

Overuse of Detention in Cross-Border Proceedings Executive Summary



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Introduction

The European Arrest Warrant (EAW) is regarded as the flagship EU judicial cooperation measure. It was adopted in the wake of the 2001 9/11 attacks amid concerns that existing extradition laws were too cumbersome to effectively tackle serious cross-border crimes. In 2004, the EAW started to operate in the EU as a fast-track system for the arrest and extradition (or “surrender”) of a person to stand trial or serve a prison sentence in another Member State.

However, the EAW has severe implications for the persons concerned. The EAW involves the arrest and deportation of a person for the purposes of standing trial or to serve a sentence in a country other than where the person is located. This typically involves detention in the country of arrest as well as where the person is deported. Deprivation of liberty is amongst the harshest of measures that states can take against people and to be legitimate, such measures should only be imposed in exceptional circumstances as a measure of last resort. In addition to the loss of liberty (and the life-changing impact it can have), because of the long distance in a cross-border setting, people face even more separation from their families, potential job loss, and may be sent to a country where they have no social ties, support system or don’t even speak the language.

Recognising the severe implications of EAWs, the EU adopted four alternative measures which judicial authorities can resort to in cross-border proceedings, both at the pre-trial stage and at the post-sentencing stage. The EU also issued guidance to judicial authorities citing the importance of considering alternative measures when deciding whether to issue an EAW, by virtue of the principle of proportionality. Furthermore, the EU adopted a suite of directives on procedural safeguards of suspects and accused persons, which apply to cross-border proceedings and should enable effective challenges to the EAW. However, the EU did not adopt any common standards on detention, so the decision to place a person requested under an EAW in detention is left up to national laws.

The EU’s failure to directly address the overuse of detention, particularly pre-trial detention, across Member States appears to be impeding any effort to restrict the use of EAWs. June 2022 will mark the 20th anniversary of the EAW, and recent reports show that the EAW is increasingly used in thousands of cases each year and is considered to be a valuable tool to law enforcement.



We continue to hear that EAWs are used far more broadly than intended, i.e., for the purposes of investigation before a case is ready for trial, for minor offences, and in disregard to people’s fundamental rights. When we turn to alternative measures to the EAW, we find very little information or data. In contrast to the flagship EAW, the alternatives are seldom used, and very little is known about them amongst practitioners. Detention and EAWs remain the “go-to” restrictive measure in criminal proceedings. The adoption of alternatives has failed to bring the EU Member States in line with regional and international principles that require detention to be used only as a measure of last resort.

Over the past year, Fair Trials (in partnership with the Ludwig Boltzmann Institute of Fundamental and Human Rights in Austria, the Centre for European Constitutional Law in Greece, the Irish Council for Liberties in Ireland, the European Institute of Public Administration in Luxembourg and Cecilia Rizcallah from Université Saint-Louis in Belgium) conducted research in Austria, Belgium, Greece, Ireland and Luxembourg to identify what obstacles there are to the use of alternative measures in cross-border proceedings.

Overview of Findings

The key reason why alternative measures have failed to limit the use of EAWs is the overuse of detention, which disproportionality affects people who are not nationals or residents of the country where the prosecution or the trial is taking place. The unequal treatment that people face in criminal proceedings in the EU depending on their place of residence or nationality is not a new issue – it has long been known and recognised by the EU when adopting the alternative instruments. Across the EU, prison populations are growing and many prisons have long suffered from chronic overcrowding, causing a dramatic deterioration of the detention conditions. These conditions are often in complete violation of fundamental human rights and in disregard to the positive obligations that all EU Member States share to protect people from degrading, inhuman treatment and torture.

Our penal systems continue to turn to detention as an automatic, fall-back solution to address all types of situations, even where not foreseen by the applicable legal framework, and in disregard of the principle that detention can only be a measure of last resort.



The reasons for the overuse of detention in judicial decision-making and prosecutorial practice have long been documented at domestic level and these same reasons also emerge clearly in a cross-border setting. The problem is intensified to the extent that a place of residence outside the country of investigation and trial will justify the need for a national arrest warrant meaning that the flight risk in such cases will simply be presumed. That national arrest warrant is then automatically translated into an EAW. Alternatives or the possibility that the person may not require any restrictive measures whatsoever aren't even considered.

