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## DIRETTRICE

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## Indice-Sommario 2026, n. 1

### Editoriale

La *vis expansiva* del diritto dell'Unione europea con riguardo agli *status* personali e familiari p. 1  
*Maria Caterina Baruffi*

### Saggi, Articoli e Commenti

La Carta sociale europea alla prova della rivendicazione dei diritti sociali da parte dei beneficiari di protezione internazionale con particolare riferimento al diritto alla salute e alla situazione dei rom in Italia p. 12

*Raffaele Cadin, Valentina Zambrano*

Some reflections about due diligence by the State in the protection against gender-based violence in Europe p. 43

*Elena Martínez García*

European Arrest Warrant in (post) pandemic times: challenges and opportunities p. 56

*Esther Montero Pérez de Tudela, Pilar Martín-Ríos*

(Im)mobility in the context of climate change: between legal challenges and legal experiments p. 82

*Marie Courtoy, Francesco Luigi Gatta*

Sulla tutela risarcitoria per le vittime dei crimini internazionali in Siria nello spazio giudiziario europeo p. 118

*Francesca Tammone*

### FOCUS

#### **Vulnerabilità legate al genere: nuove sfide per la tutela di migranti e richiedenti asilo**

*Il focus raccoglie i contributi selezionati a seguito di call for papers promossa dal Gruppo di interesse "Diritto internazionale ed europeo delle migrazioni e dell'asilo (DIEMA)" della Società italiana di Diritto internazionale e di Diritto dell'Unione europea (SIDI).*

Introduction to the Focus 'Gender-related vulnerabilities: new challenges for the protection of migrants and asylum seekers' p. 144

*Sara Tonolo*

Dal contesto afghano a due nuovi principi di rilevanza generale: il rafforzamento della dimensione di genere nella nozione di rifugiato dopo la sentenza della Corte di giustizia dell'UE *AH e FN* del 4 ottobre 2024 p. 154

*Mariano Manuel Bartiromo*



- Applying intersectionality to gender discrimination in International refugee law: the case of women asylum seekers p. 187  
*Elisabetta Belardo*
- Il nuovo Patto europeo su migrazione e asilo alla luce della Convenzione di Istanbul del Consiglio d'Europa: verso l'incorporazione di una prospettiva sempre più sensibile al genere? p. 210  
*Sara De Vido*
- Dialogue across Courts: the CJEU, the ECtHR, and the rights of migrant women p. 235  
*Sanna Elfving*
- L'emersione delle vulnerabilità di genere nello *screening* pre-ingresso: quale tutela effettiva per le donne vittime di tratta? p. 258  
*Elisabetta Lambiase*
- Género y desprotección en frontera: retos del Pacto europeo de migración y asilo y en el archipiélago canario p. 288  
*Marina Lara Orin López*
- Orientamento sessuale e tutela dei diritti fondamentali: quale tensione con le esigenze di valutazione della credibilità del richiedente protezione internazionale? p. 301  
*Attilio Senatore*
- Forced labour, trafficking, and structural exploitation of women migrant workers: International legal perspectives p. 332  
*Silvia Solidoro*



## EUROPEAN ARREST WARRANT IN (POST) PANDEMIC TIMES: CHALLENGES AND OPPORTUNITIES

Esther Montero Pérez de Tudela \*, Pilar Martín-Ríos\*\*

SUMMARY: 1. Introduction. – 2. Impact of COVID-19 on European Arrest Warrant proceedings. – 2.1. Delays in EAW-related proceedings: requests for supplementary information and physical impossibility of surrender the requested person. – 2.2. Extension of the provisional or precautionary measures. – 2.3. Necessary promotion of alternatives to detention and alternatives to the EAW. – 2.4. Necessary development of the use of technologies and increased use of videoconferencing in court proceedings. – 2.5. Impact on procedural and fundamental rights. – 3. Conclusions and recommendations.

### 1. Introduction

The European Arrest Warrant (EAW) represents a pivotal legal instrument within the European Union (EU) designed to facilitate the extradition of individuals between Member States. Established through Council Framework Decision 2002/584/JHA (FD 2002/584) in 2004, the EAW sought to replace the traditionally slow and bureaucratic extradition procedures with a more efficient system of judicial cooperation, underpinned by the principle of mutual trust among EU Member States.<sup>1</sup>

Before the adoption of the EAW, extradition procedures within the EU were primarily governed by a series of bilateral and multilateral treaties. One of the key instruments in this regard was the European Convention on Extradition of 1957, enacted by the Council of Europe. This treaty provided the foundational framework for extradition cooperation, but each State retained significant discretion in applying its own conditions and criteria for extradition. Consequently, the procedures were often characterized by delays, with

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<sup>1</sup> European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2021, 2023*, [https://commission.europa.eu/document/download/ed06c964-5e23-469f-8ba2-8ca4bb768e4b\\_en?filename=SWD\\_2023\\_262\\_1\\_EN\\_document\\_travail\\_service\\_part1\\_v2.pdf](https://commission.europa.eu/document/download/ed06c964-5e23-469f-8ba2-8ca4bb768e4b_en?filename=SWD_2023_262_1_EN_document_travail_service_part1_v2.pdf).

rigorous requirements such as the principle of dual criminality – where the offense for which extradition is requested must be recognized as a criminal act in both jurisdictions – and the potential for refusal based on political grounds or the nature of the offense.<sup>2</sup>

Thus, on that basis, FD 2002/584 on the EAW establishes a more streamlined system, based on the principle of mutual trust, promoting direct contact between judicial authorities, establishing shorter deadlines, and eliminating some formalities (such as the elimination of the need to verify double criminality in relation to a list of crimes).<sup>3</sup> This tool has become one of the most widely utilized instruments in international criminal justice cooperation, particularly within the EU.<sup>4</sup> According to a report by the European Commission<sup>5</sup>, the EAW accounts for a significant proportion of cross-border judicial cooperation, particularly in relation to the apprehension and surrender of suspects involved in serious crimes such as terrorism, human trafficking, and organized crime. Therefore, EAW is considered one of the most successful examples of mutual recognition in the realm of criminal law, having facilitated the arrest and surrender of thousands of individuals since its implementation, thus streamlining judicial processes across Member States.<sup>6</sup>

However, the EAW is not exempt from criticism, especially regarding certain aspects, such as respect for fundamental rights, respect for the principle of proportionality, and respect for the principle of sovereignty of Member States, among others.<sup>7</sup> In this regard, without a doubt, one of the most extensive debates within the EAW framework concerns

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<sup>2</sup> European Parliament, *European arrest warrant: European implementation assessment*, 2020, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS\\_STU\(2020\)642839\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU(2020)642839_EN.pdf)

<sup>3</sup> European Parliament, *European arrest warrant: European implementation assessment*, cit.; M. PLACHTA, *European Arrest Warrant: Revolution in Extradition?*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2003, no. 2, pp. 178-179; Council of the European Union, *Conclusions on the European arrest warrant and extradition procedures – current challenges and the way forward 2020/C 419/09* (OJ C 419, 4.12.2020), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XG1204\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XG1204(02)); A. MARTUFI, *Prison Conditions and Judicial Cooperation in the EU – What Future for the European Arrest Warrant?*, in *European Criminal Law Review*, 2021, no. 2, p. 135; M. FEDOROVA, S. GLESS, *The European Arrest Warrant: two decades of visions and legal reality. Introduction to Symposium of EAW 20 years on*, in *Transnational Criminal Law Review*, 2024, no. 1, pp. 1-17, <https://doi.org/10.22329/tclr.v3i1.9314>, p. 1. In the same sense, sentences of the CJEU, Case C-396/11, *Radu* (Judgment of 29 January 2013, paras 33 and 34) and Case C-399/11, *Melloni* (Judgment of 26 February 2013, paras 36 and 37).

<sup>4</sup> European Judicial Network, *Conclusions from the 60<sup>th</sup> EJN Plenary Meeting (Stockholm, Sweden, June 2023). Conclusions of the EJN: current developments on the application of the EAW*, 2023.

<sup>5</sup> European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2020*, 2022, [https://commission.europa.eu/document/download/2b235ac5-fd2c-470a-b5f8-1c4b2384263a\\_en?filename=swd\\_2022\\_417\\_1\\_en\\_document\\_travail\\_service\\_part1\\_v2.pdf](https://commission.europa.eu/document/download/2b235ac5-fd2c-470a-b5f8-1c4b2384263a_en?filename=swd_2022_417_1_en_document_travail_service_part1_v2.pdf).

<sup>6</sup> Council of the European Union, *Conclusions on the European arrest warrant and extradition procedures – current challenges and the way forward 2020/C 419/09* (OJ C 419, 4.12.2020), cit.; European Parliament, *European arrest warrant: European implementation assessment*, cit.

