

Protecting fundamental rights
in cross-border proceedings:
Are alternatives to the
European Arrest Warrant a
solution?

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

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Table of Contents

Executive Summary	6
Introduction	11
Methodology	14
The scope of the research	14
Challenges in the research	16
Part 1: The need for alternatives to the EAW	19
1. Preventing the misuse of the EAW for questioning	19
2. Preventing the unjustified use of pre-trial detention	21
3. Exposing people to inhuman and degrading treatment due to prison conditions	24
4. Discriminatory impact	28
Part 2: Obstacles to the use of alternative measures	33
1. Complex relationship between authorities through mutual trust	33
i. The application of the principle of mutual trust to EU’s criminal justice policy .34	
ii. The absence of robust mutual trust for alternatives to detention	36
2. The inconsistent application of the principle of proportionality	39
i. Lack of proportionality assessment requirement in the EU legal framework	40
ii. Lack of proportionality assessment requirement in the domestic legal frameworks	42
3. The role of the defence and the insufficient implementation of procedural safeguards in cross-border proceedings	45
i. Access to legal assistance	46
ii. Access to case file	50
iii. Access to interpretation and translation	52
iv. Right to an effective remedy	54
4. Complex legal and institutional frameworks	56
i. Complexity of legal frameworks	57
ii. Complexity of institutional frameworks	59
Policy recommendations	62
European Commission	62
EU Member States	64

Judicial and prosecutorial authorities	64
Lawyers.....	65
Annex: Legal and institutional framework of alternative measures in partners countries.....	66
Austria	66
Belgium	70
Greece.....	72
Ireland	74
Luxembourg	76

Acronyms

AFSJ	Area of Freedom, Security and Justice
CJEU	Court of Justice of the European Union
COE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
EAW	European Arrest Warrant
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Fundamental Rights Agency
LEAP	Fair Trials' Legal Experts Advisory Panel

Definitions

Charter	Charter of Fundamental Rights of the European Union.
Commission	European Commission.
Council	Council of the European Union.
EIO Directive	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.
FD ESO	Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.
FD EAW	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision.

EU Mutual Recognition Instruments	EIO, ESO, FD EAW, FD PAS, FD Transfer of Prisoners.
FD PAS	Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.
FD Transfer of Prisoners	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.
Member States	Member States of the European Union.
Procedural Rights Directives	EU Directives on the right to interpretation and translation, the right to information, the right of access to a lawyer, procedural safeguards for children, the right to the presumption of innocence and to be present at trial and the right to legal aid.
Requested person	Person subject to an EU mutual recognition instrument.

Executive summary

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 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), in a cross-border setting, 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 and 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 in particular 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. However, we also 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 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 for Fair Trials 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 the alternative measures have failed to limit the use of EAW 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 and 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 detention conditions. These conditions are often in complete violation of fundamental human rights and on 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 total 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 a 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.

- **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 that 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.

- **Incomplete EU and implementing domestic 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 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 regarding 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.
- **Complexity of EU and domestic 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:

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 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.
- **Apply a presumption of release:** prosecutors and judicial authorities enjoy a 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.

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 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.

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 Framework Decision (FD EAW)¹ 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 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 these severe implications of the EAW, the EU later adopted four new instruments which judicial authorities can resort to in cross-border proceedings, in certain cases, as alternatives to the EAW, both at the pre-trial and post-sentencing stage. These measures could, in some cases, also limit the use of detention.

The four alternative EU Mutual Recognition Instruments

Instrument	Time of the proceedings	Description
European Investigation Order 2014/41/EU ('EIO') ²	Pre-trial stage	The EIO allows authorities in one Member State to collect and transfer evidence to another Member State. ³ This means states can gather evidence across borders without the need to request that individuals be physically transferred. Whilst its main objective is to enable cross-border transfers of evidence, it can serve as an alternative to EAWs where the issuing authority is seeking the surrender of a person for the purposes of questioning. In particular,

¹ Council of the EU, 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, ([O.J. L 190 , 18/07/2002 P. 0001 – 0020](#)).

² 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. 1–36](#)).

³ However, CJEU [Case C-584/19](#), judgment of 8 December 2020, paragraph 72 suggests that the EIO is not an “alternative” to the EAW: “[i]t 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.”

		the EIO allows for testimony to be delivered via video link, reducing the need to transfer people for investigative purposes under an EAW.
European Supervision Order 2009/829/JHA ('ESO') ⁴	Pre-trial stage	The 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.
FD on Transfer of Prisoners 2008/909/JHA (FD Transfer of Prisoners) ⁵	Post-trial stage	The 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. It 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.
FD on Probation and Alternative Sanctions 2008/947/JHA ('FD PAS') ⁶	Post-trial stage	The FD PAS allows for the transfer of a sentenced person to a different Member State to serve a non-custodial sentence imposed by the original issuing state. It allows convicted persons who want to move to their home country to serve their non-custodial sentence there do so without the risk of violating the terms of their sentence by moving to another Member State (and subsequent arrest and surrender under the EAW because of that). This could also serve as an incentive for judges to use non-custodial sentences.

⁴ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, ([OJ L 294, 11.11.2009, p. 20–40](#)).

⁵ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, ([OJ L 327, 5.12.2008, p. 27–46](#)).

⁶ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, ([OJ L 337, 16.12.2008, p. 102–122](#)).

The Commission has 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 in cross-border proceedings and should, in principle, enable requested persons to prepare a more effective defence and seek the application of alternative measures 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 still left up to national laws. The EU has also failed to directly address the conditions and use of detention, in particular pre-trial detention, even though detention is inextricably linked to the use of EAWs.

June 2022 will mark the 20th anniversary of the EAW, and recent reports show that the EAW is used in thousands of cases each year and is considered to be a valuable tool to law enforcement. However, we also 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 the other EU Mutual Recognition Instruments, we find very little information or data. In contrast to the flagship EAW, the measures are seldom used, and very little is known about them amongst practitioners. EAWs (and with them, detention) remain the "go-to" measure in cross-border criminal proceedings.

In 2020, 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 for Fair Trials 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. In this report, we set out our key findings and identify policy recommendations.

First, we set out the key fundamental rights concerns that the use of the EAW raises, and how these could, in principle, be addressed by using other EU Mutual Recognition Instruments as alternatives. Then, we set out the main obstacles, in practice, to the use of the instruments in cross-border proceedings. Finally, we identify policy recommendations addressed to different stakeholders, both at EU and domestic levels.

Methodology

1. The scope of the research

This report is based on research that started in March 2020 and was conducted by our partners, the Ludwig Boltzmann Institute of Fundamental and Human Rights for Austria, the Centre for European Constitutional Law for Greece, the Irish Council for Civil Liberties for Ireland, the European Institute of Public Administration for Luxembourg (EIPA) and by Cecilia Rizcallah on behalf of Fair Trials for Belgium.

The research focused on five European Union (EU) countries: Austria, Belgium, Greece, Ireland and Luxembourg. These Member States were selected based on the number of foreign nationals in detention and the state of transposition of the EU Mutual Recognition Instruments with the aim to reflect differing situations. Luxembourg, Greece and Austria are among the countries with the highest proportion of foreign nationals in detention and transposed all four EU instruments on alternative measures. Belgium has similarly high rates of foreign national detainees and only transposed the ESO in 2017. Ireland, in comparison, has a low number of foreign nationals in detention and of pre-trial detention generally.⁷ Ireland has only very recently incorporated two EU Mutual Recognition Instruments (see table below).

Non-nationals in detention and entry into force of mutual recognition instruments in the researched countries

	Austria	Belgium	Greece	Ireland	Luxembourg
Proportion of non-nationals in detention in 2019 (%) ⁸	54.7 %	44 % in 2017 ⁹	54.9 %	13.6 %	74.4 %

Each partner undertook a review of the legislation on the transposition of the EU Mutual Recognition Instruments notified by the respective Member State to the European Commission, as well as available domestic case law and academic literature addressing these instruments. This desk research aimed to better understand the extent of the use of these instruments in practice as alternatives to the EAW (for prosecution and for sentencing), as well as the institutional framework of stakeholders involved in issuing and executing these measures. Where necessary, partners submitted freedom of information requests for data on the actual use of these mutual recognition instruments in cross-border judicial proceedings. In each Member State, partners also conducted qualitative interviews with practitioners, including lawyers, judges, and prosecutors as well as representatives of probation services and police officers.

⁷ Irish Penal Reform Trust, [The practice of pre-trial detention in Ireland: Monitoring Alternatives and Judicial Decision-making in Ireland](#), Research report, September 2015, p. 49.

⁸ Council of Europe – Université de Lausanne, Aebi and Tiago, [Prisons and Prisoners in Europe 2019: Key Findings of the SPACE I report \(2020\)](#), p 5 'Figure 4. Percentage of foreign inmates in the prison population on 31st January 2019 (N=42)'.

⁹ Service public fédéral Justice, [Rapport Annuel 2017 – Direction générale des Établissements Pénitentiaires](#), 2018, p. 46.

State of implementation

	Austria	Belgium	Greece	Ireland	Luxembourg
Entry into force of EAW	1 May 2004 ¹⁰	1 Jan 2004 ¹¹	9 Jul 2004 ¹²	1 Jan 2004 ¹³	20 Mar 2004 ¹⁴
Entry into force of EIO	1 Jul 2018 ¹⁵	22 May 2017 ¹⁶	21 Sep 2017 ¹⁷	Opted out	18 Sep 2018 ¹⁸
Entry into force of ESO	1 Aug 2013 ¹⁹	29 Mar 2017 ²⁰	15 Nov 2004 ²¹	5 Feb 2021 ²²	12 Jul 2016 ²³
Entry into force of FD PAS	1 Aug 2013 ²⁴	21 May 2013 ²⁵	15 Nov 2004 ²⁶	23 Sep 2019 ²⁷	21 Apr 2015 ²⁸

¹⁰ Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG) consolidated version §§ 3-31, adopted on 16 April 2004, which entered into force on 1 May 2004.

¹¹ Federal Act of 19 December 2003 on the European Arrest Warrant which entered into force on 1 January 2004.

¹² Law 3251/2004 European Arrest Warrant, amendment to Law 2928/2001 on criminal organisations and other provisions adopted on XX (O.G.G. Issue A' 127/9.7.2004), which entered into force on 9 July 2004.

¹³ European Arrest Warrant Act, 2003 adopted on 28 December 2003 and which entered into force on 1 January 2004.

¹⁴ Law of 17 March 2004 on the European Arrest Warrant and surrender procedures between Member States of the European Union as amended by Law of 3 August 2011. Publication Mem. A n° 39, 22 March 2004.

¹⁵ EU-JZG consolidated version §§ 55-56b adopted on 26 April 2018, which entered into force on 1 July 2018.

¹⁶ Federal Act of 22 May 2017 on the European Investigation Order in Criminal Matters, which entered into on 22 May 2017.

¹⁷ Law 4489/2017 (O.G.G. Issue A' 140/21.9.2017), which entered into force on 21 September 2017.

¹⁸ Law of 1 August 2018 on 1. Transposition of Directive 2014/41/EU from the European Parliament and the Council from 3 April 2014 regarding the decision of European Investigation orders in criminal matters, 2. Modification of the Criminal Procedural Code; 3) Modification of the modified legislation from 8 August 2000 on judicial international cooperation in criminal matters.

¹⁹ EU-JZG consolidated version §§ 100-1211, adopted on 18 July 2013, which entered into force on 1 August 2013.

²⁰ Federal Act of 23 March 2017, on the application of the principle of mutual recognition to decisions on supervision measures imposed as an alternative to pre-trial detention which entered into force on 29 May 2017.

²¹ Law 4307/2014 (O.G.G. issue A' 246/15.11.2014), which entered into force on 15 November 2004.

²² Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020, adopted on 26 November 2020.

²³ Law of 5 July 2016 regarding the effective application of the principle of mutual recognition in supervision measures as alternative to preventive custody and modifying the criminal law.

²⁴ EU-JZG consolidated version §§ 81-99, adopted on 18 July 2013, which entered into force on 1 August 2013.

²⁵ Federal Act of 21 May 2013 on the application of the principle of mutual recognition of judgments and probation decisions for the purposes of the supervision of probation measures and substitution sentences pronounced in a Member State of the European Union which entered into force on 23 June 2013.

²⁶ Law 4307/2014 (O.G.G. issue A' 246/15.11.2014), which entered into force on 15 November 2004.

²⁷ Criminal Justice (Mutual Recognition of Probation Judgements and Decisions) Act 2019, which entered into force on 23 September 2019.

²⁸ Law of 12 April 2015 regarding the effective application of the principle of mutual recognition in probation decisions and other substitution decisions and in order to enhance the effective application of the principle of mutual recognition in

Entry into force of FD Transfer of Prisoners	1 Jan 2012 ²⁹	15 May 2012 ³⁰	15 Nov 2004 ³¹	Draft law in process ³²	3 Mar 2011 ³³
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In parallel to domestic research, the EIPA and Fair Trials respectively surveyed their past trainees and members of Fair Trials' Legal Experts Advisory Panel (LEAP) - a criminal justice network consisting of over 180 criminal defence lawyers, academic and civil society organisations in Europe. Fair Trials also circulated a survey to all the EU Member States' Permanent Representations in Brussels. These surveys aimed to complete the findings with input from Member States not subject to the in-depth research.³⁴

2. Challenges in the research

Collecting data on the use of the EU Mutual Recognition Instruments was challenging. There is no systematic data collection regarding their use across EU Member States, despite requirements in each instrument for Member States to gather such data. The European Union Fundamental Rights Agency (FRA) noted that more than half of the Member States do not gather any information regarding the use of the FD PAS and the ESO. Only five Member States legally require national authorities to collate data on the use of FD PAS, none for the ESO.³⁵ Partners faced the same issues, including regarding the EIO and the FD Transfer of Prisoners. In contrast, statistics on the numbers of EAWs issued and executed each year in every Member State has been collected since 2005, initially by the Council and more recently by the European Commission. However, the data available on the EAW is also far from complete and is collected only on a voluntary basis by the Member States as the FD EAW does not impose such a legal obligation.³⁶

judgement rendered in absentia in 1) art. 634 of Criminal Law, 2) Legislation from the 23 February 2010 regarding the mutual recognition of financial sanctions; 3) the modified law of 17 March 2004 regarding the European Arrest Warrant.

²⁹ EU-JZG consolidated version §§ 39-42g, adopted on 15 December 2011, which entered into force on 1 January 2012.

³⁰ Federal Act of 15 May 2012 on the application of the principle of mutual recognition to custodial sentences or measures involving deprivation of liberty imposed in a Member State of the European Union which entered into force on 5 December 2011.

³¹ Law 4307/2014 (O.G.G. issue A' 246/15.11.2014), which entered into force on 15 November 2004.

³² Ireland has been referred to the ECJ because of its failure to transpose this FD but is committed in its 2021 legislative programme to transposition and has published a draft law, available [here](#).

³³ Law of 28 February 2011 regarding the effective application of the principle of mutual recognition in criminal judgements that have ruled for a deprivation of liberty in order to be executed in other European Union's Member States.

³⁴ EIPA: 21 respondents ; LEAP: 11 respondents ; EU Member States Permanent Representations in Brussels: 12 respondents; Austria: 11 respondents (3 lawyers, 1 judge, 5 prosecutors; 1 representative from the Ministry of Justice; 1 representative from the Probation Service) ; Belgium: 23 respondents (6 judges, 3 lawyers, 7 prosecutors, 4 probation agents, 2 persons from the Ministry of Justice and 1 from the Permanent Representation to the EU); Greece: 7 respondents (3 lawyers, 2 judges, and 2 prosecutors) ; Ireland: 6 respondents (3 defence lawyers and 3 prosecutors); Luxembourg: 6 respondents (4 lawyers and 2 prosecutors).

³⁵ FRA, [Report on Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), 2016, p. 32.

³⁶ European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant, European Implementation Assessment](#), June 2020, pp. 4-5.

In 2019, the Council simply “encouraged” EU Member States to improve the collection of data on the use of non-custodial sanctions and measures, and on the application of FD PAS and the ESO.³⁷ Years after the adoption of the EU Mutual Recognition Instruments, monitoring remains problematic.

Compared to the EAW which has been increasingly used since 2005, most of the EU Mutual Recognition Instruments have been largely ignored. In Spain, for instance, seven ESOs were issued in 2019 compared to 452 EAWs.³⁸ For instance, only one case of FD PAS was registered in Austria between 2010 and 2020 and no record of any ESO being issued by Austrian authorities. There is a dearth of information as to their use and take-up by practitioners but the research and data available confirm the very limited use of these instruments.³⁹ Out of 8 completed responses received in the course of 2020 to our questionnaire seeking data on the use of the instruments from permanent representations showed:

- EIO Directive: no data available in 7 Member States, data collected in one Member State.
- FD ESO: no data available in 6 Member States, few cases reported in one Member State and no cases at all for another Member State.
- FD Transfer of Prisoners: no data available in 6 Member States, more widely used in two Member States.
- FD PAS: no data available in 7 Member States, one case reported in one Member State.

Promising practice: Monitoring data on the use of alternative measures

In Belgium, regarding the FD Transfer of Prisoners, there is a central system handling all incoming requests for transfers and collecting all the information of detainees. A particular branch of the Ministry of Justice is responsible for proactively checking this database and transferring detainees fulfilling the conditions.

Partners also experienced difficulties in securing interviews with judicial actors and lawyers as they did not feel confident speaking about the EU Mutual Recognition Instruments other than the EAW, citing their limited knowledge or experience in relation to these instruments. Most of them noted the lack

³⁷ Council of the EU, [Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice](#), 16 December 2019, para I. 10.

³⁸ Ana Maria Neira-Pena, [The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty Versus Security](#), European Papers, European Forum, 4 November 2020, p. 7.

³⁹ This was recently restated by the Romanian Presidency: Council of the EU, [The way forward in the field of mutual recognition in criminal matters - Policy debate](#), Report of the Romanian Presidency, 27 May 2019 stressing that “Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States remains one of the most effective legal instruments in this area. There are also various other legal instruments, some of which are used relatively often (e.g. Framework Decision 2008/909/JHA on custodial sentences), while others are used less frequently (such as Framework Decision 2008/947/JHA on probation measures and Framework Decision 2009/829/JHA on supervision measures).” See also: European Judicial Network Secretariat (EJNS), [Report on activities and management 2017-2018](#), 2019, p. 16: “these instruments are not commonly used by the practitioners in the Member States due to a lack of awareness and experience of them ...”. A 2018 study by the DETOUR academic consortium similarly found that ESOs are “almost never used” (W. Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu et al., DETOUR - Towards Pre-trial Detention as Ultima Ratio, [Comparative Report](#), December 2017). In 2016, FRA pointed out the “relatively limited” use of the ESO, the FD PAS and the FD Transfer of prisoners (FRA, [Report on Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), 2016, p. 34).

of (mandatory) training and readily available information and guidelines on the use of these instruments.⁴⁰ The situation seemed to be even more challenging for defence lawyers who either didn't know these instruments at all or had barely used them. This is illustrative of the failure of such instruments as this report will explain.

Among those who were interviewed, there was significant disparity of experience and expertise. For instance, in Belgium, participants with experience in cross-border cooperation were often dealing with terrorism crimes and serious offences. Their answers were influenced by the type of criminality they deal with, which may explain the use of the EAW. In Austria, those who were mostly confronted with cross-border cases were based in large cities, and few practitioners from smaller cities responded to the requests for interviews. It is also worth noting that authorities in Luxembourg had more experience issuing measures than executing requests from other EU Member States.

⁴⁰ This was not necessarily expressed as being negative, amongst the Austrian prosecutors at least. They were much more convinced about "learning by doing". The training to become a judge/prosecutor is already very comprehensive and only few really work in cross-border cooperation.

Part 1: The need for alternatives to the EAW

In contrast to the EAW, the other EU Mutual Recognition Instruments broadly promote an alternative objective in the EU's criminal justice policy, beyond making cooperation between authorities more efficient. These measures express the objective of social rehabilitation or reintegration of persons suspected, accused or convicted, which "entails a process that starts during detention and is facilitated by being detained as close to "home" as possible."⁴¹ This objective is not achievable through the EAW, which involves the deportation of a person to stand trial or execute a sentence in another country, where the person may not have social or family ties that enable any meaningful social reintegration.

In this section, we look at how the other EU Mutual Recognition Instruments may, in theory, be used as alternatives to the EAW to limit the impact on people's fundamental rights and promote social reintegration, by (1) preventing the misuse of the EAW at pre-trial stage for investigative purposes instead of for prosecution, when a case is trial-ready; (2) protecting the fundamental right to liberty and to the presumption of innocence by limiting the use of pre-trial detention; (3) protecting people's fundamental rights by keeping them out of places of detention where conditions fail to meet the basic fundamental right to be free from inhuman and degrading treatments; and (4) preventing unequal treatment between people within the EU, based on their place of residence or nationality.

