



European Institute of Public Administration
European Centre for Judges and Lawyers



Seminar 2: The pre-Lisbon instruments: Special focus on the European Arrest Warrant

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Improving Judicial Cooperation in Criminal Matters in the area of Freedom, Security and Justice. Institutional Processes and Topical Areas



The European Arrest Warrant as seen by the defence counsel

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EAW as Seen by the Defense Counsel

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Warrant
Cracow, February 16, 2012**

**organized by the European Centre
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The Role of Defense Lawyers in EAW Cases

- Predominantly defense work on EAW in the executing state, rarely this involves defense work in the issuing state.
- Representation by professional defense counsel is not mandatory in EAW proceedings in which Poland is the executing state.
- Legal aid / state appointed defense counsel in Poland is available to the persons subject to an EAW on the same terms as those in the general rules of criminal proceedings under the CPC.
- The defendant is entitled to assistance by defense counsel. As far as the defense lawyer is concerned, he/she may either be retained by the defendant or may be appointed by the court at the suspect's request. In the latter case, the person must indicate that he/she is unable to pay the defense costs without prejudice to family support and maintenance. The general rule is that the decision whether to retain a counsel or not depends on the suspect, however if the person is a vulnerable defendant (deaf, blind, mute, juvenile or there are doubts as to his/her mental health), the appointment of a defense lawyer is obligatory (if there is no retained lawyer, the court shall appoint one *ex officio*).
- Although legal aid exists (in the form a state appointed advocate), the quality of legal services *via* legal aid varies and legal aid fees for EAW work are very low as compared to market standards, especially in large cities. Legal aid covers only the proceedings in Poland as the executing state and will not provide for the assistance of a lawyer in the issuing state.
- Lawyers appointed through legal aid generally do not have sufficient knowledge or expertise about EAW cases.
- Lack of specialization of advocates.
- If Poland is the issuing state, there is no mechanism to ensure Legal Aid / state appointed defense lawyer prior to the return of the requested person. Therefore, double representation is not possible *via* Legal Aid.
- Legal aid does not cover expenses of e.g. expert witnesses or investigators involved in defense work.
- The requested person is informed of his right to a lawyer on the first interview before the public prosecutor.

Right to Interpreter

- EAW cases often involve serious language problems, requiring multiple translations. Prosecutors, Judges and Lawyers often do not speak any of the relevant foreign languages, causing them to rely heavily on the quality of translation.
- Two levels of translation: 1) between authorities of the issuing state and the executing state; 2) between the authorities of the executing state and the defendant.
- Problems with translation of communication between lawyer, defendant and lawyers in issuing state.
- The services of an interpreter are free of charge for a defendant in criminal proceedings, including EAW proceedings. The only requirement that needs to be fulfilled is for the suspect to have insufficient Polish language skills. The interpreter will be present at all hearings and interviews with the participation of the suspect.
- Documents in the court files or generally not translated in writing into the defendant's language (with the exception of those expressly listed in art. 72 s. 3 CPC). The requested person in EAW cases will be provided with a written translation of the decision concluding proceedings regarding the EAW and any other judgment issued during the proceeding which is subject to review.
- The requested person is **informed about the content** of the EAW by the prosecutor during the interview (Art. 607k §2 CPC). Defense practice indicates that this is often insufficient and leads to later misunderstandings.
- Appointed interpreters can assist only in **formal hearings or procedural actions**, not conferences between the lawyer and the client who often do not have the language skills to communicate with their clients that do not speak Polish.

EAW-specific Problems for Defendant and Defense Counsel

- Defense Lawyer has very limited scope of action - can only move within obligatory and evaluative (non obligatory) conditions for refusal to execute EAW.
- Must have at least basic understanding of legal institutions of issuing state.
- Must have a basic understanding of the practice of the relevant public authorities in the issuing state.
- Must seek to verify argumentation and statements indicated in EAW (*Poland v. Grzegorz S.*).

