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Upholding Fundamental Rights in National Arrest Warrant Proceedings in Practice: a Need for Third Level of Judicial Protection?

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Abstract
The European Commission has repeatedly attempted to introduce EU legislation on pre-trial detention but has so far met with an overwhelming reluctance of Member States to address the issue. The latest initiative proposes to adopt an EU recommendation on the rights and conditions in pre-trial detention. This article seeks to highlight gaps in the protection of fundamental rights in national arrest warrant proceedings and whether standards on pre-trial detention alone will offer a solution for the full protection of fundamental rights in a cross-border context. It draws the link between the national arrest warrant, the EAW and the responsibility of the issuing state to guarantee the legality and validity of the national arrest warrant. The article finds that currently, compliance of judicial decision-making with the existing ECHR standards on pre-trial detention cannot be presumed in practice. This compliance also cannot be verified in an adversarial and equal judicial process until after the requested person has been surrendered. In the absence of a judicial process to challenge the legality of a national arrest warrant before the execution of an EAW, protection of the requested person's rights and access to an effective remedy remains problematic.

Keywords Pre-trial detention · European arrest warrant · Judicial cooperation in criminal matters · Mutual trust

Introduction

On 25 March 2022, the European Commission announced a new initiative in the area of pre-trial detention – a recommendation on the rights and conditions in detention.[1] With the proposed recommendation, the European Commission plans to tackle two problems identified in its earlier 2016 study on pre-trial detention – the failure of

[1] Call for Evidence for an Initiative, Pre-Trial Detention – EU Recommendation on Rights and Conditions, No. Ref. Ares(2022)2,202,649, 25 March 2022.

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national practice to comply with international standards and the negative effect of divergent national practices and material detention conditions on the European Union (EU) judicial cooperation instruments.[2] Overuse and inadequate decision-making on pre-trial detention is a long-standing and well-documented problem[3] among Member States of the EU and Council of Europe. Within the EU, pre-trial detention is no longer a purely national matter that requires national solutions since one of the main EU instruments for judicial cooperation in criminal matters – the European Arrest Warrant (EAW) – relies almost entirely on a presumed and virtually unchecked compatibility of a national arrest warrant with the right to liberty.

This article takes a deeper look at the issues related to the practice of ordering pre-trial detention and whether the existing safeguards or indeed proposed legal standards on pre-trial detention and detention conditions alone will be sufficient to justify the trust placed in the national judicial authorities' compliance with the right to liberty in cross-border proceedings. It will pay particular attention to the EAW proceedings,[4] given the fundamental role the national arrest warrant plays in the EAW process. This article highlights the main challenges identified by the author and her colleagues at Fair Trials[5] as well as defence lawyers, academics and NGOs of the Fair Trials' Legal Expert Advisory Panel[6] in their work on pre-trial detention in a cross-border context. In particular, it highlights the absence of a legal process to challenge compliance with the standards of right to liberty in EAW proceedings in the issuing state. In doing so, the article will first draw a link between pre-trial detention and the EAW ("Mutual trust in the area of pre-trial detention"). It will then present a brief overview of the existing European standards of lawful deprivation of liberty and rights of detained persons in pre-trial proceedings ("Mutual trust: on what basis?") and whether the presumption of compliance with these standards and access to the existing rights is justified in practice ("Is mutual trust adequately grounded"). Finally, the article will briefly analyse the absence of an effective remedy for failure to comply with fundamental rights standards in national arrest warrant proceedings in the issuing Member State and whether the judicial protection currently envisaged under the Framework Decision on the EAW[7] needs to be revisited to guarantee effective judicial protection in practice ("Conclusion").

[2] Ibid.

[3] C. Heard and H. Fair, *Pre-trial detention and its overuse,* Institute for Crime & Justice Policy Research 2019; Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, 2021.Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*, 2016.

[4] This article will only look at the EAW procedures insofar as they concern EAWs issued for the purpose of criminal prosecution.

[5] Fair Trials is a global criminal justice watchdog, campaigning for fairness, equality and justice in Europe, Latin America, the UK and the USA.