1) Preventing the misuse of the EAW for questioning

In principle, EAWs may only be issued for the purposes of conducting criminal prosecutions or for executing a custodial sentence. In practice however, EAWs continue to be issued for investigative purposes (for questioning a suspect) before a case is ready to go to trial. Issuing authorities opt for the 'ease' of the EAW which provides them with the certainty that the person will be rapidly presented before them for questioning. This approach involves often unnecessary detention and fails to consider the implications for the person (deprivation of liberty and surrender to another country) and whether the case is ready to go to trial.

Our research shows that people continue to be surrendered under EAWs, often because the EAW has been issued to investigate the person rather than to bring them to trial when the case is "trial-ready".⁴² Where EAWs are issued too early in the process, the affected person may be arrested and surrendered to the issuing state, and required to await trial (typically in pre-trial detention) for long, often excessive and unnecessary periods of time.⁴³ Surrender and even short periods of detention can dramatically impact a person's life, and could entail loss of housing and work, which in turn, significantly impairs the possibility of social reintegration, whether the person is ultimately acquitted or convicted.

Nevertheless, Greek judges recognised that they find it easier to use an EAW to have a person in front of them to conduct questioning, despite the fact that EAWs should not be used for investigation. Authorities tend to arrest and detain the requested person as soon as the person is needed for a

⁴¹ FRA, [Report on Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), 2016, p. 9.

⁴² Fair Trials, [Beyond the emergency of the COVID-19 pandemic - Lessons for defence rights in Europe](#), June 2020.

⁴³ Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#), Report, p. 33, May 2016.

statement, irrespective of the fact that the investigation is at a preliminary stage and therefore not ready for trial – in clear contradiction with the stated objectives of FD EAW. The practitioners interviewed seemed to follow the same process for domestic or European cases – namely, arrest, detain, and bring to the judge.

In contrast, Irish practitioners report that courts refuse to surrender requested persons pursuant to EAWs issued for investigative purposes rather than for prosecution, before a person has been charged and is ready to be tried.

In such cases, there are alternative measures that investigative authorities can (and should be required to) resort to instead, to prevent any irreparable consequence on a person's life, at a stage where they are still legally presumed innocent (prior to any finding of guilt by a court). Notably, an EIO for the purposes of questioning over video link could be issued instead of an EAW. With the use of digital technology in criminal proceedings across Europe increasing, this option could be made readily available to authorities in future.

In our research, practitioners reported the use of other possibilities, beyond the scope of the EU Mutual Recognition Instruments.

- In **Ireland**, which did not opt into the EIO Directive, requests for mutual assistance to obtain evidence (documentary or via video link) pursuant to Section 63 of the Criminal Justice (Mutual Assistance) Act 2008 could continue to be used more widely to replace EAWs.
- **Belgian** judges and prosecutors also prefer to conduct interviews in person rather than via video link which they consider less efficient. As national arrest warrants and EAWs cannot be used for the sole objective of conducting interviews, they often use the Convention on mutual assistance in criminal matters between EU Member States⁴⁴ to organise the temporary transfer of the person detained for the purpose of investigation.⁴⁵ They find this instrument, which enables the creation of joint investigation teams, easy to use and much more flexible, particularly 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. Finally, some practitioners noted that 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.

The digitalisation of justice systems can include the use of video links to enable authorities to question a person remotely, instead of resorting to an EAW. In this respect, the EU should promote the use of video link hearings, as envisaged in the Commission's Communication on the Digitalisation of Justice in the EU of 2 December 2020.⁴⁶ This would enable authorities to resort to the EIO Directive as an alternative to the EAW. However, even if this option is made available, there is also a need to establish a common understanding of 'trial-readiness' across EU Member States.

⁴⁴ Council of the EU, Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000 ([OJ C 197. 12.7.2000, p. 3–23](#)).

⁴⁵ Ibid. Article 9.

⁴⁶ [Communication](#) from the Commission on the Digitalisation of justice in the EU – A toolbox of opportunities, COM(2020) 710 final, 2 December 2020.

2) Preventing the unjustified use of pre-trial detention

Despite the significant number of studies stressing the inefficiency and negative impacts of pre-trial detention – be it in terms of de-socialisation of the suspect,⁴⁷ the high costs for the public authorities involved or the impact on prison overcrowding,⁴⁸ judicial actors across EU Member States fail to limit the use of pre-trial detention as a measure of last resort. This applies in a cross-border setting, where EAWs are typically accompanied by detention in the executing Member State pending surrender, and then in the issuing Member State upon the person's return, at least until they are heard by the relevant authority. In other words, the EAW typically involves at a minimum several weeks in detention (more if the EAW is challenged).

Further, in some Member States, an EAW can be issued where national conditions for pre-trial detention are met. Where the conditions do not ensure that pre-trial detention is strictly used as a last resort measure, the EAW will, also, not be justified or proportionate.

Unjustified and disproportionate use of pre-trial detention infringes the presumption of the individual's innocence and their right to liberty. Overuse of pre-trial detention is "detrimental for the individual, can prejudice the judicial cooperation between the Member States and do[es] not represent the values for which the European Union stands", as acknowledged by the EU Member States themselves.⁴⁹

Yet the number of persons held in pre-trial detention remains excessively high across Europe. Now, approximately 22% of the prison population in Europe is made up of persons presumed innocent, waiting for their trial or final sentence.⁵⁰ This proportion indicates that judicial practices fall short of regional and international standards which set detention pending trial as a measure of last resort. These include the common standards that emerge from the ECHR, which establishes several binding legal standards that must be fulfilled to restrict the right to liberty including through pre-trial detention.⁵¹ However, the ECHR has so far been unable to prevent the overuse of pre-trial detention.⁵²

The need for the EU to take action to address the excessive use of pre-trial detention by setting clear common minimum standards has been recognised by all EU actors for more than a decade. In 2009, the Council of the EU invited the Commission to submit a Green paper on pre-trial detention due to

⁴⁷ Patricia Faraldo Cabana, [One Step Forward, Two Steps Back? Social Rehabilitation of Foreign Offenders Under Framework Decisions 2008/909/JHA and 2008/947/JHA](#), *New Journal of European Criminal Law*, 2019 Vol 2. Issue 2, p. 154.

⁴⁸ These challenges were recognised in the original Framework Decision proposal on the European Supervision Order itself: European Commission, [Proposal for a COUNCIL FRAMEWORK DECISION on the European supervision order in pre-trial procedures between Member States of the European Union](#), COM(2006) 468 final, 29 August 2006.

⁴⁹ Council of the EU, Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, ([OJ C 295, 4.12.2009, p. 1–3](#)).

⁵⁰ Council of Europe – Université de Lausanne, Aebi and Tiago, [Prisons and Prisoners in Europe 2019: Key Findings of the SPACE I report \(2020\)](#), 24 February 2020, p. 6.

⁵¹ Article 5 of the ECHR.

⁵² Adriano Martufi and Christina Peristeridou, [The purposes of pre-trial detention and the quest for alternatives](#), *European Journal of Crime, Criminal Law and Criminal Justice*, 28(2), 2020. The authors challenge the nature and the underlying purposes of the grounds recognised by ECtHR to justify pre-trial detention and argue that ECHR standards are far from being the solution to the excessive use of pre-trial detention in EU Member States.

the detrimental impact of excessively long periods of pre-trial detention on both EU citizens and EU judicial cooperation between the Member States.⁵³ In 2011, the European Commission adopted a Green paper on detention conditions which raised the question whether EU legislation on pre-trial detention, in particular maximum length of pre-trial detention and regular review of such detention, could be envisaged.⁵⁴ However, despite expressed political concern,⁵⁵ there is still no proposal for EU legislation on pre-trial detention.

The adoption of the ESO FD was seen by the EU and its Member States as an effective way of avoiding legislative action on pre-trial detention,⁵⁶ which, as the CJEU recently stated, is not regulated by EU legislation.⁵⁷ The Commission envisaged that the ESO FD could potentially lead to reduction of pre-trial detention and to facilitate social rehabilitation of prisoners in a cross-border context. This in turn could reduce prison overcrowding and thereby improve detention conditions as well as allow for considerable budgetary savings for prisons.⁵⁸

By listing alternative measures to pre-trial detention, the ESO FD could promote the use of non-custodial pre-trial detention measures by judges. The measures envisaged in the EAW FD include the following core supervision measures:⁵⁹

- An obligation to inform the authorities of a change of residence;
- An obligation not to enter certain places (in either Member State);
- An obligation to remain at a specified place (with possible curfew requirements);

⁵³ Council of the EU, Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, ([OJ C 295, 4.12.2009, p. 1–3](#)).

⁵⁴ European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM (2011) 327, 14 June 2011.

⁵⁵ The European Parliament reiterated its call on several occasions. See European Parliament, [European Parliament resolution of 15 December 2011 on detention conditions in the EU \(2011/2897\(RSP\)\)](#), 15 December 2011, para. 10; European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), ([OJ C 285, 29.8.2017, p. 135–140](#)); European Parliament, [European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States \(2019/2207\(INI\)\)](#), 20 January 2021, para. 3 .

⁵⁶ Stefano Montaldo, [Special focus on pre-trial detention and its alternatives under EU law: an introduction](#), European Papers, European Forum, 4 November 2020, p. 3; Adriano Martufi and Christina Peristeridou, [Pilate washing his hands. The CJEU on pre-trial detention](#), EU Law Analysis, 5 December 2019.

⁵⁷ Recently, the CJEU denied the application of the Directive on presumption of innocence to pre-trial detention : CJEU, [Case C-310/18 PPU – Milev](#), Judgment of 19 September 2018, ECLI:EU:C:2018:73 ; CJEU, [Case C-8/19 PPU – RH](#), Judgment of 12 February 2019, ECLI:EU:C:2019:110; CJEU, CJEU, [Case C-653/19 PPU – DK](#), Judgment of 28 November 2019, ECLI:EU:C:2019:1024. This decision was criticised by commentators as over-restricting the applicability of the Directive; they also opined that the court had missed an opportunity to provide common standards on pre-trial detention: Adriano Martufi and Christina Peristeridou, [CJEU, Case C 653/19 PPU, DK](#), November 2019.

⁵⁸ European Commission, [Report From The Commission To The European Parliament And The Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention](#), COM(2014) 57 final, 5 February 2014.

⁵⁹ Article 8(1) of the ESO FD.

- An obligation regarding leaving the territory of the executing Member State;
- An obligation to report at specific times to a specific authority; and
- An obligation to avoid contact with specific persons.

Article 8(2) of the ESO FD further lists several other supervision measures which Member States can accept, or decline, to supervise, such as restrictions on professional activity; an obligation not to drive a vehicle; financial security or addiction treatment.

However, the ESO FD, which is not widely known or used by practitioners, hardly has this effect. Research shows that judges tend to be reluctant to engage with practical alternatives to pre-trial detention that can protect the investigation, limit the possibility of reoffending, and ensure defendants' presence at trial.⁶⁰ Despite electronic monitoring and house arrest becoming increasingly available in many Member States, their use remains limited in numerous EU Member States.

A recent survey by the Council of Europe's Annual Penal Statistics revealed that non-custodial measures are rarely used as an alternative to pre-trial detention: only 7.5% of the probation population (i.e. persons under supervision measures before the trial or serving non-custodial sanctions) corresponds to persons placed under supervision before trial.⁶¹ By way of example, in 2019, only 202 persons were subject to domestic supervision measures at the pre-trial stage in Austria and 26 persons in Luxembourg. This contrasts with numbers in Belgium (20,242 persons) and to a lesser extent Greece (6,730 persons).⁶²

This lack of systematic data collection, access to bail information services or pre-trial risk assessments, and little training in alternatives to detention means that judges and prosecutors tend to lack faith in the efficacy of alternatives and continue to rely instead on pre-trial detention. This minimal use of alternative measures means that judicial authorities have limited experience of, and therefore limited confidence in, alternatives to pre-trial detention. These measures are often new and have not yet been 'tried and tested'⁶³ at a domestic level. Due to insufficient time and resources for independent judicial review, judicial authorities also tend to follow prosecution arguments in favour of detention rather than making use of possible alternative measures,⁶⁴ particularly where lawyers do not put forward solid arguments in favour of an alternative to detention.

"Either someone can be trusted and pre-trial detention is not necessary; or they cannot and alternative measures will not help." - Austrian prosecutor⁶⁵

This lack of engagement with alternatives is not limited to judges and prosecutors. Lawyers also fail to argue for release or individualised alternatives to detention. Fair Trials' research indicates that lawyers typically do not have enough time to consult their client, study case materials (or even have timely access to case materials) and prepare for pre-trial detention hearings. Judges tend to follow

⁶⁰ Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#), Report, May 2016.

⁶¹ Council of Europe – Université de Lausanne, [Persons under the supervision of probation agencies report – SPACE II - 2019](#), 10 June 2020, p. 1.

⁶² Ibid.

⁶³ Fair Trials, [Where's my lawyer: Making legal assistance in pre-trial detention effective](#), Report, October 2019.

⁶⁴ Ibid. pp. 25-26.

⁶⁵ Quote collected during an interview conducted for this research.

prosecutorial motions for pre-trial detention, especially where lawyers do not advocate for their clients to be released or for alternative measures at the pre-trial stage.⁶⁶ In some cases, lawyers also lack knowledge about the possibilities and conditions of turning to regional and international bodies to challenge pre-trial detention orders issued by national courts.

It is also important to highlight that the promotion of alternative measures to pre-trial detention cannot be the only solution to address the overuse of pre-trial detention. There is a risk that alternatives to (pre-trial) detention may be used at the expense of release or conditional release, but not instead of (pre-trial) detention: the so-called “net-widening” effect well documented in criminology.⁶⁷ In this respect, the Belgian experience demonstrates that a high level of use of alternative measures does not necessarily result in lesser recourse to pre-trial detention. The overall number of people under pre-trial supervision measures has tripled since 1980, due to an increase in pre-trial detention, electronic monitoring, and the alternative of release under conditions. In 2014, over 6,200 people experienced some kind of ‘judicial supervision’ while awaiting a final sentence, compared to 20,242 persons in 2019. At the same time, periods of supervision for suspects released under conditions became longer and the number of conditions imposed on those suspects increased.⁶⁸

Europe has a long-standing problem in respect to the overuse of pre-trial detention. The EAW FD typically involves pre-trial detention in both the executing and issuing Member States, which is based on domestic legal standards that are not sufficiently robust to ensure that pre-trial detention is limited to a measure of last resort. By offering alternatives to pre-trial detention, the ESO FD has the potential, in theory, to promote non-custodial alternatives and limit the use of pre-trial detention in cross-border proceedings. However, without robust EU standards on the use of pre-trial detention itself, the potential of the ESO FD as an alternative to the EAW and accompanying pre-trial detention remains very limited.

3) Exposing people to inhuman and degrading treatment due to prison conditions

Prison overcrowding, and the rights violations it causes, is driven in large part by excessive use of pre-trial detention.⁶⁹ The statistics regarding prison overcrowding in Europe remain alarming. At least 11 EU Member States experience prison density of more than 100 inmates per 100 places. Some experience serious overcrowding, with rates of more than 105 inmates per 100 places (Austria,

⁶⁶ Ibid.

⁶⁷ See among others: in Belgium, Carrol Tange, Dieter Burssens et Eric Maes, [La détention avant jugement en Belgique. Étude empirique des facteurs explicatifs du recours au mandat d’arrêt et de sa durée](#), Champ pénal/Penal field 16-2019., August 2019, para. 68 ; lawyers in Greece reported that alternative measures tend to be ordered as a precaution instead of unconditional release, rather than instead of pre-trial detention. Fair Trials, [Where’s my lawyer: Making legal assistance in pre-trial detention effective](#), Report, October 2019, p. 26.

⁶⁸ Eric Maes and Alexia Jonckheere, [Dealing with crime in ordinary times as in times of crisis: a solution to reduce pre-trial detention?](#), Confederation of European Probation, October 2020.

⁶⁹ Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision making in the EU](#), Report, 2016, para. 100. See also Council of Europe, European Committee on Crime Problems (CDPC), [White Paper on prison overcrowding](#), 30 June 2016, para. 59; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), [26th General Report of the CPT, 1 January – 31 December 2016](#), April 2017, para. 52.

Greece, Malta, Romania, Hungary, France, Italy and Belgium).⁷⁰ The European Court of Human Rights (ECtHR) continues to find repeated violations of fundamental rights in relation to detention conditions and prison overcrowding – in April 2019, there were around 12,000 pending applications to the ECtHR raising issues relating to conditions of detention, indicating the systematic nature of overcrowding issues.⁷¹ In 2020 alone the ECtHR issued two pilot judgments on inhuman and degrading prison conditions in the EU Member States.⁷²

“Without mutual confidence in the area of detention, European Union mutual recognition instruments that have a bearing on detention will not work properly, because a Member State might be reluctant to recognise and enforce the decision taken by another Member State's authorities.” – European Commission⁷³

In response to the COVID-19 pandemic, about 18 Member States have engaged in decarceration to preserve public health and protect the right to life in prisons.⁷⁴ Other countries (including those with serious overcrowding problems such as Hungary, Romania, Bulgaria and Sweden), have taken no steps towards reduction of prison populations. In fact, in some states, such as Greece, the overall prison population increased during the pandemic. For a total capacity of 10,175 in Greek prisons, the total number of persons in detention in January 2020 was 10,891, while in January 2021 the population went up to 11,379.

Despite being presumed innocent, pre-trial detainees have been all but ignored from the release schemes.⁷⁵ [Overall, states failed to take the pandemic as an opportunity to address prison overcrowding and the excessive use of pre-trial detention.](#)⁷⁶ In response to the massive backlog of cases, some even adopted measures aimed at further undermining the pre-trial detainees' right to challenge their detention, including extension of procedural deadlines to rule on release applications, delay or suspension of review hearings, or extending pre-trial detention time limits – raising serious concerns about the impact on the prison population.⁷⁷

⁷⁰ Council of Europe – Université de Lausanne, Aebi and Tiago, [Prisons and Prisoners in Europe 2019: Key Findings of the SPACE I report \(2020\)](#), 24 February 2020, p 9.

⁷¹ Key note speech by Judge Siofra O'Leary, ECtHR, [High Level Conference “Responses to Prison Overcrowding”](#), 24-25 April 2019. As of 31 August 2019, the total number of pending applications before the Court was 62 100. Krešimir Kamber, [Overuse of pre-trial detention and overcrowding in European prisons](#), Policy meeting: Overuse of pre-trial detention in Europe: How can we make legal assistance more effective?, Press Club Brussels Europe, 10 October 2019, p. 9.

⁷² [Sukhachov v. Ukraine, J.M.B. v. France](#) (2020).

⁷³ European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM (2011) 327, 14 June 2011.

⁷⁴ European Parliamentary Research Service, [Briefing: Coronavirus and prisons in the EU – Member-State measures to reduce spread of the virus](#), June 2020, p. 11.

⁷⁵; Jago Russell, [COVID-19 in Europe's prisons - and the response](#), EuObserver, 18 May 2020.

⁷⁶ Observatoire International des Prisons – Section Française, [Surpopulation carcérale : face à l'urgence, le réflexe prison à la peau dure](#), 1 February 2021.

⁷⁷ Laure Baudrihay-Gérard, [The COVID-19 pandemic: the urgency to rethink the use of pre-trial detention](#), in ANTIGONE, Have prisons learnt from Covid-19?, Rivista Anno XV N.1, 2020, pp. 128-138; Fair Trials, [Beyond the emergency of the COVID-19 pandemic: lessons for defence rights in Europe](#), Report, 20 July 2020.

Extraditions of persons pursuant to EAWs raise serious human rights concerns such as inhuman and degrading treatment caused by poor prison conditions across the EU.⁷⁸ Poor prison conditions hamper mutual trust and undermine the effectiveness of EU mutual recognition instruments.⁷⁹ The EAW is inevitably affected by inadequate detention conditions which threaten to violate the absolute prohibition of inhuman and degrading treatment. Persons subject to an EAW, both pre-prosecution or while serving a sentence, are typically detained once surrendered to the issuing state. If the executing Member State believes that the requested person will be detained subject to inadequate conditions in the issuing state, it might object to the requested transfer.

Since 2016, the CJEU has recognised that judges must not surrender someone under an EAW if the requested person faces a real risk of ill-treatment due to poor prison conditions.⁸⁰ In 2018, fundamental rights issues, including prison conditions, led to refusals to execute EAWs in 82 cases.⁸¹ In the long run, repeated detention-related deficiencies have and will continue to erode the “high level of confidence between Member States”,⁸² which are at the basis of the EAW system.⁸³

Practitioners in this study reported that EAWs are continuing to be challenged on the grounds of detention conditions, causing delays in proceedings and challenges for executing authorities, who are (duly) required to verify conditions in the prisons of the issuing Member State. Resorting to the ESO FD at pre-trial stage or the PAS FD at post-sentencing stage could enable authorities to avoid placing people in detention and at risk of inhumane and degrading treatment altogether, by adopting non-custodial measures.

While EU Member States are bound by the ECHR standards, there are still no common minimum EU standards on detention conditions which vary widely across the EU and even within Member States. In the recent case of *Doronbatu*, the CJEU relied on the factors developed in ECtHR case law to assess prison conditions in the issuing state, bringing to the fore this outstanding gap in EU standards.⁸⁴ There have been numerous calls for common EU standards on detention generally, pre-trial and post-sentencing. In 2009, the European Parliament called for the establishment of EU minimum standards

⁷⁸ Fair Trials, [Beyond Surrender: Putting human rights at the heart of the European Arrest Warrant](#), 28 June 2018, p. 8.