<sup>7</sup> L. KLIMEK, *European arrest warrant*, Springer, 2015, pp. 37, 38 and 141; S.A. BLOKS, T. VAN DEN BRINK, *The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant*, in *German Law Journal*, 2021, no. 1, p. 51. DOI:10.1017/glj.2020.99; E. XANTHOPOULOU, *The European Arrest Warrant in a context of distrust: Is the Court taking rights seriously?*, in *European Law Journal*, 2022, Volume 28, no. 4-6, p. 231; P. BÁRD, S. CARRERA, M. STEFAN, *The Judicialisation of the European Arrest Warrant: Rule of Law and Fundamental Rights as Preconditions for Merited Mutual Trust*, Centre for European Policy Studies (CEPS), 2023, p. 4.

the necessary protection of fundamental rights.<sup>8</sup> Certainly, the European Commission highlighted in the report on the implementation of the EAW FD in 2011, that the EAW system was far from perfect, placing special concern on the divergent application of the proportionality check in the issuing State resulting in considerable amount of EAWs for relatively minor offences and the protection of fundamental rights of persons subjected to EAWs<sup>9</sup>, concerns that still exist today<sup>10</sup>. Despite the advancements represented by the EAW, issues persist with the varying transposition of the FD by Member States and concerns related to the protection of the fundamental rights of individuals affected by extradition procedures.<sup>11</sup>

Some of these “old” concerns and difficulties have been exacerbated by the arrival of the pandemic, which, while having a general impact on all justice systems and therefore

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<sup>8</sup> M. JIMENO-BULNES, *The application of the European Arrest Warrant in the European Union. A general assessment*, in *The Future of Police and Judicial Cooperation in the EU*, Leiden, 2010, <https://doi.org/10.1163/ej.9789004182042.i-414.95>, pp. 307-308; M. JIMENO-BULNES, *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?*, in *SSRN Electronic Journal*, 2010, 1556-5068, p. 2; E. RALLI, *The principle of mutual recognition based on mutual trust and the respect for fundamental rights: The case of the framework decision on the European Arrest Warrant*, in *European Law Institute, Annual Conference and General Assembly*, 2017, [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/YLA\\_Award/Submission\\_ELI\\_Young\\_Lawyers\\_Award\\_Evgenia\\_Ralli\\_2017.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/YLA_Award/Submission_ELI_Young_Lawyers_Award_Evgenia_Ralli_2017.pdf), pp. 3-4; V. TERZIEV, M. PETKOV, D. KRASTEV, *European arrest warrant and human rights of the accused // Proceedings of SOCIOINT 2018- 5th International Conference on Education, Social Sciences and Humanities*, 2018, 2-4 July, Dubai, U.A.E, International Org; Fair Trials, *Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant ('EAW') proceedings*, 2021, <https://www.fairtrials.org/articles/publications/reinforcing-procedural-safeguards-and-fundamental-rights-in-european-arrest-warrant-proceedings/>; Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, 2021, [https://gmr.lbg.ac.at/wp-content/uploads/sites/12/2021/09/eaw-alt\\_report.pdf](https://gmr.lbg.ac.at/wp-content/uploads/sites/12/2021/09/eaw-alt_report.pdf). Not surprisingly, as highlighted by M.C. CARTA (*Dignità umana e tutela dei detenuti nello "spazio di Giustizia" dell'Unione Europea*, in this *Journal*, 2020, no. 2, p. 63), “the European Union now seems to be moving increasingly towards the view that respect for fundamental rights (especially those of so-called vulnerable individuals, including prisoners) should be seen not as a limitation on the development of the European area of justice, but rather as a ‘constitutive element of a relatively homogeneous common area among the Member States of the Union’ (free translation of: “l’Unione europea pare oggi muoversi sempre più nella prospettiva secondo cui il rispetto dei diritti fondamentali (soprattutto dei c.d. soggetti deboli, tra cui rientrano i detenuti), più che limite al perfezionamento dello spazio europeo di giustizia, debba assurgere a “strumento costitutivo di uno spazio comune, relativamente omogeneo, fra gli Stati membri dell’Unione”).

<sup>9</sup> European Commission, *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2011)175 final, 2011.

<sup>10</sup> Fair Trials, *Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant ('EAW') proceedings*, cit.; Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, cit.

<sup>11</sup> M. FEDOROVA, S. GLESS, *The European Arrest Warrant: two decades of visions and legal reality. Introduction to Symposium of EAW 20 years on*, cit., p. 16; European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2021*, cit.

in the international legal cooperation context<sup>12</sup>, also caused specific obstacles and challenges in relation to the EAW<sup>13</sup>.

This paper, carried out within the framework of the European project *Promoting fundamental rights in (post) pandemic times in cross border proceedings*, known as EPHEBUS Project, analyzes the effects of the pandemic on the EAW, specifically exploring its impact on procedural and fundamental rights, among other aspects. Following this brief introduction, the key points of FD 2002/584 are briefly outlined. The most notable impacts of the pandemic on the procedure contemplated in the aforementioned FD are then explained, as well as the new opportunities resulting from the pandemic situation. Finally, a series of conclusions and recommendations are outlined, based on an examination of the challenges facing the EAW and the opportunities that these circumstances have presented. It could even be said that the difficult situation we have experienced has, in a way, served to stimulate policies at European level that had been slow to get off the ground for too long. A very representative example is the “European Digital Decade” and the “Path to the Digital Decade”, which are concrete proposals from the European Commission with specific measures and roadmaps to follow, with the aim of achieving the objectives set for 2030. The work underlying these proposals was carried out by the European Commission between 2020 and 2021, i.e. immediately after the outbreak of the pandemic.

## 2. Impact of COVID-19 on European Arrest Warrant proceedings

The analysis of the situation necessarily requires an initial assessment of the data available in relation to the EAW prior to the pandemic. Official data shows that, compared to figures relating to the use of the EAW in 2017, 2018 and 2019 (i.e. before the pandemic), there was indeed a slight decline in the years directly affected by the pandemic (2020 and 2021).<sup>14</sup>

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<sup>12</sup> M.M. BOSKOVIC, S. NENADIC, *Impact of COVID-19 pandemic on criminal justice systems across Europe*, in *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 2021, no. 5, pp. 282-284, <https://doi.org/10.25234/ecllc/18307>; Eurim (Associations for European Criminal Law and the Protection of Financial Interests of the EU), *Legal effects of COVID-19*, in *European Criminal Law Associations' Forum*, 2021, no. 2, [https://eucrim.eu/media/issue/pdf/eucrim\\_issue\\_2021-02.pdf](https://eucrim.eu/media/issue/pdf/eucrim_issue_2021-02.pdf); Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary*, 2022, <https://www.eurojust.europa.eu/sites/default/files/assets/st05563.en22.pdf>; L.M. TROCAN, *The impact of the pandemic COVID-19 on the judiciary system in the European Union*, in A.A. RADULESCU (ed.), *The state of emergency and the alert of the rule of law. Legal implications of the sanitary crisis generated by the COVID-19 pandemic*, Universul Juridic, 2021, pp. 212-213; Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, 2021, <https://www.eurojust.europa.eu/sites/default/files/assets/2021-05-12-covid-19-report.pdf>; European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2021*, cit.

<sup>13</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.

<sup>14</sup> European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2020*, cit.; European Commission, *Commission staff document: Statistics on the*

However, taking into account the data collected in subsequent years, 2022 y 2023, it can be stated that after a decrease in EAWs issued by EU Member States during the pandemic, this figure has remained relatively stable.<sup>15</sup>

In order to analyse the impact of the pandemic on actual employment in the EAW, the aforementioned European EPHESUS project – implemented from February 1, 2024, to February 1, 2026 – carried out various activities to raise awareness of the proper use of the EAW. In that context, we were able to gather the opinions of more than 100 professionals with extensive experience in the implementation of the EAW across Europe.

Thus, from November 2024 to February 2025, five national events (focus group discussions) were held in Greece, Spain, Portugal, Bulgaria, and Romania, so that highly qualified prosecutors, judges, and lawyers could exchange their experiences, opinions, and best practices regarding the use of alternatives to the EAW. In total, 39 experts discussed the impact of the pandemic on international judicial cooperation, the specific challenges that arose in relation to the application of EAW in pandemic and post-pandemic times, the gaps in the protection of defense rights, the challenges in relation to digital transformation and, above all, the use of instruments alternatives to the EAW.

Between February and October 2025, three Transnational Awareness-Raising Debates (interactive seminars) were held with the aim of promoting mutual learning and developing a capacity-building strategy, providing a forum for legal practitioners to engage in dialogue, sharing expertise and good practices, and strengthening practical competencies related to EU mutual recognition instruments. These transnational debates – two held in person in Bucharest and Bulgaria, and another online – were attended by 46 professionals (judges, prosecutors, jurists and lawyers) from Portugal, Spain, Romania, Bulgaria and Greece, who contributed their experience, practical vision and best practices in relation to the use of EAW in post-pandemic times.

In addition, to complement and sustain the dialogue initiated by the aforementioned activities, the EPHESUS Consortium organized three short online events: the EPHESUS Roundtables. These events brought together a total of 73 practitioners from seven EU countries and served as a platform to foster awareness-raising and dialogue on crucial issues related to the use of the EAW and to Judicial Cooperation in the European Union. The Roundtables were organized, respectively, by the University of Seville, the Center for European Constitutional Law and the consultancy IPS\_Innovative Prison Systems (between April and November 2025).

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*practical operation of the European Arrest Warrant – 2021, cit.; European Commission, Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2022, cit.; European Commission, Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2023, cit.*

<sup>15</sup> European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2022*, 2024, [https://commission.europa.eu/document/download/32810655-fe94-44c2-9099-2813c42c9adb\\_en?filename=EAW%20Statistics%20Report%202022.pdf](https://commission.europa.eu/document/download/32810655-fe94-44c2-9099-2813c42c9adb_en?filename=EAW%20Statistics%20Report%202022.pdf); European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2023*, 2025, [https://commission.europa.eu/document/download/32810655-fe94-44c2-9099-2813c42c9adb\\_en?filename=EAW%20Statistics%20Report%202022.pdf](https://commission.europa.eu/document/download/32810655-fe94-44c2-9099-2813c42c9adb_en?filename=EAW%20Statistics%20Report%202022.pdf).