[6] The Legal Experts Advisory Panel (LEAP) is Fair Trials' network of fair trial defenders. The network brings together lawyers, academics, civil society representatives, activists, and people with lived experience in the criminal justice system. LEAP works to uphold human rights, fairness and justice in criminal justice systems across Europe, focusing on both the operation of these systems and the theories and issues that drive them.

[7] Council Framework Decision 2002/548/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJL 190, 18.7.2002, p.1–20.

Pre-trial Detention and the EAW

The EAW system of surrender relies almost entirely on the presumed compatibility of national decision-making with the right to liberty under the EU Charter of Fundamental Rights (Charter) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) since a valid national arrest warrant is the mandatory first step, and indeed, the basis for issuing an EAW. The Court of Justice of the European Union (CJEU) held in *Bob-Dogi* that an EAW must be based on a separate national arrest warrant issued in accordance with the rules of criminal procedure of the issuing Member State, and in the absence of such national arrest warrant, a person cannot be arrested and held in custody.[8] This close connection between national detention proceedings and arrest and detention under the EAW from the perspective of the requested person and the issuing state is also reflected through Article 26 of the Framework Decision on the EAW which requires all periods of detention in the executing Member State to be deducted from the total period of detention to be served in the issuing Member State. A valid national arrest warrant forms the very basis of an EAW, and thus, from the perspective of the issuing state, the execution of an EAW can simultaneously be considered the execution of a national arrest warrant in another EU Member State.

This conclusion also corresponds with the findings of the European Court of Human Rights. In *Stephens v. Malta (No.1)*, the European Court of Human Rights found albeit in a pre-EAW context that by setting in motion a request for the applicant's detention pending extradition, the responsibility to ensure that the arrest warrant and extradition request are valid as a matter of requesting state's law, both substantive and procedural lay with the requesting state.[9] Thus, national arrest warrants proceedings and the subsequent arrest, detention and extradition from a foreign state must be regarded as a single process from the perspective of issuing states' responsibility to guarantee its legality. In the context of an EAW, this means that the obligation to guarantee the legality of the national arrest warrant and therefore the legality of the EAW and of any deprivation of liberty during the EAW proceedings rests with the issuing state throughout the proceedings.

The system of surrender under the EAW requires mutual trust between the Member States that the EAWs issued by other Member States are valid and comply with the standards of the fundamental right to liberty. Under the Framework decision on EAW, mutual trust has been interpreted to mean that Member States are in principle obliged to give effect to an EAW[10] and are prohibited, save in exceptional circumstances, from checking whether another Member State has actually, in a specific case, observed the fundamental rights guaranteed by EU law.[11] This certainly holds true for the validity of the national arrest warrant. It has been argued that in this aspect, the EAW essentially operates as a "system whereby the protection of fundamental rights must be subsumed to the abstract requirements of upholding mutual trust, instead of endorsing a model of a Union whereby cooperation on the basis of mutual trust must be underpinned by an effective protection of fundamental rights."[12] Thus, in the absence of checks on fundamental rights compliance in individual cases, a systemic solution for ensuring compliance with international standards would be harmonisation

[8] CJEU, Case C-241/15, *Bob-Dogi*, 01.06.2016, paras. 22–23.

[9] ECtHR, *Stephens v. Malta (No.1)*, No. 11956/07, 21.04.2009, para. 59.

[10] CJEU, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, 05.04.2016, para. 79.

[11] CJEU, Case C-220/18 PPU, *ML*, 25.07.2018, para. 50.

[12] V. Mitsilegas (2015), *The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice*, NJECL, Vol. 6(4), p.472.

of those standards and setting up adequate procedures that would encourage review of compliance with those standards in the issuing state in line with its international obligations.

