



## ENA, areszt tymczasowy, wzajemne zaufanie i pomoc prawna

Seminarium online  
24-26 marca 2021 r. (godziny poranne)

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### Prelegenci

**Constance Ascione Le Dréau**, prawnik, Ascione Le Dréau, Paryż

**Laure Baudrihay-Gérard**, Europe Legal Director, Fair Trials, Bruksela

**Jesca Beneder**, kierownik zespołu ds. zatrzymań i ENA, jednostka prawa karnego procesowego, Dyrekcja Generalna ds. Sprawiedliwości i Konsumentów, Komisja Europejska, Bruksela

**Ramin Farinpour**, starszy prawnik, sekcja europejskiego prawa karnego, ERA, Trier

**Dr Krešimir Kamber**, prawnik, Biuro Jurisconsult, Rejestr Europejskiego Trybunału Praw Człowieka, Rada Europy, Strasburg

**Agnieszka Kluczyńska-Cichocka**, Kierownik Działu Współpracy Międzynarodowej, Krajową Szkołą Sądownictwa i Prokuratury (KSSiP), Kraków

**Cathrin Larimian**, Wspieranie Systemów Praw Człowieka, Współpraca Instytucjonalna i Sieci, Agencja Praw Podstawowych Unii Europejskiej (FRA), Wiedeń

**Dr Giuliana Monina**, kierownik zespołu ds. godności człowieka i bezpieczeństwa publicznego, Instytut Praw Podstawowych i Praw Człowieka Ludwiga Boltzmanna (BIM), Wiedeń

**Mikołaj Pietrzak**, partner, Pietrzak Sidor & Partners, Warszawa

**Dr Matylda Pogorzelska**, kierownik projektu badań prawnych, Dział Badań i Danych, Agencja Praw Podstawowych Unii Europejskiej (FRA), Wiedeń

**Juan Luis Requejo Pagés**, sekretarz prawny, Trybunał Sprawiedliwości Unii Europejskiej, Luksemburg

**Dr Florentino-Gregorio Ruiz Yamuza**, starszy sędzia, sąd apelacyjny w Huelvie; członek hiszpańskiej sieci sądowej na rzecz międzynarodowej współpracy w sprawach karnych

**Tania Schröter**, Zastępca Kierownika Działu Prawa Karnego Procesowego, Dyrekcja Generalna ds. Sprawiedliwości i Konsumentów, Komisja Europejska, Bruksela

**Marcin Wolny**, prawnik, Helsińska Fundacja Praw Człowieka, Warszawa

### Kluczowe tematy

- Rola EKPC i orzecznictwa ETPC i TSUE w zakresie warunków osadzenia i stosowania instrumentów wzajemnej pomocy prawnej.
- Najlepsze praktyki oraz wzajemne zaufanie i uznawanie orzeczeń sądowych.
- Areszt tymczasowy w kontekście postępowania w sprawie ENA i jego wpływ na więzienie i inne warunki w państwach członkowskich UE.
- Nowe narzędzie internetowe FRA pomagające sędziom i innym prawnikom w podejmowaniu decyzji dotyczących ENA i innych decyzji dotyczących instrumentów wzajemnej pomocy prawnej: Europejski system informacji o prawach podstawowych (EFRIS).
- Warsztaty na temat instrumentów wzajemnego uznawania, ENA oraz narzędzi pomocy sędziom i innym prawnikom.

Języki  
angielski, polski

Numer wydarzenia  
321DT28e

Organizatorzy  
ERA (Ramin Farinpour) we współpracy z Krajową Szkołą Sądownictwa i Prokuratury (KSSiP), Radą Europy, Fair Trials oraz Instytutem Praw Podstawowych i Praw Człowieka im. Ludwiga Boltzmanna (BIM)



Przy wsparciu finansowym z programu Unii Europejskiej „Sprawiedliwość” 2014-2020



# ENA, areszt tymczasowy, wzajemne zaufanie i pomoc prawna

## Środa, 24 marca 2021 r.

08:30	Czas połączenia
09:00	<b>Powitanie i wprowadzenie</b> <i>Ramin Farinpour, Agnieszka Kluczyńska-Cichocka</i>
<b>I. EKPC W SPRAWIE ARESZTOWANIA, ORZECZNICTWO ETPC I TSUE</b> <i>Prowadzący: Ramin Farinpour</i>	
09:15	<b>Omówienie kwestii związanych z zatrzymaniami w Europie i poziomem ochrony zapewnianej przez EKPC</b> <i>Giuliana Monina</i>
09:45	Dyskusja
10:00	<b>Warunki osadzenia, tymczasowe aresztowanie i unijne mechanizmy wzajemnego uznawania (ENA i ENN): orzecznictwo Europejskiego Trybunału Praw Człowieka</b> <i>Krešimir Kamber</i>
10:45	Dyskusja
11:00	Przerwa
11:30	<b>Warunki zatrzymania, areszt tymczasowy i ENA: wpływ orzeczeń Trybunału Sprawiedliwości Unii Europejskiej na instrumenty wzajemnego zaufania i wzajemnego uznawania</b> <i>Juan Luis Requejo Pagés</i>
12:15	Dyskusja
<b>II. ARESZT TYMCZASOWY I ENA</b> <i>Prowadzący: Ramin Farinpour</i>	
12:30	<b>Czy ENA jest wdrażany prawidłowo? Najnowsze sprawozdanie i ustalenia Komisji Europejskiej</b> <ul style="list-style-type: none"><li>• Wpływ najnowszych orzeczeń TSUE</li><li>• Efekt Brexitu</li></ul> <i>Jesca Beneder, Tania Schröter</i>
13:15	Dyskusja
13:30	Koniec pierwszego dnia

## Środa, czwartek, 25 marca 2021 r.

09:00	<b>Obsługa ENA: przegląd</b> <ul style="list-style-type: none"><li>• Najlepsze praktyki i doświadczenie w wydawaniu i wykonywaniu ENA</li><li>• Wsparcie oferowane przez Eurojust i EJM</li><li>• Problemy z podwójną karalnością</li></ul> <i>Florentino-Gregorio Ruiz Yamuza</i>
09:45	Dyskusja
10:00	<b>Stosowanie praw proceduralnych określonych w prawodawstwie UE w kontekście ENA, aresztu tymczasowego i zatrzymania</b> <i>Constance Ascione Le Dréau</i>
10:30	Dyskusja
10:45	Przerwa

## Cel

To seminarium internetowe, które jest częścią serii pięciu wydarzeń współfinansowanych przez Komisję Europejską, dotyczących wzmocnienia transgranicznej wzajemnej pomocy prawnej i uznawania decyzji w kontekście zatrzymania, będzie się koncentrować na europejskiej konwencji praw człowieka (EKPC), orzecznictwie ETPC i TSUE dotyczącym warunków pozbawienia wolności i stosowania instrumentów wzajemnej pomocy prawnej.

Nacisk zostanie położony na orzecznictwo, najlepsze praktyki, wzajemne zaufanie i uznawanie orzeczeń sądowych, a także areszt tymczasowy, zwłaszcza w kontekście postępowania w sprawie europejskiego nakazu aresztowania (ENA), oraz jego wpływu na więzienie i inne warunki w państwach członkowskich UE.

## Kto powinien wziąć udział w seminarium?

Sędziowie, prokuratorzy i prawnicy z kwalifikujących się państw członkowskich UE (Dania nie uczestniczy w programie „Sprawiedliwość” 2014–2020) oraz kwalifikujących się krajów kandydujących (Albanii i Czarnogóry).

## Oplata za uczestnictwo i zwrot kosztów

Oplata za uczestnictwo: Udział bezpłatny dla sędziów i prokuratorów, opłata 70 euro dla prawników.

## Interaktywna konferencja online

Seminarium online będzie prowadzone na platformie wideokonferencyjnej Zoom. Zastosowane zostaną najwyższe ustawienia zabezpieczeń, aby zapewnić aktywny udział w dostępnym środowisku wideokonferencyjnym o najwyższej jakości. Uczestnicy będą mogli w czasie rzeczywistym komunikować się z naszymi prelegentami i innymi uczestnikami. W pełni wykorzystamy dostępne narzędzia techniczne, aby zapewnić intensywne, interaktywne szkolenie.

- 11:15 **Kwestie i wyzwania związane z ENA i aresztem tymczasowym z punktu widzenia prawnika**  
*Mikołaj Pietrzak*
- 11:45 Dyskusja
- 12:00 **Rozwiązanie problemu nadużywania aresztu tymczasowego i nieproporcjonalnego stosowania ENA z alternatywnymi mechanizmami transgranicznymi: spostrzeżenia z projektu EAW-ALT**  
*Laure Baudrihayé-Gérard*
- 12:45 Dyskusja
- 13:00 Koniec drugiego dnia

## Środa, czwartek, piątek, 26 marca 2021 r

- 09:00 **Prawa człowieka i wzajemne uznawanie orzeczeń sądowych w Unii Europejskiej: bliższe spojrzenie na proporcjonalność, areszt tymczasowy, warunki zatrzymania i współpraca z organami sądowymi innych państw członkowskich**  
*Marcin Wolny*
- 09:30 Dyskusja
- 09:45 **Narzędzia internetowe FRA pomagające sędziom i innym prawnikom w podejmowaniu decyzji dotyczących ENA i innych instrumentów wzajemnej pomocy prawnej**
- Europejski system informacji o prawach podstawowych (EFRIS)
  - Baza danych zatrzymań karnych 2015-2019
- Matylda Pogorzelska, Cathrin Larimian*
- 10:15 Dyskusja
- 10:30 Przerwa

### III. RÓWNOLEGLE WARSZTATY

*Prowadzący: Ramin Farinpour*

- 11:00
- **Prawidłowe stosowanie ENA za pomocą studiów przypadku** (*Florentino-Gregorio Ruiz Yamuza*)
  - **Ograniczenie stosowania aresztu tymczasowego w kontekście ENA i alternatywnych mechanizmów transgranicznych** (*Laure Baudrihayé-Gérard*)
  - **Narzędzia i bazy danych online pomagające sędziom i innym prawnikom wykonywać ENA i inne decyzje dotyczące instrumentów wzajemnej pomocy prawnej** (*Matylda Pogorzelska, Cathrin Larimian*)
- 12:30 Relacje z warsztatów i dyskusja uczestników
- 13:00 Zakończenie seminarium internetowego

Aktualny program na: [www.era.int](http://www.era.int)  
Program może podlegać zmianom.

Zapisz się online na to seminarium:  
[www.era.int/?130452&de](http://www.era.int/?130452&de)

### Osoba kontaktowa



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Tel.: +49 (0)651 9 37 37 321

### CPD

Programy ERA spełniają standardowe wymagania ustawicznego doskonalenia zawodowego (CPD). To zdarzenie odpowiada **11 godzinom CPD**.



Seminarium współfinansowane w ramach programu „Sprawiedliwość” (2014-2020) Unii Europejskiej

Treść tego programu odzwierciedla wyłącznie poglądy autora i jest jego / jej wyłączną odpowiedzialnością. Komisja Europejska nie ponosi żadnej odpowiedzialności za wykorzystanie zawartych w niej informacji.



**Godziny wg czasu  
środkowoeuropejskiego**

## Seminarium online

ENA, areszt tymczasowy, wzajemne zaufanie i pomoc prawna

24-26 marca 2021 / Numer wydarzenia: 321DT28e



Europäische Rechtsakademie  
Academy of European Law  
Académie de Droit Européen  
Accademia di Diritto Europeo

### Warunki uczestnictwa

#### Selekcja

1. Seminarium jest skierowane do sędziów, prokuratorów i prawników prowadzących prywatne praktyki z kwalifikujących się państw członkowskich UE (Dania nie uczestniczy w programie „Sprawiedliwość” 2014–2020) i krajów kandydujących do UE (Albanii i Czarnogóry).
2. Liczba miejsc ograniczona (40 miejsc). Udział będzie podlegał procedurze selekcji.
3. Zapisy na seminarium przyjmujemy do **14 marca 2021 r.**
4. Każda z osób zainteresowanych otrzyma odpowiedź po upływie terminu zapisów. Udział podlega procedurze selekcji.

#### Opłata za rejestrację

5. Udział bezpłatny dla sędziów i prokuratorów. Uczestnicy otrzymają materiały.
6. Opłata dla prawników razem z materiałami: 70 EUR.

#### Udział

7. Wymagany jest udział w całym seminarium, a obecność uczestników zostanie zarejestrowana.
8. ERA udostępni wszystkim uczestnikom listę uczestników wraz z adresami, chyba że nie później niż na tydzień przed rozpoczęciem wydarzenia otrzyma od danego uczestnika pisemny sprzeciw.
9. Adres uczestnika i inne istotne informacje będą przechowywane w bazie danych ERA w celu dostarczania informacji o przyszłych wydarzeniach ERA, publikacjach i / lub innych wydarzeniach w obszarze zainteresowań uczestnika, chyba że uczestnik nie wyrazi na to zgody.
10. Zaświadczenie o uczestnictwie zostanie wydane po seminarium.