The study carried out within the framework of the Project – according to research on the subject<sup>16</sup>, official reports from EU bodies<sup>17</sup> and reports from international organizations and associations<sup>18</sup> – enabled us to identify different impacts that the pandemic has had on EAW related proceedings. These impacts can be systematically grouped into five main ideas<sup>19</sup>: delays in EAW-related proceedings: requests for supplementary information and physical impossibility of surrender the requested person; extension of the provisional or precautionary measures; necessary promotion of alternatives to detention and alternatives to the EAW; necessary development of the use

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<sup>16</sup> M.M. BOSKOVIC, S. NENADIC, *Impact of COVID-19 pandemic on criminal justice systems across Europe*, cit., p. 283; L. DORNEANU, J. MALKA, L. COECKELBERGHS, *Impact of COVID-19 on access to justice and documents*, in *ERA Forum*, 2021, no. 3, pp. 408, 410, 412, 413, 417, <https://doi.org/10.1007/s12027-021-00684-4>; W. GEELHOED, *International cooperation in time of emergency*, in P. CAEIRO, S. GLESS, V. MITSILEGAS (eds.), *Elgar encyclopedia of crime and criminal justice*, Edward Elgar Publishing, 2022, p. 2 (online version), <https://doi.org/10.4337/9781789902990.international.cooperation.emergency>; M. JIMENO-BULNES, *El impacto del COVID-19 en la cooperación judicial europea*, in *Revista Aranzadi Unión Europea*, 2020, no. 10, pp. 35-36; L. KARKANIAS, *European Arrest Warrant*, 2023, <https://ikee.lib.auth.gr/record/348161>; V.C. RAMOS, A. ANAGNOSTAKIS, A. BARLETTA, J. TEHVER, N. CANESTRINI, *European Criminal Bar Association statement of principles on the use of video-conferencing in criminal cases in a post-Covid-19 world*, in *New Journal of European Criminal Law*, 2021, no. 3, p. 477, <https://doi.org/10.1177/20322844211013541>, p. 5; M. M. ŞELEA, *International judicial cooperation in criminal matters in the context of the global pandemic*, in *Istorie, Cultura, Cetatenie in Uniunea Europeana*, 2021, no. 1, p. 447; L.M. TROCAN, *The impact of the pandemic COVID-19 on the judiciary system in the European Union*, cit., pp. 12-13.

<sup>17</sup> European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2018*, 2020, [https://commission.europa.eu/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant\\_en](https://commission.europa.eu/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant_en); Council of the European Union, *Conclusions on the European arrest warrant and extradition procedures – current challenges and the way forward* 2020/C 419/09 (OJ C 419, 4.12.2020), cit.; Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary of information compiled by Eurojust and EJM*, 2020, <https://data.consilium.europa.eu/doc/document/ST-7693-2020-REV-5/en/pdf>; European Parliament, *European arrest warrant: European implementation assessment*, cit.

<sup>18</sup> Eucri (Associations for European Criminal Law and the Protection of Financial Interests of the EU), *Legal effects of COVID-19*, cit.; Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.; Fair Trials, *Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant ('EAW') proceedings*, cit.; Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, cit.; Eurojust (European Union Agency for Criminal Justice Cooperation), *Case-law by the Court of Justice of the European Union on the European Arrest Warrant*, 2023, <https://www.eurojust.europa.eu/publication/case-law-court-justice-european-union-european-arrest-warrant-october-2023>; European Criminal Bar Association, *Statement of principles on the use of video-conferencing in criminal cases in a post-COVID-19 world*, 2020, [https://www.ecba.org/extdocserv/20200906\\_ECBASstatement\\_videolink.pdf](https://www.ecba.org/extdocserv/20200906_ECBASstatement_videolink.pdf).

<sup>19</sup> The background information for this work has its origin in a systematic literature review that has taken place within the framework of the European EPHEBUS project, mentioned above, which aims to promote judicial cooperation in criminal matters by contributing to the optimal and proportional use of the EAW, including in the context of remote judicial proceedings. It has been done so by learning from and addressing fundamental and procedural rights breaches involving the use of the EAW, especially at the onset of the COVID-19 pandemic. The systematic literature review was conducted between February and March 2024; a list of keywords was developed and translated into the languages of the jurisdictions involved: that is, the literature review was conducted in English, Spanish, Bulgarian, Greek, Romanian and Portuguese. A total of 204 documents were deemed relevant, of which 84 were ultimately selected. Naturally, in addition to academic articles and papers, official reports from EU agencies and grey literature were also considered for this literature review.

of technologies and increased use of videoconferencing in court proceedings; and impact on procedural and fundamental rights.

### **2.1. Delays in EAW-related proceedings: requests for supplementary information and physical impossibility of surrender the requested person**

COVID-19 pandemic has affected the functioning of justice systems all over the world<sup>20</sup>. In general, all justice systems have been paralyzed, reason why pandemic has caused delays in justice systems both nationally and internationally<sup>21</sup>. Logically, the pandemic has also caused certain obstacles in relation to mutual recognition instruments<sup>22</sup>, mainly due to the need to deal with a state of emergency within the own States, interruption of some communication channels, difficulty in travelling due to airspace closures or quarantine obligations, etc.

In this context, the pandemic situation led also to an increase in teleworking. In this regard, the teleworking situation of judicial authorities and justice staffs has had an impact in that they only dealt with the most urgent judicial actions, which has affected the practice of judicial cooperation at the European level<sup>23</sup>. In some instances, the authorities prioritised and executed requests only in extraordinary cases and cases of serious crime (this also led to delays in the execution of European Investigation Orders (EIO) and requests for mutual legal assistance, particularly when the physical presence of a person was required, such as the hearings of witnesses or suspects)<sup>24</sup>.

As an instrument of international legal cooperation, the EAW has also been affected by the aforementioned delays and standstills that have affected the various European legal systems. At this respect, the responses given by the Member States to the pandemic situation in relation to the EAW have not always been homogeneous, although common practices can be identified. Thus, despite the difficulties, the issuance of EAWs continued as normal, although in some States it was restricted to certain cases of an emergency nature and/or exceeding a certain threshold of seriousness<sup>25</sup>.

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<sup>20</sup> Fair Trials, *Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe*, 2020. <https://www.fairtrials.org/articles/publications/beyond-the-emergency-of-the-covid-19-pandemic/>

<sup>21</sup> L.M. TROCAN, *The impact of the pandemic COVID-19 on the judiciary system in the European Union*, cit., pp. 210-211.

<sup>22</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*; W. GEELHOED, *International cooperation in time of emergency*, cit., p. 2 (online version); M.M. ŞELEA, *International judicial cooperation in criminal matters in the context of the global pandemic*, cit., pp. 447-448; Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary of information compiled by Eurojust and EJM*, cit.

<sup>23</sup> Fair Trials, *Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe*, cit.

<sup>24</sup> Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary of information compiled by Eurojust and EJM*, cit., pp. 8-9.

<sup>25</sup> Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary of information compiled by Eurojust and EJM*, cit.; Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.

In the case of the EAW, the pandemic situation has mainly affected the last phase of the procedure, that is, the surrender of the convicted person, logically due to the movement restrictions<sup>26</sup> resulting from the health alert<sup>27</sup>. At this respect, an increase in the length of surrender procedures has been observed since 2020, which, according to the European Commission's latest report on EAW<sup>28</sup>, may very possibly be related to COVID-19.

The analysis of the EAW relevant cases identifies several categories of issues, which can be divided into three main groups according to the provision of the EAW FD applied. In particular, these cases concerned the application of the Art. 15(2) and Arts. 17 and 23 of the EAW FD:

-The EAW mechanism remained functional, although pandemic measures affected undeniably the final stage of EAW proceedings: physical surrender of the requested person<sup>29</sup>. In this context, the executing authorities sought Eurojust's assistance with their requests for supplementary information (under Art. 15(2) of the EAW FD) more frequently than usual<sup>30</sup>.

-Another consequence of the pandemic situation has been the failure to comply with the deadlines established in Art. 17 EAW FD<sup>31</sup>. The cases registered with Eurojust<sup>32</sup> demonstrated that the executing authorities were already aware of the obstacles existing due to the pandemic and that they sought to inform the issuing authorities about the fact that deadlines stipulated by the EAW FD would not be able to be observed (Art. 17). In several cases, the executing authorities explained that the workload of judicial authorities, in combination with the extraordinary situation, would result in failure to make a final decision on an EAW on time.

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<sup>26</sup> About such limits, L. RICCARDI, *Alla ricerca di un bilanciamento tra la protezione dei diritti fondamentali nell'ambito dello spazio di libertà, sicurezza e giustizia e gli interessi nazionali: il COVID-19 alla prova dei fatti*, in this *Journal*, 2020, n. 2, pp. 251-255.

<sup>27</sup> Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary of information compiled by Eurojust and EJM*, cit.; Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.; C. BIERE, *Le mandat d'arrêt européen en période de pandémie: Cartographie des conséquences du COVID-19 sur son fonctionnement*, in *Revue des affaires européennes*, 2020, no. 1, p. 130.

<sup>28</sup> European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2022*, cit.

<sup>29</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.

<sup>30</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.; Eurojust (European Union Agency for Criminal Justice Cooperation), *Case-law by the Court of Justice of the European Union on the European Arrest Warrant*, cit.

<sup>31</sup> Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary of information compiled by Eurojust and EJM*, cit.

<sup>32</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.; Eurojust (European Union Agency for Criminal Justice Cooperation), *Case-law by the Court of Justice of the European Union on the European Arrest Warrant*, cit.