European Standards on Pre-trial Detention

To date, no EU legislation harmonising the substantive and procedural aspects of pre-trial detention in a comprehensive manner has been adopted. There is some debate as to whether the EU has the competence to legislate on pre-trial detention under Article 82(2) of the Treaty on the Functioning of the European Union (TFEU). It has been argued that at least three elements have to be satisfied for the EU to exercise legislative competence on pre-trial detention: cross-border dimension, necessity to ensure mutual recognition and clear benefits for mutual recognition.[13] Despite the ongoing debate, it would appear that for the European Commission, the issue of competence is not the main obstacle in tackling pre-trial detention, as evidenced by its repeated efforts to introduce hard legislation on the matter.[14] It also appears that the unanimous refusal of Member States to launch the legislative process on pre-trial detention is based more on political reluctance than lack of EU competence. Member States argue that standards of pre-trial detention are already set out in 'international fora' and focus instead should be placed on more effective application of the existing standards.[15] In its most recent proposal of an EU recommendation on the rights and conditions in pre-trial detention, the European Commission has relied on Article 82(2)(b) TFEU as its legal basis and improvement of cross-border cooperation as its stated objective.[16]

Thus, although any form of binding EU law on pre-trial detention currently appears unlikely, some procedural rights in detention proceedings are already covered by the six EU procedural rights directives.[17] These include access to a lawyer, the right to

[13] T. Coventry (2017), *Pre-trial detention: Assessing European Union competence under Article 82(2) TFEU*, NJECL, Vol. 8(1), 43–63.

[14] European Commission's proposals to legislate on pre-trial detention were discussed and overwhelmingly rejected by Member States in 2011 and 2021, see Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, Brussels, COM(2011) 327 final, 14.6.2011; Council of the European Union, Non-paper from the Commission services on detention conditions and procedural rights in pre-trial detention, No. 12161/21, 24 September 2021.

[15] Outcome of the Council meeting, 3816th Council meeting Justice and Home Affairs Brussels, 7 and 8 October 2021, p.4.

[16] Ibid.

[17] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280, p. 1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142, p. 1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 290, p. 1; Directive 2016/800 of the European parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused in criminal proceedings, OJ L 132, 21.5.2016, p.1; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1; Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016 p.1.; corrigendum OJ L91 5.4.2017, p.40.

interpretation and translation, the right to information in detention proceedings including a written Letter of Rights and the right to access to case materials and access to legal aid.[18] At the same time, other essential rights applicable in pre-trial detention proceedings are not covered by the procedural rights directives. For example, despite a clear connection between the presumption of innocence and the pre-trial detention, the CJEU has concluded that Directive 2016/343 on the presumption of innocence does not apply to pre-trial detention proceedings except in cases where pre-trial detention decision amounts to a pronouncement of guilt.[19] This applies even to such essential aspects of pre-trial detention as a shifted burden of proof. Despite Article 2 of the Directive 2016/343 stating that it applies to all stages of criminal proceedings in *DK*, the CJEU found that Article 6 of that directive which states that the burden of proof rests on the prosecution applies only to trial on merits.[20] Thus, it does not apply to national law that makes the release of a person held in detention on remand conditional on that person establishing new circumstances justifying their release.[21]

The level of harmonisation of substantive standards is different with regard to the detention of children pre-trial. While other procedural rights directives contain fragmented protections of procedural rights in pre-trial detention and virtually no substantive provisions, Directive 2016/800 not only contains provisions on procedural rights of children in detention proceedings but also covers substantive aspects of assessment and application of pre-trial detention. For example, Article 7 establishes the right to an individual assessment which must also be used when deciding on the need to apply restrictive measures during the pre-trial proceedings.[22] Article 10 of the Directive 2016/800 lists a number of guarantees essential for the proper assessment of pre-trial detention requests. These include the principle of pre-trial detention as a measure of last resort, application of detention for the shortest time possible, obligation to carry out an individual assessment, right to a reasoned pre-trial detention decision, judicial review of detention orders, speedy periodic review of continued detention at reasonable intervals either *ex officio* or at the request of the child or their representative. In addition, Article 11 contains an obligation for Member States to make available properly functioning alternative non-custodial measures that the competent authorities can assess and use instead of detention.

[18] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, ft. 19, Article 3(2)(c) and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, ft. 19, Article 7(1).

[19] CJEU Case C-653/19 PPU, *Criminal proceedings against DK,* 28.11.2019, paras. 39–42., see also Martufi A. and Peristeridou C. (2020), *Pre-trial detention and EU law: Collecting fragments of harmonisation within the existing legal framework*, European Papers, Vol.5, No.3., pp.1486–1489.

[20] CJEU Case C-653/19 PPU, *Criminal proceedings against DK,* 28.11.2019, para. 42.

