# Redefining EU Criminal Justice:

## a Vision for a Fairer System

## The ECBA's Agenda for European Criminal Justice

ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION

## We are the Go-To-Organisation for European Criminal Lawyers

**ECBA drives legal change in Europe and beyond, ensuring fair and rights-based criminal justice policies. We work closely with European and global institutions, policy-makers, and legal professionals to craft legislation that truly serves the protection of the legal profession and human rights.**

# INTRODUCTION

The European Criminal Bar Association (ECBA or the Association) is an association of independent specialist defence lawyers, with members from the European Union (EU) and Council of Europe Member States, and beyond, founded in 1998. The association is wholly independent and free from outside interference.

The ECBA is one of the main interlocutors of the European institutions on issues of criminal justice and the protection of the right of defence and fundamental rights, representing thousands of legal practitioners all around Europe through their direct affiliation to the Association as individual members, or through the collective members that participate to the life of the Association.

The ECBA welcomes the High-Level Forum on the Future of EU Criminal Justice (HLF) initiative and the active engagement with stakeholders.

Since the adoption of the roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings in 2009 the EU has developed piece by piece a strong area of justice based on mutual trust and mutual recognition. The EU justice system can be seen as a forest: a living ecosystem of diverse legal instruments that depend on one another for balance and growth. To ensure its vitality, we must nurture these connections and set out a vision that safeguards the forest and secures the future of European criminal justice.

With its members deeply engaged in the daily working of the justice system, the ECBA occupies a uniquely privileged position. Over the years the ECBA has built a set of recommendations for changes to the legal framework based on the practical experience of its members. In addition to measures required in the short term to improve issues arising from the implementation of the various framework decisions, directives and recommendations adopted over the past decades (I) the ECBA proposes a a long term vision for the European justice system (II). This paper sets out its most salient features (see the **ECBA Roadmap 2020** for full details).

When the area of freedom, security and justice was established the EU set out the highest degree of mutual trust among its Member States. This mission is yet to be completed. The distrust between Member States and judicial authorities remains to some degree. The case law developed around the question of rule of law in Poland and Hungary, around the weight of the trust to be granted to the UK after Brexit, and the concept of independent judicial

authorities illustrates this reality. From the perspective of the accused, the absence of judicial oversight due to the presence of mutual trust is not sufficiently counteracted by efficient procedural safeguards and remedies in Member States or within the EU court level.

It is important not to rely on the comfort of the current system but to strive to improve it. To make the European justice system fairer for all parties involved, to adapt it to the new challenges posed by technology and modern cross-border criminal activities. To inspire domestic justice systems to raise minimum standards. To increase the trust of European citizens in its justice area. To set out a vision that both inspires Member States and strengthens criminal justice systems across the EU, while reconnecting individuals with the European ideal and rebuilding trust throughout the Union.

# I. The EU criminal justice legal framework, the protective embrace of the forest's trees

The current legal framework was instituted to ensure basic standards and procedural safeguards in criminal justice. The forest of legislation was designed to protect its inhabitants from criminal behaviour and ensure their defence rights. One of the oldest trees in the forest, the European Arrest Warrant Framework Decision, requires a trim to flourish (a), while the emerging seedling of mutual recognition of refusal decision, requires nurturing (b).

## a. Improving the European Arrest Warrant system

From a Member State's point of view, the European Arrest Warrant (**EAW**) system created by Framework Decision 2002/584/JHA is a success story. This is less certain from the defence's perspective. Deprivation of liberty across borders, by means of EAW, and the rights of those affected by such measures, have been the focus of the ECBA for decades. ECBA members deal with persons affected by such measures on a daily basis. The rights of such persons are very limited in an area of law that was historically deemed to be an affair between states. Although the requested person's fundamental rights have been subject to increasing recognition, this change has been very gradual, and in practice the rights of such persons are still extremely limited. This is the case even within the EU, where natural persons benefit from rights enshrined in the Charter of Fundamental Rights (**CFR**) and the European Convention on Human Rights (**ECHR**) which are directly effective in the legal orders of the Member States.