-Since the surrender of requested persons is postponed, the authorities of the executing Member States find themselves unable to respect the deadline set in Art. 23 FD, which provides that the latter take place “at the latest ten days after the final decision on the execution of the EAW”.<sup>33</sup> It is thus observed that a large part of the Member States postponed surrenders resulting from the execution of an EAW, until the end of the health crisis.<sup>34</sup>

However, the justification for postponing the surrender of the person sought has not been unanimous, but rather two causes contemplated in Art. 23 FD have been or are used interchangeably, depending on the specific case or the Member State in question<sup>35</sup>: either the general cause of “force majeure” prevailing in Art. 23.3 FD or the reason for humanitarian reasons contained in Art. 23.4 FD, the latter being understood to be more in line with the situation of uncertainty surrounding the pandemic in the global context. The cause of force majeure origins more inconveniences (in the sense of more procedures and more work) because led to consultations with the issuing authority to set a new surrender date, as many times as necessary, in order to proceed to its effective practice, as established by the regulations.<sup>36</sup>

In this context, it is interesting to note that European jurisprudence<sup>37</sup> has advocated maintaining a strict concept of “force majeure” to preserve the general rule of the surrender of the requested person, making this equivalent to the “impossibility” of carrying out the surrender within the established period.<sup>38</sup>

## 2.2. Extension of the provisional or precautionary measures

Due to the impossibility of making surrenders within the framework of the EAW, the provisional measures taken in relation to the requested person have had to be extended.

The solutions have been different in each case when requested person was in provisional detention, which brings us face to face with real situations of inequality<sup>39</sup>: for some detained, the periods in provisional prison/pre-trial detention have been lengthened, even for months.<sup>40</sup> These people have been detained longer than they would have been if

<sup>33</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust’s casework*, cit.

<sup>34</sup> W. GEELHOED, *International cooperation in time of emergency*, cit., p. 4 (online version).

<sup>35</sup> Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary of information compiled by Eurojust and EJM*, cit.

<sup>36</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust’s casework*, cit.

<sup>37</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *Case-law by the Court of Justice of the European Union on the European Arrest Warrant*, cit.

<sup>38</sup> [www.eurojust.europa.eu/publication/case-law-court-justice-european-union-european-arrest-warrant-december-2021](http://www.eurojust.europa.eu/publication/case-law-court-justice-european-union-european-arrest-warrant-december-2021).

<sup>39</sup> M. JIMENO-BULNES, *El impacto del COVID-19 en la cooperación judicial europea*, cit., p. 36; Fair Trials, *Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant (‘EAW’) proceedings*, cit.; Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, cit.

<sup>40</sup> Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, cit.

the pandemic did not exist. On some occasions, this has been justified on the grounds that the law does not provide for alternatives to detention in the context of an EAW<sup>41</sup> and in other cases, it has been decided to release the person, replacing provisional detention with alternative measures to provisional detention.<sup>42</sup>

Certainly, the number of instances where a requested person was released since the time limits were not observed is clearly increased in 2020<sup>43</sup> due, highly probable, to the COVID-19 outbreak.

Anyhow, provisional measures have been extended in time, and in the hypothesis of people whose presence could not be assured, they have been detained in provisional detention much longer than they would have been in circumstances other than the pandemic scenario. Indeed, some Member States already recognized that prolonging the detention would conflict with the principle of proportionality under the EAW<sup>44</sup>. Nevertheless, the continued detention of the person, in accordance with Art. 6 of the Charter of Fundamental Rights of the European Union (CFREU), is possible, provided that the execution procedure has been carried out diligently and that the duration of the detention is not excessive. However, provisional release is possible at any time, but it is up to the competent authorities (Art. 12 FD) to make their decision, after having carried out a concrete investigation of the situation.

Certainly, a criterion of proportionality must prevail in the adoption of personal precautionary measures for the person sought, even more so in the case of provisional detention, and the obligation must be imposed on the executing judge to carry out the corresponding investigation.<sup>45</sup> But, according to the Court of Justice of the European Union (CJEU), in accordance with European law, it is not possible to establish a general and unconditional obligation to release a person sought and detained under an EAW once a period of 90 days has elapsed since his or her arrest, when there is a very serious risk of flight<sup>46</sup>. In short, it is advocated maintaining as a general criterion the surrender of the person sought, tempered with the principle of proportionality; hence the possibility of selecting the most suitable personal precautionary measure for the purpose to ensure the effective surrender of the claimed person in due time.

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<sup>41</sup> Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, cit.

<sup>42</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *Case-law by the Court of Justice of the European Union on the European Arrest Warrant*, cit.

<sup>43</sup> European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2020*, cit.

<sup>44</sup> C. BIERE, *Le mandat d'arrêt européen en période de pandémie: Cartographie des conséquences du COVID-19 sur son fonctionnement*, cit., p. 132; Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.

<sup>45</sup> Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, cit.

<sup>46</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *Case-law by the Court of Justice of the European Union on the European Arrest Warrant*, cit.

### 2.3. Necessary promotion of alternatives to detention and alternatives to the EAW

The suspension of the EAW surrenders seems to have often encouraged the executing judicial authorities to make more frequent use of alternative measures to detention<sup>47</sup>. This situation promotes to participate in broader and older reflections concerning the advisability of the sometimes too frequent and automatic recourse to detention in the context of procedures concerning EAW<sup>48</sup>.

As alternative measures to detention, but taken in the framework of an EAW, in cases where the release of people has been ordered, milder measures intended to prevent their flight (such as the obligation to report to the police, a travel ban, judicial control, release on bail or house arrest) have been adopted<sup>49</sup>. These measures could be considered in conjunction with EAW proceedings to ensure the rights of individuals are protected while also maintaining judicial efficiency.

On the other hand, due to the impossibility of making surrenders within the framework of the EAW, academics and practitioners start to consider certain European criminal law instruments which can also potentially be mobilized, either to transfer the procedure to the executing Member State, or to invite the issuing judicial authority to consider alternative measures to the EAW<sup>50</sup>, such as the issuance of an EIO (regulated in the Directive 2014/41/EU of the European Parliament and of the Council, regarding the European Investigation Order in criminal matters<sup>51</sup>) to be able to hear the person by videoconference<sup>52</sup>. These alternative measures are very interesting avenues in the context of a pandemic scenario, but also in a normalised context.

The exchange of opinions and experiences among the 158 professionals who participated in the various discussion forums of the EPHESES project led to a particularly interesting conclusion: the observation that there is excessive and systematic use of the

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<sup>47</sup> L.M. TROCAN, *The impact of the pandemic COVID-19 on the judiciary system in the European Union*, cit., pp. 209-215; M.M. ŞELEA, *International judicial cooperation in criminal matters in the context of the global pandemic*, cit., p. 458; Fair Trials, *Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant ('EAW') proceedings*, cit.

<sup>48</sup> Fair Trials, *Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant ('EAW') proceedings*, 2021, <https://www.fairtrials.org/articles/publications/reinforcing-procedural-safeguards-and-fundamental-rights-in-european-arrest-warrant-proceedings/>.

<sup>49</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *Case-law by the Court of Justice of the European Union on the European Arrest Warrant*, cit.

<sup>50</sup> F. JIMÉNEZ-VILLAREJO FERNÁNDEZ, *Ejecución de una orden europea de detención y entrega*, in *Análisis empírico y doctrinal de la Ley 23/2014 de reconocimiento mutuo de resoluciones penales*, Aranzadi, 2022, p. 250; J.W. OUWERKERK, *Are alternatives to the European Arrest Warrant underused?: The case for an integrative approach to judicial cooperation mechanisms in the EU criminal justice area*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2021, no. 2, pp. 94-98, and 101. <https://doi.org/10.1163/15718174-29020002>; Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, cit.; Eurojust (European Union Agency for Criminal Justice Cooperation), *Case-law by the Court of Justice of the European Union on the European Arrest Warrant*, cit.

<sup>51</sup> Directive 2014/41/EU of the European Parliament and of the Council, *regarding the European Investigation Order in criminal matters*, April 3, 2014, in OJ L 130, may 1, 2014, pp. 1-36.

<sup>52</sup> Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.

EAW to the detriment of other alternative instruments of mutual recognition. This overuse, frequently reported by legal professionals, highlights the widespread concern about the proportional use of EAW, often used for minor offenses. This situation has been highlighted even more clearly by the difficulties encountered during the pandemic.

In this context, professionals involved in EAW procedures also highlight the need to improve mutual trust between EU Member States, which implies an urgent need for specialized training in the use of EAW and alternative instruments, promoting the safeguarding of the fundamental rights of the person sought, as well as the need to continue promoting the digitalisation of cross-border procedures, with these professionals calling for positive and coordinated action at the European level in this respect.

Regarding the use of alternatives to the EAW, statistically, a trend towards decreased use of this instrument for the purpose of enforcing sentences has been observed in Europe since 2021. While in 2021, 72.31% of EAWs were issued for the execution of a sentence or a detention order, this percentage fell to 43.54% in 2023. This suggests (although exact figures are unavailable) an increase in the use of other instruments that contribute to achieving the same objective, such as Framework Decision 2008/909/JHA, given the interconnection between the EAW and the latter mutual recognition instrument<sup>53</sup>. In relation to EAWs issued for prosecution purposes, the panorama is different. Certainly, the COVID-19 pandemic highlighted the importance of not placing the entire weight of cooperation on instruments – so intrusive, moreover – such as the EAW. The experience of these years has shown that obtaining the statement of a suspect – which, in many cases, is the purpose of the EAW – can be achieved by issuing an EIO and without resorting to an EAW. Other instruments such as Framework Decision 2009/829/JHA on the transfer of non-custodial sentences (on the European Supervision Order, ESO), which would allow also for a reduction in the use of the EAW when issued for prosecution purposes, remain extremely underutilized today, according to data provided by the General Secretariat of the Council of the European Union.<sup>54</sup>

In conclusion, the pandemic situation highlighted, with regard to the EAW, both the need for more alternative measures to detention in the criminal justice systems of EU Member States and the more frequent use of mutual recognition instruments alternatives to the EAW.

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<sup>53</sup> European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2021*, cit.; European Commission, *Commission staff document: Statistics on the practical operation of the European Arrest Warrant – 2023*, cit.; General Secretariat of the Council, *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, 2023 (<https://data.consilium.europa.eu/doc/document/ST-6741-2023-INIT/en/pdf>).

<sup>54</sup> General Secretariat of the Council, *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, 2023, cit.