[21] Ibid.

[22] Recital 38 of the Directive 2016/800 states: "The competent authorities should take information deriving from an individual assessment into account when determining whether any specific measure concerning the child is to be taken, such as providing any practical assistance; when assessing the appropriateness and effectiveness of any precautionary measures in respect of the child, such as decisions on provisional detention or alternative measures; and, taking account of the individual characteristics and circumstances of the child, when taking any decision or course of action in the context of the criminal proceedings, including when sentencing.".

The existing gap in common EU standards on pre-trial detention is also unlikely to be bridged by the Charter of Fundamental Rights of the European Union (Charter). On the one hand, in *Lanigan*, the CJEU seemed to suggest that Charter principles must be applied to national legislation regulating detention in the executing state in the EAW proceedings.[23] The CJEU stated that Article 12 of the Framework Decision must be interpreted in conformity with Article 6 of the Charter, which provides that everyone has the right to liberty and security of person.[24] On the other hand, the CJEU has consistently held that the fundamental rights guaranteed in the European Union legal order are applicable only in situations governed by EU law and that the applicability of EU law engages the application of fundamental rights guaranteed by the Charter.[25] In the above-mentioned case of *DK*, the CJEU reiterated that finding, stating that Articles 6 and 47 of the Charter are applicable only where national rules implement the EU law which was found not to be the case with national rules shifting the burden of proof in pre-trial detention proceedings on the detainee.[26] Thus, it has been argued that the Charter is of limited use in areas not harmonised by the EU law and inapplicable for interpretation of the domestic measures that are outside the specific scope of the EU law.[27] Such rules will escape the scrutiny of the CJEU despite being closely connected with EU law in their field of application.[28]

Conversely, the ECHR and the jurisprudence of the European Court of Human Rights has an extensive and elaborate set of standards for lawful deprivation of liberty in the context of pre-trial detention. The right to liberty enshrined in Article 5 of the ECHR has an extensive body of case law guiding its interpretation and application. The European Court of Human Rights has clarified most aspects of lawful deprivation of liberty in a pre-trial setting, including a presumption in favour of release,[29] individual assessment, standards of proper reasoning which should not be general or abstract or include 'stereotyped' wording,[30] burden of proof,[31] periodic review of detention,[32] grounds for detention, principle of proportionality and obligation to assess alternative measures.[33] However, as will be argued in the next chapter, Member States' law, judicial practice, systemic shortcomings in the organisation of criminal justice systems and more generally judicial culture in applying pre-trial detention fall short of the requirements of lawful deprivation of liberty in pre-trial context. Furthermore, even where binding standards on procedural rights in pre-trial detention exist under the EU law, they may not be applicable to the issuing of a national arrest warrant in the cross-border context.

[23] CJEU Case C-237/15 PPU, *Lanigan*, 16.07.2015, para. 54.

[24] Ibid.

[25] CJEU, C-358/16, *UBS Europe SE and Alain Hondequin and Others v DV and Others*, 13 September 2018, para. 51.

[26] CJEU Case C-653/19 PPU, *DK,* ft. 21, paras. 40–42.

[27] Leandro Mancano (2021), *The use of charter and pre-trial detention in EU law: Constraints and possibilities for better protection of the right to liberty,* European Papers, pp. 138–139.

[28] Ibid., p. 133.

[29] ECtHR *Michalko v. Slovakia*, No.35377/05, 21.12.2010, para 145.

[30] ECtHR *Merabishwilli v. Georgia*, No.72508/13, 28.11.2017, para. 222.

[31] ECtHR *Bykov v. Russia*, No. 4378/02, 10.03.2009, para. 64.

[32] ECtHR *Abdulkhanov v. Russia*, No. 14743/11, 2.10.2010, para. 209.

[33] ECtHR, *Ladent v. Poland*, App. No. 11036/03, 18 March 2008, para. 55.