⁷⁹ See notably European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM (2011) 327, 14 June 2011.

⁸⁰ See notably CJEU, [Joined Cases C-404/15 Aranyosi and Căldăraru and C-659/15 PPU](#), Judgment of 5 April 2016 (GC), ECLI:EU:C:2016:198; CJEU, [Case C-220/18 PPU, ML \(Conditions of detention in Hungary\)](#), Judgment of 25 July 2018; CJEU, [Case C-128/18 Doronbatu](#), Judgment of 15 October 2019, ECLI:EU:C:2019:857.

⁸¹ European Commission, [Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018](#), Commission staff working document, SWD (2020) 127 final, 2 July 2020.

⁸² Recital 10 of the FD EAW.

⁸³ European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM (2011) 327, 14 June 2011.

⁸⁴ CJEU, [Case C-128/18 Doronbatu](#), judgment of 15 October 2019. See in particular para. 58: “it must, as a preliminary point, be recalled that, in accordance with the first sentence of Article 52(3) of the Charter, in so far as the right set out in Article 4 of the Charter corresponds to the right guaranteed by Article 3 of the ECHR, its meaning and scope are to be the same as those laid down by the ECHR. In addition, the explanations relating to the Charter make clear, with respect to Article 52(3), that the meaning and the scope of the rights guaranteed by the ECHR are determined not only by the text of the ECHR, but also by the case-law of the European Court of Human Rights and by that of the Court of Justice of the European Union.”

for prison and detention conditions as well as a common set of prisoners' rights in the EU.⁸⁵ The EU Commission has also proposed ways in which the matter can be taken further.⁸⁶ The Council of the EU has repeatedly encouraged EU Member States to enhance the use of non-custodial measures and sanctions and to address the issues of poor detention conditions.⁸⁷ However, these concerns have not yet led to any legislative action.

Promoting the ESO FD and the PAS FD might help keep people out of detention, but ultimately improving detention conditions across the EU will require EU action. EU competence for adopting binding legislation on imprisonment after conviction remains debated.⁸⁸ However, recent CJEU case law has shown that poor prison conditions and the lack of minimum standards on the treatment of prisoners negatively affects the functioning of EU Mutual Recognition Instruments, such as the FD EAW and the FD Transfer of Prisoners and could therefore fall within EU competence.⁸⁹ The added value of adopting EU minimum standards on the detention conditions of sentenced persons is undisputed, notably in terms of their enforceability via the European Commission and the Court of Justice.⁹⁰ The ECtHR and the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have both developed prison conditions standards but lack enforcement powers. Besides, in some instances, ECtHR's standards fall behind CPT preventive standards.⁹¹ Finally, commentators have stressed that for legislation on pre-trial

⁸⁵ European Parliament, [European Parliament resolution of 25 November 2009 on the Communication from the Commission – An area of freedom, security and justice serving the citizen – Stockholm programme \(P7_TA\(2009\)0090\)](#), 25 November 2009, para. 112. This call was recently repeated in European Parliament, [European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States \(2019/2207\(INI\)\)](#), 20 January 2021, para. 37.

⁸⁶ European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM (2011) 327, 14 June 2011.

⁸⁷ Council of the EU, [Council conclusions 'The European arrest warrant and extradition procedures - current challenges and the way forward'](#), 23 November 2020, para. 39; Council of the EU, [Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice](#), 16 December 2019; Council of the EU, [Council conclusions on mutual recognition in criminal matters – 'Promoting mutual recognition by enhancing mutual trust'](#), 13 December 2018.

⁸⁸ Thea Coventry, [Pretrial detention: Assessing European Union Competence under Article 82\(2\) TFEU](#), *New Journal of European Criminal Law* 2017, Vol. 8(1), pp. 43–63; Anneli Soo, [Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures](#), *ERA Forum* 20, 2020, p. 327–341.

⁸⁹ Opinion of Advocate-General Bot, [Joined Cases C-404/15 Aranyosi and Căldăraru and C 659/15 PPU](#), 3 March 2016, paras 181-182. European Parliamentary Research Service, Wouter van Ballegooij, [Procedural Rights and Detention Conditions – Cost of Non-Europe Report](#), December 2017, p. 42; Élodie Sellier and Anne Weyembergh, [Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation](#), Study requested by the LIBE committee, European Parliament, 2018, pp.106-122.

⁹⁰ Wouter van Ballegooij, [Procedural Rights and Detention Conditions – Cost of Non-Europe Report](#), December 2017, p. 8; Anneli Soo, [Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures](#), *ERA Forum* 20, 2020, p. 327–341; Élodie Sellier and Anne Weyembergh, [Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation](#), Study requested by the LIBE committee, European Parliament, 2018, pp.106-122.

⁹¹ Comments by CPT members in European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant, European Implementation Assessment](#), June 2020, pp. 57-58.

detention to be meaningful, it must necessarily cover material detention conditions, both for pre-trial and sentenced detainees.⁹²

4) Discriminatory impact

All too often, criminal courts order the detention of non-residents because they presume them to be a flight risk, or, if they release them, require them to stay in the trial state because they do not have confidence that they can be adequately supervised at home. Pre-trial detention of individuals based on their status as a non-resident is a violation of the right to equality before the law, which prohibits discrimination on the basis of nationality or residence. The imposition of pre-trial detention pending surrender in the country of arrest based on flight risk, which is assumed merely based on a person's foreign nationality or residence in another country.

The ESO FD provides an answer to these problems, allowing the court to rely on the authorities of other Member States to supervise the defendant, thus removing one of the main avoidable causes of detention of non-residents. The objective of the ESO was to address the detention of non-residents and to ensure that non-residents subject to criminal proceedings are not treated differently from residents.

For years, researchers have stressed that judicial actors consider foreign nationality and/or foreign residence as a determining factor in the risk of flight and evasion of justice by the suspect.⁹³ Foreign nationality and residency are still perceived as opportunities to escape supervision by law enforcement authorities while the trial is still pending and, ultimately, to flee justice. As a result, 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. In other words, 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.

Across Europe, the number of foreign people who find themselves in pre-trial detention is staggering and confirms the discriminatory use of pre-trial detention for non-nationals. While approximately 22% of detained persons in Europe are held pre-trial, almost 60 % of foreign people detained in European prisons in 2019 were waiting for their trial or final sentence⁹⁴ – in comparison, this average raised to 40% for the Council of Europe area in 2015.⁹⁵ In Austria, more than 65% of the persons held in pre-

⁹² European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant, European Implementation Assessment](#), June 2020, p. 71.

⁹³ See among others FRA, [Report on Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), 2016, p. 34 ; Bruno Min, [The European Supervision Order for Transfer of Defendants: Why Hasn't it Worked?](#), *Penal Reform International*, 25 September 2015; Ana Maria Neira-Pena, [The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty Versus Security](#), *European Papers*, European Forum, 4 November 2020, p. 4.

⁹⁴ Esther Montero Pérez de Tudela, [Alternative measures to pre-trial detention in Europe: what else is there?](#), last accessed February 2021, referring to Council of Europe – Université de Lausanne, [Prisons and Prisoners in Europe 2019: Key Findings of the SPACE I report \(2020\)](#), 24 February 2020.

⁹⁵ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [26th GENERAL REPORT OF THE CPT](#), 1 January – 31 December 2016, para. 53 referring to Council of Europe – Université de Lausanne, [Council of Europe Annual Penal Statistics, SPACE I – Prison Populations, Survey 2015, PC-CP \(2016\)](#), 25 April 2017, tables 4 and 5.1.

trial detention in 2018 were non-nationals.⁹⁶ In Italy, 35% of the people in pre-trial detention are non-nationals.⁹⁷ In France, persons born abroad are five times more likely to be placed in pre-trial detention.⁹⁸

Taking the example of Belgium, 45.8% of the persons held in pre-trial detention are not Belgian nationals.⁹⁹ A recent study also indicates that non-residents are twice as likely as a person who is domiciled in Belgium to be detained ahead of their trial. Persons born outside Belgium are also at greater risk than those born in Belgium.¹⁰⁰ In contrast, a study showed that a great majority of people released under conditions were born in Belgium and around 90% appeared to have Belgian citizenship.¹⁰¹ As the authors of the research suggest, this overrepresentation of non-nationals amongst the prison population cannot be explained by the types of offences (e.g. drug related) or the risk of flight, but also, in good part, is attributable to a “selectivity in the judicial decision-making process in relation to the person, selectivity based on the ethnic origin (country of birth/nationality of the person.”¹⁰² This means that “persons who are not born in Belgium or who do not have Belgian citizenship, even if we take account of other potential relevant variables, are particularly vulnerable in terms of pre-trial detention orders as well as time spent in prison”.¹⁰³

Sadly, these findings are not new¹⁰⁴ and Belgium is far from being the exception – Luxembourg, Greece and Malta for instance all have disproportionately high rates of foreign people in pre-trial detention.¹⁰⁵

⁹⁶ Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, [Safety Report 2018 - Report on the activities of the criminal justice system](#), December 2019, pp. 129 and following.

⁹⁷ Antigone, Patrieio Gonnella (ed.), [DETENUTI STRANIERI IN ITALIA - Norme, numeri e diritti](#), 3 February 2015.

⁹⁸ Observatoire International des Prisons – Section Française, [Qui sont les personnes incarcérées?](#), 16 February 2020.

⁹⁹ Dieter Burskens, Carrol Tange, and Eric Maes, [Op zoek naar determinanten van de toepassing en de duur van de voorlopige hechtenis - A la recherche de déterminants du recours à la detention preventive et de sa durée](#), Institut National de Criminologie et de Criminologie, June 2015.

¹⁰⁰ Carrol Tange, Dieter Burskens and Eric Maes, [Pre-trial Detention in Belgium. An Empirical Study of Explanatory Factors in the Use of the Arrest Warrant and its Duration](#), Champ pénal/Penal field 16-2019, November 2019, paras 45-46.

¹⁰¹ Alexia Jonckheere and Eric Maes, Caractéristiques des personnes placées sous mandat d’arrêt et/ou en liberté sous conditions, in Alexia Jonckheere and Eric Maes, La detention preventive et ses alternatives. Chercheurs et acteurs en debat, pp. 35-54.

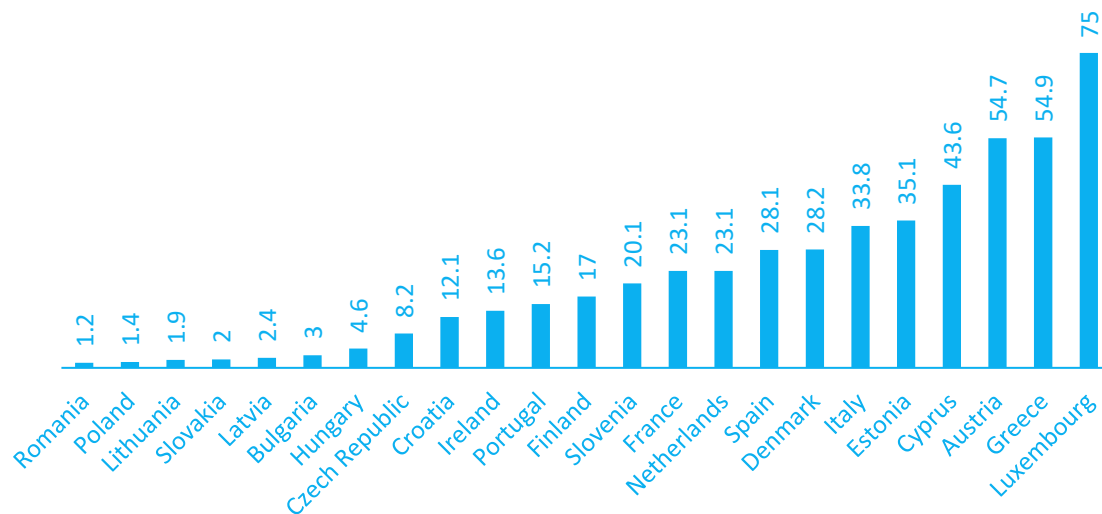
¹⁰² Unofficial translation from French, Eric Maes, Quelques données chiffrées sur l’application de la detention preventive et de ses alternatives, in Laura Aubert, « La detention preventive : Comment sans sortir ? », 2017, p. 87.

¹⁰³ Unofficial translation from French, Eric Maes, Quelques données chiffrées sur l’application de la detention preventive et de ses alternatives, in Laura Aubert, « La detention preventive : Comment sans sortir ? », 2017, p. 87.

¹⁰⁴ See for instance for Belgium, research dating from 1990 already indicating that having a residence in Belgium is the factor reducing the likelihood of being held in pre-trial detention, mentioned in Carrol Tange, Dieter Burskens and Eric Maes, [Pre-trial Detention in Belgium. An Empirical Study of Explanatory Factors in the Use of the Arrest Warrant and its Duration](#), Champ pénal/Penal field 16-2019, November 2019, para. 46.

¹⁰⁵ See Institute for Criminal Policy Research (ICPR), Birkbeck College, University of London, [World Prison Brief database](#).

Figure 1. Percentage of non-nationals held in detention in EU Member States in 2019.¹⁰⁶



This well-documented problem of non-resident suspects and accused persons being at a comparative disadvantage than residents at the pre-trial stage is recognised by the Commission, notably in the original proposal on the ESO FD itself.¹⁰⁷ The Commission went on to note the ‘vulnerable’ position of the non-resident defendant, as opposed to someone normally resident in the country: “Apart from being more or less cut off from contacts with family and friends, there is a clear risk that a non-resident suspect in such a situation could lose their job as a coercive measure (e.g. travel prohibition) that the judicial authority of the trial State has imposed on the suspect would stop this person from going back to his or her country of normal residence.”¹⁰⁸

Such difference in treatment stands against the idea of Europe as an area of freedom of movement and residence, where Member States have trust in each other’s criminal justice systems. It is also at odds with the EU’s commitment to non-discrimination on the grounds of nationality.¹⁰⁹ The European

¹⁰⁶ Council of Europe – Université de Lausanne, Aebi and Tiago, [Prisons and Prisoners in Europe 2019: Key Findings of the SPACE I report \(2020\)](#), p 5 ‘Figure 4. Percentage of foreign inmates in the prison population on 31st January 2019 (N=42)’ (data not available for Belgium).

¹⁰⁷ The Explanatory Memorandum of the original Framework Decision proposal on the European Supervision Order notes “EU citizens who do not reside in the territory of the Member State where they are suspected of having committed a crime are sometimes - mainly due to lack of community ties and the risk of flight - in pre-trial detention or perhaps subject to a long-term non-custodial surveillance measure in a strange environment for them. A person suspected of having committed a crime in a country in which he resides would benefit, in a similar situation, from a less coercive surveillance measure, such as the obligation to report periodically to the police or a travel ban”. European Commission, [Proposal for a COUNCIL FRAMEWORK DECISION on the European supervision order in pre-trial procedures between Member States of the European Union](#), COM(2006) 468 final, 29 August 2006. See also European Commission, [Report From The Commission To The European Parliament And The Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention](#), COM(2014) 57 final, 5 February 2011; European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM (2011) 327, 14 June 2011.

¹⁰⁸ *Ibid*, p. 2.

¹⁰⁹ Article 21 of the Charter, Articles 2 and 3 of the Treaty on European Union and Article 10 of Treaty on the Functioning of the European Union.

Union aims to ensure that people live in an area of freedom, security and justice, without internal frontiers. Accordingly, Europeans need to feel confident that, wherever they move within Europe, their freedom and their security are well protected in full compliance with the Union's values (including fundamental rights and the principle of non-discrimination).

“Each year tens of thousands of EU citizens are prosecuted for alleged crimes or convicted in another Member State of the European Union. Very often, criminal courts order the detention of non-residents because there is a fear that they will not turn up for trial. A suspect who is resident in the country would in a similar situation often benefit from a less coercive supervision measure, such as reporting to the police or a travel prohibition.” – European Commission¹¹⁰

Thus, the ESO FD was designed to address, primarily, (1) the situation where a non-resident defendant is kept in detention pending trial because the court finds that there is a flight risk, often because the defendant has no community ties to the trial state; but also (2) the situation where a non-resident defendant is granted temporary release but cannot leave the trial state, meaning prolonged separation from their state of residence. Both situations have considerable human impact: the defendant may lose their job; contact with family and friends will be restricted significantly; and if the defendant is detained, this will of itself have deleterious effects on their physical and mental health. The trial state also must bear the financial cost of detaining the person.

However, our research confirms that discrimination in favour of pre-trial detention for non-residents remains frequent in practice.

For instance in Austria, lawyers interviewed reported that some judges and prosecutors generally tend to assume a flight risk as soon as the person is not an Austrian resident, or not an EU citizen. Others consider that there is a risk of reoffending for foreigners with no regular place of residence who have repeatedly committed property offences. The Austrian Supreme Court ruled that, although there must be serious suspicion that the suspect committed the offence to order pre-trial detention in national procedures, the existence of reasonable grounds suffice to order detention before surrender based on an EAW. This condition is met if the assertions of the extradition documents are sound.¹¹¹

This bias towards detention in cross-border proceedings is in fact supported by the current legal framework itself. While 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), its relevant legal provision is framed as a presumption of detention rather than release. In particular, Article 12 of the EAW Framework Decision indicates that: “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

¹¹⁰ European Commission, [Report From The Commission To The European Parliament And The Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention](#), COM(2014) 57 final, 5 February 2014.

¹¹¹ Austrian Supreme Court, OGH: 15 Os 151/07f, 8 January 2008; 12 Os 12/07t, 25 January 2007; OGH 13Os89/15k, 19 August 2015.

authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.”

This approach is also reflected in the legal framework of some Member States. For instance, according to the French Code of Criminal Procedure, the fact that a person resides outside France is ground to issue a French national arrest warrant, in the same way as a person on the run.¹¹² The French Constitutional Court confirmed that the difference in treatment between resident and non-resident is justified by the difference in situation and that the investigative judge assesses the necessity and proportionality of the arrest warrant.¹¹³ However, a French defence lawyer described foreign nationality as a basis for flight risk as an “impossible presumption to rebut”.

In short, the legal framework and practice regarding non-nationals/residents appear to be in clear contradiction with international and regional standards which limit recourse to detention as a measure of last resort and enshrine equality before the law. They legitimise the use of pre-trial detention as the only relevant avenue to engage proceedings against non-residents.

In conclusion, the adoption of EU Mutual Recognition Instruments that seek to promote alternative measures to detention, we continue to see the worsening of prison conditions across Europe, in part due to overcrowding driven by pre-trial detention. In such a situation, detained persons will not receive the support they need to promote their social rehabilitation upon release.

We also continue to face the long-standing discriminatory use of detention, which is used more frequently against foreigners or non-residents, on a perceived flight risk. This position is untenable in the EU’s Common Area for Freedom, Security and Justice. There is an urgent need to recognise that the current EU legislative framework is simply insufficient to limit recourse to detention. The theoretical availability of alternative measures to EAWs cannot compensate the need to impose clear limits on pre-trial detention, particularly in respect to foreign suspects due to a presumed risk of flight.

In this context, is the promotion of the other EU Mutual Recognition Instruments as alternatives to EAWs a genuine solution? While the next part of the report identifies the obstacles, in practice, that would need to be overcome to promote the use of the EU Mutual Recognition Instruments as alternatives to the EAW (and related detention) in cross-border proceedings, it is essential for EU policymakers to recognise the necessity for an urgent, multi-pronged and coherent EU approach to address these long-standing problems that are simply getting worse.

¹¹² Article 131 of the French Code of Criminal Procedure.

¹¹³ Conseil Constitutionnel, Decision n. 2014-452 of 27 February 2015.

Part 2: Obstacles to the use of alternative measures

In this part, we analyse the four key obstacles that emerged from our research and explain the lack of use of the EU Mutual Recognition Instruments as alternatives to the EAW.

The first is the complex translation into practice of the concept of mutual trust between authorities in other Member States. Our research shows that mutual trust is accepted in relation to the EAW and detention, but not in relation to other Mutual Recognition Instruments (section 1). There are also obstacles to the consideration of alternative measures in the EU and the implementing domestic legal frameworks of the EAW. In particular, the absence of a formal requirement to conduct a proportionality assessment in respect of the EAW means that authorities are not required to consider alternative, less restrictive measures (section 2).

Our research also reveals the need to make more effective the defence's role in cross-border proceedings, as lawyers play a key role in advocating for alternative measures (section 3). Moreover, the complexity of the institutional frameworks allocating responsibilities across different authorities for the implementation of the alternative measures presents a further obstacle to the take up of these instruments (section 4).

1) Complex relationship between authorities through mutual trust

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 that each other's criminal justice systems apply the same fundamental values and principles.

"The mechanism of the European arrest warrant is based on a high level of confidence between Member States."¹¹⁴

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.

