

EAW: Next Steps, Will Pandora’s Box Be Opened?

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Abstract: The authors advocate operational improvement of the European Arrest Warrant system. When applying the judicial cooperation instruments concerning criminal matters, more attention should be devoted to the requirements of proportionality, effective judicial protection, and coherence. The power to issue an EAW should be more circumscribed whereas executing authorities should be allowed more flexibility in the decision making process as far as the execution of an EAW is concerned. The authors conclude by sketching amendments to the legal and practical framework and the efforts required to implement them as well as by addressing the issue of political feasibility.

1. Introduction

The European Commission (EC) refers to the European Arrest Warrant (EAW) as the most successful instrument of judicial cooperation in criminal matters in the EU.¹ At the same time there has been ongoing criticism.²

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¹ “European Arrest Warrant,” European Commission, accessed March 16, 2023, https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en.

The focus of this article is to sketch amendments to the current arrangements for issuing and executing EAWs in order to do more justice to the requirements of both *proportionality* and *effective judicial protection*. Crucial for doing justice to those requirements is improving the *coherence* of applying the available instruments concerning judicial cooperation in criminal matters. Coherence can be achieved by a balanced assessment of which instrument to use and by making this assessment at the very start of the process of either enforcing a sentence or conducting a criminal prosecution. Furthermore, the possibility of reconsidering at a later stage, especially during the execution proceedings, whether an EAW should be maintained or replaced with another measure would contribute to a more coherent application of the available instruments. In the context of coherence, the overarching goal of fighting (cross-border) criminality and preventing impunity will also play a role.

This article draws partly upon the findings of the *ImprovEAW Project*³ but it also incorporates ideas developed in the course of the authors' long experience with EAWs. On the one hand, the article analyses the concepts mentioned before and relates them to the current legal framework and practice, and, on the other, the article focuses on amendments to the current arrangements in order to show the way forward: the next steps.

The article concludes by paying attention to the implementation of our ideas and to their political feasibility.

2. Improving the EAW

2.1. Why?

Why should we want to improve the EAW at all? After all, it is a success. And furthermore, issuing and executing EAWs has become “business as usual”, considering the numbers of EAWs issued and executed every year.⁴

² See, *inter alios*, Steve Peers, “Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?,” *Common Market Law Review* 41, no. 1 (2004): passim, and André Klip, “Eroding Mutual Trust in an European Criminal Justice Area without Added Value,” *European Journal of Crime, Criminal Law and Criminal Justice* 28, no. 2 (2020): passim.

³ Renata Barbosa et al., *Improving the European Arrest Warrant* (The Hague: Eleven, 2022).

⁴ See: *Statistics on the Practical Operation of the European Arrest Warrant – 2021*, SWD(2023), 262 final.

In practice, however, the EAW shows serious shortcomings (*infra*, para. 2.2). Those shortcomings can lead to unjustified decisions, needless delays and extra costs, and they can also have an adverse impact on mutual trust and, therefore, on judicial cooperation in criminal matters within the EU. In short, the EAW might be called a success but, in our eyes, not an unqualified success. In this regard we would like to point out that the principle of sincere cooperation requires Member States (MS) not only to do their utmost to give effect to EAWs issued but also to do their utmost to safeguard adequate effective judicial protection. Shortcomings that stand in the way should be removed. And while it might be business as usual for MS to issue and execute EAWs, the impact on the requested person is significant.

A third reason for looking at improvements is our observation that the system has become more and more complicated. Simplifying the system contributes to efficiency and effectiveness as well as to the quality of decision-making.

2.2. Shortcomings

With regard to the shortcomings that specifically touch upon the subject matter of this article, i.e. proportionality, judicial protection and coherence, we refer to para. 3 of this article. That paragraph will demonstrate that there are defects in the way those issues are governed and dealt with in practice.

On a more general level the main obstacle to the mutual recognition of EAWs is the failure of MS to adequately transpose the EU legal framework into their national legislations. As an example we mention that many MS transposed grounds for optional refusal as mandatory grounds for refusal. Another important cause of problems is the fact that the authorities of MS disregard the autonomous meaning of concepts of EU legislation by interpreting and applying those concepts according to their national legal meaning. Those and further examples of shortcomings can be found in the *ImprovEAW* Project report.⁵

⁵ Barbosa et al., *Improving the European Arrest Warrant*.

2.3. Business as Usual

Being confronted with an EAW is certainly not “business as usual” for the requested person (and his or her family). The EAW is more intrusive than most other means of cooperation in criminal matters since it entails detaining the requested person. Detention is a consequence of arresting the requested person in the executing MS. After being surrendered, the requested person will be detained in the issuing MS. This has a huge impact on his or her freedom, family and social ties, his or her ability to work and earn a living for his or her family. Detention also limits the possibility to travel freely within the EU. Given the intrusive nature of the EAW, the proportionality of the issuance of the EAW requires special attention.