Zapisz się online i weź udział w seminarium „**ENA, areszt tymczasowy, wzajemne zaufanie i pomoc prawna**”:

[www.era.int/?130452&de](http://www.era.int/?130452&de)

#### Języki

angielski, polski

#### Osoba kontaktowa

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25<sup>th</sup> March 2021

# THE APPLICATION OF PROCEDURAL RIGHTS FRAMED IN EU LEGISLATION WITHIN THE CONTEXT OF EAWs, PRE-TRIAL DETENTION AND DETENTION

ERA ONLINE SEMINAR



Co-funded by the Justice  
Programme of the European Union 2014-2020

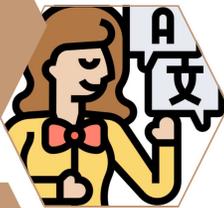


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## INTRODUCTION

### 6 PROCEDURAL RIGHTS DIRECTIVES

Interpretation  
and  
translation  
(2010)



Access to a  
lawyer  
(2013)



Presumption  
of innocence  
and right to be  
present at trial  
(2016)



Right to  
information  
(2012)



Procedural  
safeguards for  
children  
(2016)



Legal Aid  
(2016)



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## INTRODUCTION



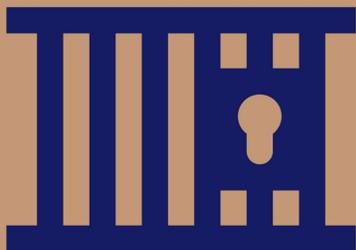
## EAWs IN A NUTSHELL

- | Framework decision adopted in 2002, modified by 2009 framework decision => EAW FD
- | National arrest warrant + decision made by a judicial authority (**issuing MS**)
  - Purpose: to investigate or to serve a criminal sentence
- | Shared with all EU MS – Mutual recognition
- | Upon arrest in another MS, extradition (**executing MS**)



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## INTRODUCTION



## PRE-TRIAL DETENTION (PTD) AND DETENTION IN EAW PROCEEDINGS

- | Rationale behind the EAW: to arrest someone who supposedly took flight
- | PTD: pending extradition and pending trial
- | Detention: to serve a final sentence
- | Either in the issuing or the executing MS



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## INTRODUCTION



### IMPORTANCE OF PROCEDURAL RIGHTS IN THE CONTEXT OF EAWs

- | Vulnerability of people targeted by EAW proceedings
- | Further increased by PTD and detention, which are very likely
- | Mutual Trust
  - EAW FD, rec.10 : “The mechanism of the EAW is based on a **high level of confidence** between MS(…)”



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*Do EU procedural safeguards effectively protect those who are subject to EAWs, particularly when they are being detained?*



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# OUTLINE



1  
Right to interpretation and translation

2  
Right to information

3  
Access to a lawyer and legal aid

4  
Presumption of innocence

5  
Right to be present at the trial

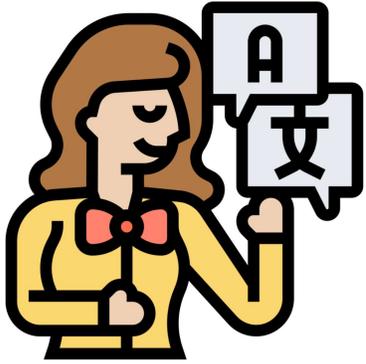
1

# RIGHT TO INTERPRETATION AND TRANSLATION



# 1/5- RIGHT TO INTERPRETATION AND TRANSLATION

## A) INTERPRETATION



| Art.11, EAW FD: right to be assisted by an interpreter *“in accordance with the national law of the executing MS. »*

| Art.2, Directive 2010/64/EU (interpretation and translation)

- Expressly applicable to EAW proceedings (§7.)
- Without delay, before investigative and judicial authorities, including police questioning, court hearings and interim hearings
- Communication with legal counsel
- Possibility to challenge refusal to grant interpretation
- Possibility to complain about quality



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# 1/5- RIGHT TO INTERPRETATION AND TRANSLATION

## A) INTERPRETATION



| Quality of interpretation

- Issue in the EU – EULITA’s work
- How realistic and efficient is it to complain?

| Timing and availability of interprets



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# 1/5- RIGHT TO INTERPRETATION AND TRANSLATION

## A) TRANSLATION

| Art. 8, EAW FD: EAW must be translated into the official language of the executing MS

| Directive 2010/64/EU (interpretation and translation)

▪ Art.3 (together with Art.1 on scope):

- Written translation of the EAW in a language the person understands
- All documents “*which are essential (...) to exercise their right of defence and to safeguard the fairness of the proceedings*”
- Decisions depriving a person of his liberty
- Quality and fairness of proceedings
- Exceptions: oral translation or oral summary



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# 1/5- RIGHT TO INTERPRETATION AND TRANSLATION

## B) TRANSLATION

| Exceptions and oral translations

- Decisions on detention should be excluded



| Quality of translations

| Timing:

- Should be simultaneous
- Often, no time limit



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# 2

## RIGHT TO INFORMATION



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### 2/5- RIGHT TO INFORMATION



- | Art.8 and 11, EAW FD:
  - Information of the EAW + its contents
  - Information about the possibility of consenting to surrender
  - Information on the offence: legal classification, circumstances, penalty imposed
  
- | Directive 2012/13/EU (right to information)
  - Art.4 and 5: Letter of rights (upon arrest)
  - ~~Art.6: info about accusation~~
  - ~~Art.7: access to the materials of the case~~

CJEU, 28th January 2021 (C649/19)



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## 2/5- RIGHT TO INFORMATION

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- | Extradition as a prerequisite to some rights?
- | Challenging the lawfulness of detention
- | Question of access to the casefile



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3

ACCESS TO A LAWYER AND LEGAL AID



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## 3/5- ACCESS TO A LAWYER AND LEGAL AID

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### B) ACCESS TO A LAWYER



| Art. 11, EAW FD: right to be assisted by a legal counsel

| Directive 2013/48/EU (access to a lawyer)

- Art.10: dual representation, in the executing and issuing MS

## 3/5- ACCESS TO A LAWYER AND LEGAL AID

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### B) LEGAL AID

| Art.5, directive 2016/1919/EU (legal aid): right to legal aid in the issuing and executing MS

- Can be subject to a means test
- *“in so far as legal aid is necessary to ensure effective access to justice”*



## 3/5-ACCESS TO A LAWYER AND LEGAL AID

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- | Effective assistance
  - Training & specialization
  - Language
  - Legal aid
- | Dual representation
  - LEAP and ECBA networks
  - Timing

# 4

## PRESUMPTION OF INNOCENCE

## 4/5-PRESUMPTION OF INNOCENCE

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### | Directive 2016/343/EU

- No specific mention of the EAW in the directive
- Right to presumption of innocence during pre-trial and trial stage
- Right to remain silent and not to self-incriminate

## 4/5-PRESUMPTION OF INNOCENCE AND RIGHT TO BE PRESENT AT THE TRIAL

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- | Disproportionate EAWs effectively violate the right to presumption of innocence
- | Overuse of pre-trial detention violates the right to presumption of innocence

# 5

## RIGHT TO BE PRESENT AT THE TRIAL



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### 5/5-RIGHT TO BE PRESENT AT THE TRIAL

#### | EAW FD

- Art.4a: optional ground for refusal if the person did not attend the trial in person unless
  - Clear information about the trial
  - Legal Representation
  - Effective service of the decision and express waiver
  - Service to take place after the surrender and right to re-trial or appeal
- Pending re-trial: PTD

#### | Directive 2016/343 (presumption of innocence)

- Right to be present at trial



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## 4/5-PRESUMPTION OF INNOCENCE AND RIGHT TO BE PRESENT AT THE TRIAL

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| Law of the issuing MS and need for dual representation

| Right to re-trial and risk of PTD



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## CONCLUSION

| Robust EU legislation on procedural rights, including in the context of EAWs, pre-trial detention and detention

| Growing awareness of the need to reform this efficient tool

| EAW as the EU procedural rights banner?



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# THANK YOU !



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Get in touch : [cald@ascioneledreau.com](mailto:cald@ascioneledreau.com)



**Fair  
Trials**

**Addressing the overuse of pre-trial detention and  
the disproportionate use of EAWs with alternative  
cross-border mechanisms:  
Insights from the EAW-ALT project**

Laure Baudrihaye-Gerard



Co-funded by the Justice Programme of the European Union 2014-2020



[www.fairtrials.org](http://www.fairtrials.org)    @fairtrials    FairTrials

1

## Structure of the presentation

- Overview of the EAW-ALT project
- The problems with the EAW
- Pre-trial alternatives to the EAW:
  - European Supervision Order
  - European Investigation Order
- Post-trial alternatives to the EAW:
  - European Probation Orders
  - Transfer of Prisoners
- Key challenges and recommendations



2

## Overview of the EAW-ALT project

- Research in 2020:
  - Statistical data collection
  - Surveys
  - Qualitative interviews
  - Legal analysis
- Countries covered: Austria, Belgium, Greece, Ireland, Luxembourg
- Funded by the EU Justice Programme



3

## Disproportionate use of EAWs?

- Statistics are not complete, but show steady increase since entry into force in 2004 to **17,471 EAWs issued in 2018**
  - European Commission implementation assessment [report](#) July 2020
  - European Parliament implementation assessment [report](#) June 2020
- Key long-standing and outstanding concerns:
  - Fundamental rights concerns linked to prison conditions
  - Main category of offences: theft and criminal damage - reports of use for minor offences (no proportionality test)
  - Use for investigation (instead of prosecution)
  - Use before a case is trial ready (resulting in longer time in pre-trial detention)
- Despite EU Procedural Safeguards Directives, soft-law and alternative instruments in cross-border proceedings (limited take-up well-documented cf. EU Fundamental Rights Agency [report](#) of 2016)



4

## Gaps in the EAW Framework Decision

- Lack of proportionality assessment:
  - No explicit requirement for the *issuing* state to conduct proportionality checks
  - As for the *executing* stage, the EAW Framework Decision does not explicitly allow countries to refuse to execute the EAW when they believe that its use is disproportionate and/or that less restrictive instruments are available
- Article 12 of the EAW Framework Decision envisages alternative measures to prevent the person from absconding before surrender (e.g. obligation to report to the police, travel ban, probation orders, bail, house arrest):
 

*“When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding”*

→ Presumption of detention rather than release?



5

## Implications on fundamental rights

- Judicial cooperation in criminal matters (Article 82(1) TFEU) is based on the principle of mutual recognition of judgments and judicial decisions → that principle is itself based on mutual trust and on the rebuttable presumption that other Member States comply with EU law and, in particular, fundamental rights
- Article 1(3) of the EAW Framework Decision: must not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, as enshrined in inter alia the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional traditions common to the Member States
- Charter of Fundamental Rights of the European Union (the Charter):
  - Article 48: presumption of innocence and rights of defence in criminal proceedings
  - Article 52: any limitation of such rights must fully conform with the requirements of necessity, proportionality and protection of the rights and freedoms of others
  - Article 6 enshrines the right to liberty
- CJEU case-law:
  - Judges must not surrender someone under an EAW if the requested person faces a real risk of ill-treatment due to poor prison conditions: Joined Cases C-404/15 Aranyosi and Căldăraru and C-659/15 PPU
  - Judges must not surrender someone under an EAW if the requested person faces a real risk of unfair trial: , Case C-216/18 PPU, LM

**In 2018, fundamental rights issues led to refusals to execute EAWs in 82 cases (European Commission)**



6

## Discriminatory impact of detention

- Despite ECHR standards, well-documented judicial practice to consider foreign nationality and/or foreign residence as a determining factor in the risk of flight and evasion of justice
- In the cross-border context, non-residence is perceived as an indicator of absconding risk which can lead to higher detention rates among non-residents
- Non-nationals and non-residents are facing pre-trial detention, when in similar circumstances a citizen resident in the same state would not be subject to such a restrictive measure → they are at greater risk of being detained pending trial than home nationals simply because they are from a different EU state or have exercised their right to free movement within the EU
- Unjustified and disproportionate use of pre-trial detention infringes the presumption of the individual's innocence and their right to liberty
- Pre-trial detention of individuals based on their status as a non-resident is also a violation of the right to equality before the law, which prohibits discrimination on the basis of nationality or residence

**Free movement with EU: non-residents should not be treated differently from residents**



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## PRE-TRIAL ALTERNATIVES (1): EUROPEAN SUPERVISION ORDER

- European Supervision Order 2009/829/JHA ('ESO')
- Allows a judicial authority in a Member State, where a person is suspected of having committed an offence, to ask the state where the person is resident to monitor compliance with pre-trial supervision measures, consisting of specific prohibitions or obligations in anticipation of the trial being held
- This allows a suspected person to remain in their state of residence, under supervision measures, until the trial takes place in the issuing Member State – instead of facing surrender under an EAW and pre-trial detention in the issuing Member State



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## Types of supervision measures

Article 8 of the ESO Framework Decision:

- An obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings
- An obligation not to enter certain localities, places or defined areas in the issuing or executing State
- An obligation to remain at a specified place, where applicable during specified times;
- An obligation containing limitations on leaving the territory of the executing State
- An obligation to report at specified times to a specific authority
- An obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed



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## AIMS OF THE EUROPEAN SUPERVISION ORDER

- Prevent discrimination between those who are residents in the trial State and those who are not : the EU aims to ensure that people live in an area of freedom, security and justice, without internal frontiers → Accordingly, people need to feel confident that, wherever they move within Europe, their freedom and their security are well protected in full compliance with the EU's values (including fundamental rights and the principle of non-discrimination)
- Encourage social rehabilitation
- Protect fundamental rights including the right to liberty and the presumption of innocence
- Reduce the number of EAWs issued for prosecution

**From the data available, there is limited or no use of the EAW (NB there is no obligation to issue an ESO)**



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## FAILURE OF THE EUROPEAN SUPERVISION ORDER?

- Lack of knowledge amongst practitioners (especially lawyers)
- Too burdensome: the ESO requires constant coordination and communication between the issuing and executing authorities
- Lack of mutual trust in alternatives (versus overreliance on mutual trust regarding the EAW) despite the fact that there is a possibility to issue the EAW to bring back the person to stand trial if he does not fulfil the conditions imposed by the ESO
- Reflects reluctance to rely on alternatives in domestic practice: e.g. *“Either someone can be trusted and pre-trial detention is not necessary; or they cannot and alternative measures will not help”* (prosecutor)
- Lack of institutionalised cooperation
- Lack of harmonisation of alternatives across the EU



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## PRE-TRIAL ALTERNATIVES (2): EUROPEAN INVESTIGATION ORDER

- Directive 2014/41/EU on the European Investigation Order ('EIO')
- Allows authorities in one Member State to collect and transfer evidence to another Member State
- The EIO covers any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team
- States are able to gather evidence across borders without the need to request that individuals be physically transferred, e.g. it allows for testimony to be delivered via video link, reducing the need to transfer people for investigative purposes under an EAW
- EIO applies to all MS except Ireland and Denmark



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## Procedure

- The executing authority must recognise an EIO where it is transmitted in accordance with conditions set in Article 7 of the Directive, without any further formality being required
- The executing authority must execute in the same manner and under the same modalities as if the investigative measure concerned had been ordered by the executing State
- The issuing state may assist in the execution of the EIO in support to the competent authorities of the executing State
- Article 1(3) of the EIO Directive: “[t]he issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure”



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## EIO INSTEAD OF EAW?

- European Commission [Handbook](#) on the EAW (Section 2.5) advises judicial authorities to give due consideration to other possible measures including:
  - EIO for a suspect to be heard via videolink in another MS
  - EIO for a suspect to be heard in another MS by the competent authorities of that MS
- But the CJEU judgment C-584/19 of 8 December 2020 (Grand Chamber) (para. 72): *“It should also be noted that the European investigation order governed by Directive 2014/41 pursues, in the context of criminal proceedings, a distinct objective from the European arrest warrant governed by Framework Decision 2002/584. While the European arrest warrant seeks, in accordance with Article 1(1) of Framework Decision 2002/584, the arrest and surrender of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, the aim of a European investigation order, under Article 1(1) of Directive 2014/41, is to have one or several specific investigative measures carried out to obtain evidence.”*



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## Obstacles in practice

- More widely used but mixed feedback
- Procedure too long and more time-consuming than letters rogatory
- Administrative burden: *“EIO forms are overloaded with information”*
- Difficulties in understanding what investigative measures were requested by the issuing state
- The executing state might not be willing to conduct the requested investigation measure requested given the costs they represent – financially but also in time and human resources
- Interviews of suspects:
  - Informal approach: *“for interviewing witnesses, it is easier to simply organise a videoconference call without using a formal EIO request”*
  - EAWs: some practitioners reported that it is easier to use EAWs to conduct an interview
  - Many practitioners reported a preference to conduct interviews in person rather than via videoconference which some judges considered less efficient → as national arrest warrant and EAW cannot be used for the sole objective of conducting interviews, they often use the Convention on mutual assistance in criminal matters between EU Member States to organise the temporary transfer of the person detained for the purpose of investigation. They find this instrument, which enables the creation of joint investigation teams, easy to use and much more flexible, in particular with neighbouring countries, those sharing the same language or for complex investigations. However, they note that joint investigations teams are only available for police cooperation and they would welcome the creation of joint investigating teams at the judicial level allowing cooperation between investigating judges of different Member States

Trials

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## Impact of alternatives on PTD rates?