*"EU law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that **they share with it, a set of common values** on which the European Union is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected."¹¹⁵*

Historically, the principle of mutual trust was developed for the purposes of integration of the EU internal market, ensuring that goods lawfully sold in one EU country could be sold in another.

¹¹⁴ Recital 10 of the FD EAW.

¹¹⁵ CJEU, [Case C-216/18 PPU, LM](#), Judgement of 25 July 2018 (GC), ECLI:EU:C:2018:586, para. 35.

20 years ago, the Commission considered its application in criminal matters to overcome the problems associated with traditional judicial cooperation based on bilateral agreements and create the EU's Area of Security, Freedom and Justice.¹¹⁶ In practice, this process has not gone without challenges, notably due to the different approaches on the interpretation and the consequences of this principle on fundamental rights (i). Our research reveals that although practitioners widely accept the concept of "mutual trust" in relation to the EAW, the level of trust necessary to ensure the smooth operation of other Mutual Recognition Instruments, in contrast to the EAW, is still not achieved in practice which hampers the proper use of these instruments (ii).

i. The application of the principle of mutual trust to EU's criminal justice policy

The principle of mutual trust allows Member States to cooperate in the fight against crime, where the opening of borders has enabled cross-border criminality, despite their legal diversities, without necessarily going through the harmonisation of the various national criminal laws. Nevertheless, this principle also entails important risks: by allowing national legal solutions to expand their legal effects on the territory of the other Member States, the principle of mutual trust could lead also to the contagion of violations of Union law – including fundamental rights – through the European area without internal borders.

The principle of mutual trust requires Member States to presume that the other Member States comply with EU law, including fundamental rights. By imposing this presumption, this principle blurs internal borders between the Member States and allows national legal solutions to move from one national legal order to another.

This principle appeared at an early stage of European integration, in the recognition of diplomas and professional qualifications. The CJEU also relied upon this principle in order to strengthen free movement rights in the internal market in cases such as *Cassis de Dijon*¹¹⁷ or *Wurmser*.¹¹⁸ In order to ensure the abolition of internal frontiers within the EU, a "qualified duty of mutual recognition based on qualified mutual trust"¹¹⁹ was inferred by the CJEU on the basis of a rebuttable presumption "of legal equality between the different systems of the EU",¹²⁰ justifying the principle of mutual trust. A good lawfully produced in one Member State could therefore in principle be sold in other Member States. In the same vein, a person who earned a diploma in one Member State should in principle be able to practice their profession in other Member States. As far as the internal market is concerned, the principle of mutual trust usually grants more rights to individuals willing to move freely within the EU. The principle of mutual trust indeed facilitates the cross-border flows of persons, economic goods and services.

With the growing development of EU integration in the field of justice and home affairs, the principle of mutual trust was quickly embedded in more sensitive fields, such as judicial cooperation in civil and criminal matters and in the field of asylum. To assure rapidity and effectiveness in the administration

¹¹⁶ European Council, [Presidency Conclusions of Tampere European Council 15 and 16 October 1999](#).

¹¹⁷ CJEU, C-120/78 *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein*, Judgment of 20 February 1979.

¹¹⁸ CJEU, C-25/88, *Wurmser*, Judgment of 11 May 1989.

¹¹⁹ J. SNELL, "The Single Market: Does Mutual Trust Suffice?", in D. GERARD and E. BROUWER (eds.), *Mapping Mutual Trust: Understanding and Informing the Role of Mutual Trust in EU Law*, Florence: European University Institute, 2016, p. 15.

¹²⁰ C. JANSSENS, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013) p. 29.

of criminal justice within the EU despite the lack of substantial harmonization of criminal law and of a pan-European criminal judiciary, the principle of mutual trust underpins most EU criminal law instruments.

The presumption imposed in this field by the principle of mutual trust includes the protection of fundamental rights. Indeed, it requires Member States “save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.”¹²¹

Even though the principle of mutual trust plays a crucial role in EU integration, it also entails several and serious consequences on a person’s fundamental freedoms. The tension between mutual trust and human rights is twofold.

Firstly, the principle of mutual trust precludes a Member State from demanding a higher standard of protection than that laid down in the Charter from other Member States.¹²² States may, therefore, be required to set aside their national standards (including constitutional ones, which are more protective than those of the Charter), in the context of cooperation with another Member State, in favour of the latter’s lower standard of protection. This consequence of the principle of mutual trust may be to lead to a levelling down of the protection of fundamental rights in the Union.

Secondly, by preventing a Member State from verifying the effective observance of fundamental rights by its peers, the principle of mutual trust may be at the source of the spread of violations of fundamental rights across the EU area and lead to the removal of responsibility from competent executing authorities. Indeed, by virtue of the principle of mutual trust, Member States were initially prevented from refusing the execution of a EAW on the basis of other grounds than those explicitly listed in the Framework Decision, which do not include a general exception relating to fundamental rights.

In view of the amplification of the risks entailed by this duty of almost “blind” trust between Member States, the CJEU started to accept exceptions to the principle of mutual trust and the presumption of compliance with fundamental rights in “very exceptional circumstances”.¹²³ The CJEU has now acknowledged that the executing judicial authority may, in exceptional circumstances and subject to certain conditions, refuse to execute an EAW where there is a real risk that the surrender of the person concerned could lead to inhumane or degrading treatment owing to the detention conditions in the issuing state,¹²⁴ or to a violation of the fundamental right to a fair trial enshrined due to concerns about the independence of the judiciary in the issuing state.¹²⁵ The CJEU also developed a whole line

¹²¹ CJEU, Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454, para 191.

¹²² Ibid. para. 192.

¹²³ Ibid. 192. By contrast, see the initial position of the Court: ECJ, judgement of 29 January 2013, *Radu*, C-396/11, ECLI:EU:2013:39,

¹²⁴ CJEU, [Joined Cases C-404/15 Aranyosi and Căldăraru and C-659/15 PPU](#), Judgement of 5 April 2016 (GC), ECLI:EU:C:2016:198.

¹²⁵ CJEU, [Case C-220/18 PPU, ML \(Conditions of detention in Hungary\)](#), Judgment of 25 July 2018, para. 168.

of case-law defining the qualities that judicial authorities issuing and executing an EAW should possess, always in view of increasing the protection of fundamental rights of individuals.¹²⁶

Nevertheless, these exceptions are clearly not sufficient to guarantee the effectiveness of the protection of fundamental rights in the EU. Our research showed that authorities widely assimilate “mutual trust” as “blind trust” in relation to the EAW, but not in respect of the other EU Mutual Recognition Instruments.

ii. The absence of robust mutual trust for alternatives to detention

In contrast to the EAW, authorities do not appear to have mutual trust in respect of the ESO and the FD PAS. Our research reveals that national authorities lack the trust necessary to ensure the 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 bias is partly due to the lack of confidence in alternative measures themselves, even at a domestic level. Taken at a cross-border level, confidence in implementation is further undermined by the differences in national legal frameworks.

Participants also justified the absence of trust by reference to the lack of knowledge of other Member States’ legal frameworks on alternatives to detention, the competent authorities, or the effectiveness of their control. FRA made a similar observation in other EU Member States.¹²⁷

Despite the measures envisaged in the ESO FD, respondents flagged an insufficient harmonisation of alternative measures. Member States adopted their own respective sets of domestic alternatives to detention, be it for prosecution or for sentencing, with significant differences in terms of conditions, procedures and how these alternatives are applied in practice. This lack of harmonisation between Member States makes it difficult for practitioners to resort to alternatives in a cross-border context.¹²⁸ They stress different reasons: they don’t know if the measure exists in the other Member States and what are the conditions to use it; they might not use that alternative at home; or they feel such measures involve more bureaucracy, notably because they have to find domestic equivalent to the issued measure. In some cases, it is also unclear whether countries will cover the costs of the implementation of the measure. For instance, in Austria, the State will pay for therapy on probation, but other Member States will require the person to cover the costs. As a result, a request for PAS would fail.

¹²⁶ See, i.a., ECJ, judgements of 10 November 2016, Özçelik, C-453/16 PPU, ECLI:EU:C:2016:860, Poltorak, C-452/16, ECLI:EU:C:2016:858, Kovalkovas, aff. C-477/16 PPU, ECLI:EU:C:2016:86 and ECJ, judgments of 27 May 2019, OG and PI, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456 and PF, C-509/18, ECLI:EU:2019:457, ECJ, judgement of 9 October 2019, NJ, C-489/19 PPU, ECLI:EU:C:2019:849, ECJ, judgement of 12 December 2019, ZB, aff. C-627/19 PPU, ECLI:EU:C:2019:1079.

¹²⁷ European Parliamentary Research Service, Wouter van Ballegoij, [European Arrest Warrant. European Implementation Assessment](#), June 2020, p. 46.

¹²⁸ See along the same lines, Élodie Sellier and Anne Weyembergh, [Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation](#), Study requested by the LIBE committee, European Parliament, 2018, pp. 99-101.

At the pre-trial stage, alternatives to pre-trial detention widely differ across EU Member States, spanning from regularly reporting to a police station to electronic monitoring. Each Member State has a different set of measures which can be imposed, different legal regimes for the supervision of the conditions and the provisional release. In Belgium, alternative measures must be reviewed every 3 months,¹²⁹ while in Luxembourg they can be lifted at any stage.¹³⁰ Some states like Ireland for instance do not include house arrest among its alternative measures to pre-trial detention (although a court can exclude a person from a certain geographical area).

The ESO FD does envisage, in Article 13, the ability of the executing state to adapt supervision measures “in line with the types of supervision measures which apply, under the law of the executing State, to equivalent offences”.

Similarly, post-sentencing probation measures are not harmonised among EU Member States, making it difficult for judicial authorities to resort to requests under the FD PAS. Practitioners report that where it is not clear what measure can be implemented in how (particularly in respect of medical therapies), requests to recognise PAS are rejected and instead, authorities can only resort to an EAW.

When it comes to the FD on Transfers of Prisoners, there are difficulties relating to different systems in relation to the executing of sentences. While early release is available in all EU Member States, the European Commission notes that there are still considerable differences between Member States regarding eligibility conditions and implementation rules.¹³¹ Some prosecutors are reluctant to transfer a prisoner to another Member State because they fear that they may “benefit” from premature release or because of the uncertainty of how much of the prison sentence the person will actually serve in prison.¹³² In Belgium, early release is possible after one-third of the sentence has been served, while in Spain, after three quarters. Belgian practitioners also noted that Belgian sentences tend to be very long compared to the Netherlands for instance. But many detainees do in practice enjoy early release which is more difficult to obtain in the Netherlands. Some states allow for electronic monitoring¹³³ or community service as a non-custodial alternative to short prison sentences

¹²⁹ Eric Maes and Alexia Jonckheere, [Dealing with crime in ordinary times as in times of crisis: a solution to reduce pre-trial detention?](#), Confederation of European Probation, October 2020.

¹³⁰ The investigating judge may place a person under electronic surveillance within the meaning of article 690 of the Criminal Procedure Code. Article 111 of the Criminal Code provides that a request to have the measures partially or totally lifted may be made at any stage.

¹³¹ European Commission, [Report From The Commission To The European Parliament And The Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention](#), COM(2014) 57 final, 5 February 2014.

¹³² Robin Hofmann and Hans Nelen, [Cross-border cooperation in the execution of sentences between the Netherlands, Germany and Belgium: an empirical and comparative legal study on the implementation of EU framework decisions 2008/909/JHA and 2008/947/JHA](#), *Crime Law Social Change* 74, 2020, pp. 381–404.

¹³³ Such as Luxembourg, where electronic surveillance referred to in article 690 of the Code of Criminal Procedure also constitutes a method of enforcing custodial sentences, following the Act of 20 July 2018 which reformed the sentencing system and established the Sentence Enforcement Chamber, governed by articles 696 ff. of the Criminal Code. For the convicted person, being placed under electronic surveillance means that he or she may not leave his or her residence or any other location designated in the decision ordering the electronic surveillance outside the time periods indicated therein and must leave those locations during certain other time periods.

– a measure which does not exist in other Member States.¹³⁴ In Austria, drug therapy is available for free which might not be the case in other states.

These variations inevitably affect the authorities' use of alternatives in a cross-border context.¹³⁵ A more harmonised approach of alternatives to detention among EU Member States would support the application of the EU Mutual Recognition Instruments as alternatives to the EAW, foster mutual trust and ensure better compliance with international human rights obligation to order detention only as a measure of last resort.¹³⁶

By contrast, judicial actors readily rely on the principle of mutual trust to execute an EAW.

- **Belgium:** Most of the interviewed judges and prosecutors understood the principle of mutual trust as precluding them from the review of the proportionality of an EAW, stressing that the effectiveness of criminal cooperation would otherwise be endangered. Accordingly, they rarely refuse to execute an EAW on the ground that another less intrusive mechanism could be used. They would nevertheless avoid ordering pre-trial detention pending surrender for minor offences and apply the test developed by the CJEU regarding poor prison conditions or fair trials concerns.
- **Ireland:** The Supreme Court relied on the principle of mutual trust to argue that it is not necessary for the Irish authorities to produce the underlying domestic warrant on the basis of which the EAW had been issued – depriving the defence of the opportunity to know the grounds on which the arrest was made.¹³⁷

Such a differentiated approach regarding the notion of mutual trust in the context of the EAW versus the other EU Mutual Recognition Instruments is in fact not surprising when considering the nature of the instruments. While all the EU Mutual Recognition Instruments require Member States to execute requests from the issuing state, the EAW can be seen as an instrument which ensures that Member States are able to exercise their own jurisdiction when prosecuting and punishing criminal behaviour, despite the fact that the suspect is located in the territory of another state; while through alternative instruments, such as the ESO, Member States grant the control over the person requested to another state. This temporary cession of sovereign power necessarily requires a higher level of mutual trust.¹³⁸

Nevertheless, the rule of law crisis the EU is currently facing has started to erode mutual trust even for the application of the EAW. Cooperation with countries where there are poor prison conditions or questions over the independence of the judiciary is problematic. As mentioned, the CJEU has

¹³⁴ European Commission, [Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union](#), COM(2004)334 final, 30 April 2004.

¹³⁵ The Romanian Presidency asked for this question to be address during the 9th round of evaluation: " It is also important to establish whether the less frequent application of the two Framework Decisions [i.e. ESO and FD PAS] might not simply be the consequence of insufficient harmonisation of substantial procedural provisions and of the differences in the transposition processes, making recognising the Decisions a practical impossibility". Romanian Presidency: Council of the EU, [The way forward in the field of mutual recognition in criminal matters - Policy debate](#), Report of the Romanian Presidency, 27 May 2019.

¹³⁶ FRA, [Report on Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), 2016, pp. 69-70, Opinion 6.

¹³⁷ Irish Supreme Court, *Minister for Justice, Equality and Law Reform v. Altaravicius* (No. 1) [2006] 3 IR 148.

¹³⁸ Ana Maria Neira-Pena, [The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty Versus Security](#), European Papers, European Forum, 4 November 2020, pp. 8-9.

acknowledged that the executing judicial authority may, in exceptional circumstances, refuse to execute an EAW due to concerns about the detention conditions or the independence of the judiciary in the issuing state. Most recently, the Amsterdam District Court sought to suspend all surrenders to Poland, in view of the ongoing attacks on judicial independence.¹³⁹ In January 2020 it refused an execution of a EAW on account of lack of judicial independence in Poland.¹⁴⁰

The functioning of the EU Mutual Recognition Instruments relies on mutual trust, but as expressed by a practitioner, mutual trust cannot be a starting point, it is an objective that must be achieved. In our view, that objective can only be attained through robust common standards, and a coherent approach with respect to all the EU Mutual Recognition Instruments. This is all the more important as a blind trust approach is not tenable in the light of the rule of law threats and fundamental rights violations across the EU.

2) The inconsistent application of the principle of proportionality

Given the severe implications of the EAW and detention on the requested person's life and fundamental freedoms, it is essential that the EAW remains exceptional and judicial authorities have regard to the principle of proportionality when determining the need for an EAW or any alternative instrument.

"The proportionality principle in criminal matters requires of course measures, such as pre-trial detention or alternatives to such detention, are only used when this is only necessary and only for as long as required." – European Commission¹⁴¹

The principle of proportionality in relation to the EAW requires an assessment of whether an alternative measure could achieve the same goal without causing the same disruption on the person concerned. In other words, authorities should engage with the other EU Mutual Recognition Instruments. However, this assessment does not appear to be made consistently when authorities decide on the issuing or execution of an EAW. Although practitioners suggest a drop in the use of the EAW for minor offences, studies have continued to report the disproportionate use of EAWs for minor offences, such as the theft of a Christmas tree, a finding of fraud (in absentia) in relation to a used car, or minor drunk driving offences, without proper consideration of whether surrender is proportionate taking into account severe human and financial costs involved.¹⁴² In our research, Irish practitioners reported that they continue to receive EAWs requests for minor offences (in which they

¹³⁹ See the request for a preliminary ruling in CJEU, [Case C-412/20 PPU - Openbaar Ministerie](#), lodged on 3 September 2020: "Do Framework Decision 2002/584/JHA, 1 the second subparagraph of Article 19(1) of the Treaty on European Union and/or the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union indeed preclude an executing judicial authority from executing an EAW issued by a court in the case where that court does not meet the requirements of effective judicial protection/actual judicial protection, and at the time of issuing the EAW already no longer met those requirements, because the legislation in the issuing Member State does not guarantee the independence of that court, and at the time of issuing the EAW already no longer guaranteed that independence?"

¹⁴⁰ Amsterdam District Court, International Judicial Assistance Division, n°20/771 13/751021-20, 10 February 2021.

¹⁴¹ European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM (2011) 327, 14 June 2011.

¹⁴² Fair Trials, [Beyond Surrender: Putting human rights at the heart of the European Arrest Warrant](#), 28 June 2018.

might be acquitted or receive a fine) and believed that there should be a higher threshold for issuing EAWs.

i. Lack of proportionality assessment requirement in the EU legal framework

The EAW Framework Decision does not explicitly require 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.¹⁴³

However, an EAW presupposes the existence of a valid national arrest warrant in the issuing state,¹⁴⁴ which must be issued in compliance with applicable national laws, which may involve a proportionality assessment. In the absence of a national arrest warrant issued separately from the EAW, the EAW is invalid and must be refused.¹⁴⁵ However, the EAW involves the arrest of a person and transfer to another country, which has potential implications beyond the national arrest warrant. An EAW may therefore be disproportionate even when a national arrest warrant is proportionate, due to, for instance, the impossibility of requested persons to maintain visits from family members (such as children) and because of language barriers.¹⁴⁶

In 2014, the European Parliament criticised this gap and stressed the “disproportionate use of the EAW for minor offences or in circumstances where less intrusive alternatives might be used, leading to unjustified and excessive time spent in pre-trial detention and thus to disproportionate interference with the fundamental rights of suspects and accused persons as well as burdens on the resources of Member States”.¹⁴⁷ It has for several years urged the Commission to mandate proportionality checks “based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate less intrusive alternative measure” – both at the issuing and the execution stage of EU Mutual Recognition Instruments.¹⁴⁸

¹⁴³ European Commission, [Report From The Commission To The European Parliament And The Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention](#), COM(2014) 57 final, 5 February 2014.

¹⁴⁴ Article 8(1)(c) of the FD EAW.

¹⁴⁵ CJEU, [Case C-241/15 Bob-Dogi](#), Judgement of 1 June 2016, ECLI:EU:C:2016:385, paras. 59-67.

¹⁴⁶ Fair Trials, [Beyond Surrender: Putting human rights at the heart of the European Arrest Warrant](#), 28 June 2018, p. 14 and ff.

¹⁴⁷ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), ([OJ C 285, 29.8.2017, p. 135–140](#)), recital F (v).

¹⁴⁸ *Ibid.* para. 7.

“[P]roblems have however arisen ... resulting from gaps in the [European Arrest Warrant] Framework Decision such as failing to explicitly include fundamental rights safeguards or a proportionality check.” – European Parliament¹⁴⁹

Despite repeated calls for legislative action,¹⁵⁰ the European Commission opted for a soft law approach. In 2017, it adopted a handbook for authorities on how to issue and execute an EAW, which refers to the principle of proportionality.¹⁵¹ Those guidelines require judicial authorities to take into account the following factors: the seriousness of the offence (for example, the harm or danger it has caused); the likely penalty if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence); the likelihood of detention of the person in the issuing Member State after surrender; and the interests of the victims of the offence.¹⁵² The handbook also calls on issuing authorities to consider the use of other cooperation measures, such as issuing an EIO to hear a person, issuing an ESO to allow the person to await trial in their state or residence or simply inviting the person to attend the criminal procedure voluntarily.