In the EU Area of Freedom, Security and Justice, people can move freely across borders. However, people in Europe will not be treated equally if they are more likely to be arrested and detained in criminal proceedings because they have chosen to live and work in another Member State. The fact that they exercised their right to free movement within the EU is used against them to justify the necessity for arrest and detention under the EAW.

Our research identified three main obstacles to the use of alternatives to detention in cross-border proceedings:

1. Lack of mutual trust in alternative measures between judicial authorities:

Mutual trust forms a fundamental cornerstone in the EU's criminal justice policy. The EAW and other cooperation measures that have followed assume that Member States can trust each other's criminal justice systems to apply the same fundamental values and principles. It is this commonality that allows for faster and simpler cooperation by requiring one Member State to recognise decisions issued by judicial authorities in another.

Our research reveals that national authorities lack the trust necessary to ensure effective implementation of alternatives to detention in cross-border proceedings. In the countries surveyed, participants mentioned the difficulty to confer the supervision of alternatives to detention to services from another Member State.

In practice, judicial actors do not seem to trust the diligence of the executing State to supervise the requested person effectively, to bring them to trial and to enforce any conviction against them. This lack of mutual trust can be explained largely by the lack of confidence in alternatives to detention generally, also at a domestic level.



Our research also shows that lack of trust comes from lack of knowledge about how systems function in other Member States, as well as a lack of institutionalised cooperation between judicial actors. This is particularly problematic for supervision or probation orders which require continued coordination and consultations between the competent authorities. While practitioners recognise the crucial role played by Eurojust in ensuring a European network, the cooperation between judicial actors often remains very informal and highly dependent on the State, authority and/or agent concerned. Neighbouring countries have generally stronger ties and better channels of communication.

2. Incomplete implementing domestic and EU legal frameworks:

Our research indicates that there are gaps in the EU legal framework, particularly in relation to the EAW. There is no legal obligation to consider the proportionality of a decision to issue an EAW which means that alternatives are not even considered. Moreover, in contrast to their approach towards alternative measures, authorities responsible for the execution of EAWs do not assess the proportionality of the measure and tend to adopt a “blind trust” approach to the EAW. This means that, under EU law, no authorities consider themselves bound to consider the proportionality and thus also the alternatives to the EAW.

Additionally, Member States all have their own set of domestic alternatives to detention, be it for prosecution or for sentencing, and these differ significantly in terms of conditions, procedures and how they are applied in practice. This lack of harmonisation between Member States makes it difficult for practitioners to resort to alternative measures. They stress different reasons: they don't know if the measure exists in the other Member States and what the conditions are to use it; they might not use that alternative at home; or they feel such measure involves more bureaucracy, notably because they must find domestic equivalence to the issued measure.

Procedural safeguards, particularly during the pre-trial period, are essential to enable the requested person to challenge an EAW before surrender and advocate for release or the application of an alternative measure. If lawyers were able to provide effective legal assistance and request alternative measures, they could gradually support a shift of judicial culture away from detention, reducing the over-use of pre-trial detention. Nonetheless, there are still significant gaps between the law and practice in the implementation of these rights, which makes it difficult for persons to effectively benefit from the procedural safeguards enshrined in EU law, particularly in a cross-border setting. Moreover, the absence of common EU standards on detention necessarily limits the potential of the existing procedural safeguards to limit authorities' recourse to pre-trial detention.



3. Complexity of domestic and EU legal and institutional frameworks:

Our research shows that another obstacle is the complexity of the EU alternative mutual recognition instruments. Each alternative is covered by a different legislative instrument and each instrument has its own set of conditions, time limits and grounds for refusal. As EU mutual recognition instruments are not directly applicable, each Member State adopted its own implementing instruments, leading to variations among EU Member States. For instance, the competent authorities involved in the application of each instrument differ from one country to another and include a large variety of actors – police officers, public prosecutors, investigating officers or judges, sentencing courts, probation services, prison authorities, as well as representatives of the Ministry of Justice and Ministry of Interior. Their roles and responsibilities vary from one country to another but also from one instrument to another, making it difficult for practitioners to understand how the instrument works in their own country and in other Member States.