Compliance with the Charter and ECHR Standards in Practice

Proper application of international standards in pre-trial proceedings is essential for the protection of the right to liberty. On an EU level, specifically in the EAW proceedings, it carries additional importance. In EAW proceedings, including the stage of issuing a national arrest, defence is essentially absent from the process until the requested person has been found and detained in the executing Member State and surrendered to the issuing Member State. In *Radu*, the CJEU stated that "the observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued."[34] Furthermore, the court considered that an obligation for the issuing judicial authorities to hear the requested person before an EAW is issued would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom, security and justice, in so far as such an arrest warrant must have a certain element of surprise, in particular in order to stop the person concerned from taking flight.[35] Thus, in the absence of an adversarial judicial process where the defence can play a role in challenging and perhaps rebutting presumptions presented by the prosecution, the obligation to guarantee compliance of national and European arrest warrant with fundamental rights standards rests entirely on judicial authorities. Research shows that this trust is misplaced.

There is currently ample evidence that the practice of Member States does not live up to the standards of lawful deprivation of liberty. A 2017 study commissioned by the European Parliamentary Research Service concluded that the rights and detention conditions of those suspected of crime continue to fail to comply with international and EU standards, including EU citizenship rights.[36] The report states that the European Court of Human Rights "judgments are not properly executed and recommendations by specialised bodies established in accordance with [United Nations] and [Council of Europe] treaties are not implemented by the Member States. Judicial cooperation within the EU is not adapted to this reality, resulting in efficiency and fundamental rights gaps."[37]

Research conducted by Fair Trials also shows that detention is still being ordered for unlawful reasons, such as the severity of the alleged offence or 'public concern'.[38] Detention orders routinely lack proper reasoning, with little to no assessment of the suspect's individual circumstances or alternative measures.[39] Proper implementation of ECHR standards and procedural rights under the EU law is also undermined by systemic deficiencies in the organisation of Member States' justice systems. In a 2016 study, Fair Trials concluded that across the jurisdictions represented in the study, under-resourced courts and lawyers had insufficient time to devote to pre-trial detention hearings which last a matter of minutes in most cases.[40] For example, researchers in Ireland found that the average length of time for a pre-trial hearing was six minutes, with most lasting three to four minutes.[41] It is doubtful that each person's individual

[34] CJEU, Case C-396/11, *Radu*, 29.01.2013, para. 39.
[35] Ibid., para. 40.
[36] W. Van Ballegooij (2017), *The cost of non-Europe in the area of procedural rights and detention conditions, study, European Parliamentary Research Service*, p. 6.
[37] Ibid.
[38] Fair Trials (2016), *Measure of Last Resort*, ft. 3, p. 18.
[39] Ibid., p. 20, see also Van Ballegooij W. (2017), ft. 39, p. 28.
[40] Fair Trials (2016), *Measure of Last Resort*, ft. 3, p. 12.
[41] Ibid.

circumstances, risks and less restrictive alternative measures could be properly presented and assessed in that amount of time.

The above study also found that in the time available to conduct pre-trial detention hearings, judges tended to favour and restate the arguments presented by the prosecution.[42] Partially as a result of insufficient time and resources for independent judicial review, lawyers in many of the studied countries noted a judicial bias toward the prosecution. Research from case file reviews and hearing monitoring showed that, for example, in Hungary, in 92.4% of reviewed case files, judges referred to the prosecution's arguments, while they only referred to defence arguments in 50% of cases. Similarly, in Lithuania, judges referred to defence arguments in only 15% of cases reviewed, relying on prosecutors' arguments in 70% of cases. In Romania, 98.55% of reviewed cases showed judges' reliance mainly or entirely on prosecution arguments.[43] This would be even more evident in cross-border cases where, as will be discussed in the next chapter, the defence (including a defence lawyer and the suspect) is effectively absent from both the process of issuing the national arrest warrant and the EAW with review and in the many Member States a judicial review of those decisions is not possible until after the requested person is surrendered.

Practice thus shows that existing European standards alone are not sufficient to prevent the overuse of pre-trial detention and the EAW which is mainly the result of flawed judicial decision-making and overstrained criminal justice systems. Nevertheless, if the current initiative of the European Commission does indeed result in a recommendation reiterating and perhaps improving upon, albeit in a non-binding form, the standards of pre-trial detention in the EU, this would be a welcome step and would give additional guidance to prosecutors and judges in requesting and ordering pre-trial detention. However, in order for Member States and indeed the citizens of the EU to trust the system of judicial cooperation in criminal matters and more specifically judicial decision-making detention in cross-border setting, the system of surrender needs to provide for access to an effective remedy before surrender is carried out. The current system of safeguards in terms of effective judicial protection in the issuing state falls short of trust placed in its ability to protect the requested person's fundamental rights.

