

Dual representation in EAW proceedings – how does it and how should it work?



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What is The European Criminal Bar Association?

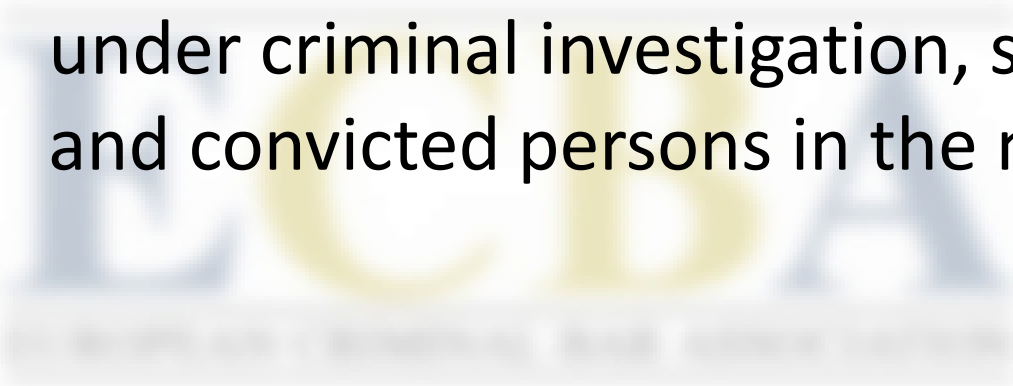


Mission statement:

The primary purpose of the ECBA is to be a leading group of independent criminal defence lawyers in the Council of Europe promoting the fundamental rights of persons under criminal investigation, suspects, accused and convicted persons.



- The ECBA consists of specialist defence lawyers in the member countries of the Council of Europe.
- Membership is open to all lawyers, whether practicing or in academic life, who support its aims, namely promoting the rights of persons under criminal investigation, suspects, accused and convicted persons in the member states.





- The association holds conferences twice a year, in spring and autumn, during which members and non-members meet and discuss the latest developments in European criminal law.
- The ECBA also acts as a platform for lawyers to meet with lawyers from all member states and to exchange information and knowledge.



**Prejudicial question:
what is the role of the lawyer?**

The role of the lawyer: overcoming the myth

- The timely and active participation of a defence lawyer in criminal proceedings contributes to the effectiveness of criminal justice systems – it is **not an obstacle** to criminal justice.
- It **ensures the fairness** of proceedings, because immediate access to legal advice is a pre-condition to exercising one's rights.



- It helps achieve a **better quality of process including evidence gathering**, and therefore of the evidence obtained, which helps to **secure its admissibility**.
- It enables **genuine reasons for refusal of execution of MR instruments to be properly argued** and **spurious ones to be discontinued**.

- It contributes to **preventing miscarriages** of justice and even to avoiding large numbers of appeals - resulting in **a reduction of the costs.**
- **It facilitates mutual recognition** in the EU because **mutual trust** in fair proceedings throughout Europe would be developed **in practice** – as access to a lawyer from the very beginning of the proceedings meets not only ECHR standards but also the common standards of many EU national legislations.

**What is
“dual representation”
or
“dual defence”?**

- Dual representation ≠ mere intervention of two lawyers.
- **Dual representation is a concept connected with legal assistance in cross-border cases.**
- Dual representation = **provision of legal assistance** (legal consultation or advice and legal representation) **by lawyers from two different jurisdictions, concomitantly and subsequently, in a coordinated manner, which is required by the cross-border dimension of the case.**
- Dual representation = “dual defence”
- “multiple representation”



**What is a
“cross-border criminal case”?**



- The broadest sense: **any case which has a cross border element.**
- Not only EAW on cases which fall within the 2000 Mutual Legal Assistance Convention (such cases represent only a very small fraction of the 'cross border criminal cases' which lawyers are faced with today).



The vast majority of cases arise out of the free movement of persons' provisions and the typical 'cross border case' which a lawyer sees today involves e.g.:

- A lorry driver who is arrested in another Member State as a result of a traffic accident;
- A crime involving a migrant worker who is working in a Member State of which he is not a national;
- A crime involving an immigrant to the EU;
- A complex financial crime where the evidence is in one country and the suspect or accused person is in another; or
- A crime which involves a number of Member States and where the most favorable jurisdiction has been selected as the country of prosecution.



- Cases involving non-nationals or involving a crime which took place elsewhere or evidence which is located elsewhere in the EU are growing in number and are increasingly impacting on the daily work of defence practitioners.
- Any steps which are taken to assist defence lawyers must cover this broad definition of a cross border criminal case.
- So far nothing has been proposed in that sense.



Why is dual representation in EAW cases needed?



- The lack of this safeguard → source of miscarriages of justice and also a source of misuse of financial resources.
- It is not possible to grant effective legal representation in European Arrest Warrant cases without granting the possibility of access to the so-called **double defence**.
- It **enables genuine reasons for refusal to be properly argued and spurious ones to be discontinued**.
- The **intervention of a lawyer from the issuing state is essential to help both the lawyer and the court in the executing state to assess the verification of any refusal grounds as swift as possible**.