Imbalance Resulting from Lack of Dual Representation

- Problems in cooperation and communication between lawyers in executing state and issuing state (*Poland v. Grzegorz K.*).
- Some legal systems have evolved a partial remedy. UK example: UK Legal Aid pays for fees of Polish lawyer to act as expert witness regarding Polish law and practice of Polish Criminal Justice system (*Poland v. Grzegorz S.*).
- Most EU States do not allow and do not provide legal aid funds for a evidence seeking (investigative) actions on the part of the Defense Counsel. This makes it difficult to verify the accuracy and veracity of the EAW and other documents received from the issuing state.
- UK does allow such actions, which often leads to evidence questioning the legality or acceptability of execution of the EAW [*vide art. 607z CPC*, verification or evidence seeking strictly dependent on the will of the Court (*Belgium v. Adam G.*)].

Relevant Proposed EU Level Legislative Changes

- Proposal for a **DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest**, Brussels, 8.6.2011, COM(2011) 326 final [Please note that as of 10 Feb. 2012 this is the version currently under review by the European Parliament. The Council removed art. 11 s. 3 - 5 of the Proposal and the relevant parts of the Preamble]

- Relevant fragments of Proposal Preamble:

(20) In order to improve the functioning of judicial cooperation in the European Union, **the rights provided for in this Directive should also apply, *mutatis mutandis*, to proceedings for the execution of a European Arrest Warrant** according to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States³⁶;

(21) The person subject to a European Arrest Warrant should have the right of access to a lawyer in the **executing Member State** in order to allow him to exercise his rights effectively under the Council Framework Decision 2002/584/JHA;

(22) That person should also have **the possibility to have a lawyer in the issuing Member State** to assist the lawyer in the executing Member State in specific cases during the surrender proceedings without prejudice to the deadlines set out in Council Framework Decision 2002/584/JHA; **that lawyer should be able to assist the lawyer in the executing Member State** when exercising the person's rights under the Council Framework Decision 2002/584/JHA in the executing State, in particular in respect of the grounds of refusal under its Articles 3 and 4; since the European Arrest Warrant is predicated upon the principle of mutual recognition, this should not entail any right to question the merits of the case in the executing Member State; as there is no incompatibility between defense rights and mutual recognition; enhancing fair trial rights both in the executing and in the issuing Member State will boost mutual trust;

(23) In order to make the right of access to a lawyer in the issuing Member State effective, **the executing judicial authority should promptly notify the issuing judicial authority of the arrest of the person and of his request to have access to a lawyer in the issuing Member State;**

- Relevant fragments of Proposal:

Article 11

The right of access to a lawyer in European Arrest Warrant proceedings

1. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA has the right of access to a lawyer promptly upon arrest pursuant to the European Arrest Warrant in the executing Member State.

2. With regard to the content of the right of access to a lawyer, this person shall have the following rights in the executing Member State:

- the right of access to a lawyer in such a time and manner as to allow him to exercise his rights effectively;
- the right to meet with the lawyer representing him;
- the right that his lawyer is present at any questioning and hearing, including the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law;
- the right that his lawyer has access to the place where the person is detained in order to check the conditions of detention. The duration and frequency of meetings between the person and his lawyer shall not be limited in any way that may prejudice the exercise of his rights under Council Framework Decision 2002/584/JHA.

3. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA, upon request, also has the right of access to a lawyer promptly upon arrest pursuant to a European Arrest Warrant in the issuing Member State, in order to assist the lawyer in the executing Member State in accordance with s. 4. This person shall be informed of that right.

4. The lawyer of this person in the issuing Member State shall have the right to carry out activities limited to what is needed to assist the lawyer in the executing Member State, with a view to the effective exercise of the person's rights in the executing Member State under that Council Framework Decision, in particular under its Articles 3 and

5. Promptly upon arrest pursuant to a European Arrest Warrant, the executing judicial authority shall notify the issuing judicial authority of the arrest and of the request by the person to have access to a lawyer also in the issuing Member State.