Furthermore, although issuing and executing EAWs might be a mere routine for some JAs, that may not be the case for JAs of MS that have not centralised the EAW-jurisdiction.

2.4. The System Has Become Complicated

The complexity involved in the concept of *effective judicial protection* is directly linked to the subject matter of this article. We will elaborate on this in paras. 3.3 and 3.4. It is further exemplified by the issue of *in absentia* judgements⁶: at the national level the judgements of the Court of Justice give rise to a growing and evermore casuistic case law with regard to the question whether surrender would breach the requested person’s rights of defence. We also refer to the two-step test in cases in which a possible violation of fundamental rights is at stake⁷ and to the definition of the concept of “judicial authority” (see *infra* para. 3.3).

⁶ Kei Hannah Brodersen, Vincent Glerum, and André Klip, *The European Arrest Warrant and in Absentia Judgements* (The Hague: Boom, 2020); Kei Hannah Brodersen, Vincent Glerum, and André Klip, “The European Arrest Warrant and *in absentia* Judgements: The Cause of Much Trouble,” *New Journal of European Criminal Law* 13, no. 1 (2022): 7–27.

⁷ For recent reflections on this topic see: Barbosa et al., *Improving the European Arrest Warrant*, 201–223; Anne Weyembergh and Lucas Pinelli, “Detention Conditions in the Issuing Member State as a Ground for Non-Execution of the European Arrest Warrant: State of Play and Challenges Ahead,” *European Criminal Law Review* 12, no. 1 (2022): 26–52; Frank Zimmermann, “Concerns Regarding the Rule of Law as a Ground for Non-Execution of the European Arrest Warrant: Suggestions for a Reform,” *European Criminal Law Review* 12, no. 1 (2022): 4–24.

2.5 Conclusion

In our opinion there certainly is room for improving the practice of issuing and executing EAWs. We also think that, where there is room, there is also an obligation to try to implement improvements. After all, improvements will contribute to mutual trust and mutual recognition, to the effectiveness and efficiency of the system and to a better protection of the rights of requested persons.

3. Proportionality, Effective Judicial Protection and Coherence

3.1 Proportionality (Legal Framework)

In accordance with the principle of proportionality the means employed must be appropriate to achieve the objective pursued and must not go beyond what is necessary to achieve it.⁸ This principle is a general principle of EU law, which means that it is binding on national authorities when they apply the provisions of the national law adopted to transpose FD 2002/584/JHA (FD). Moreover, as the EAW is capable of infringing the right to liberty (Article 6 of the Charter of Fundamental Rights of the European Union (the Charter)) of the person concerned, any limitation on the exercise of that right is subject to the principle of proportionality (Article 52(1) of the Charter). Against this background, it is hardly surprising that the Court of Justice has ruled that it is the duty of the issuing JA to “review, in particular, observance of the conditions necessary for the issuing of the [EAW] and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant.”⁹ This review is a part of the second level of the dual level of protection for procedural and fundamental rights of the requested person (*infra* para. 3.2), i.e. the level at which the EAW is issued.¹⁰ What is surprising, however, is that the Court of Justice seems to reduce the examination of the proportionality of issuing an execution-EAW¹¹ to a mere formality. When deciding whether to issue an execution-EAW, the examination of proportionality coincides with

⁸ See, e.g., CJEC Judgement of 18 November 1987, *Maisena v. BALM*, Case 56/86, ECLI:EU:C:1987:493, para. 15.

⁹ See, e.g., CJEU Judgement of 27 May 2019, OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau), Joined Cases 508/18 & 82/19 PPU, ECLI:EU:C:2019:456, para. 71.

¹⁰ *Ibid.*

¹¹ An EAW issued for the purpose of executing a custodial sentence or detention order.

the review of observance of the condition set forth in Article 2(1) of the FD: a sentence or sentences of at least four months must have been imposed. From that condition the Court of Justice seems to deduce that where that condition is met the EAW is proportionate *ipso facto*.¹² The review of proportionality is incorporated, as it were, in the judgement imposing the sentence.¹³ This line of reasoning gives rise to two objections. Firstly, as AG Campos Sánchez-Bordona has pointed out, there are other relevant factors to take into account when assessing proportionality than the sentence imposed, such as “the time elapsed between the sentence and the issue of the EAW.”¹⁴ Secondly, the requirement of Article 2(1) relates to the duration of the sentence imposed.¹⁵ However, the actual time to be served in the issuing MS may be less than the sentence imposed and even less than four months. Consequently, the remaining sentence to be served (see Section c(2) of the EAW-form) is a much more reliable indicator of proportionality than the sentence imposed.