The ECBA makes a series of proposals to ensure the protection of fundamental rights within the EAW system and improve the equality of arms in execution of EAWs. A cornerstone of the ECBA's proposals is the increased inclusion of the proportionality principle in EAW proceedings and interoperability with other mutual recognition instruments such as the European Investigation Order (**EIO**) or European Supervision Order (**ESO**).

### Proportionality

Just as with pre-trial detention provisions in a domestic code of criminal procedure, criticism and reform of the EAW cannot be undertaken without looking into the system as a whole. Any reform must address the full set of judicial cooperation instruments in criminal matters, in particular the mutual recognition instruments, and stressing the subsidiary relationship between the EAW (as the more restrictive measure for citizen's rights to liberty, and other less coercive measures. The EAW Framework Decision is not an isolated tree; its care must also extend to its roots and its connections with the surrounding forest. Yet what we see today is that the EAW has been generously watered, while other trees remain in its shadows, at risk of withering.

The EAW was devised a streamlined instrument at the service of law enforcement and prosecution. It means that, although there are other options available, authorities default to the use of the EAW. There are many drawbacks to this – not only the personal cost to the accused, who is often a self-employed person plucked out of their everyday life, but also to their families, whom they frequently support. In addition to these considerations, there is the cost to the public purse of legal fees and transport costs involved in unnecessary surrenders.

The ECBA advocates for a explicit and robust subsidiarity test at the issuing stage. It should be mandatory for Member States to seek alternative measures to the EAW. This is particularly important in cases where EAWs are issued for the purpose of interviews or in cases where it is unlikely that a longer prison term will be imposed.

In addition, a reinforced and specific proportionality test should be applied at the issuing stage. The current proportionality test should be based not on the maximum sentence possible to assess the "seriousness of the offence" but on the likely sentence

imposed on the requested person for the alleged offence. For example, in Ireland, the maximum sentence for theft is 10 years of imprisonment.[1] However, it is unlikely that a first time offender would be convicted to an effective custodial sentence. Yet if an EAW is issued – it will fulfill the abstract proportionality test. Further, a provision should be added, similar to that in the EIO Directive, to allow the executing state to consult with the issuing state on the application of less restrictive measures. This will further the use of alternative instruments that are currently underused.

## Human Rights as grounds for refusal

The refusal to surrender on basis of human rights issues is not a mandatory ground. This situation is difficult to comprehend in this century in a legal system where the CFR and the ECHR are fully applicable.

Detention conditions are the most common grounds of refusal to surrender based on human rights. In the landmark Court of Justice of the European Union's (**CJEU**) decision is Aranyosi and Caldararu[2] the Court recognised that mutual recognition does not mean that persons should be surrendered without regard to their fundamental rights. The ECBA proposes that the ground of refusal to surrender based on human rights be made explicit in the framework decision (instead of relying on the preamble of the instrument and a general provision).

## Global defence and legal aid

All judicial cooperation instruments, but in particular the EAW, should ensure the availability of global defence and legal aid. The proper defence of the execution of an EAW requires the intervention of legal representation not only in the executing state but also in the issuing state. The cost incurred by a global defence is not always affordable for an accused or defendant and few Member States provide legal aid for such purposes.

The person arrested pursuant to an EAW should be able to contest the issuing of the EAW in the issuing Member State and the issuing court should organise a hearing (by video-link) of the requested person in order to enable it to gain information on the exact circumstances of the person and to perform a new assessment on whether the EAW should be maintained or replaced by other measures. In order for the requested person to be able to challenge the EAW in an effective and timely way in both Member States, he or she needs to have access to legal assistance in both Member States. In this regard, the right to access to a lawyer in the issuing state, as it is configured in Article 10(4) Directive 2013/48/EU, splits the role of the issuing state lawyer in an artificial manner, which might have impact on the ability of the person to make use of available legal safeguards and remedies in the issuing state, while still present in the executing state, in particular if the person has to rely on legal aid.

There is a general issue in relation to legal assistance and legal aid in EAW proceedings. Some countries do not have special provisions for EAW cases (and have not implemented the existing Article 10(4) Directive 2013/48). Hence funding for legal aid does not account for the particular burden of a cross-border defence and the additional costs. The ECBA also notes that in many countries, there is lack of specialisation of defence lawyers (which is not required, not even for criminal law) and it is not possible to choose a defence lawyer. This makes it extremely difficult to ensure that persons sought by an EAW will be in an adequate position to defend their rights.