Possibilities of Avoiding Use of EAW

- Why avoid use of EAW?
 - expensive
 - very invasive in terms of abuse of art. 8 and art. 5 ECHR rights, often also art. 3, art. 1 protocol 1 ECHR
 - Arrangement by defense lawyer in issuing state (if double representation occurs) with issuing state court and the public prosecutor. This is entirely subject to the executing state lawyer being able to access this assistance, (*Holland v. Cornelis D., Poland v. Mohammed B.K.*)
 - European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959
 - Chapter III – Service of writs and records of judicial verdicts – Appearance of witnesses, experts and prosecuted persons
- Art. 7 s. 3 Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, request that **service of a summons on an accused person** who is in its territory be transmitted to its authorities by a certain time before the date set for appearance. This time shall be specified in the aforesaid declaration and shall not exceed 50 days. This time shall be taken into account when the date of appearance is being fixed and when the summons is being transmitted.
- Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 8.XI.2001

➤ Article 9 – Hearing by video conference

Art. 9 s. 8 Parties may at their discretion also apply the provisions of this article, where appropriate and with the agreement of their competent judicial authorities, to **hearings by video conference involving the accused person or the suspect**. In this case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Parties concerned, in accordance with their national law and relevant international instruments. Hearings involving the accused person or the suspect shall only be carried out with his or her consent.

Art. 9 s. 9 Any Contracting State may, at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, declare that it will not avail itself of the possibility provided in paragraph 8 above of also applying the provisions of this article to hearings by video conference involving the accused person or the suspect.

Nota bene: Poland in Government statement dated February 10, 2004 declared not to intend to use the possibility of interviewing the accused or suspected person in the form of video conference; It does not mean that other Contracting States do not avail of the possibility provided in paragraph 8 of Article 9.

- Possibility of conducting a criminal proceedings *in absentia* after personal receipt of court correspondence (Art. 377 s. 3 CPC) (*Poland v. Cornelis D.*).

EAW or European Convention on Mutual Assistance in Criminal Matters: Which one should be used in a specific case?

- EAW
 - speedier, doesn't involve Ministries of Justice
 - often surprises defendant, therefore more effective
 - often grossly disproportionate
 - very expensive
- European Convention on Mutual Assistance in Criminal Matters
 - extended time for realization Legal Assistance by other State
 - concerns about the failure of the requested person to act upon the summons, lack of element of surprise
 - chance for voluntarily appearance in requesting State less invasive, cheaper means of cooperation between Member States
- Yogurt Lady

Problems with Use and Abuse of the EAW, Select Case Studies ¹

- **lack of mechanisms to ensure dual representation**
- **no proportionality test in issuing State and no proportionality-based refusal ground in executing State, leading to widespread misuse of EAWs**
- **issuing authorities are not required to withdraw EAWs when they are properly refused by executing authorities**

- **France v. Deborah Dark**

Deborah Dark, a grandmother of two, was arrested and detained, first in Turkey, then in Spain and then in the UK. She was wanted to serve a prison sentence in France for a twenty-year old conviction he knew nothing about. Courts in both the UK and Spain had ruled that it would be unjust to extradite her to France, but she remained subject to the EAW in the rest of Europe. Too afraid to leave the country in case she was arrested again, Deborah was in effect imprisoned within the UK for 3 years and unable to visit her pensioner father in Spain. It was only in May 2010, following a lengthy campaign, that France finally agreed to withdraw the EAW against Deborah, 20 years after her conviction.

- **premature extraditions when issuing state is not “trial-ready”, leading to unnecessary periods in pre-trial detention**

- **Greece v. Andrew Symeou**

Andrew Symeou, a twenty-one year old British student, was extradited to Greece in July 2009 to face charges in connection with the death of another young man at a nightclub on a Greek island. Andrew’s extradition was ordered despite evidence that the charges he was facing were based on statements extracted by Greek police through the brutal mistreatment of witnesses, who later retracted their statements. Andrew also raised the prospect that extradition would breach his Art 3 ECHR rights. Such arguments were unsuccessful.

Once in Greece, Andrew spent a year in horrendous prison conditions, and has described how he awoke each morning covered in cockroaches and was frequently bitten by fleas in his bedding. The shower room floor was covered in excrement and the prison was infested with vermin. Despite family links in Greece and the fact that his father rented a flat for him to stay at, he was denied release pending trial on the basis that he was foreign and had not shown “remorse”. He was held in a filthy, overcrowded cell for almost a year before being finally given “local bail”. He was acquitted in June 2011, four years after the events in question. His father lost his business because of the costs.

- **insufficient provision in Framework Decision for executing state courts to examine fundamental rights consequences of surrender and, if necessary, seek further assurances or information before ordering surrender**

¹ Source: Fair Trials International, *The European Arrest Warrant eight years on – time to amend the Framework Decision?*, 1 February 2012

Thank you for
your attention

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