As far as the examination of the proportionality of issuing a prosecution-EAW¹⁶ is concerned, the Court of Justice distinguishes between (reviewing) the proportionality of the national arrest warrant (NAW) and (reviewing) the proportionality of the EAW. In the *NJ (Public Prosecutor’s Office, Vienna)* case it concluded that the national court had conducted a full review of the proportionality of the prosecution-EAW.¹⁷ That review related to “the impinging on the rights of the person concerned which goes beyond the infringements of his right to freedom already examined [in the context of the NAW].”¹⁸ In conducting that review, the court was required (by national law) to take into account “in particular, the effects of the surrender procedure and the transfer of the person concerned residing

¹² CJEU Judgement of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, Case 627/19, ECLI:EU:C:2019:1079, para. 38.

¹³ *Ibid.*, para. 35.

¹⁴ The Opinion delivered on 26 November 2019, ECLI:EU:C:2019:1014, para. 30.

¹⁵ Barbosa et al., *Improving the European Arrest Warrant*, 97–98.

¹⁶ An EAW issued for the purpose of conducting a prosecution.

¹⁷ CJEU Judgement of 9 November 2019, *NJ (Public Prosecutor’s Office, Vienna)*, Case 489/19 PPU, ECLI:EU:C:2019:849, para. 46.

¹⁸ *Ibid.*, para. 44.

in a Member State other than the [issuing Member State] on that person's social and family relationships.”¹⁹

With regard to the European Investigation Order (EIO) EU law expressly recognises the availability of less intrusive means to achieve the objective pursued as relevant to the examination of proportionality: “[w]ith a view to the proportionate use of an EAW”, Recital 26 of Directive 2014/41 calls upon the issuing JA to “consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings.”²⁰ Although neither the case law of the Court of Justice on the EAW nor the FD explicitly refers to less intrusive alternatives, the duty to consider such alternatives is inherent in the very concept of proportionality. Consequently, the issuing JA should consider whether there is an instrument of judicial cooperation which is less intrusive than the EAW but which is equally effective in achieving the objective pursued.

3.2. Proportionality (Practice and Shortcomings)

Although it is clear that the issuing JA must assess proportionality, at least when deciding whether to issue a prosecution-EAW, that duty does not have an explicit legal basis in the legal order of some MS, e.g. the Netherlands. That may cause problems particularly where the jurisdiction to issue EAWs is decentralised, as it is in the Netherlands. Research shows that issuing JAs in the Netherlands, although aware of the duty, restrict themselves to assessing the seriousness of the offence(s) on the basis of the maximum penalty that can be imposed. They are not provided with the case file but rather with the EAW-form completed by the prosecutor. Less intrusive alternatives to issuing an EAW are rarely, if ever, taken into account. Instances in which the issuing JA refuses to issue an EAW are very rare.²¹ With the exception of Poland (see *infra*), issuing JAs in other MS do not seem to carry out a fully-fledged proportionality assessment, either.²²

¹⁹ Ibid.

²⁰ OJ L 130, 1–36.

²¹ Vincent Glerum and Hans Kijlstra, “Practice in the Netherlands,” in *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, eds. Renata Barbosa et al. (The Hague: Eleven, 2022), 123–127.

²² Barbosa et al., *Improving the European Arrest Warrant*.

By contrast, in Poland the duty to assess the proportionality of issuing an EAW is laid down explicitly in national law. Research shows that Polish issuing courts, when assessing proportionality, not only take into account the severity of the penalty or the type of offence but also review whether less intrusive alternatives to issuing an EAW are available. A refusal to issue an EAW on account of a lack of proportionality is not a rare occurrence.²³

3.3. Effective Judicial Protection (Legal Framework)

There is a strong link between the examination of the proportionality of issuing the EAW and the requirements of effective judicial protection. The issuing JA's duty to examine the proportionality of issuing an EAW is a part of the second level of the dual level of protection for the requested person's procedural and fundamental rights in the issuing MS. The dual level of protection, in its turn, is linked to the requirement of effective judicial protection. That dual level consists of a "judicial decision" at the level of the adoption of the NAW and a decision by the "issuing [JA]" at the level of the adoption of the EAW. The NAW issued by a prosecutor constitutes a "judicial decision" which may serve as the basis for issuing a prosecution-EAW (Article 8(1)(c) of the FD). An EAW can be issued by a prosecutor, if the national law of the issuing MS contains provisions which are capable of guaranteeing that the issuing prosecutor is not exposed to any risk of interference by, in particular, the executive.²⁴ In short, neither the concept of "judicial decision" nor the concept of "issuing [JA]" is limited to (decisions issued by) courts. This is problematic since the EAW can impinge on the requested person's right to freedom. Evidently, that is why the Court of Justice felt the need to intertwine the dual level of protection with the requirement of effective judicial protection, i.e. effective protection by a court. At least at one of the two levels, the decision must meet that requirement. Consequently, if a prosecution-EAW is issued by a prosecutor, at least the NAW must meet the requirements of effective judicial protection. Moreover, if the EAW is issued by a prosecutor, the decision to issue that EAW and, in particular,

²³ Małgorzata Wąsek-Wiaderek and Adrian Zbiciak, "Practice in Poland," in *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, eds. Renata Barbosa et al. (The Hague: Eleven, 2022), 256–262.