### THE ECBA PROPOSES:

- **The introduction of a strengthened, case-specific proportionality test at the issuing stage, encompassing an assessment of the seriousness of the offense based on a realistic estimate of the potential sentence, as well as consideration of alternative measures (EIO/ESO).**
- **The introduction of a consultation procedure upon initiative of the executing state in EAW cases similar to that in EIO to trigger the use of alternative measures.**
- **To enshrine human rights as a ground of refusal to surrender.**
- **A fully fledged right to global defence and legal aid.**
- **A mandatory hearing by video-link after arrest as to allow the issuing state to either maintain the EAW or request an alternative measure.**
- **To ensure access to the case file in the issuing state without delay following the arrest in the executing state**
- **To ensure mutual recognition of decisions refusing surrender.**
- **To create rules for summons and hearings by video-links in cross-border cases to to avoid the use of the EAW for investigation.**
- **To ensure a right to appeal a decision to surrender in the executing state.**

1 Section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.
2 CJEU, C-404-15, 5 April 2016.

## b. Recognition of refusal decisions, a seedling to nurture

While improving the interconnection of the various EU instruments is a long term project, it is necessary to consider short term issues currently leading to disadvantages for EU citizens.

The current lack of rules around the mutual recognition of decisions to refuse surrender of persons targeted by an EAW and more generally around extradition decisions raises fundamental and defence rights issues.

As explained above the rights of arrested persons in extradition or EAW cases are very limited. In particular, there is no mutual recognition of refusal decisions by other Member States. The absence of a binding effect of such decisions is a reality even where they are pronounced by Member States applying autonomous EU law or ECHR law which has the same content throughout Member States justice systems. As a result, even if a requested person's extradition to a third state has been refused on the basis of an EU-wide right such as ne bis in idem or the right not to be politically persecuted in Member State A, they may be arrested, detained or surrendered when they enter Member State B (and all further Member States).

Additionally, any time spent in detention by the requested person in Member State A will not automatically be discounted from the time spent in pre-trial detention in Member State B or even taken into account if ultimately surrendered to the issuing Member State. An individual making use of the right to free movement is thus at risk of repeated arrest, with a risk of detention for several months in each Member State on the basis of the same EAW or extradition request. Finally, if the requested person chooses to risk arrest and enter another Member State, they will require expert legal counsel in each and every Member State to defend themselves against extradition or surrender. This will incur significant costs and effectively make it impossible to enjoy their freedom of movement under art. 21 of the Treaty on Functioning of the European Union.

See the **ECBA's Statement on Mutual Recognition of Extradition Decisions** for further details.

**THE ECBA PROPOSES:**

- **For the executing Member State's decision of refusal to surrender/extradite based on the non bis in idem principle, on grounds pursuant to recital 12 of the EAW Framework decision or the proportionality principle to be a permanent decision binding on all Member States.**
- **For the executing Member State's decision of refusal to surrender/extradite based on fundamental grounds such as risk of ill-treatment contrary to art. 19 of the CFR, or risk of flagrant denial of justice or fair trial to be binding on all Member States until evidence that the risk no longer exists is provided.**
- **To provide necessary procedural safeguards to ensure the mutual recognition of refusal decisions.**
- **To prohibit the processing of data such as Schengen Information System (SIS) alert or Interpol's red notice when a permanent refusal decision has been issued and to provide for judicial remedies for breaches of such prohibition.**
- **To create an EU level independent and harmonised mechanism to regulate issuance and subsistence of SIS alert.**