Most recently, the Council recalled that the issuing authority must determine whether it is proportionate to issue an EAW, in the light of the particular circumstances of each case and in particular the possibility to use other judicial cooperation measures.¹⁵³ Continuing with the soft-law approach, it invited EU Member States to adopt national non-binding guidelines for the application of the EAW to assist judicial authorities, notably as regards the verification of the principle of proportionality.¹⁵⁴

At present, the relationship between the different EU Mutual Recognition Instruments is far from clear. One Belgian practitioner (who frequently applies the FD on Transfer of Prisoners) highlighted by way of example the complex relationship between the EAW and the FD on Transfer of Prisoners:

- Article 25 of the FD on Transfer of Prisoners which regulates the enforcement of sentences following a EAW is far from clear, in its statement that its provisions will apply without prejudice to the EAW FD, “mutatis mutandis to the extent they are compatible.”
- Article 9(1)(h) of the FD on Transfer of Prisoners allows a Member State to refuse to recognise a judgment and enforce a sentence if, “at the time the judgment was received by the competent authority of the executing State, less than six months of the sentence remain to be served”. In contrast, the EAW can be issued for the executing of sentences of at least four months. So, for shorter sentences, the EAW will be more effective than a transfer request.
- Article 9(1)(e) also enables an executing authority to refuse to recognise a judgment and enforce the sentence where the enforcement of the sentence is statute-barred according to

¹⁴⁹ Ibid. recital C.

¹⁵⁰ See also European Lawyers Foundation and the Council of Bars and Law Societies of Europe, [EAW-Rights: analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners](#), 2016, pp. 8-9.

¹⁵¹ European Commission, [Handbook on how to issue and execute a European Arrest Warrant](#), (OJ C 335, 6.10.2017, p. 1–83), 6 October 2017.

¹⁵² Ibid p. 19.

¹⁵³ Council of the EU, [Council conclusions ‘The European arrest warrant and extradition procedures - current challenges and the way forward’](#), 23 November 2020, para. 40.

¹⁵⁴ Ibid. para. 9.

the law of the executing State. In Belgium, it is frequently the case that requests are refused on this basis, which means that an EAW is the only option.

- The principle of speciality operates very differently in the FD on Transfer of Prisoners (Article 18) and in the EAW, which raises many issues in practice and in the implementation of the instruments into national law.

There remain significant legal gaps in the EU framework and while highly welcome, our research indicates that EC guidance has not been sufficient to resolve the lack of compulsory assessment of an EAW's proportionality in the legislation itself.

ii. Lack of proportionality assessment requirement in the domestic legal frameworks

The gap in the EU legal framework means that in practice, there are diverging practices at domestic level, resulting in unequal protection across Member States.

Research suggests that judges and prosecutors are divided on the need for and the content of the proportionality test to be conducted at issuing stage.¹⁵⁵ When issuing EAWs, respondents broadly indicated that they only assess the proportionality of the underlying domestic arrest warrant without conducting a separate evaluation of the proportionality of the EAW, notably its impact on the requested persons' fundamental freedoms. Others considered there is no need for proportionality check in addition to the assessment of the legal requirements which already excludes minor offences from EAW.¹⁵⁶ However, the data collected by the European Commission also reveals that the most common reason for issuing an EAW was in relation to offences that may be minor, such as theft and criminal damage offences.¹⁵⁷

- **Austria:** The Code of Criminal Procedure requires the police, the public prosecutor and the court to assess the proportionality of any investigative and enforcement measure they take against the seriousness of the offence, the seriousness of the charges and the outcome sought. They must then apply the measure which least adversely affects the rights of the persons concerned.¹⁵⁸ This general rule also applies to the issuance of an EAW which must therefore be proportionate, including in the light of the effects of the surrender procedure on the requested person's social and family relationships.¹⁵⁹ However, practitioners surveyed had opposing views regarding the effective application of the proportionality principle. Lawyers reported that, in their experience, the proportionality test is often applied as a mere formalism and judicial authorities rarely explain why they are not using alternatives. Judges and prosecutors argued that proportionality was the most important consideration to assess before issuing an EAW, stressing factors such as the offence's gravity, the cost of the surrender procedure, the possible length of the pre-trial detention before surrender and the length of the possible sentence. Most of them noted that since they only issue EAWs for

¹⁵⁵ See similar findings in other EU Member States: European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant, European Implementation Assessment](#), June 2020, pp. 13-17; pp. 58-60, p. 72.

¹⁵⁶ Article 2 of the FD EAW.

¹⁵⁷ European Commission, [Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018](#), Commission staff working document, SWD (2020) 127 final, 2 July 2020.

¹⁵⁸ Paragraph 5(1) and (2) of the Strafprozessordnung (Code of Criminal Procedure; 'the StPO').

¹⁵⁹ CJEU, [Case C- 489-/19 PPU NJ](#), Judgment of 9 October 2019, ECLI:EU:C:2019:849, para. 44.

serious offences, they would not consider the issuance of alternative measures as an option. The question of what constitutes a “serious offence” remains, however, open to interpretation.

- **Belgium:** There is no formal legal obligation to assess alternatives when issuing an EAW for the purpose of prosecution. The law requires satisfying legal conditions stemming from the FD EAW as well as the national conditions to impose pre-trial detention.¹⁶⁰ In other words, the authorities deem the EAW to be justified where grounds for pre-trial detention in domestic law are met. There are no specific criteria to assess the cross-border impact of the EAW and the fact that moving a person abroad adds a layer of restrictions on the requested persons is not considered. In practice, judges and prosecutors interviewed nevertheless considered that an EAW was typically used as a mechanism of last resort. Issuing authorities also reported taking into account the costs of issuing an EAW, meaning that they are more reluctant to issue a ‘long distance’ EAW for minor offences.
- **Greece:** Similarly, there is no clear legal obligation to assess the possibility of ordering alternative, less restrictive measures prior to issuing an EAW. Practice reveals that courts usually only examine the legal conditions to issue the warrant, in particular the prohibition to issue the EAW and certain alternative measures for minor offences. Few perform some sort of proportionality assessment, even when the legal conditions are met. In this case, they will analyse factors such as the time elapsed since the act was committed, the severity of the offence and of the potential sentence, and the impact on the requested person. However, alternative measures are not considered unless raised by the defence – which is currently not common practice amongst lawyers.
- **Ireland:** There is no legal requirement to assess alternative measures when issuing an EAW in Ireland either. However, authorities will assess the need to issue an EAW and whether it is proportionate based on the circumstances of the case.
- **Luxembourg:** there is no obligation in the Criminal Procedural Code or internal guidelines to assess the proportionality of EU mutual recognition instruments or to justify the use of EAWs over other alternative instruments. Prosecutors reported taking into account the severity of the offence and whether facts were old/new before issuing an EAW.

In an executing role, many authorities verify the respect of the legal conditions related to the validity of the EAW but do not consider that they are required or allowed to conduct a proportionality assessment as a result of the principle of mutual trust.

“[...]no matter how pertinent the considerations made by the defence about the lack of proportionality and adequacy of the European Arrest Warrant issued by the Court of Criminal Instruction of Bordeaux may be, by virtue of the fact that the aim pursued, namely to subject the defendant to criminal proceedings pending before that court, can be achieved by a European Investigation Order, that is a choice that does not fall to this Court and about which no judgment can or should be issued, in accordance with the aforementioned principles of mutual recognition and mutual trust between EU Member States ... a possible non-respect of the principles adequacy and proportionality in the choice of the EAW does not correspond to any

¹⁶⁰ Act of 20 July 1990 on pre-trial detention and Federal Act of 19 December 2003 on the European Arrest Warrant.

of the admissible legal ground for opposing or refusing surrender of the detainee.”
– Supreme Court of Portugal¹⁶¹

In the countries surveyed in our study, our findings confirm a tendency towards a “blind trust” approach by executing authorities in respect to the issuing authority’s proportionality assessment. Lawyers interviewed reported judges not willing to allow any argument which is not directly linked to one of the grounds of refusal of the FD EAW.

- **Austria:** Some practitioners recognise that they receive EAW requests which they do not consider proportionate, notably in respect of minor offences. In practice, they try to circumvent the absence of the legal ground of refusal based on proportionality by raising other arguments. For instance, some practitioners seem to interpret extensively the possibility to refuse the execution of an EAW for Austrian residents,¹⁶² which also covers persons well-integrated in Austrian society. One prosecutor mentioned the possibility to invoke the right to private and family life to refuse the execution of an EAW in such cases, but this argument has not yet been applied. In addition, they would not order detention prior to surrender in cases of minor offences.
- **Belgium:** In accordance with the FD EAW, proportionality is not a ground to refuse the execution of an EAW. In practice, judges reported that they would frequently opt for conditional release pending surrender if the EAW relates to minor offences such as cannabis possession or driving offences and would examine the possibility of refusing the execution of the EAW based on a broad interpretation of one of the legal grounds. However, they will nevertheless execute the EAW, without seeking to contact the issuing authority about the possibility of ordering an alternative measure. Judges and prosecutors interviewed believe that introducing proportionality as a clear legal ground for refusal would undermine the effectiveness and the rapidity of European criminal cooperation.
- **Greece:** The law requires the decision to execute an EAW to be specifically reasoned.¹⁶³ Greek authorities essentially assess the compatibility of the measures with the legal frameworks of both the executing and the issuing state.
- **Ireland:** All EAWs must be endorsed by the High Court in Ireland. The defendant can either surrender or challenge the issuing of the EAW on the basis of criteria in the FD EAW and additional criteria in the Irish legislation, including that an EAW will not be issued for an investigation but only for a trial or imposition of a custodial sentence and that the offence must attract a minimum of one-year custodial sentence or a four-month custodial sentence must have already been imposed. In general, however, respondents to ICCL’s interviews considered that Courts are reluctant to reject requests for EAWs and there is a very high threshold for rejecting an EAW on the basis that it might contravene rights. Successful challenges have included those that challenge prison conditions or where an EAW has been issued following a trial in absentia. Courts generally do not apply a proportionality assessment to the execution of the EAW but rather carry out an assessment as to whether it meets the criteria in the FD EAW and Irish legislation. This will lead courts to refuse to surrender in cases which do not appear to be trial ready.

¹⁶¹ Supreme Court of Portugal, Case 739/20.9YRLSB-S1, 3 June 2020 (our translation).

¹⁶² Para 5 of EU-JZG.

¹⁶³ Article 19 (3) of law 3251/2004.

As expressed by a LEAP member:

“Except for prison conditions, almost no arguments exist against it. Proportionality especially cannot be taken into account.” – Dutch lawyer¹⁶⁴

Some practitioners thought that there was still scope to promote the use of the other EU Mutual Recognition Instruments as alternatives to EAWs issued for sentencing, where the offence is relatively minor or old. This would require though that the person is located. In which case, practitioners reported that the EAW was necessary and could not simply be replaced.

In conclusion, the current legal framework proves unsuccessful in ensuring respect for the principle of proportionality in the context of cross-border proceedings. In the absence of clear and uniform binding standards, judicial authorities fail to conduct systematically a thorough assessment of the proportionality of an EAW, whether they are deciding on issuing or executing an EAW and are therefore not actively considering the possible use of alternative, less restrictive measures instead of an EAW.

In the next section, we will see that the Procedural Rights Directives are not sufficiently robust or well implement to fill the gap, at least in respective of the participation of lawyers and the person themselves in the proceedings.

3) The role of the defence and the insufficient implementation of procedural safeguards in cross-border proceedings

The EU enacted legislation guaranteeing binding minimum standards on defence rights¹⁶⁵ which apply (at least in part) to EAW proceedings. The Commission hoped that this process, which began in 2009, would largely resolve the EAW's problems. The legislation covers the right to interpretation and translation,¹⁶⁶ the right to information,¹⁶⁷ the right of access to a lawyer,¹⁶⁸ procedural safeguards for

¹⁶⁴ Quote collected in the LEAP survey.

¹⁶⁵ The EU has adopted six directives as set out in the roadmap of 2009, see: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/rights-suspects-and-accused_en.

¹⁶⁶ 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](#)).

¹⁶⁷ 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](#)).

¹⁶⁸ 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](#)).

children,¹⁶⁹ the right to the presumption of innocence and to be present at trial¹⁷⁰ and the right to legal aid¹⁷¹ (together, the ‘Procedural Rights Directives’).

Procedural safeguards, particularly the pre-trial period, aim at placing a person in a position to prepare and exercise an effective defence. In domestic proceedings, it is often up to lawyers to make a case against pre-trial detention and argue for the imposition of an alternative measure instead, or for release. In fact, our research shows that judicial authorities expect lawyers to make the argument for an alternative instead of an EAW. This is certainly a questionable practice as it places the burden on the defence to argue for an alternative or for release, rather than on the prosecution to make the case for an EAW and detention.

Moreover, the EU Mutual Recognition Instruments are all expressed as optional measures that authorities “may” issue – there remains great discretion on the part of the authorities in deciding whether to issue such a measure, and the role of the defence in this context is key.

Lawyers must be placed in a position to suggest and argue for individualised alternatives. In a cross-border setting, this means that there must be safeguards that enable the requested person to challenge an EAW and advocate for release or the application instead of another EU Mutual Recognition Instrument. In practice, this opportunity will arise only when a person is made aware of the EAW, i.e., upon arrest. But at this point, they are in the executing country, not the country that issued the EAW. How and where can they advocate for an alternative or for release?

The Procedural Rights Directives do not explicitly cover proceedings relating to EU Mutual Recognition Instruments other than the EAW. In addition, the transposition and implementation of the relevant provisions by Member States in the context of EAW proceedings remains largely inadequate.¹⁷² Our research in the five target countries confirms systematic failure to respect these standards effectively in practice. Due to the ineffectiveness of procedural safeguards, requested persons are unable to access legal assistance in both issuing and executing states (i), access the case file in the issuing state before surrender (ii) or access interpretation and translation services (iii). As a result, persons are not in a position to challenge the decision to issue/execute an EAW and to plead for the possible use of another EU Mutual Recognition Instrument instead (iv).

i. Access to legal assistance

Lawyers can play a key role in limiting the use of the EAW (and related pre-trial detention) to cases in which the measures are justified. A lawyer’s presence and active participation at the initial stages of the proceedings can increase the chance of release or of another EU Mutual Recognition Instrument being applied instead.

¹⁶⁹ 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](#)).

¹⁷⁰ 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](#)).

¹⁷¹ 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](#)).

¹⁷² European Parliamentary Research Service, Wouter van Ballegoij, [European Arrest Warrant, European Implementation Assessment](#), June 2020, p. 41.

The role of the lawyer is particularly important in that the use of EU Mutual Recognition Instruments is left to the discretion of the authorities and there is no compulsory requirement to assess alternatives in the context of a proportionality assessment.

Further, the EIO Directive gives the accused and suspects (and their lawyers) the right to make a request for an EIO,¹⁷³ and in certain circumstances could apply for a videoconference hearing for questioning instead of an EAW. However, it is widely reported that lawyers are not sufficiently aware of this possibility.

The EAW FD gives requested persons to right to legal assistance in the executing country¹⁷⁴ and the Directive on Access to a Lawyer guarantees a right to 'dual representation' for persons subject to EAWs: upon arrest pursuant to an EAW, the requested person has the right of access to a lawyer both in the executing state where they are arrested¹⁷⁵ and in the issuing state where the alleged offence was committed or the sentence is to be served.¹⁷⁶ Dual representation is essential to provide effective and full legal advice to the requested person in order to challenge an EAW, and apply for another EU Mutual Recognition Instrument.

Given the limited legal grounds available to challenge an EAW in the executing state,¹⁷⁷ the lawyer in the issuing state plays an essential role in assisting the lawyer in the executing Member State to request the withdrawal of the EAW or the underlying national arrest warrant.¹⁷⁸ The lawyer in the issuing state can also seek access to the case file and advise on the applicable law and procedure to advise whether there are grounds to challenge the EAW (or underlying NAW). Ensuring access to legal assistance in the issuing state is therefore a safeguard against the unnecessary surrender of a person.

In practice, there continue to be challenges for arrested persons generally – in both domestic and cross-border proceedings - to access promptly legal assistance.¹⁷⁹ The added challenge when the person is arrested under an EAW is that lawyers do not always provide a sufficient level of representation to safeguard the rights of their client.¹⁸⁰ Further, many lawyers have limited knowledge about EU criminal law and the existence of the other EU Mutual Recognition Instruments, which prevents them from offering effective legal assistance on these issues.

The Commission's report on the implementation of the Directive on Access to a Lawyer notes that the legislation in four Member States does not at all reflect the right of requested persons to appoint

¹⁷³ Article 1(3) of the EIO Directive.

¹⁷⁴ Article 11 of the EAW FD.

¹⁷⁵ Articles 10(1) and (2).

¹⁷⁶ Articles 10(4) and (5).

¹⁷⁷ Articles 3 and 4 of Framework Decision on European Arrest Warrant.

¹⁷⁸ European Lawyers Foundation and the Council of Bars and Law Societies of Europe, [EAW-Rights: analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners](#), 2016, p. 9 and p. 49.

¹⁷⁹ European Union Agency for Fundamental Rights, '[Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#)', Report, 2019 pp. 59 and ff.

¹⁸⁰ Fair Trials, [Where's my lawyer: Making legal assistance in pre-trial detention effective](#), Report, October 2019, p. 14.

a lawyer in the issuing Member State.¹⁸¹ Some five Member States do not clearly ensure that requested persons receive information about this right without undue delay.¹⁸² In Bulgaria and Greece, for instance, no information is provided since the appointment of a lawyer is considered to be a matter of the issuing state only.¹⁸³ Moreover, the legislation in seven Member States does not mention the obligation to inform the issuing state of the wish of the requested person to appoint a lawyer in the issuing state.¹⁸⁴ Finally, the legislation in 10 Member States does not transpose the obligation to inform to help the requested person to appoint a lawyer in the issuing state.¹⁸⁵

While the countries surveyed within this research recognise the right to appoint a lawyer in both the executing and the issuing state, none of them have set up specific mechanism to facilitate the appointment of a lawyer in the issuing state or in their own state when the suspect person is located abroad. There is also no official mechanism to facilitate communication between the lawyers in the issuing and the executing states. As stressed by FRA, most of the time, the authorities simply inform the requested persons of their right to access a lawyer in the issuing state but provide no practical assistance.¹⁸⁶

Lawyers interviewed confirmed that access to legal assistance in the issuing state largely depends on the personal relationships and the financial ability of the requested persons, their relatives or their lawyer in the executing state to make the necessary arrangements. In practice, this means the requested person who can afford it will hire a private lawyer to make applications in the issuing state, often at significant cost. In some cases, lawyers will use their own private networks to ask lawyers in the issuing state to make applications. But in most of the cases, the first contact between the requested person and a lawyer in the issuing state will be after the person has been surrendered.

In addition to finding a lawyer in the issuing state, other difficulties arise such as meeting the costs of dual representation and the tight time-limits imposed by the EU mutual recognition instruments. Language barriers also negatively impact communication with the lawyer in the issuing state.¹⁸⁷

¹⁸¹ European Commission, [Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with the third persons and with consular authorities while deprived of liberty](#), 26 September 2019.

¹⁸² Article 10(4) of the Directive.

¹⁸³ European Union Agency for Fundamental Rights (FRA), [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#), Report, 2019, p. 65.

¹⁸⁴ Article 10(5) of the Directive.

¹⁸⁵ Ibid.

¹⁸⁶ European Union Agency for Fundamental Rights (FRA), [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#), Report, 2019, p. 65.

¹⁸⁷ European Lawyers Foundation and the Council of Bars and Law Societies of Europe, [EAW-Rights: analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners](#), 2016, pp. 49-54.

Promising practice: Providing time for communication between lawyers in the issuing and executing state

In Ireland, it is common for the High Court to grant adjournments in order to allow the Irish lawyer to contact lawyers in the issuing state and, for example, clarify the state of proceedings in the issuing state, or to apply for the withdrawal of the EAW. However, ultimately it will be necessary for the requested person or their lawyers to initiate such a contact. A major issue identified by those interviewed by ICCL was that there is no legal aid to cover work by a lawyer in the Issuing State to support these requests and defendants must hire them privately. There is also a lack of a network of lawyers across the EU who are experts on EAWs and who could aid those in the executing state. Respondents suggested this would be very helpful.

Promising practice: Creating a shared list of lawyers specialised in EU cross-border proceedings

In the absence of official mechanism to facilitate dual legal representation, various organisations provide support to lawyers willing to establish contact with European colleagues. For instance, the Defence Extradition Lawyer Forum aims to assist defence lawyers practicing in extradition.¹⁸⁸ The European Criminal Bar Association (ECBA) website indicates details of lawyers specialising in fraud and compliance across Council of Europe countries.¹⁸⁹ The Legal Experts Advisory Panel (LEAP), Fair Trials' European network of around 200 experts in criminal justice and human rights, have also been praised by practitioners as valuable in helping lawyers to connect.

In addition, there is a concern as to access to quality legal assistance. The vast majority of lawyers consulted for this research recognised that they do not apply for the other EU Mutual Recognition Instruments due to lack of knowledge. In this respect, the situation regarding the possibility to serve detention pending or post sentencing in Belgium when the person presents strong ties with the country is quite illustrative. This opportunity is enshrined in Belgian legislation¹⁹⁰ and in practice, the relevant authorities always grant such possibility when the request is made (and the person meets the eligibility criteria). However, practitioners reported that lawyers lack knowledge in respect of this possibility and fail to apply for such a possibility, at the expense of the accused or convicted person.