²⁴ See, e.g., OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau), para. 74.

the proportionality thereof, must be amenable to court proceedings that meet in full the requirement of effective judicial protection.

Much effort has been spent by executing JAs and the Court of Justice in trying to establish whether the legal order of a particular issuing MS provides for the possibility of court proceedings against the decision to issue a prosecution-EAW by a prosecutor. The approach of the Court of Justice in answering preliminary references concerning that topic consists in making a global assessment of the applicable legal order. A separate right of appeal is not required. Where the legal order provides for the pre-conditions for the issuance of the EAW and its proportionality to be reviewed by a court “before or almost at the same time as it is issued and, in any event, after the [EAW] has been issued,” that is “before or after the actual surrender of the requested person,” that system meets the requirement of effective judicial protection.²⁵ This wording gave rise to the interpretation that judicial review of a prosecutor’s decision to issue a prosecution-EAW and its proportionality *a posteriori*, i.e. *after* surrender, would suffice.²⁶ In *MM* the Court of Justice subsequently held that – in the absence of a separate legal remedy against the decision to issue the EAW and its proportionality whether before, after or at the same time of its adoption – the court in the issuing MS, that was called upon to give a ruling in the criminal proceedings *after the surrender* of the person concerned, had to be able to carry out an indirect review of the EAW if the validity of the EAW had been challenged.²⁷ That judgement might be seen as confirming the interpretation that judicial review *a posteriori* satisfies the requirement of effective judicial protection. However, in the judgement in the *Svishtov Regional Prosecutor’s Office* case the Court of Justice reiterated that the dual level of protection “means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that

²⁵ CJEU Judgement of 12 December 2019, Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours), Joined Cases 566/19 PPU & 626/19 PPU, ECLI:EU:C:2019:1077, paras. 65–71.

²⁶ See, e.g., the opinion of AG Pikamäe delivered on 30 September 2020, ECLI:EU:C:2020:758, para. 75 in fine.

²⁷ CJEU Judgement of 13 January 2021, *MM*, Case 414/20 PPU, ECLI:EU:C:2021:4, para. 72.

protection” and explicitly stated that, therefore, *either* the NAW *or* the EAW had to be capable of being the subject of judicial review *before surrender*.²⁸

To summarise, that case law amounts to a multi-dimensional matrix of relevant factors for assessing whether the requirements of effective judicial protection are met in the case of a prosecution-EAW:

1. There are two arrest warrants at issue, the NAW and the EAW.
2. Was the NAW issued by a prosecutor or a court?
3. Was the EAW issued by a prosecutor or a court?
4. If issued by a prosecutor, can the decision to issue the NAW and/or the EAW be reviewed by a court?
5. Is such a review available before or after surrender?

In itself, that matrix already is hard to process but the case law also gives rise to questions and uncertainty (*infra* 3.4).

3.4. Effective Judicial Protection (Practice and Shortcomings)

Judicial review *before surrender* has the potential to prevent the surrender to the issuing MS and to put an end to the detention in the executing MS. Where the competent court in the issuing MS finds that either the NAW or the EAW should not have been issued, the requested person cannot be detained in the executing MS anymore nor surrendered to the issuing MS. Such judicial protection before the surrender is certainly more effective than an *a posteriori* review of the NAW or the EAW, i.e. any judicial review after the detention in the executing MS and the surrender to the issuing MS. Nevertheless, *Svishtov* and the subsequent case law raise the question whether the NAW and the EAW both must be taken by a court or be amenable to be reviewed by a court, *and* at least one of those decisions must be taken by a court or be amenable to be reviewed by a court before the surrender (in other words, *Svishtov* adds a requirement) or *only one* of those decisions must be taken by a court or be amenable to be reviewed by a court, *viz.* before the surrender (in other words, *Svishtov* turns cumulative requirements into alternative requirements).²⁹ If the latter is the case,

²⁸ CJEU Judgement of 10 March 2011, *Svishtov* Regional Prosecutor’s Office, Case 648/20 PPU, ECLI:EU:C:2011:187, paras. 43–44.