Effective Judicial Protection and Right to an Effective Remedy in the Issuing State

For fundamental rights guarantees in pre-trial detention proceedings to be effective, compliance with them needs to be subject to judicial scrutiny in a process that corresponds to all guarantees of fair process. This is particularly important in EAW cases where forceful transfer to another Member State involves an additional negative impact on the requested person's fundamental rights.

Article 47 of the Charter guarantees the right to effective judicial remedy to everyone whose rights under the EU law may be infringed. The CJEU has declared effective judicial protection to be "a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."[44] The right to effective judicial protection under the Charter

[42] Ibid.; see also Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, ft. 3, 2021.

[43] Fair Trials (2016), Measure of Last Resort, ft. 3 p. 12.

[44] CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 28.02.2018, para. 35.

should thus apply to all violations of rights guaranteed by EU law.[45] In the EAW proceedings, such rights include not only the fundamental right to liberty, private and family life, potentially right to work, education or health but also the right to freely move, work and reside within the EU.

For a judicial remedy to satisfy the requirement of effectiveness under Article 13 ECHR, it must fulfil certain minimum requirements. Firstly, the remedy must be accessible, prompt[46] and offer minimum guarantees of fairness by ensuring conditions such as adversariality and equality of arms that enable the applicant to challenge a decision that restricts their rights.[47] Secondly, the complaint must be addressed on its substance[48] and the body examining the complaint must be able to directly remedy the situation by granting appropriate relief.[49] This means that effective judicial protection must be capable of preventing an alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred.[50]

Currently, the sole responsibility for ensuring the compatibility of national arrest warrant with fundamental rights rests on the judicial authorities of the issuing state. It is presumed that the process of issuing a national arrest warrant and subsequently the EAW affords such effective judicial protection. However, this presumption overlooks several of key aspects. The recent CJEU judgement in *IR* approved a system whereby no adversarial judicial review of the merits of issuing either an EAW or national arrest warrant is required until the requested person is transferred to the issuing state.[51] Thus, it appears that effective judicial protection and review of the legality of national arrest warrant in an adversarial process based on equality of arms is not accessible to requested persons in EAW proceedings until *after* their transfer to the issuing Member State. In addition, until after the requested person's transfer to the issuing state, they or their lawyer in the issuing state also do not appear to have the right to access essential documents in the case file in accordance with Article 7(1) of the Directive 2012/13/EU or other rights typically guaranteed to detained or accused persons under the EU law. In *IR*, the CJEU stated that the requested persons acquire the status of an 'accused person' within the meaning of Directive 2012/13/EU and therefore enjoy all the rights associated with that status under Articles 4, 6 and 7 of that directive "from the moment of his or her surrender to the authorities of the Member State that issued that warrant."[52] This suggests that even where there is a possibility to challenge the national arrest warrant, procedural rights enjoyed by all suspects in the EU do not apply due to the absence of the requested person from the territory of the issuing state. Even if rights such as access to case file are typically exercised through a lawyer, which the requested person must have access to in the issuing state, it appears that the lawyer's ability to exercise them on their client's behalf can be dependent on their client's physical location. Furthermore, since surrender cannot be undone, it is also apparent that if such a post-surrender challenge

[45] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, Explanation on Article 47.

[46] ECtHR *Çelik and İmret v. Turkey*, No. 44093/98, 26.10.2004, para. 59.

[47] ECtHR *Csüllög v. Hungary*, No. 30042/08, 7 June 2011, para. 46., see also CJEU, Case C-300/11, *ZZ v. Secretary of State for the Home Department*, 4.06.2013, para. 65.

[48] ECtHR *Hasan and Chaush v. Bulgaria*, No. 30985/96, 26.10.2000, para. 96.