- **Dual representation will reduce costs by avoiding unnecessary and disproportionate surrender leading to withdrawal of EAW before their execution**
 - Many EAW issued for minor offences: surrender can usually be replaced by payment of a fine before surrender;
 - Many EAW are not issued for proper purposes (to find a person to serve her documents, or to interview a person) and can be withdrawn before surrender under certain conditions;
 - Early intervention of the lawyer in the Issuing State avoids surrender in case of an illegal EAW.

FACT: Once a person is surrendered, they will be granted the assistance of a lawyer in the issuing state (ECHR).

- Therefore **granting effective dual representation is only a matter of timing:**

anticipating the intervention of the lawyer from the issuing member state.

- From a theoretical point of view, **the deprivation of liberty on the grounds of an European Arrest Warrant has to be observed as a unique and continuous deprivation of liberty that (other than in purely national cases) involves two jurisdictions and therefore requires legal assistance in those two jurisdictions.**



Dual Representation in European Arrest Warrant proceedings – how does it work now?

Case 1 - Embezzlement or Money laundering about 20 M €



Case 2

Using counterfeit money (around £100)



Case 3

Minor drugs offence



Common features:

- No clear European legal basis for dual representation;
- States do not encourage dual representation;
- The fact that dual representation occurs depends on the lawyer in the executing State (if there is one) knowing about its importance and being able to find an appropriate lawyer in the issuing State at very short notice;
- If the client has no financial means, he usually has to hope that a lawyer in the issuing State will act *pro bono* for him.
- Prosecuting and judicial authorities: EJN and Eurojust.
- No formalized way for defence lawyers to co-operate on a cross-border basis, obtain information or be trained on mutual recognition instruments or the criminal procedure of other Member States (only the ECBA; ERA project; FTI)



**Dual Representation in EAW
proceedings:
How should it be?**



How it should be

- Within proceedings concerning the execution of mutual recognition instruments, for example in EAW proceedings, a person has to defend himself **both in the issuing and in the executing States.**
- The right to counsel must therefore be granted in both states.



- Furthermore conditions for an **effective collaboration** and defence have to be ensured.
- The deprivation of liberty on the grounds of a **European Arrest Warrant** has to be observed as a unique and continuous deprivation of liberty that (other than in purely national cases), **involves two jurisdictions** and therefore requires legal combined assistance in those two jurisdictions.



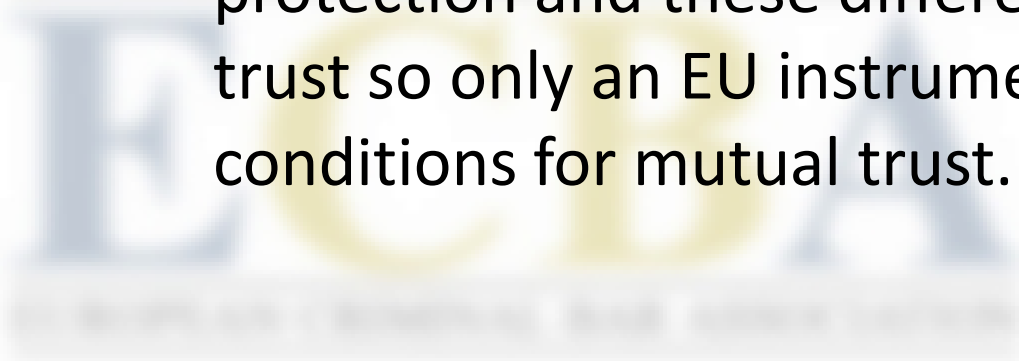
- The execution of any **other mutual recognition instruments** must also be analyzed as a part of a unique criminal process involving more than one jurisdiction and therefore requiring combined legal assistance in the respective jurisdictions.
- This understanding of the right to legal counsel will foster **mutual trust** within the EU and will consequently improve the effectiveness of the principle of **mutual recognition**.



- Furthermore a different solution is **not compliant with the ECHR and article 6 of the TEU.**
- Persons subject to an EAW are **not protected by Article 6 ECHR** since EAW proceedings are akin to extradition proceedings (not criminal proceedings) from the ECtHR point of view.
- Therefore it is imperative that their rights are laid down in EU Directives.



- **The rights laid down in the FD on the EAW are very weak and refer only to national provisions.**
- In the absence of EU legislation to protect persons subject to an EAW, their rights depend upon national law.
- EU Member States have very different standards of protection and these differences undermine mutual trust so only an EU instrument can create the conditions for mutual trust.