²⁹ CJEU Judgement of 30 June 2022, *Spetsializirana prokuratura* (Information on the national arrest decision), Case 105/21, ECLI:EU:C:2022:511, para. 52 seems to suggest the latter.

then that case law weakens the protection of the requested person's rights. This question is inextricably linked with the scope of judicial review before the surrender. If, e.g., judicial review of the NAW before the surrender is not required to encompass the pre-conditions for the issuance of the EAW and its proportionality but rather is limited to the lawfulness of the NAW itself,³⁰ the protection of the requested person's rights is weakened even further.

At the root of all of this complexity and uncertainty is the definition of the "issuing JA". Since that definition does not limit itself to courts but includes prosecutors, the Court of Justice has created additional safeguards. If EU law were to prescribe that only courts can issue EAWs, there would be no need for such safeguards. When deciding whether to issue an EAW, the issuing court would have to check whether the pre-conditions for the issuance of the EAW are met and whether it would be proportionate to issue the EAW, thereby guaranteeing that all EAWs are issued after *judicial review before surrender*.

However, even if authorities which are not courts were to be excluded from the power to issue prosecution-EAWs, there would still be a legal vacuum with regard to NAWs. Prosecution-EAWs are entirely dependent on the NAWs on which they are based. If the NAW is declared invalid, withdrawn or suspended by the competent authority of the issuing MS, the EAW cannot be executed because it is no longer based on an *enforceable* national judicial decision (Article 8(1)(c) of the FD) and, therefore, it is invalid.³¹ The right to be brought promptly before a judge in the issuing MS, as guaranteed by Article 5(3) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and by Article 6 of the Charter,³² does not apply if the requested person is arrested and detained in the executing MS with a view to surrender. Detention in the executing MS on the basis of a prosecution-EAW falls under the heading of

Cf. Adriano Martufi, "Effective Judicial Protection and the European Arrest Warrant: Navigating between Procedural Autonomy and Mutual Trust," *Common Market Law Review* 59, no. 5 (2022): 1398–1404.

³⁰ Svishtov Regional Prosecutor's Office, para. 57 only refers to the lawfulness of the NAW.

³¹ Cf. CJEU Judgement of 6 December 2018, IK (Enforcement of an additional sentence), Case 551/18 PPU, ECLI:EU:C:2018:991, para. 43.

³² Which corresponds to Art. 5 of the ECHR: Spetsializirana prokuratura (Information on the national arrest decision), para. 54.

Article 5(1)(f) of the ECHR,³³ not under that of Article 5(1)(c) and (3) of the ECHR.³⁴ This means that, under the ECHR and the Charter, the person concerned has just the right to challenge the NAW before a judge *after his/her surrender to* and *his/her arrest in the issuing MS*. In line with this, the rights conferred by Directive 2012/13³⁵ upon suspects/accused persons who are arrested or detained only apply to requested persons *once surrendered* to the issuing MS³⁶ and the issuing JA is not required to provide the requested person with the NAW and information on the possibilities of challenging that decision.³⁷

This is problematic. Even though the FD contains short and uniform time limits for the decision to execute the EAW and for the actual surrender (Article 17 and 23 FD), in practice the proceedings in the executing MS can take a considerable amount of time.³⁸ All the while the requested person cannot contest the NAW. Moreover, according to the case law of the ECtHR, the issuing MS is responsible for the lawfulness of the NAW which, after all, constitutes the grounds for the detention of the requested person in the executing MS.³⁹ Given that responsibility, it would also be in the best interest of the issuing MS to review the lawfulness of the NAW as soon as possible. However, under Article 5 of the ECHR the issuing MS is under no duty to review the lawfulness of that warrant prior to the surrender or to provide for it to be reviewed. At the time of the adoption of the ECHR there may

³³ Although Art. 5(1)(f) refers to “extradition”, this concept also encompasses surrender on the basis of the EAW. See, e.g., ECtHR Decision of 25 June 2019, *West v. Hungary*, application no. 5380/12, para. 42.

³⁴ See, e.g., ECtHR Judgement of 24 July 2015, *Čalovskis v. Latvia*, application no. 22205/13, para. 180. This is also the view of the Court of Justice: CJEU Judgement of 28 January 2021, *Spetsializirana prokuratura* (Letter of rights), Case 649/19, ECLI:EU:C:2021:75, paras. 54–55.

³⁵ OJ 2012, L 142/1.

³⁶ *Spetsializirana prokuratura* (Letter of rights), para. 61.

³⁷ *Spetsializirana prokuratura* (Information on the national arrest decision), para. 60.

³⁸ In 2021, on average the proceedings lasted 53.72 days (from arrest to the final decision) where the person concerned did not consent to surrender. However, the 90-day time limit for taking a decision on the execution of an EAW was exceeded in 6.21% of surrender proceedings. Most of those cases concerned The Netherlands, Germany and Ireland: *Statistics on the practical operation*, 14–15.