# II. Striving towards a robust criminal justice system, a healthy forest to ensure our future

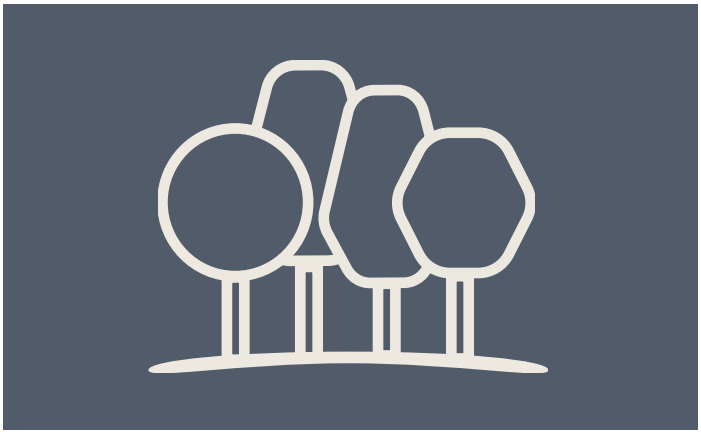
A forest that can withstand storms or wildfires is one forest with strong, deep roots, connecting the trees. Similarly, the strength of a justice system lies in the coherence of its individual pieces of legislation and the way they interact. Yet, caring for established trees does not mean that young saplings (such as regulation on video conferencing) should be neglected (a). However, taking care of existing trees does not mean that young sapling, such as regulation around video-conferencing, must be neglected (b).

## a. Interoperability of the legal instruments, the roots of the forest

The European criminal justice system was built instrument by instrument, tree by tree creating a fragmented assemblage of law open to incoherences, contradictions and gaps. Despite the advances with the roadmap 2009 directives (ABC measures) the EU still lacks a coherent and equal system of procedural rights. While the existing instruments might give the impression of a developing European code of criminal procedure, this is far from the reality. In practice, individuals and corporations continue to face significant disparities in legal protections depending on where they are investigated or prosecuted.

Since the adoption of the ABC measures the EU justice system has evolved dramatically: the European Public Prosecutor's Office (EPPO) is now in operation, mutual recognition instruments such as EAW and EIO are widely used, and the mandate for both Europol and Eurojust have grown – with further expansion under consideration.

In this context, it is necessary to protect the EU's commitment to justice and fundamental rights by ensuring legal certainty, consistent procedural protections or access to EU-funded legal aid. To move toward a truly European framework of procedural safeguards and defence rights the EU must adopt a coherent approach to their protection or at the very least ensure the interoperability of the various instruments. No decision adopted on basis of a specific EU instrument should be in violation of a right enshrined in another. No instrument should be used or considered in isolation, like a tree on a desert island, rather as one of the other many trees in the forest, ensuring the ecosystem remains balanced.



### THE ECBA PROPOSES:

- **The development of an appropriate instrument regrouping all EU instruments adopted in the area of criminal law and mutual cooperation, including case law developed by the CJEU and the ECtHR.**
- **At the very least, to amend the existing instruments by including provisions that define the articulation of the different instruments and their subisdiary application where proportionality must be respected, and a mandatory mention in each new legal instrument adopted that it must not lead to the adoption of decision in violation of other EU legal instruments.**
- **The development of legislation concerning the gathering of evidence in cross-border cases.**
- **The promotion of the digitalisation of justice in compliance with procedural safeguards and defence rights.**
- **The adoption of common standards on lawyer-client privilege in all EU cross-border cases.**
- **The adoption of pre-trial detention standards**
- **To ensure effective remedies, including exclusionary rules for evidence obtained in violation of rights.**
- **To consider and organise a comprehensive assessment of the direct access to the CJEU by EU citizens to assert their EU based rights and obtain redress for violations thereof.**
- **To provide a statutory basis for acquis developed by case law of the CJEU.**

We refer to the ECBA's statements on **Detention Conditions and Procedural Rights in Pre-trial Detention**, **Digitalisation of Justice** and **AI and Judicial system – the Independence of judges and lawyers**.

## b. Encouraging fair use of video-conferencing in criminal cases, a sapling to grow

The Covid-19 pandemic acted as a catalyst for the development of remote technologies, in particular video-conferencing. Over the last 5 years these technologies have become ingrained in the day-to-day business of the justice system. It is not deniable that video-conferencing presents a number of advantages in cross-border cases. However, experience shows that the use of remote technologies carries a serious risk of undermining the suspect's or accused's right to a fair trial (including the right to participate personally in proceedings and to exercise defence rights) if such means are applied generally and without the necessary legal, procedural, and technical safeguards. Virtual attendance is not equivalent to actual physical presence and, as in any vital affairs of the human life in which people seek direct and in-person contact, this should no less be the case for criminal proceedings in which the deprivation of liberty and other essential aspects of human life are ruled upon.