[49] ECtHR *Pine Valley Developments Ltd and Others v. Ireland*, No. 12742/87, 29.11.1991, see also CJEU Case T-720/14, *Arkady Romanovich Rotenberg v Council of the European Union*, 30.11.2016, para. 71.

[50] ECtHR *Kudla v. Poland*, No. 30210/96, 26.10.2000, para. 158.

[51] CJEU Case C-649/19, *Criminal proceedings against IR*, 28 January 2021, paras. 61, 77–79 and Case C-396/11, *Ciprian Vasile Radu*, 29.01.2013, paras. 38–40.

[52] CJEU Case C-649/19, *Criminal proceedings against IR*, ft. 56, paras. 61, 77–79.

would result in revocation of the initial arrest warrant a judge would be able to provide, at most, a compensatory remedy instead of being able to timely identify and prevent a violation of fundamental rights before it occurs. As pointed out by Leandro Mancano currently, cases where the EAW could be based on a potentially invalid national arrest warrant very clearly expose the lack of remedy and risks of a gap in fundamental rights protection.[53]

This problem has also been consistently highlighted by lawyers of Fair Trials' Legal Expert Advisory Panel. It also appears to cause practical problems for national judges which are confronted with reconciling their obligations under two competing international obligations –obligations under the ECHR and maintenance of smooth functioning of judicial cooperation under the EAW. An interesting illustration of this point is Case C-105/21 *IR (No. 2)*, currently pending before the CJEU. This case is a continuation of the abovementioned judgement in *IR,* where the Special Criminal Court of Bulgaria essentially asks whether a situation where the "issuing judicial authority makes no effort whatsoever to inform the requested person, while he or she is in the territory of the executing Member State, of the factual and legal bases for his or her arrest and of the right to challenge the arrest warrant" is compatible with Article 6 of the Charter read in conjunction with Articles 5(4), (2) and 1(c) ECHR and with Article 47 of the Charter, the right of freedom of movement, principles of equality and the principle of mutual trust.[54] The first question thus relates to the requested person's access to rights in national arrest warrant proceedings and whether they should be informed about the reasons for issuing the national arrest warrant and the legal avenues for challenging it.

Bulgarian Special Criminal Court also asks the CJEU to clarify whether in case the requested person does file a request to withdraw the national arrest warrant before he or she is surrendered to the issuing state, it is obliged to only examine it after the surrendered.[55] The referring court argues that the arrest and detention of the requested person is of dual nature. From the perspective of the executing state, it falls under Article 5(1)(f) of the ECHR. However, from the perspective of the issuing state, such detention falls under the head of 'criminal suspicion' and thus Article 5(1)(c) of the ECHR. The status of the suspect, accused or detained person is not dependant on the physical location of the person; therefore, they should in principle enjoy and be able to exercise, where necessary through their lawyer, rights afforded to them in pre-trial detention proceedings.[56] Since any subsequent arrest or detention of the requested person flows from the national arrest warrant, for the issuing state that deprivation of liberty falls under Article 5(1)(c) of the ECHR; therefore, he or she should also be able to enjoy their rights under Article 5(2) and (4) of the ECHR based on their status as the detained person. This means they should be informed about the legal and factual basis of their arrest and be afforded a legal avenue to challenge the legality of their detention.[57] Referring to the jurisprudence of the European Court of Human Rights in *Stephens v. Malta (No.1)*[58] and *Vasiliciuc v Republic of Moldova*,[59] the Bulgarian Special Criminal Court considers

[53] L. Mancano (2021), *The Use of Charter and Pre-Trial detention in EU Law: Constraints and Possibilities for Better Protection of the Right to Liberty*, ft. 29, p. 137.

[54] CJEU, Case C-105/21, *IR*, Summary of request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, 22 February 2021.

[55] Ibid.

[56] Ibid.

[57] Ibid, para. 22.

[58] ECtHR, *Stephens v. Malta (No.1)*, ft. 10, para. 59.