³⁹ See, e.g., ECtHR Judgement of 2 May 2017, *Vasiliciuc v. Moldova*, application no. 15944/11, para. 37.

have been good reasons to distinguish between detention on the basis of a suspicion that an offence has been committed (Article 5(1)(c)) and detention pending extradition/surrender (Article 5(1)(f)). At present, however, two circumstances militate against maintaining that distinction. Firstly, the EU is an area of freedom, security, and justice without internal borders. Whereas internal borders do not constitute any obstacle to recognising and enforcing a judicial decision from another MS, those borders should equally not constitute an obstacle to challenging (the grounds for) that decision. Secondly, given the state-of-the-art audiovisual communication methods, it is relatively easy for the authority of a MS to hear a defendant who is present in another MS.⁴⁰ Such methods could also be employed to enable the requested person to challenge the lawfulness of the NAW while he/she is still staying in the executing MS, i.e. before the surrender.

3.5. Coherence

What do we mean by coherence? For the purposes of this article we use the following definition of coherence: the application of instruments in a given individual case⁴¹ is coherent if (and only if) instruments are applied in a comprehensive, proportional, consistent, and complete way.

In order to ensure a coherent application of instruments this methodology should be followed when deciding to apply an instrument:

- take into consideration all available options and assess their effectiveness and intrusiveness (*comprehensiveness*);
- choose the option that is sufficiently effective and the least intrusive (*proportionality*);⁴²

⁴⁰ Cf. Art. 24(1) of Directive 2014/41.

⁴¹ This is about coherence at an individual level (coherence in a given case). It is also important to look at coherence at a general level. The application of instruments in a given case should at least be consistent with the application of instruments in another case. We will not dwell upon this angle in this article.

⁴² When assessing the proportionality of an available instrument, at least the following dimensions should be taken into account. Using an instrument without detention is less intrusive than using an instrument with detention (EAW). Involvement without physical presence in the requesting MS (e.g. through video-conferencing) is less intrusive than transferring the person concerned. Involvement on the basis of voluntary arrangements is less intrusive than employing coercive measures.

- do not choose an option that is incompatible with a measure already applied in the given case (*consistency*);
- as long as the objective is not achieved, do not refrain from using an option that has not yet been used and that meets the criteria of proportionality and consistency (*completeness*).⁴³

Two examples of a *lack of comprehensiveness*. The first example has already been mentioned before: the preamble to Directive 2014/41 urges the issuing JA to consider the issuance of a EIO instead of an EAW. The failure to consider that (less intrusive) alternative constitutes a lack of comprehensiveness. Comprehensiveness may also be missing when issuing a prosecution-EAW in order to further investigate a case where the address of the requested person abroad is known and there are no reasons to think that this person is hiding from justice.⁴⁴ In such a case, the requirement of comprehensiveness is not met when the option of trying to arrange for the availability of the requested person on a voluntary basis is not considered before deciding to issue the EAW.

The examples of a lack of comprehensiveness also relate to a *lack of proportionality*. If issuing a EIO is thought to be sufficient in order to have a suspect interrogated and to initiate or continue the prosecution procedure, issuing the EAW for the same purpose is not proportionate.⁴⁵ The issuance of the EAW is not proportionate, either, when the requested person is prepared to travel to the issuing MS and arrangements between the competent authority and the requested person can be made on a voluntary basis.

Two examples of *inconsistency*. The JA of a MS issues an execution-EAW on the basis of the FD while, at the same time, another authority of that MS initiates mutual recognition of the same custodial sentence on the basis of FD 2008/909/JHA.⁴⁶ Another problem is that sometimes the executing

⁴³ See in a somewhat different context Ken Kress, “Coherence,” in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson (Malden: Wiley-Blackwell, 2010), 521 ff.

⁴⁴ Wąsek-Wiaderek, “Practice in Poland,” 261–262.

⁴⁵ A EIO, in principle, does not interfere with the right to liberty: CJEU Judgement of 8 December 2020, Staatsanwaltschaft Wien (Falsified transfer orders), Case 584/19, ECLI:EU:C:2020:1002, para. 73.

⁴⁶ *Report on Eurojust’s casework in the Field of the European Arrest Warrant* (Eurojust, 2021), 61. See also: District Court of Amsterdam, Judgement of 29 June 2022, ECLI:NL:RBAMS:2022:3762.