- In 2019, approximately 22% of the prison population in Europe is made up of persons in pre-trial detention:
  - Luxembourg: 48.5%
  - Greece: 31.1%
- Overcrowding remains a problem and is driven in part by high pre-trial detention rates - more than 105 inmates per 100 places in Austria, Belgium and Greece
- Growth in PTD rates even during the Covid-19 pandemic – e.g. Ireland

Year	Average number of people held in pre-trial detention
2016	475
2017	541
2018	667
2018	714
2020	761

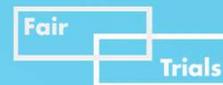
Fair

Trials

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## POST-TRIAL ALTERNATIVES (1): TRANSFER OF PRISONERS

- FD on Transfer of Prisoners 2008/909/JHA (FD Transfer of Prisoners)
- Provides a system for transferring persons with custodial sentences back to their Member State of nationality or habitual residence or to another Member State with which they have close ties
- Also allows for the transfer of prison sentences when the sentenced person is already in that Member State
- Accordingly, individuals can serve their sentence in their home country without being surrendered first to the requesting state under an EAW



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## Obstacles in practice

- Discretion of the issuing Member State
- Some states (e.g. Belgium) make frequent use of this instrument due to the proactive attitude of the administration and in particular the creation of a centralised office in charge of its implementation
- Difficulties in the exchange of information
- Practical challenges:
  1. Calculating the sentence
  2. Adapting alternative sanctions
  3. Determining the habitual residence
  4. The person's consent to the transfer



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## POST-TRIAL ALTERNATIVES (2): PROBATION AND ALTERNATIVE SANCTIONS

- FD on Probation and Alternative Sanctions 2008/947/JHA ('FD PAS')
- Allows for the transfer of a sentenced person to a different Member State to serve a non-custodial measure sentence imposed by the original issuing state
- Provides for the recognition and monitoring of probation measures in a EU Member State other than the one that pronounced the sentence, allowing the person convicted to stay within the community instead of being imprisoned
- Issuing MS issues the probation decision in a standardized certificate → Executing MS supervises the probation measure/alternative sanction (and if necessary adapts the measure)
- Rationale: to facilitate the social reintegration of sentenced persons by allowing the measure imposed on them to be supervised in another EU Member State with which they have the closest ties
- Could also serve as an incentive for judges to issue non-custodial sentences



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## Types of probation measures

obligation to inform a specific authority of any change of residence or working place	obligation to avoid contact with specific objects
obligation not to enter certain localities, places or defined areas	obligation to avoid contact with specific persons
obligation not to leave the territory of the State	obligation to provide financial compensation
instructions relating to behaviour, residence, education and training, leisure activities, or containing limitations on or modalities of carrying out a professional activity	obligation to carry out community service
obligation to report at specified times to a specific authority	obligation to cooperate with a probation officer



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## Obstacles in practice

- Lack of knowledge/familiarity: few practitioners interviewed had experience regarding the FD PAS (particularly lawyers)
- The need for probation services to pass by courts to coordinate probation measures, rather than direct cooperation between probation services
- Language barriers to ensure direct cooperation
- Requirement for the consent of the executing state in certain circumstances was reported as being one of the reasons for not using this instrument
- Delays in transferring the files – up to several months in some cases
- Differences in treatment between EU Member States in the verification and the monitoring of the respect of the probation measures
- Lack of harmonisation of alternative measures (e.g. electronic monitoring, therapy or community service as a non-custodial sentence)
- Legal aid regimes do not cover post-sentencing acts/acts in other MS



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## Key common challenges

- Complexity of EU legal framework on the alternative mutual recognition instruments → each alternative is covered by a different instrument and each instrument has its own set of objectives, conditions, time limits and grounds for refusal: e.g. the obligation to assess the proportionality which is clearly indicated in the EIO while all the other instruments remain silent on this point
- Complexity of implementing national legal frameworks and institutional set-up
- By contrast, most of the practitioners interviewed saw the EAW as a handy measure which is quick to implement and which allows them to have the requested person in front of them



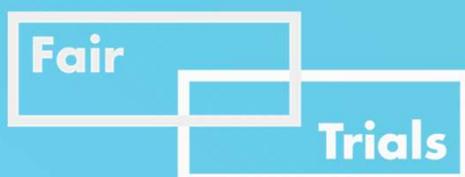
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## Key recommendations

- Need to tackle the detention culture and protect against discrimination through reform of the EAW:
  - Proportionality test
  - Mandatory grounds refusal
- Adopt common minimum standards on pre-trial detention
- Enhance institutional cooperation between all national actors (including lawyers, probation services)
- Implementation of the EU Procedural Rights Directives: Procedural safeguards are essential to enable the requested person to challenge an EAW before surrender and advocate for release or alternative measure → If lawyers are able to provide effective legal assistance and request alternatives measures, they could help limit the excessive use of both EAWs and pre-trial detention and boost the use of alternative measures where restrictions are necessary
- Improve knowledge (handbooks) and trainings
- Digitalisation



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# The latest developments on the European Arrest Warrant (EAW)

ERA, 24 March 2021 

Co-funded by the Justice Programme of the EU

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## European Parliament report on the implementation of the EAW and the surrender procedures between Member States, 2019/2207(INI), 20 January 2021

- Background report
- MEPs support the EAW as a **useful tool to fight crime**
- Certain improvements should be made, through a **targeted legislative review of some provisions** of the EAW Framework decision and a number of **non-legislative** measures

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2



**Council conclusions on the EAW and extradition procedures - current challenges and the way forward adopted on 2 December 2020, 13684/20**

- Guidance to practitioners on detention conditions and cases of alleged risk of breach of right to a fair trial
- Practical solutions, such as templates for information requests under Article 15(2) of the Framework Decision.
- Update Commission Handbook on EAW
- Legislative proposal on the transfer of proceedings in criminal matters.
- Further action in dealing with potentially abusive search and extradition requests from third countries.

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3



**Member States' position**

- Not in favour of re-opening the EAW
- The instrument has been largely successful in its current format
- Further, many issues have in the meantime been clarified by the CJEU
- A revision of the Framework Decision would take the form of a Regulation or Directive reopening discussions on all provisions. There is a risk that many of the virtues of the EAW, such as its efficiency, would be lost

*Justice*

4



**Commission's Implementation report on the EAW, 2 July 2020, COM/2020/270 final**

**Methodology:**  
 Focus primarily on provisions that affect mutual recognition;  
 Practical application not evaluated  
 Await outcome of 9th round of mutual evaluations

**Specific issues:**

- The competent issuing and the executing authorities
- Ground for refusal based on fundamental rights
- Verification of double criminality for non-listed offences
- Grounds for refusal
- Time-limits to take a decision, Article 17
- Time-limits to surrender a person, Article 23

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5



**Infringement proceedings Art. 258 TFEU**

- Letters of Formal Notice

October 2020: IE  
 December 2020: AT, CZ, EE, IT, LT and PL  
 February 2021: CY, DE and SE

- Bilateral meetings with MS

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## Follow-up actions

- Implementation **Procedural Right Directives**, in particular the right of **access to a lawyer** is crucial, especially at early stages of the EAW proceedings.
- Continuing reflections on possible further EU in this area, such as **admissibility of evidence** and **pre-trial detention** and **transfer of proceedings**. Studies on these topics are currently carried out, which will look more closely into problems and the needs for possible EU rules.

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## Follow-up actions

- Focus on the **importance of reliable data**
- Enquiring the possibilities to **expand** the e-evidence Digital Exchange System (**eEDES**) to judicial cooperation instruments, such as the EAW
- Commission **Communication on digitalisation of justice**, together with a proposal for a **Regulation on e-CODEX 2 December 2020**

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**Follow-up actions**

- Focus on the **importance of direct contacts and consultation** between judicial authorities
- **Gap in information sharing** concerning EAW developments, in particular when uncertainties arose as a result of CJEU case law
- **EAW Coordination Group** launched in April 2020

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**Revision Commission Handbook on EAW**

- Update of the more than 35 new judgments rendered on the European Arrest Warrant by the CJEU since the last version of the Handbook in 2017
- Elements of Council conclusions and EP report such as guidance relating to assessment of detention conditions and rule of law

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*Justice*

## Detention conditions, pre-trial detention and the EU mechanisms of mutual recognition (EAW and ESO): Case-law of the European Court of Human Rights

ERA Online Seminar

*The EAW, Pre-Trial Detention, Mutual Trust and Legal  
Assistance*

24-26 March 2021

Krešimir Kamber\*

ECHR, Directorate of Jurisconsult

\*The opinions expressed are personal



Co-funded by the Justice  
Programme of the European Union 2014-2020

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## Structure of the presentation

- ▶ **Detention conditions**
  - ▶ The principles
  - ▶ Material conditions of detention
  - ▶ Other aspects of imprisonment
  - ▶ Assessing the conditions of detention: the burden of proof
- ▶ **Pre-trial detention**
  - ▶ The principles
  - ▶ The relevant legal issues
- ▶ **The EU mechanisms of mutual recognition (EAW and ESO)**
  - ▶ The *Bosphorus* presumption
  - ▶ Selected ECHR case-law\* relating to the EAW
  - ▶ Selected ECHR case-law relating to the ESO

\*HUDOC <https://hudoc.echr.coe.int/>



2

## Detention conditions

3

## The principles

- ▶ The ECHR does not stop at the prison gate (*Klibisz v. Poland* (2016) § 354)
- ▶ Prisoners in general continue to enjoy all ECHR rights, save for the right to liberty (*Hirst v. the United Kingdom (no. 2)* [GC] (2005) § 69)
- ▶ Any restrictions on these other rights must be justified (Ibid §§ 69-70)
- ▶ The respect for dignity and human rights: protection from humiliating and debasing treatment (*Bouyid v. Belgium* [GC] (2015) §§ 89-90)
- ▶ The persons detained are in a vulnerable position (*Rooman v. Belgium* [GC] (2019) § 143)

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- ▶ The general test (*Kudła v. Poland* [GC] (2000) §§ 92-94; *Muršić v. Croatia* [GC] (2016) § 99)
    - ▶ The person must be detained in conditions which are compatible with respect for human dignity
    - ▶ The manner and method of the execution of the sanction do not exceed the distress or hardship of the unavoidable level of suffering inherent in detention
    - ▶ The person's health and well-being are adequately secured, given the practical demands of imprisonment
  - ▶ The absence of an intention to humiliate or debase a detainee is not decisive for State responsibility (*Peers v. Greece* (2001) § 74)
  - ▶ The emphasis on reintegration into society (*Murray v. the Netherlands* [GC] (2016) § 101)
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## Material conditions of detention

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- ▶ Adequate allocation of personal space
    - ▶ The space factor weighs heavily when establishing whether the impugned detention conditions were “degrading” within the meaning of Article 3 ECHR (*Ananyev and Others v. Russia* (2012) § 143)
  - ▶ The *Muršić* test:
    - ▶ When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, a strong presumption of a violation of Article 3 arises
    - ▶ The presumption may be rebutted only if the following factors are cumulatively met:
      - ▶ The reduction in space is short, occasional and minor
      - ▶ Accompanied by sufficient freedom of movement and out-of-cell activities
      - ▶ General appropriateness of the detention facility
    - ▶ When the personal space is between 3 to 4 sq. m the space factor remains a weighty factor in the assessment
    - ▶ When more than 4 sq. m, no issue with personal space but other aspects are relevant
  - ▶ The *Muršić* calculation: sanitary facility deducted but furniture not
- 

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- ▶ Unobstructed and sufficient access to natural light and fresh air (*Ananyev* §§ 153-154)
- ▶ Protection from inclement outside conditions, including extreme heat in summer or freezing temperatures in winter (*Ibid* § 155)
- ▶ Appropriate sanitary facilities (*Szafrański v. Poland* (2015) §§ 37-41)
- ▶ The necessity of sufficient and adequate disinfection (*Neshkov and Others v. Bulgaria* (2015) § 243)
- ▶ The “one prisoner one bed” principle (*Ananyev* § 148)
- ▶ The wearing of prison clothes may in principle be required (*Giszczak v. Poland* (2011) §§ 36-41)
- ▶ The adequate and sufficient nutrition (*Stepuleac v. Moldova* (2007) § 55)
- ▶ Exercise and recreation: at least one hour in the open air every day and preferably as part of a broader programme of out-of-cell activities (*Ananyev* § 150)

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### Other aspects of imprisonment

- ▶ Family contact and visits as an Article 8 ECHR issue (*Khoroshenko v. Russia* [GC] (2015))
- ▶ Correspondence with the outside world protected under Article 8 (*Enea v. Italy* [GC] (2009) § 143)
- ▶ The provision of adequate medical care (*Blokhin v. Russia* [GC] (2016) § 136)
  - ▶ Comprehensive
  - ▶ Regular and systematic
  - ▶ Based on appropriate diagnosis
- ▶ The specific health care issues
  - ▶ Protection from infectious diseases (*Cătălin Eugen Micu v. Romania* (2016))
  - ▶ Mental health care (*Rooman*)
  - ▶ Drug addiction (*Wenner v. Germany* (2016))
- ▶ The taking of humanitarian measures with regard to prisoners with physical illnesses, disabilities and old age (*Enea* § 58)

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- ▶ Inter-prisoner violence (*Gjini v. Serbia* (2019))
  - ▶ Special prison regimes (*Piechowicz v. Poland* (2012))
  - ▶ Solitary confinement (*Ramirez Sanchez v. France* [GC] (2006))
    - ▶ Criteria for the assessment: the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned
    - ▶ The existence of an effective remedy before a judicial body
  - ▶ Life imprisonment: the necessity of *de facto* and *de jure* reducibility of the sentence (*Vinter and Others v. the United Kingdom* [GC] (2013) §§ 119-122)
  - ▶ Freedom of religion (*Korostelev v. Russia* (2020))
  - ▶ Prohibition of discrimination (*Khamtokhu and Aksenchik v. Russia* [GC] (2017))
  - ▶ Right to an effective remedy (*Ulemek v. Croatia* (2019))
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### Assessing the conditions of detention

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- ▶ **The burden of proof (*Muršić* §§ 127-128)**
    - ▶ Applicants must provide a detailed and consistent account of the facts complained of, accompanied, if available by some evidence (statements, photographs)
    - ▶ Once a credible and reasonably detailed description of the allegedly degrading conditions of detention, constituting a *prima facie* case of ill-treatment, has been made, the burden of proof shifts to the respondent Government
    - ▶ The Government must collect and produce relevant documents and provide a detailed account of conditions of detention
    - ▶ Relevant information from national and international bodies may also inform the Court's decision
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## Pre-trial detention