Overview of Key Recommendations

It is important to tackle the obstacles to the use of alternative instruments to the EAW. However, tackling the use of detention itself is key. In the light of the prison overcrowding crisis many countries face, the EU and Member States must address the overuse of detention and find ways to limit recourse to detention and any form of coercive measures altogether. We outline here our key recommendations (please see our report for a fuller list):

European Commission

- **Initiate legislation on pre-trial detention:**

The theoretical availability of alternative measures cannot compensate the need to impose clear limits on pre-trial detention. Domestic and regional legal systems have not been sufficient. The EU must act and provide EU Member States with a clear and precise common set of standards which aim to limit recourse to pre-trial detention as a measure of last resort.



- **Adopt a clear proportionality test for the purposes of issuing an EAW:**
The use of alternatives cannot remain an “option” for authorities. There must be a clear legal obligation on issuing authorities to consider the availability of alternatives to the EAW.
- **Adopt a refusal ground based on the lack of proportionality and necessity of the EAW:**
Executing country authorities must be allowed to refuse the surrender where they are not satisfied that the issuing authority duly considered the proportionality and the necessity of issuing an EAW and the availability of alternative measures.
- **Promote the exchange of information between Member States:**
The European Commission must put in place a mechanism enabling authorities to access information about alternative measures in other EU Member States.
- **Monitor the use of the EAW and alternative instruments, through meaningful and detailed data collection:**
This must include a legal obligation on EU Member States to collect data and information on the use of all EU mutual recognition instruments, and report to the European Commission on a regular basis.
- **Continuously monitor the implementation of the Procedural Rights Directives:**
The European Commission must actively monitor the accessibility in practice of procedural safeguards in cross-border proceedings and initiate infringement proceedings against Member States who fail to implement these rights effectively.

Member States

- **Exchange with all stakeholders involved to find ways to tackle the overuse of detention:**
Tackling the overuse of detention involves a culture change beyond promoting the use of alternative measures and requires engaging in a dialogue with many different stakeholders (including lawyers, judges, prosecutors but also prison authorities, probation services, social and welfare services, civil society).
- **Effective implementation of procedural safeguards:**
Member States must ensure that procedural safeguards are accessible and effective in cross-border proceedings, as well as domestic proceedings, and continue work to ensure that legal standards translate into practice.



- **Budget and resources:**

Member States must allocate sufficient budget and resources to enable authorities to exercise their duty to ensure effective judicial protection against the overuse of detention (including enhancing judicial authorities' access to information which supports decision-making regarding release or alternative measures).

Judicial and Prosecutorial Authorities

- **Apply the fundamental rights and principles enshrined in the EU Charter of Fundamental Rights:**

Judicial authorities must anchor their practice in the overarching legal framework that applies to all criminal proceedings including where cross-border cooperation instruments are used, namely the fundamental rights and principles in the Charter and the European Convention for the protection of Human Rights and Fundamental Freedoms, including in respect of the right to liberty.

- **Refuse to automatically translate national arrest warrants into EAWs:**

It must be recognised that the EAW may involve greater restrictions of a person's rights, including deportation, than a national arrest warrant, and therefore issuing judicial authorities must conduct a specific proportionality assessment before issuing an EAW and consider the availability of alternative measures.

- **Apply a presumption of release:**

Prosecutors and judicial authorities enjoy massive discretion in deciding whether to seek and apply pre-trial detention orders. This discretion must be guided by presumption of release, unless the prosecuting authorities can demonstrate that there is a clear and robust need for detention or an alternative measure.

Lawyers

- **Actively resist pre-trial detention motions and apply for release:**

Lawyers must engage with their clients at the earliest opportunity and actively seek all information in favour of release or alternative measures to present at the initial pre-trial detention hearing.

- **Make better use of EU procedural safeguards to make defence more effective:**

Lawyers can actively rely on national and EU procedural safeguards, including the right to early access to the case file in cases of detention, to prepare more effectively their defence and challenge decisions to detain people.

