiming at approximating national criminal procedures, recognized them as necessary for the smooth functioning of MR, while at the same time allowing certain MSs to refuse to take part in them? A symptomatic example of this situation concerns the right of access to a lawyer Directive, which ensures that the person subject to an EAW has access to a lawyer in the executing state and is informed of his/her right to appoint a lawyer in the issuing state⁵²⁶. Neither Ireland⁵²⁷ nor the UK⁵²⁸ opted-in before the adoption of the text and their participation after adoption remains unclear. As said before, Denmark is in any event out of post-Lisbon Title V measures.

Such examples raise the question of the limits to the *pick and choose* possibility. These limits indeed exist and must be taken into consideration. A first limit is to be found in Art. 10 para 5 of Protocol 36 on transitional provisions. According to this provision, the UK may re-opt in, but only after authorization of the Council⁵²⁹ and “without seriously affecting the practical operability of the various parts [of the *acquis* of the EU in the AFSJ], while respecting their coherence”. Such wording could be used by the MSs to subordinate UK’s re-opt in the EAW FD to its participation in other relevant instruments, such as the probation decisions FD. A second limit resides in Art. 4a para 2 of Protocol 21. According to this provision, if the Council determines that the non-participation of the UK, makes the application of amending measures inoperable for other MS or the EU, and if the UK does not notify its wish to participate, neither the amended measure nor its previous version would be binding upon or applicable to it. This provision can work as a strong incentive for the UK to participate in the amending measures. The recommended horizontal instrument would benefit from this limit, if the EU legislator chose to formally amend the existing MR instruments. Lastly, in the application of the *pick and choose* limits, two interesting ECJ rulings, both named *UK v Council*, should be taken into account⁵³⁰. Even though these judgements concern the Schengen Protocol, the Court insisted on the

⁵²³ Secretary of State for the Home Department, [Report to Parliament on the Application of Protocols 19 and 21 to the TEU and the TFEU in relation to EU JHA matters](#) (1 Dec. 2009 – 30. Nov. 2010), Jan. 2011, p. 4.

⁵²⁴ Houses of the Oireachtas, Joint Committee on European Scrutiny, Sixth Report, [Special Report on New EU Legislation](#), 1 Jan. to 30 June 2010, Nov. 2010, p. 225.

⁵²⁵ See in this regard Mitsilegas, “The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU”, (*CMLR*, Vol. 43, 2006) p. 1278 – 1279.

⁵²⁶ Art. 10 access to a lawyer Directive.

⁵²⁷ Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality, [Session](#) of 26 Oct. 2011.

⁵²⁸ Lord Chancellor and Secretary of State for Justice and the Secretary of State for the Home Department, [Report to Parliament on the Application of Protocols 19 and 21 to the TEU and the TFEU in relation to EU JHA Matters](#) (1 Dec. 2010 – 30 Nov. 2011), Jan. 2012, p. 9.

⁵²⁹ As provided for by Art. 4 of Protocol 19 on the Schengen *acquis*.

⁵³⁰ See the decisions of ECJ, Case C-77/05, *UK v. Council* (Frontex Regulation) [2007] and Case C-482/08, *UK v. Council* (Decision concerning access to VIS) [2010].

importance of maintaining the coherence of the *acquis*⁵³¹ and concluded that MS legitimately refused to authorize the participation of the UK in the relevant measures (i.e. Frontex Regulation⁵³² and Decision concerning access to VIS⁵³³).

III. In the longer run... Codification v. Consolidation

In an overall perspective, a final and vital remark needs to be made. Bearing in mind the EU objective of attaining a complete area of criminal justice, the previous recommendations must be understood as a first step towards a more ambitious goal. If the above-mentioned suggested legislative measures were adopted, stronger coherence among MR instruments would be attained, and some of the identified gaps would be filled in. In the long run, however, this would be insufficient. These developments should be seen as preparing the ground for more ambitious action and creating a favourable environment for a future codification and consolidation of these instruments⁵³⁴. Indeed, putting all MR instruments together into one single text would be desirable⁵³⁵, putting an end to the proliferation of FDs/directives leading to a legislative mosaic of fragmented instruments⁵³⁶ that is needlessly confusing for practitioners. A single text should ideally take the form of a regulation, guaranteeing that the same legal framework governing MR applies throughout the EU area of criminal justice. This codification should take place only once the MR landscape is complete. This will only be the case once legislative instruments on disqualifications are adopted⁵³⁷, the abovementioned gaps are filled-in (especially conflicts of jurisdiction, *ne bis in idem*, transfer of proceedings) or the problem of admissibility of evidence is solved.