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- ### The principles
- 
- ▶ The general rule set out in Article 5 § 1 is that everyone has the right to liberty (*Saadi v. the United Kingdom* [GC] (2008) § 64)
  - ▶ Detention may violate Article 5 even though the person concerned has agreed to it (*Buzadji v. the Republic of Moldova* [GC] (2016) § 107)
  - ▶ Three key strands of Article 5 (*McKay v. the United Kingdom* [GC] (2006) § 30)
    - ▶ The exhaustive nature of the exceptions under Article 5 § 1, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8-11 ECHR)
    - ▶ The emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law
    - ▶ The importance of the promptness or speediness of the requisite judicial control
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- ▶ **Lawfulness under Article 5 (*Mooren v. Germany* [GC] (2009) § 72)**
  - ▶ Strict compliance with the relevant domestic law, including, where appropriate, international and EU law (*Paci v. Belgium* (2018) § 64)
  - ▶ The relevant law must be of certain quality: accessible, foreseeable and certain
  - ▶ The relevant law must be in compliance with the relevant Convention standards
- ▶ **Protection from arbitrariness (*S., V. and A. v. Denmark* [GC] (2018) § 74)**
  - ▶ An element of bad faith or deception on the part of the authorities
  - ▶ Neglect to attempt to apply the relevant legislation correctly
- ▶ **Necessity (*Ibid* § 77)**
  - ▶ The deprivation of liberty must be necessary in the circumstances
  - ▶ Detention justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest

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## The relevant legal issues

- ▶ **Different nature of the responsibility of the requesting and the requested States under Article 5 (*Toniolo v. San Marino and Italy* (2012))**
- ▶ **The requesting State**
  - ▶ Duty to ensure that the detention order and the extradition request are valid as a matter of domestic law
  - ▶ Article 5 § 1 (a) – lawful detention of a person after conviction by a competent court
    - ▶ Lawful finding of guilt, and the imposition of a penalty or other measure involving the deprivation of liberty (*Del Rio Prada v. Spain* [GC] (2013) § 125)
    - ▶ The conviction is not the result of a flagrant denial of justice (*Willcox and Hurford v. the United Kingdom* (dec.) (2013) § 95)
    - ▶ Sufficient causal connection between the conviction and the deprivation of liberty (*Del Rio Prada* § 124)
  - ▶ Article 5 § 1 (c) – deprivation of liberty for the purpose of criminal proceedings
    - ▶ The existence of “reasonable suspicion”: facts or information which would satisfy an objective observer that the person concerned may have committed an offence (*Selahattin Demirtaş v. Turkey* (no. 2) [GC] (2020) § 314)
    - ▶ The “purpose” element: bringing the person before the competent legal authority (*Ibid*)

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### ▶ The requested State

- ▶ Duty to ensure that the detention is lawful in terms of the domestic law, including international and EU law (substantive and procedural)
- ▶ Article 5 § 1 (f) – detention with a view to deportation or extradition
  - ▶ The test of necessary (further grounds for detention) not relevant (*Chahal v. the United Kingdom* [GC] (1996) § 112)
  - ▶ The relevant proceedings must be conducted with due diligence (*Shikhsaitov v. Slovakia* (2020) § 56)
  - ▶ Protection from arbitrariness: good faith, genuine grounds, conditions of detention, length (*A. and Others v. the United Kingdom* [GC] (2009) § 164)
  - ▶ The existence of time-limits and a judicial remedy (*J.N. v. the United Kingdom* (2016) §§ 83-96)
  - ▶ greater diligence than when an extradition is sought for the purposes of the conduct of criminal proceedings (*Gallardo Sanchez v. Italy* (2015) § 42)

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### ▶ The fact of the deprivation of liberty engages the responsibility of the requested State (*Toniolo* §§ 47 and 56; *Stephens v. Malta (no. 1)* (2009) § 52)

- ▶ The obligation for the detention to comply with the domestic law of the requested State
- ▶ The requested State's responsibility for the deficiencies in the underlying detention order (attributable to the requesting State) may be engaged if the deficiencies went beyond a technical irregularity which the requested State's bodies should have noticed
- ▶ The responsibility of the requesting State for the deprivation of liberty in the requested State (the question of attribution)
  - ▶ The causal link between the actions (order, decision) of the requesting State and the deprivation of liberty in the requested State (*Stephens* § 51)
  - ▶ The requesting State must ensure that the underlying detention order is valid in the substantive and procedural sense (*Ibid* § 52; *Toniolo* § 56) and compliant with the Convention (*Vasiliciuc v. the Republic of Moldova* (2017) § 24)
  - ▶ The requested State must be able to rely on the principle of mutual trust and presume the validity of the detention order (*Stephens* § 52)

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## The EU mechanisms of mutual recognition (EAW and ESO)

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### The *Bosphorus* presumption

- ▶ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC] (2005)
  - ▶ The Convention Parties are free to transfer sovereign power to an international (including a supranational) organisation
  - ▶ A Contracting Party remains responsible for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations
  - ▶ State action taken in compliance with such legal obligations is justified as long as the relevant organisation provides the protection of fundamental rights in a manner equivalent to the Convention
  - ▶ If such “equivalent protection” is provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation
    - ▶ The presumption is rebuttable if the protection of the Convention rights, in the circumstances, is manifestly deficient
    - ▶ In such instances, the Convention obligations trump all others
  - ▶ A State remains fully responsible under the Convention for all acts falling outside its strict international legal obligations (margin of manoeuvre)

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- ▶ The EU system represents a system providing an “equivalent protection” (*Bosphorus* § 165)
  - ▶ The restatement of the *Bosphorus* presumption (*Michaud v. France* (2012) §§ 105-115)
    - ▶ The application of the *Bosphorus* presumption is subject to two conditions:
      - ▶ The absence of any margin of manoeuvre on the part of the domestic authorities; and
      - ▶ The deployment of the full potential of the supervisory mechanism provided for by European Union law (preliminary ruling CJEU)
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- ▶ The *Bosphorus* presumption and the principle of mutual recognition (*Avotiņš v. Latvia* [GC] (2016) § 116)
    - ▶ Cannot be applied automatically and mechanically to the detriment of fundamental rights
    - ▶ Where the courts of a State which is both a Party to the Convention and an EU member State are called upon to apply a mutual-recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient
    - ▶ However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by EU law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law
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## The European Arrest Warrant (EAW)

- ▶ The application of the *Bosphorus* presumption (*Pirozzi v. Belgium* (2018) §§ 60-64, 71-72)
  - ▶ The EAW system is not in itself contrary to the Convention
  - ▶ It, in principle, provides for a system of “equivalent protection”
  - ▶ The EAW mechanism can fully be applied provided that, in the circumstances of a particular case, there is no manifest deficiency in the protection of the Convention rights
  - ▶ If there is an arguable allegation of manifest insufficiency in the protection of the Convention rights, which cannot be remedied in the context of the EU law, the domestic courts must examine the matter and apply the EAW in conformity with the Convention
- ▶ See further *Bivolaru v. France* (No. 40324/16) and *Moldovan v. France* (No. 12623/17)

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## EAW – Article 2 ECHR

- ▶ *Romeo Castaño v. Belgium* (2019)
  - ▶ Refusal of Belgium to execute a Spanish EAW for the purpose of criminal proceedings concerning terrorist killing on the grounds of inadequate conditions of detention
  - ▶ The procedural obligation (to investigate and, if appropriate, prosecute) under Article 2
    - ▶ Whether the Belgian authorities responded properly to the request for cooperation
      - The authorities did not act automatically and mechanically
      - They provided properly reasoned response to their Spanish counterparts
    - ▶ Whether the refusal to cooperate was based on legitimate grounds
      - The existence of a legitimate ground for refusing to execute the EAW
      - No sufficient factual basis: no in-depth examination; the risk not individualised; no information sought

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### EAW – Article 3 ECHR

- ▶ **Surrender to the issuing State**
  - ▶ *Bivolaru v. France* (No. 40324/16) and *Moldovan v. France* (No.12623/17)
- ▶ **Risk of an indirect removal to a third country – *Ignaoua and Others v. the United Kingdom* (2014)**
  - ▶ Tunisian nationals in the UK sought by Italy on the basis of EAW
  - ▶ Complaints concerning removal to Tunis, where they would be exposed to treatment contrary to Article 3
  - ▶ The UK's responsibility for an indirect removal
    - ▶ The presumption that the intermediary country would honour its international-law obligations – for the applicant to demonstrate otherwise
    - ▶ The UK authorities properly examined the case and obtained assurances from Italy
    - ▶ The EAW not issued with a view of deportation to Tunis

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### EAW – Article 5 ECHR

- ▶ ***Paci v. Belgium* (2018)**
  - ▶ Surrender from Italy to Belgium for the purpose of questioning in a criminal investigation
  - ▶ The applicant convicted in Belgium and only then (two years after the conviction) surrendered to Italy to serve the sentence
  - ▶ Complaint about not being surrendered to Italy after questioning
    - ▶ The Court cannot assess whether the Belgian courts had correctly interpreted the Framework Decision and Italian law, unless their interpretation appeared to be arbitrary or manifestly unreasonable
  - ▶ Complaint about delayed surrender to Italy
    - ▶ The Belgian authorities were active and no responsibility on their part

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▶ ***Pirozzi v. Belgium* (2018)**

- ▶ Complaint of unlawfulness of arrest by the executing State due to the incomplete case file regarding the measures taken to locate and arrest the applicant on the basis of an EAW (Italy)
  - ▶ The preceding search measures cannot in themselves raise an issue of lawfulness of detention
  - ▶ The search conducted by the police in accordance with the law

▶ ***Giza v. Poland* (2012)**

- ▶ On the basis of an EAW the applicant surrendered from Poland to Belgium on condition to be returned to serve the sentence in Poland
  - ▶ Transfer to Poland entailed a longer de facto duration of detention than it would have been the case in Belgium
    - ▶ The possibility of a longer period of imprisonment in the executing State could not be regarded as arbitrary as long as the term served did not exceed the sentence imposed by the sentencing State
    - ▶ Policies on early release fall within the States margin of appreciation
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▶ ***West v. Hungary* (dec.) (2012)**

- ▶ A UK national who committed criminal offences in different countries: in Finland sentenced; in Hungary prosecuted
  - ▶ The UK surrendered him to Hungary on a EAW without conditions
  - ▶ The Hungarian courts ruled that he would be surrendered to Finland within ten days after completing his sentence in Hungary
    - ▶ Hungary (as issuing State) sought the UK (as the initial executing State) to consent to transfer to Finland (the second state issuing an EAW)
    - ▶ The UK courts replied that they could not decide within the ten-days time-limit
    - ▶ The Hungarian authorities thus extended the detention pending transfer
  - ▶ The Court found that the Hungarian decisions were not arbitrary or manifestly unreasonable
    - ▶ From the perspective of Hungary and Finland the situation created was the one of force majeure (reference made to the CJEU *Vilkas* case (C-640/15))
  - ▶ No risk of flagrant breach of Article 5 in Finland
- 

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## EAW – Article 6 ECHR

- ▶ The right to a fair trial under Article 6 does not apply to proceedings for the execution of an EAW (*Monedero Angora v. Spain* (dec.) (2008); West §§ 65-66)
- ▶ Risk of a flagrant denial of justice in case of surrender
  - ▶ *Pirozzi* §§ 57-72
    - ▶ Conviction resulting from a trial *in absentia*
    - ▶ An issue might be raised under Article 6 by the execution of an EAW where the fugitive had suffered or risked suffering a flagrant denial of justice in the issuing State
    - ▶ Belgium did not have any discretion to determine whether the arrest was appropriate
    - ▶ The accused informed of the time and place of the hearing and represented by a lawyer – no flagrant denial of justice
  - ▶ *Stapleton v. Ireland* (2010)
    - ▶ Surrender to the UK for criminal prosecution for acts dating back more than 20 years
    - ▶ Not in itself a flagrant breach and sufficient remedies in the UK

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## EAW – Article 8 ECHR

- ▶ Right to respect for family life
  - ▶ *E.B. v. the United Kingdom* (dec.) (2014)
    - ▶ Surrender from the UK to Poland to serve a sentence
    - ▶ Separation from children in the UK who have been: (i) taken to care, and (ii) the applicant was separated from her children due to issues with her parental ability
  - ▶ West §§ 68-71
    - ▶ Lawful detention inevitably restricts family and private life
    - ▶ The Convention does not grant the right to choose the place of detention
    - ▶ The Convention does not grant a right to avoid having to serve a prison sentence in a foreign country or to choose in which country a convicted person prefers to serve a sentence imposed

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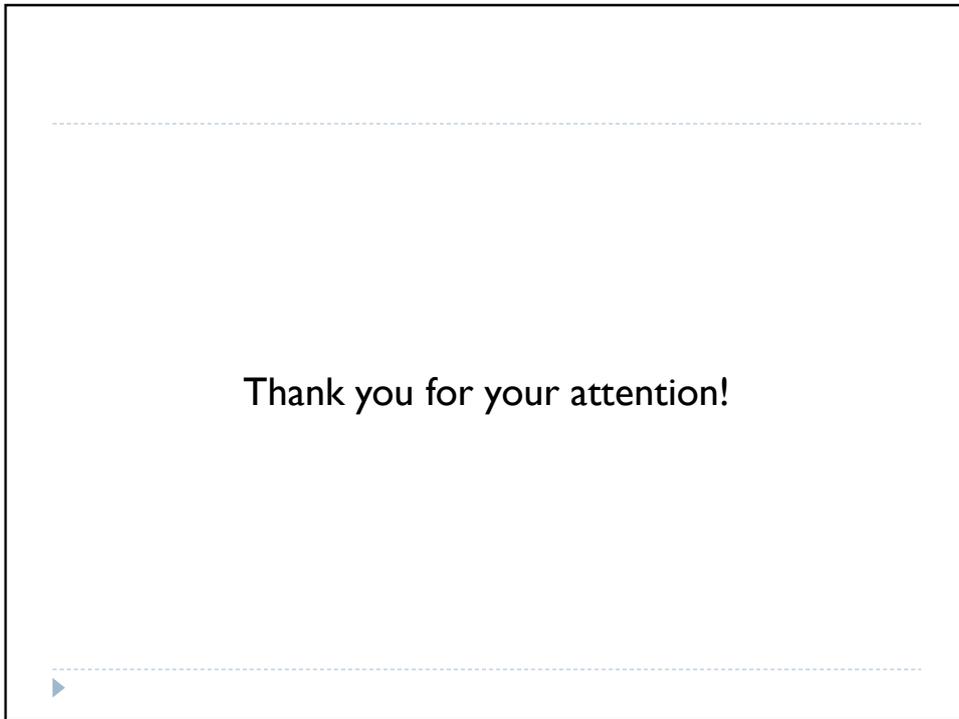
## European Supervision Order (ESO)