- Access to a **lawyer limited to the executing State** is not effective, as **this lawyer cannot properly exercise the rights of defence**, namely to assess himself and to help the courts to assess the validity of the arrest warrant in the issuing State and the existence of grounds for refusal or the need to ask for guarantees, as enshrined e.g. in the FD on the EAW.
- The Lawyer in the Issuing State must be allowed to advise the lawyer in the Executing State, but also to **intervene in the proceedings in the Issuing State**

- The intervention of lawyers in both States has to include **the right to meet in private with the client under an absolute confidentiality protection (exception for collusion) and to be present, intervene and make requests or submissions in any hearings on behalf of the client**
- There must be **Legal Aid** available, if the person is eligible



**Dual Representation in EAW
proceedings:
How will it work under the
Directive?**

CHAPTER 5

European Arrest Warrant proceedings

Article 9 ³⁶

The right of access to a lawyer and the right to be assisted by a lawyer in European Arrest Warrant proceedings

1. Member States shall ensure that a person requested for surrender in accordance with Council Framework Decision 2002/584/JHA has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European Arrest Warrant.
2. With regard to the content of the right of access to a lawyer in the executing Member State, the requested person shall have the following rights in that Member State:
 - (a) the right of access to a lawyer in such a time and manner so as to allow him to exercise his rights effectively and in any event without undue delay from deprivation of liberty;
 - (b) the right to meet and communicate with the lawyer representing him; [...]
 - (c) the right for his lawyer to be present and, in accordance with procedures in national law, participate during a hearing of the requested person by the executing judicial authority. When the lawyer participates during the hearing this shall be recorded in accordance with national law.

3. Upon request, a requested person also has the right to be assisted by a lawyer in the issuing Member State. In application of this right, the lawyer in the issuing Member State may assist the lawyer in the executing Member State by providing him with information and advice with a view to allowing the requested person to exercise his rights under Council Framework Decision 2002/584/JHA. The executing Member State shall inform the requested person of this right.

4. In case a requested person does not yet have a lawyer in the issuing Member State, the executing judicial authority, promptly after the requested person has made a request to be assisted by a lawyer in the issuing Member State, shall inform the issuing judicial authority of this request. Promptly after receipt of such a request, the issuing judicial authority shall provide information to facilitate the requested person in obtaining this assistance.

5. The rights provided for in this Directive under Articles 4, 5, 5a, 6, 8 and - when a temporary derogation under [Article 4(2) or ³⁷] Article 5(3) is applied - Article 7 shall apply, *mutatis mutandis*, to European arrest warrant proceedings in the executing Member State.

- [6. Member States shall respect the confidentiality of communication, if any, between a requested person and his lawyer in the issuing Member State.] ³⁸



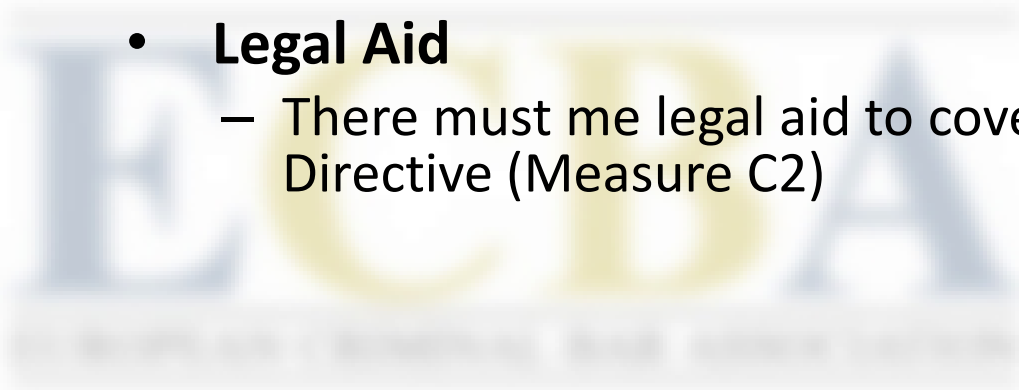
Directive – Contents, shortcomings and practical issues

- **Extent of the right in the Issuing State**
- **Practical issues for the MS**
- **Practical issues for the Lawyers**
- **Legal Aid**
- **Other mutual recognition and mutual legal assistance instruments**



Contents and shortcomings:

- **Extent of the right in the Issuing State**
 - Only advice and assistance concerning rights in the FD 2002/584/JHA?
 - Also intervention in the Issuing State?
- **Other mutual recognition and mutual legal assistance instruments**
 - Dual representation (for the exact same reasons) should be available for other cross-border situations
- **Legal Aid**
 - There must be legal aid to cover the situations enshrined in the Directive (Measure C2)





- **Practical issues for the MS**
 - Identification of the lawyer (if already retained or appointed) should be inserted in the EAW form and SIS-Notice
 - Obligation to inform the person of her rights – should also be in the EAW
 - Specialization of lawyers?
 - Legal aid / Appointed or duty lawyer schemes?

- **Practical issues for the Lawyers**
 - When is a lawyer in the Issuing State needed?
 - How to find one?
 - How to get training?



Thank you for your attention!

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