

Obstacles to the use of alternative measures

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

The insufficient implementation of procedural safeguards in cross-border proceedings



The use of alternative measures to a EAW

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...

Is this a good practice ? Shall the burden to argue for an alternative measure or for release be placed on the defence instead of the prosecution ?



Research from FairTrial shows that **judicial authorities of Member States** expect lawyers to make the argument for an alternative measure instead of an EAW.

The use of alternative measures to a EAW, in the hand of the defence...



- ❑ it is up to lawyers to make a case against pre-trial detention and argue for the imposition of an alternative measure instead, or for release.
- ❑ Lawyers must be placed in a position to suggest and argue for individualised alternatives.



BUT

First obstacle to the use of alternative measures is practitioners' lack of knowledge

Procedural rights in cross-border proceedings

- ❑ In a cross- border setting, this means that there must be procedural safeguards that aims at placing a person in a position to prepare and exercise an effective defence.
- ❑ The requested person (and the lawyer) shall be able to challenge an EAW and advocate for release or the application of a different EU Mutual Recognition Instrument.

BUT

Insufficient implementation of procedural safeguards in cross-border proceedings

The insufficient implementation of procedural safeguards in cross-border proceedings



Access to a lawyer and legal assistance in cross-border criminal proceedings

Binding minimum standards laid down in

- ❑ Directive 2013/48/EU on access to a lawyer
- ❑ Directive 2016/1919/EU on legal aid

Access to Legal Assistance

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.

- FOR EXAMPLE:
 - EAW are issued for the purposes of investigation before a case is ready for trial, for questioning a suspect.
 - Instead, a lawyer could advocate for a request for a European Investigation Order and apply for a videoconference hearing for questioning instead of an EAW

Obstacles to Legal Assistance



- ❑ **Dual Representation** under EAW; legal representation in the issuing state and in the executing state
- ❑ The authorities simply inform the requested persons of their right to access a lawyer in the issuing state but provide **no practical assistance**.
- ❑ 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.
- ❑ Access to **quality legal assistance** and legal defence for people relying on legal aid

Access to a case file in cross-border criminal proceedings

Binding minimum standards laid down in

- ☐ Directive 2012/13 on right to information

Access to case file



- 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 is to issue the measure is based.

Obstacles to Access to case file

- Ensuring **adequate timing** for the access to the case file.
 - 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 weeks before being able to seek access to the case file and challenge the detention.
 - Without access to the case file prior to surrender, the defence will not be able to challenge the EAW.



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