- ▶ The principle of necessity of the detention
- ▶ The risk of absconding as a ground for pre-trial detention
  - ▶ The absence of a fixed place of residence in the country concerned is not sufficient to justify a risk of absconding (*Sulaoja v. Estonia* (2005) § 64)
  - ▶ The risk of absconding has to be assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted (*Becciev v. Moldova* (2005) § 58)

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- ▶ The application of preventive measures in criminal proceedings – Article 2 of Protocol No. 4 (freedom of movement)
  - ▶ Any such measure must be lawful, pursue a legitimate aim and proportionate (*Miażdżyk v. Poland* (2012))
- ▶ Discrimination in sentencing linked to the absence of a permanent place of residence (*Aleksandr Aleksandrov v. Russia* (2018))
  - ▶ Relying on the place of residence as the sole factor for a more unfavourable treatment (imposing a custodial sentence) is not a reasoning based on objective and reasonable justification

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# An overview of detention-related issues in Europe and the level of protection granted by the ECHR

**Giuliana Monina**

*Ludwig Boltzmann Institute of Fundamental and Human Rights*

Online Seminar - European Rights Academy

“The EAW, Pre-Trial Detention, Mutual Trust and Legal Assistance” 24 - 26 March 2021



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## Protection granted by human rights mechanisms



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# Protection granted by human rights mechanisms

## Relevant developments

- UN standards: National detention monitoring - OPCAT (2006)
- UN standards: Bangkok Rules on women (2010); Principles and Guidelines on access to legal aid (2013), Mandela Rules on the treatment of prisoners (2015)
- CoE: European Prison Rules (2006; 2020); Recommendations of CM/Guidelines
- EU law: cooperation on arrest and detention (2001), strengthening procedural rights (2009)
- Studies on the negative effects of certain practices on prison health (eg solitary confinement) vs positive effects of dynamic security & improved quality life in prison



3

# Rights of persons in detention



arrest/custody

detention

extradition/transfer

- **Prohibition of torture and ill-treatment (Art. 3 ECHR)**
- **Right to liberty and security (Art. 5 ECHR)**
- **Right to a fair trial (Art. 6)**
- Right to privacy, family, marriage, religion, expression etc. (Arts. 8, 9, 10 ECHR)
- Prohibition of arbitrary detention
- **Arrest rights (right to information, right to legal assistance, right to interpretation and translation etc.)**
- **Prohibition of torture and ill-treatment (violence, material conditions, prison regime, person in a situation of vulnerability)**
- Other fundamental rights of detainees
- Prohibition of refoulement



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## Arrest rights

### Right to liberty, Art 5 (1) ECHR

“highest importance in a democratic society“; substantive and procedural rules to protect against arbitrary detention

**Lawfulness:** conformity with substantive and procedural domestic laws; quality/legal certainty

**Permissible grounds** to be interpreted restrictively (Labita v. Italy, § 170)

**Non arbitrariness/Proportionality:** necessity and no less severe means available (Něšťák v. Slovakia, 2007; Witold Litwa v. Poland, 2000)

*EU: Framework Decisions 2008/947/JHA on probation and alternative sanctions , 2009/829/JHA European Supervision Order: application?*



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## Arrest rights

### Access to judicial authority for those arrested or detained on suspicion to have committed a criminal offence, Art. 5(3)

- Prompt and automatic appearance before judicial authorities (Nikolova v. Bulgaria)
- Trial within reasonable time or release (pre-trial/remand)
- Restrictive application of pre-trial and remand: presumption in favour of release (Bykov v. Russia, 2009)
- Alternative measures (Idalov v. Russia, § 140)

### Right to have the lawfulness of the detention speedily examined by a court, Art 5(4) – habeas corpus



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## Arrest rights

**Right to information on the reasons for arrest, Art 5(2) ECHR**

**Right to information on the nature of and cause of the accusation, Art 6(3)(a)**

**Right to an interpreter, Art 6 (3) (e)**

**Right to remain silent and not to incriminate oneself, Art 6**

**Right to legal assistance Art 6 (3) (c)**

*EU: Directive 2012/13/EU Right to Information*

*EU: Directive 2010/64/EU Right on Interpretation and Translation*

*EU: Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings;*

*Directive (EU) 2016/1919 on legal aid*



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## Treatment and conditions of detention

### Basic Principles

***Persons in custody are in a vulnerable position and authorities are under a duty to protect their physical well-being (Artyomov v. Russia, 2010, 14).***

***Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention (...) (Hirst v. UK [2], 2005)***



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## Treatment and conditions of detention

### Use of force by law enforcement officials

It may be necessary to ensure prison security and to maintain order or prevent crime in detention facilities.

**BUT** “any recourse to physical force which has not been made strictly necessary by the person’s conduct & diminishes human dignity is in principle an infringement of the right set forth in Article 3 of the Convention” (*Tali v. Estonia*, 2014)



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## Treatment and conditions of detention

### Use of force by law enforcement officials

#### EXAMPLES

- Use of rubber truncheons against the applicant for his refusal to leave his cell (*Dedovskiy et al v. Russia*, 2008, §§ 85, 94): violation of Art 3 ECHR
- Use of rubber batons during the search of cells to overcome their resistance on entering their cell (*Milić and Nikezić v. Montenegro*): violation of Art 3
- ‘Slap in the face’ (*Bouyid v. Belgium*, 2015) - the impact on the person in question is not relevant: violation of Art 3 ECHR

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## Treatment and conditions of detention

### Use of force by law enforcement officials

#### OTHER RELEVANT STANDARDS

The use of force is a legitimate method for restoring security and order in prison only if it is used as a last resort, i.e. in line with the principles of legality, necessity, proportionality and precaution

- *UN Basic Principles on the Use of Force and Firearms, Arts 15ff*
- *UN Mandela Rules, Rule 82*
- *CoE – European Prison Rules, Rule 64-67*

Prison authorities must first and foremost prevent and resolve conflicts before they escalate, e.g. using 'conflict prevention, mediation or any other alternative dispute resolution mechanism to prevent disciplinary offences or to resolve conflicts' & dynamic security

- *UN Mandela Rules, Rule 76 (c)*
- *CoE – European Prison Rules, Rule 64, 51.2*

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## Treatment and conditions of detention

### Instruments of restraint

'Measures of restraint, such as handcuffing, do not normally give rise to an issue under Article 3 of the Convention *where they have been imposed in connection with lawful arrest or detention and do not entail the use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances*. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or try to abscond or cause injury or damage or suppress evidence' (*Svinarenko and Slyadnev v. Russia* [GC], 2014, § 117)

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## Treatment and conditions of detention

### Instruments of restraint that may constitute ill treatment

#### EXAMPLES

- Metal cage during the hearing (Svinarenko and Slyadnev v. Russia, 2014, § 138)
- Unnecessary use of handcuffs or shackles (see ECtHR Guide on prisoners rights, §181)
- Use pepper spray (Tali v Estonia, 2014, § 78ff)
- Use of restraint bed (Tali v Estonia, 2014)
- Cumulative effect



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## Treatment and conditions of detention

### Instruments of restraint that may constitute ill treatment

#### OTHER RELEVANT STANDARDS

- Use of chains, irons and others are absolutely prohibited
- Never used on women during labor, childbirth or immediately after childbirth
- Only if authorized by law, as a last resort, and in a proportionate manner
- Not be use for reasons of punishment, mere convenience of staff, because of staff shortages, as a substitute for proper care or treatment
  - *UN Mandela Rules, Rules 47-49*
  - *UN Bangkok Rules, Rule 24*
  - *CoE – European Prison Rules, 68*
  - *CPT, instruments of restraint in psychiatric establishments for adults*  
<https://rm.coe.int/16807001c3>
  - *CPT, pepper spray: 'Report - Czech Republic' CPT/Inf (2009) 8 § 46.*

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## Treatment and conditions of detention

### Inter-prisoner violence

**Duty to protect the physical well-being of detainees, if they knew or ought to have known they were suffering or at risk of being subjected to ill-treatment at the hands of his or her cellmates** (*Premininy v. Russia*, 2011, § 73; *Gjini v. Serbia*, 2019)

They must take all reasonable steps to eliminate those risks & protect:

- Despite the applicant's failure to lodge an official criminal complaint
- No action taken after CPT had reported inter-prisoner violence in the prison in question (*Gjini v. Serbia*, 2019)
- Must deal with request of transfers with the necessary urgency and in a manner proportionate to the perceived risk faced by the person concerned (*Rodić et al v Bosnia and Herzegovina* 2008; *D.F. v Latvia*)



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## Treatment and conditions of detention

### Inter-prisoner violence

#### EXAMPLES

- Protecting foreign prisoners and minorities (*Rodić et al v Bosnia and Herzegovina*, 2008)
- Protect prisoners for their sexual orientation (*Stasi v. France*, 2011, §§ 90-101)
- Protecting prisoner who have previously collaborated with law-enforcement authorities (*D.F. v Latvia*, 2013; *GJINI v. SERBIA*)



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## Treatment and conditions of detention

### Inter-prisoner violence

#### OTHER RELEVANT STANDARDS

- *CAT Committee, General Comment No 2*
- *CPT (2001) Developments concerning CPT standards in respect of imprisonment, 11th General Report on the CPT's activities, para 27*
- *ECtHR, 'Factsheet: Detention Conditions and Treatment of Prisoners' (2020) § 237*



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## Treatment and conditions of detention

### Overcrowding

#### Less than 3 metres of personal space in multi-occupancy accommodation

➡ A strong presumption of a violation of Art 3 ECHR in itself arises

#### When the personal space is between 3 and 4 square metres

➡ Violation of Art 3 if coupled with other aspects of inappropriate physical conditions of detention (e.g. inadequacy in terms of access to outdoor exercise, natural light or air, ventilation, room temperature, toilet in private and compliance with basic sanitary and hygiene requirements)  
(*Muršić v Croatia*, No 7334/13, 20 October 2016, §§ 138-139)



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## Treatment and conditions of detention

### Overcrowding

#### OTHER RELEVANT STANDARDS

**CPT (2001) Developments concerning CPT standards in respect of imprisonment, 11th General Report on the CPT's activities, para 27 & 'Living Space per Prisoner in Prison Establishments: CPT-Standards' (2015) CPT/Inf (2015) 44** - 6m<sup>2</sup> should be the minimum amount of living space for prisoners in single occupancy & 10m<sup>2</sup> per prisoner in case of multi-occupancy cells

**CoE CoE Rec(99)22 30/09/1999 concerning prison overcrowding and prison population inflation; White Paper on Prison Overcrowding 2016**

**Revised EPR Rule 18.5** - Require States to establish mechanisms and strategies for ensuring that these minimum requirements are not breached through overcrowding.

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## Treatment and conditions of detention

### Solitary confinement

Solitary confinement is not, in itself, in breach of Article 3. ... Whether such a measure falls within the ambit of Article 3 of the Convention depends on:

- the particular conditions
- the stringency of the measure
- its duration
- the objective pursued and its effects on the person concerned

(Rohde v. Denmark, 2005, § 93; Rzakhanov v. Azerbaijan, 2013, § 64)

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## Treatment and conditions of detention

### Solitary confinement

#### EXAMPLES

- Duration (AT v Estonia, 2018; Ramirez Sanchez v France, 2006; Rohde v Denmark, 2005)
- They apply also to solitary confinement for protective purposes (X v Turkey, 2012)
- Necessary procedural safeguards and precautions (Onoufriou v Cyprus, 2010; AT v Estonia, 2018)
  - Based on genuine grounds and ordered only exceptionally (Csüllog v Hungary, 2011)
  - Possibility to challenge the measure
  - Recording of the reasons for the imposition and its duration
  - Monitoring of the prisoner's physical and mental condition (Ramirez Sanchez v France, 2006)

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## Treatment and conditions of detention

### Solitary confinement

#### OTHER RELEVANT STANDARDS

- CPT, Solitary confinement of prisoners CPT/Inf(2011)28-part2; CPT (2016) Combating ill-treatment in prison
- CoE: Recommendation CM/Rec(2008)11) on children
- UN Bangkok Rules 2010 (Rule 22) in respect of pregnant women, breastfeeding mothers, or women with infants in prison.
- UN Mandela Rules 2015: Rules 43 – 46 (solitary confinement: prolonged 15 days)
- Revised EPR Rule 2020: Rule 53A (separation) Rule 60.6 (solitary confinement: only as disciplinary measure, 22 hours a day without meaningful human contact)

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## Treatment and conditions of detention

### Persons in a situation of vulnerability in detention: Special accommodation needs

- **Women:** Detention conditions, and the treatment of a mother and her new-born baby (Korneykova and Korneykov v. Ukraine, 2016)
- **Juveniles:** Detention in a adult prison (Güveç v. Turkey, 2009); lack of adequate medical care for the child during his detention, pre-trial detention (*Selcuk v Turkey*)
- **Persons with disabilities:** Failure of the government to offer appropriate treatment (*Murray v. the Netherlands*, 2016), use of restraints (Dimcho Dimov c. Bulgaria, 2018), not sufficient preventive measures to prevent suicide (Renolde v. France, 2008)
- **Life prisoners:** Without prospect of release or possibility to review the sentence (Viola v Italy, 2019; Petukho v Ukraine, 2019)

EU: Directive (EU) 2016/800 on procedural safeguards for children; Recommendation 2013 on procedural safeguards for vulnerable persons suspects



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## Treatment and conditions of detention

### Prisoners in a situation of vulnerability

#### OTHER RELEVANT STANDARDS

- **Women:** CEDAW, UN Bangkok Rules 2010, CoE CM Rec children with imprisoned parents 2018, CPT standards on Women, 2000; SPT Guidelines CAT/OP/27/1, 2016
- **Juveniles:** CRC, UN Beijing Rules, 1985; UN Havana Rules 1990; CoE CM/Rec(2008)11 juvenile offenders subject to sanctions or measures; CPT standards on juvenile (2015)
- **Persons with disabilities:** CRPD; CRPD Guidelines on Art 14; PACE Resolution 2223 (2018)
- **LGBTI persons:** Yogyakarta Principles; SPT guidelines CAT/OP/C/57/4, 22March 2016

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## Other fundamental rights of detainees

### Principle of non-refoulement

- Violation of art. 3 “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” (Soering v UK, 1989)
- Duty to carry out a thorough and individualised examination (M.S.S. v. Belgium and Greece, 2011; Tarakhel v Switzerland, 2014)
- Longer de facto term of imprisonment could violate Art. 5 (Szabo v Sweden, 2006) or flagrant denial of justice Art 6 (Soering v UK, Othman v UK, 258).