## 2.4. Necessary development of the use of technologies and increased use of videoconferencing in court proceedings

In the area of international judicial cooperation, the situation created by COVID-19 has also been addressed by implementing technological innovations (especially videoconferencing for court hearings and electronic filing of documents), which have facilitated the continuation of EAW proceedings despite physical movement restrictions<sup>55</sup>. Since during pandemic there has been an objective difficulty in carrying out physical deliveries during this period, statements have had to be conducted via videoconferencing. It can be said that the use of videoconferencing has, *de facto*, emerged as the primary alternative to the EAW<sup>56</sup>.

As can be seen, this ultimately involves continuing along the path laid out by Directive 2014/41/EC of the European Parliament and of the Council, regarding the European Investigation Order in criminal matters,<sup>57</sup> which already showed a tendency towards the use of videoconferencing as a tool to support the gathering of cross-border evidence. Along the same lines, Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters<sup>58</sup>, which streamlines and digitizes the service of judicial and extrajudicial documents in civil or commercial matters between EU Member States, also facilitated judicial cooperation in the use of videoconferencing.<sup>59</sup>

The pandemic reality has also revealed the abusive use of paper in international legal cooperation, which logically hinders and limits said cooperation and the right to defence, being the digitalisation of documents a good practice. Certainly, in the issuance and implementation of EAW the fact that most communications between judicial authorities within the framework of cross-border judicial cooperation were still conducted on paper posed a problem.<sup>60</sup> An added difficulty is that the level of digitalisation and the degree of

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<sup>55</sup> A. SOŁTYSIŃSKA, *Digitalisation of Criminal Justice*, in *Obywatel w centrum działań e-administracji w Unii Europejskiej*, 2023, p. 243, <https://ruj.uj.edu.pl/server/api/core/bitstreams/51f9cc5e-61e1-4855-b617-341b571e4e9a/content.241>; Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust's casework*, cit.

<sup>56</sup> International Cooperation Unit of the Attorney General's Office, 2021, cit.

<sup>57</sup> In Spain, Instruction 3/2002 of the Attorney General's Office (FGE) marked a change in the perception of the use of videoconferencing, signaling the beginning of its integration into judicial proceedings in Spain. More recently, the measures approved in the area of digital efficiency (Royal Decree-Law 6/2023, of 19 December, approving urgent measures for the implementation of the Recovery, Transformation and Resilience Plan in the areas of public justice services, civil service, local government and patronage, and Organic Law 1/2025, of 2 January, on measures relating to the efficiency of the Public Justice Service) have promoted the regulation of digital immediacy and the use of technology in procedural acts.

<sup>58</sup> OJ L 405, December 2, 2020, pp. 40-78.

<sup>59</sup> The conclusions reached within the framework of the European project Simplivi are very interesting in this regard ([www.simplivi.eu](http://www.simplivi.eu)).

<sup>60</sup> L. DORNEANU, J. MALKÁ, L. COECKELBERGHS, *Impact of COVID-19 on access to justice and documents*, cit., p. 410; L. FONTESTAD PORTALÉS, *La digitalización de la cooperación judicial penal en la Unión Europea*, in ID. (dir.), *A vueltas con la transformación digital de la cooperación jurídico penal internacional*, Thomson Reuters Aranzadi, 2022, pp. 31-32.

use of electronic and IT tools varies enormously from country to country and even from one area of the judiciary to another.<sup>61</sup>

At this respect, one of the key points highlighted by the pandemic is the uneven development of digitalisation among the different Member States of the EU.<sup>62</sup> As an example, in countries like Romania, videoconferencing for court hearings and the electronic filing of documents have emerged as practical alternatives or complements to traditional in-person proceedings, facilitating the continuation of electronic and wireless procedures despite physical mobility restrictions<sup>63</sup>. As a result of the pandemic, new regulations have been enacted incorporating the necessary modifications to procedural rules to adapt to the use of new technologies<sup>64</sup>. However, in countries like Greece or Bulgaria, there was no increase in the use of videoconferencing during the pandemic due to the lack of digital infrastructure in their justice systems, causing countless delays in relation to EAW procedures<sup>65</sup>. In this context, the need for technological development in criminal justice systems to ensure the proper functioning of international legal cooperation has become evident, as has the need for this technological development to be equitable across the different member states of the European Union. The recent Regulation (EU) 2023/2844 is a result of this awareness. This Regulation focuses on the digitalisation of judicial cooperation in cross-border civil, commercial, and criminal matters, seeking to improve efficiency and access to justice through electronic communication channels, such as the use of information systems and e-government, and involves almost all member states (except Denmark and Ireland). Adopted in December 2023, this regulation establishes rules for modernizing judicial procedures at the European level.

Concretely, during the pandemic, many countries turned to remote hearings — using online video or audio-conferencing technology and other similar tools — as an alternative to in-person hearings in the context of both pre-trial and trial proceedings<sup>66</sup>. It seems

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<sup>61</sup> A. SOŁTYSIŃSKA, *Digitalisation of Criminal Justice*, in *Obywatel w centrum działań e-administracji w Unii Europejskiej*, cit., p. 243.

<sup>62</sup> From a broader perspective, it should be noted how in March 2021 the European Commission presented a vision and pathway strategy for Europe's digital transformation from now to 2030. A “Digital Compass”, that translates the EU's digital transformation ambitions into concrete targets to be achieved, within four cardinal points: Digitally skilled citizens and highly skilled digital professionals, Sustainable digital infrastructures that are secure and efficient, Digital transformation of businesses and Digitisation of public services.

<sup>63</sup> M.M. ŞELEA, *International judicial cooperation in criminal matters in the context of the global pandemic*, cit., pp. 447-448.

<sup>64</sup> M. PĂTRĂUŞ, *Scurte considerații referitoare la probleme din practica judiciară privind predarea persoanei căutate în baza mandatului european de arestare în contextul pandemiei*, in *Revista Facultății de Drept Oradea*, 2020, no. 2, pp. 115-122.

<sup>65</sup> E. MONTERO PÉREZ DE TUTELA, P. MARTÍN RÍOS, C. VILLEGAS DELGADO, 2024, EPHEBUS project report “Overview of pandemic adaptations and opportunities in the use of the EAW” (Deliverable 2.2) available at: [https://www.ephesus-project.eu/uploads/1/4/4/7/144711219/d2.2.\\_overview\\_of\\_pandemic\\_adaptations\\_and\\_opportunities\\_in\\_the\\_use\\_of\\_the\\_eaw.pdf](https://www.ephesus-project.eu/uploads/1/4/4/7/144711219/d2.2._overview_of_pandemic_adaptations_and_opportunities_in_the_use_of_the_eaw.pdf).

<sup>66</sup> Fair Trials, *Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe*, cit.

relevant to emphasise that the hearing of the person requested is a relevant point in the procedure regulated by EAW. The requested person must be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State (Art. 14, see above).

This increase in videoconferencing within the framework of the EAW has also been accompanied by an increase in the use of technology for taking statements, interviews and exchanging documents during said procedure<sup>67</sup>. Nevertheless, the fact that Member States have taken pandemic measures to conduct this kind of hearings via videoconferencing, has not been a peaceful solution.<sup>68</sup> In some occasions, it has even been declared unconstitutional *a posteriori* (as in the case of Bulgaria<sup>69</sup>) on the grounds that the use of technical means for videoconferencing does not provide sufficient guarantees as to who will be present at the hearing and whether the person is being pressured or threatened.<sup>70</sup>

Certainly, use of videoconferencing and remote means for conducting pre-trial and trial proceedings can involve an impact on procedural rights<sup>71</sup>: mainly, remote hearings or restraining direct exchanges between lawyers and clients, may result in a violation of a right to a fair trial, as will be seen later. If used “by default”, hearings on a remote basis could be a negative impact on the minimum standards as developed under Art. 47 or 48 of the CFREU and Art. 6 of the ECHR, in particular on effective participation in proceedings, including one’s “right to be present”. Indeed, videoconferencing can affect the right to be present at trial and access to adequate facilities for the review of evidence.<sup>72</sup>

Inappropriate use of videoconferencing can also compromise the proper exercise of the right of defence.<sup>73</sup> Thus, the use of videoconferencing in criminal proceedings has

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<sup>67</sup> L. L. FONTESTAD PORTALÉS, *La digitalización de la cooperación judicial penal en la Unión Europea*, cit., pp. 42-43; Fair Trials, *Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?*, cit.

<sup>68</sup> European Union Agency for Fundamental Rights, *Coronavirus pandemic in the EU-Fundamental Rights Implications*, 2020, <https://fra.europa.eu/en/publication/2020/covid19-rights-impact-april-1>.

<sup>69</sup> Constitutional Court of the Republic of Bulgaria (2021), Decision No 13 on constitutional case No 12/2021 [Решение № 13 по конституционно дело № 12/2021], 5 October 2021.

<sup>70</sup> V.V.C. RAMOS, A. ANAGNOSTAKIS, A. BARLETTA, J. TEHVER, N. CANESTRINI, *European Criminal Bar Association statement of principles on the use of video-conferencing in criminal cases in a post-Covid-19 world*, cit., p. 11; International Commission of Jurists, *Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards*, 2020. [www.unodc.org/res/ji/import/guide/icj\\_videoconferencing/icj\\_videoconferencing.pdf](http://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf).

<sup>71</sup> M. M. JIMENO-BULNES, *El impacto del COVID-19 en la cooperación judicial europea*, cit., p. 35.