A codification and consolidation exercise could take a more or less ambitious form:

- A shy approach would be limited to putting together all MR instruments, consolidating them on the basis of the already adopted amendments. This option

⁵³¹ ECJ, Case C-482/08, *ibidem*, para 48.

⁵³² Council, Regulation 2007/2004 of 26 Oct. 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the MSs of the European Union, OJ L 349, 25 Nov. 2004, p.1.

⁵³³ Council, Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of MSs and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218, 13 Aug. 2008, p. 129.

⁵³⁴ Kert, "The implementation and application of MR instruments in Austria", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 45.

⁵³⁵ Spencer, "MR of decisions in criminal justice and the UK", p. 548 and Ligeti, "The principle of MR in criminal matters in Hungary", p. 280, both in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*

⁵³⁶ Braum, "Les apports de la reconnaissance mutuelle à la coopération judiciaire pénale et ses déficits. Bilan de l'expérience luxembourgeoise", in *ibidem*, p. 381 - 382

⁵³⁷ In spite of the fact that work on disqualifications has been repeatedly announced (Commission, MR of Final Decisions in Criminal Matters, COM (2000) 495, 26 July 2000, p. 15; Programme of measures to implement the principle of MR of decisions in criminal matters, p. 18, OJ C 12, 15 Jan. 2001, p. 10; European Council, The Stockholm Programme, 2010/C 115/01, pp. 12 - 13, OJ C 115, 4 May 2010, p. 1; and Commission, Action Plan Implementing the Stockholm Programme, COM (2010) 171 Final, 20 April 2010, p. 19), so far only a Convention of the EU on driving disqualifications of 17 June 1998 (OJ C 216 10 July 1998, p. 1 ff) and a Commission Communication on disqualifications arising from criminal convictions in the EU (COM (2006) 73, 21 Feb. 2006) have been adopted. The question of disqualifications is *un problème épineux laissé en friche après la communication de la Commission* (Vernimmen-Van Tigelen and Surano, "Analyse transversale", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 551).

would present the advantage of avoiding a reopening of the negotiations of the MR instruments but will miss the opportunity to further improve coherence among them.

- A second and more ambitious option would be to profit of the codification and consolidation opportunity to answer the pressing need for improving the readability and clarity of MR mechanisms, particularly noticeable where elemental issues are dealt with in different ways⁵³⁸. However, if this was the preferred option, the re-opening of the negotiations on the MR instruments would be unavoidable. The objective pursued would not be to attain complete uniformity among the provisions relating to MR instruments⁵³⁹, but to create a common general path for all MR instruments followed by specific provisions for each area⁵⁴⁰. Indeed, certain differences are justifiable in order to reflect the specificities of each aspect of MR. However, serious reflection must be devoted to the task of identifying them. For example, reflection is needed in order to determine whether the distinction between grounds for refusal or, whether their mandatory and optional nature is to be kept, considering that the distinction made in the EAW FD is not mirrored in other MR instruments⁵⁴¹. The question of legal remedies, including the definition of horizontal rules valid for MR in general, should be further investigated as well. This consolidation/codification exercise may also be the opportunity to better develop the articulation between different mechanisms of MR, notably by determining the priority and the application sequence of the form of cooperation in criminal proceedings⁵⁴². It could also be the occasion to reflect on the articulation of Art. 29 EAW FD relating to the transmission of evidence with the MLA instruments, as its usefulness is questioned with the entry into force of the EIO directive. Last but not least, the negotiations of this instrument could offer an occasion to solve the thorny problem of the language regime in judicial cooperation in criminal matters.

⁵³⁸ Spencer, "MR of decisions in criminal justice and the UK", p. 548 and Ligeti, "The principle of MR in criminals matters in Hungary", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 548.

⁵³⁹ Against such uniformity, and the need to maintain some differences, see Suominen, *op. cit.*, pp. 373 - 374.

⁵⁴⁰ Kert, "The implementation and application of MR instruments in Austria", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 45.

⁵⁴¹ Kert, "The implementation and application of MR instruments in Austria", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 27. Moreover if this distinction is kept for the future, a clarification of "optional" ground for refusal is needed, namely whether it is optional for the legislator and/or the national judges.

⁵⁴² Švedas and Mickevičius, "Future of MR in criminal matters in the EU: Lithuania", in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 357.