The situation is even worse for persons relying on legal aid. Research reveals considerable gaps in the quality of legal defence for persons relying on legal aid lawyers. For instance, in Austria and Greece, legal aid lawyers are assigned to cases for which they might have no expertise, or there is no requirement that they even be specialised in criminal law.¹⁹¹

The Legal Aid Directive indicates that the issuing state has the responsibility to ensure that requested persons who wish to appoint a lawyer in the issuing state in order to assist the lawyer in the executing

¹⁸⁸ See DELF website, <http://delf.org.uk/>.

¹⁸⁹ See ECBA, [Criminal Defence Lawyers in Europe](#), 30 January 2021.

¹⁹⁰ See Articles 6.4 and 8 of the Federal Act of 19 December 2003 on the European Arrest Warrant which entered into force on 1 January 2004.

¹⁹¹ See along the same lines, European Union Agency for Fundamental Rights, '[Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#)', Report, 2019, p. 67.

state have the right to legal aid in the issuing state.¹⁹² In practice, this is a considerable hurdle given the difficulties for the requested person to access legal assistance in the issuing state.

- **Austria:** legal aid is not regularly granted post-sentencing, meaning the sentenced person may not receive legal assistance to challenge the issuance of an EAW for executing a sentence.
- **Belgium:** legal aid only covers representation in Belgium. This means that acts conducted by Belgian lawyers to challenge the issuance of an EAW in another country are not covered by legal aid. Further, where Belgium is the issuing country, the requested person will only be eligible for Belgian legal aid once transferred to Belgium, which hinders challenges pre-surrender for people who do not have the necessary means to privately fund a lawyer. Finally, some proceedings such as a prison transfer request are not eligible for compensation under legal aid.
- **Greece:** legal aid was only extended to EAW proceedings in 2020¹⁹³ but the law makes no mention of whether acts conducted in another Member State are covered.
- **Ireland:** legal aid for cases related to EAWs is provided under a specific scheme, the Legal Aid – Custody Issues Scheme, distinct from the general Criminal Legal Aid Scheme. While the Irish Supreme Court questioned the need for two different systems, it found no breach of equality before the law.¹⁹⁴ The Legal Aid – Custody Issues Scheme is administrated by a board – rather than the Court itself. This means that the applicant first must seek from the Court a recommendation that the Scheme be applied before applying to the board which will then take the decision to grant legal aid. Besides, legal aid does not cover the appointment of a lawyer in the issuing state, but it may cover the request of an expert opinion or a lawyer report in the issuing state.
- **Luxembourg:** legal aid is only available when the person is already in Luxembourg. It is not possible to apply for legal aid before surrender. One lawyer also stressed the lack of flexibility of the system under which the level of income required to be eligible to legal aid is too low.

ii. Access to case file

The EAW FD limits the information available to requested persons only to the contents of the EAW and the possibility of consenting to surrender.¹⁹⁵

However, access to the information held by the issuing authorities is crucial to enable lawyers to provide effective legal assistance and, particularly, to challenge the underlying national arrest warrant and/or the EAW. The defence can only challenge the proportionality of an EAW if they know the grounds on which the decision to issue the measure is based.

Access to the case file held by the issuing state must be facilitated before any surrender is ordered. The timing is fundamental because once the surrender is ordered, the requested person will be detained and transferred to the issuing Member State, where they will be detained again for days or

¹⁹² Article 5(2) of the Legal Aid Directive. Ballegooij, [Procedural Rights and Detention Conditions – Cost of Non-Europe Report](#), December 2017, p. 42.

¹⁹³ Law 4689/2020, enacted on 27 May 2020.

¹⁹⁴ Irish Supreme Court, *Minister for Justice and Equality v. O'Connor* [2017] IESC 21.

¹⁹⁵ Article 11(1) of the EAW FD.

weeks before being able to seek access to the case file and challenge the detention. As already stressed, the effects of detention, even if on a short-term basis, are devastating and must be only used as a measure of last resort.

The Directive on the Right to Information gives suspects the right to access the case file, and includes specific provisions relating to EAW proceedings.¹⁹⁶ In particular, it obliges Member States to ensure that suspects or accused persons or their lawyers are granted access to all material evidence in the possession of the competent authorities in order to safeguard the fairness of the proceedings and to prepare the defence.¹⁹⁷ It also provides that access to the material evidence must be granted *'in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court'*.¹⁹⁸ Similarly, the CJEU stressed that the defence must be granted "a genuine opportunity to have access to the case materials" to ensure respect for the rights of defence and the fairness of the proceedings.¹⁹⁹ Without access to the case file prior to surrender, the defence will not be able to challenge the EAW.

However, in recent case-law, the CJEU has opted not to recognise the right to access the case file to persons who are arrested for the purposes of execution of an EAW.²⁰⁰ In other words, Articles 6 and 7 of the Right to Information Directive, which respectively provide for the right to information about the accusation and access to the materials of the case, do not apply in EAW proceedings. Presently therefore, a requested person only has the right to information about the EAW and its contents, and information relating to the offence (legal classification, circumstances, penalty imposed).²⁰¹

The practice related to access to the case file of the issuing Member State differs across the researched countries.

- **Austria:** Practitioners reported that when Austria is the issuing authority, it is frequent for lawyers in Austria – where appointed – also to request access to the case file. By contrast, access to case files is rarely requested by lawyers in the executing state. Therefore, in practice, access is typically only granted once the person is surrendered to Austria.

Promising practice: Granting electronic access to case file

In Austria, judicial authorities may grant electronic access to the case file, including to the lawyer in the executing state, where technically possible.²⁰² This is possible in national practice in some instances and lawyers reported that they have sought to apply for access also in cross-border settings.

¹⁹⁶Directive 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](#)), Article 1: "This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights."

¹⁹⁷ Article 7(2) of the Directive.

¹⁹⁸ Article 7(3) of the Directive.

¹⁹⁹ CJEU, [Case C-612/15 Kolev and Others](#), Judgment of 5 June 2018, ECLI:EU:C:2018:392.

²⁰⁰ CJEU, [Case C-649/19 IR](#), Judgment of 28 January 2021, ECLI:EU:C:2021:75, paragraph 62.

²⁰¹ Articles 8 and 11 of the EAW FD.

²⁰² Para. 53 StPO.

- **Belgium:** Access to case file when Belgium is the issuing state is particularly difficult for the requested person located abroad. In practice the person will only be granted access once they are transferred in Belgium. In effect, this situation creates an unequal treatment for non-residents. They are prevented from exercising their right to challenge until after surrender, which effectively deprives them from the right to an effective remedy simply because they exercised their right to free movement within the EU. For instance, they will not have access to the underlying national arrest warrant.²⁰³
- **Ireland:** Suspects are generally granted access to the documents related to the issuance of the EAW but not documents related to the investigation, witness statements collected in the issuing state or even the underlying national arrest warrant on which the EAW is based.²⁰⁴ Besides, the execution of an EAW is considered as an administrative proceeding which means that Courts apply the civil threshold for case disclosure. This threshold requires the request to be both 'relevant and necessary', a higher standard than the 'relevant' test used in criminal proceedings.²⁰⁵

iii. Access to interpretation and translation

Translation and interpretation services are essential in cross-border proceedings, as requested persons may not speak or understand the language of the proceedings. Requested persons must be informed of their rights in a language they understand. They must also be able to communicate with their lawyer in order to receive effective legal representation.

EU law requires Member States to ensure that "suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings."²⁰⁶ Further, interpretation provided must be of sufficient quality to safeguard the fairness of proceedings.²⁰⁷

Despite legal frameworks in line with these obligations, in practice, many obstacles to accessing interpretation services remain. This includes shortage of interpreters, inadequate assessment of the requested person's knowledge of the national language, interpretation not guaranteed for client-lawyer consultation before interrogation, poor quality of translation and interpretations services and the inability to challenge the failure to provide (qualitative) interpretation.²⁰⁸

In cross-border cases, these issues impede the effective exercise of defence rights, including the right to be informed about the right to a lawyer. Practitioners also report obstacles specific to cross-border proceedings such as the lack of translation services for communication between dual representation lawyers or delays in receiving translated documents as the issuing state may not know where the

²⁰³ J. Castiaux, [Le contrôle de la légalité du Mandat d'arrêt européen selon la jurisprudence belge](#), Conférence de Lyon des 5 et 6 octobre 2007.

²⁰⁴ Minister for Justice, Equality and Law Reform v. Altaravicius (No. 1) [2006] 3 IR 148.

²⁰⁵ Minister for Justice, Equality and Law Reform v. Stapelton [2005] IEHC 386; The Minister for Justice and Equality v. Farrell and Maguire [2019] IECA 364.

²⁰⁶ Article 2(1) of Directive 2010/64/EU.

²⁰⁷ Article 2(8) of Directive 2010/64/EU.

²⁰⁸ Fair Trials, [Where's my lawyer: Making legal assistance in pre-trial detention effective](#), Report, October 2019, p. 23.

requested person can be reached.²⁰⁹ This in turn limits the ability of requested persons to challenge the issuance of an EAW against them.²¹⁰

- **Austria:** interviewed practitioners report that free interpretation has immensely improved the conditions of trials with a European dimension. However, it was also highlighted that when receiving an EAW sometimes only some statements of the suspect are translated and nothing more. Further, there are issues with the quality of translation, with professionals poorly remunerated and often lacking the relevant legal knowledge.

Promising practice: Translation organised by the issuing state

Austrian legislation requires the Austrian authorities to translate requests made under the mutual recognition instruments (FD EAW,²¹¹ EIO Directive,²¹² FD ESO²¹³ and FD PAS²¹⁴) into the official language of the executing state if the latter does not accept requests in German. This way, the authorities avoid delays in subsequent translation requests.

- **Greece:** Courts' translation services are available to translate documents of the case or for Courts' hearing. However, their quality is questionable due to the absence of credible accreditation scheme.²¹⁵ For rare languages, it is common to appoint an interpreter for the interpreter leading to serious quality issues. There is also a severe shortage of interpreters and lawyers reported relying on other detainees to help with interpretation.²¹⁶ In contradiction with Greek legal framework,²¹⁷ interpretation services are usually not provided to facilitate communication between the lawyer and their client. Lawyers have to secure themselves the presence of an interpreter to communicate with their client who will have to pay for that service.
- **Ireland:** While practitioners surveyed were generally satisfied with access to interpretation in Ireland, LEAP members report recurring issues concerning the quality of interpretation issues. In particular, there are no specific qualification requirements for interpreters. One interviewee reported that the interpreter had a degree in science. There is no register of legal interpreters in Ireland.

²⁰⁹ European Lawyers Foundation and the Council of Bars and Law Societies of Europe, [EAW-Rights: analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners](#), 2016.

²¹⁰ European Union Agency for Fundamental Rights (FRA), [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#), Report, 2019.

²¹¹ Para. 30 (2), (3) EU-JZG.

²¹² Para. 56 (3) EU-JZG).

²¹³ Para. 115 (3) (2) EU-JZG.

²¹⁴ Para. 84 (1) EU-JZG.

²¹⁵In accordance with Ministerial Decree 67299 (O.G.G. Issue B No 2711/10.10.2014) which determines the qualifications of listed interpreters, it is sufficient to hold a high school diploma from a Greek or foreign school as well a certificate of knowledge of the Greek language, if the interpreter is a non-national.

²¹⁶ Fair Trials, [Where's my layer: Making legal assistance in pre-trial detention effective](#), Report, October 2019, p. 23.

²¹⁷ Article 233 of the Greek Code of Criminal Procedure.

iv. Right to an effective remedy

In addition to the difficulty of positioning the requested person to exercise an effective defence in cross-border proceedings, the EAW FD does not include an explicit right to challenge an EAW. Practitioners reported that such a right would give them an opportunity to raise arguments in respect of the other EU Mutual Recognition Instruments, which could be used as alternatives to an EAW.

However, the EAW FD does not operate in a legal vacuum and the Charter guarantees that requested persons must have access to an effective judicial remedy.²¹⁸ In 2019, the CJEU recognised that there must be a *possibility* to challenge the decision to issue an EAW, including its proportionality.²¹⁹ According to the CJEU, this means that requested persons are entitled to challenge before a court the conditions for issuing an EAW, and in particular its proportionality.²²⁰ The CJEU recently indicated that a person must be afforded effective judicial protection *before* being surrendered, which “presupposes, therefore, that judicial review of either the European arrest warrant or the judicial decision on which it is based is possible before that warrant is executed.”²²¹

“Given the risk of infringement on the right to liberty that is inherent in the issuing of an EAW, the option to challenge it by way of court proceedings should be available as soon as the decision to issue it has been adopted.” - Advocate General Campos Sánchez-Bordona²²²

But the CJEU subsequently suggested that this does not require a right to challenge the decision to issue an EAW before surrender.²²³ The right to challenge an EAW, in the light of the fundamental right to an effective remedy, warrants further clarification.

By virtue of the principle of procedural autonomy, it is up to Member States to organise it in their legal order: “introducing a separate right of appeal against the decision to issue a European arrest warrant taken by a judicial authority other than a court is just one possibility in that regard.”²²⁴

Accordingly, the question remains regulated by domestic law but not all Member States foresee this possibility.²²⁵ Those who have done so, have different procedures in place with different deadlines²²⁶

²¹⁸ Article 47(1) of the Charter and Article 13 of the ECHR.

²¹⁹ CJEU, [Joined Cases C-566/19 PPU JR and C-626/19 PPU YC](#), Judgment of 12 December 2019, ECLI:EU:C:2019:1077, para. 63.

²²⁰ CJEU, [Joined Cases C-566/19 PPU JR and C-626/19 PPU YC](#), Judgment of 12 December 2019, ECLI:EU:C:2019:1077.

²²¹ CJEU, [Case C-648/20 PPU PI](#), Judgment of 10 March 2021, paragraphs 47-48.

²²² CJEU, [Joined Cases C-566/19 PPU JR and C-626/19 PPU YC](#), Opinion of Advocate General Campos Sánchez-Bordona delivered on 26 November 2019, ECLI:EU:C:2019:1012, para. 87.

²²³ CJEU, [Case C-649/19 PPU IR](#), Judgment of 28 January 2021, paragraph 79: “the right to effective judicial protection does not require that the right, provided for in the legislation of the issuing Member State, to challenge the decision to issue a European arrest warrant for the purposes of criminal prosecution can be exercised before the surrender of the person concerned to the competent authorities of that Member State.”

²²⁴ CJEU, [Joined Cases C-566/19 PPU JR and C-626/19 PPU YC](#), Judgment of 12 December 2019, ECLI:EU:C:2019:1077, para. 63.

²²⁵ European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant. European Implementation Assessment](#), June 2020, p. 19.

²²⁶ *Ibid.* p. 46.

and their effectiveness widely differs from one Member State to another.²²⁷ Typically the requested person will only be able to challenge the EAW once surrendered in the issuing state.

In our research, the situation is varied.

- **Austria:** Where Austria is executing an EAW, the requested person may appeal. The appeal has a suspensive effect in respect of the surrender. Where Austria is issuing an EAW, it is possible to appeal against the decision of the court concerning the national arrest warrant and the EAW.
- **Belgium:** There is no legal remedy as such against the issuance of an EAW. The current legal framework only provides for an appeal against the underlying national arrest warrant based on the conditions to issue a national arrest warrant. This means that the requested person will only be able to challenge the EAW issued by Belgium after their surrender in Belgium, which, as already stressed, may involve an extended period of detention. Accordingly, the only avenue available to the requested person to challenge the EAW issued by Belgium itself, based for instance on the lack of proportionality, is to directly address the executing authorities. Challenging the EAW in the executing state may be particularly difficult as executing authorities tend to execute EAWs, based on the principle of mutual trust.
- **Greece:** Greek law does not provide the option to challenge the EAW where Greece is the issuing state. When Greece is the executing state, the requested person may challenge the decision to surrender them to the issuing state based on the grounds of mandatory non-execution, absence of double criminality or insufficient grounds to support the accusation.²²⁸ If they are detained, they may also challenge their detention prior to transfer. The competent court may lift detention altogether or replace it with alternative measures.²²⁹ Further, the legislation on ESO and FD PAS does not provide any judicial remedy. As for the EIO, the substantive reasons for issuing an EIO may be challenged only in an action brought in the issuing state, meaning that Greek authorities will only assess grounds for non-recognition.²³⁰ In practice, the lawyers interviewed noted that they usually share their arguments with their counterpart in the issuing state. If there is no lawyer appointed in the issuing state, their arguments will be shared by the executing authorities to the issuing authorities.
- **Ireland:** An EAW is issued by Ireland following an application by the Director of Public Prosecutions to the High Court or other relevant Court for an EAW. The Court will issue an EAW where it is satisfied upon reasonable grounds that the criteria outlined in s.33 of the European Arrest Warrant Act 2003 are met, in particular that an Irish Court has issued a warrant for the person's arrest and the person is in an EU country. Once the Court issues the EAW it is forward by the DPP to the Department of Justice who will send it to the Central Authority in the executing state. There is no automatic mechanism for a decision to issue an EAW by Ireland to be challenged by a defendant. An issuing state must apply for extradition to the Minister for Justice. The extradition proceedings must be endorsed by the Irish High Court, where the defendant is entitled to a fair hearing. An EAW will only be approved by the

²²⁷ European Lawyers Foundation and the Council of Bars and Law Societies of Europe, [EAW-Rights: analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners](#), 2016, pp. 62-64; pp. 247-251.

²²⁸ Article 450 (2) Code of Criminal Procedure.

²²⁹ Article 12 of the Law 4307/2014.

²³⁰ Articles 13 and 16, law 4489/2017.

High Court if the person is charged with an offence that is punishable by imprisonment both in Ireland and in the Issuing State for at least one year. Or it can be executed if the person has been convicted of an offence and a sentence of at least four months imprisonment has been imposed. An EAW will not be executed by Ireland if the person is to be imprisoned during an investigation, but only for purposes of trial or execution of a prison sentence. The offence must not be a political offence and the offence must not attract the death penalty. The State cannot issue a warrant in contravention of its obligations under the European Convention on Human Rights or the Irish Constitution. Respondents to ICCL interviews, outlined that EAW requests rejected by the Irish Courts in recent years were on the basis that the prison conditions in the issuing state were sub-standard or where a person has been tried and convicted in absentia.

- **Luxembourg:** By contrast, requested persons in Luxembourg have access to a general right of appeal to challenge an EAW. Moreover, the law transposing the EAW FD has specific provisions relating to the right to appeal.²³¹

Promising practice: Challenging identification before the execution of EAW

In Greece, the person arrested under an EAW has the right to dispute their identification as the requested person before the Court of Appeals decides on whether to execute the EAW or not. The Court is obliged to hear the defence argument before deciding on the case.²³²

The EU Mutual Recognition Instruments are cross-border cooperation instruments and as such, are addressed to judicial authorities and prosecutors. They are framed as optional, leaving wide discretion to authorities to decide whether to resort to them or not. It is however known that lawyers play a key role at domestic level in advocating for alternative measures to arrest and detention, and the same applies in a cross-border context. It is necessary to place lawyers in a position to make the case for another EU Mutual Recognition Instrument, or for release, when their client is facing an EAW. For this, procedural safeguards need to be adapted to the cross-border context and lawyers in both issuing and executing states need to be more closely involved in proceedings as early as possible.

4) Complex legal and institutional frameworks

Participants surveyed across the jurisdictions represented in the study stressed that under-resourced courts and lawyers have insufficient time and resources to devote to assess other EU Mutual Recognition Instruments in specific cases.²³³ The findings reflect the challenges at domestic level, where judges are making pre-trial detention decisions on the basis of insufficient information about the person and risks if they are released or alternatives are applied instead of detention, they tend to credit prosecutorial arguments in favour of detention.²³⁴ It is essential to address such informational

²³¹ Article 13, <http://legilux.public.lu/eli/etat/leg/loi/2004/03/17/n1/jo>.

²³² Article 15 (4), Law 3251/2004.

²³³ We made similar findings for pre-trial detention hearings at domestic level. Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#), Report, May 2016, pp. 12 and ff.

²³⁴ We made similar findings for pre-trial detention hearings at domestic level. Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#), Report, May 2016, p. 12.

imbalances, because proper access to information is instrumental in giving effect to the principle of equality of arms and enabling effective judicial protection of people's rights.

This is made even more difficult because of the complexity of the legal framework, which adds further administrative burden to already over loaded practitioners (i). Additionally, the corresponding institutional framework allocating responsibility to different authorities for the implementation of the EU Mutual Recognition Instruments adds a further layer of complexity and prevents the necessary information exchange between stakeholders (ii).

i. Complexity of legal frameworks

Practitioners surveyed in this research criticised the complexity of the EU Mutual Recognition Instruments. Each one is governed by a different EU legal instrument and each instrument has its own set of objectives, conditions, time limits and grounds for refusal. The most striking illustration is the obligation to assess the proportionality which is clearly indicated in the EIO Directive while all the other instruments remain silent on this point. Moreover, each EU Mutual Recognition Instruments requires implementation at national level.