<sup>72</sup> A. BEAZLEY, R. VAN DE GAER, *COVID’s Choice? Criminal Trials, and the Right to Be Present, the Right to Be Tried Within a Reasonable Time and the Possibilities of Remote Participation*, in *Tilburg Law Review*, 2024, no. 2, pp. 17-18, DOI: <https://doi.org/10.5334/tlrl.387>; European Criminal Bar Association, *Statement of principles on the use of video-conferencing in criminal cases in a post-COVID-19 world*, cit.; Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust’s casework*, cit. International Commission of Jurists, *Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards*, cit.

<sup>73</sup> Fair Trials, *Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe*, cit.; Fair Trials, *Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings*, 2022, <https://www.fairtrials.org/app/uploads/2022/01/Safeguarding-the-right-to-a-fair-trial-during-the-coronavirus-pandemic-remote-criminal-justice-proceedings.pdf>.

been shown to entail the following main drawbacks<sup>74</sup>, all applicable to the procedure regulated in relation to the EAW:

-The natural inconveniences derived from the physical absence of the accused. Physical presence ensures a series of advantages and guarantees (such as respect for the principle of immediacy).

-Limitations stemming from connectivity issues and the inadequacy of suitable equipment.

-Restrictions in lawyer attendance before and during police questioning, as well as in lawyer access to prison (when technical limitations exist).

-Problems in conducting private interviews with the lawyer and general difficulties in communication with the lawyer. Also, problems to coordinate hearings with interpreters and/or lawyers at the same time.

-Issues in exercising the right to access documents (during the proceedings); for example, a lot of documents can be not available in electronic format.

-Limitations in exchanging documents in electronic format in real time during the trial (or pre-trial proceedings), among others.

At this respect, several international institutions and organisations have made during this post pandemic years relevant recommendations in relation to the use of videoconferencing in criminal proceedings<sup>75</sup>, starting for acclaiming its use. As explained by the European Parliament in the report on the EAW made in 2020 “*The ECBA, defence lawyers and NGOs point out that in case the EAW has been issued for a criminal prosecution, electronic tools could be used more as an alternative to surrender and to prevent the person from having to spend extensive periods in pre-trial detention in the issuing Member State after surrender. (...) The option of the issuing judicial authorities hearing the requested person by video-link in accordance with Article 18 (1) (a) FD EAW is currently underused*”.

Therefore, is highly recommended that<sup>76</sup>:

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<sup>74</sup> European Criminal Bar Association, *Statement of principles on the use of video-conferencing in criminal cases in a post-COVID-19 world*, cit. International Commission of Jurists, *Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards*, cit.

<sup>75</sup> Council of the European Union, *Conclusions on the European arrest warrant and extradition procedures – current challenges and the way forward 2020/C 419/09 (OJ C 419, 4.12.2020)*, cit.; European Union Agency for Fundamental Rights, *Coronavirus pandemic in the EU-Fundamental Rights Implications*, cit.; European Criminal Bar Association, *Statement of principles on the use of video-conferencing in criminal cases in a post-COVID-19 world*, cit.; Fair Trials, *Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings*, cit.; Fair Trials, *Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings*, cit. International Commission of Jurists, *Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards*, cit.

<sup>76</sup> V.C. RAMOS, A. ANAGNOSTAKIS, A. BARLETTA, J. TEHVER, N. CANESTRINI, *European Criminal Bar Association statement of principles on the use of video-conferencing in criminal cases in a post-Covid-19 world*, cit., pp. 14-15; S. MASON, *The use of video conferencing in courts*, Webinar with the CEELI Institute, 2020, May 19, pp. 1-4, <https://rm.coe.int/ceeli-institute-the-use-of-video-conferencing-in-courts-by-mr-stephen-/16809f2785>; European Criminal Bar Association, *Statement of principles on the use of video-conferencing in criminal cases in a post-COVID-19 world*, cit. International Commission of Jurists, *Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards*, cit.

-Remote hearing should be based in law (explicitly provided in the national legislation), respecting all rights linked to defence rights.

-For substantial acts (e.g., first interview carried out during the investigation, presentation of the charges, or when deciding on pre-trial detention) suspected person should be present. Hence, remote hearings should mainly be used for bureaucratic procedural acts.

-The use of videoconferencing is recommendable for low and medium criminality cases (instead of issuing an EAW, to use another alternative instrument like an EIO).

-Its use should be time-limited and clearly necessary and proportionate based on the circumstances: European Union Agency for Fundamental Rights<sup>77</sup> has already explained that videoconferencing could be used where deemed appropriate following a case-by-case assessment.

-It is necessary to have technical conditions that enable smooth transmission of voice and images<sup>78</sup>. At this respect, access to the case file should be granted to the suspect or accused and to lawyers in both issuing and executing State, and any documents to be examined during the interview or the trial should be made available to the suspect or accused and to the lawyers in both States before and during the interview or trial<sup>79</sup>. It is necessary to create an online folder for the exchange of documents before and during the trial, and the digitalisation of documentation (it would be a good practice to prepare electronic versions of the most important documents in advance<sup>80</sup>).

-The court should explain to the requested person in detail how the hearing will proceed and what the technicalities of online communication are, and that they allow for the effective exercise of all the rights that the law guarantees to the person, so that they do not feel insecure, unequal or isolated.

-In addition, digitalisation would serve to promote dual legal representation, thereby improving the right to a fair trial and the right to defence. The preparation of the remote hearing should ensure the participation of both lawyers, in both issuing and executing State<sup>81</sup>.

-At each stage of the proceedings, the person should be provided with an adequate and reliable communication link with their lawyer with respect to the safeguards of lawyer-client confidentiality. A possible good practice to ensure lawyer-client confidentiality would be to use phones that could not be recorded or intercepted.

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<sup>77</sup> Fair Trials, *Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe*, cit.

<sup>78</sup> European Criminal Bar Association, *Statement of principles on the use of video-conferencing in criminal cases in a post-COVID-19 world*, cit.

<sup>79</sup> V.V.C. RAMOS, A. ANAGNOSTAKIS, A. BARLETTA, J. TEHVER, N. CANESTRINI, *European Criminal Bar Association statement of principles on the use of video-conferencing in criminal cases in a post-Covid-19 world*, cit., pp. 14-18.

<sup>80</sup> S. MASON, *The use of video conferencing in courts*, cit., p. 3.

<sup>81</sup> International Cooperation Unit of the Attorney General's Office, *Opinion 1/21 on the use of videoconferencing in international judicial cooperation in criminal matters*, 2021, [www.fiscal.es](http://www.fiscal.es).

-The right to have an interpreter and case materials essential to safeguard the rights of the defence translated into the native language of the suspect or accused should also be mandatory in remote hearings.

-Trial in the physical presence of the accused should remain and always be the rule, and a remote trial should require the informed consent of the suspected, accused or convicted person.

-The suspect or accused should always be heard in the physical presence of a judicial authority of the executing State, except consent for remote hearing.

-After the hearing is concluded, the judicial authority of the executing State should draw up minutes of the videoconference hearing.

-The hearing should be audio-visually recorded and the recording should be made available to the parties.

-Finally, criminal trials are generally public and open to the public. The use of videoconferencing needs to properly consider the right to a fair and public hearing.

In short, if the aim is to attribute to virtual presence a comparable value to physical presence<sup>82</sup>, under certain conditions, it will be necessary to provide the former with additional guarantees, especially regarding the hearing of the person claimed under the EAW. In this regard, it should be recalled that the ECHR has ruled that participation in proceedings by videoconference is not, in itself, incompatible with the concept of a fair and public trial, but that it is necessary to ensure that the defendant can follow the proceedings and be heard without technical obstacles and communicate effectively and confidentially with their lawyer (ECHR, judgment of 2 November 2010, *Sakhnovski v. Russia*, CE:ECHR:2010:1102JUD002127203).

Now then, although the justice system underwent a significant disruption due to the pandemic, this situation should also be perceived as an opportunity to integrate technology<sup>83</sup> and to eliminate outdated and time-consuming procedures. There has been an enormous development of technologies in the field of international legal cooperation, however, an examination of the different national situations reveals that it is still uneven, which constitutes an additional challenge for access to justice across Europe<sup>84</sup>.

It is interesting to know how and to what extent – especially in the post-pandemic reality – this issue has been addressed at EU level. This is undoubtedly a matter of priority, which has resulted in the adoption in recent years of Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and

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<sup>82</sup> This is in order to comply with the requirements of Article 8(1) and (2) of 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 (in OJ L 65, march 11, 2016, pp. 1-11), strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.

<sup>83</sup> Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary of information compiled by Eurojust and EJM*, cit.

<sup>84</sup> M.M. BOSKOVIC, S. NENADIC, *Impact of COVID-19 pandemic on criminal justice systems across Europe*, cit., p. 281.

criminal matters, and amending certain legal acts in the field of judicial cooperation. It expressly provides for the use of videoconferencing ‘in order to facilitate oral hearings in civil, commercial and criminal proceedings with cross-border implications’.

Along the same lines, it provides that the technology used must comply with the applicable rules on personal data protection, confidentiality of communications and data security, regardless of the type of hearing for which it is used. It is therefore necessary for the competent authorities to authenticate the identity of the persons from whom statements are to be taken.

## 2.5. Impact on procedural and fundamental rights

The fundamental rights that may have been most affected by the pandemic, in relation to the use of the EAW, would be the right to freedom and security (Art. 5 of the European Convention on Human Rights – ECHR- and Art. 6 of the CFREU) and, of course, the right to a fair trial.<sup>85</sup>

Focusing on the latter, the most mentioned concern about the process is the right of defence. Forming an integral part of the right to a fair trial, it is applicable from the earliest stages of the proceedings, including the pre-trial stages (in this regard, see Directives 2010/64/EU, 2013/12/EU, 2013/48/EU, 2016/1919/EU and 2016/343/EU).