*EU: European Arrest Warrant 2002/584/JHA; FD on the transfer of prisoners (2008/909/JHA): ‘Mutual trust vs fundamental rights’ (CJEU, Radu, C-396/11, 2013; Melloni, C-399/11, 2013)*



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## Our recent projects

### EU DG Justice Project

#### „Working towards harmonised detention standards – the role of NPMs“



- **Duration:** 01/2019 – 03/2021
- **Project partners:**
  - Associazione Antigone
  - Bulgarian Helsinki Committee
  - Hungarian Helsinki Committee
  - Ludwig Boltzmann Institute of Fundamental and Human Rights



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## Other recent projects

- EU DG Justice Project 2019 – 21 '**EAW-ALT: Addressing the overuse of pre-trial detention and the disproportionate use of EAW with alternative cross-border mechanisms**' *partner* with Fair Trials
- EU DG Justice Project 2019 – 21 '**From law to practice: Strengthening procedural rights in police custody (ProRPC)**' *lead* with Rights International Spain, APADPOR-CH, Irish Council for Civil Liberties, Fair Trials Europe
- EU DG Justice Project 2017- 19 '**Strengthening the rights of suspects and accused in criminal proceedings the role of National Human Rights Institutions**' *lead* with Hungarian Helsinki Committee, Helsinki Foundation for Human Rights, Peace Institute
- DG Justice Project 2013 – 15 '**The Future of mutual trust and the prevention of ill-treatment: judicial cooperation and the engagement of national preventive mechanisms**' *lead* with ERA



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## Other useful resources

[ECtHR Guide on Prisoners Rights](#) (Dec 2020)

[ECtHR Guide on Art 5](#) (Dec 2020)

[ECtHR Guide on Art 6](#) (Dec 2020)

[ECtHR Factsheet on detention conditions and treatment](#) (Oct 2020)

[CPT standards](#)

[Collection of all CoE recommendations](#)

[Atlas of Torture](https://atlas-of-torture.org/en/) <https://atlas-of-torture.org/en/>



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**Thank you!**

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**PROBLEMATYKA I WYZWANIA ZWIĄZANE Z  
EUROPEJSKIM NAKAZEM ARESZTOWANIA  
I ARESZTEM TYMCZASOWYM  
Z PUNKTU WIDZENIA ADWOKATA**

adwokat Mikołaj Pietrzak



Co-funded by the Justice Programme of the European Union 2014-2020 [www.pietrzaksidor.pl](http://www.pietrzaksidor.pl)

1

- Podstawa prawna: Decyzja Ramowej z dnia 13 czerwca 2002 roku w sprawie europejskiego nakazu aresztowania i procedury wydawania osób między Państwami Członkowskimi.
- Prawa procesowe osób zatrzymanych na podstawie ENA umocniono w sześciu dyrektywach – dyrektywie dotyczącej prawa do tłumaczenia, prawa do informacji, prawa dostępu do adwokata, pomocy prawnej, gwarancji procesowych dla dzieci oraz wzmocnienia niektórych aspektów domniemania niewinności i prawa do obecności na rozprawie.
- Wszystkie państwa członkowskie implementowały przepisy decyzji ramowej.

2

Pietrzak Sidor & Wspólnicy	<b>GŁÓWNE ZAŁOŻENIA</b>
<ul style="list-style-type: none"> <li>• Stworzenie prostego i efektywnego mechanizmu służącemu wydawaniu osób, celem prowadzenia postępowania karnego lub wykonania orzeczonej kary pozbawienia wolności lub zastosowania środka zabezpieczającego, np. tymczasowego aresztowania.</li> <li>• Na podstawie zasady wzajemnego uznawania orzeczeń przez państwa członkowskie.</li> <li>• Uznawanie decyzji następują „z automatu”, bez dodatkowych formalności stawianych przed państwem, które wydało ENA.</li> </ul>	

3

Pietrzak Sidor & Wspólnicy	<b>PODSTAWOWE ZASADY STOSOWANIA ENA I ICH IMPLEMENTACJA</b>	
<ul style="list-style-type: none"> <li>• Wydanie ENA jeżeli:</li> </ul>		
Popełnienie czynu zagrożone jest karą pozbawienia wolności o maksymalnym wymiarze co najmniej 12 miesięcy	lub	Wymiar orzeczonej kary lub środka zabezpieczającego jest co najmniej 4 miesiące
<ul style="list-style-type: none"> <li>• <b>Implementacja</b> – przykładowe rozbieżności: wymóg zagrożenia karą 12 miesięcy również w kraju wykonującym; pozostała kara do wykonania nie mniejsza niż 4 miesiące</li> </ul>		

4

- Wydanie ENA przez organ sądowy – za organ sądowy uważa się organy uczestniczące w wymierzaniu sprawiedliwości.
- **Implementacja** – przykładowe rozbieżności: dyskusja nad możliwością wydawania przez organy ścigania – warunek konieczny: niezależność od władzy wykonawczej. Około połowy państw członkowskich wskazała sądy, pozostałe państwa organy o charakterze prokuratorskim.

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- Podwójna karalność – badana za wyjątkiem katalogu 32 najpoważniejszych przestępstw, o ile są zagrożone karą pozbawienia wolności lub środka zabezpieczającego w wysokości co najmniej 3 lat, w Państwie wydającym (m.in. terroryzm, udział w grupach przestępczych, handel ludźmi, nielegalny handel narkotykami).
- **Implementacja** – przykładowe rozbieżności: dwa państwa w zakresie węższym, niektóre państwa wprowadziły obowiązek badania podwójnej karalności w każdym przypadku wobec ENA dotyczącego własnego obywatela.

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Pietrzak Sidor & Wspólnicy

PODSTAWOWE ZASADY STOSOWANIA ENA  
I ICH IMPLEMENTACJA

- Ograniczone przesłanki odmowy wykonania (obligatoryjne i fakultatywne)
- **Implementacja** – przykładowe rozbieżności: ponad połowa państw wprowadziła dodatkowe przesłanki odmowy (np. w zakresie wydania własnych obywateli, dotyczące proporcjonalności, względów politycznych), niewielka liczba uwzględnia wszystkie fakultatywne przesłanki odmowy wykonania, często są one implementowane jako obligatoryjne przesłanki odmowy (powszechnie implementowane: wykonujące państwo podejmie się wykonania kary, ściganie, ukaranie jest zakazane w państwie wykonującym ze względu na przesłanki negatywne).

7

Pietrzak Sidor & Wspólnicy

PODSTAWOWE ZASADY STOSOWANIA ENA  
I ICH IMPLEMENTACJA

- Zasada specjalności - co do zasady osoby przekazanej w wyniku wykonania nakazu bez jej zgody nie można:
 

Ściągać za przestępstwa inne niż te, które stanowiły podstawę przekazania

Wykonać orzeczonych wobec niej za inne przestępstwa kar pozbawienia wolności

ani

Wykonać innych środków polegających na pozbawieniu wolności
- **Implementacja** – przykładowe rozbieżności: trzy państwa członkowskie skorzystały z możliwości zrzeczenia się (Estonia, Austria, Rumunia); kilka państw wprowadziło możliwość cofnięcia zrzeczenia się zasady specjalności.

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- Pomimo dużego uproszczenia procedur względem tradycyjnego postępowania ekstradycyjnego pojawiają się problemy.
- Rozbieżności w implementacji wpływają na różny stopień spełnienia założeń stojących za ENA w zależności od kraju, co stwarza możliwość *forum shopping*.
- Systemowe problemy dotkliwe ze względu na praktykę obrończą:
  - proporcjonalność;
  - zabezpieczenie podstawowych praw i wolności przy uproszczeniu procedur.

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### **Podwójna reprezentacja – klucz do rzeczywistej obrony klienta**

Art. 10 Dyrektywy 2013/48/EU w sprawie dostępu do adwokata w postępowaniu i w postępowaniu dotyczącym europejskiego nakazu aresztowania oraz w sprawie prawa do poinformowania osoby trzeciej o pozbawieniu wolności i prawa do porozumiewania się z osobami trzecimi i organami konsularnymi w czasie pozbawienia wolności (implementacja listopad 2016)

Analiza prawna po stronie państwa wydania nakazu i wykonania nakazu:

- analiza założeń prawnych warunkujących wydanie nakazu oraz jego realizację i ich zestawienie,
- Analiza stanu sprawy będącej podstawą wydania nakazu
- Analiza możliwości przeprowadzenia skutecznej obrony

10

<b>Pietrzak Sidor &amp; Wspólnicy</b>	<b>PERSPEKTYWA PRAWNIKA</b>
<b>Podwójna reprezentacja – problemy praktyczne:</b>	
<ul style="list-style-type: none"><li>• Specyfika spraw ENA i znajomość jej przez obrońców;</li><li>• Dostępność informacji o prawnikach w innym kraju;</li><li>• Komunikacja w języku obcym;</li><li>• Dostęp do prawnika w ramach pomocy prawnej z urzędu.</li></ul>	

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<b>Pietrzak Sidor &amp; Wspólnicy</b>	<b>PERSPEKTYWA PRAWNIKA</b>
<b>Stosowanie środków zapobiegawcze przy wykonaniu ENA:</b>	
<ul style="list-style-type: none"><li>• Różna praktyka, często tymczasowy areszt ze względu na brak stałego miejsca pobytu a w konsekwencji obawę ucieczki;</li><li>• Zobowiązanie wobec państwa członkowskiego wydającego ENA a wolności i prawa osoby ściganej;</li><li>• Decyzja Ramowa nie ustanawia maksymalnego czasu trwania ewentualnego tymczasowego aresztowania;</li><li>• Uwzględnienia czasu tymczasowego aresztowania w związku z wydaniem ENA po przekazaniu – problematyka zastosowania środków stanowiących ograniczenie wolności.</li></ul>	

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### **Proporcjonalność**

- Brak wskazania w decyzji ramowej, wywodzona z ogólnych zasad prawa europejskiego, nigdy nie wskazany wprost w Decyzji Ramowej.;
- Niespójna praktyka;
- Dyskusje zarówno co do możliwości wprowadzenia zasady do decyzji ramowej jak i co do sposobu uregulowania;
- Środki zapobiegawcze a proporcjonalność;
- Możliwość użycia innych instrumentów współpracy międzynarodowej.

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**Dziękuję za uwagę.**

adwokat Mikołaj Pietrzak - [pietrzak@pietrzaksidor.pl](mailto:pietrzak@pietrzaksidor.pl)

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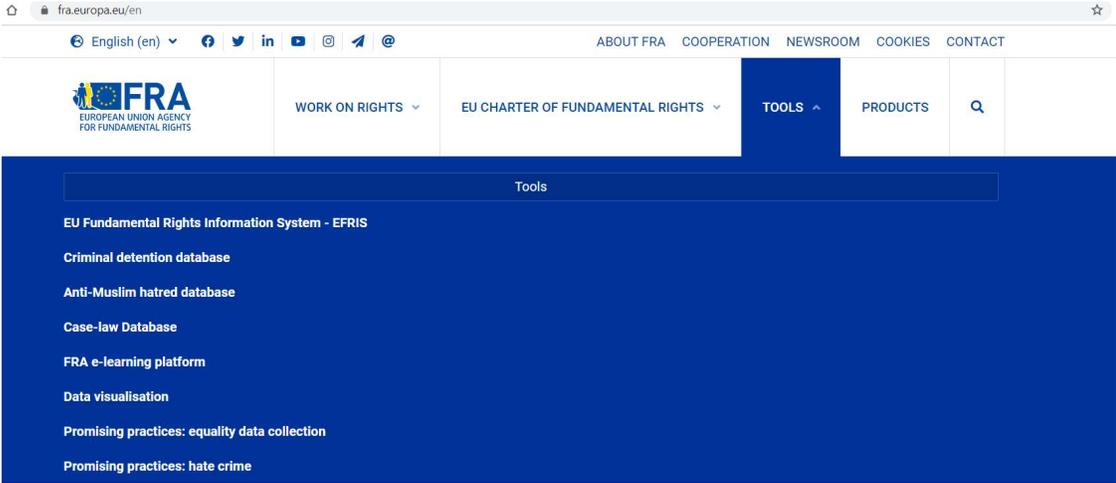
# FRA's online tools

to assist judges and other legal practitioners in EAW and other mutual legal assistance instrument decisions

ERA online seminar on the EAW, pre-trial detention, mutual trust and legal assistance, 24-26 March



Co-funded by the Justice Programme of the European Union 2014-2020



All tools are available on: [fra.europa.eu](https://fra.europa.eu)

The screenshot shows the website's navigation menu with the following items: WORK ON RIGHTS, EU CHARTER OF FUNDAMENTAL RIGHTS, TOOLS, and PRODUCTS. The 'TOOLS' menu is expanded, listing the following resources:

- EU Fundamental Rights Information System - EFRIS
- Criminal detention database
- Anti-Muslim hatred database
- Case-law Database
- FRA e-learning platform
- Data visualisation
- Promising practices: equality data collection
- Promising practices: hate crime



## Criminal Detention Database

a dataset that combines in a one place information on detention conditions in all 28 EU Member States drawing on

- national, European and international standards,
- case law and
- monitoring reports

about selected core aspects of detention conditions: including cell space, sanitary conditions, access to healthcare and protection against violence.

**Accessible via:** <https://fra.europa.eu/en/databases/criminal-detention/criminal-detention/home>

**Target audience:** Judges and other legal practitioners

For any additional information please contact us: [just\\_digit\\_secure@fra.europa.eu](mailto:just_digit_secure@fra.europa.eu)

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## Charterpedia

an online database which provides easy-to-access information about the Charter and its provisions. For each Charter Article, it includes

- the official explanations of the Charter Articles,
- related European and national case law,
- related provisions in national constitutional law as well as in international law.

It also contains references to academic analysis, national parliamentary debates and related FRA publications.

**Accessible via:** <https://fra.europa.eu/en/eu-charter>

**Target audience:** Legal practitioners, law students, academia

For any additional information please contact us: [charter@fra.europa.eu](mailto:charter@fra.europa.eu)

4



## Case-law Database

a compilation of case law with direct references to the EU Charter of Fundamental Rights Articles of following courts

- Court of Justice of the European Union (CJEU)
- European Court of Human Rights (ECtHR),
- a selection of national case law

The case law is searchable by various criteria, such as Charter rights, country or deciding body.

**Accessible via:** <https://case-law-database>

**Target audience:** Legal practitioners, law students, academia

For any additional information please contact us: [charter@fra.europa.eu](mailto:charter@fra.europa.eu)

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## Charter e-guidance

An e-learning tool tailor-made for judges. However, it can be of equal relevance and assistance to other legal practitioners.

It aims at providing practical guidance on the specific question of

- when and how the Charter of Fundamental Rights applies in a given case at national level.

The tool therefore concentrates on Art. 51 of the Charter.

**Accessible via:** <https://e-learning.fra.europa.eu/course/view.php?id=47>

**Target audience:** Judges & legal practitioners, law students, academia

For any additional information please contact us: [charter@fra.europa.eu](mailto:charter@fra.europa.eu)

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## European Union Fundamental Rights Information System - EFRIS

a Human Rights Gateway, bringing together data and information from existing human rights databases, and enables viewing and analysis of relevant assessments of fundamental rights in the EU.