JA refuses to surrender a requested person for the purpose of enforcing a sentence on the basis of Article 4(6) of the FD, while subsequently another authority of the same MS refuses to recognise and execute that sentence, e.g. because it requires a certificate under FD 2008/909.⁴⁷

The requirement of *completeness* is linked to the very goal of using one or more of the available instruments, i.e. (providing assistance to) either enforcing a sentence or conducting a criminal prosecution. In our definition, the application of instruments in a given individual case is not coherent as long as this goal is not achieved and at least one instrument remains that is proportional and consistent with other instruments already applied. In this way, the concept of “coherence” does justice to the overarching objective of the EU instruments on judicial cooperation in criminal matters: combatting impunity.⁴⁸

Which other options than issuing an EAW are available to get a sentence executed or a criminal prosecution implemented? In our view, at least the following options should be taken into account when deciding on the issuance of the EAW, insofar as they are applicable to the case at hand: the EIO, the European Supervision Order (ESO), mutual recognition of a sentence (FD 2008/909), a transfer of criminal proceedings to another MS,⁴⁹ making arrangements with the requested person on a voluntary basis and summoning the requested person on his/her address abroad.

As far as we can see at the moment the fact that different authorities are competent with regard to the different instruments available is one of the most important obstacles to a coherent application of those instruments. A prosecutor, e.g., might be competent to issue the EIO where a court is competent to issue the EAW. Further research has to be carried out and will actually be conducted within the framework of a project funded by the EU,

⁴⁷ *Report on Eurojust's casework*, 30.

⁴⁸ See with regard to the EAW e.g. CJEU Judgement of 8 December 2022, CJ (Decision to postpone surrender due to criminal prosecution), Case 492/22 PPU, ECLI:EU:C:2022:964, para. 74.

⁴⁹ See, e.g., the recent proposal of the EC for rules on the transfer of criminal proceedings between Member States: COM(2023) 185 final.

that will deal with the issue of coherence in the application of instruments of the cooperation in criminal matters within the EU.⁵⁰

3.6. Relationship between Proportionality, Effective Judicial Protection, and Coherence

In our definition, a coherent application of the available instruments implies an assessment of the proportionality of each of those instruments in a given case. Furthermore, both of those concepts relate to the concept of effective judicial protection in the sense that more coherence leads to more proportionality and to a more consistent use of instruments which, ultimately, contributes to strengthening the position of the requested person.

4. Amending the Current Procedure: Specifications and Implementation⁵¹

The ideas mentioned before are far from ready to be implemented. Describing amendments to the current arrangements in such detail that they are ready to be implemented is outside the scope of this article and requires further research. We will limit ourselves here to listing some specifications for such amendments, which can be used as a starting point. The list is not exhaustive and is only meant to illustrate the direction of the way forward. We'll also give an outline of implementation efforts required.

4.1. Guiding Principle: Adjusting the Room to Manoeuvre of JAs

One could adopt the guiding principle that there should be less flexibility available for issuing JAs and more flexibility for executing JAs in order to do justice to the requirements of proportionality and effective judicial protection and to realise a more coherent application of the available instruments.⁵² After all, once the issuing JA has chosen which instrument to apply, the principle of mutual recognition entails that this choice is locked

⁵⁰ *Mutual Recognition 2.0 (MR 2.0)* will be carried out by experts from Germany, the Netherlands, Poland and Spain.

⁵¹ See further: Barbosa et al., *Improving the European Arrest Warrant*, 275–308; André Klip, “A Next Level Model for the European Arrest Warrant” *European Journal of Crime, Criminal Law and Criminal Justice* 30, no. 2 (2022): 107–126.

⁵² See: Vincent Glerum, *Tussen vrijheid en gebondenheid. Het Europees aanhoudingsbevel 2.0* (Deventer: Wolters Kluwer, 2022).

in. Especially the examination of proportionality in the context of issuing the EAW should be more governed and bound by legislation and more judicial protection in the issuance procedure should be provided for. With regard to the execution procedure, the executing JA should have more possibilities and flexibility to engage in a dialogue with the issuing JA about other options than executing the EAW if it could lead to a better outcome.

4.2. Issuing the EAW

- Before issuing the EAW the possibility of other measures should be taken into consideration, as the following examples illustrate.
 - Is there a known address of the required person abroad? If so, then try to make arrangements on a voluntary basis. Of course there are exceptions to this rule, e.g., if for some reason this option is doomed to fail or if for reasons of urgency it is not feasible to first try other measures than issuing the EAW.
 - Is it possible to hear a requested person by means of video-conferencing and would this suffice? If so, then refrain from issuing the EAW.
 - Is it viable to have a custodial sentence recognised by the MS where the requested person resides? If so, then the issuance of the EAW is not the best option since it is more intrusive and also more cumbersome for competent authorities.
- Criteria for the use of the available options should be aligned.
- The competence in respect of the available options should be aligned by allocating it to the same authority or by putting in place effective coordination mechanisms.
- The EAW-form should contain a section concerning proportionality in order that the issuing JA is confronted with the duty to assess proportionality when deciding on the issuance of the EAW.