At this respect, the rights under the CFREU have been impacted by the decisions of Member States to cease the operation of courts thereby making filing of documents, access to legal aid, gathering of evidence, and public hearings impossible or extremely difficult. Within the framework of the EAW, the EU reports highlight the difficulty of a direct relationship between the accused persons and their lawyer and/or interpreter, even more so when there was a deprivation of liberty. Limitations were observed in the assistance of the lawyer before and during the police statement, problems related to the confidential interview with the lawyer, and limitations on lawyers' access to prisons<sup>86</sup>.

To address these limitations, several EU Member States resorted to the use of videoconferencing. However, as seen, the use of videoconferencing has also an impact on procedural rights and guarantees. Although its use helps expedite the process -which contributes to a proper satisfaction of the right to a trial without undue delay - it affects the principle of immediacy and may impede the exercise of the right to defence in various

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<sup>85</sup> C. BIERE, *Le mandat d'arrêt européen en période de pandémie: Cartographie des conséquences du COVID-19 sur son fonctionnement*, cit., p. 131; W. GEELHOED, *International cooperation in time of emergency*, cit., p. 5 (online version); European Criminal Bar Association, *Statement of principles on the use of video-conferencing in criminal cases in a post-COVID-19 world*, cit.; International Commission of Jurists, *Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards*, cit.

<sup>86</sup> A. SOŁTYSIŃSKA, *Digitalisation of Criminal Justice*, in *Obywatel w centrum działań e-administracji w Unii Europejskiej*, cit., p. 252; S. MASON, *The use of video conferencing in courts*, cit., pp. 3-4; European Parliament, *European arrest warrant: European implementation assessment*, cit.; European Criminal Bar Association, *Statement of principles on the use of video-conferencing in criminal cases in a post-COVID-19 world*, cit.; Fair Trials, *Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe*, cit.

ways. In this sense, some reports show that suspects and lawyers have not been able to exchange confidentiality before, during or after a remote hearing given the possible presence of court or prison staff at either end, as well as time constraints<sup>87</sup>.

Other problems were also observed in the exercise of the right of access to documents in criminal proceedings in pandemic and post-pandemic times: either no copy was provided, or it was not provided with sufficient time to prepare the defence<sup>88</sup>.

Moreover, as seen, courts are organizing hearings in different ways and limiting the cases to urgent ones while postponing others: such restrictions on access to justice and documents, and operations of the courts in general, impact the overall length of proceedings and consequently due process, defence rights and the right to liberty (often impacted, due to the extension of the period of deprivation of liberty; Art. 6 CFREU). It is also worth mentioning that non-compliance with deadlines affects another fundamental right linked to a fair trial: the right to a resolution within a reasonable time<sup>89</sup>.

In addition, more hypothetical consequence concerns the possibility of obtaining recognition of new risks of violation of the fundamental rights of wanted persons, leading to a possible refusal to execute certain EAW. These risks can be of two types<sup>90</sup>:

- on the one hand, risks linked to detention conditions set up to respond to the health situation, and which can harm human dignity, or the right to family life of prisoners (e.g., by the suspension of communications with the outside); risks linked to detention condition has been last decades considered the most important hurdle to the effective operation of the EAW FD<sup>91</sup>, but regarding post-trial conditions (this is, after the trial for

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<sup>87</sup> M.M. BOSKOVIC, S. NENADIC, *Impact of COVID-19 pandemic on criminal justice systems across Europe*, cit., p. 275; L. DORNEANU, J. MALKAL, L. COECKELBERGHS, *Impact of COVID-19 on access to justice and documents*, cit., p. 411; European Criminal Bar Association, *Statement of principles on the use of videoconferencing in criminal cases in a post-COVID-19 world*, cit.; International Commission of Jurists, *Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards*, cit.

<sup>88</sup> S. CARRERA, M. STEFAN, V. MITSILEGAS, *Cross-border data Access in criminal proceedings and the future of digital justice. Navigating the current legal framework and exploring ways forward within the EU and across the Atlantic*, Report of CEPS and QMUL Task Force, Centre for European Policy Studies, Brussels, 2020, <https://www.ceps.eu/download/publication/?id=30689&pdf=TFR-CrossBorder-Data-Access.pdf>.

<sup>89</sup> L. DORNEANU, J. MALKAL, L. COECKELBERGHS, *Impact of COVID-19 on access to justice and documents*, cit., p. 411; Council of the European Union, *The impact of COVID-19 on judicial cooperation in criminal matters – Executive summary of information compiled by Eurojust and EJM*, cit.; Eurojust (European Union Agency for Criminal Justice Cooperation), *The impact of COVID-19 on judicial cooperation on criminal matters – Analysis of Eurojust’s casework*, cit.

<sup>90</sup> C. BIÈRE, *Le mandat d’arrêt européen en période de pandémie: Cartographie des conséquences du COVID-19 sur son fonctionnement*, cit., p. 133.

<sup>91</sup> It is necessary to bear in mind, as pointed out by A. GAUDIERI (*Prison overcrowding: the criteria laid down by the Dorobantu judgment for calculating space. A “compass” for decisions to be made in times of health emergencies?*, in this *Journal*, 2020, no. 2, p. 241), that “in the event of a health emergency, such as that caused by COVID-19, once a real risk to the health of the prisoner has been established, taking into account the health context and the epidemiological situation in the prison where that person is actually expected to be imprisoned, it would not be possible to proceed with the transfer” (free translation of: “in caso di emergenza sanitaria, come quello da COVID-19, una volta accertato un rischio reale per la salute del detenuto, tenuto conto del contesto sanitario e della situazione epidemiologica nell’istituto penitenziario nel quale è concretamente previsto che tale persona verrà reclusa, non sarebbe possibile procedere alla consegna”).

the execution of the sentence), emerging now - on the occasion of the pandemic- concerns about pre-trial conditions and the convenience of creating EU legislation regarding not only post but also pre-trial detentions conditions.

In this regard, it is worth bearing in mind recent rulings by the CJEU: the CJEU's ruling in *Aranyosi and Căldăraru*<sup>92</sup>, which is considered groundbreaking in establishing limits to mutual trust and recognition when there are implications for the fundamental rights of persons sought through an EAW. In contrast to the automatic approach that previously prevailed, it was determined that both a systemic assessment (of the general conditions in national prisons and detention centres) and an individual assessment (of the risks that the execution of the EAW could pose to the integrity of that specific person) were necessary. In this case, the CJEU upheld the refusal to execute an EAW on the grounds of overcrowding in the cells where the requested person was to be transferred.

Continuing along these lines, the CJEU judgment of 25 July 2018, *ML*<sup>93</sup>, clarified that such a systemic assessment must focus more on the conditions of those centres where the requested person is likely to be held<sup>94</sup> and not, on the contrary, on the general prison conditions in the country concerned (the conditions of detention in Hungary were at issue<sup>95</sup>). Subsequently, the judgment handed down by the CJEU in *Dorobantu*<sup>96</sup> adopted the so-called '3-metre criterion', which was established by the ECHR in the famous *Muršić v. Croatia*.<sup>97</sup> This establishes a strong presumption of inhuman or degrading treatment, in violation of Article 3 of the ECHR, in cases where a prisoner does not have at least 3 square metres of space for their exclusive use.<sup>98</sup>

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<sup>92</sup> C 404/15 and C 659/15 PPU, judgment of 5 April 2016.

<sup>93</sup> C-220/18 PPU, judgment of 25 July 2018,

<sup>94</sup> 'Even on a temporary or transitory basis,' clarifies the aforementioned ruling.

<sup>95</sup> "Through the 2016 Act, Hungary established, with effect from 1 January 2017, a remedy enabling prisoners, in the context of a judicial appeal, to challenge their conditions of detention in the light of fundamental rights. 73. As all the interested parties involved in the present proceedings have argued, such a remedy, although it may constitute an effective judicial remedy within the meaning of Article 47 of the Charter, cannot in itself suffice to rule out the existence of a real risk that the person concerned will be subjected to inhuman or degrading treatment in the issuing Member State within the meaning of Article 4 of that Charter. 74. Indeed, although this a posteriori judicial review of the conditions of detention in the issuing Member State constitutes an important development which may encourage the authorities of the latter to improve conditions of detention and which, therefore, may be taken into account by the executing judicial authorities in their overall assessment of the conditions of detention envisaged for a person who is the subject of a European arrest warrant for the purpose of deciding on his surrender, it cannot, as such, rule out the risk that that person will be subjected, following his surrender, to treatment incompatible with Article 4 of the Charter on account of his conditions of detention. 75. Consequently, even where the issuing Member State provides for remedies enabling the legality of the conditions of detention to be reviewed in the light of fundamental rights, the executing judicial authorities remain obliged to carry out an individual examination of the situation of each person concerned, in order to ensure that their decision to surrender that person will not, as a result of those conditions, expose him or her to a real risk of inhuman or degrading treatment within the meaning of that provision".

<sup>96</sup> C-128/18, judgment of 15 October 2019.

<sup>97</sup> Grand Chamber, Application no. 7334/13, 20 October 2016.

<sup>98</sup> However, there are nuances to consider in this case as well, given the occasional nature of the restriction on the use of space, the possibility of having other areas available and freedom of movement outside the cell, etc. It is also established that furniture must be included in this calculation and the toilet area excluded. In this regard, the recommendations made by the Committee for the Prevention of Torture (CPT) (<https://www.coe.int/es/web/cpt/about-the-cpt>) are of interest.