The tool provides information and data on states, focusing on the most recent report or equivalent. For the moment it covers around

- 60 human rights mechanism, namely 44 thematic UN Special Procedures,
- 10 Treaty Bodies (Concluding Observations, Jurisprudence and deadlines for submissions of state reports), and
- 4 Council of Europe mechanisms including the European Court of Human Rights.

**Accessible via:** <https://fra.europa.eu/en/databases/efris>

**Target audience:** EU institutions, Member States, civil society, academia and media

For any additional information please contact us: [efris@fra.europa.eu](mailto:efris@fra.europa.eu)

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## Anti-Muslim hatred database 2012 - 2019

a data compilation that provides information on

- significant international, European and national case law and rulings,
- UN human rights body decisions, reports,
- findings by human rights and equality bodies and organisations relating to hate crime, hate speech and discrimination against Muslims,
- as well as relevant research, reports, studies, data and statistics on these issues.

It also provides information on victims' support organisations in the EU Member States.

**Accessible via:** <https://fra.europa.eu/en/databases/anti-muslim-hatred>

**Target audience:** Civil society, Muslims and victim support organisations, legal practitioners and scholars, public and judicial authorities, media and the general public

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## Other FRA online tools

- **Data Visualisations on various FRA survey data**  
<https://fra.europa.eu/en/publications-and-resources/data-and-maps>
- **Compendium of practices for equality data collection**  
covers practices on different discrimination grounds and areas of life in which discrimination, inequality and exclusion can occur  
<https://fra.europa.eu/en/promising-practices-list>
- **Compendium of practices for hate crime**  
collates practices for combating hate crime from across the EU.  
<https://fra.europa.eu/en/theme/hate-crime/compendium-practices>
- **e-media toolkit**  
provides the media with guidance to enhance quality journalism  
<https://e-learning.fra.europa.eu>

For any additional information please contact us : <https://fra.europa.eu/en/contact>

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# Many thanks for your attention



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Co-funded by the Justice  
Programme of the European Union 2014-2020

## **THE EAW, PRE-TRIAL DETENTION, MUTUAL TRUST AND LEGAL ASSISTANCE**

**Detention conditions, pre-trial detention and EAW: Effect of the CJEU's judgments on mutual trust and mutual recognition instruments**

**Juan Luis Requejo Pagés**

1

### **Legislative framework**

**Council Framework Decision 2002/584/JAI** of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (JO 2002 L 190, p.1), as amended by Council Framework Decision 2009/299/JAI of 26 February 2009 (JO 2009 L 81, p.24) ("The Framework Decision")

2

## Case-law on the Framework Decision

- **On its validity:**

- ✓ *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261).

- **On the concept of “issuing authority”:**

- ✓ *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19PPU, EU:C:2019:456).

- **On some technical questions:**

- ✓ Time-limits for the surrender decision (*Lanigan*, C-237/15PPU, EU:C:20215:474).

- ✓ Extension of EAW (*F*, C-168/13PPU, EU:C:2013:358).

- ✓ “Chain” of EAW (*West*, C-192/12PPU, EU:C:2012:404).

- ✓ Enforcing additional sentences (*IK*, C-551/18PPU, EU:C:2018:991).

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## Grounds for mandatory and optional non-execution of EAW

### Articles 3 and 4 of the Framework Decision

#### Avoiding overlaps

- ✓ *Non bis in idem* (*Mantello*, C-261/09, EU:C:2010:683).

- ✓ Sentences *in absentia* (*Melloni*, C-399/11, EU:C:2013:107).

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A question of trust... not of faith

*A iuris tantum* presumption.

**The guarantee of national law**

- ✓ Against unlawfull internal acts and dispositions: Knowledge (*iura novit curia*) and invalidation.
- ✓ Against unlawfull foreign acts and dispositions: Trust and non-execution.

5

The CJUE as a trust-building actor

**Reading beyond the letter of the law**

Other grounds for non-execution

*A real risk of breach of the fundamental rights*

6

## Other grounds for non-execution

“Systemic or generalized deficiencies”

- ✓ Detention conditions
- ✓ Independence of the judiciary

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## The two-step-approach

- **Detention conditions**

- ✓ *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2006:198).
- ✓ *Generalstaatsanwaltschaft (Conditions of detention y Hungary)* (C-220/18 PPU, EU:C:2018:589).

- **Independence of the courts**

- ✓ *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

8

## The two-step-approach

- **The first step:**

- ✓ Systemic or generalized deficiencies.

- **The second step:**

- ✓ A “specific and precise” risk “in the particular circumstances of the case”.

9

## Rights in balance

- The ones of the requested person.

- The general interest protected by the criminal law. The interest and rights of the victims of criminal offences.

10

## The other side of the coin

### **Deficiencies in the executing Member State?**

- ✓The right not to be requested from a Member State whose detention conditions or judiciary suffer serious systemic or generalized deficiencies.

## Operating the EAW: an overview

Dr. Florentino-Gregorio Ruiz Yamuza, Senior Judge, Spain

ERA, Academy of European Law  
Online seminar, 24-26 March 2021

Co-funded by the Justice Programme of the European Union 2014-2020



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### 1. Operating the EAW (1)



- ➔ The DNA of the cooperation based on mutual trust.
- ➔ A powerful and efficient instrument...
- ➔ Requiring a deep comprehension of the mutual trust and mutual recognition principles.

Broad and restricted conceptions

- Grounds for refusal and guarantees (Arts. 3, 4, 4 bis and 5 EAW FD)
- European public order (CFREU and ECHR) (Art. 1.3 EAW FD)
- Reconciliation of criminal systems not fully harmonised
- Procedural guarantees of each Member State

2

## 2. Operating the EAW (2)



### Old Challenges

#### European Arrest Warrant (EAW)

##### Features

- a. Single form
- b. Direct contact between judicial Authorities
- c. Short time limits
- d. Surrender of nationals
- e. Double criminality
- f. Limited grounds for refusal
- g. Mutual recognition/trust based scheme

##### Common problems

- a. Differences between Criminal Justice systems.
- b. Language barriers.
- c. Lack of cooperation training
- d. Attitude towards ICTs
- e. Need to build, preserve and increase mutual trust
- f. Fundamental Rights protection
- g. *The X factor*

3

### 2021 Horizon

Implementation

Harmonisation

Proportionality

Double criminality

*Ne bis in idem*

Interplay EAW FD-909 FD

Preservation of Fundamental Rights

3

## 3. Best practices and experience with issuing and executing an EAW



EC Handbook on how to issue and execute an EAW, October 2017



EAW. European Implementation Assessment. European Parliament, June 2020



Eurojust, EJM, EJTN



ECJ



Professional experience

4

## 4. Issuance of an EAW. Key points



### Issuing Authorities

Art. 1(1) Judicial decision  
 Art. 6(1) Judicial authority  
 (autonomous concept)

*OG-PI, XD, JD...saga*

-Independence  
 -Double level of protection fundamental and procedural rights, national and at the issuance level.  
 -Proportionality check

*AZ, YU, ZV case Executing Authority, Nov 2020  
 L and P joined cases, Dec. 2020 (impunity)*



Eurojust Questionnaire, Feb. 2021

### Proportionality

*Proportionality, ECJ*



Resort to alternative measures  
 FD on Probation and Alternative Measures  
 FD Transfer of sentenced persons  
 CoE Convention Transfer of Proceedings  
 FD Financial Penalties  
 EIO Directive, Article 1 (1) b) and certificate  
 EAW FD, Article 2(1)



Spanish example

5

## 5. Execution of an EAW. Key points



### Hearings and time limits

Time limit 60 days (Art. 17 EAW FD) vs. length of the proceedings.  
*Jeremy F*, appeals. *Lanigan* obligation to take a decision.  
 TC case detention and time limits  
 COVID Pandemic (Art 23 EAW FD). *Vilkas*, Force Majeure

### Double criminality

Arts. 2(2), 2(4) and 4(1) EAW FD. Harmonisation. Transposition models.  
*Puigdemont case*. *The Grundza-Piotrowski* paradox?  
 The X case. Legality principle. Formalities. Effectiveness of the EAW.

### Nationals and residents

Arts. 4(6) and 5(3) EAW FD and 909 FD  
*Poplaswski case*

### Ne bis in idem

Arts. 3(2) and 4(3) EAW FD. Art. 54 SCIA  
 AY case

### Fundamental rights

Art. 1.3 EAW FD.  
 From *Aranyosi-Caldararu* to *LM* cases.

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6. Double Criminality (1)			
<p><b>EAW FD</b></p> <p><b>Top 32</b>  <b>Art. 2(2)</b> Without verification of the double criminality</p> <p><b>Rest of the offences</b>  <b>Art 2(4)</b> "... the surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described."  <b>Art 4(1)</b> "... the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State...." (Taxes exception)</p> <p><b>TRANSPPOSITION MODELS</b></p>	<p><b>COMPARING OFFENCES</b></p> <p><b>Double criminality.</b></p> <p>Correlation that exists in the way criminal law has categorised a form of behaviour in two States which are involved in an extradition process.</p>		<p><b>Comparison</b></p> <p><i>In concreto</i>  <i>In abstracto</i></p> <p><b>Aspects</b></p> <p>Substantive (<i>lex loci</i>)  Procedural (<i>lex fori</i>)</p> <p>Legal National provisions</p> <p>CJEU case-law</p>

7

7. Double Criminality (2) The Grundza Judgment			
<p><b>Arts. 7(3) and 9(1) d) FD 2008/909/JHA</b></p> <p>§ 28 "...provision allows the executing State to make recognition of the judgment and enforcement of the sentence subject to the requirement that the condition of double criminality is met."</p>			
<p>§ 33-36 Scheme</p>	<p>Checking the facts constitute an offence according to Executing MS Law</p> <p>Exact match between constituent elements or name is not required</p> <p>FD Wording context and objective to be taken into account. Flexible approach</p> <p>Relevant factors are those related to the congruence of the factual elements underlying the crime, as reflected in the ruling passed in the issuing State and the definition of a violation in the legislation of the executing State.</p>		
<p>§ 46-49 Essential points to be verified. <i>The legal classification echo</i></p>			
<p>"...whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the territory of the executing State if they were present there..." "...not whether an interest protected by the issuing State has been infringed, but whether, in the event that the offence at issue were committed in the territory of the executing State, it would be found that a similar interest, protected under the national law of that State, had been infringed."</p>			

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## 8. Double Criminality (3) The *Piotrowski Judgment*



### Art. 3(3) EAW FD

EAW shall be refused if the requested person

"...may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State."

#### The facts.

PL requested the surrender of a 17 citizen to be tried as an adult. Existing special regime in BE for 16-18, depending on detailed circumstances to be assessed they are tried as juvenile or as adults

#### The question.

How, in abstract or concretely, the minor's responsibility has to be understood  
*In abstracto*, he could be considered criminally responsible.  
*In concreto* a series of complicated concurrent factors should be taken into account to grant the surrender.

#### The decision

THE CJEU rejected a detailed assessment, stating that the conduct of an evaluation before a surrender was contrary to the purpose of a system of cooperation based on mutual recognition. In line with AG opinion Advocate who noting that this type of operation of specific determination of responsibility would deprive mutual recognition of any useful effect.

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## 9. Double Criminality (2) The *Grundza Judgment*



### Arts. 7(3) and 9(1) d) FD 2008/909/JHA

§ 28 "...provision allows the executing State to make recognition of the judgment and enforcement of the sentence subject to the requirement that the condition of double criminality is met."

#### § 33-36 Scheme

Checking the facts constitute an offence according to Executing MS Law

Exact match between constituent elements or name is not required

FD Wording context and objective to be taken into account. Flexible approach

Relevant factors are those related to the congruence of the factual elements underlying the crime, as reflected in the ruling passed in the issuing State and the definition of a violation in the legislation of the executing State.

#### § 46-49 Essential points to be verified. *The legal classification echo*

"...whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the territory of the executing State if they were present there..." "...not whether an interest protected by the issuing State has been infringed, but whether, in the event that the offence at issue were committed in the territory of the executing State, it would be found that a similar interest, protected under the national law of that State, had been infringed."

10

## 9. Double Criminality (4) The Grundza-Piotrowski Paradox



### Grundza

FD 2008/909/JHA  
 Arts. 2(4) and 4(2) EAW FD  
 Accusation or conviction cases.  
 Grounds for refusal restrictive interpretation.  
 Considerable degree of *ad hoc* appreciation beyond a general and abstract examination.

### Piotrowski

Art. 3(3) EAW FD  
 Grounds for refusal restrictive interpretation  
 Particular comparison cannot go so far as to put the executing judicial authority in the position of reviewing the whole case again as this is incompatible with the principle of mutual recognition.

### The Openbaar Ministerie v A order.

The Issuing MS Law is the relevant in terms of penalty imposed.

Rejecting extradition via Art. 4(1) of the EAW FD requires that the facts for which the person is requested are not in any way constituting an offence in the executing MS. Neither the Art. 2(4), nor 4(1) or any other passage allow establishing the condition of minimum punishable threshold, being the only frame of reference in this regard that found in the legislation of the issuing State

- Impact of A case, the importance of penalty to assess offences homology.
- Diagonal interpretation (§ 56 AG opinion in *Grundza*)
- Essential elements to be weighed to check correspondence beyond criminal taxonomy to conclude a similar interest is protected in both MS.
- Obligation of the executing MS to determine correspondence? Different interpretation in a homogenous crime that is under the same or similar denomination in both States or additional sweep to detect any other possible coincidence of protected interests.

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## 10. EAW and procedural rights



**EAW FD** *In absentia* trials, Art. 4 bis. Right to be informed, Art. 11 (1), Legal counsel and interpreter, Art. 11(2). Provisional release, Art. 14. Hearing of the case by judicial Authority, Arts. 14 and 19

Directive 2010/64/EU	Interpretation and translation
Directive 2012/13/EU	Information
Directive 2013/48/EU	Access to a Lawyer
Directive 2016/800/EU	Rights of Children suspect or accused
Directive 2016/1919/EU	Legal Aid

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## 11. The role of Eurjoust and EJM



### **EUROJUST.** Regulation 2018/1727/EU

Competences. Assist and coordinate (Serious crimes, affecting 2 or more MS)

Optional competences. Related offences. ! MS and 3rd country. 1 MS.