4.3. Executing the EAW

- It should be possible for the requested person to challenge, during the execution procedure, the NAW on which the prosecution-EAW is based and/or the EAW itself (prosecution as well as execution-EAW), e.g. by using video-conferencing or another distance communication technology. After all, with the passage of time the factual and legal

situation may change, which may have consequences for its assessment, as the following examples show.

- Although not a resident, the requested person has become settled in the executing MS; consequently, transferring the criminal proceedings from the issuing MS to that MS should be considered.
- The requested person proposes that he or she will attend his or her trial in the issuing MS on a voluntary basis.
- The requested person wants to prove that the suspicion against him or her is unfounded and groundless because of new evidence.
- There should be a mechanism for involving the issuing JA directly in the execution procedure, preferably through video-conferencing or another distance communication technology, thus ensuring a real dialogue⁵³ or even a “trilogue” if the present bullet is combined with the previous one.
 - As under the Directive on the EIO (Article 6(3)), the executing JA should be able to voice its doubts about proportionality to the issuing JA. The issuing JA should be able to reconsider the issuance of the NAW and/or the EAW, to replace a prosecution-EAW with the ESO or EIO or to arrange for the transfer of the criminal procedure to the executing MS, *ex officio*, at the request of the executing JA or on the basis of what the requested person puts forward.

4.4. Implementing Issues

Some of the improvements may require amending the existing legal framework and others can be implemented within that legal framework.

⁵³ Of course, there is the instrument of Art. 15 of the FD (providing/requesting supplementary information). But a more direct involvement and especially a direct ‘dialogue’ between the issuing and executing JAs could contribute to speeding up the proceedings, to better judicial protection and more coherence in applying the available options. At the same time, applying Art. 15(2) can result in a dialogue as a Dutch example illustrates. In this case, the requested person was pregnant and the issuing JA was asked whether there were adequate facilities for detaining mother and child in the issuing MS. The issuing JA announced, *proprio motu*, that it was prepared to reconsider the EAW once the co-perpetrator was heard after his surrender. In the end, the EAW was withdrawn: District Court of Amsterdam Judgement of 10 February 2023, ECLI:NL:RBAMS:2023:1023.

4.4.1. Amending the Legal Framework

Amending EU-legislation:

- Amending the FD:
 - Incorporate proportionality requirements in the issuance procedure.
 - Create possibilities for challenging the NAW and EAW and for the involvement of issuing JAs during the executing proceedings.
 - Provide for a legal basis for using video-conferencing or another distance communication technology for challenging the NAW/EAW and involving issuing JAs during the execution procedure.⁵⁴
 - Amend the EAW-form (adding a section on proportionality)
- Adopt an EU-instrument on the transfer of proceedings.⁵⁵
- Align the FD, FD 2008/909/JHA, Directive on the EIO and the FD on the ESO.

Amending the national legislation:

- Attribute the jurisdiction concerning the available instruments only to one competent authority or provide for mechanisms to coordinate between different authorities.
- Allocate the competence to issue and execute EAWs only to courts.

4.4.2. Practical Improvements within the Existing Legal Framework

- Even without amendments to national legislation, the issuing JA may coordinate ex officio with other authorities of its MS to determine which available instrument to employ.
- The national authorities may also adopt guidelines with regard to, e.g., proportionality.

⁵⁴ The EC's Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation (COM(2021) 759 final) could be amended in this vein.

⁵⁵ As stated before, the EC has submitted a proposal for the adoption of a regulation on the transfer of criminal proceedings between Member States.

5. Final Considerations

We realise that amending the EU-legislation can take a lot of time and effort. Questions of political feasibility may also arise.⁵⁶ Clearly, the EU and the MS have other priorities at the moment. Furthermore, amending EU legislation may cause Pandora's box to open. It is not without reason that to date the FD has only been amended once.

Similar circumstances apply to amending national legislation but to a lesser degree. When looking back one can observe that at the national level MS have indeed made several amendments of the legislation with regard to the issuance and execution of EAWs.⁵⁷

Considerations with regard to time and effort and to questions of political feasibility are however less convincing when it comes to implementing practical solutions in everyday practice.

Finally, we would like to put considerations of (political) feasibility into context. Such considerations should not preclude thinking about improving the EAW. Furthermore, considerations of (political) feasibility can shift under the influence of thoughts, and maybe they actually will. So, if Pandora's box is indeed to be opened, let's not trap hope inside by slamming the lid shut too quickly.

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⁵⁶ As the authors experienced at the COPEN-meeting during which they presented some findings of the *ImprovEAW* Project. It seemed as if for some amending the EU legal framework is a no-go.

⁵⁷ Barbosa et al., *Improving the European Arrest Warrant*, passim.

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