A distinction must be made between the use of remote hearing in domestic and cross-border cases, and the use of remote technology for conducting interviews of the suspect/accused in the pre-trial stage of the proceedings and its use in trial hearings. This distinction is necessary where the seriousness of the interference with fair trial and defence rights will vary in each situation.

We refer to the ECBA's **Summary of survey to criminal defence lawyers on the use of video-conferencing in criminal and European Arrest Warrant Proceedings** and **Statement of Principles on the Use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World** for details of our policies.

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### FOR CROSS-BORDER CASES THE ECBA PROPOSES:

- **To consolidate the existing data from previous studies and organise a comprehensive assessment of the reasons for the under-use of remote video-technology.**
- **To establish the right of the accused to participate by video-link, at least in the cases in which this is the most proportionate solution.**
- **To develop suitable and compatible legal standards for remote participation where that is permitted and appropriate.**
- **To promote the development of appropriate and compatible technical infrastructures and solutions.**
- **To consider the issues relating to the transparency and privacy in the use of remote technology in criminal trials.To provide EU acquis with a legal basis when grounded in case law.**

### FOR DOMESTIC CASES, THE ECBA PROPOSES:

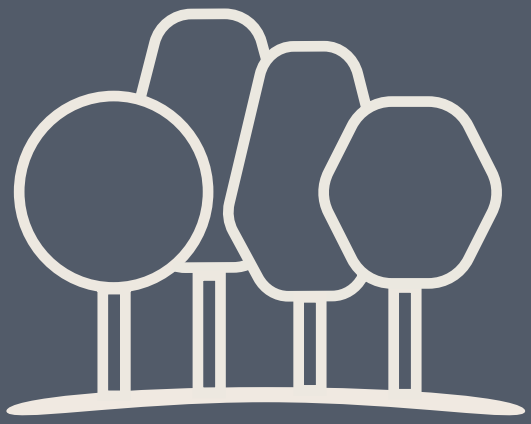
- **To organise a comprehensive assessment of the use of remote video-technology in domestic criminal cases with a view to assessing technical and legal issues, in particular the degree to which they are available, their quality, the degree of technology literacy required by users, and their impact on the right to a fair trial and the rights to defence.**
- **To establish clearly the right of the accused to be physically present at their trial and to prohibit the mandatory video-link participation of an accused in their trial in domestic cases.**
- **To develop appropriate legal standards for remote participation where that is permitted and appropriate.**
- **To promote the development of appropriate technical infrastructures and solutions allowing true-to-life remote participation, and the exercise of defence rights in this context.**
- **To consider the issues relating to transparency and privacy in the use of remote technology in criminal trials.**

# CONCLUSION

**As stated by the ECBA Chairperson, "claiming that no further EU action is needed is not only short-sighted but also undermines the Union's commitment to justice and fundamental rights. There is no such equal and effective protection throughout the EU. Even well-established rights at national level become blurred in cross-border or EU-led prosecutions. This legal uncertainty weakens both the protection of rights and the effectiveness of justice".**

**The ECBA is concerned by the lack of enthusiasm and foresight manifested by certain legislative and governative actors. It is essential to curate the current legal framework to ensure it will sustain the passage of time and remain relevant in the future.**

**A new EU roadmap would provide a vision for the future, for the vitality of the forest, by closing gaps, ensuring interoperability of the instruments, adapting to emerging trends and promoting strong procedural safeguards. The ECBA calls on stakeholders to take the opportunity of the High Level Forum to develop a strong and ambitious roadmap for the future of the EU justice area; without a clear plan the trust in the EU criminal justice system and the Union more widely will be eroded and the trust necessary for mutual cooperation will be at risk. Reaffirming the central place of the rule of law and fundamental rights within the EU criminal justice system – at the very heart of the forest – is essential to the survival of the Area of Freedom, Security and Justice.**



**For further information on any aspect of this document, please contact the ECBA at secretariat@ecba.org**

**European Criminal Bar Association**
An association of
European defence lawyers

Mondriaantoren 19th floor
Amstelplein 40
1096 BC Amsterdam | The Netherlands
www.ecba.org
Mail: secretariat@ecba.org
Fon +31 20 782 02 08

ECBA