Annex – List of interviews

- **DISCLAIMER** - The interviewed practitioners stressed that their responses reflect their personal opinion, and do not constitute the official position of their MS/institution.

- Monday 7 October
 - o Vincent Jamin, Head of JITs Network Secretariat, Eurojust.
 - o José Eduardo Guerra, National Member for Portugal, Eurojust (PT).
 - o Sylvie Petit-Leclair, National Member for France, Eurojust (FR).
- Wednesday 9 October
 - o Daniel Flore and Nathalie Cloosen, SPF Justice (BE).
- Sunday 13 October
 - o Francisco Jiménez-Villarejo, National Member for Spain, and Vice-President, Eurojust (ES).
- Tuesday 15 October
 - o Sylvie Petit-Leclair, National Member for France, Eurojust (FR).
 - o Raoul Ueberecken, JHA Counsellor, Permanent Representation to the EU (LU).
 - o Ola Lofgren, Chief of the International Unit of the General Prosecutor Office (SE).
- Wednesday 16 October
 - o Michael Švarc, JHA Counsellor, Permanent Representation of the Czech Republic to the European Union (CZ).
- Thursday 17 October
 - o Joddie Blackstock, Director of Criminal and EU Justice Policy, JUSTICE.
 - o Dr Tomasz Ostropolski, Head of Unit, European Criminal Law, Department of Criminal Law, Ministry of Justice (PL).
 - o Pedro Caiero, Professor of Criminal Law, University of Coimbra (PT).
- Monday 21 October
 - o Jan Van Gaever, substitut du procureur général près la cour d’appel de Bruxelles (BE).
- Wednesday 23 October
 - o Stefaan Guenter, avocat général près la cour d’appel de Gand (BE).
 - o Thomas Lamiroy, federal prosecutor (BE).
- Tuesday 5 November
 - o Fritz Zeder, Head of Criminal Law Division, Ministry of Justice (AT).
 - o Eugenio Selvaggi, General Prosecution Office at the Italian Supreme Court, Department for Internal and International Affairs (IT).
- Friday 8 November
 - o Tricia Harkin, Judicial co-operation in criminal matters, and Jesca Bener, Procedural Criminal Law, DG Justice, European Commission.

- Wednesday 13 November
 - o Libby Mc Veigh, Fair Trials International.
- Monday 9 December
 - o Sandra Casale, legal adviser, Direction de l'information policière opérationnelle (SIRENE), Federal Police (BE).
 - o Martin Van Steenbrugge, Commissioner, Chief FAST, DGJ DJF FAST, and Eric Clavie, Commissioner, responsable adjoint, DGJ DJF OCDEFO, Federal Judicial Police (BE).
 - o Zsuzsanna Felkai-Janssen, and Dominique Klein, Head of Sector, Unit C large scale IT system, DG Home Affairs, European Commission.
- Tuesday 10 December
 - o James MacGuill, and Peter McNamee, Council of Bars and Law Societies of Europe (CCBE).
- Friday 13 December
 - o Gisèle Vernimmen - Van Tiggelen, collaborateur scientifique, Université Libre de Bruxelles, and chef d'unité honoraire, European Commission.
- Tuesday 17 December
 - o Ministry of Public Administration and Justice, Hungary (HU).
- Wednesday 18 December
 - o Lukas Stary, National Member for Czech Republic, Eurojust (CZ).
 - o Ladislav Hamram, National Member for the Slovak Republic, and Vice President; and Mário Ernest, Seconded National Expert, Eurojust (SK).
 - o Jesper Hjortenberg, National Member for Denmark, Eurojust (DK).
 - o Jolien C.J.G.B. Kuitert, 'Acting' National Member for the Netherlands, Eurojust and Kasper van der Schaft, Public Prosecutor at the Internationaal Rechtshulp Centrum (IRC/International Legal Assistance Centre) in Amsterdam (NL).
 - o Harri Tiesmaa, National Member for Finland, and his assistant, Eurojust (FI).
 - o Mariana Ilieva Lilova, National Member for Bulgaria, Eurojust (BU).
- Friday 20 December
 - o Christophe Marchand, Defence lawyer (BE).
- Monday 6 January
 - o Dr. Ralf Riegel, Head of Division for International Criminal Law; European and Multilateral Criminal Law Cooperation, Federal Ministry of Justice and Consumer Protection (DE).
- Tuesday 14 January
 - o Robert Roth, Professor, Université de Genève (CH).