This complexity creates a significant administrative burden for practitioners. The European Judicial Network Secretariat noted that one of the reasons explaining the under-use of EU alternative instruments is the burdensome administrative procedures that must be followed.²³⁵

- **ESO:** As opposed to the surrender of a detained person, the ESO requires constant coordination and communication between the issuing and executing authorities. This is due to the provisional nature of the measures and the lack of competence of the executing state to make subsequent decision on the measures in question, notably when the person fails to comply with the obligations or if there is a need to modify supervisory measures. This implies considerable workload for the authorities.²³⁶ The Commission itself recognised that it is a highly complicated instrument to be used in the pre-trial phase of the proceedings when judges have to make quick decisions.²³⁷ Belgian lawyers, judges and prosecutors criticised the very heavy administrative burden required to implement the ESO – a measure which will in principle last a short amount of time and which requires quick execution. They also reported delays between the issuance of the ESO and its execution. For persons living in neighbouring countries, prosecutors tend to prefer to keep the control over the supervision measures in Belgium. This means that the suspect will have to travel to Belgium to report to the Belgian probation services. Another issue mentioned by practitioners relates to the failure to comply with the supervision measure under an ESO. If the suspect does not respect the conditions, the issuing authority will need to start a second procedure: the EAW. In order to avoid this double administrative burden, practitioners often prefer to directly resort to an EAW.
- **EIO:** While the EIO was recognised to be quite successful by several practitioners, some Austrian practitioners also found “forms overloaded with information” burdensome. Further, it would not be possible to hear an accused person via videoconference because, in Austria,

²³⁵ European Judicial Network Secretariat (EJNS), [Report on activities and management 2017-2018](#), 2019, p. 16.

²³⁶ Ana Maria Neira-Pena, [The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty Versus Security](#), European Papers, European Forum, 4 November 2020, pp. 13-15.

²³⁷ European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant. European Implementation Assessment](#), June 2020, p. 62.

the accused is required to be present in person for the main court proceedings. Others reported difficulties in understanding what investigative measures were exactly requested by the issuing state. Practitioners in Luxembourg reported widely using the EIO but also note that the EIO was longer and more time consuming than the letters of rogatory which were used previously.

- **FD PAS:** Few practitioners interviewed had experience regarding the FD PAS. Austrian practitioners identified as a potential barrier the need for probation services to pass by courts to coordinate probation measures, rather than direct cooperation between probation services. Some also noted the language barrier to ensure direct cooperation. Belgian judges noted that the need for the consent required from the executing state in certain circumstances is one of the reasons for not using this instrument. They also stressed that the transfer of files is frequently very slow – up to several months in some cases. Finally, they feared difference of treatment between EU Member States in the verification and the monitoring of the respect of the probation measures.
- **FD Transfer of Prisoners:** Greek practitioners noted difficulties in the exchange of information. A recent research conducted in Germany, Netherlands and Belgium also identifies as practical challenges the calculation of the sentence, the adaptation of alternative sanctions, the determination of the habitual residence and the question of whether the person consents to the transfer.²³⁸ Nevertheless, Belgian practitioners make frequent use of this instrument due to the proactive attitude of the administration and in particular the creation of a centralised authority in charge of its implementation. This highlights how practical obstacles may be overcome when there exists a genuine political willingness to promote the use of an instrument, with support provided to practitioners. An Austrian practitioner reported the need to verify prison conditions in the other Member State to decide on the transfer, which involves an additional hurdle.

Further, where all the EU Mutual Recognition Instruments are not fully implemented in domestic law, the EU instrument itself, the framework decisions, are not directly applicable.²³⁹ The situation in Ireland is illustrative in this respect. The transposition of the EAW FD was rushed through, leading to drafting problems, extensive challenges by the courts and numerous amendments. The Irish Courts described the 2003 European Arrest Warrant Act as “extraordinarily loose and vague”.²⁴⁰ The problems experienced with the EAW legislation may go some way towards explaining the reluctance of the Irish Authorities to rapidly incorporate the subsequent EU Mutual Recognition Instruments into Irish law. Irish practitioners reported that the system would benefit from greater use of Alternative Measures such as envisaged by the ESO and PAS.

The vast majority of respondents, and in particular lawyers, reported the lack of knowledge on the legal possibilities offered by these instruments and limited trainings available. For, the European Judicial Network Secretariat, the lack of awareness and experience of national practitioners is one of the main

²³⁸ Robin Hofmann and Hans Nelen, [Cross-border cooperation in the execution of sentences between the Netherlands, Germany and Belgium: an empirical and comparative legal study on the implementation of EU framework decisions 2008/909/JHA and 2008/947/JHA](#), *Crime Law Social Change* 74, 2020, pp. 393–397.

²³⁹ CJEU, [Case C-573/17](#), judgment of 24 June 2019.

²⁴⁰ *Dundon v. Governor of Cloverhill Prison* [2005] IESC 83; [2006] 1 I.R. 518, 545.

obstacles to the implementation of EU alternative instruments.²⁴¹ The recent report from the Romanian presidency at the Council of EU also stressed the need to improve trainings on mutual recognition instruments, in particular for judges, probation officers, penitentiary personnel as well as court staff and members of other legal professions.

Some respondents welcomed further trainings, whereas others stressed that mere theoretical trainings would not help - practitioners seemed to favour sharing of best practices and opportunities to strengthen networking and cooperation with colleagues working on the same issues. These concerns have been repeated over the years, including by the EU institutions themselves,²⁴² but the situation remains unchanged.

Practitioners also reported the administrative burden that accompanies the use of the instruments, and lack of resources available at a domestic level to support them. The ESO in particular, requires different forms and certificates that makes it very difficult to implement in good time, to keep up with the pace of investigations. This limits their willingness to engage with them, because timing in investigations and cases is key (particularly where detention is involved) and the priority is to keep the case moving as quickly as possible. It therefore remains the case that the EAW is more readily used, because it remains more efficient and quicker for authorities to use in cross-border proceedings, than any of the other EU Mutual Recognition Instruments.

By contrast, most of the practitioners interviewed saw EAW as a handy measure quick to implement and which allows them to have the requested person in front of them.

ii. The Complexity of the Institutional Frameworks

The competent authorities involved in the application of each instrument differ from one country to the other and include a large variety of actors – including 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 the other, making it difficult for practitioners to understand how the instrument works in their own country and in another Member State.²⁴³

- **Belgium:** The authorities responsible for implementing alternative measures to detention at the post-sentencing stage are not the same as those who are competent when these measures are taken in a cross-border situation. While sentencing courts adopt probation measures in domestic cases, it is the public prosecutor who is competent for the FD PAS. The Belgian law implementing the FD PAS requires judges to obtain prior approval from the Ministry of Justice, which adds an additional hurdle that they do not face with the EAW. Due to this legislative complexity, judges prefer to use another mechanism, the “provisional release for removal” (*liberation conditionnelle en vue de l'éloignement*) which allows for the

²⁴¹ European Judicial Network Secretariat (EJNS), [Report on activities and management 2017-2018](#), 2019, p. 16.

²⁴² See for instance, the Council Conclusions of December 2018 encouraging EU member States and the Commissions to promote training of judges, prosecutors and other practitioners to enhance the application of EU instruments based on mutual recognition. Council of the EU, [Council conclusions on mutual recognition in criminal matters — ‘Promoting mutual recognition by enhancing mutual trust’](#), 13 December 2018.

²⁴³ See on the FD on Transfer of Prisoners, Ioan Dumescu et al., [Obstacles and Solutions in the implementation of the FD 2008/909/JHA](#), STEPS 2 Resettlement: Support for Transfer of European Prison Sentences towards Resettlement, Report, 2016.

release of non-nationals with no residence permit without condition except the prohibition to return to Belgium (with the consent of the person concerned). Judges interviewed admit they would rather keep foreign detainees longer in detention and make use of this mechanism rather than releasing them earlier with probation measures to be executed abroad.

- **Austria and Greece:** The interviewed practitioners indicated that due to the complexity of the legislative framework, they fear making errors in using alternative instruments – errors which could impact the legality of the procedure – and therefore prefer to rely on procedures which they are more familiar with.

Implementation of the EU Mutual Recognition Instruments requires that the executing State make “all necessary enquiries, including via the contact points of the European Judicial Network”.²⁴⁴ But practitioners report that information about each Member State’s institutional set-up to implement alternative measures is not readily accessible.

The European Judicial Network website provides information but practitioners report that it is not comprehensive and not kept up to date. As a result, practitioners do not know where to send a request. For instance, one practitioner reported a case where the EIO did not reach the competent authority in the executing state, losing valuable time in the proceedings. Another practitioner reported that there are simply too many databases, projects that start and then aren’t pursued, leaving practitioners uncertain about whether the databases are reliable, complete and up to date. One practitioner reported that it is useful to have a “liaison magistrate” based in Belgium from France, from whom practitioners can directly and quickly obtain information about the system in their Member State.

It is particularly important to promote exchange between authorities through more institutionalised cooperation mechanisms. For instance, the FD PAS envisages “consultations” between competent authorities “with a view to facilitating the smooth and efficient application” of the instrument.²⁴⁵

Promising practice: Establishing specialised officers in charge of EU Mutual Recognition Instruments

In Belgium and in Austria, generally there are certain prosecutors and investigative judges who are *de facto* specialised in international and European cooperation files. Greater specialisation could lead better use of the alternative measures and more efficient management of the procedures. In Ireland, the Probation Service has an ‘international desk’ which deals with transfers of sentenced person subject to probation or other supervisions orders and aid the sentenced person.²⁴⁶

Participants noted 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 depends on the state, the authority and/or the agent concerned. Neighbouring countries have generally stronger ties and better channels of communication. Indeed, practitioners underlined it is far easier to work with neighbouring countries, notably due to the

²⁴⁴ Article 6(6) of the PAS FD.

²⁴⁵ Article 15 of the PAS FD.

²⁴⁶ FRA, [Report on Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#), 2016, p. 33.

geographical proximity, similarity of legal cultures and sometimes common language – elements which they consider as consolidating mutual trust. Practitioners also mentioned the lack of linguistic skills as an obstacle to cooperation.²⁴⁷

The findings reveal that authorities need more information about suspects (their family and social ties, employment status, training, housing) and the gap in the EU legal framework is a failure to organise such exchange. To be used effectively as alternatives to the EAW, the EU Mutual Recognition Instruments require, for their effective implementation, engagement with stakeholders other than judicial authorities (in particular probation services but also lawyers) but they are framed as a dialogue between judicial authorities.

In conclusion, as highlighted by the recent report of the European Parliamentary Research Service, there is a great need for improved legal certainty and better coherence across the EU mutual recognition instruments as well as the Procedural Rights Directives.²⁴⁸ As long as the EAW is perceived as the quicker and easier measure, it will remain the “go-to” option for practitioners whose priority is to ensure that the investigation advances swiftly and that the person is available for trial. Practitioners will tend to use the measure they know, which they’ve “tried and tested”, beyond any lack of knowledge or familiarity issue. Our research suggests that shifting culture to promote the use of the other EU Mutual Recognition Instruments will require much more than training and information sharing.

The EU Mutual Recognition Instruments, including the EAW FD, do not operate in a legal vacuum: their operation is framed within the fundamental rights and the general principles on which the EU Common Area for Freedom, Security and Justice, is founded. And to give this meaning, we need to start by recognising that cross-border cooperation is not just about promoting exchanges between law enforcement and judicial authorities – it requires strengthened cooperation with other stakeholders, who will promote and support release or alternatives to detention, that is, lawyers, probation services and other authorities involved in the implementation of alternatives to detention. It also requires a coherent approach in the EU’s criminal justice policy, that looks beyond promoting the efficiency of criminal proceedings, and clearly emphasises the importance of social rehabilitation of the persons concerned from the very outset of criminal proceedings.

²⁴⁷ Ibid. p. 47.

²⁴⁸ European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant, European Implementation Assessment](#), June 2020, p. 73.

Policy recommendations

Our report highlights legal, practical, and cultural obstacles that result in the ineffectiveness of the EU Mutual Recognition Instruments that could serve as alternatives to the EAW and related detention in cross-border proceedings. While it is important to tackle the practical obstacles that practitioners face, the key issue that needs to be addressed is the overuse of detention itself and discrimination within the EU based on nationality or residence. Merely promoting alternative measures will not achieve this objective, and may indeed result in non-custodial, but nevertheless restrictive measures being imposed on people instead of release, rather than instead of detention. That is why our policy recommendations look beyond promoting the use of the EU Mutual Recognition Instruments.

European Commission²⁴⁹

- **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, based on a presumption of release pending trial as a starting point. There must also be restrictions on the use of flight risk, with information other than place of residence or nationality required to justify pre-trial detention.
- **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. This could be based on the approach in the EIO Directive. This must be accompanied by a clear obligation for the issuing state to include the reasons and assessment of proportionality in the relevant form that is sent to the executing state.
- **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.
- **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

²⁴⁹ Many of these recommendations are not new and have been repeated over the year by EU Institutions such as the European Parliament (see already in 2014 European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), ([OJ C 285, 29.8.2017, p. 135–140](#)), as well as many studies, most of them financed by the EU. See among others: European Parliamentary Research Service, Wouter van Ballegooij, [European Arrest Warrant. European Implementation Assessment](#), June 2020; Fair Trials, [Beyond Surrender: Putting human rights at the heart of the European Arrest Warrant](#), 28 June 2018; Élodie Sellier and Anne Weyembergh, [Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation](#), Study requested by the LIBE committee, European Parliament, 2018; European Parliamentary Research Service, Wouter van Ballegooij, [Procedural Rights and Detention Conditions – Cost of Non-Europe Report](#), December 2017; . Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu et al., DETOUR - Towards Pre-trial Detention as Ultima Ratio, [Comparative Report](#), December 2017 ; European Lawyers Foundation and the Council of Bars and Law Societies of Europe, [EAW-Rights: analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners](#), 2016.

information on the use of all EU mutual recognition instruments, and report to the European Commission on a regular basis.

- **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 to detention in other EU Member States and the authorities responsible for the implementation of each EU Mutual Recognition Instrument. This information should be available in one single database (e.g. as part of the EJN) which is regularly kept up-to-date. This could be based on the model of the “Belgian Fiches”.
- **Enhance institutional cooperation by setting up direct cooperation channels between all relevant national stakeholders,** including courts, probation services, lawyers (legal aid offices and bar associations).
- **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. This must include:
 - **Establish an EU-wide public database of defence lawyers specialised** and trained on EU Mutual Recognition Instruments.
 - **Ensure that Member States provide appropriate funding for legal aid to people involved in cross-border proceedings,** including to cover legal assistance in both the issuing and executing Member States before surrender is ordered as well as interpretation and translation costs (including for lawyers-clients communication).
 - **Ensure access to information about the applicable rules regarding access to legal aid** for criminal cases in all EU Member States.
 - **Ensure that Member States provide access to interpretation and translation services of a sufficient quality** so that accused people can effectively participate in proceedings.
 - **Create a European platform the transmission of criminal procedural acts and digital case files.**
- **Adopt supplementing legislation to strengthen procedural safeguards in the context of EU cross-border proceedings:** Procedural safeguards must be strengthened and adapted to all EU Mutual Recognition Instruments and include a right to challenge the use of the instruments and access to a remedy. This must also involve a right to access the case file in the issuing state before surrender.
- **Develop practical handbooks for each of the EU Mutual Recognition Instruments:** Practical guidance can help promote their correct implementation and application of EU instruments.
- **Initiate a broader consultation on longer-term work aimed at bringing together in a coherent, single and accessible form the EU Mutual Recognition Instruments and other relevant EU legislative instruments such as the Procedural Rights Directives:** The EU must engage in dialogue not only judicial authorities, prosecutors and law enforcement authorities, but also defence lawyers, civil society, victim support services, probation and other social services.

- **Include in the legislative proposals in relation to the digitalisation of justice the use of video-links in the context of cross-border proceedings:** The EU should promote the availability of video-links where these may enable issuing authorities to question a person before surrender and for the person to be heard in respect of any challenge the decision to issue the EAW before surrender.

EU 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 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 (e.g. legal aid to persons in cross-border proceedings) and resources to enable authorities to exercise their duty to ensure effective judicial protection. Effective implementation of the EU Mutual Recognition Instruments (and Procedural Safeguards Directives) requires states to dedicate sufficient human, economic, logistical and technological resources.²⁵⁰
- **Offer practical trainings on the EU Mutual Recognition Instruments to practitioners, including also lawyers and probation services:** Trainings should be localised and adopted to the national implementing legal and institutional framework.
- **Promote measures to digitalise case files:** Adopt digital solutions to promote early access to the case file in both the executing and issuing Member States (with guidance that such access must be made available before surrender to enable the effective exercise of defence rights).

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 ECHR, 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.

²⁵⁰ Esther Montero Pérez de Tudela, [Alternative measures to pre-trial detention in Europe: what else is there?](#), last accessed February 2021.

- **Apply a presumption of release:** Prosecutors and judicial authorities enjoy a 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.
- **Promote social rehabilitation:** When deciding whether to issue an EU Mutual Recognition Instrument, assess the implications that the measure may have on the person's prospects for social rehabilitation, from the outset of criminal proceedings.
- **Ensure that alternatives are applied instead of detention, rather than instead of release:** Ensure that requests for alternative measures to detention are not used as a replacement where release should be ordered instead, and assess the restrictions that the alternative measure involves on the person's fundamental rights.

Lawyers

- **Actively resist pre-trial detention motions in the executing state pending surrender under an EAW:** Lawyers must engage with their clients at the earliest opportunity and actively seek all information in favour of release to present at the initial pre-trial detention hearing, or an alternative measure to detention pending surrender.
- **Challenge the proportionality of the decision to issue an EAW where alternative measures may be relevant:** Lawyers can try to seek further explanation from issuing authorities about the assessment of other EU Mutual Recognition Instruments when deciding to issue an EAW.
- **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.

Annex: legal and institutional framework of alternative measures in partners countries

AUSTRIA			
EU Instrument	Transposition Act	Issuing Authority	Executing Authority
FD EAW	Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG) consolidated version §§ 3-31, adopted on 16 April 2004 , which entered into force on 1 May 2004	<ul style="list-style-type: none"> • <i>For prosecution:</i> the prosecutor issues the EAW with the permission of the court during investigation.²⁵¹ • The court issues the EAW upon request of the prosecutor after the person is charged.²⁵² 	<ul style="list-style-type: none"> • <u>Search and arrest:</u> The police searches and arrests the person²⁵³ and informs the prosecutor of the arrest.²⁵⁴ • <u>Procedure:</u> <ul style="list-style-type: none"> ○ <i>When the first information comes by way of international police interaction, the Ministry of Inner Affairs initiates the procedure.</i>²⁵⁵ ○ <i>When the EAW is transmitted directly to the prosecutor, or when there are grounds for assuming that a person against whom an EAW has been issued is in Austria or when there is an entry in the SIS for the arrest of a person, the Prosecutor initiates the procedure</i>²⁵⁶ and informs the court of the arrest.²⁵⁷

²⁵¹ Paragraph 29 (1) EU-JZG.

²⁵² Paragraph 29 (2a) EU-JZG.

²⁵³ Paragraph 167 (1); 171 (1) StPO, Paragraph 18 EU-JZG.

²⁵⁴ Paragraph 172 StPO.

²⁵⁵ Paragraph 16 Abs 2.

²⁵⁶ Paragraph 16 (1) EU-JZG.

²⁵⁷ Paragraph 172 StPO.

			<ul style="list-style-type: none"> • <u>Decision:</u> <ul style="list-style-type: none"> ○ The Court (single judge <i>Landesgericht</i>²⁵⁸) decides on the surrender of the person to the issuing state.²⁵⁹ ○ The OLG (appeal court) decides on complaints on the court's decisions.
<p>European Investigation Order 2014/41/EU</p>	<p>EU-JZG consolidated version §§ 55-56b adopted on 26 April 2018 which entered into force on 1 July 2008</p>	<ul style="list-style-type: none"> - <i>For investigation before charge:</i> the prosecutor issues the EIO.²⁶⁰ - <i>For measures after the charge or for which the court is competent in the investigative phase:</i> the court issues the EIO.²⁶¹ 	<ul style="list-style-type: none"> - <u>Execution:</u> The police execute the order of the prosecutor. - <u>Procedure:</u> <ul style="list-style-type: none"> ○ Generally, the prosecutor leads the procedure²⁶² (i.e., examines the EIO²⁶³, consults with/demands further information from the issuing authority²⁶⁴, etc.). ○ <i>When the person concerned is charged or in cases of transmission of persons already in detention,</i> the court leads the procedure²⁶⁵. - <u>Decision:</u> <ul style="list-style-type: none"> ○ The prosecutor executes the EIO if no court permission would be needed for a corresponding national measure ○ The court permits the execution of EIO upon

²⁵⁸ Paragraph 26 (2) ARHG, Paragraph 13 EU-JZG.

²⁵⁹ Paragraph 21 EU-JZG.

²⁶⁰ Paragraph 56 (2) EU-JZG.

²⁶¹ Paragraph 56 (2) EU-JZG.

²⁶² Paragraph 55c (1)-(2) EU-JZG.