Among all the rulings handed down since then, the judgment delivered by the CJEU in *Alchaster*<sup>99</sup>, stands out. It highlights an issue of undoubted relevance: the need to carry out an individual risk assessment when there is a certain fear that fundamental rights may be affected.<sup>100</sup>

No less important is the concern recently expressed by the CJEU regarding so-called vulnerable groups. The judgment handed down by the CJEU in *GN*<sup>101</sup> is very representative in this regard, as it opens the door to the possibility of using the best interests of the child, who was the son of the requested person, as grounds for refusing an EAW. In this judgment, although it rejects the possibility that the executing judicial authority may refuse to surrender the person who is the subject of an EAW on the grounds that they have young children in their care, it raises the possibility that such a refusal may be based on "the existence of a real risk of infringement of that person's fundamental right to respect for private and family life, guaranteed by Article 7 of the Charter, and the best interests of their children, protected by Article 24(2) and (3) of the Charter, due to systemic or widespread deficiencies in the conditions of detention of mothers with young children and the care of those children in the issuing Member State', as well as on the existence of 'serious and substantial grounds for believing that, given their personal circumstances, the persons concerned will be at such risk because of those conditions'.

In this regard, in the judgment handed down by the CJEU, *Breian*<sup>102</sup>, the Court observes that the FD relating to the EAW does not provide for the possibility or obligation for an executing authority of a Member State to refuse to execute an EAW on the grounds that the surrender of the person concerned could violate the fundamental right to a fair trial, although it emphasises that, "in the context of its own examination of the existence of a ground for non-execution, that authority must take into account the reasons on which the refusal decision adopted by the first executing authority is based'. Subsequently, the CJEU judgment *Kamekris*<sup>103</sup> reiterates the same idea.

- on the other hand, as seen, the risks linked to measures adapting criminal procedures and which could result in violations of the right to a fair trial.

In this regard, in the judgment handed down by the CJEU in *Breian*<sup>104</sup>, the Court observes that the FD relating to the EAW does not provide for the possibility or obligation for an executing authority of a Member State to refuse to execute an EAW on the grounds that the surrender of the person concerned could violate the fundamental right to a fair trial, although it emphasises that, "in the context of its own examination of the existence

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<sup>99</sup> C-202/24, judgment of 29 July 2024.

<sup>100</sup> In this case, there had been changes in the conditions of parole. As the CJEU points out: "the executing judicial authority shall only refuse to execute the arrest warrant if, after requesting additional information and guarantees from the issuing judicial authority, it has objective, reliable, precise and duly updated information proving that there is a real risk that the very scope of the penalty specified on the day the offence in question was committed will be modified, with the result that a penalty greater than that initially specified will be imposed".

<sup>101</sup> C-261/22, judgment of 21 December 2023.

<sup>102</sup> C-318/24 PPU, judgment of 29 July 2024.

<sup>103</sup> C-763/22, judgment of 20 March 2025.

<sup>104</sup> C-318/24 PPU, judgment of 29 July 2024.

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The rights to an effective remedy and fair trial (Art. 47 CFREU) do not only entail access to a lawyer, legal aid, translation or interpretation, but equally the right to be present at trial in criminal proceedings<sup>107</sup>.

Given the impossibility of the physical presence of the accused provoked by the pandemic situation, we can conclude that Member States have chosen several routes: suspend or postpone the proceedings, convict in the absence of the accused (but statistics showed that the number of refusals to recognize EAW for trial *in absentia* has only increased slightly in 2020 and not in 2021) or hold the hearings and procedures by videoconferencing. It is also worth noting how some States, like Greece and Cyprus, without highly advanced videoconferencing systems and IT options, maintained the face-to-face format of the trials.

Concerns about national matters, which logically had to be dealt with in a hurry, relegated to the background the debate on issues that, once the critical times were over, could be examined in greater detail.

### 3. Conclusions and recommendations

Although the outbreak of COVID-19 posed a serious challenge for criminal justice systems in general, and for international legal cooperation in particular, crisis situations are sometimes what promote positive changes. The coronavirus pandemic can thus be reinterpreted as a unique opportunity to reconfigure, readapt and restructure systems that, as reality has shown, seem unable to respond to unforeseeable circumstances. The issues that arose at that time may have provided us with an opportunity to rethink the current state of international judicial cooperation, and could be a valuable opportunity to anticipate what, unfortunately, could happen again. The pandemic situation experienced in 2020 and in the years immediately following - still affected by restrictions of different types and scope - has been a real stress test, not only for national systems but, most particularly, for international judicial cooperation. Certainly, the paralysis of justice systems and the pandemic containment measures adopted by Member States during the pandemic caused delays in procedures related to the EAW, particularly in the surrender of the requested person, consequently leading to the extension of precautionary and provisional measures to ensure the presence (and availability in relation to the surrender) of the requested person. As seen, the extension of precautionary measures in relation to

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<sup>105</sup> C-763/22, judgment of 20 March 2025.

<sup>106</sup> "The authority must duly take into account the reasons for such decisions, especially if they are based on the protection of fundamental rights."

<sup>107</sup> A. BEAZLEY, R. VAN DE GAER, *COVID's Choice? Criminal Trials, and the Right to Be Present, the Right to Be Tried Within a Reasonable Time and the Possibilities of Remote Participation*, cit., p. 18.

the person requested under an EAW sometimes led to the extension of pretrial detention in many cases, increasing the distressing content of the EAW and sometimes impairing the individual's procedural and fundamental rights.

However, this situation has highlighted an important need: the promotion of both alternative measures to imprisonment or pretrial detention, as well as the need to promote alternatives to the use of EAW, through the promotion of less distressing mutual recognition instruments.

This debate created by the pandemic has prompted practitioners and academics to question the overuse of EAW, the control of proportionality in the use of this instrument, and to initiate a path of research and search for more proportional alternatives to EAW—individually tailored to each situation—that avoid the uprooting of suspects, accused, and convicted persons. It should be noted that the requested person is often remanded in custody while their surrender (if applicable) takes place. In cases where the requested person has built a new life in the State receiving the EAW, the surrender of the person for the purposes of prosecution or for the purpose of enforcing a sentence in another State can have significant distressing effects on the person's life (affecting family, employment, social relationships) and/or limit their chances of social reintegration if the surrender is made for the purpose of enforcing a sentence.

Certainly, when the EAW is issued for the purposes of prosecution, new technologies (the use of videoconferencing, the use of the e-EDES portal to process an EIO, etc.) can obviate the need to surrender the requested person and are more respectful of the presumption of innocence. Indeed, the person sought and surrendered under an EAW for the purposes of prosecution suffers the uprooting caused by the transfer to another Member State without there being any proven evidence that they have committed a crime.

It could be said that the importance of videoconferencing in relation to the EAW is twofold: on one hand, it facilitates its practice in exceptional circumstances (such as those caused by COVID-19), as a substitute for in-person hearings; paradoxically, on the other hand, it encourages the use of alternative instruments, such as the EIO (by facilitating the statement of the requested person, thus making their transfer to the issuing State unnecessary).

Therefore, among the obstacles and difficulties generated by the COVID-19 pandemic in relation to the EAW, we can undoubtedly highlight two major opportunities, as well as some recommendations related to them:

Greater awareness of the need to seek alternative instruments to the EAW, which have a less distressing effect on the suspect, accused, or convicted person; this includes in this debate the need to seek alternatives to custodial precautionary measures and the need to promote alternative measures to pretrial detention. It is therefore advisable to conduct awareness campaigns to educate legal professionals about the need to avoid automatically resorting to the EAW (Extraordinary Enforcement Order) when a person in the territory of another Member State is subject to criminal proceedings or must serve a criminal sentence. This increased awareness should ideally be accompanied by enhanced training for legal professionals, which should include an analysis of alternatives to the

EAW (such as the EIO), as well as greater promotion of the use of alternatives to pretrial detention. Lack of awareness of alternatives to the EAW or how they operate contributes to the increased use of the EAW.

Greater awareness of the need to update the Member States' justice systems technologically: the pandemic highlighted the need to implement more modern computer systems and new technologies that allow for the secure conduct of hearings and the exchange of electronic documentation; technological development that, in addition to being adapted to changing times, guarantees the rights of suspects, accused, and convicted persons, in order to prevent the fundamental and procedural rights of users of criminal justice systems from being affected. The experience should serve to make international judicial cooperation more effective, freeing it from burdens such as the excessive use of paper or the abusive use of certain cooperation instruments (which seems more the result of routine practices than of actual need). It would therefore be advisable to increase investment in the digitisation of the justice systems of the EU Member States, a transactional technological infrastructure (such as the creation of digital platforms that allow the exchange of documentation, evidence and the holding of hearings, in the style of the electronic transmission system of the EIO the e-CODEX platform), which entails the need for better training of professionals in the criminal justice field in the use of new technologies.

Moving towards digitalisation should also be a common aspiration, but it cannot come at any price. Apart from having to be uniform to be truly effective, it requires that the recourse to any mechanism (particularly the videoconferencing, given its prolific use) be done with scrupulous respect for the procedural rights of the litigants, adopting the additional safeguards and guarantees that are necessary to prevent its implementation from being detrimental to their guarantees.

Finally, on the road towards the digitalisation of international judicial cooperation, the risk of producing digital divides (different training of legal operators, different material resources, etc.) between the different Member States must be borne in mind, and the aim must be to achieve a scenario in which the difference in “speeds” in this process does not end up being an added factor of inequality that ultimately compromises the very idea of Justice.

**ABSTRACT:** In 2002, the Council of the European Union adopted Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States. Since then, it has been one of the most widely used instruments of mutual recognition in the field of legal cooperation in criminal matters at the European level. Due to the pandemic of 2020, the general paralysis of the justice systems and the obstacles and difficulties arising from the limitations caused by COVID-19 also affected procedures under the European Arrest Warrant, which, given its relevance due to its frequent use, deserves analysis. This paper analyzes the

effects that the pandemic has had on procedures related to the European Arrest Warrant, complementing the conclusions of this study with an analysis of the challenges faced and the opportunities that arose from them, with the aim of contributing to an improvement in its use.

**KEYWORDS:** European Arrest Warrant – COVID-19 – procedural and fundamental rights – alternatives instruments – digitalisation.