[59] ECtHR, *Vasiliciuc v Republic of Moldova,* No. 15944/11, 02.05.2017, paras. 21–25.

that ensuring the validity of national arrest warrant, which forms the basis of the EAW and thus essentially also the basis of requested person's deprivation of liberty in the executing state, continues to be the responsibility of the issuing state throughout the EAW proceedings. The Bulgarian court considers that "owing to its dual nature, the arrest falls under two legal categories in the executing State, the requested person being protected at two levels."[60] The preliminary ruling request also points to the shortcomings in the dual level of protection envisaged under the Framework Decision on EAW, noting that none of these levels foresees the involvement and ability of the accused person to express their opinion. Therefore, in order to achieve genuinely effective protection, the Bulgarian Special Criminal Court considers it necessary to recognise the need for a third level of protection, namely, the right to challenge the national arrest warrant in the course of the execution of the EAW while the requested person is in the executing state.[61]

The preliminary reference request of the Bulgarian Special Court touches upon serious gaps in effective judicial protection of fundamental rights potentially affected by not only arrest and detention in the executing Member State but also surrender itself. Given the well-documented failures of judicial authorities to apply the European standards of right to liberty in pre-trial detention proceedings, the trust of the EU and Member States in compliance with these standards in the context of EAW proceedings seems severely misplaced. In the long run, this could have the effect of undermining rather than strengthening judicial cooperation. In this regard, another fundamental aspect has been pointed out by Valsamis Mitsilegas. He notes that although mutual trust is viewed by the CJEU as inextricably linked with the establishment of an area without internal borders (at whose heart are the free movement principle and the rights of EU citizens), the court perceives mutual trust as limited to trust 'between the Member States'.[62] The citizen or individual affected by the exercise of state enforcement power under mutual recognition is markedly absent from the CJEU's reasoning on mutual trust.[63] Given that flawed judicial decision-making in national arrest warrant proceedings can potentially affect a range of EU citizen's rights, including freedom of movement, EU citizen's trust in mutual recognition processes seems equally if not more important.

A solution to this gap in fundamental rights protection would indeed be the creation of an opportunity to challenge the legality of national arrest warrant and/or the EAW in the issuing state before the requested person is surrendered. While before the COVID-19 pandemic, such a system would raise concerns of time and cost efficiency, the current EU digitalisation of justice agenda envisages cross-border court hearings via video-link which should alleviate practical concerns in this regard.[64] It is noteworthy that such a system is already recognised in a later post-Lisbon cross-border cooperation instrument. Articles 10 and 13(3) of the Directive 2014/41/EU on the European Investigation Order envisage challenges to the issuing of a European Investigation Order at the execution stage without substantially undermining the principle of mutual recognition.[65]

[60] Ibid., para. 21.

[61] Ibid., para 239.

[62] V. Mitsilegas (2015), *The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice*, ft. 12, p.472.

[63] Ibid.

[64] See, e.g., Proposal for a Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the judicial cooperation, 2021/0394 (COD), 01.12.2021, Article 8.

[65] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1, Articles 10 and 13(3).

Conclusion

This short overview reveals that fundamental gaps between European standards in pre-trial detention and their application in practice continue to exist, resulting in the overuse of pre-trial detention. This problem is exacerbated in the EAW proceedings where the requested person is not only arrested in the executing and issuing state but also transferred from one Member State to another, potentially disrupting their private and family life, work, education and other fundamental rights. While adoption of common EU standards would be a welcome step and would provide additional guidance to judicial authorities in the application of pre-trial detention, practice shows that this alone will not solve the problem. Flawed judicial decision-making on pre-trial detention requests will not be solved without fundamental changes in the organisation and resourcing of criminal justice systems and policy initiatives to relieve the excessive caseload it faces as well as putting in place adequate review mechanism before individual's fundamental rights are irreversibly impacted in the EAW proceedings.

In the Tampere conclusions, the European Council concluded that the area of freedom, security and justice should be based on principles of transparency and democratic control and open dialogue with civil society on the aims and principles of this area in order to strengthen citizens' acceptance and support.[66] While the current system of arrest and surrender under the EAW may reinforce blind mutual trust between Member States, it does little to increase the transparency, acceptance and support of EU citizens. Common standards on pre-trial detention and adequate review system of their application in cross-border proceedings would go a long way in that direction.

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Declarations

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[66] Council of the European Union, Presidency Conclusions, Tampere European Council, 16 October 1999, para. 7.

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