²⁶³ Paragraph 55d EU-JZG.

²⁶⁴ Paragraph 55d (2)-(4).

²⁶⁵ Paragraph 55c (3)-(4) EU-JZG.

			<p>request of the prosecutor.²⁶⁶</p> <ul style="list-style-type: none"> o The OLG decides on complaints against court decisions.²⁶⁷
<p>European Supervision Order 2009/829/JHA</p>	<p>EU-JZG consolidated version §§ 100-121, adopted on 18 July 2013 which entered into force on 1 August 2013</p>	<ul style="list-style-type: none"> - The prosecutor gives an opinion on the issuance of the supervision request.²⁶⁸ - The court issues the request for supervision²⁶⁹. 	<ul style="list-style-type: none"> - The court decides on the recognition and acceptance of the supervision request and orders measures to be taken to fulfil request²⁷⁰. - The prosecutor raises complaints against the decision on acceptance/declination of the supervision request.²⁷¹ - The OLG decides on complaints against the court decisions.²⁷² - The probation services implement the relevant orders of the court.²⁷³
<p>FD on Probation and Alternative Sanctions 2008/947/JHA</p>	<p>EU-JZG consolidated version §§ 81-99, adopted on 18 July 2013 which entered into force on 1 August 2013</p>	<ul style="list-style-type: none"> - The prosecutor gives an opinion on the issuance of the surveillance request.²⁷⁴ - The court hears the prosecutor and the convict on the issuance of the request²⁷⁵ and issues the request²⁷⁶. 	<ul style="list-style-type: none"> - The court decides on the recognition and acceptance of the request and orders measures to be taken to fulfil the request²⁷⁷. - The prosecutor raises complaints against decisions on the acceptance/refusal of the surveillance request²⁷⁸. - The OLG decides on the complaints raised against the

²⁶⁶ Paragraph 55e (2)-(3) EU-JZG.

²⁶⁷ Paragraph 87 StPO, Paragraph 55e (4) EU-JZG.

²⁶⁸ Paragraph 115 (1) EU-JZG.

²⁶⁹ Paragraph 115 (3) EU-JZG.

²⁷⁰ Paragraph 104 EU-JZG.

²⁷¹ Paragraph 104 (2) EU-JZG.

²⁷² Paragraph 104 (2) EU-JZG.

²⁷³ Paragraph 104 EU-JZG ; and Paragraph 179 StPO.

²⁷⁴ Paragraph 95 (1) EU-JZG.

²⁷⁵ Paragraph 95 (1) EU-JZG.

²⁷⁶ Paragraph 95 (4) EU-JZG.

²⁷⁷ Paragraph 85 EU-JZG.

²⁷⁸ Paragraph 85 (2) EU-JZG.

			<p>court decisions.²⁷⁹</p> <ul style="list-style-type: none"> - The probation services implement the orders issued by the court.²⁸⁰
<p>FD on Transfer of Prisoners 2008/909/JHA</p>	<p>EU-JZG consolidated version §§ 39-42g, adopted on 15 December 2011, which entered into force on 1 January 201</p>	<ul style="list-style-type: none"> - The prison director speaks with the convict about the possible transfer to the executing state, keeps minutes of his declaration and transfers these minutes to the Minister of Justice²⁸¹. - The Minister of Justice requests the execution in the executing state²⁸². - The court decides which part of the sentence will be served in Austria upon request of prosecutor²⁸³ and orders the transfer of the convict to the executing state²⁸⁴. 	<ul style="list-style-type: none"> - The prosecutor requests the arrest and detention of convict.²⁸⁵ - The court (single judge or senate of three depending on the sentence²⁸⁶) decides on the execution²⁸⁷. - The OLG decides on complaints on decision of court on execution.²⁸⁸

²⁷⁹ Paragraph 85 (2) EU-JZG.

²⁸⁰ Paragraph 85, 87 EU-JZG; or Paragraph 50-56 StGB.

²⁸¹ Paragraph 42a EU-JZG.

²⁸² Paragraph 42b (1), (4) EU-JZG.

²⁸³ Paragraph 42b (7a) EU-JZG.

²⁸⁴ Paragraph 42e EU-JZG.

²⁸⁵ Paragraph 41 EU-JZG, Paragraph 177 (3) StPO.

²⁸⁶ Paragraph 40a EU-JZG.

²⁸⁷ Paragraph 41b (1)-(4).

²⁸⁸ Paragraph 41b (6).

BELGIUM			
EU Instrument	Transposition Act	Issuing Authority	Executing Authority
FD EAW	Federal Act of 19 December 2003	<ul style="list-style-type: none"> - <i>For prosecution:</i> <ul style="list-style-type: none"> o The investigating judge²⁸⁹ o The public prosecutor's office²⁹⁰ on the basis of an arrest warrant issued by a court or a tribunal after the conclusion of the investigation - <i>For execution of a sentence:</i> the public prosecutor's office²⁹¹ 	<ul style="list-style-type: none"> - With the consent of the person concerned and subject to review by the investigating judge: the public prosecutor²⁹² - Without the consent: the Council Chamber²⁹³
European Investigation Order 2014/41/EU	Federal Act of 22 May 2017	<p><i>Depending on the investigation measure:</i></p> <ul style="list-style-type: none"> - The public prosecutor's office²⁹⁴ - The investigating Judge²⁹⁵ - The General Administration of Customs and Excise²⁹⁶ 	<ul style="list-style-type: none"> - Reception: the public prosecutor's office;²⁹⁷ - Execution, depending on the investigation measure: <ul style="list-style-type: none"> o The public prosecutor²⁹⁸ o The investigating judge (with filter of the public prosecutor)²⁹⁹

²⁸⁹ Article 32 of the Federal Act of 19 December 2003.

²⁹⁰ Article 13 of the Federal Act of 11 July 2018 (amending the Federal Act of 19 December 2003).

²⁹¹ This has been validated by the ECJ in its judgement of 12 December 2016, in case C-627/19 PPU, since the principle of judicial protection requiring judicial independence is respected when the judgment which the EAW seek to implement has been delivered.

²⁹² Article 13§3 of the Federal Act of 19 December 2003.

²⁹³ Article 15 of the Federal Act of 19 December 2003.

²⁹⁴ Article 24, §1 of the Federal Act of 19 December 2003.

²⁹⁵ Article 24, §1 of the Federal Act of 19 December 2003.

²⁹⁶ Article 24, §5 of the Federal Act of 21 May 2013.

²⁹⁷ Article 14, §1 of the Federal Act of 22 May 2017.

²⁹⁸ Article 16 of the Federal Act of 21 May 2013.

²⁹⁹ Article 16 of the Federal Act of 21 May 2013.

European Supervision Order 2009/829/JHA	Federal Act of 23 March 2017	<ul style="list-style-type: none"> - The Public Prosecutor's office near the district court in which is located the place of legal and habitual residence of the person concerned by the measure or, if not available, the place of delivery of the decision relating to control measures, is competent to issue the certificate.³⁰⁰ - <i>If prior agreement needed:</i> it is also the public prosecutor which is competent to ask this agreement³⁰¹. 	<ul style="list-style-type: none"> - <i>If prior agreement needed:</i> the Minister of Justice is competent to give the agreement³⁰² - Recognition and execution: the public prosecutor's office (and the investigating judge when the measures need to be modified)³⁰³
FD on Probation and Alternative Sanctions 2008/947/JHA	Federal Act of 21 May 2013	<ul style="list-style-type: none"> - The public prosecutor's office of the convicted person's lawful and habitual place of residence, or of the place of conviction is competent to transmit the decision of the Sentence enforcement Court (which decides upon the provisional measures as such).³⁰⁴ 	<ul style="list-style-type: none"> - <i>If prior agreement needed:</i> the Minister of Justice is competent to give the agreement - Recognition and execution: the public prosecutor's office³⁰⁵
FD on Transfer of Prisoners 2008/909/JHA	Federal Act of 15 May 2012	<ul style="list-style-type: none"> - <i>If prior agreement needed: the Minister of Justice is competent to ask the agreement to the executing state</i> - The Minister of Justice is mandated to transmit the judgment to the other Member State, after consultation with the public prosecutor of the 	<ul style="list-style-type: none"> - <i>If prior agreement needed: the Minister of Justice is competent to give the agreement³⁰⁷</i> - Recognition and execution: the public prosecutor's office of Brussels³⁰⁸

³⁰⁰ Article 25 of the Federal Act of 23 March 2017.

³⁰¹ It is one of the differences with the transfer of prisoners, because there the Ministry of justice is competent to transmit the judgement when the person is detained in Belgium.

³⁰² Art. 9, §1 of the Federal Act of 23 March 2017.

³⁰³ Art. 14 of the Federal Act of 23 March 2017.

³⁰⁴ Article 24 of the Federal Act of 21 May 2013.

³⁰⁵ Article 14 of the Federal Act of 21 May 2013.

³⁰⁷ Article 21 of the Act of 15 May 2012.

³⁰⁸ Article 14 of the Act of 15 May 2012.

		<p>judicial district of the place of detention, when the convicted person is detained in Belgium³⁰⁶</p> <ul style="list-style-type: none"> - The public prosecutor of the judicial district in which the judgment was handed down is competent to transmit the judgment for recognition and enforcement if the sentenced person is not in detention. 	
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GREECE			
EU Instrument	Transposition Act	Issuing Authority	Executing Authority
FD EAW	<p>Law 3251/2004 European Arrest Warrant, amendment to Law 2928/2001 on criminal organisations and other provisions (O.G.G. Issue A' 127/9.7.2004), which entered into force on 9 July 2004</p>	<ul style="list-style-type: none"> - The prosecutor of the Court of Appeals with jurisdiction to adjudicate the case against the requested person or to execute the penalty or measure depriving the requested person of their personal liberty.³⁰⁹ 	<ul style="list-style-type: none"> - <u>Reception and execution:</u> The prosecutor of the Court of Appeals of the requested person's place of habitual residence or, if their place of residence is not known, the prosecutor of the Athens Court of Appeals receives incoming EAWs, arrests and detains the requested person, enters the case in the competent judicial body's docket, and executes the decision on whether to surrender or not the requested person.³¹⁰ - <u>Decision:</u> <ul style="list-style-type: none"> o When the requested person consents to their surrender: the authority competent to issue the decision on the execution of the EAW is the presiding judge of the Court of Appeals of the place where the requested

³⁰⁶ Article 31, §1er of the Federal Act of 15 May 2012.

³⁰⁹ Art. 4, Law 3251/2004.

³¹⁰ Article 9 (1), Law 3251/2004.

			<p>person is resident or arrested.³¹¹</p> <ul style="list-style-type: none"> o <i>When the requested person does not consent to their surrender, the authority competent to issue the decision on the execution of the EAW is the judicial council of the Court of Appeals of the place where the requested person is resident or was arrested.</i>³¹²
<p>European Investigation Order 2014/41/EU</p>	<p>Law 4489/2017) (O.G.G. Issue A' 140/21.9.2017), which entered into force on 21 September 2017</p>	<ul style="list-style-type: none"> - The judge, court or prosecutor with jurisdiction to adjudicate the case for which the Investigation Order is issued, as well as any other authority acting as an investigating authority in this particular case, provided, in the latter case, that the EIO's validity is subsequently upheld by the competent prosecutor following an assessment of its compliance with the conditions laid down in Law 4489/2017.³¹³ - Such "other" authorities, with competence to act as investigating authorities in certain cases are: (a) peace court magistrates; (b) officials of the Hellenic Police and the Hellenic Coastguard, designated as investigating officers; (c) public employees designated as investigating officers with specific competences, in accordance with special laws.³¹⁴ 	<p>The prosecutor of the Court of Appeals within whose jurisdiction the investigation will take place.³¹⁵</p>

³¹¹ Article 9 (2), Law 3251/2004.

³¹² Article 9 (3), Law 3251/2004.

³¹³ Article 6, Law 4489/2017.

³¹⁴ Article 71 of the Code of Criminal Procedure

³¹⁵ Article 11 (1), Law 4489/2017

European Supervision Order 2009/829/JHA	Law 4307/2014 (O.G.G. issue A' 246/15.11.2014), which entered into force on 15 November 2004	- The prosecutor of the court which issued the judgement or the decision. ³¹⁶	- The prosecutor of the court of first instance of the place where the suspect, accused or sentenced person have their habitual residence. ³¹⁷
FD on Probation and Alternative Sanctions 2008/947/JHA	Law 4307/2014 (O.G.G. issue A' 246/15.11.2014), which entered into force on 15 November 2004	The prosecutor of the court which issued the judgement or the decision. ³¹⁸	The prosecutor of the court of first instance of the place where the suspect, accused or sentenced person have their habitual residence. ³¹⁹
FD on Transfer of Prisoners 2008/909/JHA	Law 4307/2014 (O.G.G. issue A' 246/15.11.2014), which entered into force on 15 November 2004	The prosecutor of the court which issued the judgement or the decision. ³²⁰	The prosecutor of the court of first instance of the place where the suspect, accused or sentenced person have their habitual residence. ³²¹

IRELAND			
EU Instrument	Transposition Act	Issuing Authority	Executing Authority
FD EAW	European Arrest Warrant Act, 2003 adopted on 28 December 2003 and which entered into force on 1 January 2004	<ul style="list-style-type: none"> - The High Court issues the EWA upon an application by the Director of Public Prosecutions.³²² - The Director of Public Prosecutions, to whom the European arrest warrant is issued, forwards the European arrest warrant to the Central Authority, which transmits it to the 	<ul style="list-style-type: none"> - The Central Authority forwards the EWA to the Office of the Chief State Solicitor. - The Chief State Solicitor makes an application to the High Court to have the warrant endorsed for execution. - The High Court may endorse the warrant for execution. - Once endorsed, the warrant is forwarded to the Garda Síochána to be executed.

³¹⁶ Articles 3 (2), 25 (2), 43 (2), Law 4307/2014.

³¹⁷ Articles 3 (1), 25 (1), 43 (1), Law 4307/2014.

³¹⁸ Articles 3 (2), 25 (2), 43 (2), Law 4307/2014.

³¹⁹ Articles 3 (1), 25 (1), 43 (1), Law 4307/2014.

³²⁰ Articles 3 (2), 25 (2), 43 (2), Law 4307/2014.

³²¹ Articles 3 (1), 25 (1), 43 (1), Law 4307/2014.

³²² Part 2 of the European Arrest Warrant Act, 2003.

		relevant Member State. 323	
European Investigation Order 2014/41/EU	Ireland opted out of European Investigation Order 2014/41/EU. ³²⁴		
European Supervision Order 2009/829/JHA	Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020, adopted on 26 November 2020 and which entered into force on 5 February 2021	<ul style="list-style-type: none"> - The Minister for Justice is the Central Authority for the purposes of the Act. - A court in Ireland has the power to make a supervision decision and grant bail conditional on another Member State agreeing to monitor compliance on application by a person who: <ul style="list-style-type: none"> - is before a court charged with an offence which, on conviction, could result in a sentence of imprisonment of 12 months or more, - Is lawfully and ordinarily resident in another Member State. - The Competent Authority which is the Minister for Justice must consult with the Executing State for the purposes of preparing for, forwarding and monitoring the supervision order. 	The Competent Authority in Ireland is the judicial or other authority meeting the criteria specified in Article 6 of the Framework Decision and notified to the General Secretariat in accordance with that Article. The central authority in Ireland must consult with the Competent Authority in the Issuing State for the purposes of preparing for, forwarding and monitoring the supervision order. -The Supervision Order must be endorsed by a Court. The Court may decide not to endorse where: the supervised person is not lawfully or ordinarily resident in Ireland; the person does not wish to return to the State ; the offence is a summary offence and is statute-barred ; the supervised person is not a person subject to proceeding in the issuing State for an offence that EAW would apply to, or endorsement would infringe <i>ne bis in idem</i> principle.
FD on Probation and Alternative Sanctions 2008/947/JHA	Criminal Justice (Mutual Recognition of Probation Judgements and Decisions)	The Minister for Justice is the Competent Authority, except for implementing article 14 and article 20 of the Framework Decision when the relevant Court is the competent authority, (except where there is revocation	On receiving a Court Judgement and, where applicable, a Probation Decision, the Minister for Justice may make an application to the relevant court for recognition of the judgment and probation decision, on notice to the Irish Probation Service, on notice to the person concerned and

³²³ Part 2 of the European Arrest Warrant Act, 2003.

³²⁴ Recital 44 to Directive 2014/41/EU records that Ireland opted out of the Directive in accordance with Protocol No. 21 annexed to the TEU and the TFEU.

	Act, 2019, adopted on 23 September 2019 by virtue of S.I. No. 469/2019 and which entered into force on 23 September 2019	of the decision on conditional release). The Irish Probation Service or a person subject to a probation order may request the Minister for Justice to forward a request to the competent authority in the executing state.	Superintendent of the relevant Garda Siochana District, subject to conditions or may refuse to do so.
FD on Transfer of Prisoners 2008/909/JHA	Ireland is in the process of drafting legislation that would transpose this Framework Decision.		

LUXEMBOURG			
EU Instrument	Transposition Act	Issuing Authority	Executing Authority
FD EAW	Loi du 17 mars 2004 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres de l'Union européenne, which entered into force on 22 March 2004	- for purposes of prosecution: the examining magistrate - for purposes of enforcement of a sentence or order: the Chief Public Prosecutor	The public prosecutor's office, the examining magistrate and the pre-trial chamber at the relevant district court and, on appeal, the Chief Public Prosecutor and the pre-trial chamber at the Luxembourg High Court. ³²⁵
European Investigation Order 2014/41/EU	Law of 1 August 2018 on Transposition of Directive 2014/41/EU from the European Parliament and the Council from 3 April 2014 regarding the decision of	- The "Procureur d'État" (Public Prosecutor), the investigating judge and the trial courts. ³²⁶	- Reception: <ul style="list-style-type: none"> o <i>In the case of an EIO requesting coercive measures, the "Procureur Général d'État" (Chief Public Prosecutor).</i> o <i>In the case of an EIO requesting non-coercive measures, the "Procureur</i>

³²⁵ Implementation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States - Information provided to the General Secretariat.

³²⁶ Notification made by Luxembourg, Ares(2019)2360898 - 03/04/2019. <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/2128>.

	European Investigation orders in criminal matters, Modification of the Criminal Procedural Code; Modification of the modified legislation from 8 August 2000 on judicial international cooperation in criminal matters		<p>d'État" (Public Prosecutor).³²⁷</p> <ul style="list-style-type: none"> - <u>Execution:</u> <ul style="list-style-type: none"> o <i>In the case of an EIO requesting coercive measures, the investigating judge.</i> o <i>In the case of an EIO requesting non-coercive measures, the "Procureur d'État" (Public Prosecutor).³²⁸</i>
European Supervision Order 2009/829/JHA	Law of 5 July 2016 regarding the effective application of the principle of mutual recognition in supervision measures as alternative to preventive custody and modifying the criminal law	- Any national judicial authority which is competent to order a supervision measure as an alternative to provisional detention can serve as issuing authority.	- The ESO is to be received and validated by the General Public Prosecutor ³²⁹ who, then, has to transmit the case to the relevant public prosecutor to a District "Chambre du Conseil" so as to make sure that the ESO can be properly executed in Luxembourg.
FD on Probation and Alternative Sanctions 2008/947/JHA	Law of 12 April 2015 regarding the effective application of the principle of mutual recognition in probation decisions and other substitution decisions and in order to enhance	The "Procureur général d'État" (Chief Public Prosecutor). ³³⁰	The "Procureur général d'État" (Chief Public Prosecutor). ³³¹

³²⁷ Notification made by Luxembourg, Ares(2019)2360898 - 03/04/2019. <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/2128>.

³²⁸ Notification made by Luxembourg, Ares(2019)2360898 - 03/04/2019. <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/2128>.

³²⁹ Article 3 of the Law of 5 July 5 2016.

³³⁰ Notification made by Luxembourg, Brussels, 16 March 2020 (OR. f r) 6749/1/20 REV 1 COPEN 79 EUROJUST 46 EJM 40.

³³¹ Notification made by Luxembourg, Brussels, 16 March 2020 (OR. f r) 6749/1/20 REV 1 COPEN 79 EUROJUST 46 EJM 40.

	<p>the effective application of the principle of mutual recognition in judgement rendered in absentia in 1) art. 634 of Criminal Law, 2) Legislation from the 23 February 2010 regarding the mutual recognition of financial sanctions; 3) the modified law of 17 March 2004 regarding the European Arrest Warrant</p>		
<p>FD on Transfer of Prisoners 2008/909/JHA</p>	<p>Law of 28 February 2011 regarding the effective application of the principle of mutual recognition in criminal judgements that have ruled for a deprivation of liberty in order to be executed in other European Union's Member States</p>	<p>The "Procureur général d'État" (Chief Public Prosecutor).³³²</p>	<p>The "Procureur général d'État" (Chief Public Prosecutor).³³³</p>

³³² Notification made by Luxembourg Ares(2020)1552168 – 13/03/2020 <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/3225>.

³³³ Notification made by Luxembourg Ares(2020)1552168 – 13/03/2020 <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/3225>.