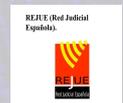
### **EJM**

Decision 2008/976/JHA

Contact points. Intermediate, assist, training  
Information



### **National networks**



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## 12. References



### SLIDE 3

**European Commission Handbook on how to issue and execute an European Arrest Warrant.**

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006(02)&from=EN)

**EAW. European Implementation Assessment. European Parliament, June 2020.**

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS\\_STU\(2020\)642839\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU(2020)642839_EN.pdf)

**Eurojust. European Arrest Warrant ECJ's case-law.**

<https://www.eurojust.europa.eu/case-law-court-justice-european-union-european-arrest-warrant-march2021>

### SLIDE 4

**Spanish Act on Mutual Recognition of Judicial Decisions in Criminal Matters in the EU.**

<https://www.ejm-crimjust.europa.eu/ejnuupload/InfoAbout/English%20version%20LAW%202023%20of%202014.pdf>

**ECJ Press Release 156/19 The Court finds that the French, Swedish and Belgian public prosecutor's offices satisfy the requirements for issuing a European arrest warrant, and clarifies the scope of the judicial protection afforded to persons referred to in such warrants.**

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-12/cp190156en.pdf>

### SLIDE 11

**EURJOUST website.**

<http://eurojust.europa.eu/about/background/Pages/History.aspx>

**EJM website.**

[https://www.ejm-crimjust.europa.eu/ejm/EJM\\_Home.aspx](https://www.ejm-crimjust.europa.eu/ejm/EJM_Home.aspx)

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# Surrender in the EU - UK Trade and Cooperation Agreement



Co-funded by the Justice Programme of the EU 2014 - 2020

*Tania Schröter*

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## Context



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## Provisional application & entry into force

*Finalisation negotiations*  
24 Dec 2020

*Transitional period*  
31 December 2020

*Entry into force after consent European Parliament*

**Provisional application**  
1 January 2021



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## Fundamental guarantees for cooperation

**commitments to respect** democracy, rule of law, fundamental rights and freedoms of individuals, including those enshrined in the **ECHR** (LAW.GEN.3)



in the event of the **denunciation of the ECHR**, there is a **right to terminate** LEJC on the date the denunciation becomes effective (LAW.OTHER.136)

commitments to **give domestic effect** to the rights and freedoms enshrined in the **ECHR** (LAW.GEN.3)



in case of serious and systematic Fund Rights deficiencies, including where the **UK no longer gives effect to the ECHR domestically**, LEJC can be **suspended**

commitments to **uphold high data protection standards**, to be ascertained by adequacy decisions taken unilaterally by each side (LAW.GEN.4)



where there are **serious and systematic deficiencies as regards the protection of personal data**, for example where an adequacy decision falls away, LEJC can be **suspended** (LAW.OTHER.137)



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## UK exit from Schengen Information System

Impossible for a non-Schengen third country to have access to the Schengen Information System



Impact on surrender  
Interpol Red Notices



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# Surrender

## Title VII



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## Objectives

- Politically very important
- EU Mandate para. 123: effective arrangements
  - based on streamlined procedures
  - subject to judicial control and time limits
  - enabling UK and MS to surrender suspected and convicted persons efficiently and expeditiously.
- Underpinned by commitment to respect fundamental rights and fair trial/procedural rights



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## TCA: outcome

- Self-standing title
- Inspired by IC-NO-EU Extradition Agreement (2006) and EAW (e.g. in absentia)
- Very ambitious title



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## Scope, Article LAW.SURR.79

- legal basis for surrender of requested persons for **prosecution purposes**: for acts punishable by the law of the issuing State by a custodial sentence or a detention order for a maximum period of at least 12 months

or

- for **execution of a sentence**: for sentences or detention orders of at least four months.



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## Authorities

- « arrest warrant » as judicial decision, Article LAW.SURR.78: Definitions
- judicial authorities: judge or courts or prosecutors.
- public prosecutor: only to the extent that considered judicial authority under domestic law
- central authority possible, Article LAW.SURR.85: Recourse to the central authority
- notification of competent authorities, Article LAW.OTHER.134: Notifications



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## Article LAW.SURR.90: Keeping the person in detention

*When a person is arrested on the basis of an arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing State. The person may be released provisionally at any time in accordance with the domestic law of the executing State, provided that the competent authority of that State takes all the measures it deems necessary to prevent the person from absconding.*



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## Time-limits

- strict time-limits:
  - to take a decision whether to surrender a person (10 days when a person consents to be surrendered, and 60 days from an arrest when a person does not consent); Article LAW.SURR.95: Time limits and procedures for the decision to execute the arrest warrant
  - to surrender a requested person (no later than ten days after the final decision on the execution of the arrest warrant); Article LAW.SURR.101: Time limits for surrender of the person.
  - if exceeded: person has to be released, Art. LAW.SURR.101(5)



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## Mandatory grounds for refusal, Article LAW.SURR.80

- amnesty in the executing State
- ne-bis-in-idem
- no criminal responsibility due to age in the executing State



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## Optional grounds for refusal, Article LAW.SURR.81 (extract)

- double criminality (but declaration possible)
- prosecution based on the grounds of the person's sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation
- in absentia decisions
- 



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## Proportionality principle, Article LAW.SURR.77

*Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State **taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention.***



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## Other safeguards

- additional guarantees, Art. LAW.SURR.84:
  - lifelong detention: review after 20 years
  - transfer of sentence in case of arrest warrant for prosecution - consent
  - real risk to the protection of the fundamental rights of the requested person (e.g. detention conditions)
- possibility to seek additional information from the issuing authority (Article LAW.SURR. 93: Surrender decision )



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## Other safeguards (2)

- procedural rights, Article LAW.SURR.89: Rights of a requested person
  - information about content of arrest warrant and about possibility to consent
  - right to interpretation and translation
  - right to be assisted by a lawyer in the executing State + information on the right to be assisted by a lawyer in the issuing State
  - right to have consular authorities informed



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## Surrender of own nationals/residents

- choice of States whether to **surrender own nationals**: total ban or imposing conditions, based on reasons related to the fundamental principles or practice of the domestic legal order; Article LAW.SURR.83: Nationality exception
  - But: aut dedere, aut judicare principle applies
- if person is a national or resident of execution State, can take over execution of the sentence (ground for refusal/additional guarantee)
  - But: consent of person required
- *Petruhhin* mechanism, Article LAW.SURR.94: Decision in the event of multiple requests



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# Questions?



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# Thank you!



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# Prawa człowieka i wzajemne uznawanie decyzji sądowych w Unii Europejskiej. Polski kontekst.

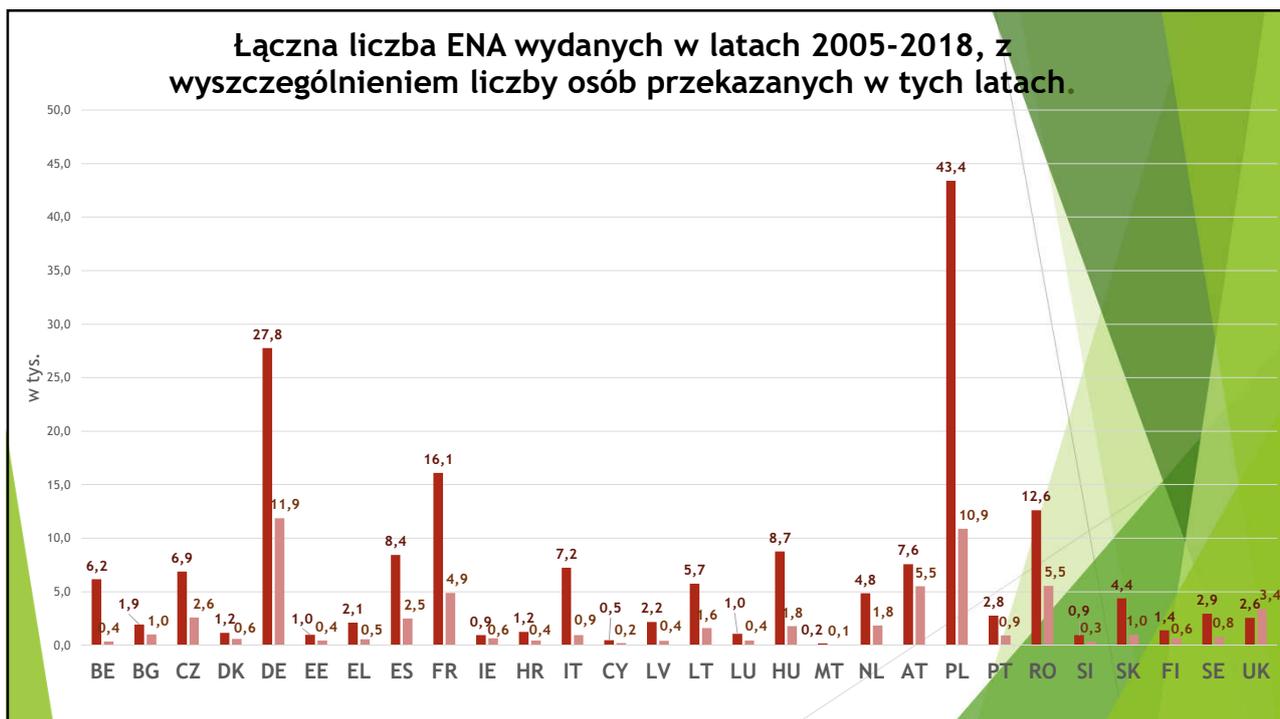
adw. Marcin Wolny  
Helsińska Fundacja Praw Człowieka



Współfinansowane ze środków programu „Justice” Unii Europejskiej na lata 2014-2020

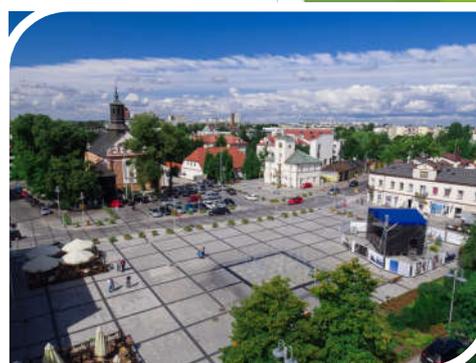
## Plan prezentacji

- ▶ Proporcjonalność stosowania ENA w polskich sprawach;
- ▶ ENA a warunki detencji w polskich jednostkach penitencjarnych;
- ▶ Wpływ „reformy sądownictwa” na wzajemne uznawanie orzeczeń;



## Proporcjonalność stosowania ENA

- ▶ Zasada legalności.
- ▶ Polityka karna państwa.
- ▶ Przewlekłość postępowania karnego.
- ▶ Zasady doręczania dokumentów i wezwań.
- ▶ Sposób pouczenia o prawach.



### POUCZENIE O UPRAWNIENIACH I OBOWIĄZKACH PODEJRZANEGO W POSTĘPOWANIU KARNYM

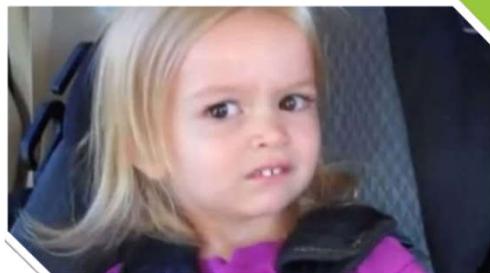
Jako podejrzanemu w postępowaniu karnym przysługują Ci następujące uprawnienia:

#### 1. Wyjaśnienia

- Podczas przesłuchania możesz składać wyjaśnienia lub odmówić składania wyjaśnień, lub odmówić odpowiedzi na poszczególne pytania bez konieczności podania przyczyn odmowy (art. 175 § 1)<sup>1)</sup>.
- W trakcie przesłuchania, na Twoje żądanie lub na żądanie Twojego obrońcy, możesz składać wyjaśnienia również na piśmie, jednakże w tym czasie nie możesz kontaktować się z innymi osobami. Przesłuchujący z ważnych powodów może odmówić zgody na złożenie wyjaśnień w tej formie (art. 176 § 1 i 2).
- Jeżeli będziesz obecny/obecna przy czynnościach dowodowych, możesz złożyć wyjaśnienia co do każdego dowodu (art. 175 § 2).

#### 2. Pomoc prawna

- Masz prawo do korzystania z pomocy ustanowionego przez Ciebie obrońcy. Nie możesz mieć więcej niż trzech obrońców z wyboru jednocześnie (art. 77).
- Jeżeli jesteś tymczasowo aresztowany/aresztowana, możesz porozumiewać się z obrońcą podczas nieobecności innych osób lub korespondencyjnie. Prokurator może zastrzec w szczególnie uzasadnionych przypadkach, jeżeli wymaga tego dobro postępowania przygotowawczego, że będzie przy tym obecny sam lub osoba przez niego upoważniona. Prokurator może także z takich samych powodów zastrzec kontrolę Twojej korespondencji z obrońcą. Zastrzeżenia te nie mogą być utrzymywane ani dokonane po upływie 14 dni od dnia tymczasowego aresztowania (art. 73).
- Jeżeli wykazesz, że nie stać Cię na obrońcę (nie jesteś w stanie ponieść kosztów obrony z wyboru bez uszczerbku dla niezbędnego utrzymania siebie i rodziny), sąd może na Twój wniosek wyznaczyć obrońcę z urzędu, również w celu dokonania określonej czynności procesowej (art. 78).
- Żądanie wyznaczenia obrońcy z urzędu w postępowaniu sądowym możesz zgłosić w terminie 7 dni od daty doręczenia Ci odpisu aktu oskarżenia. Jeżeli swoje żądanie złożysz po tym terminie lub nie dołączysz do niego dowodów, za pomocą których wykazesz, że nie możesz ponieść kosztów obrony, może to spowodować rozpoznanie wniosku po wyznaczonym terminie rozprawy lub posiedzenia (art. 338b § 1 i 2).
- Żądanie wyznaczenia obrońcy z urzędu po pierwszym terminie rozprawy lub posiedzenia powinieneś/powinnas złożyć w takim terminie, aby jego rozpoznanie nie powodowało zmiany kolejnego terminu rozprawy lub posiedzenia (art. 338b § 3).
- Możesz żądać, aby w Twoim przesłuchaniu brał udział ustanowiony obrońca. Jednak niestawienie obrońcy nie tłumaczy przesłuchania (art. 301).
- W przypadku skazania lub warunkowego umorzenia postępowania karnego możesz zostać obciążony/obciążona kosztami obrony z urzędu (art. 627 i art. 629).



## Warunki pozbawienia wolności

- ▶ Standard przestrzeni przypadającej na osadzonego.
- ▶ Problem więźniów szczególnie niebezpiecznych. Sprawy Piechowicz i Horych p. Polsce.
- ▶ Dostęp do opieki zdrowotnej.
- ▶ Efektywność testy przyjętego przez TSUE w sprawie Caldararu i Aranyosi.



## Wzajemne uznawanie orzeczeń a „reforma sądownictwa”

- ▶ Wyrok TSUE z 19 listopada 2019 r. (C-585/18, C-624/18 i C-625/18);
- ▶ Połączona uchwała Izby Cywilnej, Izby Karnej oraz Izby Pracy i Ubezpieczeń Społecznych (BSA I-4110-1/20);
- ▶ Tzw. „ustawa kagańcowa”;
- ▶ Wyrok TK w sprawach U 2/20 i P 22/19;
- ▶ Test z wyroku TSUE w sprawie Celmer.

Dziękuję za uwagę.

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